# REPORT OF THE KANSAS CITIZENS COMMITTEE TO REVIEW LEGAL LIABILITY PROBLEMS IN KANSAS AS THEY AFFECT INSURANCE AND OTHER MATTERS

## Recommendations In The Area Of Liability Insurance

A Report To Fletcher Bell,
Kansas Commissioner of Insurance

October 17, 1986

Sajjad Hashmi, Chairman
Dean, School of Business
Emporia State University

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October 17, 1986

The Honorable Fletcher Bell
Commissioner of Insurance
420 Southwest 9th
Topeka, KS 66612-1678

Dear Commissioner Bell:

I am pleased to transmit with this letter, to you and to the Legislature, the report of the Kansas Citizens' Committee on Legal Liability.

As charged, the Committee considered the matter beginning March, 1986. In the process, it listened to all points of view including the consumer, the insurance industry, and the legal profession. The Committee also reviewed reports from several other states.

The Committee believes that a serious problem exists as to availability and affordability of liability insurance in Kansas, as indeed in all states. The recommendations made in this report, if adopted, should help alleviate the problem.

I wish to publicly acknowledge a debt of gratitude to the Committee members for their considerable time and effort in preparing this report.

Sincerely,

S. A. Hashmi
Chairman, Kansas Citizens Committee
on Legal Liability, and
Dean, School of Business

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Enclosure

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# PART I

## Executive Summary

I.

## Executive Summary

### The Appointment Of The 1986 Citizens Committee.

On February 26, 1986, Fletcher Bell, the Kansas Commissioner of Insurance, appointed this Citizens Committee to review legal liability problems in Kansas as they affect insurance and related matters. We were asked to study all liability areas with the exception of the professional liability problems of health care providers. Medical malpractice was the subject of an earlier 1985 Citizens Committee report and House Bill No. 2661 was enacted by the 1986 Legislature to address these problems. It was considered unnecessary for our Committee to re-examine this same area.

### The Committee's Charge.

The Commissioner charged this Committee to determine if the liability environment in Kansas is a cause for public and legislative concern and, if so, to identify the causes and develop recommendations to solve the problem.

### Witnesses And Resources Relied Upon By The Committee.

We have heard from numerous witnesses and examined literally thousands of pages of articles discussing the insurance problem in Kansas and the United States. We also followed the national debate on this subject as reported widely by the news media. During the time our Committee met, constant attention was given to the liability

crisis by newspapers, magazine, and television and cable networks. We received considerable material from legal organizations, including National and State trial lawyers associations, and from numerous insurance organizations. Additionally, we have been assisted in our study by reports issued by Committees and Commissions working in other States and the Tort Policy Group appointed by the U.S. Attorney General. In particular, we have found the Governor's Advisory Commission on Liability Insurance from the State of New York extremely valuable. We do not necessarily agree with the recommendations of this New York Commission and recognize substantial distinctions between New York and Kansas, but we believe the extensive background discussion by the New York Commission is a logical starting point for any study of the liability problem in the United States.

The National Debate.

The number of articles written about the liability problem and the number of other States studying this matter attest not only to the extent of the problem nationally, but also to the public concern regarding the liability problem. It is an area of extreme contentiousness. The most pronounced division seems to exist between those who believe the problem is centered in our judicial system and those who find it centered with the insurance industry. The first camp told our Committee that our courts, in an effort to expand compensation to injured persons, have gone far. They contend the system has become too expensive, provides for more compensation than is reasonable, and no longer offers any degree of predictability. They point, with alarm, to the increase in paid losses between 1965 and 1986 of $2,046% for commercial liability insurance compared with an increase in inflation during the same period of 242%. They also point to the increase in losses in commercial liability insurance of 25% in 1984 and 43% in

1985. The opposing camp told us that insurance companies have caused current problems by poor management during a normal property and casualty insurance cycle. They told us the problem will be eased, if not solved, once these companies return to profitability.

We believe the liability problem is too multi-faceted and complex to be answered this simply. The problem is long-term and will require continuing attention by all interested persons. We encourage attorneys and insurance executives to make an active, but less partisan, role in finding long-term solutions. An improvement of the property and casualty insurance cycle is likely to provide respite for some risks, but as long as the expense of discharging the liability cost obligation continues to increase, the problem will persist and costs of liability protection will continue to spiral upward even as insurance cycles work through their predictable phases. To ignore this long-term scenario is a great risk to the businesses and citizens of this State since this problem is not simply an insurance problem, but impacts upon self-insureds as well.

A Serious Problem Does Exist For Some Types Of Insurance -- Availability vs. Affordability.

This Committee finds that a serious liability problem exists in Kansas. It does not yet affect all liability insurance lines and classes, but clearly has created difficulties for many professionals, businesses, and governmental agencies in this State. A constriction of commercial liability insurance, which actually began more than a decade ago, has made some insurance coverage unavailable. Even when insurance is available, there is often partial unavailability for the total risk because policies increasingly cover fewer risks and at lesser threshhold dollar

amounts. Higher deductibles and the increasing use of claims-made policies are just two examples of this growing tendency toward partial unavailability.

In other instances, insurance is available, but is often unaffordable. We recognize that affordability is a matter of opinion requiring a judgment as to what constitutes acceptable cost for insurance in a particular industry. We also recognize that consumers were somewhat shielded from reality in recent years when insurance companies used investment income earned at high interest rates to subsidize insurance premiums. Now that those high interest rates have vanished, property and casualty insurance companies have raised premiums rapidly to cushion themselves against lower investment income. Many people have had difficulty integrating higher insurance costs into their budgets.

However, whatever the cause and whether justified, many professionals, businesses, governmental agencies, and charitable public service organizations are shocked by higher insurance costs and have considered using some form of self-insurance, pooling arrangement, or joint underwriting association.

The Constriction Of Commercial Liability Markets Is Bad For Kansas.

As mentioned earlier, the constriction of the commercial property and casualty insurance markets has taken place for more than a decade. This Committee did not decide if the constriction of the commercial property and casualty insurance markets is bad or good for the financial viability of the insurance industry. Such a decision would be beyond our charge and, in our opinion, an inappropriate consideration for public policy review. We do, however, worry about the movement of risks from the commercial insurance markets to private individuals, businesses,

governmental entities, and charitable public service organizations in this State. This movement reflects the growing reluctance of commercial insurance companies to assume responsibility for many liability risks. Insurers who elect to remain in difficult markets will often do so only if premiums are based upon "worst case scenarios." These companies have told us that the legal system will become increasingly liberal and, therefore, they choose to establish high reserves to meet worst case projections. When insureds find premiums too high and threaten to self-insure, insurance companies frequently seem to welcome the termination of the business.

We have concluded that the long-term constriction of the commercial property and casualty markets will continue, even though the market cycle may improve temporarily, unless the Legislature intervenes. The judicial system is simply not able to consider appropriately the affect on the insurance mechanism of new laws and legal decisions. Evidence of the implication of a court decision upon the insurance compensation mechanism is never permitted to be argued before jury because the court correctly considers this evidence irrelevant and unnecessarily time consuming. Our fear is that as the cost of liability obligations increases, more and more risks will be transferred from commercial insurance companies, particularly in the riskiest and most unpredictable classes of risk, to be assumed by private individuals and businesses. This, in turn, increases the possibility that future losses will result in business failures, loss of jobs, tax revenues, and the loss of socio-economic advantages. If this should occur, future persons injured in these risky fields may receive little or no compensation.

If commercial insurers with substantial experience and the best expertise available find some risks unacceptable, we must ask if it is advisable for private

individuals, businesses, governmental agencies, and charitable public service organizations with far less insurance experience and expertise to assume these very same risks.

We acknowledge that most self-insurance is undertaken as a last resort when no other choice appears acceptable. We certainly do not criticize the efforts of those who self-insure. We understand their frustration. We simply suggest that if commercial insurers have accurately assessed future risks, self-insurance plans for business, governmental units, and charitable public service organizations may incur substantial future losses which will produce an extremely dangerous, potentially detrimental effect for the citizens of this State. We doubt this risk is fully appreciated. Liability losses for self-insured entities may literally bankrupt Kansas businesses and individuals in future years.

As an example, we cite the experience of the Kansas Health Care Stabilization Fund. This Fund was established in 1976 to self-insure a major portion of medical malpractice professional liability risks, after commercial insurers started to withdraw from medical malpractice markets in Kansas. At the time, it appeared to most people that medical malpractice risks in Kansas were moderate and that commercial insures had no justification for leaving this State. It may have even appeared to some that insurers were unfairly raising premiums in 1976 to compensate for the problems that existed in other States. California may have had a malpractice problem, but few believed Kansas would ever experience the same difficulties.

As it has turned out, the experts for the insurance carriers were correct. Their projections of future trouble in Kansas proved prophetic. Although the Health Care

Stabilization Fund was able to operate with minimal expense and without the profits of the insurance industry, it was unable to avoid the losses in the medical malpractice system. Hindsight shows the Fund assumed the liability risk for health care providers at the very moment the insurance industry was protecting its assets from these risks by withdrawing from the medical malpractice market.

We do not wish to have other professionals, businesses, governmental agencies, and charitable public service organizations experience the same result. Yet, as long as the highest risks are forced out the top of the commercial insurance system into the private market, this possibility exists. Only the Legislature can reverse this trend. If commercial insurance companies are to remain in the marketplace, they must be given a reasonably stable, predictable judicial system. Second, the costs of the liability system must be appropriate. A balance must be achieved between the consumers who are injured by tortuous conduct, and the same consumers who generally must purchase insurance and pay premiums. A temptation or necessity to self-insure will be tempered only if our system can maintain reasonable liability insurance costs. We view the Legislature's task as two-fold. First, an environment must be created to reverse the contraction in the commercial insurance market. Second, the liability system must be improved in order to protect existing self-insurers.

The finger pointing between lawyers and the insurance industry ignores the fact that the liability system impacts more entities than simply insurance companies. It also impacts self-insurers and insurance companies owned and operated by insureds.

Reasonable Laws To Toughen Insurance Regulation Are Necessary.

This report contains a number of recommendations to improve the liability system. We believe these recommendations strike a proper balance to help control the costs of the liability obligation. Our recommendations also include proposed laws to monitor commercial insurance carriers more closely. We support the major portion of the legislative package recommended by Commissioner Bell which will assist him in obtaining necessary information in difficult areas, and further permit him to monitor the history of reserves for insurance companies after rates have been approved. This will provide a regulatory mechanism to prevent insurance companies from taking advantage of the deteriorating liability insurance market by raising premiums and setting unnecessary high reserves for risks that prove over time to have not legitimately presented a problem. This will also allow tort reform measures passed by the Legislature, that result in lower losses from insurance reserves, to be returned to insurance consumers in the form of lower premiums.

We caution against the temptation to impose unnecessary and expensive data gathering obligations on commercial insurance companies. Any effective data gathering requirement must be structured carefully and only under the supervision of someone familiar with the insurance environment. We believe the Insurance commissioner is the appropriate person to weigh the policyholders' need to information against the need to avoid unnecessary and expensive requirements for the insurance carriers.

Summary.

If the Legislature adopts the tort reforms recommended by this Committee, there

should be an improvement for self-insurers that will translate into less risk and lower costs for Kansas citizens in future years. Our recommendations should also improve the commercial insurance markets by creating a more predictable system. The public has a right to expect their insurance premiums to reflect cost savings in the liability system as a result of tort reforms. It is unrealistic, however, to require insurance companies to predict in advance what these savings will be, just as it would be unrealistic to expect self-insurers to be able to compute the exact cost savings from individual tort reforms. We believe a more acceptable safeguard to guarantee fairness to consumers, is to permit the Insurance Commissioner to review reserves in years following rate approval as recommended in the excess profits bill proposed by Commissioner Bell. If insurance companies pay less in losses in the future than they have reserved because of tort reforms, their excess profits will be credited back to consumers. This should result in fairness for consumers while protecting insurance companies from arbitrary premium roll-backs that could threaten insolvencies for some companies if improperly imposed.

Recommendations.

A summary of recommendations of our Committee is as follows:

1. RECOMMENDATIONS TO THE STATE LEGISLATURE.

a. Punitive Damages.

RECOMMENDATION 1: That the standard of proof for punitive damages be increased to clear and convincing evidence.

RECOMMENDATION 2: That punitive damages be limited to acts of intentional wrongdoing, and to accomplish this objective punitive damages be used only to compensate for acts of willful or malicious misconduct or fraud.

RECOMMENDATION 3: That all punitive damages recovered be paid to the State General Fund.

RECOMMENDATION 4: That punitive damages be determined in a separate evidentiary hearing or bifurcated trial.

RECOMMENDATION 5: That the Legislature express its intent that the substantive changes shown above for punitive damages be given extra territorial application when the defendant is a citizen or resident of this State.

b. Collateral Source Rule.

RECOMMENDATION 6: That evidence of collateral sources be provided to the jury for their consideration in setting damages for personal injury and wrongful death actions.

c. Taxability of Awards.

RECOMMENDATION 7: That courts be required to instruct juries regarding taxability of awards in personal injury and wrongful death actions.

d. Alternative Dispute Resolution.

RECOMMENDATION 8: That the existing Kansas arbitration law should be amended to permit arbitration for tort law actions.

RECOMMENDATION 9: That the Legislature consider mandatory arbitration for small money damage claims.

e. Mandatory Settlement Conferences.

RECOMMENDATION 10: That the Legislature require mandatory settlement conferences to be held at least thirty (30) days prior to trial, and that sanctions, including reasonable attorney fees, be authorized if, after trial, it is determined that a party unreasonably refused a settlement offer.

f. Cap -- Non-Economic Damages.

RECOMMENDATION 11: That the Legislature establish reasonable caps for non-economic damages.

g. Itemized Verdicts.

RECOMMENDATION 12: That juries be required to itemize verdicts as to present and future economic damages, present and future non-economic damages, and punitive damages.

h. Mandatory Structured Awards.

RECOMMENDATION 13: That mandated structured awards be required for future economic losses when the total award exceeds $100,000.

i. Contingency Fees.

RECOMMENDATION 14: That the Legislature adopt maximum attorney contingency fees based on a sliding scale used in the Federal Tort Policy Group's recommendations, with twenty-five percent (25%) for judgments up to $100,000, and lesser percentages for judgments in excess of $100,000.

RECOMMENDATION 15: That contingent fee contracts be provided to the court for review.

j. Frivolous Lawsuits.

RECOMMENDATION 16: That the standard for frivolous lawsuits be that a lawsuit have substantial merit and that the court have authority to award fines and penalties against a party or attorney filing a lawsuit that lacks substantial merit.

RECOMMENDATION 17: That the Legislature establish a separate cause of action for Kansas residents or citizens to seek sanctions in Kansas courts for violation of the above section by parties in causes of actions brought outside this State.

k. Expert Witnesses.

RECOMMENDATION 18: That no person be permitted to qualify as an expert witness

unless the individual has devoted at least fifty percent (50%) of his time in the past two years to the practice in the same or related profession as that of the defendant, when defendant's professional conduct is at issue.

l. Comparative Negligence.

RECOMMENDATION 19: To include economic losses as one of the kinds of actions and damages governed by comparative negligence under K.S.A. 60-258(a).

m. Privity.

RECOMMENDATION 20: To limit the liability of professionals to the party or parties with whom they contract or to third parties the professional can reasonably foresee will be damaged at the time the professional advice is provided.

n. Joint and Several Liability.

RECOMMENDATION 21: That the Legislature codify the present Kansas case law on joint and several liability.

RECOMMENDATION 22: That the Legislature establish a separate cause of action for Kansas residents or citizens to seek sanctions in Kansas courts for violation of the above section by parties in causes of actions brought outside this State.

o. Mary Carter Agreements.

RECOMMENDATION 23: That guaranty agreements, sometimes referred to as Mary

Carter Agreements, be prohibited in Kansas as in violation of public policy.

RECOMMENDATION 24: That the Legislature establish a separate cause of action for Kansas residents or citizens to seek sanctions in Kansas courts for violations of the above section by parties in causes of action brought outside this State.

p. Strict Liability.

RECOMMENDATION 25: That the Legislature make the doctrine of strict liability applicable only in product liability cases involving alleged defects in manufacturing or materials, and to require that other cases, including cases involving alleged defects in design, warning or instructions, be litigated under negligence or expressed contract theories.

q. Legal Liability of Directors and Officers.

RECOMMENDATION 26: That Kansas consider a statute similar to Delaware Senate Bill No. 533 which allows corporations the discretionary authority to limit the liability of a corporate director to the corporation and the corporation stockholders for breach of fiduciary duty as a director, provided the director did not breach his duty of loyalty, did not commit an act of intentional misconduct or a knowing violation of law, did not act in bad faith, and did not derive an improper personal benefit.

RECOMMENDATION 27: That elected public officials of governmental boards and appointed members of governmental advisory boards be immune from personal liability

for discretionary acts committed in the normal course of their business, except for fraud, bad faith, or malice.

RECOMMENDATION 28: That Kansas adopt a statute exempting directors, officers, and trustees of organizations or trusts described in Section 501(c)(3) of the Internal Revenue Code from personal liability for acts performed in the normal course of their business, unless the conduct of such director, officer, of trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability.

r. Self-Insurance and Insurance Pooling Arrangements.

RECOMMENDATION 29: That the Legislature and the Insurance Commissioner support the efforts of governmental units and businesses, that consider it necessary, to self-insure or enter into insurance pooling arrangements.

s. Rate Making and Form Approval.

RECOMMENDATION 30: An objective threshhold should be established that allows a "sophisticated commercial insured" to be exempt from many of the restrictions on uses of non-admitted insurance companies and excess and surplus lines markets.

RECOMMENDATION 31: The Insurance Department should be granted any additional authority it believes is necessary to gather specific by-line data on insurance activities.

RECOMMENDATION 32: The Insurance Department should be given authority to require insurance carriers and insurance agency communities to undertake adequate

educational programs to inform consumers of new insurance policies, forms, and procedures. The Insurance Department should also be granted full authority to control the usage of new insurance forms, policies, and procedures for unsophisticated commercial insureds.

RECOMMENDATION 33: The Legislature should investigate and give strong consideration to any request from the Kansas Insurance Commissioner for additional staff and equipment, and that premium tax revenues be used, if necessary, for this purpose.

t. Limiting Market Abuse and Early Indications of Carrier Financial Difficulty.

RECOMMENDATION 34: The Legislature should provide the Kansas Insurance Commissioner with adequate authority to limit marketplace abuse and to monitor for early indications of carrier financial difficulties.

u. Alternative Funding Mechanisms.

RECOMMENDATION 35: The Legislature should continue to provide the Kansas Insurance Commissioner with stand-by authority to establish voluntary Market Assistance Programs (MAPs) for those lines of property and casualty insurance considered to be distressed.

v. Excess Reserves.

RECOMMENDATION 36: The Committee accepts the concept that insurance company reserves should be reviewed by the Insurance Department as they develop and mature

to insure they are not excessive, and recommends that the Legislature adopt that portion of the excess profits bill proposed by the Insurance Commissioner that provides for the review of established reserves.

w. Rating Plans.

RECOMMENDATION 37: The Committee accepts the concept of the Insurance Commissioner having greater authority over the establishment of rating plans.

2. RECOMMENDATIONS TO THE KANSAS INSURANCE COMMISSIONER.

a. National Standards for Enabling Authority and Standard Reporting Formats.

RECOMMENDATION 38: That the Kansas Insurance Department should continue to work with its peers in the National Association of Insurance Commissioners (NAIC) to develop uniform enabling authority and standard reporting formats to reduce associated administrative costs and that these reports should be public documents freely available to the public.

b. National Uniform Data Gathering.

RECOMMENDATION 39: The Kansas Insurance Commissioner is encouraged to assert his influence on the National Association of Insurance Commissioners (NAIC) to adopt uniform measures in the areas of national data collection, standard commercial insurance policy forms, and solvency monitoring.

c. Joint Underwriting Associations (JUAs).

RECOMMENDATION 40: The Kansas Insurance Department should cautiously approach the uses of Joint Underwriting Associations (JUAs) on a case by case basis, and use JUAs only after obtaining independent actuarial expertise and analysis to determine the appropriateness of a JUA.

d. Captive Insurance and Insurance Exchanges.

RECOMMENDATION 41: The Kansas Insurance Department should thoroughly investigate and report to the Legislature whether captive insurance legislation and insurance exchange formations taking place in several States (1) offer any relief to the insurance availability problem within Kansas, or (2) can contribute significantly to the general economic development of Kansas.

e. State Cooperation with Self-Funding Arrangements.

RECOMMENDATION 42: Kansas insurance regulations should facilitate attempts by "sophisticated commercial insureds" to use licensed carriers as fronts for self-insurance or captive insurance arrangements.

f. Insurance Company Obligation for High Risk.

RECOMMENDATION 43: The Insurance Commissioner should encourage the insurance industry to accept an obligation to make its underwriting capacity available to the more hazardous exposures in society.

3. RECOMMENDATIONS TO THE KANSAS DELEGATION IN WASHINGTON.

RECOMMENDATION 44: The Chairman of this Committee is directed to advise the Kansas Congressional delegation of its support for:

(a) The Senate Commerce Committee's Uniform Products Liability bill.

(b) The expansion of the 1981 Federal Risk Retention Act to apply to all seriously distressed property and casualty lines with federal pre-emption eliminating the necessity for risk retention groups to comply with each State's regulatory requirements.

(c) The support of the General Aviation Tort Reform Act of 1986.

# PART II

## Introduction

## II.

## Introduction

### Appointment Of Committee -- History.

In 1985, Fletcher Bell, the Kansas Commissioner of Insurance, appointed a Citizens Committee to study medical malpractice problems in Kansas. This Committee was formed in response to public concerns over the increasing costs of medical malpractice liability insurance and adverse structural changes in the Kansas health care system resulting from the costs of medical malpractice insurance. This 1985 Committee's recommendations were presented to an Interim Committee of the Legislature in October of 1985 and were eventually incorporated in House Bill No. 2661, which was enacted into law by the 1986 Session of the Legislature.

During the deliberations of the 1985 Citizens Committee, it was always understood that liability insurance problems went beyond the concerns of health care providers. Many professionals, business organizations, and governmental entities were also experiencing difficulty obtaining liability insurance at reasonable prices. Because of time constraints, however, the 1985 Citizens Committee limited its consideration to medical malpractice. The Committee generally viewed medical malpractice as the most serious liability insurance problem in Kansas and devoted its energies to finding a solution in this single area.

Even as the Legislature was drafting House Bill No. 2661, other licensed professionals in Kansas were petitioning the Legislature to expand its

consideration beyond medical malpractice. Senate Bill No. 540 was introduced to address these concerns. Senate Bill No. 540 adopted much of the language of House Bill No. 2661, but expanded the provisions to include a number of designated licensed professionals in Kansas. All together, the final draft of Senate Bill No. 540 included twenty-eight (28) different licensed entities within its protection, including, for example, accountants, attorneys, and abstractors.

Senate Bill No. 540 eventually died in the House Judiciary Committee, the same Committee that voted overwhelmingly in favor of medical malpractice legislation. By hindsight, the attempt of Senate Bill No. 540 to expand legislation designed to address medical malpractice problems to a long list of other professionals and licensed businesses, was probably premature. Clearly, the provisions of House Bill No. 2661 were designed to address the very unique circumstances applying to medical malpractice in Kansas. The House Judiciary Committee was unwilling to automatically expand these concepts to other persons and groups without additional study and review. Against this backdrop, Commissioner Bell, on February 26, 1986, re-constructed his Citizens Committee and asked that we study all areas of liability other than medical malpractice.

Committee Members.

The Committee members appointed by Commissioner Bell were selected because they represented a business, governmental entity, or profession with close ties to Kansans who were experiencing liability problems. The members also were selected because they had sufficient business experience to review liability insurance problems in Kansas objectively.

The businessmen and women appointed to the Citizens Committee all represented businesses with an insurance availability or affordability problem with the exception of Larry Heeb, who was appointed to represent the public at large. Commissioner Bell apparently believed the majority of Committee members would not ignore a legitimate solution to solve their own problem simply because the solution might fall most heavily on the insurance industry or the tort system. The hope was that this Committee could rise above the deeply held, but highly adversarial, positions of trial lawyers and insurance advocates.

This approach has been criticized by some. Some have commented concerning the fact the Committee lacked representatives from the insurance industry and the trial bar. We were advised that these groups were excluded in the belief that their well publicized positions regarding tort reform would not likely change during Committee meetings, and that the adversarial relationship of the two groups might impede the work of the Committee. The exclusion of these groups as Committee members did not exclude their opinions from being expressed. Both groups were given substantial opportunity to present their viewpoints before the Committee.

To insure that a line of communication would remain open between our Committee and both legal and insurance groups, Commissioner Bell requested Gerald Goodell, former President of the Kansas Bar Association, to serve as an advisor to the Committee on legal questions, and requested Mark Bennett, Sr., to serve as an advisor on insurance questions.

Sajjad A. Hashmi, Dean of the School of Business, Emporia State University, Emporia, Kansas, was named Chairman of the Committee. Dean Hashmi received his Ph.D. in Insurance from the Wharton School of Finance and Commerce, University

of Pennsylvania.

A list of committee members is as follows:

1. Dr. Sajjad A. Hashmi, Dean, School of Business, Emporia State University, Emporia, Kansas.
2. Joel Jacobs, FMC Corporation, Lawrence, Kansas.
3. James S. Walsh, President, Beech Aircraft, Wichita, Kansas.
4. Bill Curtis, Ass't Executive Director, Kansas Association of School Boards, Topeka, Kansas.
5. Dick Heydinger, Risk Management Director, Hallmark Cards, Kansas City, Missouri.
6. R.D. (Dick) Randall, Vice-President & General Counsel, Petroleum, Inc., Wichita, Kansas.
7. Fred Lamar, Farmland Industries, Inc., Kansas City, Missouri.
8. Bill Clarkson and Ed DeMoss, Heavy Equipment Contractors, Kansas City, Missouri,
9. Carolyn Schmitt, President, and Mary Lou Maritt, Director of Membership/ Insurance/Special Services, KNEA, Topeka, Kansas.
10. Sue Stinett, City Clerk, Bonner Springs, Kansas.
11. Harold Stones, Executive Vice-President, Kansas Bankers Association, Topeka, Kansas.
12. Pat Lacey, Dickinson County Day Care Center, Abilene, Kansas.
13. T.C. Anderson, Executive Director, Kansas Society of CPA's, Topeka, Kansas.
14. Larry Heeb, Lawrence, Kansas.
15. Bill Henry, Executive Vice-President, Kansas Engineering Society, Topeka, Kansas.
16. Richard Hrdlicka, Hesston Corporation, Hesston, Kansas.
17. Larry Williams, President, and/or Robert G. Hull, Vice-President, Finance, National Cooperative Refinery Association, McPherson, Kansas.
18. John D. Jones, McNally Pittsburg, Inc., Pittsburg, Kansas.
19. John M. Reiff, Senior Vice-President/Law and Personnel, Coleman Company, Inc., Wichita, Kansas.
20. Edward Seaton, Publisher and Editor in Chief, The Manhattan Mercury, Manhattan, Kansas.
21. Ray Ligget, Assistant Treasurer, Puritan-Bennett Corporation, Overland Park, Kansas.

Ex Officio Advisory Members

22. Chief Justice Harold R. Fatzer, Ret., Topeka, Kansas.
23. Justice Robert H. Kaul, Ret., Topeka, Kansas

Advisors

24. Gerald Goodell, Kansas Bar Association, Topeka, Kansas.
25. Mark L. Bennett, Sr., Topeka, Kansas.

Robert Martin, General Counsel, Beech Aircraft, participated in meetings on behalf of Mr. Walsh, the President of Beech Aircraft. Mary Lou Maritt attended all meetings for the KNEA following the initial meeting. Sue Stinnett, City Clerk, Bonner Springs, Kansas, was unable to attend Committee meetings, but she was provided with meeting materials and transcripts and she did participate in Subcommittee work. Also, the Committee did receive substantial input from Ernie Mosher from the League of Municipalities. David Litwin of the Kansas Chamber of Commerce attended many meetings on behalf of Edward Seaton, Publisher and Editor in Chief of the Manhattan Mercury.

In addition to the regular Committee members, Commissioner Bell requested Chief Justice Harold R. Fatzer, Retired, and Justice Robert H. Kaul, Retired, both former members of the Kansas Supreme Court, to serve as ex officio advisory members to the Committee.

Ted F. Fay, an attorney for the Kansas Insurance Department, has served as attorney for the Committee.

The Charge To The Committee.

Commissioner Bell charged the Committee with the following tasks:

* To review the legal liability environment in Kansas and judge if it should be cause for public and legislative concern because of the impact on legal liability insurance or other mechanisms used to finance the civil justice system.

* If a problem exists, identify the causes and develop, at least in conceptual terms, such recommendations as may be necessary to alleviate the direct and indirect adverse influences.

The full charge is included as Appendix A.

Our Committee has attempted to carry out the charge by dividing work into three segments. The first segment included testimony from witnesses experiencing insurance or self-insurance liability cost problems. Many members of the Committee participated in this segment of the Committee's work. The second segment involved testimony from leading spokesmen for the insurance industry, trial attorneys, and other organizations, such as Rand Corporation, that have studied matters of importance in the legal liability system. The third segment of the Committee's work involved Subcommittee meetings devoted to the study of individual areas of concern.

Witnesses Before The Committee.

Our Committee is appreciative of the time and effort of the witnesses who appeared before the Committee. Many of these witnesses travelled substantial distances without compensation from the State of Kansas in order to assist the Committee. We might have succeeded in preparing a report based solely upon the voluminous written materials made available to us, but the witnesses were able to bring these materials into focus and to answer questions from Committee members.

The Witnesses who appeared before our Committee, and the date of their appearance, are as follows:

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| April 1, 1986 | Mike Hayden, Speaker of the House, Kansas Legislature, Topeka, Kansas. |
| | Bill Johnson, Insurance and Claims Manager, Hallmark Cards, Kansas City, Missouri. |
| | Dick Randall, Vice-President & General Counsel, Petroleum, Inc., Wichita, Kansas. |
| | T.C. Anderson, Executive Director, Kansas Society of Certified Public Accountants, Topeka, Kansas. |
| | Robert Martin, General Counsel, Director, Beech Aircraft, Wichita, Kansas. |
| | Richard Brock, Administrative Assistant, Kansas Insurance Department, Topeka, Kansas. |
| May 6, 1986 | Pat Lacey, Dickinson County Day Care Center, Abilene, Kansas. |
| | Bill Henry, Executive Vice-President, Kansas Engineering Society, Topeka, Kansas. |
| | Mary Lou Maritt, Director, Kansas National Education Association, Topeka, Kansas. |
| | John Reiff, Sr., Vice-President, Law & Personnel, Coleman Company, Inc., Wichita, Kansas. |
| | Raymond Rathert, Supervisor, Fire & Casualty Division, Kansas Insurance Department, Topeka, Kansas. |
| June 3, 1986 | Nancy Perry, Director, Greater Topeka United Way, Topeka, Kansas. |
| | Ernie Mosher, Executive Director, League of Kansas Municipalities, Topeka, Kansas. |
| | Herb Iams, Director of Risk Management, Kansas Bankers Association, Topeka, Kansas. |
| | Gerald Goodell, Immediate Past President, Kansas Bar Association, Topeka, Kansas. |
| | Thomas S. Chittenden, Vice-President, State Affairs & General Counsel, American Insurance Association, New York, New York. |
| | Stephen J. Wanamaker, President, Independent Insurance Agents of Kansas, Sargent-Wanamaker Insurance, Inc., Topeka, Kansas. |
| | Andre Maisonpierre, President, Reinsurance Association |

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| | of America. |
| | Morag Fillilov, Vice-President, Government Affairs, Alliance of American Insurers. |
| July 1, 1986 | Stephan Carroll, Senior Economist, Institute for Civil Justice, Rand Corporation, Santa Monica, California. |
| | Mavis Walters, Senior Vice-President, Insurance Services Office, Washington, D.C. |
| | Dick Bouhan, Counsel, National Association of Professional Surplus Lines Office, Atlanta, Georgia. |
| August 5, 1986 | Honorable Terry Bullock, Shawnee County District Judge, Division #6, Topeka, Kansas. |
| | Thomas E. Wright, Attorney, Davis, Wright, Unrein, Hummer & McCallister, Topeka, Kansas. |
| | Mark B. Hutton, Attorney, Michaud, Cordry, Michaud, Hutton & Hutton, Wichita, Kansas. |
| September 2, 1986 | Michael L. Sexton, President, Kansas Trial Lawyers Association, Topeka, Kansas. |
| | Ron Todd, Assistant Commissioner, Kansas Insurance Department, Topeka, Kansas. |
| | Larry Magill, Executive Manager, Independent Insurance Agents of Kansas, Topeka, Kansas. |

Reports Of Other States.

We are appreciative of the work of Committees and Commissions in other States that have met to address problems similar to those concerning Kansas. We have reviewed most, if not all, of the existing written reports of other States. They have been a major assistance. In particular, the Governor's Advisory Commission on Liability Insurance in New York State has provided us with meaningful background information and will be quoted liberally in this report. We do not necessarily agree with all of the New York Commission's recommendations, but find the general statement of the liability insurance problem and the history of the tort system to be well written

and thoughtful.

We concur with the position of the New York Commission, that a report discussing current liability insurance problems can offer "no panaceas, no easy answers and few simple explanations." We similarly agree that our conclusions must involve the interaction of four forces: "(1) a highly complex industry, driven by its unique business economics; (2) a rapidly changing financial service marketplace, in which capital flows rapidly from one jurisdiction and activity to another; (3) a suddenly emergent disinflationary environment, and (4) ongoing developments in the civil justice system."

In matters as complex as those before our Committee, time constraints appear formidable. The Committee was asked to complete their work in time to present their recommendations to the 1987 Session of the Legislature. Anticipating the Legislature would appoint an Interim Study Committee on the same subject, the Committee agreed at the outset to have final recommendations completed by October of 1986 in time to present to that Interim Committee. This schedule imposed time constraints upon the Committee. However, it is doubtful additional time would have produced different or better recommendations. One is tempted to believe that even the most difficult and contentious problems can be peacefully resolved if enough time and effort is devoted. In fact, had this Committee had more time available, it is still unlikely the Committee would have seen the problem or solutions differently. At most, additional time might have permitted the Committee to develop more data in support of our viewpoint.

With this background, we turn to the problems in Kansas as we see them.

# PART III

## The Problem

## Insurance Cycles

## III.

## The Problem -- Insurance Cycles

### The Problem In Kansas.

The witnesses who appeared before our Committee to discuss their liability insurance problems clearly persuaded the Committee that many professions, government entities, businesses, and non-profit public service organizations in Kansas have problems. In some cases, needed insurance is unavailable. In other cases, the insurance is available, but at a prohibitively high price. This latter circumstance is referred to as unaffordability. The Committee heard from a sufficient number of witnesses to persuade the Committee that the nature of the problem was wide-spread. In fact, the Committee might have spent the entire available time simply categorizing the extent and nature of the liability problem for Kansans. Instead, the Committee pursued this segment of the investigation until it became obvious the liability problem in Kansas is severe and seriously affects numerous individuals, businesses, governmental units, non-profit public service organizations, and, ultimately, the general public of Kansas.

We do not suggest that liability cost problems affect all insurance similarly. The focus of the liability problem in Kansas, as it is in the United States generally, is with commercial liability insurance lines. Commercial liability lines represent a very small, although highly important, segment of the total insurance market. Kansas Insurance Department statistics show that problem casualty insurance areas constitute less than ten percent (10%) of the total insurance supervised by the

Fire & Casualty Division of the Kansas Insurance Department. When life insurance and all accident & health insurance is considered, the problem areas of casualty insurance become an even smaller percent of the total insurance markets. As we use the term, commercial liability lines include professional liability lines for many professionals. Some of the professionals experiencing difficulty, other than health care providers who are not covered by this study, include accountants, engineers, lawyers, and even teachers. Commercial liability lines also include business casualty insurance. Business casualty lines generally provide protection against liability claims. Products liability protection has been particularly troublesome in this area. Another area of concern is governmental liability insurance. It has become more difficult for many governmental units to obtain adequate liability coverage, although Kansas appears to have more governmental insurance capacity than many surrounding States. This may be attributed to the $500,000 cap existing under the Kansas Tort Claims Act in K.S.A. 76-6105. This cap applies to governments that are subject to the Tort Claims Act. The better atmosphere in Kansas for governmental units may also be because Kansas does not generally permit joint and several liability. However, if the legal atmosphere in Kansas has made more insurance available for governmental units, it has not necessarily made it available at affordable prices. Many governmental units are seriously concerned about the increasing cost of insurance.

The availability of insurance and its increasing cost has created serious dislocations in both business and government. Directors and officers of corporations are often unable to obtain liability insurance at reasonable rates. The results are predictable. Fewer individuals are willing to serve as directors. The chance of being personally included as a defendant in a lawsuit is simply too great to justify serving as a member of the Board of Directors, particularly when a

Director receives only token compensation. This same problem is experienced by the thousands of volunteers who serve without compensation as directors of non-profit corporations. These individuals are absolutely indispensable to this State and must be protected in some way from unfair and unreasonable liability exposure.

Numerous other current examples might be cited. Many more examples will surely arise if liability costs continue to increase.

The Insurance Cycle vs. Tort Reform.

The insurance industry and many business leaders told our Committee that liability insurance premiums have increased because of uncertainties in the tort liability system. They suggest that a rapid expansion of the tort system has made it difficult for insurers to reasonably predict future losses.

Lawyers and some consumer groups, on the other hand, contend that insurance company mismanagement created the current liability problem. They specifically point to cash-flow underwriting practices of insurance companies that were used when interest rates were high a few years ago. During these high interest rate years, insurance companies reduced premiums below break even levels by using high investment income, earned as reserves, as an offset.

The Short Term Effect Of Cycles vs. The Long Term Effect Of Increasing Liability Costs.

Most commentators who have addressed the issue believe present difficulties stem, in part, from both causes. Even the insurance industry has been self-critical

about the price cutting that occurred within the industry a few years ago. However, it is essential to distinguish between the effects of cash-flow underwriting compared to the effects of problems in our legal liability system. Cash-flow underwriting may have caused premiums to increase substantially from the depressed levels they reached during premium reductions of a few years ago. Cash-short period of time because of the flow underwriting, however, does not account for the present high level of existing premiums. Had cash-flow accounting never been used, premiums would not have been reduced, even during the period when insurance companies were receiving substantial investment income. Premiums would not have been subsidized by investment income and would have remained at higher levels. This certainly would have made recent increases in premiums less severe, but it would have been at the expense of the insurance buying public. The present rate shock would have been lessened, but this would have been accomplished at the expense of the public who would have continued to pay increasing premiums without receiving the benefit of investment income earned by insurance companies.

It is difficult to be too critical of the insurance industry for using their investment profits to reduce insurance premiums. Historically, insurance regulators have not considered a property and casualty insurance company's investment income in setting rates. Until recently, investment income has not been considered by regulators directly. Many rate setting laws, including Kansas, simply ignore this source of income in determining rates although the subject has been closely scrutinized by Special Committees of the Kansas Legislature on several occasions. When property and casualty companies are profitable, investment income is used to increase surplus. Increased surplus permits companies to write more insurance, or, as this is normally described, to increase capacity. When companies enter the unprofitable phase of the business cycle, the surplus established in

profitable years acts as a reservoir to be drawn upon to pay losses.

These traditional rate setting practices have served the public well, although both the Kansas Insurance Department and the Legislature have studied the investment income policy from time to time. In 1984, the National Association of Insurance Commissioners (NAIC) also conducted an extensive study of investment income in relationship to rate making policies.

Insurance company revenues are generally divided into two main categories: underwriting revenues and investment income. While premiums (underwriting revenues) account for the majority of income on a gross basis, investments are the primary source of net income. The major portion of investment income is net investment revenues which is equal to all interest, dividends, and rents.

Investment income has always been a major component of total insurance income. When considered apart from underwriting, the significance of investment income is clear. The 1984 NAIC Study of Investment Income reports that for the last twenty (20) years taken together, investment income has been the only source of net income for the insurance industry.

Whether intended, the modern property/casualty company is, very simply, a financial intermediary. It is willing to underwrite risks for a price at or near the cost of losses and expenses in order to gain the use of policyholders' funds over a period of time.

Investment income fluctuations have always played a part in property/casualty insurance cycles. However, never before did interest rates have such a profound

influence upon premiums as during the latest cycle when double digit interest rates provided insurance companies with a substantial pool of funds available to use to increase market share by reducing premiums.

How Companies Establish Premiums -- The Importance Of Reserves.

A further word at this point is in order regarding investment income. Insurance companies must establish insurance premiums prospectively. An insurance premium must not only be sufficient to cover normal overhead costs and profits, it must also be sufficient to cover all losses resulting from the coverage extended by the policy during the period covered by the premium. Self-insured entities must employ similar projections in order to set aside sufficient resources to cover future losses arising as a result of goods manufactured or services rendered during a given period of time. Insurance companies and larger self-insured entities employ numerous experts to assist them in projecting what these future losses might be. Actuaries, mathematicians, and statisticians for the insurance industry, are trained to project future losses with a reasonable degree of scientific certainty. In reaching their opinion, they not only consider past losses, but establish trends to help anticipate and provide for future liability. The money raised to provide for these future liabilities remains with the company, designated as reserves, until expended. In "long tail" lines of insurance, liability costs may not be finally determined for many years. During this period, between the date premiums are received and losses are finally paid, insurance companies invest the assets used to cover projected reserves. The investment income earned by the company is almost exclusively earnings realized from the investment of these reserves.

Due to the inherent difficulties in estimating reserves for unpaid losses, many

members of the insurance industry have recently underestimated reserves. This has resulted in insufficient reserves to pay losses incurred for previous policy years. A popular misconception is that insurance regulators will permit insurance companies to increase current premiums to offset insufficient reserves for old policy years. This is untrue. If an insurance company has under-reserved, they must meet these reserve shortfalls with earnings from other insurance business or draw upon company surplus. If they meet these obligations by reducing surplus, they may be required by insurance regulators to reduce the volume of their insurance business to avoid potential financial difficulties. Insurance regulators generally employ standard ratios that limit premium volume to a certain percentage of company surplus. Generally, total premiums should not exceed an amount equal to three times a company's policyholders' surplus. Companies that adjust their miscalculated reserves to make them adequate to cover experienced losses will reduce their surplus and as a result will reduce the amount of business they can write, thereby reducing insurance capacity for the buying public.

If an insurance company has so seriously miscalculated reserves that reduction of their surplus becomes terminal, that insurance company will face insolvency or some form of rehabilitation. The most common reason fire and casualty companies fall into insolvency, at least in recent years, has been because of improper reserve estimates.

The free market, competitive system will always have a mechanism to allow or force unprofitable companies to expire. Public policy does not demand that all insurance companies be guaranteed a future existence. Inefficient, poorly managed companies must be permitted to fail despite the turmoil that often results. It requires a great amount of courage on the part of insurance regulators to permit free market

forces to work, however, a number of safeguards have been established by States to protect the consumer. For example, the Kansas Insurance Guaranty Association Act established by K.S.A. 40-2901, et seq., was enacted by Kansas to protect the public from losses resulting from an insolvent insurer.

Insurance Company Profitability.

Our Committee rejects insurance company profitability as a legitimate policy objective. Even if this Committee accepted the proposition that a profitable insurance industry is important as a tax accumulation mechanism for the State, it is highly unlikely the citizens of Kansas or the Legislature would view insurance company profitability as worthy of public policy attention, particularly if improvement of company profits can only be achieved by limiting the rights of citizens in some other way. This Committee, however, does recognize that the profitability of property and casualty insurers may bear upon questions of insurance capacity. If limited capacity results in unavailable insurance because of inadequate surplus or an inability to attract capital, and if limited capacity forces professionals, businesses, governmental units, or charitable public service organizations to self-insure, then insurance company profits must, at least, be considered in reviewing the overall insurance availability problem.

In this regard, return on equity of the property and casualty industry has lagged behind industrial companies generally, and of other financial service companies in particular. Operating earnings have rapidly declined since the late 1970's although recent efforts by the industry to improve their balance sheets has been successful in improving company profitability. The source of recent poor performance has been underwriting losses that have increased faster than premium

and investment income. Conversely, recent improvements in profitability for the property and casualty industry have not necessarily translated into improved conditions for the public. Profitability has improved at the expense of the public: Insurance companies have increased their profitability by charging higher premiums and constricting insurance markets in areas of highest risk.

The New York Report of the Governor's Advisory Committee on Liability Insurance, dated April, 1986, summed up the Commission's analysis of the insurance industry by stating: "If a banker were to prepare a financial report card on the property/casualty industry as a whole, it would clearly receive a failing grade for recent performance, but probably a strong pass for future prospects." We concur with this observation, but as already mentioned, we are alert to the possibility the property and casualty industry's increased profitability will not necessarily translate into relief for all segments of the insurance buying public. As mentioned, the need for immediate profitability is being achieved at the expense of availability and affordability problems for the insurance buying consumer. Indeed, this is the primary cause for immediate concern by the public. We can only hope that once this initial strain upon the system has been absorbed and insurance companies have re-established profitability, they will again provide insurance coverage for greater risks and at more stable prices.

To clarify the insurance cycle even further, and to explain how the cycle affects insurance companies and the insurance buying public, and how each phase of the cycle affects each of these groups differently, we refer to a diagram incorporated into the New York Commission's study:

## STAGES OF THE P/C INSURANCE BUSINESS CYCLE

| Consumer's View | Stage No. | Insurer's View |
|---|---|---|
| Crisis. Scarcity, rapid price increases, unavailability of some lines. | 1. | Upturn. Rising revenues, higher combined ratios, lower average risk. |
| Consolidation. Fixing of new price plateau, highest ratio of price to actual cost of providing protection. | 2. | Peak. Best underwriting results, highest overall profits. |
| Upturn. Easing of prices, greater availability, more willingness to tailor products to consumer demands. | 3. | Decline. Influx of capital lured by high profits, price-cutting, lower earnings. |
| Peak. Rampant price-cutting, ample availability, fuller buyer's market. | 4. | Crisis. Massive underwriting losses, ruinous price competition, major risk of insolvencies. |

The stages are not quite as neatly divided as the chart suggests, but in the last cycle, Stage 1 clearly occurred in 1976-77, Stage 2 in 1978-79, Stage 3 in 1979-80, and Stage 4 in 1981-84. We are now again in the beginning phase of Stage 1, although there are a number of indications that it may take longer than normal to reach Stage 2.

We doubt it will ever be possible to eliminate normal market cycles. Furthermore, we do not believe it advisable to attempt to eliminate the cycle even if it was possible. The cycle reflects the competitive nature of the property and casualty insurance industry. The advantages of a competitive system far outweigh the inconveniences of competitive cycles. We do, however, encourage legislation to temper the extreme peaks and valleys of the market cycle to the extent it can be done without unduly inhibiting competition or limiting insurance pricing reaction to external economic conditions.

# PART IV

## The Problem

## Liability Protection Costs

IV.

## The Problem -- Liability Protection Costs

### The Liability Obligation.

As we have noted, the property and casualty insurance cycle has created short term volatility for some liability insurance premiums. Depending upon the phase of the market cycle, cyclical influences will generally distort premium costs, making them higher or lower than they might otherwise be. But, long term premium costs are not driven by cycles -- they are driven by the costs of discharging the liability obligation, which includes the costs of awards and settlements and the expenses of litigation. Whatever it may be called, the costs and expenses of discharging this liability obligation has continued to rachet higher. Put another way, as long as the expenses and costs of settling claims increases, the price of insurance will also move upward.

### The Kansas Courts Lack Detailed Statistics.

In an effort to accumulate accurate information regarding the costs of liability obligations, we attempted to accumulate accurate statistics regarding jury awards and tort settlements in Kansas. Unfortunately, the Courts in Kansas have never prepared detailed information. There are some statistics available for the total number of cases filed and tried, but these statistics are in such broad and general classifications that they are of little assistance. The Court system has kept no information regarding the amount of judgments in Kansas much less settlement figures for cases filed in this State. We understand the judiciary will soon begin

accumulating more detailed information, and we applaud this effort. Gathering statistics is an expensive and time consuming effort, but the rising costs of the liability system demand the best possible information and the Court system is in the best position to obtain complete and accurate data regarding awards, settlements, and transaction costs.

The Insurance Industry Has Not Kept Statistics In An Appropriate Format.

Initially, we also experienced difficulty obtaining data from the insurance industry as to liability costs. Although insurance companies submit sufficient data to insurance regulators to permit rate review, this data is not generally stored by each and every type of risk insured. As a result, it is virtually impossible for the Insurance Department to provide detailed and accurate information for areas of specific concern, such as foster care, day care centers, municipalities, etc.

ISO Data.

Our best source of information regarding liability costs was eventually obtained from the Insurance Services Office (ISO), a statistical organization supported by a substantial number of property and casualty insurance companies. Even ISO, however, did not initially have statistics in the format needed by this Committee. ISO did, however, at our request, attempt to compile data regarding Kansas experience.

There are some inherent weaknesses with ISO data. First, not all property and casualty companies use ISO, therefore, ISO information is incomplete. Second, ISO data does not include information from the excess and surplus markets, which

constitute a large segment of insurance in many of the most difficult areas of insurance markets. Third, ISO compiles no statistics regarding self-insurance, insurance pools, and similar insurance mechanisms. Finally, ISO accumulates data only on total insurance payments. It has no information and no means of acquiring information regarding the distribution of those payments.

Despite these inherent weaknesses, we appreciate the efforts of ISO in preparing information at our request. The Kansas informational packet preapred by ISO is included in full at Appendix B. Charts from Appendix B are also included with this text for easy reference.

A short discussion of the ISO charts is in order.

Charts 1, 2, and 3 -- Combined Ratios.

Chart 1 of the ISO data compares the combined ratio countrywide for all lines of insurance with the combined ratio in Kansas. Combined ratios are used by the insurance industry to evaluate company profits or losses before credit for investment income. A ratio less than 100 reflects a profit. A ratio higher than 100 reflects a loss. For example, a company with a combined ratio of 114% has paid or reserved $1.14 for every dollar of premium earned. The combined ratio does not account for investment income, so this loss may be reduced by investment earnings.

Chart 1 suggests the Kansas experience has been more favorable than the Country at large. This has been true every year except one since 1972. Chart 2 shows that Kansas has also had a more favorable combined ratio experience in major

commercial lines then countrywide experience.[1] Chart 3 shows similar favorable results for general liability lines.

The favorable Kansas combined ratio experience compared to the nation at large may be the result of some existing favorable laws in this State. Specifically, Kansas may have some advantage because of caps existing in the Kansas Tort Claims Act and the absence of joint and several liability.

Charts 4 through 11 -- Loss Data.

The ISO charts showing losses, track premiums in relationship to losses and expenses. Chart 4 shows that since 1979, the disparity between losses and premiums has continued to grow. Premiums trended lower during this period as interest income was used by insurance companies during the high interest rate cycle to reduce premiums. The alarming data on Chart 4 is not that the gap between losses and premiums widened, but that losses and expenses for general liability insurance have rapidly accelerated since 1981.

The experience in Kansas for all lines combined, as shown on Chart 5, and for general liability, as shown on Chart 6, show similar unfavorable loss and expense experience. With the exception of a few short years, losses and expenses have continually escalated since 1972.

[1] Commercial lines, as used by ISO, must be distinguished from commercial liability lines referred to throughout this report. Commercial lines include general liability, medical malpractice, commercial automobile, and special multi-peril. Special multi-peril includes lines not presently experiencing difficulties in Kansas such as commercial fire lines, therefore, commercial lines as used by ISO, show slightly better results than general liability, whereas commercial liability lines as used in this report is intended to include all problem areas.

To evaluate loss trends, ISO prepared charts that use "paid losses" rather than "incurred losses." This was done, according to ISO, to avoid arguments regarding the possible manipulation of reserve figures. Paid losses are not estimates of future losses, but represent actual cost experience. When Chart 7 is compared with Chart 8, it becomes clear that major problems for the insurance industry are concentrated in commercial and general liability lines.

In Kansas, just as in the nation at large, a comparison of Chart 9 with Chart 10 and Chart 11 demonstrates that problems for paid losses have been concentrated in commercial lines and general liability lines with losses and expenses in general liability lines virtually blowing off the top of the chart.

Chart 11 tracks the attempt of premiums to catch up with losses and expenses. The effort to date has been unsuccessful, although economic reality dictates that premiums will continue to increase until insurance companies receive what they consider to be a fair return.

## Can Kansans Afford To Self-Insure Risks Considered Too Unpredictable For Commercial Insurance Carriers?

Our concern is that rapidly spiraling losses and expenses may drive premium costs to unacceptably high levels. Furthermore, we must once again note that increasing losses and expenses impact upon self-insured plans and upon insurance companies owned by insureds, as well as upon insurance companies. We are fearful that increasing premium costs resulting from spiraling losses and expenses will, in time, drive more and more professionals, businesses, and governmental units in Kansas to self-insure in part or in whole. This is most likely to occur for those risks at the top of the risk scale and will place more and more of the

responsibility for losses and expenses in the most risky areas upon individuals, businesses, governmental units, and non-profit public service organizations rather than upon commercial insurance carriers. The danger of this scenario is that Kansans, rather than insurance companies, will eventually end up insuring the highest risks in the most unpredictable areas. In our opinion, this may be a ticking time bomb capable of causing enormous economic damage for Kansans in the future. Commercial insurers are withdrawing from these high risk areas because they fear large and unpredictable future losses. If self-insurance mechanisms are forced to assume the risk for these same high risk liability losses, insolvency may eventually result. At the very least, withdrawal of products and services of important Kansas businesses and professionals, if not some governmental units, may inevitably transpire.

Within the commercial insurance markets, accelerating losses and expenses can be expected to result in more rapid premium increases. As insurance companies experience rapidly spiraling losses and expenses, they confront increased economic pressure to set premium rates high enough to avoid all conceivable future losses. Companies begin to adopt a "worst case" mentality. As reserves for old policies fall short because of higher than anticipated losses and expenses, insurance companies are forced to cover these losses from company earnings and surplus. As these losses accumulate, insurance executives are less willing to bet upon a stable future. As a result, companies will generally establish reserves based upon "worst case" projections with premiums that increase geometrically to increases in losses. Another impact of "worst case" projections is that they eventually impact upon underwriting decisions. Insurance companies tighten underwriting procedures and withdraw from these high risks.

Substantial And Expensive Changes Have Occurred In The Kansas Legal System During The Past Twenty-Five Years.

Many changes have occurred in our legal system during the last quarter century. Some of these changes are the result of judicial decisions. Most, however, are the result of legislation. These changes have been the result of a compassionate interest in protecting and expanding the ability of injured persons to recover damages.

In 1974, Kansas adopted comparative fault, K.S.A. 60-258(a), as the foundation for our tort system. Previously, Kansas followed the traditional concepts of contributory negligence. Contributory negligence was a somewhat harsh concept that barred an injured party from recovering damages if the injured party was responsible to any degree for his or her injuries. This meant, in theory, that a drunk driver might avoid responsibility for damages if he or she negligently crashed a car into another, if the driver of the other car could be proven to have been only negligibly responsible for the accident.

In practice, contributory negligence was not quite so harsh. Juries often overlooked a party's minor negligence to insure an equitable result. However, contributory negligence permitted the jury only modest latitude, and unquestionably provided less compensation to injured parties than our comparative negligence system.

Similarly, in 1979, the Kansas Tort Claims Act, K.S.A. 75-6101, et seq., provided compensation for persons injured by the negligence of governmental units or employees. Historically, most government acts were protected by the Common Law doctrine of Sovereign Immunity. This long-standing doctrine was set aside by the

Kansas Supreme Court in the case of Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969), and the Kansas Tort Claims Act was an effort by the Legislature to re-establish limitations upon the liability of governmental units in Kansas. As with comparative negligence, the abolition of governmental immunity and subsequent enactment of the Kansas Tort Claims Act created increased liability with resulting higher costs.

These are just two of many changes that have been made to the tort system in recent years. Those who argue that legal system changes being proposed today will irreparably weaken the jury system fail to account for the liberalizing changes that have taken place during the last few decades. Had those changes not taken place -- if we could return to the system that existed twenty-five (25) years ago -- there would most likely be no liability crisis today. Few wish to return to the system that existed then. Certainly, this Committee does not make such a recommendation. Nevertheless, the costs associated with recent changes must be realistically acknowledged.

Balance Is Needed In The Legal System.

This Committee was extremely fortunate to have had Judge Terry L. Bullock, a District Court Judge for Shawnee County, as a witness before the Committee. Judge Bullock appeared at the suggestion of Gerald Goodell, the Immediate Past President of the Kansas Bar Association, and an advisor to the Committee.

Judge Bullock spent substantial time and thought preparing his remarks. He researched the testimony of earlier witnesses before our Committee and took the time and effort to reduce his remarks to writing. Judge Bullock's written remarks are attached to this report at Appendix C.

Judge Bullock clearly categorizes the philosophical and social values that must be balanced by our legal system. He points out, correctly in our opinion, that the balance between competing interests generally rests with the Legislature, not the judicial system.

We believe the liability costs of the present system, primarily as a result of major legislative changes made during the last twenty-five (25) years, have become unacceptable. We believe the balance must be adjusted to reduce the liability costs of the system. We believe this can be accomplished without denying injured parties reasonable and necessary compensation. To achieve this objective, we must look at inefficiencies existing in the judicial system and correct them. Making the system more efficient allows costs to be reduced without necessarily reducing necessary and reasonable compensation to injured claimants.

In our opinion, it is shortsighted to tolerate an unnecessarily inefficient and costly liability system to benefit injured persons today at the possible expense of persons injured in the future. It is extremely important that the health of our liability compensation system be maintained so that persons injured in the future will have a viable system capable of compensating them for their injuries. It is also important for life saving drugs and needed manufactured goods to remain available to society and not be withdrawn from the market because of unrealistic or distorted safety expectations. Similarly, playgrounds and swimming pools must not be closed because of the fear of unrealistic liability suits. Families needing day care centers must have them available at reasonable costs. Professionals must be free to use professional judgment without fear of liability suits based upon unfair and unrealistic judgments formed with the wisdom of hindsight. Finally, persons serving on boards or commissions, particularly those of non-profit and charitable organizations, should not be afraid to serve because of personal exposure to

liability.

A Short Summary Of The History Of The Tort System.

We believe the most balanced discussion of the tort system appears in the Report of the Governor's Advisory Commission on Liability Insurance for the State of New York, (April, 1986) pp. 121-129. While the discussion is short, we doubt if it is possible to add much to this excellent presentation. Accordingly, we have taken the liberty of including, verbatim, their discussion of "The Nature and Evolution of the Tort Law" and "The Making of Tort Law:"

"The Nature and Evolution of Tort Law"

> "The law of torts defines the obligations to take reasonable care not to harm others, and, where this duty has been breached and wrongful civil harm has occurred, determines the obligation of the wrongdoer to compensate the injured person through payment of money damages. The tort law is rooted in public policy, not in contractual agreement between the parties. It is this body of law that gives civil content to the implicit social contract that underlines our civilization, assigning mutual rights and responsibilities that apply equally to family members and to strangers who have nothing in common other than presence in the jurisdiction in which the law applies. With the possible exception of divorce law, American citizens probably have more direct contact with the law of torts than with any other aspect of the civil justice system.
>
> The principles and application of tort law have changed greatly in this Century. Some of this evolution reflects the sweeping scientific and technological advances that have both multiplied the forms of injury and expanded knowledge of their causes. Other elements of change have been rooted in the transformation of social and economic values that has characterized history's most restless century. It would be surprising, and very probably unhealthy, if so pervasive and powerful a social instrument as the tort law had not evolved as well. Though the proper rate an extent of change are highly contentious issues, most fair-minded observers would agree that a great deal of good has been generated as the guiding doctrines have been amended and reinterpreted. But, it is not necessary to pass judgment on the process in order to understand it. The pages that follow briefly summarize the tumultuous recent history of the tort law which is the context of all current consideration of any need for reform.

Before World War I, and to a lesser degree up until the Second World War, American tort law generally reflected the view that industrial, commercial and public sector activity -- the production of goods and the provisions of services -- was of such clear and great social benefit that extensive imposition of liability for injuries should not be permitted to restrict it. As Justice Oliver Wendell Holmes put it in his classic, The Common Law:

> 'A man need not, it is true, do this or that act -- the term act implies a choice -- but he must act somehow. Furthermore, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing hazard of what is at once desirable and inevitable upon the actor.'

Holmes went on to identify it as 'the principle of our law that loss from accident must lie where it falls,' unless the loss was caused by an action unreasonably hazardous to others. Common law rules embodied the view that the purpose of tort law was not so much to compensate the injured but rather to deter unreasonably risky activity, and that, given the benefits of commercial, industrial and governmental activity, the definition of 'unreasonably risky' should be relatively narrow.

Thus, during this period courts tended to impose on the plaintiffs in tort cases quite stringent burdens of proof of injury and the causation thereof, and to narrow the duties of care assigned to defendants. The burden was placed on the plaintiff to demonstrate that the negligence of the defendant was the proximate cause of the injury to the plaintiff. If a plaintiff was injured by a defect in a consumer good, for example, the plaintiff could not sue the manufacturer of the product for breach of warranty if he/she had not purchased it directly from that manufacturer. Since the plaintiff had probably purchased the product from a retail outlet, and therefore was not 'in privity' with the manufacturer, the make of the product was held to owe the plaintiff no duty of care.

There are other leading examples of this general tendency in the tort law. The rule of contributory negligence precluded a plaintiff from prevailing if it could be shown that the plaintiff's own negligence contributed in the slightest degree to his or her injury. The legal doctrine of assumption of risk precluded recovery of damages if the plaintiff had knowingly engaged in conduct with any awareness of the risks that later gave rise to the injury. In such instances, the plaintiff's conduct in voluntarily proceeding in the fact of a known risk was deemed a partial cause of the injury, relieving the defendant of liability. In addition, whole categories of actors considered to be acting in a public capacity -- governments and many not-for-profit organizations -- were largely immune from tort liability under the prevailing doctrines of sovereign immunity and charitable immunity.

Although these and similar principles undergirded the tort law through most of American history, they are almost entirely without force today. During the past three decades sweeping changes have been introduced into the law of torts, changes whose significance is only beginning to be realized. Whether these changes are considered generally positive or negative is a matter of individual judgment and not a little controversy.

But there can be no question that something very close to a revolution has occurred in prevailing tort principle.

Examples of the change abound. The doctrines of sovereign immunity and charitable immunity are defunct almost everywhere. The rule of contributory negligence has been abandoned in favor of the rule of comparative fault in most jurisdictions, and is in tattered circumstances where it is still formally the law. The duties of care imposed on defendants have expanded greatly, and the burdens of proof on plaintiff have been much reduced. Thus, the manufacturer's defense of no 'privity' with the buyer of its products has been abolished, and the doctrine of strict liability for product-caused injuries has been generally accepted, which rule does not require the plaintiff to establish that the manufacturer was negligent but only that the product was defective. And, new doctrines emerge yearly, such as the theories of 'enterprise' or 'market share liability,' under which the plaintiff need not show that the product of a particular defendant caused the injury, but is permitted to sue all manufacturers of that type of generic product and shift the burden of proof to the defendant to establish that its product did not cause the injury. In some jurisdictions, failure to meet this burden means that liability is apportioned among such defendants according to market share.

These changes in the law reflect significant changes in social attitudes. The earlier emphasis on protecting activity and imposing liability only to deter especially hazardous compensation of injuries and that businesses and governments take fully into account the possible consequences of their conduct before taking action. Injuries which in an earlier era where deemed unhappy but unavoidable accidents of life are now treated as occasions for a finding tort liability and a resulting duty to compensate. And, a more sophisticated and sensitive society has insisted that injuries that are difficult to gauge -- pain, anguish, stress, loss of companionship -- be compensated as fully as the physical and economic injuries that are subject to objective measurement. One major effect of this trend has been an expansion of average jury awards, not in the great mass of cases, but largely in the more serious cases where astronomical sums have become nearly commonplace.

The increasing emphasis of the law upon its compensation function has also resulted in a greater focus on spreading the risks and costs of injury. Larger entities are generally considered to be more effective avoiders and spreaders of risk than are individual consumers. As a result, businesses and governments have been asked to shoulder a greater burden of liability. Both Courts and legislators have been of the dominant view that these larger entities are better able to appraise and reduce the risks attendant on the goods and services they produce, and better able to spread the cost of risk reduction and injury compensation, than are the people who use those goods and services.

In accord with this preference for greater risk and loss spreading, a fundamental fact facilitating the shift in liability principle has been the availability of liability insurance. The presumably superior ability of corporate and municipal entities, as compared with individual plaintiffs, to purchase adequate amounts of liability insurance more cheaply and to spread the cost of that insurance more broadly has been an

important though often unspoken factor in the expansion of defendant liability. Judicial and legislative awareness of the liability insurance system has enabled lawmakers to believe they can reconcile a commitment to greater compensation for the injured with Holmes' concern that the imposition of greater liability would deter socially beneficial conduct. They have been confident that, through the purchase of liability insurance, corporate and municipal entities can pass on liability costs to the broader public, while at the same time avoiding the brunt of liability awards. This confidence is evident in the fact that in several States the abolition of sovereign immunity has been expressly keyed to the availability of municipal liability insurance.

Thus, though it is infrequently admitted, the compensatory philosophy of contemporary tort law assumes the ready availability of affordable liability insurance. Yet, the paradox of the current liability created by contemporary doctrine may increase insurance prices that are greater than even institutional insureds can bear.

These observations should not be interpreted as criticism of all expansions of tort liability, or as a call for a return to the dogma of the Nineteenth Century. There is no doubt that by our standards the old rules were harsh and unjust. Grievously injured victims or corporate and government negligence were in fact left uncompensated, and businesses and public entities were given little incentive to reduce the dangers that their products and services posed. Moreover, there can be no doubt that the expansion of tort liability and the shift in the burden of responsibility to actors has resulted in loss preventions, reductions in what the costs of accidents might otherwise be, and other social benefits. These benefits must be clearly in mind in any deliberation about the future evolution of tort law.

However, even keeping these benefits in mind, the liability insurance crisis that now afflicts New York and the rest of the nation reminds us that the effects of tort principle must be considered as an integral part of the same complex of social and commercial trends that includes the liability insurance industry. For it is the tort law that largely determines whether the cost of liability protection is within the means of the parties -- insurers and insureds alike -- among whom the cost is designed to be spread.

In the United States, each State is an independent source of tort law and doctrine. It is the New York State law of torts that directly or indirectly determines for New York businesses and public entities the answers to the three key public policy questions that govern the basic structure of liability protection costs:

* What forms and situations of injury require compensation of the injured?

* Who must pay the compensation?

* In any given situation, how much compensation is appropriate?

These policy questions have seldom if ever been addressed in this general form by any public institution other than a court of law. And even then

they are almost always considered in a specific factual context that often does not permit consideration of broader policy implications. The Anglo-American common law tradition holds that tort law should emanate, in the main, from judicial declaration and reinterpretation of principles conceived, shaped and reshaped in the countless crucibles represented by the lawsuits that arise from social interaction. Though legislatures may make an occasional policy-making incursion into a particular subject area -- e.g., Workers' Compensation, auto no-fault, the rules governing liability for medical malpractice -- they have traditionally left the making and remaking of most tort policy to the courts, confining their own role to occasional codification of the rules established in the course of the judicial process.

There are powerful arguments favoring this traditional division of policy-making responsibility. Courts offer the capacity to develop policies tempered by the exacting necessity both to do justice in the case at hand and to do so in a way that maintains a rational and recognized fabric of behavioral rules that can govern the millions of similar situations that may arise, most of which will never come to the attention of any court. The infinite capacity of experience to surprise even the most well-intended lawgiver with new and unforeseen situations dictates caution when intervening to adjust tort principles to form a position other than the bench of the jury box.

Nevertheless, case law is peculiarly unsuited to take into account some systemic effects of legal principle or procedure. The effect on insurance availability and affordability is a classic case in point. Tort proceedings are normally blind to the very existence of insurance -- and for very good reasons. Courts quite properly focus on the rights and responsibilities of the parties before the bar without reference to what assets, including insurance, the defendant may or may not possess. To do otherwise would be to distort the law according to the economic status of the parties, thereby repudiating the principle of equal protection that is a cornerstone of our polity. Yet, the very blindfold that shields justice from such distractions also numbs her sensitivity to the health of the risk-spreading mechanism that American society has developed to assure that compensation is in fact available for those who are entitled to receive it.

Justice is not achieved when deserved compensation is granted by a court; it is achieved when that compensation is paid to the plaintiff. To the extent that payment is dependent upon adequate insurance, which it very often is in the case of a serious injury, the ends of justice are subverted when insurance is unavailable at an affordable price. Nothing could be more self-defeating than a structure of law that establishes rights to compensation which systematically undermine the capacity of the economy to maintain institutions capable of assuring that these rights will actually be vindicated when injury occurs and need is great. But it is too much to ask courts and juries to look beyond the particulars of the cases they hear to consider the continued viability of the unseen risk-diffusing system which most often determines whether the justice they try to do is real or illusory. Maintaining the health of that system is the rightful task of the Executive and Legislative Branches of government.

Of course, this task cannot be carried out at the cost of fundamental

fairness. Justice for the victims of tortious misconduct may not be compromised. Every proposal must survive rigorous examination for bias and susceptibility to unintended consequences. The need is not to extinguish rights, but to bring the rights of the citizen as claimant into reasonable balance with those of the same citizen as consumer and insurance policy-holder. As we have seen, the recent surge in liability costs -- whether insured against or not -- suggests that these rights are now out of balance, thereby threatening consumer access to the protection needed to vindicate the rights of claimants. The challenge is to restore balance while taking meticulous care to preserve and strengthen the basic fairness of the system."

We believe, and fervently hope, the recommendations of this Committee in the areas of tort reform, strike the appropriate balance called for by the New York Commission.

The Rand Corporation Study.

It seems inconceivable that after so many years of argument and debate, those on the extreme ends of the spectrum continue to be so far divided. Some trial lawyers persist in seeing the liability cost problem as an insurance industry conspiracy. Some insurance executives are convinced the liability problem will disappear if only plaintiff lawyers are controlled. These extreme positions have been counterproductive, in our view, and have heightened public suspicion of both groups.

It is easy to jump to the conclusion that trial lawyers and insurance companies have refused to change their opinion because of their large personal economic interest in the position they advocate. There may be another explanation. Stephen Carrol, Chief Economist of the Rand Corporation, suggested during his testimony before the Committee, that both sides may honestly see the liability crisis from totally different perspectives. Mr. Carroll suggests that both sides may be in good faith, but simply looking at different data. He points out that median awards since 1961 have remained virtually unchanged when adjusted for inflation even as

average awards have soared. (Chart 12). Attorneys see the liability system from the perspective of the median award. Insurance cmpanies view the system from the perspective of average awards. This means some tort areas are experiencing substantial problems even as others remain virtually unchanged. It is the insurance companies and the self-insureds covering risks in the difficult areas that are experiencing serious problems. These insurance companies and self-insured businesses and governmental units, therefore, see things from the viewpoint of the average awards.

The Rand study concentrated on two major metropolitan areas, San Francisco and Cook County, Illinois. Mr. Carroll was careful to point out that the experiences in these two areas might not be valid for other jurisdictions such as Kansas. However, Mr. Carroll also noted that he speaks throughout the United States and his audiences generally accept the Rand data as indicative of common national experience and do not suggest that their local experience is substantially different.

The Rand Study pointed to the following major conclusions:

1. Median awards, when adjusted for inflation and accounted for in four (4) year increments, remained virtually consistent from 1960-64 to 1980-84. Average awards, during the same period, increased dramatically, more than doubling from 1970-74 period until 1980-84 period. (Chart 12).

2. Million dollar awards account for an increasing number of total dollars awarded and total number of cases. (Chart 13). Dollar increases have been greater in cases involving serious injuries than cases involving moderate injuries. (Chart 14). Large awards also became more

unpredictable. (Chart 15).

3. The increases in awards differed substantially based upon the type of cases involved, with automobile awards rising only modestly while malpractice and products liability increased dramatically. (Chart 16).

4. Typical awards against deep-pocket defendants such as government and business are larger than against individuals, with government paying nearly two hundred percent (200%) more than individuals and business paying four hundred percent (400%) or more. (Chart 17). These differences seem to have little to do with the severity of the injuries. (Chart 18).

5. Punitive awards grew in both San Francisco and Cook County, Illinois. (Chart 19). Businesses paid the majority of punitive damages even though the majority of cases filed are against individuals. (Chart 20). And, the amount of punitive damages have increased sharply against businesses. (Chart 21).

The Rand Corporation data seems to suggest that actual damages contain a punitive aspect when the defendant is a "deep pocket" such as a business of governmental entity. If this is true, it may explain why plaintiff attorneys often go beyond proving negligence and attempt to introduce evidence that might persuade a jury to give additional actual damages for punitive reasons.

# PART V

## Conclusion and Recommendations

V.

## Conclusion and Recommendations

This Committee believes the following recommendations will re-establish an appropriate balance to our legal system while, at the same time, strengthening necessary regulation of the insurance industry. We believe these recommendations will maintain a healthy compensation mechanism for liability claims for Kansans.

The rationale for the Committee's recommendations are included, where appropriate. Complete Subcommittee reports which formed the basis of the full Committee's recommendations are attached as Appendix D.

### 1. RECOMMENDATIONS TO THE STATE LEGISLATURE.

#### a. Punitive Damages.

RECOMMENDATION 1: That the standard of proof for punitive damages be increased to clear and convincing evidence.

RECOMMENDATION 2: That punitive damages be limited to acts of intentional wrongdoing, and to accomplish this objective punitive damages be used only to compensate for acts of willful or malicious misconduct or fraud.

RECOMMENDATION 3: That all punitive damages recovered be paid to the State General Fund.

RECOMMENDATION 4: That punitive damages be determined in a separate evidentiary hearing or bifurcated trial.

RATIONALE: Punitive damages are intended to punish the wrongdoer and prevent the re-occurrence of misconduct. The Committee supports this concept. Unfortunately, however, there is scant evidence that punitive damages accomplish their intended purpose. Too often, punitive damages are alleged in the hope of obtaining a larger settlement for actual damages. This indirectly transfers the punitive effect to the insurance mechanism, even when many States, including Kansas, do not generally permit insurance to cover punitive damages directly. The same system, however, provides lawyers -- particularly those operating on a contingency fee basis -- with huge incentives to seek large punitive damage awards and this incentive often transcends both the interest of their clients and the intent of the law.

RECOMMENDATION 5: That the Legislature express its intent that the substantive changes shown above for punitive damages be given extra territorial application when the defendant is a citizens or resident of this State.

RATIONALE: If Kansas toughens its standards to obtain punitive damages, there is a possibility, based upon a recent Washington State decision, that the Kansas law may be applied to Kansas corporations even for suits initiated in other States. This will require a foreign court to adopt the Kansas position on punitive damages as a choice of law decision.

b. Collateral Source Rule.

RECOMMENDATION 6: That evidence of collateral sources be provided to the jury

for their consideration in setting damages for personal injury and wrongful death actions.

RATIONALE: The collateral source rule is a common law rule created by the courts in the ninetheenth century. It has been defined in the Restatement (Second) of Torts as:

> "Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability although they cover all or a part of the harm for which the tortfeasor is liable."

One hundred years ago, an accident victim was seldom able to draw on outside sources to compensate him or her for expenses incurred and earnings lost during disability. Generally, an injured person's only recourse was the tort system. Courts felt it inappropriate to penalize the minority of prudent people who, at their own expense, purchased insurance that paid benefits upon an injury. The rationale seemed to be that if there is to be windfall, it is more just for the plaintiff to profit from it than for a tortfeasor to be relieved of his or her full responsibility for his or her wrongdoing.

The arguments to retain the rule or abolish it boil down to two conflicting principles. The first is that a defendant should pay for all damages flowing from his or her wrongful act. The second principle is that a plaintiff is entitled to full compensation, but is not entitled to double recovery resulting in a windfall. The Committee believes the second principle is the more equitable one.

The primary reason for the rule cited by the courts of one hundred years ago, that few people had outside sources to draw on after an injury, has little validity in today's society. Now there is worker's compensation and many forms of insurance which come into play when an injury occurs. Often times an injured person has little or no out-of-pocket expenses as the result of an injury. Common sense suggests that an injured person who has been fully compensated is less likely to sue if the eventual recovery will be reduced by the amount already recovered. Presence of the collateral source rule actually encourages litigation, because a plaintiff, even though fully compensated, knows that he or she can still file suit and recover a second time.

Scholarly analysis of the rule in recent years has generally been critical of it. One of the most thorough articles on the rule was by John G. Fleming, Professor of Law, University of California Berkeley, 54 Law Review 1478 (1966). The first paragraph of Professor Fleming's article states:

> "High ranking among the oddities of American accident law is the so-called 'collateral source' rule which ordains that, in computing damages against a tortfeasor, no reduction be allowed on account of benefits received by the plaintiff from other sources, even though they have partially or wholly mitigated his loss. Standing alone, this looks perhaps unexceptionable enough. Its sting lies in the corollary that the plaintiff may ordinarily keep both the damages as well as the collateral benefit and thus turn his plight into a bonanza."

Professor Fleming went on to conclude that the collateral source rule should be abolished. It should be noted that Professor Fleming wrote the article twenty years ago when there were fewer lawsuits.

As previously mentioned, the collateral source rule is a court-made rule and

could be overturned by the courts at any time. It would be far better for the Legislature to abolish the rule by statute.

The Legislature has already addressed the subject in the medical malpractice area. K.S.A. 60-340 reads as follows:

> "Evidence of collateral source payments and amounts offsetting payments; admissibility; effect. (a) In any medical malpractice liability action, evidence of the amount of reimbursement or indemnification paid or to be paid or to be paid to or for the benefit of a claimant under the following shall be admissible: (1) Medical, disability or other insurance coverage except life insurance coverage; or (2) workers' compensation, military service benefit plan, employment wage continuation plan, social welfare benefit program or other benefit plan or program provided by law.
>
> (b) When evidence or reimbursement or indemnification or a claimant is admitted pursuant to subsection (a), the claimant may present evidence of any amounts paid to secure the right to such reimbursement or indemnification and the extent to which the right to recovery is subject to a lien or subrogation right.
>
> (c) In determining damages in a medical malpractice action, the trier of fact shall consider: (1) The extent to which damages awarded will duplicate reimbursement or indemnification specified in subsection (a); and (2) the extent to which such reimbursement or indemnification is offset by amounts or rights specified in subsection (b).
>
> (d) The provisions of this section shall apply to any action pending or brought on or after July 1, 1985, regardless of when the cause of action accrued."

It makes little sense to abolish the rule for one group of individuals and not for others. As it now stands, K.S.A. 60-3403 will expire on July 1, 1989. It is the Committee's recommendation that there be a mandatory reduction of an award by the amount of collateral source payments. It is the Committee's opinion that the preferred method is for evidence of collateral source payments to be admissible during the trial to be considered by the jury along with all

other relevant evidence on damages.

c. Taxability of Awards.

RECOMMENDATION 7: That courts be required to instruct juries regarding taxability of awards in personal injury and wrongful death actions.

RATIONALE: Awards of damages in personal injury and wrongful death actions are often not taxable under the Federal Tax Code. The general rule in most courts is that it is improper for the jury to be allowed to consider the taxability or non-taxability of the award.

The most common reason put forth by the courts for avoiding reference to the taxability or non-taxability of awards is that it would only serve to complicate a trial and possibly confuse jurors. Some courts have said estimations of taxes are too speculative. There is merit to these arguments, but it is the opinion of the Committee that equity dictates that the jury receive instructions on the taxability of awards in personal injury and wrongful death actions. Without a jury instruction explaining tax treatment, inefficient, unjustified overcompensation is a very real possibility.

d. Alternative Dispute Resolution.

RECOMMENDATION 8: That the existing Kansas arbitration law should be amended to permit arbitration for tort law actions.

RECOMMENDATION 9: That the Legislature consider mandatory arbitration for small

money damage claims.

RATIONALE: The issue of what is the standard of care for a professional and what the duty of such a professional is in a given matter is complicated and is often highly technical in nature. The uniqueness of a professional methodology of practice is not an easy matter to discuss or resolve. Too often litigation in such matters becomes a battle of "experts" and leads the parties involved down a hopeless path of litigation expense. The Committee feels strongly that arbitration offers means to resolve such disputes of negligence during the early stages of a dispute.

Unfortunately, the present statutory language allows arbitration of any controversy except for claims arising in "tort." As a result, the Uniform Arbitration Act is unavailable for disputes involving facts. The Committee recommends that the current Kansas Arbitration laws be amended to allow parties to voluntarily agree to submit future tort claims to binding arbitration.

Mandatory and binding arbitration should be used for small claims. The Committee recommends a thorough study of Alternative Dispute Resolution (ADR) mechanisms now in use by other states, and legislative action to implement those best suited to the Kansas civil justice system.

The Committee realizes that the additional requirement for an arbitration hearing may ultimately increase expenses in some cases, but believes that it will encourage the settlement of more lawsuits and, overall, it will reduce the cost of litigation in Kansas.

e. Mandatory Settlement Conferences.

RECOMMENDATION 10: That the Legislature require mandatory settlement conferences to be held at least thirty (30) days prior to trial, and that sanctions, including reasonable attorney fees, be authorized if, after trial, it is determined that a party unreasonably refused a settlement offer.

RATIONALE: Preparation for trial and the actual trial are a very expensive means of settling differences. If more lawsuits were settled, these expenses could be avoided by both plaintiffs and defendants. Ideally, cases should be settled as soon after the filing of a suit as is practicable.

The Committee recommends that mandatory settlement conferences be required in all civil actions and, preferably, well in advance of trial. The conference should be conducted by the trial judge and fully explore the positions of the litigants.

In a variety of jurisdictions, both Federal and State, certain members of the bench are taking some laudatory steps in requiring parties to meet in a settlement conference. Such mandatory settlement conferences can lead to a speedier disposition of issues and settlement of claims for all parties concerned.

f. Cap -- Non-Economic Damages.

RECOMMENDATION 11: That the Legislature establish reasonable caps for non-economic damages.

RATIONALE: "Pain and suffering" and other kinds of non-enomonic loss are real enough. Pain, though subjective, exists, and without doubt persons injured by the wrongdoing of others are entitled to fair compensation for their suffering.

The problem arises from the subjectivity of non-economic damages. This subjectivity makes intangible losses essentially non-compensable. Who is to say, objectively, whether the pain and inconvenience associated with a particular injury is worth $10,000 or $100,000? In either case, the pain persists, and the payment does not really compensate for it.

Since pain is subjective and the assignment of a monetary value to it is essentially also subjective and arbitrary, awards for pain and suffering are unpredictable. This unpredictability makes it very difficult to write insurance or to self-insure at appropriate premium or cost levels, and also sometimes results in pain and suffering awards that are so high they result in unreasonable premium increases. In many instances, these increases reach the level of unaffordability. Even though Kansas does not require itemized verdicts and, therefore, it is impossible to judge the total amount of non-economic damage awards, evidence from other States which do require itemized verdicts suggests non-economic damages are a substantial amount of the total awards given by juries.

Stated differently, a victim is entitled to compensation for non-economic losses, but is not necessarily entitled to have his or her family become financially independent based upon losses that have cost the injured party nothing in out-of-pocket expenses.

The Federal Tort Policy Working Group notes these considerations in its February, 1986, Report, noting that the subjectivity and resulting unpredictability of non-economic loss awards leads to "awards for similar injuries vary[ing] immensely from case to case, leading to highly inequitable, lottery-like results." The Report also observes that this "lottery mentality," that is, the hope for a high judgment due to pain and suffering, often impedes efforts at reasonable settlements, thus, spurring needless litigation, Report at 66-67.

The Federal Group recommended that a limitation of $100,000 would be appropriate. Recently, the Kansas Legislature established a $250,000 cap on non-economic losses for medical malpractices cases. Our Committee does not decide upon an exact dollar figure, but recommends the Legislature establish a reasonable cap that will compensate injured parties fairly, but will prevent unreasonable windfalls.

g. Itemized Verdicts.

RECOMMENDATION 12: That juries be required to itemize verdicts as to present and future economic damages, present and future non-economic damages, and punitive damages.

RATIONALE: Kansas juries have not been required to itemize verdicts. As a result, there are no statistics regarding the exact foundation for a jury award. Itemized verdicts should permit greater knowledge as to exactly what the jury has awarded.

h. Mandatory Structured Awards.

RECOMMENDATION 13: That mandated structured awards be required for future economic losses when the total award exceeds $100,000.

RATIONALE: It is often unclear, at the time of trial, exactly what the extent of future damages will be for the successful plaintiff. Juries are forced to guess about future damages in order to give a lump sum payment. The Committee feels that awards for future losses should be structured and annuity contracts provided for the payment of such benefits. This will make the jury system more efficient while carrying out the jury's true wishes.

i. Contingency Fees.

RECOMMENDATION 14: That the Legislature adopt maximum attorney contingency fees based on a sliding scale used in the Federal Tort Policy Group's recommendations, with twenty-five percent (25%) for judgments up to $100,000, and lesser percentages for judgments in excess of $100,000.

RECOMMENDATION 15: That contingent fee contracts be provided to the court for review.

RATIONALE: The Committee believes that contingency fees should be structured in some manner so that they have some reasonable relationship to the time, effort, skill, and value to the client of the legal services provided.

The United States is one of the few nations in the world which permit attorneys

to accept cases on a contingent basis, with the fee depending on the size of a recovery.

The principal argument generally cited in support of such fees is that they give courtroom access to people of modest means, who otherwise might not be able to obtain competent legal representation. The contingent fee is, thus, presented as an egalitarian device, necessary for the Davids of the world to take on the Goliaths.

Another frequent argument is that since an attorney would be unlikely to accept an unpromising case on a contingent basis, contingent fees help weed out frivolous claims before suits are filed.

These considerations cannot be lightly dismissed. There are, indeed, cases that should be pursued, but might not be due to a variety of circumstances, especially the financial limitations of a claimant. In such cases, competent representation may not be secured unless contingent fees are permitted. Moreover, it seems likely that the contingent fee system performs, to some extent, a sorting-out function to eliminate groundless claims.

On the other hand, critics point out many considerations which strongly suggest the need to limit such fees to reasonable proportions, consonant with the degree of contingency involved. Moreover, those opposing such regulation seem to miss or ignore the distinction between abolishing contingency fees and regulating their use, or abuse. The egalitarian and sorting-out functions would not be in the least impaired by reasonable legislation -- only abuses of the system would be eliminated.

The Report of the Federal government's Tort Policy Working Group released in February, 1986, after considering numerous factors, recommended allowing contingent fees, but regulating the maximum that can be charged on a sliding scale.

The Report cites several considerations supporting limiting fees:

1. Judges and juries often inflate awards to compensate for well-understood high attorney fees, resulting in higher insurance rates that ultimately result in higher consumer prices for goods and services.

2. High contingency contracts inflate settlement amounts. Moreover, they often impede settlement, since a defendant "may balk at paying a higher than justified award in order to compensate plaintiffs for exorbitant attorneys' fees. In such situations, attorneys' fees create an additional burden by causing cases not to be settled that otherwise would be settled."

3. Contingency fees "distort the incentives of attorneys." For example, an attorney may hold out for high non-economic damages where the client might be better served with a fair award of economic loss and more limited non-economic damages.

4. Regulating the limits of contingency arrangements should reduce the overall excessive transaction costs of the civil justice system.

Other critics note that as the grounds of liability have grown, formerly valid defenses have been stripped away in recent years by courts and legislative

action. There is far less "contingency" in representing plaintiffs in personal injury actions than was formerly the case. Such defenses as contributory negligence, assumption of risk, and guest statutes, have been abolished or severely eroded, and defendants can be found liable on "strict liability" theories even though they may not have been negligent.

Thus, trials focus more on apportionment of damages and less on liability issues. The sharp reduction in contingency suggests moderation of contingent fees.

It has also been widely observed that contingency fee abuses sometimes unfairly bring the entire Bar into disrepute, undermining public confidence in the civil justice system. The recent spectacle of attorneys racing to Bhopal to sign up clients in the wake of that tragedy is an example of this potential.

Finally, we would note that the typical personal injury plaintiff is likely to have had no prior involvement as a claimant in our tort system. Thus, there is by no means equality of bargaining positions -- the client is likely to sign whatever fee arrangement the attorney suggests. The weaker party in contracts of adhesion is usually protected by the law. No reason appears why attorney contracts should be viewed differently.

The Committee recommendations will allow more than enough incentive to make good cases attractive to attorneys on a contingent basis and still fulfill the function of weeding-out weak cases. Such limits would also continue to allow personal injury attorneys to earn excellent incomes.

j. Frivolous Lawsuits.

RECOMMENDATION 16: That the standard for frivolous lawsuits be that a lawsuit have substantial merit and that the court have authority to award fines and penalties against a party or attorney filing a lawsuit that lacks substantial merit.

RATIONALE: Without a doubt, one of the most frustrating features of the judicial system for non-legal professionals to deal with, is the frustration and legal cost involved in answering and defending "frivolous" lawsuits. There is hardly anything that frustrates the public more than to have to settle a lawsuit with no meritorious claim because the legal costs of defense are more expensive than a lawsuit. The members of the Committee recognize that there is a statute, K.S.A. 60-211, which permits the court to award both expenses and attorney fees against lawyers for filing a frivolous claim. Unfortunately, the courts are not utilizing this statute to punish those attorneys who file such claims. Part of the problem, as we were told by both judges and attorneys who testified before the Citizens Committee, is that frivolous carries a connotation of "meaningless" or "totally devoid of substances." Based upon case law and interpretation, the "frivolous" lawsuit cannot be effectively controlled today, and this results in even more worthless litigation. It is the feeling of the Committee that a trial court should be authorized by statute to assess fees and costs against any party filing a claim or counter claim "lacking in substantial merit." The Committee believes such a statute would be much more effective in curtailing frivolous litigation than any other action the Legislature might take.

RECOMMENDATION 17: That the Legislature establish a separate cause of action for

Kansas residents or citizens to seek sanctions in Kansas courts for violation of the above section by parties in causes of actions brought outside this State.

RATIONALE: The legal theory supporting the right of Kansas to adopt this provision is comparable to the theory which has permitted states to adopt substantive and procedural laws designed to protect their citizens against unreasonably dangerous and defective products manufactured in other states and is directly comparable to the underlying philosophy of legislation enacted in California which permits recovery against a defendant of his insurer for unreasonably refusing to settle a claim or litigation asserted by a claimant in the State of California. If a Kansas resident is sued in a foreign jurisdiction and the suit is "frivolous," the Kansas resident or citizen should be permitted to bring an action in Kansas to compensate for damages. Of course, this suit depends upon the Kansas resident or citizen obtaining jurisdiction over the plaintiff.

k. Expert Witnesses.

RECOMMENDATION 18: That no person be permitted to qualify as an expert witness unless the individual has devoted at least fifty percent (50%) of his time in the past two years to the practice in the same or related profession as that of the defendant, when defendant's professional conduct is at issue.

RATIONALE: Although the Committee did not hear much comment during the monthly sessions on particular problems involving expert witnesses in trial, several persons voiced complaints during the Subcommittee meetings about the admission of testimony of certain expert witnesses in professional malpractice

trials. Although we have uniform instructions to juries regarding how individual jurors should weigh the testimony of expert witnesses, the Committee feels the courts have often failed to exercise their discretionary authority to impose minimum standards for expert testimony to be given to the jury. Accordingly, there should be an added restriction set by statute as to who can testify as an expert witness. The Committee supports the adoption of a provision such as that contained in Senate Bill No. 540, as amended by the Senate Committee of the Whole, that no person shall qualify as an expert witness unless the individual has devoted at least 50 percent of his time in the past two years to practice in the same profession as the defendant.

1. Comparative Negligence.

RECOMMENDATION 19: To include economic losses as one of the kinds of actions and damages governed by comparative negligence under K.S.A. 60-258(a).

RATIONALE: The Kansas Association of Certified Public Accountants brought to the Committee's attention a ruling in a Kansas case that could distort the equal application of our comparative negligence statute. In Federal Savings and Loan Insurance Corporation v. Huff, 237 Kan. 873, 704 P.2d 372 (1985), the court states:

> "While we decline to hold that a claim seeking damages solely for economic loss can never be within the purview of K.S.A. 60-258(a), we have no hesitancy in concluding an action of the nature before us, that is, an action seeking damages for economic loss to a savings and loan institution resulting from breach of fiduciary duties by its officers, is beyond the purview of K.S.A. 60-258(a)."

As our State Supreme Court has abolished joint and several liability in tort cases, (See Lester v. Magic Chief, Inc., 230 Kan. 643), the Committee feels any confusion in this area should be resolved by statutory amendment. The Committee feels that K.S.A. 60-258(a), should be amended to clearly state that economic loss damages are within the purview of that statute.

m. Privity.

RECOMMENDATION 20: To limit the liability of professionals to the party or parties with whom they contract or to third parties the professional can reasonably foresee will be damaged at the time the professional advice is provided.

RATIONALE: The best example of the situation covered by this recommendation occurs in the case where a plaintiff is allowed to sue an accountant for negligence in connection with alleged negligence on the part of the accountant in preparing audited financial statements on which the plaintiff relied to his detriment.

This Committee is advised that in New York, a rule exists that a third party can only bring a suit when the accountant knows and understands that the financial statements he is preparing are intended for use by that particular party, for a particular purpose, and the accountant demonstrates this understanding in some direct contact or communication with that particular third party. Other courts accept the New Jersey rule which is a "foreseeability" rule which allows a negligence suit to be brought by any third party whom the accountant could have reasonably foreseen would rely on financial statements audited or otherwise reported by the accountant.

Another approach contained in Section 552, Restatement of Torts, Second, requires the third party to be either known or actually foreseen by the accountant, either personally or as a member of a limited class of persons, as one who would rely on the accountant's report on financial statements. This view differs from the "forseeability" rule in that it does not include the requirement of conduct on the accountant's part linking him to the particular non-contracting party.

There are two key points to be noted in reviewing this model statute. First, the crucial limitation on the reach of this statute would be that it would be limited to actions predicated on negligence as opposed to fraud. Thus, any active and knowing wrongdoing by an accountant should be judged by the established and stern standards that are currently applied. However, in the case of unintentional mistakes and oversights, this negligence should not be extended to impose liability on accountants for indeterminate losses incurred by a potentially unlimited class of unknown users of the financial statement.

Secondly, the proposed model statute establishes a test to be applied to a given situation. Essentially, this test ensures that the accountant will only face liability to persons or entities specifically known and identified to the accountant as parties who would rely on the financial statements, based on direct contact and communication between the accountant and the third party. The rationale for this provision is based upon the theory that the privity rule embodied is based upon carefully drawn policy considerations; that is, it is the auditor's duty to render an audit opinion with due care, but this duty runs by contract only to the audit client. The auditor may anticipate that others, such as investors and creditors, might read and rely on the opinion,

but typically, the accountant has no ability to limit their numbers or to control the influence or magnitude of the risk they may take in reliance on the statement. As Judge Cardozo stated more than 50 years ago in Ultramares v. Touche, 255 N.Y. 170 (1931):

> "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entires, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to kindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."

The Citizens Committee adopts the language contained in the Restatement of Contracts.

n. Joint and Several Liability.

RECOMMENDATION 21: That the Legislature codify the present Kansas case law on joint and several liability.

RECOMMENDATION 22: That the Legislature establish a separate cause of action for Kansas residents or citizens to seek sanctions in Kansas courts for violation of the above section by parties in causes of actions brought outside this State.

RATIONALE FOR RECOMMENDATIONS 21 AND 22: Recent research indicates that a great number of states retain joint and several liability among defendants in tort cases, and, in those jurisdictions, it is possible for the plaintiff to select the defendant against whom he or she desires to bring suit or to enforce a judgment for the entire amount of recovery. Moreover, there is wide

diversity among states in respect to rights of contribution among joint tortfeasors. A few states recognize no right of contribution. A number of states allow contribution only on a per capita basis (for example: three defendants; one found 80% responsible and one 10%; would have right of contribution of 33-1/3% each). In some states, moreover, a plaintiff to whom a jury might assign a substantial percentage of fault may recover the entire judgment from the defendant of his choice. It is patently unfair for one party to be required to respond for the fault of another. The Legislature should act to codify the present law of joint and several liability. This will prevent a Kansas court from changing the present law based solely upon a change in the make-up of the Kansas Supreme Court.

o. Mary Carter Agreements.

RECOMMENDATION 23: That guaranty agreements, sometimes referred to as Mary Carter Agreements, be prohibited in Kansas as in violation of public policy.

RECOMMENDATION 24: That the Legislature establish a separate cause of action for Kansas residents or citizens to seek sanctions in Kansas courts for violations of the above section by parties in causes of action brought outside this State.

RATIONALE FOR RECOMMENDATIONS 23 AND 24: Mary Carter, or guaranty agreements, are a device which has come into common use in the last two decades, especially in product liability litigation. It involves, most frequently, the insurer for a party known to have been at least partially, if not entirely, at fault in causing injury. This party enters into an arrangement with a prospective plaintiff to initiate an action against another

prospective defendant -- often a product manufacturer -- with an agreement by the insurer that if the litigation against the manufacturer is unsuccessful or results in a judgment or settlement for less than the specified amount, the insurer will make up the difference.

In essence, Mary Carter or guaranty agreements permit a defendant at fault to place himself or his insurer in the position of having a contingent interest in the plaintiff's claim against another party. Such an arrangement smacks of champerty. These arrangements are an outgrowth or refinement of the "deep pockets" approach which has become so common in modern tort litigation. It proceeds on the erroneous theory that responsibility for fault is a secondary consideration to bringing suit against a large and industrial concern. Insurance companies are sometimes responsible for initiating Mary Carter agreements. It is a device which allows insurers to have a second chance to escape their responsibility for payment caused by the conduct of the person to whom they have issued a liability policy.

More often than not, Mary Carter agreements are negotiated and carried out in secret. While Kansas courts have recently required Mary Carter agreements to be disclosed, this does not correct the harm. Even if disclosed, it encourages defendants to work against the interests of other defendants for reasons having nothing to do with the merits of the action. There are reported cases in which a defendant and his insurer who hold one of these agreements have participated in litigation ostensibly as a co-defendant when they were, in secret, allied with the plaintiff. Secret Mary Carter agreements and guaranty agreements are utterly destructive of the litigation process and, contrary to popular belief in some quarters, they impair rather than advance the chance for settlement.

Ultimately, the target defendant is being positioned to pay a settlement which really goes for the benefit of the party at fault, more than the claimant, and in this environment, fair and reasonable settlements cannot be achieved. This is true whether the agreement is disclosed or not.

p. Strict Liability.

RECOMMENDATION 25: That the Legislature make the doctrine of strict liability applicable only in product liability cases involving alleged defects in manufacturing or materials, and to require that other cases, including cases involving alleged defects in design, warning or instructions, be litigated under negligence or expressed contract theories.

RATIONALE: Findings of a study done by the United States Department of Justice lead to that Department's recommendation for the total abolishment of the strict liability doctrine. While that recommendation has considerable merit, our recommendation does not go so far. To apply the doctrine of strict liability to the largely subjective factual determination of design, warnings, and the like, based substantially upon hindsight, is inappropriate.

q. Legal Liability of Directors and Officers.

RECOMMENDATION 26: That Kansas consider a statute similar to Delaware Senate Bill No. 533 which allows corporations the discretionary authority to limit the liability of a corporate director to the corporation and the corporation stockholders for breach of fiduciary duty as a director, provided the director did not breach his duty of loyalty, did not commit an act of intentional misconduct or

a knowing violation of law, did not act in bad faith, and did not derive an improper personal benefit.

RECOMMENDATION 27: That elected public officials of governmental boards and appointed members of governmental advisory boards be immune from personal liability for discretionary acts committed in the normal course of their business, except for fraud, bad faith, or malice.

RECOMMENDATION 28: That Kansas adopt a statute exempting directors, officers, and trustees of organizations or trusts described in Section 501(c)(3) of the Internal Revenue Code from personal liability for acts performed in the normal course of their business, unless the conduct of such director, officer, or trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability.

RATIONALE FOR RECOMMENDATIONS 26, 27, AND 28: The lack of adequate directors' and officers' liability insurance affects private businesses, governmental entities, and non-profit public service organizations. The best candidates to be directors and officers of these entities are often discouraged from serving because of liability problems.

r. Self-Insurance and Insurance Pooling Arrangements.

RECOMMENDATION 29: That the Legislature and the Insurance Commissioner support the efforts of governmental units and businesses, that consider it necessary, to self-insure or enter into insurance pooling arrangements.

RATIONALE: Even though the Committee is concerned about the movement of risks from commercial insurance markets to self-insurance mechanisms, and particularly non-insurance, the Committee recognizes that this movement is often a matter of necessity. The Legislature and the Insurance Commissioner should assist Kansas citizens, businesses, and governmental units to self-insure.

s. Rate Making and Form Approval.

RECOMMENDATION 30: An objective threshhold should be established that allows a "sophisticated commercial insured" to be exempt from many of the restrictions on uses of non-admitted insurance companies and excess and surplus lines markets.

RATIONALE: Large, sophisticated businesses do not need as much protection from insurance regulators as smaller, less sophisticated organizations. The Legislature should relax regulatory requirements that may impede sophisticated insureds from organizing or obtaining necessary insurance coverage at a reasonable price.

RECOMMENDATION 31: The Insurance Department should be granted any additional authority it believes is necessary to gather specific by-line data on insurance activities.

RATIONALE: Although the Insurance Department receives sufficient data from insurers upon which to set rates, the data is often broken down only by rating classification and subject. The Insurance Commissioner should be given additional authority to obtain data in a format that is meaningful to

consumers. Senate Bill No. 729, proposed in the 1986 legislative session, should accomplish this objective.

RECOMMENDATION 32: The Insurance Department should be given authority to require insurance carriers and insurance agency communities to undertake adequate educational programs to inform consumers of new insurance policies, forms, and procedures. The Insurance Department should also be granted full authority to control the usage of new insurance forms, policies, and procedures for unsophisticated commercial insureds.

RATIONALE: The Insurance Commissioner must be given authority to demand that insurers use educational programs to explain new or particularly complex policies, forms, and procedures. This authority would have been most helpful recently during the introduction of claims-made policies by insurance companies. Even with the elaborate disclosure statement required by the Commissioner, many consumers simply did not understand how the claims-made policy worked and were unable to make an intelligent judgment regarding claims-made policies.

RECOMMENDATION 33: The Legislature should investigate and give strong consideration to any request from the Kansas Insurance Commissioner for additional staff and equipment, and that premium tax revenues be used, if necessary, for this purpose.

RATIONALE: Insurance raises substantial revenues for Kansas through the premium tax. If necessary, premium tax revenues should be used to insure that adequate staff and resources are available to carry out the responsibilities

of the Insurance Department.

t. Limiting Market Abuse and Early Indications of Carrier Financial Difficulty.

RECOMMENDATION 34: The Legislature should provide the Kansas Insurance Commissioner with adequate authority to limit marketplace abuse and to monitor for early indications of carrier financial difficulties.

u. Alternative Funding Mechanisms.

RECOMMENDATION 35: The Legislature should continue to provide the Kansas Insurance Commissioner with stand-by authority to establish voluntary Market Assistance Programs (MAPs) for those lines of property and casualty insurance considered to be distressed.

RATIONALE: When the free marketplace fails to meet the needs of insurance consumers, the Kansas Insurance Code should be supportive of alternative risk financing mechanisms. They can provide short-term relief in extreme situations and may also serve in the long term to spur competition.

v. Excess Reserves.

RECOMMENDATION 36: The Committee accepts the concept that insurance company reserves should be reviewed by the Insurance Department as they develop and mature to insure they are not excessive, and recommends that the Legislature adopt that portion of the excess profits bill proposed by the Insurance Commissioner that provides for the review of established reserves.

RATIONALE: The Committee rejects the concept of excess profits as being unnecessary in a competitive property and casualty environment. The excess profits bill might discourage insurance companies from reducing expenses or maximizing investment income. The Committee does accept the concept of monitoring loss reserves as they mature to insure they were appropriate when established.

w. Rating Plans.

RECOMMENDATION 37: The Committee accepts the concept of the Insurance Commissioner having greater authority over the establishment of rating plans.

RATIONALE: Currently, Kansas has a "prior approval" rating system for commercial lines of insurance. Under this system, the rates and forms to be used by admitted carriers for commercial risks require prior approval before becoming effective. The traditional prior approval system places Kansas among a shrinking minority of states. There has been a trend in the last two decades toward greater flexibility (file and use systems or open competition) for those commercial insurance buyers with the sophistication to bargain knowledgeably on rates and forms. The theory has been that more open competition among carriers would enhance insurance affordability and provide the environment for rapid change and adjustment to market conditions.

Even in a "prior approval" rating system, some flexibility is provided to insurance companies through the use of rating plans which permit rates to be increased or decreased based upon certain established criteria. The Committee supports increased supervision and control of rating plans by the Insurance

Commissioner.

2. RECOMMENDATIONS TO THE KANSAS INSURANCE COMMISSIONER.

a. National Standards for Enabling Authority and Standard Reporting Formats.

RECOMMENDATION 38: That the Kansas Insurance Department should continue to work with its peers in the National Association of Insurance Commissioners (NAIC) to develop uniform enabling authority and standard reporting formats to reduce associated administrative costs and that these reports should be public documents freely available to the public.

b. National Uniform Data Gathering.

RECOMMENDATION 39: The Kansas Insurance Commissioner is encouraged to assert his influence on the National Association of Insurance Commissioners (NAIC) to adopt uniform measures in the areas of national data collection, standard commercial insurance policy forms, and solvency monitoring.

c. Joint Underwriting Associations (JUAs).

RECOMMENDATION 40: The Kansas Insurance Department should cautiously approach the uses of Joint Underwriting Associations (JUAs) on a case by case basis, and use JUAs only after obtaining independent actuarial expertise and analysis to determine the appropriateness of a JUA.

d. Captive Insurance and Insurance Exchanges.

RECOMMENDATION 41: The Kansas Insurance Department should thoroughly investigate and report to the Legislature whether captive insurance legislation and insurance exchange formations taking place in several States (1) offer any relief to the insurance availability problem within Kansas, or (2) can contribute significantly to the general economic development of Kansas.

e. State Cooperation with Self-Funding Arrangements.

RECOMMENDATION 42: Kansas insurance regulations should facilitate attempts by "sophisticated commercial insureds" to use licensed carriers as fronts for self-insurance or captive insurance arrangements.

f. Insurance Company Obligation for High Risk.

RECOMMENDATION 43: The Insurance Commissioner should encourage the insurance industry to accept an obligation to make its underwriting capacity available to the more hazardous exposures in society.

3. RECOMMENDATIONS TO THE KANSAS DELEGATION IN WASHINGTON.

RECOMMENDATION 44: The Chairman of this Committee is directed to advise the Kansas Congressional delegation of its support for:

(a) The Senate Commerce Committee's Uniform Products Liability bill.

(b) The expansion of the 1981 Federal Risk Retention Act to apply to all seriously distressed property and casualty lines with federal pre-emption eliminating the necessity for risk retention groups to comply with each State's regulatory requirements.

(c) The support of the General Aviation Tort Reform Act of 1986.

RATIONALE: The Committee recognizes that many liability problems are unlikely to be addressed at the State level. Products liability problems, for example, transcend State boundaries. Kansas manufacturers sell goods in all States and suits for defective products generally arise in states other than Kansas. In order to provide meaningful relief, national legislation is necessary and Kansas should encourage national responses to these national problems.

# COMBINED RATIO AFTER DIVIDENDS

KANSAS vs COUNTRYWIDE

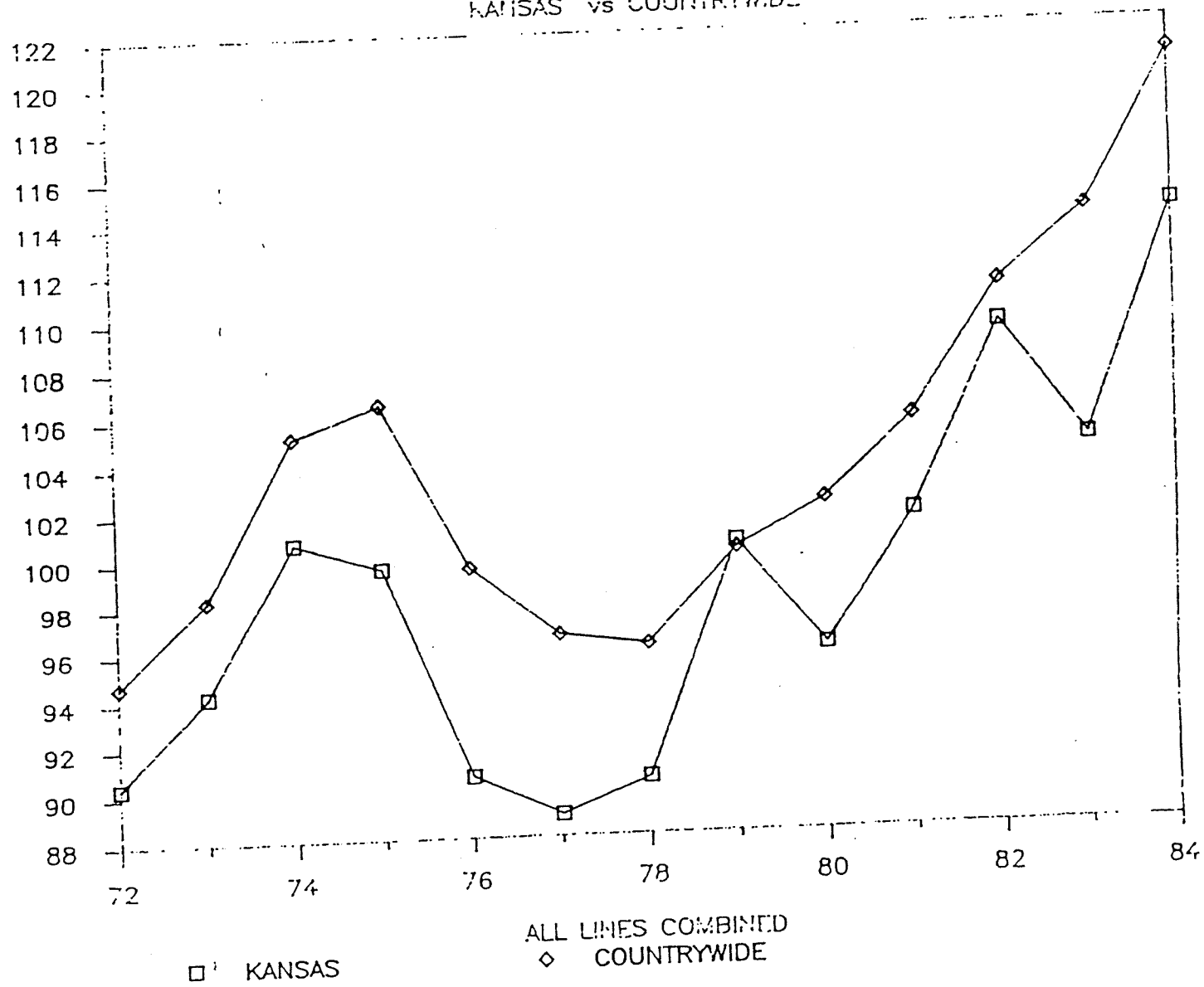



CHART 1

CHART 1

# COMBINED RATIO AFTER DIVIDENDS

KANSAS vs COUNTRYWIDE

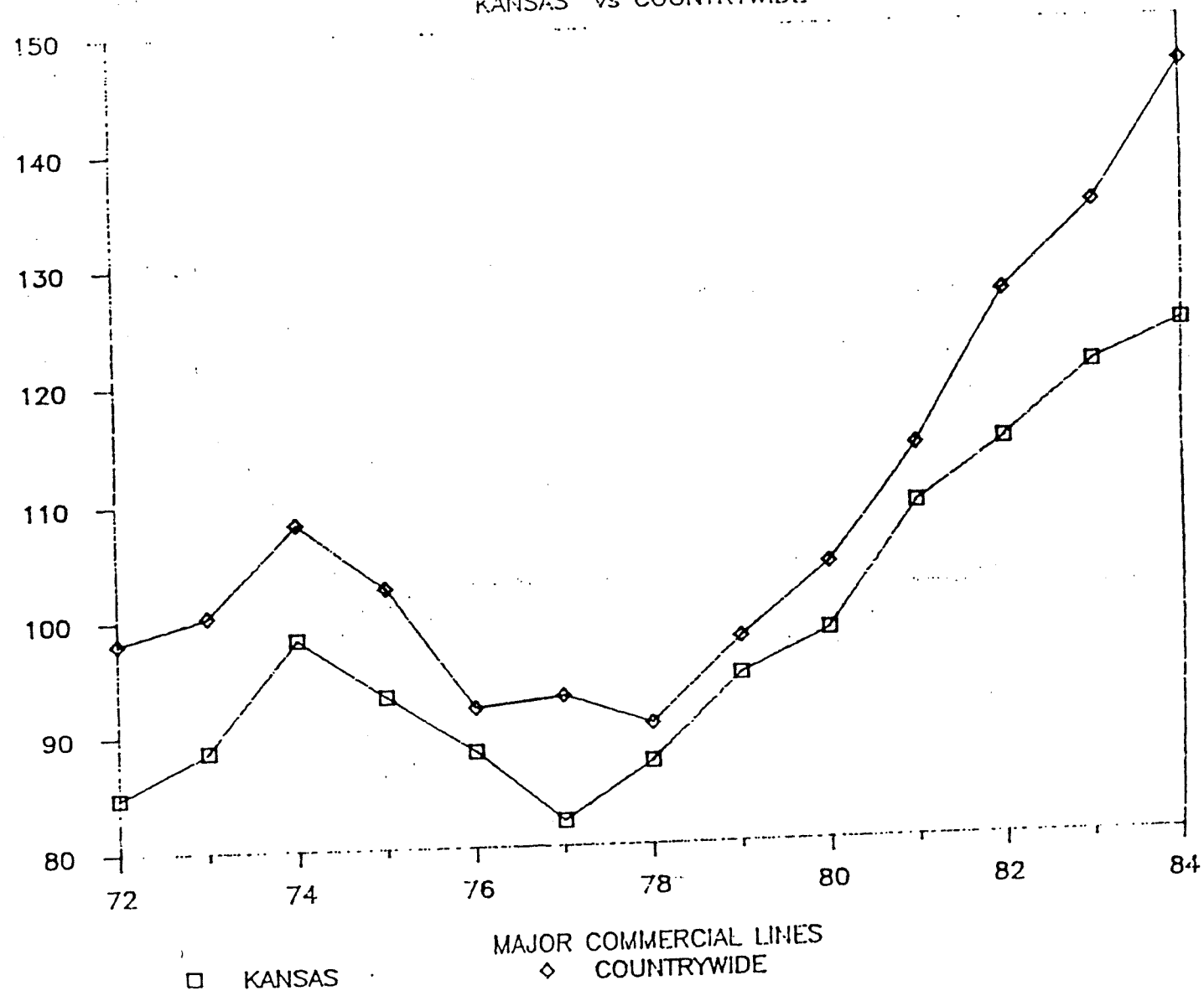



CHART 2

CHART 2

# COMBINED RATIO AFTER DIVIDENDS

KANSAS vs COUNTRYWIDE

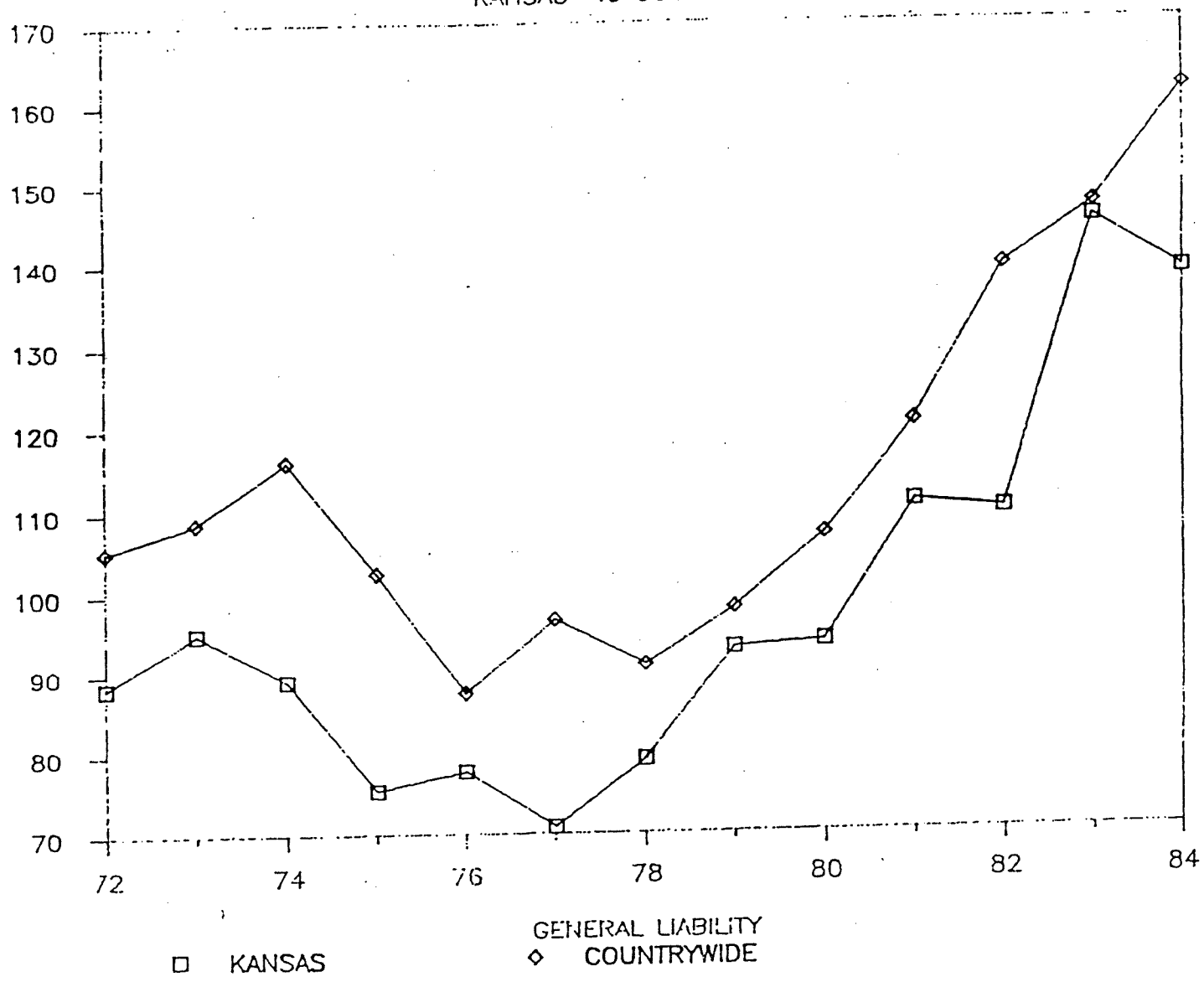



CHART 3

CHART 3

# WRITTEN PREMIUM vs LOSSES & EXPENSE

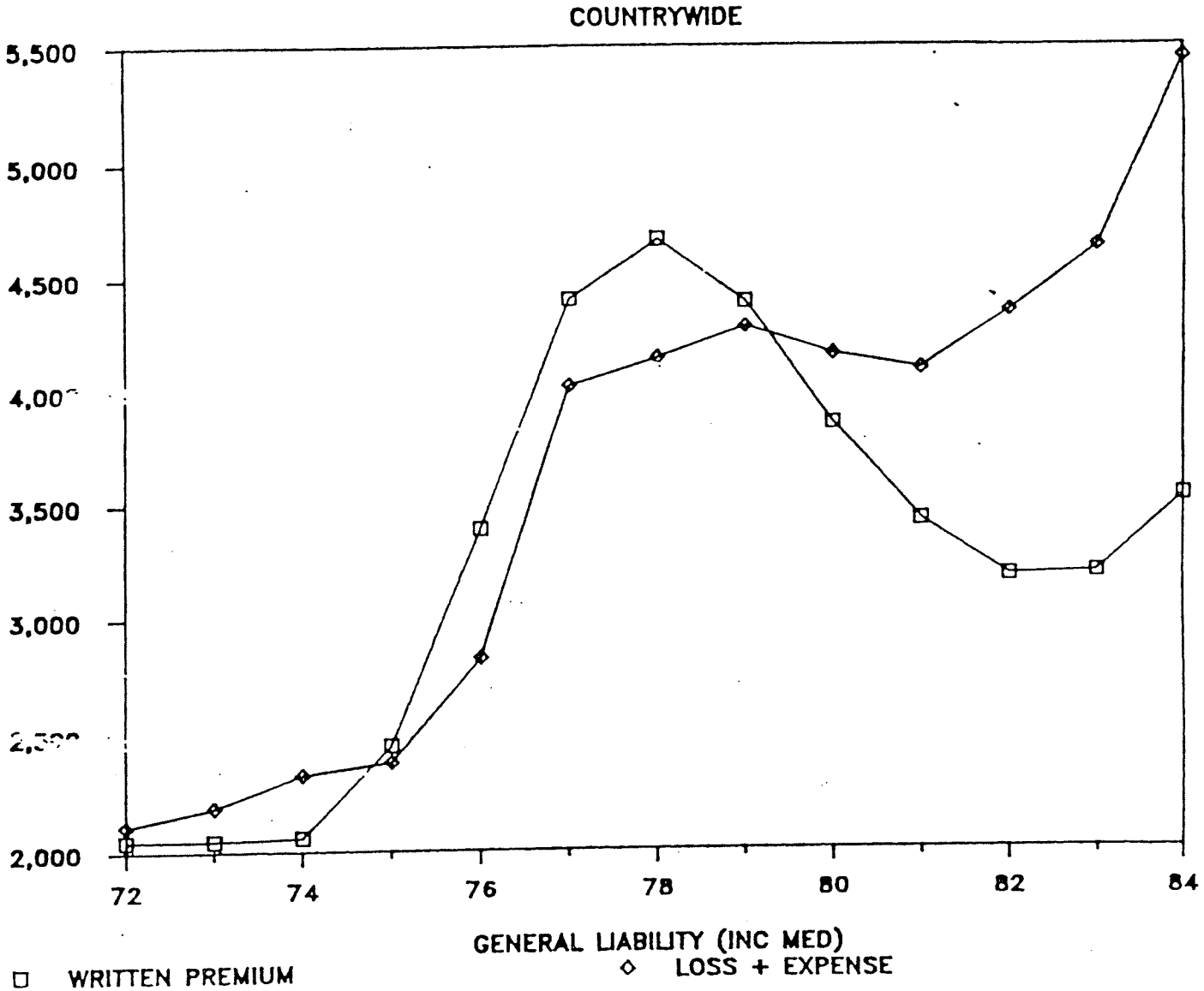



CHART 4

CHART 5

# WRITTEN PREMIUM vs LOSSES & EXPENSE

ALL LINES COMBINED – KANSAS

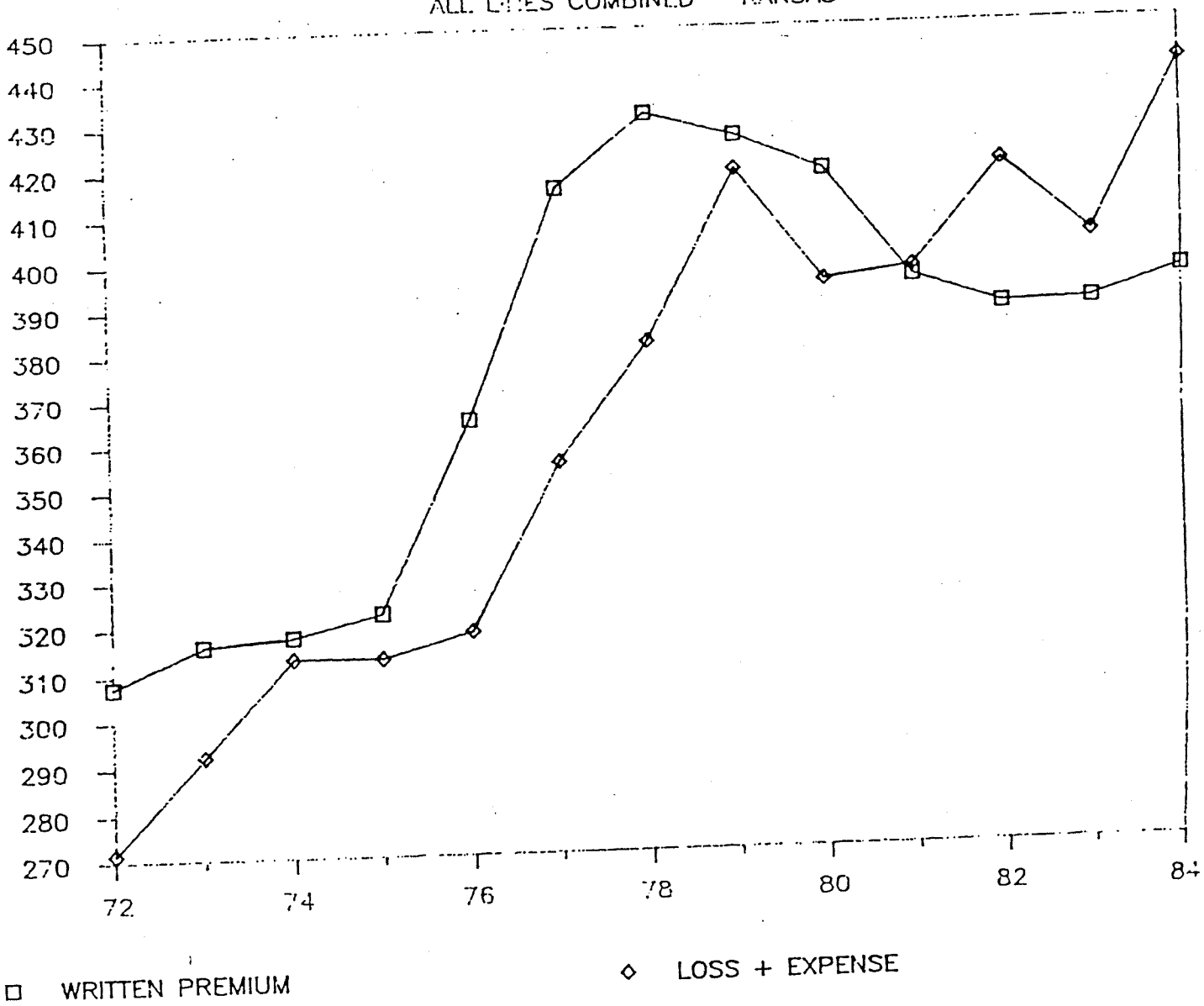



CHART 5

CHART 5

CHART 6

# WRITTEN PREMIUM vs LOSSES & EXPENSE

## GENERAL LIABILITY – KANSAS

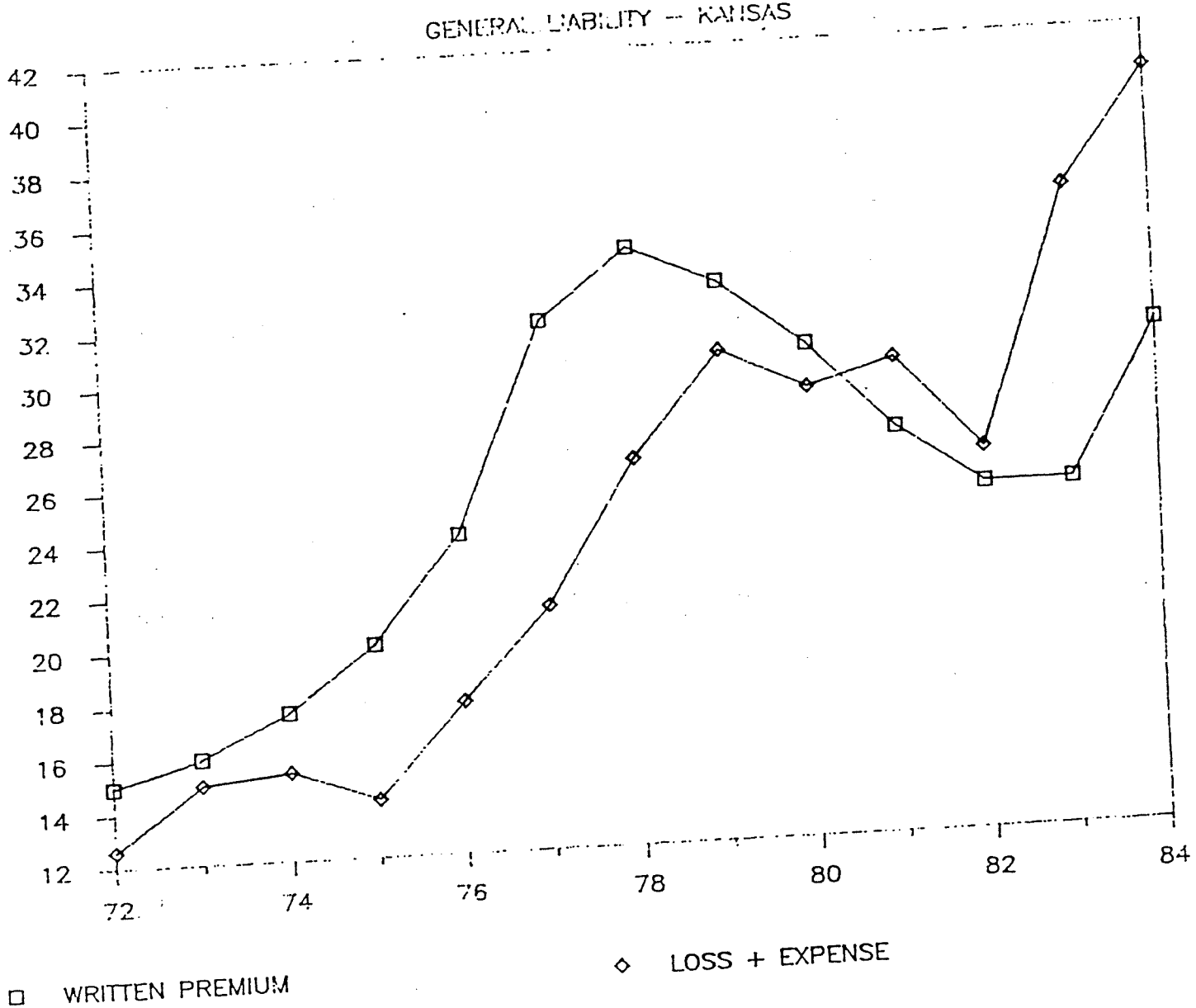



CHART 6

CHART 6

CHART 7

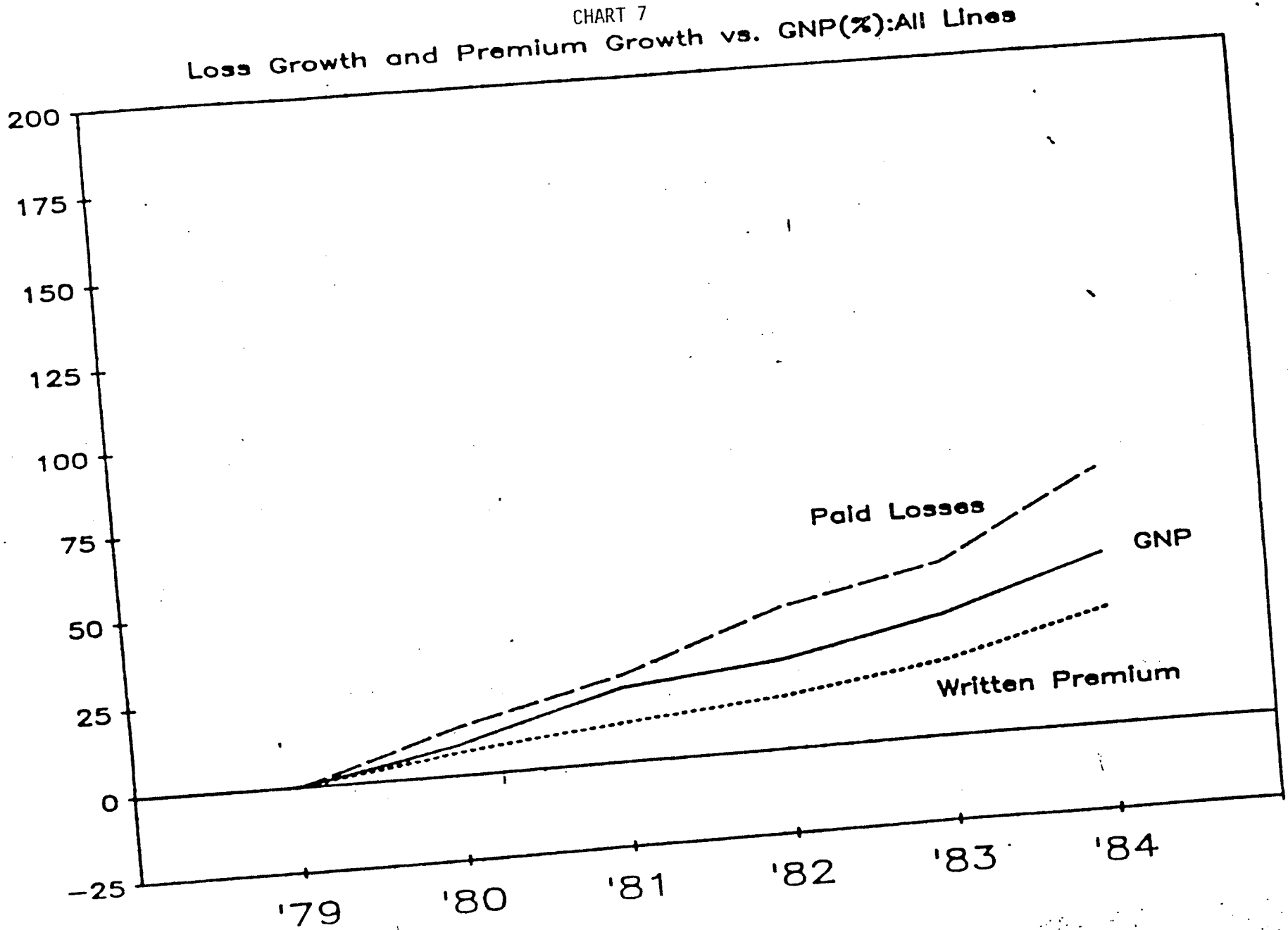



CHART 7

CHART 7

## Loss Growth and Premium Growth vs. GNP(%):Commercial Liability

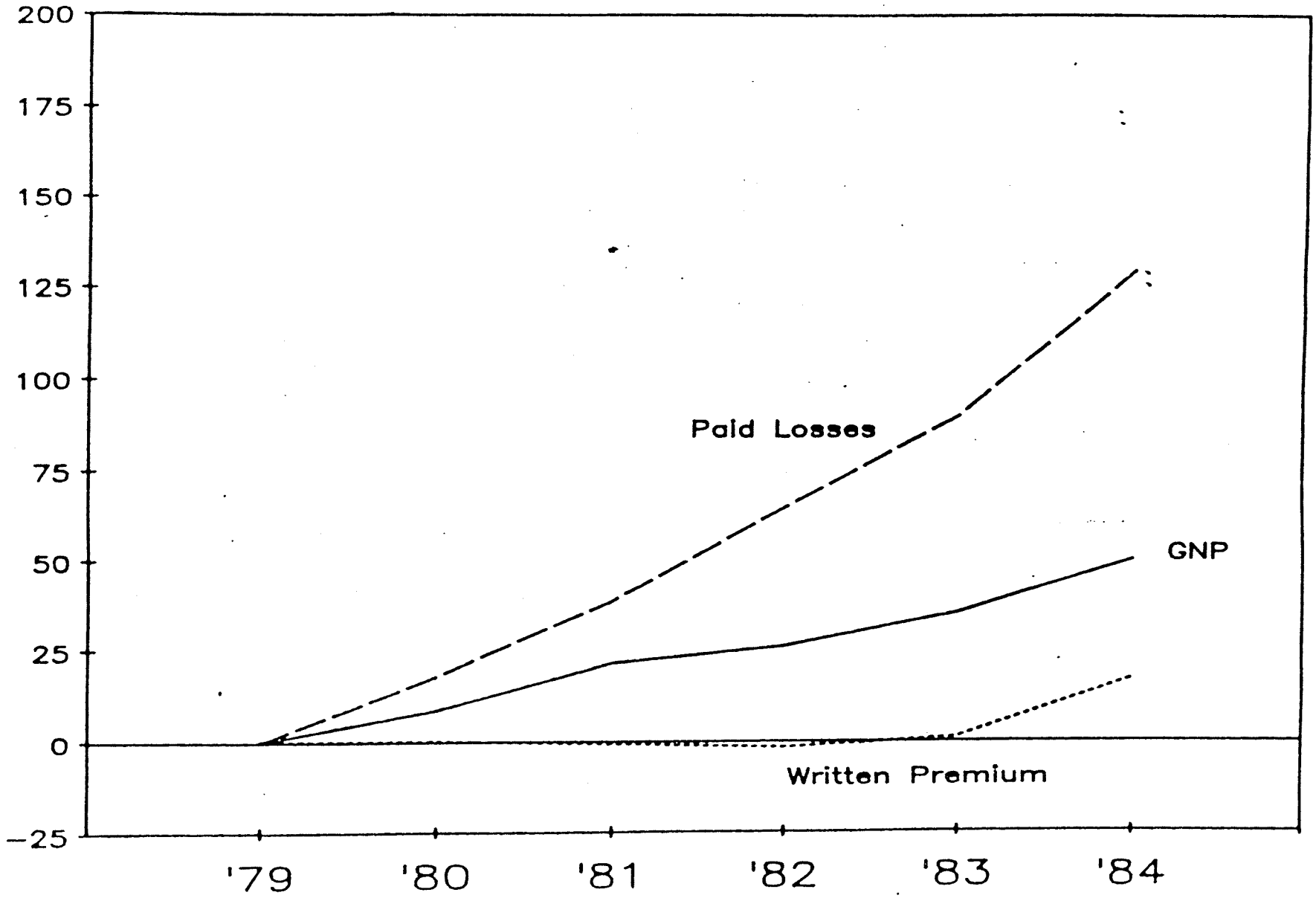



CHART 8

CHART 8

# PREMIUM vs LOSSES vs GNP

ALL LINES

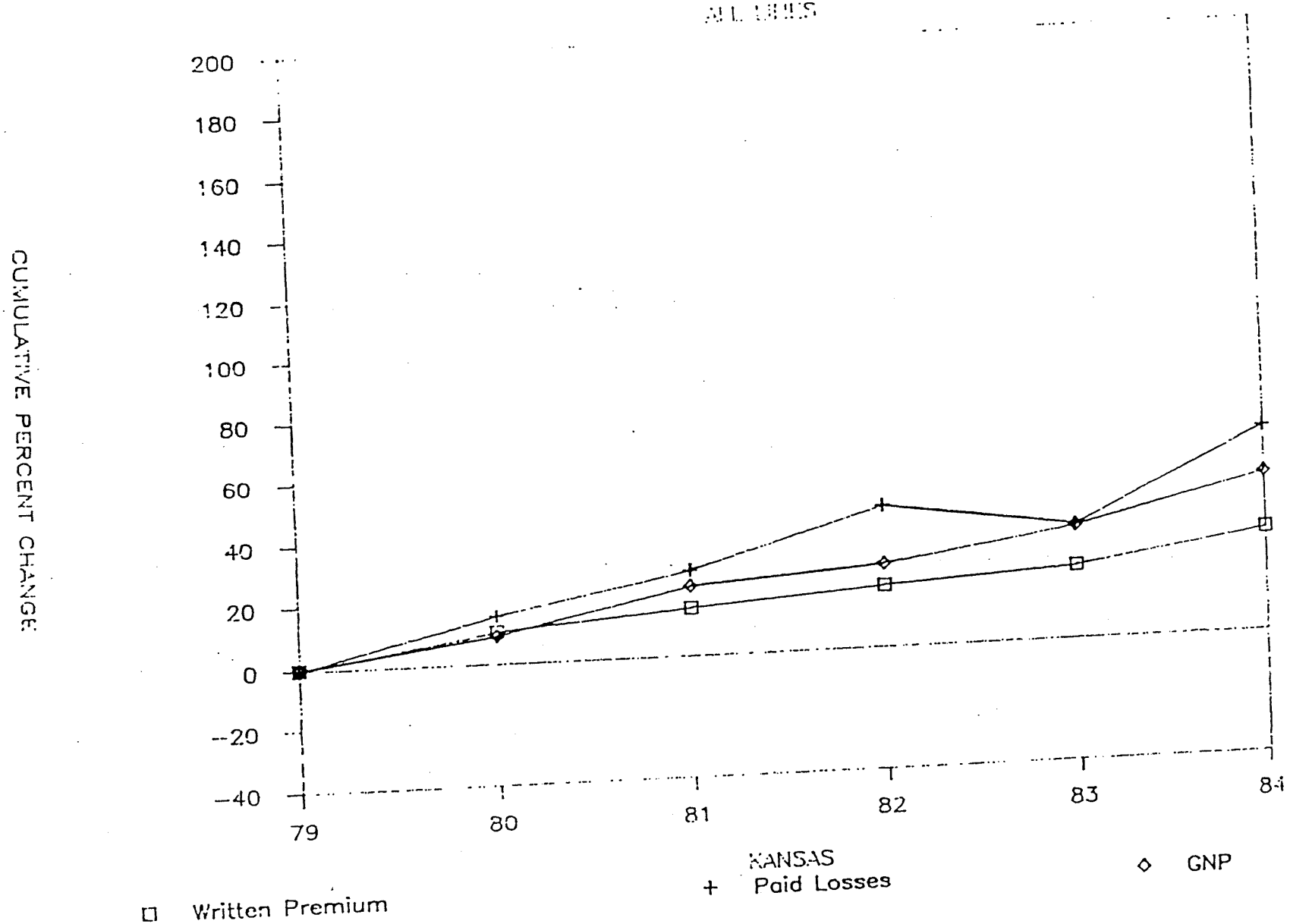





CHART 9

# PREMIUM vs LOSSES vs GNP

## COMMERCIAL LIABILITY

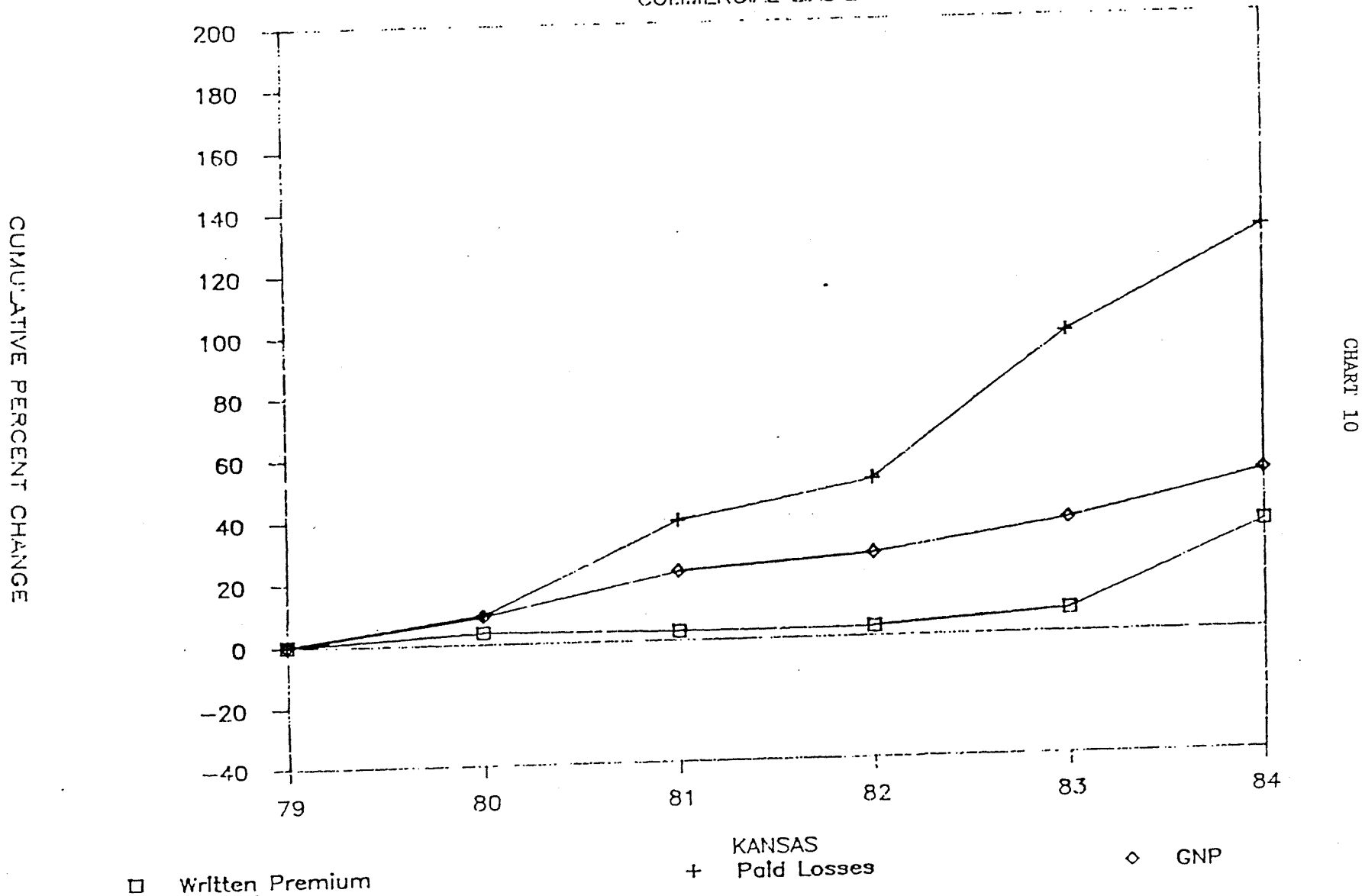



CHART 10

CHART 10

CHART 11

# PREMIUM vs LOSSES vs GNP

## GENERAL LIABILITY (INCL MED MAL)

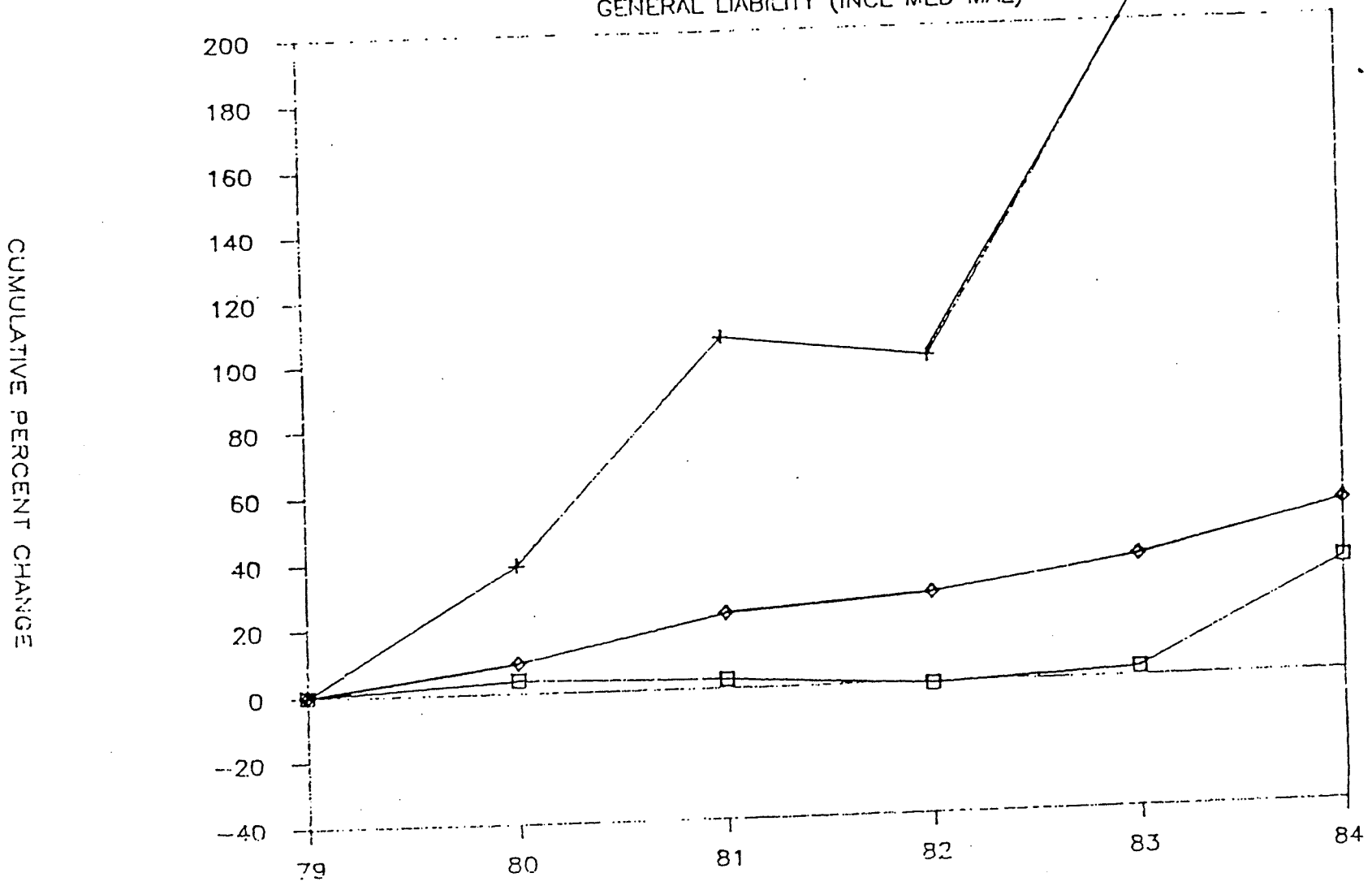



CHART 11

CHART 11

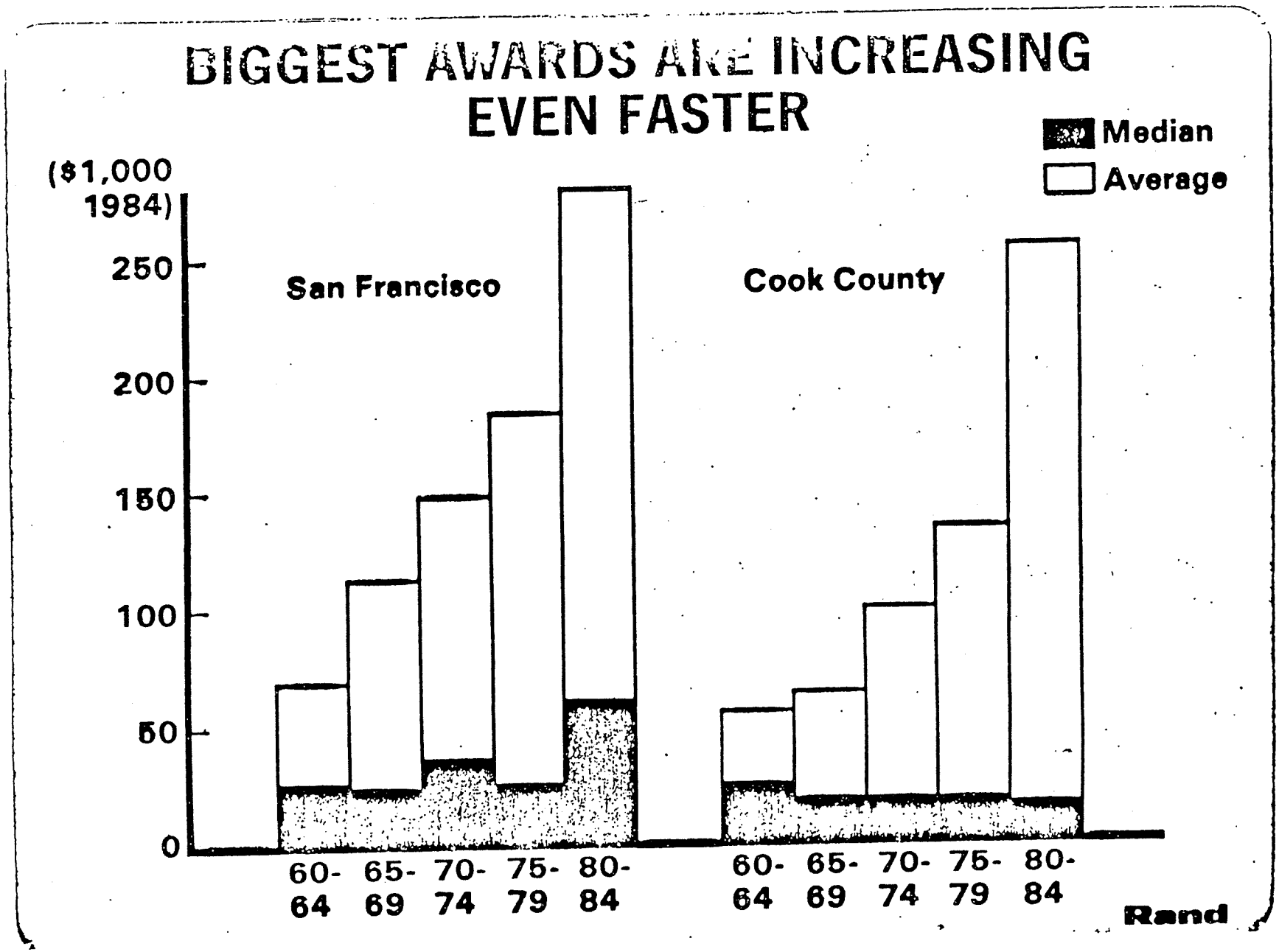

BIGGEST AWARDS ARE INCREASING EVEN FASTER
Median
Average
($1,000 1984)
250
200
150
100
50
0
San Francisco
Cook County
60-64
65-69
70-74
75-79
80-84
60-64
65-69
70-74
75-79
80-84
Rand

CHART 12

# MILLION DOLLAR AWARDS DOMINATE

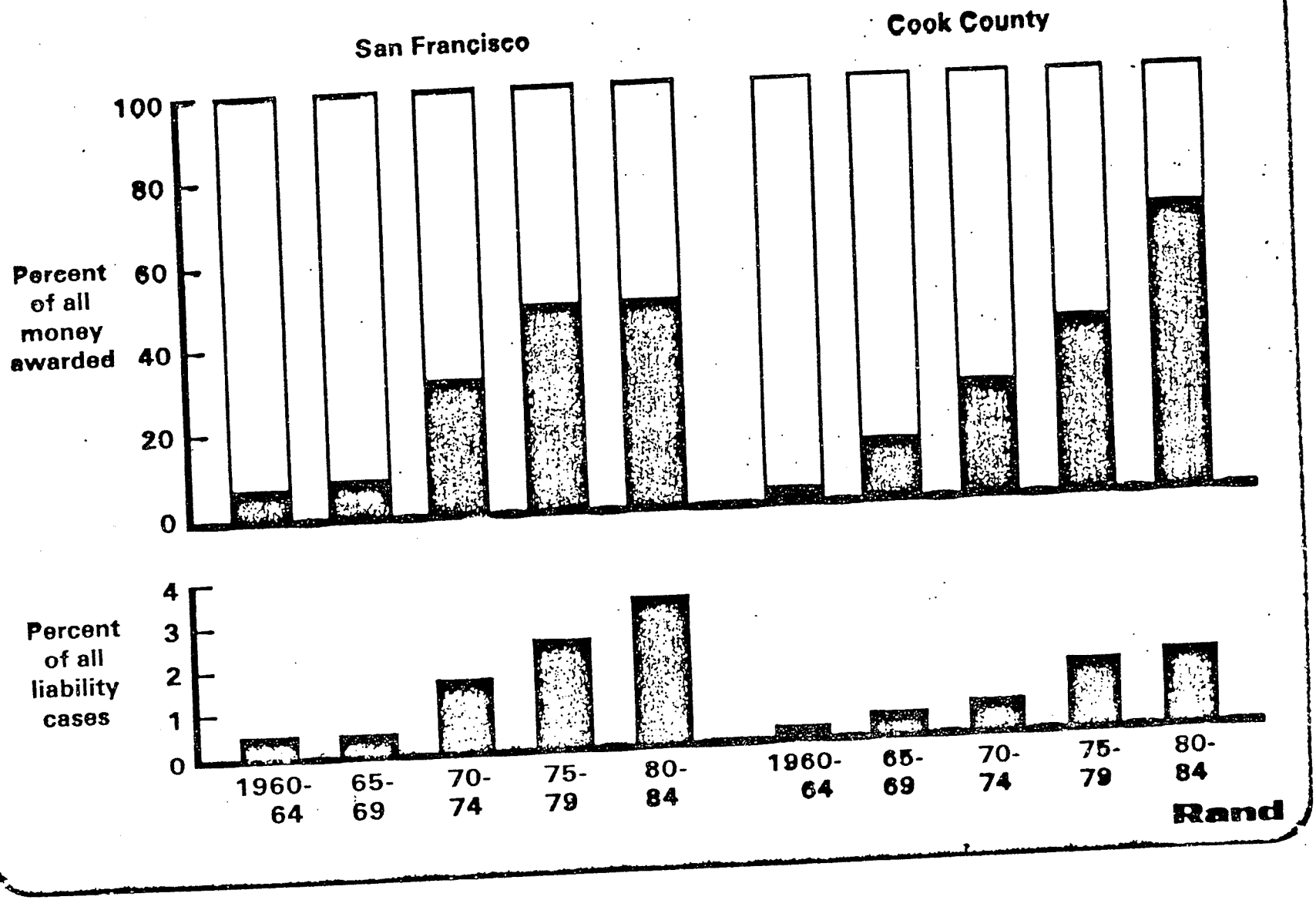



CHART 13

# INCREASES WERE GREATER FOR SERIOUS INJURIES
## (MEDIAN AWARD, $1000 1979)

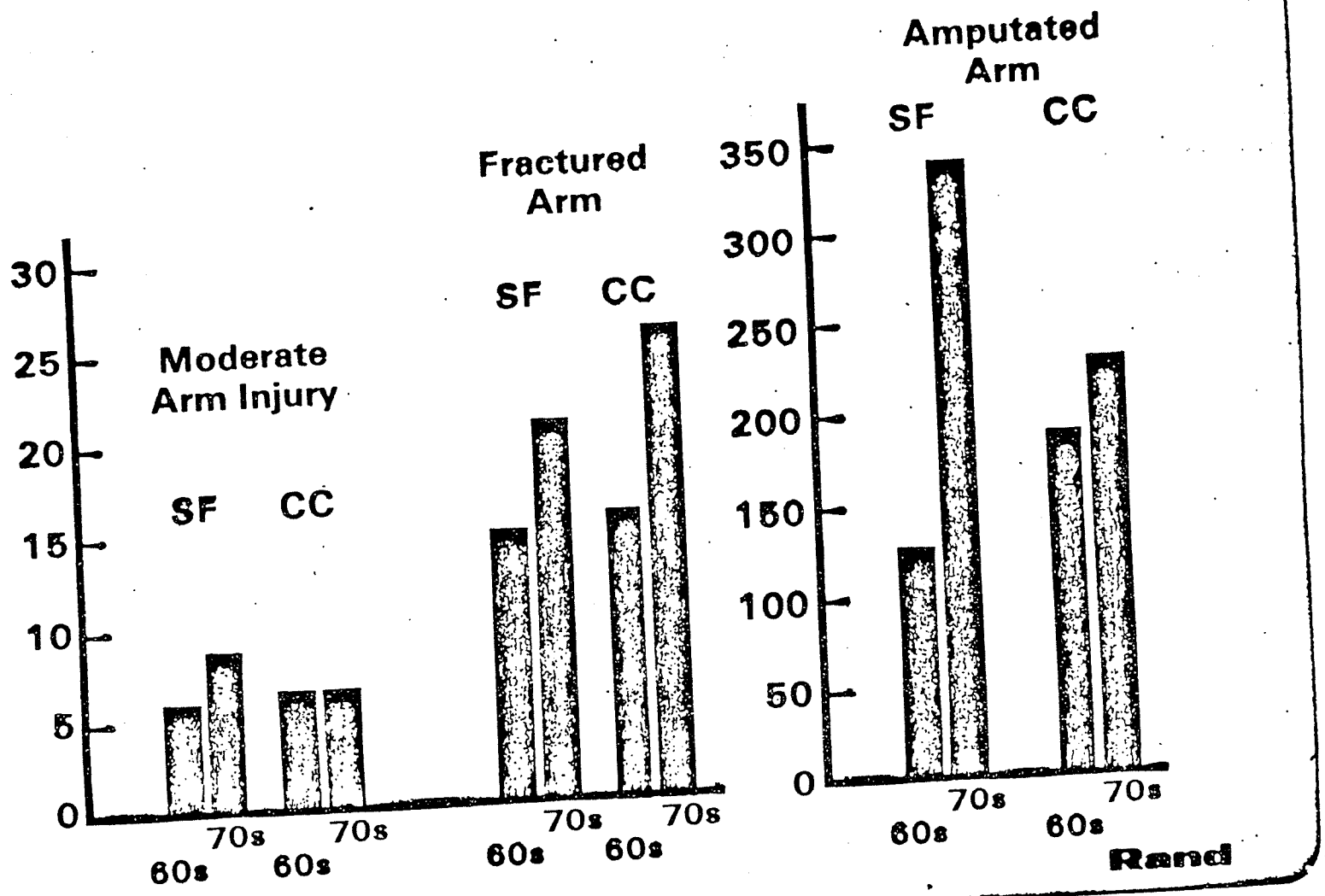
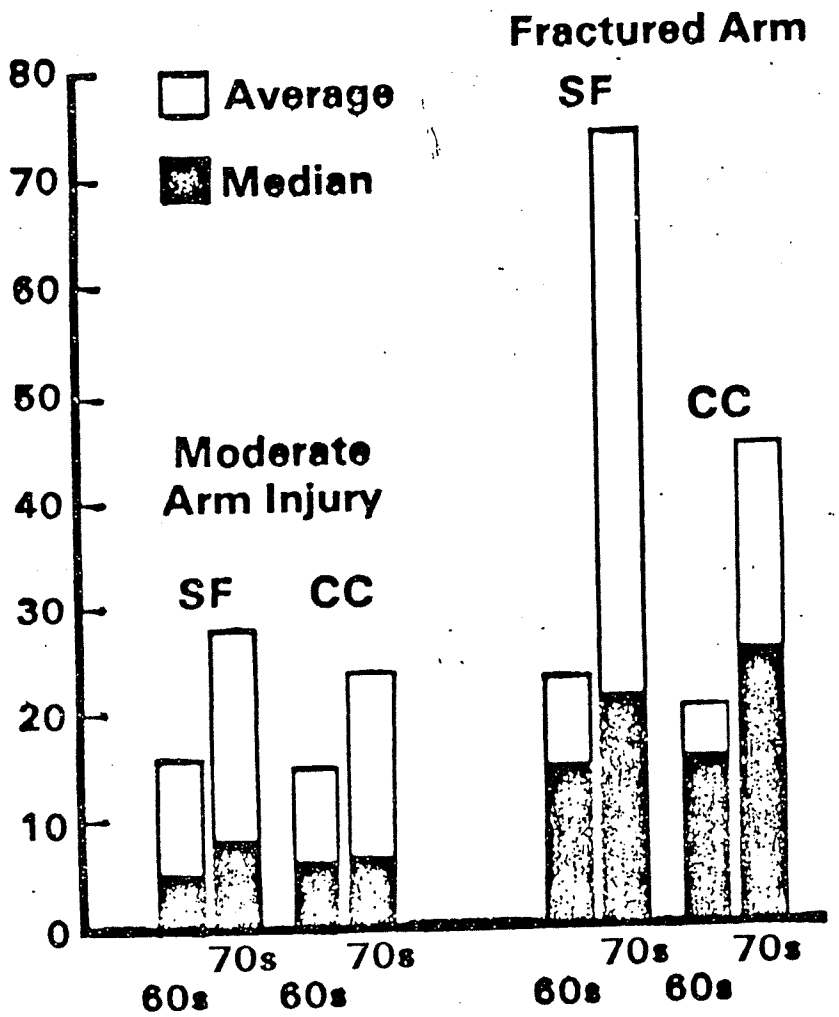



CHART 14

# LARGE AWARDS INCREASED AND BECAME LESS PREDICTABLE

($1000, 1979)



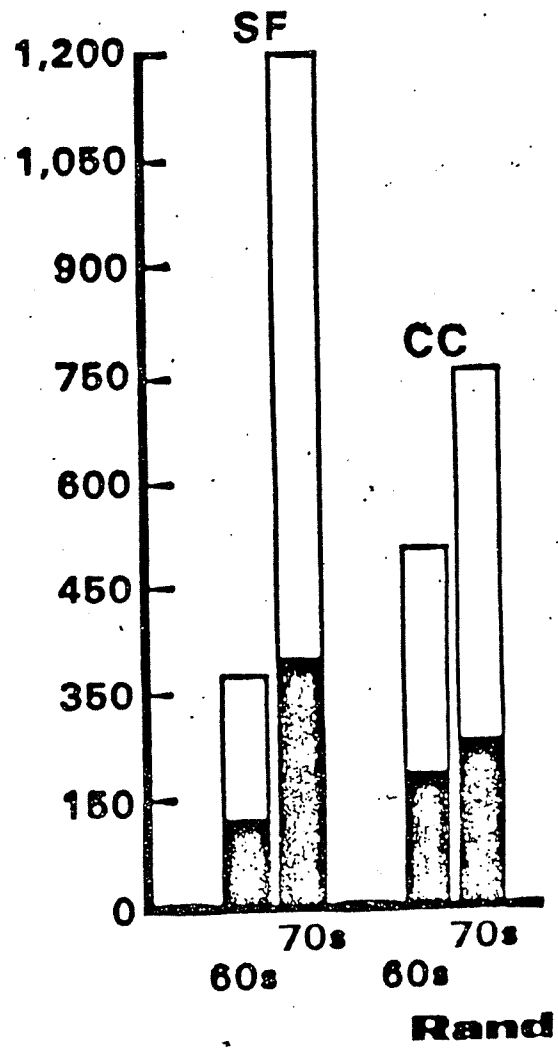




CHART 15

# AMOUNT OF INCREASE DIFFERED FOR CASE TYPES AND JURISDICTION
## (MEDIAN $1,000, 1979)

| | | San Francisco | % change | Cook County | % change |
|---|---|---|---|---|---|
| Malpractice | 1970s | 109 | 79 | 101 | 106 |
| | 1960s | 61 | | 49 | |
| Work injury | 1970s | 48 | 9 | 79 | 30 |
| | 1960s | 44 | | 61 | |
| Product liability | 1970s | 51 | 143 | 65 | 41 |
| | 1960s | 21 | | 46 | |
| Street hazard | 1970s | 48 | 140 | 37 | 54 |
| | 1960s | 20 | | 24 | |
| Automobile | 1970s | 20 | 18 | 17 | 6 |
| | 1960s | 17 | | 16 | |

Awards for serious, disabling leg fracture

Rand

CHART 16

# TYPICAL AWARDS AGAINST DEEP POCKETS ARE LARGER

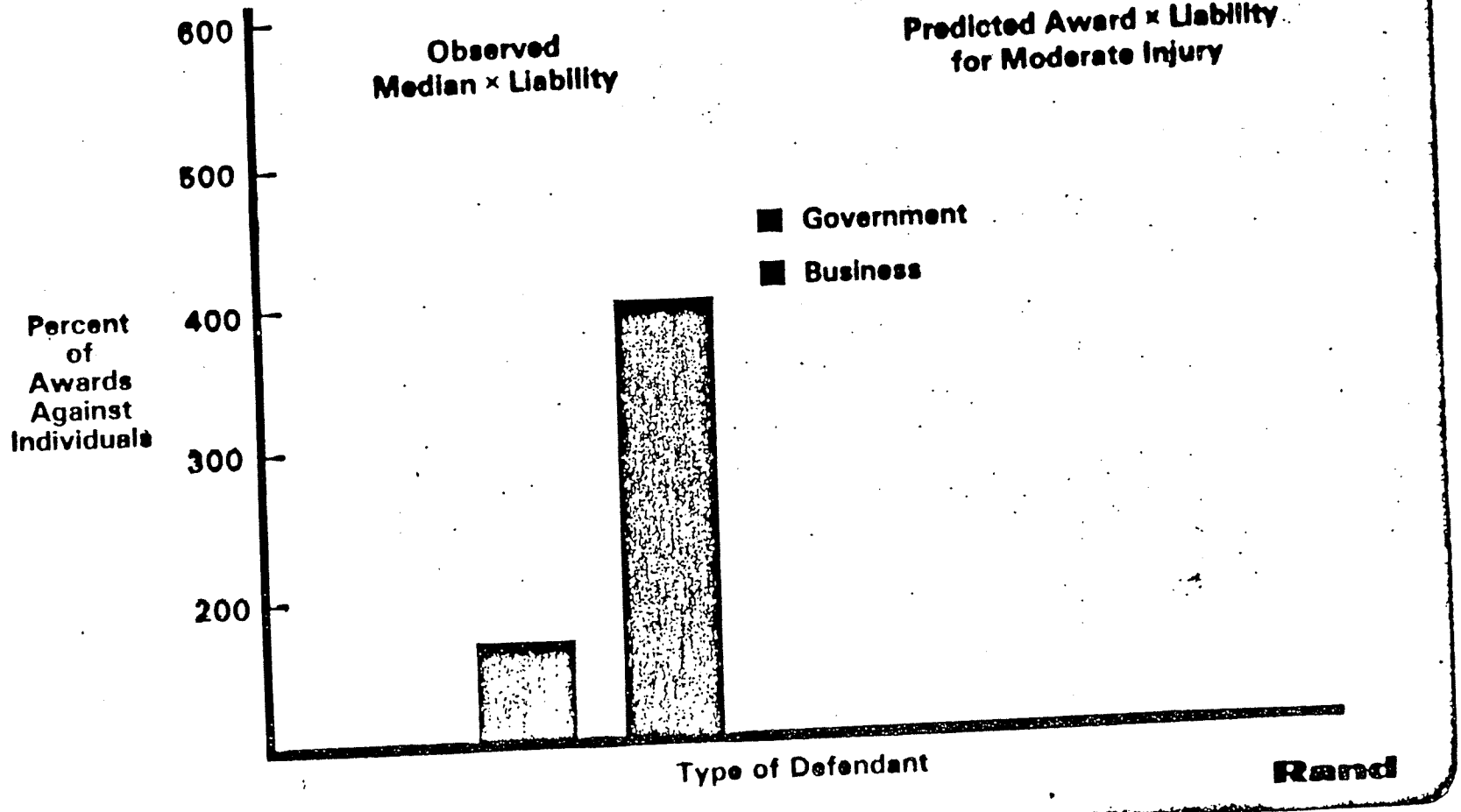



CHART 17

# LARGE AWARDS AGAINST DEEP POCKETS ARE NOT EXPLAINED BY DIFFERENCES IN CASES

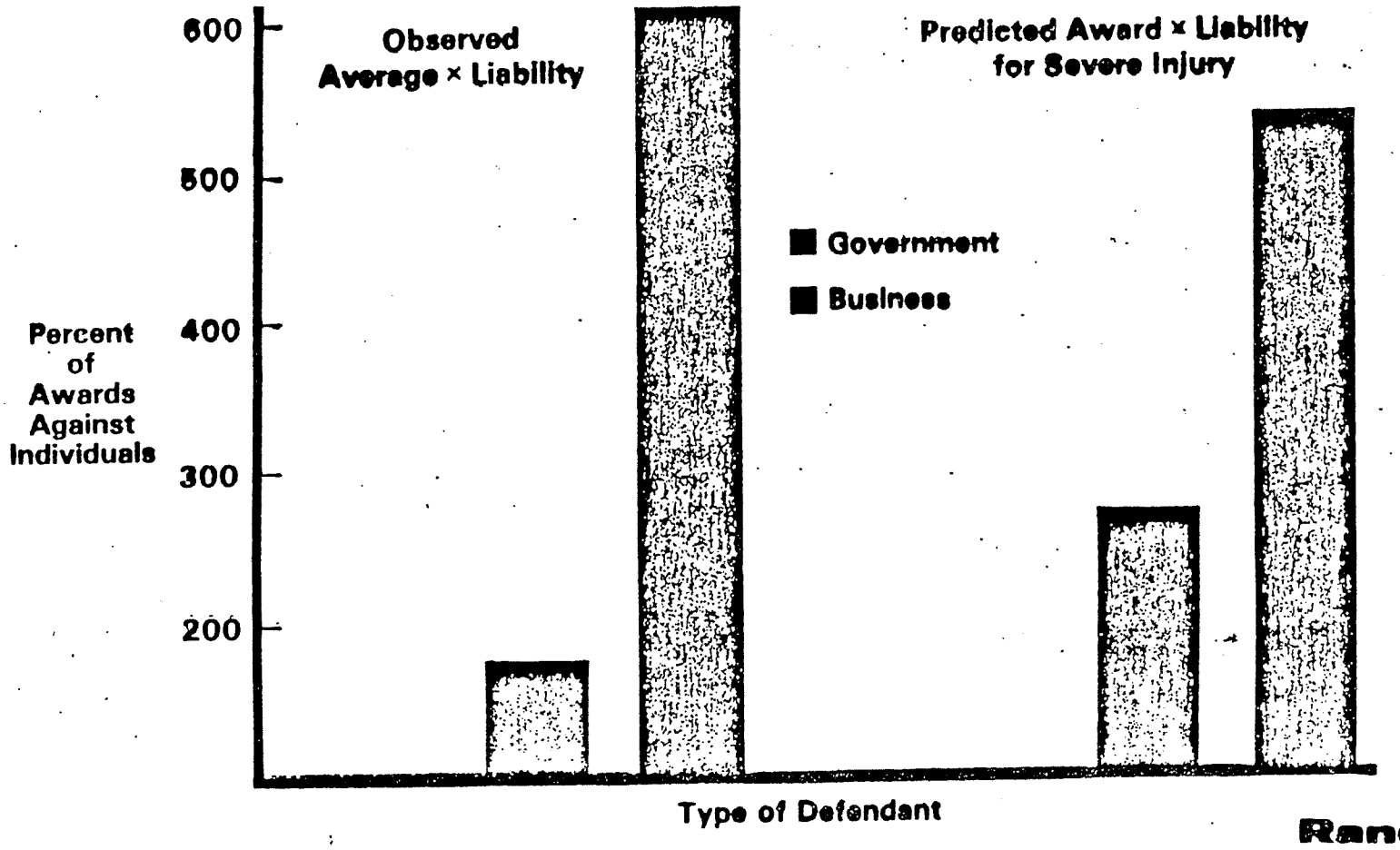
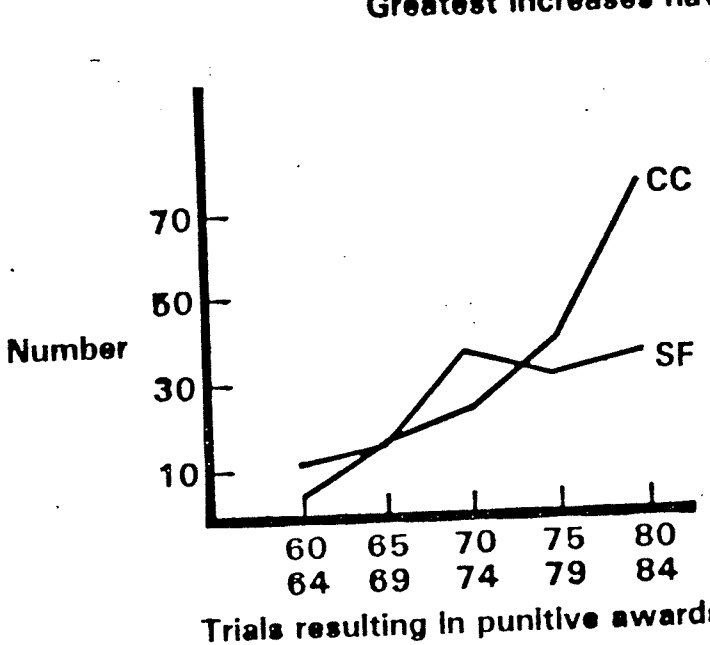


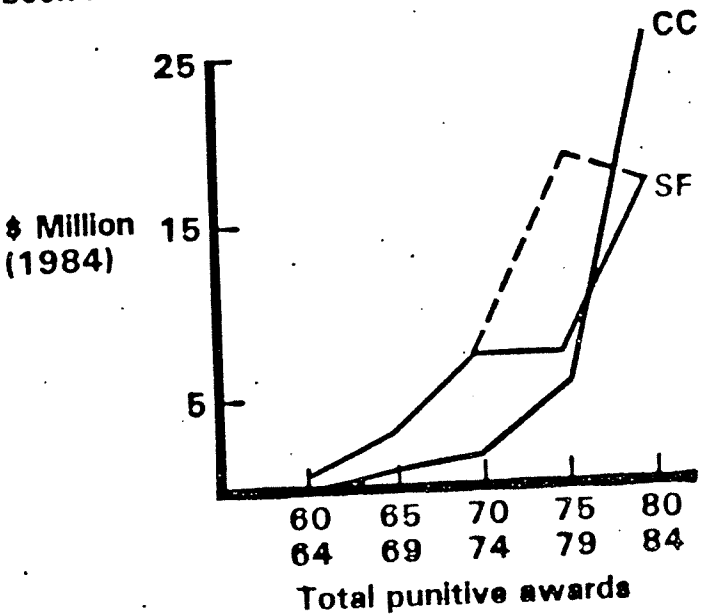

CHART 18

# PUNITIVE DAMAGE AWARDS ARE MORE FREQUENT AND LARGER

**Greatest increases have been in Cook County since 1980.**




Trials resulting in punitive awards




Total punitive awards

Rand

CHART 19

# DEFENDANTS LIABLE FOR PUNITIVE DAMAGES

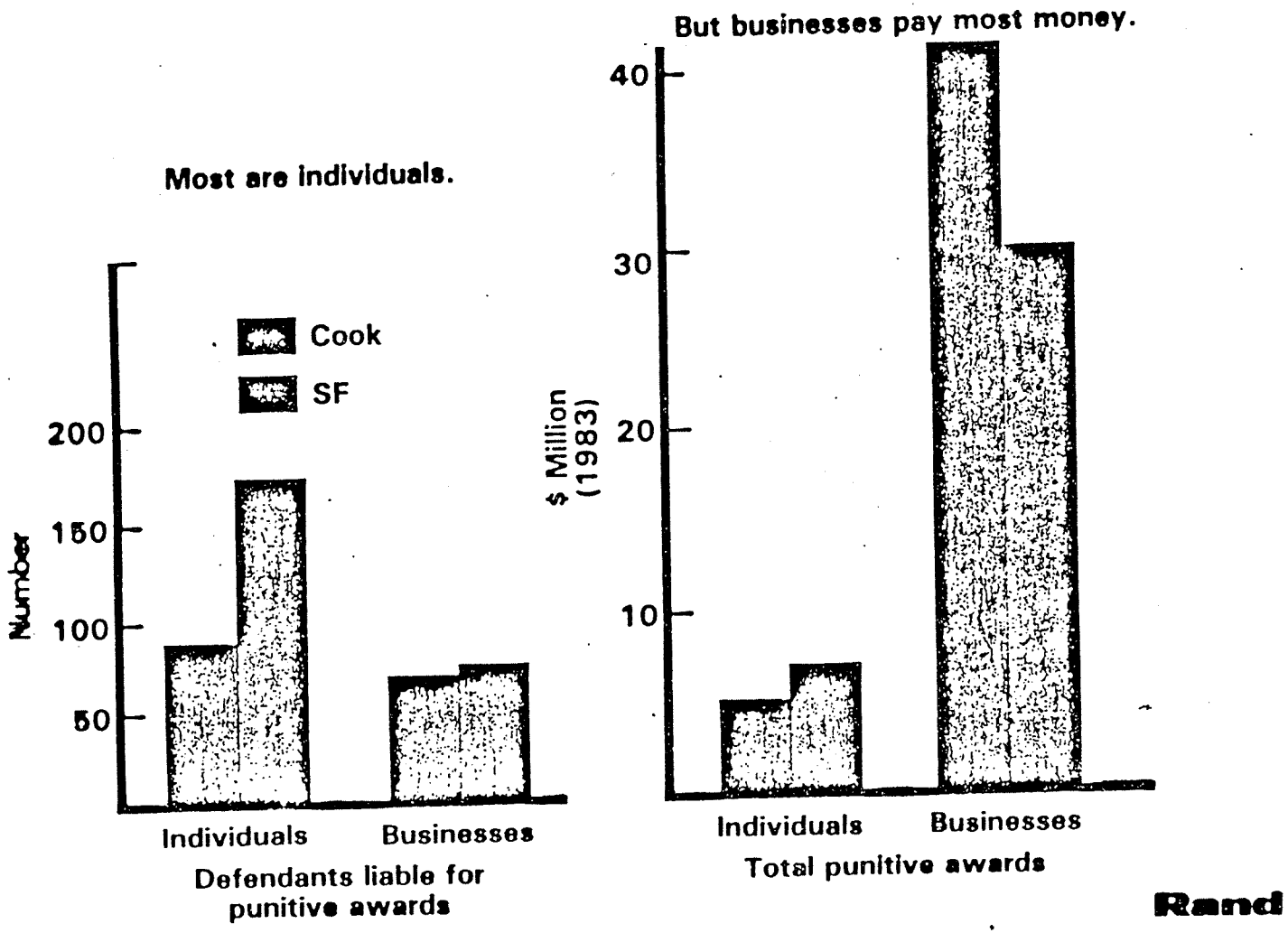
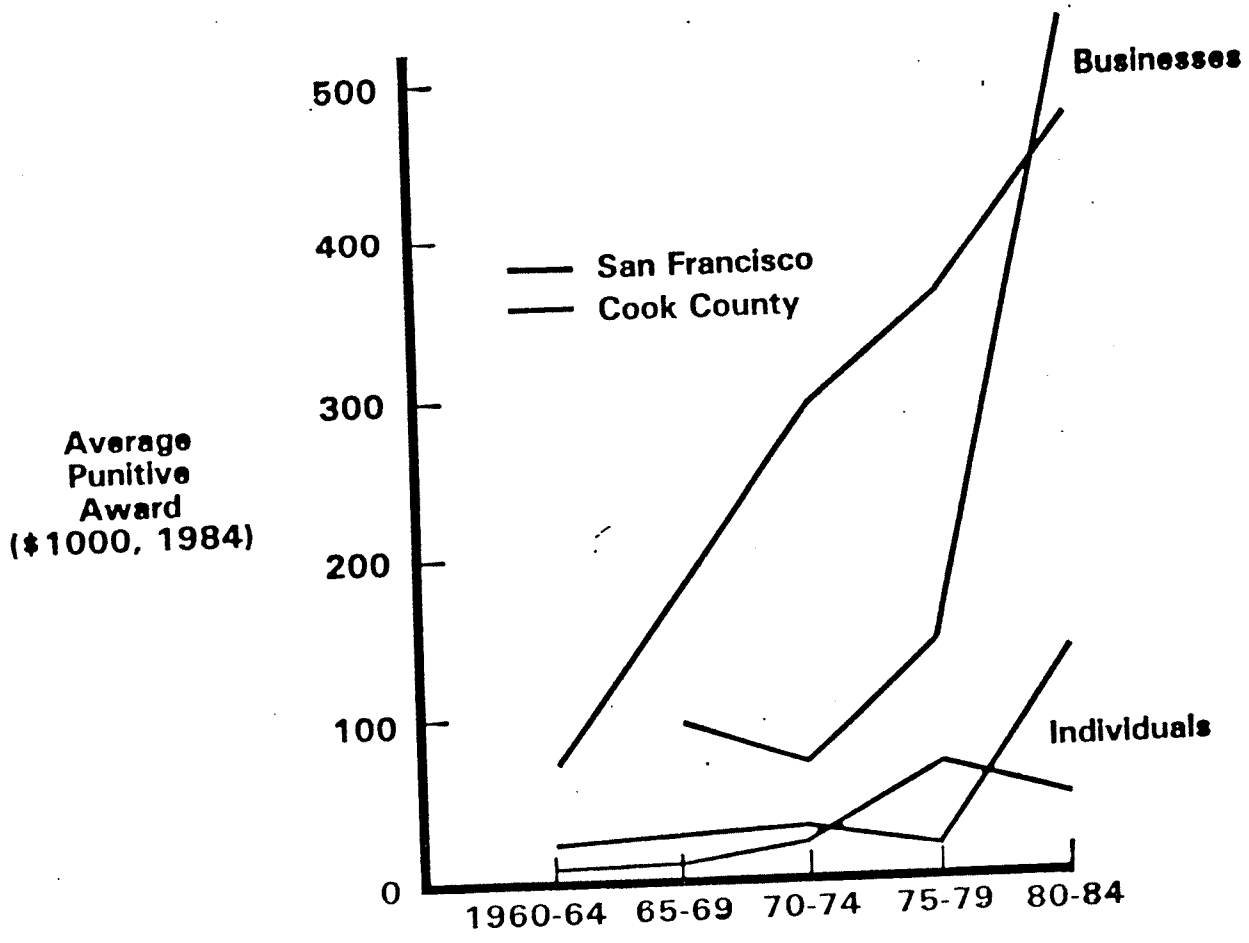



CHART 20

# PUNITIVE AWARDS AGAINST BUSINESSES INCREASED SHARPLY




Rand

CHART 21

# PART VI

## Appendices

# APPENDIX A

Charge to Legal Liability Citizens Committee

The charge to the Committee is simple. The Committee is to review the legal liability environment in Kansas and render an opinion as to whether such environment is, in fact, a situation which should be cause for public and legislative concern because of its impact on legal liability insurance or other mechanisms used to finance the civil justice system.

If so, the Committee is to identify, to the extent possible, the causative factors that seem to be responsible and develop, at least in conceptual terms, such recommendations as may be necessary to alleviate the direct and indirect adverse influences.

On the other hand, if the Committee concludes that few, if any, liability awards and settlements are excessive; that injured persons are treated fairly; and that the process used in determining whether negligent acts were committed and the manner in which the damages are calculated is effective, efficient, and meets society's needs, the Committee should so state and its recommendations should reflect such a finding.

The Committee shall have complete freedom to pursue its charge as the Committee, itself, shall determine.

# APPENDIX B

# OVERVIEW

1984 was the worst year to date for the property/casualty insurance industry. While 1985 had only slightly improved returns on net worth, the industry actually experienced the largest operating loss in its history.

Figure 1 displays key industry results for 1984 and 1985. It includes operating income - the sum of underwriting income, investment income, and miscellaneous other income. This is the most important component of insurers' net income after taxes because it represents profit or loss from insurance operations. For only the second time in its history, the industry experienced operating losses in 1984 - a record $3.8 billion loss. In 1985, underwriting loss increased by more than $3 billion (despite substantial premium increases) while investment income increased by less than $2 billion. This created another record operating loss.

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While this increase in net income after taxes is a positive occurence, WE are concerned with its source. Contributing to the 1985 $2.0 billion increase in income, is $5.4 billion in realized capital gains, a record amount. This was due to unprecendented stock market increases. Tax credits and realized capital gains are not predictable or regularly recurring and therefore cannot be depended on in future years. Positive operating income is essential if insurers are to be able to meet the insurance needs of our growing economy.

# OVERVIEW

1984 was the worst year to date for the property/casualty insurance industry. While 1985 had only slightly improved returns on net worth, the industry actually experienced the largest operating loss in its history.

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Note that throughout this report all results quoted, other than return on net worth, are on a statutory basis. Returns on net worth are quoted on a GAAP basis in order to be comparable to returns calculated in other industries. Also, 1984 and prior statistics have been determined from A.M. Best compiled data. Since 1985 data from A.M. Best is currently unavailable, information on insurer operating results collected by ISO and NAII have been used. 1985 numbers broken down in detail by state and line of insurance are not available yet for several of the enclosed charts.

# INDUSTRY RESULTS

($ BILLIONS)

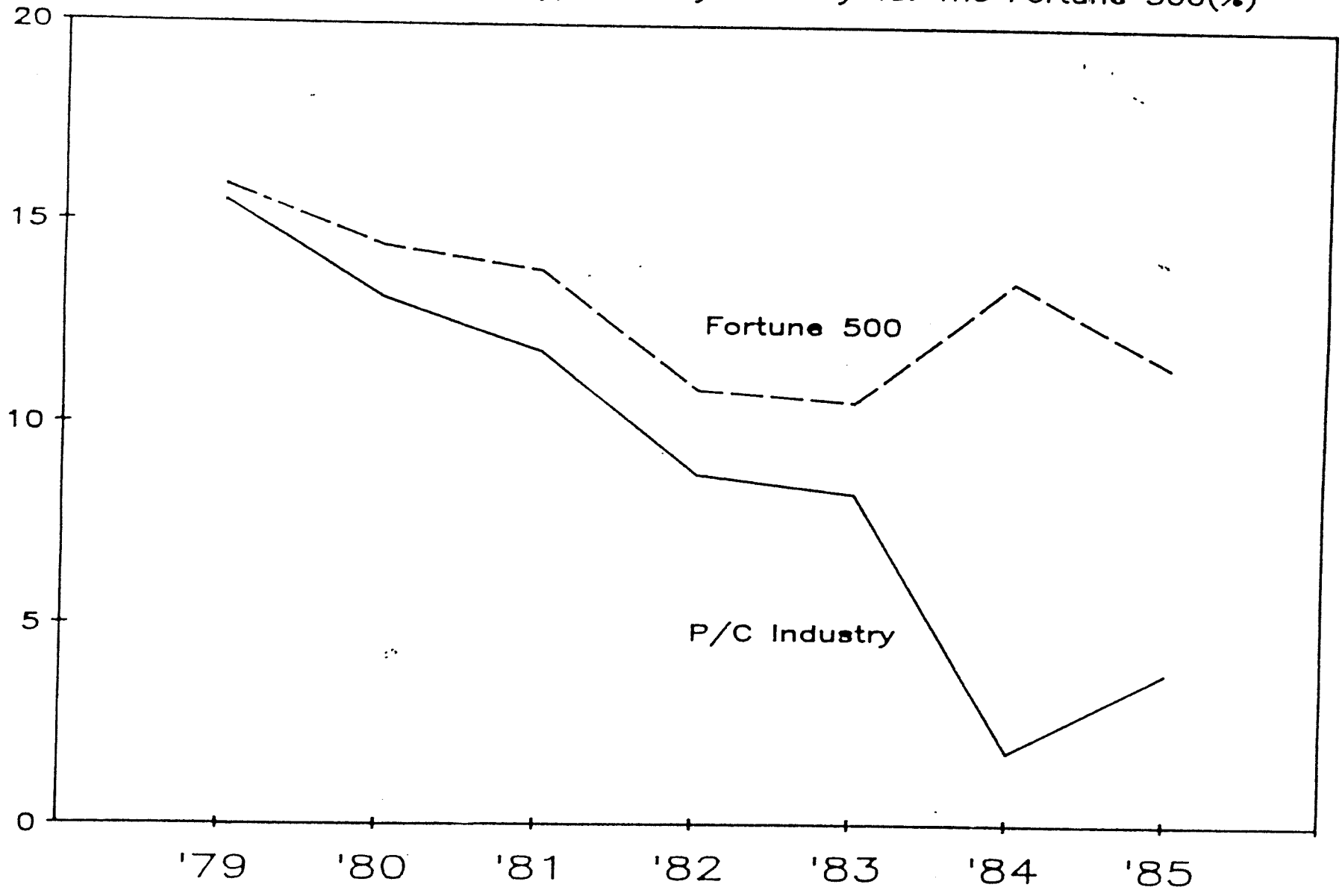
| | 1984 | 1985 |
|---|---|---|
| UNDERWRITING INCOME | - 21.5 | - 24.7 |
| INVESTMENT INCOME | 17.7 | 19.5 |
| OPERATING INCOME | - 3.8 | - 5.4 |
| REALIZED CAPITAL GAINS | 3.1 | 5.4 |
| FEDERAL INCOME TAXES | - 1.7 | - 2.0 |
| NET INCOME AFTER TAX | 0.8 | 2.0 |
| RETURN ON NET WORTH | 1.7% | 3.8% |

## RETURN ON NET WORTH

Figure 2 shows that, beginning in 1979, the industry returns on net worth have fallen increasingly below the returns for the Fortune 500 companies. In 1984, this gap in returns reached nearly 12 points - the industry rate of return was 1.7% while the Fortune 500 median return was 13.5%. In 1985, industry returns continued at a sub-par 3.8%, while the Fortune 500 median return dropped slightly to 11.5%. In fact, while the industry has now experienced two consecutive years of returns below 4%, the Fortune 500 median return has never fallen below 10% during the last 10 years.

# PROPERTY/CASUALTY RETURNS HAVE PLUMMETED

Return on Net Worth:Property/Casualty Industry vs. The Fortune 500(%)



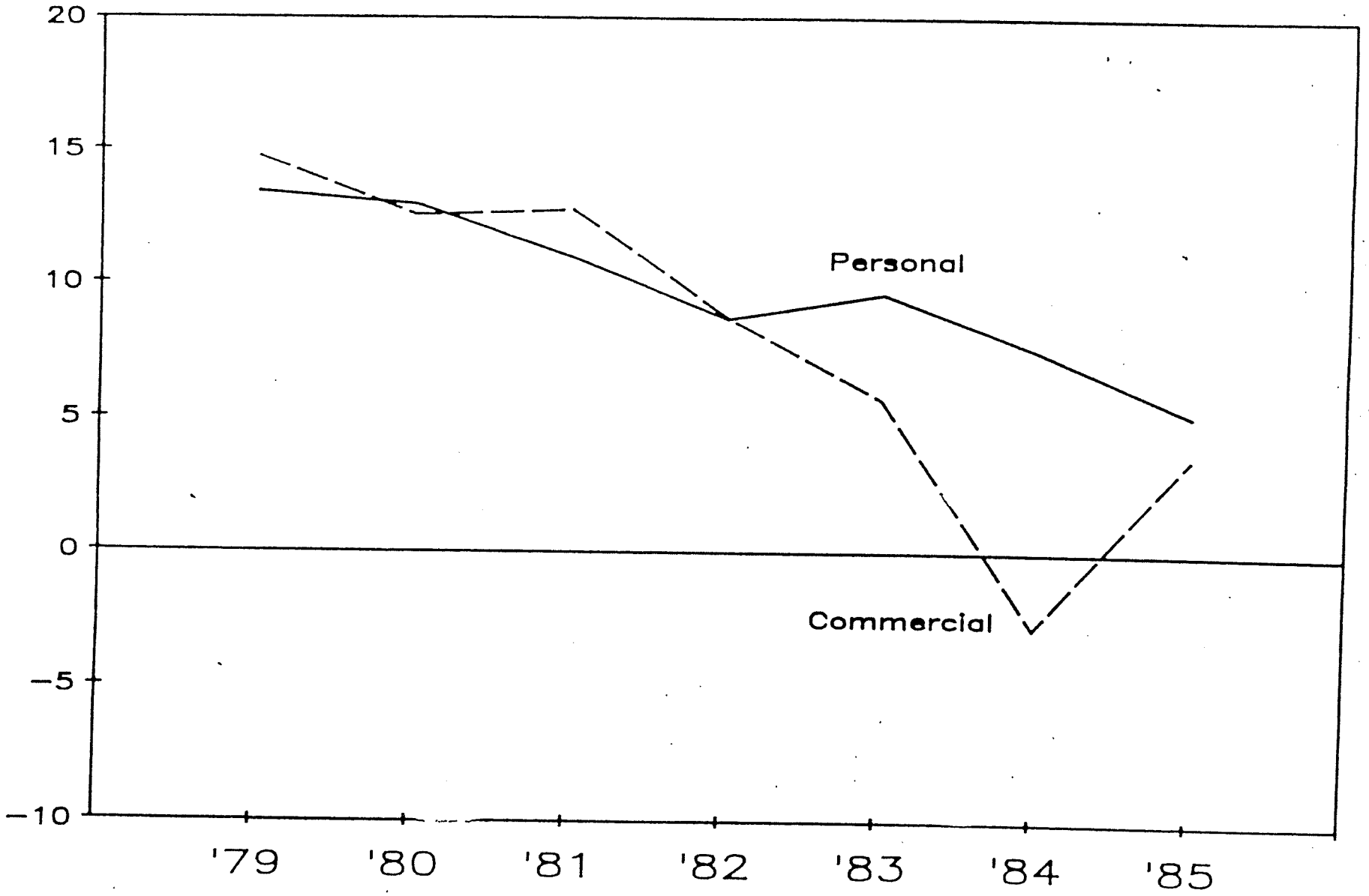
## COMMERCIAL INSURERS

The deterioration in results has not been spread among all insurers evenly. The companies that insure our nation's businesses have been particularly hard hit.

Figure 3 shows that returns on net worth for insurers that concentrate in commercial lines plummetted to negative 3% in 1984. Large premium increases have allowed their returns to rebound somewhat to 3.6%.

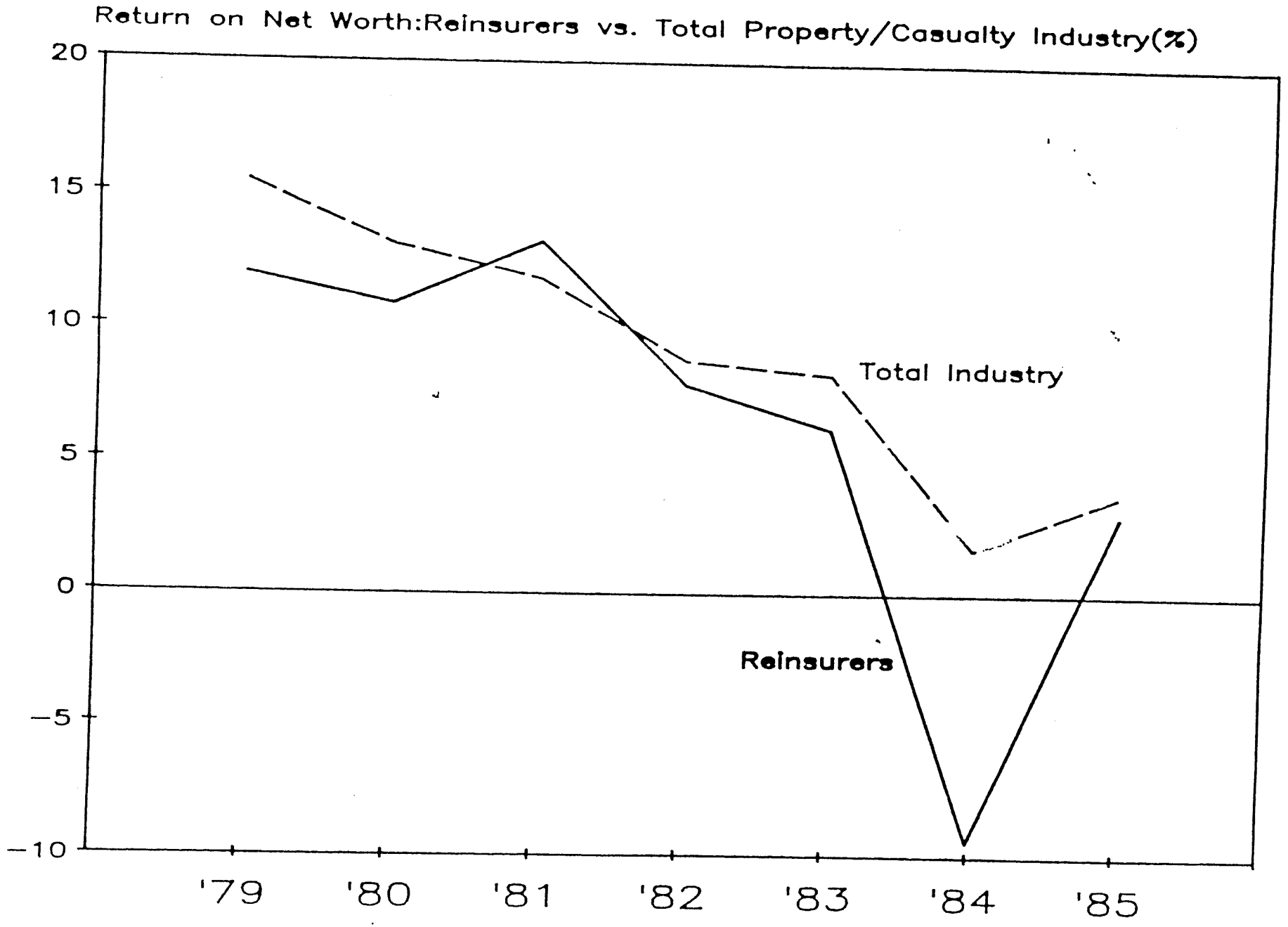
# COMMERCIAL INSURERS LOST MONEY IN 1984

Return on Net Worth:Personal vs. Commercial Insurers(%)



## REINSURERS

As bad as the results have been for commercial insurers, the deterioration is magnified for reinsurers. This is caused by reinsurers' heavy involvement in the riskiest coverages, such as commercial liability. Figure 4 shows that reinsurers' returns on net worth, which were similar to the industry's until 1983, dropped to negative 10% in 1984 - 12 points below the industry average.


Return on Net Worth:Reinsurers vs. Total Property/Casualty Industry(%)
20
15
10
5
0
−5
−10
'79
'80
'81
'82
'83
'84
'85
Total Industry
Reinsurers

## INVESTMENT INCOME AND UNDERWRITING PROFIT OR LOSS

The most important component of insurers' net income is operating income - the sum of underwriting income and investment income. It represents profit or loss from insurance operations.

Underwriting income (the difference between premiums earned and losses and expenses incurred) has been underwriting loss since 1979. Prior to 1984, investment income (interest and dividends received on investments) was large enough to offset underwriting loss in every year except 1975.

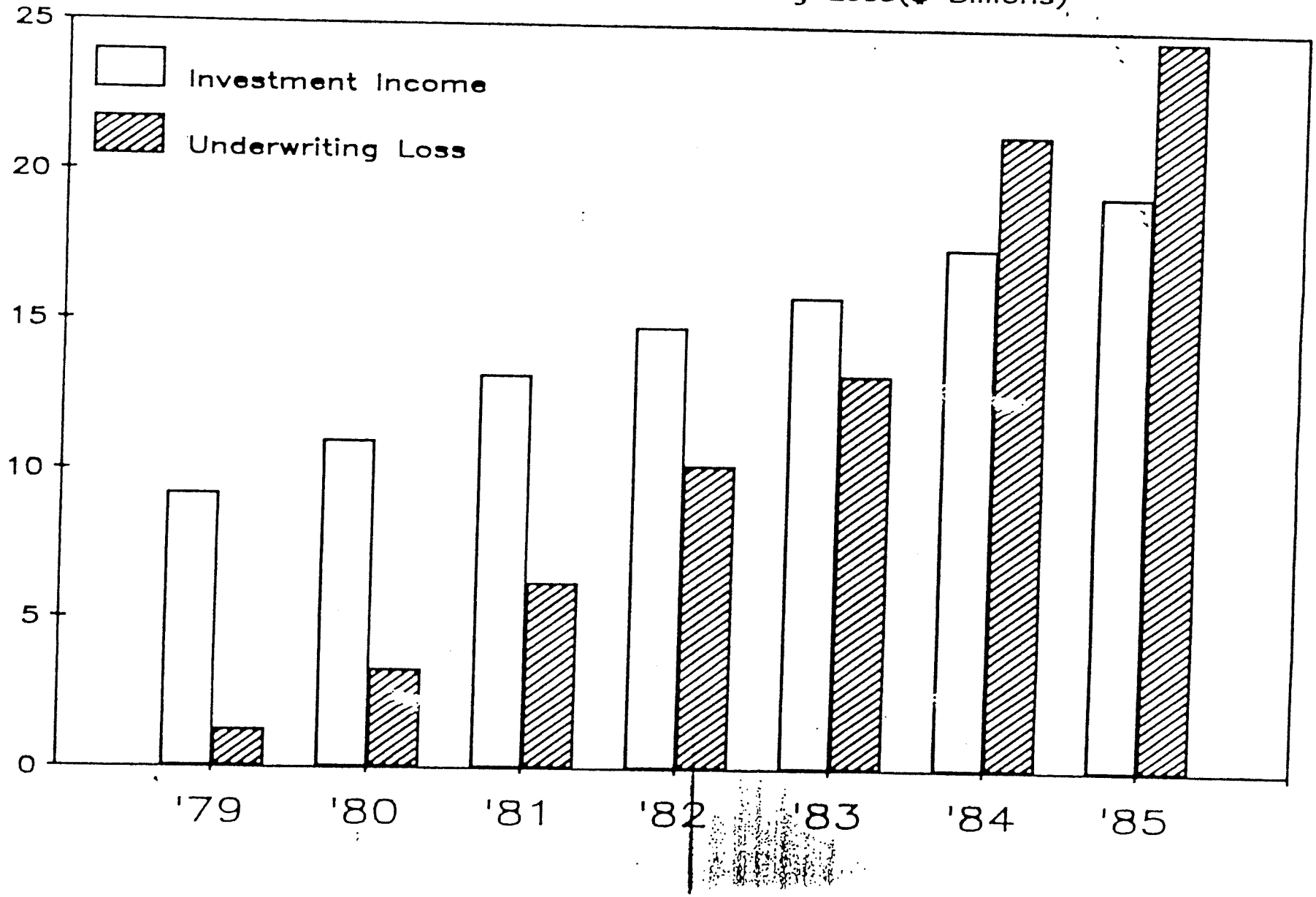
- In 1984, underwriting loss exceeded investment income by $3.8 billion (See Figure 5)
- In 1985, underwriting loss exceeded investment income by $5.4 billion.

From 1980 to 1984, investment income increased at a rate of less than $2 billion per year, while underwriting losses increased at an average annual rate of over $4 billion.

In 1985, investment income continued to increase at just under $2 billion per year. This shows that charges of insurers' mismanagement of their investment portfolio are unjustified. The annual growth in underwriting losses slowed to $3.2 billion in 1985.

However, the record operating loss reported in 1985 is caused by this increase in underwriting loss, which continues to outstrip the increase in investment income.

# INVESTMENT INCOME NO LONGER OFFSETS UNDERWRITING LOSSES



# KANSAS UNDERWRITING EXPERIENCE

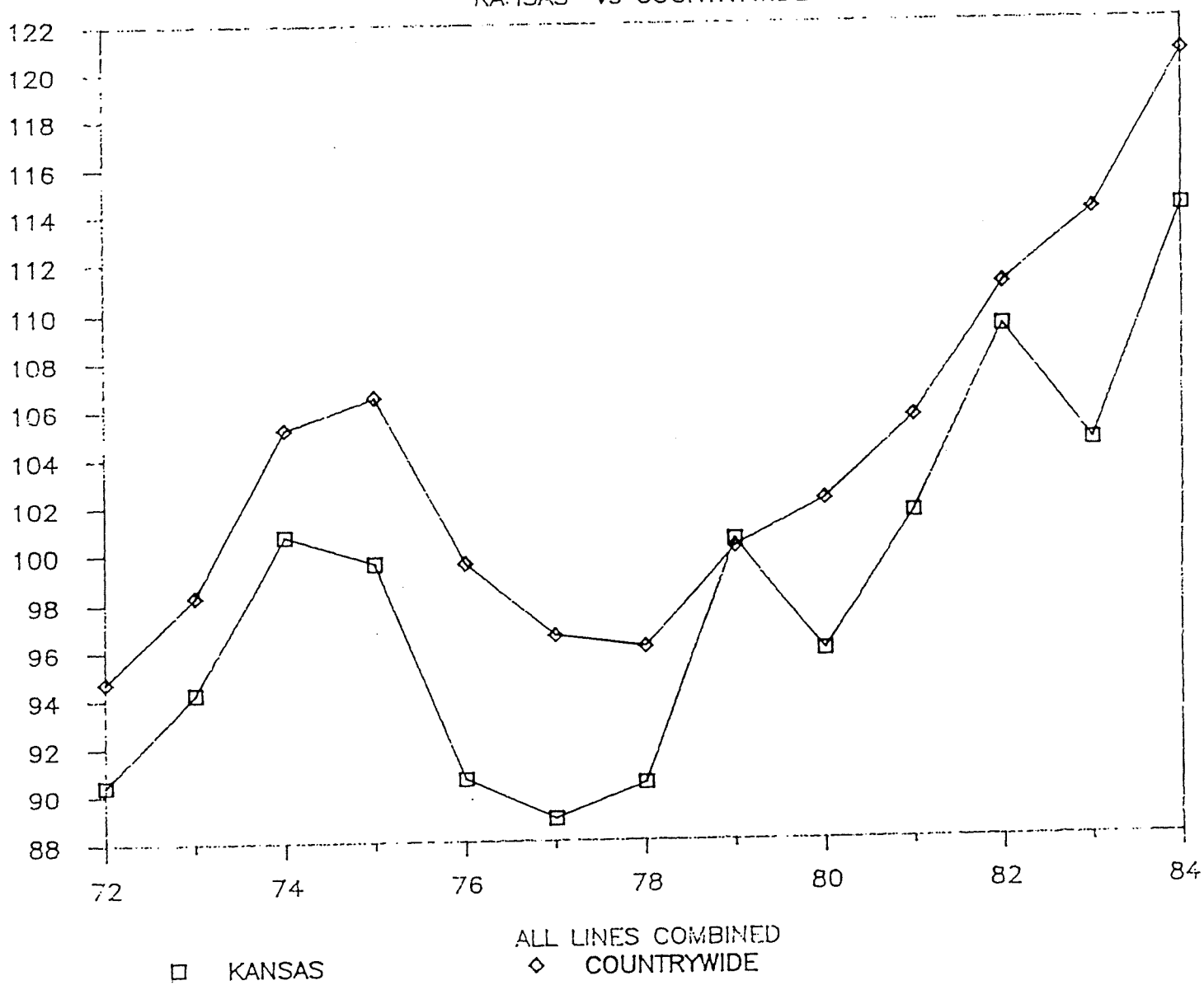
Insurer Financial Statements do not provide information on net income or net worth by line of insurance or state. However, it does provide information which can be used to track underwriting results.

FIGURES 6, 7 AND 8 COMPARE RATIOS IN KANSAS TO COUNTRYWIDE FOR ALL LINES, MAJOR COMMERCIAL LINES, AND GENERAL LIABILITY (INCLUDING MEDICAL PROFESSIONAL).

THESE EXHIBITS SHOW THAT KANSAS TRACKS THE COUNTRYWIDE TRENDS AND THEREFORE IS NOT IMUNE FROM THE GROWING LIABILITY PROBLEMS.

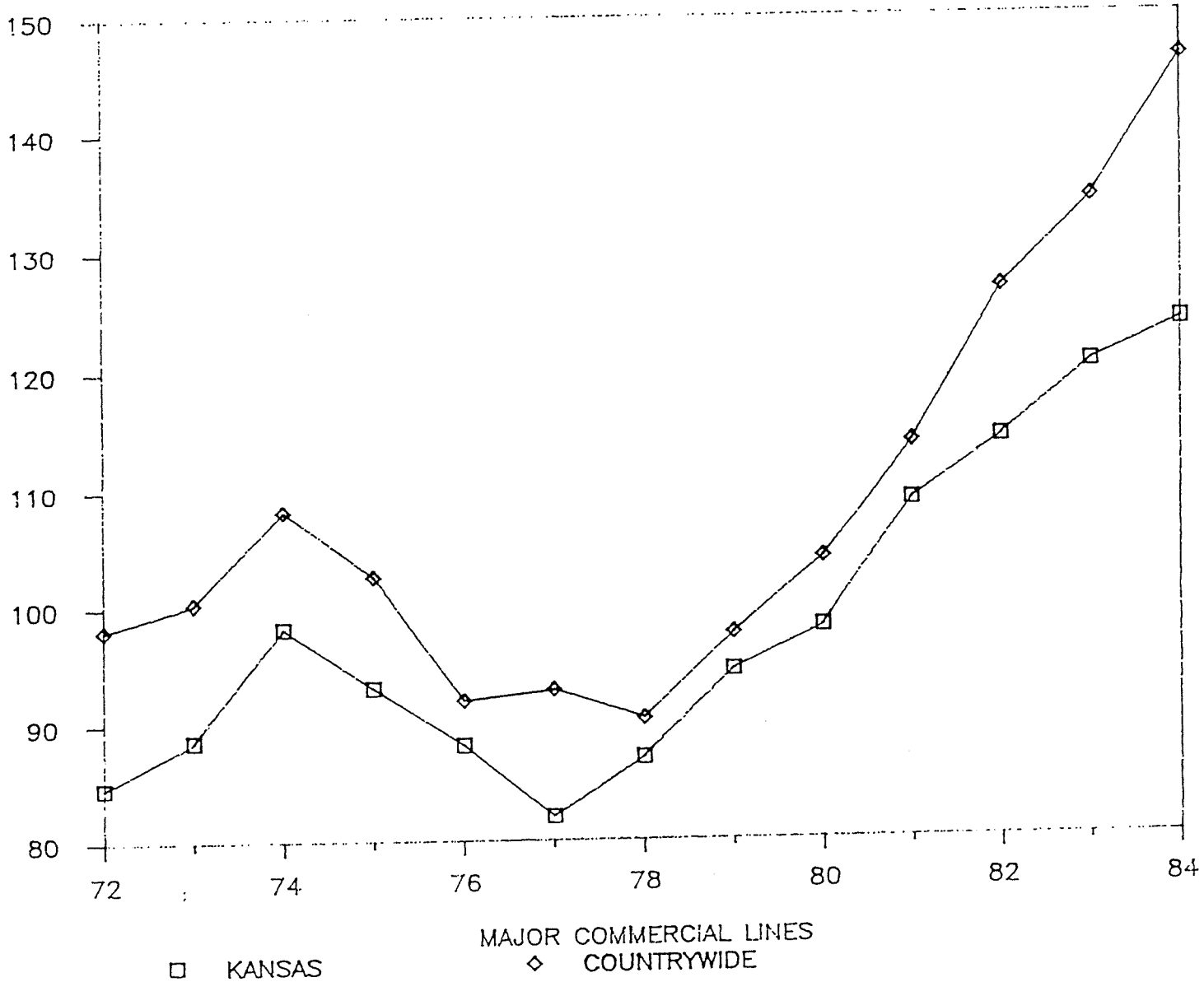
# COMBINED RATIO AFTER DIVIDENDS

KANSAS vs COUNTRYWIDE

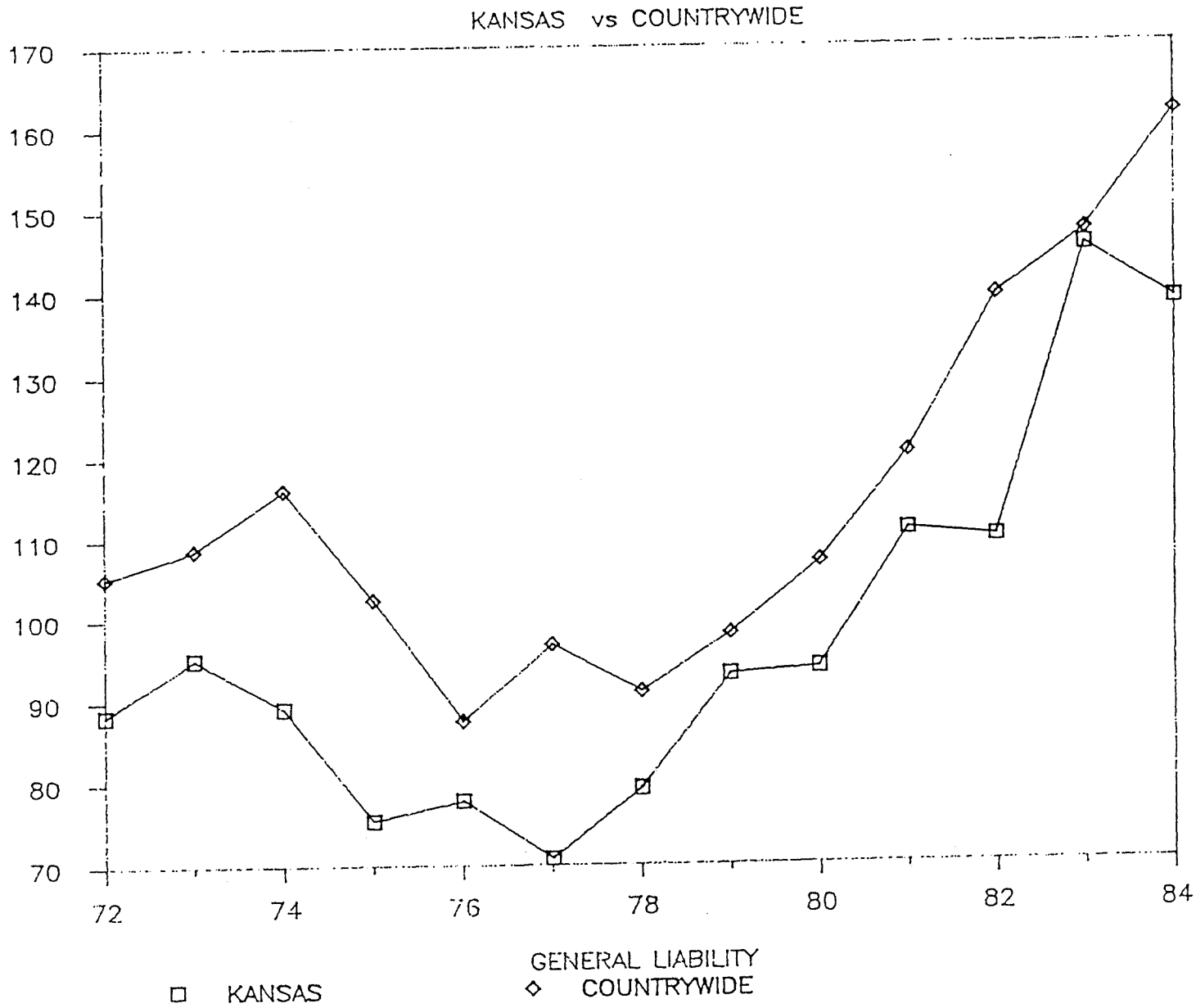


# COMBINED RATIO AFTER DIVIDENDS

KANSAS vs COUNTRYWIDE



# COMBINED RATIO AFTER DIVIDENDS



## GROWTH IN LOSSES

Commercial lines insurers are seriously affected by "bottom line" results, caused by a deficiency in income due to escalating losses. The following exhibits focus on these loss patterns, particularly for commercial liability. These exhibits compare the growth in insurance premiums to the growth in insurance costs on a constant dollar basis (i.e. adjusted for inflation).

Figure 9 shows that the all lines premiums were generally in line with losses until 1979. Since 1979, premiums did not keep pace with costs and the gap WIDENED through the early '80's.

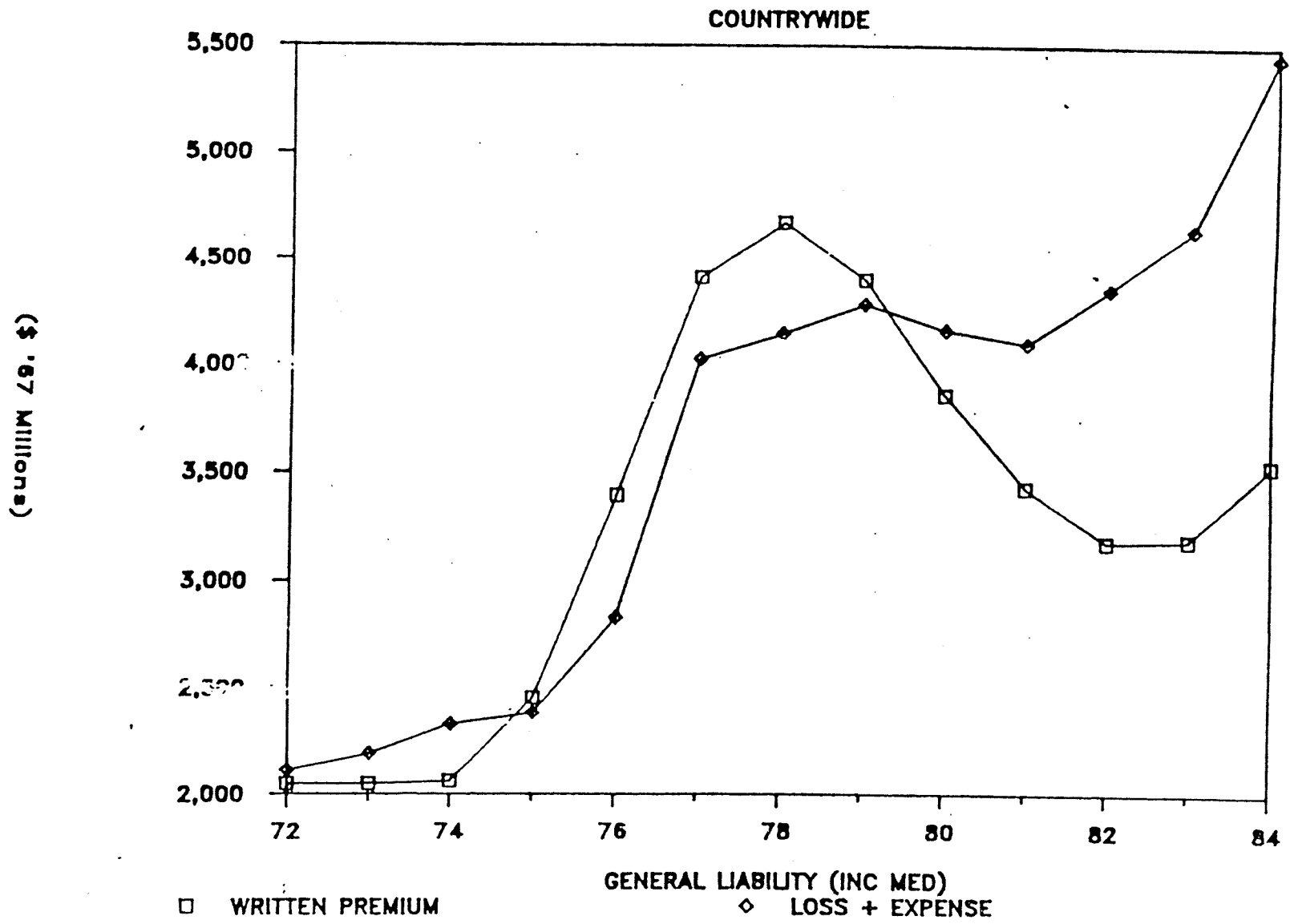
During this period, interest rates were at historic high levels. Insurers recognized that high interest rates created the potential for increases in investment income. In fact, as an earlier chart shows, investment income has grown at a rate of $2 billion per year. It was this growth in investment income that both allowed insurers to lower the premiums and created a desire to compete for additional premium dollars to invest. These low premium levels prevailed through 1984, to the benefit of insureds.

Thus, part of the reason for the premium shortfall is competitive pricing. However, a second and major cause of the problem is the losses, which have escalated to record highs. The rising loss line on Figure 9 demonstrates that today's financial problems are not simply the result of competitive pricing but are to a very significant extent "loss driven".

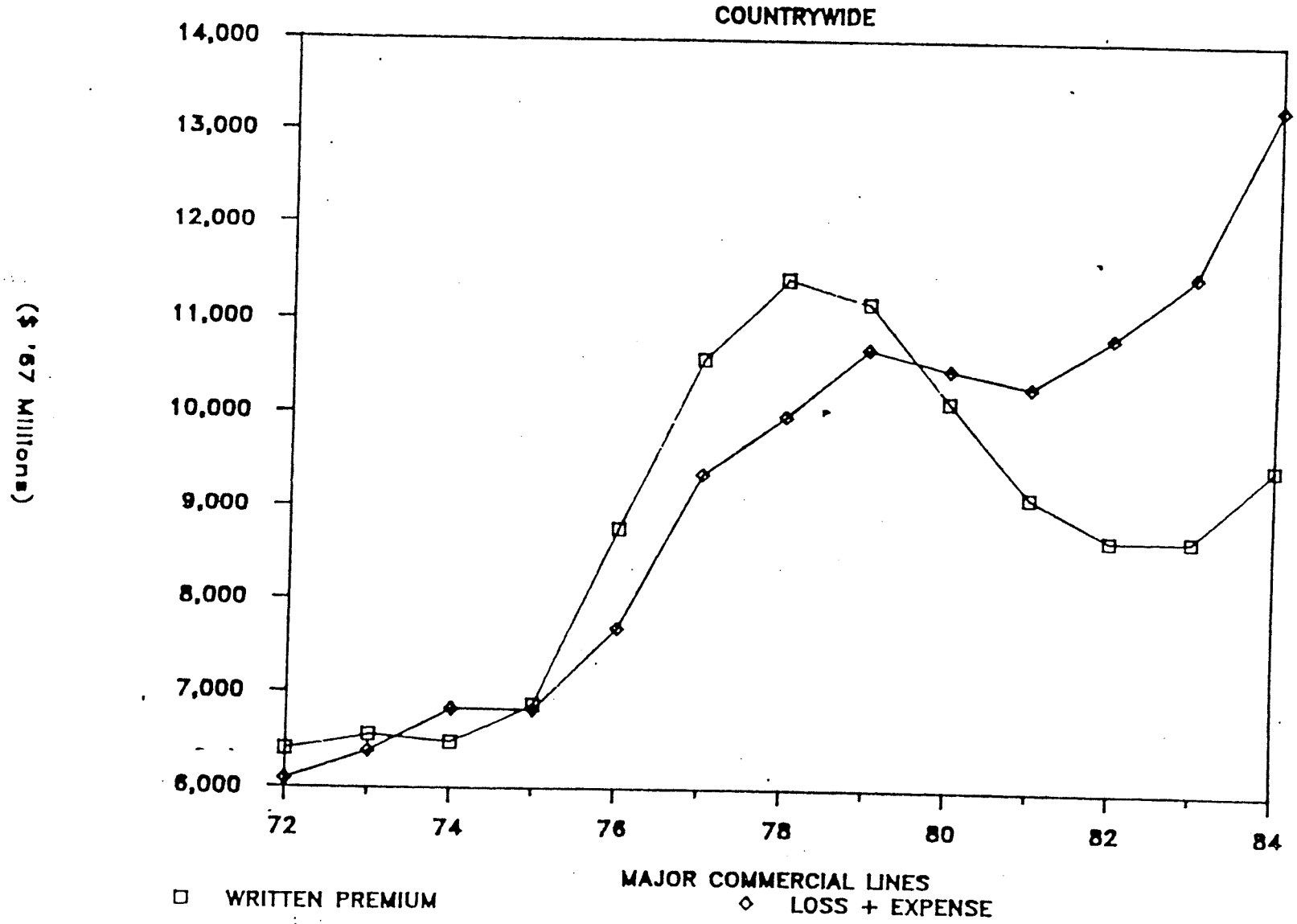
Figures 10 and 11 show that commercial lines, particularly general liability, are the major cause of the industry's current problems.

FIGURES 12, 13 AND 14 DEMONSTRATES THAT KANSAS EXPERIENCE FOLLOWS SIMILAR PATTERNS.

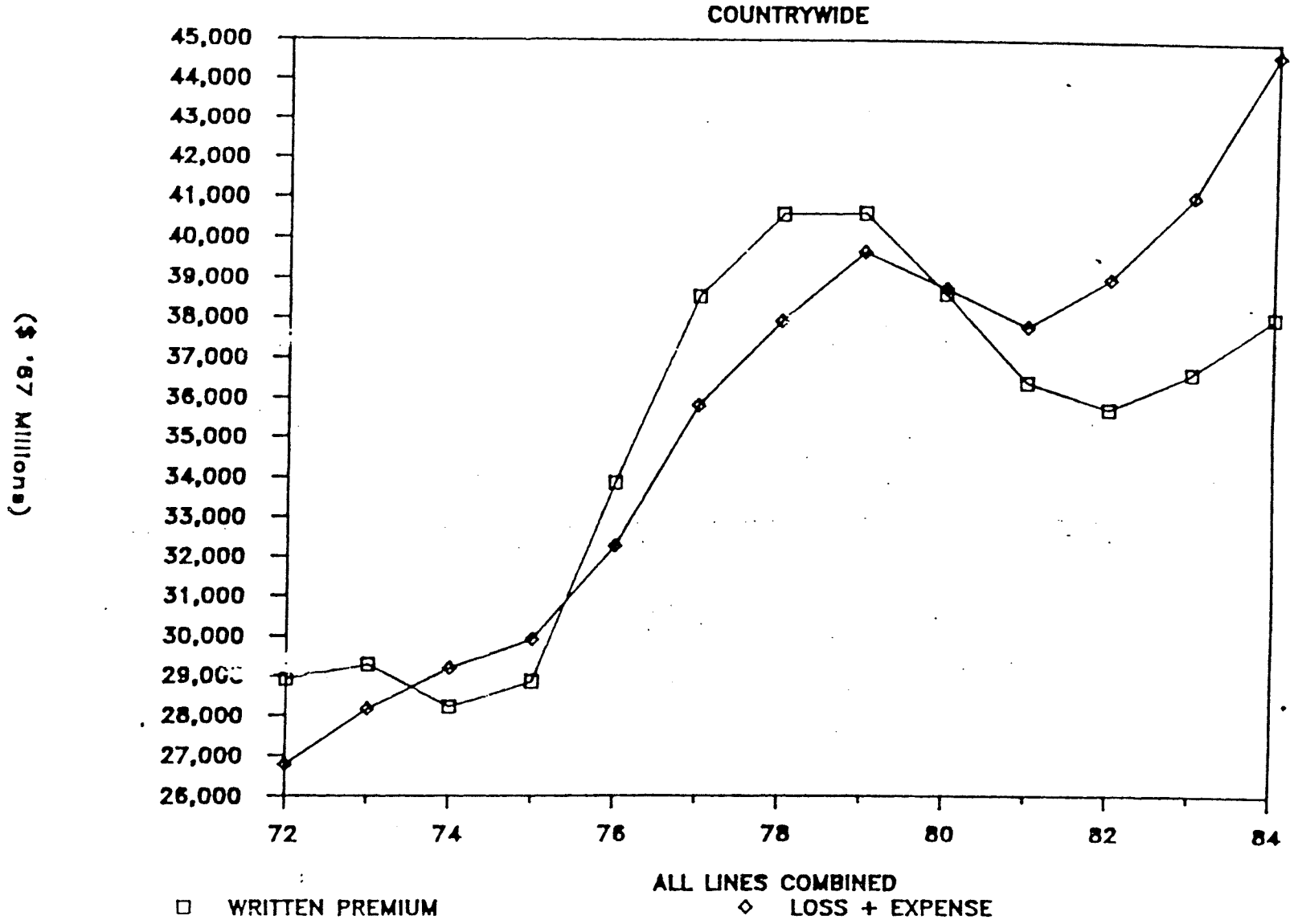
# WRITTEN PREMIUM vs LOSSES & EXPENSE



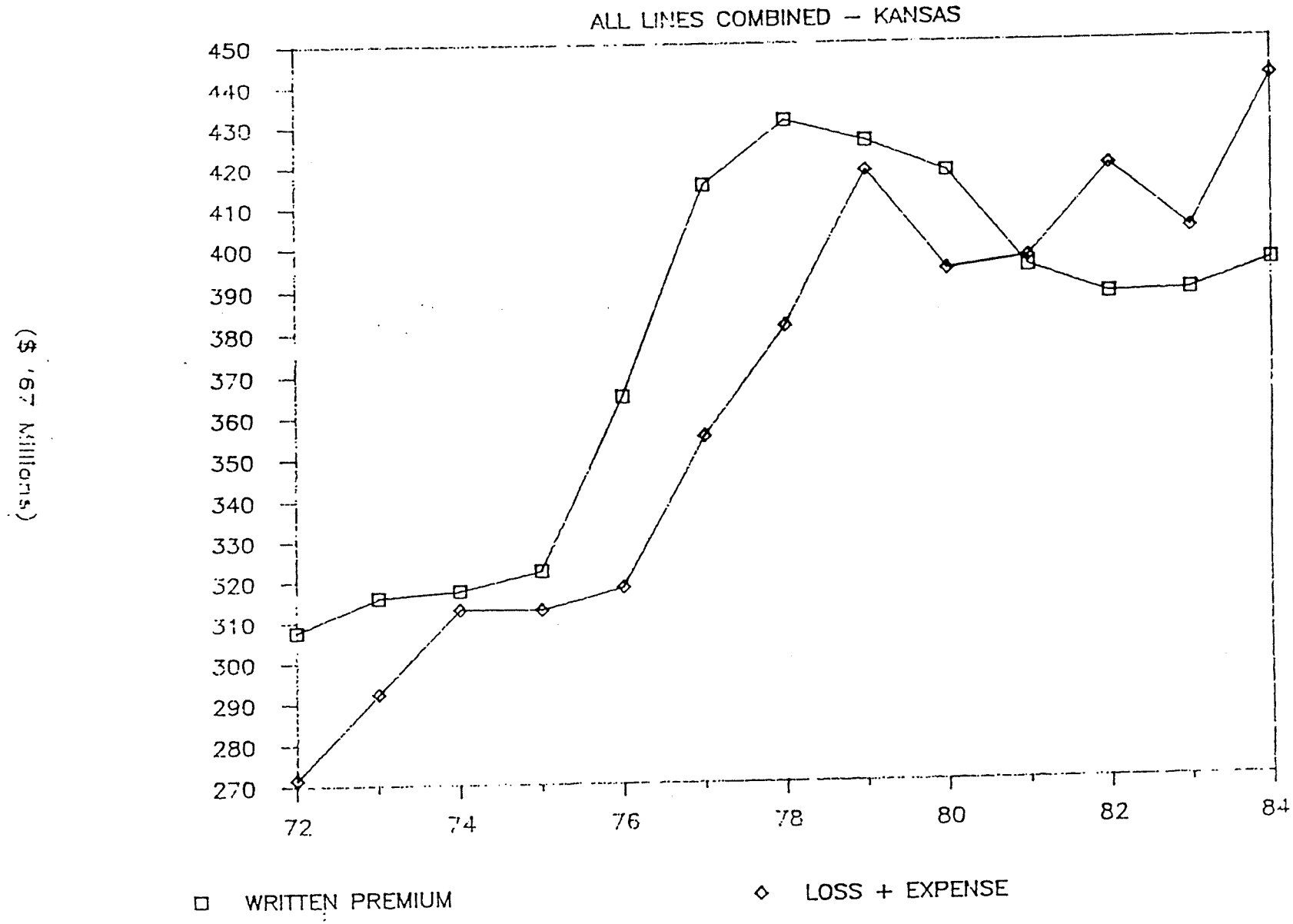
# WRITTEN PREMIUM vs LOSSES & EXPENSE



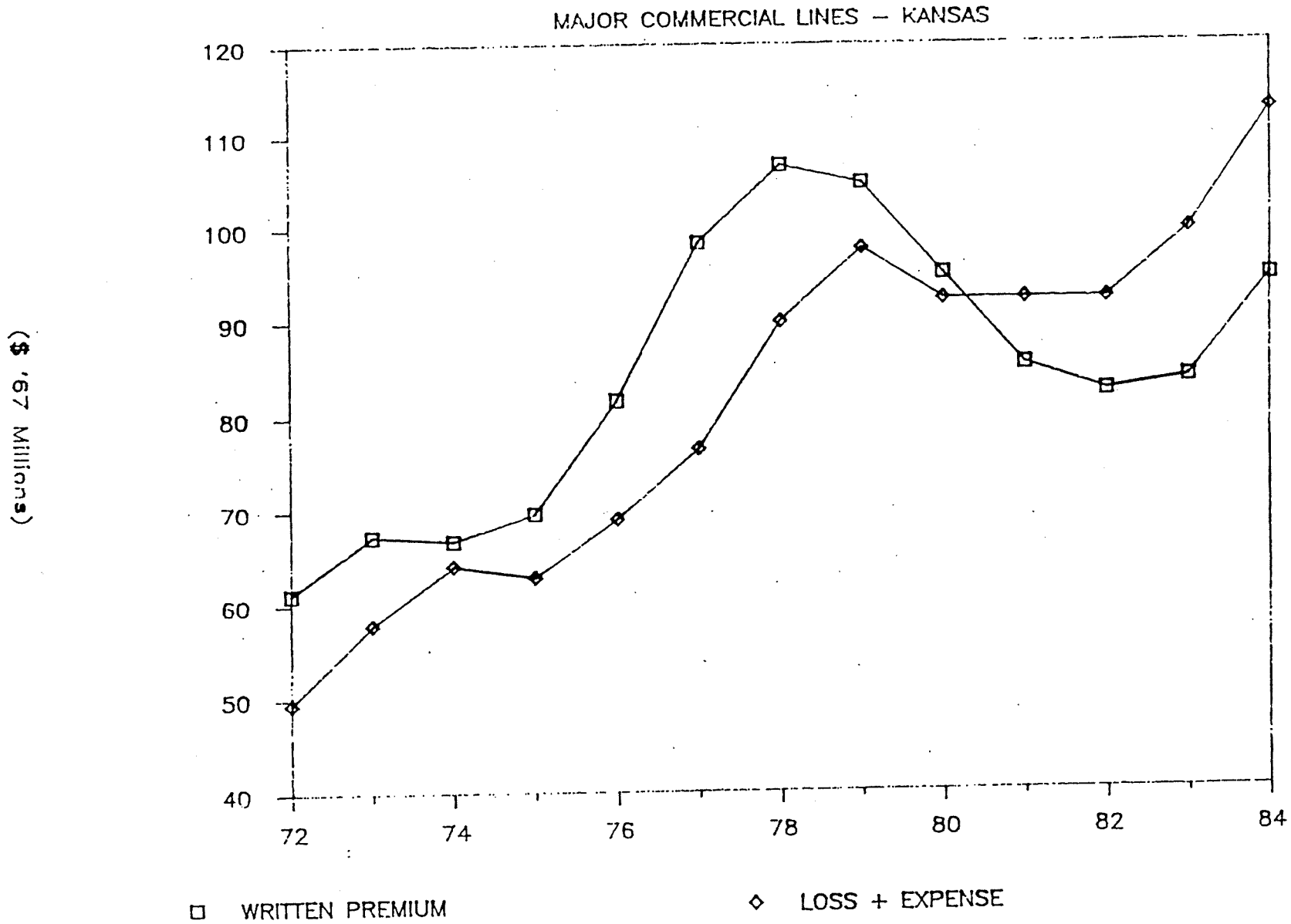
# WRITTEN PREMIUM vs LOSSES & EXPENSE



# WRITTEN PREMIUM vs LOSSES & EXPENSE

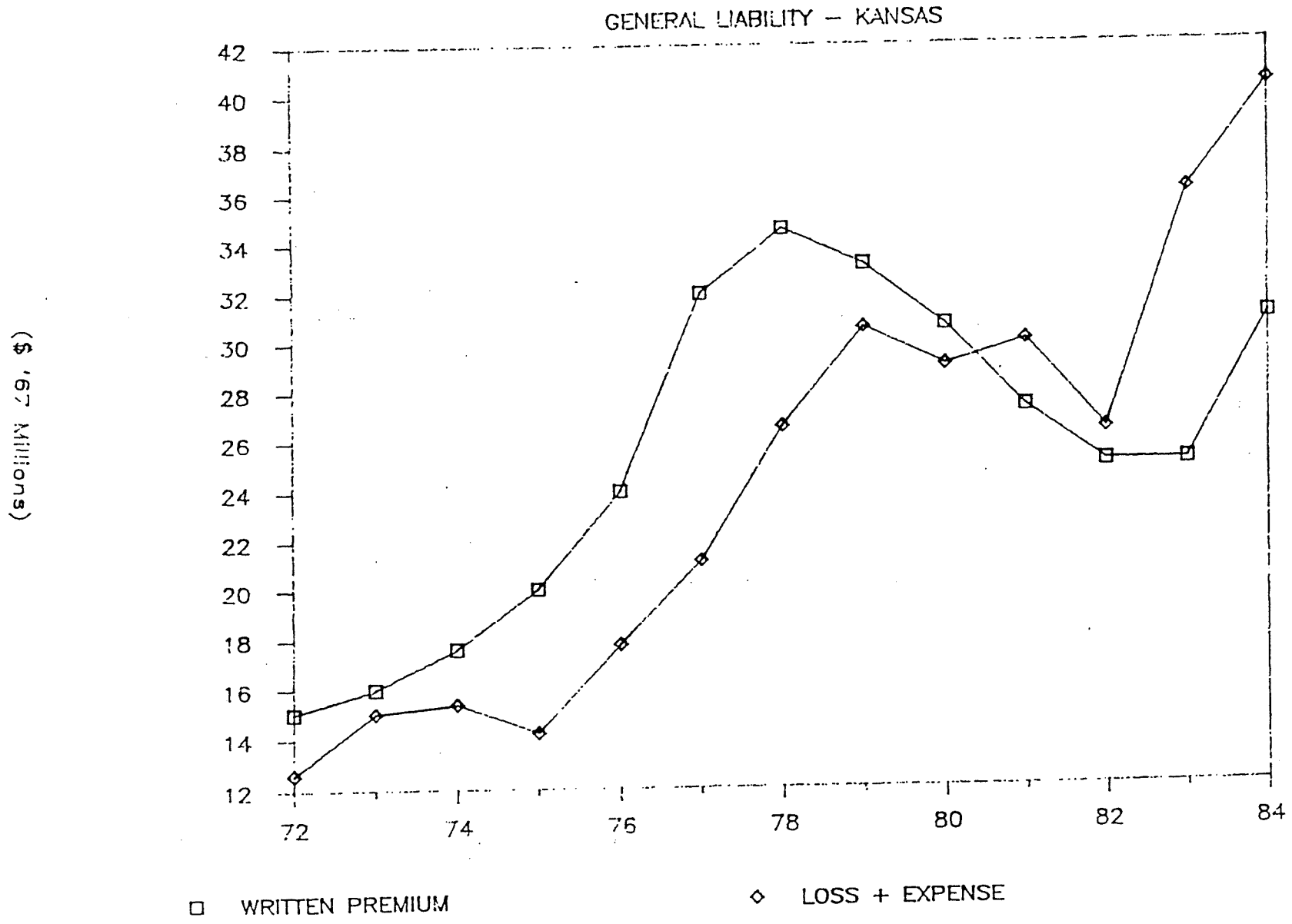


# WRITTEN PREMIUM vs LOSSES & EXPENSE



# WRITTEN PREMIUM vs LOSSES & EXPENSE

## GENERAL LIABILITY – KANSAS



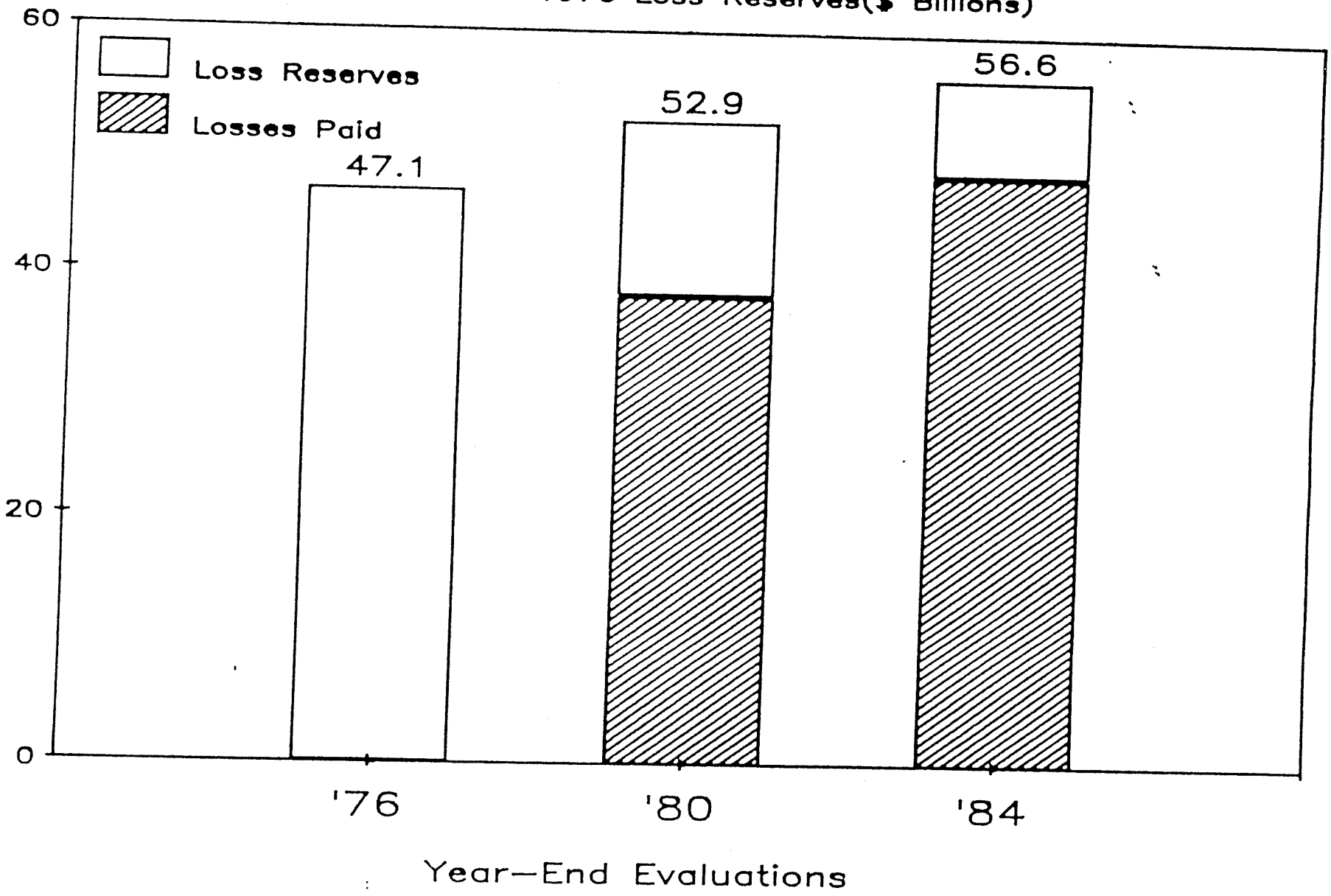
## LOSS RESERVES

Our analysis of industry profitability is based on incurred losses, which considers both losses paid during a given period of time as well as estimates of loss payments that will need to be made on claims which have not reached final judgement or settlement. Critics have charged that these loss reserves are "ARTIFICALLY" inflated by the industry to make the situation look worse that it is.

In fact experience has shown that industry loss reserves have been understated. At year-end 1976, industry loss reserves were $47.1 billion. However, as of year-end 1984, $48.6 billion had been paid out on these same claims and an additional $8 billion was still held in reserve. The conclusion is that the initial 1976 reserves were deficient by nearly $10 billion, or 20%. (See Figure 15.)

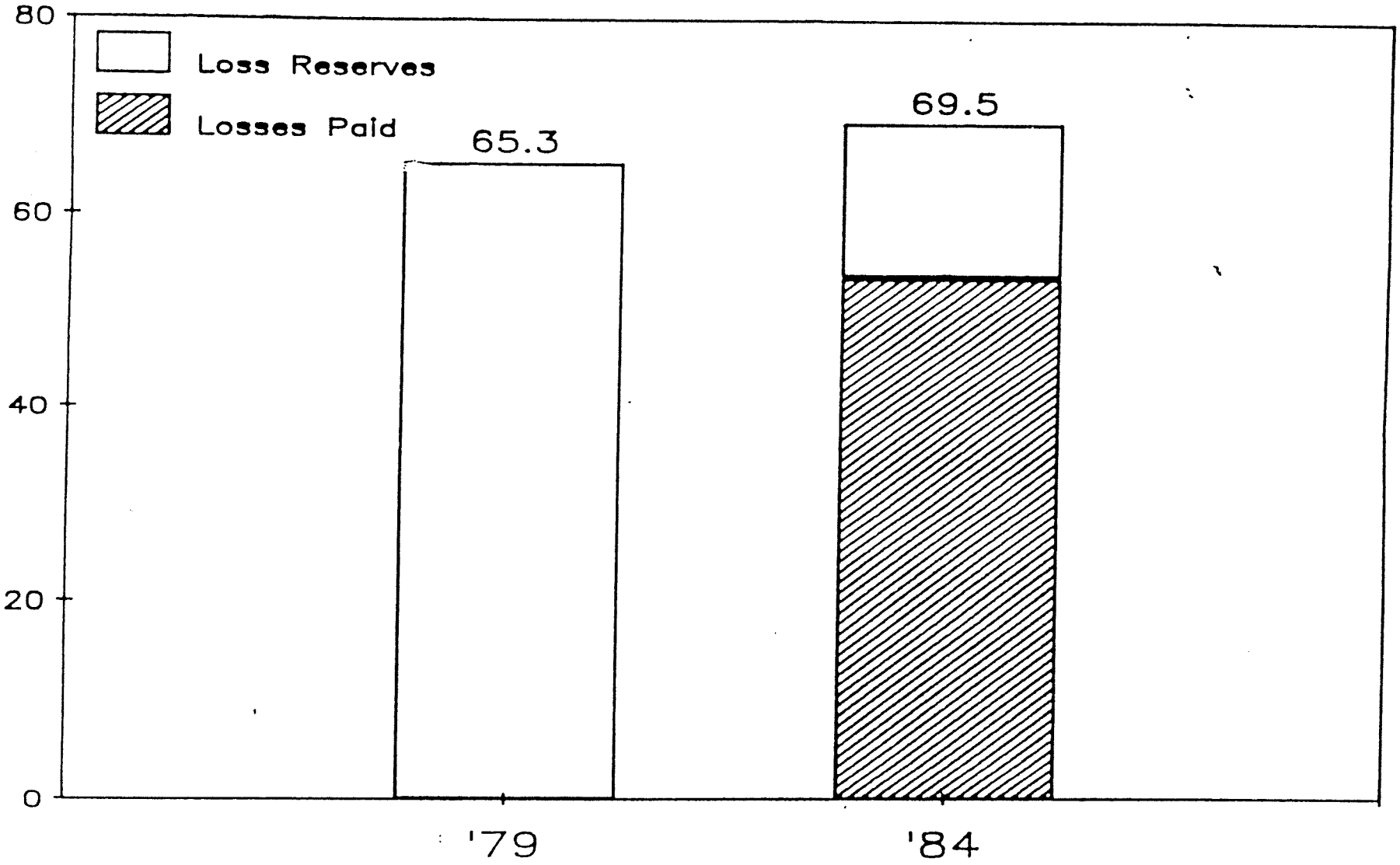
Furthermore, 1976 was not unique. Figure 16 shows a similar pattern for the 1979 reserves. That is, the initial reserve of $65.3 billion set at year-end 1979 proved to be deficient by at least $4 billion , or 6%. As of year-end 1984, $53.8 billion had been paid out on these same claims, while an addiitonal $15.7 billion was still held in reserve - for a total of $69.5 billion, or $4 billion more then initially reserved.

# 1976 INDUSTRY RESERVES FELL SHORT



# 1979 INDUSTRY RESERVES FELL SHORT

Calendar Year 1979 Liability Loss Reserves($ Billions)

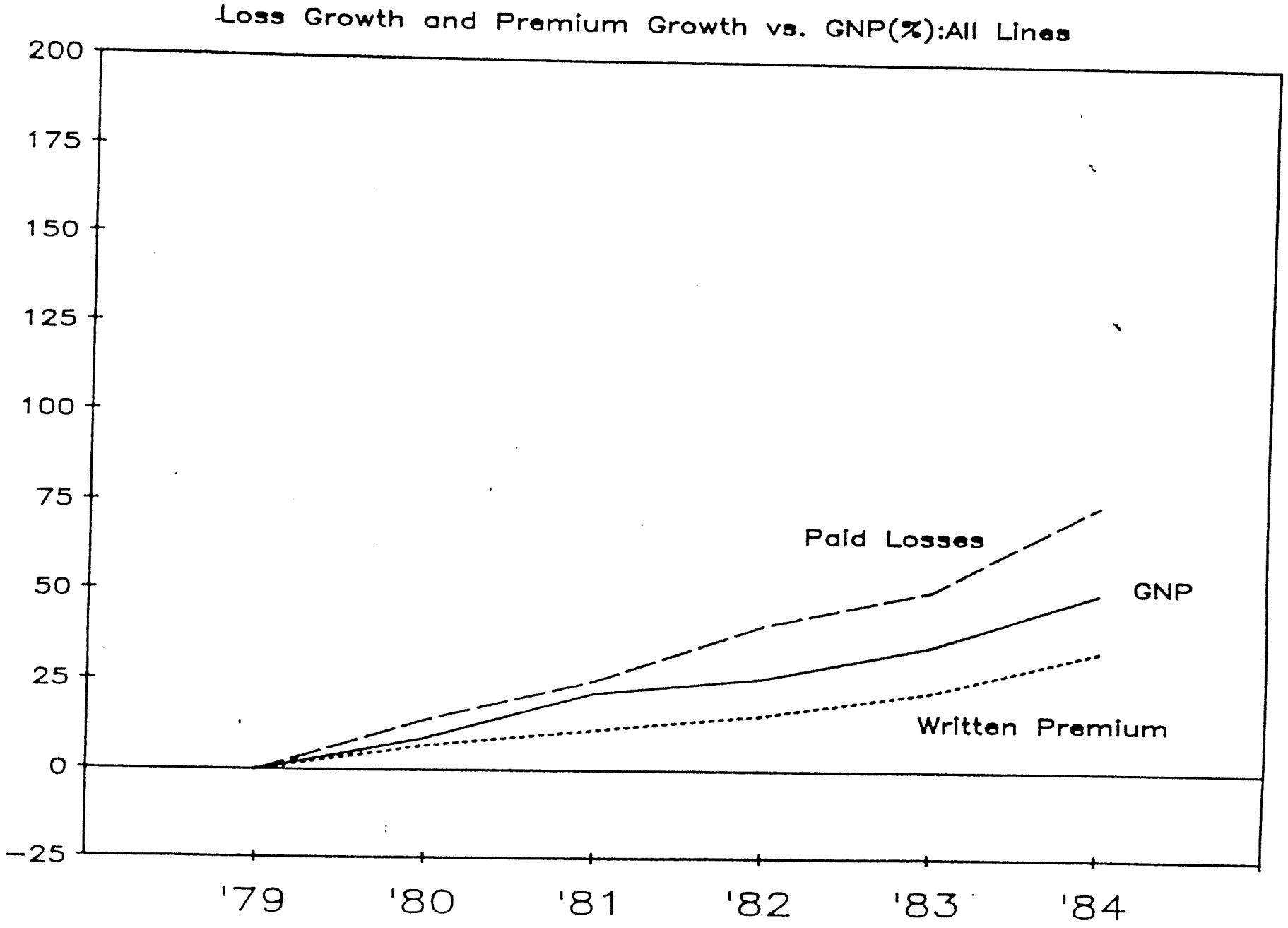


## PAID LOSSES

In order to put aside debate about possible manipulation of loss reserves, trends in paid losses can be analyzed.

In the past five years, growth in paid property/casualty losses has far exceeded the country's economic growth as measured by GNP.

From 1979 to 1984, the GNP grew 50%. During the same period, total property/casualty written premium increased only 34%, not quite keeping up with the nations's economic growth. However, paid loss growth exceeded the nation's overall growth, increasing 76%. (See Figure 17)

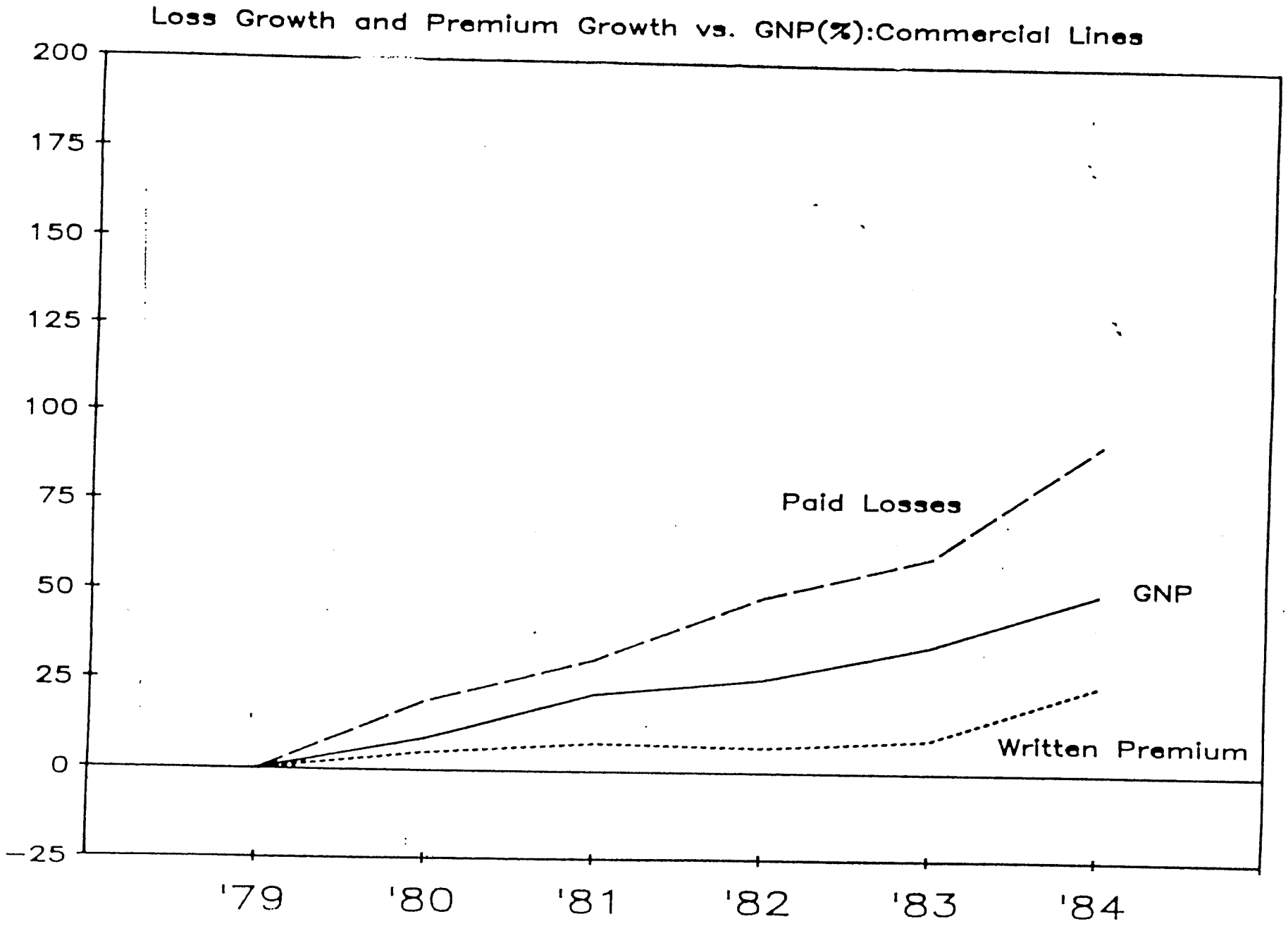

Loss Growth and Premium Growth vs. GNP(%):All Lines
200
175
150
125
100
75
50
25
0
-25
'79
'80
'81
'82
'83
'84
Paid Losses
GNP
Written Premium

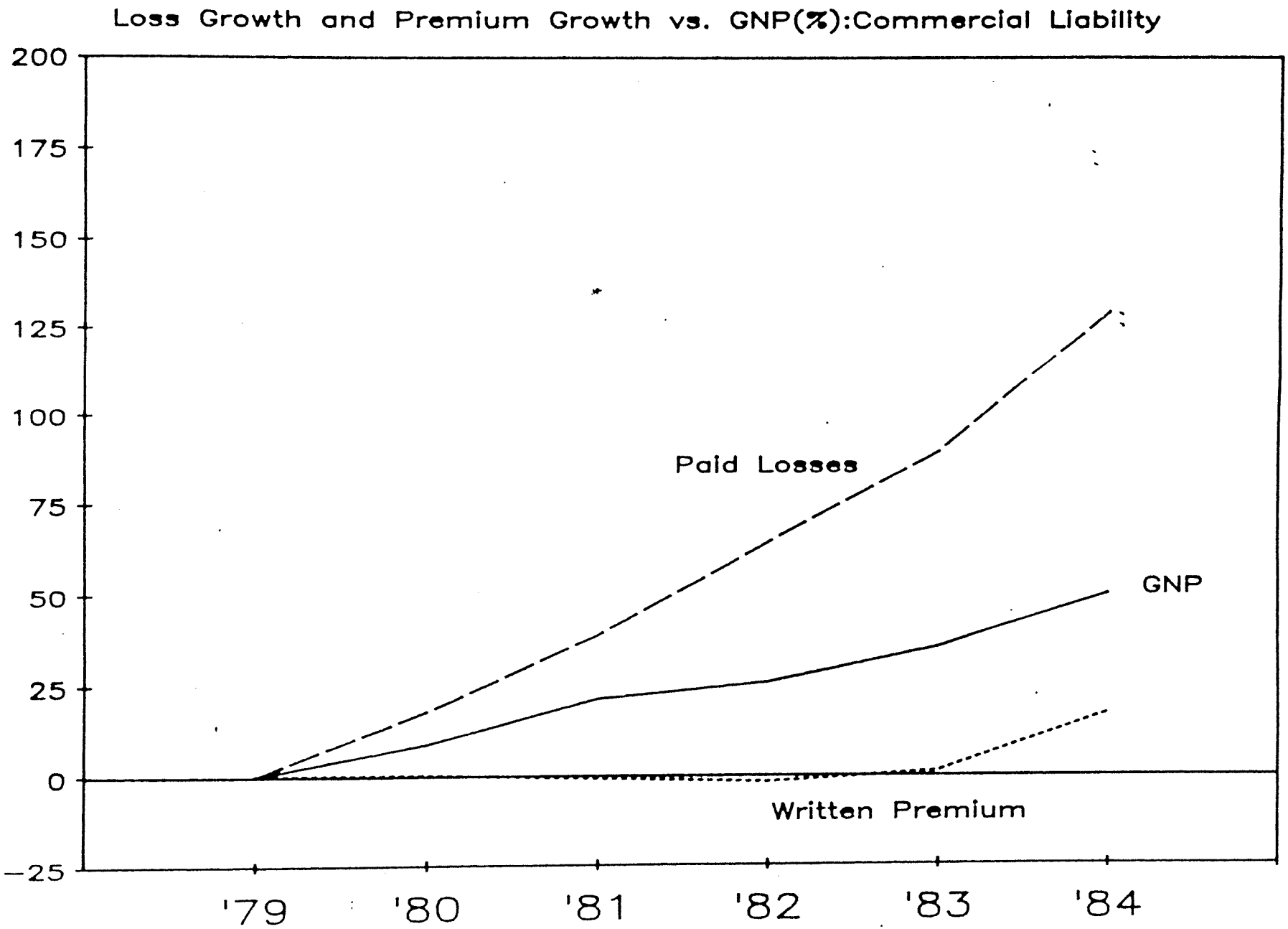
## MORE ABOUT PAID LOSSES

Figure 19 shows that the difference between loss growth and the nation's GNP growth was concentrated in commercial lines where losses grew 92% in five years.

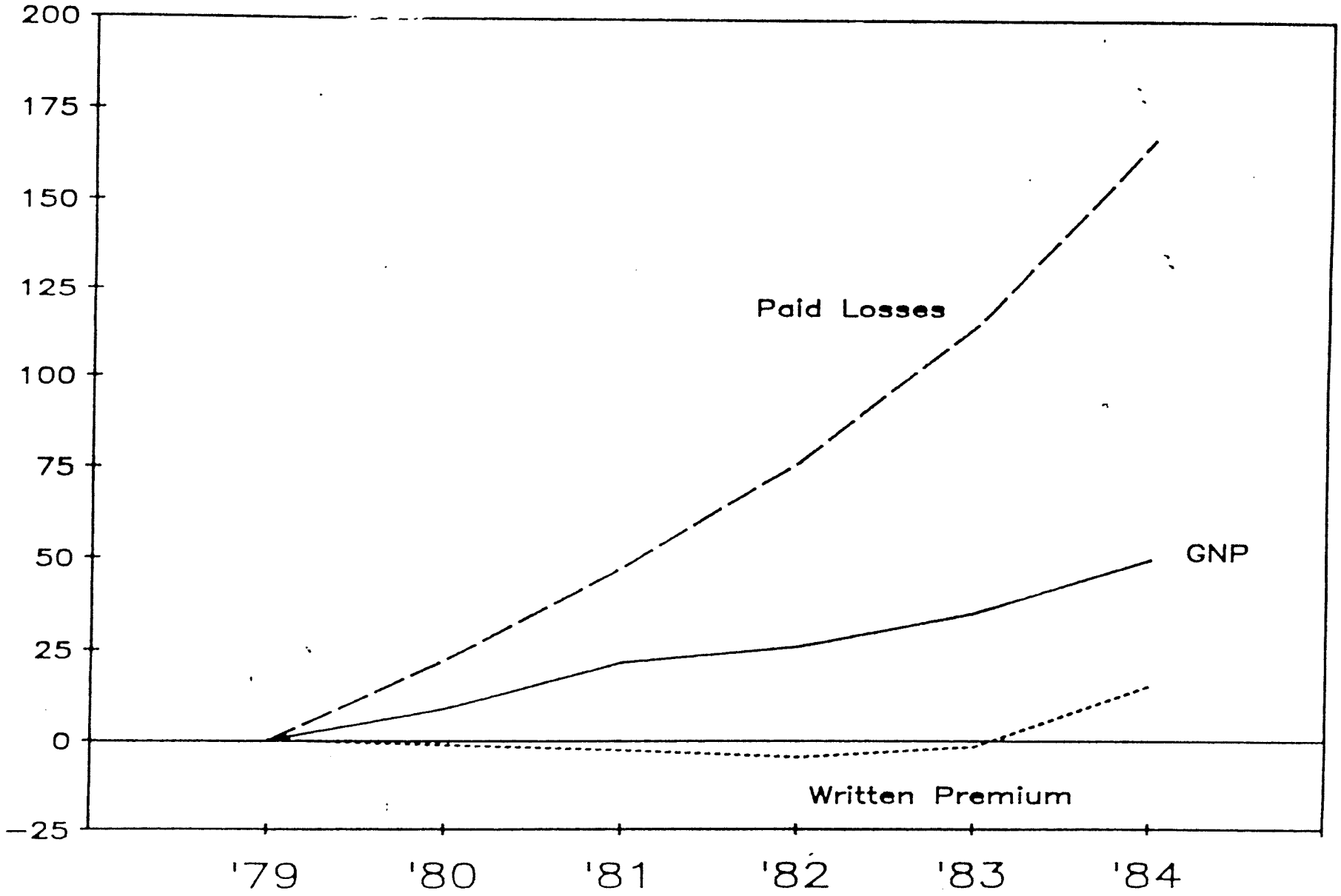
Figures 20 and 21 show that the problem is further concentrated in commercial liability and particularly general liability (including medical professional) where losses grew 130% and 167%, respectively.

For general liability and medical professional, paid losses grew at an annual rate of 22% while GNP grew at a 9% rate, for a 13 point annual gap. (See Figure 22)


Loss Growth and Premium Growth vs. GNP(%):Commercial Lines
200
175
150
125
100
75
50
25
0
-25
'79
'80
'81
'82
'83
'84
Paid Losses
GNP
Written Premium

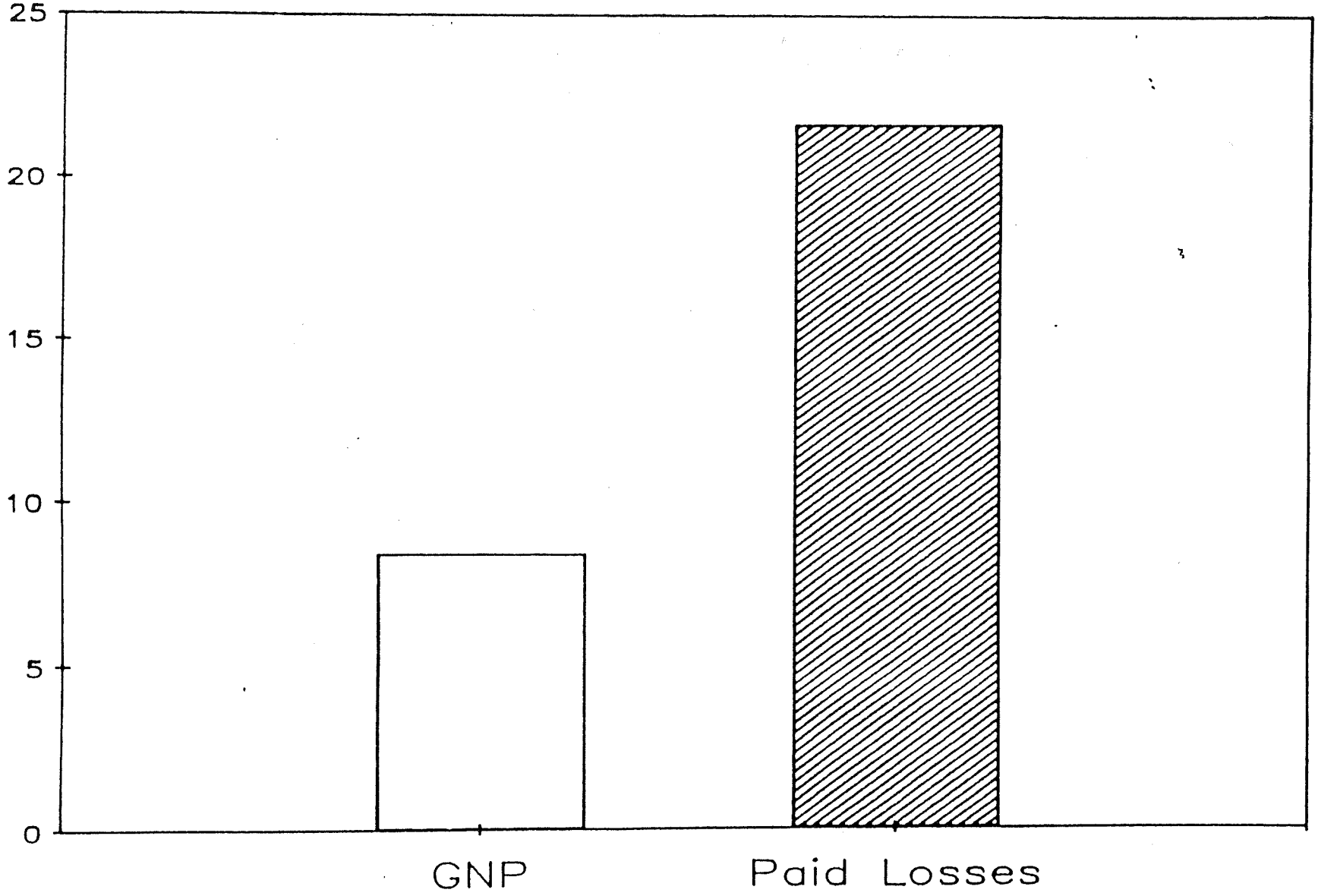

Loss Growth and Premium Growth vs. GNP(%):Commercial Liability
200
175
150
125
100
75
50
25
0
-25
Paid Losses
GNP
Written Premium
'79
'80
'81
'82
'83
'84

Loss Growth and Premium Growth vs. GNP(%):
General Liability & Medical Malpractice Combined



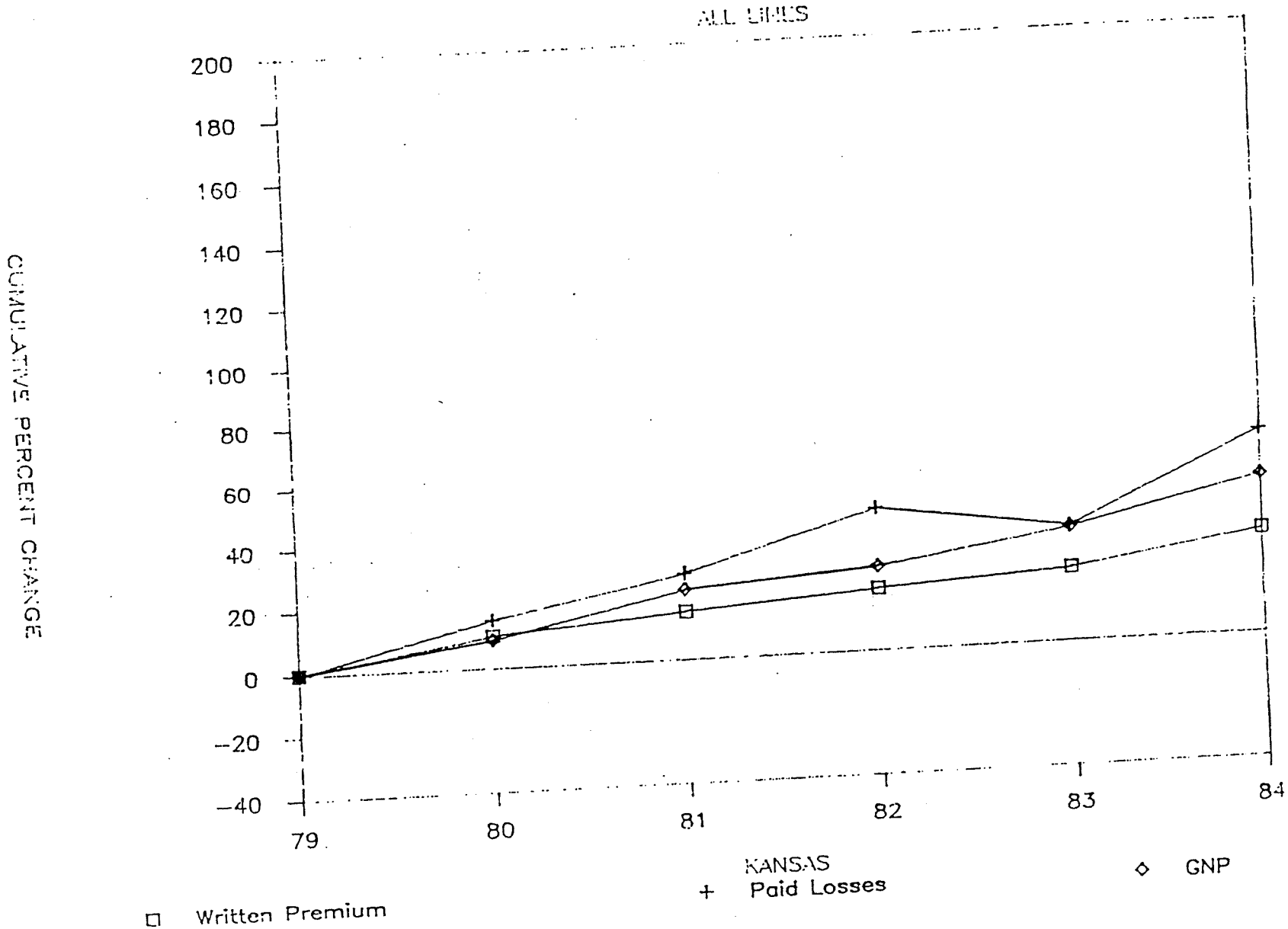
# LOSS GROWTH OUTPACES ECONOMIC GROWTH

**General Liability & Medical Malpractice Losses vs. GNP—1979—84(Annual % Change)**



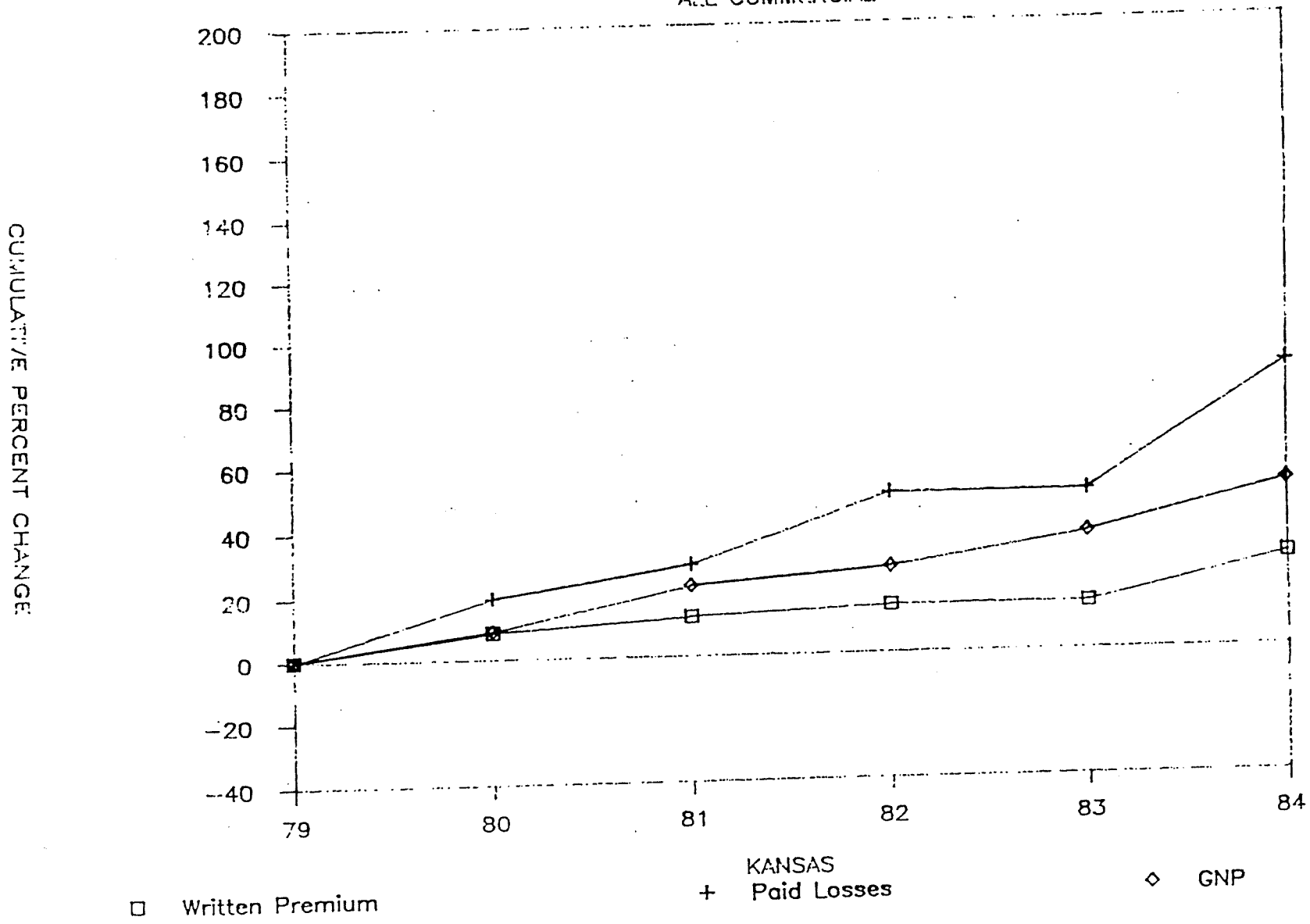
# PREMIUM vs LOSSES vs GNP

ALL LINES



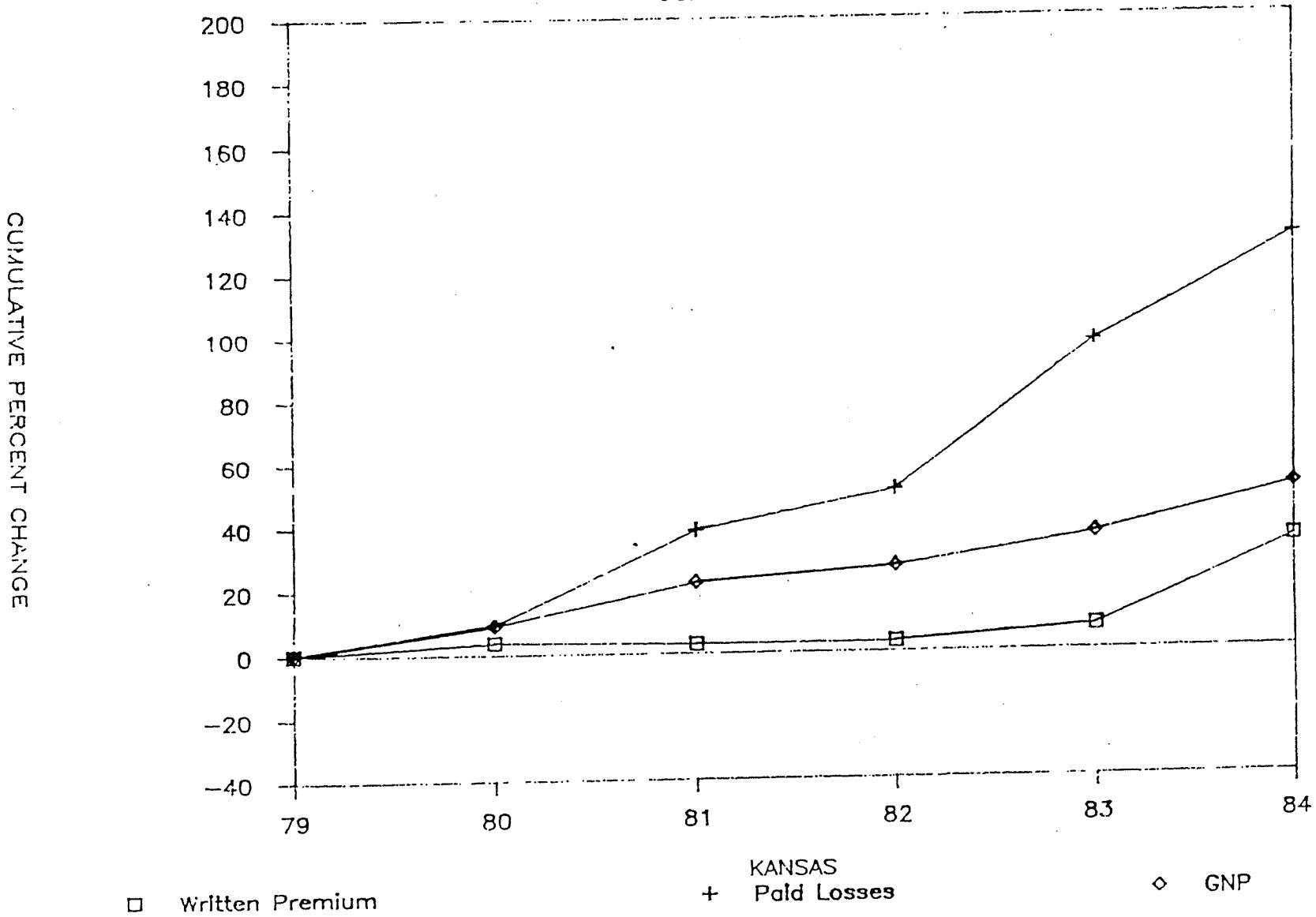
# PREMIUM vs LOSSES vs GNP

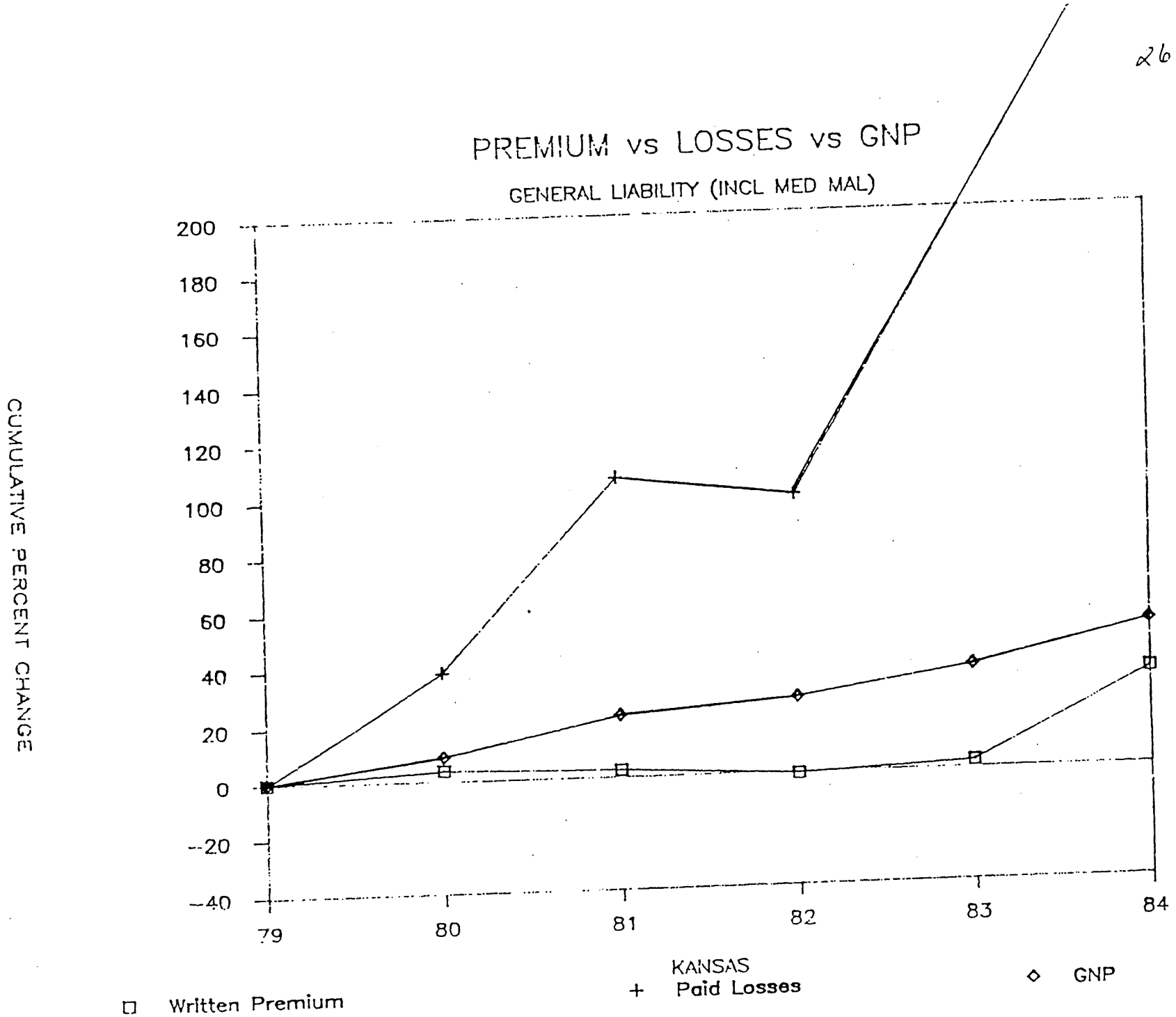
ALL COMMERCIAL



# PREMIUM vs LOSSES vs GNP

## COMMERCIAL LIABILITY



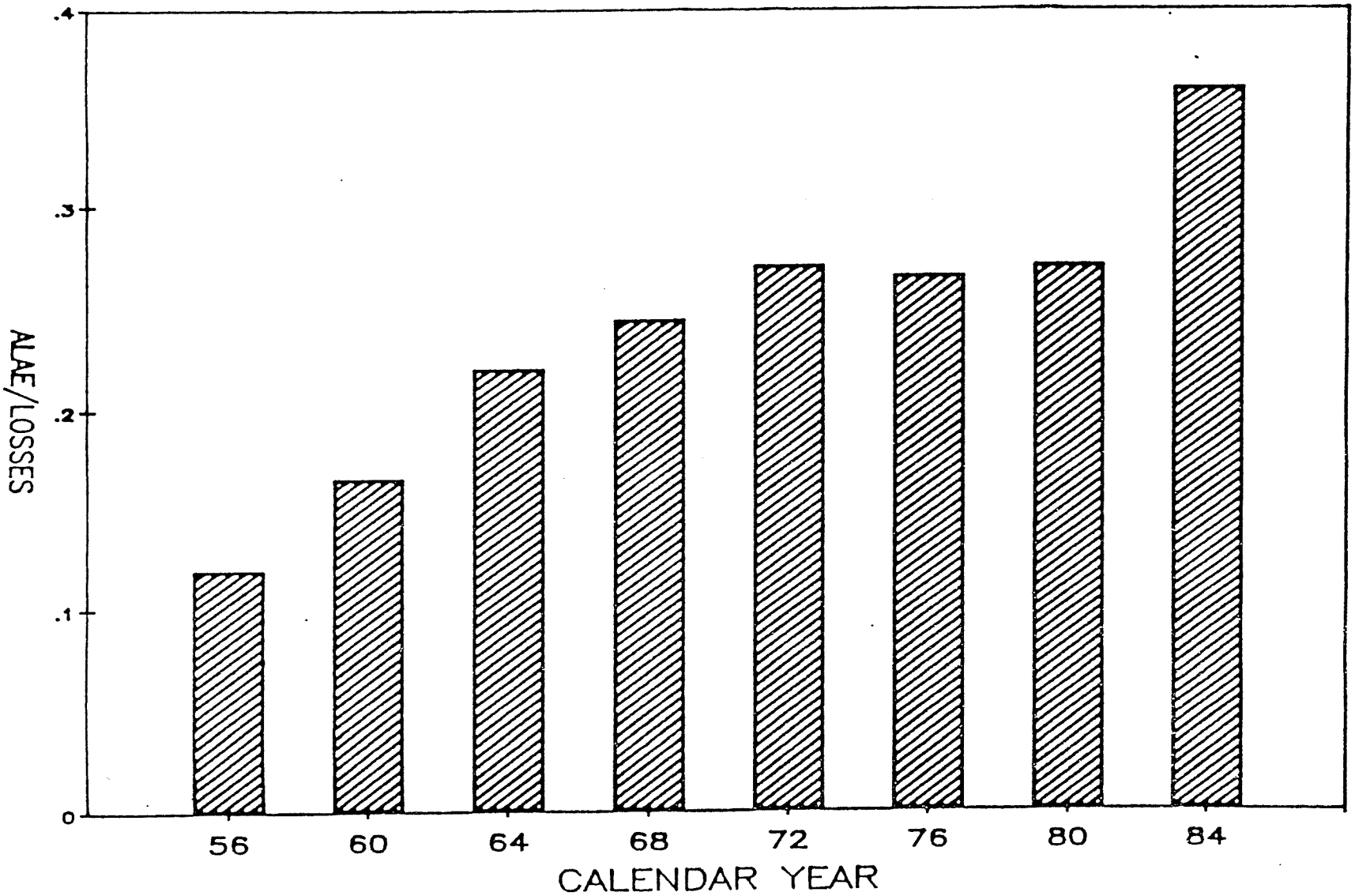

PREMIUM vs LOSSES vs GNP
GENERAL LIABILITY (INCL MED MAL)
CUMULATIVE PERCENT CHANGE
200
180
160
140
120
100
80
60
40
20
0
-20
-40
79
80
81
82
83
84
KANSAS
Written Premium
Paid Losses
GNP

# GENERAL LIABILITY DEFENSE COSTS

The previous exhibits show that general liability losses have been a particular problem, growing much faster than the nation's economic growth. However, the legal defense expense incurred by insurers to defend those general liability claims has grown even faster than losses, and is now a significant portion of the total insured payout.

Insurers call these legal defense expenditures "allocated loss adjustment expense" (ALAE) and the historical data show that ALAE is at unprecedented levels. In the late 1950's it averaged between 10% and 15% of insurers' general liability incurred losses. (See Figure 26A) IN THE LATE 1960's and 1970's, when general liability losses grew rapidly, defense expense rose even faster. By 1970, these expenses accounted for almost 25% of incurred losses, and, by 1984, had jumped to 36% of incurred losses. For every dollar insurers paid or set aside to reimburse an injured party, they've had to allocate an additional 36¢ for defense

# GENERAL LIABILITY
## RATIO OF ALAE TO LOSSES



## GENERAL LIABILITY PREMIUM GROWTH

From 1978 to 1984, general liability losses and loss adjustment expense increased 74% while written premium did not increase. Therefore, it is not suprising that insurers needed to raise their premium levels to catch up to the growth in losses.

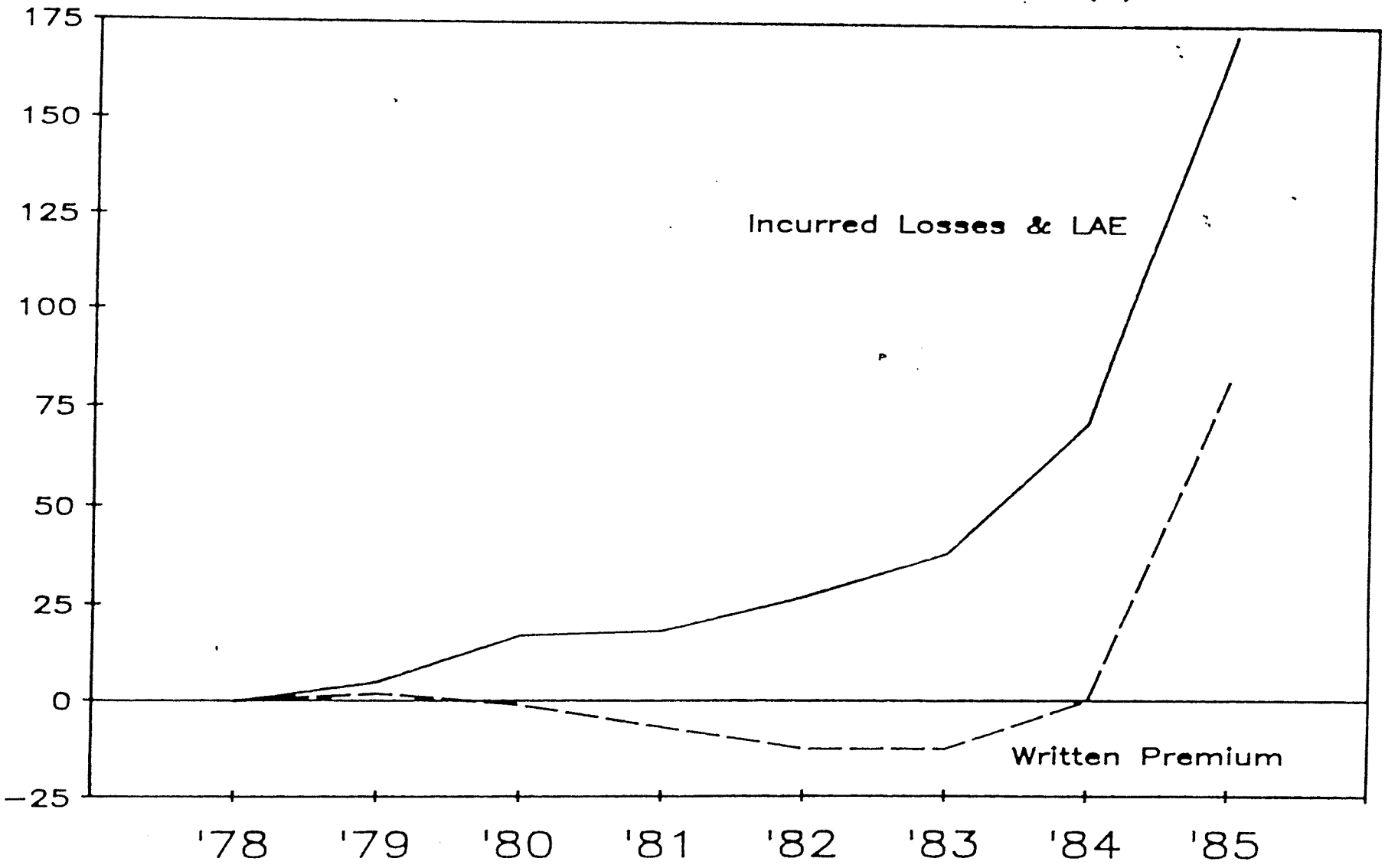
General Liability written premium increased 82% in 1985. HOWEVER, this growth should not be considered excessive since total loss growth since 1978 still exceeds premium growth.

Figure 27 shows that, since 1978, incurred loss and loss adjustment expense increased 172.5%. During this period, written premium increased only 82.2%. From 1978 to 1985, the rate of growth in losses was nearly double that of premiums.

The large increase in premium does <u>not</u> recoup past losses. In fact, this rise in premium is just an attempt to get premiums in line with dramatically rising losses.

# 1985 GENERAL LIABILITY PREMIUM GROWTH NOT ENOUGH TO CATCH LOSSES

General Liability Premium Growth vs. Loss Growth(%)



# UNIQUENESS OF THIS CYCLE

The current profitability cycle is not a typical one. A look at today's problem vs. previous records show several ominous new records have been set.

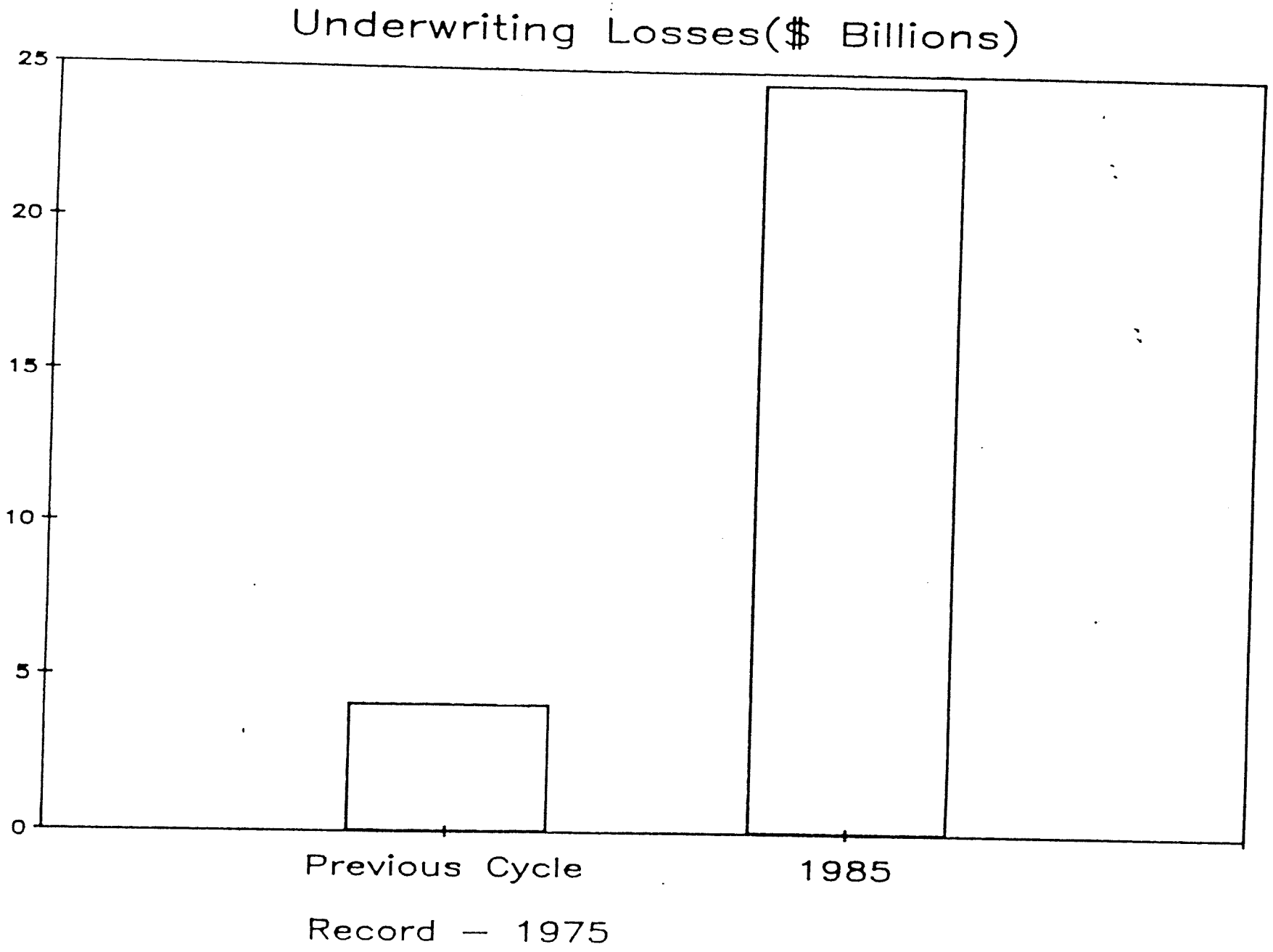
The following figures compare 1984 results to the records set prior to the current cyclic downturn. However, some of these new records were broken again in 1985.

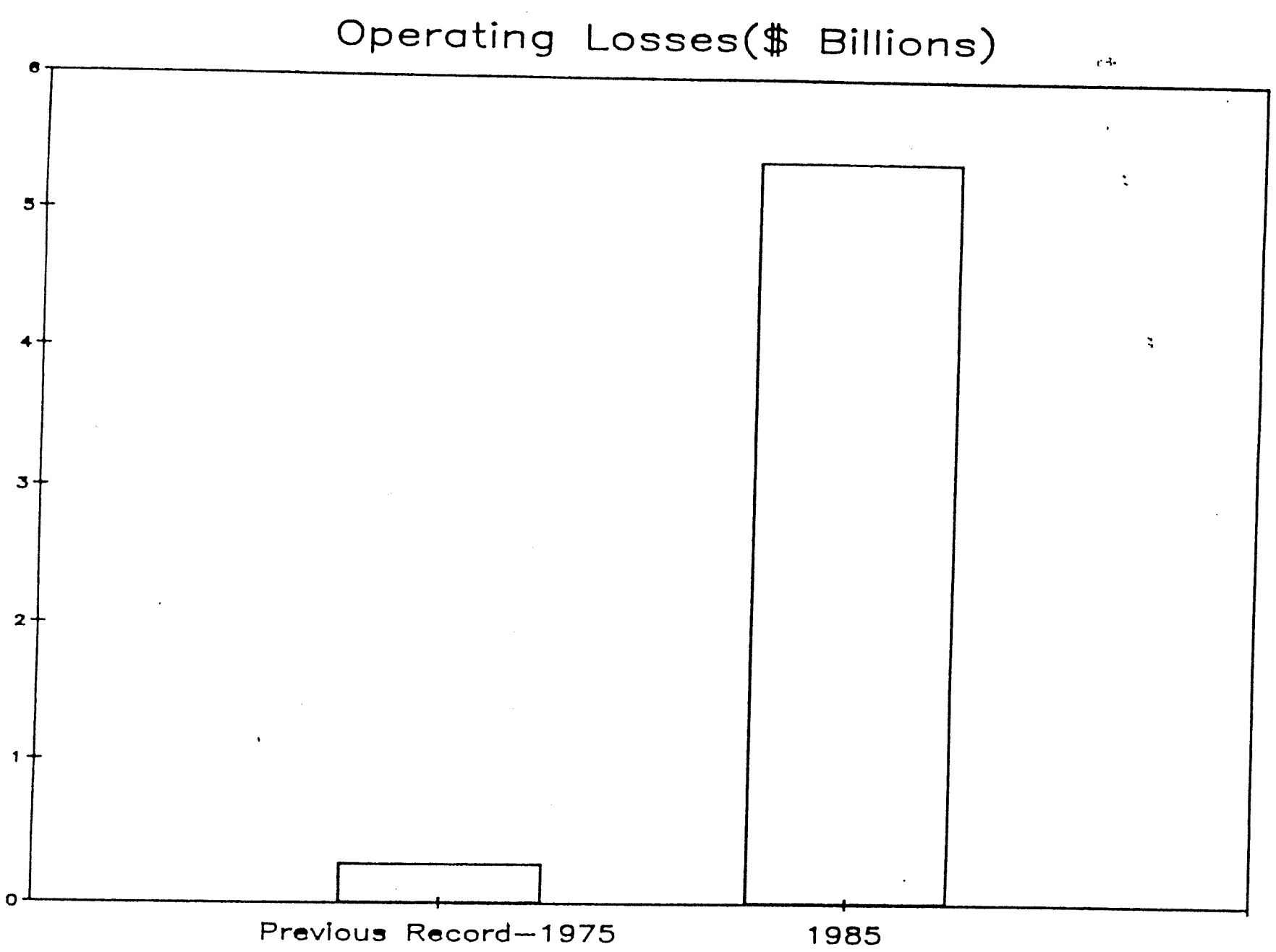
Figure 28 shows that the record 1984 underwriting loss of $21.5 billion far surpassed the previous record of $4.2 billion set in 1975. The 1985 underwriting loss of $24.7 billion was even worse.

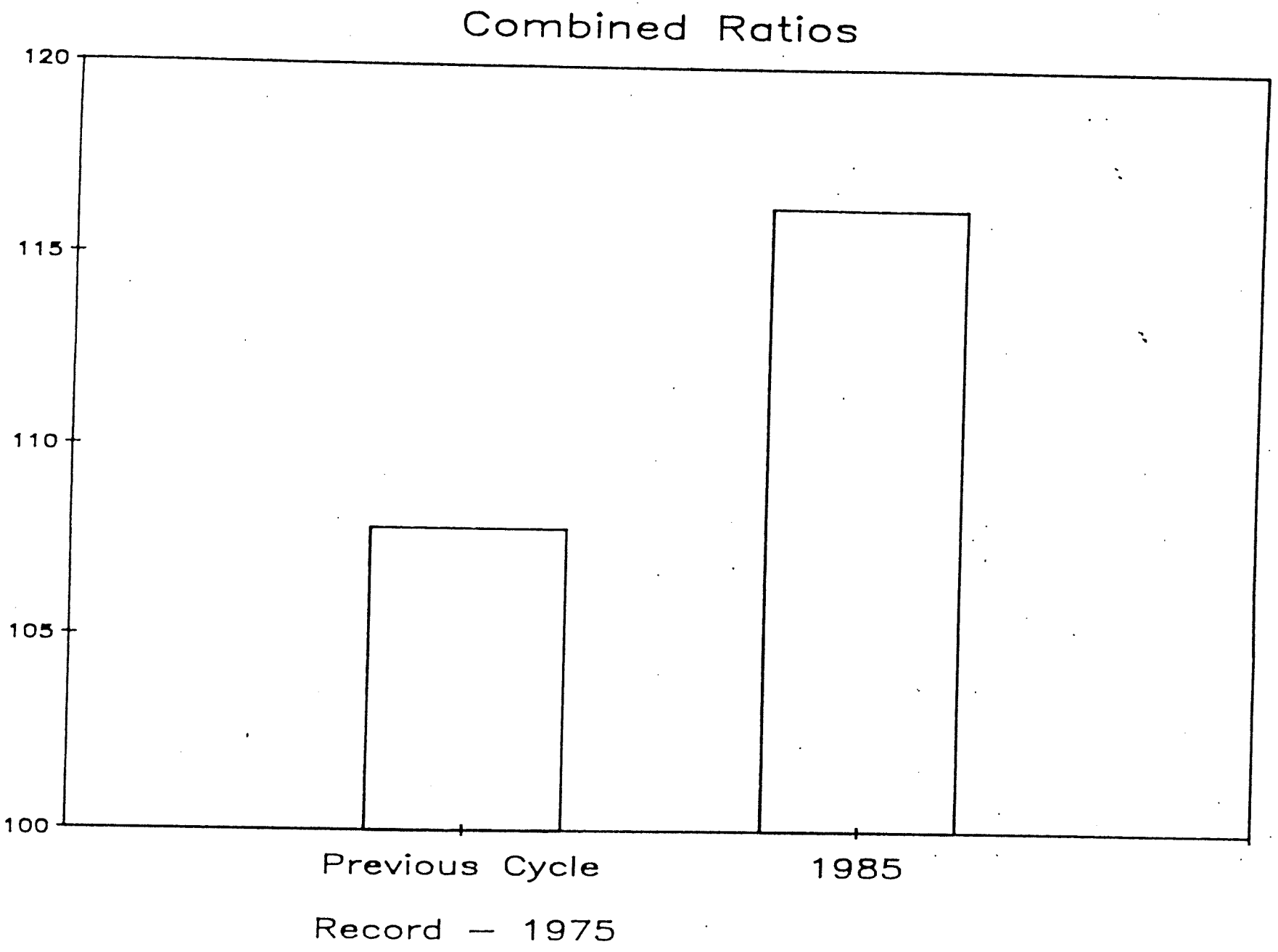
While investment income in 1984 also hit a record $17.7 billion, Figure 29 shows that the combined impact of underwriting and investment results was a record 1984 operating loss of $3.8 billion which exceeds the previous record of $300 million set in 1975. The 1985 operating loss of $5.4 billion was even worse, despite a $2 billion increase in investment income.

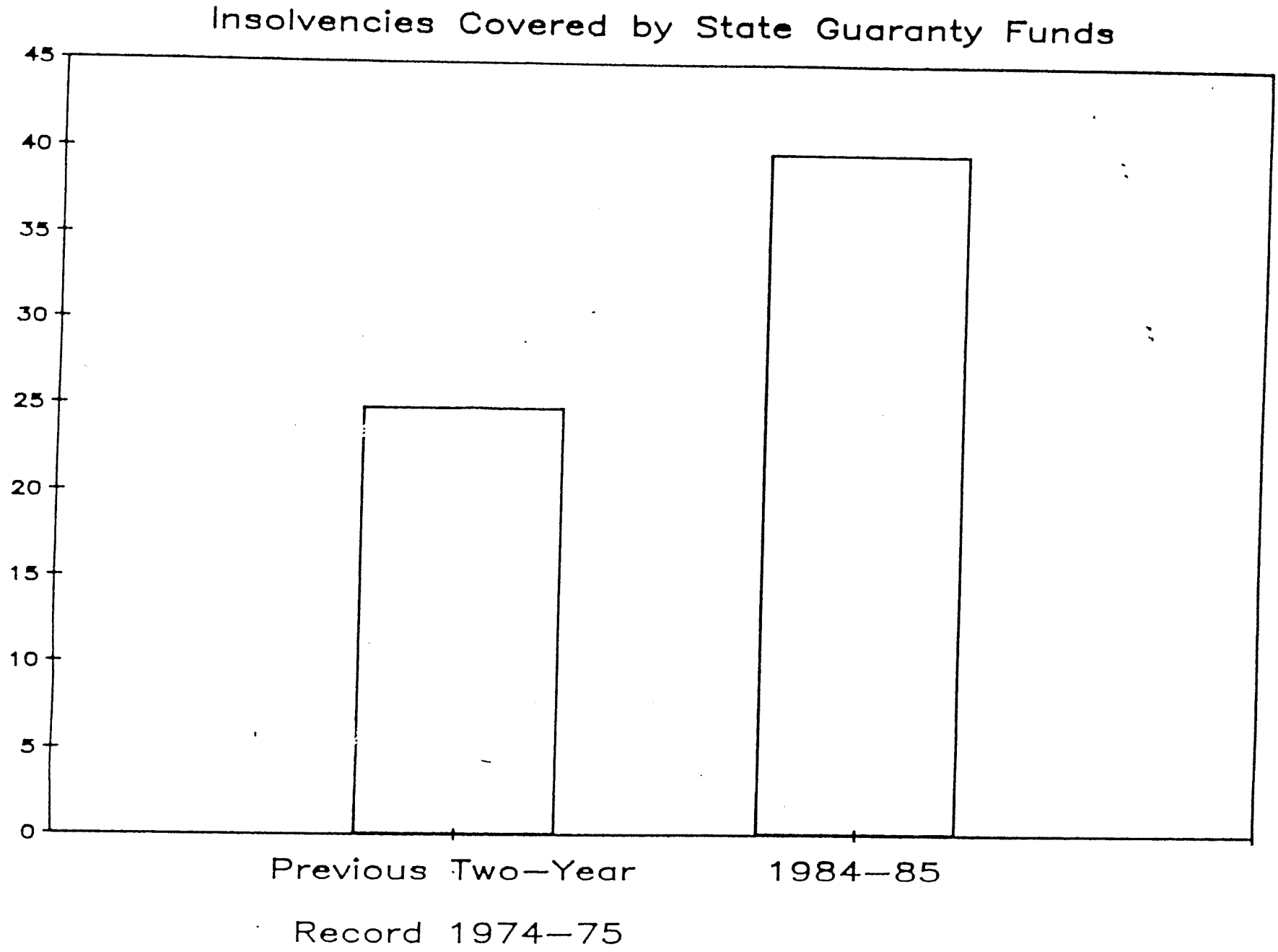
Figure 30 shows that the 1984 record combined ratio of 118.0 far surpassed the previous record of 107.9 set in 1975. The 1985 combined ratio showed a small improvement to 116.4.

Figure 31 shows that the record of 40 insolvencies covered by state guaranty funds for the two years 1984-85 exceeded the previous two-year record of 25 set in 1974-75.


Underwriting Losses($ Billions)
25
20
15
10
5
0
Previous Cycle
1985
Record — 1975


Operating Losses($ Billions)
6
5
4
3
2
1
0
Previous Record—1975
1985


Combined Ratios
120
115
110
105
100
Previous Cycle
1985
Record — 1975


Insolvencies Covered by State Guaranty Funds
45
40
35
30
25
20
15
10
5
0
Previous Two—Year
Record 1974—75
1984—85

# APPENDIX C

# TORT REFORM?

by Judge Terry L. Bullock

May I begin by thanking the Committee for inviting me here to share with you some of my personal perspective regarding some of the difficult issues which the Committee has been asked to consider. I have been asked specifically to comment on several specific proposals under review. I will do so, but before I do so I would like to comment briefly on a few matters which I would label "perspective." I have read the transcripts of all of your prior meetings and I have concluded perhaps a little philosophy would be helpful. I hope when I have concluded you will agree.

Any rational discussion of the current controversy relating to insurance and our tort system requires, in my judgment, a perspective gained from considering the proper social response to all types of natural and man-made catastrophes in the lives of humankind. Catastrophes, like the biblical rain, fall on the just and the unjust alike. These catastrophes range from those inherent in the nature of our planet such as fire, flood, earthquake, hurricane, tornado, disease, to those attributable to the activities of mankind, such as murder (and other intentional acts of brutality), automobile accidents

defective products and processes, and the damage and injury caused by the general carelessness of us all. One of the most important questions for any society is what response shall we as a people make to these human catastrophes. There are several reasonably obvious choices. They include:

1. To let the one to whom misfortune comes bear the brunt of the cost alone.

2. To permit or require the victim of life's calamities to spread the loss over a larger number of citizens through a mandatory or voluntary system of comprehensive insurance.

3. To let society as a whole absorb the loss and damage through the use of the people's taxes (a concept frequently employed in countries embracing socialistic economic theories).

4. To require the one who causes the damage to pay for the damage caused, in cases where there is an identifiable wrong-doer.

5. To permit or require the wrong-doer to spread the loss to a larger segment of society through a system of mandatory or voluntary liability insurance.

5. To compensate victims from a prepaid pool of money furnished by persons participating in activities subjecting the populace to risk.

7. To rely upon the charity of the victim's friends and family to help absorb the cost and care for the injured.

8. To utilize a combination of the foregoing options and perhaps others as well.

The values prevailing in any society dictate the choices to be made among these varying alternatives. Social notions concerning what is more important to the body politic underly the options ulitmately selected. Considerations such as which is more important, the individual or society as a whole, freedom or regulation, free enterprise or controlled economics, as well as common notions of decency and morality come into play.

Once any society, through its government, has come to grips with these important underlying philosophical issues, the next important choice is what kind of system should the government implement to carry out the compensation plan determined desirable by society's values. Again, throughout history there have been several choices.

1. Some societies have chosen bureaucratic administrative systems, selected and overseen by the political forces of the day.

2. Other societies have established arbitration type agencies which investigate and "arbitrarily" adjust claims.

3. Our society has established a system of law and courts to determine disputes, often leaving the ultimate decision in the hands of ordinary citizens operating under laws of universal applicability.

In evaluating the effectiveness of any compensation system several critical principles are important to consider.

1. Efficacy -- Does the compensation system and the the values it applies actually serve the persons for whom it was created, i.e., does it actually compensate the vast majority of those entitled?

2. Adequacy -- are the compensation awards provided by the system adequate and appropriate? and,

3. Efficiency --Are the transaction costs for getting the compensation to the victim reasonable?

In addition to these three paramount questions, it is also necessary, in order to assess the adequacy of any system of compensation, that one prioritize the social objectives of the system. In other words, one must rank order the following social objectives for any compensation system in order to evaluate its adequacy:

1. Is the primary function of the system to compensate the victim?

2. Is the primary function of the system to deter like conduct on the part of the wrong-doer and others like the wrong-doer in the future?

3. Is the primary function of the system to codify and vindicate certain values of society?

4. Is the primary function of the system to impose retribution against those who depart from society's norms?

5. Is the primary function of the system to reallocate resources and minimize the individual impact of human catastrophes, whether natural or man-made?

Another important factor to consider is whom should pay for whatever compensation system we are to have. At present, the vast majority of these costs are absorbed by the participants. Administrative and arbitration systems are usually carried on at taxpayer's expense.

Obviously, of course, the ultimate answer will be a mixture of these competing objectives, the priority of which governs the assessment of the adequacy and effectiveness of any particular system. Underlying all of these considerations will be a balancing of social values. Again, rank order is required. The following examples will illustrate the point.

1. Jobs -- mankind must work and earn a living. If the system of compensation results in the failure of employers all individuals ultimately lose.

2. Products and services -- society desires certain products and services, some of which are high risk. If the compensation system stifles productivity and experimentation, there is again a loss to the entire society.

3. World markets -- in our current economic system, our products and services must compete in a global economy. If our compensation costs are so out of line with the rest of the world that the costs of our products and services make them uncompetitive, again the loss to society may be too great to bear.

4. Impact on victims -- if the wrong-doer does not pay the full losses of a victim, who will? Many catastrophic losses cannot be borne by any individual or his or her family. If the defendant and the defendant's insurance company do not fully compensate the loss, are we willing to fund through taxes a sufficient welfare net to take up the slack and if not, will our collective conscience bear the result?

5. The environment -- much concern is expressed concerning the deterioration of our environment, including land, water and air. If the risk of liability for some commercial activities is too great to permit the activity, perhaps our values, expressed through our compensation system, are simply dictating to commerce that this is an activity that society does not wish to have.

Before proceeding to my specific comments on the points under study, I would also like to share a few additional random observations.

1. No system is ever perfect as long as human beings create and administer it. Our goal should not be for "pure" or "perfect" justice but "substantial justice."

2. We do not live in an ideal world. We should consistently strive for a more civilized society but in the process we must be careful not to kill the goose that lays the eggs on which we all survive.

3. It is the legislature and not the courts which makes the law and it is to the legislature that one must ultimately look for change. The complaint today seems to be that there are too many people suing too many people for too many things, resulting in costs and awards that we do not wish to bear. From whence have all these new rights arisen which are the subject of all these new cases? I will give you a rough, although not complete, answer. When I graduated from law school in 1964 the General Statutes of Kansas, the result of over 100 years of legislation, were contained in a single volume. Today, a mere twenty years later, one can barely reach across the volumes containing the General Statutes of Kansas. Courts, perhaps I should say judges, by nature and training, thrive on simplicity, practicality and predictability. Most of us are by nature conservative. The explosion of litigation then is primarily the

result of legislative entitlements created for our citizens (and I can tell you that the United States Congress makes the Kansas Legislature look like rank amateurs!) Courts create common law only when the legislature has not acted. Unless the decision is based on our Constitution, which it very rarely is, the legislature can always change court-made common law. We are all sworn to obey and uphold the law and we make a conscientious effort to do so.

4. We try the wrong cases! Most lawyers and judges will tell you, if they're honest, that we try the wrong cases. The big cases -- the ones that would really set some sensible guidelines for the handling of future cases quietly are settled (after a fortune is spent in expensive discovery -- usually initiated by the insurance company) for large amounts and the small, odd-ball, low-risk cases are tried. In my view, the jury system works very well -- but it often isn't used wisely.

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5. Finally, one must observe the social cycle of ones times as a predictor of that which is to come. In the formative days of our country, a philosophy of rugged individualism prevailed -- little government, highly efficient, great freedom of the individual, but somewhat brutal to those who suffered misfortune. That period was followed by the New Deal and the Great Society where our new philosophy accepted much government, less freedom, and the general concept that government could solve all problems and make all of life's hurts go away. That plan, noble as it was, failed to take into account the imperfection of human nature and the limited extent of our resources. We are now apparently well into a new conservative mode -- a time when commerce is king, when the values of the majority are paramount, when there is less concern for the unfortunate and where the emphasis is on what can I get for me. Legislatures and courts alike, being human creatures, tend to ultimately reflect the values of the society from which they spring.

With this background and perspective, I now turn to the eight proposed questions I have been asked to address and to which, with your permission, I will add a ninth.

1. Can the time and expense related to discovery be reduced and can more effecive sanctions be formulated with respect to frivilous suits?

The answer to both of these questions is yes. And, in my personal opinion, both should be done. Lawyers, like doctors, are afraid of not doing everything legally possible for fear of being judged misfeasant should they lose. Therefore, the only answer is to legally limit permissible discovery. The Judicial Council should be directed to formulate a streamlined discovery process with strict limits both as to time for and type of discovery. These limits should apply in any suit except the most complicated and expansions of discovery should be permitted only for good cause shown to the trial judge. With respect to frivilous suits, in my opinion, the problem lies with the term "frivilous." Frivilous carries with it the connotation of "meaningless" or "totally devoid of substance." The trial court should be authorized by statute to assess fees and costs against any party filing a claim or counterclaim "lacking in substantial merit."

2. Should the use of structured settlements providing for installment payment of future economic loss be required in cases involving substantial awards?

The answer is yes. In my personal opinion, in this manner the dual tripartite compensation goals of efficacy, adequacy, and efficiency can best be served.

3. Should reasonable regulation of attorney fees be required?

This is a very difficult question. Frankly, I am opposed to almost all governmental price fixing -- preferring to let market forces operate freely. Certainly, at the present time, as far as attorneys are concerned, it is a buyer's market. The field is over-crowded and there are plenty of lawyers willing to and actually competing for work at reasonable prices. In my judgment, these market forces and our rules of ethics are adequate at the present time to control overreaching. If fees are to be regulated, in my opinion, the medical malpractice rule recently adopted should be the model to be followed. It requires a fact hearing to establish all of the facts relative to an appropriate attorney fee mandated by the code of professional responsibility for lawyers. The trial judge, perhaps best qualified in terms of knowledge of the case, the efforts involved, and results obtained, should then approve or limit the fee stating his or her reasons for the decision. In this way a body of law can develop to guide lawyers in the future with respect to the appropriate fees under given circumstances.

One other idea worthy of consideration in connection with attorney fees is the so-called English Rule of loser pays all. My English counterparts would not think of trading their system for ours -- they say it discourages meritless cases because the claimant knows he or she will have to pay both lawyers and all expenses as well. They also say it encourages defendants in valid cases to pay up early -- to save double costs and fees. Further, the argument goes, why should an injured party receive only a part of his actual loss -- (the net after deducting expenses and his attorney's fees) if compensation is the objective, he should be made whole. American lawyers often oppose this idea on the theory it would discourage the filing of "creative" cases -- but perhaps that is a result desirable to society at large. One thing is clear, the English Rule places the cost at the feet of him who is at fault.

4. Should the collateral source rule be restricted?

In my personal opinion, I think the arguments for limiting the collateral source rule are pretty evenly divided. Philosophically, if the primary function of the tort system is to compensate for loss then a victim should recover only for losses not covered by collateral sources. If, on the other hand, the primary purpose of the tort system is to punish wrong-doers

and to deter like conduct in the future, then there is no reason a wrong-doer should profit from reimbursement received by the victim from sources for which he or she has paid out of his or her own funds for many years. Again, the choice is philosophical. However, if the collateral source rule is to be modified, then I would hope the Committee would not recommend that collateral sources be admissible at trial -- this would serve only to protract and confuse already complex litigation. In my opinion, if the defendant is to be credited with collateral compensation received by the victim it should be done simply by the Court as a mathematical subtraction from the award following the verdict. This would keep the trial clean and short and the issues for the jury simple and the process simply mathematical.

5. Should the rules relating to punitive damages be abolished or modified?

Again, in my opinion, the choice is philosophical, depending upon what the Committee thinks the primary purpose of the tort system is and the balancing of somewhat competing values. If the system's purpose is compensation, punitive damages can be eliminated. If the purpose is deterrance, they should be retained. If a balance is struck, they should be limited. Inasmuch as most punitive damage awards are not covered by insurance, the decision of the Committee in this regard will probably impact little on the problem under study. From my own perspective, I can say that a

claim for punitive damages complicates litigation beyond anything most would anticipate and it always seems to enflame emotions to the point where rational decision making is difficult.

6. Should the use of alternative dispute resolution mechanisms be increased?

In my opinion, the answer to this question is mixed. Apparently the system we have now works pretty well, in that roughly 95% of our cases settle. If by alternative dispute resolution one means some kind of trial before an arbitrator, that, in my opinion would only further delay the proceedings and further increase the costs. If, on the other hand, what is intended is a comprehensive settlement conference conducted by the trial judge, my answer would be enthusiastically in the affirmative. Some trial judges are reluctant to delve into the terms of settlement for fear of being perceived as less than impartial. I do not share that view and I think a statute making such a procedure clearly appropriate would be helpful in promoting this often successful activity. Authorization of the trial judge to act in this role would also eliminate the expenses of third parties and would save the time needed in bringing outside arbitrators "up to speed" in terms of the facts and legal issues in the case.

7. Should non-economic damages be limited?

Again, the choice is philosophical, in my judgment. If a person is rendered parapalegic by the wrong-doing of another, for instance, what is adequate compensation? Obviously, medical bills, lost wages, and reimbursement for any out of pocket loss is required to restore the victim to his prior economic condition. But what about the quality of his life, now substantially diminished by his handicapped condition. Some societies do not compensate for this circumstance. Ours traditionally has. Perhaps in a less than ideal world a balance should be struck. Again, the striking of that balance will require some evaluation of our values and the philosophical purposes of our system of compensation.

8. Should the use of summary judgment and other procedural techniques to expedite cases be increased?

In my opinion, the answer is again yes. At the present time summary judgment (judgment entered by the court based on the discovery record before trial) can only be entered if the uncontroverted facts taken in the light most favorable to the plaintiff, demonstrate that the plaintiff cannot prevail as a matter of law. Accordingly, summary judgment could not be used in a case where the claim presented was de minimis lex. For example, if in an automobile accident caused by the fault of the defendant the plaintiff has suffered only a slight cut or

bruise, summary judgment would be inappropriate as the value of that slight cut or bruise technically presents a jury question. If the Legislature should expand the rules limiting to summary judgment to allow a judgment to be entered by the court either for the defendant in such de minimis cases or for the plaintiff in a nominal sum, many cases could be appropriately short-circuited without detracting materially from our goal of substantial justice.

9. Can certain statutes of limitation be shortened without material damage of our goal of substantial justice?

Again, in my opinion, the answer is yes. This question directly addresses the "long-tail" problem which currently plagues both individuals and the insurance industry, particularly with regard to written contracts, real estate, products liability and the claims of minors. I see no reason why actions for minors, for example, should not be brought by guardians of the child within a reasonable amount of time after loss occurs. Minors' interests are often foreclosed in other legal proceedings through the appointment of legal representatives. If the statute is carefully written, I see no reason why claims on behalf of minors could not be generally foreclosed if not timely brought. The obvious exception, of course, would be claims of minors against the guardians who would otherwise have had the duty to make the claim.

As I have indicated previously, I speak only for myself and I hope that these comments have been helpful to the Committee. If I may be of any further assistance in your deliberation, please feel free to call on me at any time.

# APPENDIX D

EMPORIA STATE UNIVERSITY
1200 COMMERCIAL EMPORIA, KANSAS 66801-5087 316/343-1200
SCHOOL OF BUSINESS
OFFICE OF THE DEAN

October 22, 1986

The Honorable Bob Whittaker
Cannon House Office Building, Room 332
Washington, DC 20515

Dear Representative Whittaker:

In April of this year, the Honorable Fletcher Bell, Commissioner of Insurance, State of Kansas, formed a Citizens' Committee on Legal Liability to look into the problem of affordability and availability of liability insurance in Kansas. The Committee consisted of over 25 members including representatives of the aviation industry, day care centers, professional organizations, general manufacturing, the oil and gas industry, and others. The testimony before the Committee included representatives from the insurance industry, legal profession, as well as consumer groups.

The Committee completed its task last week and made over thirty recommendations. As Chairman, Citizens' Committee on Legal Liability, I have been directed by the Committee to express to you our support for (1) the Senate Commerce Committee's Uniform Products Liability Bill, (2) the expansion of the 1981 Federal Risk Retention Act to apply to all seriously distressed property and casualty lines with federal pre-emption eliminating the necessity for risk retention groups to comply with each State's regulatory requirements, and (3) the General Aviation Tort Reform Act of 1986.

These federal measures along with state action should go a long way toward making liability insurance available at affordable rates.

With deep appreciation,

S. A. Hashmi

S. A. Hashmi, Chair
Kansas Citizens' Committee on
Legal Liability; and
Dean, School of Business

bk

EMPORIA STATE UNIVERSITY
1200 COMMERCIAL EMPORIA, KANSAS 66801-5087 316/343-1200
SCHOOL OF BUSINESS
OFFICE OF THE DEAN

October 22, 1986

The Honorable James Slattery
Longworth House Office Building, Room 1431
Washington, DC 20515

Dear Representative Slattery:

In April of this year, the Honorable Fletcher Bell, Commissioner of Insurance, State of Kansas, formed a Citizens' Committee on Legal Liability to look into the problem of affordability and availability of liability insurance in Kansas. The Committee consisted of over 25 members including representatives of the aviation industry, day care centers, professional organizations, general manufacturing, the oil and gas industry, and others. The testimony before the Committee included representatives from the insurance industry, legal profession, as well as consumer groups.

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Dean, School of Business

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EMPORIA STATE UNIVERSITY
1200 COMMERCIAL EMPORIA, KANSAS 66801-5087 316/343-1200
SCHOOL OF BUSINESS
OFFICE OF THE DEAN

October 22, 1986

The Honorable Jan Meyers
Longworth House Office Building, Room 1407
Washington, DC 20515

Dear Representative Meyers:

In April of this year, the Honorable Fletcher Bell, Commissioner of Insurance, State of Kansas, formed a Citizens' Committee on Legal Liability to look into the problem of affordability and availability of liability insurance in Kansas. The Committee consisted of over 25 members including representatives of the aviation industry, day care centers, professional organizations, general manufacturing, the oil and gas industry, and others. The testimony before the Committee included representatives from the insurance industry, legal profession, as well as consumer groups.

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EMPORIA STATE UNIVERSITY
1200 COMMERCIAL EMPORIA, KANSAS 66801-5087 316/343-1200
SCHOOL OF BUSINESS
OFFICE OF THE DEAN

October 22, 1986

The Honorable Dan Glickman
Rayburn House Office Building, Room 2435
Washington, DC 20515

Dear Representative Glickman:

In April of this year, the Honorable Fletcher Bell, Commissioner of Insurance, State of Kansas, formed a Citizens' Committee on Legal Liability to look into the problem of affordability and availability of liability insurance in Kansas. The Committee consisted of over 25 members including representatives of the aviation industry, day care centers, professional organizations, general manufacturing, the oil and gas industry, and others. The testimony before the Committee included representatives from the insurance industry, legal profession, as well as consumer groups.

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EMPORIA STATE UNIVERSITY
1200 COMMERCIAL EMPORIA, KANSAS 66801-5087 316/343-1200
SCHOOL OF BUSINESS
OFFICE OF THE DEAN

October 22, 1986

The Honorable Nancy Landon Kassebaum
Senate Dirksen Building, Room 302
Washington, DC 20510

Dear Senator Kassebaum:

In April of this year, the Honorable Fletcher Bell, Commissioner of Insurance, State of Kansas, formed a Citizens' Committee on Legal Liability to look into the problem of affordability and availability of liability insurance in Kansas. The Committee consisted of over 25 members including representatives of the aviation industry, day care centers, professional organizations, general manufacturing, the oil and gas industry, and others. The testimony before the Committee included representatives from the insurance industry, legal profession, as well as consumer groups.

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Dean, School of Business

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EMPORIA STATE UNIVERSITY
1200 COMMERCIAL EMPORIA, KANSAS 66801-5087 316/343-1200
SCHOOL OF BUSINESS
OFFICE OF THE DEAN

October 22, 1986

The Honorable Robert Dole
Senate Hart Building, Room 141
Washington, DC 20510

Dear Senator Dole:

In April of this year, the Honorable Fletcher Bell, Commissioner of Insurance, State of Kansas, formed a Citizens' Committee on Legal Liability to look into the problem of affordability and availability of liability insurance in Kansas. The Committee consisted of over 25 members including representatives of the aviation industry, day care centers, professional organizations, general manufacturing, the oil and gas industry, and others. The testimony before the Committee included representatives from the insurance industry, legal profession, as well as consumer groups.

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EMPORIA STATE UNIVERSITY
1200 COMMERCIAL EMPORIA, KANSAS 66801-5087 316/343-1200
SCHOOL OF BUSINESS
OFFICE OF THE DEAN

October 22, 1986

The Honorable Pat Roberts
Longworth House Office Building, Room 1314
Washington, DC 20515

Dear Representative Roberts:

In April of this year, the Honorable Fletcher Bell, Commissioner of Insurance, State of Kansas, formed a Citizens' Committee on Legal Liability to look into the problem of affordability and availability of liability insurance in Kansas. The Committee consisted of over 25 members including representatives of the aviation industry, day care centers, professional organizations, general manufacturing, the oil and gas industry, and others. The testimony before the Committee included representatives from the insurance industry, legal profession, as well as consumer groups.

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