ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
7961 HOUSE LABOR & COMMERCE

MIEC CLAIMS 1989

Total number of MIEC claims: 0 claims closed

No MIEC claims were closed in 1989.

Legislative Research Agency

Alaska State Legislature

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January 27, 1994

MEMORANDUM

TO: Lynda Giguere

FROM: Maureen Weeks
Legislative Analyst

RE: **Telephone conversation with Pat Hanson, R.N. of Minnesota Medical Assn.**

This memorandum supplements information sent you on January 21, 1994, about practice guidelines.

As you know, Minnesota recently made a provider's use of practice parameters an "absolute defense" against a medical malpractice allegation (Ch. 549 Art. 7 Sec. 5, [62J.34]). A similar law is in place in Maine.

At your request, I telephoned officials in both Maine and Minnesota to learn their reactions to this type of law. I previously sent you extensive material from Maine, and comments from a state official in Minnesota. Yesterday, Pat Hanson, R.N., Manager of Quality, Data and Peer Review of the Minnesota Medical Association, described that association's objections to practice parameters. My notes of her comments follow.

> "The Practice Parameter Commission has been meeting bi-monthly for over a year. It has chosen expert panels to develop parameters for the following:
>
> Low back pain
> Unstable angina
> Prenatal care
>
> "This gives an idea of how much state officials do not know. The only data we have in Minnesota is UB92 data, which is from hospitals. Yet many patients with these problems are outpatients.

"Our lawyers say it is a farce to call parameters an absolute defense. It is an empty law. A physician will say he or she has used the parameters, the patients will say the physician did not. There has never been a lawsuit to test parameters, even in Maine where they have been using them for a couple of years."

Attached are the following:

"The Minnesota Medical Association's Position on Practice Parameters," MMA Ad Hoc Committee on Quality Assessment and Data Utilization, January 1994.

Minnesota Statutes Ch. 549, Art. 7, Sec. 5 [62J.34], PRACTICE PARAMETERS.

THE

MINNESOTA MEDICAL ASSOCIATION'S

POSITION ON

PRACTICE PARAMETERS

Developed by the MMA Ad Hoc Committee on Quality Assessment and Data Utilization
Approved by the MMA Board of Trustees

January, 1994

The following position paper was developed as a resource document for Minnesota physicians who will be impacted by practice parameters. Members of the Committee on Quality Assessment and Data Utilization anticipate that the paper will provide physicians, policy makers and others interested in practice parameters a foundation for discussion as the use of practice parameters steadily increases in the quest for health care reform.

Members of the Ad Hoc Committee on Quality Assessment and Data Utilization:

Kenneth Dedeker, M.D., Chair
Paul Bowlin, M.D.
David Estrin, M.D.
G. Richard Geier, M.D.
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Barbara Yawn, M.D.

MMA Staff:

Patricia C. Hanson, R.N., Manager of Quality, Data and Peer Review
Theodore M. Thompson, Esq., MMA Legislative Counsel

THE MINNESOTA MEDICAL ASSOCIATION'S POSITION OF PRACTICE PARA TERS

EXECUTIVE SUMMARY

The MMA supports practice parameter development and application in an optimistic, experimental environment of comprehensive testing and research. The MMA believes that the current status of practice parameter development, application, dissemination, and research is embryonic, but is encouraged by preliminary information which suggests that parameters have the potential to improve quality and lower costs. The MMA believes it will take a persistent long term commitment from policy makers, health care professionals, health care researchers and consumers to truly test the validity of using practice parameters to improve health care and contain costs on a long term basis.

Currently, there is a lack of conclusive information about the results of using practice parameters. Therefore, practice parameters' capabilities should be presented realistically to the public, payers, purchasers and providers. Efforts to develop, disseminate and utilize practice parameters must be researched, organized, systematized, funded adequately, and managed rigorously prior to making a final determination about whether practice parameters meet their intended goals. Currently, little is known about whether practice parameters meet the goals of improving outcomes and cost-effectiveness. However, the ability of practice parameters to improve care and limit the use of unnecessary treatments may prove to be beneficial, and therefore the MMA believes that practice parameter initiatives should be viewed with optimism and support.

To eventually be seen as a reliable vehicle to assist the decision making of providers, purchasers, regulators, payers and patients, practice parameters must be readily accessible, understandable, and applicable in the clinical setting where patients and providers interface. In addition, practice parameters must indicate the expected health and cost outcomes of alternative courses of treatments, and the data associated with using a parameter must be easily documented and readily retrievable so as not to create an administrative burden on providers or others who might wish to utilize, collect data on, or study the outcomes of a parameter.

Currently, uncertainty exists in regard to the value of various treatment options for specific conditions, and scientifically valid research will help to reduce indecision. Because there is currently scant scientific research on which to base parameters, many practice parameters have been based primarily on consensus. The MMA recognizes the extensive time needed to collect and analyze practice parameter data and construct opinions based on valid research. However, the potential fallibility of mandating the use of parameters based solely on consensus is perilous due to the potential for causing patients harm.

Practice parameters should be used to complement medical decision making, not to enforce medical decisions. Physicians must be free to deviate from practice parameters and to tailor treatments when patients' clinical conditions require that deviation occur. Physicians must be allowed to consider not only relevant outcomes research and practice parameters, but also their personal knowledge based on experience and information gleaned from patient/physician interactions. Patients' perceptions and preferences about their health care must be taken into consideration, as well as the circumstances of each patient.

Practice parameters present the greatest promise in their applicability to continuous quality improvement (CQI). Variations in treatment protocols and practice patterns should not always be viewed as inappropriate, but should be carefully researched and evaluated with the results fed back to clinicians to assess, analyze and modify treatment approaches and practice parameters that produce desired health care outcomes. Practice parameter associated indicators and research have the potential to improve the efficiency and efficacy of treatment and may assist in preventing, identifying and remedying difficulties of overuse of care, underuse of care, and poor technical and interpersonal care.

The MMA supports and encourages an increased investment of time, financial, technological and research resources in order to provide a scientific understanding of which treatments work best for specific conditions. The MMA also encourages the developers and proponents of practice parameters to verbalize practical realistic expectations and promote key principles to guide rigorous development, analysis and dissemination methodologies.

In conclusion, practice parameters must be allowed to evolve in an atmosphere of rigorous scientific research, education, experimentation and continuous quality improvement. Emphasis should be placed on collecting adequate, accurate data on various treatment options, identifying efficacious practice parameters, assessing their validity, evaluating the outcomes of parameter utilization, and providing the information to physicians and appropriate others in a timely relevant manner.

PRACTICE PARAMETER DEFINITION

Practice parameters are systematically developed recommendations for management of patients that identify a strategy or range of management strategies for a specific clinical condition. Ideally, a practice parameter should provide sound, scientific evidence for decision making based on thorough scientific outcomes research. Less ideal are practice parameters based on expert consensus.

INTRODUCTION

The MMA recognizes that medical practice parameters are increasingly being touted, proposed and implemented as promising strategies which have the potential to enhance the quality and appropriate utilization of health care services, reduce the need for defensive medical practice, and improve decision making by providers, consumers, purchasers, policy makers and others.

The primary goal of practice parameters should be to maintain or enhance quality medical care through the use of continuous quality improvement (CQI) principles. They should primarily be used to improve the processes of health care overall rather than solely to focus on individual or atypical practice patterns. Practice parameters can also be used to optimize appropriate utilization of health care resources and reduce unnecessary tests and procedures by developing valid criteria for utilization management and payment decisions. Physicians should be provided with their individual data on practice patterns and outcomes to allow comparisons to be made with aggregate data acquired from other practitioners. Once the data are provided, physicians can determine the applicability and efficacy of a practice parameter and use the information for consideration in treatment options and for CQI purposes.

Practice parameters should be based on accepted scientific principles, knowledge and evidence based outcomes research. In addition, they must be properly and thoroughly disseminated, tested, validated, continually updated at appropriate intervals and associated with a set of desirable outcomes and a mechanism for achieving those outcomes. To be meaningful, practice parameters must be used as an adjunct to a physician's knowledge which is based on experience, biomedical theory, clinical research findings and personal knowledge of the patient including the patient's history, examination findings, comorbidities, personal preferences and choices.

Practice parameters should explicitly describe the range of acceptable practice recognizing the complexity of medical decisions and the continued need for practitioners to maintain the ability to use individual clinical judgments. Therefore, practitioners must be allowed, when appropriate, to depart from a suggested practice parameter based on individual patients' needs, preferences, requests and circumstances. After adequate dissemination of information specific to a practice parameter, practitioners should document adherence to, or the reason for departure from, an appropriately approved practice parameter.

In addition, it must be determined if the practice parameter is the "ideal," or "maximum" level of care, or if it defines what would be considered "reasonable," or the "minimum" level of care. Conceivably, one practice parameter could describe the minimum level of acceptable care, while another could describe the optimal level of care. The MMA is concerned that practice parameters which are primarily developed to control costs and reduce what is surmised to be unnecessary care could result in the development of parameters which may be skewed towards a minimum level of care, and therefore could result in an adverse outcome for patients. Consequently, the MMA feels strongly that practice parameters should be developed primarily for the purpose of improving quality.

Because there are scant scientific data regarding the relationship between parameters and improved health care outcomes, the MMA believes that practice parameters, collectively and individually, should be initially implemented on an experimental basis. However, in the event that practice parameters are mandated as part of programs adopted by states or other entities and organizations, a physician must be afforded legal protection for complying with a mandated practice parameter. There must be appropriate liability protection to defend physicians who, without adequate protection, would be caught between the requirements of a practice parameter and the liability standards used by the court system.

LEGAL IMPLICATIONS OF PRACTICE PARAMETERS

Defensive medicine occurs when a physician provides what may be deemed unnecessary services in order to reduce the likelihood of being sued for medical malpractice. Practice parameters have the potential to decrease defensive medicine by establishing the appropriate boundaries of acceptable medical practice, including the services and procedures recommended and deemed necessary. The 1992 MinnesotaCare legislation specifically established an absolute defense for a physician who complies with a commissioner of health approved practice parameter. This statute needs to be reevaluated by the legislature to ensure that adequate safeguards exist and that exceptions do not weaken or limit the liability protection for providers that was intended by the legislation.

Minnesota Statutes, Section 62J.34, Subdivision 3 [Medical Malpractice Cases] states:

> (a) In an action against a provider for malpractice, error, mistake, or failure to cure, whether based in contract or tort, adherence to a practice parameter approved by the commissioner of health under subdivision 2 is an absolute defense against an allegation that the provider did not comply with accepted standards of practice in the community.
>
> (b) Evidence of departure from a practice parameter is admissible only on the issue of whether the provider is entitled to an absolute defense under paragraph (a).
>
> (c) Paragraphs (a) and (b) apply to claims arising on or after August 1, 1993, or 90 days after the date the commissioner approves the applicable practice parameter, whichever is later.
>
> (d) Nothing in this section changes the standard or burden of proof in an action alleging a delay in diagnosis, a misdiagnosis, inappropriate application of a practice parameter, failure to obtain informed consent, battery or other intentional tort, or product liability.

The aforementioned law states that adherence to a commissioner of health approved practice parameter offers an absolute defense to a practitioner. It is the MMA's understanding that the legislation was intended to provide unconditional protection; however, it is unclear whether the absolute defense will indeed provide the liability protection if a case involving the use of practice parameters goes to trial. If a practice parameter is brought to the attention of a jury in a defense to an allegation of malpractice then, in effect, the issue of the practice parameter is put "into play" and accordingly the practitioner must prove compliance with the practice parameter. The burden will be on the defense to demonstrate that the practitioner complied with the parameter. This will likely open the door for both the courts and plaintiff's attorney to interpret and reinterpret the recommendations described in the parameter. It will also provide an opportunity for plaintiff's counsel to assert non-compliance and challenge issues of fact based upon defense testimony regarding the parameter. A jury will be required to consider whether each detail of the treatment was precise, literal and in complete compliance with each detail of the parameter in question. If a physician appropriately deviates from a parameter or portion of a parameter, a jury may believe that any deviation was negligent. Conversely, if a practitioner adheres to a parameter, it may raise a legal question about whether the practitioner should have deviated, albeit slightly, from the practice parameter if, in retrospect, the outcome was not satisfactory.

The MMA has concern in regard to Minnesota Statutes, Section 62J.34, Subdivision 3, Paragraph (d) which essentially states that the standard or burden of proof is not changed in certain other situations such as misdiagnoses and inappropriate application of a practice parameter, consequently removing the cause of action from the absolute defense statute and weakening the overall protection that is intended.

In addition, several significant issues should be seriously considered. Either the legislature should address the following points and should distinguish between practice parameters as a quality of care issue from practice parameters as a legal standard of care, or the courts will undoubtedly develop case law setting standards.

1. Practice parameters generated by the action of governments and voluntary professional entities may result in litigation irrespective of their incorporation into statutes affecting health policy, professional liability, and other health care legislation.

2. There are no conclusive data indicating that practice parameters decrease malpractice claims.

3. Practice parameters may not increase the defensibility of malpractice allegations and should not be extolled as doing so until conclusive evidence exists that malpractice allegations have decreased with the use of appropriately approved practice parameters.

4. Practice parameters should not become mandatory standards of care. In a case of alleged malpractice, a practice parameter is only one of many sources of evidence which may be introduced relative to what constitutes a legal "standard of care."

5. Although the medical community may regard practice parameters as "strategies" or "recommendations for care," the courts increasingly adopt practice parameters as an expression of a "legal norm" or a "standard of care." This significant variance in nomenclature and interpretation could adversely affect practitioners who are caught between adherence to a mandated practice

parameter and feeling unable to deviate for fear of an allegation of non-adherence to what a court may hold as a legal norm, even if deviation was thought to be in the best interest of the patient.

Based on the above information, the MMA position on practice parameters as legal standards of care is as follows:

1. Ideally, outcomes research should be the basis for practice parameters and should be used as a means of evaluating the most effective treatment option for most patients with a given condition. Practice parameters that are not supported by scientific research and controlled studies could be flawed. Therefore, until adequate research proves a parameter valid, reliable, predictable, efficacious, and usable, a practice parameter should not be used as a legal standard of care.

2. Because there is currently little practical, long-term experience in the use of parameters to show how they affect day-to-day practice and improved outcomes, practice parameters must be initially viewed as an experimental means of establishing acceptable boundaries of medical practice.

PRACTICE PARAMETER DEVELOPMENT

There are several key attributes which must be considered in the development of practice parameters. The key attributes are as follows:

1. **Practice parameters should be developed by or in conjunction with physician organizations.**

   Research has shown that physicians will incorporate practice parameters into day-to-day practice when they have been part of the development and endorsement process and when they are made aware of practice parameters that are based on scientifically sound, clinically germane information. Relevant physician organizations should also review, modify if appropriate, and endorse practice parameters prior to dissemination and implementation.

2. **Reliable methodologies should be used to integrate practice parameters with relevant research findings that link practice parameters with desired health and cost outcomes. Practice parameters must be proven reliable by testing and evaluation.**

   Appropriate development of practice parameters requires the synthesis of a broad array of medical information including scientific studies, research findings, clinical experience and expert opinion of medical specialists. Scientific and clinical evidence should always take precedence over expert opinion and consensus. Statements regarding the basis for and level of credibility should be noted and available for every practice parameter.

3. **Practice parameters should be as comprehensive and specific as possible, defining the population of patients to which recommendations apply.**

A practice parameter should denote the risks and benefits of various management strategies and indicate categories of relative appropriateness for management of a specific clinical situation (e.g., appropriate, equivocal, inappropriate). In addition, a practice parameter should be detailed enough to be applicable to a specific condition, but must also allow for individual unique patient circumstances.

4. **Practice parameters should be based on current information.**

It is essential that a practice parameter take into account all current knowledge of a condition or treatment. Particularly important is the incorporation of information on contemporary technology and the results of outcomes research. Also, it must be noted when developing a practice parameter that new technology is not available in all sectors of the health care industry. It must not be assumed that all providers will have access to specific technologies that may be suggested or recommended in a particular practice parameter, thereby preventing compliance.

5. **A practice parameter must be reviewed at regular, preestablished intervals and revised, if warranted.**

A system must be established to monitor the emergence of new information and advances in medical knowledge and technology which could alter an existing practice parameter. This would ensure that practice parameters are based on current information, scientific studies, proven technology, outcomes research and changing professional consensus.

6. **Practice parameters must be widely disseminated and practitioners provided adequate time for implementation.**

Effective methods of disseminating practice parameters must be identified and a viable system for publishing parameters established. To date, there is insufficient research that indicates the most effective means of disseminating information about practice parameters. Physicians who are unaware of the existence of a practice parameter cannot be expected to consider or utilize a parameter. Therefore, substantial research needs to occur on the issue of practice parameter dissemination prior to holding a physician accountable for using a specific practice parameter.

7. **Practice parameter development should not stifle innovation in technology or medical practice.**

   It is imperative that practice parameters not inhibit innovation. The inherent danger that lies in practice parameter development is the tendency to conclude that prevailing care and subsequent practice parameters based on that care are the only correct methods of treating a given condition. This supposition may preclude the development of and authorization to apply new technology, processes of care, and pharmaceuticals that could improve and enhance medical care, thus sustaining the status quo rather than encouraging and facilitating innovation that could lead to improved health care.

8. **Practice parameters must be non-proprietary and their development methodology should be available to practitioners. Therefore, if more than one practice parameter exists for a given condition, a practitioner must be free to follow the parameter which has been developed based on accepted scientific methodology, has been approved by the appropriate national medical specialty society, and is backed by scientific evidence.**

   Currently, payers and other entities have developed proprietary practice parameters for specific conditions. Several parameters have been developed solely for cost containment purposes. Integrated service networks (ISNs) and other health care entities will most likely continue to develop parameters unique to their organization, thereby causing providers who may belong to more than one ISN or other provider group to be continually cognizant of every parameter which has been developed for a given condition. In addition, it must be noted that the majority of these practice parameters will not be sanctioned by the commissioner of health, thereby ruling out the absolute defense protection provided by statute. If physicians are required to comply with practice parameters developed by an individual ISN or other entity, the state must require standardized practice parameters. While the MMA supports the development and utilization of practice parameters, they must be tested and validated before being made mandatory.

PURPOSES OF PRACTICE PARAMETERS

Practice parameters may be used for the following purposes:

1. To use as a foundation for CQI studies as an opportunity to improve clinical decision making and quality of care;

2. To educate practitioners and decrease indecision regarding the most efficacious treatment options;

3. To educate and inform patients and assist decision making regarding treatment options;

4. To guide the allocation of health care resources;

5. To assess the effectiveness of new technology, pharmaceuticals and treatments;

6. To potentially reduce the risk of legal liability; and

7. To develop criteria for payment or utilization decisions.

PRACTICE PARAMETERS FOR USE IN CONTINUOUS QUALITY IMPROVEMENT

Practice parameters can by used in CQI for the following purposes:

1. To identify problems in systems, processes, or outcomes by the identification of patterns of care which do not produce desired results;

2. To institute corrective actions and internally monitor to assure desired change is occurring;

3. To improve planning, assessment and procedural techniques based on statistics and science;

4. To improve information used for patients' decision making;

5. To standardize systems and processes which will reduce inappropriate variability; and

6. To feed back evidence-based information to practitioners regarding differences in practice patterns.

TRANSACTION REPORT

JAN-26-94 WED 10:28

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Alaska State Legislature
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TO: Rep Bill Hudson
Attn: Royce
DATE: 1/7/93
FROM: Patricia Young

Attached are released memoranda on tort reform issues which may be of interest to you.

As you will see, at least one, 90.104 has no attachments printed with it as they were extensive. The attachments are available for reading in our main office. We also have several files of articles and news clippings too numerous to duplicate. You may, however, read them here and duplicate pertinent items.

This should serve as a beginning. Also, I believe that David Rogers may have produced a report on this work for Representative Cotten.

Let me know if / when you need more.

analysis unit in conjunction with the appropriate professional organizations. If a practitioner continues to perform procedures that are inappropriate, even after educational efforts by the review panel, the practitioner may be reported to the appropriate professional licensing board.

Subd. 4. [PRACTICE PARAMETER ADVISORY COMMITTEE.] The commissioner shall convene a 15-member practice parameter advisory committee comprised of eight health care professionals, and representatives of the research community and the medical technology industry. The committee shall present recommendations on the adoption of practice parameters to the commissioner and the Minnesota health care commission and provide technical assistance as needed to the commissioner and the commission. The advisory committee is governed by section 15.059, but does not expire.

Sec. 4. [62J.33] [TECHNICAL ASSISTANCE FOR PURCHASERS.]

The health care analysis unit shall provide technical assistance to health plan and health care purchasers. The unit shall collect information about:

(1) premiums, benefit levels, managed care procedures, health care outcomes, and other features of popular health plans and health carriers; and

(2) prices, outcomes, provider experience, and other information for services less commonly covered by insurance or for which patients commonly face significant out-of-pocket expenses.

The commissioner shall publicize this information in an easily understandable format.

Sec. 5. [62J.34] [OUTCOME-BASED PRACTICE PARAMETERS.]

Subdivision 1. [PRACTICE PARAMETERS.] The health care analysis unit may develop, adopt, revise, and disseminate practice parameters, and disseminate research findings, that are supported by medical literature and appropriately controlled studies to minimize unnecessary, unproven, or ineffective care. Among other appropriate activities relating to the development of practice parameters, the health care analysis unit shall:

(1) determine uniform specifications for the collection, transmission, and maintenance of health outcomes data; and

(2) conduct studies and research on the following subjects:

(i) new and revised practice parameters to be used in connection with state health care programs and other settings;

(ii) the comparative effectiveness of alternative modes of treatment, medical equipment, and drugs;

(iii) the relative satisfaction of participants with their care, determined with reference to both provider and mode of treatment;

(iv) the cost versus the effectiveness of health care treatments; and

(v) the impact on cost and effectiveness of health care of the management techniques and administrative interventions used in the state health care programs and other settings.

Subd. 2. [APPROVAL.] The commissioner of health, after receiving the advice and recommendations of the Minnesota health care commission, may approve practice parameters that are endorsed, developed, or revised by the health care analysis unit. The commissioner is exempt from the rulemaking requirements of chapter 14 when approving practice parameters approved by the federal agency for health care policy and research, practice parameters adopted for use by a national medical society, or national medical specialty society. The commissioner shall use rulemaking to approve practice parameters that are newly developed or substantially revised by the health care analysis unit. Practice parameters adopted without rulemaking must be published in the State Register.

Subd. 3. [MEDICAL MALPRACTICE CASES.] (a) In an action against a provider for malpractice, error, mistake, or failure to cure, whether based in contract or tort, adherence to a practice parameter approved by the commissioner of health under subdivision 2 is an absolute defense against an allegation that the provider did not comply with accepted standards of practice in the community.

(b) Evidence of a departure from a practice parameter is admissible only on the issue of whether the provider is entitled to an absolute defense under paragraph (a).

(c) Paragraphs (a) and (b) apply to claims arising on or after August 1, 1993, or 90 days after the date the commissioner approves the applicable practice parameter, whichever is later.

(d) Nothing in this section changes the standard or burden of proof in an action alleging a delay in diagnosis, a misdiagnosis, inappropriate application of a practice parameter, failure to obtain informed consent, battery or other intentional tort, breach of contract, or product liability.

Sec. 6. Minnesota Statutes 1991 Supplement, section 145.61, subdivision 5, is amended to read:

Subd. 5. "Review organization" means a nonprofit organization acting according to clause (k) or a committee whose membership is limited to professionals, administrative staff, and consumer directors, except where otherwise provided for by state or federal law, and which is established by a hospital, by a clinic, by one or more state or local associations of professionals, by an organization of professionals from a particular area or medical institution, by a health maintenance organization as defined in chapter 62D, by a nonprofit health service plan corporation as defined in chapter 62C, by a professional standards review organization established pursuant to United States Code, title 42, section 1320c-1 et seq., or by a medical review agent established to meet the requirements of section 256B.04, subdivision 15, or 256D.03, subdivision 7, paragraph (b), or by the department of human services, to gather and review information relating to the care and treatment of patients for the purposes of:

(a) evaluating and improving the quality of health care rendered in the area or medical institution;

(b) reducing morbidity or mortality;

(c) obtaining and disseminating statistics and information relative to the treatment and prevention of diseases, illness and injuries;

(d) developing and publishing guidelines showing the norms

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- HB 292 -

January 24, 1994

MEMORANDUM

TO: Representative Bill Hudson

FROM: Patricia Young P. Young
Legislative Analyst

RE: **Tort Reform Measures in Washington State**
Research Request 94.116

You asked for information on the status of the tort reform act passed in Washington State in 1986. Specifically, you wished to know whether the act has been repealed and, if so, for what reasons. You also wished to know the current status of the tort movement across the country.

The Washington State Tort Reform Act of 1986--one of the broadest reform acts in the nation--contained a variety of provisions intended to reduce liability or to reduce damage exposure for defendants. The major provisions included a cap on noneconomic damages, periodic payments for awards of future economic damages, and elimination of joint and several liability unless the defendants acted in concert, the plaintiff was fault-free, or the case involved hazardous substances, generic products, or business torts.[1] **The act has not been repealed, and the provisions continue largely in effect with the notable exception of the cap on noneconomic damages.**

In 1989, the Washington Supreme Court ruled that the cap on noneconomic damages violated a plaintiff's constitutional right to trial by jury. The elimination of joint and several liability has been challenged also, but neither stricken down nor repealed, according to Mike Tardif, assistant attorney general, tort claims division, Washington Office of the Attorney General.

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[1] Among its other provisions, the Washington act prohibits liability if the injured person was under the influence of alcohol or an illegal substance and the condition was at least 50 percent responsible for the injury.

As elsewhere, Washington's reform measures have decreased the exposure of state and local governments and reduced the payout for insurance companies. The effect of the measures on insurance premiums, however, remains questionable. And whether reducing a defendant's liability or damage exposure justifies limiting a plaintiff's right to be compensated, or *made whole*, remains the policy question at the heart of the tort reform debate. Brenda Trollin, program principal for labor and insurance issues at the National Conference of State Legislatures, notes that recent civil justice activity has for the most part involved efforts to repeal or reverse changes made to the tort system within the last few years.

For further information about the status of the tort reform movement nationwide, please see Legislative Research Memorandum 93.138 and attachments (included). Also attached to this memorandum is a summary and discussion of the various provisions of the Washington act.

I hope this information is useful. If you have questions or need additional information, please let us know.

Attachments

SUMMARY OF THE WASHINGTON STATE TORT REFORM ACT

Michael E. Tardif
Assistant Attorney General
Tort Claims Division
June 26, 1986

I. Introduction

A. The tort reform act contains provisions on a variety of subjects related to civil lawsuits claiming damages. The common denominator for most of the provisions is that they reduce either liability or damage exposure for defendants in actions for damages.

B. The act contains only one or two sections directly related to state or local government. However, the act has several favorable provisions for deep pocket defendants. These provisions should tend to decrease the tort exposure of state and local government, perhaps significantly.

II. Summary of Act

A. Section 101. Accelerated waiver of physician-patient privilege

1. Present Law.

a. The privilege applies to communications with "regular" physicians and surgeons. RCW 5.60.060(4)

b. The privilege is not waived by the filing of a personal injury action. A waiver occurs only when it becomes apparent that the patient will need to waive at trial. Phipps v. Sasser, 74 Wn.2d 439, 445 P.2d 624 (1968).

c. A waiver as to one physician operates as a waiver of contradictory or impeaching medical testimony from other physicians. State v. Tradewell, 9 Wn. App. 821, 515 P.2d 172 (1973), cert. den., 416 U.S. 985 (1974).

2. New Law.

   a. Osteopathic physicians and surgeons are included in the statute and the term "regular" modifying physician and surgeon is removed.

   b. A claimant must waive the privilege within ninety days of filing an action for personal injuries or wrongful death. If the claimant does not waive, he cannot put his physical or mental condition in issue.

   c. The privilege cannot be waived later than ninety days after filing.

   d. Waiver of the privilege as to one physician or condition waives the privilege as to all. The court can impose limitations on the extent of this waiver.

3. Comments.

   a. Failure to waive the privilege within ninety days will preclude a claimant from putting his mental or physical condition in issue.

   b. After waiver, a physician can be contacted and interviewed as a fact witness. See Formal Opinion 180. A fact witness can refuse an interview but an attorney cannot forbid the witness from speaking to opposing counsel. See <u>Wright v. Group Health</u>, 103 Wn.2d 192 691 P.2D 564 (1984).

   c. Obtain a written waiver so that it can be shown to treating physicians.

4. Effect. The change will simplify discovery in some cases and might reduce the value of some cases in which plaintiff could have previously been able to frustrate or retard discovery of critical damage information.

B. Section 201. Attorneys fees

1. Present Law.

   a. RPC 1.5 provides ethical limitations on fees.

   b. RCW 7.70.070 provides that the court shall determine the reasonableness of each party's attorneys fees in actions against health care providers.

2. New Law.

   a. A named party in a tort action may petition the court for a determination of the reasonableness of the party's attorney's fee.

   b. There is a list of criteria for reasonableness which is the same as those in RPC 1.5 and RCW 7.70.070 except that it adds the considerations of whether the fee agreement was written and the client was aware of his right to petition the court.

3. Comment. The old law on health care providers appears to have been little used. The new law is broader because it applies to all tort actions.

4. Effect. The new law might be used in cases where plaintiff's attorneys have a high contingent fee in a case which receives a large settlement or verdict.

C. Section 301. Limitation on non-economic or "pain and suffering" damages

   This will be discussed in a separate section below.

D. Section 401. Apportionment of damages among tortfeasors

   This will be discussed in a separate section below.

E. Section 501. Bar to action by person committing felony

1. Present Law. There is no law barring or limiting tort suits by persons injured while committing a felony.

2. New Law. "It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony, if the felony was causally related to the injury or death in time, place, or activity. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983."

3. Comments.

    a. It is unclear whether the qualification that the felony be related to the injury in "time, place, or activity" is meant to limit or expand the defense.

    b. An unanswered question is whether the plaintiff must have been convicted of the felony or whether the felony could be proven in the tort action.

F. Section 502. Changes to statute of limitation for health care injuries

1. Present Law. RCW 4.16.350 provides generally that actions against health care providers for professional negligence must be commenced within three years of the act causing injury or one year after discovery, but in no event after more than eight years.

2. New Law.

    a. The statute of limitations is tolled if there is proof of fraud, intentional concealment, or presence of a foreign body not intended to have a therapeutic diagnostic effect or purpose (e.g. sponges).

    b. The knowledge of a custodial parent or guardian is imputed to a person under the age of eighteen.

3. Comment. The principal change is the attempt to make minors subject to the same statute of limitations as adults. The change is meant to lessen the insurance problems of obstetricians and pediatricians who are now liable for up to 26 years.

D. Section 601. Changes to regulation of indemnification agreements

1. Present Law.

   a. RCW 4.24.115 provides generally that indemnity agreements in construction or repair contracts for real property that indemnify for liability for bodily injury or property damage are void if the damages result from the sole negligence of the indemnitee.

   b. Indemnification agreements attempting to circumvent workers compensation immunity are enforceable only if they clearly and specifically waive the immunity either by so stating or by specifically stating that the indemnitor assumes liability for actions by its own employees. Brown v. Prime Construction Co., 102 Wn.2d 235, 684 P.2d 73 (1984).

2. New Law.

   a. Indemnity agreements covered by RCW 4.24.115 are enforceable only to the extent of the indemnitor's negligence and only if the agreement expressly provides therefor.

   b. Any waiver of an employer's workers compensation immunity must be "specific and express" and "mutually negotiated" by the parties.

3. Comments.

   a. The changes seem to have been largely provoked by the rising tide of liability lawsuits and the increasing tendency of general contractors to force subcontractors to indemnify them for allegedly concurrent negligence.

b. Indemnification agreements must contain the new limitation or they are not valid.

c. The requirements for waiving workers compensation immunity are now different from those specified in Brown, supra.

4. Effect. The changes could have a significant effect on state and local governments which often require contractors to indemnify them for liability lawsuits related to construction of highways and other public facilities. The result could be an increase of litigation and expenses for government in this state.

H. Sections 701-702. Changes in the special builders statute of repose

1. Present Law.

a. RCW 4.16.310 provides generally that claims arising from construction, repair, design, etc. of improvements on real property are barred if they do not accrue within six years of substantial completion of construction or termination of services, whichever is later.

b. RCW 4.16.160 excepted "actions brought in the name or for the benefit of the state" from the six year statute. See Bellevue School Dist. v. Brazier Constr., 100 Wn.2d 776, 675 P.2d 232 (1984).

c. Manufacturers also have the benefit of the six year statute. Highsmith v. J.C. Penney, 39 Wn. App. 57, 691 P.2d 976 (1984) (defective escalator).

2. New Law.

a. The six year statute now applies to actions by the state, "overruling" Bellevue School District, supra.

b. The six year statute no longer applies to actions against manufacturers, "overruling" Highsmith, supra.

I. Section 801. Periodic payment of awards for future economic damages

This will be discussed in a separate section below.

J. Section 901. Limitation of negligence per se

1. Present Law.

Violation of a statute or regulation with the force of law could be negligence per se if certain criteria are met. See Mina v. Boise-Cascade Corp., 104 Wn.2d 696, 710 P.2d 184 (1985).

2. New Law.

a. Violation of a statute, ordinance or regulation is not negligence per se except for statutes, ordinances, or regulations related to electrical fire safety, smoke alarms, or driving under the influence of intoxicating liquor or drugs.

b. Violations of statutes, regulations and ordinances can be considered by the trier of fact as evidence of negligence.

3. Comments.

a. The new law puts statutes, ordinances, and regulations with the force of law in the same category as regulations without the force of law. See Engen v. Arnold, 61 Wn.2d 641, 379 P.2d 990 (1963).

b. The change does not affect the rule that a statute may create a private cause of action. See Loveridge v. Schillberg, 17 Wn. App. 96, 561 P.2d 1107 (1977).

4. Effect. The abolition of negligence per se will likely have little effect on many actions because both plaintiff and defendant violate statutes,

etc., which lead to determinations of negligence per se. However, it could help state and local governments in highway cases where things such as the Manual on Uniform Traffic Control Devices have the force of law and can result in unfavorable instructions or summary judgments on the issue of negligence for minor deviations from required practices or devices.

J. Section 902. Defense based on liquor or drug use

1. Present Law. The use of alcohol or drugs by a plaintiff is a matter to be considered as comparative negligence but it does not provide a complete defense to an action for personal injuries or death.

2. New Law.

   a. In an action for personal injuries or death, if the plaintiff was under the influence of liquor or drugs and this contributed more than 50% to his injuries or death, he is barred from recovery.

   b. If the amount of alcohol in the plaintiff's blood was 0.10% or more, it is conclusive proof that the plaintiff was under the influence.

Comment. An interesting question is whether the jury will be instructed concerning this law or whether the jury will simply be given an interrogatory asking for the percentage contribution of alcohol to an accident. In the former case, the jury could steer the verdict one way or the other depending on its view of drinking.

4. Effect. This change could be helpful to state and local governments in highway cases. It might result in less claims and lower settlements and verdicts.

K. Sections 903-905. Special rules for directors and officers of non-profit corporations, school districts and hospitals.

1. Present Law. There are no special rules on liability of directors and officers of non-profit corporations, school districts and hospitals.

2. New Law.

   a. Directors and officers of non-profit corporations and superintendents of school districts are not civilly liable for acts or omissions in the scope of their official capacities unless the acts or omissions constitute gross negligence.

   b. Directors of hospitals are not individually liable for injuries by a health care provider given privileges unless the grant of privileges constitutes gross negligence.

3. Comments.

   a. The gross negligence standard may not be much better than a regular negligence standard.

   b. Does the provision that directors and officers of non-profit corporations and school districts not be "civilly liable" mean that the new law also governs such things as discrimination actions?

L. Sections 906-909. Insurance provisions

The insurance commissioner must adopt regulations requiring casualty insurance companies to form a market assistance plan to assist persons and entities in obtaining casualty insurance.

The insurance commissioner is required to determine if policyholders should receive a credit in casualty rate filings.

The insurance commissioner, as chairman of the the tort reform study commission, must require the task force to study the effectiveness of joint underwriting authorities through the United States.

The insurance commissioner must report to the legislature by 1/1/91 on the effects of this act on insurance rates, availability and the impact on the civil justice system.

M. Sections 910 and 912. Effective date

Except for sections 202, 601 and 904, the act applies to all actions filed on or after 8/1/86. Section 904 (school districts) takes effect immediately.

N. Section 911. Severability

III. Section 301. Limitation on non-economic damages

A. Present Law. There is no limitation on non-economic damages as such. Punitive damages are against public policy in Washington. See Barr v. Interbay Citizens Bank, 96 Wn.2d 692, 649 P.2d 827 (1981).

B. New Law.

1. A claimant seeking damages for personal injury or death cannot recover a judgment for non-economic damages which exceeds the result of multiplying 0.43 times the average annual wage and times the life expectancy of the person incurring the non-economic damages.

   a. The average annual wage is the wage determined under RCW 50.04.355.

   b. Life expectancy is determined by tables adopted by the insurance commissioner. A claimant's life expectancy cannot be less than fifteen years.

   c. Non-economic damages are defined to be subjective non-monetary losses, including such things as pain and suffering, mental anguish, and disability and disfigurement. Economic damages are also defined, but this term is not used in this section.

2. Derivative claims, such as loss of consortium, asserted by persons who did not sustain bodily injury are included within the limitation on claims for non-economic damages arising from the same bodily injury.

3. The jury is not informed of the limitation on damages.

C. Comments.

1. The average annual wage is used to determine unemployment benefit amounts. It is determined by June 15 of each year from data for the previous calendar year by the Research and Statistics section of the Employment Security Department. The average annual wage for the past five years is as follows:

Year	Wage	Increase
1985	18,699	3.4%
1984	18,092	1.8%
1983	17,771	1.4%
1982	17,533	4.0%
1981	16,855	8.8%

2. The new law does not indicate whether the wage figure used is the figure for the year of the injury or the year of the verdict. This could make an appreciable difference in the typical tort case which is tried four or five years after the injury.

3. There might be some question concerning whether the limit is meant to apply to all personal injury claims or only to "bodily injury" claims. This might make a difference for such claims as false arrest and defamation.

4. The new law does not specify how the limit will be apportioned between the principal claimant and any derivative claimants or among the various derivative claimants. Some claims might also raise the question of whose life determines the limit, e.g., a claim by a surviving spouse and children for "derivative" injuries rather than injuries of the deceased.

5. One state has upheld a limit on non-economic damages in <u>medical malpractice</u> cases and one state has invalidated such a limit.

See Fein v. Permanente Medical Group, 695 P.2d 665 (Cal., 1985) (upheld); Carson v. Maurer, 120 N.H. 925 (1980). The Washington law is different because it applies to all personal injury actions, it has a relatively high limit, it is adjusted for inflation, and it varies with age.

6. See Appendix A for an example of a calculation of the limitation.

D. Effect.

1. Implementation of the limit will require an itemized jury verdict form which most defense lawyers believe is an advantage for plaintiffs.

2. Plaintiffs' attorneys argue that the limit penalizes the most severely injured claimants more than other claimants. This is probably not true because the severe injury cases usually have large claims for future medical, wage loss, and care costs. Current practice allows these costs to be inflated or overstated to such a degree that non-economic damages become less significant. The greatest effect of the limit probably would be in small to medium size cases without large future damages. It might make these cases more predictable and easier to settle.

3. The limit will likely tend to make plaintiffs place more emphasis on economic damages. Since these damages are more strongly based on fact, it might be somewhat easier to defend some claims.

IV. Section 401-403. Apportionment of damages among tortfeasors

A. Present Law.

1. Joint and several liability requires a tort feasor to make full compensation to a plaintiff if he is the proximate cause of an indivisible harm to plaintiff. The practical effect is that a defendant with 1% responsibility can be sued and made to pay

all of a plaintiff's damages while the defendant(s) with 99% responsibility are not sued.

2. If a defendant pays more than his fair share by way of verdict or a settlement which extinguishes co-defendant(s)' liability, defendant can sue co-defendant(s) for contribution. This has no value if co-defendant(s) has no assets. Chapter 4.22 RCW.

3. If a defendant settles with a plaintiff but does not extinguish co-defendant(s) liability, co-defendant(s) receives a credit against the eventual verdict for the amount of the settlement (or the reasonable value of it if it was too low). Chapter 4.22 RCW.

4. If an injured worker covered by workers compensation receives a recovery from a "third party", 75% of the recovery must be repayed to the Department of Labor and Industries until its lien is repayed. Chapter 51.24 RCW.

B. New Law.

1. Each defendant is liable only for his percentage of fault compared to all the fault which contributed to the injury, including the fault of non-parties, released persons, immune persons, and other persons with defenses.

   a. The trier of fact determines the percentage of fault attributable to all persons who have fault.

   b. Judgment is entered against each defendant for that defendant's proportionate share of fault, but judgment is not entered against released or immune defendants or those that prevailed on a defense.

2. A defendant is responsible for payment of another person's share of damages when they were acting in concert or when the person was the defendant's agent or servant.

3. If a claimant was not at fault the defendants against whom judgment was entered are jointly and severally liable for their proportionate share of damages. Contribution continues to apply to the joint and several liability.

4. The new law does not affect actions related to hazardous wastes or substances, solid waste disposal sites, tortious interferences with business contracts or relations, and manufacture or marketing of a fungible product in a generic form.

5. If an immune employer or co-employees are found to be at fault by the trier of fact in a third-party action, the injured worker does not have to repay his workers compensation benefits and can continue to receive benefits despite his tort recovery.

C. Comments.

1. The new law will likely require a verdict form listing all persons against whom defendants have produced evidence of some fault. An alternative would be to list only parties on the verdict form and allow the jury to allocate less than 100% of the fault to those parties with the remainder of the fault presumably being assigned to the immune persons, non-parties, etc., who are not on the verdict form.

2. The new law makes a defendant responsible only for his share of fault except for some joint and several liability exposure if the plaintiff is innocent.

3. Immune persons, released parties, non-parties, etc., are always assigned their share of fault which other defendants do not have to pay for. Even an "innocent" plaintiff does not receive an award for the shares assigned to these persons--he has joint and several liability only against defendants against whom judgment is entered. This is narrower than present law.

4. See Appendix B for examples of the apportionment of damages among tortfeasors.

D. Effect.

1. The effect of the new law on state and local government liability should be favorable. For instance, in multi-party highway cases, a comparatively negligent plaintiff would likely receive only a small award from the highway agency, even if the other defendants had little insurance.

2. Trial lawyers argue that several liability will inhibit settlement and increase court congestion. They contend that plaintiffs will not want to settle if the jury could assign a larger percentage of fault to the released party. This might not be true in cases where plaintiff is also negligent and a defendant will settle for insurance limits--whether that defendant is at trial or not, the jury can assign to him his proportionate share of fault and there is no joint and several liability. It is also possible that the prospect of several liability will simply reduce the settlement value of cases against deep pockets rather than frustrating settlements.

3. Several liability may reduce the number and value of workers compensation third-party lawsuits. Few injured workers will be innocent and thus it is likely that significant shares of liability in third-party actions may be assigned to immune employers, fellow employees, and safety inspectors.

   a. The reduction in value caused by several liability might be partly offset by the continuance of worker's compensation benefits authorized if the employer or co-employees are determined to be at fault.

   b. An injured worker who is "innocent" will receive a windfall if the employer or co-employee have only a small share of fault. The worker will receive both workers compensation and a large tort recovery.

V. Section 801. Periodic payments for awards of future economic damages

A. Present Law. Future economic damages are payed in a lump sum. RCW 4.56.240 permits a court to enter judgment requiring a jury verdict to be payed in the form of an annuity if the court finds that the injuries totally and permanently disable the plaintiff.

B. New Law.

1. In a personal injury or property damage action based on fault, where the verdict is $100,000 or more, the court must, at the request of a party, enter a judgment requiring periodic payment of future economic damages.

a. Each party must submit a periodic payment proposal. The contents of the proposal are specified by the law.

b. Security required by the judgment must be posted within 30 days or the judgment for future damages will be entered as a lump sum.

c. The court has the discretion to enter a judgment for periodic payments which the court finds best provides for the claimant's future needs. The judgment can be modified because of hardships or unforeseen circumstances.

3. If the judgment debtor fails to make a timely periodic payment, the judgment creditor may petition the court for an order requiring the remaining payments to be made in a lump sum which will be the present value of future payments.

4. When the judgment creditor dies, a party can petition the court to award and apportion unpaid future damages except for damages for loss of future earnings. Payment for future earnings continues.

5. The security reverts to the judgment debtor when the periodic payment judgment is satisfied.

C. Comments.

1. This section of the law requires an itemized verdict form if it is to be used.

2. The new law will permit a defendant to request return of medical and care costs which are unexpended when plaintiff dies.

3. Plaintiff has to bear the cost of pursuing the judgment debtor in the event of a default. The law does not require the court to order a lump sum payment in the event of default.

4. Periodic payments may be more helpful to self-insured government defendants than they are to private defendants. Government defendants might not have to post security and can easily pay over time. Private defendants have to post security and may lose it and have to assume the payments if their insurance company defaults.

5. Trial lawyers argue that this section requires a double reduction to present value. The contention is that future damages are reduced to present value by the jury and then, in effect, reduced again when they are payed out over time. This argument is valid only if one assumes that courts will continue to require reduction to present value of future damages when they know that future damages may be paid out over time. This is probably not a reasonable assumption.

6. Periodic payments of future damages are not mandated unless a party requests them. Since

few plaintiffs will likely request such payments, defendants can decide whether the advantages of periodic payments outweight their inconvenience on a case by case basis.

D. Effect.

1. The combination of the limits on non-economic damages and the periodic payment of future economic damages will squeeze large contingent fees and may give plaintiffs additional incentive to settle.

2. The uncertainty that damages for future medical and care costs will ever be collected (plaintiff may remain healthy or may die early) might lead plaintiffs to attempt to make larger wage loss claims and reduce medical and care claims.

IV. Conclusion. The tort reform act is the broadest attempt at tort reform in the United States at this time. While the act does not deal with governmental liability concerns directly, it will likely have a major effect on the government as a deep pocket defendant. However, the act does not apply to actions filed before August 1, 1986. Therefore, the full effect of the act will not be felt for several years.

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March 11, 1993

MEMORANDUM

TO:

FROM: Patricia Young
Legislative Analyst

RE: **Status of Tort Reform in Alaska**
Research Request 93.138

You asked for background information on the issue of tort reform nationwide. You also requested an overview of reform measures in Alaska, and wished to know the current status of tort reform in the state.

In this country, the civil justice, or tort, system has become closely bound with the doctrine expressed by Supreme Court Justice Oliver Wendell Holmes that for every wrong there is a remedy. This idea--that persons who are injured or suffer damages as a result of negligence on the part of others have the right to be compensated, or *made whole*--became a major issue in this country during the 1970s and again in the 1980s when liability insurance became significantly more costly. During those periods, many states passed measures affecting one or more aspects of the tort system in efforts to limit liability for injury or damage and thereby to increase the availability and to decrease the cost of liability insurance.

Civil justice reform is one response to what has been termed the liability insurance "crisis." Other legislative approaches include insurance regulation and risk management.

Civil justice reform, expressed by limits to liability, is generally opposed by trial lawyers and consumer and victim advocate organizations but championed by business, insurance, and medical interest groups. Historically, citizens could not sue the crown (or in this country, the government), but as sovereign immunity has diminished, governments have shown increasing interest in such limits as well. During 1986, at least 10,000 bills were introduced and 44 states enacted legislation either general in nature or targeting specific areas such as medical malpractice or product liability. In 1987 more than 13,000 bills were introduced, with the focus on immunities--from sovereign immunity extended to counties, cities, and in 1992 and only one passed in 1991.[5] In fact, according to Ms. Trolin, current civil justice activity for the most part involves efforts to repeal or reverse changes made to the tort system within the past few years.[6]

Because reform measures have provided little or no discernable relief to the high cost of insurance, legislative activity in civil justice reform has declined and the focus has shifted more to regulation of the insurance industry. In general, states adopted a "wait and see" attitude and many, including Alaska, established task force committees to study the impact of tort reform measures and to consider regulatory actions to moderate future insurance cycles. That shift in focus was punctuated by the 1988 antitrust lawsuit filed by 19 state attorneys general, including Alaska's, charging that four of the largest insurers colluded to fix prices and limit commercial and general liability coverage. The Supreme Court is expected to rule on the case by summer, and the face of the $30-billion-a-year insurance industry could change significantly if the ruling is in favor of the states.

Tort reform measures dating back to the mid-1980s were recently charted for individual states in a sidebar to Margaret Cronin Fisk's "The Reform Juggernaut Slows Down," *The National Law Journal*, November 9, 1992. Information for the chart, entitled "The Tort Movement's Progress Across the Nation," (p. 35) was provided by the American Tort Reform Association, the Association of Trial Lawyers of American, and the office of the general counsel of the American Medical Association. Another sidebar to the same article, entitled "Record on 'Reform' Mixed in the Courts," (p.34) lists major decisions on damage caps, collateral source restrictions, and mandatory periodic payments. Ms. Fisk's article, along with two other recent *National Law Journal* articles, "Tort Tales Lash Back," August 3, 1992, and "Debate Still Rages on Torts," November 16, 1992, provide an excellent overview of the tort reform experience. All are included in Attachment A.

Tort Reform in Alaska

Alaska's major tort reform measures were passed as Senate Bill 377 in 1986 (Chapter 139 SLA 1986), which resulted in most of the current AS 09.17, Limitations on Civil Liability (see Attachment B). Among the provisions are a $500,000 cap on non-economic damages (with disfigurement and severe physical impairment as exceptions); no punitive damages unless supported by clear and convincing evidence; periodic payments of damage awards;

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[5]Margaret Cronin Fisk, "The Reform Juggernaut Slows Down, *The National Law Journal*, November 9, 1992, p. 1.

[6]Trolin, telephone conversation, February 1993

ATTACHMENT A

National Law Journal: Margaret Cronin Fisk, "The Reform Juggernaut Slows Down," November 9, 1992; Gail Diane Cox, "Tort Tales Lash Back," August 3, 1992; Andrew Blum, "Debate Still Rages on Torts," November 16, 1992; and Related Articles

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THE NATIONAL LAW JOURNAL

740 TORT REFORM

The Weekly Newspaper for the Profession

VOL. 15—NO. 10 PRICE $3.00 © 1992 The New York Law Publishing Co. MONDAY, NOVEMBER 9, 1992

The Reform Juggernaut Slows Down

Tort reform backers fight defensive actions now.

First of a two-part series on tort reform.

BY MARGARET CRONIN FISK
Special to The National Law Journal

AFTER A FLURRY of legislative victories between 1986 and 1988, the tort reform movement has slowed down — despite its strong backing by the Bush administration.

No major tort reform measures passed in any states in 1992, according to the American Tort Reform Association. And only one made it through last year — a modification of the doctrine of joint and several liability in Nebraska.

Some limited, relatively minor "reform" measures did squeak through, however. In 1992, for instance, Colorado granted some immunity from liability to operators of llama treks. And last year, Washington, D.C., granted some immunity from medical malpractice suits to clinics serving the indigent.

Tort Reform: Where It Is Now

* Courts' mixed verdicts, Page 34.
* State by state, Page 35.
* What it cost, Page 37.
* Next week: Was there a litigation explosion?

"Tort reform has died down," says Brenda Trolin, program principal, labor and insurance, at the National Conference of State Legislatures. "It's not the issue it was three or four years ago. We're not even tracking it any more. There's more of a movement now to reverse what was done."

Says Martin Connor, executive director of ATRA, "There have been relatively few affirmative actions in the past year or two." At the beginning of the movement, "the easy pickings were picked and now we're fighting in tougher arenas." Now, he says, "The plaintiffs' bar has provided much more professional and aggressive opposition."

Barry J. Nace, president of the Association of Trial Lawyers of America, has a different take on why tort reform is moribund. "People have started to realize that these measures went way too far for business and the insurance industry," says Mr. Nace, of Washington, D.C.'s Paulson, Nace, Norwind & Sellinger.

"The battlegrounds now have a narrower focus," adds Bob Lembo, director of state relations for ATLA. "Some states are trying to pass workers'

Continued on page 34

Judge Jacqueline St. Joan sometimes hears cases out of turn in her Protective Order Court if they are urgent.

Photo by James Cook

The Court Of St. Joan

An innovative Protective Order Court in Denver hears pleas from people who can't wait for routine justice.

BY GAIL DIANE COX
National Law Journal Staff Reporter

BEYOND THE classic facade of Denver's City and County Courthouse, which is so stage-set perfect that Perry Mason's movie crew shoots there, an experiment in controlling mayhem goes on in Department 303W.

That's where Presiding Judge Brian N. Campbell took a gamble last April, breaking with the tradition that divvies up emergency pleas for protective orders among courtrooms that hear them in spare moments. Instead, he set aside one court to hear daylong sequences of horror stories — sending all the battered lovers, dazed toddlers, menacing neighbors, and bruised old men and women through the doors of Department 303W.

The judge who takes the bench there each morning at 8:30 is a woman with a fine-boned face, sensible shoes and a last name she made up: Jacqueline St. Joan. She oversees proceedings that run for hours without the guidance of attorneys on either side.

Continued on page 33

HIGHLIGHTS

Unlisted in Dallas
★ The EPA issues new Superfund sites and ignores a Texas community, again. Page 3.

Malpractice Woes
★ A new study blames bad math, bad luck for malpractice insurance troubles. Page 3.

Special Section on Litigation, Pages 25 to 32

Lawyer Shortage?
★ Can part of the deficit be blamed on not enough lawyers? Page 5.

Business Watch
★ The RTC could lose big as a result of a ruling on contracts and bonds. Page 17.

Record on 'Reform' Mixed in the Courts

THE RECORD on court challenges to tort reform measures remains mixed. The largest number of cases so far have involved damage caps, primarily because caps have been a part of some states' tort laws since 1975. Even now, there's no discernible pattern: Some state supreme courts have upheld caps; others have declared them unconstitutional.

The other significant areas in which courts have handed down decisions involve modification of the collateral source rule and mandatory periodic payments. The major decisions by these courts so far include:

Damage Caps

Upheld

California: *Fein v. Permanente Medical Group*, 695 P.2d 665, appeal dismissed, 474 U.S. 892, 106 S. Ct. 214 (1985); $250,000 cap on non-economic damages is constitutional. U.S. Supreme Court dismisses case for lack of a federal question.

Indiana: *Johnson v. St. Vincent Hospital Inc.*, 404 N.E. 2nd 585 (1980); $500,000 medical malpractice cap does not deny due process or equal protection; decision upheld by Indiana appeals court in 1981 and 1992.

Kansas: *Samsel v. Wheeler Transport*, 789 P. 541 (1990); upholds $250,000 cap on pain and suffering for tort cases other than medical malpractice.

Louisiana: *Williams v. Kushner*, 88-C1153, 88-C1188 (La. 1989); $500,000 cap on medical malpractice damages paid from state-run patient compensation fund is constitutional.

Maine: *Peters v. Saft*, 597 A.2d 50 (1991); $250,000 cap on non-medical damages in dram shop suits is not unconstitutional.

Maryland: *Murphy v. Edmonds*, 601 A.2d 102 (1992); $350,000 cap on non-economic damages does not violate state constitution.

Minnesota: *Schweich v. Ziegler Inc.*, 463 N.W.2d 722 (1990); $400,000 cap on loss of consortium does not violate "certain remedy" guarantee of state constitution.

Missouri: *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (1992); $350,000 cap on non-economic damages in medical malpractice is rational response to tort crisis.

Virginia: *Etheridge v. Medical Center Hospital*, 376 S.E. 2d 525 (1989); $1 million cap on medical malpractice does not infringe upon right to jury trial.

West Virginia: *Robinson v. Charleston Area Medical Center*, 414 S.E.2d 877 (W.Va. 1992); $1 million cap on medical malpractice non-economic damages does not violate state constitution.

Overturned

Alabama: *Moore v. Mobile Infirmary*, 592 So. 2d 156 (1991); $400,000 limit on non-economic damages in medical malpractice violates right to trial by jury.

Florida: *Smith v. Department of Insurance*, 507 So. 2d 1080 (1987); $450,000 cap on non-economic damages in tort actions violates right of access to the courts.

Illinois: *Wright v. Central DuPage Hospital*, 347 N.E.2nd 736 (1976); $500,000 cap on medical malpractice damages violates state constitutional ban against special legislation.

Kansas: *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (1988); strikes down $250,000 cap on medical malpractice non-economic damages.

New Hampshire: *Carson v. Maurer*, 424 A.2d 825 (1980); $250,000 cap on non-economic damages in medical malpractice violates equal protection; *Brannigan v. Usitalo*, 587 A.2d 1232 (1991); $875,000 limit on non-economic damages in tort cases violates equal protection.

North Dakota: *Arneson v. Olson*, 270 N.W.2d 125 (1978); $300,000 medical negligence cap discriminates against malpractice victims and denies due process.

Ohio: *Morris v. Savoy*, 576 N.E.2d 765 (1991); $200,000 cap on non-economic damages violates due process.

Texas: *Lucas v. U.S.*, 757 S.W.2d 687 (1988); $500,000 cap on medical malpractice damages violates right to remedy and jury trial.

Washington: *Sophie v. Fibreboard Corp.*, 771 P.2d 711 (1991); sliding scale cap on non-economic damages violates right to jury trial.

Collateral Source Restrictions

Upheld

Arizona: *Eslin v. Broomfield*, 570 P.2d 744 (1977); upholds limit on collateral source rule.

California: *Fein v. Permanente Medical Group*, 695 P.2d 665, cert. denied, 106 S. Ct. 214 (1985); upholds limits.

Florida: *Pinillos v. Cedars of Lebanon Hospital Corp.*, 403 So. 2d 365 (1981); mandatory offset in medical malpractice does not violate acess to courts.

Illinois: *Bernier v. Burris*, 497 N.E.2d 763 (1986); upholds modification of rule.

Iowa: *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (1980); upholds abrogation of collateral source rule in medical malpractice.

Ohio: *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991); mandatory reduction of damages by amount of collateral benefits is not unconstitutional.

Overturned

Georgia: *Denton v. Con-Way Southern Express Inc.*, 402 S.E.2d 269 (1991); statute mandating evidence of collateral sources violates guarantee of impartial and complete governmental protection.

Kansas: *Wentling v. Medical Anesthesia Services*, 701 P.2d 939 (1985); abrogation of collateral source rule violates equal protection; *Farley v. Engelken*, 740 P.2d 1058 (1987); abrogation of collateral source rule in medical malpractice violates state guarantee of equal protection.

New Hampshire: *Carson v. Mauer*, 424 A.2d 825 (1980); limits violate equal protection guarantee.

Mandatory Periodic Payments

Upheld

California: *American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga Inc.*, 683 P.2d 670 (1984); mandatory periodic payment of future damages over $50,000 does not violate state or federal due process, equal protection or jury trial rights.

Overturned

Alabama: *Clark v. Container Corp.*, 589 So. 2d 184 (1991); mandatory periodic payments violate the state constitution.

Kansas: *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (1988); mandatory periodic payment of future damages violates state guarantee of right to remedy.

New Hampshire: *Carson v. Maurer*, 424 A.2d 825 (1980); required periodic payments for judgments over $50,000 violates state equal protection guarantee.

WHAT MOVEMENT? Brenda Trolin says her group is 'not even tracking' tort reform measures any more.

CONCEDES: Says Martin Connor, 'There have been relatively few affirmative actions in the past year.'

Activists Face Defensive Moves On Tort System

Continued from page 1

comp or auto no-fault legislation. Or people are trying to get immunity for a group." But, except in the area of products liability, little broad-based legislation is being proposed.

Defensive Battles

Indeed, throughout much of the nation, tort reformers have been put on the defensive, Mr. Connor says. "Since 1988, we've spent an enormous amount of energy in preserving the reforms already enacted. Every time a state enacts one of these reforms, they're subject to a constitutional challenge." And, he says, "In Louisiana this year there was a ferocious attempt to repeal. This was one of our major preoccupations."

Now the trial lawyers have recently chimed in with a proposed reform of their own. They're trying to prevent judges from entering secrecy orders in settlements. "In almost every state, the state trial lawyer associations have launched a drive to enact legislation," efforts that tort reformers oppose. The trial lawyers have been successful only in Florida, Mr. Connor reports.

Mr. Connor says tort reformers are pushing some affirmative actions of their own. "The major push now is in product liability. In three states — New York, Pennsylvania and Texas — we were stopped by just a one- or two-vote margin in the state senate. All these [battles] will be renewed in 1993."

Louisiana provided one of the few clear-cut victories for the tort reformers this year and that was decidedly a defensive win. Legislators backed by trial lawyers proposed a package of bills that included a reversal of joint and several liability law reform, allowed punitives in all torts cases, and ordered disclosure of settlements. Louisiana has a restrictive punitives law, only allowing them for a narrow range of cases, including toxic torts and auto accidents caused by drunk drivers. In the Louisiana House of Representatives, the bills on joint and several liability and on disclosure each lost by 12 votes. But the bill on punitives narrowly passed.

After passage in the House, however, says Randy Hayden, director of public relations of the Louisiana Association of Business and Industry, "There was a groundswell of public opposition." The opposition was led by the LABI and various municipalities and non-profit organizations, who objected to provisions in the bill that would allow plaintiffs to seek punitives against anybody.

Fleeting Wins?

But Mr. Hayden says the victory for tort reformers may have been fleeting. "We think they'll come back. They'll be smarter in some areas. They'll take non-profit and government bodies out of the punitives and maybe put caps on it." And the victory came in the same year as another defeat in Louisiana — a products liability bill failed to get out of committee.

Products liability also went down to defeat in Pennsylvania, but the loss was so narrow the reformers say victory is possible in the next session. In May 1992, the Pennsylvania Senate was considering a bill that "grants non-manufacturers some form of limited immunity if they did not alter the product," recalls Mark Phenicie, legislative counsel of the Pennsylvania Trial Lawyers Association.

Tort reformers attempted to amend the bill, "setting government and industry standards as an admissible defense. It also set state-of-the-art as a defense and set a comparative negligence standard." Under the tort reform proposal, Mr. Phenicie says "they would have virtually eliminated punitives" in products liability. The tobacco industry was one of the biggest supporters of the amendment, he adds, because "the bill would limit the right to sue over second-hand smoke."

Pennsylvania was chosen as a test state, says Mr. Phenicie, "because we have the reputation of being a tough state." And, indeed, no major tort reform measure has ever passed in Pennsylvania. "Pennsylvania has the craziest laws in the nation," says Michael C. McLaughlin, president of the Pennsylvania Task Force on Product Liability.

After more than three hours of debate, the Pennsylvania Senate defeated the measure 26-24. Two years ago, products liability reform had lost 29-21 in the Senate. And this indicates, says Mr. McLaughlin, "the trial lawyers are fighting a holding action. I think we've got them on the run."

But Mr. Phenicie says the battle may still go to the trial lawyers. This time, he says "we made a few counter-

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The Tort Movement's Progress Across the Nation

For the purposes of this listing, the following measures are considered tort reforms: abolition or modification of joint and several liability; capping damages; requiring greater proof for punitive damages; modifying or eliminating punitive damages for any type of case; admitting collateral source compensation as evidence or mandating reductions of awards because of money from collateral sources; assessing penalties for frivolous claims or defenses; limiting recovery from plaintiffs partially at fault; switching some torts to no-fault; broadening rules of defense for products liability; restricting attorney fees; granting immunity from liability to certain classes of defendants; shortening statutes of limitations for certain actions.

These "tort reform" measures date back to the start of the movement in 1985. The years listed are the dates when the measures were passed. Information for the chart was provided by the American Tort Reform Association, the Association of Trial Lawyers of America, and the office of the general counsel of the American Medical Association.

Alabama
Joint and several liability: Never had
Damage limits or restrictions: $1 million cap on medical malpractice/wrongful-death actions (1987); $250,000 cap on punitives (1987). Exceptions: repetitive conduct, malice or slander.
Collateral sources: Admits such source compensation as evidence, but reduction not mandated; abolishes collateral source recovery for medical malpractice (1987). Exceptions: paid state-run sources and private insurance plans.
Other changes: Allows court to assess court costs and reasonable attorney fees for frivolous claims or defenses (1987).

Alaska
Joint and several liability: Eliminates by ballot (1988).
Damage limits or restrictions: $500,000 cap on non-economic damages (1986). Exceptions: disfigurement and severe physical impairment; no punitives absent clear and convincing evidence (1986).
Collateral sources: Admits collateral source compensation as evidence, post-verdict (1986).
Other changes: Grants immunity to directors and officers of non-profit organizations (1986); provides immunity to those who volunteer in emergencies (1988).

Arizona
Joint and several liability: Abolishes (1987). Exceptions: intentional torts, hazardous waste, defendants acting in concert.
Damage limits or restrictions: Exempts drug manufacturers from punitives, if drug was made and labeled in accordance with federal law (1989); mandates periodic payments for all medical malpractice unless evidence that such payments are not necessary (1989).
Other changes: Allows court to set penalties for unjustified actions (1986); grants immunity to directors and officers of non-profit organizations (1987); requires clear and convincing evidence of negligence in cases in which physicians deliver babies in an emergency (1990).

Arkansas
Changes: Grants immunity for directors of non-profit organizations (1987).

California
Joint and several liability: Abolishes for non-economic damages (1986).
Damage limits or restrictions: $250,000 cap on non-economic damages in medical malpractice cases (1975); sets "clear and convincing evidence" standard for punitives, trials bifurcated (1987).
Other changes: Revises limits on attorneys fees in medical malpractice to 40 percent of first $50,000, 33.3 percent of next $50,000, 25 percent of next $50,000, 15 percent over $600,000 (1987); sets two year statute of limitations for medical malpractice unless negligent act was concealed or could not have reasonably been discovered or involves foreign object left in patient's body (1988); establishes defense in product cases — manufacturers not liable if product is known to be inherently harmful (1987).

Colorado
Joint and several liability: Totally abolishes (1986); amends to allow recovery when defendants act in concert (1987).
Damage limits or restrictions: $250,000 cap, non-economic (1986). Exception: court finding of justification by clear and convincing evidence, then $500,000 cap; $1 million total cap on medical negligence; punitives may not exceed compensatory (1986).
Collateral sources: Admits collateral source compensation as evidence (1986).
Other changes: Allows court to assess reasonable expenses for frivolous pleadings, motions or defenses (1986); establishes two-year statute of limitations for products liability (1986).

Connecticut
Joint and several liability: Modifies to prohibit joint (1986); amends limiting this prohibition to non-economic damages (1987).
Damage limits or restrictions: Punitives in products liability may not exceed twice compensatory (1979).
Collateral sources: Admits collateral source compensation as evidence (1986).
Other changes: Allows court to assess twice the amount of court costs and attorney fees as penalty for frivolous suits (1986).

Delaware
Changes: Establishes defense in products liability if seller did not know of defect and did not manufacture or modify product (1987).

District of Columbia
Changes: Grants immunity from medical malpractice liability to clinics providing services to the indigent (1991).

Florida
Joint and several liability: Abolishes for non-economic damages in negligence; also for economic damages for defendants less at fault than plaintiff (1986). Exceptions: pollution, intentional torts, actions involving damages $25,000 or less.
Damage limits or restrictions: $250,000 medical malpractice cap on pain and suffering if both sides agree to arbitration, cap rises to $350,000 if defendant refuses arbitration, no cap if case goes to trial (1988); punitives may not exceed three times compensatory, absent "clear and convincing evidence," 35 percent of punitives go to state fund (1986); mandates periodic payments if requested by party to suit if economic damages exceed $250,000 (1986).
Collateral sources: Sets mandatory offset for collateral source compensation (1986).
Other changes: Allows court to assess fees for complete absence of justiciable issue of either law or fact (1986); attorneys who file three or more malpractice claims without merit in a five-year period will be subject to disciplinary action (1988); "bad baby bill" removes severely injured infants from tort system and places them in no-fault tort system, with victim receiving damages to cover medical, hospital, rehabilitation and projected wage loss, but no pain and suffering or punitives (1990); establishes modified comparative fault for all tort actions, including strict liability (1986).

Georgia
Joint and several liability: Limits to several when plaintiff is assessed portion of fault (1987).
Damage limits or restrictions: $250,000 cap on punitives, except product cases or when defendant had intent to harm (1987).
Other changes: Allows court to assess court costs and attorney fees for frivolous lawsuits or defenses (1986); grants immunity to volunteer directors and officers of charities and non-profit hospitals, unless behavior was willful or wanton (1987); grants immunity from lawsuits to good Samaritans (1987).

Hawaii
Joint and several liability: Abolishes for non-economic damages for defendants at fault 25 percent or less (1986). Exceptions: auto, product, environmental cases.
Damage limits or restrictions: $375,000 cap on pain and suffering (1986). Exceptions: intentional, environmental, pollution, toxic torts, asbestos, aircraft accidents, strict and products liability, motor vehicle cases.
Collateral sources: Prevents double recoveries by allowing subrogation liens by insurance companies or other sources (1986).
Other changes: Allows court to assess penalty not exceeding 25 percent of the losses claimed for frivolous suits or defenses (1986); subjects all civil tort actions with probable jury award of $150,000 or less to mandatory arbitration (1986); abolishes claims of emotional distress arising solely out of damage to property (1986).

Idaho
Joint and several liability: Abolishes. Exceptions: intentional torts, hazardous wastes, medical and pharmaceutical products (1987).
Damage limits or restrictions: $400,000 cap on non-economic damages (adjusted for annual wage increase), punitives not included in cap (1987); requires "oppressive, fraudulent, wanton, malicious or outrageous" conduct for punitives (1987).
Collateral sources: Admits collateral source compensation as evidence, allows court to reduce jury awards (1990). Exceptions: compensation from federal benefits, life insurance or contractual subrogation rights.
Other changes: Allows court to assess attorney fees in frivolous suits (1987).

Illinois
Joint and several liability: Abolishes for defendants at fault 25 percent or less (1986). Exceptions: medical expenses; medical malpractice, environmental cases
Damage limits or restrictions: For punitives plaintiff must show defendant acted "willfully and wantonly" (1986).
Collateral sources: Allows offset for benefits from collateral sources over $25,000, but offset cannot reduce judgment by more than 50 percent (1986).
Other changes: Allows court to assess reasonable costs and attorney fees for frivolous pleadings, motions or defenses (1986); bars plaintiff 51 percent or more at fault from recovery (1986).

Indiana
Joint and several liability: Never had.
Damage limits or restrictions: Caps medical malpractice at $250,000 (1975); amends cap to $100,000 per practitioner per incident, $300,000 annual aggregate, additional recovery from state fund, with maximum now at $750,000 (1989); adopts "clear and convincing" standard for punitives (1984).
Collateral sources: Admits collateral source compensation as evidence, with certain exclusions (1986).
Other changes: Allows court to assess court costs and attorney fees for frivolous conduct (1986); grants immunity from lawsuits to volunteers, unless insured (1986).

Iowa
Joint and several liability: Abolishes for defendants less than 50 percent responsible (1985).
Damage limits or restrictions: Punitive awards go to plaintiff unless defendants conduct was directed toward general public as well, then 75 percent goes to victims' reparation fund (1986); adopts "clear and convincing" standard for punitives (1987); repeals prejudgment interest for future damages (1987).
Collateral sources: Admits collateral source compensation as evidence, but reduction not mandated (1987).
Other changes: Allows court to assess penalties for frivolous lawsuits or deceptive tactics (1986); establishes "state-of-the-art" defense for products liability (1986).

Kansas
Joint and several liability: Abolishes by case law (1978).
Damage limits or restrictions: $250,000 cap on pain and suffering, $100,000 cap on wrongful death (1987); caps punitive award at lesser of defendant's annual gross income or $5 million, bifurcates trials, set "willful and wanton" standard (1988).
Other changes: Prohibits submission of evidence in products liability cases concerning advances in technology or changes in manufacturing process made after product was designed and sold (1986); exempts victims of latent disease or one caused by exposure to harmful material from 10-year statute of repose applying in products liability (1990).

Kentucky
Joint and several liability: Codifies common law, limiting defendants' liability to share apportioned by jury at trial (1988).
Damage limits or restrictions: Adopts "clear and convincing" standard for punitives (1988).
Collateral sources: Mandates jury must be advised of collateral source payments (1988).
Other changes: Sets two-year statute of limitations for property damage suits (1988); grants immunity to directors and officers of non-profit organizations, unless willful or wanton behavior (1988).

Louisiana
Joint and several liability: Modifies to limit defendant less than 20 percent at fault to maximum of 50 percent of plaintiff's damages (1987); previous law unchanged limiting defendant's liability to its share of damages when defendant's share of blame is less than plaintiff's.
Damage limits or restrictions: Limits medical malpractice awards to $100,000 per health care provider, capped at $500,000, excluding future medical care (1975).
Other changes: Allows court to assess reasonable expenses, including attorney fees, for frivolous conduct (1988); grants limited immunity to dram shops and hosts for damages caused by purchasers or users of alcohol (1986); establishes "state-of-the art" defense for products liability (1988).

Maine
Joint and several liability: Abolishes for dram shop cases (1985).
Damage limits or restrictions: $250,000 cap on dram shop actions (1985).
Collateral sources: Abolishes collateral source rule in medical malpractice cases, diverts funds into malpractice fund for rural obstetricians (1990).
Other changes: Effective 1986, sets medical malpractice attorney fee scale — 33.3 percent of first $100,000, 25 percent of next $100,000, 20 percent of amounts over $200,000 (1986); grants immunity to directors, officers and volunteers of charitable organizations (1988).

Maryland
Damage limits or restrictions: $350,000 cap on non-economic damages (1986).
Other changes: Grants immunity to directors and officers of charitable organizations, if group is insured (1988).

Massachusetts
Damage limits or restrictions: $500,000 cap on medical malpractice non-economic damages (1986). Exceptions: permanent loss or impairment of bodily function, substantial disfigurement.
Other changes: Sets sliding scale for attorney fees in medical malpractice — 40 percent of first $150,000, 33.3 percent of next $150,000, 30 percent of next $200,000 and 25 percent of anything over $500,000 (1985).

Michigan
Joint and several liability: Abolishes for municipalities; limits recovery from other defendants to degree of fault as as-

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Most Jurisdictions Have Some Form of 'Reform'

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sessed at trial (1986). Exceptions: blame-free plaintiff, products liability cases.

Damage limits or restrictions: $225,000 cap on medical malpractice non-economic damages (1986). Exceptions: foreign objects left in body, injuries to reproductive system, loss of vital bodily function; mandates periodic payment for future economic damages above $250,000; prohibits prejudgment interest on awards for future damages (1986).

Collateral sources: Admits collateral source compensation as evidence, post-verdict, but court cannot reduce plaintiff's damages by more than amount awarded for economic damages (1986).

Other changes: Allows court to assess court costs and attorney fees for frivolous actions or defenses (1986).

Minnesota

Joint and several liability: Limits for defendants 15 percent or less responsible — they pay no more than four times their share (1988).

Damage limits or restrictions: $400,000 cap on loss of consortium, emotional distress, embarrassment (1986); raises standard for punitives, plaintiff must prove defendant's "deliberate disregard" for the safety and rights of others (1990); prohibits prejudgment interest on awards for future damages (1986); allows individual injured by drunken driver to seek punitive damages (1991).

Collateral sources: Admits collateral source compensation as evidence for court's review only, Social Security and insurance benefits are exempted (1986).

Other changes: Allows court to assess court costs and attorney fees for frivolous claims (1986); provides immunity to volunteers of the state or municipality if conduct is not willful or wanton neglect of duty (1989).

Mississippi

Joint and several liability: Modifies, allowing joint and several coverage only to extent necessary for plaintiff to recover 50 percent of damages awarded (1989).

Other changes: Allows court to assess transaction costs and attorney fees for frivolous claims or defenses (1988); grants immunity to volunteers and good Samaritans (1988); exempts bar owners from liability if patrons cause damage or injury while under the influence of alcohol (1987).

Missouri

Joint and several liability: Limits to several when plaintiff is assessed a portion of fault; if defendant is less at fault than the plaintiff, recovery is limited to twice the level of fault assessed (1987).

Damage limits or restrictions: $350,000 cap on medical malpractice non-economic damages per defendant per occurrence (1986); Limits damages for hazardous waste cleanups to $1 million per person or $3 million per occurrence (1987); sets bifurcated trials for punitives, with 50 percent of punitive award going to state fund (1987).

Collateral sources: Admits collateral source compensation as evidence, but if used as evidence at trial, defendant waives right to a credit against a judgment for that amount (1987).

Other changes: Establishes "state-of-the-art" defense in products liability (1987).

Montana

Joint and several liability: Abolishes joint liability for defendants 50 percent or less responsible (1987).

Damage limits or restrictions: Adopts "clear and convincing" evidence standard; punitives can be awarded only in cases of actual fraud or malice (1987).

Collateral sources: Admits collateral source compensation as evidence, allows offset for non-subrogated benefits; court is required to offset damages over $50,000 (1987).

Nebraska

Joint and several liability: Eliminates for non-economic damages in all cases (1991). Exceptions: when defendants acted in concert.

Damage limits or restrictions: $1 million cap on medical malpractice claims, total damages (1976).

Other changes: Allows court to assess court costs and attorney fees for frivolous or bad-faith claim or defense (1987); allows plaintiffs to recover unless they are more than 51 percent at fault in personal injury and wrongful-death cases (1991).

Nevada

Joint and several liability: Abolishes. Exceptions: product, toxic wastes, intentional torts cases, or when defendants acted in concert (1987).

Damage limits or restrictions: Limits punitives to $300,000 in cases in which compensatories are less than $100,000 and to three times compensatories in cases of $100,000 or more (1989). Exceptions: products liability, insurance bad faith, discrimination, toxic tort, defamation cases; sets clear and convincing evidence of "oppression, fraud or malice" for punitives, bifurcates trials.

New Hampshire

Joint and several liability: Abolishes for defendants less than 50 percent responsible (1989).

Damage limits or restrictions: Prohibits punitive damages (1986); sets cap limiting liability for non-profit organizations to $250,000 per person and $1 million per incident of bodily injury (1988).

Other changes: Allows court to assess penalties for frivolous lawsuits (1986); provides immunity to volunteers working for non-profit organizations and government entities, if actions were in good faith (1988); establishes "state-of-the-art" defense for products liability (1989).

New Jersey

Joint and several liability: Establishes three-tier system wherein defendants found less than 20 percent liable are responsible only for degree of fault; defendants 20 percent to 60 percent liable can be held responsible for full economic damages but only their share of non-economic damages (1987); defendants more than 60 percent at fault can be held liable for all damages.

Damage limits or restrictions: Requires evidence of "actual malice" or "wanton and willful disregard" for rights of plaintiff for punitives (1987).

Collateral sources: Mandates offset of collateral source compensation other than workers' compensation and life insurance benefits (1987).

Other changes: Allows court to assess costs and attorney fees upon finding that a complaint, counterclaim, cross-claim or defense of non-prevailing party was frivolous (1988); FDA defense in drug and medical device products liability cases (1989).

New Mexico

Joint and several liability: Codifies law, limiting several liability. Exceptions: intentional torts, vicarious liability, certain products liability and public policy cases (1987).

Damage limits or restrictions: $500,000 cap on medical malpractice awards, except for punitive damages and medical care (1976).

Other changes: Exempts blood, blood products, human tissue and organs from strict products liability (1987).

New York

Joint and several liability: Abolishes joint liability for non-economic damages where defendant is less than 51 percent liable (1986). Exceptions: negligence, intentional or toxic torts, construction, contract, motor vehicle cases.

Damage limits or restrictions: Mandates periodic payments for future damages over $250,000 (1986).

Collateral sources: Mandates offset of collateral source compensation (1986).

Other changes: In cases involving frivolous claims or counterclaims, requires court to award successful party court costs and attorney fees up to $10,000 (1986); sets attorney fees for medical malpractice — 30 percent on first $250,000 to 10 percent on any amount over $1,250,000 (1985).

North Carolina

Changes: Cases against vaccine manufacturers and physicians must be heard by a commission, which can award up to $300,000; all children's medical costs will be paid for by the state (1987).

North Dakota

Joint and several liability: Abolishes (1987). Exceptions: intentional torts, products liability, cases where defendants acted in concert.

Damage limits or restrictions: For punitives, plaintiff must show "clear and convincing evidence of oppression, fraud or malice" (1987).

Collateral sources: Mandates offset of collateral source compensation other than life insurance or insurance purchased by recovering party (1987).

Other changes: Requires court to award reasonable court costs and attorney fees to prevailing party if opponent's claim was frivolous (1987); provides immunity to physicians providing emergency care to pregnant women, if doctor has not previously treated the woman and is not being paid for the emergency care (1989).

Ohio

Joint and several liability: Abolishes for non-economic damages where plaintiff is assessed a portion of fault (1987).

Damage limits or restrictions: Adopts "clear and convincing" standard for punitives; judge sets amounts (1987).

Collateral sources: Mandates offset of collateral source compensation, minus total of costs paid for the benefit (1987).

Other changes: Allows court to assess attorney fees to any party adversely affected by frivolous conduct (1987); establishes "state-of-the-art" defense for products liability, unless manufacturer acted unreasonably in introducing product into commerce (1987).

Oklahoma

Joint and several liability: Case law limits to actions in which damages cannot be apportioned or when plaintiff is not at fault.

Damage limits or restrictions: Absent clear and convincing evidence, punitive award may not exceed compensatory (1986); prohibits prejudgment interest on punitive damage awards (1986).

Other changes: Allows court to assess reasonable expenses and attorney fees for frivolous actions (1987).

Oregon

Joint and several liability: Abolishes for non-economic damages and for economic damages when defendant is less than 15 percent at fault (1987). Exception: some environmental torts.

Damage limits or restrictions: $500,000 cap on non-economic damages, no cap on punitives (1987); adopts "clear and convincing" evidence standard for punitives, exempts manufacturers of prescription drugs if approved by FDA and makers of over-the-counter drugs if generally recognized as safe and effective, unless maker knowingly withheld information (1987).

Collateral sources: Gives judge discretion to reduce awards from collateral sources (1987). Exceptions: life insurance, other death benefits, benefits for which the plaintiff has paid premiums, plus retirement, disability, pension plan, Social Security benefits.

Other changes: Allows court to assess attorney fees, court costs and other expenses for frivolous pleadings, motions or defenses (1987); provides immunity for voluntary directors of non-profit and governmental organizations (1989).

Pennsylvania

No major tort reform legislation passed.

Rhode Island

Damage limits or restrictions: If award is more than $150,000, parties can negotiate for periodic payments (1987).

Other changes: Allows court to assess reasonable expenses and attorney fees for frivolous pleadings, motions or defenses (1987).

South Carolina

Damage limits or restrictions: Adopts "clear and convincing" standard for punitives (1988).

Other changes: Allows court to assess reasonable expenses, including attorney fees, for frivolous suits or defenses (1988); reduces statute of limitations from six to three years for all actions (1988).

South Dakota

Joint and several liability: Limits joint for defendants 50 percent or less responsible — they pay no more than twice their share (1987).

Damage limits or restrictions: Overall $1 million cap on medical malpractice (1986); for punitives, requires pre-discovery, fact-finding hearings before judge to prove willful and malicious misconduct (1986).

Other changes: Grants immunity for directors, officers and volunteers of charitable organizations (1987).

Tennessee

No major tort reform legislation passed.

Texas

Joint and several liability: Abolishes joint for defendants 20 percent or less responsible (1987). Exceptions: when plaintiff is fault-free and defendant's share exceeds 10 percent, environmental and hazardous waste cases.

Damage limits or restrictions: Caps punitives at four times actual damages or $200,000, whichever is greater (1987); adopts "clear and convincing" standard for punitives (1989); limits period during which prejudgment interest may accrue if defendant has offered to settle (1987).

Other changes: Allows sanctions for frivolous actions (1987); bars plaintiff from recovery if 51 percent negligent in pure negligence cases and 60 percent responsible in products liability (1987). Exceptions: intentional torts, exemplary damages.

Utah

Joint and several liability: Totally abolishes (1986).

Damage limits or restrictions: $250,000 cap on non-economic damages, medical malpractice awards (1986); adopts "clear and convincing" standard for punitives; for punitive awards greater than $20,000, 50 percent goes to the state (after deduction for attorney fees), trials bifurcated (1989); requires periodic payments of medical malpractice awards over $100,000 (1986).

Other changes: Allows court to assess attorney fees to prevailing party if lawsuit or defense was not brought in good faith (1988); allows stepchildren to recover in wrongful death of stepparent (1991); sets statute of limitations for products liability — six years after purchase, 10 years after manufacture of product; provides defense if product was in conformity with government standards (1989).

Vermont

Joint and several liability: Totally abolishes (1970).

Virginia

Damage limits or restrictions: $750,000 cap on medical malpractice damages (1976), raised to $1 million (1983); $350,000 cap on punitive damages (1987).

Other changes: Allows court to assess payment of reasonable expenses, including attorneys fees, if action is not brought in good faith (1987); removes "bad baby" cases from tort system, victim is awarded damages to cover medical, rehabilitative and projected wage loss, no pain and suffering or punitives allowed (1987).

Washington

Joint and several liability: Abolishes (1986). Exceptions: defendants acted in concert, plaintiff is fault-free, hazardous

Continued on following page

Tort Wars Cost Plenty

WHATEVER THE outcome of the fights over tort reform, these battles can be quite costly — for both sides.

In Pennsylvania, for instance, where there was a major fight this spring on products liability legislation, says Michael C. McLaughlin, president of the Pennsylvania Task Force on Product Liability, "The trial lawyers gave $1.2 million to legislators."

But that figure is dwarfed, says Michael Phenicle, of the Pennsylvania Trial Lawyers Association, by the money spent by private industry supporting products liability legislation.

Mr. McLaughlin declined to reveal any figures on lobbying efforts, but he did concede, "We've been getting strong and generous support from corporations."

The insurance company, AAA Michigan, had contributed $4 million by the second filing of campaign expenses for the proposed change in automobile no-fault medical coverage. The Committee for Fairness and Accountability in Insurance Reform, which is run by the Michigan Trial Lawyers Association, spent $1.9 million — almost all of it from lawyers.

George Sinas, co-chairman of FAIR, and a partner at Lansing, Mich.'s Sinas, Dramis, Brake, Boughton, McIntyre & Reisig P.C., says, "They spent $1.3 million to get it on the ballot. We expect they'll spend another $5 to $7 million." Since the first filing, Mr. Sinas says, "we've spent $1.5 million."

Louisiana was another costly battle for both the trial lawyers and their business and industrial opponents. Trial lawyers there were trying to repeal certain tort reform measures. Randy Hayden, director of public relations for the Louisiana Association of Business and Industry, claims that "In the last election, the trial lawyers spent $1.2 million in legislative races and 30 of 39 legislators elected had trial lawyer money."

— *Margaret Cronin Fisk*

The Latest Tally Of Reform Bills

Continued from preceding page

waste, business tort, generic products cases.

Damage limits or restrictions: Court shall arrange periodic payments upon request of either party for future economic damages greater than $100,000 (1986).

Other changes: Allows court to determine before final judgment that action, claim or defense was frivolous and assess sanctions of reasonable expenses, including attorney fees (1987); prohibits liability if injured person was under the influence of alcohol or illegal drugs and this condition was 50 percent responsible for injury (1986).

West Virginia

Joint and several liability: Abolishes for defendants less than 25 percent at fault (1986).

Damage limits or restrictions: $1 million cap on medical malpractice non-economic damages (1986).

Wisconsin

Damage limits or restrictions: $1 million cap on medical malpractice non-economic damages; expired Dec. 31, 1991, not renewed (1986).

Wyoming

Joint and several liability: Totally abolishes (1986).

Other changes: Court may assess reasonable costs for attorney fees or frivolous claims or defenses (1986).

TOO FAR? Barry J. Nace says the movement has stalled because it's too pro-business and insurance.

Reformers Take the Defensive

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punches and they nearly passed." The anti-products liability legislators offered two amendments — one would limit secrecy orders and the other would deny any protection granted in the products liability bill to tobacco products. The secrecy amendment lost 26-24; the restriction on tobacco products lost 27-23. "There are competing interests out there now," Mr. Phenicle says. "We were strengthened by the near-passage." The original bill passed unanimously and was sent to the Pennsylvania House.

Going Its Way

Wisconsin is another state with a well-deserved reputation as a tough arena for tort reform. "We haven't followed the national trend," says Sherman Stock, communications director of the Wisconsin Trial Lawyers Association. "Tort reform came and went and we never became a part of it."

Adds plaintiffs' lawyer and former ATLA President Robert L. Habush, of Milwaukee's Habush, Habush & Davis, "There has been no success on the part of the tort reformers to restrict medical malpractice or joint and several awards. We went along with limits on liability for municipalities."

In 1985, however, Wisconsin did pass a $1 million cap on non-economic damages in medical malpractice. "It was adopted as part of a compromise," says Mr. Habush. But the measure expired last Dec. 31.

In this past legislative session, Mr. Stock adds, "There was a package of bills on joint and several liability and caps. Their proposals never got out of committee. The only change was that we were successful in raising the cap on wrongful death from $50,000 to $150,000."

Washington, D.C., was also a battleground for medical malpractice reform. A proposal in the D.C. City Council would have capped pain and suffering recovery at $350,000; set a three-year statute of limitations; and structured payments and eliminated collateral sources in medical malpractice cases. But ATLA's Mr. Nace says, "there were three days of hearings and nothing happened." The council never even voted on the measure.

Limited Bills

In most states bills are still being introduced, however futile they might be in the long run. But the number of attempts is down. Says John Sadwith, executive director of the Colorado Trial Lawyers Association, "We still have five to 10 bills a year. But it's not like the 60 a year of the past."

The range of the bills, too, is limited. In California, notes Leonard Esquina, executive director of the California Trial Lawyers Association, "We have over 400 various forms of tort reform introduced every year. But there hasn't been an across the board change in years."

California is unique. After the last major tort reform in 1987, when the standard for punitives was made tougher, says Mr. Esquina, "there was an agreement by both sides not to try to change the tort law for five years. The moratorium went beyond medical malpractice but the doctors and we were the only ones who abided by it.

"That agreement expires in January," Mr. Esquina adds, "and I don't know what's going to happen. The doctors think we're going to come out gangbusters." Mr. Esquina, however, declined to predict what the trial lawyers would do.

OPPOSED: Business lobbyist Randy Hayden says pressure stopped a rollback in Louisiana.

But observers expect a major legislative battle in California next year. At particular risk is the long-time cap on non-economic damages in medical malpractice cases, set in 1975.

Elections the Key

Both sides nationally and at the state level are waiting for the November election to determine which way the wind will blow.

Only one state, Michigan, has a ballot initiative on any form of tort reform. And that — a proposal to amend its no-fault auto insurance law — is fairly limited. The state currently provides all medical costs to auto accident victims; the proposal would cap recovery at $250,000, with motorists eligible to purchase additional coverage.

The measure also will "modify comparative negligence so that someone more than 50 percent responsible for an accident will not be able to obtain damages," says Ronald R. Hanlon, director of the legal department at AAA Michigan, the main sponsor of the proposal. The latest polls in that state indicate the measure is likely to pass.

Depending on who is elected to the U.S. Senate this year, a watered-down products liability bill may pass the U.S. Congress during the next session. The proponents of Senate Bill 640 failed by two votes this fall to force consideration of the bill. But the Senate voted 53-33 to limit debate, indicating a strong measure of support for the bill.

The war over tort reform, however, will continue no matter which presidential candidate wins, says Roxanne Barton Conlin, president of ATLA and partner at Des Moines, Iowa's Galligan & Conlin P.C. "I don't think they're ever going to give up." But, she adds, neither will trial lawyers. "It's a long battle. We're in for a very long haul."

THE NATIONAL LAW JOURNAL
The Weekly Newspaper for the Profession
VOL. 14—NO. 48 PRICE $3.00 © 1992 The New York Law Publishing Co. MONDAY, AUGUST 3, 1992

Tort Reform
liability ins.

Tort Tales Lash Back

Outrageous anecdotes fueled tort reform, but it's a game two can play. Franco Columbo, meet Roxie Lypps.

By Gail Diane Cox
National Law Journal Staff Reporter

DENVER — Most people never knew their names, but their stories will live on as long as there are lawyers and cocktail parties:

The burglar who won a lifetime annuity after a fall through a skylight paralyzed him...The man who sued Sears Roebuck & Co. because he had a heart attack getting his lawn mower started...The bodybuilder who picked up a cool $1 million for damages incurred running a footrace with a refrigerator strapped to his back.

They and perhaps a dozen other unforgettable characters were the poster children of the tort reform movement. Between 1985 and 1990, their tales helped the Washington, D.C.-based American Tort Reform Association persuade lawmakers in 42 states to enact limits on liability.

It is, however, a game two can play.

There's been time enough for the plaintiffs' bar to start collecting anecdotes of a different stripe: the wronged plaintiff, victimized a second time by the legal system and headed for the public assistance rolls — after a brief stop-off at their local state capital to show lawmakers the human cost of curbing liability awards.

"I've got a drawerful of horror stories," Will Glennon says cheerfully. He is the chief lobbyist for the trial lawyers association of California, where a five-year moratorium on political activity by tort reformers and by the plaintiffs' bar expires at the end of the year. "The biggest difference between their old ones and ours," he adds, "is that ours are true."

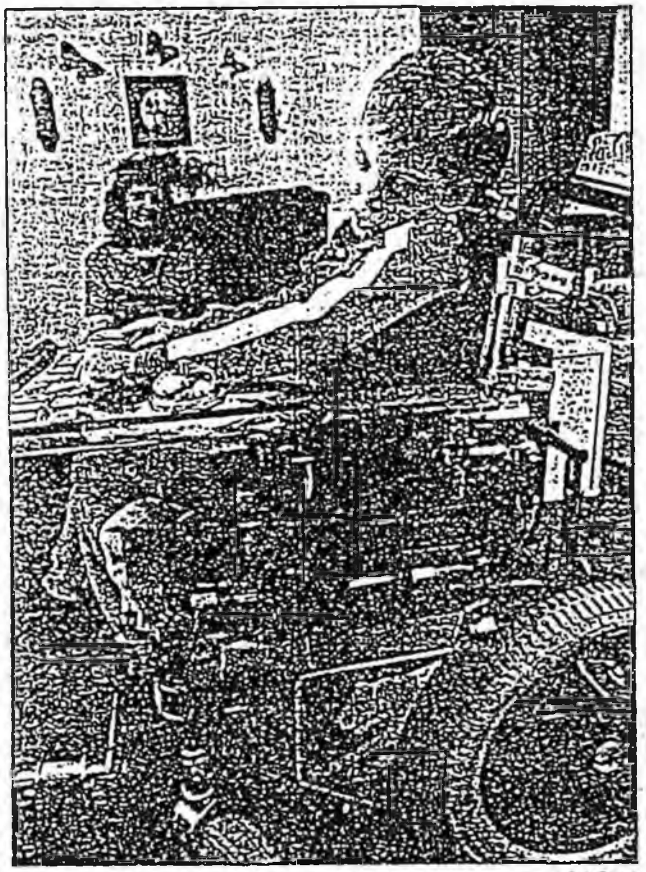
His lobbying counterpart at the California Medical Association, Timothy J. Shannon, says he's bracing for a parade of "the most egregious cases, whatever they are supposed to show," as part of the plaintiffs' bar's effort to do away with caps on recovery.

Awards Whittled Away

Refrigerator-toting bodybuilder Franco Columbo, meet scarred plaintiff Roxie Lypps.

Ms. Lypps, a former teacher, survived severe burns in a 1990 propane gas explosion in a bank in Crested Butte, Colo. A jury that heard her case last fall — there was testimony that she is unable to work and is still under-

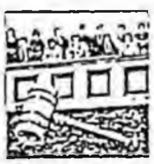
Continued on page 36



Rob Corbet

Bad medical care left Shane Fluty brain-damaged as a newborn, but Indiana's damage cap means his parents will foot most of the bill for his care.

HIGHLIGHTS



ATLA Meets

★ On the Association of Trial Lawyers of America's agenda as the bar group gathers in Washington, D.C.: punitive damages and the loser pays rule. Pages 3 and 27 to 35.

As Macy's Fees Mount, Judge Issues a Warning

So far, $2.6 million granted in latest mega-bankruptcy.

By Karen Donovan
National Law Journal Staff Reporter

AS THE CLOCK continues to tick at the Bowling Green courthouse in downtown Manhattan, where Chief U.S. Bankruptcy Judge Burton R. Lifland is presiding over the Chapter 11 petition by R.H. Macy & Co. Inc., the hours — and fees — logged by attorneys in the case are piling up.

Already, three New York firms which represent the debt-ridden retail giant and its two official creditors' committees, have received approval from Judge Lifland for more than $2.6 million in fees and $155,000 in expenses for their efforts during the first three months of the bankruptcy, from January 27 to April 30. *In re R.H. Macy & Co. Inc.*, 92-B-40477.

But that's not out of line compared to others.

For instance, when Federated Department Stores Inc. filed for Chapter 11 in 1990, Jones, Day, Reavis & Pogue, counsel for the debtor received $2.17 million in fees and $382,000 in expenses during the first 78 days, according to a Sept. 24, 1990 order.

For the first 95 days' time or 2,230 total hours in the Macy's case — three firms jammed 16,788 hours of work, logged by a total of 120 partners and associates, and 71 law clerks and paralegals.

Of the three firms — Weil Gotshal & Manges; Otterbourg, Steindler, Houston & Rosen P.C.; and Berlack, Israels & Liberman — the largest bounty went to Macy's counsel, Weil Gotshal which got about $1.5 million in addition to the $700,000 retainer it received at the beginning of the case.

Attorneys are now sifting through time sheets, preparing for their next requests for interim fees, due at the court Aug. 15. They agree that work on the case has tapered off in the last month or so, and expect that trend to continue because there is little litigation in the

Continued on page 33

Trial Bar Aims Horror Stories At Tort Reform

Continued from page 1

going painful skin grafts, and that the gas supplier had violated more than a dozen state regulations — awarded her $1.5 million. *Lypps v. Empire Gas Corp.* 32-CA-0170 (pending in Colo. Ct. of Appeals).

The catch was that it was a Denver jury. Colorado is often cited as the leading edge among states limiting recovery by plaintiffs and their attorneys; since 1986, lawmakers here have passed an estimated 60 measures that help shield defendants in personal-injury and wrongful-death suits.

The whittling away of Roxie Lypps' award made national news last March. Colorado's $250,000 cap on damages for pain and suffering cost her several hundred thousand dollars. Another chunk was lost to a limit on joint-and-several liability that protects deep-pocket defendants from insolvent co-defendants. The Wall Street Journal reported — somewhat misleadingly — that by the time it was over, "the net effect was to cut Ms. Lypp's remaining compensation to $310,822." (See "Dull Truth, Sharp Point," Page 36.)

Colorado House Majority Leader Scott McInnis, R-Glenwood Springs, an early advocate of tort reform, responded by citing a need to have "the pendulum . . . swing back, so the people who need compensation can get it." Similar quotes by Colorado lawmakers also appeared in the Denver Post, which to illustrate its article on tort reform gone awry featured the tale of Sara Carpenter.

Barely Buying Groceries

Ms. Carpenter, who used to be a nurse, had stopped on the highway in 1989 to help push an out-of-gas car into a service station. A drunken driver plowed into her. She lost one leg above the knee, and the other required extensive therapy. One of her attorneys, R. Shannon Reed of Pueblo, Colo.'s, Law Offices of Lee Sternal, says the uninsured driver testified in deposition that his well-heeled friend had had a party solely for the purpose of getting everyone drunk, knowing they would be driving afterward. But Colorado bars suits against social hosts, even in instances of willful and wanton conduct. *Carpenter v. Chacon*, 90-CV-47 (Dist. Ct., Pueblo Co.).

With the help of a prosthesis and arm braces, Ms. Carpenter was able to accompany her attorney to legislative hearings held at the start of this year, telling lawmakers how her suit was dismissed and her Social Security payments barely cover groceries and rent.

Asked about Ms. Carpenter's plight, State Sen. Al Meiklejohn, R-Arvada, told the Post, "We have gone too far."

It is premature to say whether such sentiments will translate into a rollback of curbs. But the climate for further limits sought by business, insurance and medical interests has turned chilly. Businessman John Hamlin, a former Colorado state representative, announced June 12 he is postponing a state ballot initiative to limit attorneys' contingency fees. "We just don't feel it's the right time," he said.

The man responsible for getting the bar's human-interest stories to lawmakers and reporters is John Sadwith, executive director of the Colorado Trial Lawyers Association. It's not easy, he says. Appeals go out to members in emergency phone calls as well as routine letters, asking for stories that can be related to specific measures under consideration.

Poor Shelf Life

And even the best anecdotes can have a poor shelf life.

Mr. Sadwith may soon lose a story that spoke to Colorado's ceiling on government liability, a tale so choice that it is already being passed around by the national Association of Trial Lawyers of America. In 1987, a state road worker clearing rocks pushed a seven-ton boulder down a mountain, where it crushed a tour bus. Under a law enacted the year before, the state's liability for all 33 of the dead and injured could not exceed a combined total of $400,000. Just one of the injured, Marcus Lang, lingered for a year, blinded and brain-damaged, running up more than $300,000 in medical bills before he died.

But the case is now up on a writ to the U.S. Supreme Court. A Lang estate victory could cost ATLA its prize anecdote.

Appeals aren't all that can befall yesterday's perfect anecdote. The national grapevine is rife with tales of plaintiffs who, on the eve of going public with their personal tragedies, received unexpected settlements on the condition that they forgo film at 11.

In Indiana, no less than the co-chair of the drive to modify the nation's stiffest limits on medical malpractice actions grows silent when asked for anecdotes. Plaintiffs' lawyer Terry Pahler of Indianapolis, who heads the medical malpractice subcommittee of the Indiana Trial Lawyers Association, says that although several of his clients illustrate tort reform injustices, his allegiance to them precludes his discussing details. "One problem is settlements that include confidentiality covenants," he volunteers.

Sixteen years have passed, however, since Indiana became the national model for the protection of doctors and hospitals against greedy plaintiffs, and the pool is promisingly large. When lawyers met with a joint legislative committee in mid-June to talk about how to accommodate catastrophic cases, plaintiffs' lawyer Lance D. Cline of Indianapolis' Yosha, Cline, Farrell & Ladendorf told lawmakers about Julie Miller.

Not Covering Medical Care

A 34-year-old woman whose doctors allegedly did not detect chronic coronary disease until a heart attack five years ago left her in a coma, Ms. Miller "could have collected millions in another state," Mr. Cline contends. Under the two-step Indiana law, a mandatory screening panel found medical negligence. That allowed her case to go to trial.

She collected the maximum allowed from the doctor — $100,000 — and a second maximum — $400,000 under the law at the time — from the state medical malpractice fund. Legal fees and costs left $370,000 to cover what has been estimated will be a decade of round-the-clock nursing. Ms. Miller's mother and sister are trying to care for her to keep costs down, Mr. Cline says, but out-of-pocket expenses to date are $418,332. *Elmore v. Indiana Patient's Compensation Fund*, 48 D 029204 CP 0389 (Sup. Ct., Marion Co.).

The story is even more dramatic when the victim is a brain-damaged newborn facing a lifetime of care — and that describes another of Mr. Cline's clients, Shane Fluty, who appeared on the front page of the Indianapolis Star with the headline, "Malpractice laws stacked against victims."

The Fluty case alleged that doctors' delay in dealing with a hole in newborn Shane's heart starved him for oxygen and resulted in cerebral palsy. It took his blue-collar parents more than seven years and $140,000 in legal fees to win the case and, thanks to the Indiana ceiling, what they recovered was less than one-fifth what they estimate it will cost to care for their son. *Fluty v. Everetts*, 82933-1337. (Dist. Ct., Marion Co.).

Indianpolis Star reporter Susan Headden says she and her partner on the series of malpractice stories, Joseph Hallinan, debated whether to fo-

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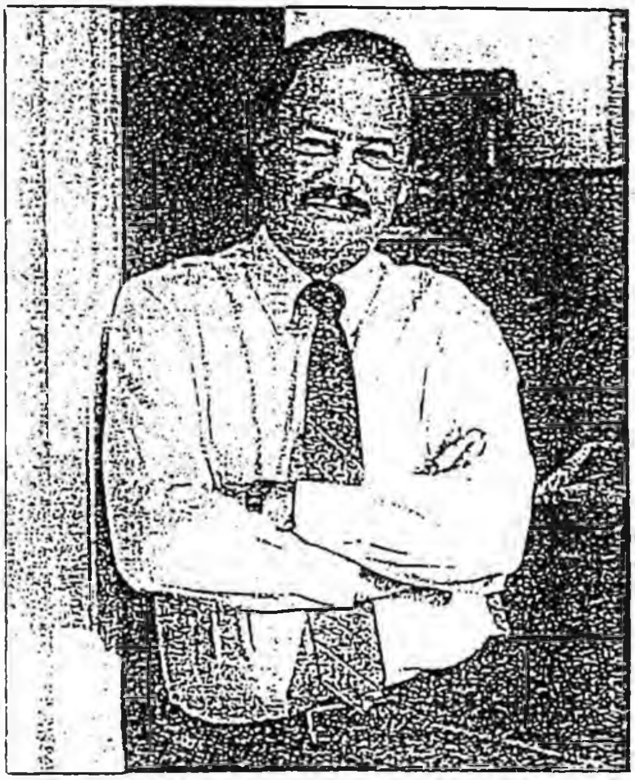

READY: Will Glennon, lobbyist for California's trial lawyers, collects horror stories on tort reform's effects which, he says cheerfully, 'are true.'

ANGRY: Indiana lawyer Lance D. Cline decries his state's strict caps on medical malpractice awards.

Dull Truth, Sharp Point

GIVEN ENOUGH retellings, any story loses its fine detail — especially stories retold to make a point.

For example, take what may be the most popular tale in the tort reformers' repertoire: An insurance company ordered to pay $260,000 plus $1,200 a month to a plaintiff who had the guts to sue after falling through a skylight while burgling a school.

The real-life version, which dates from the early 1980s in Redding, Calif., just doesn't have the same ring.

Teenager Rick E. Bodine and some friends were trying, as a prank, to take a floodlight down from the roof of a school and use it to light a tennis court. He fell through a skylight that had been painted the same color as the roof. His injuries left him a bedridden quadriplegic, brain-damaged and unable to speak. The school district was at a disadvantage because it had notice the roof was dangerous: someone had already died after falling through a similarly camouflaged skylight at another school in the district. Three days into trial, the school's insurer chose to settle. *Bodine v. Enterprise High School*, CV 73225 (Shasta Co. Super. Ct. 1982).

Of course, over time the bar's counter-anecdotes may prove equally mutable.

Plaintiff Roxie Lypps already has started down the road to urban myth cization. A published account of how Colorado's liability limits reduced her $1.5 million jury award to a mere $310,000 "is actually somewhat misleading," her attorney, Carl David Adams of Dallas' Law Offices of Carl David Adams, acknowledged in an interview four months after the story ran nationally. The $310,000 — actually $310,822 plus interest — refers only to punitive damages. It doesn't include more than $283,800 that Ms. Lypps won for actual damages, or an extra $69,000 that went to reimburse workers' compensation.

"You and I will both be better off if I don't lie to you," the lawyer says, "and she did go home scarred and maimed, with a fraction of the justice the jury wanted her to have."

But the fraction is closer to one-third than to one-fifth. — *Gail Diane Cox*

Continued from preceding page

cus on the boy because of concern about being made pawns for lawyers in the propaganda war. In the end, they included three photos of Shane as well as an account of a juror crying in frustration. The series won a 1991 Pulitzer Prize.

Rest of the Picture

Think tank researcher Deborah Hensler of the Rand Corp.'s Institute for Civil Justice in Santa Monica, Calif., says that although "anecdotes are a typical way for journalists and lawyers to understand reality," they leave scholars cold.

"I hear one of these stories on either side and say, 'That's interesting, but I don't know what it means until I see the rest of the picture,'" Ms. Hensler says. On the other hand, she acknowledges that the rest of the tort reform picture is sketchy. In 1986, Rand urged states and the federal government to take steps to measure the results of any changes in courtroom compensation systems. The recommendation "fell on deaf ears," she notes, and now there are no overall statistics on the effects of seven years of tort reform.

At a May meeting of sociologists in Philadelphia, Ms. Hensler used what she had: Of the 18 states that report their annual civil filing caseloads to the National Center for State Courts, Colorado — its penchant for tort reform notwithstanding — has shown the greatest increase in the number of lawsuits in the late '80s.

And while Ms. Hensler wouldn't be caught referring to them, Colorado is still generating the anecdotes about off-the-wall lawsuits that fueled tort reform in the first place. In the past year, for example, a Denver-area man won compensation for having been repeatedly disappointed by a dating service. So did a woman who was hit on the head by a hanging houseplant in a supermarket. Last spring, a woman sued firefighters after her own dog bit her during a fire drill at the Aspen resort where she was staying. And a state appellate judge has sued the

NEWSMAKER: Colorado trial bar official John Sadwith gets the right stories to lawmakers and reporters.

woman who says she bore his son 16 years ago; he doesn't deny it, but says she broke her promise never to sue him for paternity.

The fact that, at the other end of the damage scale, there are victims going undercompensated does not surprise Ms. Hensler and other researchers. Many studies, including one by Rand in 1991, show an inverse correlation nationally between the adequacy of awards and the severity of injury. Across the board, statistics show winning plaintiffs pay on an average about one-third of their own costs, Ms. Hensler says.

Sitting on a panel recently opposite Walter Olson, author of "The Litigation Explosion," she chided him for his lack of evidence that there even was a litigation explosion — only to have him respond that he purposely left data out of the book because it is the stories that really matter.

He has a point, she says ruefully. "I talk about numbers because that's what I do," she says, but "people's eyes do glaze over when one tries to reason by way of statistics. And lobbyists know that."

UNIMPRESSED: Researcher Deborah Hensler says, 'Anecdotes are a typical way for journalists and lawyers to understand reality,' but not scholars.

+40 TORT REFORM

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THE NATIONAL LAW JOURNAL

The Weekly Newspaper for the Profession

VOL. 15—NO. 11 PRICE $3.00 MONDAY, NOVEMBER 16, 1992

Debate Still Rages On Torts

Studies clash on the 'litigation explosion's' myths and realities.

Second of a two-part series on tort reform.

By Andrew Blum
National Law Journal Staff Reporter

AFTER IOWA University Law Prof. Michael Saks reviewed the cartons he had filled with tort reform studies dating back to the mid-1980s, he came to believe that the so-called litigation explosion of the previous decades had never occurred.

But how to measure the myth, as well as the reality, proved problematic. And this month, in Washington D.C., a group of academics are meeting to develop a neutral way to measure the scope of litigation in the United States. If they succeed in designing such a litigation barometer, the ensuing data could clarify what has been a very muddy debate over whether the American tort system is a stable protector of victims' rights or a nightmare filled with lawyers run amuk in courts that function as smoothly as the Russian economy.

Tort Reform: Where It Is Now.

• List of recent tort reform studies. Page 32.
• Tort 'reform' sometimes can have unintended results. Page 33.

A study by Professor Saks, published in the April issue of the University of Pennsylvania Law Review, is one of a plethora of analyses released in the 15 months since Vice President Dan Quayle took a then-dense, minutae-filled issue and made it political fodder and front page news by attacking lawyers and the legal system. (See "Assessing Tort Costs," Page 32.)

Yet there is a creeping belief that Professor Saks might be right.

The debate has gotten clouded — with anecdotes, horror stories and subsequent denials. The public is getting a mixed message. A leading skeptic of the litigation explosion, University of Wisconsin Law Professor Marc Galanter is calling for a new system of measuring the alleged litigation explosion — a sort of litigation index.

"We have nothing like the Consumer Price Index or unemployment [numbers]," says Professor Galanter. "There is no way [now] to keep track," he says, adding, however, that it might be possible to fash-

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Thomas Kroesch/Time Magazine

His Tales Of Horror

Stephen King's legal affairs sometimes can resemble his fiction.

Stephen King's horrors came to life in litigation.

By Stan Soocher
Special to The National Law Journal

AT THE END of Stephen King's grisly short story "The Lawnmower Man," a fat, naked man with hairy teeth, stained green from eating grass, mows down the protagonist.

For the author and his counsel, however, the story's real horror began years after publication.

Since last spring, sole practitioner Jay D. Kramer and chief litigator Peter Herbert of Cowan, Leibowitz & Latman have been fighting to remove their client's name from the motion picture "The Lawnmower Man." Mr. King's dispute with the film's producers and distributors became so heated that the normally reclusive modern-day master of the macabre was prompted to file his first lawsuit ever and to appear in court as a witness for the first time.

Continued on page 34

Jurists, Initiatives On Ballot

Most state high court justices hang on, while voters trim gay rights.

By Andrew Blum
National Law Journal Staff Reporter

CAMPAIGN '92

AS PRESIDENT-elect Bill Clinton prepares to sweep into the White House with his promise of change, voters in 14 states called for fresh air of their own and passed term limits for Congress that likely will end up being challenged in the U.S. Supreme Court.

While term limits were among the most prominent of 225 referendums, initiatives and constitutional amendments on the ballot in 41 states and Washington, D.C., they were not the only controversial ones.

• Who succeeds Bill Clinton? Page 3.
• Possible new faces in D.C., Page 6.

Others — such as the retention of a "pro-choice" chief justice in Florida, split verdicts on several gay rights measures and balloting on abortion rights and the death penalty — brought legal issues into the

Continued on page 21

HIGHLIGHTS

Delay's OK

★ The 9th Circuit rules that civil trial delays aren't necessarily unconstitutional. Page 3.

Day Job

★ Police say she was a law student by night, a bank robber by day. Was it to pay her tuition? Page 4.

Business Watch

★ ACCA, 10 years old, reaches out to women and minorities; breakup fee incentives examined. Page 15.

Sides Still Argue Over 'Litigation Explosion'

Continued from page 1

ion a method to keep tabs on data including the numbers of cases filed and jury trials.

Toward that end, he has asked representatives of research institutions to meet in Washington, D.C., on Nov. 17 "to discuss the whole question of the deficient knowledge base in the legal area and try to talk about the possibility of developing a neutral kind of indicator that could be used to track [this]."

Among scheduled attendees, says Professor Galanter, are officials of the American Bar Foundation, the Rand Institute for Civil Justice, the American Judicature Society and the National Center for State Courts. The Association of Trial Lawyers of America was not invited, said Professor Galanter. But, an insurance industry official whom the law professor declined to identify, may be in attendance primarily because, Professor Galanter says, that official has invaluable data.

For ATLA, the exclusion is a blow of sorts. With an increasing number of tort reform studies churned out in recent months, ATLA has been firing back — complaining that the studies are nothing more than propaganda aimed at jurors, judges and the law school community.

In a defensive move, ATLA recently created the Academic Liaison Committee, chaired by John F. Vargo of Indianapolis' Pardieck, Gill and Vargo. The group held its first meeting in August with about 20 academics from across the country.

Mr. Vargo, while noting ATLA can no longer continue to ignore academics, says the truth is coming out in the tort reform debate. "Facts are beginning to show that allegations made by corporate foundations, insurance companies and most recently the [Bush] administration are garbage," he says, reeling off the "myths" of punitive damages out of control, juries favoring plaintiffs and insurance rates rising due to litigation costs.

As for ATLA's meeting with the experts, Mr. Vargo says it appears that more empirical research is needed. At that meeting, Mr. Vargo said ATLA "asked them to tell us what the problem is and how to resolve it," he says. "They said there was a big gap in information." The committee is evaluating the professors' input.

Quayle Factor

While some point to a long simmering debate 10 to 15 years in the making fueled by the old saw of "lies, damn lies and statistics," all agree Mr. Quayle pushed the debate to a new level — albeit with an uncertain future in the Clinton administration.

Ever since Mr. Quayle, who chairs the Council on Competitiveness, heralded the administration's call for tort reform with a swipe at lawyers at the American Bar Association's 1991 annual convention, a series of studies attained more notoriety than they would have.

Tort reform advocate Walter Olson, author of the "Litigation Explosion" and a senior fellow at the Manhattan Institute, says the Quayle speech clearly got the opposition's juices flowing. "I got the feeling there is a concerted effort to get what in a campaign you might call 'opposition research' to counter his themes," he says.

A SKEPTIC: Prof. Marc Galanter suggests a litigation scale to determine if there really is a problem.

WHAT EXPLOSION? Iowa University's Michael Saks says the 'litigation explosion' never happened.

And Mr. Olson notes the plaintiffs' bar seems busier because "they are worried that public opinion has slipped away from them. They would like to shape public opinion back." But, he adds, "Contrary to some of the imaginings of the other side, I don't know of any strategy on the reform side that would do that. It's a question of particular researchers."

Rand senior social scientist Deborah Hensler disagrees. "I would not be surprised if some of the studies were generated or funded by parties on one side or the other," she says.

The Quayle speech, says Ms. Hensler, "drew particular attention first because of the obvious appeal to the media of a vice president who is a lawyer coming to a convention of lawyers and bashing lawyers and telling them they're to blame for economic problems." Additionally, says Ms. Hensler, it "attracted attention from people like me because the speech and initial piece issued with the Council on Competitiveness agenda, made references to data and research studies."

She adds: "Those sometimes were wrong and misleading and yet it appeared there was an interest on the part of the administration in using empirical evidence as support for the claim so...people like Marc Galanter and I were drawn into trying to respond."

Playing Catch Up

But Professor Galanter, like others reflecting on the issue, says the debate began heating up in 1986, and since academics move slowly, some of the more recent studies merely are playing catch up. "The Quayle thing heightened it," he says. "It gets people to repackage stuff they have."

For example, when the vice president took the system to task for generating 70 percent of the world's lawyers, Professor Galanter says he revisited a previous study he conducted, updating it to address Mr. Quayle's claims. And, he says, much of the vice president's rhetoric is flawed. "Most of the empirical studies...ones that are not just anecdotes or horror stories... overall end up saying this [explosion] is pretty overblown."

In Professor Saks' case, he began looking at the issue in the mid-1980s when he saw the claims then being made in the tort reform debate. He subsequently contacted those making

Continued on following page

REFORM ADVOCATE: Walter Olson says plaintiffs' attorneys fear public opinion is moving against them.

Assessing Tort Costs Is a Game of Numbers

Pick a number, any number! The cost of the tort system has been put at $29 billion-to-$36 billion, $80 billion, $117 billion and $300 billion. A series of tort reform studies since August 1991 have explored costs and other related issues. Those studies include:

Title: "Tort Cost Trends: An International Perspective"
Author: Robert Sturgis of the New York City-based Tillinghast consulting firm
Synopsis: The report predicts that tort costs could total $300 billion by the end of the decade if controls are not put in place. Said Mr. Sturgis: "We just can't blame them on lawyers. Insurance companies also contribute to the high costs." (October 1992.)

Title: "Punitive Damages Explosion: Fact or Fiction?"
Authors: Office of General Counsel at Texaco Inc.
Synopsis: The company, hit with the largest-ever punitive verdict — $3 billion in the Pennzoil Co. case — conducted the study after losing a $25 million punitive verdict this year in a benzene exposure case. *Mason v. Texaco Inc.*, 112 S. Ct. 1941. The findings: in California, Texas, Illinois and New York, punitive damages totaled $800,000 from 1968 to 1971 and $312 million from 1988 to 1991. (October 1992.)

Title: "The Cost of Litigation: A New Perspective"
Author: National Association of Manufacturers
Synopsis: The report estimates that the total U.S. bill for legal services in 1992 will be $53 billion for consumers and between $110 billion and $148 billion for business. (September 1992.)

Title: "Product Liability: 1991 Calendar Year Experience"
Author: National Insurance Consumer Organization (a group created with help from Ralph Nader)
Synopsis: The report says, based on data from the A.M. Best & Co. insurance rating firm, that products liability insurance premiums were $2.5 billion in 1991, an amount NICO said totaled less than congressional in-house spending or what Americans spend on cat food. (September 1992.)

Title: "What Are Tort Awards Really Like? The Untold Story from the State Courts"
Author: National Center for State Courts in Williamsburg, Va.
Synopsis: A study of 27 state trial courts found that automobile collision cases are among those with the largest verdicts: of all verdicts, only 6 percent had punitive damages. (August 1992.)

Title: "The Economic Effects of Scapegoat Litigation"
Author: AUS Consultants
Synopsis: Prepared for the American Tort Reform Association, the report says needless litigation against professionals stemming from S&L failures is damaging the entire U.S. economy, while costs are passed to consumers.

Title: "Trial by Jury or Judge: Transcending Empiricism"
Authors: Cornell University Law Professors Kevin M. Clermont and Theodore Eisenberg
Synopsis: This study finds that judges are more likely than juries to side with plaintiffs in medical malpractice and products liability cases. Cornell Law Review. (July 1992.)

Title: "Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate"
Authors: University of Delaware Sociology and Criminal Justice Profs. Valerie P. Hans and William S. Lofquist
Synopsis: The authors found that jurors are skeptical of plaintiffs' tort claims against business and frequently mention the litigation crisis and limiting awards. Funded by a National Science Foundation grant. (May 1992.)

Title: "The Debased Debate on Civil Justice"
Author: Prof. Marc Galanter of University of Wisconsin Law School
Synopsis: Professor Galanter says public discussion of the civil justice system is full of "quarter-truths." Among them: that the U.S. has 70 percent of the world's lawyers and that there is a litigation explosion. Wisconsin's Institute for Legal Studies. (May 1992.)

Title: "Crisis and Recovery: A Review of Business Liability Insurance in the 1980s"
Author: Sean F. Mooney, senior vice president of the Insurance Information Institute
Synopsis: The study says liability law was constrained in the late 1980s, leading to a stabilized liability insurance system; without continued pressure from the public and judiciary, the system may explode again. (May 1992.)

Title: "Do We Really Know Anything About the Behavior of the Tort Litigation System — and Why Not?"
Author: Prof. Michael J. Saks of University of Iowa College of Law

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Dean Photographic Associates

DON'T BLAME DAN: Victor E. Schwartz does not believe Dan Quayle prompted the tort reform movement.

Continued from preceding page

them to check data. "Some [data] they sent me. Sometimes they had nothing to send," he says, noting they could not make their case. "That made me curious about what the answer really was."

Many of the the new approaches, he says, come from the way th two sides in the tort reform struggle have reacted. "It has dawned on ATLA that a lot of the stuff asserted was not true." And now, Professor Saks adds, "They felt it was sensible to maintain some contact with academics." Since the defense side sees tort reform as a long-term battle, he says, "If anything, they felt thanks to the president and vice president [for] making it part of their campaign. This was an opportunity to take momentum and go forward further."

While there has been some coincidence in the appearance of various studies within the 14-month period, Ms. Hensler says clearly during the past year or so there has been an effort by the administration to identify a set of problems and promote legislative solutions.

The overall climate, Ms. Hensler says is skewed in that most scholars say assertions made by the administration that Americans are "hyper-liti-

Continued on page 35

Reform Measures Made Little Impact

BY MARGARET CRONIN FISK
Special to The National Law Journal

Tort reformers see caps as a cost curb. But one observer says lowering awards barely makes a dent in medical costs.

WHILE THE tort reform movement has met some success in state legislatures, doubt remains about how much impact the broad-based reforms have had on the American tort system.

The aim of the measures, says Martin Connor, executive director of the American Tort Reform Association, has been "to improve the fairness or efficiency of the tort litigation system." These reforms also were intended to reduce the nation's health care expenditures, he says. But plaintiffs' lawyers complain that the changes simply have made the system less fair — without reducing costs.

Because most of these measures are relatively new, little hard data, beyond the anecdotal, exists on their effect. But it is clear that some of the laws have had little discernible impact.

About 29 states, for instance, have passed statutes allowing courts to impose sanctions on attorneys who bring frivolous claims or push groundless defenses. But, Mr. Connor says, "Courts have rarely found an action was frivolous."

Fourteen states have added periodic payment provisions to damage awards, but they are seldom used. In Washington, notes Halleck Hodgins, president of the Washington State Trial Lawyers Association, "periodic payments have been ignored."

Indiana's Experience

"The only place you can produce any persuasive evidence of impact is in medical malpractice," Mr. Connor says. Doctors in Indiana, for example, which has capped medical malpractice awards since 1975, pay considerably lower premiums, notes Eleanor D. Kinney, professor of law and director of the Center for Law and Health at Indiana University School of Law, Indianapolis.

In 1989, the last year for which complete figures are available, non-surgeons in Indianapolis paid $2,223 per year for insurance of $100,000 per occurrence and $300,000 total coverage. Obstetrician/gynecologists and neurosurgeons paid $18,596. In major cities in neighboring states without caps, the figures for non-surgeons were: Cincinnati, $2,231; Detroit, $7,253; Cleveland, $2,379; Kalamazoo, Mich., $4,351. For ob/gyns and neurosurgeons, the premiums were: Cincinnati, $13,474; Cleveland, $21,932; Detroit, $72,577; Kalamazoo, $43,729.

Professor Kinney reports that Indiana doctors' premiums still have risen substantially, primarily because of a surcharge that pays for the Indiana Patient Compensation Fund, which pays the additional amount when malpractice claims exceed the $100,000 insurance carried by its physicians. Initially, that surcharge was 10 percent of the primary malpractice premium; now it exceeds 100 percent. For the ob/gyns in 1989, for instance, $10,498 of their $15,396 malpractice premium was this PCF surcharge.

Caps and Costs

The effect of caps on total health care costs is disputed. Tort reform proponents see caps as a major curb on costs. But Joan Claybrook of Washington, D.C.-based Public Citizen says lowering malpractice awards and settlements would barely make a dent in costs, because these claims are a fraction of money spent on health care. "Insurance companies pay out maybe $4 billion [on malpractice claims] per year," she says, basing her estimate on figures filed with the National Association of Insurance Commissioners and compiled by A.M. Best & Co.

The insurance industry and tort reform proponents estimate the cost of malpractice claims at in excess of $100 billion. But Ms. Claybrook says, "Those numbers are completely kallooey. The wild claims of $100 billion includes every cost of the insurance companies, including overhead and salaries."

But the reforms have had great effect on damages paid to individual plaintiffs. Plaintiffs' lawyers have amassed a litany of horror stories about clients whose damages greatly outstripped the caps. (NLJ, Aug. 3).

Caps on medical malpractice or other personal injury damages, says Barry J. Nace of Washington, D.C.'s Paulson, Nace, Norwind & Sellinger, "hit the young and the most seriously injured the hardest. Awards to the most seriously injured are reduced, while lower awards for less severe injuries are not."

"Where medical expenses exceed the cap, the state takes over," paying the medical bills through Medicaid, says Patrick M. Regan, a partner in Washington, D.C.'s Koonz, McKenney, Johnson & Regan P.C. and past president of the D.C. Trial Lawyers Association. "The costs are simply shifted from insurers to taxpayers, he says.

Caps don't always lower the costs of medical malpractice payouts, according to a study by Professor Kinney and her colleague William P. Gronfein. Indiana has had a medical malpractice cap since 1975, but Ms. Kinney and Mr. Gronfein found that, despite the cap, Indiana was paying out more for medical malpractice claims than the neighboring states of Ohio and Michigan. Indiana claimants received awards 40 percent higher than Michigan, 33 percent higher than Ohio. In addition, 27.3 percent received the maximum, which was then $500,000, while only 13 percent of the plaintiffs in Michigan and Ohio got as much as $500,000.

State Funds

In Indiana, insurance companies are liable for only the first $100,000 of a claim; anything more than that is paid through the patient compensation fund, up to the current cap of $750,000. Because insurance companies are only on the hook for $100,000, they tend to drop out of the case, letting PCF lawyers defend the claim.

Once cases are at this stage, Professor Kinney says, "the only issue is damages. So there's none of the discounting that you get in settling cases in common-law jurisdiction. The ceiling becomes the floor." Because the insurance companies are not handling the defense, the defense isn't as vigorous. So the awards are often higher.

The caps sometimes do not cover the claimant's medical expenses, Ms. Kinney notes, especially because third-party payers are reimbursed by the money awarded under the cap.

She cites one Indiana case of a 43-year-old victim of medical malpractice who received a $400,000 award. The state welfare department attached a lien for payment of previous medical expenses of $239,082.42. Attorney fees and expenses ate up another $130,000. The claimant, who was unable to work because of the injury, wound up with $30,317.55 — and was back on Medicaid within months.

But Ms. Kinney does not think the Indiana system is unfair. Except for the problem of third-party reimbursement, "the cap is fair in the way it operates," she says.

Unintended Results

Not all tort reforms have had their intended results. Under its so-called "bad baby bill," Virginia removed catastrophic birth injuries from the tort system, then set up a fund to pay the medical expenses, future care and projected wage loss of these children. Physicians paid in a premium to fund this long-term care. But, notes Robert Hall, "It's a big mess. There's now $50 million in the fund, and no claims have been paid." Only a handful of claims have been made, he says, because the definition of catastrophic birth injury was so narrow that few babies qualified.

Two of the babies whose injuries were severe enough to be considered were eliminated by loopholes, Mr. Hall says. In one case, he says, "the mother was seeing a doctor in an ob/gyn group. Four of the doctors paid money into the state fund; the other didn't. That doctor was on call when the mother went into labor." The child was born with severe birth defects. "But because that doctor was not covered, the child did not qualify."

In another case, he says, "the child was born in the parking lot of a hospital. While the hospital was a participating member" of the state fund, the parking lot wasn't. "The child didn't qualify," Mr. Hall says, despite devastating birth injuries, "because the child was not born in a participating institution." The babies not covered do have access to the state tort system.

The ultimate effects of changes in the tort system may take years to determine — especially given the constitutional challenges to so many of the measures, as well as the increased action by trial lawyers fighting tort reform. This was another unintended result of tort reform, points out Randy Hayden, director of public relations of the Louisiana Association of Business and Industry. "The tort reform movement has strengthened the trial lawyers associations. We gave them a target to shoot at."

Continued from preceding page

Synopsis: Professor Saks debunks the litigation crisis and says that in any event, not enough information is known. University of Pennsylvania Law Review. (April 1992.)

Title: "A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the United States"

Authors: Werner Pfennigstorf, a German legal scholar, and Donald Gifford, dean of West Virginia University College of Law

Synopsis: The authors found that it's not necessarily easier to recover in the United States, but that there is less tort litigation elsewhere because there is less expectation of it. Published by the Insurance Research Council. (March 1992.)

Title: "Talking Points: Addressing the Misconceptions About Personal Injury and the Civil Justice System"

Author: Washington State Trial Lawyers Association

Synopsis: The study challenges a variety of myths on the litigation crisis, medical malpractice, the justice system and trial by jury. (February 1992.)

Title: "Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts"

Author: Prof. Michael Rustad of Suffolk University Law School.

Synopsis: Professor Rustad found that there were 355 punitive damage awards in products liability cases from 1965 to 1990. Half were in Texas, California, Florida, Illinois and Missouri. Funded with a grant from the Roscoe Pound Foundation, an affiliate of the Association of Trial Lawyers of America. (January 1992.)

Title: "Inside the Quiet Revolution in Products Liability"

Authors: Cornell University Law Profs. Theodore Eisenberg and James A. Henderson Jr.

Synopsis: The study says many calls for reform, even when overstated, had some basis in fact. In 1985 defendants had reason for alarm, but pro-plaintiff results peaked in 1985 or 1986; since then plaintiffs' fortunes have declined. UCLA Law Review. (1992.)

Title: "Products Liability Reform by the Judiciary"

Author: Teresa M. Schwartz, a George Washington University National Law Center law professor

Synopsis: Professor Schwartz found that judicial perceptions are changing, with many courts beginning to see the system in more negative terms; judicial concerns are especially evident in pharmaceutical cases, in which courts are increasingly likely to reject liability-expanding doctrines. It is unclear how far courts may go in the future in cutting back plaintiffs' claims. Gonzaga Law Review (1991/92.) —*Andrew Blum*

FICTION: Life can imitate fiction, or so it seemed when two unconnected people tried to act out parts of the movie 'Misery,' with Kathy Bates and James Caan.

Continued from preceding page

bert's clients through the years have included Billy Joel, Elvis Presley's estate, Bruce Springsteen and the Walt Disney Co. He has handled litigation for Mr. King since 1987 and has been a senior partner at Cowan, Leibowitz since 1989.

MOST RECENTLY, much of Mr. Kramer's and Mr. Herbert's work for Mr. King has focused on the "Lawnmower Man" litigation. The case arose over Mr. King's assignment of the motion picture and television rights in 1975 to his short story of the same name.

In 1991, a film "The Lawnmower Man" was released by the successor in interest of the rights; Mr. King objected to the film's use of his name in the title and to the credit that said the film was based on his short story.

Mr. King filed suit in New York federal court in May, seeking damages

Stephen King's lawyers also help artistically. He arranged an auction in which people bid to get their name in print.

and injunctive relief. The complaint alleged violation of Sec. 43(a) of the Lanham Act, the federal trademark statute, and New York Civil Rights Law Sec. 51, among other things. The defendants argued Mr. King, who had described the film in a letter to his film agent Rand Holston as "an extraordinary piece of work," had suffered no irreparable harm.

In July, however, U.S. District Judge Constance Baker Motley issued a preliminary injunction in Mr. King's favor. On Oct. 1, the 2d U.S. Circuit Court of Appeals upheld the preliminary injunction that barred the film's distributors from using "Stephen King's" in conjunction with the film's title. The court stated, "Irreparable harm in cases such as this often flows not so much from some specific reduction 'in fact' to an individual's name or reputation, but rather from the wrongful attribution to the individual, in the eye of the general public."

But the 2d Circuit reversed the ban on use of the "based upon" credit. "[T]he propriety of the 'based upon' credit should have been evaluated with less emphasis on the proportion of the film attributable to the Short Story, and with more emphasis on the proportion, in quantitative and qualitative terms, of the Short Story appearing in the film," the appeals court wrote. *King v. Innovation Books*, 92-7713.

Mr. Herbert says the possessory credit was the real target of the suit and that the "based upon" claim was "tacked on at the end." Ironically, Mr. Herbert must now spend time preparing surveys to convince the court that use of the "based upon" credit creates a false impression from the public's perspective. Mr. Herbert notes an untested issue is how large and just where a "based upon" credit may be used in a film promotion.

Mr. Santora claims Mr. King really filed this suit as a "shot across the bow" to discourage the use of his name in any release of films developed from five other short stories included with Mr. King's assignment of "The Lawnmower Man" rights, which he granted before he became an internationally renowned author. Mr. Santora also insists the case will have limited impact on the U.S. film industry because the contract at issue was drafted in England.

For his part, Mr. Kramer has not only helped protect Mr. King's name, he has helped the author in more artistic ways. "Stephen is sometimes at a loss for characters' names," explains Mr. Kramer. "So last spring he agreed at my request to participate in an auction to raise money for the 92nd Street Y here in the city. People bid for Stephen to use their names for characters in his books."

The highest bid was around $3,000. According to Mr. Kramer, the winner — and a name to look for as a character in an upcoming Stephen King novel — is Katharine Magliocco.

Despite Mr. King's close relationship with his two New York counsel, he hasn't always portrayed lawyers in the kindest light in his own work. For example, in the opening chapter of his current bestseller "Gerald's Game," published in July, a corporate attorney cuffs his wife to a bed in their cabin in the middle of the Maine woods. The couple are engaged in a sex game and when the attorney gets too rough, his wife kicks him in the groin. Suddenly, the attorney is seized by a massive heart attack and dies, leaving his wife chained to the bedposts.

Mr. Herbert and Mr. Kramer both say they have no idea why Mr. King placed a corporate lawyer in the horror book's key cameo role.

Experts Seek a Scale To Measure Damages

Continued from page 33

gious" is wrong. "I think that most of the serious academic empirical research controverts that."

Roscoe Pound Study

But tort reform expert and pro-reform lobbyist Victor E. Schwartz of Washington, D.C.'s Crowell & Moring, questions such ATLA-backed projects as the January 1992 Roscoe Pound Foundation study on punitive damages by Prof. Michael Rustad of Suffolk University Law School. "One would expect something they did to have a view not sympathetic with reforming punitive damages," says Mr. Schwartz.

Though critical of Professor Rustad, Mr. Schwartz says he does not believe such studies are a result of the Quayle speech. Other reasons for the rash of studies can be attributed to the 1988 book, "Liability: The Legal Revolution and Its Consequences" by Peter Huber, a senior fellow at the pro tort reform Manhattan Institute and of counsel to the D.C. office of Chicago's Mayer, Brown & Platt.

"The book had an influence on how people think and the plaintiffs' bar in doing something to overcome that," says Mr. Schwartz. "Go in any policymaker's office — Democrat or Republican — and they had his book." He adds that legislative successes in the late 1980s and Vice President Quayle's entry into the debate fueled the fires.

(Responds Mr. Huber: "I'd be flattered if all the brouhaha was a reaction to my book. I think that's not the case. I assume it's because legal reform has been put on the national agenda.")

The bashing of Professor Rustad, though, raises the hackles of plaintiffs' attorneys. "Victor Schwartz is a paid lobbyist. That's not true of Rustad," says Anthony Z. Roisman of D.C.'s Cohen, Milstein, Hausfeld & Toll, and chair of ATLA's Section on Toxics, Environmental and Pharmaceutical Torts.

Mr. Roisman says those like Professors Rustad and Galanter have no axe to grind. "The problem is if only one side gets heard, jurors and judges begin to think it must be true. We have not gotten our message out as well." He says one way to do that is to make sure that when studies are released they are widely circulated.

Mr. Roisman says he feels the latest blizzard of studies are related to old facts that are finally getting more attention. "There is an effort to create a single thought that has been refined over time — that resolving conflicts by going to court is a bad thing....It's been expanded into an attack on people who take them to court — the lawyers.

He says the issue is very clear despite the raft of claims. "I believe the evidence is totally contrary to the underlying factual assumptions of the Quayle themes and those of Huber and some academics," he says.

With such tort reform advocates as the Manhattan Institute, the Bush administration and "the drumbeat of insurance and business interests," Mr. Roisman says the tort reform cacophony keeps building. "I think it's because in the last 12 years under the Republicans, the opportunity for poor people to influence the outcome of their lives through legislation is down. The last bastion is usually the courts."

ATTACHMENT C

Various Tort Reform Materials

DRAFT

FINAL REPORT OF THE HOUSE LIABILITY TASK FORCE

The Liability Insurance Task Force was established by the Alaska House of Representatives during the first session of the Sixteenth Alaska Legislature through House Resolution 10 (HR 10) in an effort to sort out the many controversies concerning "Tort Reform" and to "determine how the State may more effectively regulate insurance and provide civil justice"(see attached copy of HR 10). The task force consisted of the chairs of the House Judiciary, Labor and Commerce and Health, Education and Social Services Committees and other members appointed by the Speaker of the House including public members "who are involved in tort reform issues or who are involved in insurance or civil justice". A complete list of the Task Force membership is attached.

The resolution noted in particular the problems faced in the public and private sectors as a result of rising insurance costs. It concluded that a comprehensive review of "statutes, case law, practices of the insurance and legal fields and the relationship between insurance costs and civil justice" is warranted under the circumstances and instructed the task force to "recommend to the legislature any changes to the statutes appropriate and necessary for reducing insurance costs and improving civil justice".

PRIOR LEGISLATIVE EFFORTS

The issue of liability insurance availability first surfaced in Alaska in the early 1970's. By 1975, the medical community concluded that legislative relief was required. A bill creating a Joint Underwriting Association passed the legislature during the 1975 session, but was vetoed by Governor Hammond who instead created the Governor's Medical Malpractice Commission to study the problem and make recommendations to the Legislature. (See attached). On the basis of this report and following extensive hearings on the matter, the Legislature enacted a comprehensive program which set up the basic medical malpractice claims system in operation today and which created the Medical Indemnity Corporation of Alaska, a primary medical malpractice insurer and required all Alaska doctors to participate as a condition of licensure. This latter provision was repealed in 1978 where participation was made voluntary.

There were no significant additional developments until 1986 when the Legislature passed "Tort Reform" legislation largely in response to doctors and others who were concerned about insurance availability and affordability (rates had climbed to record highs). Conference CS for Senate Bill 377 made a series of changes to our civil justice system including: Modified joint and several liability; Caps on non-economic damages ($500,000 except damages relating to disfigurement or severe physical impairment); increased burden of proof for establishing punitive damages; limits on a person's ability to recover damages for personal injury incurred while that person was committing a felony; detailed provisions on requirements for damage awards; limited liability for certain directors and officers of non-profit corporations, non-profit hospitals (including hospital citizen advisory boards) and members of school boards and school districts and members of governing bodies, commissions and citizen's advisory committees of a municipality; and provisions on contributory fault, collateral benefits, apportionment of damages, offers of judgment, costs and attorney's fees, including pre-judgment interest, and the effects of a release. This legislation has been characterized as a "patch-work quilt" of necessary compromises, and, in the view of many tort reform advocates, did not go far enough toward making Alaska's civil justice system fair and predictable.

During the 1988 session, tort reform legislation intended to complete the 1986 effort was considered by the Legislature but significant differences between the House and Senate could not be resolved. However, the voters approved in November 1988 an initiative which eliminated joint liability for tort and other actions involving fault. A related provision limiting attorney contingency fees was disallowed by the Lieutenant Governor and is now the subject of litigation.

In 1989, there was another unsuccessful attempt to pass additional tort reform laws which led to HR 10 and this Task Force. Most of the controversial issues remain unresolved following the final session of the Sixteenth Alaska Legislature. However, please note that the Legislature did make several important changes to laws governing the regulation of professional conduct particularly the medical profession (See the final version of HB 146).

SUMMARY AND RESULTS OF TASK FORCE EFFORTS

At its first meeting Task Force members, tired of relying on "anecdotal evidence", concluded there was a need to establish a common factual basis for their consideration of the issues. Accordingly, a list of threshold factual questions was prepared collectively by the Task Force with instructions to Task Force Special Counsel, David Rogers, to develop the appropriate information in response to those questions and report back to the Task Force as soon as possible for further discussion. The result of this fact gathering effort is contained in a seventeen volume submittal incorporated herein by reference. These attachments contain the best information available at the time primarily from "non-partisan" sources. For a detailed discussion of how the information was developed and what each packet contains see attachment # 1. A "Highlight Summary" is included as Attachment #2. A detailed summary of the information is contained in Attachment #3.

At its second meeting this information was summarized and presented to the Task Force by David Rogers with participation by representatives of state agencies and others and considerable discussion by Task Force members. At its final meeting a problem/solution format suggested by Rep. Fran Ulmer was reviewed but no final action was taken due to an inability to obtain consensus on most of the issues.

Nevertheless, at the request of Chairman Cotten, several Task Force members did offer their written conclusions and observations which are included as Attachment #4. While attitudes about what the problem is and what you can do about it are divergent, it is important to note that based on these written comments and comments made during Task Force deliberations, there appears to be agreement on two critical points:

1) THERE IS A NEED TO FURTHER CONSIDER ALTERNATIVE DISPUTE RESOLUTION MECHANISMS WHICH MAY REPRESENT AT LEAST A PARTIAL SOLUTION TO MANY OF THE PROBLEMS IDENTIFIED BY CRITICS OF THE PRESENT SYSTEM INCLUDING: UNREASONABLE DELAY, EXCESSIVE COSTS OF LITIGATION, UNPREDICTABIILITY AND FAIRNESS OF COMPENSATION AND LACK OF ACCESS TO THE COURTS; and

2) THERE IS A NEED FOR FURTHER INFORMATION AND ANALYSIS OF ISSUES CONCERNING THE INSURANCE INDUSTRY AND REGULATION OF PROFESSIONAL CONDUCT.

CONCLUSION

Despite the frustration expressed by several members of the Task Force about our inability to draw final conclusions, there is general agreement that the materials gathered and reviewed over the past year have brought us one important step closer to a collective understanding of the problems and potential solutions faced by policymakers and the public in the civil justice arena. And by establishing a common factual basis that frees us from the never ending battle of anecdotal claims, the work of the Task Force should help decisionmakers narrow the focus of future discussions.

npire' detailed in Howden trial

Crown Court.

Mr. Comery died in a car accident in 1987. Charges against Mr. Page were dropped last year during a pretrial hearing because he is terminally ill (*BI*, June 13, 1988).

Mr. Grob

The criminal trial, which could last three months, is the climax of 6½ years of investigations since allegations were first made by Alexander & Alexander Services Inc. in a lawsuit filed in High Court in London in September 1982 against the four former Howden officials and Mr. Posgate.

A&A acquired Howden, which managed Mr. Posgate's syndicates, in 1982 for $299.9 million in cash and stock (*BI*, Sept. 28, 1981).

The Howden scandal later was the subject of Lloyd's disciplinary hearings, which led Lloyd's to expel Mr. Grob and Mr. Carpenter from the market and suspend Mr. Posgate for two six-month periods (*BI*, July 22, 1985).

The three defendants and Mr. Page were arrested in July 1987 (*BI*, July 20, 1987).

Lloyd's underwriter Colin Hart, who was arrested at the same time and faces six charges of dishonesty in regard to the Howden affair, will be tried at a later date (*BI*, May 1).

During his opening arguments, Mr. Hill, the Crown prosecutor, said the four Howden officials and Mr. Posgate used the funds misappropriated from Howden and from Mr. Posgate's syndicates to "secretly" buy 51% of the Banque du Rhone et de la Tamise, a Swiss bank that had been owned by Howden.

The four Howden officials and Mr. Posgate purchased a majority of the shares in the Swiss bank through a private "syndicate" so their names would not be disclosed to the rest of the Howden board, Mr. Hill alleged.

"Their silence was deliberate," Mr. Hill told the jury.

The four ex-Howden executives and Mr. Posgate might have retired with "their dignity and reputations untouched" in January 1982 when A&A bought Howden, said Mr. Hill.

However, A&A discovered that one of Howden's underwriting subsidiaries was suffering "substantial losses" from reinsurance written for Mr. Posgate's syndicates, said Mr. Hill. The Posgate syndicates showed 50 million pounds ($85.5 million at appropriate exchange rates) in underwriting losses from computer leasing insurance, some of which had been ceded to Howden subsidiary Sphere Drake Insurance Co. Ltd., Mr. Hill said.

A&A ordered its auditor, Deloitte Haskins

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Washington cap on damages unconstitutional

By GLENN HUNTLEY

OLYMPIA, Wash.—A portion of a 1986 Washington law that caps non-economic damage awards is unconstitutional, the state Supreme Court has ruled.

The court ruled 6-3 that the cap on non-economic damages violated a plaintiff's right to trial by jury.

Washington's tort reform law—which included the non-economic damage cap and eliminated joint and several liability in many cases—was one of the most sweeping tort reform measures enacted by any state (*BI*, Aug. 18, 1986).

The Washington ruling indicates "a fair amount of hostility in the courts" to state-imposed limits on damage awards, said Martin F. Connor, president of the American Tort Reform Assn.

Prior to the April 27 Washington decision, courts in 11 states had ruled on the constitutionality of damage caps, with a recent decision by the Kansas Supreme Court tipping the balance in favor of tort reform by a 6-5 margin, Mr. Connor said (*BI*, April 24; March 20).

"I thought we had a trend going, and then Washington pulled the plug," Mr. Connor said.

Indeed, the tide may be shifting against caps on damage awards, said Bill Wagner, president of the Assn. of Trial Lawyers of America.

"It's beginning to be a trend throughout the country for courts to closely question these artificial limits," Mr. Wagner said, adding that the Washington ruling "will be frequently cited by other courts."

The decision came in a case brought by Austin Sofie, a former pipe fitter who had sued asbestos

Continued on page 27

Tort laws hurt Texas business: Study

By MICHAEL BRADFORD

AUSTIN, Texas—Thousands of manufacturers are considering halting operations in Texas because of the state's product liability laws, a controversial study says.

In addition, some 3,000 companies have decided not to introduce new products because they are afraid they will be sued in Texas, the study says.

Furthermore, "liability costs" have contributed to the layoffs of some 30,000 Texas workers, the study says.

The study was commissioned last year by the Texas Civil Justice League, a tort reform advocacy group, and conducted by M. Ray Perryman, a Baylor University economist and head of a Waco, Texas, consulting firm that bears his name.

Texas Gov. Bill Clements, citing the study, is calling for "decisive change" in the state's product liability laws.

The study proves that the current laws have had a negative impact on the creation of jobs and are negating gains from corporate relocations to Texas, Gov. Clements said last month in a speech before the Texas Assn. of Business.

Legislation to reform the state's product liability laws, H.B. 15, sponsored by Rep. Curtis Seidlits, D-Sherman, has passed the Texas House and was being debated last week in the Senate.

The bill would establish new standards of proof in product liability lawsuits, allow judges to assess a portion of the responsibility for a product-related accident to the claimant and install a two-part trial system that would require juries to

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Washington ruling

Continued from page 3

producers claiming that their products caused his lung cancer.

In a majority decision by Justice Robert Utter, the state Supreme Court found the damage cap violated Article 1, Section 21 of the state constitution, which states: "The right of trial by jury shall remain inviolate."

"For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees. In Washington, those guarantees include allowing the jury to determine the amount of damages in a civil case," the court ruled.

However, the justices were "wrong" to conclude in the majority opinion that determination of damage awards was a duty of the jury guaranteed by the state constitution, said Steven T. Johnson, an attorney with Gibson Dunn & Crutcher in Seattle, which represented Fibreboard Corp. and three other defendants in the Sofie case.

"It enshrines the large jury award as a constitutional right for defendants," Mr. Johnson said.

Unlike many other states that capped non-economic damages in medical malpractice cases only, the Washington law imposed a formula that used life expectancy and average annual wages to set maximum damages for non-economic damages, such as pain and suffering, in any personal injury or wrongful death case.

Under the sliding scale, the average limit would be about $350,000 per case.

Attorneys noted that few cases affected by the cap have reached trial since passage of the 1986 law. The law applies only to suits filed after August 1986.

As a result, it is not known whether the reform would have accomplished its goal of reducing large jury awards and reducing liability insurance rates.

The availability of some types of insurance, such as municipal liability coverage, improved in Washington state after adoption of the tort reform law, according to a spokesman for Seattle-based SAFECO Insurance Co. of America.

However, he noted that last month's decision comes amid a competitive insurance market in contrast with the hard market that existed in 1986 when the tort reform was approved. Thus, "it's hard to say what impact" the court's decision will have on the cost and availability of liability insurance, the SAFECO spokesman said.

> **The ruling 'enshrines the large jury award as a constitutional right,' says attorney Steven Johnson.**

Plaintiffs' attorneys counter that huge non-economic damage awards were not responsible for increasing insurance rates.

"The large [award] cases are few and are not the cause of higher insurance rates," said Daniel F. Sullivan, an attorney with the Seattle firm Sullivan Golden & Otorowski. He submitted an amicus curiae brief on behalf of the Assn. of Trial Lawyers of America.

"It [the ruling] should have zero effect on insurance rates, but it will have great effect on those people who are seriously injured. People with catastrophic injuries will now continue to be fully compensated," Mr. Sullivan said.

Defense attorneys contend that the high court decision will increase the number of lawsuits filed.

The decision means a return to plaintiffs taking even minor cases to trial in hopes of "hitting the long ball" or winning a huge jury award, Mr. Johnson said.

"[Under the limit] both sides would have known to the penny what the risk of exposure would be in bringing cases to trial. Now it's the same old ball game," Mr. Johnson said.

In addition, many plaintiffs will now go to trial and strike out instead of accepting a fair settlement offer, predicted William H. Mays, an attorney with Williams, Kastner & Gibbs in Tacoma. He represented defendant Eagle-Picher Industries Inc. in the Sofie case.

"More plaintiffs will wind up with zero," Mr. Mays said.

However, Mr. Sofie's attorney said she believes the decision means more cases will be settled.

The potential of large awards will increase the likelihood of acceptable settlement offers, said Janet L. Rice of the Seattle firm Schroeter, Goldmark & Bender. "It should help with court congestion."

She also noted that state legislators had debated the constitutionality of the damage limit when they approved the law in 1986. "It was perceived from the beginning as suspect," Ms. Rice said.

Defense attorneys are expected to ask the court for a rehearing of the case, but that will be "a fruitless act" because the justices have clearly stated their opinion and rarely grant rehearings, she said.

In the underlying litigation, a Kitsap County Superior Court jury in October 1987 awarded Mr. Sofie $191,240 for compensatory damages and $1.2 million for non-economic damages.

Applying the cap under the 1986 law, Judge James Maddock reduced the award for non-economic damages to $125,136. However, he held the defendants jointly and severally liable because the case involved a hazardous substance.

The law eliminated joint and several liability for all types of damages except in cases in which defendants act in concert, the plaintiff was not at fault or hazardous substances are involved.

The lower-court ruling was appealed by both sides, and the appeal was heard directly by the state Supreme Court.

Besides striking down the damage award cap, the high court also affirmed that the defendants could be held jointly and severally liable, citing the fact that the plaintiff was not at fault.

Besides Eagle-Picher and Fibreboard, defendants in the Sofie case included Celotex Corp., Keene Corp., Raymark Industries Inc. and Owens-Illinois Inc. ■

Texas product liability bill

Continued from page 3

determine first whether a manufacturer was liable for damages and award compensatory damages and then separately decide the amount of any punitive award.

While business leaders support the study's findings and are pushing for changes in the state's product liability laws, Texas trial lawyers say the study is misleading and that there is no need for the legislative changes.

According to the study, 3,300 Texas manufacturers employing 40,000 Texas workers claim to be considering stopping all manufacturing operations in the state and moving operations to another state because of concerns regarding product liability laws.

The study based its results on survey responses from 610 Texas manufacturers with at least 10 employees and interviews with 209 economic development recruiters in the state.

The study also points out that costs associated with the state's product liability laws have prompted 1,500 manufacturers to discontinue products and 3,200 manufacturers have decided not to produce a new product because of these costs.

"Liability costs were an important factor in 30,000 Texas workers being laid off," the study adds.

People responding to surveys for the study included under "liability costs" such factors as liability insurance premiums, the decision not to introduce new products out of fear of being sued and legal fees.

Texas' product liability laws have reduced spending in Texas by more than $8.2 billion, the study states, while workers have been deprived of $53.8 million in income.

However, the study points out that the losses are partially offset by corporate relocations to Texas each year that will generate spending of $1.3 billion per year.

Plaintiffs' attorneys assail the study's conclusions.

John Howie, a member of the Texas Trial Lawyers Assn. and an attorney with the Dallas firm of Misko & Howie, criticized the study's methodology. He said the survey authors "planted a seed by telling employers what they think are product liability laws."

"Nobody can point to one example of where product liability laws have run any companies off," or forced corporations not to relocate in Texas, he said.

Mr. Howie called the product liability reform bill now before the state Senate "a tremendous setback for product safety in Texas. It shifts the burden from the expert—the manufacturer—to the uninformed consumer. That isn't the way to make a product safer."

Norman J. Glickman, an urban policy professor at the University of Texas in Austin and a pioneer in the field of urban and regional economics, told the House State Affairs Committee in March that the manufacturers and industrial recruiters interviewed had a lot to gain from changes in the laws.

Mr. Glickman said other factors—like the cost and quality of labor, access to suppliers, cost of living, taxes and quality of life—are more important to corporations selecting a home than a state's product liability laws.

Both the Texas Civil Justice League and the Texas Assn. of Business are backing the product liability reform bill.

Proponents of H.B. 15 believe that if the legislation is signed in its present form it will encourage product manufacturers and sellers to remain in Texas and encourage companies in other states to relocate to Texas.

The Texas Civil Justice League noted in a follow-up to Mr. Perryman's study that: "Certain aspects of products liability laws are wholly counterproductive, doing nothing but breeding a stifling fear of potential liability. These excesses in the law have a negative effect on the Texas business climate."

Ralph Wayne, the league's executive vp, said the biggest fear spawned by current product liability law is that "manufacturers don't know what their options are when they are manufacturing something.... We're trying to codify the game rules. There just aren't any statutory product liability laws in Texas."

For example, he said a manufacturer that makes a product for 10 years according to industry guidelines is afraid to upgrade it to state-of-the-art specifications because to do so would give the impression that the old product was not as good as it could have been.

The bill would narrow the liability of manufacturers and sellers in a number of ways.

The legislation states that the absence of a warning or instructions would not necessarily allow a product liability action if the danger or sale use associated with a product is obvious, known by the person using the product, generally available to users or not known to the manufacturer or seller at the time the product was supplied.

The bill also limits the liability of manufacturers and sellers in cases of injuries or damages caused

Continued on page 28

NATIONAL INSURANCE
CONSUMER ORGANIZATION

~~2430~~
740
SAVE

The Liability Insurance Crisis is an Insurance Problem

Prepared Remarks of J. Robert Hunter, President, National Insurance Consumer Organization
Former Federal Insurance Administrator

There is a national crisis in liability insurance. In state after state, doctors, lawyers, accountants, dentists, municipal, county and state governments, hospitals, day-care centers, school districts, nurse-midwives, directors and officers of corporations, small to mid-sized businesses and a wide variety of other economic enterprises report massive premium increases, mid-term changes in contract terms, refusals to renew policies, and the inability to find liability insurance at any price.

Unfortunately, the debate and policy proposals to alleviate the liability insurance crisis have focused almost singlemindedly on only one aspect of the problem, possible deficiencies in the tort system. In particular, the "quick-fix" that seems to be gaining favor emphasizes limitations on victims rights to recover damages. Liability limits, caps on non-economic damages, changes in the statute of limitations for lawsuit and other changes under the rubric of "tort reform" have become the centerpieces of the recommendations of many state task forces.

Ignored in this "rush to judgment" is a part of the problem at least as significant and perhaps far more important than anything happening in the nation's courtrooms: the way the insurance industry routinely conducts its business. Our initial analysis of the problem leads us to conclude that if insurance industry practices could be modified by enhanced regulatory vigilance, the part of the liability insurance problem remaining to be solved by tort reform would be small indeed. In brief, we believe that the liability insurance crisis is primarily an insurance problem.

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In our view, the primary reason the liability insurance crisis has so suddenly materialized is that the insurance industry practices "cash-flow underwriting." When interest rates and therefore investment returns are high, insurance companies tend to accept riskier exposures in order to acquire more investable premium and loss reserves. During the high interest rate period of the recent past, company earnings were high because investment income offset any underwriting losses associated with riskier lines of insurance. Insurance consumers found easy insurance availability and relatively low premiums.

Ultimately, of course, losses had to be paid. When that corresponded with the declining interest rates and investment yields of the past two years, companies attempted to both raise premiums and shed themselves of riskier business lines. Underwriting losses now dominate investment earnings, spectacularly higher premiums have become the order of the day, and business after business finds itself somehow "uninsurable", even though it has had few, if any, claims against it.

The end result of this cyclical behavior is significant instability in the market: when interest rates and investment income are high, insurance companies offer riskier coverages at discount prices, but when the consequent losses must be paid and interest rates and investment income drop, there are dramatic premium increases and cancellations of certain exposures regardless of price.

Indeed, we see today's crisis as repeat performance of the mid-1970s liability insurance crisis, a crisis which followed a similar period of very high interest rates and rapid decline. Just as is the case today, the insurance industry pointed to the courts as the primary culprit and secured a number of "tort reforms" in various state legislatures. Yet, ten years and tort reform later, the problem is back in spades, damaging state economies, reducing the supply of necessary business and governmental services and generally causing economic disruption in state after state!

Our analysis of the problem leads us to conclude that tort reform is no panacea for the liability insurance crisis. Improved regulatory control over insurer costs and rates will also be essential. Significant changes in interest rates are a routine part our economic landscape. Consequently, if real underwriting risks, even if they are reduced by tort reform, are neglected or ignored by insurance carriers in high interest rate periods, subsequent periods will continue to bring extreme instability to the pricing and availability of insurance coverage.

In our view, States should more carefully examine both the level and allocation of insurance company expenses as a part of the rate review and approval process. Are the expenses (other than losses) that insurers are seeking to recover through higher insurance rates in a particular state reasonable and are they directly associated with the particular line of liability insurance at issue? Or, are they excessive or do they include expenses that should be attributed to other insurance lines or to other states? In setting rates, property/casualty insurers seldom document or itemize their claimed operating expenses. Rather, they simply allocate these costs between insurance lines and states in proportion to premiums. Moreover, there is little if any regulatory attention to the appropriateness of specific expense items.

Finally, to the extent that increased litigiousness and higher claims do have a role in the recent rash of premium increases and withdrawals from insurance markets, it is unclear just how dominant these factors have actually been relative to the regulatory issues concerning cost determination and rate control. While some insurance companies have experienced major losses in their liability insurance lines, it is not at all clear that these losses warrant the large rate increases and drastic exposure limitations that insurers are currently seeking.

It is indeed possible that the insurance industry is simply "going out on strike", exaggerating its current financial position in an effort to pressure legislators to create a lower risk environment for their business operations. While the insurance companies argue that the tort system has created a situation of extreme financial distress necessitating major premium increases and coverage termination, we point to the spectacularly good performance of property/casualty insurance company stock over the last decade, particularly in 1985. This year, the increase in Best's Index of property/casualty stocks has more than doubled the increase in the Dow-Jones Industrial Average, a performance hardly indicative of a troubled industry. Such stock market performance implies that Wall Street sees the insurance industry's problem as a transitory phenomenon rather than a basic, fundamental problem rooted in a new and riskier legal environment.

In summary, it is not at all clear that the primary cause of the liability insurance crisis is to be found in our legal system or that tort reform is all that will be required to solve it. Our analysis of the issue indicates to us that attention must be given to both the regulatory and tort side of the problem in order to craft a fully responsive public policy response to the problem. Before states further reduce victims rights with liability limits, caps, and other quick fixes, the part of the problem caused by insurance industry practice and behavior should be identified and corrected.

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BRIEFING PAPER

The Corporate Drive to Restrict Their Victims' Rights

Introduction

A nationwide effort is underway to change this country's civil liability laws. In the 1986 state legislative session, 41 states passed legislation to restrict some rights of innocent victims to sue and be fully compensated for their injuries, according to a July, 1986 report by the National Conference of State Legislatures. In a very few states, legislatures enacted across-the-board tort law changes.

The major proponents of "tort reform," as its advocates euphemistically call it, are: the property/casualty insurance industry, in conjunction with their foreign reinsurers;[1] the business and professional lobbies, including manufacturers of hazardous goods and toxic chemicals; and the Reagan Administration, pushing to federally regulate downward the state judicial system.

Among measures considered and/or enacted in 1986 were: arbitrary caps on "pain and suffering" awards; limitations on punitive damage awards; mandatory limits on lawyers' contingency fees; modification of joint and several liability so as to preclude full recovery in the event a culpable party is unable to pay; restrictions on lump sum payments; repeal of the collateral source rule; and relaxed liability standards.

The most recent nationwide poll conducted by tort-reform proponents the American Tort Reform Association (ATRA), shows that these changes are not supported by the American public.[2] The ATRA poll showed that "at first glance the public appears receptive to a broad range of solutions to the liability problem, but focus group discussions reveal that this receptivity is easily reversed when objections to reforms are raised." When pushed to clarify what they really could support, only two solutions could be agreed upon:

1. Educate the public on the proper use of the civil court system; and
2. Impose penalties for frivolous or nuisance suits.

"Tort Reforms" Will Not Make Insurance Affordable or Available

The common sense concerns about tort reform expressed by participants in ATRA's poll – that tort reforms appear both unjust and ineffective – are valid.

Two leading property/casualty companies – Aetna Casualty and Surety Co. and St. Paul Marine Insurance Co. – recently filed rate documents notifying Florida's insurance commissioner that even extensive "tort reforms" will not reduce insurance rates. Preliminary filings with Washington state's insurance commissioner confirm this as well.[3] Conversely, a survey of insurance departments by the National Insurance Consumer Organization indicates that access to insurance is increasing, even substantially in some cases, in states were tort reforms were not enacted.[4]

In 1978, Pennsylvania enacted a law immunizing all Pennsylvania municipalities from most kinds of liability suits and limiting liability for even catastrophic events to $500,000 per occurrence. 42 P.C.S. 8501 et seq. Yet according to the Pennsylvania legislature's Local Government Commission, Pennsylvania cities and towns are still having their insurance policies cancelled.[5] Iowa abolished joint and several liability as applied to defendants less than 50% at fault for all cases tried after July 1, 1984. Iowa Code Ann. Sec. 668.4. But in late 1985, 41 Iowa counties had their liability insurance cancelled.[6]

And in Ontario, Canada, most "tort reform" measures the insurance industry is seeking are currently the law -- including caps on pain and suffering, restrictions on the award of punitive damages, and prohibition of contingency fees.[7] In addition, Ontario rules require any unsuccessful plaintiff to pay the defendants' costs. And there is no constitutional right to a jury trial in Canada, so most trials are before judges. Yet the insurance industry for many of its customers is raising premiums by 400% or more, cancelling coverage in mid-term and refusing to provide coverage at any price.[8]

The Cause of the Insurance Crisis -- The Insurance Industry Cycle

The reason tort reform will not work is that the "insurance crisis" of the mid-1980s has little to do with lawsuits or the tort system. The evidence shows it to be the result of a self- inflicted insurance industry profit cycle, which last began several years ago. When interest rates were high, the industry cut prices in order to obtain premium dollars to invest at high interest rates. When interest rates, and thus investment income, dropped, the industry responded by sharply increasing insurance premiums and reducing availability.

In fact, in all the controvery, there is remarkable agreement about this. A leading stock analyst recently o States should give state insurance departments more authority and funding. The General Accounting Office found in 1979 that state insurance departments are lacking in investigators, auditors and other professionals and can not effectively recommend the appropriate levels of insurance rates.[25]

o States should afford citizens greater consumer representation before insurance regulatory bodies, including direct intervention in rate proceedings as many states now authorize in utility matters.

o States should revoke of all existing prohibitions against individuals and businesses joining to self-insure or purchase liability insurance as a group. (On October 27, 1986, the Risk Retention Act of 1986 was signed into law, which authorizes self- insurance or group insurance purchases of all commercial liability lines).

o States should require that insurance companies engage in greater loss prevention efforts such as research and advancement of health and safety conditions and experience loss rating, and to disclose evidence in their claims files of known defective products or hazardous conditions to appropriate law enforcement and regulatory authorities. (In the medical malpractice area, the Health Care Quality Improvement Act was signed into law November 14, 1986, which requires insurance companies and health care facilities to disclose information about malpracticing physicians, and offers protection to health professionals who testify against their peers for incompetence).

Prepared by
Attorney Joanne Doroshow
December, 1986

Footnotes

1. Reinsurance is insurance for insurance companies. The insurer pays the reinsurer a premium, in exchange for which the reinsurer agrees to share the risk with the insurer. Lloyds of London is the dominant reinsurance company with approximately 25% of the world-wide market. Lloyds is not subject to federal regulation. State governments responding to a survey conducted by the National Insurance Consumer Organization (NICO) indicated that they do not have regulatory control over Lloyds. NICO concluded that insurance regulation of Lloyds is essentially non-existent in the U.S.

2. Burson-Marsteller, which conducted the poll, interviewed a total of 1,002 U.S. adults selected nationwide. In addition, two focus group sessions were conducted involving 20 of the "influential public," defined as heads-of-households with incomes above $40,000 who voted in 1984.

3. "Tort-reform legislation: Did state get 'suckered,'" *The Seattle Times*, (July 1, 1986).

4. "Six Insurance Industry Fibs, A Study by the National Insurance Consumer Organization," (Aug. 27, 1986).

5. General Assembly of the Commonwealth of Pennsylvania, Local Government Commission, Hearing on Municipal Liability (Sept. 24, 1986), report presented Nov. 1985.

6. Statement of Iowa State Senator Lowell Junkins, before the Florida Senate Commerce Committee (Jan. 7, 1986).

7. Ministry of the Attorney General, Report on Products Liability, Ontario Law Reform Commission (1979) at 62, 74-78.

8. *Toronto Star*, (Jan. 10, 1986) ("Liability coverage crunch may shut day-care agencies"); *Toronto Globe and Mail* (Jan. 15, 1986) at A1, A2 ("Ski team can't get liability insurance").

9. Statement of James B. Stradtner, General Partner at Alex. Brown & Son, Inc. investment bankers, addressing the National Association of Insurance Brokers, reported in the *Journal of Commerce* (May 15, 1986) at 14A.

Stradtner was also reported as saying that "[illegible] mercial insurance industry has an almost incurable [illegible]enchant for 'shooting itself in the foot,'" and that in his long career as an industry watcher there has never been a swing such as the current upheaval in prices. Ibid.

10. *Business Insurance*, (Mar. 31, 1986).

11. Testimony of J. Robert Hunter, President, National Insurance Consumer Organization, Before the U.S. House Committee on Public Works (Jan. 22, 1986) at 2-3.

12. See, e.g. Testimony of James S. Kakalik, Rand Corporation, Before the Subcommittee on Trade, Productivity, and Economic Growth of the U.S. Joint Economic Committee, (July 29, 1985).

13. See, "The Assault on Personal Injury Lawsuit: A Study of Reality Versus Myths," *Public Citizen* (Aug. 1986) at 6-11.

14. Locolio, Russell A. J.D., M.P.H., M.S., "Variations on S962,258: The Misuse of Data on Medical Malpractice," *Law, Medicine & Health Care* (June 1985). Localio is the Director of Research at the Risk Management Foundation owned by Harvard University and the hospitals affiliated with Harvard Medical School.

15. Peterson, M., and Priest, G., "The Civil Jury: Trends in Trials and Verdicts (Rand Institute for Civil Justice 1982).

16. "Property and Liability Insurers Report Strong Profits, Signaling Easing of Crisis," *The Wall Street Journal* (Aug. 28, 1986).

17. See, e.g., Curran, "Bargains Beckon in Insurance," Fortune Magazine," (Aug. 4, 1986) at 217; "Analysts Bullish On Insurer Stocks," *Business Insurance*, (Aug. 4, 1986) at 1.

18. Statement of John C. Finch, Senior Associate Director, General Government Division, Before the Subcommittee on Oversight, Committee on Ways and Means of the House of Representatives on the Profitability of the Property/Casualty Insurance Industry (April 28, 1986) at 4.

19. Homer, Pamela E., "Premium Paychecks: Executive Compensation in Leading Property/Casualty Insurance Companies," Public Citizen (May, 1986).

20. Mintz, M., *At Any Cost: Corporate Greed, Women and the Dalkon Shield* (1979).

21. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757; 174 Cal. Rptr. 348 (1981).

22. Brodeau, P. *Outrageous Misconduct: The Asbestos Industry On Trial* (1985).

23. 113 Cong.Rec. 6917-6919 (1966).

24. Bellotti, et al., "An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance," (May, 1986).

25. U.S. General Accounting Office, "Issues and Needed Improvements in State Regulation of the Insurance Business," (Oct. 1979).

WSJ 3/8/93

HEALTH

Doctors Are Spurring Effort to Remedy The Nation's Ailing Malpractice System

By Edward Felsenthal
Staff Reporter of The Wall Street Journal

The state of Maine has started to shield obstetricians from liability for birth defects if they follow a checklist when they treat pregnant women.

The program is part of an experimental effort to curb malpractice suits, which were cited by six out of 10 Americans in a recent survey as one of the biggest causes of spiraling U.S. health-care costs. Another goal of the program is to reduce costs by eliminating unnecessary treatment.

CURING Health Care
PART OF A SERIES

Doctors — particularly some specialists who have to pay as much as $100,000 a year in malpractice-insurance premiums — have been lobbying hard for change. The price of medical malpractice protection seems not to be as high as the public thinks. In fact, U.S. physicians pay $9 billion in malpractice premiums annually, or only about 1% of national health costs. Individual premiums have actually been declining — a fact that would surprise people who have listened to doctors complain.

The greater cost of malpractice may be the defensive medicine doctors are forced to practice. Some experts believe that the extra tests, expensive procedures and detailed paperwork add as much as $27 billion a year to the nation's health costs.

Public Relations Headache
There's no relief in sight for pharmaceutical makers under attack by the administration. Article on page B4.

The health-overhaul plan that President Clinton has promised to introduce in May is almost certain to include proposals to improve the current medical malpractice system. His health reform task force, headed by Hillary Rodham Clinton, has set up a "malpractice and tort reform" working group to explore various options.

Mr. Clinton has indicated that he supports establishing alternative dispute-resolution systems, which settle malpractice disputes out of court. He is also interested in establishing treatment guidelines for various illnesses and conditions, which like the Maine program might well result in a reduction in some expensive tests and procedures. Meantime, health maintenance organizations are already seeking to set standards for the level of care that doctors should be offering to cut costs.

Some health specialists contend that doctors shouldn't be asked to cut back on treatments without some assurance that patients won't sue them. "The cost-containment pressures are saying do less, while [doctors'] concerns about liability make them want to do more. They quite understandably feel very squeezed," says Patricia Danzon, a Wharton School health economist.

In the 1950s malpractice suits were rare, but by 1990, according to an American Medical Association study, 7.7 lawsuits were filed for every 100 doctors. In recent years malpractice cases have resulted in some of the legal system's biggest jury awards. So even though median awards are suprisingly low — as little as $36,000 in North Carolina, for example — fear is high. Says Richard Lamm, a former Colorado governor who now studies health policy at the University of Denver, "There's no question that doctors have a fear of lawyers. The question is how rational it is."

Rational or not, malpractice concerns have taken a human toll, engendering both skepticism among patients toward their doctors and wistful nostalgia among physicians. "I'm trying to talk my son out of going into medicine," says Ronald Cilley, a Phoenix gynecologist. "I keep trying to tell him it isn't the same."

Dr. Cilley quit delivering babies when his malpractice-insurance premiums reached about $56,000 a year. He is one of hundreds of doctors in high-risk specialties like obstetrics and neurosurgery who have radically curtailed their practices or abandoned medicine as insurance premiums soared in the mid-1970s and 1980s.

Others have just turned cautious. As a child, obstetrician Jason Collins of Slidell, La., recalls watching his obstetrician father diagnose minor illnesses over the telephone. By contrast, the younger Dr. Collins says, a patient recently called him from out of town, describing symptoms of an ordinary bladder infection. Reluctantly, Dr. Collins recommended she go to an emergency room in the town she was visiting. "I'm learning to be more careful," he says.

Evidence is murky about how much is added to the nation's health costs by defensive medicine, the extra precautions doctors say they take to ward off lawsuits. Inflation-adjusted data from a 1987 AMA study put the figure at $27 billion. But critics counter that some of what is labeled

Please Turn to Page B4, Column 5

Malpractice-Insurance Costs

PROBLEM:
Current system inadequately deters accidents, fails to redress most injuries, and impairs doctor-patient relationships.

COST:
$36 billion spent on malpractice-insurance premiums and defensive medicine

POSSIBLE SOLUTIONS:
- Adjustments in current system: Caps on damage awards, limits on attorneys' fees, periodic rather than lump-sum payments to successful plaintiffs; shorter time frame for patients to sue
- Out-of-court dispute resolutions: Pretrial screening of cases by experts
- Doctors' guidelines: Doctors would be protected from liability if they followed legislature-approved guidelines
- No-fault: Like the workers' compensation system, a doctor- and hospital-funded plan would reimburse all patients injured while under medical care, even if the care wasn't negligent

Success of medical-malpractice cases in five counties from 1981 to 1985

County	% of Successful Malpractice Plaintiffs	% of Successful Plaintiffs in All Cases	Median Malpractice Awards
Cook, Ill.	33.6%	57.9%	$194,326
Dallas	21.4	50.9	58,240
Denver	20.7	54.4	70,000
Los Angeles	30.8	55.7	156,520
New York	43.3	64.6	255,[illegible]00

Source: Stephen Daniels, "Verdicts in Medical Malpractice Cases," Trial, May 1989

ENTERPRISE

Troubled B&Bs

TECHNOLOGY

November 21, 1989

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

Re: Multistate Insurance Antitrust Lawsuit

Dear Representative Cotton:

David Rogers asked that I give you some background and an update on the multistate insurance antitrust lawsuit, State of Alaska v. Hartford Insurance Company, et al. Although I have left the Department of Law, I am still representing the state in this case.

This litigation involves lawsuits filed by 19 states against four major American primary insurance companies and a wide variety of reinsurance companies. The reinsurance companies, for the most part, do business at Lloyd's of London. Additional defendants include the Insurance Services Office (ISO) and several insurance industry trade associations.

The case began with the so-called "insurance crisis" of the mid-1980s. As you may recall, during those years many state and local governments, school districts, corporations, and small businesses had great difficulty finding affordable insurance. In particular, casualty and pollution coverage were extraordinarily scarce. The rapid, simultaneous, nationwide withdrawal of these types of insurance from the marketplace led a group of five state attorneys general to investigate possible collusion among the insurers.

The investigation revealed a pattern of collusion which pervaded the casualty liability insurance industry on both sides of the Atlantic. In a nutshell, the allegations are that leading primary insurance companies and reinsurers conspired to withdraw casualty and pollution coverage from the United States market. Moreover, it is alleged that these defendants coerced others - notably the Insurance Services Office - to take actions which prevented other potential competitors from offering these types of coverage. As a result, consumers paid more premium for less insurance coverage than ever before.

All types of collusion between competitors are illegal under the federal and state antitrust laws. In this instance, all but one of the state attorneys general filed suit against the defendants in federal court, alleging violations of the Sherman Act and the respective state laws. The exception was Texas, which filed suit in Texas state courts.

The federal cases were consolidated before Judge William Schwarzer in San Francisco. The case followed an unusual path. Judge Schwarzer stayed all discovery efforts by the states, and invited defense motions to dismiss the case "on the pleadings" under Federal Rule of Civil Procedure 12(b)(6). Essentially, a motion to dismiss under this rule accepts all facts pled by the plaintiff as true, but argues that as a matter of law the plaintiffs cannot prevail. The defendants filed a variety of motions to dismiss, the primary basis being immunity from antitrust liability under the federal McCarren - Ferguson Act.

In October of this year, Judge Schwarzer granted most of the motions to dismiss, and entered final judgment against the states. The main basis for his dismissal of the litigation was the McCarren - Ferguson Act, which allows the insurance industry wide latitude to engage in anticompetitive acts illegal in virtually every other industry. Judge Schwarzer's ruling construed this exemption very broadly, and took an extremely narrow view of the facts alleged by the attorneys general.

The states have appealed Judge Schwarzer's decision to the Ninth Circuit Court of Appeals. Briefing will begin shortly, and a decision on appeal should be rendered next fall. Alaska has participated actively in the case from its inception, and we intend to continue to do so.

Enclosed for your information is a copy of Judge Schwarzer's decision. If you need any more information, or if I can be of any further assistance, please do not hesitate to call.

Sincerely yours,

Richard D. Monkman
Deputy Commissioner

RDM/mst0266L
102189a
Enclosure

cc: Tom Wagner, Assistant Attorney General (w/Enclosure)
Antitrust and Commercial Section, Department of Law

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TORT REFORM
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Finding Fault, Finding Funds

Three states are curbing lawsuits over birth-related injuries.

States are lowering health care costs through malpractice and tort reform But critics say the benefits are short-term.

by Dag Ryen

The first skirmishes in the battle to reform the American health care system already are underway as states tackle medical malpract.ce and tort reform. Testing such ideas as no-fault compensation, arbitration, caps on damages and peer review panels, states are seeking to subdue this major contributor to rising health costs.

But many analysts see current efforts as a Band-Aid approach. "I think we've reached the end of the road on what malpractice reform proposals can do on their own," said Kenneth Abraham of the University of Virginia Law School. Significant gains can only be made "as part of a larger health care package," Abraham said.

Nonetheless, states continue to chip away at the old tort system, driven by skyrocketing costs for malpractice insurance and the growing incidence of defensive medicine, all of which ends up on patients' medical bills.

New York reviews no-fault program

In New York, Gov. Mario Cuomo has called for the establishment of a fund to reimburse families for birth-related injuries. The program would be similar to no-fault compensation plans already in effect in Virginia and Florida.

The Cuomo proposal, which will come before the New York Assembly early next year, would cover any neurological injury sustained during pregnancy or the first 72 hours after birth. Families would be reimbursed at set rates for anything from broken bones to cerebral palsy in newborns. The program would be paid for by fees assessed on all doctors, nurses and hospitals in the state.

But the measure is likely to meet opposition from the legal community and from elements of Cuomo's own party. Critics argue that no-fault compensation programs are too expensive and relieve medical personnel of responsibility for quality care.

A 15-year-old California study indicated that the cost of a no-fault program in that state would be prohibitive. "We concluded that it would cost about $800 million a year to fund a medical malpractice no-fault system," said study coordinator Don Harper Mills. "At that time, we were only paying about $250 million for the tort system," he said.

Another major study underway, the Harvard Medical Practice Study, indicates that only a fraction of those who are injured as a result of questionable medical practice ever receive compensation. The study suggests that only one claim makes its way into the courts for every eight cases of injury caused by medical negligence.

To make matters worse, many cases that reach the courts involve no negligence. Dr. Troyen Brennan, who heads the Harvard study, said, "Very few negligent events lead to claims, and even fewer lead to any sort of payment."

One goal of malpractice reform is to reach everyone who suffers from poor medical care. The advantage of no-fault schemes is that they distribute compensation more evenly among all patients who suffer injuries. But the costs can add up quickly.

In Florida, a recent analysis indicates that the state's two-year-old no-fault program for birth-related injuries may rapidly be running out of money. While the state is realizing about $15 million each year from fees on doctors and hospitals, it may need twice that much to cover claims filed in 1989 and 1990.

According to Sharon Jacobs, staff assistant to the Florida House Health Committee, the actuarial figures are cause for concern. "It's something that we definitely have to review. It could be more money has to come in; it could be that the program isn't working right," Jacobs said.

How much for pain and suffering?

Another tool the states are using in the battle against rising malpractice costs is capping the damages juries can assess for pain and suffering. A bill submitted in Hawaii would set the ceiling at $350,000, while one in Iowa would cap non-economic claims at $200,000. About half the states have enacted such limits, most setting the maximum at $250,000.

Caps on non-economic damages have been rejected by some state courts. In 1985, however, the U.S. Supreme Court approved the constitutionality of a California limitation.

The $250,000 ceiling is incorporated in a tort reform package floated by the Bush Administration. The president's proposal would deny Medicaid and Medicare dollars to states that fail to adopt tort reform measures. The plan also would require states to offer alternatives to litigation, such as arbitration or expert panel review.

In many states the drive to modify the malpractice system is closely tied to efforts to combat infant mortality. The cost of malpractice insurance premiums has hit obstetricians and gynecologists especially hard. In Detroit for instance, OB/GYN practitioners pay an average of $134,000 annually in premiums.

High insurance rates are blamed for forcing many doctors out of practice, although on a national scale physicians spend only 3.4 percent of their total income on insurance premiums. The cost of malpractice insurance for obstetricians and gynecologists, however, more than tripled between 1982 and 1988.

The percentage of obstetricians who accept Medicaid patients has dropped to less than 60 percent. And the number of practicing family physicians has dropped by almost 20 percent over the past two decades. The loss of doctors is particularly severe in rural areas, where family physicians practice obstetrics, and affects low-income populations.

Virginia and North Carolina were among the first states to confront the problem. In 1976, the North Carolina Legislature enacted a no-fault childhood vaccine injury compensation bill that limited the liability of vaccine manufacturers and pediatricians. The following year, Virginia passed the nation's first no-fault medical liability bill, creating an infant injury fund to compensate those injured during birth.

Better babies in the boonies

North Carolina has since bolstered its program with insurance premium subsidies for obstetricians in rural areas. Through the Rural Obstetrical Care Incentive (ROCI), doctors can receive as much as $6,500 from the state to help pay their malpractice insurance.

"The program is working great," said Rep. Robert Hunter, who sponsored the bill. "ROCI helps stem the outflow of rural doctors. Now we're working on ways to get new doctors into the rural areas," Hunter said.

One proposal before the North Carolina Legislature calls for all obstetricians to participate in county health plans that ensure care for indigent pregnant women.

An act passed by the Texas Legislature last year also reduces insurance premiums for physicians who treat a significant number of indigent patients. The plan calls for the

Photo courtesy of the Oklahoma Dept. of Human Services

To hold down hospital and health care costs, states are limiting the right to sue. Shown are young kidney patients.

Reforms seek to expand health care by lowering the cost of malpractice insurance.

state to contribute the first $100,000 in damages awarded as a result of prenatal or neonatal care. To qualify, the OB/GYN's caseload must be at least 10 percent charity care. Participation in the program qualifies physicians for a significant discount in insurance premiums.

These programs are expected to improve the alarming statistics on infant mortality by providing greater access to prenatal and neonatal care. According to Hunter, the ROCI program has been instrumental in reducing North Carolina's infant mortality rate by several percentage points to near the national average.

Links to comprehensive health care

Perhaps the most comprehensive reform proposal being considered at the state level is the Affordable Health Care Plan submitted by Republican members of the Michigan Senate. In addition to major changes in the state health insurance arena, the plan calls for the creation of an arbitration panel to settle malpractice claims outside the court system.

The panel would consist of nine members representing health facilities, physicians, insurers, attorneys and the general public. It would be empowered to conduct hearings and assess damages.

The plan also calls for reductions in the statute of limitations on medical injury claims and for a general cap of $1.5 million on economic damages in malpractice cases. Moreover, the proposal would regulate attorneys fees and define specific qualifications for expert witnesses.

Despite the activity on various fronts, most analysts discount any hope of lasting impact on the incidence or cost of medical malpractice without concurrent health care reform.

"There's been very little attention given to radical reform," said Dick Merritt, director of the Intergovernmental Health Policy Project, a Washington-based health research organization. "These things are cyclical and dependent on the peculiarities of the insurance cycle. Right now claims are down and the size of awards is tapering off," Merritt said.

Abraham agreed that current reform efforts are only piecemeal. "Not much is going to happen on the malpractice front alone. There's a clash of values with no firm social consensus," Abraham said.

A major barrier is that malpractice and tort reform involve two of the most powerful lobbying groups in the nation: doctors and lawyers. Medical associations are wary of initiatives that allow others to sit in judgment over medical practice.

On the other side, trial attorneys and bar associations generally resist efforts to curtail access to the traditional tort system. And, in fact, between 40 and 50 percent of jury awards go to cover attorneys' fees.

Caught between these giants, the public and its elected representatives are loathe to rock the status quo. "People criticize lawyers till they're blue in the face, but take away their right to sue and they get even angrier," Abraham said.

As a result, further reform efforts may be slow in coming, and may be dependent on successful reconstruction of the entire American health care system. ☐

A broadly based attack on infant death and low birth weights has been mounted by the Southern Regional Project on Infant Mortality under the auspices of the Southern Governors' Association. As part of its ongoing educational effort, the project will host a conference on access to care and medical malpractice issues on Dec. 12-13 in Research Triangle Park, N.C. The conference will bring together state legislators, attorneys, health providers, advocates and insurance commissioners to assess problems and to develop solutions. For more information, contact Shelley Gehshan, Deputy Director, Southern Regional Project on Infant Mortality, Hall of the States, 444 North Capitol St., NW, Washington, DC 20001, (202) 624-5897. ☐

THE IMPACT OF TORT CHANGES ON INSURANCE RATES

"It is clearly impossible to say that if you adopt a certain tort reform, you will get 'X' reductions in premiums."
— Franklin W. Nutter, 3/86
President, Alliance of American Insurers

In early 1986 the insurance industry launched a multi-million dollar media campaign proclaiming a "lawsuit crisis." The crisis, industry representatives claimed, was driving up insurance rates and forcing the cancellation of coverage. To solve the probl n, the industry called upon lawmakers to make radical changes in the civil justice system.

But when asked by consumer advocates, legislators, and insurance commissioners, whether their proposals to limit victims' compensation will bring down insurance rates or ease availability, insurance industry executives reply that it's impossible to say.

In December 1986, the National Insurance Consumer Organization (NICO) released documents prepared by State Farm Fire and Casualty Company, Great American West, and the Insurance Services Office, which demonstrate that limiting tort laws would have little or no effect on rates. State Farm told the Kansas Insurance Department that restricting joint and several liability and limiting punitive damages would have no impact, while capping damages for pain and suffering would reduce rates by no more than one percent.

The Florida Experience

The best evidence of the negligible impact of tort changes on insurance rates has been provided by two of the leading liability insurers in the country.

In the summer of 1986, the Florida legislature enacted several restrictions limi compensation to injured victims. These restrictions included: restricting joint and several liability (the liability of more than one wrongdoer causing the same harm), capping compensation for non-economic damages, such as disfigurement and sterility, and limiting punitive damages.

In August, the Aetna Life & Casualty Company and the St. Paul Company filed documents with the Florida insurance commission concluding that these limitations on victims' rights will have no effect on insurance rates.

More recently in Florida, over 100 companies have told the Florida Insurance Department that the tort limits passed by the legislature will reduce liability premiums by an average of only one percent.

At the same time, insurers in Florida are increasing medical malpractice premiums by 25 to 35 percent.

Similar Actions in Other States

Not surprisingly, the experience of other states which passed restrictions on compensation in 1986 has been similar to Florida's. For example:

- After the Washington state legislature approved a cap on non-economic damages, insurers sought substantial but unjustified rate increases. They were rejected by the insurance commission.

- After Colorado enacted a $250,000 cap on non-economic damages as well as other "reforms," the Hartford Insurance Company announced it would start cancelling current malpractice policies in 1987. This led Republican legislators to charge that "the insurance industry deceived the legislature when it pushed the reforms as dealing with the liability crisis."

- In Maryland, the state's major medical malpractice insurer was granted a fifty percent rate increase only months after successfully lobbying for a $350,000 cap on non-economic damages.

The Ontario Experience

Most tort changes the industry is seeking in the U.S. — including caps, restrictions on punitive damages, and the prohibition of contingency fees — are currently the law in Ontario, Canada. Yet the insurance industry in Canada has raised some premiums by 400 percent or more, cancelled coverage in mid-term, and refused to provide coverage at any price in some cases.

Who Benefits?

Wrongdoers and insurance companies are the only beneficiaries of proposals to limit citizens' rights to use the courts. In no state are there either requirements or hard promises that any of the savings will go to insurance consumers.

The real way to lower rates and increase the availability of insurance is meaningful insurance reform — not cutbacks in the rights of citizens under the civil justice system.

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THE NEED FOR INSURANCE REFORM

In 1984 Americans spent $287 billion—or over 11 percent of their disposable income—on insurance. The cost and availability of insurance has a significant impact on our work, our homes, and our recreation. Yet, remarkably, the insurance industry operates largely outside of the public eye.

Through its enormous power and influence, the insurance industry has gained unprecedented special privileges. The federal government provides virtually no regulation or oversight of the industry. Among the privileges the industry enjoys are:

- exemption from anti-trust laws, which prevent price-fixing;
- exemption from scrutiny by the Federal Trade Commission;
- exemption from disclosing even the most basic information on its income and payouts on different types of insurance.

The federal government has left the job of regulating insurance companies to the states—with mixed results. State insurance commissioners are typically underfunded and understaffed. Few even employ an actuary! Many have developed "cozy" relationships with the industry they are supposed to regulate. (Half of all insurance regulators come from or return to the industry, according to the General Accounting Office.) Consumer interests have been poorly represented in the insurance rate and policy making process.

Consumers, small businesses, non-profit organizations, and others are now paying the price for the insurance companies' free reign: staggering increases in the cost of liability insurance, unjustified cancellation of policies, and an assault on the rights of innocent victims to receive just compensation for injuries caused by defective and dangerous products.

The solution to the so-called "insurance crisis" is more effective regulation of the insurance industry. Reforms aimed at making the industry more accountable to consumers will control its short-sighted underwriting practices, its mismanagement, and its historical boom and bust cycle.

WHAT CONGRESS SHOULD DO

Enact Disclosure Legislation or "Sunshine Laws."
Disclosure legislation should require the insurance industry to submit, on a sub-line by sub-line, insured by insured basis, the amount it pays out in claims compared to its premium and investment income. The analysis of such data, which the industry currently refuses to disclose, is essential to determine the true financial condition of the industry, as well as the likely effect of tort law restrictions on injured people and on insurance rates.

Repeal Industry's Special Exemptions.
The McCarran-Ferguson Act, which exempts insurance companies from anti-trust laws and allows them to fix prices, should be repealed. Moreover, Congress should direct the Federal Trade Commission—currently prohibited from even studying the industry—to review the prices, coverage, and underwriting practices of the industry.

Regulate Foreign Reinsurers and Create Alternatives.
Much reinsurance (insurance for insurance companies) is written by foreign companies such as Lloyds of London. Free from any American or foreign regulation, these companies often demand arbitrary cancellation of coverage or premium increases. Because of their tremendous impact on the American insurance market, foreign reinsurers should be subjected to regulation to ensure that their underwriting decisions are in the public interest.

Furthermore, since U.S. insurers currently have no effective recourse when Lloyds raises its rates, as it did in 1985, a federal reinsurance program should be established to compete with Lloyds and help bring down rates. Such a program was very successful during the "insurance crisis" of the 1960's.

Create a Federal Office of Insurance.
Nationally, insurance is a $310 billion business, accounting for 12% of our gross national product. Yet only the states regulate the industry. For a number of reasons, state regulation has not always protected the public. A federal office of insurance would monitor the industry and establish standards for state regulators to follow.

WHAT STATES SHOULD DO

Require Experience-Rating.
Good drivers pay less than bad drivers for auto insurance, and homeowners who are good risks pay less than those who are bad risks. But many professionals (such as doctors) and businesses pay a set rate regardless of their individual claims experience, i.e., they are not experience-rated.

By requiring insurance companies to experience-rate all professional and commercial risks, just as they experience-rate drivers and homeowners, states could reduce insurance rates for most insureds.

Improve State Regulation.
State insurance commissioners must be provided enough personnel, particularly actuaries, to effectively

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analyze and regulate insurance rates. Strong conflict-of-interest laws, preventing the "revolving door" of government-industry turnover, and subpoena power for state insurance administrators are essential.

Increase Consumer Representation before Regulatory Bodies.

Typically, only regulators and insurance companies participate in rate cases. Citizens' Insurance Boards and Offices of Public Advocate should be established to provide for consumer representation and participation in rate cases.

Prohibit Arbitrary Cancellations.

Under current law in most states, insurance companies may cancel a policy at any time, without notice, for any reason or for no reason at all. It is fundamentally unfair for a policyholder who has entered into an insurance contract for a specified term to suddenly find that contract cancelled before the term ends. States should enact legislation that would prohibit midterm cancellation unless the policyholder has engaged in fraud, has failed to pay his or her premiums, or if there has been a change in the underlying risk.

Prior Approval of Rate Increases.

Insurance companies should be required to obtain approval of state insurance commissions prior to adopting rate increases. This would dampen the erratic pricing cycles of the industry. Flex rating with a narrow band of automatic approval is a possible alternative.

WHAT PEOPLE ARE SAYING ABOUT LIABILITY INSURANCE AND VICTIMS' RIGHTS

"We are witnessing a multi-million dollar advertising and public relations hoax — a fraud financed by the insurance industry seeking to enrich its already huge profits at the expense of innocent victims. Its chief beneficiaries are the perpetrators of harmful products, hazardous chemicals and dangerous conditions in the workplace and environment."

— *Ralph Nader*

On the Consumer Benefits of the Civil Justice System

"Civil justice is one of the great triumphs of the American system. It allows any person, regardless of their resources, to challenge the largest corporate or government power and receive compensation for wrongful injuries. It forces wrongdoers to change their products and practices or risk further liability. It forces public disclosure of defective products and dangerous practices. The civil justice system must be preserved and the rights of consumers protected. The public interest demands no less."

— *Joan Claybrook, President of Public Citizen, before the Commerce, Transportation and Tourism Subcommittee of the House Committee on Energy and Commerce, 5/21/86*

"Where product liability has had a notable impact — where it has most significantly affected management decision making — has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit."

— *Nathan Weber, author of The Conference Board's 1987 report, "Product Liability: The Corporate Response," based on a survey of the risk managers of 232 major corporations*

On the "Lawsuit Crisis"

"The explosion in liability lawsuits is nothing but a myth."

— *Business Week, 4/21/86*

Today as in 1976, the insurance industry blames the legal system for huge premiums. Their implausible claim is that judges and juries became generous in 1976, stingy for the next eight years and inexplicably generous again."

— *Robert Hunter, President, National Insurance Consumer Organization, New York Times, 4/13/86*

"Compare the estimated $28 to $35 billion spent in 1985 on tort litigation to the $3? billion Americans spend on tobacco each year, or the $60 billion spent on alcohol products each year, or the $80 billion gross income earned by doctors each year."

— *Ralph Nader, before the Economic Stabilization Subcommittee of the House Committee on Banking Finance and Urban Affairs, 8/6/86*

"Our studies do not support any claim of recently escalating jury awards."

"A number of highly publicized news articles quoting our statistics have grossly misstated them."

— *Philip J. Hermann, Chairman of the Board, Jury Verdict Research, before the Economic Stabilization Subcommittee of the House Committee on Banking Finance and Urban Affairs, 8/6/86*

"Not only is the evidence missing to indicate a significant national increase in filings above the increase in population, but in a number of state courts, selected civil filings have decreased between the period 1981-1984."

"Changes in the number of these filings [tort, contract, real property rights and small claims] are not attributable to an increase in the propensity of Americans to sue, but rather to an increase in the number of Americans."

"The existence of any litigation explosions has been cyclical, and there is no evidence to support the notion of a continuing nationwide increase in lawsuits in the state trial courts between 1981-1984."

— *Robert Roper, Director, Court Statistics and Information Management Project, National Center for State Courts, before the Economic Stabilization Subcommittee of the House Committee on Banking, Finance, and Urban Affairs, 8/6/86*

"Not surprisingly, a jury of peers tends to increase awards over time by no more than the rise in medical costs, general inflation and the value of lost work. Recent changes in average jury awards and numbers of lawsuits filed mirror increases in average wages, medical costs, life expectancy and population growth."

— *Dr. Mark Cooper, author of the 1986 Consumer Federation of America report, "Trends in Liability Awards: Have Juries Run Wild?"*

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On the Relationship Between "Tort" Reforms and Insurance Prices

"It is clearly impossible to say that if you adopt a certain tort reform, you will get "X" reduction in premiums."

— *Franklin W Nutter, President, Alliance of American Insurers, 3/86*

"If legislators agree to sacrifice some of their constituents' rights, they ought to come away with something more than the insurance industry's gratitude and promises of future financial support.

— *Miami Herald, 5/5/86*

"There is little evidence that making the changes in the tort system proposed by the federal government and the insurance industry will prevent a similar "crisis" in the future given the cyclical nature of the insurance industry."

— *National Association of Attorneys General Ad Hoc Committee on Insurance in its May 1986 report, "An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance"*

"How can an industry that spends millions on advertising and contributes heavily to state and federal campaigns to reform tort law not recognize the public relations debacle associated with telling a state, which reformed its tort law, that the reforms are worth zero in the pricing of insurance products?"

— *Journal of Commerce, 10/24/86*

On the Financial Condition and Mismanagement of the Insurance Industry

"The property and casualty industry must accept the major responsibility for its current financial condition."

— *Insurance Services Office, NAII, "1985: A Critical Year"*

"[W]e've seen seven cycles since 1900. . . ." . . [They] involve price, coverage and marketing concessions and the aftershock of needed quick price increases to undo the damage of these highly competitive periods."

— *John H. Bretherick, President of Continental Corp., National Underwriter, 11/21/86*

"Just as surely as night follows day, there will be another period of vigorous price competition when results improve. The insurance industry is its own worst enemy."

— *Thomas B. Hagen, President of Erie Insurance Group, Best's Review, 6/86*

"The property/casualty insurance industry is in a stronger capital and surplus position than it has ever been in and it clearly has enough capital and surplus to meet the needs of the insurance industry today and in the near future."

— *Dr. Michael E. Hogue, President and managing director of Insurance Research Group at the 1985 convention ofthe National Association of Professional Insurance Agents*

"The push to tort reform is a cynical scheme to pin the blame on the courts for the current high costs of commercial liability insurance while allowing the insurance industry to escape blame for its own financial mismanagement."

— *St. Petersburg Times (Florida), 4/20/86*

"The latest financial results lead us to repeat an observation we made sometime ago. . . . It was our impression that the 'crisis' was brought on by the intense rate-cutting wars begun in the late 1970's, and the huge premium increases and the more selective risktaking of the past year would soon end the crisis."

— *Chicago Sun-Times, 8/30/86*

"The industry is saying 'give us tort reform and that will solve the problem.' The fact of the matter is, we have to solve our own problem, which means underwrite properly, price correctly, adjust losses correctly . . . ."

— *Joe Decaminada, Senior Vice-President, Secretary, and counsel for Atlantic Mutual Insurance Co., National Underwriter, 11/28/86*

"Even while the industry was blaming its troubles on the tort system, many experts pointed out that its problems were largely self-made. In previous years the industry had slashed prices competitively to the point that it incurred enormous losses. That, rather than excessive jury awards, explained most of the industry's financial difficulties. Now that insurers have been able to push up prices, profitability is returning. Nothing complicated about that."

— *Business Week, 1/12/87*

On Medical Malpractice

"When one looks at the data, the overwhelming causes of the medical malpractice insurance crisis are, (1) malpractice, (2) poor underwriting practices by insurance companies, and (3) very weak disciplining of incompetent or negligent physicians by hospitals, medical societies, state licensing boards and federal peer review agencies."

— *Ralph Nader, syndicated column, 1986*

"The greatest cause of malpractice is malpractice. You must understand that some of the malpractice out there is so grievous, offensive and implausable as to beggar the imagination. Without real malpractice, we would not have this problem."

— *Barry S. Shutrin, M.D., Director of Maternal-Fetal Medicine of Pasadena's Huntington Memorial Hospital reported in the A.M.A. News, 6/21/85.*

"A Pennsylvania study conducted by the medical society and the trial lawyers showed 1% of physicians (228) responsible for 25% of all malpractice payments by the insurance fund. All of these physicians had multiple claims in a ten-year period."

— *Joan Claybrook, President of Public Citizen, Baltimore Sun, March 1986*

United States General Accounting Office

GAO

Report to Congressional Requesters

December 1986

MEDICAL MALPRACTICE

Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms

GAO/HRD-87-21

CONTROLLING LIABILITY INSURANCE COSTS:
STATE INITIATIVES IN THE AREA OF INSURANCE REGULATION

INTRODUCTION

According to the Insurance Information Institute, Americans, who constitute approximately 5 percent of the world's population, purchase 43.7 percent of the total world insurance premiums. The Japanese are second with 13.5 percent, followed by West Germans, 7.1 percent, British, 7.1 percent, and French, 5.2 percent. Americans view insurance as a necessity, not a luxury, and have come to rely upon it in all facets of their lives. The current affordability/availability crisis has emphasized the importance of insurance to the economy of the country and the conduct of social activities. Consumers pay higher prices for products, and rising insurance premiums result in restricting social activities. Doctors are refusing to deliver babies because of costly medical malpractice insurance. The list of public and private sector entities and individuals affected is all-encompassing.(1, p. 22)

Everyone is aware of the problems, but arriving at solutions is an extremely controversial process. Because so many groups are affected, and each has its own perspective, reaching consensus is difficult. However, state legislatures have targeted three prime areas for easing the crisis: reform of the civil justice system; regulatory reform of the insurance industry; and establishment of risk management programs, including the establishment of alternative financing mechanisms such as pooling and self-insurance.

This State Legislative Report, the second in a series of three, addresses the issues surrounding regulation of the insurance industry.

OVERVIEW OF THE CURRENT CRISIS

Because the insurance industry has experienced capacity restrictions in previous years, many observers believe the current problems are part of the cyclical nature of the business. Data provided by Insurance Services Office, Inc. (ISO), show that the last two major cyclical "crises" were in 1969 and 1975. This particular cycle, however, appears to be much more serious, because it is longer than previous cycles and affects entire lines of insurance, where others did not.

The rise in insolvencies is indicative of the gravity of the situation. According to the National Association of Insurance Commissioners, the insurance industry experienced from 1969-1980 an average of three insolvencies per year in multistate companies. In 1984, the number increased to 14 and 1985 saw a record of 21. As of April, 1986, six were reported, with more expected.

A study by ISO, "The Coming Capacity Shortage," contends that the 1984 capacity shortage is different from the other downturns in a number of ways. The 1984 loss of $3.9 billion was 10 times greater than the shortage in 1975. Past year low points resulted from declines in the stock market, but 1984 losses were solely the result of operating losses. According to ISO, "1984 was the first time in decades that a surplus decline was not accompanied by an overall stock market slump." For the first time, commercial lines were more seriously affected than personal lines and would take "much

REGULATION OF THE INSURANCE INDUSTRY

> "If you took all the men and women employed in the U.S. insurance industry and laid them head to toe, starting on New York's William or John Street--the little-talked-about insurance industry equivalents of neighboring Wall Street--they would stretch up the West Side Highway, head to toe, over the George Washington Bridge into New Jersey, down the New Jersey Turnpike to the Pennsylvania Turnpike, across Pennsylvania into Ohio, through Ohio past Chicago, past Des Moines, past Lincoln, Nebraska--still head to toe, one after another--past Cheyenne, Wyoming, to someplace just shy of Salt Lake City...one million eight hundred ninety-five thousand employees or very nearly as many people as constitute the Armed Forces."(1, pp. 11, 16)

Regulation of this enormous industry is the responsibility of the states. After the United States Supreme Court held that the insurance industry was subject to federal regulation (United States v. South-Eastern Underwriters Association, 322 U.S. 533, 1944), Congress enacted the McCarran Act of 1945 (59 Stat. 33, U.S.C. Sec. 1011 et seq.) supporting the continued regulation of the insurance industry by the states.

NEED FOR INSURANCE REGULATION

The vital role that insurance plays in American society, as well as certain characteristics of the industry, necessitates its regulation. According to Bob Hunter, president of the National Insurance Consumers Organization, "An insurance shortage is just as critical to our society as an oil shortage. Without insurance, the whole economy just grinds to a halt."

The insurance industry is regulated for the following reasons:

1) Its size.

2) The nature of the insurance contract. Because an insurance contract is a contract for future services, it is critical that consumers believe in the financial soundness of companies and that these companies will be able to pay future losses. Solvency is a primary goal of regulation.

3) The complexity of the industry and its financial system make it difficult for consumers to have sufficient knowledge of industry operations and terminology to purchase wisely.

4) The extent to which the public and private sector rely on insurance to conduct daily activities.

These reasons provide the basis for regulation and should provide the rationale for statutes, rules and regulations that are designed to effect that end. That is, regulatory responses to the current situation should be designed to protect the public by ensuring stability and solvency of insurance companies, and ensuring that rates are neither excessive or inadequate and that markets are available for reasonable risks.(3, pp. 9-14)

STRUCTURE OF STATE REGULATION

State insurance departments are administered by a commissioner, director or superintendent. The individuals are either appointed by the governor or elected (see Chart A). Elected commissioners have the longest tenure.(4)

causes of financial difficulties of some insurance companies is that they were undercapitalized when they entered the market in the early 1980s.

2) Adequate Staffing. In order to provide effective oversight of the insurance industry, staff actuaries are necessary. An actuary calculates insurance and annuity premiums, reserves and dividends. Their ability to analyze the cost of insurance coverage through assessment of the probability of loss occurrences enables them to establish prices which are fair to the consumer and also enables companies to make reasonable profits. One criticism of state insurance departments is that there are few, if any, actuaries on staff.

3) Data Reporting Requirements. A major concern in evaluating problems in the industry relates to the need for the collection of adequate data and its compilation in a form that is usable and understandable. Often insurance data is a collection of aggregate data that does not allow an analysis of individual lines of insurance.

Terminology and accounting methods used by the industry are often different from the general understanding of such concepts. For example, reports of industry losses for 1985 have been calculated at anywhere from a $5.5 billion loss to a $1.7 billion profit. The discrepancies are due, in part, to industry accounting methods on certain types of income, including returns on investments.

Critics also point to an Internal Revenue Service provision that permits insurers to estimate how much they will need to pay future losses and to include that amount in each year's underwriting losses. According to Robert Hunter, president of the National Insurance Consumers Organization, the insurance industry is guilty of overestimating its losses to get a better tax break. Companies contend that the practice exists because of the difficulty in predicting losses. This issue is an important consideration for state legislatures. Several states such as Connecticut (P.A. 86-98) and Georgia (Act No. 1518 OCGA Code Section 33-3-22.1) have recently enacted legislation requiring expanded financial reporting requirements.

Certain indicators broken down by lines could be useful in the monitoring of the industry. Such indicators include:

a) Premiums earned.
b) Premiums written.
c) Number of claims.
d) Number of new claims during the reporting period.
e) Number of claims closed during the reporting period, and actual payouts.
f) Number of claims outstanding at the end of the reporting period.
g) Total losses incurred.
h) Total losses incurred as a percentage of premiums earned.
i) Total number of policies in force on the last day of the reporting period.
j) Total number of policies cancelled.
k) Total number of policies nonrenewed.
l) Net underwriting gain or loss.
m) Separate allocations of expenses for commissions, other acquisition costs, general office expenses, taxes, licenses and fees, and other expenses.

management through the adoption of risk management programs. Alaska has actively pursued this course and reports a significant measure of success.

Other issues under consideration by a number of states are

- o Increased professional staffing, particularly the addition of actuaries;
- o Creation of a state insurance fund to provide coverage for groups where coverage is deemed essential to the public welfare;
- o Establishment of reinsurance mechanisms (public and private); and statutory authority for banks and brokerage houses to enter the reinsurance portion of the insurance industry in several states (perhaps in under-served lines only);
- o Authorization of group commercial liability insurance for companies meeting minimum capitalization standards;
- o General review of capitalization requirements for all new companies;
- o Requirements related to excess profits;
- o Providing funding of an alternative insurance unit in the department of insurance to affirmatively assist groups looking to "self insure" or "bulk purchase"; and
- o Designation of "critically under-served lines" and statutory authority to allow premium tax offset for insurers willing to write these lines for a prescribed period of time (to be phased out as crisis abates).

CONCLUSION

As legislatures review the factors contributing to the liability insurance shortage, discussions will continue as to possible reforms of insurance regulation. Certain practices by the industry such as cash-flow underwriting have contributed to the magnitude of the problem. Excessive dependence upon profit from investment income based on high interest rates does not reflect sound business practices. The difficulty of obtaining usable statistics from the insurance industry is also a major concern. These problems are apparent and can be solved.

Legislators will have to reflect upon more nebulous areas of insurance in order to moderate the cyclical nature of the industry. The concept of insurance may require rethinking. Insurance is a pooling mechanism by which the risk of accidental loss is shared by a group of similar risks, the larger the pool the better. The success of insurance relies on the law of averages and depends upon a large volume of business to spread the risk efficiently and affordably.

In an effort to create a risk-free society, the public may have come to expect more from insurance than it can give. The realization that all activities are not insurable may be difficult to accept. The recognition that some risks are so great and/or the affected population so small as to prevent the calculation of a premium sufficient to make the insurance concept work is crucial to a fair consideration of the situation.

A small segment of society has been aware of insurance dynamics for some time. For example, individuals suffering from cystic fibrosis, even during the early 1980s, were faced with the question of affordability and availability of insurance for medical costs. The high risks as calculated by insurance companies made such insurance impossible to underwrite. Another area considered to be difficult to underwrite due to the high level

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3 Report to the Congress of the United States. Issues and Needed Improvements in State Regulation of the Insurance Business, by the Comptroller General, October 9, 1979.

4 a) Fletcher Bell (Kansas, 16 years)
b) George Dale (Mississippi, 11 years)
c) Bill Gunter (Florida, 11 years)
d) Richard Marquardt (Washington, 11 years)

GLOSSARY

ACCIDENT FREQUENCY: Rate of occurrence of accidents; e.g., number of accidents per million man-hours worked.

ACCIDENT SEVERITY: A measurement of the seriousness of the results of accidents; i.e., days lost per one thousand man-hours worked.

CAPACITY: Relationship between the quantity of capital funds at risk in the industry and the quantity of funds legally and administratively required to furnish the amount of insurance likely to be demanded in the future.

CAPTIVE INSURERS: An insurance company owned by a single industrial company.

CASH-FLOW UNDERWRITING: The practice of charging inadequate premiums to generate dollars for investment, and then relying upon investment returns to offset underwriting deficits.

CASUALTY INSURANCE: A class of insurance made up of a variety of subclasses, principally concerned with insurance against loss due to legal liability to third persons, but comprising also several unrelated lines.

ERRORS-AND-OMISSIONS INSURANCE: Insurance against loss due to failure, through error or unintentional omission, to have insurance in force.

EXCESS INSURANCE: Insurance covering above a specified amount; insurance covering after the loss exceeds the coverage of other insurance.

EXPOSURE: The state of being exposed to the chance of loss. The extent of exposure to loss as measured by payroll, gate receipts, area, etc. The chance of fire being communicated to an insured risk from its surroundings.

LOSS RATIO: The percentage of losses to premiums. The proportion which losses incurred bear to the earned premiums.

LOSS OF USE INSURANCE: Insurance against loss due to the insured's inability to use property, such as a vehicle.

LOSS-PAYABLE CLAUSE: A clause in an insurance contract providing for payment of loss, for which the insurer is liable to the insured, to someone other than the insured.

LOSSES OUTSTANDING: The amount of loss for which the insurer is liable and which it expects to pay in the future, shown as a reserve.

LOSSES PAID: The amount of loss for which money has been disbursed by the insurer.

LOSS RESERVE: That portion of the assets of an insurance company kept in a readily available form to meet probable claims provided for the payment of losses which have been incurred but not yet due.

LOSSES INCURRED: Total losses, whether paid or unpaid, sustained by an insurance company under a policy or policies.