Kansas Legislative Research Department October 7, 1986

MINUTES

SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE

September 11 and 12, 1986
Room 313-S -- Statehouse

Members Present

Representative Joe Knopp, Chairman
Senator Neil Arasmith
Senator Paul Feleciano
Senator Bob Frey
Senator Jeanne Hoferer
Senator Bill Mulich
Senator Nancy Parrish
Senator Eric Yost
Representative Art Douville
Representative Ken Grotewiel
Representative Rex Hoy
Representative Robin Leach
Representative Bruce Mayfield
Representative Mike O'Neal
Representative Mike Peterson
Representative John Solbach

Staff Present

Mike Heim, Kansas Legislative Research Department
Jerry Ann Donaldson, Kansas Legislative Research Department
Chris Courtwright, Kansas Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Torrence, Revisor of Statutes Office
Gordon Self, Revisor of Statutes Office
Nadra Spingler, Secretary

Conferees Present

Dave Retter, Concordia City Attorney
Bob Watson, Overland Park City Attorney
Jim Kaup, League of Kansas Municipalities
Jerry Palmer, Kansas Trial Lawyers Association
Fred Allen, Kansas Association of Counties
Richard Funk, Kansas Association of School Boards

Conferees Present (Continued)

Mike Rees, Chief Counsel, Kansas Department of Transportation
Ron Todd, Assistant Commissioner, Insurance Department
Bob Hayes, Insurance Department
Ted Fay, Insurance Department
T. C. Anderson, Kansas Society of Certified Public Accountants

September 11, 1986
Morning Session

Representative Joe Knopp, Chairman, called the meeting to order at 10:15 a.m. He stated the two-day agenda would focus on additional information concerning municipal liability problems, tort reform, recommendations of the Insurance Department, and Committee discussion and direction to staff.

Dave Retter, City Attorney for Concordia, and Chairman of the Task Force on Tort Reform and Insurance of the League of Kansas Municipalities, appeared for the League to present the Task Force's proposed amendments to the Tort Claims Act. He said the Task Force was a resource group of 11 members composed of attorneys and appointed and elected local officials. His comments were an overview of the group's findings to be presented in more detail by fellow conferees.

He said the Task Force recommended that consideration be given to making the Tort Claims Act a closed rather than an open-end concept, regarding tort liability. He said when the Act was passed in 1979, insurance was affordable and available, but societal policies have changed, and plaintiffs against municipalities are more and more frequent. Governmental bodies are different from the private sector and they have fewer ways to pay losses. Definiteness in the law is needed to help cities deal with budgets, plan for manpower needs, educate employees, and remove the disincentive for good people to run for office. He noted the Judicial Council, in 1972, predicted indefiniteness would occur with an open-end liability approach, and this has happened. Mr. Retter said it was not logical, in view of the emphasis on economic development, to ask small municipalities to cut programs or to disincorporate to escape tort liability. A closed-end concept would help economically. He stated his group has amendments regarding punitive damages which could be adapted to either the open- or closed-end concept.

In response to questions, Mr. Retter said he has had people in Cloud County tell him they will not run for office because of liability. He believed it would be very helpful if the law clearly relieved public officers of personal liability. The risks they see are to their own pocketbooks. An important plank in the Task Force's proposals is to place punitive damages under a cap. In regard to specific cases brought against cities in Cloud County, Mr. Retter said its exposure was relatively limited and had had no significant lawsuits. This does not mean the governing body has not made mistakes but that plaintiffs' lawyers have not identified the problem.

Bob Watson, City Attorney for Overland Park and former City Attorney for Kansas City, Kansas, presented amendments on behalf of the Task Force and the city of Overland Park regarding sections of the Tort Claims Act covering punitive damages. Attachment No. 1 contains a summary of these changes, reasons for them, and drafts of the revised laws. Among other provisions, the proposals would prohibit punitive damages being assessed against employees of cities altogether or more narrowly define the types of conduct which could expose employees to personal liability for punitive damages and would place such damages within the $500,000 damage cap.

In response to questions, Mr. Watson said without amendments, elected officers fear that they stand personally exposed to liability. He gave examples of a situation in Kansas City where punitive damages were awarded against an individual member of the governing body and in Wichita where punitive damages were awarded against an employee of the city. He clarified that both cases were federal civil rights suits and were not brought under the Kansas Tort Claims Act. He noted the concern of city employees who are told they might not be immune. He believed punitive damage awards were out of place in civil law. Cases involving individual employees committing crimes against others maliciously should be handled under criminal law procedures. Mr. Watson pointed out the Legislature had provided some guidance regarding punitive damages for doctors. A member noted that the threat of punitive damages is being used to extort more compensatory damages. Mr. Watson did not know if the changes he outlined would affect insurance liability rates. Mr. Watson said, in regard to an inquiry made to an insurance carrier concerning punitive damage coverage of public officers, the carrier said they were covered to the extent allowed by state law. He believed the state law was unclear.

Jim Kaup, League of Kansas Municipalities, presented a statement and proposals for changes to the Tort Claims Act (Attachment No. 2), on behalf of the League's Task Force which were not covered by Mr. Watson. He said tort reforms should not be made just to reduce insurance costs. In reality, the situation is different now than in 1979, and more and more cities have to self-insure or join pools rather than go to private insurance carriers.

In response to questions, Mr. Kaup said he did not discuss with the Task Force which amendments were priorities, but, in his personal opinion, changing open-end to closed-end liability and the written notice of claim provision were the most important. If these changes are made, some of the others would not be necessary, he said. He believed the advantage of closed-end liability would be that future actions of courts would be controlled. Mr. Kaup did not believe it would be difficult to establish a laundry list where liability should lie. He noted that language for some of the suggested changes recommended by the Task Force came from the 1986 revision of the Colorado Tort Claims Act. Other states have closed-end liability, and the Judicial Council recommended closed-end liability with a laundry list of immunities. The League is not asking for the return to governmental immunity but wants certainty regarding future liability exposure and wants to make sure cities can operate as self-insurers or in pools, he said.

Jerry Palmer, Kansas Trial Lawyers Association, gave background on the case which affected municipal liability and of legislative actions which resulted in the open-end concept. The study done for the League by the

Tillinghast consulting firm concluded that there was no crisis regarding liability insurance availability nor was there a great degree of claims frequency, but there were enormous increases in costs. He said municipalities are asking for relief from punitive damages when there has not been one award in seven years for punitive damages under the Kansas Tort Claims Act. Public officers have less opportunity for liability in their public roles than in their private roles. He said most local officials are sued under the Federal Civil Rights Act over which the state legislature has no jurisdiction. He said a closed-end act could even liberalize the law and provide a greater opportunity to recover and seven years of court interpretation under open-end approach would be lost.

In response to questions, Mr. Palmer said he would support a bill stipulating that members of the governing bodies who are acting within the scope of their duties are not responsible individually. He would not oppose the League's recommendation regarding the community service definition. He believed the League's proposal to require written notice of a claim to the governing body within 180 days after discovery of the injury was a barrier to recovery, discriminated against those injured, and might not be constitutional. He noted that K.S.A. 75-6104 regarding municipalities adopting or not adopting regulations was a real problem. If a standard is set, it is presumed one has to comply. He questioned how a "standard of care" could be defined and noted that only municipalities were concerned about this. On the issue of blanket immunity for no profit organizations and boards, this could lead to any group of persons organizing themselves as a nonprofit organization in order to obtain immunity, he said.

In response to Mr. Palmer's remarks, Mr. Kaup said the recommendation regarding mandatory guidelines was a priority with the League for the 1987 Session in order to undo what happened in the Fudge decision. He said that it is not in the public interest to penalize those cities that have standards, and guidelines for conduct of city employees such as police officers in certain situations.

The Committee recessed for lunch.

Afternoon Session

The Chairman reconvened the meeting at 1:40 p.m.

Fred Allen stated the Kansas Association of Counties has a tort claims committee of county commissioners, officers, and staff people who have expertise in insurance matters. It has been functioning and has met with League members regarding their proposals. He said the committee is in general agreement with all of the League's proposals and believed people should be able to run for office without fear of liability.

In response to questions, Mr. Allen said he knew of no major liability problems related to counties. He said the Tort Claims Act, generally, is a good act and is considered one of the best in the nation. Copies of it have

been furnished to county associations in other states. He noted that claims and settlements under the federal civil rights actions are outlandish. Mr. Allen stated that his group had received some bad advice in obtaining a speaker for its annual meeting who misstated provisions of the Kansas Tort Claims Act. He hoped to clarify these statements during ensuing meetings.

Richard Funk, Kansas Association of School Boards (KASB), repeated his support of 1986 H.B. 3114 which specified that individual board members are not liable. In response to questions received at the July meeting of the Committee, he said he had researched the question of whether individual board members had been held liable noting none had been found liable to date. He said there are now seven cases pending which have named individual board members.

In response to questions, Mr. Funk said he did not know if there is a problem getting members to run or having them retire from boards because of liability. Members are concerned, however, that they are acting in good faith as a body but a suit may be brought against them personally. He did not know if any of the seven individuals had retained their own attorneys.

Mr. Funk said KASB is attempting to get a handle on liability insurance and is working with the Insurance Commissioner to develop insurance pools for workers' compensation. A member pointed out that there was a duplication of efforts being made by municipalities and counties also in this area. Mr. Funk said school boards are better risks since they do not have police and fire employees and therefore, schools do not want to be in the same pool with cities and counties.

Mike Rees, Chief Counsel for the Department of Transportation (KDOT), said his agency is not interested in significant changes to the Tort Claims Act even though the agency has many tort claims filed against it. He said the number of claims per year has been 35 to 40 since 1982. He believed KDOT claims have been interpreted by courts in a reasonably consistent manner to date. At some point in the future, some changes may be needed, he said. He is satisfied with present law and is against any radical change.

In response to questions, Mr. Rees said KDOT does not handle Highway Patrol cases. He said municipalities have a right to be disturbed by the recent Fudge case. KDOT is self-insured and has a line item in its appropriations to cover liability costs. There have been no big increases in settlements and there has been no case where the judgment was more than the offer to settle. He said 25 to 30 percent of the cases are dismissed for technical reasons, one-half are settled, and the remainder are tried. Mr. Rees noted, however, there was the potential for suits to impact on the budget, and a big injury suit in excess of $1 million would definitely be a problem.

Staff reviewed a memorandum regarding tort law and liability insurance changes (Attachment No. 3). The memorandum lists suggestions made by conferees and those discussed by the Committee.

The Committee discussed suggestions contained in Attachment No. 3 upon which there was general agreement. Under the heading "Tort Law Changes," staff was directed to draft a proposal to include suggestions for itemized jury verdicts (No. 3), immunity for directors and officers of nonprofit

organizations (No. 8), immunity for volunteers of charitable organizations (No. 10), and authorization for the Kansas Supreme Court to gather information regarding structured settlements (No. 20). It was noted that the Committee should have input in the type of information gathered by the Supreme Court. Under the heading "Kansas Tort Claims Act," the Committee agreed to have drafted the suggestions that H.B. 3114 be reenacted (No. 1), that structured settlements be allowed (No. 7), and that the $500,000 cap be clarified to apply to insurance pools (No. 8). The suggestion was made that the draft on No. 8 should provide that the cap will always apply but cities can also buy additional insurance.

Representative Peterson moved that the Committee take no action on any of the suggestions under "Kansas Tort Claims Act" not previously agreed upon. He said the judicial system in this area was working well and should not be jeopardized. The Chairman stated that all suggestions should have the benefit of discussion so conferees will know the reasons for the Committee's actions. There was no second to the motion.

The Committee then discussed item No. 1 on page 1, the collateral source rule. A member noted that every time that collateral source rule changes are made, courts find fault with them. He suggested if changes are made, the Committee should utilize expert talent, such as Professor Jim Concannon, in working out the details. Another suggestion was made regarding the Judicial Council's expertise and that its input would be helpful before major steps are taken in this area. Factors of cost and burden to the judicial system should be considered, and the double payment problem should be addressed without eliminating the entire collateral source rule.

Representative Solbach moved that item No. 1 be tabled and the Judicial Council be requested to determine if changes in the collateral source rule should be made, especially in regard to unjust enrichment through double payment, with its findings to be studied by a legislative interim committee. The motion was seconded by Representative Peterson. The motion carried.

In regard to item No. 2 (limit punitive damage awards), a member pointed out that some conferees had said the rationale for punitive damages was for compensation, but he believed the purpose was to punish and correct actions in the future. Other points made were that something should be done to limit punitive damages assessed against individuals who do not act through malice, but at the same time provide for punitive damages against unscrupulous individuals or corporations. A Committee member said there are built-in safeguards now which allow judges to refuse or to limit punitive damages to a reasonable figure. Another Committee member said punitive damages are being used as a weapon to get higher settlements. A member noted that punitive damages may be used as leverage, but that no conferee had given a concrete example of this.

Representative Douville stated he had seen the threat of punitive damages cause settlements to be increased and he moved that item No. 2 be drafted for consideration. The motion was seconded by Senator Yost. In discussion, it was noted there is a lack of information regarding the number of punitive damage claims being filed. There was a continued division of opinion regarding whether or not punitive damages serve as a "hammer" to get additional compensation in settlements.

Representative Leach made a substitute motion that the Committee take no action on item No. 2. It was seconded by Representative Peterson. The Chairman ruled the vote on the substitute motion failed to carry and requested, with the consent of the Committee, that a draft be prepared based on the Coalition recommendation in Attachment No. 3, but without language concerning a cap. There was discussion regarding the rights to a jury trial which the draft omits in the second phase of a two-part trial. Staff pointed out that this language came from the medical malpractice law, and constitutional concerns would also apply to this law. The suggestion was made that the kind of conduct which allows a person to claim punitive damages could be defined in the draft. Because of equal division of the Committee on the issue of punitive damages, the Chairman ruled that no further changes be made in the Coalition draft and that the other issues could be debated when the draft is completed.

On item No. 4 (instructing juries about taxability of awards), Representative Solbach moved that the Committee take no action on this suggestion. The motion was seconded by Senator Frey. In discussion, it was pointed out the provision would require two tax experts to testify, would complicate matters, and would require more time. He said experts are not always available. Another member said, in light of the new tax reform, the suggestion should not be a burden. The problem of explaining to juries tax brackets and deductibles was noted.

Representative O'Neal made a substitute motion that item No. 4 be referred to the Judicial Council for study. The motion was seconded by Representative Peterson. The substitute motion carried.

On item No. 5 (mandating structuring of awards), it was noted that this was also addressed in item No. 7 under "Kansas Tort Claims Act" of Attachment No. 3.

Representative Leach moved that the Committee take no action on No. 5. The motion was seconded by Representative Solbach. A member suggested that the Model Periodic Payment by Judgments Act, which addresses periodic payment of judgements, be considered in regard to No. 5.

Representative O'Neal made a substitute motion that the Model Act be drafted for consideration and it was seconded by Senator Parrish. The substitute motion carried.

On item No. 6 (limiting noneconomic damage awards), the difference between noneconomic damage and punitive damage awards was discussed.

Senator Arasmith moved to limit noneconomic damages to $250,000, the same as in the medical malpractice law. The motion was seconded by Representative O'Neal. In discussion, it was pointed out that by limiting noneconomic damages, the Committee was stripping away the rights of citizens to recover regardless of the extent of damages, and there was direct causal relationship between certain tort law changes and the lowering insurance premiums in the area of medical malpractice, which is not present with this suggestion. Representative O'Neal limited his second, noting there is a difference in noneconomic damage and pain and suffering, and the cap should be

placed on the pain and suffering element of noneconomic damage. The Chairman pointed out that the Committee's decision should not be based on just helping the insurance industry, but should be made because people are being unjustly enriched which relates to the judicial system. It was also pointed out that no evidence had been presented nor documentation given that what has happened with insurance rates is the fault of the judicial system. Action was delayed on No. 6 until additional information could be obtained from the patterned jury instructions of Kansas (PIK).

On item No. 7 (establishing criteria for expert witnesses), Senator Frey noted that experts are not always close at hand, nor was it feasible in today's world to establish criteria. He moved that the Committee take no action on No. 7. The motion was seconded by Representative Solbach. The motion carried.

On item No. 9 (allowing shareholders to amend the corporate charter to cap or eliminate awards against directors and officers), it was noted that this suggestion is part of the Delaware Corporation Code. Senator Frey moved that No. 9 be included in a draft, and the motion was seconded by Senator Hoferer. The motion carried.

On item No. 11 (enacting an alternative dispute resolution procedure), Representative Solbach noted there are alternative resolution procedures available now if both parties agree. If made mandatory, these create a constitutional problem. He moved that the Committee take no action on No. 11. The motion was seconded by Representative Peterson. The motion carried.

On item No. 12 (limiting attorney contingency fees), Representative Peterson said this proposal is being studied by the Judicial Council. He moved that the Committee take no action on No. 12. This was seconded by Senator Parrish. The motion carried.

On item No. 13 (mandating settlement conferences), it was noted that settlement conferences were part of the medical malpractice law, but penalties were not. A Committee member noted that most courts are using settlement conferences now. Representative Solbach moved that the Committee take no action on No. 13. This was seconded by Representative Douville. The motion carried.

On item No. 17 (including health care equipment manufacturers in the definition of "health care provider"), Representative Peterson moved that the Committee take no action on No. 17. This was seconded by Senator Feleciano. The motion carried.

On item No. 18 (providing the statute of limitations for construction defects runs from date of completion of project), Senator Yost moved that No. 18 be drafted for consideration. This was seconded by Senator Mulich. The motion carried.

On item No. 19 (pretrial screening panels for suits against professionals), Representative Peterson moved the proposal be drafted, which was seconded by Senator Frey. Representative Solbach questioned at what point a screening panel would be brought in and believed mandating a panel would complicate the issue. A member noted that the medical malpractice committee had

problems with this concept and objected to a panel of two or three people determining if there is cause for action. The motion carried.

On item No. 23 (amending the arbitration law to permit the voluntary submission of tort disputes), Representative Solbach moved that the proposal be drafted for consideration and this was seconded by Representative Peterson. The motion carried.

On item No. 24 (requiring the party responsible for unreasonable settlement delay to pay attorney fees), it was noted that this proposal was already present law. No action was taken on No. 24.

On item No. 25 (prohibiting juries from being instructed about the consequences of its special verdicts), it was noted that H.B. 2215 containing this provision was discussed and received no support in the 1986 House Judiciary Committee. Representative O'Neal was not sure how much consideration it received and moved the proposal be drafted. The motion was seconded by Senator Yost. A member said the proposal would allow the jury to come back with a verdict that it totally unintended by the jury since it changes the law substantially, and the Judiciary Committee had extensive debate resulting in no support for H.B. 2215. Representative O'Neal agreed the concept may not be germane to the Committee's charge and withdrew his motion. It was the consensus of opinion that no action be taken on No. 25.

The Chairman recessed the meeting at 5:10 p.m.

September 12, 1986
Morning Session

The Chairman reconvened the meeting at 9:15 a.m. Testimony was received from the Insurance Department regarding insurance proposals.

Ron Todd, Assistant Insurance Commissioner, said Ted Fay and Bob Hayes from the Insurance Department would help answer questions. He reviewed statistical information concerning reports received by the Department regarding the National Association of Insurance Commissioners (NAIC) data base and product liability, professional liability statistical summaries, professional liability closed claims summaries, product liability closed claims and statistical summaries, and product liability policy year and summary reports. This information is on file in the Legislative Research Department. A summary of the types of reports required and data gathered by the Department is in Attachment No. 4.

Mr. Todd said that reports required in K.S.A. 40-1130 and 40-1131 concerning product liability have no value to decision makers in determining whether companies make or lose money in a particular year, and he requested that they be repealed. K.S.A. 40-1132 and 1133 duplicate 1130 and 1131, and also provide for reports from which the type of information needed can be acquired. There was discussion regarding the Department's ability to be able to compare, from reports, current year figures with prior years because of the way direct, incurred, and future losses are reported. In regard to

professional liability statistical summary reports information, Mr. Todd said in order to compare policy rather than calendar year information, the statutes covering professional liability should be drafted the same as K.S.A. 40-1132 and 1133.

Mr. Todd then reviewed proposed legislation which the Insurance Department was offering for consideration, but not endorsing or supporting. S.B. 528 (Attachment No. 5) was submitted by the Department to the 1986 Legislature, but because another controversial bill was amended into it, it received no action. It is a bill which requires insurance companies to inform insureds before premiums are raised that rates will be raised.

In discussion, a member noted that an amendment was added to S.B. 528 to protect people on Medicare. Mr. Todd said he was not against the amendment last Session, but it was an entirely different subject, a health issue, which should not be involved with liability. He said the Department would not object to a separate bill containing the amendment.

Mr. Todd said S.B. 729 (Attachment No. 6) was another 1986 Session Insurance Department proposal. It resulted from requests from the Legislature for certain statistics which the Department could not furnish. The bill removes language from the statute which prevents the Department from requesting any information it wants in reports. He pointed out that if the Legislature wants the Department to have the authority to get any kind of figures it wants, this law should be on the books. He said insurance companies will oppose the bill, and the Department does not necessarily think the law should be amended this way, but the draft would authorize that any information can be obtained which the Legislature believes it is necessary.

In response to questions, Mr. Todd said the bill's enactment would put the Department on the spot, but it is willing. The Department already has authority to establish reporting plans, but S.B. 729 would remove restrictions to require companies to keep statistics on a basis other than what they use to rate risks. Senator Frey pointed out the bill would permit only the Commissioner to decide what information the general public and the Legislature needed to have and suggested that the bill provide for an advisory committee of consumers and others to give different points of view to the Commissioner. He noted the Committee's frustration with lack of statistics which it and most people feel are needed, but which the Commissioner does not believe is necessary.

Mr. Todd pointed out the bill could authorize rules and regulations which would provide for public forums for input. He believed the Department's requirements now for reporting give adequate information to admit companies to do and continue to do business in Kansas. He noted that an NAIC committee, headed by Commissioner Bell, is working on other areas for reporting of statistics other than what is needed to determine proper rates. These include statistics concerning various rating classes, such as day care, that have been lumped together with other classes for rating purposes. He noted that costs of obtaining additional information may be passed on to policyholders. Passage of S.B. 729 could put an undue burden on insurance companies and increase rates if some type of expensive reporting was required, but the bill does not mandate that the Commissioner do anything, Mr. Todd said.

Senator Feleciano questioned why the bill was needed if provisions were not mandatory. He objected that the Commissioner did not appear in person before the Committee and does not take a position on, nor push, these bills. He asked what the Commissioner's position was on S.B. 729. Mr. Todd responded that the bill was to give the Legislature an idea of what could be done if it feels other information is needed. Another member noted that if the insurance industry was not asking the Legislature to make changes in the tort system to bail them out, the Committee would not be asking the Department for statistics. The medical community got bailed out because it had statistics supporting its position. It was pointed out that Commissioner Bell, on the national level, was saying more information was needed, but at the state level was saying that maybe information was not needed. Mr. Todd responded by saying the Department was trying, with S.B. 729, to present to the Legislature a way the Department could readily require certain information to be reported, but he stated he did not believe the information the Committee was seeking was necessary.

Mr. Todd explained Attachment No. 7, a discussion draft on excess profits. He said the Department believed the Legislature might want to consider the proposal if it feels a safeguard is needed against insurance company windfalls if tort reform is enacted. The concept is taken from the Florida law, but is drafted in a different manner. It would require a report on a policy year basis for three years, after which the Commissioner would determine if there was an excess profit which could be considered in the next rate filing. On the downside, he said the proposal could cause companies to withdraw or restrict writings, which has happened in Florida. However, the Florida law contained other provisions which may have affected writings also. Mr. Todd said the Department did not believe the proposal was necessary, but would be a guide if the Legislature feels there is a need for safeguards against windfall profits.

In response to questions, Mr. Todd said the Department does not believe there is a real need for the bill. In regard to the Commissioner's position on the proposal, he said this type of law is reasonably workable if the Legislature decides something is needed in the law to safeguard against windfall profits, but the Department does not believe there is going to be a windfall profit. In regard to the Department's guide for profit that only the Commissioner uses to grant rate increases, Mr. Todd said this varies by line, and all companies belong to the same rating organization that uses a 2 1/2 percent profit margin, with the automobile profit margin being 4 percent. The excess profit proposal would make it easier to break out the companies and not lump them all together.

Present law does not require the use of investment income in rate making, only underwriting income. He noted the Department had requested legislation to include investment income along with underwriting profit in the law before. He said, however, the use of investment income by insurers in rate making has caused the present insurance crisis. In this draft, there would be three years of past history of what happened in a policy year. A good estimate can then be made as to what losses will be. He stated the Department has no authority to order rebates if there are excess profits or to cut rates, but can call hearings. Ideally, high-risk persons should be the only ones paying higher premiums, but the theory of insurance companies is that people with low risks have to pay for people who have losses. Companies

in any kind of insurance business can choose what risks they want to write. Mr. Todd said the only way around this is to have a state-run insurance company. He did not believe that a rate review law requiring a breakout of classes, a committee to screen and make final decisions, and investment income tied to the rate making process would do anything to bring liability rates down. Reduction in losses is the only way rates will go down, he said.

Mr. Todd explained the assigned risk proposal (Attachment No. 8) which the Insurance Department suggests if the Legislature believes there is a problem in this area. The proposal establishes a mandatory liability assigned risk plan for municipalities similar to those now in existence for auto, workers' compensation, and medical malpractice. If passed, insurers would be contacted to offer a plan to be available to municipalities. The proposal does not solve problems with rates, but addresses availability, he said. The Commissioner submits the proposal on the same basis as previous proposals discussed.

Mr. Hayes responded to questions regarding the Department's assistance plan for municipalities in force since January, 1986. He said the Department has been able to assist several cities in obtaining a broad range of insurance coverage. The plan has not helped in affordability, but has helped availability, he said.

Mr. Todd explained the rating plan proposal (Attachment No. 9) which would authorize the Commissioner to establish regulations placing limitations on the amount of premium modifications resulting from the application of various rating plans. Because of criticism of the Commissioner in letting premium modification occur, the Department submits the proposal for consideration if the Legislature wants the Commissioner to have more authority over rating plans.

A member asked Mr. Todd, if the Committee adopted all five proposal he had presented to help alleviate problems, what position the Commissioner would take in the legislative session regarding them. Mr. Todd responded that if legislative committees want the bills, the Commissioner will not oppose them. In response to further questions, Mr. Todd said the rating plan in Attachment No. 9 would allow individual risks and individual character of risks to be considered. It would not require only Kansas experience versus countrywide experience be used.

The Committee resumed discussion of suggestions contained in Attachment No. 3, "Tort Law Changes."

In regard to item Nos. 15 and 22 (clarifying comparative fault in regard to economic loss and codifying the joint and several liability rule), Representative O'Neal furnished a copy of the Supreme Court ruling dealing with comparative negligence, i.e., the Huff case (Attachment No. 10), which raises doubt on when the joint and several liability rule and the comparative fault rule applies. He explained that CPAs recommend that suits for economic loss involving negligence should be under the comparative negligence rule and the joint and several liability rule abrogation should be clarified. He moved that a draft be prepared regarding No. 15, which was seconded by Senator Arasmith. The motion carried.

On item No. 14 (clarifying the scope of liability for CPAs), Representative O'Neal said CPAs are concerned about the scope of their liability to third parties. He gave examples of CPAs giving opinions in the course of audits which clients take to different sources. If information or opinions turn out to be inaccurate, liability may be imposed on the CPA. CPAs suggest the law be clarified to limit liability exposure regarding third parties. He said language for a draft suggested by CPAs is in Attachment No. 3 and would codify the definition of "foreseeability" for CPAs and bring them in line with the privity rule. Extending the scope of the draft to include other groups that give advice such as lawyers and bankers was discussed. A member noted that some time restriction should be placed on the length of time the opinion could be used. Representative O'Neal said the draft should limit the use of the opinion and be generic to cover other groups.

T. C. Anderson, representing the Kansas Society of Certified Public Accountants, had no objection to applying the law to other groups. Senator Frey made a motion, which was seconded by Senator Mulich, that a draft be prepared, with the inclusions of generic coverage and limited warranty on the use of opinions. The motion carried.

In regard to item No. 21 (defining "frivolous" lawsuits), the Chairman called attention to comments made by Judge Terry Bullock before the Citizens Committee regarding tort reform (Attachment No. 11). On page 10, he states that the problem with frivolous suits lies in its definition. Staff said the definition in the statute was "without reasonable basis in fact and not in good faith." A member pointed out that most plaintiffs believe their suits are not frivolous, and a major question is who decides what is meaningful and devoid of substance. The point was made that if the judge decides, he may not have all the facts if he dismissed a suit before discovery procedures. The Chairman noted that no conferees had given the Committee any examples of problems with frivolous cases, and getting into this area increased the complexity of the Committee's assignment.

Senator Frey moved that the Committee take no action on No. 21, which was seconded by Representative Douville. The motion carried.

On item No. 2 under the "Kansas Tort Claims Act" heading (reversing the focus of action, open-end to close-end concept), the point was made that seven years of case law would be lost if the focus was reversed. A Committee member said the policy question was whether the Legislature determines liability by enacting a closed-end law or if courts determine liability on a case-by-case "open end" basis, thereby expanding liability into areas the Legislature did not intend.

Representative Leach moved that the Committee take no action on No. 2, which was seconded by Senator Mulich. The motion carried.

In regard to item No. 3 (enacting a six-month notice of claim requirement and a 60-day mandatory waiting period after filing notice, but before filing suit), Senator Frey said courts do not seem to accept the concept. He moved that the Committee take no action on No. 3, which was seconded by Representative Douville. The motion carried.

On item No. 4 (prohibiting punitive damages against government entities and employees or clarifying the procedure and imposing further restrictions), concern was expressed regarding the expansion of immunity to employees of government entities and the need for some assistance on their behalf. Representative Leach made a motion, which was seconded by Senator Mulich, to prohibit punitive damage awards against elected officials and to permit cities to defend employees against punitive damage claims.

On item No. 5 (clarifying, expanding, and creating new exceptions from liability in K.S.A. 75-6104), the Chairman noted that the League's Task Force represents a large interest group. He suggested the items may need additional study but should be put on the agenda for discussion. With the consent of the Committee, he directed staff to prepare a draft based on the League's proposals on this item.

The Committee recessed for lunch.

Afternoon Session

The Chairman reconvened the meeting at 1:45 p.m.

On item No. 6 (limiting noneconomic damage awards), PIK instructions regarding personal injury damages were furnished members. They show elements of compensation for pain and suffering, disability, disfigurement, and mental anguish as noneconomic damages a person can suffer. The Chairman suggested that a $250,000 cap be placed on pain and suffering only, and with the consent of members present, he directed staff to include this in a draft for Committee consideration. (Attach 12)

The Committee considered suggestions made regarding Attachment No. 3 and "Insurance Law Changes." Staff said Nos. 1, 2, 4, 5, and 6 were presented by the Insurance Department. In regard to No. 2, it was suggested that the draft require insurance companies to report information most people except insurance companies think is necessary to know. Senator Frey moved to include in a draft regarding S.B. 729 a provision for an advisory panel on insurance data needed and the specific items listed in a report prepared by the National Conference of State Legislatures (NCSL), and that this draft also include item Nos. 1, 2, 4, 5, and 6. The motion was seconded by Senator Feleciano. The motion carried.

On item No. 3 (requiring insurers to report information on all claims against professionals), Representative Leach moved that a draft be prepared regarding No. 3, which was seconded by Representative Grotewiel. The motion carried.

In regard to item No. 7 (expanding the auditing capacity for Insurance Commissioner), Ted Fay said this suggestion, if enacted, probably would require additional staff. A member suggested that an actuary be assigned to the staff who would be able to give the Legislature more input. Mr. Fay said hiring outside persons to examine everything the Department does would be

costly and would not be utilized as well as if used only in problem areas. The Committee, after discussion, took no action on this item.

On item No. 8 (basing rates on Kansas experience), it was pointed out that Kansas does not have enough experience in some areas on which to base rates. A member noted Kansas does not know what its experience is because of lack of information.

Staff noted he met with Mr. Fay and Mr. Ray Rathert of the Insurance Department to find out what effect tort reform had on insurance rates regarding no-fault auto, workers' compensation, and general liability. Through information requested from Insurance Services Office (ISO) regarding four or five different lines, he hoped to be able to make a comparison concerning insurance rates in Kansas which has enacted tort reform and rates in states that have not. Representative Leach noted that No. 8 was part of No. 15 and suggested that it not be tabled until No. 15 was considered.

On item No. 9 (providing for consumer representation in the rate making process), Senator Hoferer said it may sound like a good idea, but questioned the ability of a lay person to adequately understand the rate making process. Another member said hearings were needed before rates are set. Providing a rate setting committee was suggested. Mr. Fay said Texas has a three-man board of commissioners that sets rates and New York has a consumer representative. Staff was requested to research this in other states and give more background on this point.

On item No. 10 (requiring full disclosure of financial status of insurers), it was pointed out that investment disclosure bills have been considered previously. Mr. Fay said even though present law does not allow the Insurance Department to use this information when rates are set, it knows what a company's investment return is and companies do use investment income in setting rates. He believed a disclosure requirement to be used in rate setting could result in swings up and down in premiums, and rates would not be as stable. Staff noted that the Florida law has this provision.

Following further discussion, the Chairman noted that Nos. 9, 10, 11, and 15 were elements of the Florida law and, with the consent of the Committee, directed staff to prepare a draft encompassing these suggestions.

On item No. 12 (authorizing state-owned or operated reinsurance programs), Representative Douville said the Health Care Stabilization Fund the state is presently operating is not satisfactory, and the insurance cycle is moving out of its problem. He moved that the Committee take no action on No. 12. This was seconded by Senator Hoferer. The motion carried.

On item No. 16 (funding an actuary position and upgrading the Insurance Department's rate review staff), it was the consensus of the Committee that this suggestion was a Ways and Means decision.

On item No. 17 (allowing state-chartered financial institutions to invest in reinsurance companies), staff was directed to include this suggestion in the draft concerning Nos. 9, 10, 11, and 15 regarding the Florida law.

On item No. 18 (prohibiting defense costs of insurance companies to be included within policy limits), a member pointed out that this type of policy would encourage early settlement of a case. Staff said the Kansas Bar Association will discuss this issue at a meeting in late September, after which more information will be available. No. 18 was held for more information.

The Chairman said drafts of bills will be considered in October and a hearing will be held in November. Mr. Fay reported that the Citizens Committee would present its recommendations to the Committee in October.

A letter with an attachment addressed to Representative Leach and written by Rick Johnson, attorney, Valley Falls, outlining his concern and suggestions for improving the system was distributed and is attached (Attachment No. 13).

A motion was made by Senator Feleciano and seconded by Representative Douville to approve the minutes of the July 10-11 and August 14-15, 1986, meetings. The motion carried.

The next meeting of the Committee will be October 9 and 10, 1986. The Chairman adjourned the meeting at 2:45 p.m.

Prepared by Mike Heim

Approved by Committee on:

November 14, 1986
(date)

ins9-11.min/MH

September 11, 1986

Members of the Legislative Interim
Committee on Tort Reform
Statehouse
Topeka, Kansas 66603

Re: Tort Claims Act -- Proposed amendments -- Punitive Damages -- League Task Force on Municipal Tort Liability

Ladies and Gentlemen:

The following proposal for amendment to the Tort Claims Act's provisions regarding punitive damages is given on behalf of the League of Kansas Municipalities Task Force on Municipal Tort Liability as well as on behalf of the City of Overland Park.

Rather than hope that existing language in the Tort Claims Act allows this or means that, only to find out later that we guessed wrong, as in the Jackson case and the Fudge case, we wish to clear up known ambiguities, even if they are cleared up in a way that is not entirely to our liking. It is better to deal with a problem head-on and up-front, knowing the exact parameters of it than to wonder whether or not a problem exists, hoping that it doesn't, but having to advise clients as if it did. For example, should I advise the governing body that it need not purchase more than $500,000 comprehensive general liability insurance coverage for its proprietary functions because the cap in the Tort Claims Act applies to them? I would rather confidently know that it does than to be left to wonder and to hope.

Above all else, ths Governing Body members of the City of Overland Park, as well as the various members of the city's boards and commissions, the City Manager, the Department Managers of the City and very many of the employees of the city are fearful that their personal assets are at risk for actions they may take in the discharge of their duties for the city. I have assured them that they have little to fear, that in most cases the city or the city's insuror must pay any judgments that are taken against them. However, there is that window of vulnerability in the area of a punitive damage award taken against them, either under the Tort Claims Act or under the federal civil rights

Attachment 1

act, 42 USC Section 1983, to which they stand exposed and which, despite my assurances, still troubles them.

The enclosed drafts of proposed amendments to K.S.A. 75-6105, 75-6108, 75-6109 and 75-6116 were written with the following purposes in mind:

1. To prohibit punitive damages against an "employee" altogether. The historical justification for them no longer exists. Compensatory damages are now allowed for every conceivable kind of injury, including mental anguish, physical pain, loss of consortium, loss of society, and emotional trauma. The rationale that punitive damages serve as compensation for non-compensable injuries has no basis anymore. They are merely a windfall for plaintiffs. The civil law evolved to compensate for injury, not to punish. They are out of place in the civil law and they are unscientific. What kind of civil remedy for the plaintiff is the punishment of the defendant? If punishment and deterrance are necessary, legislatures should enact appropriate criminal statutes with the protections that normally accompany impositions of penal fines.

2. But if abolition is not possible, then to explicitly but narrowly define the type of conduct ("actual fraud" and "actual malice") which could expose employees to personal liability for punitive damages under the Tort Claims Act, so that employees have notice of the types of acts that can get them personally into trouble. These definitions were derived from California statutes, the Kansas act on professional liability actions (K.S.A. 60-3401 et seq.), and from case law.

3. To explicitly state that the $500,000 cap includes punitive damages.

4. To set a higher standard of proof, in fact the criminal standard ("beyond a reasonable doubt"), for finding that an employee has committed an act that warrants punitive damages, and to require a unanimous verdict by the jury on them. Now, juries have unlimited discretion in determining the amounts of punitive damages to award, whereas criminal fines must be fixed, and the burden of proof of civil punitive damage liability is established by a preponderance of the evidence and not evidence beyond a reasonable doubt. Likewise, employees in civil cases do not receive the protection of the double jeopardy clause and, therefore, are subject to civil punitive damages and criminal fines for the

same act. Nor do employees in civil suits enjoy the protection against self-incrimination. See 37 Vanderbilt Law Review 1117.

5. To bifurcate the trial so that the jury is allowed to find that punitive damages are warranted in the first phase, but to require the judge to set the amount in the second phase, after he hears evidence relative thereto, such as the financial condition of the employee.

6. To prohibit admission of evidence of the financial condition of the employee in the first phase of the trial, and to prohibit any discovery of the employee's financial condition unless the jury allows punitive damages in the first phase of the trial.

7. To allow the judge to award no more in punitive damages than were awarded in actual damages, or $10,000, whichever is less, all of which is subject to the over-all $500,000 cap. Without a cap, an employee could end up paying far more in punitive damages than he would ever be required to pay as a fine if he or she had been found guilty of a criminal act.

8. To prohibit submission of a claim for punitive damages or any evidence thereon to a jury until the judge holds a preliminary hearing and determines that there is clear and convincing evidence that punitive damages may be warranted.

9. To allow a city to pay the punitive damages awarded against an employee if the governing body can make certain findings. Without this explicit authority, the governing body members could be subject to charges of unlawful expenditure of public funds if it pays them, although it can be argued that the current law allows governmental entities to pay them.

10. To prohibit disclosure at trial the fact that the city may ultimately pay the punitive damages awarded against an employee.

11. To allow an employee to recover attorney's fees from a plaintiff who does not substantially prevail on his punitive damage claim.

12. To require the city to provide a defense to an employee whenever the plaintiff alleges in his petition that

the employee's acts were within the scope of his employment, except that the city need not provide a defense if a conflict of interest develops between the city and the employee because the city finds that the employee was acting outside the scope of his employment or because the city finds that the employee was prompted by actual fraud or actual malice; but the employee is allowed to recover from the city his attorney's fees (if he can't get them from the plaintiff) if the jury ultimately finds that he was acting within the scope of his employment and that no punitive damages will be allowed against him. Nevertheless, the city is allowed to pay the attorney's fees even when punitive damages are awarded against the employee, if the governing body can make certain findings.

13. To allow the employee to retain additional counsel to defend him against a punitive damages claim (where there is no conflict with the city and the city is defending him), but leaving it to the discretion of the governing body whether or not to reimburse those costs to the employee.

14. To allow the city to recover attorney's fees or other costs incurred on behalf of an employee if the employee does not cooperate in his own defense and that of the city, if he is ultimately found by the trier of fact to have been acting outside the scope of his employment with the city, or if his acts or omissions were prompted by actual fraud or actual malice.

15. To allow a city to defend an employee named in a Section 1983 suit to the same extent and subject to the same conditions and limitations as in the Tort Claims Act.

16. To allow the city to pay punitive damage awards given against employees in civil rights cases to the same extent it may do so under the Tort Claims Act if the governing body makes the same findings it is required to make in that act. Without this explicit authority, a governing body member might be exposed to charges of unlawful expenditure of public funds if it pays them, although again the argument can be made that the current law allows this.

The enclosed drafts of proposed changes to K.S.A. 75-6105, 75-6108, 75-6109, and 75-6116, dated 9-10-86, are an attempt to incorporate these purposes into the Act.

Yours very truly,

Robert J. Watson

Robert J. Watson
City Attorney of Overland Park

DRAFT
9-10-86

75-6105. Same; maximum liability for claims; apportionment of multiple claims; no liability of governmental entity [or employee thereof] for punitive or exemplary damages or interest; conditional liability of employee for punitive or exemplary damages; definitions; procedure; proof; limitations; payment by governmental entity, when; attorneys fees. (a) Subject to the provisions of K.S.A. 75-6111, the liability for claims within the scope of this act shall not exceed five hundred thousand dollars ($500,000) actual, punitive and all other damages for any number of claims arising out of a single occurrence or accident.

(b) When the amount awarded to or settled upon multiple claimants exceeds the limitations of this section, any party may apply to the district court which has jurisdiction of the cause to apportion to each claimant the proper share of the total amount limited herein. The share apportioned to each claimant shall be in the proportion that the ratio of the award or settlement made to the claimant bears to the aggregate awards and settlements for all claims arising out of the occurrence or accident.

[ALTERNATE 1]

(c) Neither a governmental entity nor an employee thereof acting within the scope of his

or her employment shall be liable for punitive or exemplary damages or for interest prior to judgment.

[ALTERNATE 2]

(c) A governmental entity shall not be liable for punitive or exemplary damages or for interest prior to judgment.

(d) In any civil action where a claim for punitive or exemplary damages is made against an employee, the trial shall be bifurcated. An employee acting within the scope of the employee's employment shall not be liable for punitive or exemplary damages or interest prior to judgment, except ~~for~~ that where the finder of fact in the trial's first phase unanimously concludes beyond a reasonable doubt that the employee has been guilty of an act or omission ~~of an employee because of~~ actuated by actual fraud or actual malice, the finder of fact may find that damages shall be allowed for the sake of example, and by way of punishing the employee. No evidence of the defendant's wealth or financial condition shall be admissible in the trial's first phase. No discovery of the defendant's financial condition shall occur unless punitive or exemplary damages are allowed by the finder of fact in the trial's first phase. If such damages are allowed by the finder of fact, the trial's second phase shall be conducted before the

court which shall give such damages in an amount not exceeding the lesser of (1) the amount of actual damages awarded or (2) $10,000. At the trial's second phase, the court may hear and consider evidence outside the record made at the trial's first phase that would be an aid in determining the amount of punitive or exemplary damages to be assessed. The employee shall have the right in the trial's second phase to introduce evidence including but not limited to evidence of his or her financial condition, economic policy, and social policy, and to introduce expert testimony.

(e) As used in this section and in K.S.A. 75-6108, 75-6109 and 75-6116 and any amendments thereto the following definitions shall apply:

(1) "Actual Malice" means a state of mind characterized by an evil intent to injure the plaintiff without a reasonable justification or excuse.

(2) "Actual Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention of the part of the defendant of thereby depriving the plaintiff of property or legal rights or otherwise causing injury.

(f) Before any claim for punitive or exemplary damages and any evidence in support thereof may be submitted to the finder of fact in the trial's first phase, the court shall find, after a hearing on the record at a time no later than the pre-trial conference, and

based upon clear and convincing evidence, that there is a reasonable basis to believe that the employee claimed against has been guilty of an act or omission actuated by actual fraud or actual malice.

(g) Notwithstanding any other provision of law, a governmental entity is authorized to pay any part of a judgment taken against an employee of the governmental entity that is for punitive or exemplary damages and may reimburse to the employee his or her cost of any attorney's fees or other expenses incurred in defense of the punitive or exemplary damages claim if the governing body of that governmental entity, acting in its sole discretion, finds all of the following:

(1) The judgment is based upon an act or omission of an employee, which act or omission was committed within the scope of the employee's employment with the governmental entity, and was committed in the apparent best interest of the governmental entity.

(2) The employee cooperated in good faith in the defense of his or her own interests and the interests of the governmental entity in the action or proceeding.

(3) Payment thereof would be in the best interest of the governmental entity.

(h) The possibility that a governmental entity may pay that part of a judgment that is for punitive or exemplary damages or attorney's fees or other costs related thereto

shall not be disclosed in any trial in which it is alleged that an employee of that entity is liable for punitive or exemplary damages, and such disclosure shall be grounds for mistrial.

(i) Nothing in subsections (g), or (h) of this section shall affect the provisions of subsection (c) of this section prohibiting the award of punitive or exemplary damages against the governmental entity, or affect the provisions of K.S.A. 75-6109(b) and any amendments thereto immunizing the governmental entity from liability for any punitive or exemplary damages against the employee.

(j) In any action against an employee in which punitive or exemplary damages are sought, if the plaintiff does not substantially prevail on his or her claim, the court shall award attorney fees against the plaintiff and in favor of the employee.

DRAFT
9-10-86

75-6108. Same; defense of governmental entity or employee, when; refusal by governmental entity to provide defense, when; recovery of defense costs, when; requests to provide defense, procedure. (a) Upon request of an employee in accordance with subsection ~~(e)~~(f), a governmental entity shall provide for the defense of any civil action or proceeding against such employee, in his or her official or individual capacity or both, on account of an act or omission alleged in the petition to have occurred within ~~in~~ the scope of his or her employment as an employee of the governmental entity, except as provided in subsection (c).

(b) A governmental entity may provide for a defense by its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense. A governmental entity has no right to recover such expenses from the employee defended, except as provided in K.S.A. 75-6109.

(c) Except as provided in K.S.A. 75-4360, a governmental entity may refuse or cease to provide for the defense of an action against an employee if the governmental entity determines that a conflict of interest is created because:

(1) Thg act or omission was not within the scope of such employee's employment;

(2) such employee acted or failed to act because of actual

fraud or actual malice;

~~(3) the defense of the action or proceeding by the governmental entity would create a conflict of interest between the governmental entity and the employee;~~ or

~~(4)~~(3) the request was not made in accordance with subsection ~~(e)~~(f).

(d) If after a timely request in accordance with subsection ~~(e)~~(f), a governmental entity ~~fails or~~ refuses or ceases to provide an employee with a defense pursuant to subsection (c) and the employee retains his or her own counsel to defend his or her interests in the action or proceeding, such employee is entitled to recover from the governmental entity such reasonable attorney's fees, costs and expenses as are necessarily incurred in defending his or her interests in the action or proceeding if the trier of fact ultimately finds that the action or proceeding arose out of an act or omission in the scope of employment as an employee of the governmental entity, ~~but such employee is not entitled to such reimbursement if the trier of fact finds that such employee acted or failed to act because of actual fraud or actual malice~~ and that no punitive or exemplary damages will be allowed. A governmental entity may nevertheless reimburse the employee such attorney's fees, costs and expenses, at its sole discretion, pursuant to K.S.A. 75-6105(g).

~~Nothing in this section shall~~

~~be construed to deprive an employee of the right to petition a court of competent jurisdiction to compel the governmental entity or the governing body or an employee thereof to perform the duties imposed by this section.~~

(e) If a governmental entity has provided an employee with a defense in accordance with subsections (a) and (b), above, but the employee nevertheless retains additional counsel to aid in his or her defense against a claim for punitive or exemplary damages, the governmental entity may reimburse the employee such attorney's fees, at its sole discretion, pursuant to K.S.A. 75-6105(g).

~~(c)~~(f) An employee's request for a governmental entity to provide for the defense of the employee shall be made in writing within fifteen (15) days after service of process upon the employee in the action. In actions involving employees of the state, such request shall be filed in the office of the attorney general. In actions involving employees of a municipality, such request shall be filed with the governing body thereof or as otherwise provided by such governing body. A governmental entity, in its discretion, may provide requested defense for any of its employees who failed to make a request within the time prescribed by this subsection.

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9-10-86

75-6109. Same; indemnification of employee acting within scope of employment; no punitive or exemplary damages; recovery of defense costs by employee, when; recovery or defense costs by governmental entity, when. (a) Except as otherwise provided in subsections (b) and (c), below, and elsewhere in the Kansas [tort] claims act, a governmental entity is liable, and shall indemnify its employees against damages, for injury or damage proximately caused by an act or omission of an employee while acting within the scope of his or her employment.

(b) A governmental entity shall not be liable under the provisions of this act for any punitive or exemplary damages against an employee, nor for payment of any costs, judgments or settlements which are paid through an applicable contract or policy of insurance.

(c) The governmental entity shall have the right to recover any payments made by it for any ~~judgment, or portion thereof, and costs or~~ attorney's fees or other costs incurred by or on behalf of an employee's defense if the employee fails to cooperate in good faith in the defense of his or her own interests and the interests of the governmental entity in the claim or action or if the trier of fact finds that the act or omission of the employee was ~~because of~~ outside the scope of the employee's employment with the governmental entity or was actuated by such employee's

actual fraud or actual malice.

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9-10-86

75-6116. Payment of liability and defense costs in civil rights cases; compromise or settlement of claim; payment of punitive damages; not a waiver of immunity. (a) If an employee of a governmental entity is or could be subject to personal civil liability on account of a noncriminal act or omission which is alleged in the complaint to have occurred within the scope of the employee's employment and which allegedly violates the civil rights laws of the United States or of the state of Kansas, the governmental entity shall provide for the defense of any civil action or proceeding which arises out of the act or omission and which is brought against the employee in the employee's official or individual capacity or both to the extent and under the conditions and limitations provided by K.S.A. 75-6105, 75-6108 and 75-6109 and amendments thereto for the defense of actions and proceedings under the Kansas tort claims act.

(b) If the employee's act or omission giving rise to the action or proceeding was committed within the scope of the employee's employment, was not ~~the result of~~ actuated by actual fraud or actual malice and the employee reasonably cooperates in good faith in the defense of his or her interests and the interests of the governmental entity in the action or proceeding, the governmental entity, subject to any procedural requirements imposed by statute, ordinance,

resolution or written policy, shall pay or cause to be paid any judgment or settlement of the claim or suit, including any award of attorney fees~~,~~ and all costs ~~and fees incurred by the employee in defense thereof~~.

~~(b) A municipality may pay for the cost of providing defense, judgments and other costs involving actions for alleged civil rights violations in the same manner as that provided in the Kansas tort claims act.~~

(c) Notwithstanding any other provision of law, a governmental entity is authorized to pay that part of a judgment taken against an employee of the governmental entity that is for punitive or exemplary damages for alleged civil rights violations and may reimburse to the employee his or her cost of any attorney's fees or other expenses incurred in defense of the punitive or exemplary damages claim if the governing body of that governmental entity, acting in its sole discretion, finds all of the following:

(1) The judgment is based upon an act or omission of an employee, which act or omission was committed within the scope of the employee's employment with the governmental entity, and was committed in the apparent best interest of the governmental entity.

(2) The employee cooperated in good faith in the defense of his or her interests and the interests of the governmental entity in the action or

proceeding.

(3) Payment thereof would be in the best interest of the governmental entity.

~~(c)~~ (d) In actions described in subsection (a), a claim against the state or an employee of the state may be compromised or settled for and on behalf of the state or employee under the conditions and procedures provided by K.S.A. 75-6106 and amendments thereto for settlements of actions pursuant to the Kansas tort claims act.

~~(d)~~ (e) Nothing in this section or in the Kansas tort claims act shall be construed as a waiver by the state of Kansas of immunity from suit under the 11th amendment to the constitution of the United States~~.~~, nor as a waiver by a governmental entity of its immunity from liability for punitive or exemplary damages under Section 1981, 1983, or 1985 of Title 42 of the United States Code.

League
of Kansas
Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

TO: Chairman Joe Knopp and Members of the Special Committee on Tort Reform and Insurance Liability
FROM: Jim Kaup, Attorney, League of Kansas Municipalities
DATE: September 11, 1986

LEAGUE TASK FORCE ON MUNICIPAL TORT LIABILITY

The Task Force on Municipal Tort Liability was created by action of the Governing Body of the League of Kansas Municipalities in July 1986. The Task Force is comprised of the six members of the League's standing Committee on Municipal Legal Defense and five members appointed by the League president.

The Task Force was created for the following purposes:

1. To identify the causes and effects, and extent, of the current tort liability and insurance "crisis" faced by local governments in Kansas.

2. To analyze the Kansas Tort Claims Act and state insurance laws for those amendments and revisions necessary to reach an appropriate level of immunity for local governments from tort liability which will balance the needs of harmed individuals with the public's need for governmental programs and services.

3. To assist the League in developing policy positions and legislative proposals regarding tort law reform and insurance regulatory efforts for the 1987 legislative session.

4. To assist the League's staff in preparing proposed amendments for consideration by the Special Committee on Tort Reform and Insurance Liability during the summer and fall of 1986, and to follow through on those recommendations during the 1987 legislative session.

The membership of the Task Force is as follows:

David Retter, Chairman, City Attorney, Concordia
Dale Bell, City Attorney, Emporia
Greg A. Bengston, City Attorney, Salina
John Dekker, Director of Law, Wichita
Robert Evans, City Manager, Bonner Springs
Irene B. French, Mayor, Merriam
Tom Glinstra, City Attorney, Olathe
Ron Miller, City Administrator, Topeka
David R. Platt, City Attorney, Junction City
Robert G. Suelter, City Attorney, Great Bend
Robert Watson, City Attorney, Overland Park

The attached materials are recommendations of the Task Force arrived at following several meetings held in August and September of 1986. Attached to each proposed amendment to the Kansas Tort Claims Act is a short explanation of the purpose of, and need for, the change in law. These proposals have not been submitted to the League Governing Body and have not yet been considered for inclusion in the League of Municipalities Statement of Municipal Policy.

Attachment 2

EXPLANATORY NOTE TO
K.S.A. 75-6101

The Task Force recommends the amendment of this statute by the addition of certain legislative findings which identify the nature and extent of the public costs associated with governmental liability in tort. The proposed language also reflects the proposal of the Task Force that the Kansas Act be modified from one of "open-ended tort liability" to one of "closed-ended liability." An example of a state law which utilizes the "closed-ended" approach, i.e., an act which sets out those areas of governmental functions and services for which there shall be tort liability, is the Colorado Tort Claims Act. A relevant portion of that act is set out as follows:

> 24-10-106. **Immunity and partial waiver.** (1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section. Sovereign immunity is waived by a public entity in an action for injuries resulting from:
>
> (a) The operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of his employment, except emergency vehicles operating within the provisions of section 42-4-106 (1) and (3), C.R.S. 1973;
>
> (b) The operation of any public hospital, correctional facility, as defined in section 17-1-102, C.R.S., or jail by such public entity;
>
> (c) A dangerous condition of any public building;
>
> (d) A dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved, of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any highway which is a part of the federal secondary highway system, or of any highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon. As used in this section, the phrase "physically interferes with the movement of traffic" shall not include traffic signs, signals, or markings, or the lack thereof, but shall include the failure to repair a stop sign or a yield sign which reassigned the right-of-way or the failure to repair a traffic control signal on which conflicting directions are displayed, if such failure constituted a dangerous condition as defined in section 24-10-103 (1);
>
> (e) A dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming facility. Nothing in this paragraph (e) or in paragraph (d) of this subsection (1) shall be construed to prevent a public entity from asserting sovereign immunity for an injury caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area or a highway, road, or street right-of-way.
>
> (f) The operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by such public entity.
>
> (2) Nothing in this section or in section 24-10-104 shall be construed to constitute a waiver of sovereign immunity where the injury arises from the act, or failure to act, of a public employee where the act is the type of act for which the public employee would be or heretofore has been personally immune from liability.
>
> (3) In addition to the immunity provided in subsection (1) of this section, a public entity shall also have the same immunity as a public employee for any act or failure to act for which a public employee would be or heretofore has been personally immune from liability.

EXPLANATORY NOTE TO
K.S.A. 75-6102:

Two amendments are proposed to the definitions section of the Tort Claims Act. First, additional language would be added to the definition of "municipality" to clarify that the governmental-proprietary function distinction no longer has any basis in Kansas tort law. (See also the proposed amendment to K.S.A. 75-6101.)

Second, a new definition would be added, for "community service work." This amendment is identical to the language in 1986 House Bill 3114, passed by both the House and Senate. This definition ties in with the proposed exemption from tort liability for persons engaged in community service programs (see K.S.A. 75-6104(s)). It is the intent of these amendments to encourage local governments to more fully utilize court diversion programs authorized by law (e.g., DUI) by removing the present obstacle to such utilization--the fear of liability against the governmental entity for acts of persons engaged in community service work.

75-6103. Liability of governmental entities for damages caused by employee acts or omissions; when; applicable procedure. (a) Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state.

(c) ~~(b)~~ (1) Except as otherwise provided in this act, either the code of civil procedure or, subject to provision (2) of this subsection, the code of civil procedure for limited actions shall be applicable to actions within the scope of this act. ~~Actions for claims within the scope of the Kansas tort claims act brought under the code of civil procedure for limited actions are subject to the limitations provided in K.S.A. 61-1603.~~

(2) Actions within the scope of the Kansas tort claims act may not be brought under the small claims procedure act.

and no governmental entity or employee shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to entity or employee that produced the damages.

(b) (1) In order to encourage the provision of services to protect the public health and safety, and to allow governmental entities to allocate their limited fiscal resources, a governmental entity or employee thereof shall not be deemed to have assumed a duty of care where none otherwise existed by the performance of a service or an act of assistance for the benefit of any person. The adoption of a policy or a regulation to protect any person's health or safety shall not give rise to a duty of care on the part of a governmental entity or employee thereof where none otherwise existed. In addition, the enforcement of or failure to enforce any such policy or regulation or the mere fact that an inspection was conducted in the course of enforcing such policy or regulation shall not give rise to a duty of care where none otherwise existed; however, in a situation in which liability exists in accordance with the provisions of this act, nothing shall be deemed to foreclose the assumption of a duty of care by a governmental entity or employee thereof when the governmental entity or employee thereof requires any person to perform an act as the result of such an inspection or as the result of the application of such policy or regulation. Nothing in this section shall be construed to relieve a governmental entity of a duty of care expressly imposed under other statutory provision.

(2) Nothing in this act shall be deemed to create any duty of care.

(d) (1) Any person claiming to have suffered an injury by a governmental entity or employee thereof shall file a written notice as provided in this section within 180 days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this act, and failure of compliance shall forever bar any such action.

(2) The notice shall contain the following:

(a) The name and address of the claimant, and the name and address of his or her attorney, if any;

(b) A concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;

(c) The name and address of any public employee involved, if known;

(d) A concise statement of the nature and the extent of the injury claimed to have been suffered;

(e) A statement of the amount of monetary damages that is being requested.

(3) If the claim is against the state or an employee thereof, the notice shall be filed with the attorney general. If the claim is against any other governmental entity or an employee thereof, the notice shall be filed with the clerk of the governmental entity. Such notice shall be effective upon mailing by registered mail or upon personal service.

(4) When the claim is one for death by wrongful act or omission, the notice may be presented by the personal representative, surviving spouse, or next of kin of the deceased.

(5) Any action brought pursuant to this act shall be commenced within the time period provided for in subsection (c)(1), or it shall be forever barred; except that, if compliance with the provisions of subsection (6) of this section would otherwise result in the barring of an action, such time period shall be extended by the time period required for compliance with the provisions of subsection (6) of this section.

(6) No action brought pursuant to this act shall be commenced until after the claimant who has filed timely notice pursuant to subsection (1) of this section has received notice from the governmental entity that the entity has denied the claim, or until after 60 days has passed following the filing of the notice of claim required by this section, whichever occurs first.

EXPLANATORY NOTE TO K.S.A. 75-6103

Generally, this section of the Tort Claims Act sets out the scope of liability for governmental entities for acts of their employees. It further provides that the code of civil procedure for limited actions governs lawsuits brought under the TCA.

The proposed amendment for 75-6103(a) is intended to codify current Kansas case law which establishes fault-based liability and rejects the doctrine of joint and several liability. This amendment is not intended to make any change in current Kansas tort law.

New subsection (b) is offered as a legislative response to the recent Kansas Supreme Court decision of Fudge v. City of Kansas City. Specifically, this amendment is an effort to "undo" that portion of the Fudge decision which says that a special duty is created when governmental employees are subject to "mandatory guidelines" to be followed in a given situation, and that liability arises where third parties are injured as a result of the breach of this court-created "special duty." Proposed new subsection (b) is merely a codification of what we view the pre-Fudge rule in Kansas to have been, i.e., that the duty of care owed by governmental employees is to the public at large, not to specific individuals. The proposed amendment contains language explaining why such a duty of care is in the public interest, and specifically provides that the adoption of policies or regulations (e.g., the Fudge case) does not in and of itself create any duty of care on the part of the governmental entity or its employee in the absence of an already existing duty. Proposed subsection (b)(2) is merely a reminder of the fact that no rights and no duties arise from the Tort Claims Act itself.

The proposed amendment to new subsection (c) is the deletion of language which would be inconsistent with proposed amendment subsection (d).

The language proposed as new subsection (d) establishes a written notice of claim procedure which would be jurisdictional in Kansas Tort Claims Act lawsuits. The amendment would require a person who alleges to have suffered injury as a result of an action of a governmental entity or employee to file a written notice with the governmental entity within 180 days after date of discovery of the injury. Subsection (d)(2) sets out the information which must be contained in the written notice, subsection (d)(3) provides for the filing of the notice of claim, and (d)(6) establishes a mandatory waiting period following the filing of the written notice of claim before a lawsuit can be commenced under the Tort Claims Act. The purpose of this 60-day waiting period is to provide an opportunity for the parties to assess the claim, determine its merit, and possibly achieve a settlement prior to trial.

75-6104. Same; exceptions from liability. A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

(a) Legislative functions, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution;

(b) judicial function; or quasi-judicial function

(c) enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, regulation, ordinance or resolution; . The implementation or failure to implement a policy or regulation, whether valid or invalid, adopted for the protection of any person's health, safety or welfare or adopted to implement a statute, regulation, ordinance or resolution shall not give rise to a duty of care.

(d) the adoption or failure to adopt a policy or regulation for the protection of any person's health, safety or welfare shall not give rise to a duty of care;

~~(d)~~ any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused; and regardless of the level of discretion involved

(e)

(f)

~~(e)~~ the assessment or collection of taxes or special assessments;

(g)

~~(f)~~ any claim by an employee of a governmental entity arising from the tortious conduct of another employee of the same governmental entity, if such claim is (1) compensible pursuant to the Kansas workmen's compensation act or (2) not compensible pursuant to the Kansas workmen's compensation act because the injured employee was a firemen's relief association member who was exempt from such act pursuant to K.S.A. 44-505d at the time the claim arose;

(h)

~~(g)~~ the malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction or removal. ~~Nothing herein shall give rise to liability arising from the act or omission of any governmental entity in placing or removing any of the above signs, signals or warning devices when such placement or removal is the result of a discretionary act of the governmental entity.~~ The decision to place or remove, or not to place or remove, signs, signals or warning devices is a discretionary act.

(i)

~~(h)~~ any claim which is limited or barred by any other law or which is for injuries or property damage against an officer, employee or agent where the individual is immune from suit or damages;

(j)

~~(i)~~ any claim based upon emergency preparedness activities, except that governmental entities shall be liable for claims to the extent provided in article 9 of chapter 48

(k) of the Kansas Statutes Annotated;

~~(j)~~ the failure to make an inspection, or making an inadequate or negligent inspection, of any property other than the property of the governmental entity, to determine whether the property complies with or violates any law or regulation or contains a hazard to public health or safety;

(l)

~~(k)~~ snow or ice conditions or other temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the governmental entity;

(m)

~~(l)~~ the plan or design for the construction of or an improvement to public property, either in its original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval and if the plan or design was prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared;

(n)

~~(m)~~ failure to provide, or the method of providing, police or fire protection;

(o)

~~(n)~~ any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury;

(p)

~~(o)~~ the natural condition of any unimproved public property of the governmental entity;

(q)

~~(p)~~ any claim for injuries resulting from the maintenance of an abandoned cemetery, title to which has vested in a governmental entity pursuant to K.S.A. 17-1366 through 17-1368, and amendments thereto, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing the injury; or

(r)

~~(q)~~ the existence, in any condition, of a minimum maintenance road, after being properly so declared and signed as provided in K.S.A. 1982 Supp. 68-5,102.

The enumeration of exceptions to liability in this section shall not be construed to be exclusive nor as legislative intent to waive immunity from liability in the performance or failure to perform any other act or function of a discretionary nature.

(s) any claim for damages resulting from performance of community service work;

The members of the governing body of a governmental entity acting within the scope of their employment shall not be liable for damages resulting from any act of the governing body of the governmental entity irrespective of whether or not such act involved the exercise of discretion or the level of discretion involved.

EXPLANATORY NOTE TO
K.S.A. 75-6104

The amendments to 75-6104 are offered in the alternative to the Task Force's original proposal to change the Kansas Tort Claims Act from a law of "open-ended liability" to one of "closed-ended liability." Should the legislature choose to reject our public policy arguments in favor of the change to closed-ended liability, we submit the following amendment to that section of the Tort Claims Act which establishes the exceptions from liability.

The major amendments to this section begin with the addition of language to 75-6104(c). This additional language is another response to the Fudge decision and specifically provides that implementation (or failure to implement) policies or regulations cannot in and of itself establish a duty of care where none otherwise existed. A related amendment, also in response to Fudge, is new (d) which would provide that the adoption, or failure to adopt, a policy or regulation cannot in and of itself establish a duty of care where none already existed.

The next major amendment to this statute is found at new (h), the traffic signing exception from liability. The amendment would strike a portion of the current law and replace it with clear language providing that decision of whether or not to place or remove traffic signs, signals or warning devices is a discretionary act and as such would enjoy the exception from liability provided at 75-6104(e).

The amendment found at (f) would be a new exception from liability for damages resulting from performance of community service work.

A new paragraph is recommended to follow the listing of exceptions from liability ((a) through (s)). This new exception would provide for blanket individual immunity for members of governing bodies when acting within the scope of their employment.

Several other proposals are found in this amendment to K.S.A. 75-6104, specifically the addition of "quasi-judicial" to the judicial function exception in (b) and a clarification to new (e) to the effect that the discretionary function exception is applicable to any situation where discretionary authority exists, regardless of the degree of discretion involved.

75-6106. Same; settlement of claims, procedure; effect of settlement. (a) Subject to the terms of a.. insurance contract, if any, a claim against the state or employee thereof acting within the scope of the employee's office or employment may be compromised or settled for and on behalf of the state and any such employee by the attorney general, with the approval of the state finance council. The approval of settlements and compromises by the state finance council is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c, except that such approval also may be given when the legislature is in session.

(b) Subject to the terms of the insurance contract, if any, claims against a municipality or employee thereof acting within the scope of the employee's office or employment may be compromised or settled by the governing body of the municipality, or in such manner as such governing body may designate.

(c) The acceptance by a claimant of any such compromise or settlement hereunder shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the governmental entity involved and against the employee whose act or omission gave rise to the claim, by reason of the same subject matter.

(No amendments proposed)

75-6107. Same; judgment against governmental entity, effect; judgment against employee, effect. (a) The judgment in an action subject to the provisions of this act against a governmental entity shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee whose act or omission gave rise to the claim.

(b) Any judgment against an employee whose act or omission gave rise to the claim shall constitute a complete bar to any action for injury by the claimant, by reason of the same subject matter, against a governmental entity.

(No amendments proposed)

75-6110. Same; costs for defense of municipalities or its employees; special liability expense fund, establishment and maintenance; tax levy. (a) Payments by municipalities for the cost of providing for its defense and the defense of employees pursuant to this act and for the payment of claims and other direct and indirect costs resulting from the implementation of this act may be paid from the general or other existing fund of such municipality or from a special liability expense fund established for such purpose pursuant to subsection (b).

(b) Whenever the governing body of any municipality shall determine that it is advisable to establish a special fund for the payment of such costs and to establish a reserve therefor, in lieu of paying the same out of the general or other existing fund of the municipality, such governing body may create and establish a special liability expense fund for the payment of such costs and may place therein any moneys received by the municipality from any source whatsoever which may be lawfully utilized for such purpose including the proceeds of tax levies hereinafter authorized and provided. Such fund shall not be subject to the provisions of K.S.A. 79-2925 to 79-2937, inclusive, and any acts amendatory thereof or supplemental thereto, except that in making the budget of such municipality, the amounts credited to and the amount on hand in such special fund, and the amount expended therefrom, shall be included in the annual budget for the information of the residents of such municipality.

(c) Whenever the governing body of any municipality which is authorized by law to levy taxes upon property has established a special liability expense fund under the provisions of this section and shall determine that moneys from other sources will be insufficient to pay such costs, the governing body is hereby authorized to levy an annual tax upon all taxable tangible property within the municipality in an amount determined by the governing body to be necessary for such purpose and in the case of cities, counties and school districts, to pay a portion of the principal and interest on bonds issued by cities under the authority of K.S.A. 12-1774, and amendments thereto, for the financing of redevelopment projects upon property located in such county or such school district. All such tax levies shall be exempt from the limitations imposed under the provisions of K.S.A. 79-5001 to 79-5016, inclusive, and amendments thereto, and shall not be subject to or limited by any other tax levy limitation prescribed by law.

(No amendments proposed)

75-6111. Same; purchase of insurance by governmental entities; interlocal agreements for purchase of insurance or pooling arrangements.

K.S.A. 75-6111 is hereby amended to read as follows: 75-6111. (a) A governmental entity may obtain insurance to provide for (1) its defense, (2) for its liability for claims pursuant to this act, including liability for civil rights actions as provided in K.S.A. 75-6116 *and amendments thereto*, (3) the defense of its employees, and (4) for medical payment insurance when purchased in conjunction with insurance authorized by (1), (2) or (3) above.

Any insurance purchased under the provisions of this section may be purchased from any insurance company or association. In the case of municipalities any such insurance may be obtained by competitive bids or by negotiation. In the case of the state, any such insurance shall be purchased in the manner and subject to the limitations prescribed by K.S.A. 75-4114, and amendments thereto, *except as provided in section 1*. With regard to claims pursuant to the Kansas tort claims act, insurers of governmental entities may avail themselves of any defense that would be available to a governmental entity defending itself in an action within the scope of this act, except that the limitation on liability provided by subsection (a) of K.S.A. 75-6105 *and amendments thereto* shall not be applicable where the contract of insurance provides for coverage in excess of such limitation in which case the limitation on liability shall be fixed at the amount for which insurance coverage has been purchased or where the governmental entity has entered into a pooling arrangement or agreement pursuant to subsection (b)(2) of this section and has waived, by ordinance or resolution of its governing body, the limitation on liability provided in K.S.A. 75-6105 and amendments thereto, in which case the limitation on liability shall be fixed at the amount specified in such ordinance or resolution.

(b) Pursuant to the interlocal cooperation act, municipalities may enter into interlocal agreements providing for:

(1) The purchase of insurance to provide for the defense of employees and for liability for claims pursuant to this act; or

(2) pooling arrangements or other agreements to share and pay expenditures for judgments, settlements, defense costs and other direct or indirect expenses incurred as a result of implementation of this act including, but not limited to, the establishment of special funds to pay such expenses. ~~With regard to establishing and maintaining such pooling arrangements or other agreements to share in expenditures incurred pursuant to this act, governmental entities and employees or agents thereof shall not be required to be licensed pursuant to the insurance laws of this state.~~ Any pooling arrangement or other agreement authorized by this subsection shall not be construed to be an insurance company nor otherwise subject to the provisions of the laws of this state regulating insurance or insurance companies.

~~(c) Any municipality which for the year 1979 has failed to budget sufficient money to pay premiums for the purchase of liability insurance under the provisions of this act, or to pay the cost of risk management and insurance consultant services or other direct and indirect costs of implementing this act during the year 1979, is hereby authorized to expend any uncommitted moneys which may be available to it which may be expended for such purpose, notwithstanding the provisions of K.S.A. 79-2935. If no such moneys are available to a municipality authorized by law to issue no-fund warrants, such a municipality may issue no-fund warrants therefor in accordance with the procedures set forth in K.S.A. 79-2928 but the approval of the state board of tax appeals as to the issuance of such no-fund warrants shall not be required.~~

Sec. 5. K.S.A. 74-4702, 75-4101 and 75-6111 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

Approved May 1 1980

EXPLANATORY NOTE TO K.S.A. 75-6111

The two proposed amendments to this statute are illustrative of fact that municipalities in Kansas are increasingly turning to self-insurance and insurance pooling as a means of avoiding the hardships associated with the liability insurance "cycle." Because of this greater reliance upon self-insurance pooling among municipalities, there is a desire to create statutory distinction between "insurance purchased" as used in this statute, and participation in pooling arrangements as authorized by 75-6111. Specifically, the amendment to (a) would provide that the cap on liability ($500,000) found in K.S.A. 75-6105 is not waived when a governmental entity enters into a pooling arrangement as authorized by this statute unless the governmental entity takes the positive act of passing an ordinance or resolution establishing such a higher liability limit. In other words, the automatic waiver of the $500,000 liability cap which occurs under present law when a governmental entity obtains insurance coverage in excess of the $500,000 limit would not apply in the instance of pooling arrangements, in the absence of a positive declaration by the governing body of the governmental entity that it will hold itself liable to some higher liability limit.

The proposed amendment to (b)(2) would provide that any of the pooling arrangements authorized by 75-6111 would not be treated in law as insurance companies and therefore would not be subject to insurance regulatory laws of the State of Kansas. The struck language from (b)(2) would be surplus language should the amendment be accepted.

75-6112. Same; judgments against municipalities, how paid; interest; periodic payments. (a) Upon motion of a municipality against whom final judgment has been rendered for a claim within the scope of this act, the court in accordance with subsection (b) may include in such judgment a requirement that the judgment be paid in whole or in part by periodic payments. Periodic payments may be ordered paid over any period of time not exceeding ten years. Any periodic payment upon becoming due and payable under the terms of the judgment shall constitute a separate judgment. Any judgment ordering any such payments shall specify the total amount awarded, the amount of each payment, the interval between payments and the number of payments to be paid under the judgment. Judgments paid pursuant to this section shall bear interest as provided in K.S.A. 16-204, and amendments thereto. For good cause shown, the court may modify such judgment with respect to the amount of such payments and the number of payments to be made or the interval between payments, but the total amount of damages awarded by such judgment shall not be subject to modification in any event and periodic payments shall not be ordered paid over a period in excess of ten (10) years unless a structured settlement has been approved by the court following a finding that such is in the best interests of the parties

(b) A court may order periodic payments only if the court finds that:

(1) Payment of the judgment is not totally covered by insurance coverage or by pooling arrangements authorized by K.S.A. Supp. 75-6111(b)(2) obtained therefor; and

(2) funds for the current budget year and other funds of the municipality which lawfully may be utilized to pay judgments are insufficient to finance both the adopted budget of expenditures for the year and the payment of that portion of the judgment not covered by insurance obtained therefor.

EXPLANATORY NOTE TO
K.S.A. 75-6112

The proposed amendment to subsection (a) would specifically authorize payment of judgments by structured settlement, when ordered by the court following a finding that a structured settlement would be in the best interest of the parties.

The amendment to subsection (b)(1) is another effort to distinguish between "insurance purchased" and coverage obtained via pooling arrangements.

75-6113. Same; moneys for payment of judgments or settlements against municipalities, sources. Payment of any judgments, compromises or settlements for which a municipality is liable pursuant to this act may be made from any funds or moneys of the municipality which lawfully may be utilized for such purpose or if the municipality is authorized by law to levy taxes upon property such payment may be made from moneys received from the issuance of no-fund warrants or general obligation bonds. ~~Such~~ warrants may mature serially at such yearly dates as to be payable by not more than ten (10) tax levies. Bonds issued under the authority of this act shall be issued in accordance with the provisions of the general bond law and shall be in addition to and not subject to any bonded debt limitation prescribed by any other law of this state. Taxes levied for the payment of warrants or bonds shall be exempt from the limitations imposed under the provisions of K.S.A. 79-5001 to 79-5016, inclusive, and amendments thereto and shall not be subject to or limited by any other tax levy limitation prescribed by law.

, temporary notes

, temporary notes

issued under the authority of this act

EXPLANATORY NOTE TO K.S.A. 75-6113

The amendments proposed to this section of the Tort Claims Act are offered as clarifications to what the members of the Task Force believe is already applicable Kansas law. First, at two points in this statute the term "temporary notes" is inserted to clarify that the issuance of temporary notes is a lawful act for purposes of paying judgments or settlements under the Tort Claims Act. This is considered only a clarification due to the fact that under the provisions of the general bond law (K.S.A. 10-101, et seq), legal authority exists to issue temporary notes any time there is statutory authority to issue general obligation bonds (e.g., K.S.A. 75-6113).

The second amendment to this statute serves to clarify our interpretation of 75-6113 that the authority for the issuance of no-fund warrants for purposes of paying tort judgments or settlements is based upon K.S.A. 75-6113 itself, and no reliance upon any other statute is necessary for the underlying authority to issue the no-fund warrants. This amendment should also clarify the point that the procedure for such issuance is provided within the text of this statute itself and is not dependent upon any other Kansas law.

MEMORANDUM

September 10, 1986

TO: Special Committee on Tort Reform and Liability Insurance

FROM: Kansas Legislative Research Department

RE: Suggested Tort Law and Liability Insurance Changes

The following are suggestions for changes to the Kansas tort and insurance liability system which have been made by various conferees before the Special Committee on Tort Reform and Liability Insurance. Included also are other tort and insurance reform measures which the Committee has been made aware of through studies and materials distributed to it. The suggested change is listed, as well as the source for the suggestion.

Tort Law Changes -- General

1. Eliminate the collateral source rule -- Kansas Coalition for Tort Reform (hereinafter referred to as the Kansas Coalition). (See Attachment I) Professor Jim Concannon urged that the collateral source rule be retained when there are subrogation rights and that collateral sources be used to first offset that portion of the loss attributed to the injured plaintiff's negligence.

2. Limit punitive damage awards -- Kansas Coalition. (See Attachment II) A representative of the Kansas Association of Defense Counsel has suggested enactment of something similar to 1986 H.B. 2457.

3. Itemize jury verdicts -- Kansas Coalition and the Kansas Trial Lawyers Association. (See Attachment III)

4. Instruct juries about the taxability of awards -- Kansas Coalition. (See Attachment IV)

5. Mandate structuring of awards similar to 1986 H.B. 2661 which passed -- Kansas Coalition.

6. Limit noneconomic damages awards -- Kansas Coalition.

7. Establish criteria for expert witnesses similar to those contained in 1986 S.B. 540 -- Kansas Coalition.

8. Grant or allow immunity for directors and officers of nonprofit organization -- Kansas Coalition. The following suggested language was submitted: "No director or officer of a non-profit corporation shall be liable for actions taken, or omissions made, in the performance of his duties as a board member except for wanton or wilful acts or omissions."

Attachment 2

Insurance Law Changes

1. Enact 1986 S.B. 528 which would require property and casualty insurers to notify policy holders of any rate increases prior to increasing the premiums. The bill would require premium rates for any renewal policy to be at the same rates charged in the preceding policy until the insured is notified of any increase -- the Kansas Insurance Department.

2. Enact S.B. 729 which would authorize the Insurance Commissioner to require property and casualty insurers to record and report loss and expense experienced on specific classifications of insurance -- Kansas Insurance Commissioner. The Kansas Trial Lawyers Association supports insurer reporting of adequate data regarding Kansas profit and loss experience of the various lines of insurance.

3. Require insurers to report to the appropriate state licensing agency and to the Kansas Insurance Department all information on all claims against professionals -- Kansas Engineering Society.

4. Enact an excess profits tax -- Kansas Insurance Commissioner.

5. Mandate the establishment of a joint underwriting authority (JUA) for property and casualty insurers -- Kansas Insurance Commissioner.

6. Authorize Insurance Commissioner to more closely regulate rating plans submitted (the same concept was contained in 1986 H.B. 3104) -- Kansas Insurance Commissioner.

7. Expand audit capacity of the insurance commissioner to insure data supplied by insurers is accurate and not falsified -- Kansas Trial Lawyers Association.

8. Base rates for insureds on (Kansas) experience -- Kansas Trial Lawyers Association and American Association of Retired Persons.

9. Provide for consumer representation in the rate making process -- Kansas Trial Lawyers and the American Association of Retired Persons.

10. Require full disclosure of financial status of insurers so that a full-blown rate of return rate regulation is possible. This would include consideration of investment income -- Kansas Trial Lawyers Association.

11. Authorize the Insurance Commissioner to conduct financial market conduct and trade practices exams of insurers to curb rating and other market abuses -- Kansas Trial Lawyers Association.

12. Authorize a state-owned or operated reinsurance program with a risk management component -- Kansas Trial Lawyers Association.

13. Authorize the Insurance Commissioner to more extensively regulate reinsurers and surplus line insurers -- Kansas Trial Lawyers Association.

15. Rollback or freeze property and casualty insurance rates -- a Committee member.

16. Fund an actuary position and otherwise upgrade Insurance Department rate review staff -- a Committee member.

17. Allow state chartered financial institutions to invest in domestic reinsurance companies.

18. Prohibit defense costs of insurance companies to be included within policy limits.

X86-209/MH

Bill No. _____

AN ACT relating to the admissibility of evidence of payments received by an injured party from sources collateral to the defendant in all civil actions; repealing K.S.A. 1985 Supp. 60-3403.

Be it enacted by the Legislature of the State of Kansas:

New Sec. 1. (a) In any action for damages for personal injury, including bodily harm, sickness, disease or death; or for property damage, the court shall admit into evidence the total amount of all compensation or benefits received or entitled to be received by the claimant from any collateral source, except compensation or benefits from life insurance coverage.
(b) If a party elects to introduce evidence of compensation or benefits from any collateral source, the court shall admit evidence of any amounts paid or contributed to secure the right to any compensation or benefits concerning which evidence of collateral source compensation or benefits has been admitted; and the extent to which the right to recover is subject to a lien or subrogation right.
(c) The provisions of this section shall apply to any action pending or brought on or after July 1, 1987, regardless of when the cause of action accrued.

New Sec. 2. This act replaces K.S.A. 1985 Supp. 60-3403 and shall be applied to all actions pending under that statute. K.S.A. 1985 Supp. 60-3403 is hereby repealed.

(g) The provisions of this section shall apply only to an action based upon a cause of action accruing on or after July 1, 1987.

Bill No. _____

AN ACT providing for the itemization of verdicts when damages are assessed for personal injury and repealing 1986 Kan. Sess. Laws Ch. 229, Section 14(a).

Be it enacted by the Legislature of the State of Kansas:

New Sec. 1. In any action for personal injury, any damages found shall be itemized by the trier of fact as follows:
(a) Past economic damages;
(b) Past noneconomic damages;
(c) Future medical damages;
(d) Future economic damages excluding future medical damages;
(e) Future noneconomic damages; and
(f) The interval over which future damages are to be paid.

New Sec. 2. 1986 Kan. Sess. Laws Ch. 229 Section 14(a) is hereby repealed.

Bill No. _____

AN ACT regarding jury instructions on the taxibility of awards for bodily injuries.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. In any action where damages are awarded for bodily injuries, the court if requested by either party shall instruct the jury whether the award is subject to taxation under state or federal laws.

RECEIVED

JUN 18 1986 65 289

SPONSOR: Sen. Sharp & Rep. Spence, Sens. Bane, Berndt, Citro, Cordrey, Vaughn, Zimmerman, Reps. Hebner, Jonkiert, Reynolds, Van Sant

DELAWARE STATE SENATE

133RD GENERAL ASSEMBLY

SENATE BILL NO. 533

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE DELAWARE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each House thereof concurring therein):

Section 1. Amend subsection (b)(6) of Section 102, Title 8, Delaware Code, by deleting the period at the end of the subsection and substituting therefor a semicolon.

Section 2. Amend subsection (b) of Section 102, Title 8, Delaware Code, by adding a new subsection (7) to read as follows:

"(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under section 174 of this Title, or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this subsection to a director shall also be deemed to refer to a member of the governing body of a corporation which is not authorized to issue capital stock."

Section 3. Amend subsection (b) of Section 145, Title 8, Delaware Code, by deleting the phrase "for negligence or misconduct in the performance of his duty."

Section 4. Amend the first sentence of subsection (e) of Section 145, Title 8, Delaware Code, by (a) deleting the phrase "as authorized by the board of directors in the specific case," (b) deleting the word "unless" after the word "amount" and substituting therefor the word "if" and (c) by adding the word "not" after the phrase "determined that he is".

CC EMcG MJS
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Commentary on Section 145(b)

Paragraph (b) has been amended to conform the standard for indemnification under the statute with the recent holdings of the Delaware Supreme Court. No substantive change in the law is intended.

Commentary on Section 145(e)

The first amendment to Section 145(e) deletes the previous requirement for authorization of advancement of litigation expenses, "as authorized by the board of directors in the specific case" so as to permit general authorization of advancement of expenses including a mandatory certificate of incorporation or by-law provision to that effect. The second amendment to Section 145(e) changes the undertaking required for the advancement of expenses to directors and officers so as not to create an obligation to repay unless a specific determination is made that the director or officer is not entitled to be indemnified as authorized in Section 145. Nothing in these changes to subsection (e) relieves the board of directors from its affirmative duty to see that the determination required by subsection (d) is made for any indemnification under subsections (a) and (b).

Commentary on Section 145(f)

The addition of the phrase "and advancement of expenses" is intended to make clear that the "other rights" provided for in Section 145(f) may include rights to have expenses advanced on terms other than those provided in Section 145(e). The phrase "and shall continue as to a person who has ceased to be a director, officer, employee or agent" has been relocated to a new subsection (j).

Commentary on Section 145(j)

New subsection 145(j) has been added to set forth the provision from Section 145(f) referred to above. No substantive change in the law is intended.

(Substitute Senate Bill No. 366)

AN ACT

To enact section 2305.38 of the Revised Code to confer qualified immunities from civil liability in tort upon uncompensated volunteers of nonprofit charitable organizations.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 2305.38 of the Revised Code be enacted to read as follows:

Sec. 2305.38. (A) AS USED IN THIS SECTION:

(1) "CHARITABLE ORGANIZATION" MEANS EITHER OF THE FOLLOWING:

(a) ANY NONHOSPITAL, CHARITABLE NONPROFIT CORPORATION THAT IS ORGANIZED AND OPERATED PURSUANT TO CHAPTER 1702. OF THE REVISED CODE, INCLUDING, BUT NOT LIMITED TO, ANY SUCH CORPORATION WHOSE ARTICLES OF INCORPORATION SPECIFY THAT IS ORGANIZED AND TO BE OPERATED FOR AN EDUCATION-RELATED PURPOSE;

(b) ANY NONHOSPITAL, CHARITABLE ASSOCIATION, GROUP, INSTITUTION, OR SOCIETY THAT IS NOT ORGANIZED AND NOT OPERATED FOR PROFIT, INCLUDING, BUT NOT LIMITED TO, ANY SUCH ASSOCIATION, GROUP, INSTITUTION, OR SOCIETY THAT IS ORGANIZED AND OPERATED FOR ANY EDUCATION-RELATED PURPOSE.

(2) "COMPENSATION" DOES NOT INCLUDE ACTUAL AND NECESSARY EXPENSES THAT ARE INCURRED BY A VOLUNTEER IN CONNECTION WITH THE SERVICES THAT HE PERFORMS FOR A CHARITABLE ORGANIZATION, AND THAT ARE REIMBURSED TO THE VOLUNTEER OR OTHERWISE PAID.

(3) "CORPORATE SERVICES" MEANS SERVICES THAT ARE PERFORMED BY A VOLUNTEER WHO IS ASSOCIATED WITH A CHARITABLE ORGANIZATION AS DEFINED IN DIVISION (A)(1)(a) OF THIS SECTION AND

Passed June 24, 1986

Approved July 1, 1986

1:15 pm

Richard F Celeste

Governor.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the_____ day of_____, A. D. 19___,

Secretary of State.

File No._____ Effective Date_____

Sub. S.B. 366*
(As Reported by H. Select Committee on
Civil Justice & Tort Reform)

Sens. Aronoff, Meshel, Boggs, Snyder, Horn, Cupp, Schafrath, Watts, Gaeth, Butts, Fisher, Nettle, Branstool, Ney, Oelslager, Carney, Gillmor, Collins

Reps. Doyle, Pottenger, Stinziano

Provides volunteers associated with nonprofit charitable organizations with three qualified immunities from civil liability.

CONTENT AND OPERATION

I. Definitions

The bill would prescribe qualified immunities from civil liability, as described in Parts II and III below, for volunteers associated with charitable organizations. Those organizations would be defined to include the following (proposed sec. 2305.38(A)(1)):

(a) Any nonhospital, charitable nonprofit corporation that is organized and operated pursuant to Ohio's Nonprofit Corporation Law (Chapter 1702. of the Revised Code), including, but not limited to, any such corporation whose articles of incorporation specify that it is organized and to be operated for an education-related purpose;

(b) Any nonhospital, charitable association, group, institution, or society that is not organized and not operated for profit, including, but not limited to, any such association, group, institution, or society that is organized and operated for an education-related purpose.

A volunteer would be defined as an officer, trustee, or other person who performs services for a charitable organization but does not receive compensation, either directly or indirectly, for those services. (Proposed sec. 2305.38(A)(5).) For purposes of the definition of a volunteer, compensation would not include "actual and necessary expenses" that are incurred by a volunteer in connection with services that he performs for a charitable organization, and that are reimbursed to the volunteer or otherwise paid. (Proposed sec. 2305.38(A)(2).)

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* This analysis was prepared before the report of the committee appeared in the House Journal.

II. First qualified immunity

The bill would provide volunteers associated with charitable organizations with a qualified immunity from civil liability relative to other individuals' actions or omissions. Specifically, a volunteer would not be liable in damages in a civil action for injury, death, or loss to persons or property (i.e., tortious liability) that arises from the "actions or omissions of any of the organization's officers, employees, trustees, or other volunteers," unless either of the following situations is involved (proposed sec. 2305.38(B)(1) and (2)):

(a) With prior knowledge of an action or omission of a particular officer, employee, trustee, or other volunteer, the volunteer authorizes, approves, or otherwise actively participates in that action or omission;

(b) After an action or omission of a particular officer, employee, trustee, or other volunteer, the volunteer, with full knowledge of that action or omission, ratifies it.

III. Second and third qualified immunities

A volunteer also would be provided with two qualified immunities from civil liability relative to his own actions or omissions.

Specifically, a volunteer would not be liable in damages in a civil action for injury, death, or loss to persons or property that arises from his actions or omissions in connection with any supervisory or corporate services that he performs for the charitable organization unless an action or omission of the volunteer involves conduct as described under the "first immunity" above or unless an action or omission constitutes willful or wanton misconduct or intentionally tortious conduct (proposed sec. 2305.38(C)). For purposes of this immunity, "corporate services" and "supervisory services" would have the following meanings:

(a) Corporate services--services that are performed by a volunteer who is associated with a charitable organization that is a nonprofit corporation and that reflect duties or responsibilities under Ohio's Nonprofit Corporation Law (proposed sec. 2305.38(A)(3));

(b) Supervisory services--services that are performed by a volunteer who is associated with any type of charitable organization and that involve duties and responsibilities in connection with the supervision of one or more officers, employees, trustees, or other volunteers of the organization (proposed sec. 2305.38(A)(4)).

A volunteer also would not have civil liability in connection with any nonsupervisory or noncorporate services that

he performs for the charitable organization unless an action or omission of the volunteer involves conduct as described under the "first immunity" above or unless an action or omission constitutes negligence, willful or wanton misconduct, or intentionally tortious conduct. (Proposed sec. 2305.38(D).)

IV. Miscellaneous

The bill contains three miscellaneous provisions. First, it would specify that its proposed qualified immunities do not create, and cannot be construed as creating, new causes of action or substantive legal rights against volunteers of charitable organizations. (Proposed sec. 2305.38(E)(1).)

Second, it would clarify that the proposed qualified immunities do not affect, and cannot be construed as affecting, any common law or statutory immunities or defenses that volunteers may be entitled to under circumstances not covered by the bill. (Proposed sec. 2305.38(E)(2).) Third, it would specify that the proposed immunities only apply to causes of action in tort against volunteers that arise on or after the bill's effective date. (Section 2 of the bill.)

ACTION	DATE	JOURNAL ENTRY
Introduced	03-25-86	p. 1318
Reported, S. State & Local Government	05-15-86	pp. 1477-1478
Passed Senate (32-0)	05-20-86	pp. 1488-1489
Reported, H. Select Committee on Civil Justice & Tort Reform	--	--

ASB0366-RH/mm

Be it enacted by the Legislature of the State of Kansas:

KSA 1-501. **Actions for Negligent Performance of Accounting Services: Doctrine of Limited Foreseeability.** (a) This article governs any action based on negligence brought against any person, proprietorship, partnership, professional corporation or association duly authorized to engage in the practice of certified public accounting in this State, or any of its employees, partners, officers, shareholders or members. (b) No person, proprietorship, partnership, professional corporation or association authorized to practice certified public accounting under this chapter, or any of its employees, agents, partners, officers, shareholders or members, shall be liable to any person or entity for civil damages resulting from acts, omissions, decisions or other conduct amounting to negligence in the rendition of professional accounting services, unless:

(1) The plaintiff directly engaged such person, proprietorship, partnership, corporation or association to perform professional accounting services; or

(2) The defendant knew at the time of the engagement that the professional accounting services rendered the client would be made available to the plaintiff, who was identified in writing to the defendant, for use in connection with a specified transaction; and

(3) The defendant knew that the plaintiff intended to rely upon the professional accounting services rendered the client in connection with a specified transaction; and

(4) The defendant had direct contact with the plaintiff and expressed by words or conduct the defendant's understanding of the plaintiff's intended reliance on such professional accounting services in connection with a specified transaction.

Be it enacted by the Legislature of the State of Kansas:

60-258a. Contributory negligence as bar to recovery in civil actions abolished, when; award of damages based on comparative negligence; imputation of negligence, when; special verdicts and findings; joinder of parties; proportioned liability.

(a) The contributory negligence of any party in a civil action shall not bar such party or said party's legal representative from recovering damages for negligence resulting in death, personal injury, ~~or~~ property damage or economic loss, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.

(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.

(c) On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury, ~~or~~ property damage or economic loss, any other person whose causal negligence is claimed to have contributed to such death, personal injury or property damage shall be joined as an additional party to the action.

(d) Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

(e) The provisions of this section shall be applicable to actions pursuant to this chapter and to actions commenced pursuant to the code of civil procedure for limited actions.

NAIC Product Liability Insurance

The first exhibit provides product liability insurance information that is compiled by the National Association of Insurance Commissioners from the special annual statement supplement for product liability insurance. This information is on a calendar year basis for the years of 1981 through 1985. The calendar year information is not rate making information and does not compare premiums with the losses that were incurred against those premiums.

Kansas Statutory Reporting Requirements

Specific reporting requirements presently provided for in K.S.A. 40-1126 through K.S.A. 40-1133 pertain to professional and product liability insurance programs. These statutes establish three types of special reporting requirements (calendar/accident year statistical data, closed claims reports and policy year statistical data). The following schedule provides the dates when each reporting requirement became effective:

Statute(s)	Reporting Required	Initial Effective Date
40-1126 to 40-1129	Professional Liability Insurance Statistical and Closed Claim Reporting	7-1-75
40-1130 and 40-1131	Product Liability Insurance Statistical and Closed Claim Reporting	7-1-77 and 7-1-78
40-1132 to 40-1133	Product Liability Insurance Policy Year Statistical Reporting	7-1-83

Summaries produced from reporting requirements have been as follows:

Statutory Requirement	Area of Information Summarized	Summaries Prepared	Distribution of Summaries
40-1126 to 40-1129	Professional Liability Calendar/Accident Year Statistical Information	Annually Since 1976	None. No requests received.
40-1126 to 40-1129	Professional Closed Claims, Health Care Providers Only**	Annually* Since 1976	Legislature, when requested. Other interested parties annually.

40-1130 and 40-1131	Product Liability Insurance Statistical and Closed Claims	Annually* 1977-1983	Legislature when requested

Note: This information is being reported to the department; however, we have not compiled the reported information since 1983. No requests from legislative members or other parties have been received for this information.

40-1132 and 40-1133	Product Liability Insurance Policy Year Statistical Reporting	Annually* Since 1984	Legislature when requested

*Copies of these summaries are attached

**Although only the health care provider information has been summarized, the department has been providing copies of the closed claims information to other categories of health care provider licensing agencies.

These reporting requirements were enacted to provide a greater level of detailed loss information than what was then available from the insurance industry or the department. The first two reporting requirements for professional and product liability insurance (K.S.A. 40-1126 to K.S.A. 40-1131) produced calendar/accident year statistical data and closed claims information that could not be utilized to evaluate premium rate adequacy or excessiveness. The third reporting requirement, Product Liability Insurance Policy Year Statistical Reporting, did produce Kansas experience that can be utilized in evaluating the overall accuracy of past product liability premium rate levels. The usability of the product liability information accumulated under both reporting requirements is discussed in the enclosed summaries.

All of the above reporting requirements result in additional expenses for the insurance industry and additional workloads for this department. One of the basic problems with these statutory reporting requirements is the necessity to assure compliance with the requirements. This often is difficult to determine and when pursued can significantly increase the department's workload. The product liability policy year reporting statutes include a substantial penalty provision (approximately $43,000 of penalties have been collected). Because of this penalty provision, we believe that industry compliance with the product policy year reporting requirements has been superior to their compliance efforts with the other reporting requirements.

The department has not directly utilized any of the closed claims reporting information, for product or professional liability insurance, to assist in rate level review or rate filing analysis. Calendar/accident

year statistical information accumulated for product and professional liability insurance has not assisted in department reviews. This type of information should not be utilized for direct rate level evaluations since it does not relate to the policy year rate making procedures utilized to establish premium rates.

Policy year product liability insurance reporting information (K.S.A. 40-1132 and 1133) received and summarized by the department has been of limited assistance in reviewing current or prospective premium rate levels. The most significant benefit of this information is that it will provide a method to determine premium rate accuracy for past years. Another limitation of the utilization of this information is that the loss data for all years is not yet finalized. New claim or suit could be made for any of the policy years, including 1977, and that reserved amounts for outstanding claims and suits are often substantially revised.

Since none of these specific reporting requirements have been of direct benefit to the department in reviewing current or prospective premium rates, the department requires insurance industry compliance because of the continued existence of the statutory provisions. It should also be noted that the department summarizes only those areas where there has been a demonstrated legislative interest and there has been little, if any, utilization of the information in premium rate reviews or evaluations.

CONCLUSIONS

Product liability reporting requirements, except for the policy year reporting required by K.S.A. 40-1132 and 1133, are not being utilized by the department and the department has not been requested to furnish this information to any other party. It would appear that the reporting requirements of K.S.A. 40-1130 and 1131 could be discontinued.

.ssional liability reporting requirements have been utilized to a limited extent to monitor the medical malpractice area. The results of these reporting requirements have not been of any assistance in rate level evaluations.

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[As Amended by House Committee of the Whole]

As Amended by House Committee

As Amended by Senate Committee

Session of 1986

SENATE BILL No. 528

By Committee on Financial Institutions and Insurance

1-31

AN ACT relating to insurance; [concerning premiums;] requiring notice prior to increasing premiums for certain policies [and notice of premium due of a medicare supplement policy of insurance; amending K.S.A. 1985 Supp. 40-19c09 and repealing the existing section].

Be it enacted by the Legislature of the State of Kansas:

~~Section 1. The~~ New Section 1. On and after January 1, 1987, the premium *rates* for any contract of property or casualty insurance continued or renewed following the effective date of this act shall be no greater than ~~that~~ those charged for the immediately preceding policy period ~~unless and until the insured is notified of any applicable increase if: (a) The notice is received after the continuation or renewal date; and (b) the contract is placed with another insurance company within 60 days of such notification. Such cancellation shall be pro rata at the rate charged for the immediately preceding policy period~~ unless and until the insured is notified of any applicable increase. *Notice to the agent shall be considered notice to the insured.*

[New Sec. 2. Except as otherwise provided in this act, no medicare supplement policy of insurance, as defined by the commissioner of insurance by rule and regulation, and no insurance contract insuring a person age 65 or over and providing benefits for hospital, medical or surgical services or benefits for accident or sickness other than by reason of the insured's dis-

Attachment 5

ability, issued or delivered in this state shall be terminated for failure to pay premiums when due unless the insurer sends to the insured by certified mail and addressed to the insured's last address of record with such insurer, a notice indicating the policy terminated due to failure to pay the required premium as of the premium due date. Such notice shall be sent no later than 45 days following the date on which premium was due, and shall inform the insured of the amount of premium that would be required to reinstate the policy and of the time within which such premium must be remitted to the insurer to effect such reinstatement. Upon payment of the required premium by the insured to the insurer within 15 days of the insurer's having mailed such notice, the policy shall be automatically reinstated as continuous coverage without lapse by the insurer without imposing upon the insured any new exclusions, reductions or waiting periods and without requiring of the insured proof of insurability.

[New Sec. 3. (a) The provisions of this act shall apply to health maintenance organizations organized under article 32 of chapter 40 of the Kansas Statutes Annotated.

[(b) The provisions of this act shall not apply to: (1) An insurance contract which is billed for by the insurer to other than the insured or a guardian, conservator or trustee of the insured;

[(2) an insurance contract billed for by the insurer to the insured on a preauthorized check or bank draft basis; and

[(3) an insurance contract for which the insurer has sent the proper notice as provided under this act more than twice in the preceding 12 months.

[Sec. 4. K.S.A. 1985 Supp. 40-19c09 is hereby amended to read as follows: 40-19c09. Corporations organized under the nonprofit medical and hospital service corporation act shall be subject to the provisions of the Kansas general corporation code, articles 60 to 74, inclusive, of Chapter 17 of the Kansas Statutes Annotated, applicable to nonprofit corporations, to the provisions *of sections 2 and 3 and to the provisions* of K.S.A. 40-214, 40-215, 40-216, 40-218, 40-219, 40-222, 40-223, 40-224, 40-225, 40-226, 40-229, 40-230, 40-231-40-235, 40-236, 40-237, 40-247,

40-248, 40-249, 40-250, 40-251, 40-252, 40-254, 40-2,100, 40-2,101, 40-2,102, 40-2,103, 40-2,104, 40-2,105, 40-2,116, 40-2,117, 40-2a01 to 40-2a19, inclusive, 40-2-216 to 40-2,220, inclusive, 40-2,401 to 40-2,421, inclusive, 40-3,301 to 40-3,313, inclusive, and amendments thereto, except as the context otherwise requires, and shall not be subject to any provisions of the insurance code except as expressly provided in this act.

[Sec. 5. K.S.A. 1985 Supp. 40-19c09 is hereby repealed.]

Sec. 2 [6]. This act shall take effect and be in force from and after ~~its publication in the Kansas register January 1, 1987, and~~ its publication in the statute book.

SESSION OF 1986

SUPPLEMENTAL NOTE ON SENATE BILL NO. 528

As Amended by House Committee of the Whole

Brief of Bill*

S.B. 528, as amended, would enact new law regarding notification prior to increasing premiums for property or casualty insurance. The bill would, effective January 1, 1987, establish the premium rates for any renewal policy to be at the same rates charged in the preceding policy period unless and until the insured is notified of any increase. Notice to the agent would be deemed to be notice to the insured.

The bill also would require an insurer, including health maintenance organizations, to send to an insured notice by certified mail before termination of coverage under a medicare supplement policy because of failure to pay premiums when due. The notice would have to be sent not later than 45 days after the premium due date, with the policy automatically reinstated upon payment of the delinquent amount by the insured within 15 days of notice.

The notice procedure would not be required in the case of group insurance contracts, contracts subject to a pre-authorized or bank draft payment plan, or in the event the notice procedure was implemented two or more times during the preceding 12 months for a given insured.

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* Bill briefs are prepared by the Legislative Research Department and do not express legislative intent.

Background

The bill in its original form was requested by the Insurance Commissioner, whose representative explained that there have been brought to the Commissioner's attention instances when a company has renewed a risk and subsequently billed the insured for a premium significantly greater than that paid the previous year.

The House Committee of the Whole amended the bill to include the requirements concerning notice by certified mail before termination of medicare supplement policies. These requirements were originally embodied in 1986 Sub. for H.B. 2290.

As Amended by Senate Committee

Session of 1986

SENATE BILL No. 729

By Committee on Federal and State Affairs

3-10

AN ACT relating to insurance; concerning recording and reporting of loss and expense experience; amending K.S.A. 40-937 and 40-1118 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 40-937 is hereby amended to read as follows: 40-937. (a) *Recording and reporting of loss and expense experience.* The commissioner shall ~~promulgate~~ *develop* reasonable ~~rules *and regulations* and~~ statistical plans~~,~~ ~~reasonably adopted to each of the rating systems on file with, which may be modified from time to time and~~ which shall be used ~~thereafter~~ by each insurer in the recording and reporting of its loss and ~~country-wide~~ expense experience, in order that the experience of all insurers may be made available at least annually in such form and detail as may be necessary to aid ~~him~~ *the commissioner* in determining whether rating systems comply with the standards set forth in K.S.A. 40-927, *and amendments thereto*. Such ~~rules *and regulations* and~~ plans may also provide for the recording and reporting of expense experience items which are specially applicable to this state ~~and are not susceptible of determination by a prorating of country-wide expense experience~~. In ~~promulgating such rules *and regulations* and~~ *developing such* plans, the commissioner shall give due consideration to the rating systems on file with ~~him~~ *the commissioner* and, in order that such ~~rules *and regulations* and~~ plans may be as uniform as is practicable among the several states, ~~to the rules *and regulations* and~~ to the form of the plans used for such rating systems in other states. ~~No insurer shall be required to record or report its loss experience on a classification basis that is inconsistent with the~~

Attachment 6

~~rating system filed by it.~~ The commissioner may designate one or more rating organizations or other agencies to assist ~~him~~ *the commissioner* in gathering such experience and making compilations thereof, and such compilations shall be made available, ~~subject to reasonable rules *and regulations* promulgated~~ by the commissioner, to insurers and rating organizations: *Provided*, ~~That nothing in this act shall be construed to require, nor shall the commissioner adopt any rule to require, any insurer to record or report its loss or expense experience on any basis or statistical plan not consistent with the rating system filed by it.~~

(b) *Interchange of rating plan data.* Reasonable ~~rules *and regulations* and~~ plans may be ~~promulgated~~ *developed* by the commissioner for the interchange of data necessary for the application of rating plans.

(c) *Consultation with other states.* In order to further uniform administration of rate regulatory laws, the commissioner and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers and rating organizations in other states and may consult with them with respect to rate making and the application of rating systems.

(d) *Rules and regulations.* The commissioner may make reasonable rules and regulations necessary to effect the purposes of this act.

Sec. 2. K.S.A. 40-1118 is hereby amended to read as follows: 40-1118. (a) *Recording and reporting of loss and expense experience.* The commissioner shall ~~promulgate rules *and regulations* and~~ *develop* statistical plans, ~~reasonably adopted to each of the rating systems on file with him, which may be modified from time to time and~~ which shall be used ~~thereafter~~ by each insurer in the recording and reporting of its loss and ~~country-wide~~ expense experience, in order that the experience of all insurers may be made available at least annually in such form and detail as may be necessary to aid ~~him~~ *the commissioner* in determining whether rating systems comply with the standards set forth in K.S.A. 40-1112, *and amendments thereto*. Such ~~rules *and regulations* and~~ plans may also provide for the recording and report-

ing of expense experience items which are specially applicable to this state ~~and are not susceptible of determination by a prorating of country-wide expense experience~~. In promulgating such ~~rules *and regulations* and~~ plans, the commissioner shall give due consideration to the rating systems on file with ~~him~~ *the commissioner* and, in order that such ~~rules *and regulations* and~~ plans may be as uniform as is practicable among the several states, ~~to the rules *and regulations* and~~ to the form of the plans used for such rating systems in other states. ~~No insurer shall be required to record or report its loss experience on a classification basis that is inconsistent with the rating system filed by it.~~ The commissioner may designate one or more rating organizations or other agencies to assist ~~him~~ *the commissioner* in gathering such experience and making compilations thereof, and such compilations shall be made available, ~~subject to reasonable rules *and regulations* promulgated~~ by the commissioner, to insurers and rating organizations~~: *Provided*, That nothing in this act shall be construed to require, nor shall the commissioner adopt any rule to require, any insurer to record or report its loss or expense experience on any basis or statistical plan not consistent with the rating system filed by it~~.

(b) *Interchange of rating plan data.* Reasonable ~~rules *and regulations* and~~ plans may be ~~promulgated~~ *developed* by the commissioner for the interchange of data necessary for the application of rating plans.

(c) *Consultation with other states.* In order to further uniform administration of rate regulatory laws, the commissioner and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers and rating organizations in other states and may consult with them with respect to ratemaking and the application of rating systems.

(d) *Rules and regulations.* The commissioner may make reasonable rules and regulations necessary to effect the purposes of this act.

Sec. 3. K.S.A. 40-937 and 40-1118 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

SESSION OF 1986

SUPPLEMENTAL NOTE ON SENATE BILL NO. 729

As Amended by Senate Committee on Financial Institutions and Insurance

Brief of Bill*

S.B. 729, as amended, would amend two statutes relating to property and casualty insurance companies and concerns recording and reporting of loss and expense experience.

The bill as amended would strike from current laws language that restricts the authority of the Insurance Commissioner to adopt statistical plans different from the rating systems filed with the Commissioner by the companies. The effect is to authorize the Commissioner to develop statistical plans requiring property and casualty companies to record and report loss and expense experience on specific classifications of insurance.

Committee amendments are technical.

Background

The bill was requested by the Commissioner of Insurance and supported by the Joint Subcommittee on Insurance as legislation necessary to gather data on actual claim losses on and expenses related to property and casualty insurance policies issued in this state. The data would be used to aid the Commissioner, and the Legislature, in determining whether rating systems filed and used by the companies comply with Kansas law.

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* Bill briefs are prepared by the Legislative Research Department and do not express legislative intent.

Excess Profits Proposal
(Discussion Draft)

This proposal has been developed to return to Kansas policyholders any excessive profits derived by insurers for commercial casualty insurance, or more specifically, commercial liability insurance. The objective of this proposed bill is to establish a method to define, identify and determine to what extent past premium rates may have been excessive by utilizing the insurer's approved rate filings procedures to assist in the early detection of any excessive profit amounts. Important features of the proposed bill are:

1. Excess profits being defined as a percentage amount of 5% greater than the anticipated underwriting profit. For commercial liability insurance the customary anticipated profit is 5%; therefore, an insurer may realize a 10% profit without being subject to the excessive profit determination.

2. Use of policy year data provides an equitable basis for the determination of any excess profits that may be realized.

3. Provisions have been included to permit the insurer to either refund the excessive profits to the applicable policyholder, provide premium credits to existing policyholders who are otherwise entitled to a refund, or incorporate such excessive profits to reduce current or prospective premium rates.

4. Inclusion of appropriate references to approved rate filing information will permit the commissioner to require consideration of investment income for those insurance premium rates that included investment income as indicated in the respective filings. This avoids the need to amend or otherwise review the existing statutory provisions for casualty insurance rates.

5. Provisions have been incorporated to facilitate the early identification of potential excess profit for those areas of liability insurance with "Long Tail" liability exposures. The accelerated identification process will occur three years after the conclusion of a specific policy year. For example, if the proposed bill became effective in 1987, the final excess profit determination policy year ending 1987 will be subject to determination in the last half of 1990. To assist in monitoring whether accelerated excess profits determination is accurate, the provisions set forth in Section 7 requires continuing reports for five additional years.

The attached is proposed as a discussion draft, since our review of recent excess profits legislation of Florida indicated that there is not yet any specific model statute which is amenable to all parties. This discussion draft bears little, if any, direct relationship to the Florida law, except that we believe this draft proposal will provide a basis to identify excess profits realized from rate making practices and methods of returning those identified excess profits to the Kansas policyholders.

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LEGISLATIVE PROPOSAL NO. _____
(Discussion Draft)

AN ACT relating to insurance; property and casualty, excess profits.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

Section 1. As used in Sections 1 through 9
(a) "Commercial casualty insurance" means insurance as defined in K.S.A. 40-1102(1)(b), (c) and (m) except for workers' compensation and employers liability insurance, burglary, theft and robbery insurance, credit insurance, aircraft liability insurance and automobile liability insurance, but limited to coverage of commercial risks.
(b) "Policy Year Ending" means an aggregate record of all transactions involving premiums earned being compared with losses and expenses incurred for annual policy periods ending during a specific calendar year.
(c) "Anticipated underwriting profit" means the dollar amount obtained by multiplying the earned premiums for each policy year by the percentage factor for profit as set forth in the approved rate filing, filed by or on behalf of the insurer, applicable to each policy year.
(d) "Excessive profit" means any net underwriting gain that is greater than the anticipated underwriting profit plus five percent (5%) of earned premiums for each policy year.

Section 2.
(a) Each insurer offering commercial casualty insurance covering risks located in this state shall file, prior to July 1 of each year, with the commissioner of insurance the following information, as applicable to each reported policy year ending period for each class of commercial casualty insurance in accordance with the reporting forms prescribed by the commissioner of insurance:
    (1) Earned premiums
    (2) Incurred losses
    (3) Allocated loss adjustment expenses
    (4) Unallocated loss adjustment expenses
    (5) Administrative and selling expenses incurred in Kansas or allocated to Kansas
    (6) Kansas Policyholder dividends
(b) Provisions of subsection (a) shall be applicable to any class of commercial business for which the insurer has Kansas earned policy year premiums greater than $100,000 in accordance with the reporting forms prescribed by the commissioner of insurance.

Section 3. Each insurer's underwriting gain or loss for each policy year shall be computed as follows: The sum of the policy year losses, allocated loss adjustment and unallocated loss adjustment expenses valued as of December 31 of each year, developed to an ultimate basis in accordance with the approved rate filing filed by or on behalf

of each insurer applicable to each policy year, plus applicable policyholder dividends, shall be subtracted from the policy year earned premiums to determine the underwriting gain or loss.

Section 4. The underwriting gain or loss shall be compared to the anticipated underwriting profit amount to determine any excessive profit amount for each policy year.

Section 5. If the insurer has realized an excessive profit, as determined form the third annual report following each policy year, the commissioner of insurance shall order the amount of the excessive profit, as determined in accordance with Section 4, to be placed into a segregated fund while affording the insurer an opportunity for a hearing. Each insurer shall maintain a segregated fund for excessive profits unless an insurer affirmatively demonstrates to the commissioner of insurance that the placement of the excessive amounts into the fund will render the insurer insolvent or in a hazardous condition as set forth in K.S.A. 40-222(b).

Section 6. All excess profit amounts placed into an insurer's segregated fund, and the interest thereon, shall be distributed to the policyholder at the policyholder's last known address, or offered as premium credits to existing policyholders who are otherwise entitled to a refund, or provides evidence satisfactory to the commissioner of insurance that such excess profit amount has been or will be utilized in computing the current or prospective premium rates. Each insurer shall submit to the commissioner of insurance a proposal for the refund, or other dispensation, of all excess profit amounts and the interest thereon, within sixty (60) days of the determination the excess profit realized pursuant to Section 5 of this Act. Refunds made pursuant to this Act shall be treated in the same manner as policyholder dividends. Upon completion of the refund of excessive profit amounts, the insurer shall immediately certify to the commissioner of insurance that refunds have been made.

Section 7. Each insurer shall continue to submit annual reports of the incurred losses, allocated loss adjustment expenses and unallocated loss adjustment expenses for each policy year until each policy year has been reported for five additional consecutive annual stages of development, unless otherwise specified in the reporting forms prescribed by the commissioner of insurance. These additional annual reports will be submitted for purposes unrelated to the determination of excessive profit amounts as required by Sections 3, 4, 5 and 6 of this Act.

Section 8. The commissioner of insurance shall prescribe such rules and regulations as may be deemed necessary to carry out the purposes of this Act.

00113 Section 9. This act shall take effect and be in force from
00114 and after its publication in the statute book.
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Assigned Risk Proposal
(Discussion Draft)

This proposal would establish a specific assigned risk program for municipalities (as defined n the Kansas Tort Claims Act). This specific authority by statutory revision, is being proposed in order that limitations may be placed upon the premium rates to be utilized by the assigned risk program. Although it is not immediately anticipated the premium rate limitation of 150% of the average rates charged during the second preceding year may result in the participating insurers subsidizing the municipal liability business written through the proposed program.

Another major difference between this assigned risk program and the other similar programs that are currently in existence is that municipal entities are not required by statute to maintain liability coverage. Aside from these differences the commissioner believes that a assigned risk program maybe necessary because of the availability and affordability problems encountered by municipal entities during the last twenty-four months.

As proposed, this program's authority is not limited to specific kinds or types of liability coverage; therefore, if this proposal is enacted municipalities could apply to the program and receive coverage for such liability exposures as public officials legal liability, county engineers professional liability, roads, streets and bridges liability as well as other kinds and types of liability insurance.

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LEGISLATIVE PROPOSAL NO.

AN ACT relating to insurance; apportionment or assignment of risk for certain insurance; promulgation of a plan by commissioner; rate limitation; requirements.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

Section 1. Every insurer undertaking to transact liability insurance in the state of Kansas and every rating organization which makes rates for such insurance, shall participate in a plan or plans for the equitable apportionment among insurers of applications for insurance from municipalities as defined in K.S.A. 75-6102(b) who are in good faith, entitled to liability insurance, but who are unable to procure the same through ordinary methods.

Such plan or plans shall provide:

(a) Reasonable rules governing the equitable distribution of risks, by direct insurance, reinsurance or otherwise, and their assignment to insurers;

(b) rates and rate modifications applicable to such risks shall not exceed 150% of the average rates charged similar risks by the five insurers developing the most written premium in Kansas on municipal liability insurance in the normal market during the second preceding calendar year;

(c) the extent of liability which each insurer shall be required to assume;

(d) a method whereby applicants for insurance, insureds, agents and insurers may have a hearing on grievances and the right of appeal to the commissioner.

Sec. 2. To carry out the purpose of this section, and after hearing, the commissioner shall prepare and promulgate a plan meeting the requirements of this act. The commissioner may designate one or more rating organizations, insurers or other agencies to assist him in the preparation, operation and promulgation of such a plan. If, after a hearing, the commissioner finds that any activity or practice of any insurer or rating organization in connection with the operation of such plan or plans is

unfair or unreasonable, or otherwise inconsistent with the provisions of this act, he may issue a written order specifying in what respects such activity or practice is unfair or unreasonable, or otherwise inconsistent with the provisions of this subsection, and requiring discontinuance of such activity or practice.

Sec. 3. Any insurer participating in the plan promulgated by the commissioner may pay a commission with respect to insurance assigned under the plan to an agent licensed for any other insurer participating in the plan or to any insurer participating in the plan.

Sec. 4. Any hearing held by the commissioner of insurance pursuant to the provisions of this act shall be in substantial compliance with the provisions of K.S.A. 40-281.

Sec. 5. The commissioner may establish rules and regulations necessary to carry out the provisions of this act.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

Rating Plan Proposal
(Discussion Draft)

This proposal is patterned after Section 3 of S. 9351-A of the State of New York and pertains to the authority of the Commissioner of Insurance to regulate rating plans.

Existing provisions of K.S.A. 40-1112 permit the utilization of rating plans and individual risk modification plans; however, the current statute does not specifically authorize the commissioner to establish regulations which place limitations on the amount of premium modification that may result from the application of the various rating plans. Proposed provisions also incorporate statutory requirements for the insurers to maintain documentation for the premium adjustments applied under such rating plans.

This proposal is being submitted for legislative consideration and in response to individual concerns that insures may have been abusing existing rating plans to modify their approved rate filings. The proposed wording could be viewed as specific legislative intent to require limitations on premium credits and debits for these rating plans.

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expected differences in loss or expense characteristics, and shall be designed so that such plans are reasonable and equitable in their application, and are not unfairly discriminatory, violative of public policy or otherwise contrary to the best interests of the people of this state. Such standards shall not prevent the development of new or innovative rating methods which otherwise comply with this act. Such rating plans shall be filed or refiled by insurers in compliance with the regulation. The commissioner of insurance shall review such plans and may disapprove a plan that does not comply with the regulation. The regulation shall establish maximum debits and credits that may result from the application of a rating plan, shall encourage loss control, safety programs, and other methods of risk management, and shall require insurers to maintain documentation of the basis for the debits and credits applied under any plan. Once it has been filed and approved, use of the rating plan shall become mandatory and such plan shall be applied uniformly for eligible risks in a manner that is not unfairly discriminatory;

(4) rates shall be reasonable, adequate and not unfairly discriminatory.

expressio unius est exclusio alterius (the expression of one excludes the other) the choice of the legislature to not provide for the payment of interest on certain refunds while expressly providing for such payment on other refunds indicates an intention to exclude from the omitted refunds the obligation of interest. Since K.S.A. 79-2005 does not specifically provide for the payment of interest except on no-fund warrants, the district court was incorrect in awarding prejudgment interest.

Since it has been determined that K.S.A. 79-2005 does not authorize the payment of interest on refunds of taxes which were improperly collected, we do not need to consider the issue of whether interest could be awarded on remand when the appellees had not requested such at any time prior to the hearing on remand.

The decision of the district court is modified and the case is remanded for further proceedings.

No. 57,932

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION, As Receiver for North Kansas Savings Association, *Plaintiff*, v. HOWARD D. HUFF, *et al.*, *Defendants*.

(734 P.2d 172)

SYLLABUS BY THE COURT

1. COMPARATIVE NEGLIGENCE—*Application.* If contributory negligence or an analogous defense would not have been a defense to a claim prior to the adoption of the comparative negligence statute, K.S.A. 60-258a, it does not apply following its adoption.

2. SAVINGS & LOAN ASSOCIATIONS—*Damages Action for Breach of Fiduciary Duties by Officers—Comparative Negligence Statute Does Not Apply.* **The comparative negligence statute (K.S.A. 60-258a) is inapplicable to an action by the receiver of a savings and loan institution against the institution's officers seeking damages for economic loss sustained by the institution occasioned by the officers' breach of fiduciary duties owed.**

3. SAME—*Damages Action for Breach of Fiduciary Duties by Officers—No Cause of Action for Contribution or Implied Indemnity—No Right of Subrogation Against Nonparties to Litigation.* **Based upon the limited facts before the court, it is *held:* (1) Defendants, savings and loan association officers, have no valid cause of action under Kansas law seeking contribution or implied indemnity from other persons (nonparties to the litigation); and (2) defendants have no present right of subrogation against such other persons.**

On certification of two questions of law from the United States District Court for the District of Kansas, DALE E. SAFFELS, judge. Opinion filed July 26, 1985. Question No. 1: The comparative negligence statute (K.S.A. 60-258a) does not apply to an action by the receiver of a savings and loan institution against officers of the institution seeking damages for economic loss sustained by the institution as a result of the officers' breach of fiduciary duties. Question No. 2: Defendants have: (1) no valid cause of action seeking contribution or implied indemnity from other persons; and (2) no present right of subrogation against such other persons.

Daniel Bakonar, of Watson, Ess, Marshall & Enggas, of Kansas City, Missouri, argued the cause, and *Rolland J. Eton*, of the same firm, of Olathe, attorneys for defendant Donald R. Pierce; *R. Kent Sullivan*, of Payne & Jones, Chartered, of Overland Park, attorneys for defendants William C. Challee, Gertrude Erickson, Charles Fleming and Robert Johnson; *Charles White Hess*, of Linde Thomson Fairchild Langworthy Kohn & Van Dyke, P.C., of Overland Park, and *Albert Thomson*, of the same firm, of Kansas City, Missouri, attorneys for defendant Howard D. Huff, and *Richard E. McLeod*, of Shook, Hardy & Bacon, of Kansas City, Missouri, and *Thomas R. Buchanan*, of the same firm, of Overland Park, attorneys for defendants Mark Eaton, John Highland and Pat Waggoner, were with him on the briefs for defendants.

Alan V. Johnson, of Sloan, Listrom, Eisenbarth, Sloan & Glassman, of Topeka, argued the cause, and *Gregory J. Buss*, of the same firm, was with him on the briefs for defendant Fidelity & Deposit Company of Maryland.

P. John Owen, of Morrison, Hecker, Curtis, Kuder & Parrish, of Kansas City,

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Missouri, argued the cause, and *Nancy L. Shelledy*, of the same firm, and *A. Bradley Bodamer*, of the same firm, of Overland Park, and *Norman H. Raiden*, general counsel, *Ralph W. Christy*, deputy general counsel, *William K. Black*, associate general counsel, and *Dorothy L. Nichols*, trial attorney, Federal Home Loan Bank Board, of Washington, D.C., were with him on the briefs for plaintiff.

Robert T. Stephan, attorney general, and *Jeffrey S. Southard*, deputy attorney general, were on the *amicus curiae* brief for the Attorney General of Kansas.

Julia L. Young, general counsel, was on the *amicus curiae* brief for the Kansas Banking Department.

The opinion of the court was delivered by

McFARLAND, J.: The case comes before us on a certification from the United States District Court for the District of Kansas under the authority of the Uniform Certification of Questions of Law Act, K.S.A. 60-3201 *et seq.*

The two certified questions are:

1. DOES THE COMPARATIVE NEGLIGENCE STATUTE, K.S.A. 60-258a, APPLY TO AN ACTION FOR ECONOMIC LOSS BROUGHT BY THE RECEIVER OF A SAVINGS AND LOAN ASSOCIATION AGAINST INDIVIDUAL OFFICERS AND DIRECTORS OF THE ASSOCIATION FOR NEGLIGENT BREACH OF FIDUCIARY DUTIES UNDER BOTH THE COMMON LAW AND THE STATUTORY LAW?
2. IF THE COMPARATIVE NEGLIGENCE STATUTE, K.S.A. 60-258a, IS NOT APPLICABLE, CAN THE DEFENDANTS STATE VALID IMPLIED INDEMNITY, SUBROGATION, AND/OR CONTRIBUTION CLAIMS AGAINST OTHER PERSONS INVOLVED IN THE TRANSACTIONS AT ISSUE?

North Kansas Savings and Loan Association (NKSA) was a state chartered but federally insured savings and loan association situated in Beloit, Kansas. NKSA became insolvent and the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) receiver for the institution. FSLIC, in its receivership capacity, brought this action against various former officers and employees of NKSA seeking recovery of damages for economic loss sustained by NKSA in connection with the making of certain allegedly imprudent loans which had resulted in the collapse of the institution. The defendants and their connection to the litigation are as follows:

(1) [illegible] and D. Huff, Chairman of NKSA's Board of Directors, its executive officer and a member of its Executive Committee;

(2) Donald R. Pierce—NKSA's President, a member of its Board of Directors and Executive Committee;

(3) William C. Chaffee, Gertrude Erickson, Charles Fleming, and Robert Johnson—members of NKSA's Board of Directors;

(4) Mark Eaton, John Highland, and Pat G. Waggoner—officers of NKSA serving on its Loan Committee; and

(5) Fidelity & Deposit Company of Maryland—underwriter of a fidelity bond to indemnify NKSA from losses to it resulting from dishonest and fraudulent acts of officers and employees (sued by virtue of a count alleging dishonest and fraudulent acts of defendant Huff).

Specifically, plaintiff FSLIC contends the individual defendants breached their fiduciary duties in failing to protect the assets and economic viability of NKSA and in undertaking (or failing to prevent) numerous unsound and unlawful transactions engaged in by NKSA. The transactions of which FSLIC complains are described by it as follows:

(1) On November 4, 1981, with the approval of the directors, NKSA loaned $2,270,000 to Grandpa John's, Inc. (an Illinois corporation operating discount department stores in southern Illinois), at a time when its (NKSA's) net worth was approximately $1,212,815 and received as collateral first mortgages on six commercial properties whose market value was $1,650,000 or less;

(2) On March 9, 1982, with the approval of the directors, NKSA loaned $1,200,000 to Orient Coal Trust II (an Illinois land trust newly organized to engage in recovery of coal from refuse coal gob and tailings) at a time when its (NKSA's) net worth was approximately $1,111,511 and received as collateral a first mortgage on unimproved real property (the site of the refuse) whose market value was less than $175,000;

(3) Beginning in 1981, NKSA loaned the Double Gee syndicate of investors money to finance the lease of a cruise ship; these loans were refinanced in June, 1982, with the approval of the directors; the aggregate amount of all loans was $1,200,000 at a time when NKSA's net worth was approximately $1,143,982;

NKSA was given as collateral a certificate of deposit in a nonexistent bank purportedly in the British West Indies;

(4) Beginning in August, 1981, and continuing to June 1, 1982, with the approval of the directors, NKSA loaned $2,108,750 to Citation, Inc. (a Minnesota corporation with a negative net worth of $350,000), and its affiliates or nominees and received first mortgages on six properties in Minnesota whose market value was $795,000 or less; NKSA's net worth on June 1, 1982, was approximately $1,143,982;

(5) On July 12, 1982, at the direction of Huff and Pierce, NKSA loaned Heinz Weimhoff $170,000 without collateral and without requiring him to execute a note evidencing his receipt of and obligation to repay these funds; and

(6) On July 15, 1982, with the approval of the directors, NKSA loaned $11,000,000 to United Development Corporation (a Colorado corporation newly organized to purchase and develop ranch property in Colorado and Utah) at a time when its (NKSA's) net worth was approximately $1,127,329; NKSA received a second mortgage on the ranch property, whose market value was less than $3,500,000 and which was encumbered by a first mortgage with an outstanding loan balance of $1,431,873.

Of the above six transactions, no payments of principal or interest were made on four and one payment of interest and principal was made on the remaining two. These transactions allegedly caused NKSA's insolvency and are alleged to have been unsafe and unsound practices entered into in violation of federal rules and regulations.

Defendants seek to have their respective negligence compared to each other as well as to certain nondefendants (borrowers, guarantors, and appraisers). As stated by plaintiff FSLIC, "[D]efendants want to compare themselves to the six borrowers to whom loans should not have been extended, to guarantors whose guarantees were not credit worthy, and to appraisers selected by the defaulting borrowers instead of, as required, by the directors of NKSA."

This brings us to the first certified question (hereinafter reiterated for convenience):

DOES THE COMPARATIVE NEGLIGENCE STATUTE, K.S.A. 60-258a, APPLY TO AN ACTION FOR ECONOMIC LOSS BROUGHT BY THE RECEIVER OF A SAVINGS AND LOAN ASSOCIATION AGAINST INDIVIDUAL OFFICERS AND DIRECTORS OF THE ASSOCIATION FOR NEGLIGENT BREACH OF FIDUCIARY DUTIES UNDER BOTH THE COMMON LAW AND THE STATUTORY LAW?

It is the position of plaintiff FSLIC that this question should be answered in the negative on the basis that violation of federal law is asserted in the action and state law is therefore inapplicable. The petition filed herein alleges violation of federal and state statutory law as well as the common law. In this certified question we are asked to determine a specific question under Kansas law. We believe the issue raised by plaintiff is outside the purview of the certified question.

We turn now to the discussion of this certified question on its merits.

K.S.A. 60-258a provides:

"(a) The contributory negligence of any party in a civil action shall not bar such party or said party's legal representative from recovering damages for negligence resulting in death, personal injury or property damage, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.

"(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.

"(c) On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury or property damage, any other person whose causal negligence is claimed to have contributed to such death, personal injury or property damage shall be joined as an additional party to the action.

"(d) Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed."

FSLIC makes several persuasive arguments as to why this certified question should be answered in the negative.

(a) *Does the absence of contributory negligence as a defense in this case bar application of K.S.A. 60-258a?*

Plaintiff FSLIC as receiver for NKSA stands in the shoes of the savings and loan institution. NKSA is a corporation and, accord-

ingly, can only act through its officers and directors. Here the institution seeks to recover economic loss sustained by it as a result of the institution's mismanagement by its officers. It is legally impossible for NKSA to be contributorily negligent in such litigation and, accordingly, contributory negligence is a defense unavailable to the individual defendants herein. The action against the defendant underwriter of the fidelity bond is, of course, predicated upon contract law and K.S.A. 60-258a is inapplicable to suits on contracts. See *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635, 666 P.2d 192 (1983).

This court has consistently held that if contributory negligence or an analogous defense would not have been a defense to a claim, the comparative negligence statute (K.S.A. 60-258a) does not apply. *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635; *Arredondo v. Duckwall Stores, Inc.*, 227 Kan. 842, 610 P.2d 1107 (1980). Defendants liken the legal inability of NKSA to have been contributorily negligent to legal inability of a young child to be held contributorily negligent, noting *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982), wherein comparative negligence principles were applied even though the two-and-one-half-year-old injured plaintiff was legally incapable of being contributorily negligent. We do not find this analogy persuasive. A child of tender years cannot be guilty of negligence by virtue of its lack of responsibility even when the same act, if done by an adult, could constitute negligence. In the action before us, NKSA (through its receiver) is suing the only individuals who could act for it in its management alleging, in essence, that it was destroyed through its officers' mismanagement of the affairs. That is, the officers charged with managing NKSA breached their fiduciary duties to it and caused the collapse of the institution. The action is, in a sense, wholly intramural.

We conclude the absence of contributory negligence as a defense in this case bars the application of comparative negligence (K.S.A. 60-258a).

(b) Is K.S.A. 60-258a inapplicable herein by virtue of the fact the receiver seeks damages solely for economic loss?

By its express language, K.S.A. 60-258a is restricted to actions seeking "damages for negligence resulting in death, personal injury or property damage." Generally speaking, the measure of damages to real or personal property is the difference in value immediately before and after the destruction or damage. *Ettus v. Orkin Exterminating Co.*, 233 Kan. 555, 561, 665 P.2d. 730 (1983). Obviously such a measure of damages is inappropriate to the action before us wherein plaintiff seeks recovery of the principal amounts loaned plus interest and other expenses related to the loans. While we decline to hold that a claim seeking damages solely for economic loss can never be within the purview of K.S.A. 60-258a, 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 duty by its officers, is beyond the purview of K.S.A. 60-258a.

(c) Does the statutory law and public policy of Kansas require joint and several liability rather than proportional fault be applied to the cause of action herein?

The Kansas case law relating generally to the fiduciary duty owed by a corporate officer is summarized in Sampson v. Hunt, 233 Kan. 572, 665 P.2d 743 (1983), as follows:

"A strict fiduciary duty is imposed on officers and directors of a corporation to act in the best interest of the corporation and the stockholders. The duty imposed by this position of trust requires an officer or director to work for the general interests of the corporation. *Newton v. Hornblower, Inc.*, 224 Kan. at 514; *Parsons Mobile Products, Inc. v. Remmert*, 216 Kan. 256, Syl. ¶ 2, 531 P.2d 428 (1975); 18 Am. Jur. 2d, Corporations § 497. The standard of duty by which the conduct of a director of a corporation is to be judged should be that measure of attention, care, and ability which the ordinary director and officer of corporations *of a similar kind* would be reasonably and properly expected to bestow upon the affairs of the corporation. *Speer v. Dighton Grain, Inc.*, 229 Kan. 272, 276, 624 P.2d 952 (1981). Directors and officers are liable to the corporation and the stockholders for losses resulting from their malfeasance, misfeasance or their failure or neglect to discharge the duties imposed by their offices. 229 Kan. 272, Syl. ¶ 8." 233 Kan. at 584. (Emphasis supplied.)

As noted in the emphasized citation from *Sampson v. Hunt*, the standard of duty in judging the conduct of a corporate officer is directly related to the kind of corporation he or she serves. Even a cursory review of the Kansas statutes relative to corporations establishes the legislative intent is to place higher standards of duty on savings and loan institution officers than on officers of ordinary for profit corporations. The following examples illustrate this point:

First, although K.S.A. 17-6301(a) imposes the duty on the board of directors to manage a for profit corporation, K.S.A.

17-6301(e) allows a director to rely "in good faith upon the books of account or reports made to the corporation by any of its officers . . . or by an appraiser selected with reasonable care . . . or in relying in good faith upon other records of the corporation." See also K.S.A. 17-6422. The Savings and Loan Code (K.S.A. 17-5101 *et seq.*), however, while providing in K.S.A. 17-5311 for a duty comparable to K.S.A. 17-6301(a), does not have any exception comparable to K.S.A. 17-6301(e) or any provision comparable to K.S.A. 17-6422. Therefore, directors of a Kansas savings and loan association do not have the statutory defense available to them that is available to their counterparts in domestic for profit corporations.

Second, K.S.A. 17-5812 provides for civil and criminal liability for officers and directors of a savings and loan association "to the extent of the damage thereby caused" the association by their unauthorized and ultra vires acts. There is no similar provision in the General Corporation Code of Kansas (K.S.A. 17-6001 *et seq.*).

Third, the statutory liabilities of directors for impairment of capital differ with respect to savings and loan associations and for profit corporations. Specifically, the directors of each type of corporation may not vote dividends which impair capital. K.S.A. 17-5412, -6420 and -6424. Under both statutory schemes, such directors are jointly and severally liable to creditors unless they dissent from the dividend declaration and have their dissent appropriately recorded. K.S.A. 17-5412 and -6424. The similarity ends at that point, however. Directors of domestic for profit corporations have a statutory right of contribution from those "who voted for or concurred in the unlawful dividend" and a statutory right of subrogation "against stockholders who received the dividend." K.S.A. 17-6424(b) and (c). The legislature has not afforded any comparable rights of contribution or subrogation to directors of savings and loan associations. Additionally, the legislature has specified that a savings and loan director who consents to the payment of an unauthorized dividend is guilty of a felony. K.S.A. 17-5412.

We glean no statutory basis for the proposition that the legislature intended that an officer of a savings and loan association could dilute his liability for his breach of fiduciary duty by application of comparative fault principles. Indeed, the contrary inte[illegible] apparent – that breach of fiduciary duty by savings and loan officers which impairs the capital of a savings and loan institution is so serious and detrimental to the people of Kansas that joint and several civil liability is necessary.

Before concluding this point, some comments on public policy are appropriate. The potentiality for harm to Kansas citizens from mismanagement of savings and loan associations is enormous. A large percentage of their investors place their life savings in such institutions, relying upon the officers of such institutions to discharge their duties properly. When a savings and loan association fails the domino effect can be staggering. Public confidence in all savings and loans is shaken. Declining deposits in savings and loan associations have a direct effect on the construction, sale, and resale of homes, which in turn affects many other areas of our economy.

We conclude that the statutory law and public policy of Kansas require that officers of savings and loan associations who breach their fiduciary duties be subject to joint and several liability rather than have liability based on principles of comparative fault.

Conclusion on Question No. 1

We conclude the answer to certified question No. 1 is "No," based on the rationale heretofore expressed.

We turn now to the second certified question, repeated for convenience as follows:

IF THE COMPARATIVE NEGLIGENCE STATUTE, K.S.A. 60-258a, IS NOT APPLICABLE, CAN THE DEFENDANTS STATE VALID IMPLIED INDEMNITY, SUBROGATION, AND/OR CONTRIBUTION CLAIMS AGAINST OTHER PERSONS INVOLVED IN THE TRANSACTIONS AT ISSUE?

As previously noted, defendants are attempting to broaden the liability base by drawing in borrowers, guarantors, and appraisers. This has been done by seeking application of comparative fault principles (rejected in certified question No. 1), and by seeking to commence third-party practice proceedings against such other persons (the request being denied by the district court).

The district court's statement of relevant facts (required by K.S.A. 60-3203 to be included in the order of certification) relates wholly to certified question No. 1. A copy of the petition filed in

the district court by FSLIC reflects its claims against the officers are predicated upon such acts as: (1) accepting appraisal reports from borrowers, contrary to the requirement that NKSA must select appraisers (K.S.A. 17-5504), and failing to approve appraisers, contrary to 12 C.F.R. § 563.17-1(c)(1)(iii) (1985); (2) accepting insolvent guarantors; and (3) making loans with obviously inadequate collateral. The doctrine of implied indemnity is conditioned on a defendant having to pay what another ought to pay (*Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. at 642), or on the old concept of active-passive negligence which seeks to make the more culpable party bear the ultimate loss (see *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 [1980]). In viewgof the statutory duties imposed uon directors of savings and loan associations and the strong public policy consideration behind the same (see discussio in question No. 1), it is difficult to conceive that a valid cause of action could be stated for implied indemnity. FSLIC is seeking to hold the officers liable for the officers' individual wrongdoing—for breach of their fiduciary duties.

The Kansas law of contribution was summarized in *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978), as follows:

"[I]t might be well to review some of our rules relating to the liability of joint tortfeasors under our prior case law. In *Alseike v. Miller*, 196 Kan. 547, 412 P.2d 1007 (1966), it is stated that Kansas adheres to the common law rule that there is no right of contribution between *joint tortfeasors*. Where no right of contribution exists as between joint tortfeasors, a defendant has no right under the provisions of K.S.A. 60-214(a) to bring in to plaintiff's cause of action a joint tortfeasor who was not originally made a party to the action by the plaintiff.

"However, K.S.A. 60-2413(b) provides:

"'A right of contribution or indemnity among judgment debtors, arising out of the payment of the judgment by one or more of them, may be enforced by execution against the property of the judgment debtor from whom contribution or indemnity is sought. (Emphasis supplied.)'

"In *McKinney, Administrator v. Miller*, 204 Kan. 436, 464 P.2d 276 (1970), it was held, when a joint judgment is entered in an action founded upon tort, contribution between the joint judgment debtors is authorized by K.S.A. 60-241 .... In *McKinney, Administrator v. Miller*, supra, this court cited the case of *Fort Scott v. Railroad Co.*, 66 Kan. 610, 72 Pac. 238 (1903), with approval. In *Fort Scott* an action was brought by one joint judgment debtor against the other joint judgment debtor. The judgment had been entered in a prior tort action brought against the two joint tortfeasors. The plaintiff in the Fort Scott action had previously paid the entire joint judgment entered against the tortfeasors. A jude[illegible]ent for one-half the amount paid was recovered from the other joint [illegible] debtor.

"Therefore, under the Kansas law as it existed prior to statutory comparative negligence a plaintiff could choose his tortfeasor and a defendant had no right to bring in another joint tortfeasor to plaintiff's action. However, if plaintiff sued and recovered a judgment against two tortfeasors plaintiff could proceed to collect the judgment from either judgment debtor. When one judgment debtor had satisfied the entire judgment he could then recover one-half of the amount paid from the other judgment debtor. The effect of these prior holdings was to make each defendant jointly and severally liable for all of plaintiff's damage regardless of whether others contributed to cause such injuries. The right of contribution between judgment debtors in such case was on a fifty-fifty basis. Plaintiff controlled his own lawsuit and could collect a judgment from any judgment debtor he chose. The inability of any judgment debtor to pay his half of the judgment would concern only the judgment debtor who satisfied the judgment and then sought contribution." 224 Kan. at 197-98.

Keill went on to conclude where comparative negligence applies, even the limited contribution previously permitted was inapplicable.

The "other persons" herein are not parties and, accordingly, cannot become joint judgment debtors. Therefore, even if the Kansas limited concept of contribution were applicable to tortfeasors not subject to comparative fault principles, it would not be applicable to the "other persons" herein.

As to subrogation, this concept is inapplicable until and unless defendants have paid a debt for which another is primarily responsible and such payment must generally be in full discharge of that party's obligation. Mere liability to pay is not ordinarily enough for one to be substituted to the rights of the creditor. *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635. Accordingly, defendants have no present right of subrogation.

Conclusion on Question No. 2

Based on the limited facts before us, we conclude the answer to certified question No. 2 is "No."

Bullock

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

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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, cold-ball, low-risk cases are tried. In my view, the jury system works very well -- but it often isn't used wisely.

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 harts 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.

A. PERSONAL INJURIES

PIK 9.01 ELEMENTS OF PERSONAL INJURY DAMAGE

If you find for the plaintiff you will then determine the amount of his recovery. You should allow him such amount of money as will reasonably compensate him for his injuries and losses resulting from the occurrence in question including any of the following shown by the evidence:

a. Pain, suffering, disabilities, or disfigurement, and any accompanying mental anguish suffered by plaintiff to date (and those he is reasonably certain to experience in the future);

b. The reasonable expenses of necessary medical care, hospitalization and treatment received (and reasonable expense of necessary medical care, hospitalization and treatment reasonably certain to be needed in the future);

c. Loss of time or income to date by reason of his disabilities (and that which he is reasonably certain to lose in the future); and

d. Aggravation of any pre-existing ailment or condition.

In arriving at the amount of your verdict you should consider plaintiff's age, condition of health before and after, and the nature, extent and duration of the injuries. For such items as pain, suffering, disability and mental anguish there is no unit value and no mathematical formula the Court can give you. You should award such sum as will fairly and

adequately compensate him. The amount to be awarded rests within your sound discretion.

The total amount of your verdict may not exceed $ ...., the amount of plaintiff's claim.

Notes on Use

This instruction should be used in a case where comparative negligence is not applicable. Where comparative negligence applies, the first sentence should be deleted and the following sentence substituted: "You shall determine the amount of damages sustained by _____." See PIK 20.21, Instruction 10.

Comment

If there is no evidence of certain of the above elements of damages or of future disability, pain or suffering, medical expenses or loss of income, they should be deleted.

If this action is brought by the personal representative of the deceased for damages arising from injuries sustained by the deceased in his lifetime and is joined with an action by heirs for the victim's wrongful death under K.S.A. 60-1901—60-1905, as in Prowant v Kings-X, Inc. 185 Kan 602, 347 P2d 254 (1959), appropriate parts of this instruction should be given as well as the appropriate instruction on damages due to wrongful death.

All injuries and losses that are the natural and probable result of the negligence or wrongful act are compensable, Foster v Humburg, 180 Kan 64, 299 P2d 46 (1956), and Billups v American Surety Co. 173 Kan 646, 650, 251 P2d 237 (1952).

Most of the elements set out in the instruction are enumerated in Albin v Munsell, 189 Kan 304, 313, 369 P2d 323 (1962); Sharp v Pittsburg Coca Cola Bottling Co. 180 Kan 845, 848, 308 P2d 150 (1957), and Colin v De Coursey Cream Co. 162 Kan 683, 178 P2d 690 (1947).

Disfigurement is compensable, Spenable v Thomas, 139 Kan 725, 33 P2d 729 (1934).

Aggravation of pre-existing condition is compensable, Boeck v Katz Drug Co. 155 Kan 656, 127 P2d 506 (1942).

Medical care and treatment includes nursing, drugs and orthopedic appliances and the reasonable value of medical care gratuitously given or paid for by a collateral source, such as by relatives, insurance or employer. Rexroad v Kansas Power & Light

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September 9, 1986

Rep. Robin Leach
Box 117
Linwood, KS 66052

Re: The "Manufactured" Liability Insurance Crisis

Dear Rep. Leach:

I read with interest your article about escalating insurance premiums in the Valley Falls Vindicator on September 4th. You requested comments to be presented to the Special Committee On Tort Reform.

Please note the enclosed photocopy from Consumer Reports, the August 1986 issue. The headline reads: "The Manufactured Crisis, Liability-insurance companies have created a cresis and dumped it on you."

The article states that the "crisis" is of the insurance industry's own making. A Washington state task force concluded last year that the crisis, "is mostly a result of poor management practices by the [insurance] companies".

In New York, a report to the Governor's Advisory Commission on Liability Insurance said that "the industry's poor recent financial condition largely reflects self-inflicted wounds".

Insurance companies have two major sources of money to cover claims and make profits--the premiums policy holders pay, and the interest the companies can earn on money that isn't immediately needed to pay claims. When interest rates are high, insurance companies try to gain as many customers as possible, to bring in the premium dollars they want to invest.

In the early 1980's, when interest rates topped 20 percent, insurance companies slashed premiums to sell as many policies as they could, "The insurance companies did anything they could to get money to put into the money markets," says Dennis Jay, a spokesman for the Professional Insurance Agents trade association. "They did not underwrite the business as well as they should have."

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In 1981, the property and casualty industry suffered a record $6.3-billion in underwriting loses. Yet there was no "liability crisis". Investment gains of $13.2-billion the same year still created plush net profits. The "crisis" came when interest rates dropped, slowing the rise of investment income.

To right itself, the industry has taken two major steps. First, it has jacked up rates for all liability-insurance buyers to levels that not only cover current costs but, some critics charge, recoup losses from mismanagement in previous years. Second, companies have dropped lines of business designated as "high risk".

When pressed, some insurance-industry representatives concede that the effect of the business cycle on interest rates is a major factor in the present "crisis". "The fact that premiums are going up at high rates is purely due to the cycle," says Sean Mooney, Senior Vice President at the Insurance Information Institute.

The insurance industry is trying to turn its crisis into an opportunity--a chance to press for one of its favorite objectives, "tort reform". In plain words, the industry's version of tort reform means placing limits on the rights of injured people to sue for and recover damages.

The latest round in the industry's long-standing compaign began in early 1985. At that time, insurance-industry leaders already knew that a cycle-borne crisis that would necessitate jarring premium increases was brewing. The industry launched an advertising program aimed at United States opinion leaders--politicians, business leaders, executives, and journalists.

In March of 1986, the Insurance Information Institute announced a $6.5-million advertising campaign to sell "the lawsuit crisis". This second campaign, still in progress is aimed at the general public.

The so-called "Litigation explosion" repeatedly cited by advocates of tort reform is essentially a myth. Under close scrutiny many of the facts and figures cited by tort-reform advocates do not hold up. Careful examination of the data "provides no evidence to support the existence of a national 'litigation explosion' in the state trial courts during the 1981-84 time period", said Dr. Robert Roper, project director at the National Center For State Courts. The center's data show that the annual number of tort filings in 17 states studied rose 9 percent between 1978 and 1984. Meanwhile, population in those states rose 8 percent.

Clearly, however, the insurance companies' message is getting through. State and Federal legislators have passed or are considering a number of industry-backed tort-reform proposals, most of which would limit compensation to victims. Such tort-reform measures will not solve the insurance crisis. Indeed, similar measures have been

tried in various places--with little if any effect on insurance rates or availability.

In hearings before state legislatures, insurance-industry representatives have declined to promise that the tort-reform measures they advocate would result in lower insurance premiums. Even if they ended the industry's self-inflicted crisis, however, such measures would still be repressive and undesirable. Adequate compensation for injured parties is a part of our system of justice.

The lawsuit crisis may be phony, but the insurance crisis is real. Towns, doctors, day-care centers, and others face urgent problems of insurance availability and affordability. What is needed to alleviate the problem is not tort reform but better regulation of the insurance industry. The Governor's Advisory Commission on Liability Insurance in New York has put forward several worthwhile recommendations for strengthening the regulatory system:

1. Price regulation. Insurance regulators should do more to keep prices on an even keel, discouraging both excessive and artificial cyclical price cuts that endanger the health of insurance companies and excessive price hikes that create hardships for consumers. The Commission suggested that a state insurance department can achieve this goal in part by setting upper and lower limits on permissible prices that insurors may charge. That practice would help to avoid wild swings, while still giving insurors some flexibility. As in any price-regulated industry, insurance companies could request changes in the permitted price bands from time to time.

2. Limiting cancellations. The recent crisis atmosphere was created partly because of abrupt cancellations or nonrenewal of coverage by insurers. The Commission proposed that insurance companies be permitted to cancel or refuse only in certain clearly defined circumstances, such as nonpayment of premiums or fraud on the part of the insured. A "major change in the scale of risk" assumed by the insurer would be a valid cause for cancellation or non-renewal. But presumably the insurer would have to demonstrate to regulators that the risk level had indeed become unreasonable.

3. Providing more resources. The insurance industry is regulated almost exclusively by the 50 states, even though the industry has been nationwide in scope for decades. State insurance regulators are typically understaffed operations that are responsible for more work than they can capably handle. Federal oversight is needed. But so long as the states have the responsibility, the state insurance departments need more staff, more money, and in many cases more legal authority.

4. Appointing a consumer advocate. The commission recommended that an individual be appointed to work full time representing

the interests of consumers before the New York State Insurance Department. In light of the strong lobbying presence of the insurance industry in every state, the suggestion is a sensible one for all states to consider.

5. Letting municipalities pool risks. The commission suggested creating a structure whereby municipalities and other government bodies could share the risks of liability claims. Since one large claim could severely damage a small town, county, or government body, that suggestion makes sense. It's also consistent with the theory of insurance, in which many parties share the risk of an event that will probably happen only to a few.

In addition to those recommendations, Consumer Reports also advocates three more.

First, the insurance industry should be subject to both federal and state antitrust laws (the laws that ban price-fixing), as most industries are. Under the McCarran-Ferguson Act, which Congress passed in 1945, insurance companies are all but exempt from federal antitrust rules. That makes it harder to stop companies if they act in concert to raise prices for a particular line of insurance.

Second, conflict-of-interest policies for insurance regulators should be made stiffer, in light of a United States General Accounting Office study finding that half of state insurance regulators came from the insurance industry or found employment in it after leaving office.

Third, state regulators should encourage insurance regulators to offer economic incentives to corporations and municipalities that follow good safety and risk-management practices.

Rep. Leach, the Consumer Reports article is very well done and deserves the attention of the Special Committee On Tort Reform. Please share this letter and the article with your committee.

Very truly yours,

Rick A. Johnson

Rick A. Johnson

leh
Enclosures

The manufactured crisis

Liability-insurance companies have created a crisis and dumped it on you.

March 23, 1980, was a bright, beautiful spring day in Gillette, Wyo. So Alta Means thought she would do some cleaning in a cottage she owned. Her granddaughter, nine-year-old Dustina Rhodes, lazily tagged along. Suddenly, the tiny cabin exploded into an orange fireball, engulfing Means in flames and blowing Dustina out the door. The grandmother died a couple of weeks later from massive burns; the granddaughter survived but suffered severe burns.

A spark had ignited a cottage bloated with propane gas—gas that leaked through a *Honeywell V8280* valve on the cottage's room heater. That type of valve, the Consumer Product Safety Commission subsequently said, tended to jam open because of a defect in design and manufacture. The valve was recalled by Honeywell in 1985. Dustina Rhodes and Alta Means' estate sued Honeywell for their losses. They eventually settled for more than $1-million.

Now the insurance industry and manufacturers are trying to pass legislation that could make it more difficult to adequately compensate victims like Dustina Rhodes for their injuries. The push for so-called "tort reform" is on at both the state and Federal levels.

Insurers say legislation is needed to fix a "crisis" that has made many types of liability insurance costly—or even impossible to get. The insurance industry has launched a $6.5-million advertising campaign and an intense lobbying and public-relations effort to lay the blame for its financial problems on people who are injured, juries, or lawyers.

The insurance crisis

The current liability-insurance crisis began a little more than a year ago with skyrocketing premiums and cancellations of policies.

☐ In New Haven, Conn., a chain of seven day-care centers affiliated with Yale University saw its liability insurance premium jump from $400 in 1984 to $2400 last year.

☐ In Brooksville, Fla., a general vascular surgeon paid $5000 for malpractice insurance in 1984. In 1985, the rate tripled to $15,000, and this year he is paying $38,000. The doctor is thankful he doesn't practice in Miami, where his rates would top $70,000 a year.

☒ In Hammondsport, N.Y., the Bully Hill Winery has sharply curtailed its free wine-tasting because its insurance premiums have gone from $3000 for $1-million in coverage in 1985 to $8000 for $500,000 in coverage in 1986.

☒ Aetna Life and Casualty has recently dropped some 400 municipalities from its liability-insurance rolls.

The increasing cost and declining availability of liability insurance affects everyone. Police departments cancel patrols and cities dismantle playgrounds for lack of municipal liability insurance. Many obstetricians are leaving their field. The number of nurse-midwives could shrink as they, too, find it increasingly difficult—if not impossible—to obtain malpractice insurance. Doctors' escalating insurance costs are bound to show up in their bills to patients. Day-care centers could become less affordable as their insurance rate hikes are passed on to working parents. The cost of owning a condominium rises with every bump up in liability-insurance premiums.

How it happened

In its advertising and in most statements to the press and the public, the insurance industry lays blame for the crisis on lawyers, juries, or victims whose alleged carelessness brought on their own problems. Lawyers use the civil justice system "to right every imagined wrong," cries the Insurance Information Institute, an industry trade group.

A more objective analysis suggests that the "crisis" is of the insurance industry's own making. A Washington state task force concluded last year that the crisis "is mostly a result of poor management practices by the [insurance] companies." In New York, a report of the Governor's Advisory Commission on Liability Insurance said that "the industry's poor recent financial condition largely reflects self-inflicted wounds."

Insurance companies have two major sources of money to cover claims and make profits—the premiums policyholders pay, and the interest the companies can earn on money that isn't immediately needed to pay claims. When interest rates are high, insurance companies try to gain as many customers as possible, to bring in the premium dollars they want to invest. In the early 1980s, when interest rates topped 20 percent, insurance companies slashed premiums to sell as many policies as they could.

"The insurance companies did anything they could to get money to put into the money markets," says Dennis Jay, a spokesman for the Professional Insurance Agents trade association. "They did not underwrite the business as well as they should have. [Underwriting is the science of assessing risk and setting an appropriate premium to cover the risk.] But it's very tempting to get the money in today to earn 21 percent interest and worry about the losses later."

In 1931, the property-and-casualty industry suffered a record $6.3-billion in underwriting losses (premiums collected minus expenses and claims paid). Yet there was no "liability crisis." Investment gains of $13.2-billion the same year still created plush net profits.

The "crisis" came when interest rates dropped, slowing the rise of investment income. By 1984, the profit/loss picture had reversed itself. Underwriting losses of $21.5-billion exceeded investment income of $17.7-billion. Even so, the industry managed to show a small profit—in large part as a result of the tax benefits described on page 547.

In 1985, underwriting losses were $24.7-billion, and investment income was $19.5-billion. Because of tax benefits, the industry again came out slightly ahead, but profits were weak.

To right itself, the industry has taken two major steps. First, it has jacked up rates for all liability-insurance buyers to levels that not only cover current costs but, some critics charge, recoup losses from mismanagement in previous years. Second, companies have dropped buyers of business designated as "high risk."

When pressed, some insurance poli-

try representatives concede that the effect of the business cycle on interest rates is a major factor in the present crisis. "The fact that premiums are going up at high rates is purely due to the cycle," says Sean Mooney, senior vice president at the Insurance Information Institute. He nevertheless maintains that the "lawsuit crisis" is the reason that some parties can't get liability insurance at all.

An orchestrated campaign

The insurance industry is trying to turn its crisis into an opportunity—a chance to press for one of its favorite objectives, "tort reform." In plain words, the industry's version of tort reform means placing limits on the rights of injured people to sue for and recover damages.

The latest round in the industry's long-standing campaign began in early 1985. At that time, insurance-industry leaders already knew that a cycle-borne crisis that would necessitate jarring premium increases was brewing. The industry launched an advertising program aimed at U.S. opinion leaders—politicians, business leaders, executives, and journalists.

In June, 1985, John Byrne, then chairman of the board of Geico, a major insurance company, told the Casualty Actuaries of New York that "the insurance industry should quit covering doctors, chemical manufacturers, and corporate officers and directors." Byrne also said, "It is right for the industry to withdraw and let pressure for [tort] reform build in the courts and in the state legislatures."

By summer of 1985, insurance rates indeed started rising. As the varied group of liability-insurance consumers began to feel the squeeze, they started to complain. Through the second half of last year, a grass-roots coalition of doctors, municipalities, nurse-midwives, manufacturers, day-care centers, and others with insurance problems came together. Many of them believed what the insurance industry was telling them: that greedy lawyers and excessive jury verdicts were to blame for the increasing insurance rates.

In early 1986, the Journal of American Insurance pointed to the tort-reform movement as a superb example of coalition-building by the insurance industry.

This March, the Insurance Information Institute announced a $6.5-million advertising campaign to sell "the lawsuit crisis." This second campaign, still in progress, is aimed at the general public.

"Print and television commercials talk about the possible demise of high-school football and other sports programs and suggest you write to the Insurance Information Institute. If you do write, you get advice on how to influence legislators. Voters, the insurance people hope, will pass the message of panic on to their state and Federal representatives.

Those 'high' awards

Insurance-industry leaders say that the average award in product-liability cases is now more than $1-million.

That figure—and many others used by the industry—is based on statistics compiled by Jury Verdict Research, a firm in Solon, Ohio, that keeps track of such things. The Jury Verdict Research statistics, however, don't reflect reality very well.

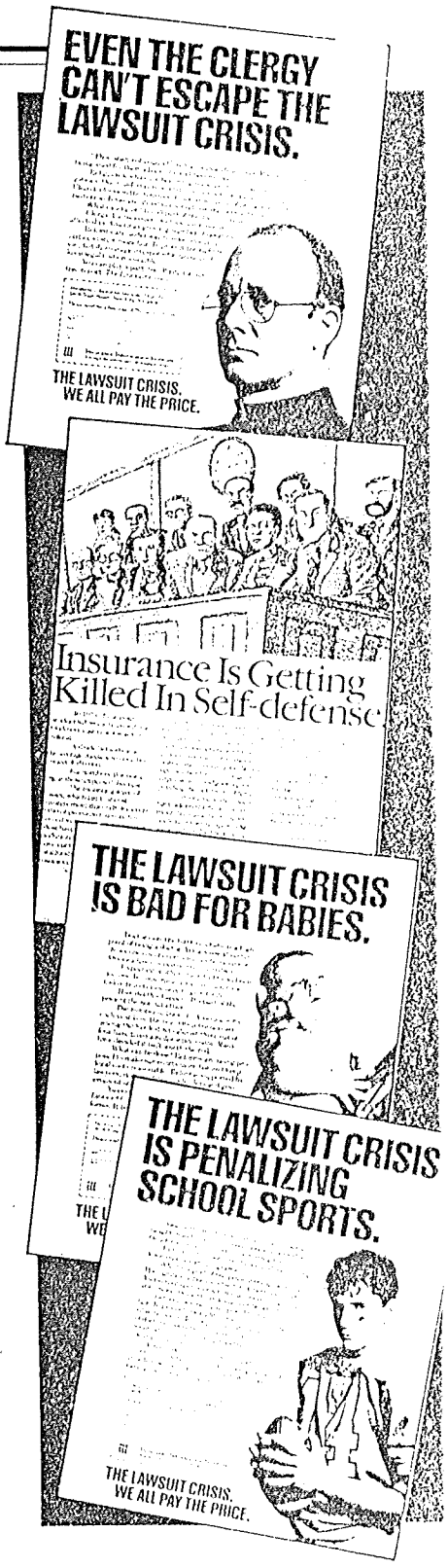
The statistics are raw data on initial awards by a jury, and that's usually not the last word in litigation. Cases are often appealed, and the appeals court may reduce the award or overturn the verdict, resulting in an award of zero. To avoid the uncertainty and added expense of an appeal, some plaintiffs and defendants agree to an immediate post-trial settlement, which can be significantly lower than what the jury awarded.

Trial judges also reduce jury awards. Indeed, the very first multimillion-dollar award on record ($3.5-million in damages won by actor John Henry Faulk in 1962 for being blacklisted for his political views in the 1950s) was reduced to $450,000 by the judge. According to one study, done by the Rand Corporation's Institute for Civil Justice, half of the initial jury awards surveyed were reduced after the trial. The largest awards were the ones most likely to be reduced and subject to the biggest reductions.

There are other important reasons why the average verdict numbers are, statistically speaking, extremely "soft." The Jury Verdict Research statistics include only verdicts in favor of the plaintiff. Cases that the defendant wins and that result in an award of zero are not counted. Cases settled before trial aren't counted either.

One unusually large verdict can skew the numbers by pulling the annual average way up. Such was the case in 1978, when a jury awarded more than $127-million to a man who was seriously burned when a gasoline tank exploded in an accident involving a Ford *Pinto*. As a result of that one verdict, the average product-liability award in 1978, according to the Jury Verdict Research, hit $1.7-million—up an astounding 285 percent over the previous year's average. But the trial judge later reduced the *Pinto* award to $6.7-million. Had the statistics accurately reflected

Insurers are spending millions of dollars—including $6.5-million through the Insurance Information Institute—to sell the idea of a "lawsuit crisis."



that, they would have shown the average award in 1978 to be just 19.5 percent over the previous year, not 285 percent.

It's best to look at median awards rather than average awards. To be sure, the average would provide the best gauge of the industry's costs—if the figures were trustworthy. But, as we've seen, average awards are disproportionately influenced by a few large verdicts—the very ones most apt to be reduced post-trial. Furthermore, it's the median, not the average, that shows how the typical injured person is compensated.

Between 1975 and 1984, according to Jury Verdict Research, the growth in the median initial medical-malpractice award has been less than the rise in inflation. In product-liability cases, the growth rate for median initial awards has exceeded the inflation rate, but not by much.

The Rand Corporation's Institute for Civil Justice has tracked tort action in San Francisco and in Cook County, Ill., which includes Chicago, since 1960. It has found that the median initial award, adjusted for inflation, stayed virtually level.

The phantom explosion

The explosion that claimed the life of Alta Means was real. The so-called "litigation explosion" repeatedly cited by advocates of tort reform is essentially a myth. Under close scrutiny, many of the facts and figures cited by tort-reform advocates do not hold up:

Assertion: The U.S. is in the midst of a "litigation explosion."

Fact: Last year, the National Center for State Courts (a nonprofit group funded largely by the courts themselves) analyzed data on tort litigation in 20 state courts for the years 1978, 1981, and 1984. Careful examination of the data "provides no evidence to support the existence of a national 'litigation explosion' in state trial courts during the 1981-84 time period," said Dr. Robert Roper, a project director at the center.

The center's data show that the annual number of tort filings in 17 states studied rose 9 percent between 1978 and 1984. Meanwhile, population in those states rose 8 percent. While court filings in 20 states did rise 14 percent between 1978 and 1981, they fell 4 percent between 1981 and 1984.

The number of liability cases filed in Federal courts has increased significantly. But a single type of suit—damage claims related to asbestos—accounts for much of the increase. Last year, 4239 of the 13,554 product-liability cases filed in Federal courts—31 percent—were asbestosis cases. That's not surprising. Asbestosis and asbestos-induced cancer result from many years of exposure; only in recent years have the consequences of long-term exposure become evident in debilitating illness and death. In CU's opinion, people who are suffering from asbestosis or asbestos-induced cancer (and the families of those who have died) deserve compensation.

Assertion: Plaintiffs win million-dollar verdicts regardless of merit.

Fact: Stories told to prove this point are, at most, isolated incidents, and are often exaggerated to the point of myth. Insurers like to cite their favorite horror stories—about large awards given to a woman who said she lost her psychic powers after a hospital CAT scan, or to a man who injured himself using a lawn mower to trim a hedge, or to a California vandal who injured himself falling through a school-building skylight.

Such anecdotes typically lose some important details and gain a few embellishments in the telling. Take the case of the psychic. Both United Press International and Associated Press made much of the fact that Judith Haimes was awarded close to $1-million by a Philadelphia jury last March after she said that a CAT scan at Temple University Hospital made her lose her psychic abilities. That's what made the headlines.

Buried at the bottom of both wire-service stories was the fact that Judge Leon Katz told the jury to disregard that issue, and to base the verdict on whether the hospital was negligent in administering a contrast dye into her brain. The procedure allegedly caused Haimes to suffer breathing difficulties, intense headaches, nausea, and incontinence. What the jury really decided was that the hospital had negligently caused Haimes's adverse physical reaction, not that she had lost her psychic powers.

A Crum & Forster ad in 1977 referred to the man who used a lawn mower to trim a hedge, hurt himself, sued the manufacturer, and won. The tale has been repeated dozens of times in support of the notion that consumers injure themselves foolishly and then seek out greedy lawyers to bring groundless lawsuits. But the story was purely apocryphal. Crum & Forster admitted that it had no reliable source for the alleged incident.

And that vandal who fell through the skylight? There's some truth to that one. But the incident isn't as absurd as it first sounds. The skylight was painted the same color as the school's roof. The school district knew that situation was hazardous because a young girl had already been killed falling through a similar skylight at another school six months before.

When a plaintiff receives a large award, it's usually for a very good reason. Jury

Verdict Research has on file 2094 cases in which initial verdicts equalled or exceeded $1-million during the period from 1962 to 1985. Of those, 71 percent were for such damages as paralysis, permanent brain damage, wrongful death, amputations, and burns.

What insurers want

Several proposals have been put forth by the insurance industry and its supporters in state legislatures.

Limits on awards for pain and suffering. Most industry-backed tort-reform proposals do not attempt to limit the amount of recovery for economic losses such as lost wages and medical costs. However, limits are being proposed on compensating victims for the pain and suffering that results from an injury. CU believes that while those harms are difficult to quantify, they are nonetheless real and should not be subject to a fixed, preset limit. A man confined to a wheelchair as a result of someone's negligence but still able to keep working at his regular desk job might suffer no lost wages, but certainly his quality of life would be affected.

Limits on punitive damages. Punitive damages, as the name implies, are imposed to punish a defendant for acting irresponsibly or with disregard for safety. CU believes punitive damages must be maintained in full force to help deter manufacturers and others from irresponsible behavior.

Elimination of joint and several liability. The legal doctrine of joint and several liability applies when more than one defendant is responsible for causing an injury. If one defendant cannot pay, the burden of payment is transferred to the other parties found to be at fault.

Critics of the doctrine say that it encourages plaintiffs to sue multiple defendants, especially those with "deep pockets," such as large corporations, municipalities, and people who carry a lot of insurance. Why, they ask, should a wealthy defendant that bears only, say, 5 percent of the responsibility for a mishap have to pay for most or all of the damages, simply because the other defendants cannot pay?

The question is a valid one, and the issue a complex one. But CU does not believe the doctrine should be abolished. Without it, there would be no mechanism to make sure victims can recover a fair amount for damages. If the doctrine of joint and several liability were eliminated, victims would be left holding the bag when those defendants able to pay succeed in shifting the blame to those who can't.

Limiting contingency fees. Lawyers who take on a liability or malpractice case typically work on a contingency-fee basis: They get a percentage of the damage award, typically about 30 percent of the damages paid. If they lose the case, they get nothing. Such a system allows victims who aren't wealthy to obtain legal representation at little or no initial cost. At the same time, because attorneys are "investing" their own time and money in the case, they have an incentive to weed out frivolous or weak cases. Furthermore, it would create an imbalance if lawyers for injured consumers were subject to a form of price control while corporations and other large defendants were not limited in their legal budget. All in all, CU thinks the contingency-fee arrangement is an acceptable one.

The wrong cure

Clearly, however, the insurance companies' message is getting through. State and Federal legislators have passed or are considering a number of industry-backed tort-reform proposals, most of which would limit compensation to victims.

Maryland, for example, has put a $350,000 cap on pain and suffering damages in personal-injury cases. Missouri set the same limit for pain and suffering awards in malpractice cases.

In June, the New Jersey Assembly passed and sent to the state Senate a bill that would limit pain-and-suffering damages to $5000 for minor injuries, $300,000 for catastrophic injuries. The bill also sets a $500,000 lid on the amount a person could collect from a public entity, such as a county or municipality.

In California, voters recently passed Proposition 51, which eliminated the legal doctrine of joint-and-several liability for pain-and-suffering damages. And the Florida legislature this June passed a bill to limit awards for pain and suffering to a maximum of $450,000. (The Florida legislature, tied the measure to a 40 percent rollback in liability-insurance premiums. Within two days, six insurance companies had announced that they would no longer write new commercial liability insurance in the Sunshine State.)

In New York, the Governor's commission recommended some changes in the tort system, such as modifying the doctrine of joint and several liability. CU's Executive Director, Rhoda Karpatkin, served on the commission and filed a dissent. Nonetheless, a bill incorporating some tort-system changes—undesirable ones, in our opinion—was about to be signed into law as this issue went to press.

The Reagan Administration has proposed a sweeping package that would cover product-liability claims against corporations, Government contractors, and the U.S. Government itself. The Reagan

Why insurers are profitable

Between 1975 and 1984, the property-and-casualty insurance industry's assets more than tripled, to $265-billion. Industry surpluses—assets left after liabilities are deducted—are at near-record levels of $64-billion. Both assets and surpluses have shown a nearly unbroken record of growth through the recent so-called crisis years. Over those same years, the industry has also enjoyed substantial profits. Part of the reason has to do with the industry's favored tax status. Here's how the system works:

When a policyholder files a claim, the insurance company estimates what its ultimate payment will be and sets that money aside into a "loss reserve." The money may not actually be paid out for years, especially if damage disputes are dragged through the courts. But for tax purposes that money is deducted as an expense. Using this privilege, companies salt away billions of dollars.

Meanwhile, the insurance company invests the loss reserve in bonds, real estate, or the stock market, and garners a profit. (The profit is taxable, unless it flows from a tax-exempt investment such as municipal bonds.)

"As a result of certain tax advantages, many property/casualty companies have not paid federal income taxes for a number of years and, in fact, have qualified for refunds," said Natwar M. Gandhi of the U.S. General Accounting Office. "While property and casualty companies had about $46-billion in underwriting losses from 1975 through 1984, they had about $121-billion in investment gains during this period, resulting in a net gain of about $75-billion for those years. From 1975 through 1984, federal income taxes were a negative $125-million, a rate of minus 0.2 percent of the net gain."

The tax-revision proposals currently being considered by Congress would make little dent in the insurance industry's tax privileges; they would, however, impose a minimum tax on insurance companies.

plan, which Attorney General Edwin Meese called a response to "the crisis in tort liability" would impose caps of $100,000 on awards for noneconomic damages such as pain and suffering. Punitive damages would also be capped at $100,000. In addition, the Reagan bill would limit fees that lawyers could charge in product-liability cases.

Such tort-reform measures will not solve the insurance crisis. Indeed, similar measures have been tried in various places—with little if any effect on insurance rates or availability. In Ontario, Canada, lawyers' contingency fees are not allowed and awards for pain and suffering are capped. Nonetheless, liability-insurance rates in Ontario are skyrocketing and the insurance is hard to get—just as in the U.S.

In hearings before state legislatures, insurance-industry representatives have declined to promise that the tort-reform measures they advocate would result in lower insurance premiums. Even if they ended the industry's self-inflicted crisis, however, such measures would still be repressive and undesirable, in our view. Adequate compensation for injured parties is a part of our system of justice.

The right cure

The lawsuit crisis may be phony, but the insurance crisis is real. Towns, doctors, day-care centers, and others face urgent problems of insurance availability and affordability. What is needed to alleviate the problem is not tort reform but better regulation of the insurance industry. The Governor's Advisory Commission on Liability Insurance in New York has put forward several worthwhile recommendations for strengthening the regulatory system:

☐ **Price regulation.** Insurance regulators should do more to keep prices on an even keel, discouraging both excessive and artificial cyclical price cuts that endanger the health of insurance companies and excessive price hikes that create hardships for consumers.

The Commission suggested that a state insurance department can achieve this goal in part by setting upper and lower limits on permissible prices that insurers may charge. That practice would help to avoid wild swings, while still giving insurers some flexibility. As in any price-regulated industry, insurance companies could request changes in the permitted price bands from time to time.

☐ **Limiting cancellations.** The recent crisis atmosphere was created partly because of abrupt cancellations or nonrenewal of coverage by insurers. The Commission proposed that insurance companies be permitted to cancel a

refuse to renew coverage only in certain clearly defined circumstances, such as nonpayment of premiums or fraud on the part of the insured. A "major change in the scale of risk" assumed by the insurer would be a valid cause for cancellation or non-renewal. But presumably the insurer would have to demonstrate to regulators that the risk level had indeed become unreasonable.

☐ **Providing more resources.** The insurance industry is regulated almost exclusively by the 50 states, even though the industry has been nationwide in scope for decades. State insurance regulators are typically understaffed operations that are responsible for more work than they can capably handle.

Federal oversight is needed. But so long as the states have the responsibility, the state insurance departments need more staff, more money, and in many cases more legal authority.

☐ **Appointing a consumer advocate.** The Commission recommended that an individual be appointed to work full time representing the interests of consumers before the New York State Insurance Department. In light of the strong lobbying presence of the insurance industry in every state, the suggestion is a sensible one for all states to consider.

☐ **Letting municipalities pool risks.** The Commission suggested creating a structure whereby municipalities and other government bodies could share the risks of liability claims. Since one large claim could severely damage a small town, county, or government body, that suggestion makes sense. It's also consistent with the theory of insurance, in which many parties share the risk of an event that will probably happen only to a few.

In addition to those recommendations, CU also advocates three more.

First, the insurance industry should be subject to both Federal and state antitrust laws (the laws that ban price-fixing), as most industries are. Under the McCarran-Ferguson Act, which Congress passed in 1945, insurance companies are all but exempt from Federal antitrust rules. That makes it harder to stop companies if they act in concert to raise prices for a particular line of insurance.

Second, conflict-of-interest policies for insurance regulators should be made stiffer, in light of a U.S. General Accounting Office study finding that half of state insurance regulators either came from the insurance industry or found employment in it after leaving office.

Third, state regulators should encourage insurance companies to offer economic incentives to corporations and municipalities that follow good safety and risk-management practices. ■