Approved March 20, 1985
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./p.m. on March 1, 1985 in room 514-S of the Capitol.

All members were present except: Senators Frey, Hoferer, Burke, Feleciano, Langworthy, Parrish, Steineger and Talkington.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Ron Smith, Kansas Bar Association
Homer Cowan, The Western Companies of Ft. Scott
Bill Sneed, Kansas Association of Defense Counsel
Dudley Smith, Topeka Attorney
Dick Scott, State Farm Insurance
Larry McGill, Independent Insurance Agents
Lee Wright, Farmers Insurance Group
Mark Bennett, American Insurance Association
Bud Cornish, Kansas Association of Property and Casualty Insurance Companies
Wayne Stratton, Kansas Hospital Association and Kansas Medical Society
David Litwin, Kansas Chamber of Commerce and Industry
David Edwards, Cessna Aircraft
Tom Martin, Beech Aircraft
Glenn Cogswell, Alliance of American Insurers

Senate Bill 35 - Kansas Comparative Fault Act.

Ron Smith, Kansas Bar Association, appeared in opposition to the bill. He stated the KBA's Executive Council had to review the overall context within which this legislature will look at this bill. The KBA Executive Council came to two general conclusions on pure comparative fault. The climate for changing our comparative fault statute is inappropriate and the arguments are inconsistent. KBA remains unconvinced that the people of Kansas understand and want a dispute resolution system in which a person is more at fault than another can still recover damages. A copy of his remarks is attached (See Attachment I).

Homer Cowan, The Western Companies of Ft. Scott, appeared in opposition to the bill. He testified, the passage of the bill would increase rates, increase litigation, increase defense costs, increase settlement costs, burden the present system, increase taxes, increase cost of products, increase cost of medical, increase cost of automobiles and be unfair. A copy of his testimony is attached (See Attachment II).

Bill Sneed, Kansas Association of Defense Counsel, introduced Dudley Smith, a practicing attorney in Topeka.

Mr. Smith stated the Kansas Defense Counsel takes the position that this bill should not be passed. It will increase litigation, and it is beneficial to lawyers as a whole in Kansas. He stated people from all over the state feel the Kansas laws are the fairest they know. Most lawyers think it is unfair to have to pay for someone else's responsibility. This will open up to joint liability in every case. It takes away from retailers; they should not be held responsible for manufacturer's defect that they had nothing to do with. He stated the extension of the statute of limitations will create chaos. He doesn't think the citizens of Kansas are crying to say, it's time to change the law. The Kansas Defense Counsel oppose the bill.

Senate Bill 35 continued

Dick Scott, State Farm Insurance, appeared in opposition to the bill. He explained they are a large writer of personal lines insurance, vehicles claims and homes claims. They do market checks with these policyholders, and they believe that persons primarily negligent should not look for someone who is not so negligent to have to pay so much. Availability of insurance should not control your thinking on this subject. He stated for every injury claim they pay out, there are 12 claims involving property damage. This bill will cost money. Figures from Missouri that passed pure comparative fault in March, 1983, show in 1983, there was a 7% increase in frequency of injury claims, in 1984 an additional 8.4% increase in injury claims and 14% increase in property damage claims. Contributory negligence was said to be too harsh.

Larry McGill, Independent Insurance Agents, appeared in opposition to the bill.

Lee Wright, Farmers Insurance Group, appeared in opposition to the bill. He stated they believe the present modified comparative system works well in Kansas. He asked the committee to look at his handout from the Insurance Department of Iowa (See Attachment III). Iowa had passed pure comparative and now have modified that was passed by the legislature in January, 1985.

Mark Bennett, American Insurance Association, appeared in opposition to the bill. He stated he is in support of everything said up to now.

Bud Cornish, Kansas Association of Property and Casualty Insurance Companies, appeared in opposition to the bill. He stated his association endorses what has been said.

Wayne Stratton, Kansas Hospital Association and Kansas Medical Society, stated the Association and the Society oppose the adoption of the bill. He stated it is the position of the Kansas Hospital Association and the Kansas Medical Society that the present tort laws in Kansas encourage litigation to the detriment of health care providers. The present comparative fault statute, however, is not a cause of this problem and in fact, has been worked out over the last decade in a manner which is reasonable to all parties and in line with the philosophy of the citizens of the state of Kansas. A copy of his testimony is attached (See Attachment IV).

David Litwin, Kansas Chamber of Commerce and Industry, stated, although I cannot state that KCCI is formally opposed to enactment of this bill, because our board has not yet addressed the issues it presents, I am confident that if this bill were presented in its present form to our board, it would be decisively rejected. A copy of his remarks is attached (See Attachment V).

David Edwards, Cessna Aircraft, testified the adoption of this bill will exacerbate a problem that is already considered by the general aviation industry to be the most significant problem facing the industry, and many other industries, today, and that is product liability. It is a problem that threatens the very survival of an industry that has been a Kansas staple for many years. A copy of his testimony is attached (See Attachment VI).

Tom Martin, Beech Aircraft, testified Beech brings 73½ million dollars to Kansas businesses. The significant cost to them is products liability

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./p.m. on March 1, 1985

Senate Bill 35 continued

insurance, and that must be passed along to the consumer, which affects his aircraft sales. He stated all of the vendors who supply parts have products liability, and these costs are passed on to Beech Aircraft.

Glenn Cogswell, Alliance of American Insurers, stated he endorsed the comments of Homer Cowan, Dudley Smith and Dick Scott.

Senator Feleciano read Senator Francisco's remarks to the committee. Senator Francisco recommended the bill be referred to interim study.

The meeting adjourned.

Copy of guest list attached (See Attachment VII).

Copy of Senator Francisco's remarks is attached (See Attachment VIII).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-1-85

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Ron Smith	Topeka	Ks Bar Assn
Mark L Bennett	Topeka	AIA
Wayne Hall	Topeka	KNS / KHA
Geoff Wright	Mission	FARMERS INS
Glenn D Cogswell	Topeka	Alliance of Am Ins
L M CORNISH	"	Ks Assoc of Prop + Cas
Jim Ward	Topeka	Ks. Trial Lawyers Assn
WALT DARLING	TOPEKA	DIVISION OF BUDGET
BILL SNEED	TOPEKA	Ks Assn of Def. Counsel
HOMER COWAN	Ft. Scott	The Western Co's
David Litson	Topeka	KCCI
Dudley Smith	"	Kan Bar Assn
CHARLES BELT	WICHITA	CHAMBER OF COMMERCE
Marjorie Van Buren	Topeka	OJA
Nancy Ingle	"	Budget
Mike Beerman	"	Ks Railroad Assn
Brent Johnson	"	Ks Ins Dept
LARRY MAGILL	"	INDEP INS AGENTS
Don Strole	Topeka	Blue Healy Assn
Ben Coates	Topeka	SRS
Dick Scott	O.P.	State Farm Ins Co
Bill Westerbeke	Lawrence	Judicial Council
[illegible]	[illegible]	KAJ
TROY BELL	"	KHA
Tom Martin	Wichita	Beech Aircraft
David R Edwards	Wichita	Cessna

Attach. VII

3-1-85

RON SMITH
Legislative Counsel

KANSAS BAR ASSOCIATION

SB 35
Senate Judiciary Committee
March 1, 1985

Mr. Chairman. Members of the committee. My name is Ron Smith. I am Legislative Counsel for the Kansas Bar Association.

KBA has studied SB 35 since it was first released by the Judicial Council last fall. We've agonized over our position because (1) SB 35 is important legislation on which the state's largest professional association for attorneys should have a position, and (2) a great many people put a great deal of time and effort into the study of this concept. Their efforts should not be taken lightly. KBA appreciates their work.

During our deliberations we studied not only the provisions of this legislation, but its philosophy and intent. I spent some time talking with my counterparts in the states which have pure comparative fault about procedural problems that have occured since their state adopted this concept. Their uniform response is that Pure Comparative Fault is not a problem-free concept.

KBA's Executive Council had to review the overall context within which this legislature will look at this bill. The KBA Executive Council came to two general conclusions on pure comparative fault:

1. The climate for changing our comparative fault statute is inappropriate and the arguments are inconsistent; and,

2. KBA remains unconvinced that the people of Kansas understand and want a dispute resolution system in which a person more at fault than another can still recover damages.

Let me discuss these concepts separately.

I. Timing & Consistency

The argument can be made that if pure comparative fault is good legislation, then the public climate in which change is made shouldn't matter. But legislation is not made in a vacuum. The tort litigation system is currently under fire. Some call it obsolete; that a common law system is no longer relevant for the last years of the 20th Century. I don't agree,

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but that opinion is widely held.

What I do think is important for purposes of "context" of this discussion, is that tort reform is tort reform. If you believe the proponents of SB 110 to be pushing "tort reform", then you must also include proponents of SB 35 as proponents of tort reform. Both bills make fundamental changes by which personal injury litigation is decided. The only difference in the legislation is the "direction" of tort reform.

Before lawyers or legislators or the public can decide whether a restrictive tort reform philosophy or an expansive tort reform philosophy is appropriate, both philosophies must be measured against the same standards. Otherwise, inconsistent positions are created.

I guest that is where I disagree with my friends in the defense bar who favor some restrictive changes, but not SB 35, and my friends in the plaintiff's bar who advocate SB 35, but not other changes. Neither philosophy is measuring the tort reform legislation using the same standards.

What does all this have to do with SB 35?

The central question is whether pure comparative fault is a better system of personal injury dispute resolution than our 49% rule? The arguments can be made academically for this change, but the real problem is getting the public to sort all of this out.

Let's assume you send SB 35 to the floor for debate. Couldn't the opponents of pure comparative fault argue simply and effectively that in this 1985 session of the legislature is kind of a Baskin-Robbins for different flavors of tort reform legislation. We've seen introduced:

1. limitations on personal injury recoveries;

2. limitations on pain and suffering awards;

3. changes in collateral source rules;

4. changes in evidentiary rules governing residencies of expert witnesses;

5. limits on contingent fee contracts;

6. evidentiary changes for inclusion of evidence regarding non-use of seat belts;

7. advocates of higher no-fault tort thresholds to further limit pain and suffering awards;

8. the use of verbal tort thresholds and less reliance on money damage thresholds in auto negligence cases;

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9. worker's compensation legislation to restrict claims;

10. proposals to limit or abolish punitive damages;

11. restrictions on tort-based causes of action between family members;

This legislature is asked to adopt SB 35, which instead of restricting tort litigation, actually INCREASES the size and number of personal injury cases, CHANGES the fundamental rules governing valuation of personal injury cases, and allows YOU to recover from ME if you are more at fault than I am.

How do legislators go home and sell the consistency of that argument?

The KBA Executive Council asked itself virtually the same question. After considerable debate, our conclusion was you can't.

KBA has a strong, consistent position, announced earlier this year in this committee, opposed to fundamental changes in the adversarial tort law system UNLESS proponents of such change could show clear and convincing public benefit from such change.

Lawyers might distinguish between SB 35 and other forms of tort reform. However, we believe the public cannot and, more importantly, will not draw such fine distinctions. If KBA is consistent in opposition to substantive tort reform in one part of the personal injury spectrum, we must consistently oppose other tort system changes if such change do not benefit the public.

II. Public Perception

I've listened to the testimony. I heard how the new pure comparative fault system works, and the injustices it is supposed to solve. I have not heard how the public is going to benefit from the increased litigation that will be part of SB 35.

Several states including judicially-activist states like California have received pure comparative fault by judicial enactment. Proponents encourage you to legislate a pure comparative fault system.

But remember pure comparative fault is not brand new. It was an option available in 1974 when the legislature chose our 49% rule. If our 49% rule of comparative fault is unfair to plaintiffs, the Kansas Supreme Court has had the opportunity over 45 times since 1974 to declare Kansas comparative negligence unconstitutional and implement pure comparative fault. They have not elected to do so.

If the public is demanding this change to pure comparative fault,

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they've not spoken very loud. I saw nobody representing the general public speaking for this legislation here last Friday. I think this silence needs a voice. While there was disagreement on our Executive Council on the fine points of SB 35, it is appropriate to state that the Council believes that the public will generally resist the idea that a person who is heavily at fault in an injury situation should be able to recover a portion of his damages.

Yes, one can argue the public doesn't yet understand pure comparative fault. But another logical argument can be made that proponents of change first have a duty to inform the public and get the public behind their proposal. If such understanding is there and support is given by the public, change will come.

In conclusion, pure comparative fault represents a movement away from individualized responsibility for injury and towards a more socialized responsibility. It constitutes an attempt to find a simplified way to translate laws regarding complex events. But Kansans don't yet understand why the Judicial Council makes this recommendation. Until they do, we shouldn't force this concept.

In addition to these major problems, there are other aspects of Pure Comparative Fault that have not been covered in these hearings. They are listed on the next page, and are mostly self-explanatory. I won't elaborate on them.

Mr. Chairman. The Kansas Bar Association is opposed to SB 35 for the above reasons.

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III. Procedural Problems

There are many issues with pure comparative fault causing problems in those other states which have adopted the concept. SB 35 speaks to none of them. Some of these concepts may have been studied by the committee and rejected for one reason or another, but these concepts haven't been discussed before this Senate Judiciary committee.

Only one problem -- a setoff rule -- was mentioned last Friday. The undiscussed concepts and remaining problems include:

1. Impact on settlement possibilities between 49% comparative negligence rules and "pure" concepts;

2. How to restrict the use section 5(b)(1) joinders of sources of insurance payments made in settlement so that the section is not used to circumvent KSA 60-454 and get before the jury the fact that other defendants have insurance.

3. SB 35 still does not help the situation where defendants are not acting in concert with each other, therefore aren't jointly and severally liable, but one or more defendants remain insolvent. There is no reallocation rule between joint tortfeasors if one is insolvent or uninsured.

4. In many "pure" comparative systems, where a defendant is less at fault than the plaintiff, why should these lesser-at-fault defendants owe a more-at-fault plaintiff solely by virtue that the plaintiff was injured and defendant wasn't?

5. Did the Judicial Council consider an "Oregon-type" rule of joint and several liability which makes the jointly liable defendant with more negligence than the plaintiff subject to paying the whole award, but not the jointly liable defendant whose negligence is less than plaintiff's?

6. What about the fairness of conflicting substantive laws? Under SB 35 a defendant may join the plaintiff's employer for purposes of diminishing defendant's percentage of fault, but employees cannot recover anything from the employer if the employer negligent because of worker's compensation.

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POSITION MEMORANDUM

OF

THE WESTERN CASUALTY AND SURETY COMPANY

THE WESTERN FIRE INSURANCE COMPANY

THE WESTERN INDEMNITY COMPANY, INC.

ALL OF

FORT SCOTT, KANSAS

SENATE

BILL NO. 35: A proposal by the Senate Judiciary to establish "pure comparative" fault in Kansas, replacing the present "modified" fault laws.

COMPARATIVE FAULT VS. COMPARATIVE NEGLIGENCE: Both legal concepts work the same way, except COMPARATIVE FAULT is broader. Comparative Negligence concerns itself with negligence cases only. While Comparative Fault encompasses "breach of warranty" and conduct resulting in strict or statutory liability.

THREE NECESSARY TERMS: Three necessary terms --

1. Contributory negligence (Fault). If any party's action contributed to the cause of action there can be no recovery.

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2. Modified comparative negligence (Fault). When your negligence is equal to the negligence of the other party(ies) there can be no recovery. (There are some variations, such as "equal to," "less than," "more than" ---)

3. Comparative Negligence (Fault). This is what is called the "pure" system. "Everybody collects from everybody." From the standpoint of the Plaintiff Attorney, this is the best of the three concepts.

"Everybody collects something from everybody" doesn't sound too bad -- PROVIDED YOU CAN AFFORD IT!

THE COST!:

A recent 10 year study, by a ten member research team, comprised of the legal profession, field of insurance, statistics and computing has just been released.[1] The study involved all 50 states and took 10 years to complete.

The additional cost of the present system in Kansas vs. the proposals of S.B. 35: (Study used North Carolina premiums as a base).

The modified comparative fault system costs $82,560,000.00 more than the historical contributory negligency system; and,

The pure comparative fault system will cost $148,608,000.00 more than the present Kansas system.

That's approximately $230 million dollars more than what Kansas paid under the old contributory negligence concept.

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[1] An Investigation of the Relative Costs of Comparatve vs. Contributory Negligence Standards. Copyright 1983.

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Add to this insurance other than auto which would be affected by comparative <u>fault</u> as opposed to comparative <u>negligence</u>, the cost would be over --

<u>$270 MILLION!</u>

MORE LAWSUIT COSTS:

Our courts, on a country-wide basis are already clogged. Legislatures across the country are creating new jobs for more judges. The entire court system is bursting at the seams. S.B. 35 would create considerable more expense paid into the system -- Not the injured party.

Iowa, by case law, went to the comparative fault system. Lawsuits in our own office went up 50%. The legislature of Iowa has now legislated the system back to <u>modified</u> fault.

Missouri, by case law, went to comparative fault and the legislature this year will try to remedy their situation as lawsuits have increased.[2]

NOT FAIR!:

At first blush, the concept of "everybody collects something from everybody" does not seem unfair.

> "I am 10% at fault and you are 90% at fault. You pay me 90 and I'll pay you 10."
>
> "You are 10% at fault and I am 90% at fault. You have 'deep pockets' and my pocket has a hole in it. -- I <u>collect</u> my 10% from you. You have a worthless piece of paper for your 90%."

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[2] Western Position Memorandum for Missouri

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FORT SCOTT, KANSAS 66701

"Further, I made you spend $50,000 in legal fees. My attorney gets 50% of mine, but I still got 50% of 10%, which is better than a stick in the eye."

The uninsured, the minimum coverage person, the bankrupt person has a "clean shot" at the more financial responsible person -- and better than a clean shot at the target (deep pockets) risk. Either way more suits are filed, which goes into ratemaking (your premiums).

AND IF YOU THINK THAT'S UNFAIR ---

HEY!:

Joint and Several Liability -- Oversimplified means "everybody owes for everybody else," or, each owes the whole."

Let's put you as a co-defendant with several other parties against a badly injured plaintiff. --

You -- 5% at fault
Co-defendant #1 -- 70% at fault
Co-defendant #2 -- 25% at fault

You are financially sound, with a policy with $500,000 limits.

Judgment is -- $1,000,000.00 for an innocent plaintiff.

Your co-defendants have holes in their pockets.--

The plaintiff now takes the entire $1,000,000.00 **FROM YOU!** $500,000 from your insurance policy, and $500,000 from your personal estate --- WOW!

Senate Bill 35 does give you a right of action against your two judgment proof defendants --- WOW!

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AND RAISES YOUR

TAXES TOO!: Faced with the legal climate across the country, many <u>settlements</u> are made by city and municipal governments to claimants who are 80% - 90% --- 90% <u>at fault</u>![3]

ABROGATES

KANSAS LAW: S.B. 35 abrogates <u>present Kansas law</u>. -- The Kansas Supreme Court held that the common law principles of <u>Joint and Several</u> liability which previously existed, no longer applied in comparative negligence actions (Brown vs. Keill -- 1978 Kansas).

The court said -- defendants cannot be compelled to pay more than their "fair share of the loss."

WHAT'S WRONG WITH THAT?!

PRESENT MODIFIED FAULT SYSTEM

IS FAIR!: When the Supreme Court struck down <u>contributory</u> negligence, your cost of insurance went up about 12%. Nevertheless, <u>contributory negligence</u> <u>was unfair</u>, and although insurance costs more, it was fair.

S.B. 35 will cause insurance costs to rise substantially, maybe 40% over a period of time. Now we are paying more money to go back to being <u>unfair</u> Don't let the pendulum swing too far right --- It just came from too far left --- Now, it's in the middle.

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[3] See Smart's Insurance Bulletin (attached)

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We submit, passage of S.B. 35 would ---

1. Increase rates
2. Increase litigation
3. Increase defense costs
4. Increase settlement costs
5. Burden the present system even more than it is now
6. Increase taxes
7. Increase cost of products
8. Increase cost of medical
9. Increase cost of automobiles
10. BE UNFAIR!

Respectfully submitted,

THE WESTERN CASUALTY & SURETY COMPANY
THE WESTERN FIRE INSURANCE COMPANY
THE WESTERN INDEMNITY COMPANY, INC.

Homer H. Cowan, Jr.*
Vice President

*Registered Lobbyist in the State of Kansas and the State of Missouri

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eral liability was developed, it was commonly believed that juries were unable to determine the relative degree of responsibility among defendants and plaintiffs. At that time, it was felt that juries could determine only *whether* a party contributed to the injury, not how much of the damage each individual caused. Accordingly, then, if the plaintiff was found even partially responsible he or she was denied recovery. If the plaintiff was fault-free, the defendants were deemed jointly liable, but no allocation of "degree of fault" was possible under the contributory negligence/joint and several liability system.

The sixth toe of the law

Joint and several liability is, however, a sixth toe in a comparative fault system. With broader acceptance of comparative fault law, a majority of state courts and legislatures have recognized that juries are able to allocate the amount of fault attributable to each party in an action. When contributory negligence barred a plaintiff from any recovery, there was some justification for the belief that insolvency of a 50 percent responsible defendant deprived a plaintiff unfairly. But now, with fault being apportioned among plaintiffs and defendants, it doesn't make sense to make a single defendant bear the risk for all damage to a plaintiff who may be proportionately more at fault.

For example, in a 1980 incident, a motorcyclist was riding in the center lane of a city street in California. A woman in the lane next to him swerved into the curb, then in front of the motorcyclist, pushing him into a car approaching from the opposite direction. The cyclist was severely injured.

Six years before this accident, the California city had re-marked the road from two to four lanes. City records showed no significant changes in accident frequency on the street after remarking, but the injured cyclist sued both drivers and the city anyway. Before going to trial, insurers for the two drivers settled with the motorcyclist for their policy limits of $15,000 and $100,000 — a total of $115,000. In trial, the jury awarded the motorcyclist over a million dollars in damages. Under joint and several liability, the city, as the sole remaining defendant, was responsible for the damages left over after the insurance settlement was deducted from the jury award — still more than one million dollars. This, despite the limited amount of fault attributable to the city in the case. The city is appealing the decision.

The Alliance of American Insurers supports the abolition of joint and several liability and recommends replacing it with several liability alone. Under several liability, each defendant would be responsible for only that portion of an award corresponding to the percentage of responsibility assigned to that defendant by a court or jury.

In other words, a several liability system would provide that a five percent responsible co-defendant pays only five percent of the plaintiff's damages. The plaintiff who causes 45 percent of his own injuries, under several liability, recovers 55 percent from the responsible co-defendants,

State	Type of Law	Comparative Laws Only
Nebraska	Modified (slight/gross)	Enacted
Nevada	Modified (50%)	Enacted
New Hampshire	Modified (50%)	Enacted
New Jersey	Modified (50%)	Enacted
New Mexico	Pure	Adopted
New York	Pure	Enacted
North Carolina	Contributory	
North Dakota	Modified (49%) (pure comparative applies to product liability or strict liability cases)	Enacted
Ohio	Modified (50%)	Enacted
Oklahoma	Modified (50%)	Enacted
Oregon	Modified (50%)	Enacted
Pennsylvania	Modified (50%)	Enacted
Rhode Island	Pure	Enacted
South Carolina	(S.C. Supreme Court ruled Modified (49%) comparative negligence statute unconstitutional)	
South Dakota	Modified (plaintiff proves slight negligence)	Enacted
Tennessee	Contributory	
Texas	Modified (50%)	Enacted
Utah	Modified (49%)	Enacted
Vermont	Modified (50%)	Enacted
Virginia	Contributory	
Washington	Pure	Enacted
West Virginia	Modified (49%)	Adopted
Wisconsin	Modified (50%)	Enacted
Wyoming	Modified (49%)	Enacted

Source: Alliance of American Insurers, Government Affairs Department

Attch. II

An Investigation of the Relative Costs of Comparative v. Contributory Negligence Standards

Attch. II

INTRODUCTION AND SUMMARY OF FINDINGS

This report is the product of the first and only comprehensive study of the relative costs of comparative and contributory negligence in the nation.[1] It is the result of the combined efforts over a ten month period of a ten member research team comprised of specialists in the legal profession and the fields of insurance, statistics and computing. It involved the analysis of tens of thousands of items of data from all fifty states over the past ten years. The findings establish conclusively that comparative negligence systems are more costly to the individual insurance purchaser and that the cost differential increases over time. More specifically:

1. Prior to 1970, 43 jurisdictions adhered to the contributory negligence standard while only 7 jurisdictions had adopted comparative negligence. (Appendix A)

2. At the end of 1980, 33 jurisdictions had adopted comparative negligence leaving 17 with the contributory standard. (Appendix A)

3. Based on the automobile insurance study, comparative negligence system purchasers paid 12% more in 1971 than contributory negligence system purchasers for insurance. (Table 1, Page 8)

4. By 1980, comparative negligence system purchasers could expect to pay from 22.8% to 47.4% more than contributory system purchasers for automobile insurance. (Table 1, Page 8)

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[1]The history of this research project is outlined in Appendix C.

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5. The average yearly difference in cost over the ten year period from 1971 to 1980 was 16.0% for modified comparative and 28.8% for pure comparative. (Table 1, Page 8)

5(a). Based upon 1981 automobile premiums earned for North Carolina, the consumer could expect to pay an additional $82,560,000 under a modified comparative system or an additional $148,608,000 under a pure comparative system. (Table 2, Page 11)

5(b). When all liability insurance premiums are considered, the expected total additional cost of the negligence system changes are $96,480,000 and $173,664,000, respectively. (Table 3, Page 12)

6. The average difference in cost using the most recent data (1980) is 22.8% for modified comparative and 47.4% for pure comparative. (Table 1, Page 8)

6(a). Based upon 1981 automobile premiums earned for North Carolina, the consumer could expect to pay an additional $117,648,000 under a modified comparative system or an additional $244,584,000 under a pure comparative system. (Table 2, Page 11)

6(b). When all liability insurance premiums are considered, the expected total additional cost of the negligence system changes are $137,484,000 and $285,822,000 respectively. (Table 3, Page 12)

RESEARCH FINDINGS

Table 1 presents the pure premium estimates by system. Figure 1 presents the data in Table 1 in graphical form. These results demonstrate that comparative negligence systems are substantially more costly to the consumer of liability insurance than contributory negligence systems and that the cost of comparative systems is increasing more rapidly than for contributory systems.

Over the ten year period 1971-1980, an individual in a modified comparative negligence state would expect to have paid an average of 16% more per year for his automobile insurance than an individual in a contributory negligence state. Under a pure comparative negligence system an individual would expect to have paid 28.8% more than an individual in a contributory negligence state. A review of the results indicates that although there was a range of differences on a year by year basis, the cost of comparative negligence to the average policyholder was significantly higher for every observation and is increasing at a more rapid rate.

Attch. II

TABLE 1
Automobile Liability Insurance
Relative Pure Premium by Negligence System 1971-1980

(1)	(2)	(3)	(4)	(5)	(6)
	Contributory Negligence System Pure Premium	Modified Comparative Negligence System Pure Premium	Percent Difference Between (2) and (3)	Pure Comparative Negligence System Pure Premium	Percent Difference Between (2) and (5)
1971	$60.36	$ 67.81	12.3	$ 67.69	12.1
1972	61.17	68.19	11.5	70.59	15.4
1973	65.58	78.67	19.9	75.84	15.7
1974	70.57	82.75	17.3	86.41	22.5
1975	71.88	92.23	28.3	108.75	51.3
1976	76.12	83.65	9.9	110.74	45.5
1977	83.13	87.92	5.8	108.49	30.5
1978	88.91	104.47	17.5	109.61	23.3
1979	94.47	108.76	15.1	117.65	24.5
1980	87.96	108.05	22.8	129.63	47.4
	Average Percent Difference		16%		28.8%

See Chart - Reverse

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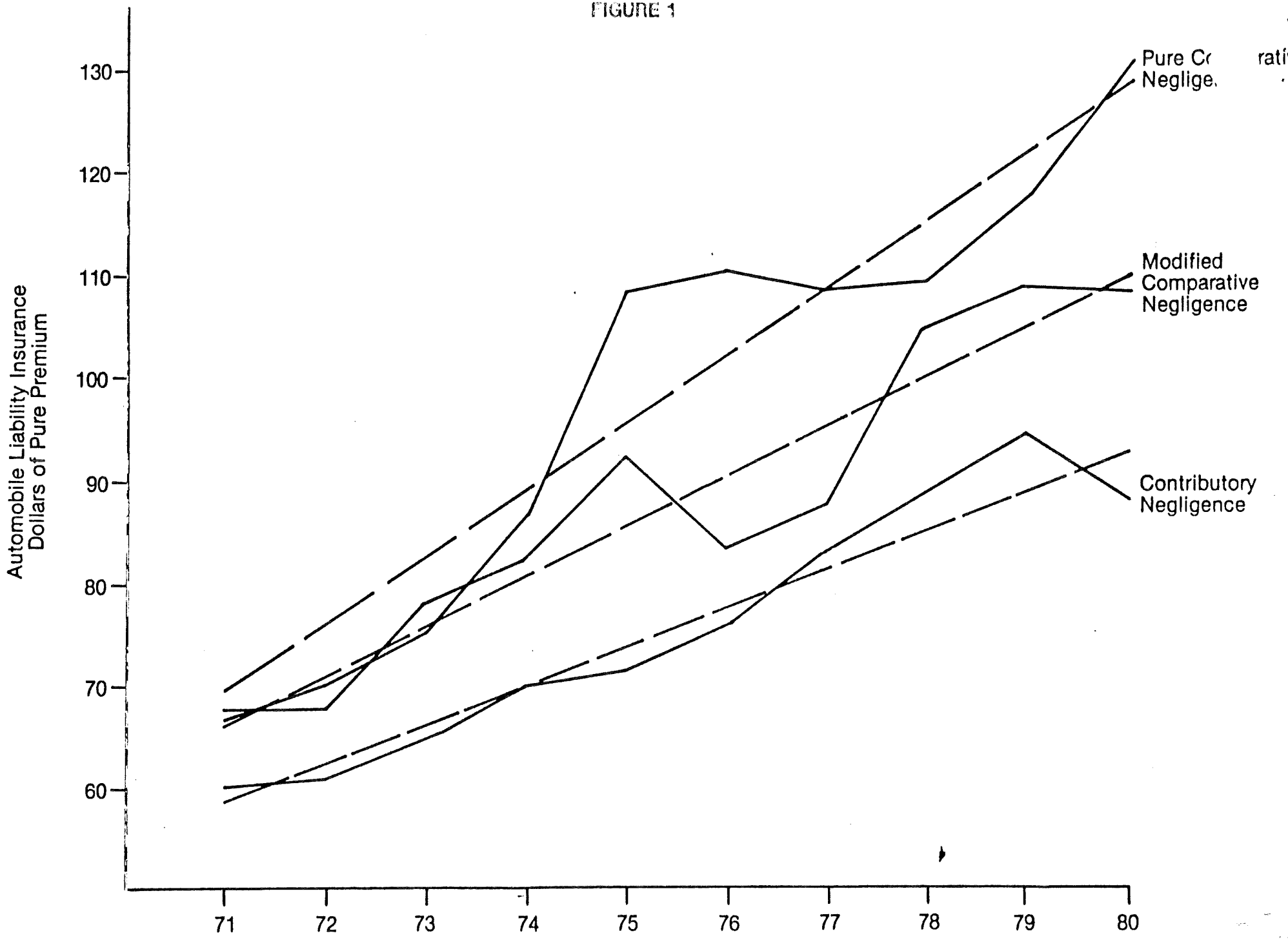
FIGURE 1



Estimated Pure Premiums and Trend Lines of Negligence Systems
from 1971 to 1980

COST IMPLICATIONS FOR NORTH CAROLINA

The implication of these findings is that a change to comparative negligence in North Carolina will cause higher insurance premium payments by policyholders and higher loss payments by insurance companies and others paying liability claims. The increase is substantial and the results are dramatically strong. A move to comparative negligence in North Carolina could be expected to produce a premium increase of between 16% and 28.8% over the present system.

To put this figure into focus, consider the total 1981 automobile liability insurance premium in North Carolina: $516,000,000. As shown in Table 2, North Carolina drivers could expect an increased cost of between $82,560,000 and $148,608,000 because of the adoption of comparative negligence. As shown in Table 3, if one adds to this the cost of liability insurance protection for non-automobile accidents, such as those losses covered by other types of liability insurance, the cost increase to North Carolina citizens could be expected to be between $96,480,000 and $173,664,000. These findings bear out the estimates presented in our initial report to the Senate Judiciary III Committee in 1981. A copy of this report is attached as Appendix D.

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APPENDIX D

[Report to Senate Judiciary III Committee]

JOSEPH E. JOHNSON & ASSOCIATES

P.O. Box 2190
Greensboro, North Carolina 27402

April 27, 1981

Honorable William A. Creech
Chairman
Senate Judiciary III Committee
State Legislative Building
Raleigh, North Carolina 27611

Re: HB 377 -- Comparative Fault Bill

Dear Senator Creech:

Upon request of Southern Railway Company, Joseph E. Johnson & Associates (Insurance Consultants) were asked to analyze the potential cost consequences of the passage of HB 377 -- the Comparative Fault Bill. The undersigned principals of Joseph E. Johnson & Associates are faculty members of the Department of Business Administration, specializing in and teaching Risk and Insurance at the University of North Carolina at Greensboro.

The Legislative Research Commission majority report sheds little light upon whether a change from contributory negligence to comparative negligence would have much, if any, impact upon the cost of liability insurance in North Carolina. The Commission chose not to include in its final report reference to a study that was available which was conducted by the Louisiana Insurance Rating Commission. That study examined settlement costs of more than twelve hundred claims which had been settled on the basis of contributory negligence with projections of what those claims would have cost in comparative negligence states. Thirteen major insurers participated in that study.

The Louisiana study indicated an increase in pure losses of 16.7%. That loss projection would justify an increase in insurance rates of approximately 25%.

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It is fair to say, therefore, that a radical change of the rules of law which directly affect and control the rights of negligent claimants and plaintiffs to recover for alleged injury and damage involve individuals and businesses now paying liability premiums of many hundreds of millions of dollars. A change in the law which impacts to a small extent, even five to ten percent, involves an immense amount of exposure and cost to industry and the general public. If the expected increase should be 25%, we are talking about an additional cost to industry and the public of well over a hundred million dollars per year.

In light of this fact and the conclusion previously expressed, i.e., that valid studies could be made to determine the cost of comparative negligence as opposed to contributory negligence, it would seem expedient and wise to us that the General Assembly should not enact such a far-reaching bill as HB 377 without first having made an impartial and comprehensive study of the cost consequences.

Very truly yours,

JOSEPH E. JOHNSON & ASSOCIATES

By: Dr. Joseph E. Johnson /s/

By: _____

Attch. II

SMART'S INSURANCE BULLETIN

• 154 SUNNYSIDE DR., SAN LEANDRO, CA 94577 • (415) 632-2200 •
• ANNUAL SUBSCRIPTION $70.00 • SINCE 1957 • DARRELL HEPPNER, EDITOR •

March 2, 1984

Dear Reader,

This week's issue is devoted to a single subject, deep pocket theory -- specifically joint and several liability. The term, "deep pocket theory," is generic and applies to many situations in which one party pays a third-party liability claim even though the party may have been only partially responsible. Many public agencies and corporations become the financially responsible party, or "deep pocket" for the total claim. Faced with the current legal climate in California, many settlements are made with claimants even though the public agency or corporation was slightly at fault, say 1% to 10%. Here's the way we see it:

DEEP POCKET THEORY
JOINT AND SEVERAL LIABILITY

In 1980 a motorcyclist was in the center lane of a city street in Signal Hill, California. The woman in the lane next to him turned to grab her purse in the back seat from a grandchild. Her car swerved and hit the curb. Overcorrecting, she then swerved in front of the motorcyclist, hitting him and pushing him into a car coming from the opposite direction.

Six years before the accident the City of Signal Hill had re-marked the road from two to four lanes, each ten feet wide. The severely injured motorcyclist sued both drivers and the city. City accident records failed to indicate any noticeable change in accidents on the street after it was re-marked.

Prior to trial the insurance companies for the two drivers settled with the motorcyclist for their policy limits of $15,000 and $100,000 for a total of $115,000. The city was left as the sole defendant. The jury awarded the motorcyclist $1.5 million in damages. The City of Signal Hill paid approximately $1.4 million after the insurance settlement was deducted from the jury award. The city became the "deep pocket" for the bulk of the jury award.

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In the City of Los Angeles an eleven year old boy was riding his bicycle down a hill. His brakes failed. He ran into a moving automobile. The seller and manufacturer of the bicycle settled for a collective $825,000. In the lawsuit, the allegation was made that the foliage at the corner possibly obstructed the view of both the boy and driver thus enhancing the chance of the accident. The city was responsible for the maintenance of the foliage at the corner. A jury awarded $2.5 million in damages and found the city liable. After the insurance settlement was deducted from the award, the city paid about $1.7 million. The city was the "deep pocket" for claim payments that only a few years ago wouldn't have been legally possible.

A two-way stop sign cost the City of Escondido over a million dollars. In this southern California case a boy on a motorcycle drifted through a stop sign and was hit by a speeding car. He is now a paraplegic. In the suit it was alleged that the city should have made the intersection a four-way stop, not a two-way stop. It was also alleged that the street-side weeds obscured vision. Because of the serious injuries, the city settled for $1.1 million. These are a few of the many California cases past and present that could be cited.

However, the effects of joint and several liability cases aren't limited to public entities. Corporations are facing similar situations. For example, a component-part manufacturer who was 10% responsible for the injuries arising out of a products liability claim could be held to be 100% responsible if the retail seller had gone out of business.

Automobile manufacturers face many lawsuits alleging faulty manufacture, design or installation. A faulty door latch is the claim in Taylor v. Volkswagen of America. The driver of the vehicle was found to be 65% responsible and Volkswagen 35%. The driver had $15,000/30,000 insurance coverage and no assets. Volkswagen paid the entire $3.1 million judgment, less the $15,000 from the driver's insurance carrier and a few hundred thousand dollars from several other parties involved in the accident. A corporate "deep pocket" was tapped.

A legislative solution to joint and several liability was attempted in three consecutive sessions: 1978, 1980, and 1982. The first two attempts found the Senate unanimously approving the idea, but the Assembly wouldn't. The same fate may await the current version - SB 575 co-authored by Senator Foran and Senator Beverly. SB 575 was passed by the Senate in January and awaits the pleasure of the Assembly Judiciary Committee.

In its current, amended form SB 575 would eliminate payments for non-economic damages, such as "pain and suffering" (when a responsible party is less than 40% responsible) to only the actual percentage of negligence. This is a partial solution to the deep pocket-joint and several problem. The legislative digest summarizes SB 575 this way:

> Under existing law, in an action based upon negligence or product liability against multiple tortfeasors for an indivisible injury, the tortfeasors are jointly and severally liable for all compensable damages attributable to the injury except that they are not liable for damages attributable to the negligence of the plaintiff. However, tortfeasors may seek equitable indemnity from other tortfeasors.

POSITION MEMORANDUM

OF

THE WESTERN CASUALTY AND SURETY COMPANY

THE WESTERN FIRE INSURANCE COMPANY

THE WESTERN INDEMNITY COMPANY, INC.

ALL OF

FORT SCOTT, KANSAS

SUBJECT: Comparative Fault - Missouri Style

WESTERN'S PHILOSOPHY:

The Western has built its business reputation on the philosophy of fairness to those insureds and claimants who receive claim payments. This philosophy has stood with The Western for over seventy years.

In excess of forty states[1] have now changed their negligence standard to a comparison of fault among the parties involved in an accident. The Western believes the move from the harsher standard of contributory negligence to comparative negligence was a just and socially desirable improvement. Yet...yet for maximum justice, additional adjustments or "fine tuning" must be considered.

The elusive standard of "fairness" is the concern of this memorandum. Fairness is the standard of Western's philosophy.

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1 Summary of Negligence Standards, Western Insurance Companies, September 5, 1984

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BACKGROUND:

With the Gustafson v. Benda Supreme Court Case of November 22, 1982, Missouri became a "pure comparative negligence state." Missouri joined 13 other states using the "pure" form while an additional 28 states have decided in favor of a "modified comparative negligence" rule.[2]

PRESENT COMPARATIVE FAULT:

In the wake of the Gustafson case, the Missouri Supreme Court enacted, totally, the Uniform Comparative Fault Act. As a result, two broad results will occur which The Western believes to be fundamentally unfair. First, a person or person's heirs may recover from another even though (s)he was almost completely at fault.

Missouri's entire body of law is based upon the reasonable, prudent person. Under the Gustafson case, recovery is permitted by a person who is, for instance, eighty percent (80%) at fault against one or more who are twenty percent (20%) at fault.

If I "run a stop sign" and you hit my car and injure me with damages of $1 million; should you pay 20% or $200,000? Should you pay for your failure to recognize that I would run the stop sign?! NO, you should not! Present Missouri law is unreasonable on this point.

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[2] Ibid.

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WHAT WILL
"PURE COMPARATIVE"

COST: The Illinois "pure" experience certainly stands as a warning. The average verdict outside the Chicago area increased 40% the first year after pure comparative negligence was adopted.[3] We believe one of the substantial reasons for this high increase is "pure comparative." On a national average basis the annual increase for "pure comparative" is estimated at 28.8%.[4]

MODIFIED COMPARATIVE

FAULT: The Western believes it is fair to give recovery of damages only to persons who basically conduct themselves in a reasonable, prudent manner. To achieve this proper balance, comparative negligence must be limited or modified. To leave comparative negligence unmodified often rewards the careless, the foolish, the person who causes accidents. The Western believes only persons who are less than half or fifty percent at fault should be permitted recovery from another. This is the approach selected by the Kansas Legislature.[5] Of Missouri's neighbors, six have a modified comparative form of comparative negligence or contributory negligence.[6]

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3 Comparative Negligence: The Pros and Cons on How Our Legal System Assesses Fault, Journal of American Insurance, November 1, 1984, p.11.

4 An Investigation of the Relative Costs of Comparative v. Contributory Negligence Standards, Joseph E. Johnson & Associates, Inc., 1983.

5 Kansas Statutes Annotated, 60-258a

6 Arkansas, "50% Type"; Iowa, "50% Type"; Kansas, "50% Type"; Nebraska, "Slight v. Gross Type"; Oklahoma, "49% Type"; Tennessee, "Contributory Negligence Type"; See above #1

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PRESENT JOINT AND SEVERAL LIABILITY:

The second result of the Gustafson Case which is fundamentally unfair is the use of pure comparative negligence with "joint and several liability."

"Should you have to pay all of a court judgment when you were only slightly at fault?" The Western says "NO"!

For the sake of an example, you are a member of the Jefferson, Missouri City Council. The City has been sued for failure to have certain markings on the roadway trimmed at an intersection.[7] (There is no sovereign immunity for lawsuits over operation of motor vehicles or conditions of a public entity's property below certain levels)[8] The lawsuit also names another person who was driving erratically and at a high rate of speed before hitting another car, injuring 3 people in that car. The three bring a lawsuit.

The lawsuit goes on trial and an award of $300,000 is given to the injured parties, divided equally. The jury further says that the negligent driver is 90% at fault for his part in causing the accident and that the injured parties and the City were each 5% negligent.

The negligent driver has complied with Missouri's Financial Responsibility Law and his insurance company pays the injured persons $25,000.

The injured parties now turn to Jefferson City, Missouri. The City must pay the sum of $260,000 to satisfy this court judgment!

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7 Smart's Insurance Bulletin, San Leandro, CA 94577, March 2, 1984

8 Missouri Statutes, 537.600

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In fairness it must be noted, the City would have a claim against the negligent person for any amount it pays over its 5% share; but that claim is usually worthless!

You now see the impact of joint and several liability when used with comparative negligence! You now realize the impact of joint and several liability on a person, company, or unit of government which is supposed to have "deep pockets"[9]

The problem of "killer roads"[10] is but one area where "joint" liability has disastrous effects. In addition to city, county, and state government, the medical profession, the business and manufacturing community [11] and many others are seen as having unlimited resources or "deep pockets." Each has its own "horror story" of the effects of joint liability.

MODIFIED JOINT AND SEVERAL LIABILITY:

The Western believes a person should only be responsible for the percentage of negligence which might be assessed by a judge on jury. This is the law in Kansas.[12]

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9 Current Issues: Civil Justice Alliance of American Insurers, 1984

10 Legal Problems Caused by the Killer Roads of the United States, The Forum, Richard S. Kuhlman, Volume XIX, Number 2, Winter, 1984

11 Multiple Defendant Problems in Product Liability Cases, Part 2, For The Defense, Defense Research Institute, Vol. 25, No. 2, February 1983

12 Brown v. Keill, 580 P2d 867 (Kan 1978)

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The reasoning is best expressed:

> Just as the courts were reluctant to apply the all-or-nothing rules which denied a plaintiff all recovery for any negligence under the principles of contributory negligence, so also, courts are reluctant to make manufacturers bear the risk for all damage, or to make one defendant bear the risk for all damage for an entire judgment, where another defendant, or the plaintiff, has been found to be causally responsible for some share.[13]

Even if Missouri chooses not to abolish joint and several liability, justice demands joint and several liability be modified!

Possibly the Iowa solution to joint and several liability is the answer. There, joint and several liability applies only when the negligent person is over fifty percent at fault.[14]

CONCLUSION:

With comparative negligence, a greater degree of fairness has been achieved to injured persons in the State of Missouri.

By making the new negligence standard a pure comparative one, The Western believes the court went too far in the Gustafson Case. We believe the Missouri Legislature should modify the effect of the pure comparative negligence rule to achieve maximum justice.

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13 Multiple Defendant Problems in Product Liability Cases, Part 1, For The Defense Research Institute, Vol. 25, No. 2, January, 1983

14 See #10 above, p. 15

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Report Date 1-24-85

INSURANCE DEPARTMENT OF IOWA

TERRY E. BRANSTAD
GOVERNOR

BRUCE W. FOUDREE
COMMISSIONER

Lucas State Office Building
Des Moines, Iowa 50319
(515) 281-5705

SUMMARY OF REPORT

The attached report, prepared by the Commissioner of Insurance in response to Section 14 of House File 2487, deals with the issue of insurance practices employed by insurance companies operating in the state of Iowa in the wake of adoption by the 70th General Assembly of a system of comparative fault. The Commissioner's Report includes an analysis of consumer complaints, a statement on the Commissioner's policy toward pattern agreements, a survey of insurance companies which write a large volume of automobile insurance in the state of Iowa, and a brief statement on the possible effects of the new bill upon premiums.

Initially, the report recognizes that House File 2487 has only been in effect since July 1, 1984. Because there is a one to three month lag time between a company decision on a claim and the filing of a consumer complaint with this Department, complaints concerned specifically with House File 2487 were not received by this Department until mid-September or early October. These complaints dealing with the modified comparative negligence law were not very prevalent. In fact, this Department has never received a proportionately large number of consumer complaints concerning the issue of comparative negligence. For these reasons, any conclusions that may be drawn from the available data are suspect.

The Department has taken the position that pattern agreements involving an insurance company and an individual consumer are an unfair trade practice in violation of Chapter 507B of the Iowa Code. However, this Department recognizes that pattern

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agreements between companies are a necessary aspect of doing business and allows these type of agreements, as long as they do not directly impact upon a consumer.

Attached to the report is a survey of companies which write a large volume of automobile insurance in the state of Iowa. Once again, it needs to be reiterated that the survey must be reviewed in light of the fact that House File 2487 has been in effect for only six months. The survey shows that the number of property/casualty complaints have diminished, the number of lawsuits being filed is down, and claims frequency has increased.

The report concludes with a brief statement on the possible effect of the new law upon premiums.

INSURANCE DEPARTMENT REPORT
ON THE EFFECTS OF HOUSE FILE 2487

This report prepared by the Commissioner of Insurance was mandated by House File 2487 by the 70th General Assembly of the Iowa Legislature. Pursuant to Section 14 of House File 2487, this report will deal with the issue of insurance practices developed in response to the adoption of comparative fault in the State of Iowa. The statute also requires that this report include proposals for legislative action and an explanation of steps taken by this Department to alleviate existing or potential problems in insurance practice under comparative fault. This report is, of necessity, incomplete because the statute has only been in effect since July 1, 1984. This leaves a period of less than six months to gather information and draw conclusions. The typical complaint to this Department concerns a fact situation which is one to three months old. Because of the lag time between company decision and the filing of a complaint, this Department is just now beginning to see the effect of the new statute.

Attach. III

ANALYSIS OF COMPLAINTS

In December of 1982, in Goetzman v. Wichern, 327 N.W.2d 742, the Iowa Supreme Court made pure comparative negligence the law in Iowa. In 1983, this Department began to see some complaints involving comparative negligence. This Department received approximately 175 complaints dealing specifically with comparative negligence during that year. This Department did receive about 220 complaints per month during 1983 concerning property and casualty insurance, in general. While we do not have statistics on the number of complaints we had arising out of the contributory negligence system, we believe it is a similar number. There has never been an extraordinarily large number of complaints concerning comparative negligence.

In 1984, this Department received 117 complaints regarding comparative negligence: 84 before July, 5 during July, 28 after July. These complaints are broken down in this manner to illustrate the impact of the new statute upon complaints. As already noted, there is a lag time of one to three months between company decision and complaint to this Department. Therefore, the July complaints probably concern the pure comparative negligence law in effect prior to the enactment of House File 2487. The post-July complaints are the beginning of the complaints under modified comparative negligence enacted in House File 2487. There will always be complaints coming to this Department involving factual issues. These factual determinations are issues about which reasonable persons may disagree. The Iowa Department of Insurance does not have jurisdiction to resolve such factual questions, except where there is a showing of a pattern of business practice in violation of chapter 507B of the Iowa Code.

During the debate on House File 2487, a number of legislators expressed concern about companies arbitrarily assigning a small percentage of fault to complainants in third-party liability situations where liability should be total on the part of the company's

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insured. For example, the concern was that a company may assign a ten or fifteen percent liability to an adverse claimaint, where in reality, the liability might be 100% on the part of the company's insured. This Department has always seen complaints along this line since the Goetzman decision. The Department continues to see these type of complaints. However, the Department has not seen enough of them to develop evidence of a pattern of practice with regard to any particular insurer. There are, of course, a number of files that continue to be under investigation regarding this issue. One must be careful to note the difference between a business practice prohibited by Section 9 of House 2487 and an honest difference of opinion over factual matters.

Because of the legislative concern and the concern generated by our consumer complaints, this Department instituted a practice of sending out the attached form letter marked Exhibit 1. This letter is designed to put the burden on the company to justify the assignment of fault its adjustor has made. On occasion, this letter has caused a company to reverse or modify its position. In the vast majority of cases, however, the company has justified their original position.

House File 2487 makes it an unfair trade practice for a company to establish a pattern of business practice of assigning a percentage of fault to a claimant when there exists no reasonable evidence upon which the assignment is based. To date, this Department has not established sufficient evidence of a violation of this statute.

PATTERN AGREEMENTS

Pattern agreements are agreements that insurance companies make between each other in which fault is assigned on an arbitrary basis by virtue of the factual type of accident. For instance, an uncontrolled intersection accident is a 60% assignment on the left hand vehicle and a 40% assignment on the right hand vehicle. And, a rear-end

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collision is a 90% assignment on the car in the rear and a 10% assignment on the front car. Pattern agreements do not take into effect the true facts of an accident.

Pattern agreements only became important after the Goetzman decision. They are a product of comparative negligence. The Iowa Department of Insurance has always taken the position that pattern agreements are a violation of Chapter 507B of the Iowa Code, as an unfair trade practice. This policy was in effect prior to the adoption of House File 2487. However, this Department has not objected to such agreements between companies where there is no impact upon the consumer. This allows companies to handle a large number of claims more efficiently.

The Department requires that claims between an individual consumer and an insurance company be dealt with on an individual basis. Where an intercompany agreement impacts on a consumer, as in the case of a deductible, the Insurance Department will insist that the case be handled individually. As a practical matter, most companies in Iowa are not using pattern agreements. Pattern agreements are a product of the Wisconsin comparative negligence law. The few companies that do use pattern agreements between each other are companies that have been using them for a long time in Wisconsin.

COMPANY SURVEY

The Iowa Insurance Department did a survey of insurance companies which write a large volume of automobile insurance in the State of Iowa. It is hard to draw conclusions from this survey because House File 2487 has only been in effect for six months and because companies are not uniform in their method of keeping statistics. The methodology was a request of the companies for a complaint count, a suit count, and any claims information they might possess.

The complaint count was inconclusive, but did tend to confirm the Insurance Department's records that complaints are the same or have diminished in 1984. This may be because of House File 2487 or because consumers are getting used to the concept of comparative negligence after years under the contributory negligence standard.

The suit count information tends to show a "bulge" in suits filed prior to July 1, 1984. The obvious inference is that this is an attempt by attorneys to get suits filed under the pure comparative negligence system. In a few cases, there is a "bulge" of suits reported in the third quarter. When this Department checked the phenomenon, it found that these suits were actually filed in the second quarter but were not reported until the third quarter. From the information provided, there will be fewer suits filed under the modified comparative negligence law established in House File 2487. Those individuals who have negligence in excess of 50% will not be filing suits.

Claim information is inconclusive because of other intervening factors, such as weather, speed limits, differences in clientele of individual companies, inflation, etc. Generally, claims increased in all areas of property casualty insurance during the period of the survey.

Many companies reported that the modified comparative negligence law is easier to explain to consumers and that consumers seem to accept it better than pure comparative negligence.

AFFECT ON PREMIUMS

One company, AID Insurance Company, reduced premium rates on private passenger automobile business by 10.5% as a result of the statute. The company did this

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prospectively before it had any claims data returned. This Department has not seen similar reduction in premiums by other companies. However, there is no doubt that the modified comparative negligence statute will decrease claim losses when compared to pure comparative negligence and, hence, decrease premiums. There are certain claims that would be payable under pure comparative negligence that would not be paid under modified comparative negligence. However, these events have not occurred in a vaccuum. And, hence, there is no way to guarantee an absolute decrease in premiums.

ATTACHMENTS

We are attaching the responses our office received from the survey of companies.

JSB/860-2

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3-1-85

Mr. Chairman and Members of the Committee:

I am Wayne Stratton, attorney for the Kansas Hospital Association and the Kansas Medical Society. Both the Association and the Society oppose the adoption of Senate Bill No. 35.

You have previously heard testimony regarding the impact of the cost of the present tort system upon the health care in the state of Kansas. Senate Bill 35 would only encourage additional litigation against the health care providers of the state.

Presently our tort system encourages patients who have an adverse outcome from medical treatment, as a certain number will inevitably have, to take their chances at recovering from a health care provider. Such litigants usually have nothing to lose and everything to gain by filing suit. As a result, more money is spent today determining liability than compensating the injured. Presently, professional liability insurance is paying out in settlements, overhead costs, loss adjustment expense and related items--$1.66 for every $1.00 premium collected. This cost is passed on to the health care provider and ultimately to the public.

The earlist attempts to establish comparative negligence systems in Kansas occurred in the late 1800s, with Kansas courts taking the approach that in certain actions when a plaintiff's negligence was substantially outweighed by the defendant's negligence the plaintiff could recover. F. Maloney, From Contributory to Comparative Negligence: A Needed Law Reform, 11 U. Fla. L. Rev. 135, 155 (1958); see also Pacific R.R. v. Houts, 12 Kan. 328 (1873); Sawyer v. Sauer, 10 Kan. 466 (1872). Although initially abandoned, the premise that the defendant's negligence must outweigh the plaintiff's was codified in K.S.A. 60-258a which S.B. 35 attempts to repeal and replace with a pure system whereby the plaintiff can recover for any fault of the defendant, however minimal.

But fault has remained the basis of the Kansas tort system in this area for over 100 years, and when fault is the premise of liability, the pure comparative negligence rule does not make sense-it is illogical, unfair and confusing, Maloney, supra. The pure system actually allows plaintiffs to recover under conditions that mimic strict liability-allowing a plaintiff who is almost totally responsible for his own injuries to be compensated for his own irresponsibility. J. Davis, Comment, Comparative Negligence--A Look at the New Kansas Statute, 23 Kan. L. Rev. at 116 (1974).

The modified approach appears most logical and compatible with a jury's sense of values by asking who was more at fault. The ordinary human reaction is to deny aid to parties found guilty of causing their own circumstances. J. Haugh, Comparative Negligence: A Reform Long Overdue, 49 Or. L. Rev. 38, 46 (1969).

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The New Hampshire legislature, in rejecting a pure form of comparative negligence, premised its decision on the basis that well established concepts of fault and responsibility would be discarded. Nixon, The Actual "Legislative Intent" Behind New Hampshire's Comparative Negligence Statute, 12 N.H.B.J. 17 (1969).

Ideally, comparative negligence laws reduce the court's burden and encourage settlement between parties. Plaintiffs will settle if they feel a jury will weigh their fault and its impact on the injury. The pure form encourages litigation and reduces pretrial settlement because the plaintiff does not need to consider his fault as a factor to recovery.

You were erroneously told sometime ago that Senate Bill 35 would not relate to medical malpractice cases since there is no comparison of negligence in such cases. Nothing could be further from the truth. I am currently defending cases in which such issues are present. Examples are:

1. An opthamologist. The patient did not seek regular appointments as he was told to do.

2. A general practitioner. The plaintiff did not return for followup care of an infection although frequent appointments were made for her.

3. An orthopedic surgeon who removed a bone chip. However, the plaintiff complained of a small peripheral nerve injury. Plaintiff worked for months thereafter and reinjured himself at work.

4. A psychiatrist. The patient was committed to a state hospital and left against medical advice. She attempted suicide.

5. A hospital. The patient fell, claim is also being made by the husband although the records show that the husband would release the wife from restraints applied by the nurses.

6. An orthopedic surgeon. Plaintiff was severely injured in an automobile accident. She claims her leg was not properly set. She left Kansas and there was a delay in obtaining subsequent medical treatment.

All of these cases are mentioned not to discuss the merits or lack of merit of any cases but merely to emphasize that in each of these cases the element of comparative fault of the plaintiff is involved.

Attch. IV

Kansas citizens believe strongly that a person should be responsible for his own acts and conduct. It makes no sense to permit a plaintiff to deliberately ignore medical advice, cause injury to himself and then enter into a crap shoot to see if he can convince 10 out of 12 people that he is entitled to something.

Moreover, Senate Bill 35 would radically change Kansas law with reference to injuries caused by third parties. Under the provisions of this statute, a health care provider could be responsible for the negligence of other people who cannot be joined in a lawsuit. Moreover, the burden would then fall upon the health care provider to prove the plaintiff's case against such third party.

I think the last case I mentioned might be illustrative of some of the problems which would be involved if this bill were adopted. In that case, the patient left the state of Kansas and sought medical treatment later from another physician. She developed an infection which required lengthy surgery and now claims that all of this was due to the earlier treatment by the Kansas physician. The parties whose fault might be compared under such a circumstance is not only the plaintiff and the Kansas physician, but the driver of the car causing the plaintiff's injury and the out-of-state physician who subsequently operated, which operation led to the plaintiff's infection. Under Senate Bill 35 the plaintiff could sue only the Kansas doctor and obligate him to bring in other parties and in effect, prosecute the plaintiff's case against all such parties. Moreover, if you can assume that the identity of the driver is unknown, and cannot be joined the health care provider might be totally liable for all the injuries of the plaintiff.

Moreover, the alternative may likely result in increased litigation against health care providers. A tortfeasor who causes injury to a plaintiff has little to lose by claiming that a physician or other health care provider caused injury in the treatment of the injuries caused by the negligence of the tortfeasor. The health care providers will then be brought into the litigation even though the plaintiff may not be complaining of any negligent acts. Since by law health care providers are required to carry at least $3.2 million in insurance, both plaintiff's counsel and the attorney for the tortfeasor will be motivated to draw health care providers into the fray.

In summary, it is the position of the Kansas Hospital Association and the Kansas Medical Society that the present tort laws in Kansas encourage litigation to the detriment of health care providers. The present comparative fault statute, however, is not a cause of this problem, and in fact, has been worked out over the last decade in a manner which is reasonable to all parties and in line with the philosophy of the citizens of the state of Kansas.

Attch. IV

3-1-85

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

SB 35

March 1, 1985

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

SENATE JUDICIARY COMMITTEE

by

David S. Litwin
Director of Taxation

Mr. Chairman, members of the committee. I am David Litwin, appearing on behalf of the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to testify today.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

When I addressed this committee on SB 35 last Friday, I described several major concerns raised by this bill, with emphasis on the serious danger that a great many

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more cases might be brought, thus tying up the courts, forcing defendants and their employees to spend an unwarranted amount of time in court and at depositions in very questionable cases, and raising liability insurance rates to unacceptable levels. However, I said that since our board of directors had not yet had occasion to speak on this issue, I was not appearing either in opposition to or support of the bill.

Since that time, my attention has been directed to a provision of the statute I did not comment on. I am referring to section 8, subsection (b), particularly paragraph (6). This latter subsection would, in cases based on strict liability in tort; make each party who is strictly liable responsible jointly and severally for the shares of liability of all strictly liable defendants. This provision would in practical terms completely repeal comparative fault in the area of products liability or any other sphere to which the theory of strict liability might be applied. We feel that there is no sound reason for this change. To the contrary, in every case the entire damage award would in practical terms be assessed against the party with "deep pockets," no matter how small that party's share of the fault might be. This result would in turn help send liability insurance rates through the roof, to the point where it could become simply unaffordable by some producers and sellers.

Moreover, several of our members have impressed on me during the past week that strict liability in the products liability field is already causing severe problems for many important industries in Kansas, not the least of which is the general aviation aircraft manufacturing industry. If this bill is enacted in its present form, it could only exacerbate this serious and already deteriorating situation.

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Although I cannot state that KCCI is formally opposed to enactment of this bill because our board has not yet addressed the issues it presents, I am confident that if this bill were presented in its present form to our board, it would be decisively rejected.

Thank you once again for the opportunity to appear today. If there are any questions, I will be pleased to answer them.

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Cessna

MARCH 1, 1985

TO: JUDICIARY COMMITTEE OF KANSAS SENATE

RE: SENATE BILL NO. 35

I am Dave Edwards, Secretary and general counsel for Cessna Aircraft, and I appreciate this opportunity to express our view of proposed Senate Bill No. 35.

The adoption of Senate Bill No. 35 will exacerbate a problem that is already considered by the general aviation industry to be the most significant problem facing the industry, and many other industries, today -- that is product liability. It is a problem that threatens the very survival of an industry that has been a Kansas staple for many years.

By changing Kansas law to pure comparative fault, the immediate effect of Kansas Bill No. 35 will be more lawsuits filed in Kansas against Kansas manufacturers and, more importantly, almost no chance for a manufacturer to successfully defend itself. Experience from other jurisdictions tells us that juries are always inclined to assign some degree of fault to all of the parties to a lawsuit. And, the rule of joint and several liability endorsed by Senate Bill No. 35 will subject major manufacturers like Cessna, who are always "target defendants", to the payment of portions of claims attributable to the fault of others, such as aircraft pilots and fixed base operators who maintain aircraft, but are not subject to the jurisdiction of Kansas courts or are severely underinsured or thinly capitalized.

A few numbers will put the size and nature of the problem at Cessna in perspective for you. In 1979, Cessna produced and delivered 8,400 airplanes from its three aircraft plants in Kansas. Deliveries have declined dramatically in every year since and, in 1984, we delivered less than a thousand airplanes -- the smallest number since 1951. The decline in our Kansas employment reflects the depression we have experienced. In 1979, our Kansas employment peaked at almost 19,000. Today it is less than 8,000 and just yesterday we announced more cutbacks at our Aircraft Division in Wichita. To date, Cessna and the rest of the general aviation industry, including our Kansas neighbors, Beech Aircraft and Gates-Learjet, have not benefited from the recovery in many segments of the economy and there is not a great deal of belief that a market turnaround is imminent.

Although the economic plight of general aviation is probably familiar, perhaps not as familiar is the fact that, simultaneously, another and perhaps more permanently threatening crisis confronted our

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Aircraft Marketing Division Cessna Aircraft Company, P.O. Box 1521, Wichita, Kansas 67201, 316/685-9111, Telex 417-400

industry. The cost of product liability insurance has skyrocketed and, more importantly, its availability to the general aviation industry is disappearing. It is important to understand that the problem is not simply one of cost. In the past year, the London insurance market and the reinsurance markets it utilizes, where almost all aviation products insurance is written, have severely restricted the amounts of coverage available. One of the most prominent reasons cited by underwriters is the decided trend in our court systems toward tougher standards of liability for manufacturers. Senate Bill No. 35 is another step in the same direction and its adoption by a state in which general aviation is a leading industry will result in further strain on the cost and availability of insurance.

A word about product liability insurance costs. Cessna's annual cost for product liability insurance has increased from just over $5 million in 1979 to more than $22 million this year. Spread over the number of units produced in those years, the cost has increased from $630 per unit to almost $23,000 per unit in the last 5 years. Partly as a result of similar increases, small aircraft plants have been closed by Piper Aircraft in Pennsylvania and Florida and by Beech in Liberal, Kansas. Cessna will soon be closing its Strother Field Plant near Winfield, Kansas which in 1979 employed 850 people.

In summary, we believe that the current Kansas law on comparative fault is equitable to manufacturers and users of their products alike. It does not require the changes called for by Senate Bill No. 35. Compounded by a depressed aircraft market and an extremely tight insurance market, our industry and thousands of Kansas jobs hang in the balance.

For the reasons described, The Cessna Aircraft Company opposes Senate Bill No. 35.

Thank you.

D. R. EDWARDS, SECRETARY
THE CESSNA AIRCRAFT COMPANY

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Mr. Chairman:

SENATE BILL 35, ON COMPARATIVE FAULT, IS THE RESULT OF A THREE YEAR STUDY BY THE KANSAS JUDICIAL COUNCIL. BOTH THE DEFENSE AND PLAINTIFF'S LAWYERS AGREE THAT THE CURRENT LAW HAS MANY PROBLEMS, AND NEITHER GROUP IS WHOLEHEARTEDLY SUPPORTING S.B. 35. SINCE THIS IS A COMPLICATED AREA, AND NUMEROUS CHANGES ARE SUGGESTED BY THE JUDICIAL COUNCIL, IT MAY BE WISE TO RECOMMEND REFERRING S.B. 35 TO AN INTERIM STUDY.

James L. Francisco

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