Kansas Legislative Research Department December 2, 1986

MINUTES

SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE

October 9-10, 1986
Room 313-S -- Statehouse

Members Present

Representative Joe Knopp, Chairman
Senator Paul Burke, Vice-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 Donaldson, Kansas Legislative Research Department
Chris Courtwright, Kansas Legislative Research Department
Mary Torrence, Revisor of Statutes Office
Gordon Self, Revisor of Statutes Office
Jill Wolters, Revisor of Statutes Office
Nedra Spingler, Secretary

Conferees Present

Sajjad Hashmi, Dean, Emporia State School of Business and Chairman of the Citizens' Committee
Ted Fay, Insurance Department
John M. Reiff, Senior Vice-President, Coleman Company, Wichita
Tom Sullivan, Kansas Trial Lawyers Association

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Conferees Present (continued)

Michael Sexton, Kansas Trial Lawyers Association
Ron Smith, Kansas Bar Association
T. C. Anderson, Kansas Society of Certified Public Accountants
Kevin Fowler, Attorney, Kansas Society of Certified Public Accountants
Janet Stubbs, Kansas Home Builders Association
David Litwin, Kansas Coalition for Tort Reform
Jim Kaup, League of Kansas Municipalities
Larry Magill, Independent Insurance Agents of Kansas
Dee Ann Bernhard, Alliance of American Insurers
Bill Mitchell, Alliance Insurance Companies

October 9, 1986
Morning Session

The Chairman, Representative Joe Knopp, called the meeting to order at 10:15 a.m. Staff called attention to testimony furnished members from the Junior League of Kansas City, Kansas pertaining to its concerns regarding the impact the liability crisis has had on nonprofit organizations and their volunteers (Attachment No. 1).

Ted Fay, Insurance Department, introduced Sajjad Hashmi, Dean of the Emporia State School of Business and Chairman of the Citizens' Committee on liability insurance. Mr. Fay said other members of the Citizens' Committee were present and available to answer questions.

Dean Hashmi presented a summary, "Executive Summary Part I," of the Citizens' Committee's finding and recommendations. The full Committee report will be concluded shortly. He said health care and medical malpractice were not considered by the Committee since these had been addressed by the 1986 Legislature. The Committee's charge was to determine if liability in Kansas was cause for concern and to make recommendations. The Committee heard many witnesses, followed national debate, and received information from other states and commissioners. He said the Committee believes the New York Governor's Advisory Committee on Liability Insurance would be a good starting point for making decisions about changes in Kansas. He noted the division between those who believe changes need to be made in the system and those who believe changes need to be made in the insurance industry.

Dean Hashmi said the Committee believes a serious problem exists in Kansas and although improvement of the insurance down cycle has helped, the liability problem is long-term and will continue to exist unless measures are taken to prevent spiralling costs of liability insurance which impact on Kansas business and citizens. The growing tendency for constriction of liability insurance for Kansas professionals and businesses results in risks being shifted to private individuals, businesses, government entities, and charitable organizations that have far less insurance experience and expertise. This will cause business failures and loss of jobs, tax revenues, and socio-economic advantages. The Dean said liability losses for self-insurers may bankrupt businesses and individuals in future years. He cited the example of the health

Care Stabilization Fund as not being able to absorb losses in the medical malpractice system. This fund assumed the liability risk at the same time the insurance industry protected its assets by withdrawing from the medical malpractice market. Dean Hashmi said the Citizens' Committee believed only the Legislature can reverse the trend by creating the environment to reverse the contraction in the commercial insurance market and to improve the liability system to protect existing self-insurers. The Citizens' Committee supports the majority of the legislation that would give Commissioner Bell assistance in monitoring insurance companies. The Committee cautioned, however, against imposing unnecessary and expensive data gathering obligations on insurance companies (Attachment II).

Dean Hashmi noted that the recommendations are conceptional because of the lack of time to properly detail them, that they represent the views of all parties -- consumers, lawyers, and the industry, and that the Citizens' Committee's detailed final report will give the rationale for each recommendation.

In discussion, the Chairman noted the interim Committee's dilemma in determining whether the best public policy is to deny such things as punitive damages awards to the injured, thereby increasing individual costs but decreasing costs to society at large, but without any correlated reduction in insurance premiums. In response to questions, Dean Hashmi said the injured party would receive compensation anyway and whether the defendant should be punished is a different issue.

In response to a question, Dean Hashmi said the Committee did not consider the effect on the Health Care Stabilization Fund of not charging the surcharge for three years. He stated the Committee believes tort reform is necessary and should not be instituted just to save the insurance industry money. The Committee did not make recommendations just to help the industry, he said. Although the Committee had no concrete evidence presented that tort reform would definitely affect insurance rates, it believed any steps taken that will reduce the total payouts of the insurance industry will be reflected in premiums. Dean Hashmi called attention to statements made to the Citizens' Committee by Judge Bullock, who pointed out that reforms should be made not because of particular problems but with the philosophical understanding of what needs to be done justly and fairly. A member pointed out there should be some connection between reforms made and the impact they will have on the problems in Kansas. Dean Hashmi said insurance companies were at fault with illogical reduction of premiums in the late 1970s and early 1980s, but the Citizens' Committee believes tort reforms are needed.

In response to further questions, Dean Hashmi said if insurance companies are required to furnish a lot of data to the Insurance Department, consumers will pay the costs and additional staff would be needed to analyze it. He believed the Commissioner should have the latitude to decide what information is needed. In regard to placing a freeze on rates, he said his personal opinion was that rates will not likely be raised further and if tort reforms are made, rates should go down, not up. In discussion regarding the Citizens' Committee's recommendation concerning punitive damages, Dean Hashmi said the Committee discussed at length punitive damage awards going to the State General Fund. It had no recommendation on who pays the cost of prosecuting the punitive damage suit. A member questioned how a private attorney would proceed or if the state would be asked to help with the prosecution.

The Citizen's Committee recommendation regarding punitive damages and extra territorial application of frivolous lawsuits was explained by John Reiff, an attorney serving on the Committee. Mr. Reiff said the Citizens' Committee considered punitive damages because it believed they have an effect on compensation awards. A member questioned how this affected the insurance industry if it does not pay the punitive damages in Kansas. Mr. Reiff said some punitive damages are insured in Kansas and this insurance is available in other states and this has an impact on Kansas. Based on his personal experience Mr. Reiff said that when punitive damages are part of a claim there is greater pressure to settle at a higher amount to avoid exposure. A member noted that the proposal regarding extra territorial application of frivolous lawsuit legislation was new ground for Kansas and might suppress economic development if a person can be sued in Kansas that could not be sued in other states. Mr. Reiff believed it might be an economic plus if this statute was available.

The Citizens' Committee recommendation regarding joint and several liability and Mary Carter agreements (n) and (o) of Attachment No. 2, were discussed. Mr. Reiff pointed out that, under Mary Carter agreements, a co- defendant may not know of agreements made with the plaintiff by an another defendant until the end of the case which puts the co-defendant at a disadvantage.

The Committee recessed for lunch.

Afternoon Session

The Chairman reconvened the meeting at 1:45 p.m. Dean Hashmi continued reviewing the Citizens' Committee recommendations.

In regard to the rate making and form approval recommendation, a member questioned how this authority was different from the Commissioner's present authority. Dean Hashmi said this recommendation clarifies and expands existing authority. The question was asked if the Commissioner presently receives enough information on insurance company reserves to enforce the proposed excess profits bill. Dean Hashmi responded that the Insurance Department does receive information from insurance companies but may want more information on reserves.

In regard to recommendations made to the Congressional Delegation, Dean Hashmi did not know if Kansas should initiate its own risk retention act. Mr. Fay said this has not been attempted on a state level, and if the federal act is amended and expanded to areas other than product liability, states will not have to implement their own statutes.

Following Dean Hashmi's review, other members of the Citizens' Committee in attendance were introduced.

Information was furnished members by the Kansas Trial Lawyers Association regarding information that Aetna Insurance Company furnished the Florida legislature which indicates tort reform will have no effect on insurance rates (Attachment III).

Mr. Reiff spoke on behalf of the Coleman Company and not as a member of the Citizens' Committee. The company manufactures a variety of consumer goods and recommends reforms in the area of punitive damages. He presented a proposed draft on punitive damages and rationale for the changes (Attachment IV). Mr. Reiff said he compared his draft with the draft the Committee will consider and, although his draft covers more issues, the two were not markedly different. Areas of major concern are the definition of wanton conduct which he believed should mean "intentional wrong doing," and his Company's belief that all punitive damages should go to the plaintiff rather than to the state. This would alleviate representational problems for lawyers, e.g., the possible need for the state to be represented in such proceedings.

The Committee then considered proposed drafts concerning tort reform The Chairman said votes on the issues would be determined by the majority rule and that drafts not receiving approval could be introduced by members as individual bills.

In regard to the draft (7RS 0021) on punitive damages, staff explained that the proposal provides for a separate procedure for the judge to determine the amount of punitive damages, that the burden of proof to be clear and convincing evidence, and that 50 percent of the award to go to the state. There was discussion regarding the separate hearing and concern was expressed that it would create delays, increase settlement costs, and the fact that no evidence had been presented to indicate that changes in punitive damages were necessary. It was pointed out, on the other hand, that the provision would prevent juries from being prejudiced by the punitive aspect of the claim and hearing evidence about the finances of the defendant and that punitive damages were punishment which should be determined by the court.

Representative Peterson did not believe the bill was within the scope of the charge of the Committee and saw no need to change present law. He moved that the proposal not be recommended, which was seconded by Representative Leach. A member said punitive damages was the most important issue before the Committee and directly affected compensation awards and the ability of professional people to treat and deal with people. Definitions relating to punitive damages under present law and as contained in PIK instructions, and those definitions proposed in the Coleman draft were discussed. A member expressed concern that the same judge who heard the facts in the first phase may not be the same one for the second phase. He questioned how the judge would determine the amount of punitive damages without knowing the facts.

The change in subsection (c) regarding burden of proof was discussed. Representative Hoy made a submotion to omit "wanton conduct" in Section 1 (c), which was seconded by Senator Arasmith. A member said this would do away with a public policy tool which protects citizens from wanton conduct of others which results in damages to people. Concern was expressed that issues in the draft needed to be well thought out, and that bifurcated trials result in more court time, the need for facilities and delays in decisions. A member said that more consideration should be given to the details of what the judge is supposed to consider. The vote on the substitute motion failed. The vote on the original motion then failed.

Senator Frey made a conceptional motion to amend the bill in subsection (d) to deduct attorney fees and other costs from punitive damage awards and divide the balance fifty-fifty between the plaintiff and the state. This was seconded by Senator Feleciano.

In discussion, the point was made that the amendment would eliminate the need for the plaintiff to pay attorney fees. Representative Solbach objected to punitive damage awards going to the state since the plaintiff is the one who has been outraged and has pursued the case. He questioned if the state would have to provide a special tort counsel to assist with punitive damage claims.

Representative Solbach made a substitute motion to delete subsection (d) and substitute the seven considerations required of the court on page 4 of the Coleman draft. The substitute motion was seconded by Senator Parrish.

Representative Solbach said that the threat of punitive damages under current law is the only tool people have against the wanton conduct of large corporations, and that the purpose of punitive damages was not just to punish but to compensate the victim. A member said that if an individual makes a decision and if it is willful and wanton and injures someone then he pays the cost of the injury and is punished. Punishment should be decided not on whether the corporation or the individual is large or small, but on the nature of the act and the state has the same right to punitive damages money as it has to assess charges in criminal punishment.

The vote on the substitute motion failed to carry. The vote on the original motion to amend (d) carried.

Senator Arasmith moved that the bill as amended be drafted. This was seconded by Senator Burke.

Senator Frey made a substitute motion to incorporate the seven factors for courts to consider in Attachment No. 4, page 7 (Coleman draft) into the bill, which was seconded by Senator Mulich. The substitute motion carried.

Senator Arasmith then moved the bill incorporating all amendments be drafted, which was seconded by Senator Burke. The motion carried. Senator Feleciano voted against the motion.

In regard to the bill draft (7RS 0038) relating to itemized jury verdicts, staff said the proposal exempts medical malpractice liability actions and provides itemized verdict amounts awarded for economic and noneconomic losses. The suggestion was made that economic and noneconomic losses be broken down further and that consideration be given to placing a cap on pain and suffering or establishing a separate category for pain and suffering.

Representative Solbach moved that a draft be prepared as presented. This was seconded by Representative Grotewiel.

Representative O'Neal made a substitute motion to recommend the proposal with the understanding that economic and noneconomic losses be broken down into categories similar to the medical malpractice law.

There was discussion in order to clarify the substitute motion. Michael Sexton, Kansas Trial Lawyers Association, pointed out the language in Section 2 (a) and (b) of the bill is designed to put caps on wrongful death cases which is not current law. He said the word "pecuniary" meant something different than "economic" and would have the impact of shifting certain losses under the $100,000 cap. Staff said this was not the intent of the draft and that "pecuniary" should be reinserted.

The suggestion was made to amend Section 1 to divide economic loss into economic and medical loss, present and future, and to divide noneconomic losses into pain and suffering, disfigurement, disability, and loss of consortium, or to call economic losses pecuniary losses. Representative O'Neal said that his substitute motion was intended to categorize economic and noneconomic losses similar to the medical malpractice law with a breakdown of special damages, include PIK instructions, codify existing wrongful death instructions, and change language back to "pecuniary."

The substitute motion was seconded by Representative Douville and it carried.

Representative O'Neal moved that the bill, as amended, be drafted, which was seconded by Senator Burke. The motion carried.

Staff then reviewed a bill draft (7RS 0044) dealing with periodic payment of judgments. Staff said options for the Committee to decide were contained in brackets. The proposal was based on the Uniform Law Commissioners draft and was recommended by the Kansas Bar Association as an alternative to structured settlement provisions in the medical malpractice law. Following discussion, it was the consensus of the Committee to incorporate on page 3, Section 5, alternate (b); on page 6, alternate (1); on page 8, leave the discount factor at 3 percent; on pages 9 and 10, Section 13, the first alternative; on page 10, Section 13, retain the sentence in brackets; and on page 10, Section 14, add the last sentence; and on page 11, retain Section 19. Following a suggestion by Ron Smith, Kansas Bar Association, it was the consensus of opinion that provisions on page 3 concerning itemizing by the jury coincide with amendments made to the bill concerning itemized jury verdicts. It was the consensus of the Committee that the bill, as amended, be drafted.

In regard to the draft (7RS 0039) limiting damages for noneconomic losses, staff said the proposal was modeled after the medical malpractice law and contained the $250,000 cap on noneconomic awards.

Following discussion regarding the intent to limit this to pain and suffering only, Representative O'Neal moved that "noneconomic loss" be deleted and "pain and suffering" be inserted, which was seconded by Representative Solbach. The motion carried.

There was discussion regarding the need for the proposal when the Committee had received no evidence of such need or that its passage would affect insurance rates. It was suggested that the Committee should wait until information could be obtained from itemized jury verdicts which would indicate the number of cases the proposal would affect. A member pointed out that companies will not write insurance because of awards for pain and suffering, and a cap on pain and suffering would attract the insurance industry.

Representative Solbach moved to pass over the bill until further research was done on it, which was seconded by Representative Peterson.

Senator Arasmith made a substitute motion to recommend a draft be prepared as amended, this was seconded by Representative Hoy and the substitute motion failed to carry. No further action was taken on the bill.

In regard to the bill draft (7RS 0037) dealing with directors and officers of nonprofit corporations and liability, staff said the proposal was based on the Delaware code, a recognized guide for corporate conduct in America. The bill permits shareholders to eliminate or to limit personal liability for directors and officers of corporations.

Senator Mulich moved that the bill be drafted, as presented. The motion was seconded by Representative O'Neal and it carried.

The Committee recessed at 4:40 p.m.

October 10, 1986
Morning Session

The Chairman reconvened the meeting at 9:15 a.m. The committee resumed consideration of proposals concerning tort reform.

In regard to the bill draft (7RS 0054) providing for immunity from liability for unpaid volunteers of nonprofit charitable organizations, staff said the definition for these volunteers was taken from federal Internal Revenue Service Code exemptions in Section 501 (c)(3). The proposal limits coverage to charitable and educational organizations, but could be broadened. A committee member said that the policy reason for the proposal was to exempt all people who volunteer their time regardless of whether they qualified under section 501 (c)(3), and it was questioned if this section covered the intent. There was further discussion and concern expressed about making the exemption too broad.

Representative Hoy moved, Senator Arasmith seconded, to leave out subsection (3) of 501 (c).

Senator Feleciano made a substitute motion that the bill be drafted as it is, which was seconded by Senator Frey. Staff pointed out the proposal excludes medical care facility and nursing home board volunteers. The vote on the substitute motion failed to carry.

Representative Solbach made a substitute motion to conceptionally amend the proposal by adopting a suggestion made by staff that volunteers have immunity, but the organization itself is fully responsible for the organization's negligence. The substitute motion was seconded by Senator Burke and it carried.

Representative Leach moved that the bill, as amended, be drafted, which was seconded by Representative Grotewiel. The motion carried.

In discussing the bill draft (7RS 0050) on immunity for directors and officers of nonprofit organizations, staff explained the proposal was the same as the previous bill except it covers directors and officers.

Representative Leach moved the bill be drafted, which was seconded by Representative Hoy. Concern was expressed regarding expanding the list of organizations to include subsections (4), (5), and (6) of Section 501(c) the Internal Revenue Code. It was suggested that the proposal be limited to only charitable organizations. It was pointed out if that bill passed, officers and directors would still have to buy insurance.

Senator Feleciano made a substitute motion to table the bill, which was seconded by Senator Frey. The substitute motion failed.

In further discussion, a member pointed out there have been no claims or losses paid in this regard and the proposal would not affect rates.

Representative Mayfield made a substitute motion to restrict the proposal to charitable organizations by deleting (4), (5), and (6) of Section 501(c) and retain 501(c)(3), and to clarify the entity itself can still be sued. This motion was seconded by Representative Douville. The question was raised that by providing immunity for these persons, they will not buy insurance which may cause increased rates for other people. The vote on the substitute motion carried.

Representative Douville moved that the bill, as amended, be drafted, which was seconded by Representative Hoy. The motion carried.

Discussion then centered on a bill draft (7RS 0051) dealing with professional opinions and advice. Staff noted the proposal, requested by the CPAs, was drafted to cover other professions and grant liability immunity. A disclaimer could be added or a provision that only certain persons can rely on the information and a time limit for use of the opinion could be incorporated.

T. C. Anderson, Kansas Society of Certified Public Accountants, said if accountants are negligent, they will stand behind it as of the day of the opinion, but a time limit is needed to prevent information from being used later, particularly in investment situations. He explained the alternative draft suggested by the CPAs (see Attachment) would codify what it is believed to be common law. The alternative bill also refers to "professional services" rather than opinions and advice. He explained the functions of accountants which were included in "service" and pointed out that use of "service" would get to the heart of the problem because there is more to professional service than opinions and advice. In response to questions, Mr. Anderson did not believe the proposal went beyond common law and explained how, without privity, the use of the accountant's services could expand beyond the original intent.

Kevin Fowler, attorney for the CPAs who drafted the CPA's proposal, said the problem is that parties in a contract cannot limit liability to an unknown third party. Mr. Anderson noted that CPAs are concerned that privity in Kansas might be modified or overturned by courts, and codifying privity would

ensure that Kansas CPAs were protected. The Chairman said the public policy question regarding this draft was whether courts would continue to decide issues on privity or, if by codifying current common law, companies insuring CPAs and other professions would be encouraged to write business in Kansas.

Senator Frey said that the proposal does more than that. He believed common law presently protects professions, and if specific requirements for time limits or disclaimers are mandated and the professional does not comply, he is liable and would not have the protection of common law. He said there had been no evidence presented that the Supreme Court has denied privity to CPAs.

Representative O'Neal moved to add a statement in the proposal that legislative intent was not to modify common law in this area other than as provided in the bill draft as presented by the Revisor's Office. This was seconded by Representative Hoy and it carried.

There was further discussion regarding "professional service" and comparison made between provisions limiting the use of information in the Revisor's draft and the CPA's draft. Concern was expressed that the CPA version creates too many requirements and that CPAs could exempt themselves from all liability. Mr. Anderson said accountants want to stand behind their work but they cannot get liability insurance at a reasonable cost. Insurance company rate books reflect the worst case scenario. In Kansas, CPAs can only get $1 million coverage but, absent privity, are subject to losses for a greater amount. He believed the CPA proposal would help CPAs decide whether or not to take an engagement.

Senator Arasmith moved the bill be drafted, as amended, which was seconded by Senator Hoferer.

Senator Frey made a substitute motion that the draft reflect subsection (b) of the CPA draft but state who may rely on the document and provide that the disclaimer has to be in writing, which was seconded by Senator Hoferer. The motion carried.

Representative Solbach moved to limit coverage of the bill to CPAs only, which was seconded by Representative Leach. It was noted that by covering other professions, unique services of other professions from whom there had been no testimony had not been considered. It was pointed out that by leaving the proposal generic, other professions would be given the opportunity to testify when the bill is heard. The vote on the motion failed to carry.

Senator Arasmith moved that the bill, as amended, be drafted, which was seconded by Senator Mulich. In discussion, concern was expressed that passage of the proposal would open up a Pandora's box. David Litwin, representing the Kansas Coalition for Tort Reform, suggested it be limited to licensed professions. The point was made again that other professions will indicate at hearings if they want to be included. The vote on the motion carried. Representative Solbach voted against the motion.

The Chairman stated that action taken by the Committee on proposals would be drafted in final form, copies of which will be made available for interested parties to check out and copy. Committee members will be sent

copies prior to the next meeting upon request. He stated that conferees would have the opportunity to comment and further Committee action may be taken at the November meeting prior to adopting the final report. He requested staff to prepare a preliminary report for the November meeting which will be circulated to members after the November meeting for final approval.

In regard to the comparative negligence draft (7RS 0046), staff explained the proposal combines two separate requests for drafts, one being requested by the CPAs to include economic loss in the comparative negligence statute, and the other to codify the abolishment of the doctrine of joint and several liability in these situations which had been done by common law.

Representative O'Neal moved to amend the proposal in subsection (h) to make provisions applicable to cases filed after July 1, 1987, which was seconded by Representative Douville. The motion carried.

Ron Smith of the Kansas Bar Association called attention to the new language regarding the doctrine of joint and several liability and that there were two case law exceptions to this rule. He questioned whether the draft was codifying current law.

Senator Feleciano moved to delete the last sentence in subsection (e), which was seconded by Senator Burke and it carried.

Representative O'Neal moved that the bill draft, as amended, be drafted, in final form, which was seconded by Representative Hoy. The motion carried.

In regard to the bill draft (7RS 0041) dealing with the statute of limitations, staff said the proposal was requested by the Homebuilders Association of Kansas and subsection (d) provides for the construction industry, a shortened statute of limitations. The Chairman stated the public policy question was what is an appropriate limit for bringing lawsuits for negligence in a particular type of activity. A member questioned if any testimony had been received from the industry that the current ten-year limit was a problem. Janet Stubbs, Homebuilders Association of Kansas, responded that her group was not locked into a three-year maximum in the bill. A member pointed out that damages to a house are not very often discovered within three years.

Representative Hoy moved to change the maximum from three to five years, which was seconded by Senator Mulich. The motion carried.

Ron Smith called attention to the large number of statute of limitation provisions throughout the statutes covering a variety of subjects which makes it difficult for attorneys to advise people. He suggested that all statute of limitation provisions be compiled into one area of the statutes so they will be easier to find. Staff noted it may be difficult to accomplish this even with the computer since not all of the statutes use the same language.

The Chairman expressed concern that making an exception in the statute of limitation for only the construction industry was right, fair, and just as far as it relates to insurance since there had been no evidence the proposal would alleviate insurance problems.

Representative Solbach moved that the proposed draft be tabled, which was seconded by Senator Frey. It was noted that the motion was not in line with action that the Committee had taken on other bills that did not guarantee the alleviation of insurance problems. Representative Solbach withdrew his motion.

Senator Burke moved that the bill draft be passed over and that the industry be permitted to testify at the next meeting, which was seconded by Representative Solbach. The motion carried.

In regard to the pretrial screening panel bill (7RS 0040), staff said language for the proposal was taken from 1986 S.B. 540 prior to its amendments.

Representative Solbach moved that the bill be drafted, which was seconded by Senator Frey. The point was made that screening panels may reduce the costs of discovery. It was noted that it is difficult to get competent people to serve on screening panels for $150 compensation.

Representative Solbach withdrew his original motion and then moved that in Section 5 (c) that the admissibility of the screening panel reports not be included in the proposal. Senator Frey seconded the motion and it carried.

Representative O'Neal noted that in Section 2, the first sentence, some of the professions listed would never be involved in personal injury suits.

Representative O'Neal moved that "for personal injury or death" be stricken, which was seconded by Representative Solbach. The motion carried.

Senator Frey moved that the proposal include a method of using screening panels without filing a petition and that a request for a screening panel could be made before or after filing a petition, which was seconded by Representative Solbach. The motion carried.

Senator Frey moved that the bill, as amended, be drafted, which was seconded by Representative Solbach. The motion carried.

The Committee recessed for lunch.

Afternoon Session

The Chairman reconvened the meeting at 1:40 p.m. Consideration of proposals was continued.

After discussion of the bill draft (7RS 0043) dealing with arbitration of tort claims, Representative Leach moved that the draft be passed over; this was seconded by Representative Solbach. The motion carried.

The Committee then discussed the bill draft (7RS 0045) amending the Kansas Tort Act. Discussion focused on Section 3, subsection (d), relating to

guidelines adopted by governmental entities. The Chairman pointed out if the Legislature does not respond to a recent Kansas Supreme Court case, the response of the cities would be to throw away their employee manuals.

Jim Kaup, League of Municipalities, said that cities have already been told to go through manuals and delete those procedures that might affect liability. He said guidelines are not enacted for the purpose of defining the scope of liability to the third party, but are instituted for guidance for employees. Mr. Kaup said some cities have manuals adopted by administrators that the elected officers do not know exist.

Concern was expressed regarding Section 3 (i) and decisions in placement of traffic signs; specifically that this subsection was giving cities complete discretion whether or not to comply with the Uniform Traffic Manual. Mr. Kaup pointed out the uniform manual was discretionary in nature, but courts were saying that cities are liable for what cities thought was discretionary.

Following further discussion, Representative Leach objected to provisions in (i) and moved to strike Section 3 (i) and go back to former language in (h) that was stricken. This was seconded by Representative Grotewiel. The point was made that the motivation of city council members and government entities is to do what is right for the public and they do not intend to go out and hurt the public. The vote on the motion failed. Representative Leach wished to be recorded as voting for the motion.

The Committee discussed other sections of the proposal. Mr. Kaup requested that in Section 6 (b)(2), include the provision that pooling arrangements shall not be subject to the state's insurance laws. It was the consensus of the Committee that this be added.

Discussion was resumed on Section 3 (i). A member said it was dangerous to give absolute immunity for failure to place signs on roads whether it is discretionary or not. The suggestion was made to delete (h) and give locals control. It was noted that the driver also should have some responsibility. A member said the greatest number of lawsuits involved traffic and questioned why victims should not be compensated for negligence. Mr. Kaup said the League's Task Force on Liability had addressed the problem and recommended this portion of the proposal. It was noted that city governing bodies have to decide priorities where budget money will be spent or may not have any money at all. He questioned if a city should be sued because of a decision not to do a certain thing. In response to a question regarding how much premium money cities would save if the proposed bill was passed, Mr. Kaup said it was not possible to give a dollar figure. A member said that many times signs are put up only after accidents happen, and this proposal would let the state and local governments out of the business of safety protection in order to cut insurance rates.

Representative Solbach moved to delete (i) and go back to the original language in (h), stating it was dangerous and the Committee owed it to the citizens to remove it. The motion was seconded by Representative Leach. The motion failed. Senator Feleciano and Representatives Solbach and Leach voted in favor of the motion.

Representative Hoy moved that the bill, as amended, be drafted; this was seconded by Senator Burke. The motion carried. Senator Feleciano and Representatives Solbach and Grotewiel voted against the motion.

The Committee considered proposals relating to the Insurance Department.

The Committee then discussed a proposed bill (7RS 0029) requiring notice prior to increasing premiums. Staff said the proposal provides that notice to the insurance agent of the increase in premium shall be notice to the insured. In response to questions regarding the Insurance Department's position on S.B. 729, Larry Magill of the Independent Insurance Agents of Kansas said the Department supported the bill before it was amended.

Representative Leach moved to amend Section 1 to state there will be no increase for 18 months. He said this would be similar action as that taken by Florida and sets a holding pattern so insurance companies will not pull out of the state. The motion was seconded by Representative Solbach. The motion failed.

It was questioned if the notice to the agent would qualify as the notice to the insured. Mr. Magill noted that the agent represents the insured and this eliminates the need for the company to deal directly with the insured. If the insured refused to accept the new rate, he would be kept under a binder, he said, and the proposal codifies what the Department thinks is common law. Concern was expressed that without a time limit, the insured might not be notified until shortly before the policy expired.

Senator Feleciano moved that old rates will apply for 30 days after the notice of a rate increase, the amendment to be added at the end of the first sentence in Section 1. This was seconded by Senator Frey. The motion carried.

Senator Feleciano moved that the bill, as amended, be drafted. The motion was seconded by Representative Hoy and the motion carried.

A bill draft (7RS 0049) dealing with reporting loss and expense experience and the creation of an advisory committee to the Commissioner was discussed. Staff said the proposal requires insurance companies to report losses in specific classes, provides for a statistical reporting plan, and establishes an advisory committee to the Commissioner regarding insurance data and information. A member suggested that, since the Committee seemed reluctant to limit rate increases, the advisory committee should have authority not only to ask for information but to recommend to the Commissioner approval or disapproval of increases.

Tom Sullivan, representing the Kansas Trial Lawyers Association, said the proposal should address investment and tax credit income of insurance companies because they affect rate making. The Committee should look at the profits of the property and casualty industry as a whole and not just underwriting experience. He pointed out that during 1975-1984, for all states, the industry had a $75 billion increase in profit, and in 1985 a $2 billion profit with property and casualty stock increasing 500 percent; that this is five times the Dow Jones average; and that these figures are from the insurance

industry. Mr. Sullivan said that Florida, in giving the industry tort reforms, rolled back rates. Aetna Insurance Company, under oath, told the Florida legislature that tort reform had zero percent to do with premiums. He urged the Committee to consider the complete picture of profit and loss regarding insurance companies.

Staff pointed out that another bill draft to be considered dealt with investment income and other provisions included in the Florida law which, if approved, could be compiled into one bill.

Senator Feleciano moved to incorporate into the bill draft Section 9 of the Florida law to require insurers to provide the Commissioner information regarding premiums, taking into account investment income and loss. The motion was seconded by Representative Leach. The vote on the motion carried.

Representative Leach moved to change "may" to "shall" in Section 1 (b) and (d). In discussion, staff pointed out in subsection (a) that the Commissioner is already mandated to develop statistical plans, and regarding rules and regulations in subsection (d), it is assumed the Commissioner will develop these as necessary. The motion was seconded by Senator Feleciano and the motion carried.

A member pointed out that no time limit had been designated in the proposal for the advisory committee members to serve and no compensation provided. It was the consensus of the Committee that members serve for two years and receive per diem and expense payments similar to legislative compensation.

Senator Feleciano moved that the bill, as amended, be drafted. This was seconded by Representative Hoy and the motion carried.

In regard to the bill draft (7RS 0030) concerning reporting claims and actions for damage for professional malpractice, staff said the proposal was requested by the Kansas Engineering Society and was based on medical malpractice legislation enacted in 1986. Mr. T. C. Anderson of the Kansas Society of Certified Public Accountants (CPAs) pointed out that the reporting procedure in the proposal was different from that required of the Medical Society in the medical malpractice law. A member responded that there were multi-facets to consider in medical malpractice that other professions do not have. He objected to several unnecessary boards investigating potential claims. Mr. Ron Smith of the Kansas Bar Association pointed out that if attorneys had to report claims to their administrative agency (the Supreme Court) prior to a hearing, this might prejudice their case which the Supreme Court must hear. There was discussion regarding the possibility of reports being considered to be claims and if this would discourage self-reporting.

Representative Grotewiel believed the proposal would generate a lot of paperwork that nobody would read and which would complicate lawsuits. He moved that the Committee pass over this draft, which was seconded by Senator Frey. The motion carried.

Concerning the bill on excess profits (7RS 0031), staff said the proposal was patterned after the Florida law. He explained the formula which defines "excess profit" in Section 3. Members questioned if investment income

was figured in the formula and if the percentage allowed in figuring anticipated profit was appropriate and might affect rates. It was pointed out the Commissioner has to approve rates. Mr. Magill said if the Commissioner turns down rates, they are generally reduced when resubmitted. Concern was expressed that the excess profit concept takes the Commissioner off the hook and allows companies to have the advantage rather than the policyholder who may not benefit from the surplus. Staff said nothing in the proposal allows a company to recoup surplus money from the policyholder following a year of losses. There was discussion regarding the number of years upon which experience should be calculated before excess profit is declared, it being noted that an average could not be obtained in a one-year period.

Senator Feleciano moved to incorporate a four-year period, the same as the Florida law. This was seconded by Representative Grotewiel. The motion carried.

Senator Feleciano moved that the bill, as amended, be drafted. This was seconded by Representative Grotewiel and the motion carried.

On the bill providing an assigned risk plan (7RS 0034), staff said this was an Insurance Department proposal and would give the department a joint underwriting authority (JUA) similar to auto liability insurance. It was noted the proposal would require all companies writing liability insurance in the state to participate in a JUA which may raise rates for the other insured but might lower them for municipalities. It was pointed out that losses would be passed on to policyholders. Mr. Magill said he was not aware of an availability problem for municipalities, although few companies are writing liability. He did not believe the state should force companies to underwrite liability. It was noted that the Citizens' Committee recommended that a JUA not be utilized.

Representative Leach moved that the Committee pass over this draft, which was seconded by Representative Hoy. The motion carried.

In regard to the bill draft dealing with rating plans (7RS 0033), staff said the bill was an Insurance Department proposal and is patterned after the New York law. The bill states that the Commissioner will set standards for modification of rates rather than their being based on rating plans. It was pointed out the proposal would enable the Commissioner to separate classifications such as day care centers in order to get better data on rates.

Representative Leach believed provisions in Section 1 (c) gave the Commissioner an escape clause and moved to make it mandatory that the Commissioner establish rules and regulations by changing "may" to "shall." This was seconded by Representative Grotewiel and the motion carried.

There was discussion regarding excess lines insurance. Dee Bernard of the Alliance of American Insurers gave a brief explanation of excess lines insurance which are not subject to rate review by state regulatory agencies. The Committee requested additional information on this subject at its next meeting. Mr. T. C. Anderson pointed out that the CPAs group rate increase of 600 percent was not approved by the Commissioner and cost more because an international excess lines company was the only place it could be obtained. Concern was expressed by members that the Committee had not heard this element

of the liability insurance business before, and the insurance problems of day care centers, doctors, and others may be because they are written on surplus or excess lines.

Representative Leach moved that the bill, as amended, be drafted. This was seconded by Representative Grotewiel. The motion carried.

In regard to the bill draft (7RS 0053) creating an advisory committee on insurance rates, staff said the New York law had a consumer advocate committee that makes recommendations on rates. The Florida law contains nothing in regard to a consumer advocate. He noted that an NCSL article suggests a consumer advocate be present at rate hearings.

A member expressed concern that the Committee meeting was prolonged and suggested that consideration of the rest of the proposals be delayed until the next meeting when more members were present. The Chairman directed staff to conclude the review of the bill draft and to get the balance of the proposals before the Committee, to review them briefly. Staff resumed the review of the bills.

Senator Feleciano moved to change the number of members from three to five and that they be appointed, one each, by the Governor, President of the Senate, Speaker of the House, and the ranking minority leaders of both houses. This was seconded by Senator Frey. The motion carried.

Senator Frey noted that the advisory committee for the Department of Transportation has veto power over the Secretary under certain conditions. He moved that the insurance advisory committee have veto power over the Commissioner. This was seconded by Senator Feleciano. The motion carried.

Senator Frey moved that the bill, as amended, be drafted. This was seconded by Senator Feleciano. The motion carried.

Staff briefly reviewed bill drafts (7RS 0049; 7RS 0048; and 7RS 0047) on investments, freeze and rollback of rates, and reinsurance. No action was taken on these proposals.

Staff was directed to prepare a memo outlining action taken on proposals considered, omitting the recommendations of the Citizens' Committee.

The need for an additional day of meetings in November was discussed. The decision was made that the Committee would meet for three days, November 12, 13, and 14, with the first day scheduled for hearings on drafts. Final drafts will be mailed to members for approval after the meeting.

The Chairman adjourned the meeting at 5:00 p.m.

Prepared by Mike Heim

Approved by Committee on:
December 19, 1986
(date)

tortoct.min/MH

THE JUNIOR LEAGUE OF KANSAS CITY, KANSAS Inc.
P.O. Box 2485, Kansas City, Kansas 66110

September 5, 1986

The Honorable Joe Knopp
State Representative - Manhattan, Kansas
1201 Houston
Manhattan, Kansas 66502

Dear Mr. Knopp:

It is my understanding that you are chairman of a legislative committee studying liability insurance matters. Further, I understand a series of public hearings have been and are being held to address certain issues as they pertain to these matters and therefore I respectfully include with this letter, testimony I would like to have entered on the record and present at an upcoming meeting of your committee.

As you will note by reading the enclosed material, I represent a non-profit organization, The Junior League of Kansas City, Kansas, and consequently my focus is on the impact the "crisis state" of the liability insurance industry has on non-profit organizations and the work they do for the betterment of the communities they serve.

Thank you for your time and consideration of the views I set forth. I would appreciate hearing from you if it would be possible for personal testimony to be given.

Sincerely yours,

Jane A. Angle

Jane A. Angle
President

JAA/rlg

cc: The Honorable Nancy Parrish
Mr. Mike Heim

09-05-20

Ways & Means
10/9-10/86
Attachment I

My name is Jane Angle and I am President of the Junior League of Kansas City, Kansas, Inc. By way of further introduction, let me also explain to those of you who are not familiar that the Junior League of Kansas City, Kansas is a not for profit organization which is a member of The Association of Junior League, Inc., an international organization of women committed to promoting voluntarism and to improving the community through the effective action and leadership of trained volunteers. Its purpose is exclusively educational and charitable. Comprising our national association are 266 individual Junior Leagues located throughout the United States, Canada, Mexico and Great Britain with a combined membership of over 160,000.

I offer this background information for 2 purposes: first to let you know the purpose of our organization and secondly to tell you that until January 1, 1986 through our national association, each individual League was offered the opportunity to obtain Non-profit Association Professional Liability Insurance. Not only was the policy a non-deductible policy which covered defense costs in addition to the limits, but it was most reasonably priced at $400.00 annually.

The Errors and Omission portion of this policy was designed for the individual performing professional duties such as Junior League volunteers perform in the way of counseling duties and health service aids. Also it combined the features of a Directors and Officers Liability policy and thereby covered individuals against the liabilities they incur from "wrongful acts" of management. So you can see a Junior League had broad protection at least until January 1, 1986. Since then the KCKJL has had no protection of this kind nor does our National Association offer us hope for obtaining coverage at that level. Not that the Association plan suffered from adverse claims experience, nor did the lack of participation cause its demise. Unfortunately, the program was an innocent victim of the crisis state of the liability insurance market. Similarily I am sure many non-profit community service organizations face a similar plight.

I call it a plight particularly in the case of our League for several reasons. We have just found coverage after an arduous search, but coverage seems to be based on 2 basic principles, availability and affordability and in the particularly hard market we are in, both affordability and availability are

relevant to us. Frankly, we have purchased D and O coverage only with an annual premium of $2,258; drastically different from the $400 we had paid. We had little market freedom as to choice, nor have we found E & O coverage available.

Yet we purchased what D & O coverage we could find primarily because we recognize the preconceived idea held by many, that Junior Leagues' members are part of a "deep pocket" group, a target risk and are further subjective to joint and several liability. Further we acknowledge that although it was not that many years ago that organizations went without this kind of protection, we think it naive not to consider the liability jackpots which have occurred most frequently in recent years.

Our further concerns include the stability of the marketplace where companies are quite quickly in and out of the market, therefore offering only sporadic coverage availability. Kansas, we are told, represents total premiums of less than 2% of the total volume that major insurance companies do nationally, a further threat as to the availability to us particularly under adverse conditions. Although it has seemed to us that the market system generally regulates industries most effectively, this does not now appear to be the case in the insurance industry. First of all, the cycle of going from a soft market where coverage is both affordable and available to the other extreme, a particularly hard market seems to be lengthening. Although the last soft market lasted 5 years versus what had normally been 3 years, again I am told by those a part of the insurance profession that in their opinion quite probably it will be at least 3 years before this hard D and O, E and O liability market softens.

Therefore what can be done during the next 3 years, or during any other cyclical period where coverage is either not available, affordable or changes are occuring? Perhaps we will be forced to accept the fact that 2 out of every 6-10 years we will be without insurance coverage. We cannot self insure during those years so what will that mean to organizations like the Junior League? Undoubtedly it will mean abandoning high-risk projects; perhaps hiring people to do what we ourselves have done as volunteers merely to be afforded the benefit of the insurance protection the hired individual offers. Also, I suppose there exists the possibility of creating non-profit subsidiaries in an effort to

create a shell for some of our activities. Yet as you and I clearly know, these risk management practices take time and money and ultimately that the time and money we spend in these areas will not be spent on our true purpose of improving the community in which we live and serve, thereby the community becomes the real loser in this case.

Beside the time and money spent, another aspect to consider is the willingness on the part of truly qualified individuals to serve on community boards or in volunteer capacities considering the risks to which they may be exposed. Again, it is the community and its citizenry that suffer as this loss of expertise effects programs and jeopardizes agencies perhaps to the point of their existence. I would like to elaborate on the volunteer activities the KCKJL engages in so that hopefully you can also appreciate how we feel about our time being well spent and our community served. The KCKJL has a current active membership of 227 women with each women contributing 100 plus volunteer service hours annually. We have served the Kansas City, Kansas/Wyandotte County Community for 52 years. During this time, we have also raised over $700,000 and returned 75% of that to our community, a sum exceeding $525,000. Our projects include individual members who give either direct service to specific community agencies, such as Bethany Medical Center, Kaw Valley Arts Council, St. Joseph's Home for the Elderly, Rebecca Vinson Center, the Kansas City, Kansas Public Library, to name but a few, or we work in coalition with community organizations by providing funds and volunteers to establish or assist their various programs. For example, this year we have pledged $5,000 and 2 volunteers to Argentine Youth Service to enable them to establish a chemical dependency counseling program. We will also be continuing our association with Wyandotte House, Inc., a residential treatment facility for abused and neglected youth ages 10-18 which we helped found in 1970. This year's commitment represents the third of three years, including $10,000 given annually and three volunteers, one of whom serves as their Volunteer Coordinator, another as a teachers' aide and the third sits on their Board of Directors with the additional specific duty of a fundraiser for Wyandotte House.

Last year, we co-sponsored a pilot program, called Merritt Horticultural Center which provided educational, therapeutic and occupational skills for handicapped

adults. This was programmed with assistance from The Menninger Foundation and was under the auspices of the Wyandotte County Mental Retardation Board. In addition to which we were involved in 12 other community projects during 1985-86.

Past projects of which we are most proud have included involvement with opening a Ronald McDonald House in Octobe- of 1981. The KCKJL pledged $50,000 over a period of 5 years and some of our members still serve in such capacities as weekend Relief Managers. Also, we've worked with HOSPICE, a home health care agency for the terminally ill. In 1984 we won the J.C. Penney Golden Rule Award which recognizes outstanding volunteer service in the Greater Kansas City Community for staging a 30 minute live p oduction written by Fred Mackey of the Theatre for Young America and designed specifically for elementary school age children to education them about the prevention of child abuse. We also held a national conference to train others in producing this play.

I offer this information not to extol our virtues, but rather to say we do feel we know and meet our community needs and wish not to have our activities interrupted or our resources diverted in any way.

And so it is to avoid this we seek the Kansas Legislatures' assistance. We are aware of legislation enacted in the area of tort reform and encourage such activities. Yet we would be concerned about any legislation that caused the experiences which occured in Florida, for example, where tort reform legislation was enacted at the same time legislation was also passed mandating rates and rate decreases which ultimately caused numerous companies to withdraw from the State.

We would mention perhaps the continued further development of a Market Assistance Plan in the area of D and O, and E and O which has provided help in the case of products liability and daycare centers. Yet we are quick to recognize such a plan would only address availability and not affordability and therefore we feel this to be not completely satisfactory.

As to a final suggestion for improvement and perhaps one which would impact non-profits in the most positive manner would be legislation to provide personal

immunity. Although it can be said that the purpose of a tort system is to enhance a high level of responsibility and accountability on the part of persons accepting these responsibilities, it would not seem to me to undermine this effect by excluding a small group of persons in a particular area who by the very act of volunteering, demonstrate acceptance of certain responsibilities. At a time when the Federal Government in particular and the State Government as well are encouraging volunteer activities, it seems not only contradictory but rather quite threatening to allow volunteer organizations and their members who are engaged in projects for the betterment of their community to risk being sued. Quite naturally, motivation suffers but likewise charitable activities risk being destroyed. Many volunteers are simply not willing to take the risk and consequently their volunteer activities cease.

In conclusion, I not only thank you on behalf of the KCKJL for allowing me this opportunity to speak with you today, but also want to say that certainly I and the organization I represent recognize not only the complexity of the issue as well as the complexity of its possible solutions. However, we know also that you like us, are as concerned regarding the quality of life for all Kansans and therefore trust you will be supportive in every way possible to protect the work done by Junior League volunteers and other not-for-profit agencies to enhance conditions within our State. Thank you again for listening.

II

FLETCHER BELL

COMMISSIONER OF INSURANCE

October 8, 1986

The Honorable Joe Knopp, Chairman
Special Committee on Tort Reform
and Liability Insurance
State Capitol Building, Room #175-W
Topeka, Kansas 66612

Dear Chairman Knopp:

As reported to your Committee earlier, I appointed a 1986 citizens Committee to study problems associated with the Kansas liability insurance system. The Committee has completed their final work which they have furnished to me in the form of an Executive Summary which includes the Committee's recommendations. I am forwarding this Executive Summary for your review prior to Dean Sajjad Hashmi's testimony before your Committee on October 9, 1986. Dean Hashmi has served as Chairman to the Citizens Committee since its inception.

In order to get the Citizens Committee's recommendations to you in time for your consideration, I am forwarding the Executive Summary without the full Committee report. I understand that the Citizens Committee will be completing and sending to me the complete report within the next two weeks. I will send it to you when it is received.

The recommendations of the Citizens Committee were not put in final form until their meeting on October 7th. As a result, I have not had an opportunity to review the recommendations in great detail. However, I know the members of the Citizens Committee worked very hard to complete their work and their opinions and recommendations deserve your careful consideration.

I have previously provided your Committee with certain suggested insurance regulation provisions. As I told you at the outset, I

Tort Reform
Attachment II
10/9-10/86

support these recommendations, but only if meaningful tort reforms are made to improve the long-term liability costs and expenses.

With warmest personal regards, I remain

Very truly yours,

Fletcher Bell
Commissioner of Insurance

FB:jlb
Enclosure
cc: All Committee Members
Legislative Staff
LE/3690

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

October 7, 1986

The Honorable Fletcher Bell
Commissioner of Insurance
Kansas Insurance Department
420 S.W. Ninth Street
Topeka, KS 66612-1678

Dear Commissioner Bell:

In January of this year, you appointed a Citizens Committee to study liability cost problems in Kansas.

I am pleased to advise you that on October 7, 1986, the Committee completed its recommendations. I am attaching the Executive Summary from the full report which includes the Committee's recommendations.

The full report of the Committee is in final draft form, but will not be available until next week. I have been asked to appear before the Legislature's Special Committee on Tort Reform and Liability Insurance to present the Citizens Committee's recommendations on October 9, 1986 at 10:00 a.m. In order to provide you with our views prior to that meeting, I am sending the Executive Summary now and will send the full report when it is in final form.

I, of course, will limit my remarks before the Legislature to the opinions of the Committee. I will not attempt to represent your views since I realize you will not have sufficient time to review the Committee's recommendations prior to October 9th.

Sincerely,

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

bk

Attachment

PART I

Executive Summary

I.

Executive Summary

a. The Appointment Of The 1986 Citizens Committee.

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

b. The Committee's Charge.

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

c. Witnesses And Resources Relied Upon By The Committee.

We have heard from numerous witnesses and examined literally thousands of pages of articles discussing the insurance problem in Kansas and the United States. We have also followed the national debate on this subject as reported widely by the news

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

d. The National Debate.

The number of articles written about the liability problem and the number of other States studying this matter attest not only to the extent of the problem nationally, but also to the public concern regarding the liability problem. It is an area of extreme contentiousness. The most pronounced division seems to exist between those who believe the problem is centered in our judicial system and those who find it centered with the insurance industry. The first camp told our Committee that our courts, in an effort to expand compensation to injured persons, have gone too far. They contend the system has become too expensive, provides for more compensation than is reasonable, and no longer offers any degree of predictability. They point, with alarm, to the increase in paid losses between 1965 and 1985 of 2,046% for commercial liability insurance compared with an

increase in inflation during the same period of 242%. They also point to the increase in losses in commercial liability insurance of 25% in 1984 and 43% in 1985. The opposing camp told us that insurance companies have caused current problems by poor management during a normal property and casualty insurance cycle. They told us the problem will be eased, if not solved, once these companies return to profitability.

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

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

This Committee finds that a serious liability problem exists in Kansas. It does not yet affect all liability insurance lines and classes, but clearly has created difficulties for many professionals, businesses, and governmental agencies in this State. A constriction of commercial liability insurance, which actually began more than a decade ago, has made some insurance coverage unavailable. Even when

insurance is available, there is often partial unavailability for the total risk because policies increasingly cover fewer risks and at lesser threshhold dollar amounts. Higher deductibles and the increasing use of claims-made policies are just two examples of this growing tendency toward partial unavailability.

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

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

f. The Constriction of Commercial Liability Markets Is Bad For Kansas.

As mentioned earlier, the constriction of the commercial property and casualty insurance markets has taken place for more than a decade. This Committee did not decide if the constriction of the commercial property and casualty insurance markets is bad or good for the financial viability of the insurance industry. Such a decision would be beyond our charge and, in our opinion, an inappropriate

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

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

If commercial insurers with substantial experience and the best expertise available find some risks unacceptable, we must ask if it is advisable for private individuals, businesses, governmental agencies, and charitable public service organizations with far less insurance experience and expertise to assume these very same risks.

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

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

As it has turned out, the experts for the insurance carriers were correct. Their projections of future trouble in Kansas proved prophetic. Although the Health Care Stabilization Fund was able to operate with minimal expense and without the profits of the insurance industry, it was unable to avoid the losses in the medical malpractice system. Hindsight shows the Fund assumed the liability risk for health care providers at the very moment the insurance industry was protecting its assets from these risks by withdrawing from the medical malpractice market.

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

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

g. Reasonable Laws To Toughen Insurance Regulation Are Necessary.

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

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

h. Summary.

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

g. Reasonable Laws To Toughen Insurance Regulation Are Necessary.

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h. Summary.

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

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

i. Recommendations.

A summary of recommendations of our Committee are as follows:

1. RECOMMENDATIONS TO THE STATE LEGISLATURE.

a. Punitive Damages. That the standard of proof for punitive damages be increased to clear and convincing evidence.

That punitive damages be limited to acts of intentional wrongdoing, and to accomplish this objective punitive damages be used only to

compensate for acts of willful or malicious misconduct or fraud.

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

That punitive damages be determined in a separate evidentiary hearing or bifracted trial.

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

b. Collateral Source Rule. That evidence of collateral sources be provided to the jury for their consideration in setting damages for personal injury and wrongful death actions.

c. Taxability of Awards. That courts be required to instruct juries regarding taxability of awards in personal injury and wrongful death actions.

d. Alternative Dispute Resolution. That the existing Kansas arbitration law should be amended to permit arbitration for tort law actions.

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

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

f. Cap -- Non-Economic Damages. That the Legislature establish reasonable caps for non-economic damages.

g. Itemized Verdicts. That juries be required to itemize verdicts as to present and future economic damages, present and future non-economic damages, and punitive damages.

h. Mandatory Structured Awards. That mandated structured awards be required for future economic losses when the total award exceeds $100,000.

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

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

j. Frivolous Lawsuits. That the standard for frivolous lawsuits be that a lawsuit have substantial merit and that the court have

authority to award fines and penalties against a party or attorney filing a lawsuit that lacks substantial merit.

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

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

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

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

n. Joint and Several Liability. That the Legislature codify the present Kansas case law on joint and several liability.

That the Legislature establish a separate cause of action for Kansas

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

o. Mary Carter Agreements. That guarantee agreements, sometimes referred to as Mary Carter Agreements, be prohibited in Kansas as in violation of public policy.

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

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

q. Legal Liability of Directors and Officers. That Kansas consider a statute similar to Delaware Senate Bill No. 533 which allows corporations the discretionary authority to limit the liability of a corporate director to the corporation and the corporation stockholders for breach of fiduciary duty as a director, provided the director did not breach his duty of loyalty, did not commit an act of intentional misconduct or a knowing violation of law, did not act in

bad faith, and did not derive an improper personal benefit.

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

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

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

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

The Insurance Department should be granted any additional authority is believes is necessary to gather specific by-line data on insurance

activities.

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

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

t. Limiting Market Abuse and Early Indications of Carrier Financial Difficulty. The Legislature should provide the Kansas Insurance Commissioner with adequate authority to limit marketplace abuse and to monitor for early indications of carrier financial difficulties.

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

v. Excess Reserves. The Committee accepts the concept that insurance company reserves should be reviewed by the Insurance Department as

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

w. Rating Plans. The Committee accepts the concept of the Insurance Commissioner having greater authority over the establishment of rating plans.

2. RECOMMENDATIONS TO THE KANSAS INSURANCE COMMISSIONER.

a. National Standards for Enabling Authority and Standard Reporting Formats. That the Kansas Insurance Department should continue to work with its peers in the National Association of Insurance Commissioners (NAIC) to develop uniform enabling authority and standard reporting formats to reduce associated administrative costs and that these reports should be public documents freely available to the public.

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

c. Joint Underwriting Associations (JUAs). The Kansas Insurance Department should cautiously approach the uses of Joint Underwriting

Associations (JUAs) on a case by case basis, and use JUAs only after obtaining independent actuarial expertise and analysis to determine the appropriateness of a JUA.

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

e. State Cooperation with Self-Funding Arrangements. Kansas insurance regulations should facilitate attempts by "sophisticated commercial insureds" to use licensed carriers as fronts for self-insurance or captive insurance arrangements.

f. Insurance Company Obligation for High Risk. The Insurance Commissioner should encourage the insurance industry to accept an obligation to make its underwriting capacity available to the more hazardous exposures in society.

3. RECOMMENDATIONS TO THE KANSAS DELEGATION IN WASHINGTON.

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

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

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

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

III

kansas trial lawyers association

410 security national bank, kansas city, kansas 66101, (913) 621-0202

October 7, 1986

Honorable Joe Knopp
Chairman, Interim Committee on
Liability Insurance & Tort Reform
Kansas State Capitol
Topeka, Kansas 66612

Re: Effect of Tort Reform on Insurance Rates

Dear Chairman Knopp:

Finally an insurance company has told us the effect tort reform will have on insurance rates. According to Aetna Casualty and Surety Company tort reform will make NO DIFFERENCE in liability insurance rates.

This year the Florida legislature enacted tort reform legislation. The legislative package also included a "roll back" of premium rates to the 1984 level unless certain information was provided to the Florida Insurance Commissioner. All insurance carriers in Florida except for Aetna filed suit to prevent enforcement of this law claiming that it was too burdensome and unconstitutional. Aetna chose to comply with the law. Enclosed is a copy of the information provided by Aetna to the Florida Insurance Commissioner. Please note pages 10, 11 and 12 where Aetna explains the effect these five "reform" provision will have on their premium rates and the basis for their conclusions. As you can see tort reform has no effect of insurance rates.

Testimony was recently given at the hearing on the Restraining Order. The sworn testimony of the remaining insurance carriers confirmed the Aetna conclusion. A transcript of the testimony has been ordered but has not yet been prepared. When we have received the transcript, I will see that you receive a copy of it.

Tort Reform
10/9-10/86
Attachment III

michael l. sexton, president

For several years we have believed that the attack on the tort system was unfounded. Slowly but surely the true facts are coming to light. Each new fact that is uncovered confirms that the tort system works fairly for all parties and that there is no relationship between the insurance crisis and the tort system.

On behalf of the consumers of Kansas and K.T.L.A. I urge your committee not to make any changes in the tort system until all the facts are available and the facts confirm a need to alter this time tested system.

Very truly yours,

Michael L. Sexton

MLS/jy
cc: All Interim Committee Members
Enclosures

Commercial Insurance Division
151 Farmington Avenue
Hartford, CT 06156
(203) 273-0123

August 8, 1986

Denied
R
FUC-86-2166

Honorable Bill Gunter
INSURANCE COMMISSIONER
Florida Department of Insurance
Tallahassee, FL 32301

ATTN: Mr. Charlie Gray, Chief
Bureau of Policy and Contract Review

Dear Mr. Gray:

RATE REVISION
MANUFACTURERS AND CONTRACTORS PACKAGE POLICY
THE AETNA CASUALTY AND SURETY COMPANY
THE STANDARD FIRE INSURANCE COMPANY
THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT

In accordance with your Insurance Laws, our Companies file a revised rate level which results in an overall selected premium increase of 14.2% with an annual premium effect of $510,150. As you will note, the selected change is less than our indicated change.

Our Companies' decision to revise rates results only after a thorough and comprehensive analysis. We evaluated our experience, market conditions, tort reform, and other relevant factors as they affect the establishment of adequate rate levels. The enclosed exhibits prepared by actuarial unit are submitted in support of our rate filing decision, and demonstrate that the resultant rates are neither excessive, inadequate, nor unfairly discriminatory.

We propose to implement this filing with respect to all policies written on or after January 1, 1987. So as to not delay the filing of our rate level decision, revised rate pages will be forwarded under separate cover when available.

A stamped, self-addressed envelope is enclosed for your convenience in responding.

Sincerely,

Thomas L. Rudd

Thomas L. Rudd, Superintendent
Insurance Department Affairs - Commercial Lines

TLR/sas

PROPOSED JANUARY 1, 1987 RATE FILING EXPLANATORY MEMORANDUM

The attached exhibits demonstrate the need for changes from the current rate level to be effective January 1, 1987 to avoid rates that are inadequate, excessive or unfairly discriminatory.

Exhibit I shows the development of a rate indication at the allowable profit provision for January 1, 1987. Line 1 is Earned Premiums at May 1, 1986 levels. On level factors for flexible rating are contained on Exhibit IA. Line 2 is adjusted incurred losses trended to an expected loss date of January 1, 1988. The resultant loss ratio on Line 3 is projected Florida 1987 experience.

Line 4 displays the expected loss and loss adjustment expense ratio. The expense assumptions are listed on Exhibit II. Calculation of investment income and the resulting ELR are shown on Exhibit III. The expected loss ratio was calculated in accordance with Florida regulation. Exhibit IV contains the yield rates used in the investment income calculation.

Line 5 shows the credibility of our Florida experience. The credibility weighted loss ratio on Line 7 is the combination of our Florida experience and our Countrywide experience for this line of business.

Line 8 shows the anticipated loss reduction multiplier resulting from tort reform in Florida. The derivation of this impact is detailed in the tort reform analysis package.

Line 9 shows the indicated rate need at January 1, 1987 reflecting the May 1, 1986 rate level.

Line 10 shows the selected liability rate change.

Line 11 shows the selected rate need from Line 10 as an impact on combined property and liability for this line of business.

FLORIDA EXHIBIT I

MANUFACTURERS AND CONTRACTORS
PACKAGE PROGRAM
STATEWIDE RATE LEVEL CHANGE

(1)	1983-1985 LIABILITY EARNED PREMIUMS AT MAY 1, 1986 LEVELS	5,497,760
(2)	1983-1985 ADJUSTED INCURRED LOSSES AND LOSS ADJUSTMENT EXPENSE	4,942,060
(3)	3 YEAR LOSS AND LOSS ADJUSTMENT EXPENSE RATIO	0.899
(4)	EXPECTED LOSS AND LOSS ADJUSTMENT EXPENSE RATIO	0.668
(5)	CREDIBILITY	0.705
(6)	COUNTRYWIDE 3 YEAR LOSS AND LOSS ADJUSTMENT EXPENSE RATIO	0.779
(7)	CREDIBILITY WEIGHTED LOSS RATIO [(3)x(5)]+[(6)x(1-(5))]	0.864
(8)	TORT REFORM LOSS REDUCTION MULTIPLIER	0.999
(9)	CREDIBILITY WEIGHTED LIABILITY INDICATION [(7)x(8)/(4)]-1	29.1%
(10)	SELECTED LIABILITY RATE CHANGE	24.1%
(11)	OVERALL MANUFACTURERS AND CONTRACTORS IMPACT	14.2%

NOTES:

(1) EARNED PREMIUMS INCLUDE ADJUSTMENTS FOR FLEXIBLE RATING SEE EXHIBIT I-A

(2) LOSSES HAVE BEEN DEVELOPED AND TRENDED TO JANUARY 1, 1988

(3) CREDIBILITY = $\frac{P}{P + K}$ X BALANCING FACTOR OF 1.0251

WHERE: P = EARNED PREMIUM AT 5/1/86 LEVELS
K = 2,500,000
BALANCING FACTOR GIVES FULL CREDIBILITY TO CW DATA

(4) EXPECTED LOSS RATIO = 1 - EXPENSES - ALLOWABLE PROFIT PROVISION

(5) TORT REFORM LOSS REDUCTION MULTIPLIER = 1 - (0.004)x(% BODILY INJURY OF TOTAL LIABILITY)

EXHIBIT I A

FLORIDA
MACPAK
STATEWIDE RATE LEVEL REVIEW

SCHEDULE RATING ADJUSTMENT FACTORS

Year	Premium Before Adjustment	Adjustment Factor	Premium After Adjustment
1983	1414950	1.054	1491357
1984	1780958	1.061	1889596
1985	2053159	1.031	2116807
Total	5249066		5497760

RATE LEVEL REVIEW
MACPAK

EXHIBIT II

EXPENSES

	FLORIDA	COUNTRYWIDE
REGULAR COMMISSION	15.0	15.0
CONTINGENT COMMISSION	2.4	2.4
GENERAL & OTHER ACQ.	15.6	15.6
TAXES	3.2	3.2
TOTAL	36.2	36.2
UNALLOCATED LOSS ADJUSTMENT	6.0	6.0

EXPENSES ARE BASED ON PAST ACTUAL AND FUTURE BUDGETED EXPENSES

FLORIDA
INVESTMENT INCOME

EXHIBIT III

YEARS FROM START OF ACCIDENT YEAR	EXPECTED PATTERN OF LOSS PAYMENTS	YEARS OF DISCOUNT	DISCOUNT FACTOR AT 5.91%	DISCOUNTED PAYMENTS
LIABILITY - MACPAK				
1.25	22.5%	0.625	0.9647	21.7
2.25	15.1%	1.75	0.9044	13.7
3.25	23.4%	2.75	0.8539	20.0
4.25	15.0%	3.75	0.8063	12.1
5.25	7.4%	4.75	0.7613	5.6
6.25	5.6%	5.75	0.7188	4.0
7.25	4.0%	6.75	0.6787	2.7
8.25	3.4%	7.75	0.6408	2.2
9.25	2.1%	8.75	0.6051	1.3
10.25	1.5%	9.75	0.5713	0.9
TOTAL	100.0%			84.1
1a. Discounted Value of Expected Loss Payment Pattern =				84.1
2a. Undiscounted Pattern - Discounted Pattern = 100 - (1a)				15.9
3a. Investment Income Opportunity as a % of Expected Premium*				10.6
PROPERTY				
1.00	64.8%	0.50	0.9717	63.0
2.00	31.4%	1.50	0.9175	28.8
3.00	1.8%	2.50	0.8663	1.6
4.00	1.0%	3.50	0.8179	0.8
5.00	1.0%	4.50	0.7723	0.8
TOTAL	100.0%			94.9
1b. Discounted Value of Expected Loss Payment Pattern =				94.9
2b. Undiscounted Pattern - Discounted Pattern = 100 - (1b)				5.1
3b. Investment Income Opportunity as a % of Expected Premium*				2.6
Liability/Property Investment Increase Differential = (3a) - (3b)				8.0
Liability Underwriting Profit = Property Underwriting Profit - Liability/Property Differential				-3.0
Liability Expected Loss Ratio = 1 - Expenses - Liability Und. Profit				0.662

* See attached for explanation

FLORIDA EXHIBIT III A

INVESTMENT INCOME OPPORTUNITY AS A % OF EXPECTED PREMIUM

Property

$$IPMp = ILSp(1 - E - Up)$$

$$= ILSp(1 - E - .05)$$

Liability

$$IPMl = ILSl(1 - E - Ul)$$

$$= ILSl(1 - E - [Up - (IPMl - IPMp)])$$

$$= \frac{ILSl}{1 - ILSl} \times (1 - E - .05 - IPMp)$$ after solving for IPMl

ILSp = Investment Income as % of Loss for Property

ILSl = Investment Income as % of Loss for Liability

IPMp = Investment Income as % of Premium for Property

IPMl = Investment Income as % of Premium for Liability

Up = Underwriting Profit for Property = .05

Ul = Underwriting Profit for Liability = Up - (IPMl - IPMp) as defined by Florida regulation

E = Expenses

Exhibit IV

FLORIDA

EXPECTED INVESTMENT INCOME YIELD Y(A)

CURRENT

YIELDS

	Before FIT	After FIT
Y_O	8.70%	6.09%
Y_N	10.15%	5.43%
Y_A	8.86%	5.91%

Y_O = Expected investment income yield on assets invested prior to the time the new rates are expected to be in effect.

Y_N = Expected investment income yield on assets newly invested or reinvested during the time the new rates are expected to be in effect.

$Y_A = Y_N W_N$ and $Y_O W_O$, where

W_N = Proportion of assets, held during the time the new rates are expected to be in effect, that is expected to be newly invested or reinvested.

$W_O = 1 - W_N$

BODILY INJURY CLAIM COST IMPACT OF FLORIDA TORT LAW CHANGE

Summary

The following table summarizes the expected impact of the new Florida law on bodily injury claims costs (including Allocated Loss Adjustment Expenses). The impacts shown were developed from data gathered via a special claim study conducted by the AEtna. The claim study and the analysis are detailed in the succeeding sections of this memorandum.

Impact of Tort Law Changes

Impact of Tort Law Changes

Tort Law Change	Line of Business: Products Bodily Injury	Line of Business: All Other General Liability
Collateral Source Offset	0	(0.4%)
Joint & Several	0	0
Limitation of Noneconomic Damages to $450,000	0	0
Punitive Damages	0	0
Future Economic Damages over $250,000 Paid at Present Value	0	0

All Other General Liability includes the bodily injury liability portion of package policies, SMP Section II, and monoline General Liability policies. The analysis as shown is based solely on AEtna data and, therefore, is applicable only to AEtna's book of business.

Claim Study

The attached special claim analysis form, designed to gather data on the impact of the tort reforms, was completed by experienced Branch Office claim personnel. Claims eligible for analysis were selected according to the following criteria:

1. Commercial Casualty claims (excluding National Accounts business) for policy years 1981 through 1985
   a. reported prior to January 1, 1986
   b. open as of May, 1986
   c. closed during the last six months

2. All claims in category (1) with indemnity payments or reserves over $25,000 were analyzed (total of 55 claims).

3. Fifty closed claims with indemnity of less that $25,000 were randomly selected.

The completed forms were reviewed for internal consistency prior to coding and analysis.

Collateral Source Analysis

Exhibits I and II detail the analysis of the revision in the collateral source rules. Exhibit I is for claims over $25,000 indemnity. Exhibit II is for claims under $25,000 indemnity.

Exhibit I shows that since the right of subrogation exists for many collateral sources available to the plaintiff, the economic losses incurred are not expected to be substantially reduced due to the law change. Furthermore, current AEtna claim settlement practices recognize, in part, the existence of collateral sources as part of the negotiating process used in arriving at a mutually satisfactory damage value with the plaintiff.

Exhibit II shows that for claims under $25,000, no additional savings are expected due to the change in Florida law.

Joint and Several Analysis

Exhibit III details the analysis of joint and several additional payments made by AEtna. Total joint and several payments were 4.5% of indemnity payments over $25,000. A review of each claim generating additional payments due to joint and several liability indicated no reduction in those payment due to the interaction of economic damages sustained by the plaintiff, the percentage of liability assigned to AEtna's insured, and the policy limits purchased.

Analysis of Limitation of Noneconomic Damages to $450,000

Nine claims had the potential for coming under the new limitation for noneconomic losses. The nine cases were identified on the basis of full liability value—not our insured's share of the liability. Data in the above format allowed for a review of whether total claim value could be reduced and whether such a reduction would impact on AEtna's incurred claim cost.

The review of the actual data submitted on these cases indicated no reduction of cost. This result is due to the impact of degree of disability on future losses, the impact of policy limits, and the actual settlement reached with the plaintiff; all seemed to reduce the expected noneconomic component of damages to less than $450,000.

Analysis of Punitive Damages

Only two cases were found where punitive damages had an impact on the claim settlement value. The total impact was estimated at less than $15,000 or less than 0.1% of total indemnity payments. Consequently, it appears that there will be no impact on AEtna's claim values due to changes in the allocation of the punitive damages awarded.

Analysis of Installment Payment of Future Economic Damages Over $250,000

Ten claims had the potential for coming under this section of the law. The review of individual cases indicated no net savings to AEtna for the following reasons:

1. interaction of policy limits, past economic losses, and future economic losses
2. settlement value of the case
3. apparent implicit recognition of the periodic nature of future damages

Overall Summary

The expected net reduction in claim costs is based on an analysis of AEtna claims. As such, the analysis is applicable only to AEtna's book of business.

Due to the level of detail of the historical claim data, informed claim judgement was required in some instances to ascertain some of the detail required for the analysis. The judgement, if any, was exercised by experienced claim adjustors and is implicit in the analysis.

The analysis shown represents the best estimate of future cost reductions if the law as currently structured remains in effect. However, the sunset provision of the law takes effect in four years. Furthermore, the law applies only to cases filed under the law, and the Florida statute of limitations is four years. Consequently, it is possible that any plaintiff who might be severely impacted by the provisions of the law would delay filing until after the law expires. If this situation arises, then the expected reductions will be lower than those indicated in this memorandum.

EXHIBIT I

FLORIDA

COLLATERAL SOURCES - CLAIMS OVER $25,000

	Products	All Other
Economic Paid	$ 206,000	$ 1,854,000
Future Economic	466,000	2,567,000
General	624,000	11,960,000
Total Indemnity	1,296,000	16,380,000
Claims with Collateral Sources	628,000	4,187,000
Claims with Collateral Sources and with Liens	255,000	1,987,000
Claims with Collateral Sources and without Liens	378,000	2,200,000
% of Claims with Collateral Sources Available	28.8%	13.4%
Estimated Reimbursement Rate	50%	50%
Economic as % of Total Indicated	51.9%	27.0%
% of Indicated which could be Reduced	7.5%	1.8%
Claims with Collateral Sources without Liens - subject to:		
Statutory Liens	378,000	1,132,000
Contractual Liens	0	100,000
Not Subject to Liens	0	949,000
% Not Subject to Liens	0%	43.1%
Claims with Collateral Sources not Subject to Liens where Collateral Sources had an Impact on Settlement	N/A	556,000
Estimated Impact	N/A	28,000
Estimated Impact - % of Total Award	N/A	5%
Net Reduction to Collateral Source Savings Due to Right of Subrogation	7.5%	1.0%*
Previously Recognized Collateral Sources	N/A	0.2%
Net Impact of Collateral Source Changes	0	0.8%

*(1.0 - .431) x 1.8%

EXHIBIT I
(cont.)

Net Impact of Collateral Source Offset on Claims Over $25,000 Adjusted to Total Loss Costs, including Allocated Loss Adjustment Expense

$25,000 and over Claims Dollars as a % of Total Claims Dollars (est.)	75%
Estimated Allocated Expense as % Total Loss x ALAE	33%
Net Impact of Total Loss and ALAE: 0.8% x .75 x (1 - .33) =	0.4%

EXHIBIT II

FLORIDA

COLLATERAL SOURCES - CLAIMS UNDER $25,000
WITH COLLATERAL SOURCES

	Products	All Other
Total Indemnity Paid - Claims with Collateral Sources	$ 36,500	$149,215
Indemnity Paid on Claims with Liens	5,000	16,300
Indemnity Paid on Claims without Liens but with Right of Subrogation		
Statutory	13,500	33,750
Contractual	0	67,200
Indemnity Paid on Claims not Subject to Subrogation where Collateral Sources Influenced Settlement	18,000	29,965
Net Indemnity Payments where Some Offset Could be Made	0	2,000
Total Indemnity for Claims Less Than $25,000	170,648	816,506
% of Total Indemnity Available for Additional Offset	0	0.2%
Estimated Additional Offset for Claims Under $25,000 Adjusted to Total Loss Costs Including Allocated Loss Adjustment Expense (cf Exhibit I) (0.2% x .25 x (1 - .33)) =	0	0.0%

EXHIBIT III

FLORIDA

JOINT & SEVERAL PAYMENTS
CLAIMS OVER $25,000

	Products	All Other
Total Indemnity Payments	$1,296,000	$16,380,000
Additional Payments Due to Joint & Several	232,000	568,000
Reduction in Potential Savings Due to File Review	232,000 *	568,000 **
Net Savings	0	0

*1 Claim - death case - expected economic losses high enough to cover additional payment

**2 Claims - 1 death case - estimated settlement value may be close to economic value; therefore, additional payment of $193,000 would still be required (policy limits paid out at that time)

1 permanent total case - estimated settlements probably will cover custodial care (i.e., economic loss); therefore, no savings due to law change.

CLAIM REVIEW DATA ELEMENTS

	CLAIMANTS 1	2	3
Claim Number:	_____	_____	_____
Policy Number:	_____	_____	_____
Policy Limit ($):	_____	_____	_____
Claimant Name:	_____	_____	_____
Policyholder Name:	_____	_____	_____
State of Accident:	_____	_____	_____
Date of Accident (mm/dd/yy):	_____	_____	_____
Date Reported (mm/dd/yy):	_____	_____	_____
Date Closed (mm/dd/yy):	_____	_____	_____
RESERVE			
Incurred Indemnity ($)	_____	_____	_____
Incurred Expense ($)	_____	_____	_____
POLICY COVERAGE ISSUES - yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
Impact on settlement - major	[ ]	[ ]	[ ]
minimal	[ ]	[ ]	[ ]
CLAIMANT INFORMATION			
Date of Birth - (mm/dd/yy)	_____	_____	_____
Injured in Course of Employment? yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
Did Claimant return to work? yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
male/female:	_____	_____	_____
married: yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
INJURY INFORMATION (DISABILITY)			
1. None	[ ]	[ ]	[ ]
2. Temporary Total	[ ]	[ ]	[ ]
3. Temporary Partial	[ ]	[ ]	[ ]
4. Permanent Partial	[ ]	[ ]	[ ]
5. Permanent Total	[ ]	[ ]	[ ]
6. Death	[ ]	[ ]	[ ]
COLLATERAL SOURCES			
Available: yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
Type of Source:			
Medicare	[ ]	[ ]	[ ]
Social Security	[ ]	[ ]	[ ]
Group Health	[ ]	[ ]	[ ]
Blue Cross/Blue Shield	[ ]	[ ]	[ ]
Workers Compensation	[ ]	[ ]	[ ]
No Fault	[ ]	[ ]	[ ]
Wage Continuation	[ ]	[ ]	[ ]
Other	[ ]	[ ]	[ ]
Amounts Paid ($)	_____	_____	_____

	CLAIMANTS 1	2	3
Lien: yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
statutory	[ ]	[ ]	[ ]
contractual	[ ]	[ ]	[ ]
Did presence of collateral sources influence settlement value? yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
Impact on settlement: major	[ ]	[ ]	[ ]
minimal	[ ]	[ ]	[ ]

DEFENDANT INFORMATION	DEFENDANTS 1	2	3
Multiple Defendants: yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
% Liability assessed to Plaintiff:	_____	_____	_____
% Liability assessed to each defendant:	_____	_____	_____
Were any defendants unable to pay? yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
If yes - % of Liability:	_____	_____	_____

SUIT INFORMATION	CLAIMANTS 1	2	3
Was a suit filed? yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
If yes, disposition of suit:			
1. Settled prior to trial	[ ]	[ ]	[ ]
2. Settled during trial	[ ]	[ ]	[ ]
3. Plaintiff verdict	[ ]	[ ]	[ ]
4. Defense verdict	[ ]	[ ]	[ ]
5. Appeal	[ ]	[ ]	[ ]
6. Other	[ ]	[ ]	[ ]
Amount ($):	_____	_____	_____

DAMAGES

1. Specials			
a. Medical ($)			
Present:	_____	_____	_____
Future:	_____	_____	_____
b. Loss Income ($)			
Present	_____	_____	_____
Future	_____	_____	_____
c. Other ($)			
Present:	_____	_____	_____
Future:	_____	_____	_____

2. General Damages

a. Pain and Suffering (I) _____ _____ _____

b. Permanency/Disfigurement (I) _____ _____ _____

	CLAIMANTS 1	2	3
3. Punitive(Exemplary) Damages			
a. Alleged - yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
b. Granted - yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
c. Influence on settlement - yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
major	[ ]	[ ]	[ ]
minor	[ ]	[ ]	[ ]
4. Prejudgment Interest - yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
If yes, what was the amount?	_____	_____	_____
ESTIMATED DAMAGE VALUE(Full Liability):	_____	_____	_____
ESTIMATED SETTLEMENT VALUE:	_____	_____	_____
Joint and Several Additional Payments:			
yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
If yes, what was the amount?	_____	_____	_____

Commercial Insurance Division
151 Farmington Avenue
Hartford, CT 06156
(203) 273-0123

August 8, 1986

Geneva
R
FCC 86-216

Honorable Bill Gunter
INSURANCE COMMISSIONER
Florida Department of Insurance
Tallahassee, FL 32301

ATTN: Mr. Charlie Gray, Chief
Bureau of Policy and Contract Review

Dear Mr. Gray:

RATES
MANUFACTURERS AND CONTRACTORS PACKAGE POLICY
TORT REFORM AND INSURANCE ACT OF 1986
THE AETNA CASUALTY AND SURETY COMPANY
THE STANDARD FIRE INSURANCE COMPANY
THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT

In accordance with your Insurance Laws, our Companies files as required in Section 66(5) of the Tort Reform and Insurance Act of 1986.

We have calculated January 1, 1984, liability rates adjusted to reflect only changes in coverage and to account for investment income. Based upon our calculations, these rates are 38.2 percent lower than those rates in effect as of October 1, 1986. Enclosed are exhibits that review our calculations and a manual page with the appropriate rate adjustment factor.

Therefore, under separate cover and in accordance with Section 66(6), Tort Reform and Insurance Act of 1986 we intend to file liability rates we contend are more appropriate.

A stamped, self-addressed envelope is enclosed for your convenience in acknowledgment.

Sincerely,

Thomas L. Rudd

Thomas L. Rudd, Superintendent
Insurance Department Affairs-Commercial Lines

TLR/sas

FILING OF ADJUSTED JANUARY 1, 1984 RATES EXPLANATORY MEMORANDUM

Exhibit I is the supplementary manual page which contains the factor to adjust the January 1, 1984 rate pages to account for the change in investment income opportunity.

Exhibit II details the calculations for determining the adjustment to January 1, 1984 rates due to the change in investment income opportunity. In addition, Exhibit II displays the calculation of the difference in rate level between adjusted January 1, 1984 and October 1, 1986.

Exhibits III and IV show the yield rates underlying the investment income calculation for January 1984 and current.

EXHIBIT I

THE AETNA CASUALTY AND SURETY COMPANY
THE STANDARD FIRE INSURANCE COMPANY
THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT

FLORIDA (09)

MANUFACTURERS AND CONTRACTORS PACKAGE POLICY

RATE PAGE

The following Company exceptions apply:

The rates shown on the State Rate Page are subject to the following modification:

Rate Level Adjustment 1.025

FLORIDA

EXHIBIT II

INDICATED CHANGE IN JANUARY, 1984
RATES DUE TO CHANGE IN INVESTMENT INCOME

YEARS FROM START OF ACCIDENT YEAR	EXPECTED PATTERN OF LOSS PAYMENTS	YEARS OF DISCOUNT	CURRENT DISCOUNT FACTOR 5.91%	DISCOUNTED PAYMENTS
1.25	22.5%	0.625	0.9647	21.7
2.25	15.1%	1.75	0.9044	13.7
3.25	23.4%	2.75	0.8539	20.0
4.25	15.0%	3.75	0.8063	12.1
5.25	7.4%	4.75	0.7613	5.6
6.25	5.6%	5.75	0.7188	4.0
7.25	4.0%	6.75	0.6787	2.7
8.25	3.4%	7.75	0.6408	2.2
9.25	2.1%	6.75	0.6051	1.3
10.25	1.5%	9.75	0.5713	0.9
TOTAL	100.0%			84.1

1a.	Discounted Value of Expected Loss Payment Pattern =	84.1
2a.	Undiscounted Pattern - Discounted Pattern = 100 - (1a)	15.9
3a.	Investment Income Opportunity as a % of Expected Premium*	10.6

YEARS FROM START OF ACCIDENT YEAR	EXPECTED PATTERN OF LOSS PAYMENTS	YEARS OF DISCOUNT	JANUARY, 1984 DISCOUNT FACTOR 6.81%	DISCOUNTED PAYMENTS
1.25	22.5%	0.625	0.9597	21.6
2.25	15.1%	1.75	0.8911	13.5
3.25	23.4%	2.75	0.8343	19.5
4.25	15.0%	3.75	0.7811	11.7
5.25	7.4%	4.75	0.7313	5.4
6.25	5.6%	5.75	0.6847	3.8
7.25	4.0%	6.75	0.6410	2.6
8.25	3.4%	7.75	0.6001	2.0
9.25	2.1%	8.75	0.5619	1.2
10.25	1.5%	9.75	0.5261	0.8
TOTAL	100.0%			83.1

1b.	Discounted Value of Expected Loss Payment Pattern =	83.1
2b.	Undiscounted Pattern - Discounted Pattern = 100 - (1b)	17.9
3b.	Investment Income Opportunity as a % of Expected Premium*	12.0

(2)

FLORIDA

EXHIBIT II A

INDICATED CHANGE IN JANUARY, 1984
RATES DUE TO CHANGE IN INVESTMENT INCOME

(4) Change in Liability Underwriting Profit = (3b) - (3a) 1.6

(5) Current Liability Expected Loss Ratio
= 1 - Expenses - Liability Und. Profit 0.668

(6) January, 1984 Liability Expected Loss Ratio
= Current ELR + Change in Underwriting Profit 0.685

(7) Indicated Increase in January, 1984 Rates = $\frac{\text{January, 1984 ELR}}{\text{Current ELR}}$ 1.025

(8) Current Difference in Rate Level = $\frac{\text{EP AT 5/1/86 LEVELS}}{\text{EP AT 1/1/84 LEVELS}}$ = 1.659

(9) Difference in Rate Level from Adjusted 1/1/84 Rates = $\frac{(8)}{(7)}$ = 1.619

Exhibit III

FLORIDA

EXPECTED INVESTMENT INCOME YIELD Y(A)

UNDERLYING JANUARY 1984

YIELDS

	Before FIT	After FIT
Y_O	9.09%	6.84%
Y_N	12.30%	6.64%
Y_A	9.38%	6.81%

Y_O = Expected investment income yield on assets invested prior to the time the new rates are expected to be in effect.

Y_N = Expected investment income yield on assets newly invested or reinvested during the time the new rates are expected to be in effect.

$Y_A = Y_N W_N$ and $Y_O W_O$, where

W_N = Proportion of assets, held during the time the new rates are expected to be in effect, that is expected to be newly invested or reinvested.

$W_O = 1 - W_N$

Commercial Insurance Division
151 Farmington Avenue
Hartford, CT 06156
(203) 273-0123

August 8, 1986

Honorable Bill Gunter
INSURANCE COMMISSIONER
Florida Department of Insurance
Tallahassee, FL 32301

ATTN: Mr. Charlie Gray, Chief
Bureau of Policy and Contract Review

Dear Mr. Gray:

SPECIAL CREDIT
TORT REFORM AND INSURANCE ACT OF 1986
MANUFACTURERS AND CONTRACTORS PACKAGE POLICY
THE AETNA CASUALTY AND SURETY COMPANY
THE STANDARD FIRE INSURANCE COMPANY
THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT

In accordance with your Insurance Laws, our Companies file for an exemption from the application of Section 66(1), Tort Reform and Insurance Act of 1986, which deals with the special credit implementation.

As to all policies referenced in this filing subject to Section 66(1) with premiums based upon rates in effect May 1, 1986, we will not apply the special credit provision, pursuant to the attached exhibits. This special filing is submitted in accordance with Section 66(3).

Should you have questions or comments, please contact me at area code (203) 273-4846.

A stamped, self-addressed envelope is enclosed for your convenience in acknowledgment.

Sincerely,

Thomas L. Rudd

Thomas L. Rudd, Superintendent
Insurance Department Affairs - Commercial Lines

TLR/fid

SPECIAL CREDIT FILING EXPLANATORY MEMORANDUM

The attached exhibits demonstrate that the payment of the special credit would result in rates that are inadequate.

Exhibit I shows the development of a rate indication after the special credit for the fourth quarter of 1986. Line 1 is Earned Premiums at the rate level for policies extending through the credit period less 10%. On level factors for flexible rating are contained in Exhibit IA. Line 2 is adjusted incurred losses trended to an expected loss date midway through the quarter, November 15, 1986. The resultant loss ratio on Line 3 is projected Florida fourth quarter 1986 experience net of a 10% credit.

Line 4 displays the expected loss and loss adjustment expense ratio. The expense assumptions are listed on Exhibit II. Calculation of investment income and the resulting ELR are shown on Exhibit III. The expected loss ratio was calculated in accordance with Florida regulation. Exhibit IV contains the yield rates used in the investment income calculation.

Line 5 shows the credibility of our Florida experience. The credibility weighted loss ratio on Line 7 is the combination of our Florida experience and our Countrywide experience for this line of business.

Line 8 shows the anticipated loss reduction multiplier resulting from tort reform in Florida. The derivation of this impact is detailed in the tort reform analysis package.

Line 9 of Exhibit I shows the rate increase needed to just achieve rate adequacy after paying the credit. A positive indication implies the full credit should not be paid.

Line 10 is the indicated credit at the point of rate adequacy. A negative indication implies a rate increase is needed even if no credit is granted.

FLORIDA EXHIBIT I

MANUFACTURERS AND CONTRACTORS
PACKAGE PROGRAM
STATEWIDE LIABILITY RATE LEVEL CHANGE

(1)	1983-1985 LIABILITY EARNED PREMIUMS AT COLLECTED RATE LEVEL FOR POLICIES EXTENDING THROUGH CREDIT PERIOD, LESS 10% CREDIT	4,665,949
(2)	1983-1985 ADJUSTED LIABILITY INCURRED LOSSES AND LOSS ADJUSTMENT EXPENSE	4,497,331
(3)	3 YEAR LOSS AND LOSS ADJUSTMENT EXPENSE RATIO	0.964
(4)	EXPECTED LOSS AND LOSS ADJUSTMENT EXPENSE RATIO	0.668
(5)	CREDIBILITY	0.705
(6)	COUNTRYWIDE 3 YEAR LOSS AND LOSS ADJUSTMENT EXPENSE RATIO	0.788
(7)	CREDIBILITY WEIGHTED LOSS RATIO [(3)x(5)]+[(6)x(1-(5))]	0.912
(8)	TORT REFORM LOSS REDUCTION MULTIPLIER	0.999
(9)	CREDIBILITY WEIGHTED LIABILITY INDICATION [(7)x(8)/(4)]-1	36.3%
(10)	INDICATED CREDIT 1-{[1+(9)]x0.9}	-22.7%

NOTES:

(1) EARNED PREMIUMS INCLUDE ADJUSTMENTS FOR FLEXIBLE RATING SEE EXHIBIT I-A

(2) LOSSES HAVE BEEN DEVELOPED AND TRENDED TO NOVEMBER 15, 1986

(3) CREDIBILITY = $\frac{P}{P + K}$ X BALANCING FACTOR OF 1.0261

WHERE: P = EARNED PREMIUM AT 5/1/86 LEVELS
K = 2,500,000
BALANCING FACTOR GIVES FULL CREDIBILITY TO CW DATA

(4) EXPECTED LOSS RATIO = 1 - EXPENSES - ALLOWABLE PROFIT PROVISION

(5) TORT REFORM LOSS REDUCTION MULTIPLIER =
1 - (0.004)x(% BODILY INJURY OF TOTAL LIABILITY)

EXHIBIT I A

FLORIDA
MACPAK
STATEWIDE RATE LEVEL REVIEW

SCHEDULE RATING ADJUSTMENT FACTORS

Year	Premium Before Adjustment	Adjustment Factor	Premium After Adjustment
1983	1334298	1.054	1406350
1984	1679443	1.061	1781889
1985	1936129	1.031	1996149
Total	4949870		5184388

RATE LEVEL REVIEW
MACPAK

EXHIBIT II

EXPENSES

	FLORIDA	COUNTRYWIDE
REGULAR COMMISSION	15.0	15.0
CONTINGENT COMMISSION	2.4	2.4
GENERAL & OTHER ACQ.	15.6	15.6
TAXES	3.2	3.2
TOTAL	36.2	36.2
UNALLOCATED LOSS ADJUSTMENT	6.0	6.0

EXPENSES ARE BASED ON PAST ACTUAL AND FUTURE BUDGETED EXPENSES

FLORIDA
INVESTMENT INCOME

EXHIBIT III

YEARS FROM START OF ACCIDENT YEAR	EXPECTED PATTERN OF LOSS PAYMENTS	YEARS OF DISCOUNT	DISCOUNT FACTOR AT 5.91%	DISCOUNTED PAYMENTS
LIABILITY - MACRAE				
1.25	22.5%	0.625	0.9647	21.7
2.25	15.1%	1.75	0.9044	13.7
3.25	23.4%	2.75	0.8539	20.0
4.25	15.0%	3.75	0.8063	12.1
5.25	7.4%	4.75	0.7613	5.6
6.25	5.6%	5.75	0.7188	4.0
7.25	4.0%	6.75	0.6787	2.7
8.25	3.4%	7.75	0.6408	2.2
9.25	2.1%	8.75	0.6051	1.3
10.25	1.5%	9.75	0.5713	0.9
TOTAL	100.0%			84.1
1a. Discounted Value of Expected Loss Payment Pattern =				84.1
2a. Undiscounted Pattern - Discounted Pattern = 100 - (1a)				15.9
3a. Investment Income Opportunity as a % of Expected Premium*				10.6
PROPERTY				
1.00	64.2%	0.50	0.9717	63.6
2.00	31.4%	1.50	0.9175	28.8
3.00	1.8%	2.50	0.8663	1.6
4.00	1.0%	3.50	0.8179	0.8
5.00	1.0%	4.50	0.7723	0.8
TOTAL	100.0%			94.9
1b. Discounted Value of Expected Loss Payment Pattern =				94.9
2b. Undiscounted Pattern - Discounted Pattern = 100 - (1b)				5.1
3b. Investment Income Opportunity as a % of Expected Premium*				2.6
Liability/Property Investment Increase Differential = (3a) - (3b)				8.0
Liability Underwriting Profit = Property Underwriting Profit - Liability/Property Differential				-3.0
Liability Expected Loss Ratio = 1 - Expenses - Liability Und. Profit				0.662

* See attached for explanation

FLORIDA

INVESTMENT INCOME OPPORTUNITY AS A % OF EXPECTED PREMIUM

Property

$$IPMp = ILSp(1 - E - Up)$$

$$= ILSp(1 - E - .05)$$

Liability

$$IPMl = ILSl(1 - E - Ul)$$

$$= ILSl(1 - E - [Up - (IPMl - IPMp)])$$

$$= \frac{ILSl}{1 - ILSl} \times (1 - E - .05 - IPMp)$$ after solving for IPMl

ILSp = Investment Income as % of Loss for Property

ILSl = Investment Income as % of Loss for Liability

IPMp = Investment Income as % of Premium for Property

IPMl = Investment Income as % of Premium for Liability

Up = Underwriting Profit for Property = .05

Ul = Underwriting Profit for Liability = Up - (IPMl - IPMp) as defined by Florida regulation

E = Expenses

Exhibit IV

FLORIDA

EXPECTED INVESTMENT INCOME YIELD Y(A)

CURRENT

YIELDS

	Before FIT	After FIT
Y_O	8.70%	6.09%
Y_N	10.15%	5.43%
Y_A	8.86%	5.91%

Y_O = Expected investment income yield on assets invested prior to the time the new rates are expected to be in effect.

Y_N = Expected investment income yield on assets newly invested or reinvested during the time the new rates are expected to be in effect.

$Y_A = Y_N W_N$ and $Y_O W_O$, where

W_N = Proportion of assets, held during the time the new rates are expected to be in effect, that is expected to be newly invested or reinvested.

$W_O = 1 - W_N$

BODILY INJURY CLAIM COST IMPACT OF FLORIDA TORT LAW CHANGE

Summary

The following table summarizes the expected impact of the new Florida law on bodily injury claims costs (including Allocated Loss Adjustment Expenses). The impacts shown were developed from data gathered via a special claim study conducted by the AEtna. The claim study and the analysis are detailed in the succeeding sections of this memorandum.

Impact of Tort Law Changes

Impact of Tort Law Changes

Tort Law Change	Line of Business: Products Bodily Injury	Line of Business: All Other General Liability
Collateral Source Offset	0	(0.4%)
Joint & Several	0	0
Limitation of Noneconomic Damages to $450,000	0	0
Punitive Damages	0	0
Future Economic Damages over $250,000 Paid at Present Value	0	0

All Other General Liability includes the bodily injury liability portion of package policies, SMP Section II, and monoline General Liability policies. The analysis as shown is based solely on AEtna data and, therefore, is applicable only to AEtna's book of business.

Claim Study

The attached special claim analysis form, designed to gather data on the impact of the tort reforms, was completed by experienced Branch Office claim personnel. Claims eligible for analysis were selected according to the following criteria:

1. Commercial Casualty claims (excluding National Accounts business) for policy years 1981 through 1985
   a. reported prior to January 1, 1986
   b. open as of May, 1986
   c. closed during the last six months

2. All claims in category (1) with indemnity payments or reserves over $25,000 were analyzed (total of 55 claims).

3. Fifty closed claims with indemnity of less that $25,000 were randomly selected.

The completed forms were reviewed for internal consistency prior to coding and analysis.

Collateral Source Analysis

Exhibits I and II detail the analysis of the revision in the collateral source rules. Exhibit I is for claims over $25,000 indemnity. Exhibit II is for claims under $25,000 indemnity.

Exhibit I shows that since the right of subrogation exists for many collateral sources available to the plaintiff, the economic losses incurred are not expected to be substantially reduced due to the law change. Furthermore, current AEtna claim settlement practices recognize, in part, the existence of collateral sources as part of the negotiating process used in arriving at a mutually satisfactory damage value with the plaintiff.

Exhibit II shows that for claims under $25,000, no additional savings are expected due to the change in Florida law.

Joint and Several Analysis

Exhibit III details the analysis of joint and several additional payments made by AEtna. Total joint and several payments were 4.5% of indemnity payments over $25,000. A review of each claim generating additional payments due to joint and several liability indicated no reduction in those payment due to the interaction of economic damages sustained by the plaintiff, the percentage of liability assigned to AEtna's insured, and the policy limits purchased.

Analysis of Limitation of Noneconomic Damages to $450,000

Nine claims had the potential for coming under the new limitation for noneconomic losses. The nine cases were identified on the basis of full liability value—not our insured's share of the liability. Data in the above format allowed for a review of whether total claim value could be reduced and whether such a reduction would impact on AEtna's incurred claim cost.

The review of the actual data submitted on these cases indicated no reduction of cost. This result is due to the impact of degree of disability on future losses, the impact of policy limits, and the actual settlement reached with the plaintiff; all seemed to reduce the expected noneconomic component of damages to less than $450,000.

Analysis of Punitive Damages

Only two cases were found where punitive damages had an impact on the claim settlement value. The total impact was estimated at less than $15,000 or less than 0.1% of total indemnity payments. Consequently, it appears that there will be no impact on AEtna's claim values due to changes in the allocation of the punitive damages awarded.

CLAIM REVIEW DATA ELEMENTS

	CLAIMANTS 1	2	3
Claim Number:	_____	_____	_____
Policy Number:	_____	_____	_____
Policy Limit ($):	_____	_____	_____
Claimant Name:	_____	_____	_____
Policyholder Name:	_____	_____	_____
State of Accident:	_____	_____	_____
Date of Accident (mm/dd/yy):	_____	_____	_____
Date Reported (mm/dd/yy):	_____	_____	_____
Date Closed (mm/dd/yy):	_____	_____	_____
RESERVE			
Incurred Indemnity ($)	_____	_____	_____
Incurred Expense ($)	_____	_____	_____
POLICY COVERAGE ISSUES - yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
Impact on settlement - major	[ ]	[ ]	[ ]
minimal	[ ]	[ ]	[ ]
CLAIMANT INFORMATION			
Date of Birth - (mm/dd/yy)	_____	_____	_____
Injured in Course of Employment? yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
Did Claimant return to work? yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
male/female:	_____	_____	_____
married: yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
INJURY INFORMATION (DISABILITY)			
1. None	[ ]	[ ]	[ ]
2. Temporary Total	[ ]	[ ]	[ ]
3. Temporary Partial	[ ]	[ ]	[ ]
4. Permanent Partial	[ ]	[ ]	[ ]
5. Permanent Total	[ ]	[ ]	[ ]
6. Death	[ ]	[ ]	[ ]
COLLATERAL SOURCES			
Available: yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
Type of Source:			
Medicare	[ ]	[ ]	[ ]
Social Security	[ ]	[ ]	[ ]
Group Health	[ ]	[ ]	[ ]
Blue Cross/Blue Shield	[ ]	[ ]	[ ]
Workers Compensation	[ ]	[ ]	[ ]
No Fault	[ ]	[ ]	[ ]
Wage Continuation	[ ]	[ ]	[ ]
Other	[ ]	[ ]	[ ]
Amounts Paid ($)	_____	_____	_____

2. General Damages
   a. Pain and Suffering ($) _____ _____ _____
   b. Permanency/Disfigurement ($) _____ _____ _____

	CLAIMANTS 1	2	3
3. Punitive (Exemplary) Damages			
a. Alleged - yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
b. Granted - yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
c. Influence on settlement - yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
major	[ ]	[ ]	[ ]
minor	[ ]	[ ]	[ ]
4. Prejudgment Interest - yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
If yes, what was the amount?	_____	_____	_____
ESTIMATED DAMAGE VALUE (Full Liability):	_____	_____	_____
ESTIMATED SETTLEMENT VALUE:	_____	_____	_____
Joint and Several Additional Payments: yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
If yes, what was the amount?	_____	_____	_____

	CLAIMANTS 1	2	3
Lien: yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
statutory	[ ]	[ ]	[ ]
contractual	[ ]	[ ]	[ ]
Did presence of collateral sources influence settlement value? yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
Impact on settlement: major	[ ]	[ ]	[ ]
minimal	[ ]	[ ]	[ ]

DEFENDANT INFORMATION

	DEFENDANTS 1	2	3
Multiple Defendants: yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
% Liability assessed to Plaintiff:	_____	_____	_____
% Liability assessed to each defendant:	_____	_____	_____
Were any defendants unable to pay? yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
If yes - % of Liability:	_____	_____	_____

SUIT INFORMATION

	CLAIMANTS 1	2	3
Was a suit filed? yes	[ ]	[ ]	[ ]
no	[ ]	[ ]	[ ]
If yes, disposition of suit:			
1. Settled prior to trial	[ ]	[ ]	[ ]
2. Settled during trial	[ ]	[ ]	[ ]
3. Plaintiff verdict	[ ]	[ ]	[ ]
4. Defense verdict	[ ]	[ ]	[ ]
5. Appeal	[ ]	[ ]	[ ]
6. Other	[ ]	[ ]	[ ]
Amount ($):	_____	_____	_____

DAMAGES

1. Specials			
a. Medical ($)			
Present:	_____	_____	_____
Future:	_____	_____	_____
b. Loss Income ($)			
Present	_____	_____	_____
Future	_____	_____	_____
c. Other ($)			
Present:	_____	_____	_____
Future:	_____	_____	_____

Exhibit IV

FLORIDA

EXPECTED INVESTMENT INCOME YIELD Y(A)

CURRENT

YIELDS

	Before FIT	After FIT
Y_O	8.70%	6.09%
Y_N	10.15%	5.43%
Y_A	8.86%	5.91%

Y_O = Expected investment income yield on assets invested prior to the time the new rates are expected to be in effect.

Y_N = Expected investment income yield on assets newly invested or reinvested during the time the new rates are expected to be in effect.

$Y_A = Y_N W_N$ and $Y_O W_O$, where

W_N = Proportion of assets, held during the time the new rates are expected to be in effect, that is expected to be newly invested or reinvested.

$W_O = 1 - W_N$

A PROPOSAL TO REFORM THE LAW OF PUNITIVE DAMAGES IN THE STATE OF KANSAS

Introduction

It is a well-established principle in Kansas and a majority of other jurisdictions that:

> Punitive damages by definition are not intended to compensate the injured party. . . [R]ather, [their purpose is to] punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.

McDermott v. Kansas Public Service Co., 238 Kan. 462, 464, 712 P.2d 1199, 1201 (1986) (quoting Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981)).

Because punitive damages are specifically intended to punish and deter extreme conduct similar to criminal sanctions, a number of courts and commentators consider an award of such damages as an imposition of a quasi-criminal penalty. See McDermott, 238 Kan. at 467, 712 P.2d at 1203 (recognizing penal nature of punitive damages). See also Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective

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Products, 49 U. Chi. L. Rev. 1, 8 (1982) (discussion of punitives as quasi-criminal remedy). As long ago as 1886 in Boyd v. United States, 116 U.S. 616, 634, and as recently as 1983, in Smith v. Wade, 461 U.S. 30, 59 (Rehnquist, J., dissenting), the United States Supreme Court recognized the quasi-criminal nature of punitive damages. Although a number of authorities consider punitive damages to be so similar to criminal sanctions as to warrant constitutional protections afforded to a criminal defendant, see, e.g., Schmidt, The Constitutionality of Punitive Damages: A Challenge for the Judiciary, For the Defense 20 (Feb. 1985), and Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983), courts have refused to recognize that punitive damages approach the same severity as criminal sanctions warranting constitutional safeguards. See McDermott v. Kansas Public Service Co., 238 Kan. 462, 467, 712 P.2d 1199, 1203 (1986).

Even though courts have firmly held that punitive damages are not as severe as criminal sanctions and do not therefore require equal constitutional safeguards, a strong case could be made that some form of added safeguards are necessary to protect the rights of the quasi-criminal defendant. It has been noted that the character of punishment "is not changed by the mode in which it is inflicted, whether by a civil action or

a criminal prosecution." United States v. Chouteau, 102 U.S. 603, 611 (1880). Accordingly, Justice Rehnquist observed in Smith v. Wade, 461 U.S. at 59, that "although punitive damages are 'quasi-criminal', their imposition is unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors." Id. (Citations omitted.) The Justice went on to add that the Court in the past had observed that "punitive damages may be employed to punish unpopular defendants, and . . . that juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." Id. (Citations omitted.) Because punitive damages are considered quasi-criminal, standing halfway between the civil and the criminal law, see Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 8 (1982), and given the potential for abuse, some form of safeguards standing halfway between the civil and criminal law recognizing the quasi-criminal nature of punitive damages are necessary.

As the dollar amounts of punitive awards continue to climb, see Robert Stewart, Crime and Corporate Punishment, Corporate Report 50 (May 1985) (punitive awards in Kansas City

area citing Greater Kansas City Jury Verdict Service; 1980--31 verdicts, $886,000; 1983--34 verdicts, $2.2 million; 1984--31 verdicts, $20 million), several states have recognized the seriousness of punitive damages by adopting specific legislation which provides safeguards. See, e.g., Colo. Rev. Stat. § 13-25-127 (requiring proof beyond a reasonable doubt); Minn. Stat. Ann. § 549.20 (Supp. 1978) (requiring clear and convincing evidence standard); and Ore. Rev. Stat. § 30.925 (1979) (clear and convincing evidence standard, showing of prima facie case, and list of specific guidelines to be followed in awarding punitive damages). Such safeguards are a necessary response given the potential of punitive damage awards of not only punishing a defendant, but also damaging it financially to the point of bankruptcy. See Owen, Punitive Damages in Products Liability Litigation, 74 Mich L. Rev. 1257, 1322 (1976). See also Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel, 14 St. Mary's L.J. 351, 381 (noting bankruptcy filings of Johns-Manville). As the Kansas Supreme Court recently noted, "the purpose of punitive damages is to sting, not to kill, a defendant." McDermott v. Kansas Public Service Co., 238 Kan. 462, 467, 712 P.2d 1199, 1203 (1986). Our laws should reflect a commitment to that principle.

It is particularly significant to note that the Kansas legislature recognized the seriousness of punitive damages and the potential for abuse by adopting legislation in 1985 which establishes specific procedural safeguards when punitive damages are involved in any medical malpractice case. See 1985 Kan. Sess. Laws ch. 197, p. 951 (court to determine amount of award, clear and convincing evidence standard, specific definition of elements, award limit). Although the legislature limited this reform to medical malpractice cases, there is no reason why any defendant (doctor, manufacturer or property owner) should not be afforded similar protections. It is in this context that the following statute is proposed.

A Proposal to Reform the Law of Punitive Damages in the State of Kansas

Purpose: The purpose of this bill is to establish and clarify the substantive law of punitive damages of the State of Kansas. It is intended as a statement of the public policy of this State and is the law that should be applied to any civil action within this jurisdiction in which there is a claim for punitive damages. Further, because any civil action against a Kansas citizen in which a claim is made for punitive damages involves the potential punishment of that Kansas citizen, including corporations and businesses domiciled in Kansas, which matter is of significant concern to this state, Sections 1, 2, 3, and 4 are declared to be substantive law, and not merely procedural. They shall therefore apply to all civil actions in which punitive damages are sought against a Kansas citizen outside the State of Kansas.

Section 1.(a) Punitive damages shall be allowed in civil actions only upon a showing by plaintiff that the acts of the defendant constituted willful conduct, fraud, or malice.[1]

(b) "Willful conduct" means an act performed with a designed purpose or intent on the part of a person to do wrong or to cause an injury to another.

The term "willful conduct" shall also include behavior caused by or contributed to by marijuana, a narcotic drug, or a controlled substance, as those terms are defined in K.S.A. Section 65-4101, or by alcoholic liquor, as that term is defined in K.S.A. Section 41-102.

(c) "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant to deprive a person of property or legal rights or otherwise cause injury.

(d) "Malice" means a state of mind characterized by an intent to do a harmful act without a reasonable justification or excuse.[2]

Section 2.(a) In order to recover, plaintiff must prove by clear and convincing evidence[3] that defendant's conduct satisfies the requirements of Section 1.(a).

(b) To be clear and convincing, evidence should be "clear" in the sense that it is certain, plain to the understanding and unambiguous. It must also be "convincing" in the sense that it is so reasonable and persuasive as to compel the trier of fact to believe it.[4] Proof by clear and convincing evidence is far more persuasive than proof by a mere preponderance of the evidence.

Section 3.(a) In any civil case the issues of liability for compensatory damages and liability for punitive damages, if any, shall be determined separately.[5]

(b) The trier of fact shall first determine defendant's liability for compensatory damages and, when appropriate, the amount of such damages.

(c) Should the trier of fact award compensatory damages against the tortfeasor, the claimant may then move for permission to submit evidence in support of a claim for punitive damages.[6]

(d) Before allowing the trier of fact to hear any evidence on the issue of punitive damages, the trial court shall first determine in a separate hearing whether claimant has established a prima facie case for punitive damages,[7] which hearing may, upon motion of the claimant, occur before trial.

(e) If the trial court determines that claimant has established a prima facie case, evidence on the issue of punitive damages may then be offered, and the trier of fact shall then determine whether punitive damages should be awarded.

Section 4.(a) If the trier of fact determines that punitive damages should be awarded, the trial court shall determine the amount of the damages.[8]

In making this determination, the court shall consider:

(1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;

(2) The degree of the defendant's awareness of that likelihood;

(3) The profitability of the defendant's misconduct;

(4) The duration of the misconduct and any intentional concealment of it;

(5) The attitude and conduct of the defendant upon discovery of the misconduct;

(6) The financial condition of the defendant; and

(7) The total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct including, but not limited to, compensatory and punitive damage awards to persons in situations similar to the claimant's and the severity of the criminal penalties to which the defendant has been or may be subjected.[9]

Section 5.(a) In no case shall punitive damages be assessed if compensatory damages are not awarded, or where only nominal damages are awarded.[10]

Section 6.(a) No discovery of the defendant's financial condition shall occur until after the trial court determines that claimant has established a prima facie case for punitive damages.[11]

(b) Evidence regarding defendant's financial condition shall not be admitted until after the trier of fact has determined that punitive damages should be awarded.[12]

Section 7.(a) Punitive damages can properly be awarded against a master or principal because of an act done by an employee or agent only if:

(1) The master or principal authorized the doing and the manner of the act, or

(2) The employee or agent was unfit and the master or principal had actual knowledge of that before the act was committed, or

(3) The employee or agent was employed in a managerial capacity and was acting in the scope of employment, or

(4) The master or principal or a managerial agent of the master or principal ratified or approved the act.[13]

Section 8. This act shall have both prospective and retrospective application to all claims and causes of action in the State of Kansas, whether or not they have arisen at the time this act is effective; and it is the specific intent of this act that it apply to all claims and causes of action pending upon the effective date of this act.

Section 9. If any provision of this act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

FOOTNOTES

[1] The elements outlined in this section are very similar to elements established by the Kansas common law regarding the type of conduct that warrants punitive damages. See, e.g., Hess v. Jarboe, 201 Kan. 705, 443 P.2d 294 (1968).

[2] In 1985, the Kansas Legislature recognized the definitions in §§ 1(b)-(d) as proper definitions of conduct warranting punitive damages in medical malpractice actions. 1985 Kan. Sess. Laws, Ch. 197, p. 951. There is no reason why these definitions provided in the medical malpractice actions should not be equally applied to claims for punitive damages in any other type of action. Problems of vagueness and ambiguity are no less a problem in other actions than they are in the area of medical malpractice. It is only fair and consistent with the idea of deterrence that the manufacturer, city government, or any potential defendant, in addition to the doctor, should be able to know with a degree of certainty what conduct could result in an award of punitives.

[3] As at least two jurisdictions have statutorily recognized, the "clear and convincing" standard is appropriate as punitive damages are best understood as injecting a quasi-criminal element into a civil case. See Minn. Stat. Ann.

§ 549.20 (Supp. 1978) and Ore. Rev. Stat. § 30.925 (1979). This standard represents a sensible compromise between the "preponderance of evidence" standard of civil litigation and the "beyond a reasonable doubt" standard of the criminal law. As punitive damages fall in between, the middle standard is warranted. See Owen, Crashworthiness Litigation and Punitive Damages, 4 Journal of Products Liability 221, 226 (1981) ("It seems both fair and logical to require the imposition of quasi-criminal punishment, standing halfway between the civil and the criminal law, be supported by a standard of proof halfway between the civil law's "preponderance of the evidence" and the criminal law's "proof beyond a reasonable doubt"). See also Model, Uniform Product Liability Act § 120(a) and Analysis (U.S. Dept. of Commerce 1979) 44 Fed. Reg. 62,714, 62,748-49 (1979).

In addition, it should be noted that the "clear and convincing" standard is no stranger to our civil system as it is required in various actions where it has been determined that a higher standard of proof is warranted. See, e.g., Nordstrom v. Miller, 227 Kan. 59, 605 P.2d 545 (1980) (fraud); and Kan. Stat. Ann. § 60-401(d) (1981) (required to establish falsity of an instrument or conveyance). Conduct warranting a quasi-criminal penalty is just as serious and should be imposed

accordingly. See 1985 Kan. Sess. Laws, Ch. 197, p. 951 (recognizing "clear and convincing" as proper standard for any medical malpractice action claiming punitive damages).

[4] P.I.K.2d Inst. 2.11 n.6 (1977). For other definition, see Nordstrom v. Miller, 227 Kan. 59, 605 P.2d 545 (1980).

[5] Bifurcation is well known to the Kansas court system. For a number of years, judges have been authorized by statute to order separate trials for any claim or issue when such a bifurcation would further convenience, avoid prejudice, or be conducive to expedition or economy. Kan. Stat. Ann. § 60-242(b) (1983).

Although the statute makes clear that such an order is discretionary, case law indicates that bifurcation is generally advantageous when the question of punitive damages is involved. See, e.g., Betts v. General Motors Corp., 236 Kan. 108, 689 P.2d 795 (1984), and Tilley v. International Harvester Co., 208 Kan. 75, 490 P.2d 392 (1971). In Betts, the Kansas Supreme Court approvingly noted the trial court's reasons for bifurcation.

> The court pointed out the advantages of a bifurcated trial in terms of jury comprehension of the issues, economy of court time, and reducing the trial expenses to the parties. It noted that the additional expenses

> of time and resources might be unnecessary if determination of the fault issues made the damages issues moot or enhanced the prospects of settlement.

Betts, 236 Kan. at 116, 689 P.2d at 801-02.

Bifurcation is particularly warranted in product liability cases in order to avoid confusion on the clearly distinct issues of liability. In such cases, liability for compensatory damages is strictly applied focusing on the condition of the product and not the conduct of the manufacturer. See Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel, 14 St. Mary's L.J. 351 (1983). The fact that a manufacturer's liability in a products action is based on strict liability focusing on the condition of the product and not on the manufacturer's conduct is the cornerstone of the argument that punitive damages are not appropriate in product liability actions. Id. at 369-371. Punitive damages, on the other hand, are based entirely on the conduct of the tortfeasor. A separation of such issues in this context, in particular, is unquestionably warranted.

In addition, it could be argued that bifurcation provides a necessary safeguard in separating the determination and imposition of a quasi-criminal penalty from the traditional civil question of liability for compensatory damages. Because of the

inherent differences between punitive and compensatory liability, it stands to reason that the two questions should remain separate to emphasize both the distinction and the more serious nature of the quasi-criminal penalty.

[6] See infra n.10 (regarding requirement of award of actual damages prior to punitives).

[7] Professor David Owen, a recognized authority in the area of punitive damages, supports legislation that would require a plaintiff to establish a prima facie case for punitive damages before being allowed to proceed on the defendant's liability for such damages. Owen, Problems Assessing Punitive Damages Against Manfacturers of Defective Products, 49 U. Chi. L. Rev. 1, 53 (1982). Although Owen specifically refers to a California statute that requires a pretrial showing of a prima facie case not considering bifurcation, Cal. Civ. Code § 3295(c) (West 1981), his reasoning applies to our statute as plaintiff still is not allowed to proceed to the punitive damage stage without first establishing a prima facie case for such damages. Professor Owen reasons:

> Because a single punitive damages award can amount to millions of dollars and because the likelihood of such assessments is less predictable than compensatory damages awards, a prima facie ruling on punitive damages at an early stage will help avoid the unnecessary

> expenditure of considerable sums for the construction of an elaborate punitive damages defense.

Id. at 54.

Owen is further convinced that such a requirement is necessary as he recognizes that it is the "present day practice of seeking punitive damages in substantially all damage actions" prompting an explosion of punitive damage awards. Id. n.258 (citing Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 762, 168 Cal. Rptr. 237, 250 (1980)).

Concluding, Owen argues that "[b]ecause of the growing frequency of punitive damage claims, and because such claims only infrequently are well supported, such a procedure should save time and expense . . . ." Id. at 54. It is only just that plaintiff be required to meet this hurdle of establishing a prima facie case given that (1) punitive damages are a windfall to plaintiff, (2) if plaintiff gets to this stage, he will already have been compensated, and (3) the expense of further defense and the potential loss that is faced by defendant is great.

[8] See 1985 Kan. Sess. Laws, Ch. 197, p. 952 (court to determine amount of punitive damage award in medical malpractice actions). However, it is important to note that the problems

of excessive punitive awards which prompted this legislation are not necessarily unique to medical malpractice actions alone. As noted earlier, punitive damage awards have jumped significantly since 1980, according to the Greater Kansas City Jury Verdict Service. In 1980, 31 punitive damage verdicts totalled $866,000. By 1984, thirty-one punitive damage verdicts were reported totalling $20,000,000. Stewart, Crime and Corporate Punishment, supra at 50. In 1985, one punitive damage award of $10,000,000 was awarded to a Kansas City plumbing company that had been excluded from the yellow pages. Id. As the Kansas Supreme Court recently noted, "the purpose of punitive damages is to sting, not to kill, a defendant." McDermott v. Kansas Public Service Co., 238 Kan. 462, 467, 712 P.2d 1199, 1203 (1986) (citations omitted).

To avoid such excessive awards, a number of authorities advocate that the judge rather than the jury should determine the amount of damages. Such procedure would bypass a jury that can best be described as often emotional, easily inflamed, and susceptible to prejudice. See Smith v. Wade, 461 U.S. 30, 59 (1983) (Rhenquist, J., dissenting) (citing Walther & Plein, Punitive Damages: A Critical Analysis, 49 Marq. L. Rev. 369 (1965) (punitive damages frequently based upon caprice and

prejudice of jurors)). Professor Owen offers the following reasons for such a change:

> The best protection against excessive punitive damages awards would probably be to shift the responsibility for their measurement from the jury to the trial judge once the jury has determined that such damages should be assessed. This scheme offers several advantages over the traditional method of allowing the jury to determine such awards. First, it would reduce the probability that punitive damages awards might be unduly influenced by emotion, since most judges are presumably more detached in their deliberation and therefore more likely to render objective damages assessments. Additionally, evidence of the defendant's wealth that could prejudice the jury on the issue of liability could then be excluded from jury consideration. Further, judges would be able to call upon their experience in criminal sentencing, unavailable to jurors, in evaluating the need for punishment and deterrence in particular cases. Finally, trial judges usually have a more sophisticated appreciation than jurors of the often far reaching effects that punitive damages awards may have on the operations of particular corporate defendants.

Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1320-21 (1976).

In addition, it could be argued that the assessment of punitive damages, given their quasi-criminal nature, is similar to sentencing in a criminal process. Accordingly, the judge should be given the responsibility of imposing the quasi-criminal sanction once the jury has determined that punitive damages should be awarded as a means of providing defendant a quasi-criminal safeguard against a jury's possible abuse of its

discretion. See Dworkin, Product Liability Reform and the Model Uniform Product Liability Act, 60 Neb. L. Rev. 50, 75 (1981): "Since the judge is assumedly less subject to emotional appeals, and is instructed to follow specific considerations in making the determination, extreme awards should be eliminated."

Two other commentators have offered the following support for giving the responsibility of assessing the amount of punitive damages to the judge:

> To increase the likelihood that damages will be applied in a principled manner, the judge, rather than the jury, should assess the sum of the damages. Although the judge is in no better position to decide whether the defendant's conduct was outrageous, the question of punishment calls for expertise. Delicate issues of economics and social policy are involved in deciding the amount of punishment--issues with which the ordinary juror is likely to have little familiarity. Beyond being more aware of the public policy implications of the award of punitive damages, judges have more experience in meting out punishment. They are less likely to be impressed by the histrionics of counsel and so to be inflamed by passion or prejudice.

Mallor and Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L.J. 639, 664 (1980).

The authors continue by adding:

> This procedure would parallel the present practice in criminal trials in most states in which the

> sentence is imposed by the trial judge after conviction by the jury. This bifurcation of the adjudication and sentencing functions is designed to avoid the possibility that the jury's determination of guilt would be influenced by evidence of the defendant's character and personality. . . . This rationale would apply equally to a civil trial in which punitive damages are sought. Much of the information that is needed to impose a proper sum of damages may be too complex for the jury to evaluate effectively. Evidence of the defendant's wealth, while admissible in most states, may give rise to what one writer has dubbed the "Robin Hood" syndrome. Similarly, evidence of past or present criminal prosecution, or of other ongoing civil cases, may influence the jury and lead it to compromise any doubts it may have on the initial question of liability. Yet all of this information is vital for principled application of punitive damages. To avert the possibilities of compromise and overly harsh penalties, the questions of liability and punishment should be separated, and the judge provided with access to information that would otherwise be excluded.

Id. at 664-65.

[9] See Minn. Stat. Ann. § 549.20 (Supp. 1978) and Ore. Rev. Stat. § 30.925 (1979), which provide similar guidelines to be considered when awarding punitive damages. See also Model, Uniform Product Liability Act § 120(a) and Analysis, U.S. Dept. of Commerce, 44 Fed. Reg. 62,714, 62,748-49 (1979) (suggesting similar guidelines); Mallor and Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L.J. 639, 667-69 (1980); and Owen, 74 Mich. L. Rev., 1257, 1314-19 (discussing the vagueness of standard used to measure the awards of

punitive damages and the need for tighter guidelines similar to the ones outlined in the proposed statute).

Such guidelines are warranted given the nature of punitive damages. Because punitive damages involve an imposition of a quasi-criminal penalty, safeguards in the form of specific guidelines are necessary to check a possible abuse of discretion. See Electrical Workers v. Foust, 442 U.S. 42, 50 (1979) (citations omitted) (because of broad discretion both as to imposition and amount of punitives, impact of these windfall recoveries is unpredictable and potentially substantial). As one court noted, "since such damages are punitory [sic] and are assessed as an example and warning to others, they are not a favorite in law. . . ." Gilpin v. Ks. State High School Activities Assn., Inc., 377 F. Supp 1233, 1244 (D. Kan. 1973). The court stressed that punitive damages should be allowed only with caution and within a narrow limit. Id.

10 This section simply codifies Kansas case law. See e.g., Stevens v. Jayhawk Realty Co., Inc., 236 Kan. 90, 689 P.2d 786 (1984), and Webber v. Patton, 221 Kan. 79, 81, 558 P.2d 130, 132 (1976) (citing Watkins v. Layton, 182 Kan. 702, 706, 324 P.2d 130 (1958), that before punitive damages may be awarded, a plaintiff must establish a right to recovery of actual damages).

11 See Bryan v. Thomas Best & Sons, Inc., 453 A.2d 107 (Del. Super. 1982). In Bryan, the court held that there should be no discovery of defendant's financial condition until plaintiff could show a factual basis for his claims of punitive damages. The court reasoned that this would best balance defendant's right to privacy and to protections against harassment against plaintiff's need for this information. Id. Accord Leidholt v. District Court, 619 P.2d 768 (Colo. Super. 1980), and Breault v. Friedli, 610 S.W.2d 134 (Tenn. App. 1980). See also Cal. Civ. Code § 3295(c) (West 1981) (statute requiring plaintiff to make a prima facie showing of manufacturer's liability for punitive damages before discovery of wealth may proceed); and Owen, supra n.2 (regarding possible savings of time and expense of discovery and construction of elaborate punitive damages defense).

12 Section 5(a) would eliminate the risk of prejudice by the jury on the issue of liability by not allowing the jury to be influenced by the disclosure of the defendant's wealth. Although such risk is acceptable in the ordinary civil proceeding, given the quasi-criminal nature of punitive damages such a risk is not warranted. See Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1320 (1976) (noting the risk of prejudice by the jury upon discovery of

defendant's wealth). See also Dubois, Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster, 43 Ins. Counsel Journal 344, 351 ("There is usually great disparity between the parties' financial status which can create a Robin Hood-like state of mind in the jury room").

[13] This section is merely a codification of well-established Kansas case law. See Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 666 P.2d 711 (1983).