Approved April 1, 1986
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Vice Chairman Robert Wunsch at
Chairperson

3:30 ~~a.m.~~/p.m. on February 25, 1986 in room 519-S of the Capitol.

All members were present except:
Representatives Solbach and Luzzati were excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Torrence, Revisor of Statutes Office
Jan Sims, Committee Secretary

Conferees appearing before the committee:
Ralph Gundlefinger, Providers Insurance Company
Jerry Slaughter, Kansas Medical Society
David Litwin, Kansas Chamber of Commerce & Industry
Richard Harmon, Kansas Association of Property & Casualty Insurance Companies
Kathleen Sebelius, Kansas Trial Lawyers Association
Eugene Ralston, Kansas Trial Lawyers Association
Ron Smith, Kansas Bar Association

HB 2918 - An act relating to certain liability claims; placing limitations on attorney fees charged.

Representative Stephen Cloud appeared before the committee in support of HB 2918. Rep. Cloud said it is his belief that the medical malpractice liability problem which has been before the committee is only a portion of the total liability problem in Kansas. This liability crisis goes beyond medical practitioners to other professionals and governmental entities. He attributes a portion of this crisis to a society that has gone "litigation mad" and juries returning higher verdicts than ever before. Rep. Cloud cited the Kansas Citizen's Committee for the Review of the Tort System's report stating that contingent legal fees are an important means to assure that persons otherwise unable to afford an attorney have a right to obtain legal representation but that a limitation on contingent fees is appropriate and reasonable. He also stated Canan 2 of the Code of Professional Responsibilities stating that legal fees will not clearly exceed reasonable compensation. It is Rep. Cloud's opinion that $400,000 to $500,000 in fees in a case exceeds reasonable compensation. He said that imposition of the provisions of HB 2918 would deter the filing of frivilous suits. (Attachment 1)

Ralph Gundlefinger of Providers Insurance Company appeared before the committee in support of HB 2918. He stated that California has limited contingent fees and he believes it is working in California. He said insurance companies are leaving Kansas in the writing of all types of liability coverage. He said this bill will bring down costs because it will deter unjust enrichment. He feels that HB 2918 will bring back some stability to the insurance environment in Kansas and the legal system.

Jerry Slaughter of the Kansas Medical Society spoke in favor of HB 2918. He said he feels it will have the effect of increasing the share of money going to plaintiffs in lawsuit judgments. (Attachment 2)

David Litwin of the Kansas Chamber of Commerce & Industry spoke in support of HB 2918. Mr. Litwin said that one of the major causes of the liability crisis in Kansas is runaway costs in our tort system which must be addressed. He cited studies which conclude that the system is nearing the breaking point and the costs of defense are so high and the process so slow that many cases are settled to avoid defense costs; many innocent defendants are bankrupted defending themselves and many plaintiffs are inadequately compensated. He urged that the KCCI is not advocating elimination of contingency fees but questions the amounts involved. He stated that there is less contingency of risk now than when these fees were established but the biggest question in modern-day lawsuits is damages. The KCCI supports this bill in theory but does have some reservations about the scale in the current bill. (Attachment 3)

Richard Harmon of the Kansas Association of Property & Casualty Insurance Companies appeared before the committee in support of HB 2918. He stated that juries are now arriving at verdicts which are padded to allow for contingency fees. The passage of this bill would allow the plaintiffs to recover more of the judgments entered in their favor.

Kathleen Sebelius of the Kansas Trial Lawyers Association appeared before the committee in opposition to HB 2918. She said there is very little relationship between the current liability crisis and the contents of this bill. There is no relationship between the contingency fee and limitations on it and the severity or frequency of claims. She said that many studies done by varying groups have found Canada which is having a similar liability crisis has no contingency fees. She stated it is inadmissible evidence to inform a jury that a contingency fee arrangement has been entered into between a plaintiff and his attorney. The Disciplinary Administrator of Kansas has never had a disciplinary complaint based on a contingent fee arrangement. There has been no disbarment or censure because of a contingent fee. It is not the plaintiffs who have contingent fee arrangements with their attorneys who are complaining about them. (Attachment 4)

Ron Smith of the Kansas Bar Association spoke to the committee in opposition to HB 2918. He said that the appropriate place for the development of a limitation on contingent fees if same is necessary is with the court because this question becomes a control on the practice of law. He asked what would happen if there were no contingent fee arrangements. If the hourly rate was applied to the hours invested in trying a case and that amounted to 80% of the verdict would that be unconscionably "exceeding reasonable compensation"? (Attachments 5 and 6)

Eugene Ralston of the Kansas Trial Lawyers Association responded to questions by committee members relative to the practice followed in compensating attorneys who refer plaintiffs to other attorneys who then handle the cases and the effect of advertising.

The Chairman announced that HB 2457 scheduled for hearing today would be taken up tomorrow.

The Chairman adjourned the meeting at 5:20 P.M.

TUESDAY, FEBRUARY 25, 1986

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE ON HB 2918 BY REPRESENTATIVE STEPHEN R. CLOUD

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I APPEAR BEFORE YOU THIS AFTERNOON, URGING YOU TO ACT FAVORABLY ON HB 2918 WHICH PLACES A VERY LIBERAL CAP ON ATTORNEY CONTINGENCY FEES. I FREELY ADMIT TO YOU THAT THIS BILL IS TOUGH MEDICINE. I DO NOT UNDERESTIMATE THE ORGANIZED OPPOSITION THAT WILL BE FIGHTING TO DEFEAT THIS BILL, NOR DO I UNDERESTIMATE THE POTENTIAL POLITICAL LIABILITY I AM ASSUMING BY INTRODUCING IT. BUT, LADIES AND GENTLEMEN OF THE COMMITTEE, I WOULD SUBMIT TO YOU THAT WE MUST FACE HEAD ON A VERY SERIOUS CRISIS IN OUR COUNTRY: A CRISIS THAT CRIES OUT FOR A SOLUTION. I BELIEVE THAT HB 2918 IS A PART OF THAT SOLUTION.

AS A COMMITTEE, WE HAVE HEARD WEEKS OF TESTIMONY DESCRIBING THE MEDICAL MALPRACTICE INSURANCE CRISIS THAT EXISTS IN THIS STATE. I CONTEND THAT WE HAVE A LIABILITY CRISIS THAT GOES FAR BEYOND JUST MEDICAL MALPRACTICE. WE HAVE FIRM EXAMPLES OF ACCOUNTANTS, BANK DIRECTORS, THE DEPARTMENT OF HEALTH AND ENVIRONMENT, FARMERS, AND SMALL MANUFACTURERS WHO HAVE FOUND IT IMPOSSIBLE TO SECURE LIABILITY INSURANCE OR HAVE FOUND THAT THE COST TO SECURE THAT LIABILITY INSURANCE HAS ESCALATED BEYOND THEIR REACH.

THE REASON FOR THIS CRISIS IS THAT WE LIVE IN A SOCIETY THAT HAS GONE LITIGATION MAD. THE AVERAGE JURY AWARD IN THE GREATER KANSAS CITY AREA HAS GONE FROM AN AVERAGE AMOUNT OF $39,853 IN 1980 TO $535,017 IN 1985. THAT INCREASE REPRESENTS A ONE THOUSAND TWO HUNDRED FORTY TWO PERCENT INCREASE.[1] ACCORDING TO THE AMERICAN TORT REFORM ASSOCIATION, 16.6 MILLION LAWSUITS WERE FILED IN THIS COUNTRY LAST YEAR ALONE. THESE LAWSUITS CLAIMED A TOTAL OF 60 BILLION DOLLARS. IN FEDERAL COURTS, PRODUCT LIABILITY SUITS ALONE JUMPED 600 PERCENT IN TEN YEARS: FROM 1,579 IN 1974 TO 10,745 IN 1984.

[1]Greater Kansas City Jury Verdict Service

Attachment 1
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IN THE FIELD OF ACCOUNTING, I HAVE ONE SPECIFIC EXAMPLE OF A VERY GOOD CERTIFIED PUBLIC ACCOUNTING FIRM WHO PAID $750 LAST YEAR FOR LIABILITY INSURANCE AND THIS YEAR WILL PAY $8,200 WITHOUT ONE LIABILITY CLAIM BEING MADE AGAINST THE FIRM. AS OFFICER AND DIRECTOR, LIABILITY INSURANCE BECOMES NONEXISTENT OR, IN THE BEST CASE SCENERIO, VERY, VERY EXPENSIVE, WE SEE PEOPLE WHO HISTORICALLY HAVE AGREED TO SERVE ON THE BOARDS OF OUR LOCAL BANKS ARE NOW REFUSING TO SERVE AND, IN SOME CASES, EVEN RESIGNING FROM EXISTING BOARDS.

OUR VERY OWN KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT HAS HAD TO MAKE VERY DIFFICULT BUDGETARY DECISIONS REGARDING WHAT TYPE OF VACCINE THEY WOULD CONTINUE TO OFFER OUR CITIZENS DUE TO THE PRODUCT LIABILITY CRISIS. THE COST PER DOSE OF DPT VACCINE (DIPTHERIA-PERTUSSIS-TETANUS) HAS GONE FROM 12¢ IN 1982, TO 26¢ IN 1983; TO 96¢ in 1984, TO $2.25 IN 1985; TO AN ESTIMATED $3.84 PER DOSE IN 1986. THIS REPRESENTS AN INCREASE IN NECESSARY MONIES FROM THE STATE GENERAL FUND FROM $10,000 TO $193,060. TO OFFSET THAT STAGGERING INCREASE, KDHE HAS DECIDED TO TERMINATE THE VACCINE PROGRAM FOR TUBERCULOSIS. I QUOTE FROM A RECENT MEMO FROM A MANUFACTURER OF THESE VACCINES TO KDHE. "YOU SHOULD BE AWARE THAT VIRTUALLY ALL OF THE ADDITIONAL REVENUE GENERATED BY THESE PRICE INCREASES WILL BE DEVOTED TO LIABILITY COSTS AND MAY NOT BE ADEQUATE FOR THAT PURPOSE IF CURRENT TRENDS AND JURY VERDICTS CONTINUE."

ON TOP OF ALL THE OTHER PROBLEMS THAT OUR FARMERS ARE FACING TODAY, THEY NOW ARE FINDING IT VERY DIFFICULT TO SECURE LIABILITY INSURANCE FOR THEIR FARMS. MANY INSURANCE AGENTS ARE FINDING IT NECESSARY TO CONTACT NUMEROUS INSURANCE COMPANIES IN AN EFFORT TO FIND ONE WHO WOULD BE WILLING TO OFFER LIABILITY INSURANCE TO THEIR CLIENTS.

THE SMALL MANUFACTURER, WHO IS THE LIFEBLOOD OF OUR JOB OPPORTUNITIES IN KANSAS, CONTINUE TO STAGGER UNDER THE UNBELIEVABLE COSTS OF PRODUCT LIABILITY FOR THE GOODS THAT THEY PRODUCE. THE KANSAS CHAMBER OF COMMERCE AND INDUSTRY'S BOARD OF DIRECTORS UNANIMOUSLY ADDED TORT REFORM TO ITS LIST OF MAJOR LEGISLATIVE OBJECTIVES FOR THE 1986 SESSION OF THE KANSAS LEGISLATURE.

THE FOLLOWING QUOTE IS FROM THE JANUARY 1986 EQUAL EMPLOYMENT COMPLIANCE UPDATE. "WHILE PENZOIL COUNTS THE BILLIONS IT INTENDS TO COLLECT FROM TEXACO, A SMALLER BUT EQUALLY STARTLING JURY AWARD HAS BEEN MADE AND UPHELD BY THE TRIAL JUDGE IN AN AGE DISCRIMMINATION ACTION BROUGHT UNDER STATE LAW THAT PROVIDED FOR FULL COMPENSATORY AND EXEMPLARY DAMAGES. IN RAWSON vs SEARS ROEBUCK AND COMPANY 615 F. Supp. 1546, THE JURY AWARDED FIVE MILLION DOLLARS FOR PAIN, SUFFERING AND HUMILIATION, BOTH PAST AND FUTURE AND, TEN MILLION DOLLARS FOR EXAMPLARY DAMAGES TO AN INDIVIDUAL WHO ALLEGED AGE DISCRIMMINATION."

AS I HOPE YOU CAN SEE, THE PROBLEM GOES FAR BEYOND JUST MEDICAL MALPRACTICE. IT STRETCHES THROUGHOUT THE ENTIRETY OF OUR SOCIETY. TO ATTEMPT TO REACT TO THESE PROBLEMS, A RECENT CALIFORNIA CITIZEN'S COMMISSION ON TORT REFORM MADE THE FOLLOWING REPORT, "A STATUTE SHOULD BE ENACTED PLACING A QUANTITATIVE LIMITATION ON CONTINGENCY FEES THAT WOULD EMPOWER THE JUDICIAL COUNSEL TO AMEND THE CEILINGS AS CONDITIONS CHANGE. IN ANY EVENT, CONTINGENCY FEES SHOULD BE CALCULATED AFTER THE DEDUCTION OF PLAINTIFF'S NON-RECOVERABLE COSTS. THE INITIAL SCHEDULE SHOULD LIMIT FEES TO 40% ON THE FIRST $50,000 OF THE NET AWARD, AND 25% OF THE REMAINDER."

THIS WAS ADOPTED ON A VOTE OF 21-1 BY THE CALIFORNIA COMMISSION. A SUBSEQUENT BILL IN THE CALIFORNIA LEGISLATURE WAS PASSED AND WAS FOUND TO BE CONSTITUTIONAL.

OUR VERY OWN KANSAS CITIZEN'S COMMITTEE FOR THE REVIEW OF THE TORT SYSTEM RECENTLY ADOPTED THE FOLLOWING STATEMENT. "THE CITIZENS COMMITTEE IS CONVINCED THAT THE CONTINGENT FEE ARRANGEMENT IS AN IMPORTANT MEANS TO INSURE THAT PERSONS UNABLE TO PAY NORMAL ATTORNEY FEES AND COSTS HAVE A RIGHT TO OBTAIN ADEQUATE REPRESENTATION. THE CITIZENS COMMITTEE BELIEVES, HOWEVER, THAT A 25% LIMITATION ON CONTINGENT ATTORNEY FEES FOR AWARDS IN EXCESS OF $100,000 IS APPROPRIATE AND REASONABLE. THE 25% LIMITATION IS COMPARABLE TO THAT PRESENTLY IMPOSED BY K.S.A. 45-536 (1983) OF THE KANSAS WORKERS COMPENSATION ACT. ON BALANCE, THE CITIZENS COMMITTEE RECOMMENDS 25% AS A REASONABLE LIMITATION ON ATTORNEY CONTINGENT FEE CONTRACTS."

HB 2918 SIMPLY PUTS A 50% CAP ON THE FIRST $200,000 OF THE NET AMOUNT RECOVERED AND A 15% CAP ON THAT PORTION OF THE NET AMOUNT RECOVERED WHICH EXCEEDS $200,000. THIS WILL ALLOW PLAINTIFFS TO ACTUALLY RECEIVE A HIGHER PERCENTAGE OF VERDICTS AND SETTLEMENTS. CANON 2 OF THE CODE OF PROFESSIONAL RESPONSIBILITIES UNDER K.S.A. 7-125 CLEARLY FORBIDS EXCESSIVE LEGAL FEES. "THE TOTAL FEE OF THE LAWYERS DOES NOT CLEARLY EXCEED REASONABLE COMPENSATION FOR ALL LEGAL SERVICES THEY RENDER TO CLIENT." THIS COMMITTEE RECEIVED TESTIMONY THAT ON ONE PARTICULAR CASE INVOLVING A 1.2 MILLION DOLLAR VERDICT, THE ATTORNEY WAS GOING TO RECEIVE BETWEEN 30 AND 40 PERCENT. I WOULD SUBMIT TO YOU THAT FOUR HUNDRED TO FIVE HUNDRED THOUSAND DOLLARS "CLEARLY EXCEEDS REASONABLE COMPENSATION FOR ALL LEGAL SERVICES". TESTIMONY WAS ALSO HEARD BY THIS COMMITTEE WHICH INDICATED THAT SOME PLAINTIFFS ATTORNEYS CHARGED LARGE CONTINGENCY FEES TO FINANCE CASES THAT THEY EITHER HAVE LOST IN THE PAST OR THAT THEY ANTICIPATE THEY WILL LOSE IN THE FUTURE. I WILL SUBMIT TO YOU THAT THIS PROCEDURE CLEARLY VIOLATES THE CODE OF ETHICS. WHEN A CLEAR NEED HAS BEEN DEMONSTRATED FOR A PLAINTIFF AND A VERDICT HAS BEEN AWARDED, IT IS OUR RESPONSIBILITY TO MAKE SURE THAT PLAINTIFF RECEIVES AS HIGH A PERCENTAGE AS IS POSSIBLE OF THE VERDICT AMOUNT. HB 2918 WOULD DO JUST THAT.

I URGE YOU TO RECOMMEND HB 2918 FAVORABLE FOR PASSAGE AND TAKE, AT LEAST, ONE SMALL STEP TOWARDS TORT REFORM WHICH THIS COUNTRY SO DESPARATELY CRIES OUT FOR.

THANK YOU.

KANSAS MEDICAL SOCIETY
1300 Topeka Avenue · Topeka, Kansas 66612 · (913) 235-2383

Testimony of the Kansas Medical Society on HB 2918
February 25, 1986

The Kansas Medical Society appreciates the opportunity to comment on HB 2918, which would establish limitations on contingent fee contracts in civil actions.

As you probably know, we have been on record several times previously in support of a reasonable contingent fee limitation. Studies have shown that contingent fee contracts, in and of themselves, do not appear to have a significant impact on claim severity, or aggregate costs in the malpractice compensation system. However, as a matter of equity, a reasonable contingent fee limitation would have the effect of returning more of the award or settlement dollar to the injured person. On that basis, we think a reasonable fee limitation is good public policy, and yet will preserve a person's ability to obtain competent counsel, which most people would agree is the primary reason for allowing contigent fees contracts in the first place.

There is growing evidence that, at least in the medical malpractice area, only about 1/3 of the premium dollar is eventually returned to patients in the form of indemnity payments. A reasonable contingent fee limitation is one clear way to increase compensation to injured patients, without increasing aggregate system costs. Thank you for the opportunity to comment on HB 2918.

Jerry Slaughter
Executive Director

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February 25, 1986

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

HB 2918

February 25, 1986

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Judiciary Committee

by

David Litwin

Mr. Chairman, members of the committee. My name is David Litwin, representing the Kansas Chamber of Commerce and Industry.

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. KCCI receives no government funding.

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.

At its meeting earlier this month, the KCCI Board of Directors adopted a policy pertaining to liability insurance cost and availability and tort reform. A copy is appended to this testimony.

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The path that led to the adoption of this policy is the same one that the entire nation has followed during recent months. Concerned with increasing reports of physicians and other health care providers encountering major difficulty in obtaining affordable and adequate liability coverage, we followed closely the proceedings last summer of the legislative interim medical malpractice committee and Commissioner Bell's citizens' panel. We felt, after carefully considering both sides, that there was unquestionably a very serious crisis brewing in medical malpractice insurance that, while not yet grave in proportions, clearly threatened the delivery of health care if decisive action were not taken quickly.

Meanwhile, as those proceedings wound to a conclusion, we began to receive more and more disturbing reports from the business community all over Kansas that many kinds of liability insurance were becoming either unavailable, or available at unacceptable cost, or with vastly reduced policy limits, limited coverage, and/or higher deductibles. Shortly thereafter, this stream became a national flood, and the business and professional liability insurance crisis has received extensive publicity in the last two months in both print and broadcast media.

In both the medical and general liability spheres, virtually all who have studied the situation objectively conclude that there are at least two distinct causes of the problem: factors involving management and marketing within the liability industry, and soaring costs of our civil justice system. There is no question that shortsighted pricing and other factors in the insurance industry have contributed to the crisis, but it is equally certain that a fundamental cause is runaway costs in our tort system. Both must be addressed.

Thus, for example, Karl Koch, Executive Vice President of the National Association of Insurance Commissioners, testified before a joint subcommittee of this Legislature only last week that the crisis stems not only from insurance industry trends, but from

"a trend in the civil justice system which has increased the claims costs of insurers and reduced their defenses against claims as well as caused a mind set by many consumers to sue at the slightest opportunity."

There are endless data available to illustrate the extent of the problem in the civil justice system. For example, the number of million dollar verdicts nationally in 1983 was greater than during the entire period 1962 to 1977. The number of lawsuits in state courts increased almost 25% in only the four-year period 1977 to 1981. The sum total of these and many other data is simply that the system is nearing the breaking point, with the costs of defense so high and the process so lengthy that countless dubious cases are settled early just to avoid defense costs, and many innocent defendants are practically bankrupted by the costs of establishing their innocence through jury verdicts. Worse still, the system fails to give adequate compensation to many innocent injured plaintiffs.

The result of the twin streams of a civil justice system running out of control and a liability insurance industry that has not always acted responsibly is the liability crisis. How serious is it? We will shortly be polling our 3,000 members to find out how their liability coverage situation is, but in the meantime we have no reliable data for Kansas. However, the U.S. Chamber of Commerce, over 90% of whose members are small businesses, earlier this month released preliminary returns from its national survey of its members. Fourteen percent stated they have been unable to renew or secure any coverage at all. Fifty-one percent report increases in premium ranging from 100% to over 500%, with another 17% between 50% and 100%.

There is no question but that reforming the civil justice system is a complex, multifaceted undertaking. Numerous issues must be addressed, including punitive damages, examining the extent to which increased reliance on mediation and informal arbitration might shorten and simplify the determination of many cases, reducing the

abuse of discovery and controlling the soaring costs of discovery procedures, and other issues as well. It is equally clear that one of these issues is counsel fees, and particularly - but certainly not necessarily exclusively - the matter of the size of plaintiff attorneys' contingent fees.

Let me say at the outset - we are not by any means arguing for abolishing the contingent fee arrangement, although I might note parenthetically that in many countries it is viewed dimly. We'll accept the argument of its proponents that it's "the poor person's ticket to court," and no doubt that is the case in many instances. The question, rather, is how much is enough? How large a fee must a plaintiff's attorney have in prospect in order to be interested in prosecuting a case diligently? Must an attorney be a full participating partner in his client's case?

We suggest that both in order to reduce costs of the system and increase the percentage of money spent on that system that reaches injured plaintiffs, as well as for moral reasons, reasonable regulation is called for.

There is no question that the prospect of enormous fees has led to the shocking scramble for legal employment is disasters. Apart from the fact that they demean the legal profession, such activities if unrestrained decrease that portion of the resources available for compensation to the victims.

Moreover, many authorities have noted that there is no equal bargaining power. Most clients will agree to whatever fee the attorney proposes, since they are usually on unfamiliar turf and often have had little or no prior contact with civil litigation.

Moreover, in many cases there is no real element of "contingency," and the main issue is damages. This is especially true today, after many defenses have either been

abolished or restricted. Grant P. DuBois, writing in the December 1985 issue of the American Bar Association Journal, states:

> "The contingency risk of loss that justified a one-third to 40 percent share of a plaintiff's verdict for a trial attorney in the 1950s and 1960s no longer exists. Negligence trials today focus primarily on apportionment of damages, not on whether there is liability. ...What ever happened to the plaintiff's risk of loss? Most defense trial lawyers would have to pause before remembering the year their states abolished contributory negligence, assumption of risk or the automobile guest statutes as defenses. Instead we have strict liability, total comparative negligence and broadened application of punitive damages. The dostrine of caveat emptor has disappeared, and judicial distinctions among trespasser, licensee and invitee are long gone. During the last 20 years the personal injury trial has become a personal road to riches for the plaintiff's attorney. Verdicts and settlements in the millions, unthinkable before the 1970s, are now commonplace. ...The fact is that the risk of loss to the personal injury plaintiff has faced away...But the risk of loss to the defendant and its insurer has become almost prohibitive. Nonmeritorious cases are settled more often and for more than they are worth; some insurance risks have become unratable. This may not have occurred to the California Supreme Court when it created products liability without fault with the justification of 'spreading the risk.' Excessive verdicts, particularly punitive, necessitate costly posttrial motions and appeals."

We believe that the proposed rule is very reasonable and would restore a proper balance. One suggested change...The maximum 50% allowed up to $200,000 seems quite high at the upper ranges, and conversely the 15% limit on recoveries over $200,000 may be too restrictive. We suggest you consider a scale that doesn't drop off quite so precipitously at the upper end, or allow such high fees at the lower end. For example, Rule 1:21-7 of the New Jersey Supreme Court, one of the first entities to regulate contingency fees, allows up to a third on the first $250,000, 25% on the next $250,000, 20% on the next $500,000, and on recoveries over $1 million, the attorney must apply to the court, which will allow a "reasonable" fee.

However, the foregoing is only a suggestion that the committee might consider. We fully endorse the bill and believe it would go far toward achieving its purpose.

Thank you again for the opportunity to testify, I'll be happy to answer any questions.

POLICY

KCCI supports reforms which, in medical malpractice actions, would impose caps on damage awards with the exception of past and future medical expenses and other out-of-pocket costs, provide for structured awards of future economic loss, require itemization of jury awards, make decisions of pretrial screening panels admissible in evidence, require expert witnesses to be active in clinical practice, establish mandatory settlement conferences, link postjudgment interest rates to the yield of United States Treasury bills, require evidentiary hearings on the reasonableness of attorneys' fees, and reduce the exposure of the Health Care Stabilization Fund.

KCCI further supports, in principle, the enactment of provisions which would curtail the activities of impaired health care providers, accelerate and improve practitioner discipline, impose mandatory requirements concerning the reporting of malpractice incidents, immunize good faith reporting of such incidents, require the implementation of peer review and risk management programs, and impose civil fines for malpractice.

KCCI further believes that there is an equally serious crisis in the cost and availability of liability insurance in a wide range of industries and professions and for public entities, and in the cost of litigating tort claims. KCCI believes that reforms that are necessary and appropriate in the medical malpractice area should, on the whole, be adopted in these more general spheres as well, and urges the legislature to enact remedial legislation as soon as possible. Such legislation should include provisions that would eliminate or significantly restrict the award of punitive damages, place caps on awards for pain and suffering, authorize structured awards, limit attorney contingent fees, eliminate the collateral source rule, eliminate discovery abuse and control discovery costs, provide for alternate dispute resolution in appropriate cases, limit venue shopping in tort actions, and effect such other procedural and substantive reforms as may be necessary.

TESTIMONY ON H.B. 2918

February 25, 1986
Kathleen Gilligan Sebelius

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

The contingent fee is the key to the courthouse door for people who could not otherwise afford to go and defend their legal rights. It is in the public interest and should be preserved.

A contingent fee contract is an agreement in which the lawyer agrees to represent the client in exchange for a percentage of any money received by settlement or judgment in a case. If the client's case is meritorious and the lawyer is able to obtain money for him, the lawyer is entitled to the agreed-upon percentage as an attorney's fee. If no money is received in the case, then the client owes the lawyer no legal fees whatsoever.

In the United States today, the contingent fee is the predominant legal fee arrangement in personal injury litigation, will contests, the collection of overdue commercial accounts, stockholders' suits, class actions, tax practice and condemnation proceedings.

In examining the reasons for the existence of contingent fees, it is helpful to picture the usual situation out of which a contingent fee contract arises in a personal injury case. The client may well be a lower or middle income individual who has never had an occasion to hire an attorney before. He has been injured and has lost his principal source of income. He

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has substantial medical bills and may have expenses for property damage (such as an automobile) which may or may not be covered in part by some private insurance. If this individual ever was in a financial condition in which he could afford to hire an attorney on an hourly basis, he is certainly not able to do it now. In this unfortunate circumstance, he faces the tremendous problem of attempting to assert and prove a liability claim against someone, usually while he is still incapacitated by the injury. His need for competent legal counsel is obvious, as is his inability to hire an attorney on any basis other than a contingency. A tremendous social need is thereby served by the contingency arrangement: it provides access to the judicial process to all individuals who are unable to hire attorneys on an hourly fee basis. On the other hand, if the individual can afford to hire an attorney on an hourly fee basis, and prefers to do so, that type of arrangement is almost always available, too.

The contingent fee makes it possible for anyone in our society to get the best lawyer. The client need not be a rich man. He need only have a good case.

The contingent fee provides the incentive to attract the best lawyers and to impel them to use their skills and their imagination to obtain a good result for the client. It also has the effect of encouraging lawyers to improve the law, itself. The incentive is there to make the law better, to make the recovery more adequate.

The contingent fee serves the interests of society because it encourages efficiency, economy, and speed. The lawyer has

no incentive whatsoever to create work. Just the opposite. The lawyer has every incentive to minimize the amount of work done and the amount of expense incurred. Thus, the contingent fee encourages less work, less delay, and less paper. In that respect it is just the opposite of the time-charge basis of billing which encourages more work, more expense, more paper, more delay.

The basic problem with the contingent fee is that it has not been used for the defense of cases. If the contingent fee could be adapted to the defense of cases, so that defense lawyers were result-oriented, instead of time-oriented, then expense and the delay of litigation would be reduced.

The contingency fee system has a host of critics, who have argued that the system is unfair, that it encourages litigation and that lawyers take more than a reasonable share of the winnings. None of those arguments have been supported by objective data from the numerous studies examining tort law and the effects of legislative changes.

* the 1973 report of the HEW Commission on Medical Malpractice found that the contingency fee arrangement operates as an effective screening device against groundless liability suits - since the lawyer who loses collects nothing. In its survey the Commission found that plaintiffs' lawyers believed that medical liability cases were the most difficult of all personal injury suits. The prospect of spending a great deal of time pursuing a suit that would ultimately be lost caused medical liability attorneys to reject 88% of all prospective plaintiffs. Since that study was done, however, physician-

owned insurance companies have observed that plaintiffs' lawyers have become more proficient in developing and pressing professional liability cases;

* Patricia Danzon, in her work with the Rand Corporation, found limiting contingency fees had no effect on frequency of cases filed and an uncertain effect on the severity of awards;

* The American Medical Association and the American Bar Association have agreed in studies published during the past year that capping contingency fees won't reduce the number of suits.

Some argue that attorneys overreach the client by taking too high a percentage of the client's recovery. The most common percentage is 1/3 of the settlement or judgment, although the percentage can be either lower or higher depending on the individual lawyer and the difficulty of the case. Studies have shown that the average lawyer's hourly rate in a non-contingent case compares closely with the contingent fees for cases won. The hourly contingency figure does not count the hours spent on cases lost, since no fees are paid on those cases.

Insurance company statistics show that for every premium dollar collected, approximately 30¢ goes to the insurance company for profits, taxes, management costs, sales commissions, etc. The next 35¢ goes to the insurance company for accident investigation, claims adjusters, expert witnesses, legal defense and trial costs. The last 35¢ goes to the plaintiff to pay for lost income, medical expenses, property loss

and other damages and the plaintiff's expert witnesses, court costs, investigators and lawyers' fees.

The average contingent fee is 1/3 of the settlement or judgment. This means that the plaintiff spends about 11¢ of the premium dollar for his legal costs, while the insurance companies spend 30¢-35¢. Attempts to limit the contingent fee are not really based on providing more of the award to injured persons. These actions are really attempts to limit the amount that the injured can spend to prove their cases in court. It is to the insurance industry's advantage to make it economically unfeasible to bring even the most justified lawsuits, because that would reduce the amount insurance companies must pay to injured claimants.

Finally, any client has and should continue to have the right to petition the court to determine whether the attorney's fee is excessive.

Kansas was one of the 12 states which passed a law in the mid-70's, giving the court the discretion, in medical malpractice cases, to determine reasonable attorney fees. During the last malpractice crisis, one decade ago, and in the last few years, eleven additional states have either required increased judicial supervision of attorney fees or specifically limited contingency fee arrangements. There is no state which has acted to limit the hourly fee or total amount collected by a defense attorney. Since these reforms have typically been promoted by the insurance industry and/or medical societies, that may be understandable.

The only rational way for a reasonable fee to be determined is through a flexible examination of all of the factors involved in a particular case. This should be done by agreement between the client and the attorney.

The contingent fee system provides legal representation not only for the poverty stricken, but also for the person temporarily disabled from working by an injury. It is a system in which the lawyer takes the risks, and the client pays nothing if the lawyer does not win the case. It is also a system which has benefited our society by encouraging the design of safe products and safe palces for employees to work.

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Special Committee
of the
Kansas Bar Association's
Litigation Section

SUBCOMMITTEE REPORT
to the
KBA Prospective Legislation Committee
and
KBA Executive Council

CONTINGENT FEE CONTRACTS LIMITATIONS

December 31, 1984

Preface:

Whether to impose limitations on contingent fee contracts is becoming an issue proponents of "tort reform" believe could bring about substantial and substantive changes to the practice of law, although the goals of tort reform remain somewhat ill-defined.

As a result, a growing public debate on contingency fee contracts has emerged. This is reflected in the attitudes and statements of some members of the Kansas legislature. As a result of this debate, the Kansas Bar Association's Litigation Section appointed a 1984 special subcommittee to study the contingent fee contract system and make recommendations to the KBA Legislative Committee as to what position, if any, the KBA should maintain regarding contingent fee proposals.

It should be noted from the outset that one member of the Special Subcommittee does not concur that there is a growing public debate on contingent fee contracts because no formal grievances have been filed with the Kansas Disciplinary Administrator, Arno Windscheffel, and that to state that there is a growing public debate gives the improper impression of wide-spread discontent. The member therefore objects to the use of the phrase "growing public debate" as being erroneous.

Misconceptions about contingent fee contracts have generated controversy. The 1984 Legislative session saw a floor attempt to amend Kansas statutes to limit contingent fee contracts in all civil matters to 25%. The amendment was narrowly defeated. Certain interest groups already indicate a desire to offer "reform" legislation in this arena. The Profession must be in a position not only to react to such challenges to traditions in the practice of law, but act with measured analysis of the role contingent fee contracts play in our system of civil justice. Lawyers must be willing to examine our practices to eliminate actual problems which

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might exist. While the KBA will not be stampeded into irrational action, neither can it remain reclusively ambivalent about such issues. It is within this charge that the Contingent Fee Subcommittee operated.

The Subcommittee had benefit of numerous law review articles, court rules and cases as well as a 1976 survey of the states and their systems for regulating contingent fee contracts. The Subcommittee is indebted to the American Bar Association, the Kansas Trial Lawyers Association, and the Defense Research Institute for pertinent authoritative articles on the subject.

Inquiries were made of the Kansas Disciplinary Administrator concerning complaints received from the public about contingent fees. Mr. Windscheffel advised that his office has received some complaints, most of which concern misunderstandings as to whether expenses of litigation were deducted before or after application of the contingent fee to the recovery. While there were indications of express dissatisfaction, especially where the expenses of litgation amounted to one half or more of the award, Mr. Windscheffel acknowledged that to date of the inquiry, no formal complaints concerning contingent fee contracts had been filed by the public with his office.

GENERAL CONCLUSIONS

All members of the Subcommittee are of the opinion that contingent fee contracts provide a positive service to the public and benefit the clients served by the contingent fee system. Often such contracts are the only method many deserving claimants can use to obtain access to the judicial system to determine substantial and substantive rights. Substantial alteration of, or punitive regulation towards, the contingent fee contract system may act to preclude otherwise meritorious claims from the judicial system, thus disenfranchising a large portion of our citizens. Such exclusions have important negative social implications. The regulation of contingent fee contracts, if any regulation is desirable, is therefore best left with the Judicial branch of government.

RATIONALE

Certainly the Legislature has the power to regulate the practice of law, and contingent fee contracts are part of that practice. Such power is shared with the Judicial branch of government. The vast majority of states do not legislatively regulate contingent fee contracts. The practice of law must be flexible in order to serve the wide variety of clients needing legal services. Contingent fees are part of this requirement of flexibility. The primary question then becomes which branch of government can more flexibly regulate such contracts, if regulation is needed in order to promote the public good?

The Legislature has already regulated some aspects of contingent fee contracts. Workers Compensation claimant attorneys may receive a 25% statutory maximum of the non-medical recovery as the attorney's fee.

But more often, the Legislative has granted the Courts the primary responsibility of regulating contingent fee contracts. Courts have inherent powers to review fee contracts of counsel. Since 1976, Kansas courts have had specific authority to review fee contracts of both parties in medical malpractice litigation (KSA 7-121b). If the court feels the contract's overall effect is improper, the court can unilaterally alter the final fee of counsel--notwithstanding contract provisions to the contrary.

Courts have not hesitated to act where there is clear duty to act. The Code of Professional Conduct (KSA 7-125) makes it improper to represent someone charged with criminal conduct using a contingent fee basis. The ultimate sanction for attorneys--disbarment proceedings--can and have been used when violations occur (see in re Steere, 217 Kan. 276).

Every person who has gone to an attorney for a legal matter has the right to have the "reasonableness" of a fee contract judicially determined. The Courts have the power to make such determinations on the spot, within the context of the existing lawsuit. If given a statute against which contracts are measured, separate additional lawsuits might become necessary to determine "reasonableness," adding more lawsuits to the system.

Proposed new rules of Professional Conduct are being considered by the Kansas Supreme Court. The new rules on fees prohibit the use of contingent fee contracts in domestic relations as well as criminal matters. If codified, the same disciplinary sanctions and the same trial court overview of such matters, remain. Therefore, the Subcommittee believes that the public's conception that contingent fee contracts are unregulated, or that such contracts somehow fuel our litigous nature, is erroneous.

Contingent fee contracts are often blamed for the existence of spurious litigation. A closer examination indicates that the opposite may be true. Since if the lawsuit is unsuccessful the entire cost of the litigation falls on the attorney, there is no incentive provided by the existence of contingent fee contracts to spur such litigation.

The Kansas Supreme Court has the inherent power to regulate the conduct and fees paid to the officers of its courts. This includes contingent fee contracts. Some states have court rules on contingent fee maximums, normally on a reverse sliding scale basis. The Kansas Supreme Court has not elected to promulgate such rules, but certainly can if in its regulatory discretion it determines a need exists. If the

Court elects to make such rules, the Committee recommends the Court reject the concept of flat precentages and instead adopt a standard discussed by the Court in Schultz v. Phillips Petroleum Co., 235 Kan., at page 223:

> "The amount of attorneys fees should be within the sound discretion of the trial court based upon guidelines established by this court."

This case discusses various criteria against which contingent fee contracts can be measured, including the time spent, the contingent nature of success, the amount involved, the result achieved, and the responsibility assumed.

Because flexibility of regulation is critical, the Court-supervised system, if implemented, could establish an organization to which could be delegated the investigative authority to determine whether individual contracts are abusive in effect. This organization could advise the Court on recommendations for control of abuse, which can be implemented by Court rules.

If the Court undertakes a more visible regulation of contingent fee contracts, the Subcommittee believes it should consider a "floor" amount in controversy below which the Court would not exercise its authority, unless specifically requested. When we think of regulation of contingent fee contracts we automatically assume the regulation is of large personal injury contracts. Many smaller plaintiff's cases, however, are often unwritten contingency fee contracts. To require trial court approval of such contracts would slow the judicial docket to an unreasonable pace. The Supreme Court could determine the appropriate "floor."

Finally, the Subcommittee suggests that the concepts of "tort reform" and contingent fee contract regulation" are mutually exclusive. The Contingent Fee Subcommittee of the Litigation Section, Kansas Bar Association, is not convinced that regulation of the latter will achieve the former, even if we assume tort reform is desirable. The contention that contingent fee contracts cause our society to be more litigation-prone is difficult to support.

Respectfully Submitted,

John F. Hayes, Chairman

Donald A. Bell

Nelson E. Toburen

Deanne Watts Hay

Harold K. Greenleaf

Supreme Court of Kansas

ALFRED G. SCHROEDER,
Chief Justice

Kansas Judicial Center
Topeka, Kansas 66612-1507

(913) 296-3807

January 13, 1985

Hon. David Prager, Chairman
Kansas Judicial Council
301 West Tenth Street
Topeka, Kansas 66612

Dear Justice Prager:

The Supreme Court is requesting the Judicial Council to study the issue of Supreme Court regulation of attorney contingent fee contracts and submit its recommendations on the matter to the Supreme Court.

I am enclosing a copy of pages 20-21 of the Kansas Bar Association's 1985 Legislative Policy booklet which more fully describes the issue recently considered by the court.

Respectfully,

Alfred G. Schroeder

ALFRED G. SCHROEDER
Chief Justice

AGS:ph

Enc.

cc: Mr. Gerald L. Goodell
Marcia Poell

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House Judiciary
February 25, 1986

mandatory professional liability insurance. Most Kansas lawyers carry malpractice insurance. Oregon, the only state which currently mandates lawyer malpractice insurance, has a unified bar (as opposed to a voluntary bar association) and a lawyer-owned insurance company. Kansas is currently a two-company state for legal malpractice insurance. Without other options available for malpractice coverage, a mandated program may leave Kansas lawyers without any commercial insurance coverage.

TORT REFORM

Issue: Changing the adversarial practice of law.

KBA Position: The Kansas Bar Association OPPOSES any changes in the existing adversarial tort law system whether proposed by the Kansas Medical Society or others, including but not limited to changes in (1) rules governing residency of expert medical witnesses, (2) creation of dollar caps on non-pecuniary losses in personal injury actions, (3) changes in the collateral source rule, (4) suggestions for overall limits on awards in certain personal injury actions, and (5) changes in methods of pleading, proving and awarding punitive damages **unless** proponents of such change can demonstrate a clear and convincing public need for such change, and such change can demonstrate a clearly defined benefit to the public.

Rationale: Fault-based tort compensation systems grew from our common law, with some statutory modifications. While the antiquity of a law does not guarantee its reasonableness, it does insure that reasonable minds have discussed the theories and the law.

The purpose of our tort compensation system is to maintain a system of "individualized justice" which accomplishes two basic goals: (1) having the wrongdoer compensate the victim of such wrongful acts so that society in general will not have to make such compensation, and (2) deter the defendant from repeating such conduct that juries have determined is intolerable.

While modifications to a pure tort compensation system have been made in the past, none have evolved without strong public involvement, and a well-studied look for alternatives. The public must derive some basic and substantial benefit from any tort law change before such change is warranted. Changes most often involve trade offs that the public must recognize and understand before such change will have lasting public acceptance.

While the Kansas Bar Association is not unalterably opposed to changes in the tort compensation system, we believe it should not happen without an exhaustive legislative process of review which hears all sides and gathers the evidence needed to resolve these complex issues.

Issue: Contingent fee regulation.

KBA Position: The Kansas Bar Association OPPOSES legislative regulation of contingent fee contracts in legal matters. If such regulation is needed, it should come in a Supreme Court rule which sets guidelines for trial courts to review the attorney fee contracts of all parties, and make determinations of reasonableness based on the difficulties and circumstances of each individual case.

Rationale: The attorney-client relationship is intensely personal. Contingent fee contracts are designed primarily to insure that everyone has access to our judicial system. Contractural arrangements between attorneys and clients should not be abrogated by statute without sound, fundamental reasons of major public policy significance and which have a reciprocal benefit for all persons.

Late in 1984, a special subcommittee of the Litigation section of the Kansas Bar Association studied the contingent fee contract system of Kansas. The committee had benefit of numerous law review articles, court rules and cases, as well as a 50-state survey of how the several states regulate or abstain from regulation of such contracts.

All members of the special study committee were of the opinion that contingent fee contracts provide a positive service to the public in that they are the only way many deserving people can afford a judi-

cial determination of their rights. While there is a general feeling by the public that lawyers benefit too much under contingent fee contracts, or that such contracts somehow cause lawsuits, these perceptions are unfounded. The Rand Corporation's study of contingent fees indicates use of the contingent fee screens some cases out of the system, and, on average, the lawyer using contingent fee contracts will earn about the same as his defense counterpart. The appearance of contingent fee abuse can be eliminated through continuing legal education, and if necessary, court rules.

A sizable majority of states do not regulate contingent fee contracts. However, a dozen states, including Kansas (KSA 7-121b) require court approval of fees in medical malpractice cases. There is little question that the Kansas Supreme Court has inherent powers to regulate contingent fee contracts. The canons of ethics and corresponding Disciplinary Rules make it clear that no attorney may fall below the prescribed level of conduct with regard to such fees without being subject to disciplinary action [KSA 7-125. See also DR. 2-106(B)].

Punitive regulation of the contingent fee system may keep otherwise meritorious claims from the judicial system, which would disenfranchise a large sector of our citizens from dispute resolution systems. The negative social implications from such exclusion would be great. Regulation of such contracts is therefore best left with the judicial branch of government.

Issue: Medical Malpractice Issues.

KBA Positions: KBA SUPPORTS legislation which:

1. Implements certain recommendations by the Board of Healing Arts to create a stronger peer review system;
2. Reduces the amount of required insurance that a health care provider must purchase from the Health Care Stabilization Fund from $3 million to $1 million;
3. Provides for experience rating of Kansas physicians;
4. Requires the plaintiff to offer proof of the present value of future damages;
5. Requires itemized jury verdicts;
6. Strengthens screening panel statutes.

KBA opposes limitations on awards.

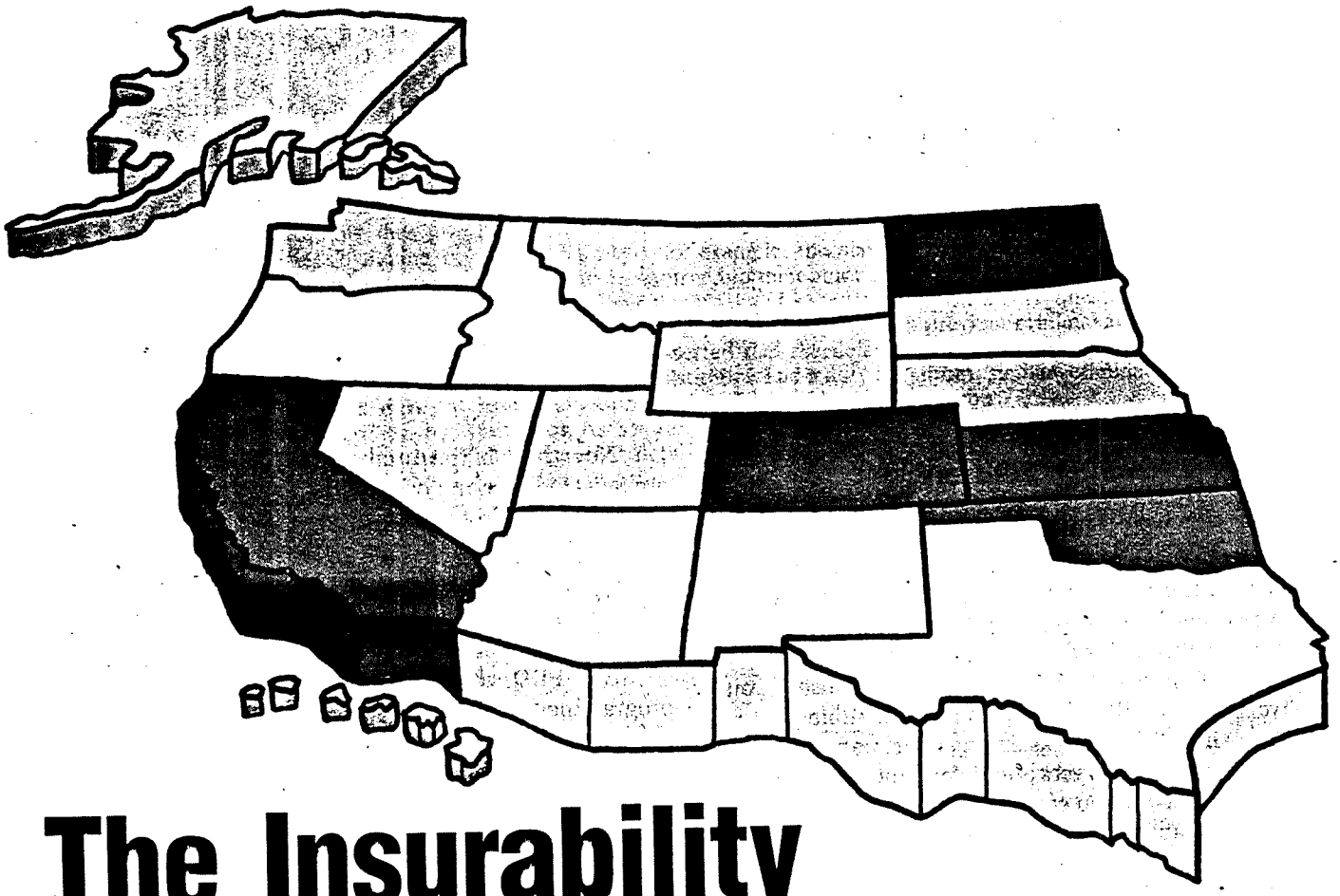
Rationale: Premiums for medical malpractice insurance are very high and create a problem for Kansas health care providers. However, there are many reasons why premiums have increased. Drastic changes in the tort system such as limiting the amount of damages which can be recovered, cannot be justified. Priority should be given to reducing the incidence of medical malpractice, improving the actuarial aspects of the Health Care Stabilization Fund and modifying the tort system to prevent the filing of groundless suits, and controlling verdicts which are truly excessive. KBA positions on these issues would accomplish those objectives without changing the basic nature of the tort system.

TRENDS IN LAW

Issue: Prohibition of medical technological causes of action.

KBA Position: The Kansas Bar Association OPPOSES legislation designed to prohibit certain causes of action, such as wrongful life, wrongful birth, etc.

Rationale: Statutory prohibitions against new causes of action, without a strong showing that such causes of action are detrimental to society as a whole, are inappropriate. The court system is fully capable of separating meritorious lawsuits and legal issues from those of questionable origin. Judicially prohibitive statutes, in general, are often too broadly based to be fair. The court system is designed to litigate individual issues of merit and broad-based exclusions by statute are inappropriate.



The Insurability of Punitive Damages

By Steven G. Schumaier and Brian A. McKinsey

A young girl sustains serious injuries when she is struck by a drunk driver. She sues, and wins a judgment for both punitive and compensatory damages. Can the defendant driver now compel his automobile liability insurance carrier to pay the punitive damage portion of the award? Yes, he can, the Supreme Court of Tennessee held in *Lazenby v. Universal Underwriters,* 383 S.W. 2d 1 (1964).

Before the expansion of strict liability and the imposition of vicarious liability for punitive damages in products, automobile, malicious prosecution and false imprisonment cases, state courts found it unthinkable and immoral to permit insurance to cover intentional acts. Since the evolution of modern tort law, however, with punitive damages an increasingly common element of civil litigation, the public policy basis for disallowing their coverage by liability insurance may have become archaic.

The trend is unquestionably in favor of the insurability of punitive damages. No jurisdiction has moved from insurability to uninsurability. At least 29 jurisdictions either allow the insurability of such damages without exception or, more frequently, allow it in cases of vicarious liability. Only 13 jurisdictions disallow any coverage as a matter of public policy. Some states have not decided the issue due to their non-recognition of punitive damages or, in at least two jurisdictions, due to the compensatory character of punitive damages.

In jurisdictions where the insurability of punitive damages is in limbo, an assault in favor of insurability is likely to be made when punitive damages are the only substantial damages involved—in malicious prosecution, false arrest and defamation cases, for example.

Arguments in favor of insurability also will be pressed when the punitive damages are vicariously imposed. In product liability cases, for example, the manufacturer may have had actual knowledge of the propensity of its product to cause harm, but may not have designed the product with the intent to injure. Similarly, even though an employer may have had knowledge of an employee's drunk driving record, it does not necessarily follow that it sent the employee on a mission to injure someone.

Privity and negligence

Initially, insurance contracts indemnified against loss caused by natural occurrences or negligence only, and then care-

Punitive Damages

Insurable

Alabama
Arizona
Arkansas
Connecticut
Delaware
District of Columbia
Georgia
Idaho
Iowa
Kentucky
Maryland
Mississippi
New Hampshire
New Mexico
Oregon
Rhode Island
South Carolina
Tennessee
Texas
Vermont
West Virginia
Wisconsin

Undetermined

Alaska
Hawaii
Missouri
Montana
Nevada
North Carolina
South Dakota
Utah
Wyoming

Non-Insurable

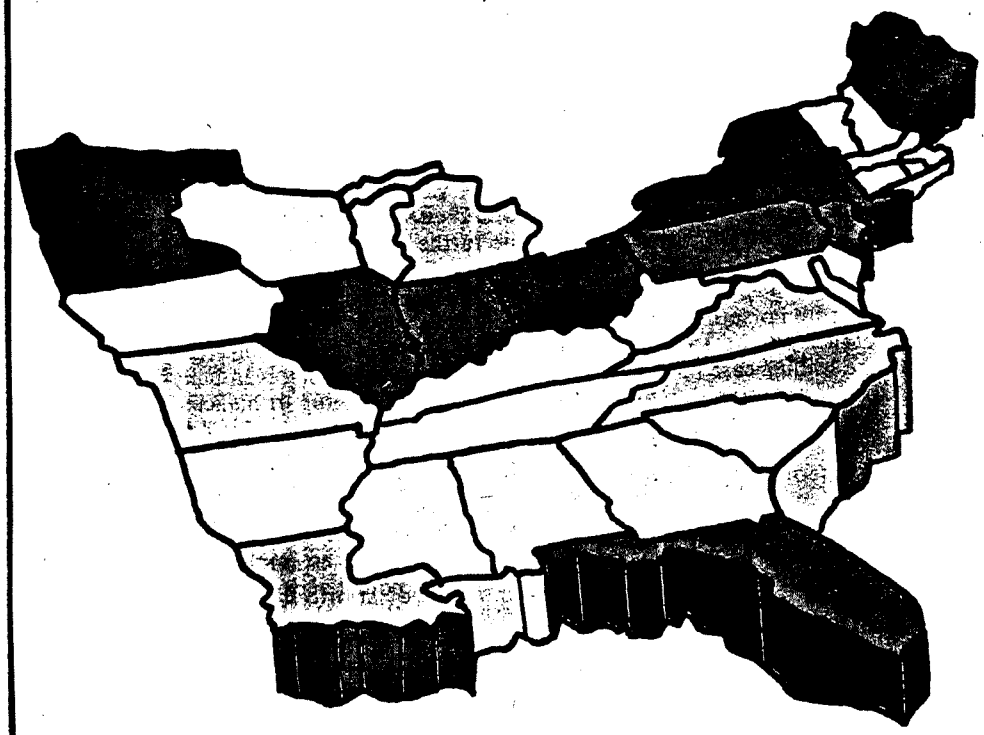
California
Colorado
Kansas
Maine
Minnesota
New York
North Dakota
Ohio

Vicarious only

Florida
Illinois
Indiana
New Jersey
Oklahoma
Pennsylvania

Not Recognized

Louisiana
Massachusetts
Michigan
Nebraska
Puerto Rico
Virginia
Washington



ABA Journal graphic by Bob Fernandez

fully prescribed the conditions under which payment would be made. There was no strict liability.

In order to recover for injury from a defective product, the plaintiff had to prove privity and negligence. There was no civil rights litigation, no liability of public officials and little innovation in the standard liability insurance contract.

The traditional view against the insurability of punitive damages was capsulized by Judge Minor Wisdom in *Northwestern Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962):

"[T]he delinquent driver must not be allowed to receive a windfall at the expense of the purchasers of insurance, transferring his responsibility for punitive damages to the very people—the driving public—to whom he is a menace. We are sympathetic with the innocent victim here; perhaps there is no such thing as money damages making him whole.

"But his interest in receiving noncompensatory damages is small compared with the public interest in lessening the toll of injury and death on the highways; and there is such a thing as a state policy to punish and deter by making the wrongdoer pay."

Policy arguments against insuring punitive damages developed in an age of individual defendants acting intentionally or maliciously. It was argued that if the insurer paid the punitive damages, it was no deterrent to the manufacturer or distributor. On the other hand, it was argued that if the act was only a matter of actual knowledge of the defect and there was no intent to injure, there was no violation of public policy.

Change and response

The law changes with caution, but it changes. As society and technology change, the law responds. And in the wake of legal changes come challenges to insurance. The evolution of product liability law illustrates the point.

As technology moved from individual manufacturing to mass-produced and mass-marketed products, the law of product liability came out of the horse-and-buggy days, too.

Until quite recently, most jurisdictions required a plaintiff to prove privity of contract with the tortfeasor. This requirement has been almost completely abolished. *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960).

For many years, the almost exclusive ground for recovery for personal injuries was negligence. This set up serious obstacles of proof for plaintiffs. In most jurisdictions the inability to establish liability

for actual damages precluded an award of punitive damages.

As mass production began to mass produce injuries, however, American courts began to find that public policy was served best by holding the manufacturer of a defective product responsible for injuries caused by the product and to remove some obstacles of proof in order to achieve that result. *McPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.J. 1916). This eventually resulted in the judicial recognition of strict product liability in the vast majority of states. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Calif. 1963).

Previously, if an employer's servant intentionally caused injury, neither the employer nor its insurer could be liable because such an act would be outside the scope of the servant's employment and respondeat superior would not apply.

In a product liability action, however, evidence of several other injuries by a defendant's product or the manufacturer's knowledge of the dangerousness of its product could meet the requisites for recovery of punitive damages, even though the defendant's liability for the personal injury was vicarious.

With the increasing availability of punitive damage awards, manufacturers and distributors sought ways to insure them.

Uniform net loss

The challenge to the noninsurability of punitive damages focused on a little clause that for decades has been used almost without change in liability insurance contracts: the "uniform net loss clause." It typically states that the insurance company will pay "*all sums* which the insured shall become legally obligated to pay arising from bodily injury or property damage. . . ." Because insurance companies are afraid to make any changes that could affect the marketing of their policies and because of the wealth of decisions interpreting the clause, it remains in general use.

Following the majority trend, however, courts are construing the UNL clause in favor of insuring punitive damages. As the courts attempt to dovetail old public policy with current tort trends, insurance companies are beginning to view their old friend, the uniform net loss clause, with more suspicion than respect.

All cases involving the insurability of punitive damages involve at least one of two questions: Is the coverage void against that state's public policy? Does the insurance policy provide for this coverage?

As one early English court noted, "Public policy is a very unruly horse and once you get astride it you never know where it will carry you." *Richard v. Mellish*, 2 Bing. (Eng.) 229. The same horse has carried different courts in different directions.

Denial on definition

The traditional route denied insurability of punitive damages based upon the term's definition. Punitive damages are imposed to punish a wrongdoer and to deter him and others from similar conduct. In *McNulty*, Wisdom reasoned that because punitive damages were not compensatory, assessing them against the insurance company would punish it instead of its insured. This ultimately would punish society as a whole by premium increases and defeat the raison d'etre of punitive damages.

The trend is unquestionably in favor of punitive damages. No jurisdiction has moved from insurability to uninsurability.

One court also noted that because the fact-finder may consider the wealth of a defendant in determining punitive damages, policy limits might also be admissible if those damages are insured. *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061 (Fla. 1983).

But the unruly horse has gone in the other direction at the same trot. In *Lazenby*, the leading case in favor of the insurability of punitive damages, the court argued essentially three points:

- Punitive damages have not conclusively been determined to be a realistic deterrent.
- The reasonable expectations of the insured should be given weight, and the average insured would assume that punitive damages are covered.
- Contracts should not be declared void as against public policy unless they are clearly and unambiguously void.

Some courts have held that the defendant was unaware that its act or omission could result in punitive damages and therefore, no public policy in favor of deterrence is compromised by allowing insurance. *First Bank (N.A.) - Billings v. Transamerica*, 679 P. 2d 1217 (Mont. 1984).

It has been observed that an insurance policy that only covers actual damages is almost worthless in cases such as false arrest, assault and battery, libel and slander, which often involve nominal actual damages but great potential punitive damages.

Proximate cause

Many decisions state that unless proximate cause can be shown between the fact of liability insurance and the subsequent act giving rise to punitive damages, it should not be assumed that insurance will lead to an increase in willful conduct. *Sinclair Oil Corp. v. Columbia Casualty Co.*, 682 P.2d 975, 981 (Wyo. 1984).

Some courts, addressing the concern that insuring punitive damages may promote willful conduct, have pointed out that the insurance company still can bring pressure to bear on its insured by exclusions or the threat of premium increase or policy cancellation. Others have noted that only those insureds who statistically face a similar risk would be affected by the higher premiums that Judge Wisdom feared punitive damage insurance would cause. *Cieslewicz v. Mutual Service Casualty Insurance Co.*, 267 N.W. 2d 595, 601 (Wis. 1978).

Compromise

Some decisions have reached a compromise, disallowing coverage for individual intentional acts while allowing coverage for punitive damages stemming from vicarious liability. As one court observed, "Certainly no social policy will be furthered by hindering the growth of businesses beyond that to which one man can personally attend. Without liability insurance coverage, a businessman can ill afford the risk of delegating responsibility to employees who may eventually commit some willful, wanton or malicious tort in the scope of his employment." *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1067 (Fla. 1983).

This view stems from the belief that when liability for punitive damages is vicarious, there is no employer conduct to deter. The potential exposure in excess of insurance, the cost of litigation and its adverse public relations effect is thought to be deterrent enough. Because the employee frequently cannot satisfy a judgment for punitive damages, it has been argued that it is no more unreasonable to have insurance to cover punitive damages than it is to shift liability from the employee to the employer.

Of course, this is one point on which the two camps markedly disagree. Opponents of punitive damage insurance argue that an employer will select, supervise and discipline its employees more carefully if it lacks that insurance. Proponents counter that the employee's tortious conduct may be a one-time occurrence that the employer could not control.

Looking at language

Another important public policy —enforcing contracts within the reasonable expectations of the parties—should be given priority, some state courts believe. Thus, the minute variations in the language of the uniform net loss clause determines what coverage is extended. *Schnuck Markets, Inc. v. Transamerica Insurance Co.*, 652 S.W. 2d 206 (Mo. App. 1983).

Two views emerge. The majority either holds that the clause is ambiguous and resolves the ambiguity against the insurer who created the ambiguity, or simply holds that punitive damages are covered because they always "arise" out of the underlying action for injury or damage. The minority view is that punitive damages are not covered because they cannot be said to be damages for bodily injury or property damage.

Survival of public policy

The unruly horse is likely to stand firm against the insurability of punitive damages only when the insured intended the injury, such as an unprovoked assault or an injury inflicted during the course of criminal conduct. Here alone the public policy argument should survive.

Gone are the days when insurance companies could rest assured that punitive damages would be excluded automatically on public policy grounds. Now insurance contracts should be worded specifically to include or exclude punitive damages as a covered risk. Otherwise, contract interpretation will be left to courts that are more inclined to construe language in favor of the insured.

Insurer and insured must examine the state law and the insurance policy itself to determine whether the policy covers punitive damages. A plaintiff's lawyer should determine whether his client's claim for punitive damages is insurable, and if not, whether it is collectible in the event of judgment.

The following points should be kept in mind:

- The insurability of punitive damages is determined by the law of the state in which the insurance contract was entered into, and not the place of the tort. Generally the place of the contract is the place where the insured is a resident, the policy was delivered and the first premium was paid.
- The public policy of the state in which the insurance contract was made may determine whether punitive damages are insurable. Many states, however, simply look to the language of the insurance policy and the nature of the tort insured.
- Specific exlusionary language in the policy will always control.

As the courts continue to find that punitive damage awards are covered by insurance awards, insurers will begin to dispose of the generalized uniform net loss clause. The courts are turning the "unruly horse" of public policy out to pasture in favor of the more reliable mount of contract interpretation.

—Journal

Steven G. Schumaier and Brian A. McKinsey are partners in the Clayton, Mo., law firm of Schumaier, Roberts & McKinsey.

3. Punitive Damages

The award of punitive damages in tort cases, a subject of continuing debate, is controversial even as to its antecedents. There is some historical evidence that appellate courts, reluctant to grant new trials on verdicts for especially high damages in cases of outrageous conduct, fashioned the theory to rationalize letting these awards stand. Another explanation is that punitive damages became a compensation for intangible harm of a kind that had not won articulate judicial recognition in the earlier development of injury law.[1]

Whatever the historical roots of punitive damages, the remedy has become almost universal.[2] However, it has also provoked much criticism, often directed at the size of some awards and at the granting of punitive damages to multiple plaintiffs suing for the same occurrence or product defect. Perhaps the most publicized American punitive award was the jury verdict in Grimshaw v. Ford Motor Company,[3] a suit for terrible burns suffered by a 13-year-old boy when a rear-end collision caused an explosion in a car in which he was riding. In that case, the jury awarded $125 million in punitive damages, but an appellate court affirmed the trial court's order that the plaintiff accept a remittitur to three and one half million dollars or face a new trial.

Typical applications and verbal formulas. Media coverage of the Grimshaw case, tending to suggest that it involved a runaway jury, may have obscured the efforts of American courts to engage in a rational development of the law of punitive damages. A few recent precedents will illustrate judicial reasoning on the subject, as well as suggesting the range of conduct in various areas of activity which will support punitive awards. A recurrent theme in the decisions is evident in a case involving the design and marketing of a television set which caught fire after it had

been turned off, causing severe personal injuries to the owner.[4] In affirming a punitive award of $100,000, a federal appellate court cited evidence indicating not only that the manufacturer "knew that its transformers might catch fire because of improper and dangerous design," but that for several years before the plaintiff's injury, the manufacturer continued to sell sets without redesigning them or informing purchasers of known hazards.[5]

A similar emphasis on manufacturer knowledge appeared in an unreported decision in which a Denver trial judge refused to reduce an award of $6,200,000 for a near-fatal septic abortion, allegedly the result of the plaintiff's use of an intrauterine contraceptive device. The judge viewed the manufacturer's sales campaign as "characterized by a conscious decision . . . to market an inadequately tested, dangerous product by unethical and improper means." He also referred to the firm's suppression of information, its making of "additional false claims" and its "effort to cover up the facts" once it was specifically aware of side effects.[6]

The conduct of insurers has been a fertile ground for the imposition of punitive damages. In an illustrative case at the border of contract and tort, in which an insurer refused to pay under three hospitalization policies, the court defines the test for punitive damages as requiring "an extreme deviation from standards of reasonable conduct . . . done with knowledge of its likely effects."[7] Although unjustified refusals to pay insurance claims are breaches of the insurance contract, punitive damages are appropriate when the defendant's conduct "independently establishes the elements of a common law tort."[8] An important policy basis of punitive awards in such cases lies in the judicial recognition that

> To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that the claimant's maximum recovery could exceed the policy

> limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.[9]

While developing positive gauges for the imposition of punitive damages, courts have also sought to establish boundaries on these awards, utilizing a specialized culpability terminology. One such decision denies punitive damages to Ralph Nader on his claim that he was bumped from an overbooked airline flight, an event which kept him from addressing a rally. In that case, the Court of Appeals for the District of Columbia held that the carrier's failure to disclose in advance the possibility of bumping was not "willful and wanton" conduct, which showed a "conscious, deliberate and callous disregard" for passengers.[10] Noting that the Civil Aeronautics Board had approved overbooking and had declined to require notice of the practice, the court said that an airline "may not be condemned as a wanton wrongdoer for conforming to the standards set and the practices approved by the agency charged with the duty of regulating it -- standards and practices that the agency has found to be in the public interest."[11]

These cases, presented as illustrations, give a flavor of the verbal formulas which courts use to determine whether punitive damages are appropriate. The kinds of words one finds in the decisions include "aggravated," "outrageous," "intentionally," "maliciously," and "reckless, wanton or oppressive."[12]

General policies. The policies supporting punitive damages, if unclear in their historical origins, have evolved to reflect a fairly well established set of judicial purposes. These include the communication to the defendant of a social judgment that his conduct was intolerable, as well as a forward-looking goal of deterring the defendant and others from acting that way in the future. Courts have

also reasoned that, especially when actual damages are likely to be minimal, punitive awards provide an incentive for the plaintiff to act as a "private attorney general" against socially deleterious conduct. Moreover, in the case of especially outrageous acts, it has been contended that to allow punitive damages will help to channel vengeance-seeking plaintiffs into the courts. Finally, a practical, if somewhat unprincipled, argument for punitive damages is that such awards help to assure the plaintiff's total compensation under a regime which usually bars the recovery of attorneys' fees unless they are specifically authorized.[13]

Criticisms. Some judges and scholars have found much to criticize in the use of punitive damages, at least in certain situations. One set of criticisms focuses on the use of punitive damages as a deterrent. These arguments relate both to compensatory damages in tort and to the function of the criminal law. One line of attack on punitive damages emphasizes that compensatory awards themselves have a deterrent effect.[14] A parallel contention is that when the defendant's conduct constitutes a crime, it is an improper double punishment to impose a punitive civil award if the criminal justice system is "adequately performing the functions of punishment and deterrence."[15]

A cognate criticism appears in a dissenting opinion opposing the award of punitive damages in a relatively trivial episode -- the snatching of dentures from the mouth of a departing employee by her angry employers, who also were her creditors. This dissenter expresses "grave doubts about the public policy involved in . . . placing in private hands the use of punishment to deter."[16] A further variation on this line of argument emphasizes the contrast between the standards employed in punishment for crime and in the imposition of punitive damages. As Justice Schaefer

wrote in one decision, "in a criminal case the conduct which gives rise to the imposition of punishment must be clearly defined," whereas the standard is fuzzier when "the question is whether the conduct of the defendant can be characterized as either negligence or as willful and wanton conduct."[17] Malcolm Wheeler has explicitly applied a constitutional logic to this issue and has found the law of punitive damages wanting for several reasons, including the indefiniteness of the guidance provided to juries.[18] He concludes that the protection of the fourth, fifth and sixth amendments should be extended to defendants on punitive claims.[19]

Other critiques of punitive damages focus on applications in particular fields of tort. For example, one commentator contends that the imposition of punitive damages without proof of fraud in products liability cases will ultimately sting the wrong persons. Since the cost of punitive damages must ultimately be reflected in consumer prices, and "since punitive damages are almost universally recognized as a form of 'civil punishment,'" this critic argues that "the consuming public would otherwise ultimately end up 'punishing' itself through increased prices of the products."[20]

Rationales. There are several rationalizations of punitive damages which both justify these awards in positive terms and respond to the criticisms just summarized. The use of punitive damages in products liability cases draws support from the idea that they provide a special inducement to manufacturers to warn of hazards discovered after products are on the market.[21] Another argument, responsive to the assertion that punitive damages are essentially criminal in nature, views such awards as serving the "tort law's goal of providing security for individual interests," by contrast with the retributive function of the criminal

law.[22] A further reply to the contention that punitive damages are a form of criminal penalty, threatening a sort of double jeopardy, is that it is "naive to suppose -- even where conduct is of a type that is frequently prosecuted -- that the criminal system will always fulfill its function."[23]

At a more abstract level, a noted claimants' attorney has argued that punitive damages play an important role in a society where "[c]ivilization is so complex, industries so large, commodities so varied and complicated, and governments so encumbered, that checkmates are needed, wherever possible, to assure that a conscience is formed where there is no patent responsibility."[24] In that milieu, punitive damages may be said to represent an independent societal judgment on the character of conduct, a remedy which is complementary both to compensatory damages in tort and to criminal punishment and which provides a valuable intermediate function between the two.

Principles of review. If one accepts the idea that punitive damages are properly available for some torts, it becomes necessary to establish guidelines for the balancing process in which courts must engage to impose them. Recent commentaries have catalogued factors that courts might consider in deciding on the award and amount of punitive damages. These factors include the defendant's "lack of concern for the public safety," as well as the "flagrant" character of its behavior; the severity of harm that the defendant's conduct was likely to cause in addition to the harm which actually happened; and the profitability of the conduct, as well as the defendant's financial position.[25] Some decisions have dealt with the last mentioned element very quantitatively. For example, reviewing a judgment against an insurer for alleged "bad faith" handling of a policyholder's claim, a court affirmed a million dollar

award on the ground that it represented only .00002 per cent of the company's gross assets and one twentieth of one per cent of its net worth.[26]

In reviewing punitive awards, courts may take into account some of the basic criticisms of punitive damages. For example, they may be less inclined to favor such a civil award if they consider the criminal justice system to be adequate in the particular setting.[27] Courts also may use various limiting devices in responding to the problem of multiple punitive judgments, which conceivably can be awarded for scores or hundreds of injuries from the same occurrence or product line and which may involve potentially ruinous consequences for defendants.[28] For example, judges may entertain evidence of prior punitive awards for torts which affect more than one individual in order to effect the principle that "no matter how many cases come to trial, the defendant's punitive damage liability would not exceed the amount thought proper by the most severe jury."[29]

While practically all American courts employ punitive damages on occasion, all those courts will also utilize a combination of reason and intuition to scrutinize judgments, drawing the line against verdicts which seem to ignore economic realities. In one case, affirming a judgment for compensatory damages against an insurer for breach of the covenant of good faith and fair dealing, the California Supreme Court reverses a $5 million punitive award. It points out that this amount was more than 40 times larger than the compensatory damages and also represented as much as seven months of the company's net income.[30] In affirming the remittitur order in the Grimshaw case, with which we introduced this subject,[31] the appellate court says that it was proper for the trial court to take into account "the ratio [of punitive to compensatory damages], the 'aggravating circumstances' (the degree of reprehensibility), the wealth of the defendant and its

of it generating capacity, the magnitude of the punitive award, including the amount by which it exceeded the compensatory."[32]

We note also that there are some situations in which courts find punitive awards singularly inappropriate. Thus, in refusing to assess punitive damages against a municipality under New York's Court of Claims Act, that state's court of appeals approvingly quotes an appellate division pronouncement that "it would be anomalous to have 'the persons who bear the burden of punishment, i.e., the taxpayers and citizens', constitute "the self-same group who are expected to benefit from the public example which the granting of such damages supposedly makes of the wrongdoer'."[33]

Conclusion. The controversy over punitive damages appears at a point of especially high legal tension in the case of drunken driving. A majority of the California Supreme Court, expounding the "self-evident" lesson that "[d]runken drivers are extremely dangerous people,"[34] has held that a drunk driver may be guilty of the "malice" required by state punitive damages statutes if he operates a motor vehicle "under circumstances which disclose a conscious disregard of the probable dangerous consequences."[35] The majority reasons that in formulating "rules on damage assessment and in weighing the deterrent function," courts "must recognize the severe threat to the public safety which is posed by the intoxicated driver."[36] However, in a strong dissent which takes issue with the majority's empirical premise, Justice Clark concludes that the "additional increment of deterrence" would be "marginal at best":

> When the punitive sanction is applicable only to unintended and unanticipated consequences of the wrongful conduct, its deterrent effect is diluted. It is further diluted when the imposition of sanction is not certain but is solely discretionary with a jury.[37]

Thus convinced that the decision would create "no significant deterrence," Justice Clark argues that "allowance of punitive awards merely permits the jury to transfer funds from the defendant and his family for the unjust enrichment of the plaintiff and his family."[38]

This case is particularly symbolic of the arguments over punitive damages, because it deals with an activity which causes so much social cost and entails comparably high degrees of emotional and intellectual involvement, pitting judges against each other on issues of both philosophy and economics. While we might well divide on the propriety of this particular application of punitive damages, our view of the more general issue is that punitive awards play a mediating role between tort and criminal law that is worth preserving. Doubtless, legislatures as well as courts will continue to ponder the lively arguments about the worth of punitive damages as an instrument of tort law, and reformers will press proposals to shift decisional power to the judge from the jury[39] as well as to adopt maximum dollar limits. Our sense of the matter is that the institution of punitive damages -- as well as the arguments -- will endure. Punitive awards appear to have the virtues of their vices. The very uncertainty that properly concerns critics is a built-in feature of a vehicle through which courts make useful interstitial social judgments. Moreover, judges possess adequate tools to control the potential for unfair application inherent in any of the general verbal formulas for punitive damages.

NOTES

1. Mallor and Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L. J. 639, 642-43 (1980).

2. A recent survey indicates that every state except Louisiana, Nebraska and Washington permits punitive damages for some tort suits. Almost All States Allow Punitive Damages, Bus. Ins., Feb. 1, 1982, at 14 (reporting survey by ABC Underwriters).

3. 119 Cal. App.3d 757, 174 Cal. Rptr. 348 (1981).

4. Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975), cert. denied, 424 U.S. 913 (1976).

5. Id. at 109.

6. Palmer v. A.H. Robins Co. (Colo. Dist. Ct. 1979), summarized in Colorado Judge Refuses to Reduce Dalkon Shield Award, 16 Trial No. 8, at 10 (Aug. 1980); $6.2 Million Award of Punitive Damages Against Manufacturer of Dalkon Shield Upheld, 24 Pers. Inj. Newsletter 93 (1980), aff'd, ____ Colo. ____, ____ P.2d ____, Prod. Liab. Rep. (CCH) ¶ 10,085 (1984) (failure to warn for at least eighteen months after knowledge of hazard became available was "'attended by circumstances of fraud' and/or constituted a 'wanton and reckless disregard of the injured party's rights and feelings'").

7. Linscott v. Rainier Nat'l Life Ins. Co., 100 Idaho 854, 860, 606 P.2d 958, 964 (1980).

8. Travelers Indemn. Co. v. Armstrong, ____ Ind. App. ____, ____, 384 N.E.2d 607, 618 (1979). See also Travelers Indemn. Co. v. Wetherbee, 368 So.2d 829, 835 (Miss. 1979) ("a gross breach, the equivalent of an independent tort").

9. Standard Life Ins. Co. v. Veal, 354 So.2d 239, 248 (Miss. 1977).

10. Nader v. Allegheny Airlines, Inc., 626 F.2d 1031, 1035 (D.C. Cir. 1980).

11. Id.

12. Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1265-66 (1976).

13. Mallor and Roberts, supra note 1, at 647-650; Owen, supra note 12, at 1297-99. In an important recent commentary, Professor Ellis suggests that seven justifications which have been offered for punitive damages can be essentially reduced to two: "(1) that wrongdoers deserve punishment, beyond that provided by reparative damages; and (2) that imposing a detriment on defendants promotes efficiency by deterring loss-creating conduct." Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 11 (1982). For skepticism about the persuasive force of these rationales, see Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, id. at 133, 137-48.

14. See, e.g., Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1182 (1931) ("[T]he 'compensatory' damages are usually admonitory as well as reparative").

15. Mallor and Roberts, supra note 1, at 655. See also Note, Double Jeopardy and the Rule Against Punitive Damages of Taber v. Hutson, 13 Ind. L. Rev. 999 (1980) (assessing nineteenth century case refusing to award

punitive damages when defendant is subject to state criminal prosecution for the same offense).

Cf. Frizzy Hairstylists, Inc. v. Eagle Star Ins. Co., 93 Misc.2d 59, 403 N.Y.S.2d 389 (App. Term), modifying 89 Misc.2d 822, 392 N.Y.S.2d 554 (1977). In this case, the trial court thought that the evidence supported a finding that the defendant's employees acted with malice in "low-balling" the plaintiff's fire claim and found a "public policy" reason to support punitive damages. The trial court criticized the defendant's "complete lack of interest" in probing a suspicion that the plaintiff had committed arson on his own property as "symptomatic of the insurance industry's abandonment of its public obligation to defeat fraudulent claims in favor of seeking higher premiums from the public." 89 Misc.2d at 826-27, 392 N.Y.S.2d at 557. Reversing the punitive award, however, the appellate term said that punishment was "more properly within the province and jurisdiction of the State Superintendent of Insurance." 93 Misc.2d at 60, 403 N.Y.S.2d at 390.

6. Jones v. Fisher, 42 Wis.2d 209, 226, 166 N.W.2d 175, 184 (1969) (Hansen, J., dissenting).

7. Mattyasovszky v. West Towns Bus Co., 61 Ill.2d 31, 35-36, 330 N.E.2d 509, 511 (1975).

8. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, e.g., at 285-88 (1983).

9. See generally id. at 322-51.

20. Haskell, The Aircraft Manufacturer's Liability For Design and Punitive Damages --the Insurance Policy and the Public Policy, 40 J. Air L. & Com. 595, 612 (1974).

21. Note, In Defense of Punitive Damages, 55 N.Y.U. L. Rev. 303, 328-30 (1980).

22. Id. at 337.

23. Mallor and Roberts, supra note 1, at 657.

24. Belli, Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society, 49 UMKC L. Rev. 1, 23 (1980).

25. See Owen, supra note 12, at 1366-68; Mallor and Roberts, supra note 1, at 667-68.

26. Pistorius v. Prudential Ins. Co., 123 Cal. App.3d 541, 554-55, 176 Cal. Rptr. 660, 668 (1981).

27. Cf. Mallor and Roberts, supra note 1, at 658 ("punitive damages should not be imposed in instances in which the criminal system is fulfilling its function," but "should be used in civil cases involving criminal misconduct only when they are needed as a substitute for, or as a supplement to, criminal sanctions").

28. An important expression of this concern by Judge Friendly appears in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) ("[w]e have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill").

29. Note, Mass Liability and Punitive Damages Overkill, 30 Hastings L. J. 1797, 1800-01 (1979).

30. Egan v. Mutual of Omaha Ins. Co., 24 Cal.3d 809, 824, 598 P.2d 452, 460, 157 Cal. Rptr. 482, 490 (1979).

31. See text with note 3 supra.

32. Grimshaw v. Ford Motor Co., 119 Cal. App.3d at 822, 174 Cal. Rptr. at 390.

33. Sharapata v. Town of Islip, 56 N.Y.2d 332, 338-39, 437 N.E.2d 1104, 1107, 452 N.Y.S.2d 347, 350 (1982) (quoting 82 App. Div.2d 350, 363-64, 441 N.Y.S.3d 275, 283 (1981).

34. Taylor v. Superior Court, 24 Cal.3d 890, 899, 598 P.2d 854, 859, 157 Cal. Rptr. 693, 698 (1979).

35. Id. at 892, 598 P.2d at 855, 157 Cal. Rptr. at 694.

36. Id. at 899, 598 P.2d at 859, 157 Cal. Rptr. at 698.

37. Id. at 910, 598 P.2d at 865-66, 157 Cal. Rptr. at 705 (dissenting opinion).

38. Id. at 910, 598 P.2d at 866, 157 Cal. Rptr. at 705 (Clark, J., dissenting).

39. See, e.g., Owen, Civil Punishment and the Public Good, 56 S. Cal. L. Rev. 103, 120 (1982); Mallor and Roberts, supra note 1, at 664.

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