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Table 2a. Preexisting liability reforms

Type of reform	No. of states	Percentage of liability premiums affected[a] General liability	Medical malpractice	State list
Modify joint and several liability	11	22%	17%	Indiana, Iowa, Louisiana, Kansas, Nevada, New Hampshire, Ohio, Oregon, Pennsylvania, Texas, Vermont[b]
Limits on punitive damages	8	30%	36%	Georgia, Illinois, Maine, Minnesota, New Jersey, New Mexico, New York, Ohio
Other reforms:				
Provide for structured or periodic payments	10	11%	11%	Alabama, Alaska, Delaware, Florida, Kansas, New Hampshire, North Dakota, Oregon, Washington, Wisconsin
Modify dram shop rules	16	42%	44%	Alabama, Colorado, Connecticut, Delaware, Illinois, Iowa, Maine, Michigan, Minnesota, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Vermont, Wyoming
Modify statute of limitations	14	27%	28%	Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Idaho, Michigan, Minnesota, Nebraska, New Hampshire, Oregon, Pennsylvania, Tennessee

[a]The base year for the percentage of liability premiums affected is always 1985 to assume comparability of the results across years.
[b]New Hampshire, Ohio, and Vermont abrogated joint & several liability prior to 1985. The remaining states modified the doctrine.

Table 2b Liability reforms in 1985

Type of reform	No. of states	Percentage of liability premiums affected[a] General liability	Medical malpractice	State list
Modify joint and several liability	2	1%	2%	Colorado, Oklahoma
Cap on punitive damages	2	7%	6%	Illinois, Montana
Other reforms in 1985:				
Modify dram shop liability	6	7%	5%	Maine, Massachusetts, Missouri, South Dakota, Wisconsin, Wyoming
Limit liability, establish immunities	2	5%	5%	New Jersey, New Mexico

Table 2c. Liability reforms in 1986

Type of reform	No. of states	Percentage of liability premiums affected: General liability	Percentage of liability premiums affected: Medical malpractice	State list
Modify joint and several liability	16	53%	55%	Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Hampshire, New York, Utah, Washington, West Virginia, Wyoming[a]
Limits on liability	13	11%	14%	Alabama, Alaska, Colorado, Connecticut, Delaware, Hawaii, Indiana, Maine, Maryland, New Hampshire, Tennessee, Utah, Wyoming
Limits on noneconomic damages	10	14%	12%	Alaska, Colorado, Florida, Kansas, Maryland, Minnesota, New Hampshire, New Mexico, Oklahoma, Washington
Limits on punitive damages	6	9%	7%	Colorado, Florida, Minnesota, New Hampshire, New Mexico, Oklahoma
Other reforms in 1986:				
Modify collateral source rule	5	13%	9%	Colorado, Connecticut, Indiana, Michigan, Minnesota
Provide for structured or periodic payments	7	12%	10%	Alaska, Connecticut, Iowa, Maine, Michigan, Utah, Washington
Modify dram shop rules	11	17%	18%	Arizona, Colorado, Connecticut, Indiana, Maryland, Michigan, Montana, New Hampshire, Tennessee, Utah, Wyoming
Modify statute of limitations	4	5%	5%	Colorado, Connecticut, Maine, Washington
Limit attorney contingency fees	4	5%	3%	Connecticut, Maine, New Hampshire, Wisconsin

[a]Colorado, Utah, and Wyoming abrogated joint and several liability in 1986. The remaining states modified the doctrine.

other reform measures were adopted in at least ten states: limits on liability, limits on noneconomic damages, and our catch-all "other reform" measure. Of all the years we will consider in this analysis, 1986 is the most prominent in terms of the extent of liability reform measures.

As table 2d shows, liability reforms in 1987 were again dominated by modifications in joint and several liability rules, which were adopted in an additional 16 states. Beyond this, 15 states representing two-fifths of all premiums imposed caps on punitive damages in an effort to limit liability costs. Other liability measures such as modifications in the collateral source rule also were widely adopted.[10]

The classification of state reform legislation into the categories shown in table 2 somewhat obscures the differences among states in particular reform measures. Limits on

Table 2d. Liability reforms in 1987

Type of reform	No. of states	Percentage of liability premiums affected: General liability	Percentage of liability premiums affected: Medical malpractice	State list
Modify joint and several liability	16	28%	24%	Arizona, Colorado, Connecticut, Georgia, Idaho, Louisiana, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Texas
Limit liability and establish immunities	1	0.4%	0.1%	New Mexico
Limits on noneconomic damages	5	3%	3%	Alabama, Idaho, Kansas, Montana, Oregon
Cap on punitive damages	15	39%	37%	Alabama, Colorado, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Missouri, Montana, North Dakota, Ohio, Oregon, Texas, Virginia
Other reforms in 1987:				
Modify collateral source rule	11	19%	22%	Alabama, Connecticut, Georgia, Iowa, Maryland, Missouri, Montana, New Jersey, North Dakota, Ohio, Oregon
Provide for structured or periodic payments	6	6%	6%	Alabama, Idaho, Montana, North Dakota, Ohio, Rhode Island
Modify dram shop rules	6	16%	13%	Missouri, New Jersey, North Dakota, Ohio, Texas, Vermont
Limit attorney contingency fees	4	8%	9%	Connecticut, Ohio, Oregon, Washington

noneconomic damages, for example, differ among those states enacting this reform. Reforms must be classified if they are to be compared across states, but one consequence is that only the average effect of a particular reform type is measured.[11]

3. Sample characteristics and model description

How did the performance of insurance markets change between 1985 and 1988? That there were significant changes is apparent from the overall insurance market trend information that appears in table 3.[12] For the two lines of insurance considered here—general liability coverage and medical malpractice insurance—the profitability of insurers over the study period experienced a substantial change. Premiums rose, and losses diminished so that overall insurer profitability increased. This profitability is reflected in the loss ratio (i.e., the ratio of losses to premiums), which changed dramatically over the 1985–1988 period for these two lines of insurance. Losses exceeded premiums for both

Table 3. Change in real total annual insurer loss and premiums, by line, 1985–1988 (in $ millions)

	Losses	Premiums	Loss Ratio 85	Loss Ratio 88
General liability	$ −4871	$ 5678	1.12	0.62
Medical malpractice	$ −531	$ 1256	1.22	0.79
Automobile	$ 7924	$14201	0.75	0.71

Table 4. Definitions of insurance rating laws

Prior Approval	Rates must be filed with and approved by the state insurance department before they can be used. Approval can be by means of a deemer provision, which indicates approval if rates are not denied within a specified number of days.
Modified Prior Approval	Rate revision involving change in expense ratio or rate relativity require prior approval. Rate revisions based on experience only are subject to "file and use" laws.
Flex Rating	Prior approval of rates required only if they exceed a certain percentage above (and sometimes below) the previously filed rates.
File and Use	Rates must be filed with the state insurance department prior to their use. Specific approval is not required, but the department retains the right of subsequent disapproval.
Use and File	Rates must be filed with the state insurance department within a specified period after they have been placed in use.
No File	Rates are not required to be filed with or approved by the state insurance department. However, the company must maintain records of experience and other information used in developing the rates and make these available to the commissioner upon his request.

lines of insurance in 1985, when insurers were incurring more claim costs than they were earning in premiums. By 1988, loss ratios had dropped by 40 percentage points or more, and insurers were once again paying less in claims than they were earning in premiums.

This dramatic change in loss ratio was not common to every line of insurance. Table 3 provides an example of automobile insurance. Both losses and premiums increased for this line, and loss ratios remained below 1.0 and relatively unchanged over the period. The experience of automobile insurance and other lines is consistent with the general perception that the liability reform measures were directed primarily at controlling the emerging liability crisis, which was concentrated in the lines of general liability and medical malpractice.

While the focus of this study is on the effects of liability reform measures, it also is important to take account of the differences among states in the stringency of their insurance regulation. The range of different kinds of insurance regulation is summarized in table 4, where these regulations are listed in an order that roughly corresponds to decreasing stringency.[13] These insurance regulations are intended, at least in part, to restrain insurance prices. The most common forms of regulation are "file and use" and the less stringent "use and file." Strict prior approval regulation is, however, used in approximately one fourth of all the states.

Table 5 summarizes the sample characteristics for the data set that will be analyzed. Our approach will be to assess the change in insurance market performance by state

Table 5. Sample characteristics

	Mean	Standard Deviation
General Liability		
Losses 85	369723.0	588309.9
Losses 88	272997.8	411076.0
Premiums 85	329192.7	449420.3
Premiums 88	441847.6	595447.3
Loss Ratio 85	1.017	0.248
Loss Ratio 88	0.569	0.142
Medical Malpractice		
Losses 85	86102.5	142093.2
Losses 88	75726.1	179104.1
Premiums 85	70944.7	111103.8
Premiums 88	95969.3	154137.4
Loss Ratio 85	1.155	0.587
Loss Ratio 88	0.584	0.317
Explanatory Variables for Both Lines		
Percentage change in aggregate income	0.097	0.073
Prior approval rating law	0.280	0.454
Modified prior approval	0.020	0.141
Flex rating	0.100	0.303
File and use system	0.420	0.499
Use and file system	0.120	0.328
No file	0.060	0.240
Preexisting reforms	0.700	0.463
Modify joint and several liability:		
in 1985:	0.040	0.198
in 1986:	0.320	0.471
in 1987:	0.320	0.471
Limits on liability	0.300	0.463
Limits on noneconomic damages	0.280	0.454
Limits on punitive damages	0.420	0.499
Other reforms	0.380	0.490

between 1985 and 1988. All variables in the table are in real (inflation-adjusted) terms using 1987 as the reference point for adjusting the value of losses, premiums, and income levels.[14] For both general liability and medical malpractice, real losses and premiums declined over the period.[15] Losses declined more than premiums, producing a reduction in the loss ratio. In 1985, insurers paid $1.02 to $1.16 in claims for every $1.00 of premiums. In 1985, they paid about $0.58 in claims for every $1.00 of premiums.[16]

The independent variables that will be used to explain variations in 1988 premiums, losses, and loss ratios are also listed in table 5. The percentage change in aggregate income in a state is included to account for the increases in insurance markets that can be expected as a state's economy grows.[17] The various insurance market regulation variables listed next, are set equal to 1 if a state uses that regulatory regime and to 0 otherwise. The mean value indicates the percentage of states employing each method of regulation.

Liability reform measures are the final set of variables appearing in table 5. A variable is set equal to 1 if a state adopted that reform and to 0 otherwise. The first four variables are for specific reform policies; the "other reforms" variable is a catch-all category for the other reform types. Since joint and several liability reforms were the most influential of the legal reform measures, an effort was made to distinguish these reforms by year. As can be seen, most states that reformed the joint and several doctrine did so in 1986 or 1987.

These data were used to explain state-to-state variations in losses, premiums, and loss ratios in 1988. In the economic model, the 1988 value is a function of its 1985 value, economic growth, insurance regulation, and liability reforms.[18] To estimate this relationship, we estimate the following models for each insurance line, where we allow for an autoregressive component:

$$\ln(\text{Loss}_{88}) = \alpha_1 + \beta_1 \ln(\text{Loss}_{85}) + \gamma_1 \ln\left(\frac{\text{Income}_{88}}{\text{Income}_{85}}\right) + \sum_{i=1}^{5} \psi_{1i}\,\text{Regulation}_i + \sum_{k=1}^{n} \xi_{1k}\,\text{Reform}_k + \epsilon_1, \tag{1}$$

$$\ln(\text{Premiums}_{88}) = \alpha_2 + \beta_2 \ln(\text{Loss}_{85}) + \gamma_2 \ln\left(\frac{\text{Income}_{88}}{\text{Income}_{85}}\right) + \sum_{i=1}^{5} \psi_{2i}\,\text{Regulation}_i + \sum_{k=1}^{n} \xi_{2k}\,\text{Reform}_k + \epsilon_2, \tag{2}$$

$$\ln(\text{Loss Ratio}_{88}) = \alpha_3 + \beta_3 \ln(\text{Loss Ratio}_{85}) + \gamma_3 \ln\left(\frac{\text{Income}_{88}}{\text{Income}_{85}}\right) + \sum_{i=1}^{5} \psi_{3i}\,\text{Regulation}_i + \sum_{k=1}^{n} \xi_{3k}\,\text{Reform}_k + \epsilon_3. \tag{3}$$

By expressing variables in log forms, the equations measure the effect of regulation and reform variables in percentage terms. This is useful, since a liability reform adopted in a large state would be expected to have much larger effects in total dollars than the same reform in a small state. The number of liability variables n varied depending on the particular specification.

Although the specifications of each of the equations are similar, the empirical predictions differ, and it is useful to consider each of these equations in turn. Equation (1) indicates that the value of losses in a particular state should be related to the losses experienced in that state in 1985, where the lagged dependent variable serves as a proxy for the size and underlying composition of the insurance market and the losses that are generated by the insurance that is purchased. If the losses experienced in a state are constant over time, then the coefficient β_2 would equal 1.0. This unitary value of β_2 can be viewed as a reference point for the degree of stability in the state's loss structure. Similarly, lagged dependent variables are included in equations (2) and (3) as well.

The second variable, the percentage change in the state's annual income, should have a positive sign for two reasons. First, increases in the income in the state generally imply a larger insurance market in terms of the volume of potential claims. Second, the primary component of compensation for bodily injury cases is the present value of lost earnings of the injured party, and this amount is going to be quite specifically linked to income levels within a state. However, we would expect no effect from this variable on the loss ratio, since growth in the economy should increase both losses and premiums in roughly the same proportions.

The regulation variables test for the effect of each regulatory regime, compared to the least stringent "no file" regime. Insurance regulation is intended to affect prices of insurance rather than losses or premiums.[19] Thus we would not expect the coefficients on these variables to differ from zero in the losses equation (1). If these regulations lower the price and profitability of insurance, as is often their stated intent, then premiums should be lower (equation (2)) and loss ratios should be higher (equation (3)) in regulated states.

Of greatest interest are the liability reform measures. Liability reform is not necessarily synonymous with decreasing losses. but the reforms in the mid-1980s had that character. We examine here not whether liability reform was socially optimal but instead whether it accomplished the objectives of its proponents, those who argued that the level of tort liability had become excessive and that some level of losses below the 1985 level was the socially desirable amount. Because of the small sample of firms that undertook liability reforms in any one year, it may be difficult to estimate statistically significant effects with available data.

The reforms represented an attempt to bring insurance costs under control, primarily by reducing the number and size of judgments against insureds. The reforms clearly were intended to reduce insurer losses; it is less clear whether the reforms were intended to reduce premiums. Insurers may have favored tort reform to increase profitability, while insureds may have expected the reduction in losses to be passed through in premium reductions. If there is considerable price competition within a state, the effect of reform measures on losses should be ultimately passed through to consumers. Thus, one would expect liability reforms, if successful. to have a negative effect on premium levels.

The expected effect of liability reform variables on loss ratio (equation (3)) is even less clear. If reforms reduced losses and premiums by the same proportion, the loss ratio would be unaffected. The loss ratio represents the inverse of the price of insurance, and one would expect that in the long run, competitive market forces would lead insurance companies to make adjustments that would equalize the marginal profitability of insurance coverage across companies and states. Thus, one would not necessarily expect to observe persistent differences in average loss ratios across states, although there might be short-run differences that occur in response to market shocks.

As a consequence, in equation (3) none of the variables other than the lagged loss ratio should have a long-run effect on the loss ratio observed in the market. However, in the short run, effects clearly could arise.

The liability reform variables are in some respects the counterpart of insurance regulation. Whereas insurance regulation is intended to reduce premiums and to raise the loss ratio, liability reforms are intended to lower losses and to decrease the value of the loss ratio. As in the case of insurance regulation, this influence should not have a permanent effect on the profitability of insurance, and consequently on the loss ratio, assuming companies achieve equilibrium profitability of their insurance coverage across different states. The time needed for the market to reach equilibrium, however, may be substantial. Given that most of the reforms were concentrated in 1986, and loss ratios are being observed in 1988, it would be quite surprising if one observed a substantial response to the shift in liability regimes. By 1987, firms would only have begun to experience the impact of the liability reform measures, since both medical malpractice and general liability lines have much longer tails on the distribution of claims than does automobile insurance. Until this loss experience occurs, firms have generally displayed a reluctance to change their rates based on a kind of Bayesian assessment of what loss levels might prevail, since ratemaking is governed by classical statistical principles.[20]

4. Empirical results

4.1. General liability

The estimates of the three different insurance equations for general liability coverage appear in tables 6a and 6b. Table 6a presents the results in which the reform variables are restricted to measures of whether reforms were undertaken in particular years. That is, taking account of the presence of preexisting reforms, did a state undertake reforms in 1985, 1986, or 1987? In contrast, table 6b focuses not so much on the timing of the reform but on its character. For example, did the state adopt a liability reform relating to joint and several liability? Focusing on the year-by-year reform index may be instructive if the specific reform measure is not of consequence, but rather the state undertook measures to curb liability costs. Should this situation apply, reform bills may serve as a proxy for a shift in the state's attitude towards liability costs more generally. Table 6b, by contrast, addresses the role of specific reform policies as opposed to the more general issue of whether the existence of a reform package is of consequence.

The role of the lagged insurance variable is similar in both tables 6a and 6b. The lagged value of the log of losses has a strong effect on the log value of 1988 loss losses; the coefficients are not statistically different from 1.0, indicating that losses experienced in a state are fairly constant over time. Similarly, the coefficient on the lagged log value of premiums indicates stability in premiums over time.

Table 6a. General liability regressions for losses, premiums, and loss ratios, with detailed liability variables

	Coefficients (standard errors)		
Dependent variable	Log of losses 1988	Log of premiums 1988	Log of loss ratio 1988
Intercept	−0.30	0.330[a]	−0.244
	(0.421)	(0.182)	(0.189)
Log of 1985 value of dependent variable	1.01[b]	0.995[b]	0.686[b]
	(0.030)	(0.013)	(0.145)
Percentage change in aggregate income	0.922	1.932[b]	−0.742
	(0.750)	(0.294)	(0.630)
Insurance regulation variables			
Prior approval	−0.295	−0.049	−0.151
	(0.176)	(0.069)	(0.162)
Modified prior approval	0.029	0.136	−0.192
	(0.263)	(0.102)	(0.230)
Flex	−0.221	−0.028	−0.129
	(0.162)	(0.063)	(0.147)
File and use	−0.118	−0.023	−0.105
	(0.177)	(0.069)	(0.153)
Use and file	0.001	−0.062	0.014
	(0.176)	(0.069)	(0.152)
Reform variables			
Preexisting reforms	−0.062	−0.016	−0.017
	(0.072)	(0.028)	(0.064)
Reforms in 1985	−0.206[a]	0.004	−0.169[a]
	(0.093)	(0.036)	(0.085)
Reforms in 1986	−0.296[b]	−0.133[b]	−0.109[a]
	(0.069)	(0.027)	(0.066)
Reforms in 1987	−0.134[a]	−0.062[a]	−0.034
	(0.069)	(0.027)	(0.062)
R-square	0.978	0.996	0.468

[a] Coefficients are statistically significant at the 95% confidence interval, one-tailed test.
[b] Coefficients are statistically significant at the 99% confidence interval, one-tailed test.

The linkage between the log value of loss ratios in 1985 and the log of the loss ratios in 1988 diverges much more from a proportional relationship. The lagged loss value coefficient is .69 in table 6a and .59 in table 6b. The link between loss ratios over time is relatively weak. The profitability of insurance as reflected in the loss ratio exhibits much less consistency over time because losses and premiums are volatile, and they have conflicting effects on the loss ratio.

The role of percentage change in aggregate income generally follows one's expectations, since it has a statistically significant positive effect on premiums. This reflects the role of expanding insurance markets in states with increasing levels of income. However, loss levels and loss ratios are not significantly related to income changes. Although one would not have expected an effect on insurance profitability, the level of losses should have been expected to rise in an expanding market.

Table 6b. General liability regressions for losses, premiums, and loss ratios

	Coefficients (standard errors)		
Dependent variable	Log of losses 1988	Log of premiums 1988	Log of loss ratio 1988
Intercept	−0.202	0.263	−0.552[b]
	(0.496)	(0.187)	(0.190)
Log of 1985 value of dependent variable	1.005[b]	1.007[b]	0.592[b]
	(0.039)	(0.015)	(0.170)
Log (aggregate income 1988/ aggregate income 1985)	0.853	1.619[b]	−0.732
	(0.950)	(0.322)	(0.791)
Insurance regulation variables			
Prior approval	−0.105	−0.117[a]	0.084
	(0.169)	(0.057)	(0.145)
Modified prior approval	−0.134	−0.090	−0.028
	(0.298)	(0.100)	(0.256)
Flex	−0.065	−0.077	0.026
	(0.194)	(0.065)	(0.165)
File and use	0.066	−0.082	0.136
	(0.189)	(0.064)	(0.163)
Use and file	0.059	−0.169[a]	0.186
	(0.220)	(0.074)	(0.189)
Reform variables			
Preexisting reforms	0.026	−0.034	0.047
	(0.089)	(0.030)	(0.074)
Modify joint and several liability			
in 1985:	−0.042	−0.141[a]	0.111
	(0.250)	(0.084)	(0.215)
in 1986:	−0.201[a]	−0.114[b]	0.019[a]
	(0.096)	(0.032)	(0.087)
in 1987:	−0.080	0.006	−0.022
	(0.105)	(0.035)	(0.094)
Limits on liability	0.017	0.072[a]	−0.041
	(0.117)	(0.040)	(0.100)
Limits on noneconomic damages	−0.232[a]	−0.052	−0.130
	(0.121)	(0.042)	(0.102)
Limits on punitive damages	−0.095	−0.085[a]	−0.036
	(0.113)	(0.038)	(0.097)
Other reforms	−0.103	−0.055	−0.052
	(0.118)	(0.040)	(0.101)
R-square	0.990	0.997	0.493

[a]Coefficients are statistically significant at the 95% confidence interval, one-tailed test.
[b]Coefficients are statistically significant at the 99% confidence interval, one-tailed test.

The performance of the insurance regulation variables suggests that these regulations have no significant effect on the profitability of insurance or on restraining insurance prices.

Prior approval and use and file regulation have significant negative effects on premiums in table 6a; they account for a 7.9% and 11.7% reduction in premiums, respectively.

The parallel results in table 6b are potentially more instructive, since the variable list controls in greater detail for the mix of liability reform measures, enabling the results to better distinguish the role of insurance regulation from the specific character of the liability reform efforts. The negative effect of the prior approval and use and file regulation variables on premiums is consistent with the public-interest intent of insurance regulation. The usual objective of regulation is to restrain insurance prices seeking to keep insurers from earning excessive profits. This objective is, however, less prominent for general liability insurance, which tends to be purchased by corporations, than for automobile insurance, most of which is purchased by consumers.

In no case, it should be noted, is there any significant effect of the insurance regulation variables on loss ratios. The profitability of insurance—or, put somewhat differently, the price that is actually charged for insurance (as measured by the inverse of the loss ratio)—is unaffected by insurance regulation. This is what one would expect in a situation in which the insurance market has reached equilibrium.

Liability reform measures, the final set of variables in these tables, represent the primary matters of interest. In each case, the presence of preexisting liability reform measures does not have a statistically significant effect on the 1988 value of the insurance variable.

Table 6a reports results for the year-by-year reform measures. Reforms had a strong significant effect in reducing general liability losses in 1986 and in 1987. The magnitude of these effects is also substantial, since these variables suggest that the 1986 reforms lowered losses by an amount that was equal to 10.1% of the average loss level for the sample in 1985, and reforms in 1987 lowered losses by an amount equal to 4.6% of the average 1985 losses.

In a competitive market, one would also expect lower loss levels to lead to reduced premiums. The linkage may not be a one-for-one relationship, since loss ratios were unsustainably in excess of 1.0 in 1985. Excluding all administrative costs and the potential for earning interest on premiums, the business of running insurance was at best a break-even proposition. One would expect insurance rates to return to more profitable, long-run loss ratios below 1.0. Premium levels dropped by a significant amount in states that adopted liability reforms in both 1986 and 1987; these decreases were substantial, but somewhat less than the amount by which losses dropped in those two years. The effect of the 1986 reforms was to reduce premium levels by 9.1% of their 1985 levels and to reduce losses by 10.1% of their 1985 levels. The 1987 reforms led to a premium drop that was 4.3% of the 1985 levels and a loss decrease that was 4.6% of the 1985 level.

The results in table 6a also indicate that in both 1985 and 1986 insurance reform measures were successful in increasing the profitability of insurance by decreasing the loss ratio. As indicated by the estimates above, the reform effects for 1987 affect losses and premiums similarly, implying that the net effect on the loss ratio is not statistically significant.

The examination of the specific reform measures in table 6b suggests that the reform efforts that had a significant effect in reducing losses were modifications of joint and several liability in 1986, and limits on noneconomic damages. Each of these effects is quite substantial, since they imply a reduction in the losses from their 1985 levels of 8% for limits on noneconomic damages and 6.9% for modifications of joint and several liability.

One should be careful, however, in extrapolating these results. For example, it is unlikely that a state can simply adopt a joint and several liability reform and reduce its general liability insurance losses by 6.9%. Rather, what these variables suggest is that states with a joint and several liability provision in the product liability reform package (and that possibly undertook other efforts to control liability costs) experienced these effects. The role of the liability provision variables may be to capture changes in the liability climate that are correlated with the adoption of such measures.

To the extent that these loss reductions are passed through to consumers, there should also be an effect on premium levels. Such effects are evident in the results of the middle column of table 6b, since there is a significant negative effect on premiums from both the 1985 and 1986 modifications of joint and several liability, as well as a significant negative effect of limits on punitive damages and limits on liability. The results in the final column of table 6b indicate that, as a net effect, all these efforts on both premiums and losses appear to offset one another, since there are no statistically significant effects on loss ratios. (Nevertheless, 5 of the 7 liability reform variable coefficients are negative; none is statistically significant at the usual confidence levels.) Because of the refined nature of these variables, the results in table 6a, which are designed to capture the more aggregative influence of liability reforms, probably provide a better measure of the effect on loss ratios over this period.

4.2. *Medical malpractice*

The findings for medical malpractice reported in tables 7a and 7b are somewhat similar to those for general liability. The lagged log value of the loss ratio and the lagged log value of premiums each affect the current amounts of these variables in 1988, and the coefficients are not significantly different from 1.0. Rather, both losses and premiums are transmitted in a manner that suggests that $1.00 in losses or premiums in 1985 leads to $1.00 in premiums or losses in 1988, which is consistent with a situation in which both losses and premiums are stable over time.

As in the case of the general liability results, the loss ratio is not very stable over this period. Instead of a one-for-one relationship between the loss ratio in 1985 and 1988, a 1% increase in the 1985 loss ratio translates into a .34% increase in the loss ratio in 1988. The profitability of insurance in a state in 1985 is consequently a very weak predictor of the profitability of insurance in 1988.

Insurance regulation variables have little apparent effect on medical malpractice insurance prices. Indeed, there is no statistically significant effect of any of these variables on losses or loss ratios in tables 7a or 7b, and only one statistically significant effect on premiums. The use and file variable is significant in the premium equation in table 7a, but this relationship is not robust; the coefficient on use and file regulation in table 7b is not statistically significant. These are the measures that should be affected by insurance regulations if they act to restrain prices and the profitability of insurance.

The role of the liability reform variables in each set of results for medical malpractice is similar to that for general liability, but the effects appear to be less pronounced. No

Table 6a. Medical malpractice regressions for losses, premiums, and loss ratios with detailed liability variables

	Coefficients (standard errors)		
Dependent variable	Log of losses 1988	Log of premiums 1988	Log of loss ratio 1988
Intercept	−1.113	0.899[a]	−0.615
	(0.946)	(0.5[illegible]1)	(0.391)
Log of 1985 value of dependent variable	1.102[b]	0.983[b]	0.348[a]
	(0.075)	(0.041)	(0.193)
Percentage change in aggregate income	−2.103	0.259	0.506
	(2.054)	(1.034)	(1.464)
Insurance regulation variables			
Prior approval	0.007	−0.352	0.059
	(0.484)	(0.257)	(0.377)
Modified prior approval	0.201	−0.495	−0.036
	(0.714)	(0.385)	(0.530)
Flex	0.341	−0.302	0.294
	(0.473)	(0.241)	(0.369)
File and use	0.130	−0.427	−0.061
	(0.521)	(0.274)	(0.388)
Use and file	0.153	−0.424[a]	2.6E−4
	(0.471)	(0.250)	(0.359)
Reform variables			
Preexisting reforms	−0.113	0.048	0.2[illegible]
	(0.181)	(0.092)	(0.145)
Reforms in 1985	−0.208	−0.277[a]	0.116
	(0.324)	(0.165)	(0.255)
Reforms in 1986	−0.227	−0.214[a]	−0.065
	(0.170)	(0.092)	(0.132)
Reforms in 1987	0.063	0.106	−0.043
	(0.175)	(0.098)	(0.135)
R-square	0.920	0.964	0.363

[a] Coefficients are statistically significant at the 95% confidence interval, one-tailed test.
[b] Coefficients are statistically significant at the 99% confidence interval, one-tailed test.

Statistically significant effects appear on losses, which one would expect to be the main mechanism by which liability reforms would exert their influence. Only one measure, limits on noneconomic damages (table 7b), significantly depresses losses, resulting in a 4.7% decrease in 1985 loss levels.

The 1985 and 1986 reforms both led to drops in premiums. Although the absolute magnitude of these premium effects are quite large, with reductions of 17.3% and 13.4% of 1985 premium levels, respectively, these reforms have no influence on insurance market profitability. The specific reform components listed in table 7b show, however, that there was a reduction in premiums due to the modifications of joint and several liability in 1985, but this reduction did not translate into any decrease in the 1988 loss ratio.

Table 7b. Medical malpractice regressions for losses, premiums, and loss ratios

	Coefficients (standard errors)		
Dependent variable	Log of losses 1988	Log of premiums 1988	Log of loss ratio 1988
Intercept	−0.382	1.204[b]	−0.512
	(0.928)	(0.483)	(0.364)
Log of 1985 value of dependent variable	1.017[b]	0.929[b]	0.396[a]
	(0.081)	(0.044)	(0.193)
Log (aggregate income 1988/ aggregate income 1985)	−1.542	−0.196	−0.127
	(2.128)	(1.070)	(1.552)
Insurance regulation variables			
Prior approval	0.193	0.026	−0.004
	(0.340)	(0.185)	(0.274)
Modified prior approval	0.109	−0.085	−0.151
	(0.622)	(0.331)	(0.480)
Flex	0.398	−0.026	0.102
	(0.399)	(0.215)	(0.322)
File and use	0.405	0.033	0.017
	(0.390)	(0.209)	(0.325)
Use and file	0.408	0.011	0.047
	(0.448)	(0.244)	(0.372)
Reform variables			
Preexisting reforms	−0.023	0.003	0.209
	(0.190)	(0.098)	(0.146)
Modify joint and several liability			
in 1985:	−0.450	−0.640[a]	−0.362
	(0.667)	(0.276)	(0.514)
in 1986:	0.068	0.067	0.166
	(0.208)	(0.104)	(0.147)
in 1987:	0.116	0.158	0.106
	(0.225)	(0.116)	(0.176)
Limits on liability	0.028	−0.087	0.140
	(0.250)	(0.128)	(0.194)
Limits on noneconomic damages	−0.451[a]	−0.132	−0.294
	(0.246)	(0.135)	(0.188)
Limits on punitive damages	−0.098	−0.090	−0.205
	(0.236)	(0.124)	(0.190)
Other reforms	−0.332	−0.214	−0.286
	(0.259)	(0.132)	(0.194)
R-square	0.935	0.972	0.490

[a]Coefficients are statistically significant at the 95% confidence interval, one-tailed test.
[b]Coefficients are statistically significant at the 99% confidence interval, one-tailed test.

This pattern of results for medical malpractice is somewhat puzzling. Tort reforms intended to constrain costs and enhance profitability did neither. Yet, these results suggest that premiums were dampened by the introduction of a reform measure.

Two explanations, beyond the possibility of spurious results, appear plausible. First, if liability reforms stabilized insurance companies' expectations about the losses that would be experienced for policies currently being written, this could restrain premiums even though current losses are unaffected. Future expected losses may have been influenced, which may be of consequence for medical malpractice coverage, whose claims have a long tail.

Second, the reform measures were correlated with states in crisis; there is the possibility that insurance was being rationed in these states. Anecdotal evidence regarding denials of insurance coverage in the mid-1980s is abundant. A decrease in premiums could arise from a decrease in prices or a decrease in the quantity of insurance sold. If premiums decreased because the amount of coverage written declined, a drop in premiums does not necessarily signal a favorable development in the operation of insurance markets. The available data do not permit us to distinguish among these possible explanations.

5. Conclusion

The mid-1980s was probably the most tumultuous time in recent insurance market history. There have been other periods, of course, in which premiums escalated rapidly. Indeed, a large literature is devoted to analyzing underwriting cycles in the insurance industry. However, because the dramatic increase in premiums in the mid-1980s was concentrated in such a small period and was accompanied by evidence of insurance rationing, this became a matter of prominent policy concern.

The main implication of this article is that the performance of insurance markets is something that is to a substantial extent within our policy control. States that enacted tort reforms between 1985 and 1988, and particularly the flurry of states that adopted such measures in 1986, were able to restrain the growth in liability costs. A substantial negative effect on the level of losses was observed. These restraining effects were much more pronounced and robust for general liability insurance than for medical malpractice.

The specific reform measures alone may not, however, account for all the significant drop in losses associated with them. Our results are consistent with the possibility that a state's undertaking of comprehensive effort to reform its liability laws may be more consequential than the specific components of the measures. Thus, the general shift in the liability climate generated by liability reform efforts may contribute to the effect of tort reform efforts. The role of these measures was captured by our yearly liability reform variables.

Although the impetus for the reforms we studied came largely from firms, the benefits spread much more broadly. In addition to reducing costs and lowering the loss ratio, liability reform measures also lower premiums. The relationship between the decline in premiums and the decline in losses is not exact, quite apart from the role of administrative costs, since the markets were out of equilibrium in 1985. Loss ratios were aberrationally high, and one would expect some long-run adjustment in such ratios to ensure that insurance companies could earn a normal rate of return.

Although the role of liability reforms appears to have been instrumental in stabilizing the performance of insurance markets, one should be cautious in ascribing any broader value judgments to the desirability of these "reforms." The fact that states undertook measures to control liability costs and that these measures were designated "reforms" does not imply that they led to improvements in the structure of liability. Making such judgments requires that one investigate the structure of the reform effort and determine whether the decrease in costs achieved by these reform measures is beneficial. Since reductions in costs typically imply decreased compensation of accident victims, the desirability of cost reductions is not always clear-cut. Indeed, if all cost reductions were desirable, one could achieve the optimal level of reform by eliminating all liability whatsoever.

Wholly apart from the concern with whether the stringency of the present liability system is optimal, it is, however, clear that the liability reform efforts in the mid-1980s did serve a constructive function. Before these reform efforts were enacted, liability markets were in substantial disarray. Insurance was too unprofitable to be offered at these rates over the long run. Many insurance companies denied coverage to parties seeking insurance. During this disruptive period, motels closed swimming pools, municipalities shut down playgrounds, and many firms withheld innovative but potentially risky products from the market.

Insurance, like any other factor of production, should have a ready supply sold at a price that reflects its long-run cost. The liability reform efforts of the mid-1980s did more than constrain the spiraling costs of insurance. They stabilized insurance markets, and thereby fostered the sound functioning of the economy.

Notes

1. The material in this paragraph and the subsequent discussion of trends in general liability premiums is drawn from Viscusi (1991).
2. These statistics are drawn from the Insurance Information Institute (1992), p. 29.
3. See page 23 of the Insurance Information Institute (1992).
4. See Casualty Actuarial Society (1990).
5. These refinements include a more flexible econometric specification, conversion of the dollar amounts to real (inflation-adjusted) terms, and much more detailed and comprehensive specification of the liability and insurance regimes in different states.
6. Blackmon and Zeckhauser (1991) found that most of the other provisions included in reform legislation had no effect on insurance costs. Examples include limits on attorney fees, measures to encourage alternative insurance supply and self-insurance, limits on mid-term policy cancellations, changes in dram shop laws, and reduction of liability awards for collateral sources.
7. State liability reform data for 1985–1987 were obtained from the Alliance of American Insurers, Civil Justice Enactments Bulletins, 1985–1987. Preexisting legislation variables were obtained from various sources. See Seman (1984) for states with limits on recovering punitive damages, Bagby and Whitman (1983) for states with provisions for structured or periodic payments, Smith (1984) for states with specific statutes of limitation for products liability, Brake (1984) for states with dram shop provisions, and Thofner (19??) for states with joint and several liability statutes.
8. Dram shop rules pertain to drinking establishments and accidents arising from activities at bars or saloons.

9. This statement and other characterizations of the role of different liability reform measures can be verified using Table 2b.
10. The collateral source rule requires that liability awards be reduced by the amount of compensation received by the victim from other sources, such as workers' compensation.
11. This grouping of reforms also reduces the accuracy of the econometric analysis. Such errors in independent variables, assuming random errors, causes the estimated coefficient to be smaller (closer to zero) than the actual effect of a variable.
12. State-level data on insurer direct premiums and adjusted loss ratios are compiled from annual data published in Best's Review. Losses are calculated by multiplying the adjusted loss ratio by direct premiums. Since the loss ratios reflect losses incurred relative to earned premiums, our measure of losses is accurate only to the extent that premiums written are equal to premiums earned.
13. Insurer rate filing regulation data and corresponding descriptions were obtained from the National Association of Insurance Commissioners.
14. Implicit price deflators for gross domestic product were obtained from Council of Economic Advisors. *Economic Report of the President* (Washington: U.S. Government Printing Office, 1992).
15. Premium amounts are based on premiums written. Blackmon and Zeckhauser (1991) adjusted these values to account for the fact that losses are stated in proportion to premiums earned, not written. With this model specification, however, an adjustment using the U.S. ratio of earned to written premiums exerts only a scale effect and does not affe . any of the significance tests.
16. The value of the loss ratio provides an important index of the overall profitability and price of insurance. For example, it is possible for the insurance market to be in substantial disarray even though losses and premiums are declining. Such declines may be observed if there is quantity rationing, so that a decrease in losses and premiums does not necessarily imply that the insurance market is thriving. The difficulty is that the standard insurance statistics pertain to revenues (i.e., premiums) so that the specific quantity of insurance purchased and its price cannot be distinguished. This compounding of the role of quantity and price requires that one be careful interpreting the results and that one also examine loss ratios as well as get a better sense of the insurance pricing practices.
17. State-level aggregate personal income data are published in the U.S. Department of Commerce *Survey of Current Business.*
18. Letting the subscript i denote state i, subscript t denote year t, e_{it} be insurance expenses in year t for state i, and r_{it} be the competitive return (as a proportion of expected premiums), then in a competitive equilibrium

$$\text{Premium}_{it} = \text{Losses}_{it} + (e_{it} + r_{it})P_{it},$$

or

$$\text{Premium}_{it} = \frac{\text{Losses}_{it}}{1 - e_{it} - r_{it}}.$$

The value of the loss ratio will be given by

$$\text{Loss Ratio}_{it} = \frac{\text{Losses}_{it}}{\text{Premiums}_{it}} = 1 - e_{it} - r_{it}.$$

The absolute loss level and premium level will not affect the loss ratio, since competition will work to equalize the marginal loss ratio value $1 - e_{it} - r_{it}$ across states. The unit price of insurance is the inverse of the loss ratio, or $1/(1 - e_{it} - r_{it})$.
19. Although the stated intent of regulation is to limit prices, the performance of insurance regulation in practice has been more mixed. For example, over the 1974–1981 period, automobile insurance regulation did decrease the price (as measured by the inverse of the loss ratios), but there was also a substantial price decrease experienced in the states that moved from a regulated to a deregulated situation. Deregulation served to foster more price competition than would have otherwise occurred under a regulatory regime. For discussion of these results, see Grabowski, Viscusi, and Evans (1989).
20. See the Casualty Actuarial Society (1990).

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ATTACHMENT #1

MEMORANDUM

TO: Liability Task Force

FROM: David Rogers

RE: Fact finding efforts

DATE: January 19, 1990

Our next meeting is set for March 2 (starting at 1:30 p.m.) and March 3 (if necessary; starting at 9:00 a.m.) in Juneau. Attached are materials compiled by my office to date which deal with the various factual matters identified by the Task Force at its first meeting in September. They provide a fairly comprehensive overview of the subjects under discussion although some materials may be dated and/or incomplete. I did not attempt to cover every conceivable angle given limits of time and space, although I did arbitrarily expand the scope of our inquiry into professional liability issues to include Nurses and Dentists.

Additional information will be forwarded upon receipt.

If I have missed an issue that you are concerned about or failed to address a question raised at the last meeting please let me know as soon as possible and I will try to respond before our next show. Please note there are some overlaps since several folks responded to my questions in one letter/submittal which cannot be easily divided (note, for example, information regarding dentists and nurses in "Availability/Affordability;Insured Percentage"); certain reports and studies fall into more than one category. There may also be missing or out of order pages, etc. although I have gone through everything pretty carefully to avoid this problem. Each section was stapled if it could be stapled, bound if not, or "rubberbanded" if it couldn't be stapled or bound. All sections have holes for a three ring notebook if you prefer that method of keeping things organized.

I have not attempted to "stack the deck" one way or the other. Generally, I have tried to give you the best available information from "non-partisan" sources (particularly those identified in the Group #1 and #2 game plans). However, I have also taken the liberty of including what some may consider "partisan" materials (from both sides of the fence) where I felt the information was relevant or helpful in defining a point of view on the many interrelated issues before us. I anticipate that some of the materials contained in this second packet will be rejected by the Task Force for one reason or another when it draws its final conclusions.

You may also want to take a second look at your first packet for other views on the issues.

Additional suggestions are encouraged. If I have left something out which has been recommended by one party or another I am happy to reconsider. It is also quite possible that constructive information in my possession has been lost in the shuffle.

This should not be considered a final product as there are gaps and other problems (some yet to be discovered) which will hopefully be resolved as the process continues. I apologize for the long delay between meetings, but I had to start from scratch and things have arrived in bits and pieces often requiring additional analysis and follow-up; further complicated by last minute realizations that I had missed a piece of the puzzle, endless problems with scheduling our second meeting (Christmas, Session, and busy Task Force members) and other logistical difficulties. After you (and I) have had a chance to start digesting all this and prior to our next meeting, I'll send out a memorandum with my thoughts and observations along with additional materials.

I know there is a lot to review in a fairly short period of time but the subjects addressed are complex and I thought it best to give you as much original data as possible for starters rather than to simply offer a summary of my impressions and conclusions. Fortunately, some of these materials can be skimmed easily.

Just pretend you are a student studying for a mid-term exam.

My thanks and compliments to the many people and organizations who bent over backwards to assist me in this effort without complaint; and a special thanks to Julie Kraft who was always there when I needed her advice and assistance.

Here is a brief discussion of major attachments by topic as set out in the Task Force Group 1 and Group 2 "to do" lists:

1. INSURANCE RATES: You will find attached rate information (current to this date), including "tail" coverage quotes,

received from the major admitted carriers who have responded to informational requests similar to that contained in the "Claims Survey" section. These surveys were sent to as many admitted carriers as we could identify at the time for each of the target professional groups (Lawyers, Physicians, Hospitals, Architects, Engineers and Land Surveyors). In an effort to broaden the scope of our inquiries, I am also including current rate filings provided by the Division of Insurance for Nurses, Nurse mid-wives, Dentists, and Accountants. No other rates have been included but I am told that the Division of Insurance is developing a comparative analysis of auto and home owner's rates which I will pass along.

Finally, I've attached the MIEC rate filing documents provided by the Division of Insurance for your information. Rates filings for other liability policies of admitted carriers (including MICA, which was to thick to include) are available in my office for anyone who is interested. Please let me know. I am also attempting to nail down rates for those non-professional categories listed as problem areas by the Division of Insurance and/or the Alaska Independent Insurance Agents and Brokers Association; and determine general rate trends for the major professional categories over the last several years. I have not focused on "surplus lines" ,"purchasing groups" and similar issues because you have to draw a line somewhere but we may want to take a closer look in the future. More on this topic in the analysis memorandum. Stay tuned.

2. AVAILABILITY OF INSURANCE: Information developed by the Division of Insurance, the Alaska Independent Insurance Agents and Brokers Association, various professional organizations and the Division of Occupational Licensing, along with responses from several of the major admitted carriers (included in the claims survey section) are attached. This is pretty good stuff. Please read these materials carefully. I am told that relevant additional data developed by the Division of Insurance in December concerning surplus lines (which apparently can only be used when there is an admitted carrier availability problem) will be provided in the near future. Information regarding CPA's (and hopefully Day Care facilities) will follow.

3. PERCENTAGE OF UNINSURED: All available information is included for Doctors, Lawyers, Engineers, Architects, Land Surveyors, Dentists and Nurses. Information regarding CPA's and Day Care Facilities will be forwarded as soon as possible. You will note that with the exception of Doctors, most of the data on this topic is dated, speculative or non-existent. A current survey would be necessary to adequately answer this inquiry. I suspect that most, if not all , of the professional organizations would to be willing to conduct such a survey if necessary; but given the effort

required I have not asked them to pending Task Force discussion. However, I have prepared a draft questionnaire which I can share with you upon request. A survey conducted by the Alaska State Medical Association which apparently addresses this issue and perhaps related questions is currently underway with results available by mid-February if all goes according to plan.

4. AVAILABILITY OF SERVICES: This has been hard to pin down since the Task Force provided little guidance on the "other services" category. I have surveyed with a broad brush state and federal agencies, professional and other organizations and individuals who might have something to add to the discussion. All available information received to date is included for target professionals (expanded list). Additional information regarding CPA's is in progress. I'm still working on the "other services" category and waiting for a response from the Department of Health and Social Services; information compiled to date is attached. In addition, I just received word from the Alaska State Medical Association that there are doctor availability problems in the following communities: Haines, Tok, Ketchikan and Dillingham as well as a variety of specialized service gaps (eg. no Ob/Gyn) in other communities. I've also heard that Craig currently has no doctors but this hasn't been confirmed.

Finally and for your information, I am told that it is very difficult for people to find lawyers to represent them in Worker's compensation and certain medical malpractice cases.

5. WHO RECEIVES WHAT FROM SETTLEMENT: See attached "pie chart" from the Rand Corporation contained in the so-called "three-level" study discussed below. Similar information is contained in "Costs and Compensation Paid in Tort Litigation" by Kakalik and Pace also included in that section. Based on my discussions with various interested parties, it appears that no such breakdown has been developed for Alaska, but I suspect that the results would be comparable.

6. CLAIMS EXPERIENCE OF SELF-INSURED ENTITIES: I also sent a claims survey to target self-insurers in Alaska (all major public entities that we could identify at the time and a couple of private entities); results received to date are included (State of Alaska, Municipality of Anchorage, Anchorage School District and the University of Alaska) along with a couple of letters from hospitals in Cordova and Petersburg. A second, less complicated request went out recently to a wider cross section of self-insured's in an effort to pick up more information since several entities were either unable or unwilling to respond to my naively comprehensive original request. In addition, as I mentioned

above, most of the major players in the Alaska admitted professional liability market have responded as best they could with the exception of National Union (lawyers liability) which has apparently declined to respond.

Please note that this section begins with the heading "Claims Information-Professionals".

7. ROLES AND MECHANISMS OF STATE AGENCIES: The attached materials summarize the duties of three state agencies which have primary roles in this arena - The Division of Insurance in the Department of Commerce and Economic Development, which regulates insurance activities in the state; the Division of Risk Management in the Department of Administration which is responsible for handling claims against the State of Alaska, a "self-insured" public entity; and the Division of Occupational Licensing within the Department of Commerce and Economic Development which regulates several of the professional groups discussed in the attachments including Doctors, Dentists, Nurses, Architects, Engineers, Land Surveyors, and Certified Public Accountants. I am still waiting for information on State agencies involved in licensing/certification of hospitals, day care facilities, etc. but I should have more on this soon.

8. STATUS OF STATE SUIT AGAINST INSURANCE COMPANIES: See attached memo from Attorney General's office which tells us what has happened to date along with comments from industry representative Tom Slagle.

9. PEER REVIEW PANEL RESULTS; TOTAL NUMBER OF MEDICAL MALPRACTICE CASES: As you will see from reading the attached letter from the Alaska Court System much of this information is not readily available. The last document in this section does contain potentially useful information but, ironically, I've lost track of the source. Hopefully, someone out there can help me fill in the blanks. I'm also trying to determine annual costs to the State Court system relating to tort litigation and how long it takes to resolve a typical negligence case from the filing of a complaint to final disposition.

10. OTHER SOLUTIONS TRIED ELSEWHERE; MATRIX OF STATE SYSTEMS; FEDERAL ACTIONS: I have included information developed by the National Conference of State Legislatures, a New York law firm which tracks these issues and miscellaneous other sources including the Rand Corporation. There is also a separate attachment on "pre-judgement interest" in response to a specific Task Force inquiry. The James Ludlam article ("Battle for Medical Malpractice Reform") while partisan was included because it contains useful information on legislative strategy issues and "tort reform" pros and cons among other things. I've also attached

an NCSL summary of pending 1989 legislation around the country to give you a sense of current thinking on the subject and a copy of an Alaska Attorney General's opinion on the constitutionality of several proposals contained in HB 166; but please note my unsolicited opinion that the conclusions contained in this memorandum are speculative and debatable.

There is duplication in this section but I wanted to give you a choice of formats. Some information may be dated (e.g. Statute of Repose/Limitations) due primarily to the ever present possibility of judicial decisions overturning these laws on constitutional grounds.

At a minimum, I recommend that you read the NCSL narrative and the Wilson, Elser report and take a quick look at what was going on around the country in 1989. An interesting overall view of Federal and State activities is also contained in Chapter 8 of the Winston/Litan book discussed below.

11. ALTERNATIVE CLAIMS RESOLUTION MECHANISMS: I've included a sampling of information on this topic which should give you a pretty good sense of some of the more significant alternatives which are in operation or under consideration. This section includes a 1984 Rand study on state court arbitration, a comparison of three medical liability reform proposals, and discussions of the Hawaii arbitration system and the Virginia Birth Related Neurological Injury Compensation Act. I also direct your attention to Huber who argues direct "first party" insurance (apparently similar to the policies some people purchase before they get on airplanes) and comments contained in the Litan et. al. piece discussed below. Finally, you may want to refer to my original information package for a review of Governor Cowper's "No Fault" medical malpractice proposal.

12. IMPACTS OF U.S. TORT SYSTEM CHANGES: This information is hard to come by. I have tried to provide several reasonably credible perspectives on the question, although at first glance the evidence appears to be somewhat contradictory. This section includes information from Rand ("Assessing the Effects of Tort Reform"; "Frequency and Severity of Malpractice Claims"), and actuaries Milliman and Robertson along with several other articles on the subject. Please note that the Danzon report on Frequency and Severity of Claims is often referred to by other civil justice commentators. The Maine report discussed below also addresses these issues.

13. LEGISLATIVE RESEARCH REPORTS. All reports prepared to date on liability issues are attached.

14. RAND STUDY-THREE LEVELS: It took awhile to find this study but I am pleased to introduce "Trends in Tort Litigation, The Story Behind the Statistics" by Hensler et. al. I have also included a recent Maine medical malpractice study which you may find interesting along with several other reports (mostly from Rand) which address a number of questions raised by the Task Force; and will be happy to order additional materials in your discretion (see attached Rand Bibliography).

15. RESULTS AND AMOUNT OF SELF-REGULATION: Attached are applicable statutes, regulations, current annual reports, national standards, disciplinary statistics, state by state comparisons and observations supplied by various professional organizations and regulators, along with information regarding educational programs and requirements. More will follow as soon as it arrives in my office including the Alaska Bar Association's latest annual report and a general discussion of trends over the last few years.

16. CHANGES IN TIME IN LAW OF LIABILITY AND DAMAGES: The Huber and Brodeur books (five copies each) just arrived and are available upon request. Call if you want one. I have also included an excellent overall discussion of the issues (including a summary of the kinds of changes which have occurred over the last 30 years) edited by Stephan Litan and Clifford Winston of the Brookings Institution which I urge you to review, particularly the Forward and Chapters 1 and 8. I have talked to Mr. Litan and concluded that he does not appear to have any axes to grind.

17. CHANGES IN INSURANCE SERVICES; HOW THE PUBLIC IS TREATED: While it is not exactly responsive to this specific question, I have included a report prepared by well known consumer advocate Robert Hunter which hits on a number of topics before us. This also can be considered a partisan effort (which may require a rebuttal from the insurance industry and others), but I feel we have an obligation under the terms of our mandate to review Mr. Hunter's many findings and conclusions since he is considered by many to have a steady and enlightened handle on the issues before us. As I mentioned before, Gary Fye is also willing to discuss the service issue at our next meeting if there is no objection from the group. Otherwise, I am open to additional suggestions on how to further explore this topic and related questions.

18. INSURANCE DEPARTMENT REPORT: Jim Jordan, formerly of the Division of Insurance, says there is no such report.

19. MISCELLANEOUS: I have also included several additional attachments which may fall into the "bias" category but are still worth reviewing in my opinion. These include excerpts

from a Tillinghast study on U.S. and World trends, a claim data overview by ISO, Inc., information prepared by Al Tamagni, Senior regarding Alaska Court Rules and related matters, a 1986 report prepared by several state Attorney's General on the causes of the liability insurance situation, A Louis Harris study and others.

Have fun and feel free to call with questions, etc.

Remember, "no pain, no gain".

ATTACHMENT NUMBER TWO

Highlight Summary (as of March 1990)

ATTACHMENT # 2

SUMMARY OF DATA HIGHLIGHTS
(as of March, 1990)

I. AVAILABILITY AND AFFORDABILITY OF INSURANCE.

A. Availability has improved. Based on information received by the Task Force to date from the Division of Insurance and various professional liability carriers, there appear to be no significant availability problems for most professionals with certain limited exceptions. According to the Alaska Independent Insurance Agents and Broker's Association, Inc. there are some availability problems for non-professional categories like day care centers, liquor liability, small specialty and general contractors, pollution and any small business that requires liability coverage only.

B. Generally, rates appear to have stabilized within the last year or so although costs are still perceived as prohibitive and/or unreasonable for some categories, most notably testing labs, structural engineers, attorneys doing SEC work, pollution and asbestos work, real estate developer combinations, computer programers and certain physician categories including but not limited to OB/GYN. Many experts tell us that this is a cyclical business and anticipate another round of availability/affordability problems in the future.

C. Affordability is relative; the greater percentage of income represented by insurance premiums, the greater the concern. It is interesting to note that nationwide medical malpractice premiums were 6.2% of physician's gross income in 1986; the national average for Architects and Engineers is 4.2% - it is estimated that in Alaska the average is 7%. We have no comparable information for lawyers.

II. PERCENTAGE OF UNINSURED.

A. Based on information provided by the Alaska State Medical Association the total percentage of uninsured physicians in Alaska is 24% in cities, 12% in towns and 56% in the Bush. The study further indicates that OB/GYN (44.7%), Family Practice (34%) and Orthopedics (23%) have the largest block of uninsured. A more recent survey by the Medical Association of Family Practice and OB/GYN practitioners indicates that 15% are uninsured (based on a response rate of over 50%); a majority of these in urban areas. The differences between these numbers possibly are explained by the fact that the latter survey takes into account doctors who are insured by group programs although additional information and analysis is required.

compensation by collateral sources and limits on attorney contingency fees. The constitutionality of many of these measures has been challenged in state and federal courts; some upheld, some not for a variety of reasons. The most comprehensive reforms have been enacted in Alaska, Washington, Hawaii, Colorado, New Hampshire, New York, Florida, Illinois and California.

B. During the 1980's, legislative activity on these issues peaked in 1986 when 36 state legislatures passed tort reform laws. In 1989, only seven legislatures enacted such laws, although many measures were pending. The focus of state activity appears to have shifted to regulation of the insurance industry and auto insurance matters, including "Proposition 103" and "no fault" proposals.

C. At the Federal level, Congress is most concerned with products liability issues and changes to the McCarran-Fergusan Act which among other things, provides limited anti-trust immunity to insurers.

VII. ALTERNATIVE PROPOSALS.

A. There are a variety of alternative systems in place or under consideration which may provide some relief; although most commentators agree that more analysis is required. These include: 1) court annexed mandatory arbitration programs (with "de novo" appeal rights) for cases which fall within certain limits and other administrative arbitration and/or adjudication proposals including pre-trial peer review screening panels and voluntary, binding arbitration mechanisms; 2) "No-fault" alternatives like the Virginia Birth-Related Neurological Injury Compensation Act which establishes a fund financed by voluntary payments from physicians and hospitals to cover actual and necessary medical and related expenses, loss of earnings from age 18-65 based on a discounted formula and reasonable expenses incurred in connection with filing the claim including attorney's fees. A similar program is operated in Florida which also allows recovery of up to $100,000 in non-economic damages. Also note that Governor Cowper has proposed a general medical malpractice "no-fault" system and Alaska currently has arbitration and peer review systems applicable to medical malpractice, court ordered arbitration procedures for small claims and recognizes certain contractual arbitration agreements; and 3) a variety of other proposals including use of direct "first party" insurance and state subsidization of certain insurance premiums for qualified applicants (see, for example, HB 449 and 450 by Donley and Gruenberg).

B. Reviewers of the Hawaii and other court annexed arbitration programs have found that they seem to achieve their goals of reducing litigation costs, increasing pace and maintaining the satisfaction of participants. A Rand Study ("Reforming the Civil Justice System, How Court Arbitration May Help" by Deborah Hensler) indicates similar attitudes about the California and Pennsylvania programs.

VIII. THE RAND THREE-LEVEL STUDY.

A. This study, "Trends in Tort Litigation - The Story Behind the Statistics" by Deborah R. Hensler, Mary E. Viana, James Kakalik and Mark A. Peterson, attempts to settle three highly controversial issues which dominate discussions about the need to reform our civil justice system: How much litigation is there? Are jury awards stable? How much does litigation cost and who gets the money?

B. The authors tell us that one of the reasons for confusion is that there is not a single tort system. Instead, there are at least three types of tort litigation, each with its own distinct class of litigants, attorneys and legal dynamics - 1) the world of routine personal injury torts, exemplified by auto suits. These occur frequently and usually involve modest injuries and relatively low financial stakes. Settled law and routine procedures lend an air of stability to this world; 2) the world of high stakes personal injury suits such as products liability, malpractice and business torts. Here the litigation is newer, the law increasingly uncertain; and 3) the world of mass late[illegible] cases, such as asbestos litigation, Dalkon Shi[illegible]s and other suits arising from mass exposure to d[illegible], chemicals or toxic substances. The lack of "fit" between traditional tort law and the facts of these cases lead many to view them as problematic.

C. What is the story behind the statistics? The author's found that: Routine personal injury torts such as auto cases are growing slowly in frequency and costs, and their outcomes - inflation adjusted - have not changed much over the last 25 years; Higher stakes torts such as malpractice and product liability are growing faster in frequency and costs, and their outcomes have increased dramatically over the past 25 years in the jurisdictions observed intensively, and substantially in the shorter five year period for which they had national data; Mass latent injury torts, once identified, tend to explode in number, carry high transaction costs and have highly uncertain outcomes.

Please note that a recent article in the New York Times suggests that these trends may be altering based on a recent study by two Cornell Law School professors which concludes that published opinions since the mid-1980's "have moved toward benefiting defendants over plaintiffs".

D. In response to a specific Task Force question about "who gets what" the authors tell us that: for auto cases 19% of total litigation dollars go to the defendant's lawyers for legal fees and expenses, 26% are for plaintiffs legal fees and expenses, with 52% left for the plaintiff; Non-Auto- 30%, 2[illegible]% and 43% respectively; Asbestos, etc.- 37%, 26% and 37%. We have a few Alaska specific numbers on this question. For example, MICA tells us that on the average they spend approximately 13 cents on the dollar in defending claims; although this number varies depending on whether there is formal legal action, whether there is a plaintiff recovery and other factors.

IX. IMPACTS OF U.S TORT SYSTEM CHANGES- FREQUENCY, SEVERITY AND RATES.

A. While malpractice claim severity has risen roughly twice as fast as the Consumer Price Index, Patricia Danzon in a study prepared for the Rand Corporation ("Frequency and Severity of Malpractice Claims-New Evidence") tells us that certain tort reforms - particularly caps on awards, periodic payment of future damage provisions and shorter statutes of limitation/repose - appear to reduce the frequency and severity of medical malpractice claims as compared to what would have happened if the law had not been enacted. This conclusion is more or less confirmed in other studies contained in our information packet including the recent National Academy of Sciences Study (which acknowledges a "modest" reduction in medical malpractice claim frequency and severity), the 1988 Winston/Litan anthology by the Brookings Institution and the 1989 study done for the Maine Legislature by the Public Health Resource Group, Inc. (but there is disagreement over the significance of this impact).

B. However, there appears to be no definitive evidence that any reduction in claim frequency and severity effects the cost or availability of insurance; although the experience in California suggests that certain tort reform measures may at least contribute to stability (in the context of doctor owned insurance companies at any rate); and Danzon argues that certain reforms that reduce the uncertainty in estimating malpractice claim costs "may be expected to reduce premiums by a modest amount over and above the reduction in mean expected losses" (although she also mentions other factors such as litigation expenses and "changes in the timing of disbursement of loss reserves, and hence investment income").

C. The jury is still out on this one. More time may tell.

X. ALASKA CLAIMS EXPERIENCE- PRELIMINARY FINDINGS.

A) Professionals: Based on information obtained to date it appears that: 1) most medical malpractice claims/recoveries are under $150,000; 2) there are few "jumbo" recoveries (over $1 million), and none reported over $3 million (through 1988) but payments on these claims typically represent a large percentage of total losses for a given year; 3) punitive damages are rarely, if ever, awarded; 4) most claims are settled before trial, many settled without formal legal action; 5) less than half of MICA claims resulted in a payment to the claimant; and 6) MICA's defense costs, on average, are about 18 cents for every dollar, but this number varies depending on a number of factors.

B) Self-Insured/Uninsured Entities: Based on the results of a survey of several major public and private entities obtained to date, it appears that: 1) the majority of claims/recoveries are between 0 and $50,000, claims against public entities tend to be larger; 2) most are settled prior to formal legal action; 3) there are occasional large payouts (mostly State claims) which typically represent a large percentage of total losses for a given year; and 4) defense costs do not appear to be significant but this observation requires additional information and analysis.

XI. WHAT SHOULD THE LEGISLATURE DO?

A. The four primary commentators relied on (Rand, Brookings, National Academy of Sciences and the Maine Legislative Study by the Public Health Resource Group, Inc.) agree that sweeping alternatives to the existing system are intriguing but require more study. It is less clear how they feel about partial alternatives like the Hawaii arbitration program.

B. In the meantime, Winston/Litan et al. support "fault based" rules of liability and argue that in terms of reducing uncertainty and eliminating inappropriate levels of compensation under a "fault based" system there is a strong case for limiting non-economic damages in tort cases but only in a way that takes into account the age of the injured party and the severity of the injury. In the same report, Patricia Danzon also argues for more restrictive statutes of limitation, provisions requiring periodic payment of future damages and modification to collateral source rules which will give public and private insurers rights of subrogation against the tort reward. The authors oppose stiffer regulation of insurance rates and support greater solvency regulation by state regulators.

C. On the other hand, the Maine group concludes that new tort reforms at this time are questionable policy options to reduce insurance premiums and to insure medical care availability pending more information that should be available within the next two years. If reforms are pursued they further suggest they be designed to expire after a period of time if the price of insurance and availability of essential medical services do not improve by some measure satisfactory to the legislature. In any event, the report cautions that you cannot just target one set of issues.

Instead, Legislatures should develop a carefully balanced mix of changes to the tort, regulatory (for example, they suggest requiring rate changes to be spread over time and requiring insurer's to demonstrate effective cost control programs) and medical care delivery systems (they suggest investigations of multi-claim physicians, greater efforts to diffuse potential complaints, information collection requirements and, possibly, adoption of "care standards") based on a considered understanding of what will be gained and what will be lost.

D. The National Academy of Sciences, which focuses on the issue of medical liability and obstetrical care, takes a different tack. On the basis of its findings - that the costs of the current system in terms of impaired obstetrical care are great, that tort reforms are so far largely ineffective, and that data evaluating the merits of proposed alternatives to the tort system are lacking - the report concludes that state legislatures should not focus on further reform efforts within the existing tort system but should instead redirect their energies toward developing alternatives to the traditional tort system for resolving medical malpractice claims and towards implementing these alternatives in certain circumstances.

E. Other commentators on the issues before us, like Robert Hunter, advocate various forms of insurance regulatory reform; risk management and disclosure requirements; certain tort reforms like limiting attorney's fees for both sides (although he focuses on defense fees), penalties for frivolous actions and settlement incentives; and increased use of alternative systems except in defective products and similar cases which Hunter feels should be subject to common law principles without damage limits as a necessary deterrence measure.

F. A very recent study completed by Harvard University was available to late in the process to be included in this report but should be carefully reviewed before any final conclusions are drawn.

Finally, it may be helpful to keep in mind the words of Gustave H. Shubert, Director of the Institute for Civil Justice of the Rand Corporation, who observed in 1986: "I think underlying all our problems with the civil justice system is the inability of this country to decide whether it wants to have a pure compensatory system or whether it wants to have a fault based liability system. We can't decide whether everybody should be compensated for every injury no matter what its cause, or whether we want compensation to be limited in a strict way, in a comparative way, or in a contributory way to those who have caused the injury. My personal assessment is that we are experiencing the disadvantages of trying to operate both systems in tandem, the worst of both worlds. We are attempting to compensate everyone with a fault-based system and we are incurring huge social overhead costs by attempting to do so. I believe it is time to focus on that overall choice and to be rational in doing so".

ATTACHMENT NUMBER THREE

Information Summary and Index - "Almost Everything You Ever Wanted to Know About Liability Issues (and were afraid to ask???)

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ATTACHMENT #3

ALMOST EVERYTHING YOU EVER WANTED TO KNOW ABOUT LIABILITY ISSUES (and were afraid to ask???)

Here is a general summary by category of the information contained in the multi-volume factual submittals along with occasional editorial commentary as appropriate:

1. RATES: See Attached rate information including rate filings for selected entities.

2. AVAILABILITY/AFFORDABILITY OF INSURANCE: According to the information compiled by the Division of Insurance the market for professional liability insurance is "soft". Their specific findings based on a survey of major brokers placing professional liability are:

* The situation is improving which is to be expected in a soft market;

* Prices are coming down;

* Coverage is generally available but sometimes at high premium or with restrictive conditions. Non-availability appears to occur with home inspection services and any small unseasoned professional;

* Some insurers are now writing as part of a package policy;

* Policies are usually "claims made" with defense within limits and adjustment cost included in any applicable deductible;

* Pollution usually has a $25,000 deductible;

* Costs are perceived to be prohibitive for testing labs, structural engineers, attorneys doing SEC work, pollution and asbestos work, real estate/developer combinations and computer programers. They cited the following examples:

> Lloyds- testing lab-$1/2 million coverage $50,000 premium last year; $1 million coverage $25,000 this year.
>
> CNA- mechanical engineer doing some electrical and survey-$3 million in billings-$1 million coverage, $25,000 deductible, $129,000 premium.

* Only Allstate was identified during their survey as providing unlimited Civil Rule 82 coverage on its personal

lines coverage. Demand is not there although markets could be found.

The Alaska Independent Insurance Agents and Brokers, Inc. also looked at availability/affordability of other lines of liability insurance based on a survey of members from all areas of the state. They concluded that only the following categories have both availability and affordability problems: Day Care Centers, Liquor Liability, Small Specialty and General Contractors, Pollution, and any small business that requires liability coverage only (no supporting property or auto).

These findings are more or less confirmed by responses to our professional liability claims survey discussed below, informal conversations with representatives of insurance companies and in letters contained in this section from representatives of various professional organizations and regulators. Generally, there does not appear to be an availability problem for most professionals at this time. Affordability, as Keith Brown points out, is relative. Note that Dan Rowley estimates that insurance premiums for Alaska Architectural and Engineering firms are approximately 7% of annual gross billings, as compared to the national average of 4.2%; according to the Medical Malpractice Liability Study prepared for the Maine Legislature (see discussion below) nationwide medical malpractice premiums were 6.2% of physicians gross practice income in 1986. I have no comparable statistics for Alaska. Also note that according to Mr. Rowley seven out of eleven carriers nationally have a maximum limit of $1 million; six of those carriers don't do business in Alaska. Finally, note that in addition to the groups identified by the Division of Insurance rates for certain physicians are very high as we will see in more detail below.

3. PERCENTAGE OF UNINSURED: a) Physicians: Based on information provided by the Alaska State Medical Association the total percentage of uninsured is 24% in cities, 12% in towns and 56% in the bush. According to my notes, the study further indicates that OB (44.7%), Family Practice (34%) and Orthopedics (23%) have the largest block of uninsured. The results of a recent detailed questionnaire sent out to over 600 doctors gives us a different picture. Based on responses from over 50% of those surveyed, 15% of the Family Practice and OB/GYN physicians are uninsured in Alaska. Apparently, this figure takes into account a variety of group insurance programs not reflected in the other information provided by the State Medical Association. The results also suggest that a majority of uninsured Family Practice and OB/GYN's are located in Anchorage and other urban areas. Please note that MICA insures approximately 50% of Alaska insured physicians, MIEC approximately 30% and CNA approximately 10% through

group practices that meet CNA criteria; b) Hospitals: Based on a recent survey of 23 hospitals by MICA four (Kodiak Island, Central Peninsula Hospital, Cordova Community and Petersburg General) are uninsured/self-insured. The others are either insured through MICA (most), affiliations with a national chain or the Federal government. MICA also insures twelve health related health care facilities, many of which are "rural" including a skilled nursing facility, clinics, intermediate care facilities and home health services; c)Lawyers: Information on lawyers is based on a survey conducted several years ago when availability was limited and prices had skyrocketed; although market circumstances have changed for the better since then according to Keith Brown, former Chairman of the Alaska Bas Association's Professional Liability Insurance Committee. If I am reading the results correctly, at that time, 275 firms were covered by liability insurance, 120 were not; d) Architects, Engineers, Land Surveyors: There is no statistical information available for Alaska, although nationally 49% of architectural firms do not carry professional liability insurance - 42% of 1-5 person, 17% of 6-10 person and 15 percent of 11-25 person engineering firms are "bare". Rich Ritter of the Alaska Chapter of the American Institute of Architects estimates that 70% of the architect and engineering firms he does business with in Alaska carry professional liability insurance; although he is aware of one major Anchorage firm recently going bare apparently due to the high cost of insurance. Nurses: No numbers are available. Note that Gail McGuill of Occupational Licensing tells us that while nurses typically are covered by their employers' policy increasing numbers are purchasing their own policies to protect themselves further; Dentists: According to Frank Thomas-Mears, writing on behalf of the Alaska Dental Society, approximately 2% of Alaska dentists are uninsured. We have no information for CPA's or other professionals at this time.

We don't have a solid answer to the question of how many professionals are going bare (or limiting their practices, reducing coverage or getting out of the business altogether) because they can't afford the premiums; or who do not carry insurance for philosophical or logistical reasons. A survey conducted by each professional organization is the best way to clarify this issue along with the related question of how many professionals are in fact uninsured.

4. AVAILABILITY OF SERVICES: The information contained in this section is limited. What follows is a discussion of some of the service gaps in Alaska that I have been able to identify and comments on whether these gaps are attributable to the affordability or availability of liability insurance: a) Health Care: There are a number of communities in the state (mostly rural) that are having difficulties recruiting and retaining physicians. According to the Health

Association of Alaska and the Alaska State Medical Association Haines, Tok, Ketchikan, Dillingham, Wrangell and Petersburg (and possibly Craig) are having doctor availability problems along with other communities with specialized care gaps. In addition, according to a 1988 survey of availability of obstetric care for low income women, fewer than half of the physicians surveyed (93% of the 196 family practice and OB/GYN physicians surveyed responded) are now providing obstetric care; "within two years only slightly more than a third of the surveyed physicians may be offering obstetric services in Alaska." However, recent uncorroborated information suggests that this trend not be true for Anchorage and perhaps other larger urban communities. This source contends that six new obstetricians have begun practicing in Anchorage in the last two or three years and two additional obstetricians will begin practicing there in the near future.

In the more recent survey of Family Practice and OB/GYN physicians discussed above, 32% of doctors formerly providing obstetrical services have stopped performing this service primarily due to the cost of liability insurance.

Many others also attribute this situation to the cost of liability insurance and other health care cost factors. For example, the Report of the Governor's Interim Commission on Health Care (September 1988) states that rural providers, especially those providing obstetrical care, have been particularly hard hit by the increase in medical liability insurance: "The cost of medical liability insurance has created a particularly severe problem for pregnant women in rural areas. Non-Native residents of Glenallen, Dillingham, Bethel, and some other communities have lost access to—local obstetrical and prenatal care because local providers are either unable or unwilling to pay for the expensive premiums" (at page 57). The report contends that medical liability insurance premiums had more than doubled between 1985 and 1988. See also the comments of Harlan Knudson of the Health Association of Alaska.

For native rural residents the problem, according to Dr. Ward Hurlburt of the Public Health Service, is particularly one of finding money to fund travel costs for diagnostic and treatment services in the larger cities : "As we discussed, as health professionals, we could point to many places in our program where, with added funding, we could do a better job. If I were to select one area, however, to point to where I could see a need related to medical services for rural Alaskans, I would identify the lack of funding for travel...At this time...we are basically paying only for emergency travel. If the State were wanting to identify an area for potential positive impact on the provision of Native services for rural Alaskans, I would suggest consideration of the development of a mechanism for supporting travel costs." The Department of Community and Regional Affairs tells us that this position was echoed in a Resolution passed in November by the North and Northwest Alaska Mayors Conference which proposed an insurance program which will cover both transportation to Anchorage or Fairbanks and services provided by non-Indian Health service facilities in these towns.

There also appears to be a nursing shortage in Alaska. According to Gail McGuill of the state Division of Occupational Licensing : "It has recently been more severe than the cyclical shortage in rural communities and in certain specialty areas of practice. Almost all acute care and long term care facilities in the state have had to utilize "traveling nurses", nurses retained through agencies for short term periods of employment...Of the four main issues discussed in this letter, I view the nursing shortage and the problems it has caused for the health care industry in our state to be the most crucial one. Although, a concentrated effort of agencies in Alaska working together to remedy the shortage has not occurred, individual agencies and organizations have been attempting to alleviate the problem with the resources available to them." There are many cited reasons for this situation including poor pay and benefits, lack of hospital administration support, limited opportunities to further professional education, inadequate staffing, state laws that limit nursing practice, lack of access to child care facilities, insufficient in-service education and lack of competent support personnel. The cost (or availability) of liability insurance does not appear to be a significant contributing factor.

b) Legal Services: We have no Alaska specific information. However, informal discussions with attorneys have identified several service gaps worth noting - representation of claimants in state and federal workmen's compensation matters; certain medical malpractice claims; low income legal services that cannot be provided by Alaska Legal Services and/or the Alaska Pro Bono program; and general legal services for middle income people who don't qualify for assistance but can't afford standard legal rates for a variety of basic legal services involving personal and family matters; a problem which may be growing due to the increasing need for some legal services in our society. These gaps do not appear to be due to high liability insurance premiums.

c) Engineering/Architectural/etc Services: We have no Alaska specific information on this but according to Rich Ritter of the Alaska Chapter of the American Institute of Architects there is no apparent availability problem despite the fact that over 50% of Alaska Architects, Engineers and Land Surveyors have left the state in recent years. He feels that "there is still a core group of experienced professionals remaining in Alaska available to provide professional services". It is not clear how much of the attrition is due to the cost of liability insurance versus the dramatic recent economic slump.

d) Dentists: Frank Thomas-Mears tells us that Dental services in rural areas are not impacted by affordability and availability of insurance since a majority of dental practitioners are employed by the Public Health Service and protected under the Federal Tort Claims Act. Of those private practice dentists which either contract with the PHS or native corporations most are insured.

d) Day Care: The only other significant service gap that I have been able to identify to date (other than the need for a comprehensive health insurance program to take care of people who "slip through the cracks" under our current system, a subject which is being addressed elsewhere; and sewer and water system and similar service needs which are well beyond the scope of our duties) concerns Day Care Facilities. According to the report of the Governor's Interim Commission on Children and Youth parents "often have difficulty finding child care that meets their needs and matches their resources." This is particularly a problem for parents who work rotating shifts, nights or weekends, parents with infants and parents with school age kids who need before and after school supervision: "Too few programs offer flexible hours, overnight care and flexible staffing to ensure safe care for children. Not enough family child care homes exist to accommodate the needs of parents who work a non-traditional or normal schedule. The result is a near crisis in urban and rural Alaska." Recent changes to Federal welfare laws (the Federal Family Support Act of 1988) will exacerbate this problem. It is estimated that the welfare reform work and training requirements will result in the need for day care space for an additional 2400 children statewide.

And child care is expensive. Again according to the Governor's Interim Commission, a recent survey of 600 American families indicates that 40% of their respondents feel they cannot afford their current child care arrangement or the arrangement they would prefer. The authors of the study add that evidence indicates Alaskans would agree. In March 1987 infant care ranged from $321 to $521 per month, pre-school care from $301 to $450 per month, school age child care from $132 to $215 per month and care for children with special needs from $600 to $1,200 per month. High quality care may be even more expensive.

A variety of solutions are under discussion including a plan proposed by Virginia Johnson, Dean of the School of Education at the University of Alaska Anchorage, called the Middle School Day Care Center, which would locate day care centers at the six middle schools in the Anchorage area with the curriculum being developed by the Director of the Day Care Centers.

It is difficult to determine if the cost of liability insurance contributes to the day care service gap. It is my understanding based on several informal conversations with people familiar with these issues that affordability and availability is less of an issue at the present time, even for new facilities. It is interesting to note that current policies exclude liability for molestation/abuse related circumstances and, in some cases, require adult/child ratios that exceed state standards.

5. CLAIMS EXPERIENCE - Preliminary Findings:

a. Professionals: We requested claims experience data from all of the major admitted professional carriers. However, only information received from MICA and MIEC, the major medical liability carriers is useful. Generally, the information provided indicates that: 1) most medical malpractice claims/recoveries in Alaska fall within the 0-$150,000 category (MICA tells us that the average claim is $48,731; average claim where indemnity is paid is $124,353; 2) there are few "jumbo" recoveries (over $1 million), and none reported over $3 million (through 1988), but payments on these claims typically represent a large percentage of total payouts for a given year (MIEC tells us that nationally about 3% of claims account for over 70% of loss costs; these numbers appear to be consistent with their Alaska experience); 3) Punitive damages are rarely, if ever, awarded; 4) most claims are settled prior to trial; many are settled without legal action; 5) for MICA at least, less than one-half of claims filed result in a payment to the claimant; 6) on the average, MICA defense costs are approximately 18 cents per dollar; this number varies depending whether the claim was settled without litigation, whether there was a payment to the claimant and other factors; and 5) it is hard to predict which doctor will cause the big claims, although MIEC tells us that the highly, trained well regarded physicians often get the "jumbo" cases.

b.Self-insured/Uninsured entities: We have surveyed a wide variety of public and private "self-insured" entities. Results received from the State of Alaska, the University of Alaska, the Municipality of Anchorage, the Anchorage School District, the City of Fairbanks, the North Star Borough, the North Star Borough School District, the City and Borough of Juneau, NANA Regional Corporation, Inc., Nabors Alaska Petroleum Services, Phillips Petroleum Company, the Carr-Gottsten Corporation, Petersburg General Hospital and Cordova Community Hospital indicates that: 1) the majority of claims are between 0 and $50,000, public entities report more claim activity than private entities; 2) most are settled, often prior to formal legal action; 3) there are occasional large claim payouts (mostly the State of Alaska;) which typically represent a large percentage of total losses in a given year; 4) defense costs do not appear to be significant but this information requires further analysis. Please note that NANA has made two specific suggestions of issues that should be looked at by the Task Force which are contained in their letter to David Rogers dated January 31, 1990 attached.

6. ROLES AND MECHANISMS OF STATE AGENCIES: The information provided is self-explanatory. However, please note that the Division of Insurance has four primary functions: a) Market Conduct Surveillance (review and approve as appropriate all rate and form filings and perform market conduct examinations on insurance companies or producer licensees to ensure that the consumer is treated fairly in the marketplace);b) Licensing (to license qualified individuals and insurance companies to market insurance in Alaska); c)Financial Surveillance (primarily to ensure solvency - i.e. that the company has sufficient reserves to protect policy holders and pay their claims - and to determine if investments meet statutory requirements and if reinsurance agreements comply with Alaska law); and d) Consumer Complaint and Investigation (to investigate and resolve individual consumer complaints that are filed with the Division. Statistical data that is collected by this section is utilized by the market section as a means to identify licensees or trade practices that warrant further examination.

7. STATUS OF STATE SUIT AGAINST INSURANCE COMPANIES: This lawsuit was filed by 19 states against four major American primary insurance companies and a variety of reinsurance companies alleging anti-trust violations in the form of a pattern of collusion. According to the Attorney General's Office, the allegations are that leading primary insurance companies and reinsurers conspired to withdraw casualty and pollution coverage from the United States market; and that defendants coerced others to take actions which prevented other potential competitors from offering these types of coverage resulting in consumers paying more premium for less coverage than ever before. Tom Slagle of the American Insurance Organization adds that the primary thrust of the lawsuit was that various entities conspired to eliminate the occurrence policy for a claims made policy. In October of 1989, Federal District Court Judge Schwarzer granted defendants' motions to dismiss and entered final judgment against the states. The states have appealed this decision to the Ninth Circuit Court of Appeals; a decision is expected next fall. According to the Attorney General's Office, Alaska has actively participated in this case

(against the advice of advice of industry representatives according to Slagle) and intends to continue.

6. PEER REVIEW PANEL RESULTS: With the exception of information concerning the number of professional malpractice cases filed in Alaska state courts between January 1, 1987 and July 1, 1989 (177: 90 medical mal.; 56 legal mal,; 31 other), there is no official information available from the court system on peer review panel matters or other issues relating to frequency and severity of claims/judgments; although within the last year or so the court system has started to keep track of how long a case takes from start to finish. The data contained on the last page of this section regarding peer review panel results since 1977 was developed by the Alaska State Medical Association. While incomplete, it suggests that there is no apparent upward trend in cases processed through expert advisory panels (an average of 26 per year; although this does not appear to be consistent with the Court System statistics discussed above) and defendants are not always vindicated. Of 178 cases evaluated, the panels sided with the defendant 138 times and with the plaintiff 40 times. You may also want to refer to information prepared by Al Tamagni Sr. of Pension Services Ltd. regarding pending civil cases in Anchorage Superior Court.

Information provided by MICA during Task Force deliberations involving 90 cases where panels had been appointed (only definitive information available; MICA has dealt with a total of 244 lawsuits from its inception to March 1990) tells us that: 1) There were 15 reports adverse to health care provides with payment resulting in all instances by MICA and/or co-defendants; 2) Eleven reports were either mixed or equivocal as to the health care provided. In one instance, that case is still pending (as of March 5, 1990) with no resolution. Five cases resulted in settlement by MICA. Two cases were dismissed by the plaintiff. Another case was dismissed by the plaintiff but it was unclear whether the basis for the dismissal was voluntary or successful defense motion for summary judgement. Two of the cases resulted in payment by other co-defendants but no contribution from MICA; 3) Sixty-five reports were favorable to the health care providers. Five are still pending without resolution. One was tried to a plaintiff verdict with a substantial recovery. Three were tried to a defense verdict with no recovery of costs and fees by MICA. Twenty-eight cases were dismissed by one mechanism or another. Twelve were dismissed by plaintiff in return for a waiver of costs and fees. Seven were dismissed on successful motions for summary judgement with virtually no recovery of costs and fees by defense. Nine were dismissed but the basis for dismissal was unclear. Finally, in one case, the MICA defendant was dismissed by the plaintiff who proceeded to try the case against a co-defendant and recover a substantial sum through a plaintiff verdict and large judgement.

9. RESULTS AND AMOUNT OF SELF-REGULATION: Given the large amount of information contained in this section, I will only attempt to set out several general observations about the subject:

a) With the exception of lawyers, all target professionals (doctors, architects, engineers, land surveyors, dentists and nurses) are regulated by the Division of Occupational Licensing within the Department of Commerce and Economic Development through various regulatory Boards. Lawyers are governed by the Alaska Bar Association (and its Board of Governors) created by statute as an "instrumentality of the State". All groups also have independent professional organizations (e.g. The Alaska Dental Society, the Alaska State Medical Association,The Alaska State Nurses Association, The Alaska Chapter of the American Institute of Architects, the Juneau Bar Association, etc.)

b) All target groups are subject to a variety of admission and licensing requirements, grievance procedures, and disciplinary sanctions for improper conduct; along with certain peer review procedures, sometimes required as a condition of membership in their respective professional associations. Note that lawyers are subject to rules promulgated by the Alaska Supreme Court.

c) Only Physicians, Nurses and Dentists have mandatory continuing education requirements. For example, physicians are required to complete at least 17 continuing medical education hours per year to retain a medical license provided through hospitals, the Alaska State Medical Association, local medical societies and physician specialty associations. Lawyers have an extensive optional continuing legal education program. Architects, Engineers and Land Surveyors apparently have no continuing legal education requirements or voluntary programs.

d) Based on information gathered to date, it is difficult to determine if, in fact, a relatively small number of professionals cause a relatively large percentage of complaints/disciplinary actions but some statistics included in this section suggest that is the case. The Alaska Bar Association tells us that since 1982 there were 1505 complaints against 710 attorneys. 57% of the attorneys had only one complaint against them which accounted for 27% of the complaint volume. 18% of the attorneys had two complaints against them which accounted for 17% of the complaint volume. The remaining 25% of the attorneys had three or more complaints against them and were responsible for 56% of the complaint volume. However, additional information provided on disciplinary actions taken against lawyers suggests that there are repeat offenders but they do not dominate the statistics except in the disbarment and probation categories.

Certainly, the number of disciplinary actions taken annually appear to represent a relatively small percentage of total professionals in several of the target groups. Please note that according to the Alaska Bar Association, there has been a marked increase in informal requests for ethics opinions from Bar Counsel which suggests that lawyers are attempting to practice preventative medicine, so to speak.

e) All target groups are subject to specific statutory or regulatory provisions regarding unprofessional conduct. In addition, Physicians apparently follow the American Medical Association "Principles of Medical Ethics", as a condition of membership in the Alaska State Medical Association; Nurses apparently follow the Code of Ethics of the American Nurses Association; Lawyers are subject to a Code of Professional Responsibility promulgated by the Alaska Supreme Court; Dentists who belong to the Alaska Dental Society (2/3 of all Alaska dentists) agree to adhere to a Dental Code of Ethics (along with agreeing to be subject to peer review and mediation procedures); same with Architects, Engineers and Land Surveyors who each have separate codes adherence to which is a condition of membership to their respective professional organizations.

f) As to a specific task force question concerning Alaska physician disciplinary actions compared to other states, the information provided by the Public Citizen Health Research Group ranks Alaska #2 (per capita) in Doctor discipline for 1987; up from 19 in 1986 (Pam Ventgen tells us that in 1981 there was 1 disciplinary action; 0 in 1982; 4 in 1983; 2 in 1984; 1 in 1985; 2 in 1986; 5 in 1987; 5 in 1988 and 7 in 1989. She also points out that HB 70, passed in 1987 provided for a full time investigator and an executive secretary for the medical board which may help explain these numbers) The recommendations contained in this report are also worth noting: Increase license fees to $500 per year and use all money to finance doctor disciplinary actions; Require periodic re-certification of doctors based on written exams and audits of doctor performance such as medical record review; Grant subpoena power to state licensing boards to go after evidence necessary to evaluate doctors; Grant state boards emergency powers to suspend a doctor's license to practice, pending investigation, when continued practice is considered to constitute a hazard to public safety; Require all hospitals to have a risk management program designed to prevent injury to patients (according to the American Hospital Association only 60 percent of hospitals have such programs and only half of these are excellent programs); Require all insurance companies to experience-rate doctors with sub-specialities, whereby doctors with the best records pay the lowest premiums, and multiple malpractice "loser" doctors pay the most; Require insurance companies to immediately disclose and forward to the state licensing board the filing of malpractice claims, as well as the results of all malpractice settlements and adjudications (see HB 146 now in House HESS); Require hospitals or other institutions taking disciplinary actions against doctors to publicly disclose and forward to the state licensing board the details of such actions; Provide immunity and confidentiality to all those reporting doctor malpractice, incompetence, substance abuse or fraud to state medical boards (see HB 146); Provide strong consumer representation on state medical boards; Do not allow the state medical society to control membership on the boards; Officials should make strong, public statements indicating a commitment to strong doctor discipline and protection of patient's safety. It is my understanding that several of these suggestions have already been adopted in Alaska.

10. MATRIX OF STATE SYSTEMS; FEDERAL ACTIVITY: It is difficult to briefly summarize this material but several general observations can be made:

a) Legislative responses to the increasing cost and availability of insurance and apparent claim trends can be broadly categorized into civil justice- or tort reform - measures, insurance regulatory reform measures and risk management measures. According to Patricia Young formerly of the Legislative Research Agency from information provided by the National Conference of State Legislatures (NCSL), in 1986 the emphasis was on civil justice reform. The legislative focus in 1987 turned to immunities- from — sovereign immunity extended to counties, cities and towns, to immunity from personal liability extended to groups of public employees and volunteers. However, more recently legislative activity in civil justice reform has declined and the focus has shifted to regulation of the insurance industry, including the anti-trust suit discussed above. In 1989, the majority of legislative activity regarding liability dealt with regulation of the automobile insurance industry, including California's proposition 103 and similar measures introduced in other states.

b) The significant "tort reform" measures enacted over the years include laws relating to limits on recovery (caps) of damages; abolition or modification of Joint and Several Liability; reduction of compensatory awards by collateral sources, or at least notification to the jury of such sources; limits on attorney's contingency fees; limits on punitive damages; periodic payment of awards; penalties for frivolous suits; settlement incentives; limits on prejudgment interest; and establishment of statutes of limitation and repose. Proposals concerning alternative systems and similar issues will be discussed below. I have little "easy to read" summary information on the status of proposals regarding regulation of the insurance industry, professional competency laws and similar approaches to the problem.

c) According to the recent report by the New York law firm of Wilson, Elser, Moskowitz, Edelman and Dicker (Wilson) contained in this section, a majority of the states have considered or enacted "tort reform" laws as described above in various forms. The constitutionality of many of these measures has been challenged in state and federal courts with mixed results; some upheld, some not for a variety of reasons. See also the Alaska Attorney General's opinion for a discussion of some of these cases including the recent decision by the Washington Supreme Court on their cap mentioned below.

d) According to the Wilson Report, in 1989, the most significant activity concerning Civil Justice reform occurred in the courts rather than the Legislatures. In 1986 thirty-six state (36) legislatures passed tort reform laws (varying in degree and significance). In 1989 only seven (7) states enacted reforms; although many measures were pending (see NCSL 1989 pending legislation summary). NCSL tells us that four state courts rendered decisions in litigation questioning the constitutionality of damages caps. In Maryland, the cap on non-economic damages in all civil suits was upheld; in Kansas, a $100,000 cap on such damages in wrongful death actions was upheld; the Virginia Court upheld a cap on total damages in medical malpractice cases; but in Washington, the cap on all non-economic damages was ruled unconstitutional(letter from Brenda Trolin dated December 23, 1989).

e) According to the Wilson Report, states which enacted the most extensive reforms in 1986 include Alaska, Washington, Hawaii, Colorado, New Hampshire, New York, California, Florida and Illinois (See Wilson starting on page 1 of the Introduction for a detailed breakdown of how many states enacted various reform measures in 1986 and 1987; and for a discussion of 1989 tort reform enactments).

f) Alaska; in 1986, enacted a series of civil justice changes 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 sustained while that person was committing a felony; detailed provisions on damage award requirements; 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 judgement, costs and attorney's fees (including pre-judgment interest), and the effects of a release. This legislation has been characterized by tort reform advocates as a "patch work quilt" of necessary compromises, and, in their view, did not go far enough toward making Alaska's civil justice system fair and predictable. As you know, Alaska also has a medical malpractice claims system created during the 1970's.

g) On the automobile insurance front, California's Proposition 103 is the biggest news. This reform measure narrowly adopted by California voters in November 1988 included a one year 20% roll back in most property/casualty "insurance charges" from November 1987 levels; a 20% automobile insurance discount for "good drivers", as defined as those with no more than one moving violation in three years; a requirement of advance state approval for insurance rate increases after November 1989; and election, instead of appointment, of the State Insurance Commissioner starting in 1990. Prop 103 also requires the Insurance Commissioner publish for consumers a list of rate comparisons, and compels insurance companies to notify their customers of the right to join an "independent, non-profit corporation which shall advocate the interests of insurance consumers in any forum." The California Supreme Court upheld all of 103's long term restrictions on insurance rates and practices, but struck down the provision that would require insurers to be "substantially threatened with insolvency" before they could receive relief from rollback. The Court held that insurers may charge rates above the rollback level whenever insurers can justify them as not being excessive.

Many states are also considering "No-fault" automobile insurance proposals in response to escalating auto insurance costs. Note that according to NCSL at least 20 states already have no-fault legislation in many different forms particularly on issues relating to restrictions on the right to sue, conditions necessary to sue for pain and suffering and first party coverage.

h) The Wilson Report concludes as to state activity: "In general, although state legislatures have reviewed thousands of bills addressing the Civil Justice System and insurance regulation, disputes persist as to what precisely are the problem areas, and solutions to the perceived problem areas remain elusive. It is likely that state legislative activity will continue in the area of civil justice reform and the courts will be entertaining arguments relative to the interpretation and validity of these reforms for some time." See Wilson at page 7.

i) Federal activity in this area has confined itself primarily to products liability. For the past several years Congress has seriously considered proposals to federalize products liability law. Detailed discussions of current proposals are contained in the Wilson materials at pps. 77 and 93. In addition, Congress is considering a variety of proposals to modify the McCarren-Ferguson Act, a 1945 law that provides limited anti-trust immunity to insurers and continues the authority of the state to serve as the primary regulators of the insurance industry. A proposal to modify the doctrine of Joint and Several liability also is pending in the Senate according to my sources.

j) Two final notes. On the question of "pre-judgement interest", according to a 1983 Rand Note prepared by Stephan Carrol (which hasn't been updated according to Carrol) at least 26 states had pre-judgement interest laws on the books. The Note also suggests that juries implicitly provide pre-judgement interest at a rate equal to the underlying inflation rate plus 3.7 per cent per year in addition to any applicable statutory pre-judgement interest rate.

As to contingency fees, commentators argue that limiting those fees will potentially increase the amount of compensation paid to claimants, increase the likelihood that a case is dropped, decrease the likelihood of litigation to verdict and deter frivolous suits by placing the plaintiff's lawyer at financial risk; but will also preclude some victims with legitimate claims from obtaining representation. It is not clear whether the presence of contingency fee arrangements increases the total number of claims (See Frank Sloan "State Responses to the Malpractice Insurance "Crisis" of the 1970's: An Empirical Assessment"- Vanderbilt University, 1985). One study also concludes that in modest cases contingent fee lawyers spend less time on a case than hourly fee lawyers; but there is no statistically significant evidence of a differential in effort for larger cases, although there is an indication that if there is an effect it is in the opposite direction (see Rand, "The Impact of Fee Arrangement on Lawyer Effort" by Kritzner et. al.) For detailed discussions of these issues see "Rand Three Level Study and Other Reports" and various references to the subject contained in "Impact of U.S. Tort System Changes". Note that Danzon suggests that contingency fee limits reduced the amount of settlements by 9%, reduced the number of cases litigated to verdict by 1.5%, and reduced the number of cases dropped by 5% (See Maine Malpractice Study at page 36).

II. ALTERNATIVE PROPOSALS: Here is a summary of some of the more significant alternatives I have been able to identify that are either in effect or under consideration today:

a) Arbitration and Screening Panels: According to the Rand article by Deborah Hensler entitled "Reforming the Civil Justice Process, How Court Arbitration May Help" arbitration programs may be established by state statute or by rule of a state supreme court or a local court. Typically, under these programs the Court is authorized to compel arbitration for cases that fall within certain limits (Rand says $25,000 is the typical cutoff); with certain exceptions. However, any of the parties to a suit may reject an arbitration award and request that the case be calendered "de novo" (without regard to the arbitration verdict). This appeal option is generally considered necessary to ensure that the litigants right to a trial is not abrogated. In 1984, Rand's Institute for Civil Justice estimated that arbitration programs are operating in more than 100 trial courts around the country and estimated that over 100,000 cases are arbitrated annually through this process. Apparently, there also are voluntary, binding program options.

Typically in court annexed arbitration programs cases are heard by private attorneys or retired judges who volunteer to serve as arbitrators and, according to Rand, receive only a small honorarium for their efforts. Arbitration hearings usually are private, informal and often brief. After giving the parties an opportunity to settle, the facts of the case are heard with the litigants often appearing as witnesses. If accepted, an arbitrator's award in entered as a judgement and is enforceable. As a disincentive for frivolous appeals, some programs require applicants who request a trial de novo to reimburse the court for arbitrator's fees; in some programs court costs and attorneys fees may be levied on unsuccessful appellants, or applicants who do not improve their position (e.g. Hawaii-if the court does not alter the award by at least 15% in favor of the appealing party; see Patricia Young memo in this section). Note that such programs also are required by some carriers.

Does it work? The reason for these programs is to reduce congestion, costs and delay. According to Rand preliminary information derived from two studies of a new program in California and an older program in Pennsylvania arbitration can and does contribute significantly to reducing congestion, costs and delay. These findings are confirmed by the Hawaii and North Carolina experiences discussed in this attachment. For example, reviewers from the University of Hawaii of the Hawaii program which covers all tort cases with a probable jury award of $150,000 or less concluded in January of 1989 that: "Hawaii's Court Annexed Arbitration Program appears to be meeting its goals of reducing litigant costs, increasing pace, and maintaining the satisfaction of participants....To our knowledge no other arbitration program in the country claims to be reducing litigation costs; Hawaii leads the nation in this area." Similarly, a 1989 evaluation of the North Carolina program by the

University of North Carolina concludes that the program: disposed of cases faster that standard procedures; reduced trials and out of court settlements replacing them with "promptly scheduled adversarial hearings in a courtroom before specially trained arbitrators"; and improved litigants satisfaction with the outcome and procedure used in their cases. The study also notes that attorneys were satisfied with the program and, in a survey, voted strongly in favor of continuing it.

However, the Rand study cautions that program design and implementation are critical factors in determining success. Some of the design issues that must be considered include: setting jurisdictional limits of the program, establishing procedures for determining case eligibility, adopting guidelines and procedures for selecting arbitrators and deciding how many arbitrators will hear each case, where the hearings will take place and whether there will be financial disincentives for appealing.

Please be advised that the American Medical Association, The American Hospital Association and the Physician Insurers Association of America each have proposed versions of alternative systems apparently involving arbitration or a form of administrative adjudication with various limitations on recovery. I do not have sufficient first hand information on these proposals at this time to go into specific differences but you may want to refer to the analysis prepared for MICA by Jerry Cogan. The State Alternative version of the PIAA proposal is also included for your information. Also note that the AHA calls for a study of a Medical Indemnity Fund as a supplemental method for compensating medical malpractice victims financed by assessments or surcharges levied on medical malpractice insurers and the self-insured.

In Alaska, arbitration and peer review systems applicable to medical malpractice (AS 9.55.535 and 536) and court ordered small claims arbitration procedures (AS 9.43.190-220) are available. In addition, state law recognizes certain contractual arbitration agreements (AS 43.010-180; Uniform Arbitration Act). I have no other information on the latter two options.

b) The No-Fault Alternative to Tort Recovery: James Ludlam ("The Battle for Medical Malpractice Tort Reform: A Report From the Front Lines" prepared for the Annual Meeting of the American Academy of Hospital Attorney's, June 1989) tells us that in the 1970's and 1980's there was much discussion of possible no-fault alternatives to compensating plaintiffs for catastrophic injuries including "trip insurance" under which a patient bought his own coverage, or a system for which there would be payment without fault on the basis of a worker's compensation type schedule (similar to that proposed by Governor discussed in my introductory memo to the Task Force dated September 15, 1989). There was little or no action on these proposals. In fact, the California Medical Association and the California Hospital Association concluded that these systems would be more expensive than the existing tort system based on a study of over 25,000 charts and dropped the whole idea.

Then, in 1987 North Carolina and Virginia adopted no fault programs followed by Florida in 1988. The North Carolina program was restricted to vaccine related injuries which were compensated for out of a fund consisting of state appropriations with a limit of $300,000. Damages only can be awarded under this system to the person receiving the vaccine.

The Virginia Birth-Related Neurological Injury Compensation Act, mentioned at our first Task Force meeting, apparently was adopted to meet a crisis in the availability of insurance for physicians practicing obstetrics (according to Ludlam, it was expected that 25% of the OB/GYN's were going to lose coverage by the end of 1987). The Act applies only to patients of physicians and hospitals that have voluntarily participated in the program by payment of $50 per delivery with a $150,000 maximum by a hospital and a $5,000 fee for a physician doing obstetrics. These payments are voluntary. In addition, all other physicians are assessed a fee of $250 as a condition of licensing. If the fund falls short there is an annual premium tax on all liability carriers in the state. The purpose of the fund is to assure lifetime care of infants with severe neurological injuries sustained during labor, delivery and resuscitation, and to be the sole and exclusive remedy for those who participate. The fund is administered by the Industrial Commission of Virginia with the assistance of an expert panel of three physicians. Compensation is limited to actual and necessary medical and related expenses, loss of earnings from age 18-65 based on a discounted formula and reasonable expenses incurred in connection with filing the claim including attorney's fees.

Following in the footsteps of Virginia, the Florida legislature passed a comprehensive malpractice reform package in 1988. Part of the package was a no-fault state run fund to provide for the care and treatment of babies born with permanent, severe disabilities due to mechanical failure or malpractice. The Fund, administered by the State Worker's Compensation Division, is to be financed by an annual payment of $5,000 per year by each participating physician. The parents may recover the cost of care and rehabilitation and up to $100,000 for non-economic damages. As an aside, the total Florida legislation (114 pages) also included caps for other cases, arbitration options, a new watchdog unit called the Medical Quality Assurance Division, hospital reporting requirements of malpractice cases involving doctors and other provisions designed to provide notice of certain events. It is interesting to note that there are no caps if both parties refuse arbitration.

One final note on alternative systems. Peter Huber ("Liability-The Legal Revolution and its Consequences") calls for a return to contract principles in the form of direct first party insurance.

Other miscellaneous procedures to provide faster and less expensive ways to resolve disputes include: "fast tracks" for certain types of cases; dismissal of inactive cases; penalties for last minute settlements made after the trial is underway; procedures designed to limit filing of motions and pleadings; procedures limiting discovery; and procedures which set firm trial dates.

12. THE RAND THREE LEVEL STUDY AND OTHER REPORTS: "Trends in Tort Litigation- The Story behind the Statistics" by Deborah R. Hensler, Mary E. Vaiana, James S. Kakalik, and Mark A. Peterson attempts to set the record straight on many of the underlying issues that we too are attempting to sort out. They start by reminding of us of how all this began:

"Over the past two years, manufacturers, physicians, consumer advocates and trial attorneys have vigorously debated the costs and benefits of the tort system as a mechanism for compensating and deterring injuries. The debate began with a perceived "insurance crisis". Liability insurance premiums, particularly for medical malpractice and commercial lines, increased sharply and insurance for some kinds of activities became unavailable at any price. While there is broad consensus that obtaining and paying for insurance was a pressing problem, there was little agreement about the cause or its solution. On the one hand, insurers linked rising rates and unavailability to trends in tort litigation, thus focusing attention on the legal system. In many states and at the federal level, insurers, manufacturers, health care professionals and local government officials formed coalitions to support substantive changes in tort law. On the other hand, trial attorneys and consumer groups generally opposed these changes arguing that what needed reform was not the tort law but poor management practices in the insurance industry."

The authors go on to say that not only did these groups hold different positions on these issues they also held sharply different views of reality (and presented contradictory statistical data to support their claims):

"Proponents of change argued that there has been an explosion of liability lawsuits in the past five years, that recent verdicts demonstrate that civil juries are "out of control" and that the monetary benefits delivered by the tort system to injured parties are overshadowed by the enormous costs of administering the system. Tort reform was needed to counteract these trends. Opponents of tort reform argued that the litigation explosion is a myth, that jury awards have been basically stable for 25 years, and that the transactions costs of the system are acceptable, given the systems twin objectives of compensation and deterrence. Tort reform was not only unnecessary - it might be harmful to those whom the system is intended to serve."

In the author's words, "Where does the truth lie?" In an effort to resolve these apparent contradictions and put the issues in perspective for policy makers this report attempts to answer three questions - How much litigation is there? Are jury awards stable? How much does litigation cost, and who gets the money? A summary of their basic conclusions follows:

a) One of the reasons for confusion is that there is not a single tort system. Instead, there are at least three types of tort litigation, each with its own distinct class of litigants, attorneys and legal dynamics. The FIRST is the world of routine personal injury torts, exemplified by auto suits. They occur frequently and usually involve modest injuries and relatively low financial stakes. Settled law and routine procedures lend an air of stability to this world. The SECOND is the world of high-stakes personal injury suits such as product liability, malpractice and business torts. Here the litigation itself is newer, the law is still evolving, and the stakes per case are larger and increasingly uncertain. The THIRD is the world of mass latent injury cases, such as asbestos litigation, Dalkon Shield cases and other suits arising from mass exposure to drugs, chemicals or toxic substances. The lack of "fit" between traditional tort law and the facts of these cases leads many to view them as problematic.

b) How much tort litigation is there? Based on data compiled from the Administrative Office of the U.S. Courts, the National Center for State Courts and the Rand Institute for Civil Justice they have concluded that: accident cases are a steady or declining percentage of court action; non-auto personal injury cases such as malpractice and product liability are growing moderately in state courts and more dramatically in federal courts; and mass latent injury cases have the potential for explosive growth as new evidence of harms is developed.

c) Are jury awards stable or out of control? Based primarily on data complied by Rand from Cook County, Illinois and San Francisco, California between 1960 and 1984 (only data available in the U.S that can be used to discuss long term trends) they have concluded that: Plaintiffs in auto cases involving modest injuries and expense continue to obtain modest awards and, at least in recent years, these awards generally hold after trial; Plaintiffs in product liability and malpractice cases are winning more frequently and obtaining higher awards; Deep pocket defendants in product liability cases ultimately pay much, if not all the awards against them, even after post-trial adjustments; Jury behavior seems more unpredictable, but this may simply be because we do not have a very good sense of why juries make the decisions they do. The authors suggest that these trends may hold nationwide because of the similarities between the jurisdictions studied.

d) Litigation costs - How much, to whom? Based on Rand studies of litigation costs the authors state: "Our snapshot of litigation shows that the costs of litigation consumed about half of the $29 to $36 billion dollars that were spent on litigation. When we disaggregate these costs, we see that in more complex cases (non-auto torts) the costs of litigation were higher. In the case of asbestos claims, the only mass latent injury cases for which these data have been assembled, litigation costs constituted almost two-thirds of the total per-claim expenditure." Their specific breakdown in percentage of totals: Auto - 19% in Defendant legal fees and expenses, 26% in Plaintiff legal fees and expenses and 52% to Plaintiff; Non-auto- 30%, 24% and 43% respectively; Asbestos- 37%, 26% and 37%. See also pie charts contained on pages 27 and 28 of the report and the Tillinghast cost breakdown contained in Miscellaneous on page 15.

e) What is the story behind the statistics? Here is the authors' summary of their findings: Routine personal injury torts such as auto cases are growing slowly in frequency and costs, and their outcomes-inflation adjusted- have not changed much over the last 25 years; Higher stakes torts such as malpractice and product liability are growing faster in frequency and costs, and their outcomes have increased dramatically over the past 25 years in the jurisdictions observed intensively, and substantially in the shorter five year period for which they had national data; Mass latent injury torts, once identified, tend to explode in number, carry high transaction costs and have highly uncertain outcomes.

Unfortunately, this report does not resolve the nagging underlying question of why have we had significant affordability and availability problems that have lead to considerable debate of these issues. Is it indus /practice, increased claims loss experiences, or both? I have found no study or analysis which settles this question in my mind.

Please note that a recent study by two Cornell Law School professors recently reported in the New York Times indicates that since the mid-1980's published opinions have moved toward benefitting defendants over plaintiffs suggesting a possible shift in overall trends.

The Medical Malpractice Liability Study by the Public Health Resource Group, Inc. for the Maine Legislature submitted in June 1989 is also worth noting in some detail. Here are their general findings:

a) Premium rates for Maine Physicians have been rising to "record proportions" over the last ten years.

b) Frequency, severity and losses as a percentage of income do not indicate that the liability insurance problem in Maine is out of control. It does suggest that more efficient methods of estimating reserves, reinsuring and obtaining legal services could reduce the price of premiums for policy holders while continuing to provide high quality coverage. These are areas where policy changes could achieve savings to the insurance industry and ultimately the rate payers.

c) Maine is experiencing a steady decline in physicians who provide obstetrical services; although the decline appears limited primarily to urban areas. The principal reasons reported by physicians for this decline are the price of medical malpractice insurance and fear of a malpractice suit.

d) It is not clear whether tort reforms actually have succeeded in reducing the price of insurance or the frequency or severity of claims, or whether they will succeed in reducing or stabilizing premiums or claims in the future; although it is far easier to estimate the effect of certain reforms on the frequency and severity of claims than on the price of insurance or the willingness of physicians to practice high risk specialties. For example, caps on awards have potential to reduce the dollar amount of high stakes claims and limits on attorneys fees may increase compensation to plaintiffs (while also leaving some victims with smaller claims without representation, they add). Nor is it known if these parameters would have increased more than they have in the absence of reforms. Moreover, many state reform statutes have not been in operation long enough to have a clearly measurable effect. For these and other reasons, new tort reforms at this time are questionable policy options to reduce insurance premiums and to insure medical care availability. Ongoing studies to be completed within the next two years may provide a clearer picture. If reforms are contemplated, the legislature might consider designing them to expire after a certain period of time if availability and affordability of insurance and medical services does not improve by some measure acceptable to policymakers.

e) Alternative systems are appealing because they may help reduce inefficiencies and costs of the current tort system. Unfortunately, no state has implemented an exclusive alternative and it will be years before any evidence is available on the impact of such approaches. Please note the report indicates that the Vermont Legislature is considering the AMA fault based administrative system discussed briefly above.

f) A principal goal of the government in a regulated industry like insurance is to get insurers to manage their business as efficiently as possible and provide a quality product to consumers at a reasonable price and at a fair return on investment. Accordingly, the Insurance Regulator should be directed to promulgate an investment income model and require insurers to demonstrate an effective cost control program. The report also suggests that the State could authorize insurance regulators to spread rate changes over three years and implement a merit rate system and/or system of deductibles which would have the effect of spreading the risk of claims payments and resulting rate increases to those policy holders responsible.

g) To keep professionals on their toes, the state could require investigations by the medical board of physicians who have three or more claims over a ten-year period which resulted in a payment; create an ombudsman within the board to defuse potential complaints before they are elevated to a claim; and require the board to collect additional information on the voluntary or involuntary loss of hospital privileges in or outside the state. They also suggest that the Legislature take a look at "care standards" that have been proposed by a variety of entities.

h) They conclude: "There are many approaches to controlling the rising and unstable malpractice liability premiums in Maine and their effect on access to care. These include changes in the tort system, the insurance regulatory system and the medical care delivery system. To target one while ignoring the other will create disequilibrium and lead to policies likely to fall far short of the mark. Each has some merit and some drawbacks. Each needs to be addressed with a realistic understanding of what will be gained and what will be lost. It was no surprise to many experts that the St. Paul Companies decided to lower their premiums due in part to a reduction in expected reserve demand for outstanding claims. Considering past history, however, the medical malpractice issue is likely to revisit Maine in a very few years. The severity of the problem will depend on how comprehensive an approach the Legislature takes now."

13. IMPACTS OF U.S TORT SYSTEM CHANGES: (Frequency, Severity and Rates - this section does not attempt to discuss impacts of tort reform on victim rights and related issues, but see

pros and cons discussions contained in your first information packet along with the James Ludlam article discussed above): While tort reform measures do appear to affect the frequency and severity of claims there is no solid proof to date that they also have a direct effect on the cost or availability of insurance.

Patricia Danzon of the University of Pennsylvania in a series of Rand articles (including in particular "Frequency and Severity of Malpractice Claims-New Evidence"- 1986) appears to have produced the most credible contemporary analysis of the relationship between certain tort reform provisions and the frequency and severity of medical malpractice claims. Although her study is restricted to medical malpractice claims her conclusions are worth examining in some detail:

a) Malpractice claim severity has risen roughly twice as fast as the Consumer Price Index. Nevertheless, the tort reforms enacted since the mid-1970's malpractice "crisis" affected the frequency and severity of malpractice claims over the decade from 1975-1984 in a manner broadly consistent with economic theory and previous evidence. Although claim frequency and severity have continued to rise despite reforms this trend does not indicate that the tort changes have had no effect.

b) For example, states that enacted shorter statutes of limitations and set outer limits on discovery rules have had less growth in claim frequency than states with statutes more lenient to plaintiffs. On the average, cutting one year off the statute of limitations for adults reduces claim frequency by eight percent. The effect would presumably be greater for a reduction from, say, four to three years than from ten to nine years.

c) Statutes permitting or mandating the offset of collateral benefits have apparently reduced malpractice claim severity by eleven to eighteen percent and claim frequency by fourteen percent relative to comparable states without collateral source offset. One of the reasons for this is that collateral source offsets often reduce the potential for recovery for a large number of claims, thereby reducing incentives to file.

d) Caps on awards have reduced severity by twenty-three percent. This percentage represents the average impact of the various forms of cap, over the period of 1975 and 1984, during which time some statutes were still under challenge. If the dollar thresholds are not revised periodically to keep pace with inflation, the future effect will presumably be greater, unless juries find ways of implicitly circumventing the limits by increasing allowances for uncapped components of the award.

e) Arbitration statutes apparently increased claim frequency, but reduced overall average severity. Disaggregated data would be necessary to determine whether the reduction in observed average severity results from a reduction in awards per case or simply reflects the filing of more small claims. The net effect appears to be an increase in total claim costs, but compensation of more claimants.

f) None of the other reforms analyzed, including screening panels and limits on contingency fees, appears to have had any systematic impact on claim frequency or severity.

g) Urban areas have a particularly high frequency of non-meritorious claims (those closed without payment) and claims filed more than two years after the alleged injury. Per capita income, the unemployment rate, and the number of attorneys per capita have no statistically significant effects. The surgery rate in a state increases claim frequency, and the ratio of surgeons to medical specialists increases claims severity.

h) On average, severity of malpractice claims has increased at almost twice the rate of inflation of consumer prices over the last decade.

i) The above analysis on claim frequency and severity should not automatically be translated into an effect on premiums (a subject beyond the scope of this paper) for several reasons: First, the net potential impact on premiums also depends on litigation expenses and changes in the timing of disbursement of loss reserves, and hence investment income. Second, reforms that reduce the uncertainty in estimating malpractice claims costs- namely caps on awards, periodic payment of amounts for future damages and shorter statutes of limitation/repose- may be expected to reduce premiums by a modest amount over and above the reduction in mean expected losses. This result can be expected because of the reduction in the insurer's risk. Perhaps more importantly, she adds, by reducing uncertainty, such reforms should reduce the volatility in price and availability of malpractice insurance, which is a major inefficiency of the present malpractice system.

Please note that Danzon's claim severity conclusions are more or less confirmed by actuaries Milliman and Roberston, Inc. in their August 5, 1988 letter to MICA.

While this potential positive impact on insurance costs is theoretically possible and there is evidence that the experience in California (which has had time to test the theory) and perhaps other states bears this out (the informal opinion of Ray Bacon of the California Department of Insurance and Ron Neupauer of MIEC who feels strongly that California tort reform measures have had a significant impact on rates which currently are increasing less than inflation; although he agrees that other factors also come into play), as well as evidence to the contrary, I have found no study that definitively concludes this has been the case. And I suspect no such study exists. See "Insuring Our Future: Report of the Governor's Advisory Commission on Liability Insurance," New York, 1986- "no research currently available quantifies the linkage or even irrefutably establishes that such a linkage exists." In fact, according to Franklin Nutter, president of the Alliance of American Insurers (quoted in the attached article from Public Citizen, "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." Similarly, the Frank Sloan article entitled "State Responses to the Malpractice Insurance 'Crisis' of the 1970's: an Empirical Assessment" states: "The empirical results of the study presented here give no indication that individual state legislative actions, or actions taken collectively, had their intended effects on premiums." One last comment. When evaluating the significance of the California experience, it is useful to keep in mind that 90% of the insurance is provided by doctor owned companies which have a significant incentive to keep rates down.

Perhaps the most recent and detailed analysis of this issue in the context of medical liability and obstetrical care is contained in the 1989 report of the National Academy of Science Institute of Medicine's Committee to Study Medical Professional Liability and the Delivery of Obstetrical Care which has just been brought to my attention by a Task Force Member. While I have not had time to review this report in any detail, I have summarized their conclusions on the question of "tort reform". According to the study's Preface, the Institute of Medicine appointed a "distinguished interdisciplinary committee" (see attached list of participants) to evaluate the data relating to the effects of medical professional liability issues on access and delivery of obstetrical care. The preface continues that this study was a response to an inquiry of the American Academy of Pediatrics along with several other groups who believed that more attention to professional liability issues was "urgently" required. Here are there general findings on the basic question of legislative solutions to the problem:

a) Every state but West Virginia has enacted legislation modifying common-law tort doctrine that is intended to relieve the medical liability crisis; many are discussing additional reforms.

b) After evaluating these reforms (and reviewing the Danzon analyses, a 1987 Report of the General Accounting Office and others) the committee concluded that only a modest reduction in medical malpractice claim frequency and size of awards has been achieved. The committee also concluded that "the many deleterious side effects of the tort system for resolving obstetrical claims - resulting in distortions of health care delivery patterns - have not been reduced by those tort reforms." (See Attachment to follow, Volume I page 127).

c) The committee believes that the problems created by the medical professional liability issues in obstetrics represent a serious threat to the delivery of obstetrical care in this nation. However, although some of the tort reforms already in place have merit, they do not appear sufficient to stem the exodus of obstetrical providers from the profession or to solve the attendant problems caused by the current professional liability climate in obstetrics.

d) On the basis of its findings - that the costs of the current system in terms of impaired obstetrical care are great, that tort reforms are so far largely ineffective, and that data evaluating the merits of proposed alternatives to the tort system are lacking- the committee concludes that state legislatures should not focus on further reform efforts within the existing tort system but should instead redirect their energies toward developing alternatives to the traditional tort system for resolving medical malpractice claims and toward implementing these alternatives in certain circumstances.

e) The committee recommends that states consider three proposals for additional research and implementation on a limited basis: the no-fault designated compensable events scheme (including those variants enacted in Virginia and Florida discussed above), the AMA-Specialty Society's fault based administrative system, and legislation authorizing the use of contractually determined legal relationships governing medical professional liability between providers and patients. The committee also recommends that the Federal Government provide grant funds to finance studies of proposed legislation and to begin pilot projects for limited implementation of various solutions.

Despite these findings, keep in mind that some commentators still feel that it may be too soon to draw any definite conclusions about the impacts of tort reform measures. According to Brenda Trolin of the NCSL a minimum of five years is needed before cases processed under previous systems clear the courts. Several additional years must pass before a sufficient number of cases have been processed through systems to determine whether changes have had the desired consequences.

And Patricia Young formerly of the Legislative Research Agency reminds us : "Because of the variations in state constitutions and laws regarding tort reform, identical reform measures may have dissimilar impacts in each state. Thus, even those reform measures which appear promising require careful consideration in the context of an individual states circumstances to determine potential ramifications. Opponents frequently argue that constitutional rights-including equal protection, access to courts, and trial by jury- are violated be certain reform measures. Also, reform measures can encourage or discourage lawsuits. Although some measures may facilitate and expedite resolution, they may also encourage claims which would not otherwise be made."

One of the keys to better understanding of this issue is more and better information. Most agree that this general lack of statistical data is a problem. According to Stephan Carroll ("Assessing the Effects of Tort Reforms, 1987 at viii): "The kinds of data needed to assess the effects of reform are generally not now available... Three types of new data collection systems need to be considered: 1) systematic efforts to obtain data from insurers and self-insured defendants on the aggregate outcomes of liability claims; 2) special surveys of claimants, the bar, and insurers to obtain the detailed individual claim information needed to identify reform's winners and losers; and 3) systems for collecting information both on the other factors that impinge on the behavior of participants in the tort system, and therefore have to controlled for, and on economic outcomes and injuries".

14. ROBERT HUNTER ("CHANGES IN INSURANCE SERVICES; HOW THE PUBLIC IN TREATED"): Given limits of time and space I will only summarize in "bullet" form Hunter's many recommendations contained in the publication called "How to Tame the Insurance Industry Cycle and Make the Legal System More Efficient- A Suggested Legislative Agenda for 1987" by Robert Hunter and Jay Angoff. Hunter's central premise is that limiting the ability of severely injured people to sue and be compensated for their injuries does not bring down insurance rates (see above for additional discussion of this issue). He proposes many reforms including: Requiring disclosure by insurance companies of data on actual income and payouts on different types of insurance; permit group insurance/risk-retention group programs; allow banks to write liability insurance; establish joint underwriting associations which provide insurance to those who can't get insurance in the voluntary market; establish state reinsurance programs which would authorize self-insureds to pay the state a premium in return for which the state would agree to pay all claims above a certain specified amount; establish state run insurance companies; establish

interstate compacts for interstate reinsurance programs; prohibit arbitrary cancellations of policies; require experience rating where good risks pay less than those who are bad risks; to allow the market to work competitively despite the McCarren-Ferguson Act, establish flex-rating which would allow insurance companies to raise or reduce rates without insurance commissioner approval within a "zone of reasonableness"; beef up enforcement by properly funding and staffing state insurance agencies; close the "revolving door" by discouraging or limiting the practice of hiring industry people to regulate the industry; establish an office of Insurance Consumer Advocate which would represent the consumer point of view at rate hearings and ensure that the insurance regulators do not rubber stamp insurance company rate requests; prohibit the pass through of lobbying expenses; require risk management by insurance purchasers and self-insureds which should reduce the frequency and severity of claims; allocate medical malpractice insurance costs more equitably. For example, doctors in high risk specialities pay for the risks that should be shared by others, doctors are broken down by insurance companies into to many categories with too few doctors in some categories, doctors pay for malpractice that could be more easily be borne by hospitals, and doctors are not experienced rated; insurance companies should disclose names of doctors involved in claims and the amount of those claims. This information should be made available to various organizations and the public in general; limit lawyers fees on both sides. Hunter focuses on defense costs and contends that defense legal fees have doubled in ten years. States could limit defense fees by disapproving any rate that included within it more than a certain percentage (he suggests 25%) for defense costs which would force the insurer to keep an eye on fees insuring that a greater percentage of the money flowing through the system would end up in the hands of the injured person; penalize frivolous actions on both sides including frivolous motions and objections by defendants lawyers who charge by the hour; to encourage accountability to the public, prohibit secrecy agreements which prevent disclosure of the details of a settlement and other information about the case; encourage offensive collateral estoppel which prevents re-litigation of certain facts (i.e. once a fact is established it can be used in future cases); pass back collateral source benefits by requiring the defendant to pay the full amount of a verdict but excuse the source of collateral benefits from paying such benefits to the extent they are already included in the jury verdict and then require the source of the collateral benefits to reduce the cost of those benefits across the board based on these savings; create incentives to settle including penalizing defendants for refusing to make reasonable offers to settle, and penalizing plaintiffs for making unreasonable demands; and last but not least, establish alternatives to the tort system including no-fault systems (particularly for relatively minor injuries), arbitration, mediation, mini-trials, and other dispute resolutions systems. However, Hunter is careful to point out that cases involving defective products should be subject to common law principles without any limits on either compensatory or punitive damages: "The stories of A.H Robins and the Dalkon Shield, Ford and the Pinto gas tank, Richardson-Merrell and MER-29, and Johns-Manville and asbestos are just a few of the scandals unearthed as a result of tort litigation. And it was only the fear of more litigation, and of large awards for both compensatory and punitive damages, which finally forces these and other dangerous products off the market and encourages the development of less dangerous substitutes."

15. CHANGES IN TIME IN THE LAW OF LIABILITY AND DAMAGES: "Liability, Perspectives and Policy" edited by Robert E. Litan and Clifford Winston of the Brookings Institution in Washington, D.C. (1988) provides insight not only into the question of how tort law has evolved over the last thirty years but also presents an excellent overview and summary of the many issues we have attempted to review in this memorandum and related attachments. Here are the key findings:

a) Tort law is largely based not on statutes but on common law, a body of legal principles developed case by case by judges, primarily those in state courts. It is difficult to generalize about the status of tort law in all jurisdictions but certain important changes in doctrines have occurred in the past several decades, all of which have expanded the system's function in spreading losses:

* Whether by applying the negligence test in a flexible fashion or by imposing liability on parties whose behavior is causally related to accidents but who are not necessarily negligent (so-called strict liability) the courts have increased manufacturer's liability for defective products. Certain courts have held that a product can be defective even if it conforms to prevailing regulatory standards and if the manufacturer had no knowledge at the time of design or production that it would entail the risks later attributed to it in litigation.

* The negligence standard itself has been expanded through litigation to impose liability on a wide class of service providers not previously accustomed to being sued. Day care centers, ski lift, ice rink, and amusement park operators, taverns and restaurants, and not-for-profit organizations have all been taken to court for failures to warn of certain dangers and for the careless conduct of their employees. The exposure of these defendants to liability claims has been widened by the doctrine of joint and several liability, which allows prevailing plaintiffs to recover up to the full

amount of a total damage award from any single defendant if the other defendants are unable to pay, and by the collateral source rule, which prohibited juries from reducing damages by subtracting insurance monies or other compensation plaintiffs receive from other sources.

* The concept of contributory negligence has been relaxed in many states so that negligent plaintiffs are no longer totally barred from recovery. Instead, they find their damages reduced by the proportion by which their negligence contributed to their injury. In addition, beginning with the Federal Tort Claims Act of 1946, which waived the federal government's sovereign immunity, courts have made state and local governments liable for tort suits.

* Courts have relaxed the standards the plaintiffs must satisfy in proving, under either the negligence or strict liability doctrine, that defendants have caused their injuries. This trend has been manifested primarily in product liability and so-called toxic tort cases, which have frequently required courts to decide whether plaintiffs' injuries have been caused by their exposure, often over long periods of their lives, to substances recently discovered to be associated with the development of cancer or other serious diseases. Courts have adopted a long range of rules to determine causation in such cases. Some have placed liability on the first or last source to which plaintiffs can establish they were exposed; others have made all manufacturers of the substance jointly and severally liable. In one noted case involving the exposure of Vietnam veterans to the chemical Agent Orange, a federal court actively encouraged a $180 million settlement even though no hard scientific evidence had been uncovered that linked the chemical to the medical infirmities claimed by the plaintiffs.

* Finally, courts in certain jurisdictions have liberally interpreted statutes of limitation, which bar plaintiffs from recovering if they wait too long after suffering injury to file suit. In many toxic tort, product liability and medical malpractice cases it is difficult to determine when injury actually occurs. It could develop decades later when the symptoms of disease become observable. Although jurisdictions differ widely on this issue, the trend has been for courts not to invoke the statute of limitations to bar suits involving long-latent injuries.

These observations appear to be more or less consistent with the more detailed and critical analysis of these trends contained in Peter Huber's book "Liability, the Legal Revolution and Its Consequences" (1988).

b) The calls for reforming the civil justice system are less urgent now (1988) than they were in "recent months". As in previous insurance cycles, increases in premiums have moderated. In some instances, coverage that was withdrawn has reappeared. In 1986 the property and casualty industry earned 11.6 percent on its equity, a return lower than the manufacturing sector average of 13 percent during the past decade but still considerably better than the disappointing performance of the previous two years.

c) The issues raised by the most recent crisis will not disappear. If nothing else, the dramatic increases in premiums and curtailments of coverage have called greater attention to the nation's civil justice system - whether it is working satisfactorily, and if not why - then at any point in recent memory. Moreover, interest in these issues will intensify if and when the underwriting cycle reverses course and turns against the industry once again. Chances are that it will in five to ten years.

d) Injuries pose three different and potentially conflicting challenges for all societies. One is to efficiently deter behavior that cause injuries. A second and related objective is to exact retribution against those responsible (the criminal law is a key component of this function). The third challenge is to compensate victims for their injuries. Compensation may be supplied by the government or the private sector (through insurance), and may or may not be linked to specific injuries or types of accidents. Tort law- rules allowing accident victims to seek compensation through the judicial system from the parties responsible - can be considered a mechanism for meeting all three of these challenges.

e) Of the millions of insurance claims filed each year, typically only 2% are resolved through litigation. Of cases brought to court, less than 5% are tried to verdict; the rest are settled.

f) The amounts actually received by successful plaintiffs are often much smaller than those originally awarded by juries due to trial judge and appellate overrides and/or the inability of some defendants to satisfy the judgement. In one study of 198 tort verdicts between 1984 and 1985 that resulted in awards of 1 million or more the final distributions to plaintiffs were on average 30% less than the original award. Successful plaintiffs received the jury award in only 51 cases.

g) As Rand noted, average awards in tort cases in San Francisco and Cook County increased sharply, considerably faster that growth in real GNP and real prices of medical services.

h) Awards in medical malpractice cases and products liability cases were significantly higher and increased at a faster pace than those for personal injury cases generally.

i) Much of the Cook County and San Francisco increases are due to "explosive growth" in jury awards of $1 million or more (Cook County-Two verdicts between 1960 to 1964 accounting for 4% of all personal injury awards; 67 verdicts between 1980 to 1984 accounting for 35% of awards; San Francisco- only 3.3 % of all personal injury case produced $1 million plus awards which accounted for half of the total amounts awarded).

j) From the liability insurers point of view these statistics cause problems - Insurers can only remain profitable if they set their premiums to cover total expected claim costs, and large dollar claims increase uncertainty about the range of possible losses.

k) The greater frequency of large dollar awards can be partly explained by increases in non-economic damages - pain and suffering - as well as increases in punitive awards in certain cases. One commentator (George Priest, see page 10) finds that non-economic damages generally account for 30% to 40% of all tort damage awards and for even higher proportions of very large awards. Patricia Danzon draws similar conclusions according to Litan/Winston.

l) There are gaps in existing compensation programs and devices. For example, more than 30 million people in this country remain uninsured for medical purposes at any given time, and perhaps more than 20 million are uninsured throughout a given calendar year. In addition, many of those with insurance have limited coverage, especially for the catastrophic medical expenses often associated with major tort litigation. Gaps also exist in programs designed to compensate for income losses, although such coverage (provided through public and private disability programs) probably has increased over time. There is little evidence that expanded tort liability has efficiently filled in the gaps left by the public and private network of compensation plans. In fact, it may be undermining the compensation objective by inducing private insurers to withdraw coverage and raise premiums at the expense of low income consumers.

m) While they have broadened the availability of compensation, more liberal liability doctrines and larger damage awards and settlements may have overdeterred, forcing socially worthwhile products, services and activities to be curtailed, withdrawn from the market or eliminated. (A classic example of this phenomenon is the loss of physicians willing to perform obstetrics, as discussed in this memorandum under "Availability of Services" above and in the Danzon article contained in chapter 4 of this book. Similar effects are observed by Peter Huber in chapter 5 regarding hazardous waste facilities.)

n) Delivering compensation through the tort system is very expensive. According to Rand, the United States spent between $29 million and $36 million in 1985. Of that amount less than half the total ($14 billion to $16 billion) was paid to plaintiffs as damage awards; the rest went to lawyers and court administrators. Researchers at New York University, using a variety of methodologies, have arrived at similar estimates for administrative costs.

o) Because these costs are so high, interest has grown in supplementing or replacing the tort system with alternative means of compensation similar to the worker's compensation system. Most suggestions would place some sort of cap on total compensation - especially for pain and suffering - in return for automatic eligibility. More ambitious proposals envision separate funds, financed by taxes on employees or employers or both, to pay compensation awarded to victims of medical malpractice or exposure to toxic substances. But the limited experience with alternative compensation programs in the United States has not been encouraging. The federal black lung program, was established in 1969 to provide temporary compensation for an estimated 100,000 miners with pneumoconiosis. But due to broadened eligibility provisions by Congress, 542,000 miners, spouses and dependents have received benefits under the program by the end of 1981. Because of this experience, future proposals to establish compensation programs are unlikely to be given serious consideration by Congress or state legislatures unless they are accompanied by convincing demonstrations that their costs can be contained. The New Zealand experience, which does not cover disease or sickness, has not been evaluated comprehensively; and is of probable limited value in the United States which is larger and has a more heterogeneous population. In short, we simply do not know whether society would be better off if the process of identifying risks and hazards were further centralized by replacing the tort system with more intensive regulation.

p) Nevertheless, the most effective way of avoiding much of the transaction cost would be to provide ways of compensating injured parties that do not require the high fact-finding expenses characteristic of tort litigation. This suggests a tradeoff: relaxed standards for eligibility but limits on compensation, especially for non-economic damages. The Product Liability Reform Act of 1986 (S. 2760) offers the tradeoff within the tort system itself by giving plaintiffs incentives to accept manufacturers settlement offers that limited non-economic damages components. This approach could be generalized to all types of tort cases; although it is not clear whether an expedited settlement process would result in net savings.

q) Stiffer regulation of liability insurance rates or policies will not solve the liability crisis and conceivably could be counterproductive. Tighter regulations by some states will only induce some carriers in those states to reduce coverage they offer or even withdraw entirely. The only way in which regulation of the property-casualty industry might be significantly improved is to strengthen solvency regulation by state insurance agencies. At the Federal level, it is unclear whether repeal of the McCarran-Ferguson Act would have a significant impact on insurers.

r) Virtually all tort reform measures would reduce compensation available through the system. In fact, there is evidence, at least for medical malpractice cases, that tort reforms have already reduced the frequency of claims and the growth rate of insurance premiums (he cites the 1987 update of the Tort Policy Working Group under the Reagen Administration contained in your first packet). But deterring injury is also an objective of tort law, and reducing compensation could weaken deterrence. The problem facing policymakers is that relatively little empirical information is available to indicate how tort compensation could be modified without compromising deterrence.

s) Judges should encourage juries to evaluate the costs and benefits of the behavior of both plaintiffs and defendants in tort cases in deciding which parties should bear the loss from the accident at issue.

t) The search for cost effective reforms should focus on modifications of the tort system to reduce uncertainty and eliminate inappropriate levels of compensation while retaining a fault-based rule of liability (which while costly and inefficient is probably less expensive than no-fault systems). Accordingly, there is a strong case for limiting non-economic damages in tort cases (as well as for more restrictive statutes of limitation, periodic payment of future damages and revised collateral source mechanisms that give private and public insurers rights of subrogation against the tort award, according to Danzon) but only in a way that takes into account the age of the injured party and the severity of the injury. By reducing non-diversifiable risk, such changes would also reduce the volatility of insurance premiums.

u) Finally, while some may be disappointed by the failure of Congress to enact comprehensive tort reform legislation, the experiments now being conducted by the states may prove more useful in the long run. Given the uncertainties about economic effects of different legal rules, we may one day be grateful that reform proceeded in the relatively uncoordinated fashion that it has in recent years. Today we simply know too little to be confident that any major overhaul of the U.S. tort system would produce more benefit than harm.

Alaskans For Liability Reform

TO: All Board Members
Associations, Labor Groups
Community Leaders

FROM: Dick Cattanach
Alaskans for Liability Reform

Enclosed is a complete analysis of medical malpractice lawsuits within the state of Alaska.

The data was extracted from a report by Maureen Weeks to Representative Mark Boyer on 3/17/1992.

What effect does this have on our Court System and our Health Care System?

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

57% BETWEEN MEDICAL AND 88% OF CIVIL MALPRACTICE, CIVIL LIABILITY LAWSUITS AND CLAIMS ARE WITHOUT MERIT

Alaskans For Liability Reform

An analysis of frivolous civil liability lawsuits and claims against hospitals and physicians in Alaska from 1977 through 1989*

*Information for this report is based on a March, 1992 report by the Legislative Research Agency and presented to Representative Mark Boyer per his research request # 91.222. "State Approaches to Medical Malpractice."

OVERVIEW

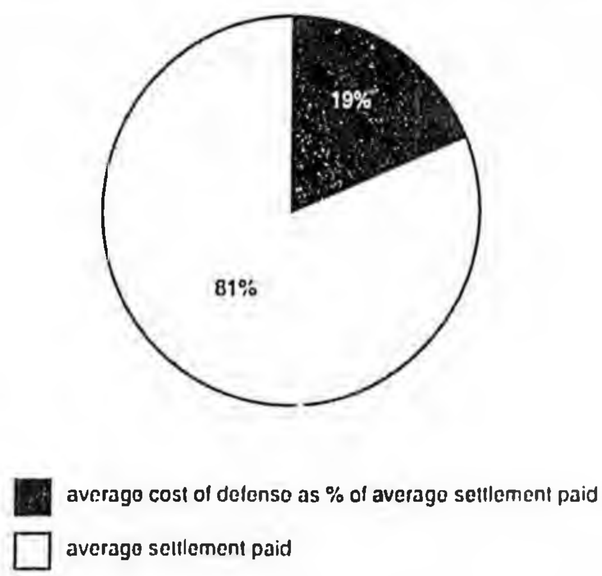
Civil justice in Alaska has generally been developed by the courts on a case-by-case basis. This has resulted in an chaotic system of rules that are often ambiguous and contradictory. The result is high malpractice and liability insurance premiums, lawsuits filed decades after construction or delivery of services, and exorbitantly high costs of litigation to the parties involved and to the taxpayers who pay for our civil justice system.

As the information in these pages shows, a high percentage of the claims and lawsuits filed against Medical Indemnity Corporation of Alaska (**MICA**, a primary medical malpractice insurer created by the Alaska Legislature) and Medical Indemnity Exchange of California (**MIEC**) are settled without payment. This suggests that many claims are frivolous, weak or unfounded. And yet the cost of litigating this avalanche of poorly-supported liability claims takes its toll on the parties involved as well as our civil justice system.

During the period 1977 - 1989, the average cost to defend a MICA lawsuit that resulted in payment equalled 19 percent of the amount eventually paid. Meanwhile, 57 percent of the MICA lawsuits settled without any payment. And 61 percent of the MICA claims that never reached a lawsuit settled without payment. During the period 1980 - 1989, some 88 percent of the closed MIEC claims settled without payment.

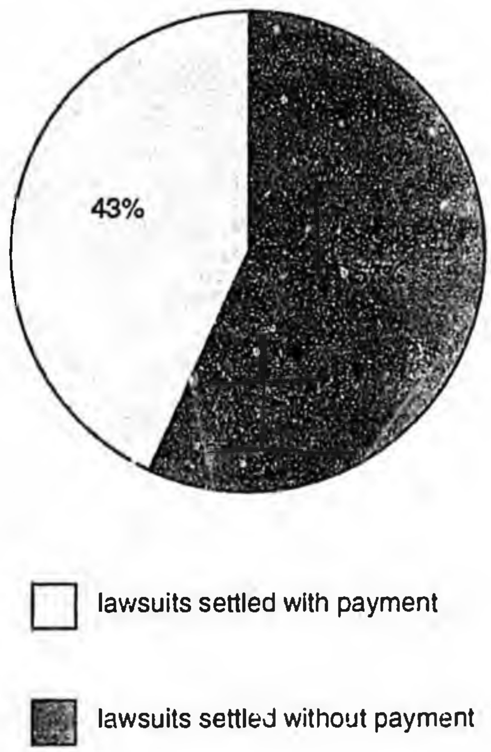
Alaskans for Liability Reform support amending the Alaska Rules of Civil Procedure and the Alaska Civil Liabilities Act to ensure all parties in a law suit are treated fairly, suits are brought and concluded within a reasonable time period, and awards made by the courts are reasonable and fair.

1977 - 1989, the cost of defending a MICA lawsuit averaged 19% of the amount of the settlement paid

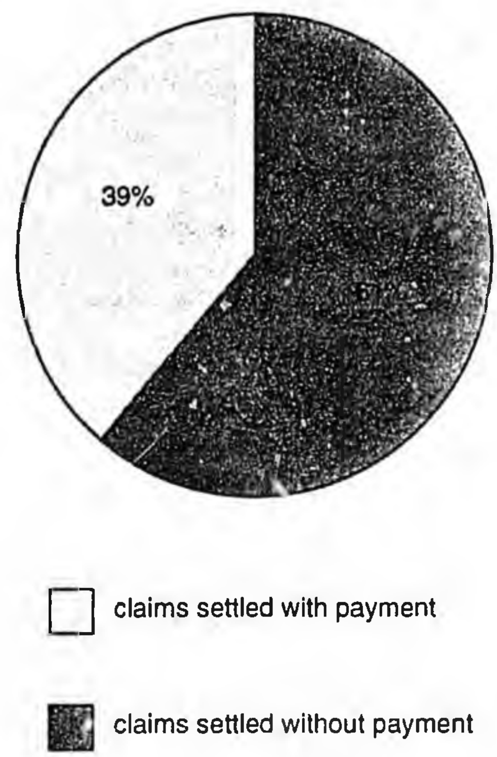


OVERVIEW

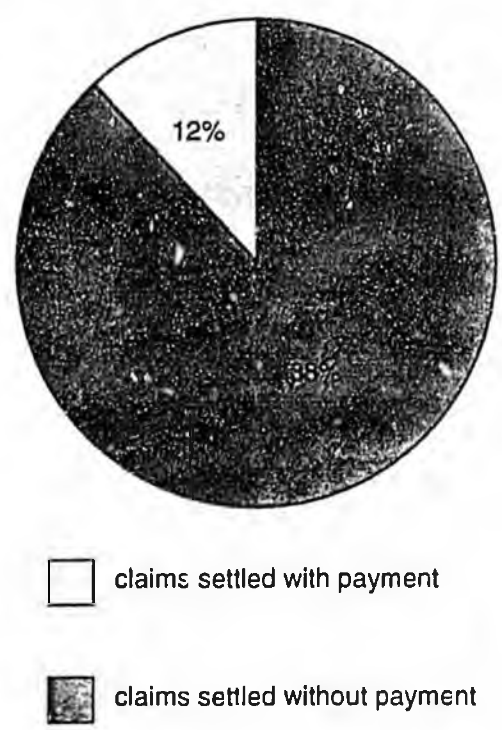
From 1977 - 1989, of the 174 MICA lawsuits, 57% settled without payment



From 1977 - 1989, of the 119 MICA claims, 61% settled without payment

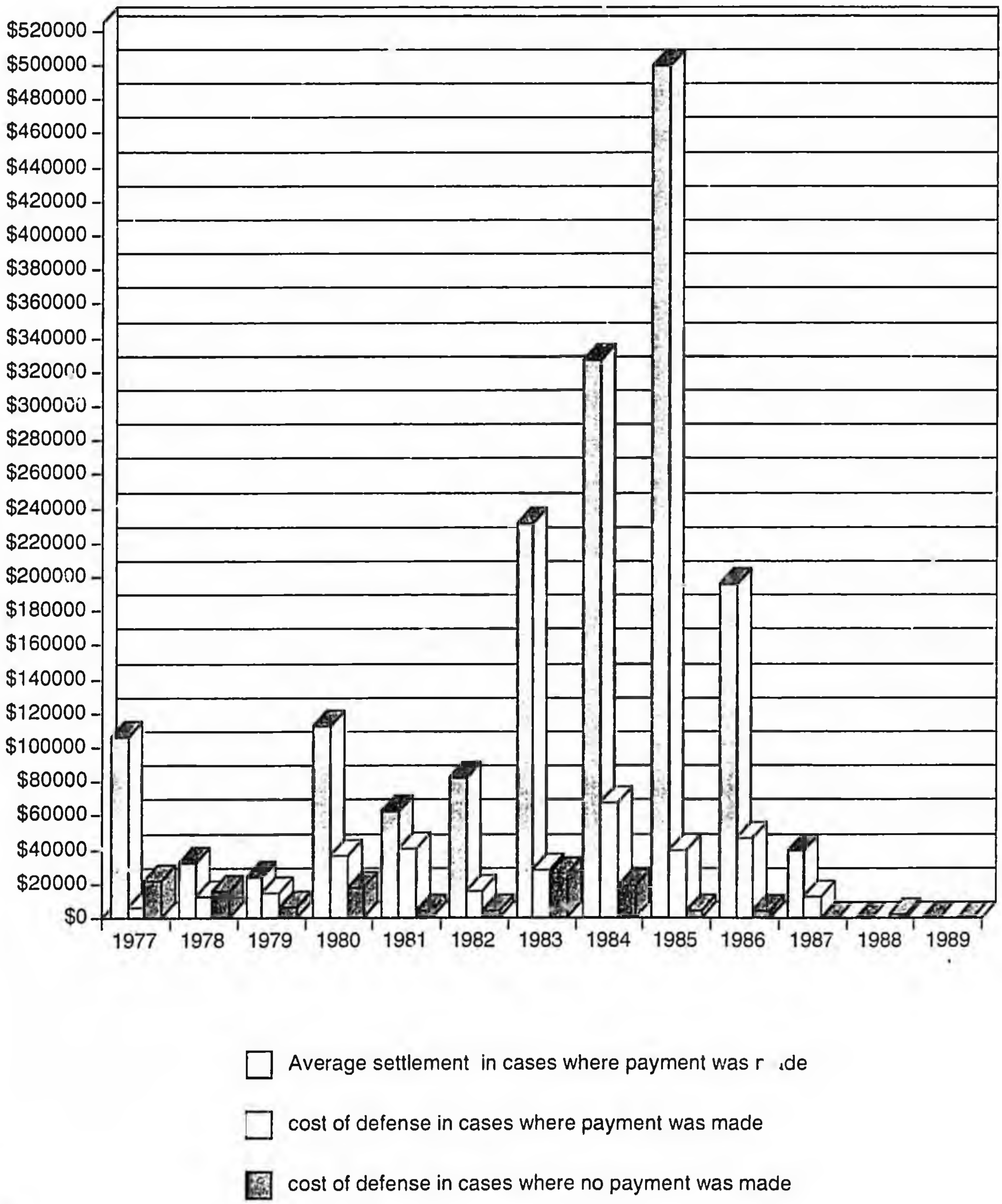


From 1980 - 1989, of the 181 closed MIEC claims, 88% settled without payment

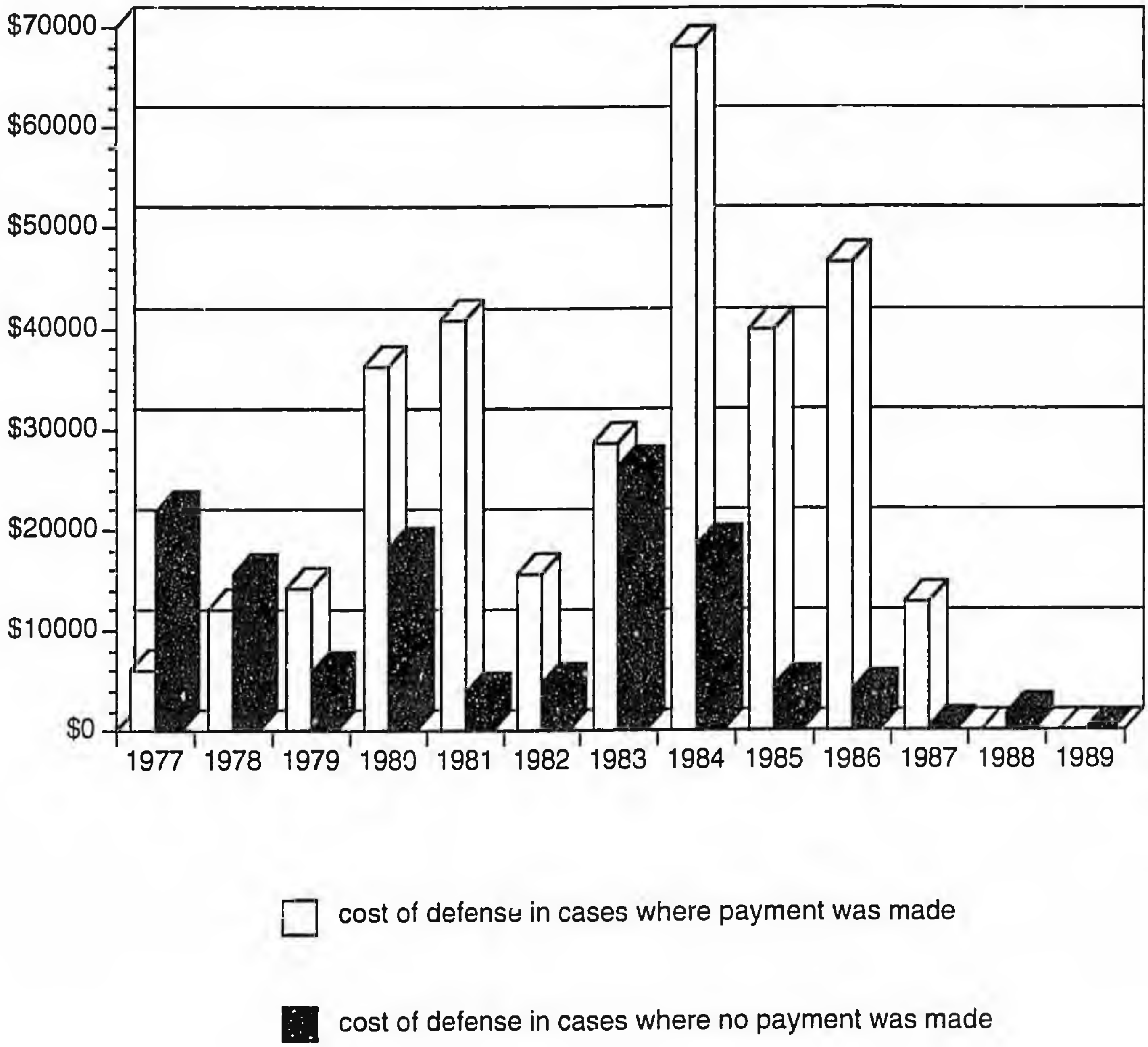


1977-89 SUMMARY, MICA LAWSUITS

Average cost of defense compared to settlement payment

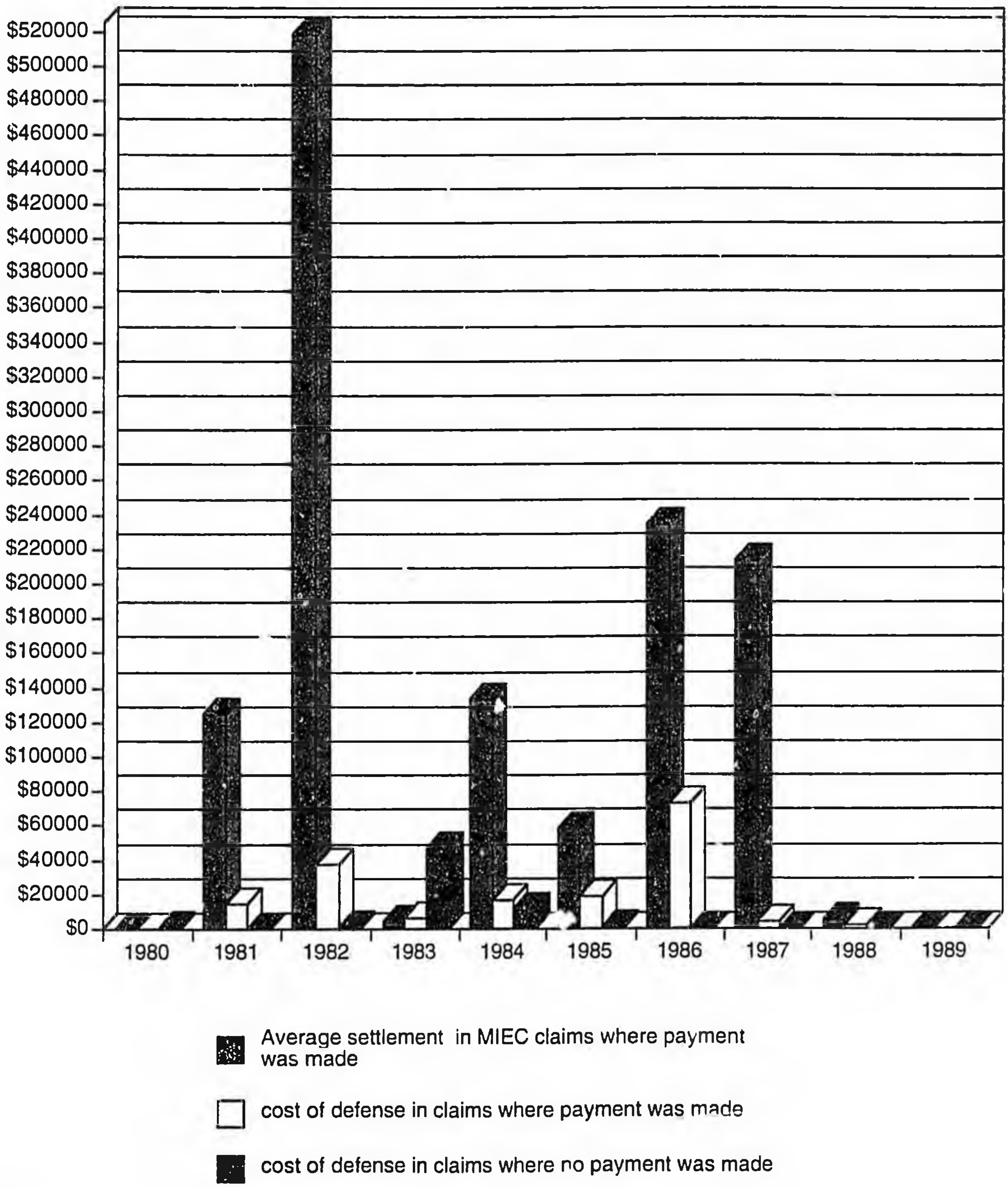


Average cost of defense in cases with payment vs cost of defense in cases without payment



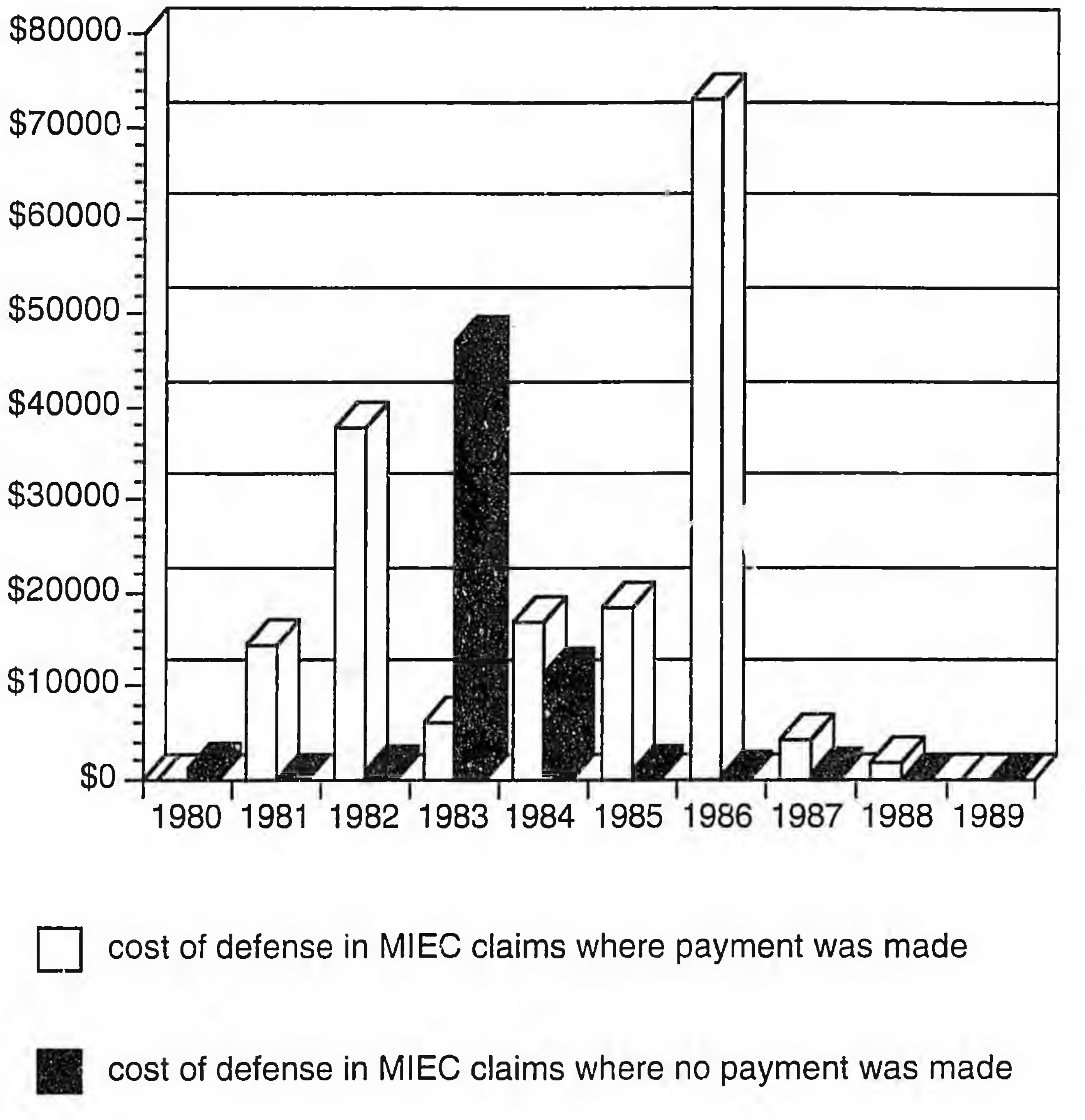
1980-89 SUMMARY, MIEC CLAIMS

Average cost of MIEC defense compared to settlement payment



SUMMARY, MIEC CLAIMS 1980-89

Average cost of defense in MIEC cases with payment vs cost of defense in cases without payment



1977 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 8

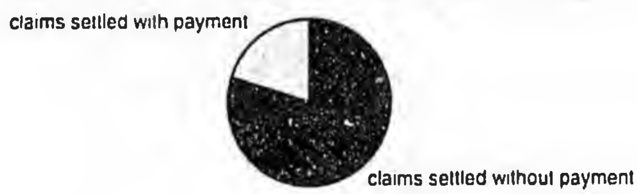
Number (and percentage) settled without payment: 4 (50%)
Number (and percentage) settled with payment: 4 (50%)
Average settlement: $106,250
Average cost of defense in cases resulting in no payment: $21,880
Average cost of defense in cases resulting in payment: $6,053

Total number of MICA claims: 5

Number (and percentage) settled without payment: 4 (80%)
Number (and percentage) settled with payment: 1 (20%)
Average settlement: $7,500
Average cost of defense in cases resulting in no payment: $12,222
Average cost of defense in cases resulting in payment: $1,240

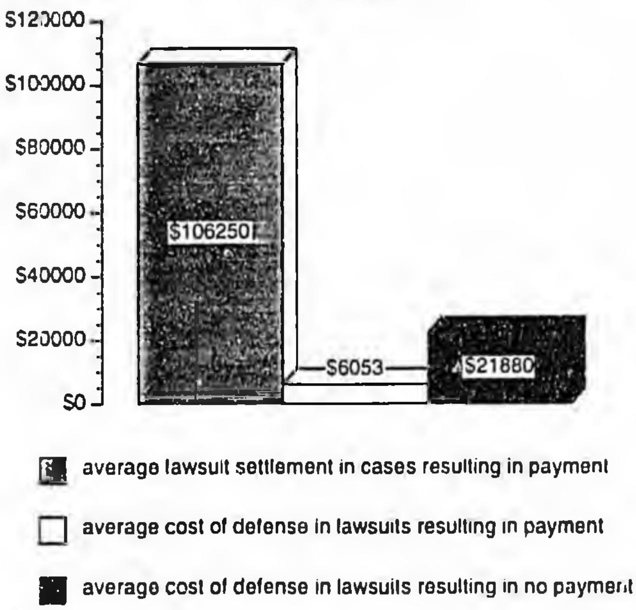
50% of all 1977 MICA lawsuits settled without payment

80% of all 1977 MICA claims settled without payment

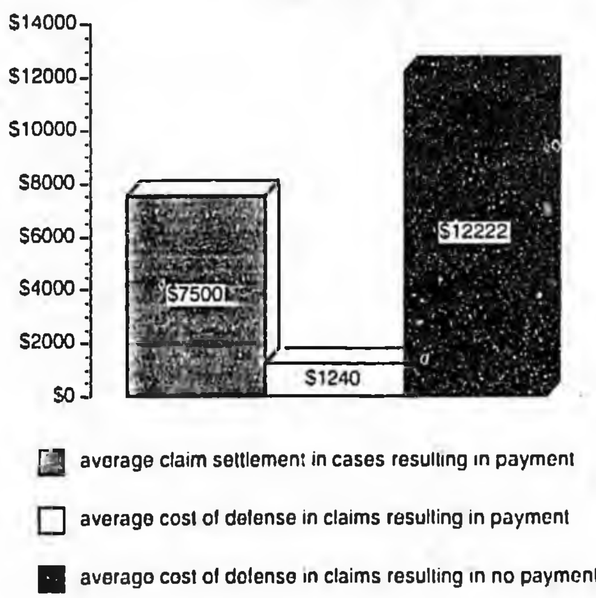


Cost of defending suits & claims as compared to settlements

1977 MICA lawsuits



1977 MICA claims



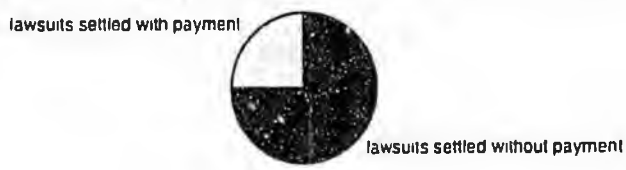
No data available for 1977

1978 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 8
Number (and percentage) settled without payment: 6 (75%)
Number (and percentage) settled with payment: 2 (25%)
Average settlement: $32,500
Average cost of defense in cases resulting in no payment: $15,470
Average cost of defense in cases resulting in payment: $12,148

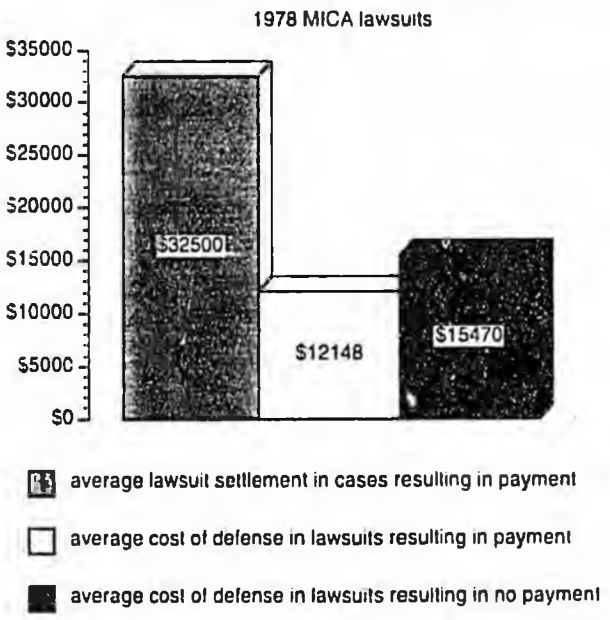
Total number of MICA claims: 3
Number (and percentage) settled without payment: 2 (66%)
Number (and percentage) settled with payment: 1 (33%)
Average settlement: $35,426
Average cost of defense in cases resulting in no payment: $190
Average cost of defense in cases resulting in payment: $0

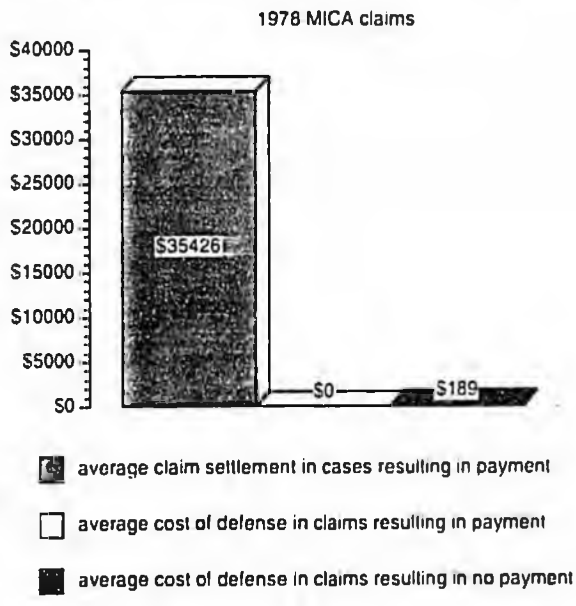
75% of all 1978 MICA lawsuits settled without payment



66% of all 1978 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements





MIEC CLAIMS 1978

No data available for 1978

1979 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 6

- Number (and percentage) settled without payment: 4 (66%)
- Number (and percentage) settled with payment: 2 (33%)
- Average settlement: $23,500
- Average cost of defense in cases resulting in no payment: $5,850
- Average cost of defense in cases resulting in payment: $14,294

Total number of MICA claims: 2

- Number (and percentage) settled without payment: 2 (100%)
- Number (and percentage) settled with payment: 0 (0%)
- Average settlement: $0
- Average cost of defense in cases resulting in no payment: $545
- Average cost of defense in cases resulting in payment: $0

66% of all 1979 MICA lawsuits settled without payment

100% of all 1979 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements