

Approved February 3, 1986

Date

MINUTES OF THE House COMMITTEE ON Judiciary

The meeting was called to order by Chairman Joe Knopp at
Chairperson

3:30 ~~xxx~~/p.m. on January 22, 1986 in room 313-S of the Capitol.

All members were present except:

Committee staff present:

Mike Heim, Legislative Research Department
Mary Torrence, Revisor of Statutes Office

Jan Sims, Committee Secretary

Conferees appearing before the committee:

Homer Cowan, Western Insurance Companies
Bob Trunzo, St. Paul Fire & Marine Insurance Co.
Kathy Pinkham, Medical Defense Insurance Company

Homer Cowan of The Western Companies of Ft. Scott, Kansas appeared before the Committee. He stated that the present issues pertaining to the medical malpractice insurance crisis in Kansas are the same as have existed since 1974 and 1975. He said that this problem is a unique one in that companies are paying such a high number of claims with such high awards that they are unable to price their product because the predictability has been taken out of rate making. The industry lost \$2.8 billion last year and only 3 companies now actively write medical professional liability insurance in Kansas. One of those companies, St. Paul, has put a hold on writing new policies. Mr. Cowan explained the concept and operation of the Health Care Stabilization Fund, which his company administers. He stated that the new risks taken into the Fund in the last year makes the number in the Fund about double what it was last year. He said that no one wants to take money away from injured people; there just has to be a way found other than the present method, of getting the money. Injured parties only get 30% of every award. He presented the written policy position of the Western Companies (Attachment 1).

Bob Trunzo of St. Paul Fire & Marine Insurance Company appeared before the Committee. He explained the moratorium which his company has placed on writing professional liability insurance effective January 1, 1986. He explained that this is a nationwide policy and that it does not mean that St. Paul will not stand behind its insureds. If a present insured adds a new doctor he will be covered. They are only putting a hold on writing new policies. He said the reasons for this were an unacceptable loss ratio on malpractice lines and a large growth in premium not equal to the percentage of their book of business which represents medical malpractice policies. Mr. Trunzo spoke of the frequency and severity portions of claims. He stated that although Kansas' frequency level is rising quickly it is below the national average. It is above the average however in the severity category and that is continuing to rise. These trends must be changed for the insurance industry to survive in Kansas. He stated that St. Paul's capital allocation for malpractice policies and a lifting of the moratorium could be forthcoming with the adoption of this bill. He said it is impossible from an actuarial standpoint to predict what will happen to premiums if HB 2661 is passed. He said the cap will have an effect in multiple defendant cases which is almost all of the cases filed. He further felt that it would lessen the disagreement of approach to a suit between the Fund and the primary carrier.

Kathy Pinkham of Medical Defense Insurance Company appeared before the Committee. She said her company is a doctor-owned insurance company insuring approximately 500 doctors in Kansas. They have been suffering losses for the three years they have written in Kansas. She stated that her company would like to see a decrease in the Fund surcharge. They feel that would give Kansas doctors some relief in this situation.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.



1/22 Cou

The Medical Malpractice Crisis -- 1974
The Products Liability Crisis --- 1976
The Medical Malpractice Crisis -- 1984

1985

Medical Malpractice
 Dram Shop
 Municipal Liability

Day Care Centers
 Professional Liability

 Churches
 Asbestos

Manufacturers
 Accountants

1986

- THE INSURANCE CRISIS -

OR

"WHAT ELSE IS NEW??"

attachment 1
Abuse Judiciary
1/22/86



1985 -- THE INSURANCE CRISIS

In 1975-1976-1977, on behalf of The Western Insurance Companies of Fort Scott, I testified before a number of legislative committees. I put together a voluminous exhibit of some 90 pages. While directed to Product Liability -- I said,

"It is not a Products Crisis. It's an Insurance Crisis"

In 1977 --

"Last year the medical malpractice crisis. This year, the Products Liability crisis. Still to come is availability and pricing of other areas of insurance"

In 1977 --

"A company cannot establish rates for future losses unless there is predictability in the legal and social climate."

"The Insurance Industry does not create the legal and social climate. They can only react to it."

Still in 1976-1977:

"A given injury of 1960 may have averaged \$25,000. In 1975 that value is \$250,000. The \$250,000 injury of 1960 may well have a 5 million dollar value in 1975."

1986

Attached you will find some other excerpts from the 1977 testimony. The only purpose of attaching this testimony that is nearly 10 years old is to suggest -- Nothing has changed. In fact, the ability to predict losses has simply spread to almost every area of liability insurance ... from Boy Scouts to churches.

There is today a capacity shortage. The industry has lost 3.8 billion dollars from its surplus. That means there is less



money within the industry to risk. If you've been burnt by some bad investments, you don't keep investing in the known loser.

The same Tort Reforms talked about in 1974 are still being talked about. Harassed legislatures across the country have tried desperately to stop the bleeding -- with a band-aid here, a band-aid there -- but, no one as yet has dared try to solve the cause of the perpetual blister. The System is not working as it was intended to work. There must be some legislative guides and absolute restriction. --

It's funny ... but without insurance, everyone turns to the Federal Government. The Federal Government should fund this program or that program ... the Federal Government is broke, but they can manufacture some more paper money -- we can't

Legislatures have created state insurance companies, and non-profit entities, and pools -- it really doesn't make any difference, they are broke, too!

Our Fort Scott paper just last week ran a "Wednesday Extra" -- maybe the feature ran in other papers, too -- but it's interesting to read because it tells you the problem --- and it relates quite well to everything we were telling this legislature in 1974-75-76-77.

The legal and social climate today is far more unpredictable than it was in 1977 and again, it is my firm conviction that it will be worse in 1990 than it is today unless the system is restructured. The economy of the world would collapse without insurance, but you may see a world without insurance unless the public that sits on juries and the courts that interpret the laws and the legislators who make the laws understand that not all things are insurable and that for every injury there must be a recovery unless, of



course, we prefer a socialistic form of government.

The theory of joint and several liability that causes San Diego County to pay all of a 2.5 million dollar verdict to a plaintiff who was injured in a car accident where all of the parties were drinking and smoking marijuana is a classic example of "deep pocket bingo". The theory that the City was negligent for failing to install curve signs was penalized by the entire judgment since the driver of the vehicle was without insurance!

On ABC's "Nite-Line" program a week or so ago, Ralph Nader argues that the "crisis" is being manufactured by the Insurance Industry. Let me counter with this ... There are 2,000 insurance companies out there trying to make a profit ... About 1,975 of them have backed off of most general liability lines. The can't all be wrong.

The number of companies going broke is just starting ... let me give you some figures.

The aggregate assessments for insolvencies for the year 1985 were almost three hundred million dollars. To put this another way, the assessments against The Western Insurance Companies of Fort Scott, Kansas from 1969 to 1983 were \$984,713.34. That is for a period of 14 years. The assessments in 1985 alone, against The Western Companies is approaching the two million dollar level!!



On the "Nite-Line" program mentioned earlier, Nader was asked:

"Tell me of one single law ... one single legal concept that you can say will be the same 5 years from now -- Even one (1) year from now."

NO RESPONSE!! (From Nader)

Predictability!! That's the only way rates can be set to be "neither excessive, nor inadequate" ... As Kansas Statutes now demand."

In my opinion, there is a need for immediate action that can only be done by the federal Congress or state legislators. I believe I would prefer to have the state legislators attack the problem because they are likely to seek more reliable solutions than simply printing more money!

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

Attachments:

1. 1975-77 excerpts of testimony
2. 1-15-86 News Analysis of Country-wide Insurance Problem
3. Position memorandum of The Western Insurance Companies in respect to Tort Reform

1977
testimony
Cowan

THE MANUFACTURERS PROBLEM: The "Products crisis" concerns itself with about 10% to 15% of products classifications. Keep in mind that the market is functioning for 85% to 90% of all manufacturers.

THE INSURANCE PROBLEM: Predictability of number of losses and size of losses is very difficult to project due to the "products explosion". As to some classes, the industry has no way to know or predict the adequate rate.

THE CONSUMER PROBLEM: How much protection can the consumer afford? Idealistically everyone wants unlimited compensation for any injury or loss irrespective of how the loss occurred or irrespective of whether anybody did anything wrong.

THE SOLUTION: There is no one single solution. It took a series of circumstances to bring about the problem and it will take a series of circumstances to solve the problem.

TORT REFORM is a partial solution. The liberal expansion (or interpretation) of the law in recent years has engulfed the insurance premium based upon "legal liability" and "reasonable damages." Guaranteed recovery and recoveries far in excess of economic loss are not within the premium charged a few years ago and may well be beyond the premium charged today.

The old doctrine of LET THE BUYER BEWARE was no good.

The new doctrine of LET THE SELLER BEWARE is no good.

There must be a balance between the equities of all concerned.
The manufacturer (the Risk)
The insurance industry
The legal profession
The public

OR WE ALL LOSE.

A recent survey of Kansas manufacturers listed these suggestions:

1. Statutory reform of tort liability
 - a. Elimination of punitive damages
 - b. A bar to recovery if product has been altered
 - c. Limitation of attorney's contingency fee
 - d. Admissibility of evidence of collateral sources
 - e. Modification of the doctrine of strict liability

1977
Testimony
(Cowan)

IN THE BEGINNING

The Egyptians used two ships and put one-half of a valuable cargo on one ship and one-half on the other ship. This was the first known instance of "spreading the risk", an insurance principle that does exist and must exist today.

In the 17th century, Lloyds Coffee Shop on Tower Street in London was the gathering place for traders, ship owners and money lenders. Ship owners desiring coverage on hulls or cargos would describe their venture, ship, route and other pertinent information. Lenders would then individually assume some limit of liability. This was "underwriting" in its earliest form, a basic insurance principle that does exist and must exist today. A sound ship, calm water routes and a good captain would receive more money (limits) for less cost (premium) than an unsound ship traveling a route beset by predictable storms. The latter will be subject to higher cost; if coverage can be obtained at all.

In 1976, a government mandate caused to be placed upon the market a product for massive use and condemned the insurance industry for their unwillingness to "guarantee results" of the use of that product. It was called the Swine Flu Program.

The problem of offering the requested coverage for the Swine Flu Program was the impossibility of predicting the number of claims or the size of awards. Predictability, the cornerstone of ratemaking. A company must be able to predict with reasonable accuracy the number of losses and the size of losses contemplated within the premium to be charged.

In between the coffee house in London and the Swine Flu Program of Washington, lies the tale of insurance as we have known it in the past. The latest chapters are not yet written as the latest in the cycle of "crisis" is still unfolding. Insurance as it may be in the future is yet to be determined.

The one word to underline.....
circle in red and put in
quotation marks

"PREDICTABILITY"

1977 testimony (Callon)

The cost of insurance is dependent upon --- How often do you use it?
--- The public decides that too.

Today, with extremely liberal legal climate, a day created for the consumer, the use of insurance has multiplied to a point that there is no such thing as "just an accident." It's a claim.

One no longer cuts themselves with a knife. -- It's a product claim. The blade was "too long" or the handle "too short".

The public decides what a claim or an injury is worth. And like all things, the cost has gone up dramatically. In the past 8 years, the number of losses has increased from \$50,000 to \$1,000,000 and the cost per claim from \$11,000 to an estimated average of \$80,000 by 1980. (See Exhibit E-1).

The cost of insurance in every line of coverage has gone up --- drastically. Yet not in proportion to other costs. The latest survey by the Department of Insurance reflects the following:

The survey showed that while hospital costs had arisen 289% and physicians' charges 82.4% over the past 10 years, automobile liability premium costs in Kansas had risen only 36.6%.

Also, while labor and parts related to auto repairs jumped 150% and 89%, respectively, over the period, auto physical damage premium costs rose 69%.

In the homeowners insurance area, premiums rose just 29.7% in the past decade, while costs for materials and labor in home construction leaped 150% and 211%, respectively.

The cost of insurance is tied directly to the cost of things insurance is intended to pay. Automobile parts are established by the automobile manufacturers. Building costs are established by the building contractors. Injury costs are established by the jury. (the public).

A given injury of 1960 may have averaged \$25,000. In 1975, that value could be \$250,000. The \$250,000 injury of 1960 may well have a 1975 jury value of \$5,000,000. The public decides.

Including - million dollar judgements ✓

Crisis: Insurance drought threatens business, government, individuals

EDITOR'S NOTE: Across the country, liability insurance — our paid protection from the economic ruin of lawsuits — is drying up. When it is available, its cost is leaping; some customers feel lucky to be paying premium increases of 500 to 1,000 percent. This story outlines the crisis and its causes.

By Fred Bayles
Associated Press Writer

A tavern in Albany, N.Y., closes its doors. A Miami trucking firm goes out of business after 60 years. The mayor of a small Pennsylvania town orders police off the streets.

The common denominator in each case is a sudden and sweeping "drought" in liability insurance.

Once routinely purchased by business and government as protection against the economic ruin of lawsuits, liability insurance has become scarce and expensive. The growing list of those left out in the cold includes municipalities, professionals like engineers and architects, day-care centers and businesses ranging from large chemical companies to small manufacturers.

This crisis is more pervasive and has occurred more suddenly than the well-publicized rise in medical malpractice insurance rates that have hobbled hospitals and doctors. The drought also has different causes.

Roger Singer, Massachusetts' deputy insurance commissioner, says his office is flooded with calls from people who can't get insurance or who face rate increases of 300 percent and more.

"It's everybody from some of the biggest companies in the state to an individual chimney sweep who can't get coverage," he said.

The crisis touches all society. The New Mexico Retail Liquor Dealers Association estimates 75 percent of its membership can't get or afford insurance. South Carolina officials are trying to persuade an insurer to continue coverage for hundreds of churches.

"I would expect the churches to be the better risks, and if the company starts canceling the better risks, then other companies would follow, and we would have chaos," said state Insurance Commissioner John Richards IV.

The drought's impact is widespread. When Mission Insurance Co., a carrier in California, dropped its specialty day-care insurance, the ripples reached across the country. Hundreds of day-care centers went hunting new policies.

It affects everyday life. Northeast ski operators will raise the price of lift tickets a few dollars to cover the cost of higher insurance. Denver Girl Scouts may have to cancel summer camp for want of coverage.

The Chicago suburb of Mount Prospect leveled its popular toboggan run after its insurer threatened to cancel the town's policy.

The insurance drought follows the worst year in the liability insurance industry — a loss of \$3.8 billion.

Insurance executives blame the red ink on the steady increase in the size and scope of lawsuits. Laws expanding the definition of liability and court interpretations of policies have left insurers with hefty judgments on claims they say they never intended to cover.

The industry points to a \$15.5 million judgment in Jackson Township, N.J.

Hartford Accident and Indemnity Co. was ordered to pay damages for the slow contamination of town wells by chemicals from a landfill even though its policy excluded pollution coverage, except for "sudden and accidental" incidents.

"The courts have interpreted our contracts to such an extent that we no longer know what is covered," said Warren Levy, a spokesman for the Insurance Information Institute.

Insurers and their customers also are paying for nearly seven years of "interest rate underwriting" — a time when companies sold policies at bargain basement prices while bolstering profits through in-

vestments paying 14 percent or better. ^{Trye!}

Some say insurance rates fell below realistic levels as competition raged for the premium dollars. When interest rates dropped abruptly, insurance companies were caught between shrinking investment income and soaring legal judgments.

"The companies are not making the investment return that had helped prop up the bad underwriting," said James Chastain, a professor of insurance at Howard University's School of Business and Public Administration. ^{Trye}

The losses have cut into insurance reserves — the money set aside to cover future claims. They have also scared away money invested by reinsurance companies, foreign carriers like Lloyd's of London that basically insure the insurance companies.

The loss of funds means less insurance is available. With less insurance to sell, companies are more selective about whom they cover. Many now avoid high-risk customers like liquor establishments and municipalities.

New Jersey Insurance Commissioner Hazel Gluck said the insurance industry was "trying to step back from writing risks."

But consumer activists say insurance companies manufactured the crisis to boost rates and force demands for controls on liability suits.

"This is an industry rather uniquely positioned to use organizational extortion," said Ralph Nader, the consumer advocate. "They're holding the consumer and government hostage."

victims. Some have curtailed growth to pay the higher premiums. Others have simply closed. Leonard Brothers Trucking Co., started 60 years ago in Miami, blamed the lack of insurance when it closed this year.

"Everybody has to cut expansions," said Tim Lyons, executive director of the Hawaii Pest Control Association. "Some marginal companies are going out of business because they won't be able to afford the insurance and some can't even get it."

State and local governments also find it hard to get coverage.

"We find, quite frankly, that we are being orphaned by the insurance industry," said Bill Dressel of the New Jersey League of Municipalities. Dressel said 30 percent of the state's 567 municipalities were searching for coverage.

When insurance is available, it's expensive. Newport Beach, Calif., saw rates go from \$43,595 last year to \$390,665 this year. In Scottsdale, Ariz., insurance for the school district climbed from \$117,500 for \$11 million in coverage to \$658,000 for \$6 million of coverage over the past two years. The change will mean higher taxes.

A U.S. Conference of Mayors study recently reported that half of 40 communities polled said their insurance premiums doubled over the past two years.

"Cities say they are being squeezed financially in their attempts to insure against liability in countless areas — property damage, police, fire and errors of omissions, among others," the study said.

The crisis has forced elected officials to make hard choices. Madison, Ind., closed

the swimming pool after the city lost its insurance. When Sykesville, Md., population 2,000, lost liability insurance for its officials this summer, the president of the town council resigned. He returned to office when insurance was found.

Mayor Dave Cornish of Collegeville, Pa., ordered police off the streets for two days while the borough tried to find insurance. The community of 3,100 finally got a policy for \$5,400, more than six times its previous premium.

"I don't think there's any doubt that it will cause a tax increase," said Cornish.

Some respond to the crisis by doing without insurance.

Bill Martin of the Texas Municipal League said 100 cities in his state had "gone bare."

"If they are hit with a large claim they would be forced to go to the taxpayers for relief," he said.

Others have banded together. Municipal leagues in 11 states now have liability insurance pools. New Hampshire recently created a state insurance pool for municipalities, day-care centers and liquor establishments.

Others are pushing for change in civil law. California lawmakers are considering legislation limiting judgments against defendants in some cases. Local officials are lobbying for a \$1 million ceiling on awards against Nebraska municipalities.

Chastain, the Howard University insurance professor, said such tort reform was essential to stabilize prices. But he also said the insurance industry must do better at assessing risks and setting prices.

Higher
Prices for
everything
+
Tax increase

City, county rates nearly double this year

By Michael Beck
Tribune Staff Writer

Fort Scott and Bourbon County officials say they understand why fewer companies want to handle governmental liability insurance.

However, that understanding doesn't take the pain out of paying 75 percent to 100 percent more for insurance this year than they paid last year.

In October, the Fort Scott City Commission agreed to spend \$92,000, or 74 percent more than last year, for liability insurance, workman's compensation and property insurance.

Finance Director Jon Garrison said the

bulk of that increase was in liability coverage, for which the city had searched for about three months

The Western Insurance Companies, which had written the city's liability insurance for decades, notified officials last year that they could no longer underwrite the policy.

So, after an extensive search, the city was able to find three companies to bid on the city's policy. The best bid, city officials thought, was PenCo Insurance Co., Topeka.

County officials have run into the same problem, paying about double, or \$80,000, for liability insurance, according to County Clerk Barbara Wood.

Virginia Johnson, manager of the Waters Insurance Agency, handles both governments' insurance. She said that although she was able to find a few companies to provide the policies, the number of companies writing government liability insurance had dropped radically.

"There are so many lawsuits and so many judgments," Mrs. Johnson said. "Everybody's sue-happy."

One possible alternative to high insurance costs is a county-city insurance pool, which Mrs. Johnson said she thought the state might eventually establish. The pool would be a state-run trust from which judgments would be paid.

Kae of lawsuits burdens industry

By Fred Bayles
Associated Press Writer

Henry Lowd jokes about it. "People come from miles around to fall on our property," said the executive secretary for Randolph, Mass., a Boston suburb sued for \$65,000 by a New Hampshire woman who fell at the town police station.

The threat of lawsuit is no laughing matter to growing numbers of municipalities, manufacturers, bars and others. The rise in litigation is a special burden to the nation's troubled insurance industry, which suffered a record \$3.8 billion loss last year, a loss blamed in part on the constant drain of lawsuits.

Insurers recorded \$101.1 billion in losses last year, up from \$70.2 billion paid in 1980. As a result, insurers have raised rates and cut coverage. The impact is felt everywhere, from local government to day-care centers.

"People want to use the civil justice system to resolve the smallest dispute," said Richard Marrs, head of The Travelers Companies claims department. "Neighbors who may have had a disagreement many years ago might have gotten together and worked it out. Today they want to get a lawyer."

Courts around the country have recorded an increase in the number and size of lawsuits:

- 1,580 product liability suits were filed in federal district courts in 1974. Last year, the number was 10,745.

- The New Mexico Public Liability Fund reported that of \$8 million in claims paid since 1976, \$6.2 million was awarded in the past two years.

Mark Peterson, a senior researcher with the Institute for Civil Justice, an affiliate of the Rand Corp., said civil cases in San Francisco and Chicago involving automobile accidents and "slips and falls" were giving way to more expensive product and government liability suits.

Many point to court interpretations that have expanded the definition of liability.

"Joint and several," a legal concept rooted in English common law, says an injured party may recover losses from anyone with some responsibility for the injury.

In recent years, many courts have held that "deep pocket" defendants — government and businesses with large financial resources — can be held liable for all damages even if they are only minimally responsible.

San Diego County, Calif., recently was ordered to pay \$2.5 million to a man paralyzed when a friend's car missed a curve and rolled over. Although the two men were judged at fault for speeding, drinking and smoking marijuana, the county, judged 10 percent at fault for failing to install curve markers, had to pay all damages because the driver had no insurance.

Pa. & Ill !!

Social issues are also clamoring for their day in court. The national concern over drunken driving has brought rulings, like one from the Arizona Supreme Court, that liquor establishments are responsible for actions of patrons who become intoxicated and later are involved in accidents.

Hank Graham, president of the Arizona Licensed Beverage Association, said the ruling persuaded him to sell his share in a tavern and liquor store.

"I'd like to have an ice cream store," he said. "I haven't heard of anybody suing an ice cream store yet."

Even successful legal fights are costly. Randolph, Mass., won the \$65,000 suit filed by the New Hampshire woman who fell in the police station. But the town's insurer spent \$16,000 defending the suit. The company later canceled the town's insurance.

Latest insurance cycle is unprecedented

By Fred Bayles
Associated Press Writer

Insurance people agree theirs is a business of ups and downs, reacting to income-producing interest rates by either raising or lowering premiums. But the current dip in the insurance roller coaster ride is surprisingly deep.

In 1980, the MGM Grand Hotel in Las Vegas, partly gutted by fire and reeling from the deaths of 87 guests and employees and injuries to 700 other people, was able to buy a unique retroactive insurance policy.

For just \$38 million, a consortium of insurance companies sold the hotel a \$170 million package to cover eventual settlements with victims and their families.

Five years later, times have changed. In Kennewick, Wash., Corthea Olsen is faced with a 500 percent increase in insurance for her day-care center, even though it hasn't had a claim in 10 years.

"We are faced with losing money that should go to teaching the children," she told state lawmakers.

The two cases illustrate the cyclic nature of the insurance business, a feast-to-famine industry that goes from periods of frenzied competition and low rates to tight markets and high prices.

But this latest cycle in liability insurance

is unprecedented. Economic and social factors cost insurers a collective \$3.8 billion in 1984 — the worst year on record — and dried up insurance for steady customers.

Those able to buy insurance face rate increases of 300 percent to 1,000 percent even when they have never filed a claim.

Consumer advocates like Ralph Nader say the industry has manufactured a crisis, but insurance executives say events are beyond their control. Twenty insurance companies have been declared insolvent this year, the highest number in 11 years.

The insurance industry has ridden a roller coaster of cycles since the 1920s. When insurance money is plentiful, rates fall as companies compete for premium dollars to invest in stocks, bonds and real estate. When rates fall too far and investment income can no longer support them, the cycle reverses and rates climb.

The latest cycle began in the late 1970s when insurers cut rates to lure additional dollars for high-interest investments. Foreign insurers, banks and brokerage houses, attracted by the investment promise, entered the business.

"The industry is naturally competitive," said Warren Levy, a spokesman for the Insurance Information Institute. "With new money coming in and everybody looking to increase market share, companies cut rates."

Although the results looked good — the industry recorded a net gain of \$7 billion in 1981 — experienced hands began to worry.

John Jennings, an editor with National Underwriter magazine, said the industry was slow to react. "They knew this was happening to them and yet it took until 1985 for the market to turn," he said. "It should have turned in 1983."

Dramatic rate increases began last year, yet premium income is still below levels of six years ago.

And while income has remained static, losses have climbed. In 1980 the industry paid \$70.2 billion in claims; last year, claims were \$101 billion.

Richard Early, an assistant vice president at Aetna Life and Casualty, said court rulings had saddled insurance companies with claims they never intended to cover.

This uncertainty has scared insurers away from potentially high-risk customers.

The industry contends it has to be more selective about customers because it has less money for insurance.

Ironically, there are signs the industry's roller coaster ride already is heading up. Insurance stocks are considered a good investment. "Earnings should be excellent in 1986 and better in the next few years," said David Wells, an analyst for Goldman, Sachs.

Industry, government, consumers hope for changes in business

By Fred Bayles
Associated Press Writer

The sudden, sweeping impact of the nation's insurance drought has raised a clamor for change.

Insurance executives, frightened by ledgers bleeding red ink, want major alterations in the way they do business. Consumers, facing rate increases of 500 percent or more, cry for more controls. Elected officials study ways to better track the far-flung insurance industry and assure high-risk groups get coverage.

Everyone agrees the way America insures itself will be different in the future.

For Richard Earley, one of the top underwriters for Aetna Life and Casualty Co., recent events prove that not all things are insurable.

Earley said the industry will be more cautious about who it insures. Even conscientious customers in high-risk groups like municipalities, day-care centers and chemical companies may suffer.

"You've got to view a risk with an eye that even the good guys are going to be left holding the bag," he said.

Consumer advocates like Hunter and Ralph Nader say state regulators must be wary that insurers may be overstating today's problems to leverage an advantage in the future.

"State regulators must do some investigation and for once and all tell people the truth," said Nader.

Nader also thinks government should take a greater role in seeing that high-risk groups can get insurance. He recommends federal backing for some high-risk insurance pools. Ironically, some of his concerns are echoed by the insurance industry.

James Holland, head of The Travelers Companies' Casualty-Property Division, feels government must work with the industry to establish such insurance pools.

"Companies individually can't respond to this problem," said Holland. "It has to be some collective action and under some basis that will not expose us to antitrust allegations."

Such a business-government partnership was recently formed in New Hampshire, where 24 insurers joined with the state to provide in-

Warren Levy, a spokesman for the Insurance Information Institute, foresees a time when more insurance companies will limit business to specific areas. Where many companies once insured municipalities, one company may soon sell insurance solely to a city's transit system. Another insurer may specialize in police liability.

"Fewer companies are trying to provide a marketplace across the board," said Levy.

Insurers are redefining what they will and will not cover. Some want legal costs included in liability limits. Tough new exclusions, such as environmental risks, are being tacked onto policies. But the biggest move for change involves the notion of time.

Most policies cover claims on an occurrence basis: a manufacturer sued today for a loss that happened in 1955 would be covered by whoever held the policy that year.

Insurers say this leaves them vulnerable to the past, pointing to asbestos suits that have been filed two to three decades after a policy was written.

The industry wants regulators to

regulate the industry was poor. regulation of the industry was poor. Insurance companies have been regulated at the state level since the end of World War II. In many states, Hunter said, the insurance departments, outnumbered and outgunned by the insurance industry, often rubber-stamp rate increases and changes in coverage. *not many*

Other groups are looking for alternatives to private insurance. Many states, large cities and major companies are already self-insured, having set aside funds to cover potential claims. Smaller municipalities in at least 11 states have formed insurance pools and more are considering them.

Such pools have had mixed reviews. David Grubb, mayor of Park Ridge, N.J., said the municipal insurance pool of 25 communities he helped form saved his city \$4,000 in premiums. Harvey Mathias, an official with the North Carolina League of Municipalities, does not see savings for members of a pool his organization is establishing. "But it may be better than no insurance at all," he said.

While some look for alternatives to commercial insurers, state officials are hearing calls from consumers for closer scrutiny of the insurance industry.

Hunter, of the National Insurance Consumer Organization, said

approve "claims-made" policies that hold insurers liable for claims filed only during the time a policy is in force.

This change allows insurers to look to the past and present, instead of the uncertain future, to set rates based on a more predictable risk.

Under the present system, a suit by a shipyard worker exposed to asbestos in the 1950s would fall on the shoulders of the company that wrote the insurance 30 years ago, when there was no knowledge of the potential problems with asbestos.

Under the change, the claim would be covered by the present insurer, who, knowing of the potential for asbestos suits, would have charged a higher premium to cover the higher risk.

But consumer advocates warn such a switch could leave customers and claimants in the cold if high-risk customers can no longer buy insurance.

"All this is to set predictability," said Bob Hunter, head of the National Insurance Consumer Organization. "There's predictability for the companies, but much less predictability for the consumer."

Maryland Insurance Commissioner Edward Muhl, an officer with the National Association of Insurance Commissioners, agreed the quality of regulation varied from state to state. To deal with that, he said his organization was setting up a computer network that will allow states to compare notes and create more common regulations. *good*

Muhl acknowledged that regulators should have stepped in when insurance rates fell below realistic levels in the early 1980s; a fact that is blamed in part for the current problems. *True*

But he cautioned that tighter regulation in the future might require state commissioners to demand higher rates if insurers drop them too low again.



TORT REFORM

- A POLICY STATEMENT -

of the

THE WESTERN INSURANCE COMPANIES

FORT SCOTT, KANSAS

HISTORICAL:

The Western Companies of Fort Scott were born in Kansas over 75 years ago and have become a national company in the property insurance and casualty insurance field.

New products in this field are a direct result of the needs of the American insurance buying public, and it is our function to develop insurance products and to sell these products in such a manner to make a profit sufficient enough to satisfy stockholders and maintain employment and capital surplus to continue writing insurance.

We do not believe it is our place to tell General Motors how to build cars, nor tell attorneys how much they can charge their clients. The Western has grown and prospered under the American judicial and tort system and we feel, while not perfect, it is still the best system known to mankind and we endorse its preservation. Contained within the system is the principle that for every wrong there must be a legal remedy and an inherent right for every citizen to seek redress in the courts of our land. The Western does not believe it should dictate what is legal liability, nor what is a proper measure of damages.



AFFORDABILITY AND

AVAILABILITY

The insurance needs of the public today are, under the present system, in jeopardy because loss costs have exceeded premium charged. Today the insurance needs are being threatened because the product is not affordable to many -- and in some cases, simply not available.

THE GOLDEN EGG

Insurance needs have expanded as a result of our laws. The lack of insurance in the early history of our country was the cause of the "contingent fee" system used by the legal profession. Probability of recovery was so remote in many instances, the contingency fee system was the only game in town. It served the needs of people who could not afford to retain an attorney.

The law demanded availability of insurance as automobile insurance became mandatory. To be mandatory, there had to be a guarantee of availability and pooling mechanisms were mandated to insure the uninsurable!

Jury awards once remained low because the jury was not sure if there was insurance. A defendant with holes in the sole of the shoes might warrant a verdict of \$5,000, and the same facts with the same jury might justify a \$25,000 award if the defendant wore a black silk suit. And, this ultimately created the "target risk", the risk that juries knew there was insurance.

Time honored common law defenses fell by the wayside as courts reasoned that with insurance, the legal concept of defense was no longer needed. Thus, insurance was responsible for case law repeal of laws prohibiting wife suing husband, or the guest passenger laws. Thus, new causes of action were developed as availability was guaranteed.



And, new avenues of recovery were developed. The repeal of contributory negligence as a defense, doubled the probability of recovery under modified comparative negligence, and with pure comparative negligence, the public were enticed to the courts more often under the concept -- "Everybody wins something" -- The insurance carnival journeyed down the long dusty road, and the dust obscured the edge of the cliffs.

Legal liability began to drift away from strict rules of evidence that someone had to do something wrong that caused an injury, to the concept that since there was an injury, somebody, somewhere, had to have done something wrong. Juries, confident of insurance, awarded damages based upon injury, not a legal wrong.

And, product refined the doctrine of strict liability into guaranteed recovery ... and if the injury was a result of the plaintiff's own mis-use of the product, the courts said the manufacturer failed to warn, thereby granting recovery. And, when the manufacturer placed "warning" decals on lawn mowers, advising the public that the blades would cut, and printing a 38 page booklet of instructions, the courts said the manufacturer should have known that the public could not read!

And the public, realizing that you could sue your own doctor, found new legal encouragement as the doctrine of "guaranteed results" began to take shape in the minds of jurors.

The time value of money, and projected medical bill over a lifetime, projected on continuing rise in medical costs, began to justify awards in the "million of dollars". As all these things entered the ratemaking stream of insurance pricing ... the product suddenly became unaffordable -- and in some cases, unavailable.



The goose that laid the golden egg is about to have a hysterectomy!!

**AN INSURANCE
MANUFACTURED**

CRISIS!!

This is the cry of critics. -- Fact alone responds to this accusation. -- If all these products are overpriced by the industry -- why is no-one wanting to sell the product. If this is all "good stuff", why is it that only a handful of companies out of several thousand are willing to sell it any any price?? Why is it that every state formed non-profit company created by statute to fill the void -- is now broke??

A WORLD WITHOUT

INSURANCE?

The economy of the world would collapse. It is that simple.

**THE CHECKS AND
BALANCES OF SOCIETY**

HAS BROKEN DOWN

Historically, under our system, the needs of society have kept the scales balanced. If not, courts or legislatures did. In the present tort explosion, society has failed to recognize the pass-thru mechanism of insurance, the cost of which is passed through to the public in the cost of products or medical costs -- which in turn increases the cost of insurance. It must be recognized and some checks and balances must be implemented. NOW!!



THE TORT SYSTEM

MUST BE REFINED

The Western does not advocate the system be destroyed or replaced with a different system. The Western does believe in the injured person's right to recover and, indeed, a recovery commensurate with the true damages. Nevertheless, under present trends ... it is unaffordable -- and, a world without insurance is already here in some areas of exposure -- Insurance is unavailable.

THE REMEDY

Recommendations for remedy:

1. Actual damages as of date of trial - payable upon judgment.
2. Pain and suffering damages capped at \$250,000.00.
3. Future damages to be based upon structured settlement, unless parties to the case agree otherwise.
4. Mandatory pre-trial settlement conference, with findings admissable.
5. Punitive damages prohibited in respect to civil damages running in favor of plaintiff. -- Punitive damage should be a "fine" running in favor of the state.
6. Standard of care based upon standards in state and contiguous states.
7. Expert witness fees admissable.
8. Collateral sources admissable, including re-marriage.
9. Abolish Joint & Several Liability.
10. Abolish "Pure Comparative Fault".



These recommendations do not:

1. Impair injured parties right to courtroom.
2. The limitation on pain and suffering, while a restriction, is on a most speculative item of damage. \$250,000 for this item should be adequate in the greatest number of cases.
3. Structured settlement in respect to future damages is fair to all parties, and will buy several million dollars of future benefits. The injured party receives all benefits IF NEEDED. Presently, the system awards the money on speculation of need.
4. Mandatory pre-trial settlement conference, designed to reduce court load and reach quicker settlements at reduced cost.
5. Punitive damages should be a fine, a penalty, not a "windfall" to an injured party who theoretically is compensated by the general award for damages.
6. Standard of care should not be the standard of theory of what might happen in the field of development, but the real world standard in the defendant's general geographic area. A new theory developed in New York should not be the standard of care in Kansas.
7. Expert witness charge up to \$3,000 per day for testimony. The jury should know this.
8. All collateral sources of recovery should be admissable. Jury can disregard, but jury should know the truth, including re-marriage.
9. Joint & Several Liability is to the advantage of the injured party, but is also a unjust penalty of a defendant who must pay "everything", when only slightly at



fault. To solve one problem, we create a problem.

10. "Pure Comparative Fault" allows a wrongdoer to be unjustly enriched.

THE WESTERN

OPINION

The Western is most concerned about affordability. Rates adjust to legal and social changes, and the situation becomes -- "How much protection can you afford??" -- but high rates impact the inflation rate and the pocketbook of every person in America. "How much protection can the public afford?", is a question the public must know to determine how much more can we pay the injured party and does an injury in and of itself constitute a right to automatic recovery?

Availability, or the lack of insurance at any price is intolerable. -- Availability is the strongest restriction of an injured party's right to recovery. Without insurance, in most cases, would be -- "Recover what??"

In the words of William O. Bailey, president of Aetna Life and Casualty,

"The availability problem is not a problem created by our industry. It is first and foremost a problem with the civil justice system. Judges, jurors and legislators are creating ever more liberalized notions of liability without regard for the economic consequences of their individual decisions. State courts and the federal court system had individually fashioned a patchwork of changes in the liability rules, causing unprecedented losses to fall haphazardly upon our industry ... This is the biggest challenge this industry has ever faced. We must work together to fashion and implement solutions."



Therefore, this position paper is being made available to all of our employees, or anyone else who wants a copy, with the suggestion that only you and I, the public, can force a remedy to a most pressing public problem.

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 Kansas and Missouri



February 3, 1986

The Honorable Joe Knopp
Chairman, House Judiciary Committee
Room 175 - West
State House
Topeka, KS 66612

The Honorable Rex Hoy
Chairman, House Insurance Committee
Room 112 - South
State House
Topeka, KS 66612

Gentlemen:

Thank you for extending us the opportunity to appear before your committee last week in Topeka. During the course of my testimony, I cited some frequency and severity figures which you suggested I include in a letter to you.

I traced for the committee the development of our frequency and severity statistics on a countrywide basis. Frequency and severity are the components of loss and are two measures from which rates are made. Frequency is the number of claims per basic unit -- for instance, per insured physician, per occupied bed, etc. Over the last ten years, countrywide frequency, based on our own statistics, has risen nearly every year and shows a constant upward movement over the years. To illustrate, in 1975 on a countrywide basis, we had 8.5 claims per 100 physicians reported to us. In 1984, that number has risen to 16.4 claims per 100 physicians -- nearly a 100% increase in frequency over a nine period.

Kansas frequency numbers have increased in the corresponding nine year period also. To illustrate, in 1975, 8.8 claims per 100 physicians were reported to us. That number has risen steadily to 13.7 claims per 100 doctor for 1984.

The other component of loss -- severity has also increased from 1975 to 1984. Severity is the loss and allocated loss expense (costs for defense of the claim) per reported claim. Severity has nearly tripled since 1974. Our countrywide figures illustrate the following: in 1975 we paid \$8685 for an average claim and in 1984 we paid out approximately \$23,000.

*Attachment 2
House Judiciary
1-22-86*

received after minute approval

Kansas severity has tripled since 1975. In 1975 the cost of our claims averaged \$7795. In recent years the costs are as follows: 1979 - \$10,589; 1980 - \$18,522, 1981 - \$21,960, 1982 - \$24,900, 1983 - \$25,900, 1984 - \$21,300. The trend from 1979 until the present is even more alarming.

Again, to summarize my comments, while Kansas frequency is below our countrywide average, the severity has been increasing steadily. This is of concern to us.

Jury awards in medical malpractice cases have risen by nearly 136% since 1980 -- from 404,726 to 954,858 in 1984. These average medical malpractice awards from Jury Verdict Research, Inc. (JVR) include verdicts against all health care providers including those that reach \$1 million or higher. In fact, JVR has indicated that the number of malpractice verdicts in excess of \$1 million has increased from 4 in 1976 to 70 in 1983. Out-of-court settlements are also growing at a corresponding rate.

When I appeared before the Special Committee last year, I also cited the average costs for specific cases reported to us. Set forth below is a list of the top 10 allegations as reported to us along with the average cost of these claims:

<u>Allegation</u>	<u>Number of claims</u>	<u>Average cost 1983-1984</u>
1. Surgery/Post-op Complication	1,442	\$33,444
2. Improper Treatment/Birth-Related	703	\$80,969
3. Surgery/Inadvertent Act	546	\$36,860
4. Failure to Diagnose/Cancer	478	\$56,340
5. Failure to Diagnose/Fracture, Dislocation	452	\$22,954
6. Improper Treatment/Drug Side Effect	380	\$40,694
7. Surgery/Inappropriate Procedure	379	\$26,250
8. Failure to Diagnose/Pregnancy Problems	313	\$37,648
9. Improper Treatment/Fracture, Dislocation	309	\$38,648
10. Failure to Diagnose/Infection	273	\$65,297

During my committee presentation last week, I was also asked about the location of these claims. Set forth below is a summary of 1983-84 malpractice claims against physicians by location:

<u>Location</u>	<u>Number of Claims</u>
Physician's Office	2,203
Clinic	990
Surgi-Center	108
Hospital - All Areas	8,256
Emergency Room	1,298
Operating Room	3,892
Obstetrics	916
Patient Care Area	1,401
Outpatient Surgery	135
Other Areas	614

Committee members also asked about premiums in other states. Set forth below are premiums for a claims-made policy with 200/600 limits in effect as of July 31, 1985:

Specialty	Colorado	Nebraska	Missouri		Oklahoma	Kansas
			St. Louis	Rest of State		
Phys. No Surgery	\$ 2,089	\$ 1,506	\$ 4,285	\$ 3,572	\$ 1,121	\$ 2,676
Phys. Minor Surgery	4,088	2,911	8,448	7,044	1,958	3,956
Phys. Major Surgery	5,088	3,613	10,530	8,779	3,277	5,236
Emergency Room	6,089	4,315	12,611	10,515	3,277	7,028
General Surgeon	10,465	7,395	21,732	18,120	5,666	12,079
Orthopedic Surgeon	12,539	8,853	26,053	21,723	9,018	16,065
Ob,obgyn	14,614	10,311	30,374	25,326	6,784	20,052
Neurologists	21,874	15,414	45,499	37,937	9,018	25,368

The rates reflected above for Kansas do not include the surcharge for the Health Care Stabilization Fund (HCSF).

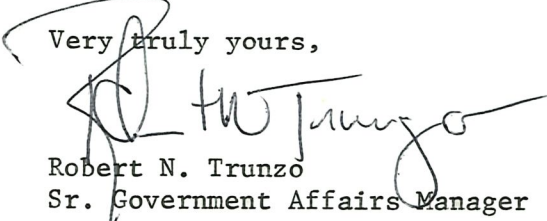
I was asked one additional question about whether a small group of physicians were generating the majority of the loss dollars. As you know, that has been a constant claim by certain groups so we decided to investigate this assertion. We reviewed our book of business at our Kansas City Service Center and can assure you this is not the case with our St. Paul book of business. Our increase in frequency and severity is among all health care providers and not restricted to a certain group of so-called "repeat offenders."

As I stated before your committee, the package assembled by the Special Committee on Medical Malpractice has cost effective features. When we view potential areas to write our medical business, clearly, the regulatory and legislative climate is important. Consequently, the changes contemplated in the law should enhance the Kansas medical liability climate for current writers of medical malpractice of insurance. We can not however, with any degree of accuracy, predict

what our rates will be in 1987 and 1988 without having the benefit of our data for 1985 and 1986. You did ask me what effect the \$1,000,000 cap would have on physician and surgeon rates. At the present time, we are not able to isolate this variable (a \$1,000,000 limitation on awards) in our rate analysis and project an exact amount of savings which could be expected if a cap were enacted. It is logical to assume, however, that if we limit the number of dollars flowing out of the medical liability insurance system by placing a cap on awards it will have a positive effect on premiums charged by Health Care Stabilization Fund. As you know, that surcharge has been increasing at a dramatic rate and now represents a substantial amount of premium for Kansas health care providers.

I hope my comments have been helpful. Should you have any additional questions, please feel free to contact me.

Very truly yours,



Robert N. Trunzo
Sr. Government Affairs Manager

RNT/bp

cc: Ron Heim
Dave Loritz, Kansas City Service Center
Paul Longman, Kansas City Service Center