Approved March 17, 1986
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

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

10:00 a.m. on February 28, 1986 in room 313-S of the Capitol.

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

Committee staff present:

Mary Hack, Revisor of Statutes
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Kathleen Sebelius, Kansas Trial Lawyers
Dr. Richard Maxfield, Certified Psychologist
John Myers, Office of the Governor
Ron Smith, Kansas Bar Association
Jack Euler, President-Elect of the Kansas Bar Association
Dr. Richard Darnall, local dentist

Senate Bill 540 - Professional malpractice by licensees of state other than health care providers.

Kathleen Sebelius, Kansas Trial Lawyers, testified in opposition to the bill. She stated citizens of Kansas want some legislative action to ensure affordable and available liability insurance. Will the provisions of Senate Bill 540 answer that plea for help? All indications are that this unique and unchartered solution will not have a significant impact on the problem. A copy of her testimony and other material is attached (See Attachments I).

Dr. Richard Maxfield, Certified Psychologist, testified he is opposed to this legislation both as a provider of psychological services and as a potential consumer of the services of the other 23 licensed groups in this measure. A copy of his testimony is attached (See Attachment II).

John Myers, Office of the Governor, testified after reviewing this bill, the Governor finds the concept and ultimate results of Senate Bill 540 to be both inequitable and premature. The benefits derived from the passage of this bill are far outweighed by the significant reduction of rights for Kansas citizens. A copy of his testimony is attached (See Attachment III).

Ron Smith, Kansas Bar Association, appeared in opposition to the bill. He introduced Jack Euler from Troy, Kansas.

Jack Euler, President-Elect of the Kansas Bar Association, appeared in opposition to the bill. He testified he wished the bill was the answer that many organizations supporting the bill want. Licensed professionals deserve affordable insurance and good, dependable coverage. At least with the practice of law, we just don't see how this legislation will achieve those worthy goals. A copy of his testimony is attached (See Attachment IV). He pointed out an error in his testimony on page 4; he is not a former chairman of this committee but was former chairman of the House committee.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 313-S Statehouse, at 10:00 a.m./pxx on February 28, 1986

Senate Bill 540 continued

Dr. Richard Darnall, local dentist, appeared in support of the bill today, since he was unable to be present for yesterday's meeting when most of the proponents appeared. He testified he is appearing to express his support for Senate Bill 540 as it pertains to proposed tort reform legislation in professional malpractice liability actions relative to those of us engaged in the legal practice of dentistry in Kansas. A copy of his testimony is attached (See Attachment V).

Following the testimony of the bill, the meeting was opened for questions.

The meeting adjourned.

Copy of the guest list is attached (See Attachment VI).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-28-86

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
	Topeka	KS Bar Assn
	Topeka	KBA
	Topeka	KBA
	Topeka	KSCPA
	Topeka	Gov. Office
	Topeka	Ins. Dept
	Topeka	Ins. Dept
	Topeka	Am. Ins. Assn.
	Topeka	Assoc. Press.
	Topeka	KCCI
	Topeka	KS Dental Assn
	TOPEKA	OJA
	"	Ins Dept.
	Topeka	KS Soc. of Architects
	Topeka	KS. Consulting Engineers
	TOPEKA	KS. Assoc. of REALTORS
	"	HBAK
	"	KS Hearing Aid Assn
	TOPEKA	WU LAW STUDENT

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TESTIMONY ON PROFESSIONAL LIABILITY: S.B. 540

February 28, 1986
Kathleen Gilligan Sebelius

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

The discussion of S.B. 540 needs to be placed in a context of the general crisis in liability insurance. Some features of this crisis are clear: rates have risen dramatically for almost every industry and profession, and the insurance coverage has been severely restricted.

The causes of this sudden and dramatic shift have been harder to obtain and more difficult to discuss; and, the so-called solutions seem unlikely to solve the current problems.

Citizens of Kansas want some legislative action to ensure affordable and available liability insurance. Will the provisions of S.B. 540 answer that plea for help? All indications are that this unique and uncharted solution will not have a significant impact on the problem.

The last panic cycle of the insurance industry was in the mid-70's and product manufacturers, doctors and municipalities came to Legislatures around the country for relief. In the mid-60's, the bottom cycle of the industry was aimed at inner-city risks, and the practice of "red-lining", totally eliminating certain central city areas from insurance coverage, was a major social issue.

The crisis of the 70's produced cries for tort reform in products liability and medical malpractice, as well as limited immunity for governmental entities. Kansas was one of the

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states which did not totally panic and did not arbitrarily restrict the rights of innocent victims, and the "crisis" abated in this state and throughout the country.

The dire predictions in the mid-70's of doctors refusing to practice medicine and all business being driven into bankruptcy did not occur. In fact, just the opposite occurred. In the early 80's, liability insurance prices dropped even though lawsuits and awards were on a gradual rise.

Mr. Charles Baxter, from Farm Bureau Insurance, gave a very articulate explanation to the Liability Subcommittee of the cycle of insurance pricing and what he termed as the "bad management practices" of industry competition for premium dollars leading to price cutting below justifiable rates. He explained that the inadequate premiums caused an exaggerated cycle of recovery, which is now occurring with huge rate increases and restrictions of liability coverage.

Mr. Robert Hunter, the former Federal Insurance Administrator, visited Kansas a few weeks ago to discuss liability insurance. He presented some graphs to illustrate the insurance cycles, which are attached to the remarks.

Also attached is the "Statement of Imminent Peril" issued in the State of New Jersey. This is an indication of the kind of aggressive action which some states have taken to counter these huge rate increases, cancellations, and policy restrictions. Several states have public advocates or persons with the Office of Attorney General who are working to challenge rate increases or insurance cancellations.

Most of the parties advocate tort reform. The proposals of S.B. 540 would limit liability of all professionals to $1 million, regardless of damages incurred. It is impossible to measure the impact of this legislation without gathering some basic information.

Even if the legislative public policy is to limit all liability to drive down the price of insurance, it is impossible to set an appropriate cap without obtaining detailed claims information. Surely no one would argue that even if there had never been <u>any</u> $1 million claims in any of these professions that rates would be lowered. Since insurance is based on experience not forecasting, our previous record should have a bearing on the rates.

Why have some lines become so restricted or hard to obtain? Currently, insurance for day care centers and directors and officers is almost impossible to obtain and very difficult to afford. Are the day care centers different than two or three years ago? What is the claims history in Kansas? Surely all of these risks did not become prohibitive at the same time.

Some of the specific questions which need to be asked are:

What is the claims history for various professions, industries, business, which have experienced rate increases or cancellations?

- how many claims are filed per year?
- how much is collected in premiums?
- how much is paid on closed claims?
- how much is allocated to reserves?

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- how expensive are costs: administration, defense, etc.?

- what is the highest award/settlement?

Unless this data is analyzed for a period including the latest cycle from the mid-70's through the mid-80's, it is impossible to design legislation to solve the crisis. Even if the Legislature wants to support a cap on awards, it is important to know at what level the cap will have an effect.

Currently, Kansas has a $500,000 cap on all tort claims actions - suits against state or municipal government. Yet, our liability insurance for governmental entities is just as expensive and restrictive as the insurance in states with no cap.

Mr. Hunter brought some recent data from Canada which is also helpful to examine.

We are here to share in the concern about extraordinary increases in insurance rates, the elimination of reinsurance in many significant areas, and the rush to curtail and eliminate liability. We urge the Kansas Legislature to continue to examine this critical situation, and to work to obtain the data about the real situation in Kansas courts prior to making determinations about legal changes.

We also urge some agressive action from the Insurance Commissioner and Legislature to make insurance available for basic services. In the mid-70's Kansas took a bold step and organized the Health Care Stabilization Fund, to provide excess insurance for doctors. While there has been criticism about the fiscal management of the Fund, there is no doubt that it solved a basic problem of available coverage.

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While reinsurance needs to be addressed at the national level, to promote insurance independence and free the United States from foreign entities able to restrict entire markets, the state can help to provide affordable alternatives for many areas.

The Senate has considered some legislation requiring additional notice and reasons for cancellations and restrictions; more of this is required. In states where rate increases have been vigorously challenged, the companies have often lowered or withdrawn the initial request.

It may be that the data shows areas of significant abuse which should be changed. But, the specific data is needed in order to develop a comprehensive and meaningful solution.

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Regular Session, 1983

SENATE BILL NO. 373

BY MR. KELLY

ENROLLED

Act 595
(eff. 7/14/83)

3-21

AN ACT

To enact R.S. 22:1451.2, relative to annual reports by property and casualty insurers, to require annual reports of property and casualty claims experienced in this state; to provide for the form of the reports and the information to be included therein; to require the commissioner of insurance to compile and review all reports and to publish a report; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 22:1451.2 is hereby enacted to read as follows:

§1451.2. Annual reports, property and casualty insurers

A. The commissioner shall promulgate rules and regulations which shall require each insurer licensed to write property and casualty insurance in this state, as a supplement to Schedule T of its annual statement, to submit a report on a form furnished by the commissioner showing its direct writings in this state.

B. The supplemental report required by Subsection A of this Section shall include but not be limited to the following types of insurance written by such insurer:

(1) Motor vehicle bodily injury liability insurance, including medical

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pay insurance.

(2) Products liability insurance.

(3) Medical malpractice insurance.

(4) Architects and engineers malpractice insurance.

(5) Attorneys malpractice insurance.

(6) Motor vehicle personal injury protection insurance.

(7) Motor vehicle property liability insurance.

(8) Uninsured motorist insurance.

(9) Underinsured motorist insurance.

C. The supplemental reports shall include the following data for the previous year ending on the thirty-first day of December:

(1) Direct premiums written.

(2) Direct premiums earned.

(3) Net investment income, including net realized capital gains and losses, using appropriate estimates where necessary.

(4) Incurred claims, developed as the sum, and with figures provided for, of the following:

(a) Dollar amount of claims closed with payment, plus

(b) Reserves for reported claims at the end of the current year, minus

(c) Reserves for reported claims at the end of the previous year, plus

(d) Reserves for incurred but not reported claims at the end of the current year, minus

(e) Reserves for incurred but not reported claims at the end of the previous year, plus

(f) Reserves for loss adjustment expense at the end of the current year, minus

(g) Reserves for loss adjustment expense at the end of the previous year.

(5) Actual incurred expenses allocated separately to loss adjustment, commissions, other acquisition costs, general office expenses, taxes, licenses and fees, and all other expenses.

(6) Net underwriting gain or loss.

(7) Net operation gain or loss, including net investment income.

D. This report shall be due by the first of May of each year, and the first report shall cover the year 1983.

E. It shall be the duty of the commissioner to annually compile and review all such reports submitted by insurers pursuant to this Section. The filings shall be published and made available to any interested insured or citizen.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED:_____

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MONTHLY LETTER

LESLIE WRIGHT & ROLFE GROUP

INSURING YOUR SUCCESS SINCE 1900

No. 198

A DETAILED ANALYSIS OF THE ECONOMIC AND SOCIAL FACTORS THAT DRIVE INSURANCE PRICES AND CAPACITY

Imagine your reaction the next time you visited your neighbourhood supermarket if you found that prices had doubled, all economy sized containers and packages had disappeared, and some types of food were unavailable! ... the cost of groceries for a family of four had doubled overnight!

The chances are you would be angry and frustrated. Consumer groups would plead for government help. Here and there governments might declare a state of emergency. Producers and distributors would complain that their costs had risen. Consumers would consider setting up co-ops and growing their own food.

Does this sound familiar? Not in the grocery trade, but this has been occurring in the conservative property and casualty insurance industry.

While grocery prices have been increasing, a little here and a little there, to keep pace with rising costs and inflation, insurance companies in the commercial insurance field have been engaged in a cut throat price war that has raged unabated for nearly seven years. Until recently commercial property and casualty insurance was unquestionably the greatest bargain of any financial services product.

Late in 1984 market forces caused changes and just a few short months later insurance companies had pushed the cost of many lines of property and casualty insurance to the highest levels in recent history. In addition, a shortage of insurance occurred, (yes, that's possible) and some specialty types of insurance became virtually unavailable while the cost of others increased dramatically.

Like our hypothetical grocery shopper commercial insurance buyers are frustrated and angry. Some have complained to government while others are looking at self insurance, group programs, increased deductibles, captives and other ways of controlling costs.

After carefully analysing each clients requirements and preparing underwriting proposals, insurance brokers can only suggest and negotiate rates. Rates are finally determined by the insurance companies. A qualified insurance broker can advise how to mitigate increases and still obtain suitable coverage. Providing your broker with full information about your business operations and claims experience is essential. Carrying out the recommendations that he suggests and retaining higher levels of risk will assist your broker in negotiating better terms. Final decisions, however, are made by insurance underwriters and in a difficult market clients may ultimately have to live with the decisions made by the insurers.

Insurance prices, like groceries and all other services and products, are the result of supply and demand and other economic factors. While negotiating insurance in a hard market can be a disheartening and frustrating exercise, it will be easier if the buyer understands the economic and regulatory factors that affect insurance pricing.

SUPPLY FACTORS

The supply side of insurance is governed by a basic cycle, the strength and duration of which is influenced by various internal and external factors.

GOVERNMENT REGULATIONS

To ensure that insurance companies remain solvent (and some are not) and able to pay claims, the governments in most countries license and control their operations. One important control is the ratio between surplus and premiums. Insurers typically are allowed to write total annual premiums equal to three times their surplus. Premiums can be increased to the extent that the Insurer purchases reinsurance that is acceptable to the regulatory authorities.

Because of these regulations the capacity or supply of insurance rises and falls proportionately with invested capital, surplus and available reinsurance.

CAPITAL & SURPLUS

Capital or surplus is generated from new investment in the insurance industry such as the sale of shares, and from retained profits from prior years' operations and the sale of assets such as real estate.

The surplus from which capacity flows depends on profit to generate additional surplus internally or to attract new investment into the insurance industry.

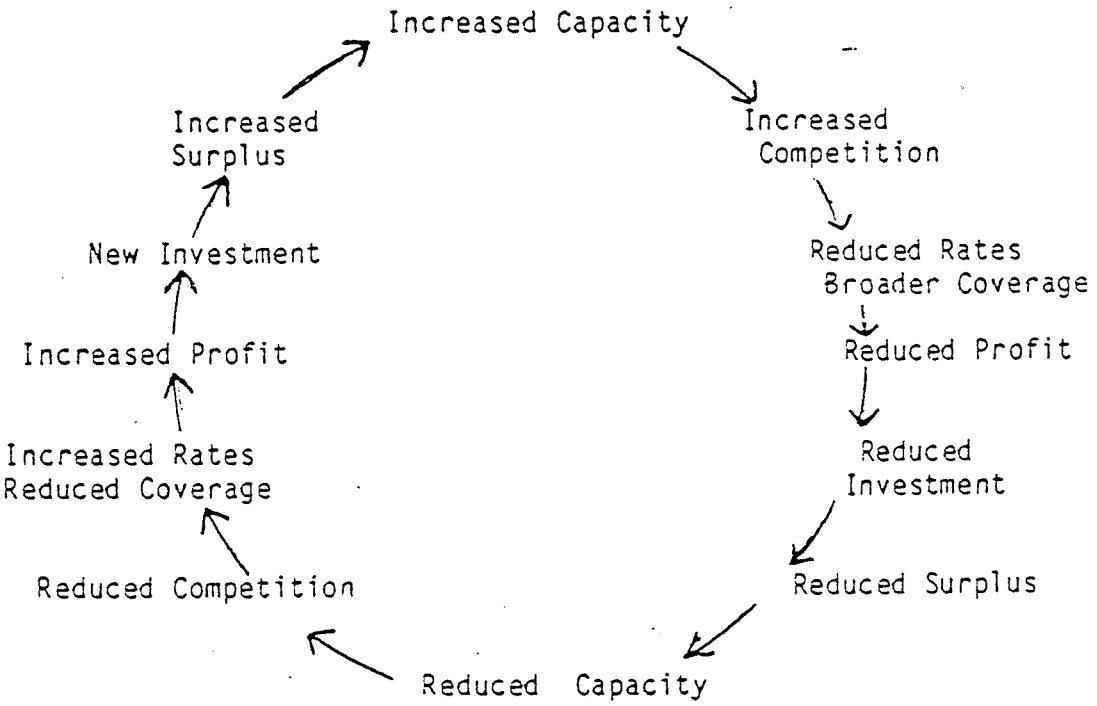
THE BASIC CYCLE

The basic cycle is profit driven. As profits increase they are reinvested and new capital is attracted into the industry. Because government regulators relate the premiums that an Insurer can write to its capital and surplus, an increase in investment produces an increase in the industry's capacity. Unless there is a corresponding increase in demand the increased capacity will produce increased competition which results in lower rates and broader coverage. These conditions will lead to reduced profit and ultimately losses which reduce the industry's capital and surplus and cut its capacity. To solve this problem rates are increased.

As rates increase and terms become more conservative, opportunities for well financed insurers to increase their market share will arise. Many insurers will seek additional investment in order to increase their capacity and in essence become part of the solution.

Unfortunately, many poorly managed and troubled insurers have to "clean house" before they can again move forward and this will cause them to cancel risks in mid term, refuse to renew, increase prices, reduce coverage, withdraw from certain classes and take other drastic and often unfair steps.

The additional premiums generated by rate increases become part of the overall premiums to which government imposed multiples apply and this causes a further reduction in the industry's capacity that won't be increased, except by new investment, until the higher rates work their way through the system producing profit which can be reinvested.



This type of cycle has been carrying on for many years. During the last cycle new factors - investment income and reinsurance - that had always been around suddenly became dominant driving forces.

INVESTMENT INCOME

The money that insurance companies earn comes from two main sources:

1. Underwriting profit or what is left over from the premiums collected after claims and expenses are paid.

2. Investment income or what can be earned on an insurance company's cash flow and legally required reserves.

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Starting in the mid 1970's inflation and the demand for investment funds from the private and public sectors pushed interest rates to unprecedented highs. Insurance companies saw this as an opportunity to increase their investment income. This action was encouraged by hungry reinsurers. Capacity reached unknown highs. Competition was rampant. Many Insurers aggressively wrote almost any kind of business at price levels that could not possibly produce an underwriting profit. These Insurers hoped to earn investment profits that would offset their underwriting losses and for a while this worked. Clients with long stable relationships with brokers and Insurers transferred their business to take advantage of the lower prices and broad coverage that was available.

As a result of this reckless underwriting claims grew at a faster rate than income and, ultimately, claims and expenses exceeded both premiums and investment income causing many insurance companies, particularly reinsurers, to have bottom line losses. Early in 1984 it became apparent that this strategy was failing. Interest rates had dropped - they had become insuffient to cover the underwriting losses. The industry was writing business at bargain prices. Reliance on investment income didn't change the basic cycle, but greatly amplified its effect. When the bubble burst in the latter months of 1984 the industry was writing more business than it could handle. The reaction was sudden and violent much like the supermarket whose prices doubled overnight.

EQUITY PRICES

Insurance companies are allowed to invest part of their assets in approved common stocks. The 1974 hard market was fueled by the tremendous drop in the market value of common shares. While stock prices have not been a major factor in the current hard market they represent another potential force that can drive the cycle upwards or downwards.

REINSURANCE

Historically the direct companies shared many risks in order to protect themselves from large claims that might impair their financial stability. At one time it was not uncommon to see thirty or forty separate policies insuring the same risk or thirty or forty companies sharing in a "subscription" policy. As the size of risks grew this system became unwieldy and direct companies bought more and more reinsurance in order to be able to write larger risks. By the 1970s it had become common for very small companies to underwrite jumbo risks backed primarily by reinsurance rather than their own assets. Small companies, with say $5,000,000 in capital and surplus, wrote policies with limits of $50,000,000 and $100,000,000 and even more. The increased use of reinsurance led to some serious abuses. First of all some companies started using unlicensed foreign reinsurers. A few of these reinsurers were not financially secure and could not pay their claims, leaving the direct companies, which often were small, having to pay claims from their own limited assets. A second problem was caused by the high degree of competition in the reinsurance business. Reinsurance companies hungry for investment income accepted business at substantial discounts from the already low rates charged by

direct Insurers. This allowed the direct Insurers to assume large risks, pass most of the risk to reinsurers and still have a substantial amount of cash flow to invest. These were very clever moves as long as the reinsurers were financially sound and could pay up when called on. Many conservative Insurers continued to operate on a sound basis but competitors drew everyone into the game to some degree and the result was even more downward pressure on rates. When the market turned reinsurers were the first to tighten up.

Reinsurers raised rates, reduced coverage, and cut capacity. This had a leveraged effect on direct Insurers who were forced to take similar steps. Reinsurers had accelerated the move to lower rates during the soft market and now accelerated the return to more realistic rates and tougher conditions.

RESERVES

Since most claims (particularly liability claims) take some time to settle, it is impossible for an insurance company to know where they stand at the end of any year. To help evaluate their position, reserves for both known claims and incurred but not reported claims, are established. These reserves are determined in various ways but depend heavily on estimates by claim managers and casualty actuaries.

When large amounts of premium are being generated to invest and Insurers appear profitable some less conservative insurance company managements may underestimate their reserves. In the short term this will make reinsuers happy and justify higher dividends to shareholders. Insurers who deliberately underestimate reserves operate in a euphoric fool's paradise. When the claims are paid, the real amount becomes known, and this of course accelerates losses in the year when settlement is made causing another highly leveraged impact on a tight market.

Some industry observers believe that reserves at December 31, 1984 were understated by as much as 10-20%. For those companies already showing a loss these reserve deficits, when finally adjusted, will to the extent of the adjustment further increase the losses.

CATASTROPHE CLAIMS

Like most of us, insurance companies react to the world around them. Insurance companies and their actuaries like to deal with predictable risks. An insurance company that insures 10,000 concrete office buildings can fairly accurately project future fire losses.

Insurers have historically better handled those risks that occur relatively often (high frequency) and produce relatively small losses (low severity). Such risks are predictable and suitable rates can be established with relative ease. Insurers have greater difficulty dealing with unique risks applicable to specific industries and high severity low frequency risks, such as earthquakes. Some of these risks can only be handled when insurers are permitted to accumulate reserves over a long period.

The 1980s have become a world of uncertainty. Who can predict the potential losses from risks and activities such as,

- acid rain
- industrial accidents (Bhopal)
- earthquakes
- seepage from stored chemicals (PCB's)
- air pollution
- defoliants
- medical services
- legal services
- design and construction

Who can predict what economic woes will afflict us during the balance of the Eighties?

A few to consider are:

- further failures of financial institutions
- trade embargoes
- unexpected currency fluctuations.

The recent escalation of unpredictable risks has caused insurance companies to return to a more conservative underwriting stance further reducing the industry's capacity to write business.

At the present time the supply of insurance is possibly 20% below demand. This is causing the current escalation in commercial insurance pricing.

So far we have been looking at the factors that control the supply of insurance. We have seen that there is a basic cycle in which profit generates surplus which generates excess capacity. We have then seen how excess capacity results in greater competition which produces lower premiums and, ultimately, financial losses for insurance companies. The market then swings to the hard segment. Rates are raised, capital and surplus rise, capacity is increased, new money is attracted and the industry once again becomes profitable.

We have seen how the various segments of the cycle are accelerated and slowed by outside factors including investment income, the stock market, reinsurance, claims reserves, catastrophe claims and, of course, new investment.

DEMAND FACTORS

The demand for insurance is somewhat fixed as most prudent buyers consider that they must continue to protect their assets and buy coverage for unexpected liabilities. Those with mortgages on commercial property are forced to continue to buy insurance. The demand for insurance is somewhat less variable than supply because many buyers desire to continue or must continue their protection. Demand increases somewhat as insurance rates drop and decreases when rates rise and buyers turn to self insurance, increased deductibles and so on.

Increased demand for insurance is primarily brought about by three factors:

1. Demand rises as real new investment (factories, homes, stores, buildings) is made and new risks to insure are created during a buoyant economy. Inflation increases prices and causes an artificial increase in demand.

2. Demand rises as old risks are seen in a new light. Some major risks, such as pollution, that caused Insurers to reduce their capacity, create an increased demand as insurance buyers learn more about these exposures and try to obtain coverage.

3. Demand rises when attractive new products are conceived, developed, and marketed by the insurance industry.

At this point in time the worldwide capacity of the insurance industry has been significantly reduced because of a reduction in capital and surplus due to the lack of profit. At the same time the demand for insurance is increasing not so much because of real economic growth, but rather because of the need for specialized insurance to cover areas that are perceived to be highly risky by both insurance buyers and insurance companies. Some of these areas are Pollution and Contamination exposures including clean-up expenses, chemical waste problems and Professional Liability risks. Many of these risks are arising because of changes in our legal system, but many are simply the result of the insurance industry withdrawing from certain areas that it considers to be high risk and where little or no catastrophe reinsurance is available. We are reminded of the increased demand attributable to wartime rationing. The result of a reduced supply and increased demand is higher prices and tougher terms.

THE CANADIAN SCENE

Insurance is an international business. Without the support of multinational insurers and reinsurers Canada's domestic insurance industry would not be able to weather the huge disasters that can occur anywhere at any time. Without these international resources major earthquakes, chemical spills and marine disasters could not be handled by Canadian insurers.

Although Canada is a separate country it has close social, economic and legal ties with the United States. Our legal systems stem from the same roots, but have developed independently. Over the years many legal principles that protected defendants and their insurers have been modified or eliminated as a result of court decisions. This trend has been most noticeable in the United States. Many insurers consider the high and unexpected settlements resulting from these changes as the root cause of today's problems.

The Canadian insurance industry has historically been dominated by insurers from foreign countries, particularly Britain, Switzerland, Germany and, of course, the U.S.A. While foreign involvement will continue as a major factor, we think that "winds of change" are starting to blow. We are beginning to see some major Canadian groups becoming significant players in the property and casualty business. These include E.L. Financial Corporation which has recently purchased the troubled Canadian Indemnity Company and already owns the Dominion of Canada Group and Empire Life. Another new player is the Trilon Financial Corporation which recently purchased most of the Canadian operation of the Fireman's Fund Insurance Company from American Express. The Laurentian Group, which includes Imperial life and the Laurentian Pacific, has developed a national presence under the leadership of Claude Castonguay. A major effort is underway to establish a Canadian insurance exchange which will operate somewhat like the New York Insurance Exchange and Lloyds.

In spite of these developments, foreign insurers continue to be a major part of the Canadian scene, but many are transferring the day to day management of their Canadian operations to their Canadian head offices. American companies with a significant Canadian presence include the U.S.F. & G., CIGNA, American International Group, Travelers, Hartford and Allstate. British insurers include The Guardian, Royal, Commercial Union, Prudential and, of course, Lloyd's. Other foreign insurers include the Zurich, Gerling Global and The Tokio Marine & Fire Insurance Company.

Canada is dominated by foreign owned brokers. There are only three Canadian owned brokers with a national presence. Positioned between the local agents and the national brokers are the regional brokers who are privately owned and offer a range of specialized services to their clients. Several large Canadian regional brokers, including Leslie Wright & Rolfe Limited, operate in the West, Central Canada or the Maritimes. These brokers specialize in various fields including construction, professional liability, strata housing and travel insurance.

EFFECT ON CLIENTS

The current insurance problems are affecting business, professional, government and institutional buyers to a much greater extent than individuals. While the cost of homeowner and tenant packages and personal automobile insurance is rising the main impact is on commercial insurance.

Liability insurance is a disaster area.

Many general liability insurers have been hit by American courts holding that injuries such as silicosis, asbestosis and pollution that occurred over extended periods are covered not just by current policies, but by all policies in force over the period when injuries occurred. Insurers have become liable for claims under policies that had expired years ago. The limits provided by companies in each year that they insured a risk are being added together to create a large and unexpected liability. Insurers have reacted by introducing "claims made" general liability policies designed to avoid this "long tail." While this problem is limited to only

a small percentage of risks, insurers may ultimately force the majority of clients to accept "claims made" policies.

While all classes of general liability insurance have been hit, some classes such as chemical risks, drug manufacturers, municipalities and manufacturers with an extensive American products liability exposure have been particularly affected.

The limited market for many specialty liability forms has been further restricted as many marginal players have pulled out or cut back.

Professional liability policies issued to accountants, lawyers, architects, engineers and other professionals have long been written on a "claims made" basis, but are also having prices raised and conditions tightened in reaction to large awards and the gradual erosion of the law of negligence. The courts are virtually holding professionals to be guarantors of results. While these trends may be socially desirable, the cost of insurance to cover them may ultimately force many professionals to find other solutions or be forced from the marketplace.

Property insurance, while less affected than liability coverage, is also suffering from higher prices and tougher terms. Insurers are now withdrawing frills, demanding standard wordings and higher deductibles.

The contract bonding business, while not immune from market cycles, has not been as seriously affected as casualty insurance. Many companies, who attempted to write underfinanced and inexperienced contractors in order to gain a market share, have withdrawn. Selective and experienced underwriters continue to provide a market for well managed and sound contractors.

REACTING TO A DIFFICULT MARKET

Armed with an understanding of the cyclical insurance market and the factors that influence prices and capacity, how should a wise commercial insurance buyer react? Panic is not in order. Plan to reduce the risks that need insuring, make your risks attractive to insurers and self insure the portion of risk that you can financially absorb. Continue to insure against catastrophe losses of a magnitude and nature that you cannot absorb.

Reducing or eliminating risks can be accomplished in many ways. Some risks can be transferred to other parties in carefully written contracts. High risk operations can be sold, terminated or sub-contracted. New high risk operations can be delayed.

Risks can be made more attractive to insurers in many ways. A few that come to mind are:

- loss control programs
- sprinkler systems
- improved construction

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Risks can be self insured in many ways. Increasing deductibles and simply not buying insurance on high frequency/low severity risks is a common way. More sophisticated self insurance arrangements include funded group plans and captives. Many self insured arrangements allow the insured, rather than the insurer, to earn investment income on premiums until claims are actually paid.

In spite of the difficult market insurance buyers will continue to rely on the commercial insurance market for their catastrophe insurance. Buyers, however, may need to redefine their interpretation of catastrophe in light of both cost and availability of coverage.

SOLVENCY

Business failures are a natural development in a free enterprise market. They weed out poorly managed, dishonest, underfinanced or marginal operators. Insurance companies, trust companies, banks and credit unions are important parts of our financial infrastructure. Until a few short years ago Canadians had come to rely on government regulation and control to ensure that these organizations were sound. In the past four years several trust companies, two regional banks and four insurance companies have failed. Inspection staffs had not kept pace with changes in these industries.

Brokers and insurance buyers must spend more time reviewing the financial affairs of their insurers. A number of excellent publications classify the financial strength of insurance companies in various ways. In today's market, bargain prices or exceptionally broad terms may be warning signs of impending disaster.

REACTING TO A NEW COMPETITIVE MARKET

Many insurance buyers will need to re-evaluate their position when insurance markets, as they inevitably will, become more competitive. While some buyers may wish to transfer their business to the most competitive insurers, those with a long term outlook may wish to remain insured with the stable companies who provided them with coverage during the difficult times, in order to build a more permanent relationship. Buyers should carefully examine the reputation and long term financial stability of insurers, particularly when purchasing coverages where the insurer is obligated to pay claims many years in the future.

LONG TERM SOLUTION

Considering the highly competitive nature of the insurance industry and the number of factors that affect insurance pricing and capacity, it is unlikely that any internal solutions will solve the problem. Perhaps the solution lies in some compromise between government control and increased responsibility by insurers, buyers and brokers. Government and our legal system need to be more responsive to insurance industry problems and the social and economic consequences of failing to respond to them. Insurance company management and buyers need to develop a long term outlook.

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STATE OF NEW JERSEY
DEPARTMENT OF INSURANCE
HAZEL FRANK GLUCK, COMMISSIONER
CN 325
TRENTON, N.J. 08625
609-292-5363

STATEMENT OF IMMINENT PERIL

INSURANCE
DIVISION OF ADMINISTRATION

Emergency Adoption of New Rules and Concurrent Proposal N.J.A.C. 11:1-20

The Department of Insurance is currently experiencing an increasing influx of consumer and agent complaints regarding indiscriminate cancellation, nonrenewal, premium increase and underwriting practices of commercial insurers. The actions complained of include mid-term cancellations, mid-term increases in premiums, failure to provide timely notice of nonrenewals and block cancellations and nonrenewals of entire lines of insurance. In addition, the Department, as well as affected public entities and others, have been notified by commercial insurers of their intentions to block nonrenew their clients' comprehensive general liability policies if the Department fails to approve a new commercial general liability policy form proposed by the Insurance Services Office, the largest rating organization in the State.

The property/casualty industry is presently attempting to recover from very serious problems caused by six consecutive years of increasing underwriting losses. The business is hurting because it underpriced its products, especially in casualty coverages.

Many industry advocates lay blame for the current crisis in commercial property/casualty lines upon the tort law system and overly sympathetic judges and juries. They assert that it is impossible for companies to determine with any degree of certainty the maximum exposure they face on policies written due to the liabilities created by the federal Superfund and New Jersey Spill Fund Acts and the courts' undue expansion of the common law liability of municipalities for environmental incidents and their concomitant disregard of contract provisions designed to provide insurers with coverage defenses.

Insurance company response to poor results has been to increase rates and reduce coverage substantially. This response is also in reaction to poor results experienced by reinsurers here and abroad who are withdrawing from the United States market. The end result is a capacity crunch.

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As in previous "capacity crunch" incidents, the public suffers severe and economically debilitating dislocations. After a period of glut, when premiums drop to a fraction of their prior price levels, underwriting tightens like a vise and important major manufacturing and service industries find themselves unable to purchase insurance protection at any price from any company.

The insurers' actions in terminating existing coverage, refusing to renew expired policies and in dramatically increasing rates have led to an availability and affordability crisis in commercial lines insurance. Municipalities, environmental concerns, product manufacturers, medical professionals, transit authorities, nurse-midwives and day-care centers are among the hardest hit. Most of the affected professions and other entities cannot find coverage and if they are fortunate enough to do so, the cost is prohibitive.

The property/casualty industry asserts that its actions are necessary because of the financial harm caused by six years of overheated price competition during which rate adequacy and normal underwriting standards were sacrificed in order to maintain premium income. In support of its assertions, the industry points to an 17.7 percent underwriting loss in 1984 and an 18.5 percent underwriting loss for the first six months of 1985. The industry contends that these results pose great dangers to the very solvency of an unacceptably large number of insurers. Advocates of the industry assert that it must improve its earnings if the industry is to maintain its current capital base and attract new capital to meet the insurance needs of a growing economy.

Although we agree that the industry's operating results has deteriorated for seven consecutive years, and that more disciplined underwriting along with adequate rates are needed, we see no justification for the rash of actions undertaken by the industry in terminating coverage prior to the expiration dates of policies and in increasing rates and reducing coverage in mid-term. The United States General Accounting Office in developing a financial overview of the property/casualty insurance industry found that for the 10-year period 1974 through 1983, the industry suffered about $28 billion in underwriting losses. However, for the same period, the industry had about $100 billion in investment gains, resulting in a total gain of about $72 billion for those years. Further, from 1974 through 1983, the industry paid only $1.3 billion in federal income taxes, about 2 percent of the industry's total gain for the period. While in past years investment gains have exceeded underwriting losses by a fairly wide margin, in more recent years the gap has narrowed. However, in every year, investment income has exceeded underwriting losses. Therefore, we should not permit the industry to abuse its policyholders as it implements new strategies to address its past mismanagement practices.

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The data emanating from Wall Street tends to support this view. Property/casualty stocks have soared to record highs more than doubling the Dow Jones Industrial Average rise in 1985. Moreover, property/casualty stocks has historically outperformed the Dow Jones and other broad stock price indices, even in periods of adverse underwriting results.

Also, the A. M. Best Company (the leading financial analyst of the insurance industry) recently reported that the property/casualty industry has ample resources available to meet all contingencies. Best's found that the industry has liquid assets equal to 31 percent of liabilities and total unaffiliated investments exceeding liabilities by four percent.

While the property/casualty industry's profits were low last year and modest rate adjustments were expected, rates have skyrocketed. Instead of moderate rate increases, we see massive cancellations and mammoth price increases of up to 2000 percent for day-care centers, municipalities, transit authorities, truck and bus operators and others.

The Commissioner finds it necessary to adopt emergency rules restricting mid-term cancellations, mid-term price increases, prohibiting block cancellations and nonrenewals and requiring timely notice of non-renewals and cancellations in property/casualty commercial lines because failure to act promptly will result in serious harm to the insurance-buying public and the economic environment within the State. These techniques comprise some of the many steps insurers are taking in an effort to halt a competitive situation in commercial lines (and its related lack of regard for underwriting profit during the past several years) that has compromised the operating results of the industry. However, as the industry strives to return to a sounder financial footing, it should not abdicate its responsibilities. We are not insensitive to the industry's present condition and the critical need for corrective action; however, we observe that in many cases insurance companies have exceeded the boundaries of reasonableness in the conduct of their business and these activities must cease."

While we recognize that some premium increases, are perhaps justified, there is absolutely no reasonable excuse for mid-term cancellations unless on an individual basis as a result of unfavorable underwriting factors relating to the individual risk which were not present at the inception of the coverage. Moreover, unless a risk has developed an adverse loss history, it should be eligible for renewal under an insurer's current underwriting rules and rates. If a risk meets a company's underwriting standards at a "bargain basement" or even a "manual" premium when investment income is high and the physical nature of the risk itself does not change when investment income deteriorates, that risk should not be penalized by cancellation or non-renewal.

These are indeed distressing matters, which not only constitute unfair practices that are injurious to the public, but which also interrupt the free flow of commerce. Society cannot function properly when its commerce is so disrupted. The statutory responsibilities enjoins the insurance regulator to take agressive action to protect the interests of policyholders and the State, to the extent that insurance companies provide responsible, equitable and fair treatment to the insuring public. These emergency rules are being adopted to ensure that the insuring public receives treatment from

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their insurers that is consistent with the insurance laws of New Jersey. Delay in adopting rules fosters insecurity, distrust, unfair pricing and unavailability of insurance to magnitudes where the insurance buying public will be affected by extreme adversities.

Hazel Frank Gluck

Hazel Frank Gluck

9/16/85

Date

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COMPARISONS BETWEEN "TORT REFORMS" SOUGHT BY THE INSURANCE INDUSTRY AND THE LAW OF ONTARIO, CANADA

In most of the 50 states, the insurance industry is seeking legislation that would make it more difficult for injured people to win lawsuits and would limit the amount of money they could recover if they do win. The law of Ontario, Canada (where the insurance industry is raising rates just as it is in the United States, see Chart 2) already contains the provisions the insurance industry seeks, as the following chart shows:

The insurance industry wants:	Ontario, Canada has:
A. Caps on compensation for pain and suffering -- e.g., for quadriplegia or brain damage -- typically of $250,000.	A. Caps on compensation for pain and suffering. Ontario has a cap of $100,00 in 1978 Canadian dollars ($185,000 in current Canadian dollars). See Andrews v. Grand and Toy Alberta Ltd., 2 S.C.R. 229 (1978); Ontario Law Reform Commission Report on Products Liability, at 62 (1979) (hereinafter "Ontario Law").
B. Restrictions on punitive damages: e.g., limiting punitive damages to a specific amount or a specific multiple of the compensatory award, or absolutely prohibiting punitive damages.	B. Restrictions on punitive damages. In Canada, punitive damages are virtually unknown in tort cases. They are allowed only for intentional torts. Ontario Law at 75; Linden, Canadian Tort Law, at 49-51 (1977).
C. A prohibition on injured people specifying the amount they seek in the complaint (in legal jargon, eliminating the *ad damnum* clause).	C. A prohibition on injured people specifying the amount they seek in the complaint. In Ontario, the plaintiff is not permitted to demand a specific amount in the complaint. See Gray v. Alanco Development, Inc., 1 O.R. 597 (1967); Ontario Law at 75.
D. Restrictions on contingency fees -- e.g., by establishing a sliding scale that reduces the percentage of the award the lawyer can receive as the award gets larger.	D. No contingency fees. In Ontario, contingency fees are prohibited. Ontario Law at 72, 75.
E. Restrictions on the role of the jury -- e.g., taking the authority to determine the amount of punitive damages away from the jury, or requiring the jury to answer detailed interrogatories that limit its discretion.	E. Restrictions on the role of the jury. There is no constitutional right to a jury trial in Canada. Most trials are judge trials. Ontario Law at 74, 102-04.

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F. Penalties for "frivolous" suits -- e.g., requiring the plaintiff to pay the cost of defending such a suit.

F. Penalties for "frivolous" suits. In Ontario, if the plaintiff loses he must pay the defendant's attorney's fees, as well as his own. Ontario Law at 72, 76.

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WHAT HAPPENS TO INSURANCE RATES WHEN "TORT REFORM" LEGISLATION IS ENACTED?

Virtually every "tort reform" measure the insurance industry is seeking is currently the law in Ontario, Canada (See Chart 1). Yet the insurance industry is raising premiums by 400%, cancelling coverage in mid-term and refusing to provide coverage at any price in Ontario, Canada just as it is in the United States. For example:

- The insurance industry has refused to provide insurance at any price for Ontario day care centers (See Exhibit 1).

- The insurance industry has refused to provide insurance at any price to all but 1 of 121 Canadian School Boards responding to a questionnaire (See Exhibit 2).

- The insurance industry has refused to provide liability insurance for Toronto and many other cities (See Exhibit 3).

- The insurance industry has refused to provide liability insurance at any price to the Canadian national ski teams, which have never had a major claim against them (See Exhibit 4).

- The insurance industry has raised premiums 1000% and at the same time reduced coverage for the Ontario intercity bus industry (See Exhibit 5).

- Hospitals in Toronto can still get insurance, but only at "greatly increased" premiums (See Exhibit 6).

- An insurance company renewed the Ontario School Bus Operators Association's policy on December 1 -- at 400% more than it charged the year before (See Exhibit 1).

If any of the organizations denied coverage were ever sued -- and many of them have never been sued in the past -- they would be sued under the laws of Ontario, where pain and suffering awards are capped at $185,000, punitive damages are virtually non-existent, contingency fees are prohibited and the plaintiff must pay the defendant's attorney's fees if he loses. Yet the insurance industry is raising its rates 400% and more, cancelling policies in mid-term and refusing to provide coverage at any price both in the U.S., which has not enacted the tort provisions the industry seeks, and in Ontario, Canada, where such provisions have long been in the law.

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Exhibit 1

Toronto Star
Friday, January 10, 1986

Liability coverage crunch may shut day-care agencies

By Elaine Carey Toronto Star

Two of the largest day-care agencies in Metro may be forced to close down next month because they have been unable to renew their liability insurance.

Family Day Care Services, which provides care for about 600 children through home care and a school-age centre, and Cradleship Creche, which cares for another 550 children, say they can't get insurance at any cost.

Cradleship's policy expires Jan. 31 while Family Day Care has until the end of February to try to find some solution, said John Pepin, its executive director.

"But our agent and two others have been trying everywhere and there just isn't anything," he said. "If it's hitting us this way, it will eventually hit the others as well."

'Pay 1,000 per cent'

Family Day Care, one of the oldest registered charities in Canada, has been in operation for 135 years and has never had an insurance claim, he said. Its premiums rose 65 per cent last year to about $2,500 but this year the insurer refused to renew the policy.

"At this point we are willing to pay 1,000 per cent more if necessary, but we can't even get a quote," he said.

Dr. Myrna Francis, executive director of Cradleship Creche — which has operated for almost 50 years without a claim — said their insurer refused to renew their policy when it expired Dec. 31, but granted them a month's extension to try to find other insurance. But insurers simply say they will no longer issue policies to day-care centres.

The provincial Day Nurseries Act requires day-care centres to have liability insurance to operate, she said, and they have informed the province of the situation.

'Deficit financing'

"We are just waiting to hear form the government and we will very shortly have to decide what course of action to take," she said.

Pepin said the implications of putting 1,150 children out of day care are "horrendous. Most of these people are low-income and without day care they would lose their jobs.

"Even if we do get some kind of ministerial approval to operate without insurance, if there was ever a suit and we're not protected, we put ourselves in a very vulnerable position," he said. "We can't afford to self-insure — we have barely enough funds as it is and we end up deficit financing every year. Where would we find the funds to cover it?"

The liability insurance industry in Canada has hit a crisis because of skyrocketing court awards and falling interest rates. Many companies have simply refused to issue policies for vulnerable groups, including four of Metro's municipal governments and the Metro School Board, which are now self-insuring.

Insurers cite problems in the United States, where several day-care centres have been charged with sexually abusing children in their care, as one reason for their unwillingness to renew day-care policies.

Umbrella Day Care Coalition, which arranges insurance for 185 non-profit day-care centres in Metro, did manage to get insurance Oct. 1 for only a slight premium increase, "but we had to stay away totally from American insurance companies," director June Hall said.

The U.S. company they had been dealing with for years refused to renew at all, she said, and up until a week before the policy expired "no one would touch it." The coalition eventually found a British insurer who was willing to take on the policy.

But Pepin said that company and others willing to renew policies two months ago are now flatly refusing, claiming that one suit involving a small child could cost them millions.

"I think, as all these day-care organizations come up for renewal, they will find enormous problems," he said.

Higher insurance rates hit school bus operators

By Kim Zarzour Toronto Star

School bus companies and school boards are bracing themselves for hefty vehicle insurance increases that threaten to put some smaller bus operations out of business.

If school boards don't take the brunt of the increase, officials say, parents may have to find another way to get their children back and forth to school.

Metro area boards spent about $70 million transporting more than 123,000 students last year. Board officials say the cost of that service will increase considerably when the new busing contracts are negotiated in the spring.

Insurance companies blame the higher rates — which are also causing problems for municipalities, school boards and trucking companies — on increasing frequency and cost of claims and higher court awards to accident victims

Bus operators and school boards said yesterday that the situation took them by surprise.

"It just seemed to hit us in November and December," said Ted Moorhead, president of the School Bus Operators Association of Ontario. Moorhead said he was shocked by a 400 per cent increase when he renewed his insurance Dec. 1.

Charter bus companies have already been hit with big jumps in insurance rates. Gray Coach Lines Ltd. recently hiked the price of monthly commuter passes to cover higher liability insurance premiums. The Ontario Motor Coach Association has called for an investigation by a legislative committee.

Moorhead said most school bus operators haven't yet been hit by the increases, but they fear it's inevitable.

While some operators say the increases will be no more damaging than the soaring gas prices of recent years, others, especially the smaller companies, are worried.

"I can't take any large increases without going bankrupt. If it goes up 100 or 200 per cent, then I'll have to think about closing my doors," said Ronald Young, who operates a fleet of 50 buses for the Peel Board of Education. "The school board is going to have to bear the brunt of the increase, and they in turn will have to pass it on to the taxpayers."

William McWhirter, transportation officer with the Toronto board, said school boards will just have to find the money somewhere.

"If we don't realize that the whole industry is in trouble and try to help them out, then we're not going to have any transportation service at all."

The bus operators association has scheduled a meeting to discuss the insurance problem next week.

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Exhibit 2

416/963-0311

555 Yonge Street
Toronto, Ontario
M7A 2H6

Ministry of
Consumer and
Commercial
Relations

BACKGROUND NOTES - January 9, 1986

SUBJECT: LIABILITY INSURANCE

INSURANCE CLASS: SCHOOL BOARDS

121 of the 165 boards (excluding Canadian Forces Board and Treatment Centres) responded to an insurance questionnaire distributed in early December 1985 and at this time only one board has been unable to obtain liability insurance coverage at all. The board is the Moose Factory Island District High School Area.

Several boards have had to reduce the maximum liability insurance coverage that was available to them last year.

The premium increases have ranged from a low of 12% to a high of 563% over the previous year's premium.

Several boards have indicated that new exclusions have been imposed on them by the insurance industry, such as sports related activities, shop programs, and environmental issues. At this time the only boards to have advised us that this has been given to them in writing by their insurance broker are the Wellington County Board of Education and the Kirkland Lake Board of Education. The Wellington County Board of Education has halted all physical education programs until further notice.

We are currently working with the Ontario Association of School Business Officials to review that options are available to school boards to solve this problem.

No board is expected to close because of a lack of insurance.

The Ontario Association of School Business Officials has been trying for some time to arrange a co-operative for school boards under which they would insure each other. Planning for this continues, and OASBO has asked for Ministry of Education assistance in collecting the required data. The Ministry is considering this request, which includes a request for financial assistance (about $25,000).

An inter-ministry work group has been formed to examine the entire insurance situation, led by Consumer and Commercial Relations. The Ministry of Education has representation on this committee.

Exhibit 3

Toronto Star
Friday, January 10, 1986

'Crisis' team to investigate soaring price of insurance

By Denise Harrington Toronto Star

A provincial task force will look at government-run coverage and tougher insurance regulations in a bid to solve the crisis of soaring premiums facing Ontario cities, school boards and hospitals.

"This government is not prepared to stand aside while this crisis threatens some elements of our economic and social system," Consumer Minister Monte Kwinter told the Legislature yesterday.

The task force, under former Economic Council of Canada chairman David Slater, will examine the costs and availability of liability insurance in Ontario and whether rules governing the industry could be improved to ensure stable rates.

Kwinter also announced yesterday a new plan to pay limited compensation to customers of bankrupt insurance companies.

The government will help hospitals pay for massive premium increases if they face "true financial hardship," Kwinter promised.

Replying to questions in the Legislature, Kwinter said the Liberal government is not considering offering automobile insurance or public sickness and disability insurance.

☐ Metro day-care agencies may close without insurance. Page A4.

"At the present time the government's preference is not to be in the insurance business," Kwinter added outside the Legislature.

"On the other hand, if the case can be made, and if it can be documented that this would be the route to go and makes economic sense and provides the kind of services required, we would certainly look at it."

Metro and the municipalities of Toronto, York, Etobicoke and East York have been unable to get any insurance coverage against personal injury for 1986. The province is encouraging municipalities to set up insurance pools to handle soaring rates and lack of coverage.

'Doing nothing'

Opposition Leader Larry Grossman complained that Kwinter has, "after six months of literally doing nothing," decided to appoint a task force "that will take a minimum of another three months before anything happens."

New Democratic Party leader Bob Rae said the government should introduce a sickness and disability insurance plan for all Ontarians, as well as an auto insurance scheme similar to those in Manitoba and Saskatchewan.

But Kwinter pointed out public insurance plans in those two provinces were facing deficits this year. He said the problem of soaring premiums was worldwide because of high court awards, low interest rates paid on investment on premiums, and competitive cut-rate premiums offered several years ago.

Outside the Legislature, Kwinter said the government will set up a plan to provide a maximum of $200,000 in coverage to customers of companies that go bankrupt. All panies will be asked to pay into und at rates to be set later.

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Exhibit 4

Globe Mail
Jan. 15/81

Insurance problems may curtail season for Canadian skiers

Special and Canadian Press

OTTAWA

Canada's national ski teams may have to leave the World Cup circuit at the end of this month because of an insurance problem that could also cripple competitive skiing across Canada.

Ron Payment, executive director of the Canadian Ski Association, says the inability to get sufficient liability insurance may force the association not only to call home its national teams but also to cancel all domestic competitions.

Most provincial ski programs and some club programs would also be affected, since they are tied to the CSA's insurance policy. The CSA executive plans an emergency meeting on Jan. 25 in Ottawa.

Glenn Wurtele, the national head coach, said yesterday in Kitzbuehel, Austria, that he hadn't been told that the teams might be called home or even that there is an insurance problem.

"It certainly is news to me. I find it extremely hard to even envision it happening; I really can't imagine something happening on that scale."

Mr. Wurtele said he could not see Sport Canada, with its huge investment in Olympic sports, allowing the teams to be called home.

The association is one of a growing group of sports organizations finding it difficult to purchase liability insurance at an affordable cost.

The CSA says it was first told that the price of liability insurance would double, and then found that coverage was unavailable at any price.

The association's current coverage on national alpine, cross-country, jumping, free-style, biathlon and nordic combined skiers, coaches and staff ends on Jan. 29, after several extensions by the New York-based American Home Assur-

SKI — Page A2

Ski teams can't get liability insurance

● From Page One

ance Co.

"I'm not sure what will happen after that," Mr. Payment said yesterday. "The odds are good we won't have insurance. The executive must decide what to do.

"If we don't find re-insurers . . . it could mean recalling all the teams and it could affect all of our developing teams leading to 1988," the year of the Winter Olympics in Calgary.

Mr. Payment said he understands that U.S. teams may also be having insurance problems. He said, however, that European ski teams don't face the sort of problem confronting Canadian teams, at least in part because accident settlements tend to be lower in Europe.

He said he has been trying to get more information on the European situation to see if he can glean any pointers to help Canadian ski teams deal with their difficulties.

CSA was first advised by its insurance agent it could expect to pay between $90,000 and $100,000 for $10-million in liability insurance for 1986. Mr. Payment said the CSA, which has never had a major liability claim against it, was willing to pay that amount, but later found that insurance companies had backed away from offering liability insurance at any price.

In 1984, the CSA paid $7,000 for liability insurance, with the premium rising to $47,000 last year.

Mr. Payment said the association has been unable to find coverage from any of about 100 companies it has approached. That leaves the association with the option of going through the remaining three months of the season without liability insurance.

"If we had no insurance, it would expose the coaches and staff to (possible) lawsuits and we could have mass resignations," Mr. Payment said. "Some volunteers have indicated they will resign if there is no insurance."

The CSA is considering buying accident insurance for the skiers, but that is expensive and it does not cover the volunteers, coaches, staff and the association.

"If a skier becomes paralyzed, accident insurance may pay $250,000, but he may decide to sue. A settlement of a few million isn't unusual."

The increased difficulty of getting adequate liability insurance, a result of large claim settlements in North America, has affected all Canadian amateur sports organizations.

Hugh Glynn, president of the National Sport and Recreation Centre, had no instant remedy, but said the problem needs immediate attention. He said he informed Otto Jelinek, the Minister of Fitness and Amateur Sport, about the situation before Christmas, but has not had a reply.

"One thing is for certain: the Government must step in. They will bring volunteer organizations to a standstill, if they keep this up. It appears to be a pressure tactic (by the insurance companies) to bring action from the Government.

"Our organizations have gone as far as Lloyds of London and they have turned us down."

Rob Toller, a spokesman for Mr. Jelinek, said on Monday that the minister was extremely concerned about the situation and was "seeking the best advice he could find" from the sports community and the insurance industry.

"But really, he doesn't know just what he can do to ease the situation."

Barbara McDougall, Minister of State for Finance, indicated in Parliament on Monday that she will be bringing in new policies to deal with the general problem of liability insurance, but she did not elaborate on what those initiatives would be. A special committee of the Ontario Legislature already has been struck to study the situation.

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Exhibit 5

TAB 10 THE JOINT DEPT OF INSURANCE CANADA.

416/963-0311

555 Yonge Street
Toronto, Ontario
M7A 2H6

Ministry of
Consumer and
Commercial
Relations

BACKGROUND NOTES - JANUARY 9, 1986

SUBJECT: LIABILITY INSURANCE

INSURANCE CLASS: BUSES

Since the OMCA wrote the Premier on September 18the, senior staff from MTC and CCR have been involved in meetings and initiatives aimed at assisting the bus industry. Notably, arrangements were made with the Facility Association to provide insurance coverage for this industry, the Honourable Ed Fulton has met with the OMCA and has gained insight into the insurance crisis from the industry's perspective, and the Deputies from MTC, CCR, and Tourism and Recreation have met to seek solutions to this problem.

The Deputy Minister of CCR met with representative from the Ontario Motor Coach Association on November 23, 1985.

EFFECTIVE IMMEDIATELY bus carrier tariff increases will be approved by the Minister MTC without referral to the OHTB. This will allow tariff increases due to insurance premium increases to be approved in a week instead of the previous 30-60days.

The intercity bus industry in Ontario is facing increased costs of liability insurance. Premiums have increased ten-fold from levels of $2000-3000 per coach to $20000-24000 per coach for much less coverage.

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Exhibit 6

JAN 10 '86 10:49 DEPT.OF INSURANCE CANADA.

416/963-0311

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Toronto, Ontario
M7A 2H6

Ministry of
Consumer and
Commercial
Relations

BACKGROUND NOTES - January 9, 1986

SUBJECT: LIABILITY INSURANCE

INSURANCE CLASS: HOSPITALS

In June of 1985, the Ministry of Health became aware of a major price increase in hospital liability insurance.

July 8, 1985, the staff of the Ministry of Health met with representatives of the Ontario Hospital Association and their insurance brokers.

Both the Ministry of Health and the O.H.A. met with the Superintendent of Insurance subsequently to review options/alternatives that might be available.

The Ontario Hospital Association has established a Task Force, including an observer from the Ministry of Health to review the alternatives available to the industry. The review will include examination of options such as self insurance, change in coverage from occurrence to claims made, etc.

A group of 20 Metro Toronto hospitals are conducting a similar, but independent, review.

The hospitals of the Province are still able to purchase liability insurance, although at a greatly increased premium.

In terms of the increased premiums, the Ministry of Health has not made any overall provision for the costs but is reviewing each hospital's overall financial position and is prepared to provide additional funds in cases of true financial hardship.

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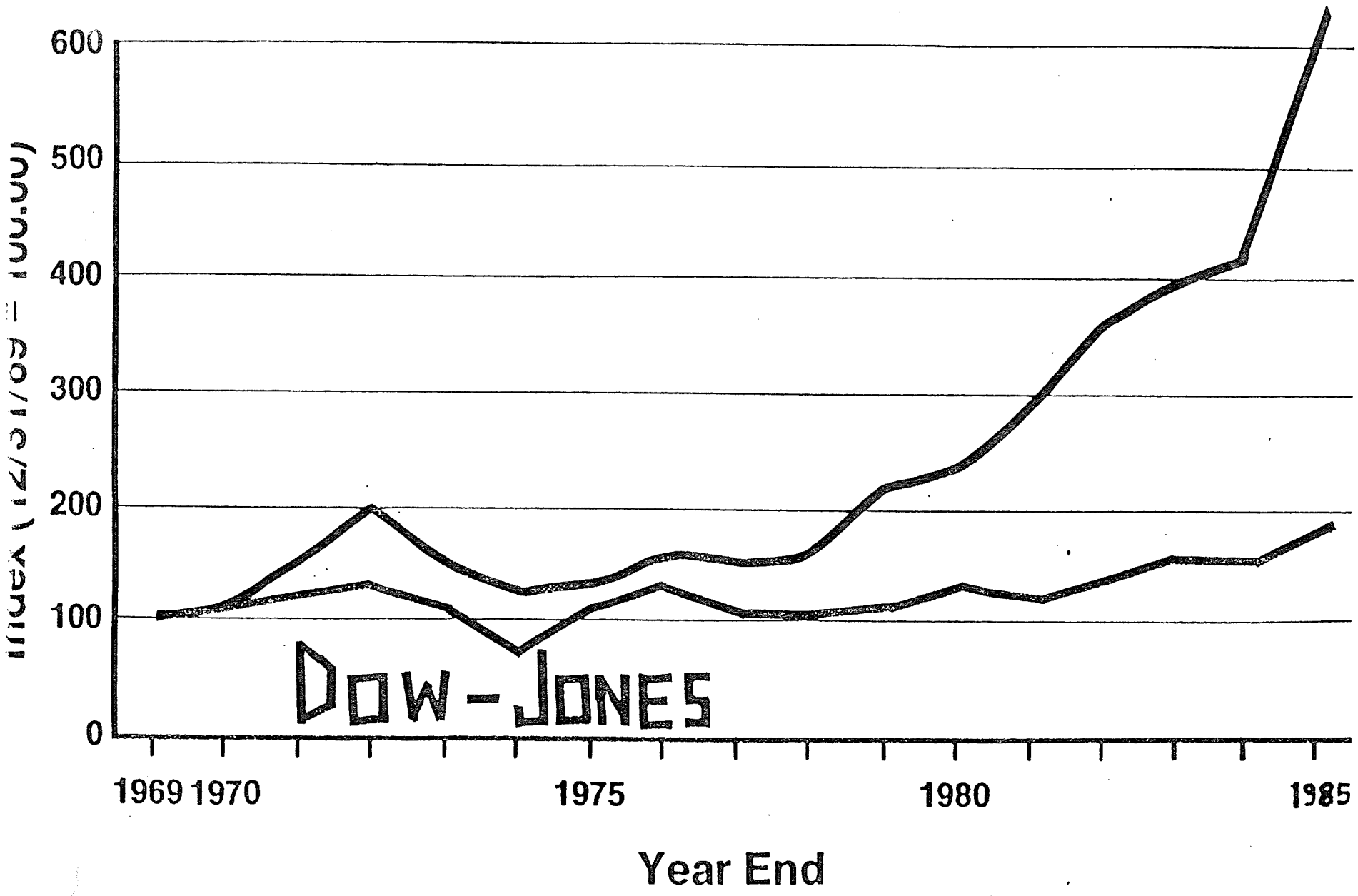
BEST'S PROPERTY/CASUALTY STOCK INDEX



ART 1

THE "CYCLE" AND CONSUMER ABUSE

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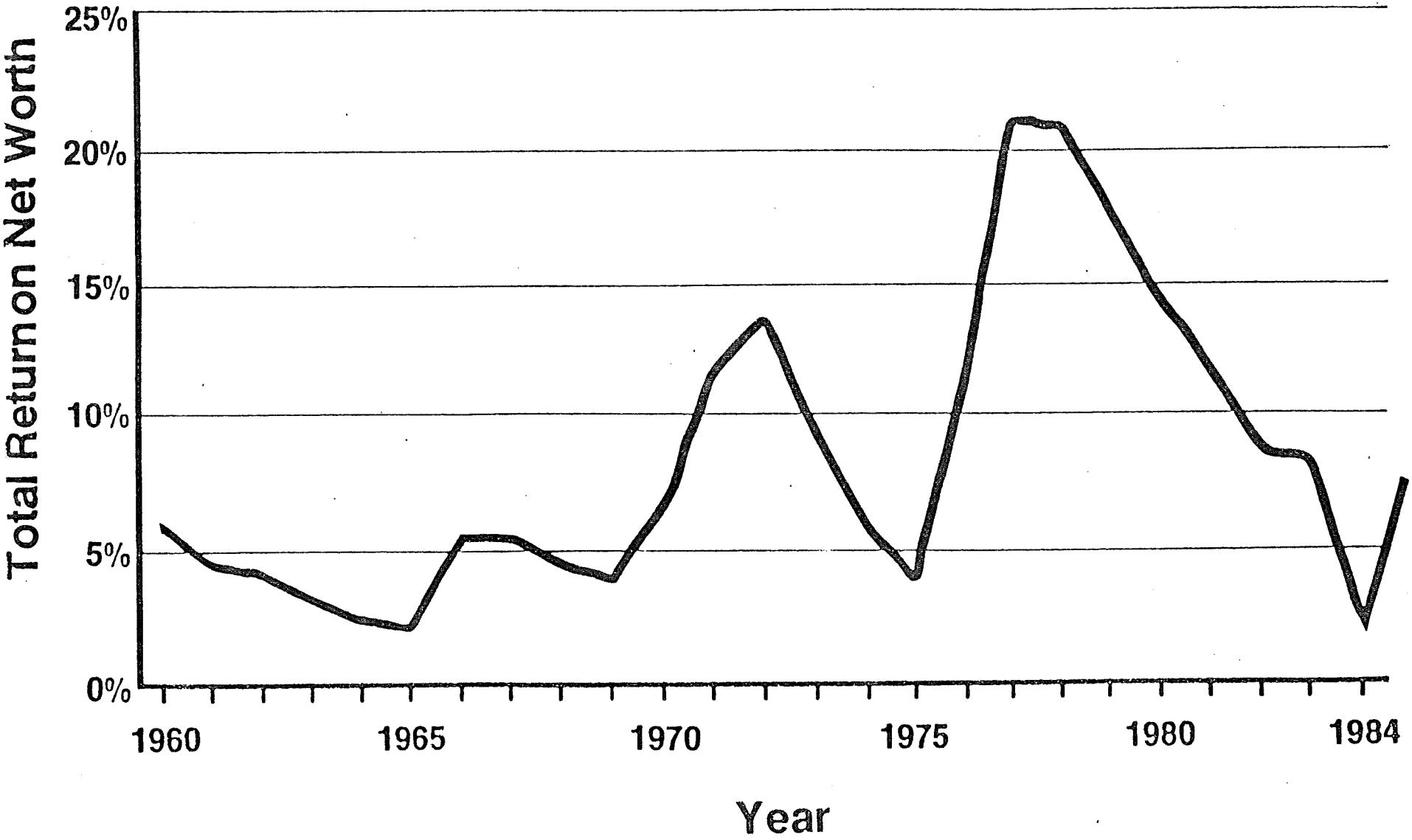
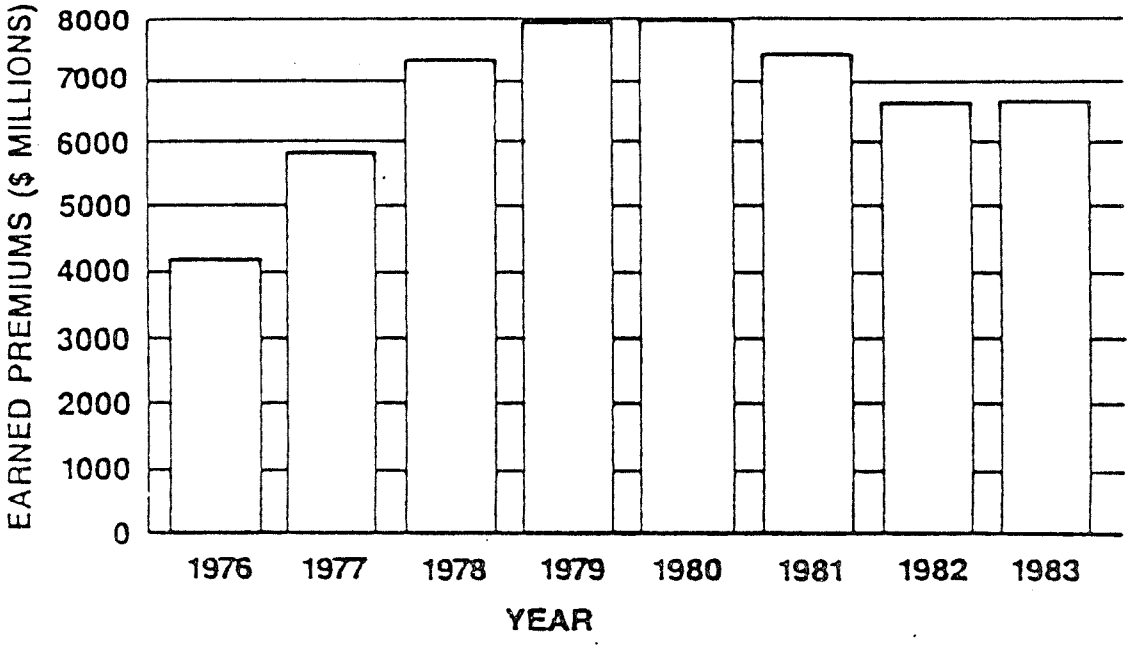


CHART.

NATIONAL LIABILITY INSURANCE STRIKE



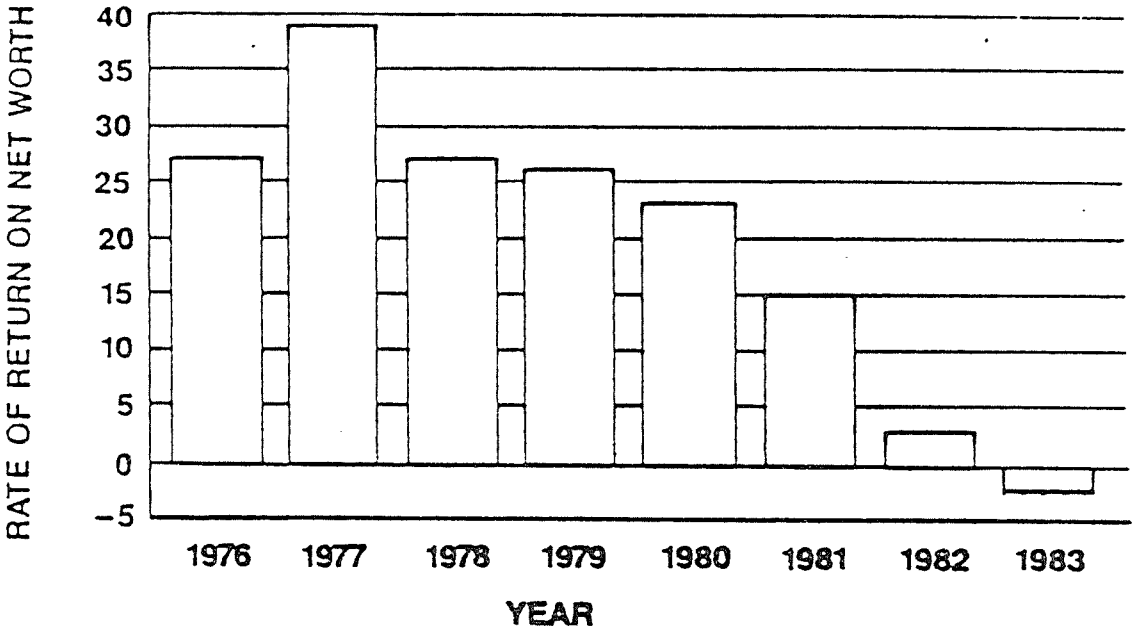


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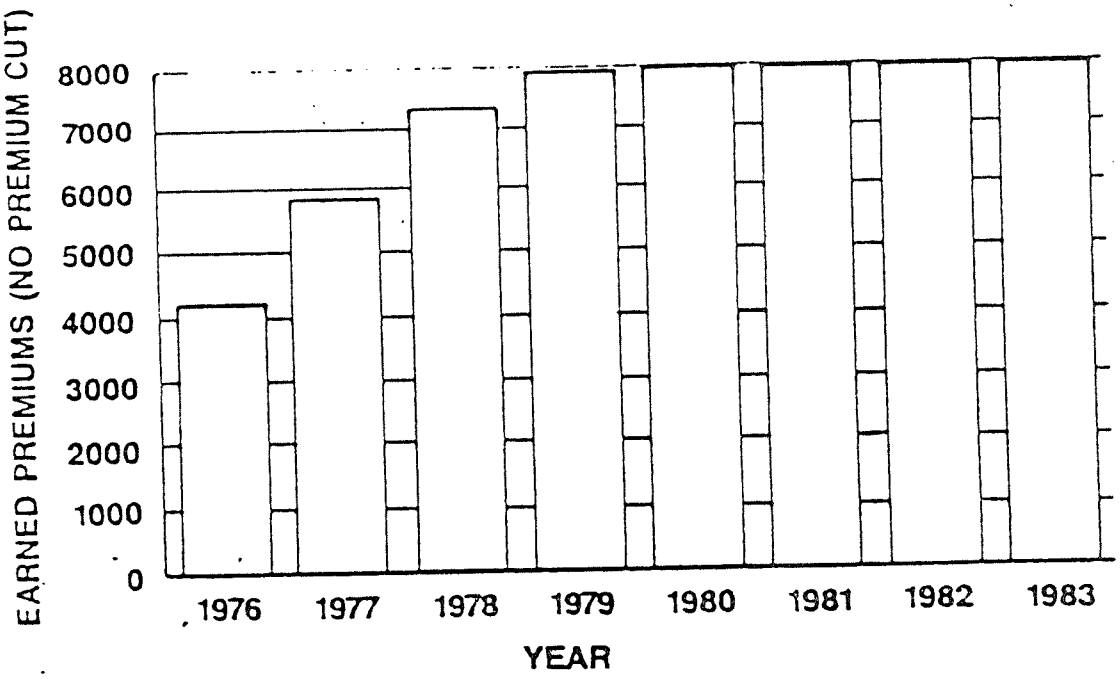
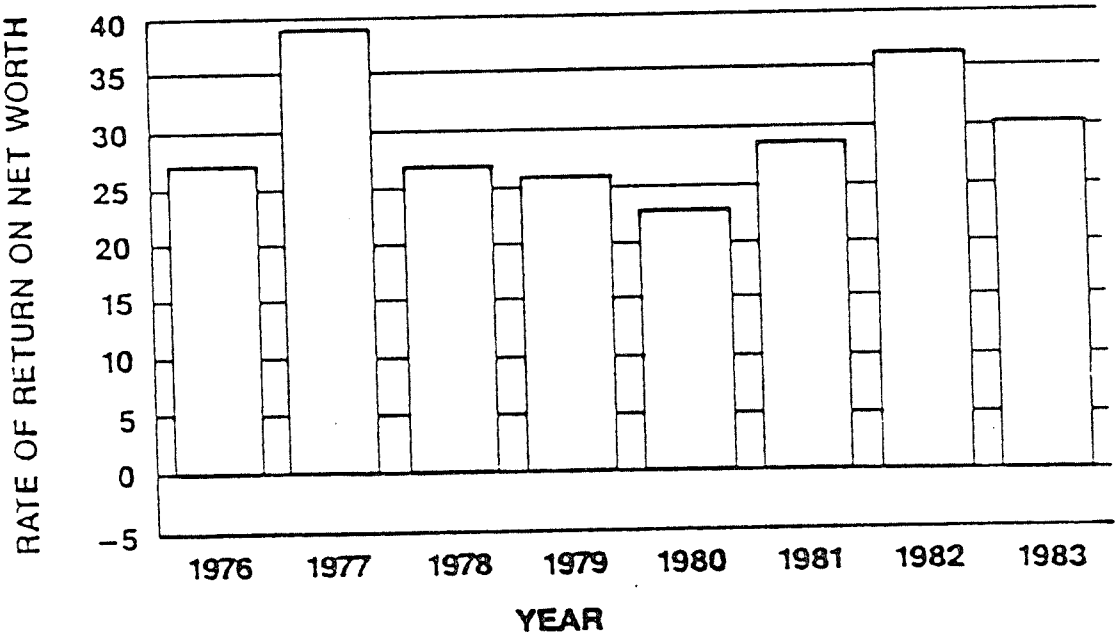
CHART

NATIONAL LIABILITY INSURANCE
STRIKE II





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DATA UNDERLYING CHARTS 3 & 4

COMMERCIAL LIABILITY INSURANCE PROFITABILITY STATISTICS (1)
Rate of Return on Net Worth (2)

Year	Earned Premiums (Millions of $)	Actual ROR	All American Industry (3)
1976	$4160	27%	13.3%
1977	5865	39	13.5
1978	7334	27	14.3
1979	7943	26	15.9
1980	7969	23	14.4
1981	7416	15	14.0
1982	6627	3	11.0
1983	6671	-2	11.5
Average		19%	13.5%

(1) Source: National Association of Insurance Commissioners Report on Profitability, By Line, By State.

(2) Rate of Return on net worth estimated from the NAIC Reported Insurance Operating Profit on Earned Premiums by converting to net worth by multiplying by a 2:1 Premium/Net Worth Ratio. Investment Income on Surplus is added at an assumed after tax yield as follows: 1976, 5.0%; 1977, 5.5%; 1978, 6.0%; 1979, 6.5%; 1980, 7.0%; 1981, 7.5%; 1982, 8.0%; 1983, 8.5%.

(3) Fortune 500, 1976-1980; Business Week, 1981-1983.

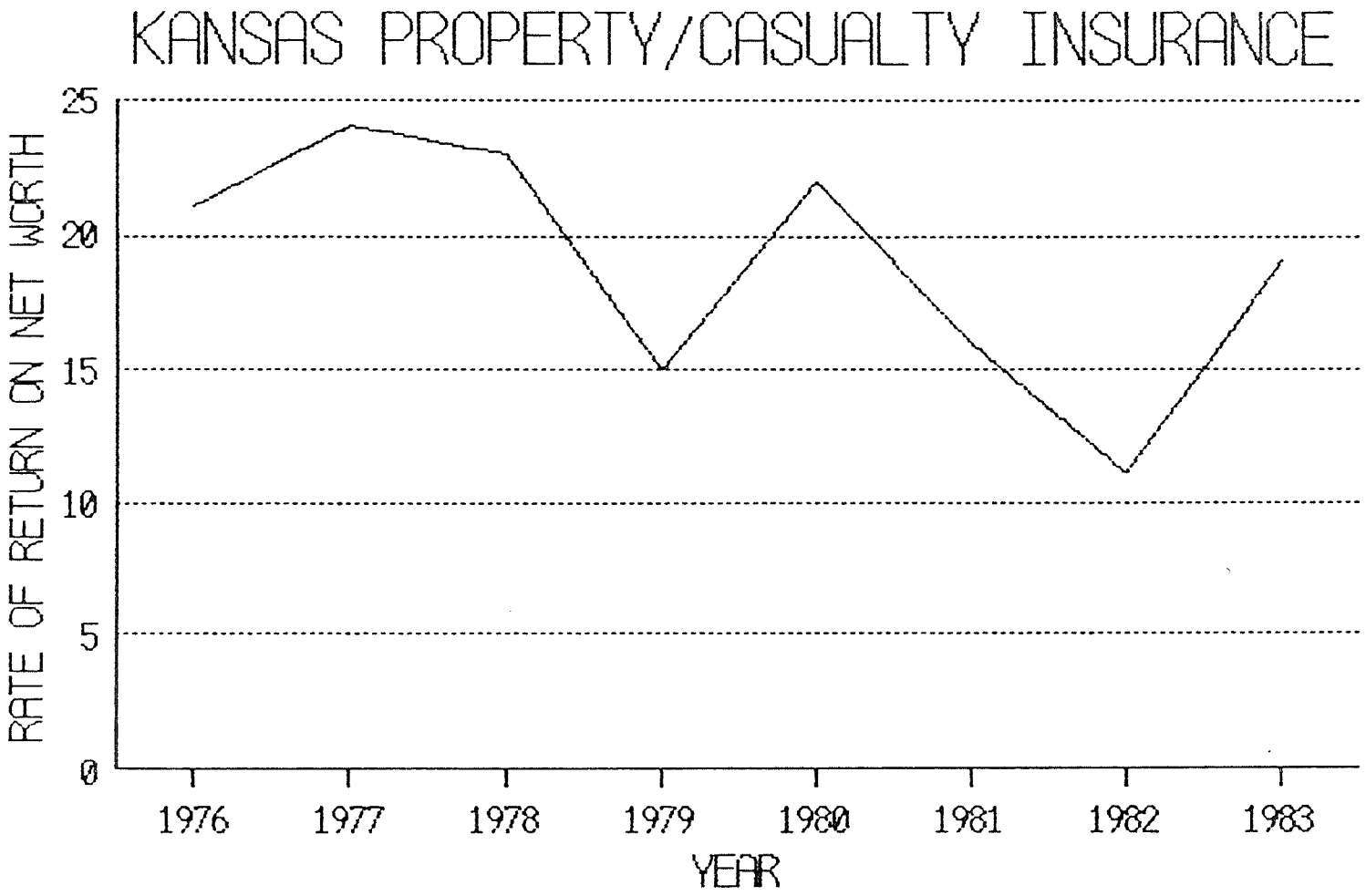
NOTE: Had the insurers not cut premiums after 1980 but held them constant, the Rate of Return on Net Worth would have been:

1981	29%
1982	37%
1983	31%
8-year average	30%

The problem is clearly rate cutting, nothing else!

I

KANSAS 1


KANSAS PROPERTY/CASUALTY INSURANCE
RATE OF RETURN ON NET WORTH
25
20
15
10
5
0
1976
1977
1978
1979
1980
1981
1982
1983
YEAR

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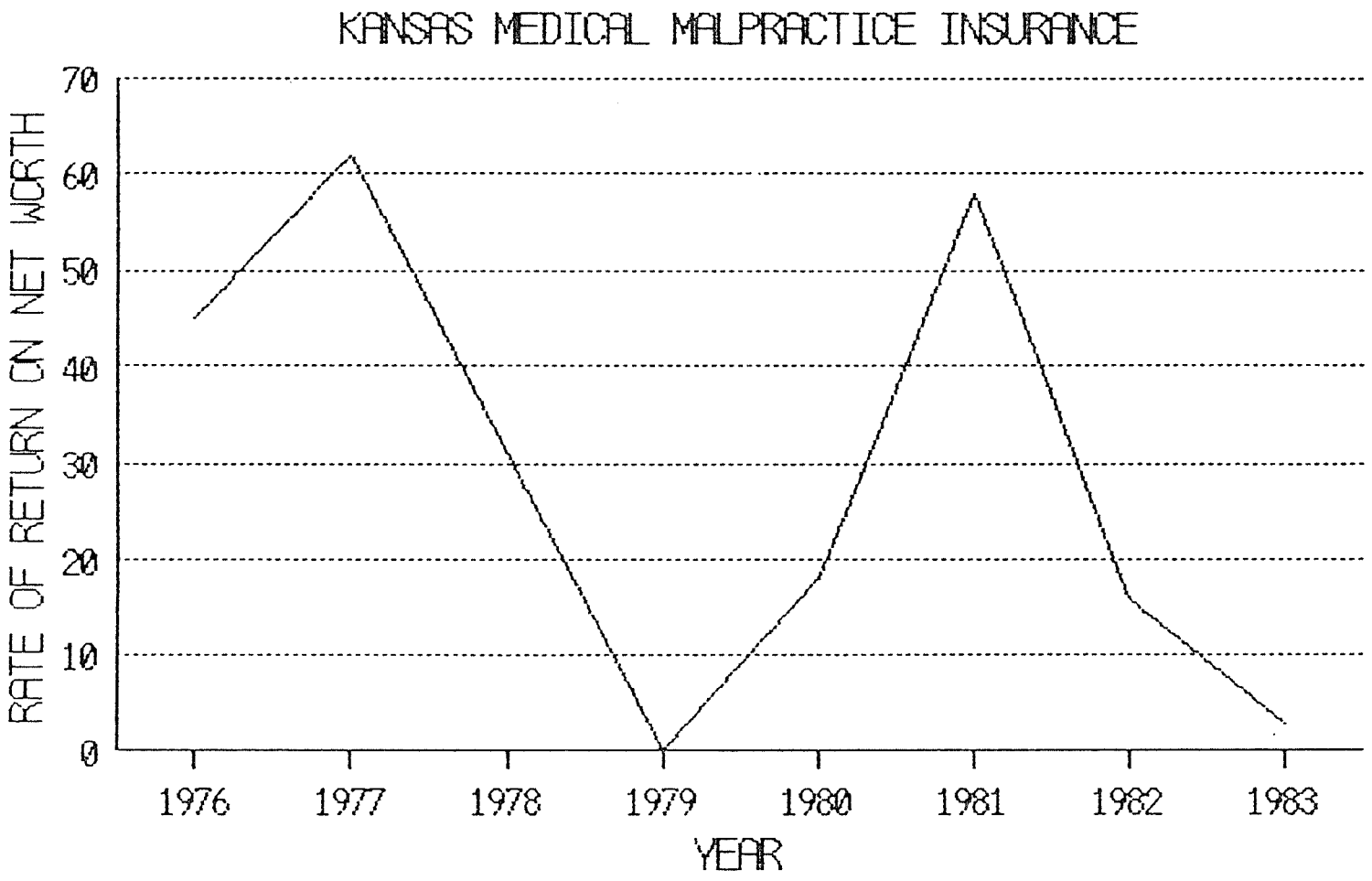
KANSAS


KANSAS MEDICAL MALPRACTICE INSURANCE
RATE OF RETURN ON NET WORTH
70
60
50
40
30
20
10
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1976
1977
1978
1979
1980
1981
1982
1983
YEAR

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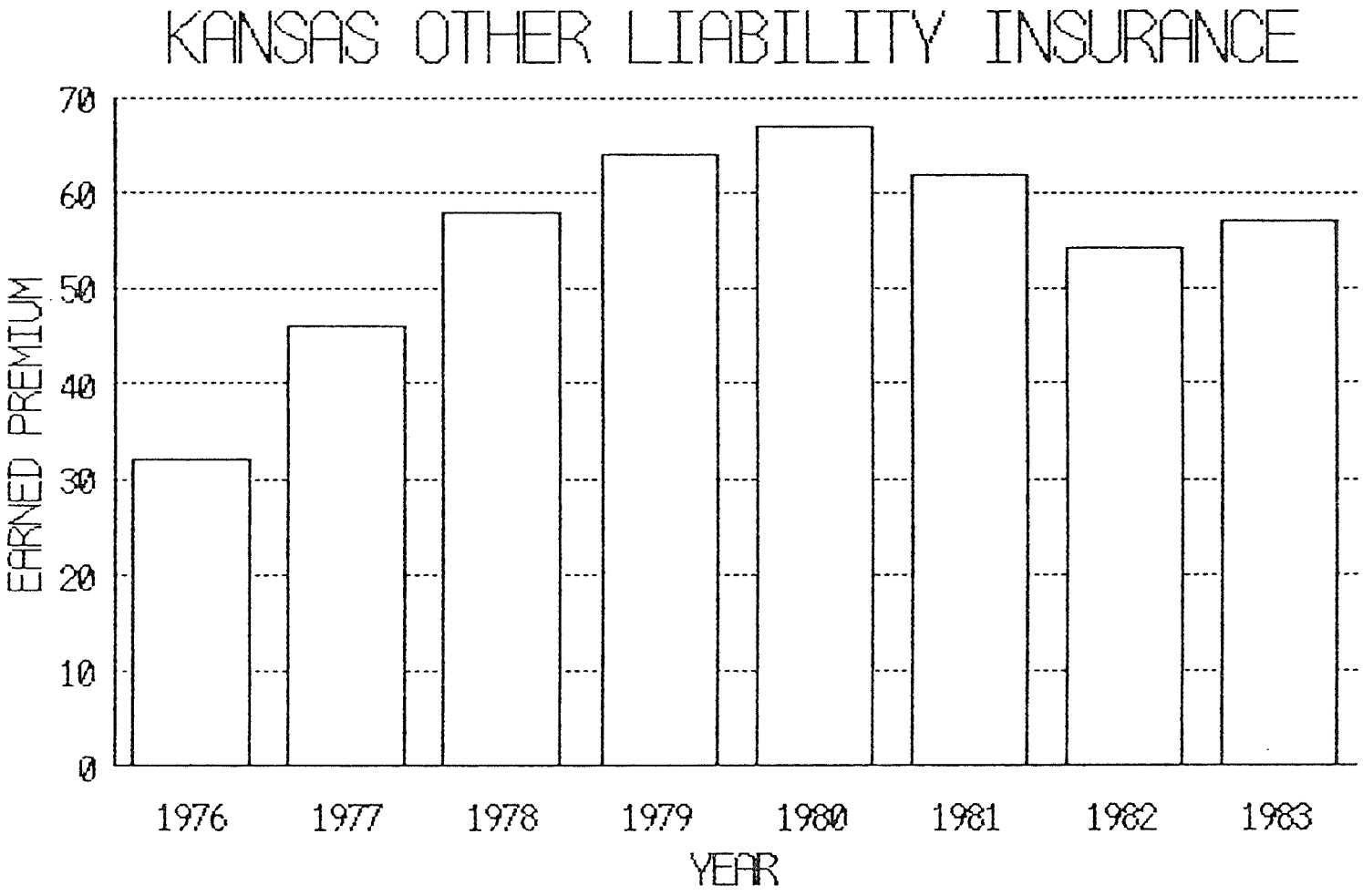
KANSAS 3


KANSAS OTHER LIABILITY INSURANCE
EARNED PREMIUM
70
60
50
40
30
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1976
1977
1978
1979
1980
1981
1982
1983
YEAR

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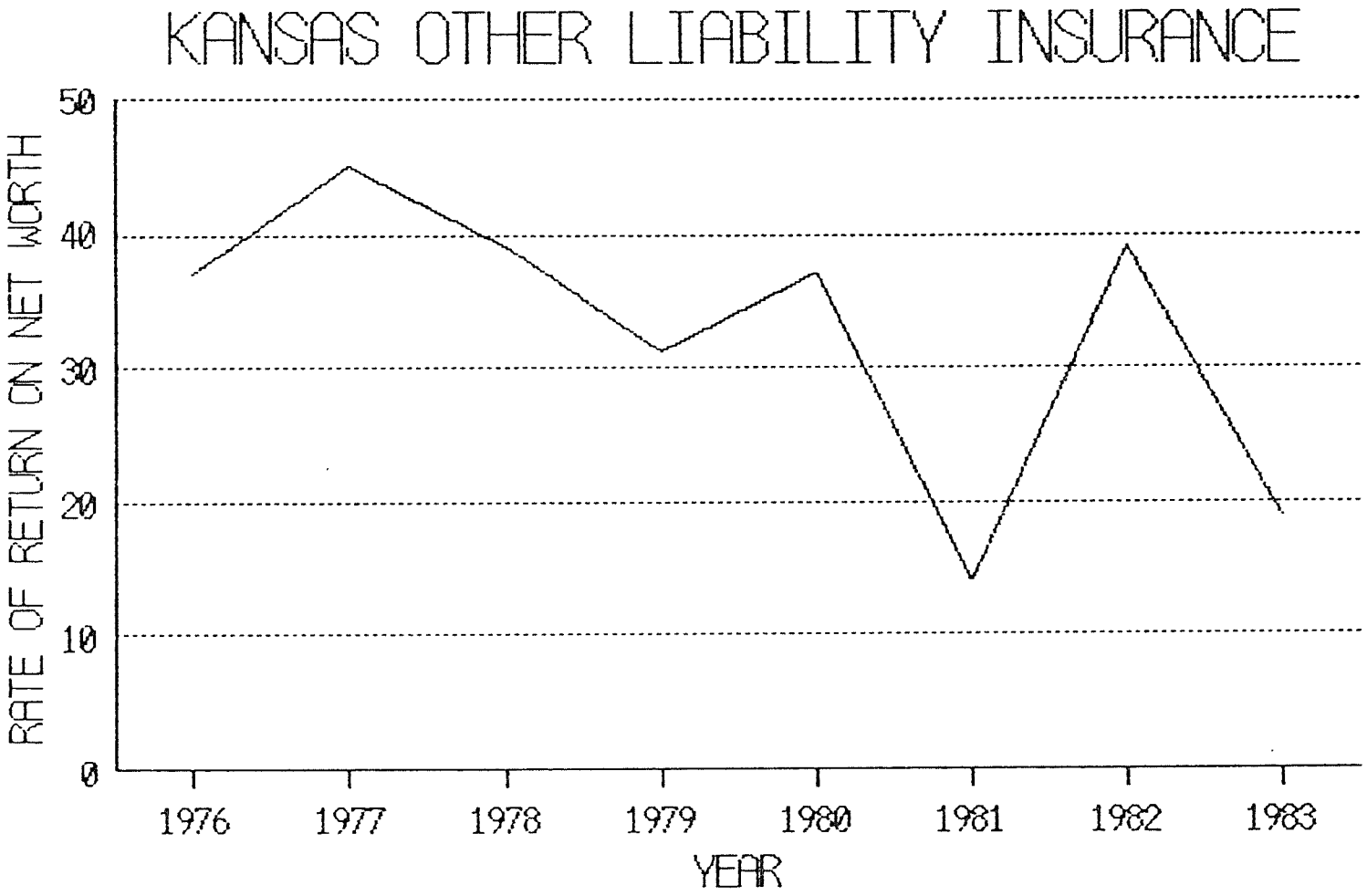
KANSA. 4


KANSAS OTHER LIABILITY INSURANCE
RATE OF RETURN ON NET WORTH
50
40
30
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1976
1977
1978
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1980
1981
1982
1983
YEAR

I

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TESTIMONY

February 28, 1986

Mr. Chairman, Members of the Committee:

Thank you for the opportunity to testify on Senate Bill 540. I am Dr. Richard Maxfield. I am a Certified Psychologist and spend a considerable portion of my day providing services directly to patients. I should make it clear from the outset that I am here today to express my personal views and am not representing any group or association.

I am opposed to this legislation both as a provider of psychological services and as a potential consumer of the services of the other 23 licensedgroups in this measure. By virtue of my being a Certified Provider the State has acknowledged that I have met minimum standards expected within my profession. And consumers of those services expect those standards to be maintained in my practice. When a patient comes to me to receive help with their emotional problems they place a trust in me to aid them to the best of my ability. Should I betray that trust through an act of negligence I believe my patient has a right to be fairly compensated for that error. And I could well imagine instances where the proposed limits would fall well short of just compensation.

It is my belief that should malpractice be found a jury is in a better position to take into account the specific circumstances of the victim, the nature and effect of the malpractice, and arrive at a just compensation than is the Legislature which proposes limits on awards in the abstract. Though the proposed caps may in fact be appropriate in the majority of cases they do potentially punish a number of people who have already been victimized by those in whom they have placed their trust.

Although I am aware that premiums for liability coverage are increasing, I do not believe that this measure will stem those rates. I believe that more vigorous enforcement of professional standards by the professions and by licensing boards may be a more effective means of curbing instances of malpractice and therefore limiting or reducing our liability rates. I would be happy to answer any questions the Committee might have.

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STATE OF KANSAS

OFFICE OF THE GOVERNOR
State Capitol
Topeka 66612-1590

John Carlin *Governor*

Testimony to
Senate Judiciary Committee
on Senate Bill 540
by John Myers
February 28, 1986

Mr. Chairman and members of the committee, I'm John Myers, Director of Policy for Governor Carlin, and I'm here to testify on his behalf on Senate Bill 540. Senate Bill 540 is one of several legislative measures introduced which attempts to address the problem of obtaining affordable professional liability insurance. After reviewing this bill, the Governor finds the concept and ultimate results of S.B. 540 to be both inequitable and premature. The benefits derived from the passage of this bill are far outweighed by the significant reduction of rights for Kansas citizens.

Governor Carlin recognizes that the problem confronting health care providers extends to other professional groups as well. He has on many occasions called for a comprehensive approach to the entire issue of liability insurance and the rising costs of premiums. However, any across-the-board approach that is not based on an exhaustive indepth study does a disservice to the members of the affected groups and the public at large. Recently Richard D. Brock, Administrative Assistant to Kansas Insurance Commissioner Fletcher Bell appeared before the special joint sub-committee of the House and Senate Insurance Committees. In his testimony Mr. Brock described the cyclical nature of the insurance industry and advised the sub-committee not to overreact to the current problem. Before this state initiates law that significantly reduces the rights of the citizen, study should be conducted of at least the licensing and reviewing procedures for the respective professionals, the factors being utilized to establish premium costs, the availability of liability insurance for the particular group, and the existing cost and pattern of increases in premium charges. Without this investigation, we cannot conscientiously determine if there is in fact a need for legislative action.

The major focus of S.B. 540 is the provision which would limit the injured parties' right to recovery to a total of one million dollars. This limitation would apply to all claims arising from the malpractice of professionals currently licensed by the State of Kansas. This cap is modeled after the limitation proposed for health care providers in H.B. 2661 and would equate the insurance needs of all professions without regard to the unique situations existing in each field and without regard for the rights of the victims. The Governor cannot accept this unfair and arbitrary mandate which places the burden of actual damages and future expenses on the backs of the innocent party. Whether the injury is the result of medical malpractice or of the negligent design of a building, the right of the injured part to be reimbursed for actual damages must be preserved.

Thank you for allowing me to express Governor Carlin's opinions against SB 540.

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2-28-86

KANSAS BAR ASSOCIATION

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Topeka, Kansas 66601
(913) 234-5696

SB 540

Senate Judiciary Committee

February 28, 1986

Mr. Chairman. Members of the Senate Judiciary Committee. I am Jack Euler, President-Elect of the Kansas Bar Association and a member of the Executive Council of KBA.

Our Executive Council represents the association's policy making arm. It is composed of both elected and appointed members. Our Council represents a diverse group of lawyers. Some are plaintiff's lawyers; some are primarily defense-oriented. Many on the Council are small town lawyers like myself whose practices vary, and some do little trial work.

We submit issues to our Legislative Committee for study, and many times they bring issues to us that have been suggested either by our membership, or as a result of previous bill introductions. Further, in some instances, we appoint special study committees on issues of great interest.

The liability insurance problems are certainly with us today. Nobody denies this. Certainly the pain of premium increases, or insur-

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ance that is unavailable, is real. Lawyers are affected like any other consumer.

Clearly the natural legislative instinct is to do something. I know you realize how important the fact-gathering function of a legislature can be.

In our December, 1984, Executive Council meeting, KBA was well aware that certain tort reform, especially regarding the medical care industry, was going to be a major issue to the 1985 Legislature. Our discussion that day was long, and members were encouraged to express their feelings.

There were some on the Council who felt tort reforms were totally unjustified. Others felt just as strong that some changes should be considered. In the end, our Executive Council did what you often do: we compromised.

Our compromise doesn't place us unalterably opposed to limits on total awards. Or limits on pain and suffering. Our position tries to put the Kansas lawyer into the shoes of the Kansas citizen. Kansans know that you change the law all the time in Topeka. They rely on you to determine what the facts actually are, and they rely on you to legislate based on facts.

We believe they would say that before changing the state's legal system's ability to solve disputes, fully compensate litigants, and deter further negligent activities, those who want such changes should demonstrate (1) a clear and convincing public need for the change, and (2) the public will benefit from the change.

Mr. Chairman, we don't think these two prerequisites ask too much from the legislative process.

Our specific concerns are these:

(1) The limits in the law apply to all licensed professions, but not all citizens or others who may be defendants in civil litigation in Kansas. Thus you create constitutional questions.

(2) To my knowledge there are no similar bills limiting awards for similar professions in other states. This means you are trail-blazing, which can be awfully lonely at times. You would have to show the Court some rationale behind this action. Why should my liability be limited and a plumber's liability not limited, solely because I am "licensed?" The Court would have to look at the effect on affected organizations, such as our own, to determine whether this legislative action is appropriate.

(3) Finally, there is the issue of fairness. If I run into you in my car, you can sue me for an unlimited amount, if you have damages that great. Most Kansans fall into this category. If I am negligent in the practice of law, and cause just as much financial harm, why should public policy say that you cannot collect the full measure of damages. If my law practice causes a business client to lose his Two million dollar business, what rationale says it is appropriate public policy that allows him to collect only half his damages?

(4) We are uncertain how the limits on awards in this bill would operate if the litigation that contained a legal malpractice claim also has a count alleging violation of federal law, such as RICO, which allows

treble damages and no limits. Even in state courts, would the federal supremacy clause control the limits of the award? Or SB 540?

(5) New Section 11, which sets up the screening panel for legal malpractice, applies only to "personal injury or death" caused by such malpractice. Does this mean that lawyers who malpractice but do not cause personal injury or death are not entitled to a screening panel? We fail to see the reasons why this is limited.

These are difficult questions, Mr. Chairman.

As a former Chairman of this Committee, I believe I know the difficult political and personal pressure you feel as you wrestle with tort reforms. You have a great desire to do what is right. All of us who once swore an oath to uphold the state and federal constitutions remember that desire. And the duty.

KBA only wishes SB 540 could help ease the pressure of insurance premiums, or solves the problem. Unfortunately, as our liability insurance consultants analyze it, it does neither.

As we understand it, the purpose of the bill is to make professional malpractice insurance more available and/or more affordable. I cannot speak for other professions covered by the bill. KBA's insurance program consultants, Jan Pacey of Forrest T. Jones & Company, in Kansas City, Missouri, indicates to us by separate letter sent to Ron Smith, KBA's Legislative Counsel, that based on our premium and loss experience, current limits in SB 540 will have little practical effect on availability or affordability of lawyer malpractice insurance.

You all know what SB 540 does, so I won't repeat anything.

Insurance for lawyers in Kansas is a real problem. Our members are unhappy. We aren't yet sure what next year's round of premiums will show. Primarily, in Kansas, there are about 4,000 lawyers who are in the private practice and perhaps would like insurance. Many of these lawyers are skilled practitioners. Because of their practice, however, such as Real Estate, or Oil and Gas, or municipal bonding, or Security and Exchange Commission work, finding coverage at all is difficult. We believe 90% of those 4,000 lawyers carry insurance, but we don't know how many of the 10% that don't are without insurance voluntarily, or because no one will write them.

We aren't sure of the state figures, but nationally, a significant number of legal malpractice claims come against lawyers who've been practicing an average of 8 to 10 years. It isn't ordinarily the young lawyer who is sued.

Many lawyers who get coverage do not seek more than $100,000, which is the usual minimum policy. The higher limits of liability are not needed in their practice. Obviously, in those cases, the limits on awards provide little help with cost of premiums.

The lawyer 7 years out of law school pays $1,528 to St. Paul Insurance for the customary $100,000 basic coverage. Some lawyers have seen 300 to 500% increases in premium between 1985 and 1986. We are beginning to see some competition in rates from Home Insurance out of Iowa, but essentially, Kansas is a one-company state -- St. Paul.

KBA is also considering self-insurance through a multi-state captive.

We don't expect self-insurance to save us money, however. It's chief virtue is help with availability.

Conclusion

Mr. Chairman, I wish SB 540 was the answer that many organizations supporting the bill want. Licensed professionals deserve affordable insurance and good, dependable coverage. At least with the practice of law, we just don't see how this legislation will achieve those worthy goals.

KBA is interested in helping find solutions to these insurance problems. It is my understanding that the Insurance Commissioner is going to reappoint his Citizens Commission to help look at tort reform as a broad subject area. We support that decision. KBA believes that there are strengths and weaknesses in our legal system and that our legal system ought to be able to withstand public scrutiny. If there is a clear and convincing public need for change and if the public will benefit from a change, then the KBA is obligated to come to you and suggest change. Unless and until this clear public need is demonstrated, however, the KBA respectfully urges that the presently existing time tested method of redress of tort claims ought not to be altered. Such a clear public need for the enactment of SB 540 cannot be demonstrated; accordingly, the KBA opposes the enactment into law of SB 540.

Please let us know how we can help.

IV

"President Talkington, Fellow Senators, Ladies and Gentlemen. My name is Richard Darnall. I am a dentist licensed in Kansas and engaged in the full-time practice of oral and maxillofacial surgery, a designated speciality of dentistry involved with not only the extraction of teeth, but also the management of oral diseases and conditions, and injuries to the teeth, mouth and jaws, which includes the repair of facial fractures and surgical reconstruction of developmental and acquired jaw deformities and malocclusions. I have undergone examination by a national panel of my peers and been made a Diplomate of the American Board of Oral and Maxillofacial Surgeons in 1979. I am on staff at three Topeka hospitals where I have admitting and surgical privileges to provide health care services to my patients requiring hospitalization.

I come before this committee today to express my support for Senate Bill 540 as it pertains to proposed tort reform legislation in professional malpractice liability actions relative to those of us engaged in the legal practice of dentistry in Kansas. I support this bill because I feel the current laws are inadequate to equally protect victims of malpractice and victims of frivolous malpractice actions, and that the attitudes and practices of certain members of the legal profession and the general public, have taken advantage of the present system that has resulted in runaway frequency of claims made, and staggeringly high awards being given. I refer you to the appendix to my statement which is a reprint of an article from The National Law Journal, published February 20, 1984 which leaves little doubt as to intent of purpose relative to malpractice suits against dentists. I also refer to a quote from the Topeka Capital-Journal, December 1, 1985, attributed to Mr. Curt Scott, Kansas Insurance Commissioner Fletcher Bell's chief examiner, "The civil justice system is just generating losses that nobody can predict."

These occurrences have had far reaching adverse effects on the delivery of health care in dentistry as well as in medicine in the state of Kansas and nationwide. Since 1982 my colleagues and I have seen our malpractice premiums escalate by 100 to 260% annually to well within five digit figures in 1985 with additional rate increases requested for 1986. While premiums rise, coverage availability shrinks as carriers leave the market. Such increased costs to providers will most certainly result in increased costs to consumers. Probably of greater importance though, will be the noneconomic effects on the health care delivery system including the following: decreasing availability of higher risk services to the consumers as providers selectively eliminate those services to reduce their risk of exposure to liability; general mistrust developing between provider and patient; the general conception among health professionals that more and more patients view treatment encounters as potential financial windfalls; that more and more consumers equate a poor or unanticipated treatment result as malpractice on the part of the provider, regardless of the truth in fact; and that few consumers will have any difficulty finding an attorney to file a malpractice claim for them under such circumstances.

Several years ago, the Kansas Dental Association instituted voluntary peer review mechanism to help resolve patient-provider disputes before they result in litigation, and it is generally considered that this has been

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an effective forum. Nevertheless, it is my opinion that measures as outlined in Senate Bill 540 are necessary in order to stabilize the professional malpractice liability crisis, and ensure the continued availability and affordability of quality dental care services in the State of Kansas

With these goals in mind, I am supportive of the proposed changes in professional malpractice liability actions in this bill regarding the limits recoverable for economic and noneconomic losses, itemized awards and structured payments, expert witness qualifications, screening panel and settlement conference provisions, and incidence reporting requirements. Additional measures that I feel should be included are the elimination of contigency attorney fees and the structuring of attorney fees based on a percentage of award with a decreasing percentage scale for increasingly higher awards. I would also recommend inclusion of a provision that in the event of frivolous action or defense, the court is authorized to make substantial award for costs and attorney's fees to the aggrieved party.

This concludes my statement.

V

THE NATIONAL
LAW JOURNAL

VOL. 6—NO. 24 PRICE $2.00 *The Weekly Newspaper for the Profession* MONDAY, FEBRUARY 20, 1984

Dental Flaws

Malpractice Suits Against Dentists Are on the Rise

By Mary Ann Galante
National Law Journal Staff Reporter

DENTISTS may not enjoy the status, income or glamour of doctors, but when it comes to legal aches, they're catching up.

Dental malpractice claims have been rising dramatically over the past decade, as has the average amount paid on each claim. Like its more lucrative cousin, medical malpractice, litigation against dentists has driven insurance premiums up, created a small but growing number of lawyers with expertise and posed new legal questions for the definition of such tort law concepts as intent, negligence and even fraud.

The growth in claims has been spurred by widening theories of malpractice liability which, defense lawyers say, have "spilled over" from suits against doctors into suits against dentists and oral surgeons.

Other important factors are the public's increasing awareness that most dentists are insured, a growing willingness to sue professionals and the fact that dentists are taking more risks than they used to as their field becomes more competitive. There are more and more dentists every year, and thanks to fluoride, fewer and fewer tooth-decay problems for them to work on, dentists and their lawyers explain.

Besides all that, no one denies the importance of a certain public-image problem.

"The goddamn dentist sticks a needle in your mouth and causes pain," said J. Gary Gwilliam, a plaintiffs' malpractice attorney with Gwilliam & Ivary, P.C., in Oakland, Calif. That makes damages for pain "easy to sell," he noted.

To be sure, dental malpractice is not for everyone — it requires some arcane knowledge, preparation is costly, and experts for the plaintiffs are even scarcer than physicians who are willing to testify against other doctors.

A dental malpractice case general-

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More Lawsuits Putting the Bite On Dentistry

Continued from page 1

ly costs some $10,000 to $30,000 to prepare, with experts alone costing $250 to $1,000 a day. The most common plaintiff victory in a dental malpractice suit has been a verdict in the $10,000-to-$20,000 range.

But there have been some spectacular exceptions, including:

• The $2.75 million jury award in a Massachusetts state court in 1981 — later reduced to $1 million by the judge — to a young women who contracted spinal meningitis after a dentist failed to give her antibiotics before extracting a wisdom tooth. *Snow v. Yavner*, 75-1863 (Middlesex County Superior Court).

• A similar case in Dutchess County, N.Y., Supreme Court — a trial court — in which a young man won $1,050,700 last December after he became partly paralyzed from brain damage. In the case — now on appeal — the jury decided that, had the dentist personally taken the patient's history — instead of relying on the patient's friend — he would have learned about the patient's heart murmur and administered prophylactic penicillin before treatment. *Russo v. Cuttler*, 6678-82.

• An award of $1.1 million for pain and suffering, plus $500,000 for loss of consortium to a California couple, Clayton Lowell and his wife, Shirley.

In an experimental procedure, two metal pins to hold bridges were implanted in Mr. Lovell's jaw, causing him to lose sleep, concentration and eventually his job as a carpenter. After more than 200 psychotherapy sessions and replacement of the painful pins with dentures and crowns, Mr. Lovell is back to normal health. *Lovell v. Manges*, 50840 (Alameda County Superior Court). The case settled for $400,000 while the jury was out, but the plaintiff plans another suit based on the insurer's alleged bad faith.

The big verdicts, of course, remain the exceptions. "The problem is the general public looks at the loss of teeth as normal," observed Norman Shafler, a Los Angeles sole practitioner who is Mr. Lovell's attorney and a former practicing dentist. "I think a jury would give you more for the loss of a finger than they would for an entire mouthful of teeth."

Still, the statistics chronicle a steady rise in the number of claims and the amount each one is worth.

In 1983, the Warren, N.J.-based Chubb Corp. — which American Dental Association officials say insures 49 percent of the profession — paid 2,252 claims, up from 223 claims settled in 1972. (See accompanying story.) They settled for an average of $10,008 each, an increase from the average figure of $1,500 a decade earlier.

Women vs. Dentists

Interestingly, the vast majority of these claims have been filed on behalf of women, who plaintiffs' attorneys estimate lodge some 75 percent of dental malpractice claims.

"Men are more stoic and tend to take their lumps more," said Edwin J. Zinman, a San Francisco malpractice attorney and former practicing periodontist. "A man might not be as trusting of a man [dentist] as a woman would be of a man. I've had a number of women tell me that they feel betrayed."

Whoever the plaintiffs are, they have more dentists to sue. With a couple of exceptions, enrollment in dental schools has risen steadily since 1965, to the point where there are now about 120,000 dentists in the United States. At the same time, the recession and fluoride-promotion programs have had a terrible impact on dentistry, emptying some offices of 50 percent or more of their patients.

The drop in the number of patients has resulted in dentists venturing into new areas that previously were thought of as not worth pursuing. "As dentistry has gotten more competitive, dentists are looking for more things to do," said Mr. Zinman, who estimates he has about 50 active dental malpractice cases.

Novelty is not the only problem faced by lawyers trying to sue dentists. Finding expert witnesses is a notorious problem. So is getting the kind of records that doctors routinely keep but dentists do not.

It is often difficult, if not impossible, to construct what happened if, for example, X-rays are not available.

"There's all sorts of creative excuses" for missing records, notes Julian Steiner, a dentist who practices law with Goldsmith & Tabak in Manhattan. He recalled how dentists have claimed to have lost

'It's the most horrible thing you can think of, going through life with a fat tongue.'

records through selective basement floods, or to muggers who took only the defendant's briefcase.

But as often as not, the lack of records — which can be an effective defense — helps the plaintiff. In the Snow case, the defendant dentist claimed his only record of what was done were billing cards.

The dentist, said his lawyer, John Finnerty of Boston's Finnerty & Finnerty, "was a terrible witness — he let the plaintiff's lawyer lead him around the courtroom . . . And the best defense is good records," the attorney added.

By far, however, plaintiffs' lawyers point to a conspiracy of silence — which dentists and their lawyers deny — among dental professionals as their biggest obstacle in pursuing dental malpractice suits. "It's the hardest part of the job," says Peter A. Goldstein of Colorado Springs, Colo., who has brought about a dozen dental malpractice cases.

"It's almost impossible to get one of these guys to testify against another one of the members" of the profession, says Charles R. Johnson of Johnson, Eklund & Davis in Gregory, S.D., "I do legal malpractice, too, and it's not nearly as difficult. Even the legal profession is more honest about its mistakes."

Philip J. Crowe, a partner with Boston's Lubin & Meyer, describes how the record verdict in *Snow* came about only after he spent "a couple years" persuading a dental expert to testify. "I had to work on him a long time," Mr. Crowe recalled.

Another malpractice lawyer, Gerald Orseck of Liberty, N.Y.'s Orseck, Orseck & Greenberg, agreed. "The dentists just don't want to testify against each other," said Mr. Orseck, who successfully tried the Russo case. "You can never get an expert in the same area where an action is pending."

Mr. Zinman, in fact, described a million-dollar defamation suit he has filed on behalf of a dental specialist against a malpractice defense lawyer, Gerald A. Sheppard of Los Angeles' Shield & Smith. According to the suit, after the expert was a witness in a successful malpractice case, Mr. Sheppard sent a letter to other professionals telling them that the expert had testified. Mr. Sheppard refused to return telephone calls about the suit, which is pending in Los Angeles Superior Court. *Barkin v. Sheppard*, C 435898.

Agreement with that thinking has led plaintiffs' lawyers in remote areas to turn to other sections of the country — notably California, New York and even Canada — to import experts willing to testify against their own.

A few have found other solutions: An Oklahoma City attorney, Howard K. Berry III of Berry & Berry, P.C., tells how he hired and deposed a San Francisco dentist-lawyer, then read the transcript at a dental malpractice trial.

One result of these difficulties has been the common perception that dental malpractice simply wasn't worth lawyers' time. For the same amount of effort, the thinking went, the payoff was far better in suing doctors.

Comparatively Puny Case Values

The change hasn't been fast. Even today, most dental malpractice settlements usually don't rise to the million-dollar level. But the comparatively puny case values have led more than one personal-injury specialist to shy away from dental cases that do not potentially involve at least $20,000.

"We're very selective," says Ira A. Cohen, a Manhattan lawyer who has worked on 30 to 40 dental malpractice cases. Mr. Cohen is far from alone when he says he won't take a dental malpractice case unless he has "an expert report up front that there has been malpractice and . . . fairly extensive damages."

But once the process has begun, plaintiffs' lawyers have managed to dig into an increasingly sophisticated bag of tricks to explain their cases, including the expected — skulls and diagrams — to the unusual — including clay models of facial swelling, enlarged X-rays and gigantic plastic teeth.

Attorneys with experience in dental trials say

Continued on page 26

Big verdicts against dentists are still fairly rare. 'The general public looks at loss of teeth as normal,' explains lawyer Norman Shafler.

Some 75 percent of claims against dentists are filed by women. 'Men are more stoic,' says malpractice attorney Edwin J. Zinman.

Patient Consent Is a Major Issue In Dental Cases

Continued from page 24

presenting them isn't much different from any other malpractice case, except a few odd quirks.

One of these is that some teeth are worth more than others. The rear bicuspids and eye teeth or canines, for example, are the most valuable because of their strength and ability to support bridge and crown work.

Plaintiffs almost always seek the one-time replacement costs for poor dental work. But as their lawyers become more sophisticated in dental malpractice, they also ask for replacement costs over a lifetime when, for example, the dental work to be replaced is a set of crowns and bridges that only lasted for about 10 years.

Dentists, for their part, say the crisis is evidence that it's become almost open season on the profession, not evidence that dentistry is flawed. "A true screw-up is rarely the case," said one insurance expert who deals in dental malpractice claims.

Dentists' lawyers say many injuries are partly patients' fault. 'A doctor isn't a guarantor of success,' says one.

And often, the profession charges, injuries are at least partly the plaintiff's fault when someone has not followed a dentist's advice to see a specialist or even to brush his or her teeth. "A doctor is not a guarantor of a result," noted Mr. Finnerty.

That knowledge may be why insurance companies report a high success rate of those suits that do eventually go to court. "Ninety percent do not actually go to trial, but of those that do, the defense wins are high," said one insurance company expert. "The relatively small number [of dental malpractice claims] usually makes it more advantageous to settle."

The kinds of claims those companies are settling range from problems with the most advanced techniques to troubles with the basic services provided by the discount dentistry of retail dental clinics and some prepaid group plans.

According to one Los Angeles dentist, patients treated in large numbers in such clinics are often overtreated when payment is based on how much the dentist does. On the other hand, when payment is by the head, small, hard-to-detect cavities can go unfilled. "What sometimes happens is there will be two or three tiers of treatment, depending on how payment will be made," said the dentist, who asked not to be named.

Complaints of dentists doing too much or too little aren't limited to those treated through group plans or dental clinics. Even with private practitioners, a growing number of actions allege negligence in dentists' failure to refer a patient to a specialist.

Often, claims stem from periodontal neglect. Poor hygiene causes infections of the gum and bone which, if untreated, can result in the loosening and the eventual loss of teeth. The lawsuits start when general practitioners don't recognize the disease, warn patients they have it or fail to refer them to periodontists.

When the allegation is overtreatment, more plaintiffs are claiming intentional fraud. Instead of just, say, filling a tooth, the theory goes, a dentist might recommend putting in a crown and bridge — a bigger-ticket item that costs an extra $300 or so per tooth. Or it could include crowns and bridges that plaintiffs later believe weren't needed at all.

Possible Concealment

Along with fraud, fraudulent concealment may be added if a plaintiff suspects a dentist has swapped X-rays, selectively "lost" records or recreated documents.

Whether or not an intentional tort is alleged, often the big issue in dental malpractice cases centers on informed consent — whether a patient was told of all the risks and consequences of a suggested treatment.

"The theory used to be you had to show negligence. Cases like jaw fractures used to be slam-dunk defense wins, because its one of the risks of the operation," says Clifford R. Anderson Jr., a longtime specialist in defending dental malpractice cases and a partner with Pasadena, Calif.'s Fleming, Anderson, McClung & Finch, P.C. "Now, it's negligent not to advise what might happen. . . . With expanding theories of liability you can get a bad result [and plaintiff's verdict] even without negligence."

Still, some allegations remain hard to prove.

One of the toughest from a plaintiffs' standpoint is proving causation when a patient suffered from a permanently numb lip or tongue — called man-

Dentists are very unwilling to testify against each other. Philip J. Crowe spent 'a couple of years' persuading one expert to testify.

dibular or lingual nerve parasthesia. "It's the most horrible thing you can think of — imagine going through life with a fat tongue," said San Francisco lawyer Sherre Sturm of Sturm, Conrow, Epstein & Johnson.

Typically, the actions come about after wisdom teeth are removed when a wayward scalpel or drill injures a nerve. It's an occurrence, defense lawyers claim, that often doesn't last forever and can be an expected risk.

While that may or may not be, because nerve injuries cannot be seen, proving damages in such cases is often an uphill battle.

Still, that's a battle that more and more lawyers are willing to wage.

Said Dan Harris, claims manager of the California Dentists' Insurance Co.: "Claims will only reflect the times. Every dentist can expect to be sued at some time in his career."

AS THE MALPRACTICE liability of dentists has grown, two insurance companies that have provided the bulk of dental malpractice insurance are abandoning coverage completely.

Their reason is the fact that claims are estimated to be growing — both in terms of severity and numbers — by 10 to 15 percent a year. As one major insurance carrier executive put it, "Anyone in this field is losing their shirts."

Faced with mounting losses, expenses and competition, the Chubb Corp. of Warren, N.J. — which now insures dentists in every state but California and New York — has announced plans to withdraw completely from the field April 1, after more than a dozen years. The Chubb insurance plan, which was sponsored by the American Dental Association, provides 49 percent of the dentist policies in the nation. Other professional liability insurance companies are expected to pick up the slack.

In New York, Public Service Mutual Insurance Co., which had insured that state's dentists for 25 years, also withdrew from offering coverage last year. "It was a business decision — they found they were not making money in it," said Nathan Cyperstein, a Manhattan sole practitioner who represents the carrier.

"If you want to assume that every dentist is entitled to malpractice coverage [even those with a insurance crisis right now," said another ... surance executive who wished not to be named. "And if claim projections are right, it can only get worse. It can't get any better."

The Chubb Corp.'s action came after state dental organizations in Colorado, Illinois and Oregon and the national organization of oral surgeons withdrew their endorsements from the ADA program. That happened after Chubb in 1983 sought to increase dentists' premiums — depending on the rate and amount of claims in each state — by anywhere from 50 to 200 percent.

A 150 Percent Jump

The requested rates were made necessary, insurance industry experts say, by forecasts that the actual increase in professional liability claims in some states would jump in one year by as much as 145 to 150 percent.

A good yardstick of how the situation has changed is evidenced by the Chubb experience in Chicago. For malpractice coverage, insurance departments' records show that in 1983, the insurer took in $3.2 million in premiums. By December of that year, Chubb had paid $2.6 million in expenses or payments on 385 claims. Another 101 claims were closed with no payments, and 203 claims remain open.

the company's total expenditures jump to ... lion.

"Even when the dentist doesn't do anything wrong, the jury figures a lot of insurance companies are stealing our money, so darn it, let's give this guy some compensation," notes Steven K. Frankel of Siff & Newman, P.C., a New York malpractice attorney.

Chubb executives would not comment on industry speculation that mounting losses have resulted in a miniature malpractice crisis. And insurers note that even at the higher rates — which can climb to $1,200 per year for oral surgeons — "dental malpractice is still the biggest insurance bargain around," said one observer, who pointed out that doctors, by comparison, pay far more for the same amounts of coverage.

The company's apparent retreat was not a first. Chubb had insured California dentists until a few years ago when, according to one observer, the California Dental Association "didn't like the company's message" of rising costs and feared dentists could be left entirely without coverage.

The result was the formation of a self-insurance group, the Dentists' Insurance Co.

— *Mary Ann Galante*