Kansas Legislative Research Department December 4, 1986

MINUTES

SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE

November 12, 13, and 14, 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 John Solbach

Staff Present

Mike Heim, Kansas Legislative Research Department
Jerry Donaldson, 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

Jim Kaup, League of Kansas Municipalities
Jerry Palmer, Kansas Trial Lawyers Association
David Litwin, Kansas Chamber of Commerce and Industry, Kansas Coalition for Tort Reform
Gary McCallister, Kansas Trial Lawyers Association
Richard Croker, United Telecommunications Corporation, Westwood
T. C. Anderson, Kansas Society of Certified Public Accountants
Kevin Fowler, Kansas Society of Certified Public Accountants

Conferees Present (continued)

Ron Todd, Kansas Insurance Department
Larry Magill, Independent Insurance Agents of Kansas
Tom Sullivan, Kansas Trial Lawyers Association
Mike Sexton, Kansas Trial Lawyers Association
Ralph Skoog, Kansas Trial Lawyers Association
Jay Thomas, Kansas Trial Lawyers Association
L. M. Cornish, Kansas Association of Property and Casualty Insurance Companies
Homer Cowan, Western Insurance Company
Ralph Sampson, Coleman Company
Bob Runnels, Kansas Catholic Conference
Ted Fay, Kansas Insurance Department
Bob Hayes, Kansas Insurance Department
Ron Smith, Kansas Bar Association
Bill Sneed, Kansas Association of Defense Attorneys

November 12, 1986
Morning Session

Representative Joe Knopp, Chairman, called the meeting to order at 10:15 a.m.

Staff called attention to an item entitled "Chief Executive Circular" (Attachment 1) of the Insurance Services Office, Inc. (ISO), which indicates that ISO does not know the effect of, nor will it consider, tort reform measures adopted by states in its quantification of insurance rates and is not putting itself on the line in this regard. Staff distributed a letter and information from State Farm Insurance Company (Attachment 2) to the Kansas Insurance Department which reflects that proposed tort reforms will have little effect on this company, noting that it is not a major liability writer.

The Chairman said during the three-day meeting, conferees would have the opportunity to make comments regarding proposals considered by the Committee. Drafts of proposals would be referred to by the Revisor's number. The Committee then heard testimony.

Jim Kaup, League of Kansas Municipalities, submitted amendments to bill draft 7 RS 0045 (hereinafter, all bills will be referred to by their last two numbers) regarding punitive damages (Attachment 3), which he noted would replace Section 8 of the bill and would allow municipalities the discretion of paying attorney fees and punitive damage awards against officers and employees regarding federal civil rights actions, if it is in the public interest to do so. In response to questions, Mr. Kaup said subsection (c) (1), (2), and (3) establishes the criteria which cities must consider in decisions regarding the payment of punitive damages. Concern was expressed by members that it was inconsistent if the jury finds in favor of a plaintiff in a civil rights case that the city then determine that paying damages was in the best interest of the city. Mr. Kaup said the intent was to have a narrowly-drawn provision with

standards to be met and the decision to pay would still be discretionary. The employee would have to be acting within the scope of his employment to qualify, he said.

There was discussion regarding Section 3(i) of the bill regarding the need for mandatory and discretionary placement of traffic signs. Mr. Kaup said the Uniform Traffic Manual is not used by many smaller cities to determine placement of signs. A member noted that county engineers are familiar with the manual and understand it. He believed deviating from the manual would expose government entities to liability. Mr. Kaup said, if the Committee deletes (i) and restores the stricken language in (h), the League would appreciate some statement from the Committee regarding the need to clarify government entity liability pertaining to traffic signs. Mr. Kaup was requested to discuss the traffic sign situation with the League board.

Mr. Kaup stated the League endorsed the other suggested changes to the Tort Claims Act.

Jerry Palmer, Kansas Trial Lawyers Association (KTLA), commented on provisions in the bill. He pointed out that there was no evidence that changes in the Tort Claims Act would affect insurance premiums since these are not determined only on Kansas experience. He objected to provisions in Section 3(d) which addresses the Fudge case. He said that if a city employee hurts someone, he should be held liable, and changes in the law should not be made to address just one case. There was no evidence that insurance companies had responded to the Fudge case with higher rates, he said. He questioned, in Section 3(e), how a "degree" of discretion could be determined and noted the provision could cause havoc with courts. In regard to Section 3(i), Mr. Palmer did not believe that people who design roadways do not know about the Uniform Traffic Manual. He pointed out there is also another book used in Kansas for low volume traffic roads which recognizes problems of townships and counties regarding road signs. He supported current language and said there is no problem with the way it works. Mr. Palmer commented on provisions in Section 3(t) and suggested community service workers not be granted immunity if they are involved in the operation of a motor vehicle or are covered by insurance.

There was also discussion regarding who was being protected -- the entity, community services worker, or both. Mr. Palmer believed it should be only the entity. The definition of "employee" was discussed. Staff noted it was the intent of the Committee that the individual not be held liable, as the bill was drafted.

In regard to Section 6(c) and insurance pooling arrangements, Mr. Palmer objected to pools being a separate class and not subject to the supervision of the Insurance Department. A member noted this section concerned insurance matters and not torts, and suggested it be separate.

David Litwin, representing the Kansas Chamber of Commerce and Industry (KCCI) and the Kansas Coalition for Tort Reform, presented a statement (Attachment 4) listing reasons for supporting Bill No. 21, regarding punitive damages with suggestions on the amount of awards; Bill No. 37, liability of corporation directors; Bill No. 39, a pain and suffering cap; and Bill No. 44, periodic payments of judgments. He urged that it be expressly stated in Bill No. 40 that the screening panel report is admissible and pointed out, in Bill

Nos. 50 and 54, that trade, labor, and chambers of commerce are also having problems and might be included in exemptions as nonprofit organizations. Mr. Litwin said his groups have taken no position on Bill No. 45 (liability of government entities and their employees), Bill No. 46 (comparative negligence), and Bill No. 51 (professional opinions), but would probably endorse them if they were presented to the memberships. He stated the Coalition has no position on the insurance regulation bills. Attached to his statement is an article regarding a $65 million award, of which $58 million was awarded for punitive damages, and noted it would not take many of these types of awards to affect the insurance industry.

In discussion, a member said that Mr. Litwin's groups should take a position on the insurance proposals also, since both tort reform and insurance regulations pertained to the insurance liability problem. Mr. Litwin said he did not know if the Commissioner needed these changes and, as an individual, he was leery of a freeze or rollback of rates. He said his groups could meet after Committee decisions are made and decide if they want to suggest insurance legislation.

Gary McCallister, attorney representing the KTLA, presented testimony regarding Bill Nos. 54 and 50 pertaining to liability of directors, officers, and volunteers of nonprofit organizations (Attachment 5). He said KTLA supports the concept of the bills, but noted that Bill No. 54 creates carte blanche immunity for volunteers of charitable organizations under IRS Code Section 501(c)(3), which may not be the intent of the Committee. He gave examples of the negligent operation of a motor vehicle by a volunteer which resulted in unfortunate results for the victim, and noted that the proposal provides immunity for volunteers with no recovery possible for victims. Mr. McCallister provided a revised draft of Bill No. 54 (Attachment 6) which addresses the definition of charitable organization. It requires that the organization carry liability insurance to cover the acts of volunteers, excluding volunteers in medical care facilities in order for immunity otherwise to apply. Provisions in (b) and (c) ensure that coverage is available and payment available to the victim of a volunteer's negligent act.

Mr. McCallister presented a redraft of Bill No. 50 (Attachment 7) dealing with officers and directors of nonprofit charitable organizations.

In additional remarks, Mr. McCallister objected to Bill No. 40 (screening panels), which he did not believe would solve or reduce the incidence of claims or filing of lawsuits. There has been no significant increase in claims, he said. He questioned how these panels would work and compared them with the experience of medical malpractice screening panels. Without knowledge from court proceedings regarding what actually occurred, the panel would have difficulty in determining causation. He said a number of professions do not keep records upon which the panel could rely to determine whether the standard of care had been breached. He said there was no crisis regarding claims against professions, and screening panels would be expensive, time consuming, unworkable, and nonbeneficial.

The Committee recessed for lunch.

Afternoon Session

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

Richard Croker, Vice-President and Associate General Counsel for United Telecommunications Corporation, Westwood, spoke in support of Bill No. 37, personal liability of directors and officers of for-profit corporations. The bill conforms with the Delaware law. The proposal would permit Kansas corporations to obtain and retain good directors without their putting their personal assets at risk, and it would aid economic development, he said. He requested that the proposal receive action by late February in order for his corporation to file proxy material for its annual stockholders meeting in April.

In response to questions, Mr. Croker said passage of bill draft No. 37 would be good public policy for both small and large corporations and would be in the stockholders' best interest if good directors are retained to look out for their earnings. Although his corporation has not experienced difficulty in obtaining new board members because of the liability situation, Mr. Croker said he is concerned and does not want to jeopardize the valuable input of good directors. He said the corporations's old insurance carrier cancelled its policy, resulting in a big increase in premiums.

T. C. Anderson, Kansas Society for Certified Public Accountants (KSCPA), reiterated support of Bill No. 46 regarding comparative negligence, noting there was a serious need in the area of accounting that the joint and several liability rule not be applied to a CPA for the fraudulent actions of another. A member expressed concern that joint and several, which currently applies in certain areas, would be eliminated by this proposal even in intentional fraud cases. Kevin Fowler, attorney for the CPAs, explained the rationale, stating the rule presently goes too far and subsection (f) would not apply to an intentional wrongdoer.

Following distribution by staff of a copy of current law regarding arbitration (Attachment 8), Mr. Anderson said his group was concerned about the arbitration of tortuous acts, noting there is confusion regarding current law and whether these acts could be arbitrated after the fact. He requested that a draft be prepared to permit arbitration of an existing tort claims if both parties agree.

Mr. Anderson spoke in support of Bill No. 51 dealing with liability for professional opinions or advice. He said the bill was vitally important so that everyone would know what the CPA's report would be used for, who uses it, and what it is worth. It was pointed out that the proposal may expose people who fail to limit opinions to liability they may have under current case law. Mr. Anderson said that was possible, and noted that Illinois has limited this legislation to CPAs only. Because of the rapid erosion of privity across the country, his group believes the provision should be statutory before a court ruling is made which would wipe out small CPA firms. A member noted the five disclaimer items in Section 1(b) might be a problem for professions other than CPAs. Mr. Anderson stated KSCPA originally requested the proposal to apply to only CPAs, and no other profession had appeared before the Committee nor asked to be included. A member pointed out that even if the proposal is limited to

CPAs, it could have ramifications in case law in other areas. Mr. Fowler said the state of present law is uncertain because court decisions are old. He said that it was important that privity be codified because parties to an agreement cannot limit between themselves what cannot be limited in law. He stated KSCPA would support limiting the proposal to the CPA profession.

Proposals concerning the Insurance Department were considered. Ron Todd, Assistant Insurance Commissioner, gave testimony regarding excess coverage, surplus lines, and nonadmitted insurance. He said current law allows an admitted company or agent to place risks with a nonadmitted company such as Lloyds of London which has no certificate of authority from the Insurance Department. These risks can be placed only through an agent that has an excess lines license and this was allowed originally in order to increase capacity, he said. Mr. Todd said there were 213 companies and 276 excess lines agents in Kansas. The Department does not have any control over the rates of nonadmitted companies. He noted that excess lines companies pay 4 percent of premiums as a premium tax to the state. Mr. Todd's statement, information on nonadmitted insurers, and 1983 and 1984 premium tax reports are attached (Attachment 9). He said figures for 1985 for excess lines have not been tabulated, but he assumed the premium amount would be up. In regard to admitted companies and excess lines insurance coverage, Mr. Todd said if the Department disapproves a company's coverage for some reason, if that coverage is not otherwise available, a nonadmitted company, which often is affiliated with or owned by an admitted company, can sell the coverage at a higher rate. He noted this has happened with municipal liability insurance.

In response to questions, Mr. Todd said rates charged in Kansas by companies chartered in other states do not have to be approved by the other state. Most other states operate excess lines companies as Kansas does and, if subjected to regulation, they would not write insurance rather than submit to regulations. Mr. Todd believed, as a result of legislation passed in Florida, insurance rates there would be as high or higher than in Kansas. If further regulatory restrictions were placed on admitted companies, he believed there would be more shifts to nonadmitted companies. There was discussion regarding the need for 1985 figures to determine a trend. It was noted the severity of the crisis would be shown by the amount of excess premium written and trends in excess premium lines.

Some of the additional information requested by the Committee from the Insurance Department regarding premiums written and earned, losses paid and incurred, and the comparison percentage for the years 1983, 1984, and 1985 was furnished by Mr. Todd (Attachment 10).

Larry Magill, Executive Vice-President, Independent Insurance Agents of Kansas (IIAK), said his group supports the Kansas Coalition's tort reform recommendations. He noted an insurance business article estimated that excess and surplus lines coverage doubled in Kansas in 1985.

Mr. Magill presented a statement (Attachment 11) addressing insurance proposals and a suggested amendment for Bill No. 45. He stated his board has not reviewed all bill drafts and has no official position on Bill No. 58 which requires inclusion of investment income in rate making, but he believed this provision would destabilize rates since companies could not accurately forecast future investment income. The IIAK is opposed to additional JUAs as provided

for municipal liability coverage in Bill No. 34. He pointed out the Insurance Department has placed all municipalities that asked for assistance. He believed the proposal would drive potential carriers from the state and hoped the Legislature would not assign risks to all companies.

Mr. Magill said his group is neutral on Bill No. 29 which requires companies to continue the same rate for 30 days after notice of an increase. In discussion regarding this bill, Mr. Magill said IIAK would opposes the notice being sent to the insured rather than the agent, as this would undermine the agent-client relationship. The agent may be able to get better rates for the insured with another company. In regard to Bill No. 47, banks and reinsurance, Mr. Magill said IIAK is opposed to banks entering the insurance business. Federal law prohibits banks from acting as insurance agents in certain areas, and he questioned if banks would be interested in reinsuring companies writing hazardous lines. Mr. Magill opposed Bill No. 31, excess profits, stating companies would avoid unpredictable liability lines in favor of those coverages with more predictable loss experience. He believed it was unfair to legislate against excess profit and not against excess losses, noting that profits go into an insurer's capacity to write new coverage and capacity makes insurance available.

In discussion, a member pointed out the insurance industry asked the Legislature to do something about losses, and if this resulted in a windfall profit for the industry, it should be willing to return such profits to rate payers. Mr. Magill believed competition would drive prices down and he questioned why, without companies having a guaranteed rate of return, an excess profit law was needed. A member suggested that no action be taken until statistics can be obtained on premiums for consistency. In regard to Bill No. 48, Mr. Magill said a special credit and rate freeze would project a negative image on Kansas as an insurance marketplace. However, his group is neutral on this proposal. In regard to Bill No. 42, Mr. Magill said IIAK is neutral, but would oppose the advisory committee having veto power. He pointed out that reporting requirements for product liability have probably increased company costs and will increase premiums with no apparent benefit. He said Bill No. 30, reporting professional liability claims, would discourage agents from making early reports if they knew all incidents would be reported to the Insurance Department and would affect the carrier's ability to defend claims. This requirement could not be applied to nonadmitted companies and would be a significant burden to the few admitted companies that cover most professions. In regard to Bill No. 45, Mr. Magill said he had not discussed the proposal with the League, but recommended a provision that the $500,000 cap not be waived by higher insurance limits unless it is specifically waived by the public entity in advance of a loss. He believed this would make it easier to obtain more competitive umbrella liability quotes. He said that pooling arrangements are small insurance companies and should be subject to the oversight of the Insurance Department. IIAK opposes Bill No. 53, the rate review board and public advocate, which would add cost to the system and cause companies to quit writing insurance in Kansas, he said.

Tom Sullivan, KTLA, offered amendments to Section 1 of Bill No. 42 (Attachment 12), reporting loss and expense experience, noting that investment income, tax credit, and dividends should be reported as well as underwriting losses and earnings. The amendments were modeled after the products liability reporting law. He believed the amendments' reporting requirements would

reflect the entire financial picture and not just the picture carriers give the Department to establish rates. He said that it was important that Kansas' experience be considered in rate setting. In regard to the advisory committee, he said KTLA recommends amending New Section 3(e) to specify that a certain number of meetings be held. Mr. Sullivan requested that Bill No. 58, rate making, be amended in Section 3(g) to provide that tax credits be considered in rate making.

Mike Sexton, KTLA, presented amendments recommended for Bill No. 21, punitive damages (Attachment 13). The amendments are to Section 1(a) regarding the bifurcated trial which he said was unconstitutional as written. He had no objection to bifurcated trial, but the same trier of fact should make the second decision. He also recommended the bill be amended by adding to the last sentence "or reckless indifference" in Section 1(b). Mr. Sexton suggested that a provision similar to California law could be added so that 50 percent goes to an organization specifically targeted to enhance the deterrent system rather than to the state, or the 50 percent state share could go to the judicial system to affray court costs. In relation to Bill No. 21, Mr. Sexton presented an example of a "closed-claim" questionnaire used in Texas (Attachment No. 14).

In regard to Bill No. 39, noneconomic cap, Mr. Sexton pointed out that Aetna and St. Paul Insurance Companies and ISO have said low caps on noneconomic losses have done nothing for either availability or affordability of liability insurance, and State Farm has indicated tort reforms make no difference to that company. He questioned if a cap would benefit many cases since there has been a potential of only 12 cases in Kansas in the last three years. The Chairman noted that the Committee had earlier decided not to recommend such a bill.

Mr. Sexton said KTLA opposes Bill No. 51 dealing with liability for professional opinions. There is no need to change when current law protects these situations. He opposed the proposal even if it was limited to CPAs because of the way it is drafted with too many loose ends. Senator Arasmith requested Mr. Sexton to send him his suggestions on this bill.

Ralph Skoog, attorney representing KTLA, supported Bill No. 43, alternative dispute resolution procedures, but did not believe the draft represented the intent of the Committee to allow parties the right to voluntarily enter into agreements to arbitrate their controversy. He presented an amendment to add, after "controversy" in the third line, "including a claim in tort" which clarified that arbitration is not mandatory. Mr. Skoog's statement and amendment is in Attachment 15.

Mr. Skoog gave a statement for KTLA supporting Bill No. 38 regarding itemized verdicts (Attachment 16). He did not believe Section 2 regarding wrongful death was necessary, as everybody currently understands the question of past and future losses in death cases as compared to cases where injured persons survive.

Jay Thomas, attorney representing KTLA, presented a statement (Attachment 17) supporting Bill No. 29, concerning notice of insurance rate increases. He objected, however, to the notice of an increase in rates going to the agent rather than to the insured and gave examples of problems this

practice created for his family. He requested that the bill be amended or modified to require a notice to the insured.

L. M. Cornish, Kansas Association of Property and Casualty Insurance Companies, stated that companies must have capacity, profitability, predictability, and concern for solvency and losses which reduce surplus and lessen capacity. He noted the high rate of insolvency for reinsurers and that Lloyds of London has withdrawn from the American market because it does not believe America's civil justice system is adequate.

He noted the reduced premium rates when interest rates were high and the increase in premiums when interest rates went down, coupled with the civil justice system's verdicts and awards and the increase in medical and litigation costs. This has resulted in companies not being able to predict and write long-term lines. He urged that a favorable insurance climate be created and that the costs of doing business in the state not be driven up. Mr. Cornish said his group joins with the Coalition in supporting its tort reform recommendations.

In regard to insurance reforms and Bill No. 47, reinsurance, Mr. Cornish did not believe banks would want to get involved in the reinsurance of child care, product liability, medical malpractice, and other lines, as banks were already experiencing difficult times. He said Bill No. 48, special credit and freeze of rates, would not encourage companies to do business in the state. In regard to Bill No. 42, reporting expenses and losses and creating an advisory committee, he said that the Commissioner presently has adequate authority to do these things regarding reports and that Kansas is recognized nationwide as having an outstanding insurance department. In regard to Bill No. 31, excess profit, he said without excess loss protection, the proposal would inhibit the industry. He said Bill No. 56, rate review board, would create another unnecessary layer of regulation and that provisions in Bill No. 30, reporting professional claims, have been tried with product liability without success. He said Bill No. 58, reporting earnings and losses from investments for rate making, has been a matter of policy for some time.

In response to questions, Mr. Cornish indicated reporting requirements to obtain data was not necessary as ISO could furnish data on any item needed. A member noted the ISO policy decision regarding tort reform which indicates it will not try to determine the effects of tort reforms. By accumulating figures, the Insurance Department can show trends and collect data which would not be harmful to do, he said.

Homer Cowan, Western Insurance Company, Fort Scott, said that if data collected by Kansas cannot be compared with that of other states, it will be meaningless. If collected on a uniform basis, costs will be shared and data will mean something. He said the National Association of Insurance Commissioners will meet in December and should have a draft regarding collection of data approved next year. Commissioners will have the discretion whether to use it or not, and data requirements will be tailored to the needs of the state. He urged the Committee not to put shackles on the insurance marketplace, and he objected to the creation of an advisory committee.

Ralph Sampson, attorney representing the Coleman Company, said the frequency of punitive damage awards in Kansas was real and not imagined. He

gave examples of cases occurring during the last three years where punitive damages exceeded by far the amount of award. He said the Coleman Company believed it is a mistake to award punitive damages to the state, school funds, or public interest law firms who will be able to litigate more cases. In his opinion, punitive damages should be awarded to the plaintiff. He objected to the KTLA amendment to add "reckless indifference" to Bill No. 21, as this would affect every decision made by manufacturers regarding potential liability. He believed wanton conduct as a rationale for punitive damages should be abandoned and that only fraud, willful, or intentional conduct, and malice be the standards used.

In response to questions, Mr. Sampson said the concept of wanton conduct was so unclear in the courtroom that any decision can be based on reckless indifference.

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

November 13, 1986
Morning Session

The Chairman reconvened the meeting at 9:15 a.m.

Lori Callahan, American Insurance Association, presented information from Mark Bennett which included information provided by the American Insurance Association and its position on tort reform measures (Attachment No. 18).

Bob Runnels, Executive Director, Kansas Catholic Conference, spoke for the Roman Catholic Bishops of Kansas regarding concerns with rising costs of liability insurance and the difficulty of obtaining good people to serve on volunteer boards. His statement (Attachment 19) lists five areas in which his group asks assistance. Attached to his statement is information describing action taken by various states regarding tort reform. In response to questions, Mr. Runnels said the Church has experienced difficulty with all types of liability insurance and costs have tripled. The Catholic Conference has experienced difficulty in getting uncompensated volunteers to serve for fear of being sued. He stated two people on school boards have been sued by teachers over dismissals, and liens were placed on their homes.

The Committee then began consideration of insurance bill drafts. Staff reviewed changes made in drafts.

In regard to Bill No. 29, Representative Leach moved to strike the last sentence in the first paragraph to require that notice is given to the insured, which was seconded by Representative Grotewiel. The motion carried. It was noted the proposal was consistent with 1986 S.B. 528.

Representative Leach moved to recommend that Bill No. 29, as amended, be recommended by the Committee. The motion was seconded by Senator Feleciano and the motion carried.

In regard to Bill No. 42, dealing with reporting loss and expense experience, staff said the proposal would allow the Commissioner to obtain data that could be broken down on a class basis, such as day care centers. Ted Fay, Insurance Department, said if companies cannot comply with requirements, the Commissioner will not pursue them, since it was not the intent that requirements be an imposition on companies. He said the Commissioner now probably cannot ask for this information. Adequacy of rates would not be determined on just Kansas experience, but by a formula to compute what is done in Kansas with countrywide experience, he said. Staff said the list of 13 requirements for the statistical plan was taken from recommendations made in a report by the National Conference of State Legislatures.

Bob Hayes, Insurance Department, said the list is similar to that required for product liability reports. Information from product liability reports received prior to 1983 legislation is not being summarized, but reports received since 1983 are being processed, he said. Investment income is required in product liability reports.

Mr. Sullivan said amendments in Attachment 12 expand data collection requirements from 13 to 28.

Representative Leach moved that Bill No. 42 be amended to include the 28 requirements in Attachment 12. This motion was seconded by Representative Grotewiel.

In discussion, the Chairman pointed out that, with the inclusion of all the amendments' subsections, companies would have to comply with 40 different categories which might be left for the advisory committee to determine rather than being set by statute. A member pointed out the Commissioner has not furnished information in the past with which rates could be improved. The Chairman noted the purpose of the data was to determine if there is a problem with the tort system and to tie reserves to premium years. With the consent of his second, Representative Leach withdrew his motion.

Provisions on page 5 (d) of the draft concerning the advisory committee were discussed. The points were made that the Legislature might circumvent the advisory committee and demand things it had not considered, that there was no provision as to where compensation for expenses would come from, and that a sunset provision was needed.

Senator Feleciano moved that a sunset provision be added to require the advisory committee to justify its existence after two years, which was seconded by Representative Douville. The motion carried. It was the consensus of the Committee that the advisory committee should have flexibility in calling meetings, and no change was made in New Section 3(e).

There was further discussion regarding the list of 13 requirements in Section 1(a) (1) through (13). It was noted that reporting investment income was not included. The points were made that it would be two years before the advisory committee had a chance to do anything and, in the meantime, the National Association of Insurance Commissioners would have its statistical plan ready; information set forth in the requirements might be outdated before it is implemented or impossible to obtain; and the Legislature could sunset the bill if requirements are not possible to fulfill.

Mr. Sullivan suggested a compromise by adding item numbers 23 though 28 of Attachment 12 which would conform to the product liability list. The Chairman said there were three options: (1) remove all items thereby leaving the statistical data to the discretion of the Commissioner and the advisory committee; (2) bring the list into conformity with the product liability list; and (3) adopt all of the KTLA suggestions in Attachment 12. A vote was taken on the options, and the Committee voted to pursue option No. 2.

There was discussion regarding a requirement to report investment income. A member questioned how knowledge of investment income would be used in rate setting, noting the company cannot give this income back to the policy holder, and the industry had been criticized previously for using investment income to lower premiums. Another member noted that the Commissioner said he wanted authority to determine investment income to decide if rates should go up or down.

Representative Douville moved to retain and include in Bill No. 42 items (1) through (13) in Section 1(a) and add (23) through (28) of Attachment 12, which was seconded by Senator Feleciano. The motion carried.

Senator Feleciano moved that Bill No. 42, as amended, be introduced. The motion was seconded by Representative Leach and the motion carried.

In regard to Bill No. 31, excess profits, staff said the proposal was submitted by the Commissioner and was based on Florida law. Concern was expressed regarding the 5 percent profit figure in Section 1(d), it being noted that a government agency would be telling a private business how much money it could make. Some claims do not mature for five or ten years and companies have to save for those payments. In response to questions, Mr. Fay said this is the first time this proposal has been submitted to the Legislature. It was pointed out that this control is not unique, that other groups have excess profit reporting requirements with no guarantee of making a profit.

Senator Feleciano moved that Bill No. 31 be introduced, which was seconded by Senator Frey. Opposition was expressed to the motion as being detrimental to getting lower rates and it would send a message that Kansas does not believe in insurance companies making a profit. A member said the proposal was one the Commissioner believes he needs to get the best policies at the best rates. The vote on the motion failed to carry. Representative Leach asked to be recorded as voting in favor of the motion.

In regard to Bill No. 58, rate making, staff said the proposal combined two drafts, one suggested by KTLA, and the other by the Insurance Department. It specifies provisions upon which the Commissioner sets rates and would be a mechanism to determine if rate increases were justified. Mr. Fay said the Department presently can review rating plans, but the proposal would allow it to have more input in what rate planning will be. Mr. Hayes said it was not the intent of the proposal to allow the Department to eliminate rating plans and set the same rate for everybody, but the bill would be a tool for the Commissioner to be able to set maximum debits and credits. The proposal was submitted because of problems the last two years with rating plans affecting commercial insurance premiums, he said. He had no objection to changing Bill No. 58 to apply only to commercial enterprises. It was noted that a provision

to require that investment income be considered in rate making was suggested by both KTLA and the Insurance Department. Mr. Hayes said the investment income provision did not come from the Insurance Department this year.

Representative Solbach made a motion that Bill No. 58 be introduced as a bill, which was seconded by Representative Leach. The motion failed.

Representative Leach noted it was difficult to consider KTLA and insurance suggestions in one bill. He moved to delete the new language on pages 1 and 2, which was seconded by Senator Frey. The motion carried.

Senator Feleciano moved that Bill No. 58, as amended, be introduced as a bill. This was seconded by Representative Leach and the motion carried.

In regard to Bill No. 56, rate review board, it was noted the policy was whether a review panel or the Commissioner would have the authority to review rates. Representative Hoy moved that No. 56 not be recommended for introduction, which was seconded by Senator Arasmith. The motion carried.

In regard to Bill No. 48, special credit and freeze on rates, staff said the proposal was based on Florida law. Representative Hoy moved the bill not be recommended for introduction, which was seconded by Representative O'Neal. The motion carried.

In regard to Bill No. 47, financial institutions and reinsurance, staff said the proposal allows banks and savings and loans to establish or to invest in domestic reinsurance companies. The point was made that the proposal grants authority to these institutions without any comment from them. Another member believed it would increase competition and bring rates down. Ron Smith, Kansas Bar Association (KBA), said the proposal had nothing to do with competition or with taking over insurance companies, but would allow banks to invest in reinsurance.

Representative Leach moved that Bill No. 47 be recommended for introduction as a bill, which was seconded by Representative Grotewiel. The motion failed. A member objected to the vote and believed the proposal would put more money in the market. It was noted there had been no proponents for the proposal and a bill could be requested later if interest is shown.

In regard to Bill No. 30, reporting professional claims, it was the consensus of the Committee that it be passed over. It was the consensus of the Committee that Bill No. 34, dealing with a joint underwriting authority, be passed over.

The Committee recessed for lunch.

Afternoon Session

The Chairman reconvened the meeting at 1:45 p.m. The Committee considered tort reform measures.

In regard to Bill No. 38, itemized verdicts, staff said the new language on page 2 regarding itemization was taken from PIK instructions. Senator Frey moved that Bill No. 38 be recommended for introduction as a bill, which was seconded by Representative Douville. The motion carried.

On Bill No. 46, comparative negligence, Ron Smith said KBA had no objection to Section 1 (a) through (e) and Mr. Anderson said it covered CPA problems regarding economic loss. In discussion concerning subsection (f), it was noted the wording goes much farther than originally contemplated and does not hold to the one court case the proposal was intended to address. Suggestions for amendments to this section by Mark Bennett in Attachment 18, page 2, were noted.

Representative O'Neal moved to add the language in Attachment 19 suggested by Mr. Bennett. This was seconded by Senator Mulich and it carried.

Representative Douville moved that Bill No. 46, as amended, be introduced as a bill, which was seconded by Representative O'Neal. The motion carried.

Staff said the Committee's intent was to allow arbitration in tort disputes that have already arisen. According to a Law Review article, K.S.A. 5-401 already permits that type of agreement. Senator Feleciano moved to adopt the suggested amendment to K.S.A. 5-401 by Ralph Skoog in Attachment 15, and otherwise clarify that section, which was seconded by Representative Solbach. The motion carried.

Senator Feleciano moved a bill on arbitration be recommended for introduction. The motion was seconded by Representative Grotewiel and it carried.

In regard to Bill No. 51, professional opinions, Mr. Anderson presented amendments to the proposal (Attachment 20).

Representative Solbach moved that the amendments be adopted, which was seconded by Representative Leach. Mr. Anderson said Bill No. 51 expands, with its five provisions, more than his group requested. He explained again how a CPA's opinion could be used without his knowledge and noted that current law says CPAs are not liable. However, if privity is overturned, a small CPA business could be ruined since it only has $1 million insurance coverage. The point was made that it is not the intent of the Committee to change the law of privity, but one profession, CPAs, are concerned since the law has eroded in other states. The bill is intended as a safety valve. It was noted that it might not be a problem for other professions.

Representative Douville made a substitute motion to delete (4) of Attachment 20, which was seconded by Representative Solbach. The substitute motion carried.

Representative Douville moved that a bill as recommended be introduced. This was seconded by Senator Arasmith and it carried.

In regard to Bill No. 44, periodic payments, Mr. Smith reported on this proposal for the KBA Legislative Committee and said it had not acted on this model act. Two of its members are involved with the Uniform Laws Commission that drafted the model and the Commission may recommend changing the model to a uniform law. He said the KBA Legislative Committee believed such a proposal would benefit plaintiffs as well as defendants and would give predictability regarding the impact on premiums. The Chairman noted the model law would take a lot of study. He said that the Committee could recommend further study by the KBA after the proposal is introduced, or wait until the KBA makes a recommendation after December 5 when its committee meets.

Representative Solbach moved that the Committee take no formal action to introduce the proposal at this time, that the Committee report reflect the Committee sees merit for the bill, and action be delayed until the KBA makes a recommendation regarding certain policy options in the model act. This was seconded by Representative Douville. The motion carried.

In regard to Bill No. 41, statute of limitation for contractors, Senator Frey said the Homebuilders Association had indicated it would not be able to present testimony at this time. He moved that No. 41 be passed over. This was seconded by Representative Douville. The motion carried.

In regard to Bill No. 39, limit on noneconomic damages, the Chairman noted that previously the majority of members had believed the proposal should not be recommended.

Representative Hoy moved that No. 39 be recommended for introduction as a bill, which was seconded by Senator Arasmith. It was pointed out the Committee had voted not to recommend the proposal and there had been no testimony that its passage would impact the insurance situation significantly.

Representative Douville made a substitute motion to pass over the bill, which was seconded by Representative Leach. After discussion, Representative Douville withdrew his motion. The vote on the original motion failed.

The Committee then discussed Bill No. 45 dealing with the Tort Claims Act. Staff explained changes in the draft since the last meeting. There was discussion regarding Section 3(b) regarding quasi-judicial functions recommended by the League of Kansas Municipalities.

Senator Frey said zoning board decisions which were a concern of the League must be ratified by the governing body which would come under the legislative function. He moved to strike "quasi judicial," which was seconded by Senator Feleciano. The motion carried.

There was discussion regarding Section 3(d) which addresses the Fudge case. The points were made that without guidelines as a standard of conduct, expert witnesses would testify as to the standard that applied.

Mr. Sullivan objected to the League asking for this exclusion based on just one case. He believed guidelines should be the standard of care. Mr. Kaup said all the League wants is to turn the law back as it was before the Fudge case where guidelines were not considered standards for determining liability. He did not believe it was legislative intent that the Supreme Court set liability as it did in the Fudge case. He said city employees produce manuals that have been adopted by department heads which might result in liability. The court does not say you should have policies but, if you do, you will be liable. In his opinion, this was new liability the Legislature has not dealt with before. Without the amendment, cities will cull manuals which were drafted for personnel purposes and not to determine duty of care, he said. A member stated that in all cases where there is anything in writing, nothing can be used as evidence to establish a duty of care under this amendment. Mr. Kaup said it was not the League's intent to go beyond the Fudge case and its precedent.

Representative Hoy moved to leave (d) in the draft, which was seconded by Senator Yost.

Senator Frey made a substitute motion to strike "any administrative policy, guideline or procedure" and insert "written personnel policy," which was seconded by Representative Leach. Senator Frey said this narrows provisions down to cases where cities write personnel policies and exempts those policies from being used as a standard of care. The vote on the substitute motion carried.

Representative Douville moved to accept (d) as amended, which was seconded by Senator Hoferer and the motion carried.

In regard to subsection (t), Representative Solbach moved to add "unless it involves operating a vehicle where insurance is provided," which was seconded by Senator Mulich. The suggestion was made that the wording should end after "vehicle," which was included in the motion. The motion carried.

In discussion regarding immunity for community service workers which involves both state and municipal employees, a member said city conferees indicated there was no difficulty in getting insurance.

Representative Grotewiel noted the lack of testimony which would indicate a problem and moved to delete the new language in (t), which was seconded by Senator Frey. The vote on the motion failed.

Mr. Kaup addressed the Committee's decision made regarding quasi-judicial functions in (b), giving examples where actions were taken by local governments on a quasi-judicial basis and noting that the Committee's action affected people who had been shielded by law. It was the decision of the Committee not to reverse action taken on this subsection.

Concern was expressed that subsection (e)(3) created problems for cities when public officers voted to spend tax dollars to pay punitive damages for an employee who did something wrong. The provision speaks as though action is already completed. Mr. Kaup said the intent was that the city may reimburse an employee for a punitive damage claim if the three requirements listed can be

met. Senator Feleciano did not believe the provision stating payment was in the best interest of government was a good idea and moved to strike this language; this was seconded by Representative Solbach. The motion carried.

In regard to Section 4(c), Representative Solbach moved to delete changes in Section (c). It was pointed out that this would be the same as current law and would not give elected officers immunity for actual fraud and malice. The motion was seconded by Senator Feleciano, and it carried.

There was discussion concerning Section 6(a) and pooling arrangements. Mr. Kaup said the provision allowed cities to pool risks and noted that 31 cities were pooling insurance effective in April under the League plan. The League plan was discussed and there was no objection to leaving subsection (a) as written. In further discussion regarding the plan and Section 6(c), Mr. Kaup explained the difference between a pooling arrangement and private insurance. It was pointed out that self-insurers are not regulated by the Insurance Department, and municipal pools would not be plowing new ground. Staff was requested to research qualifying requirements before self-insurance is allowed.

Bill Sneed, Kansas Defense Attorneys Association, pointed out there are specific guidelines self-insurers have to meet regarding Workers' Compensation. Mr. Kaup did not know what would happen to the cities not in the League-sponsored pool. The pool will be regulated by an elected board of trustees and the League wants them to have the same status as self-insurers who are not regulated by the Insurance Department.

Senator Frey moved to strike (c) and reinstate the stricken language at the top of page 9.

It was pointed out that the motion addressed two different subjects. Mr. Kaup said the stricken language pertained to licensing and believed retaining (c) would help the pool be successful. The reason for pooling is to cut down administrative costs, improve efficiency, and get risk management function by meeting pool requirements to remove risks. He said pooling arrangements would not affect the insurance industry adversely and do not change the responsibility of entities to pay claims in any way.

Mr. Fay pointed out that exempting itself from insurance laws indicates that municipalities are conducting themselves like an insurance company. Mr. Kaup said it was not the purpose of the pool to make money. It was pointed out that if pools were considered to be insurance companies they would have to pay premium taxes. Senator Frey withdrew his motion.

The suggestion was made to determine, in the Session, if requirements for Workers' Compensation pools would be applicable to pool. It was the consensus of opinion that more research was needed, and (c) was left in the draft for consideration by the Legislature.

In regard to Section 8(b)(3), reimbursement for attorney fees, the amendment offered by the League in Attachment 3 was considered. It was noted this section was affected by the amendment made to delete subsection (e)(3) regarding reimbursement. Mr. Kaup said the amendment in Attachment No. 3 was needed for federal civil rights actions and its use would be discretionary.

Representative O'Neal moved to adopt a conceptual amendment as in Attachment 3 pertaining to 75-6116 (a) and (b) permitting payment of punitive damages in federal civil rights actions where actual malice or fraud does not exist, which was seconded by Senator Mulich. The motion carried.

Senator Arasmith moved that Bill No. 45, as amended, be recommended for introduction, which was seconded by Senator Hoferer. The motion carried.

The Chairman recessed the meeting at 5:05 p.m.

November 14, 1986

The Chairman reconvened the meeting at 9:25 a.m. He stated this would be the last meeting of the Committee. Minutes of the meeting of September, 1986, were approved. Staff said minutes that have not been approved will be sent to members and would be considered approved by a certain date if there are no corrections. The Committee resumed consideration of tort reform measures.

In regard to Bill No. 21, punitive damages, the Chairman said the policy question was whether the second hearing procedure was conducted by the court or by the jury that tried the case. Mr. Smith said the KBA Legislative Committee had noted that sometimes punitive damages are alleged in pleadings and used as a hammer on the defense.

In regard to subsection (e)(2), he questioned how a partnership could ratify actions of another partner and if, under common law, the partnership is the entity that can sue or be sued.

David Litwin did not believe KBA's recommendation reflected the views of the business community and it would have serious effects on morale, production, and services. He noted the KTLA says there was no problem in Kansas, but he disagreed. A member pointed out that no testimony had verified that punitive damages are running rampant in Kansas. He believed the fear in the business community of being sued for punitive damages was unfounded. The suggestion was made to leave the second procedure in the hands of the jury and change the provision if it does not work.

Senator Feleciano moved to strike "to the court" and to insert "trier of fact," where appropriate. The motion was seconded by Representative Douville. The vote on the motion carried.

There was discussion regarding page 2 (c) and the KTLA recommendation to add "reckless indifference."

Senator Feleciano moved this amendment be adopted. Mr. Skoog pointed out this term may already be common law and KTLA is not asking for anything new. The provision would ensure there would be no loophole for trustees to lose someone's money through indifference. A member objected that "reckless indifference" was too broad and allows punitive damages to be imposed when any type of negligence is involved.

Representative O'Neal moved that the draft follow the medical malpractice definition for wanton conduct. It was pointed out that the bill already did this.

Section 1(d) was discussed. Senator Frey stated that arguments against giving punitive damage award money to the state are greater than those for it. He moved to strike subsection (d), which was seconded by Representative Douville. The motion carried.

There was discussion regarding the seven requirements in Section 1(b). It was noted that not all of them should be mandatory.

Senator Feleciano moved to change "shall" to "may" in the last sentence, which was seconded by Representative Leach. The motion carried.

In discussing subsection (e), a member questioned how a case could ever be won under these provisions. Mr. Smith said (e)(1) and (2) were taken from the medical malpractice law which spoke only to the medical profession, and he questioned the need for this in the draft.

Representative Leach moved to strike Section (e)(1) and (2), which was seconded by Representative Grotewiel. The motion failed to carry.

Representative Hoy moved that Bill No. 21, as amended, be recommended for introduction. This was seconded by Senator Arasmith. The motion carried.

In regard to Bill No. 40, screening panels, Senator Frey gave examples of difficulty getting experts to testify, inadequate compensation for panel members, and other problems experienced by screening panels, and suggested that no action be taken until it is determined if other types of screening panels work and that the concept receive more study.

Senator Frey moved that Bill No. 40 not be recommended for introduction, that further study be done on the concept, and the progress of the medical malpractice screening panel be noted before action is taken on the concept of Bill No. 40. The motion was seconded by Senator Mulich and it carried.

In regard to Bill No. 50, directors and officers of nonprofit organizations, Senator Feleciano said if directors and officers had homeowner policies, they should be able to use them as coverage. He moved to add at the end of Section 1(a), "but only to the extent directors and officers are not required to be insured by law or not otherwise insured." This was seconded by Senator Frey and it carried.

Senator Arasmith moved that Bill No. 50, as amended, be recommended for introduction, which was seconded by Senator Mulich. The motion carried.

In regard to Bill No. 54, volunteers of nonprofit organizations, Senator Feleciano moved to add the same amendment as in Bill No. 50. This was seconded by Representative O'Neal. The motion carried.

Senator Feleciano moved to exclude adult care homes and certain other entities from the definition of charitable organizations. The motion was seconded by Representative Leach. The feasibility of giving immunity to nursing homes and the definition of charitable organizations was discussed. The point was made that volunteers would be immune, but organizations would be liable. Mr. Skoog questioned how popular it would be to provide immunity for anybody who cares for the sick, aged, and disabled. It was noted the original consideration for excluding medical care facilities was because it was believed homeowner policies would cover volunteers. The vote on the motion failed to carry.

Representative Leach said the proposal would not pass the Legislature without this amendment and he moved to table Bill No. 54. There was no second to the motion. It was pointed out that if there was no objection to giving volunteers immunity, members should vote against the amendment.

Representative Solbach made a conceptual motion to not grant immunity to licensed people, which was seconded by Representative Grotewiel. The motion failed to carry.

Representative Hoy moved that Bill No. 54, as amended, be recommended for introduction, which was seconded by Senator Arasmith. The motion carried. Senator Feleciano asked to be recorded as voting against the motion.

In regard to Bill No. 37, personal liability of directors and stockholders of corporations, staff said this proposal was recommended at the Committee's last meeting. The Chairman noted that no further action was needed.

Representative Hoy moved that Bill No. 58 be amended to apply only to commercial lines, which was seconded by Representative Douville. The motion carried.

Staff reviewed a rough draft of the Committee report, which will be amended to include testimony, Committee recommendations, and action taken since the report was written.

The suggestion was made to include in the report a statement that it was hard to document the effect tort law changes will have on insurance rates.

There was discussion regarding $25 billion underwriting losses mentioned in the beginning of the report. Senator Frey suggested the sentence be dropped, or that underwriting loss be defined. He also suggested that ISO figures regarding Kansas experience should be added and the ISO position regarding tort reform should be noted. Senator Frey suggested, in regard to Bill No. 45, since the report may be utilized for legislative intent, that the report include a statement that pooling arrangements are not construed to be insurance companies subject to insurance laws but this would not relieve government entities from the responsibility of complying with other portions of the law.

The Chairman stated that, with these changes, the Committee report would be tentatively approved. It will be sent to members in final form for approval. Staff should receive additional recommendations and any minority reports by December 1. Staff was instructed to include in the report discussion of proposals the Committee did not pass.

The meeting was adjourned at 12:00 noon.

Prepared by Mike Heim

Approved by Committee on:

December 19, 1986
(date)

tortnov.12/MH

CHIEF EXECUTIVE circular

October 3, 1986

ISO POLICY DECISION ON TORT REFORM ANNOUNCED

Chief Executive CE-86-31

BACKGROUND

Various tort reform measures have been enacted or are still under active consideration in many states. It is clear that meaningful tort reform will have a favorable, prospective impact on loss severity and/or frequency, variable by state and line of insurance which, ultimately, will be reflected in state loss experience.

However, in some jurisdictions, an immediate rate reflection in response to tort reform is being demanded. Statutes in Florida, New York and Hawaii mandate that insurers reflect tort reform legislation in their filings. The New York Insurance Department has already advised companies of its estimates of the cost reductive effects of tort reform. Florida has mandated a 1987 rollback to adjusted 1984 rates, unless companies file 1987 rates reflecting the impact of tort reform by October 15, 1986. Hawaii has mandated a 10% decrease in rates on October 1st to reflect tort reform, with further reductions required in future years. The Washington Insurance Department is requiring that future rate filings reflect enacted tort reform even without a specific statutory requirement.

Tort Reform
11/12/13/14
Attachment 1

Insurance Services Office, Inc., 160 Water Street, New York, New York 10038 (212) 487-5000

ISO POSITION

ISO is unable to quantify, and to reflect in its filings with a reasonable degree of certainty, any immediate cost effects of tort reform. ISO believes that the reflection of any beneficial effect of tort reform on insurance pricing, where mandated, is a matter of individual insurer judgment and not a precise actuarial exercise. Such judgment is consequently more properly applied by individual insurers, rather than by ISO in its role of acting on behalf of those affiliated insurers which elect to use ISO's services.

Therefore, the ISO Board of Directors has established -- as ISO policy -- that, inasmuch as ISO cannot immediately reflect any cost effects of tort reform in its filings, any such effects are best determined by the judgment of each insurer, taking into account the distribution by coverage, class, and limits on its own book of business.

ISO ACTION

Consistent with this policy, ISO advisory rates will not reflect tort reform and each company must make its own assessment as to the immediate effect, if any, of tort reform on its book of business.

In New York, in order to assist companies in complying with the refiling requirements of the new law, ISO released Commercial Lines Circular CL-86-29 which contained revised manual rules utilizing the cost reductive effects promulgated by the Superintendent of Insurance, without commenting on their appropriateness.

In Florida, ISO has developed a filing procedure -- which has been approved by the Insurance Department -- whereby individual companies must supplement the ISO filing with their own individual estimates of the impact of tort reform. At the direction of the Insurance Department, ISO will collect these individual estimates and file them on behalf of each insurer. Refer to ISO Commercial Lines Circular CL-86-33 for specific details.

ADDITIONAL INFORMATION

ISO plans to shortly provide insurers with information which could be considered by each company in reflecting any effect of tort reform, including an analysis of the tort reform measures enacted in individual states.

Within the next several days, ISO will release such information to insurers via Commercial Lines and Technical Services Circulars. In anticipating receipt of this material, each insurer should note ISO's strong belief that any beneficial effects of tort reform cannot be quantified with any degree of accuracy. Accordingly, providing any quantitative information does not imply that any actuarial precision can be applied to what is -- in effect -- an imprecise subject. However, the information may aid individual insurers in supplementing their judgment which, ultimately, will be the major factor in determining any beneficial pricing effect of tort reform.

CAUTION

In Circular CL-86-33 we detailed the Florida filing procedures which must be completed by October 15th. Since -- to avoid the rollback -- Florida rate filings require individual insurer estimates of the cost effects of tort reform and, since the judgment of each insurer will be the major component in arriving at these estimates, we urge individual insurers to promptly begin developing their own estimates, without waiting for the ISO material on tort reform which, as heretofore mentioned, will not produce precise results.

Daniel J. McNamara
President

cc: ISO Board of Directors
Actuarial Committee
Commercial Lines Committee
Personal Lines Committee

State Farm Fire and Casualty Company

State Farm General Insurance Company

112 E. WASHINGTON ST.
BLOOMINGTON, ILLINOIS 61701

October 21, 1986

Mr. Ray Rathert
Kansas Insurance Department
420 S. W. 9th Street
Topeka, Kansas 66612

Ray:

Before any discussion of State Farm and tort reform, it must first be clearly understood that most of the problems in the liability field are in lines which State Farm does not write. Because of this, the impact of tort reform on our book of business is going to be considerably different from that of a major liability writer.

We have been requested by several insurance departments to come up with some estimate of the effect of newly passed tort reform legislation on our rates in their states. We know of no way this can be done actuarially. Consequently, we resorted to judgement.

The few enacted tort reform statutes usually include items such as:

1) Collateral source of indemnity

2) A non-economic cap

3) Joint and several restriction

4) Punitive damage limitation

5) Alternate methods of payment.

A sampling of commercial liability claims provided the following:

1) Collateral source of indemnity. The sample indicated that approximately 7% of our total indemnity losses were potentially subject to a collateral source. Only about a quarter of these reflected a known collateral source. In our judgement, 50% would be a very liberal estimate of the success in reducing damages due to the existance of a collateral source. The net savings from the collateral source change is thus about 1% (7% X 25% X 50%).

2) Non-economic cap. Non-economic caps are established at such a level that our sample indicated only very few claims would exceed the cap. It is our judgement that the loss savings resulting from the non-economic cap will not exceed 1% of our total indemnity losses.

3) Joint and several restriction. In our sample of liability claims, no claim was found that would have been affected by the joint and several restriction.

4) Punitive damage limitation. Again, in our sample, no punitive damage awards were found.

5) Alternative methods of payment. On our book of business, the savings due to alternative payment methods on future economic losses would be negligible in relation to our total indemnity losses.

Although we believe the effect of tort reform on our book of business would be small, we do believe that effective tort reform legislation can have a positive impact on not only pricing but also availability. It is important to keep in mind that tort reform, or absence thereof, is only one of many factors which influence pricing and availability. Any of these other factors can produce an opposite effect which could equal or outweigh any positive effect of tort reform.

Attached are liability rate comparisons for Kansas and surrounding states. As you know, we use ISO rates for monoline policies. Even in our package policies, the original liability loadings were also derived from ISO rates.

Again, as you know, we do review our rate levels at least annually. It will probably be several years before any effect from tort reform legislation can be expected to influence our experience. Anyway, hope these brief comments will be of some use to you in your discussions of this subject.

Best regards,

Bob

Robert J. Nagel
Assistant Vice President
State Filings Division

RJN:kc/1021

93221 School - elementary, junior high - public (subline 314)
53989 Shopping Center - lessor risk (subline 314)
54131 Grocery - retail (subline 326)
56991 Clothing or Wearing Apparel (subline 326)

H = highest rated territory
L = lowest rated territory

		93221		53989		54131	56991
		BI	PD	BI	PD		
Kansas	H	1.50	.006	2.50	.016	12.50	5.70
	L	.97	.006	2.00	.016	10.00	5.10
Arkansas		.92	.006	2.00	.016	17.00	6.10
Colorado	H	4.40	.006	6.40	.016	38.50	12.00
	L	3.10	.006	4.80	.016	29.00	9.10
Illinois	H	1.28	.006	3.86	.016	11.40	10.23
	L	.67	.006	2.11	.016	6.49	5.60
Iowa		3.40	.006	4.40	.016	17.50	8.40
Minnesota	H	6.50	.006	13.50	.016	48.50	32.00
	L	3.20	.006	8.00	.016	22.50	19.00
Missouri	H	5.30	.006	9.70	.016	41.50	23.00
	L	2.50	.006	4.00	.016	19.50	9.60
Nebraska	H	1.00	.006	5.10	.016	20.50	16.50
	L	.52	.006	1.70	.016	8.60	7.00
New Mexico		2.00	.006	3.30	.016	16.50	8.50
Oklahoma	H	1.50	.006	2.50	.016	27.00	12.50
	L	1.00	.006	1.60	.016	15.00	7.00
Wyoming		.41	.006	2.21	.016	10.70	6.80

The above rates for Illinois and Wyoming are our State Farm rates derived from ISO loss costs. All other were taken from the current ISO manual with no deviation.

DRAFT
10-27-86

3

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

(b) If the employee's act or omission giving rise to the ~~action~~ claim or ~~proceeding~~ suit ultimately is found by the trier of fact to have occurred within the scope of the employee's employment, was and is not found by the trier of fact to have been ~~the result of~~ actuated by actual fraud or actual malice, and if the governmental entity finds that the employee reasonably cooperated in good faith in the defense of his or her interests and the interests of the governmental entity against the ~~action~~ claim or ~~proceeding~~ suit, the governmental entity, subject to any procedural requirements imposed by

Text deleted
after conference
Attachment 3

or an employee of the state may be compromised or settled for and on behalf of the state or employee under the conditions and procedures provided by K.S.A. 75-6106 and amendments thereto for settlements of actions pursuant to the Kansas tort claims act.

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

4

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

November 11, 1986

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony before the

Interim Tort Reform Committee

by

David S. Litwin

Mr. Chairman, members of the committee. I am David Litwin, representing the Kansas Chamber of Commerce and Industry (KCCI) and the Kansas Coalition for Tort Reform, of which KCCI is a member. We appreciate the opportunity you've extended to comment on the draft legislation as this committee's work comes to a conclusion.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

Before commenting on the bill drafts, on behalf of both the Coalition and KCCI, I would like to thank the Chairman and the members of the committee, and the staff in both the Legislative Research Department and the Revisor's Office, for the great amount of time and energy that has been devoted to this interim study. I think that at the outset, the committee had a major time management problem, since the possible scope of the study was extremely broad, but only a limited time was available. Particular thanks are due to you, Mr Chairman, caught as you were in the center of a frequently divided committee. You have worked hard to steer an even, responsible course.

Turning to the drafts, as the Coalition does not have a position on the insurance regulation bills, we have no comment to make in that area.

The punitive damage bill, 7 RS 0021, is excellent. The Coalition feels that punitive damages, though partaking considerably of elements of the criminal law, have a legitimate place on the civil side of our justice system. However, among perfectly responsible business and professional citizens, there is a spreading feat that unjustified punitive awards, in unreasonable amounts, will be imposed, as they have been around the country. The result is an increasing sense of fear and paralysis, resulting in products and services never seeing the light of day, or being withdrawn from the market.

The challenge, then, is to see to it that punitive damages are awarded only where they should be, and in amounts which punish but do not kill. The draft bill is an excellent one, containing as it does bifurcation, explicit criteria to be considered by the court in determining the amount of damages during the second phase of the trial, an elevated standard of proof that must be met by plaintiff, definitions of the conduct that gives rise to a punitives claim, and awarding of a substantial part of the judgment to the state for public purposes.

The only major constraint that is absent is an objective ceiling on punitive damages. That could be expressed as a multiple of compensatory damage (e.g., punitive damage could not exceed three times the amount of actual damages), a dollar ceiling,

and/or a formula that takes account of financial abilities. The medical malpractice reform adopted in 1985 contains a formula ceiling, plus an absolute ceiling of $3 million, and I would suggest that if this is a sound approach in the medmal area, then it is in other punitive damage claims too. It would provide further assurance that punitive damages will serve their legitimate purpose without being excessive.

Still, on balance this is a very good bill, and we hope it is recommended by the committee.

The itemized jury verdict draft, 7 RS 0037, is excellent. It will not only help assure that juries carefully think our damage decisions, but will aid judges in using their existing powers of additur and remittitur to increase or decrease excessive or inadequate awards.

The proposed limitation of liability of corporate directors in shareholder derivative suits, bill number 0037, is apparently identical to a similar enactment earlier this year in Delaware. We support it without reservation. Directors' and officers' liability insurance has been among the hardest hit during the current availability and cost crisis, and the threat of unlimited derivative liability is a major contributing factor. It's important to emphasize that this bill would not curtail anybody's rights. It simply permits, but doesn't require, corporate shareholders to limit their <u>own</u> right to sue directors on behalf of the corporation.

We also support number 0039, the pain and suffering cap bill. Providing some reasonable limit on this entirely subjective, though certainly real, kind of damage is perhaps the single most important "tort reform" that could be enacted at this time. Unlimited pain and suffering awards hinder the settlement of cases, and skew the pattern of compensation, sometimes undercompensating seriously injured people and overcompensating those with less serious injuries. As far as insurance considerations are concerned, the spectre of unlimited pain and suffering awards adversly impacts liability insurance more than any other element of current tort law, for the enormous increase in the size of tort awards nationally is substantially due to pain and

suffering verdicts. Enactment of a reasonable limitation would absolutely send a signal to the industry that Kansas is an hospitable environment in which to write affordable insurance at stable rates. The failure to enact such a bill would send the opposite message.

The bill in question, with its $250,000 cap, is reasonable and appropriate. It balances fairly the conflicting considerations of adequate compensation and a stable insurance climate. The amount of the cap is identical to the one already enacted in the medmal area, and is equally appropriate here. When combined with full redress for economic loss and other kinds of noneconomic damage it would assure injured people fair and adequate compensation.

I would note in passing that the cap is similar to one enacted last May in Colorado, except that in Colorado the court is authorized for good cause to raise the statutory maximum in particular cases.

The screening panel bill, number 0040, is perhaps an advance over current law, but so long as it does not clearly authorize the admission in evidence at trial of panel reports, I fear it would add to delay and cost with little or no effect in bringing about early resolution of claims. In its present form, it is substantially the same as the 1976 enactment in the medmal area. The inadmissibility of screening panel reports under that law was cited in the 1985-86 hearings as the reasons for the failure of that reform to achieve its purpose. We urge the committee to resolve the currently ambiguous language (which doesn't say expressly whether a report is admissible or not) to make it clear that reports are admissible, subject of course to the right to summon and cross-examine panel members at trial.

The Coalition also supports legislation to limit the liability of directors and officers of nonprofit organizations. Certainly this would include the charitable and educational organizations presently covered by the language of the two proposed bills, numbers 0050 and 0054. This is not strictly speaking a business issue, but it surely is a serious societal one as worthy charities find it ever more difficult to attract and retain good people on their boards.

At the same time, there are other kinds of nonprofit organizations that are also having similar problems. I refer especially to trade and labor organizations and the like including, yes, chambers of commerce, the kinds of organizations described in sections 501(c)(5) and (6). We have received reports that these types of organizations are also having difficulty. Again, we're not suggesting that such orgnizations should be immune, but only that their volunteers should be immune, except for intentional, reckless, or ratified actions.

We support draft 0044, the proposed period payment of judgments act. This draft is generally similar to the uniform act. It is comprehensive, anticipates forseeable contingencies, and certainly has our support.

Neither the Coalition nor KCCI has taken a specific position on the remaining civil justice reform bills: 0045 (restricting Tort Claims Act liability for certain quasi-judical and administrative actions); 0046 (amending the comparative negligence law to make it applicable to all kinds of damages, not just personal injury or property); and 0051 (limitations of liability for rendering of professional advice). However, they all attack very real and well-defined problems, and I have no doubt that if put to our membership, they would be endorsed.

Thank you once again. I will try to answer any questions that the committee may have.

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The $65 Million Malpractice Question

All New York loves a lottery, and the best game in town takes place in the courtroom. That's what Agnes Mae Whitaker, a victim of medical malpractice, discovered recently. She drew a jury that gave her $65 million — but it's not the kind of luck the rest of us should toast.

Ms. Whitaker's suffering is beyond dispute. The doctors at Lincoln Hospital failed to diagnose an intestinal constriction. The jury found that they so neglected its treatment that an infection developed, requiring removal of most of the small intestine. To cover the patient's lost earnings, past medical bills and the care she will continue to require, the jury awarded her $7 million. But that award — startling in itself — is dwarfed by the additional grant of $58 million for "pain and suffering."

That is where justice is lost to luck. By what measure could even such suffering be worth $58 million? What manner of life does the jury intend to confer on the ailing 56-year-old woman — and on her heirs, who suffered no injury whatever? Why should stupendous sums go to those who manage to fix legal blame on a source like the City of New York that can at least ostensibly "afford" to pay? Why should all other citizens ultimately bear its cost in inflated taxes and liability insurance premiums?

Hold on, say the malpractice lawyers. That huge award, perhaps the nation's largest to date, won't ever be paid. The city is already moving to have the trial judge set it aside, and if he doesn't, the appeals court will surely knock it down. Perhaps. But the public hears mostly about the initial $65 million, not the reduced amount eventually paid. That feeds the lottery mentality in a big way.

Patients rush to press even marginal claims. Lawyers eagerly take promising cases for contingency fees. Insurers, warned of how a jury's emotions might be inflamed, settle out of court for increasing amounts. And doctors perform costly, often unnecessary "defensive medicine."

Why not cool the lottery fever at a stroke by capping pain and suffering awards at a few hundred thousand dollars, as some states are doing? Governor Cuomo and the Democrats of the State Assembly have resisted that idea, saying no study has precisely quantified how such a cap would reduce costs. That's true. But there is broad agreement that a limit would, eventually and inevitably, have some beneficial effect. Ms. Whitaker's luck only dramatizes the need for trying it now.

5

WRITTEN TESTIMONY ON PROPOSED BILL 0054 and 0050 PERTAINING TO THE LIMITATION OF CIVIL LIABILITY OF DIRECTORS, OFFICERS AND VOLUNTEERS OF CERTAIN NON-PROFIT ORGANIZATIONS PRESENTED TO THE SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE

November 12, 1986

by

Gary D. McCallister
on behalf of the Kansas Trial Lawyers Association

Mr. Chairman, ladies and gentlemen of the committee, my name is Gary D. McCallister, a practicing attorney in the City of Topeka, Kansas, and I am appearing before your committee in behalf of the Kansas Trial Lawyers Association to present testimony concerning Proposed Bills 0054 and 0050 concerning the subject of limiting civil liability for directors, officers and volunteers of certain non-profit organizations. I would first like to thank the members of the committee for allowing us the opportunity to present our views concerning this proposed legislation.

At the outset, KTLA supports the concept of attempting to protect officers, directors and volunteers from certain claims of civil liability so as to enhance and encourage volunteer participation in appropriate charitable and other educational organizations without the fear of being exposed to personal civil liability. You, as members of this special committee in attempting to achieve this desirable end result, must be careful not to enact legislation providing carte blanche immunity to certain individuals from civil liability for negligent acts and omissions without considerable thought and analysis.

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COMMENTS CONCERNING PROPOSAL 7 RS 0054

This proposed bill creates carte blanche immunity for volunteers of charitable organizations possessing IRS 501(c)(3) status from their negligent acts and omissions. As stated above, this may well be a desirable result from a public policy standpoint, but it may also create many untoward results that certainly are not desirable from a public policy standpoint nor are they results that are likely to be intended by you who support this bill as it is presently drafted.

Lets consider two simple examples which arise from the negligent operation of a motor vehicle by a volunteer of a 501(c)(3) charitable organization and result in most unfortunate results for the victim.

Scenario No. 1. Assume the volunteer of a 501(c)(3) charitable organization is driving an automobile which picks up a member of the charitable organization to deliver the member to the charity's office to obtain services provided by the charity. On the way to the office of the charitable organization, the automobile is involved in a collision and two passengers are either killed or injured. The driver of the vehicle maintains an automobile liability policy in accordance with Kansas nofault laws, and the charitable organization does not maintain coverage of any kind.

Result: The proposed draft of the bill would provide blanket immunity for the negligent acts and omissions of a volunteer while serving in his capacity as an uncompensated volunteer for the charitable organization. Therefore, it is likely that the victims of the crash who were either killed or injured would not have any recourse against the driver or his insurance carrier because of his immunity from civil liability notwithstanding the existence of motor vehicle insurance.

Scenario No. 2. Assume a volunteer for a Kansas 501(c)(3) charitable organization, who is a Missouri resident and who is not required by state law to maintain automobile liability insurance, travels to Kansas in his automobile and once again picks up a member of the charitable organization to deliver him to the charity's office located in Kansas where he is to be provided charitable services. The car is involved in a crash and two passengers are either killed or injured. Further assume the charitable organization does not carry liability insurance.

Result: Under the proposed draft, there would be no source of recovery for the injured or deceased victims.

Our comments are not intended to suggest that the desired results of immunity cannot be achieved, but it becomes important to analyze the definitional sections of the bill with respect to what is encompassed within a "charitable organization" and the manner in which the immunity is granted to the uncompensated volunteer. We do not believe it is good public policy for the legislature to create additional risks of loss for a victim of negligent acts and omissions by the granting of improperly bestowed immunity for uncompensated volunteers, officers or directors. For this reason, we have prepared and proposed to you a redraft of this legislation which should avoid many of the pitfalls of the present draft.

The definition of charitable organization is redrafted to include an incentive for the charitable organization to be financially responsible so that appropriate losses as a result of volunteer negligence can be compensated. This is not a suggestion or form of mandatory insurance, but rather a specific grant of immunity to uncompensated volunteers of charitable organizations when the charitable organization has demonstrated

its willingness to be financially responsible for the negligent acts and omissions of its volunteers. A dis-incentive is provided to the charitable organization to exist without appropriate general liability insurance coverage which is readily available and, in most instances, is not too costly to afford. Please note, this general liability insurance type of insurance should not be confused with directors and officers liability insurance policies which are not readily available and in many instances are also too expensive for a charitable organization to afford. These will be addressed later with respect to Bill Proposal 7 RS 0050.

The definition section has also been drafted to exclude medical adult care homes and adult family homes as defined by statute.

Subsections (b) and (c) of the bill are redrafted to make sure that coverage under insurance policies required by state law or which otherwise exist for the benefit of any uncompensated volunteer are made available to the victim of negligent acts and omissions of the uncompensated volunteer. To the extent the volunteer is not insured or is uninsured above his personal policy limits, and recognizing the charitable organization provides general liability coverage, the immunity is provided for the volunteer and he is shielded from personal liability which is the purpose for the bill in the first instance. This directly resolves the situations described above in the two scenarios.

With the above modifications, KTLA supports the enactment of such legislation to provide limited civil immunity from civil liability for neligent acts and omissions of uncompensated volunteers.

COMMENTS CONCERNING BILL 7 RS 0050
(Directors and Officers Liability)

Many of the comments and pitfalls described above with respect to uncompensated volunteers liability and immunity issues extend to the area of providing immunity from civil liability for directors and officers of charitable organizations. In this regard, many charitable organizations have been confronted with the situation where directors and officers liability insurance is both unavailable and unaffordable. This has inhibited many people from becoming directly involved as a director and officer of a charitable organization which oridinarily is in great need of their participation.

Once again, the granting of immunity to such officers and directors must be done with caution. In this regard, KTLA has redrafted Proposed Bill 0050 and has included provisions which will not only protect directors and officers of charitable organizations from personal liability, but will likewise serve the interests of victims injured by those directors and officer's negligent acts and omissions where insurance is required by law or is otherwise available for the benefit of such victims. With the acceptance of the proposed amendments, KTLA believes Proposal 0050 should be enacted to encourage and assist charitable organizations to obtain the participation of highly qualified and willing participants as directors and officers of their organizations.

7 RS 0054

KTLA PROPOSED REDRAFT OF BILL 0054

PROPOSED BILL NO. _____

By Special Committee on Tort Reform and Liability Insurance

Re Proposal No. 29

AN ACT concerning civil procedure; limiting civil liability of volunteers of certain nonprofit organizations.

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

Section 1. (a) As used in this section:

(1) "Charitable organization" means those charitable or educational organizations exempt from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code of 1954, and which maintain liability insurance in minimum limits of $250,000/$500,000, but does not include medical care facilities as defined in K.S.A. 65-425 and amendments thereto, medical facilities as defined in K.S.A. 65-424(a) and amendments thereto, adult care homes as defined in K.S.A. 65-3501 et seq. and 39-923 et seq. and amendments thereto and adult family homes as defined in K.S.A. 39-1501 et seq. and amendments thereto.

(2) "Compensation" does not include actual and necessary expenses that are incurred by a volunteer in connection with the services that the volunteer performs for a charitable organization and that are reimbursed to the volunteer or otherwise paid.

(3) "Volunteer" means an officer, director, trustee or other person who performs services for a charitable organization but does not receive compensation, either directly or indirectly, for those services.

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(b) A volunteer is not liabile in damages in a civil action for acts or omissions as such a volunteer unless such conduct constitutes willful or wanton misconduct or intentionally tortious conduct, but only to the extent the volunteer is not required to be insured by law or is not otherwise insured against such acts or omissions.

(c) A volunteer is not liable in damages in a civil action for the actions or omissions of any of the officers, directors, trustees, employees or other volunteers of the charitable organization unless the volunteer authorizes, approves, ratifies or otherwise actively participates in that action or omission which constitutes willful or wanton misconduct or intentionally tortious conduct, but only to the extent the volunteer is not required to be insured by law or is not otherwise insured against such acts or omissions.

(d) Nothing in this section shall be construed to affect the liability of a charitable organization for damages caused by the negligent or wrongful act or omission of its volunteer and a volunteer's negligence or wrongful act or omission, when acting as a volunteer, shall be imputed to the charitable organization for the purpose of apportioning liability for damages to a third party pursuant to K.S.A. 60-258a and amendments thereto.

(e) The provisions of this act shall apply only to causes of action accruing on or after July 1, 1987.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

7 RS 0050

KTLA PROPOSED REDRAFT OF BILL 0050

PROPOSED BILL NO. _____

By Special Committee on Tort Reform and Liability Insurance

Re Proposal No. 29

AN ACT concerning civil procedure; limiting civil liability of directors and officers of certain non profit organizations.

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

Section 1. (a) Directors or officers of a charitable organization are not liable in a civil action for damages arising from their acts or omissions as individual directors or officers or as a board as a whole unless such conduct constitutes willful or wanton misconduct or intentionally tortious conduct, but only to the extent the directors and officers are not required to be insured by law or are not otherwise insured against such acts or omissions.

(b) Nothing in this section shall be construed to affect the liability of a charitable organization for damages caused by the negligent or wrongful acts or omissions of its directors or officers, and a director's or officer's negligence or wrongful act or omission, when acting as a director or officer, shall be imputed to the charitable organization for the purpose of apportioning liability for damages to a third party pursuant to K.S.A. 60-258a and amendments thereto.

(c) As used in this section, "charitable organization" means those charitable or educational organizations exempt from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code of 1954 and which maintains liability insurance in minimum limits of $250,000/$500,000.

(d) The provisions of this act shall apply only to causes of action accruing on or after July 1, 1987.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

bitrate; award held binding. Thompson v. Barber, 87 K. 692, 695, 125 P. 33.

8. Acts constituting misbehavior preventing rereference, considered. Whitehair v. Kansas Flour Mills Corp., 127 K. 877, 275 P. 190.

9. Award for something not submitted in claim constitutes "legal defect." Gillioz v. City of Emporia, 149 K. 539, 542, 548, 88 P.2d 1014.

10. Action to set aside award; grounds herein exclusive; hearing not trial *de novo*; unverified motion to set aside award, effect. Gillioz v. City of Emporia, 149 K. 539, 542, 88 P.2d 1014.

5-212. Proof by party enforcing award. In all cases, the party enforcing any award shall produce satisfactory proof to the court of the due execution of the submission or arbitration bond, and that the party refusing or neglecting to obey the award or umpirage hath been furnished with a true copy thereof, at least ten days before the term at which the application to enforce such award is made.

History: L. 1876, ch. 102, § 12; May 1; R.S. 1923; § 6-112.

5-213. Fees of arbitrators and umpires. Each person chosen and performing the duties of arbitrator or umpire under this act shall be entitled to receive one dollar ($1) per day for services; and every witness for attendance, and judge for administering oaths or affirmations, the same fees as are prescribed by law for other cases in the district court; which fees shall be taxed by the arbitrators, and inserted in their award or umpirage.

History: L. 1876, ch. 102, § 13; R.S. 1923, § 6-113; L. 1974, ch. 446, § 4; July 1.

Research and Practice Aids:

Arbitration and Award⇐41.

C.J.S. Arbitration and Award § 54.

CASE ANNOTATIONS

1. Failure of arbitrators to tax fees held mere irregularities. Hopper v. Fromm, 92 K. 142, 144, 141 P. 175.

Article 3.—LABOR DISPUTES

Revisor's Note:

Sections transferred from 6-114 to 6-123.

5-301 to 5-310.

History: L. 1886, ch. 28, §§ 1 to 10; R.S. 1923, §§ 6-114 to 6-123; Repealed, L. 1951, ch. 98, § 1; June 30.

Article 4.—UNIFORM ARBITRATION ACT

Law Review and Bar Journal References:

Review of 1973 legislative session, Robert F. Bennett, 42 J.B.A.K. 153, 154 (1973).

The Kansas version of the Uniform Arbitration Act, Robert Fowks, 43 J.B.A.K. 9 (1974).

Proposed medical malpractice legislation, Lee J. Dunn, Jr., 44 J.B.A.K. 199, 202 (1975).

5-401. Validity of arbitration agreement. A written agreement to submit any existing controversy to arbitration or a provision in a written contract, other than a contract of insurance or a contract between an employer and employees or between their respective representatives, to submit to arbitration any controversy, other than a claim in tort, thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

History: L. 1973, ch. 24, § 1; L. 1977, ch. 25, § 1; July 1.

Law Review and Bar Journal References:

"The Arbitrator: As a Punisher and as a Professional," Robert J. Fowks, 47 J.B.A.K. 7, 10 (1978).

Arbitration of contractural disputes, 17 W.L.J. 657, 663 (1978).

"So You Thought You Knew What a Tort Was," Prof Robert J. Fowks, 49 J.K.B.A. 31 (1980).

CASE ANNOTATIONS

1. Cited; act not retroactive; uninsured motorists arbitration clause invalid under law as applied. Clayton v. Alliance Mutual Casualty Co., 213 K. 84, 85, 515 P.2d 1115.

2. Arbitration Act not applicable to arbitration agreements made before July 1, 1973. City of Beverly v. White, Hamele & Hunsley, 224 K. 386, 580 P.2d 1321.

3. Cited; Federal Arbitration Act applies, interstate commerce; "claim in tort" arbitrable thereunder. R. J. Palmer Constr. Co. v. Wichita Band Instrument Co., 7 K.A.2d 363, 365, 642 P.2d 147 (1982).

4. Not applicable to arbitration clause in employment contract between school district and teachers bargaining unit. NEA-Topeka v. U.S.D. No. 501, 7 K.A.2d 529, 530, 531, 532, 644 P.2d 1006 (1982).

5. Agreement to arbitrate as part of state construction contract not void and unenforceable, arbitration award upheld. Evans Electrical Constr. Co. v. University of Kansas Med. Center, 230 K. 298, 303, 634 P.2d 1079 (1981).

5-402. Proceedings to compel or stay arbitration. (a) On application of a party showing an agreement described in K.S.A. 5-401, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or

So You Thought You Knew What a Tort Was?

by Prof. Robert J. Fowks

We became confident in our intellectual abilities when, after our first few weeks in law school, we discovered a tort was not some sort of confection. Expanding upon this bit of enlightenment, our legal knowledge grew until we could all recognize a tort when we saw one: because all torts involve money damages, unless of course, they involve injuctions; and every tort is a civil wrong, but it might be a statutory wrong, or absolute liability. But they all involve property damage or personal harm or . . . well, we know one when we see one. In any case, it's no piece of cake.

Kansas adopted the Uniform Arbitration Act July 1, 1973, and promptly made it nonuniform.[1] The Kansas version is similar to those passed by approximately 20 other states and the District of Columbia, with the major exception of the wording of the first section—the application—of the act. We added to two of the exceptions (contracts of insurance and labor agreements) a third—the proviso that parties may not contract for predispute arbitration of a complaint in tort. Only Arkansas has a similar provision.[2]

This third exception may well cause extensive litigation because the legislature neglected to define what they meant by a complaint in tort. A reading of the legislative history provides little help. The only solid reference to the addition of the phrase is at H. J. 340, March 8, 1973, and is limited to the notation the exception was added.

We will make some assumptions in trying to define "tort" as used in the arbitration statute. Since the prohibition concerns solely agreements to arbitrate future disputes, it is arguable that only a commercial enterprise will be involved. Private citizens are unlikely to contract except in a commercial setting, and then probably with a business rather than with another person. It is also unlikely that anyone would contract specifically, in advance of the act, to arbitrate what a layperson would consider a tort. That is, "A" would not agree with "B" to arbitrate any future automobile accidents or assaults between them. Therefore we seem to be left with agreements to arbitrate tort disputes arising out of a commercial contract.[3]

Given our stage for conflict, how will the court define a tort? By their rules of construction Kansas Courts attempt to interpret a statute in such a manner as to give meaning to the stated or apparent legislative intent[4] while remaining within the literal meaning of the words used, and still render it constitutionally understand-

1. KAN. STAT. ANN., 1978 Supp., 5-401 (1977).
2. UNIFORM ARBITRATION ACT, 7 UNIFORM LAWS ANNOTATED, (1979).

3. Fowks, R., Creedale R., *Kansas Arbitration and the Uniform Act*, 35 J.B.A.K. 307 (1967). See also, Goldberg, G. *The Agreement to Arbitrate*, THE PRAC. LAW. 61 (Mr. 1975).
4. *Eidem v. Farmers Ins. Co., Inc.*, 221 Kan. 415, 4, 560 P.2d 117, 122 (1977). *State v. Bunker*, 223 Kan. 386, 389, 559 P.2d 798, 801 (1977).

REMARKS BY

KANSAS INSURANCE DEPARTMENT

BEFORE THE

SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE

TOPEKA, KANSAS

NOVEMBER 12, 1986

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THE TERMS "EXCESS COVERAGE", "SURPLUS LINES" AND "NON-ADMITTED INSURANCE" ARE ALL TERMS DESCRIBING THE SAME THING -- THAT IS -- THE PLACEMENT OF COVERAGE WITH AN INSURER NOT LICENSED OR ADMITTED TO TRANSACT BUSINESS IN THE STATE WHERE THE RISK IS LOCATED. FOR WHATEVER IT IS WORTH, THE TERM "EXCESS COVERAGE" OR "SURPLUS LINES" STEMS FROM THE FACT THAT AMERICA'S DEMAND FOR INSURANCE PROTECTION HAS ALWAYS EXCEEDED THE CAPACITY PROVIDED BY COMPANIES DOMICILED IN THE UNITED STATES. CONSEQUENTLY, WHEN STATES BEGAN ENACTING LAWS REQUIRING THE LICENSING OF INSURERS AS A PREREQUISITE TO DOING BUSINESS, THERE WERE RISKS THAT COULD NOT OBTAIN AN ADEQUATE AMOUNT OF COVERAGE FROM LICENSED INSURERS. THIS THEN LED TO A MODIFICATION OF STATE LAWS WHICH PERMITTED INSURANCE TO BE PLACED IN A NON-ADMITTED COMPANY BUT RETAINED SOME CONTROL OVER THE TRANSACTION.

THIS CONTROL WAS RETAINED BY PERMITTING INSURANCE TO BE PLACED WITH A NON-ADMITTED COMPANY ONLY WHEN IT IS DONE BY A RESIDENT INSURANCE AGENT THAT HAS RECEIVED SPECIFIC APPROVAL TO DO SO IN THE FORM OF AN EXCESS COVERAGE LICENSE. OBVIOUSLY, IT IS DIFFICULT TO EXERCISE ANY DIRECT REGULATORY CONTROL OVER AN INSURANCE COMPANY

THAT IS NOT SUBJECT TO THE LAWS OF THE CONCERNED STATE. BECAUSE OF THIS DIFFICULTY, STATES -- INCLUDING KANSAS -- PLACE LIMITATIONS ON THE EXCESS COVERAGE AGENT'S ABILITY TO PLACE INSURANCE WITH A NON-ADMITTED COMPANY.

THE PROCEDURES FOR OBTAINING AN EXCESS COVERAGE AGENT'S LICENSE AND THE REQUIREMENTS APPLICABLE TO THE PLACEMENT OF INSURANCE WITH A NON-ADMITTED INSURER ARE CONTAINED IN SECTIONS 40-246A, B, C, D, E AND F OF THE KANSAS INSURANCE STATUTES. VERY BRIEFLY, AN AGENT MUST HAVE BEEN A LICENSED RESIDENT AGENT OF THIS OR SOME OTHER STATE FOR AT LEAST 3 CONSECUTIVE YEARS IMMEDIATELY PRECEDING HIS OR HER APPLICATION FOR AN EXCESS COVERAGE LICENSE. ONCE LICENSED, THE EXCESS COVERAGE AGENT MUST OBTAIN THE WRITTEN CONSENT OF THE PROSPECTIVE INSURED PRIOR TO PLACING THE RISK WITH A NON-ADMITTED COMPANY -- MUST PROVIDE THE PROSPECTIVE INSURED INFOPMATION REGARDING THE FACT THAT THE INSURER'S FINANCIAL CONDITION, POLICY FORMS AND RATES ARE NOT SUBJECT TO REGULATION BY THE INSURANCE COMMISSIONER -- MUST ADVISE THE INSURED THAT PROTECTION OF THE INSURANCE GUARANTY FUND DOES NOT APPLY TO COVERAGE PROVIDED BY A NON-

ADMITTED COMPANY -- AND ANY POLICY ISSUED IS TO BE STAMPED WITH A NOTICE REITERATING THESE CAVEATS. FINALLY, INSURANCE IS TO BE PLACED ONLY WITH A COMPANY THAT IS ON A LIST OF COMPANIES PREPARED BY THE INSURANCE DEPARTMENT. COMPANIES ON THE LIST ARE THOSE WHO HAVE FILED AN ANNUAL STATEMENT WITH THE DEPARTMENT WHICH SHOWS THE COMPANY MEETS CERTAIN FINANCIAL REQUIREMENTS -- $1,500,000 CAPITAL AND SURPLUS IN MOST CASES -- OR HAS FILED THEIR ANNUAL STATEMENT WITH THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AND APPEARS ON THE NON-ADMITTED INSURER LIST PUBLISHED BY THAT ORGANIZATION.

THESE STATUTES AND THESE REQUIREMENTS RESULTED FROM ACTION TAKEN BY THE 1982 LEGISLATURE AND HAVE THEREFORE BEEN SUBJECTED TO CLOSE LEGISLATIVE SCRUTINY FAIRLY RECENTLY. AT THE SAME TIME, HOWEVER, WE MUST RECOGNIZE THAT THIS SCRUTINY TOOK PLACE PRIOR TO THE INSURANCE MARKET CONDITIONS WHICH LED TO CREATION OF THIS COMMITTEE. AS A RESULT, THERE ARE SEVERAL FACTORS INVOLVING THE NON-ADMITTED MARKET THAT ARE EITHER MORE NOTICEABLE THAN THEY WERE IN 1982 OR HAVE TAKEN ON A LITTLE DIFFERENT MEANING. AS I DISCUSS THESE, I WILL NOT DO SO

IN ANY ORDER OF SIGNIFICANCE SO THE FACT THAT I START WITH ONE AND END WITH ANOTHER HAS NO MEANING AS FAR AS WE ARE CONCERNED.

FIRST, THERE IS A MORE VISIBLE TENDENCY FOR ADMITTED INSURERS TO OWN OR BE AFFILIATED WITH ANOTHER INSURER WHICH DOES BUSINESS ON A NON-ADMITTED BASIS. SOME OF THESE ARE IDENTIFIED ON THE ATTACHED MATERIAL BUT I DON'T WANT TO LEAVE THE IMPRESSION THAT THIS IS A COMPLETE LIST -- THESE ARE JUST T' 'NES MEMBERS OF THE STAFF WERE IMMEDIATELY AWARE OF. THIS PRESENTS SOME VERY REAL AND VERY DIFFICULT REGULATORY PROBLEMS THAT HAVE A DIRECT IMPACT ON INSURANCE BUYERS. THE REGULATORY DIFFICULTY STEMS FROM THE SIMPLE FACT THAT INSURANCE CONTRACTS AND MOST RATES UTILIZED BY ADMITTED INSURERS ARE SUBJECT TO PRIOR APPROVAL BY THE COMMISSIONER WHILE THOSE USED BY NON-ADMITTED INSURERS ARE NOT. CONSEQUENTLY, THE REGULATOR IS SOMETIMES CAUGHT BETWEEN A ROCK AND A HARD PLACE BECAUSE DISAPPROVAL OF A PARTICULAR CONTRACT DOES NOT PREVENT ITS SALE IN KANSAS. AND, NOT ONLY CAN THE DISAPPROVED PRODUCT BE SOLD BUT THE CONSUMER IS EXPOSED TO A HIGHER PRICE, A LACK OF GUARANTY FUND PROTECTION IN THE

EVENT OF INSOLVENCY AND SIGNIFICANT DIFFICULTIES IN THE EVENT OF A DISPUTE BECAUSE OF THE INACCESSABILITY OF THE INSURANCE COMPANY.

ANOTHER FACTOR THAT FREQUENTLY RAISES QUESTIONS IS THE PROVISION IN THE STATUTE WHICH STATES: "MERE RATE DIFFERENTIAL SHALL NOT BE GROUNDS FOR PLACING A PARTICULAR RISK IN A NON-ADMITTED CARRIER WHEN AN ADMITTED CARRIER WOULD ACCEPT SUCH RISK AT A DIFFERENT RATE. THIS PROVISION IS LEGISLATIVE CONFIRMATION THAT EXCESS COVERAGE LAWS WERE ORIGINALLY DESIGNED TO ACCOMMODATE AMOUNTS OF COVERAGE -- LIMITS OF LIABILITY -- THAT COULD NOT BE ACCOMMODATED BECAUSE OF THE CAPACITY LIMITATIONS OF THE ADMITTED MARKET. IT ALSO IS DESIGNED TO ENCOURAGE RETENTION OF THE NON-ADMITTED MARKET AS A "LAST RESORT" MARKET OPTION AS OPPOSED TO A COMPETITIVE MARKET THAT IS UNFETTERED BY REGULATION. THE PURPOSE THE SUBJECT PROVISION IS INTENDED TO SERVE IS WELL-FOUNDED AND CERTAINLY IF THIS RESTRICTION WERE TO BE REMOVED, THE REGULATORY REQUIREMENTS APPLICABLE TO ADMITTED INSURERS WOULD HAVE TO BE RECONSIDERED. OTHERWISE, THOSE WHO REFUSE TO SUBJECT THEMSELVES TO REGULATORY OVERSIGHT OR CANNOT QUALIFY FOR ADMISSION WOULD HAVE AN UNFAIR COMPETITIVE ADVANTAGE. NEVERTHELESS,

INSURANCE BUYERS ARE NOT EASILY PERSUADED THAT PROHIBITING THE NON-ADMITTED MARKET FROM BEING USED SOLELY BECAUSE OF PRICE CONSIDERATIONS IS IN THEIR BEST INTEREST. WHEN FACED WITH A SIGNIFICANT PREMIUM INCREASE THAT COULD BE AVOIDED BY USE OF THE NON-ADMITTED MARKET, THE VIRTUES OF THIS PROHIBITION BECOME VERY UNCLEAR TO THE PERSON PAYING THE PREMIUM TO SAY THE LEAST.

THE FINAL FACTOR THAT HAS BEEN RESPONSIBLE FOR SOME CONSTERNATION ON THE PART OF INSURANCE BUYERS ARE THE TAX PROVISIONS THAT APPLY TO POLICIES PLACED IN THE NON-ADMITTED MARKET. FIRST, THE TAX RATE ON PREMIUMS WRITTEN BY A NON-ADMITTED INSURER ARE 4% OF THE GROSS PREMIUMS WHEREAS THE PREMIUM TAX RATE ON BUSINESS WRITTEN BY A DOMESTIC COMPANY IS 1% AND BY AN ADMITTED FOREIGN OR ALIEN COMPANY 2%. IN ADDITION, THE TAX IS INCLUDED IN THE PREMIUM CHARGED BY ADMITTED COMPANIES BUT IS A SEPARATE ADD-ON AMOUNT WITH RESPECT TO POLICIES PLACED BY AN EXCESS COVERAGE AGENT. IN OTHER WORDS, AN INSURANCE BUYER THAT IS REQUIRED TO USE A NON-ADMITTED COMPANY BECAUSE OF AN INABILITY TO PURCHASE DESIRED COVERAGE FROM AN ADMITTED INSURER WILL, IN ESSENCE, PAY 4% MORE FOR THE SAME COVERAGE

PLUS BEING EXPOSED TO THE UNCERTAINTIES OF THE NON-ADMITTED MARKET. AND, IF AN INSURED KNOWINGLY PURCHASES INSURANCE FROM A NON-ADMITTED COMPANY WITHOUT GOING THROUGH AN EXCESS COVERAGE AGENT, K.S.A. 40-246A PROVIDES THAT THEY SHALL BE PERSONALLY LIABLE FOR DOUBLE THE AMOUNT OF TAX DUE.

THIS IS AN ABBREVIATED DESCRIPTION OF THE NON-ADMITTED INSURANCE MARKET AS WELL AS A DESCRIPTION OF SOME OF THE MORE SIGNIFICANT FACTORS THAT HAVE BEEN OF PARTICULARLY NOTICEABLE IMPACT DURING THE RECENT MARKET SITUATION. ATTACHED TO MY STATEMENT IS DATA REGARDING THE AMOUNT OF PREMIUMS, TAXES AND OTHER INFORMATION THAT SHOWS HOW MUCH BUSINESS IS WRITTEN IN COMPANIES NOT ADMITTED TO KANSAS. AS YOU CAN SEE, THIS IS A SIGNIFICANT MARKET AND ONE THAT WAS SHOWING MATERIAL GROWTH EVEN BEFORE THE AFFORDABILITY/ AVAILABILITY SITUATION AROUSED CONCERN.

1. Number of Companies on Non-Admitted Insurers List
   We have had a total of 286 since we began maintaining the list.
   deleted 73 over the years
   Total as of 11-5-86 213

2. Number of Excess Lines Agents in Kansas as of Nov. 5, 1986
   276.

3. Amount of premium by line
   See attached for the years 1983 and 1984.
   (1985 is not available)

4. Amount of tax --

Premium tax collected for year 1985 (to 11-5-86)	$1,694,880.10
" " " " " 1984	$ 831,422.26
" " " " " 1983	$ 675,183.04

5. Admitted companies with Excess Lines Companies:

Admitted	Excess Lines Co.
Hartford Companies	First State Ins. Co. Hartford Ins. Co. of The S.E. Nutmeg
Sentry	United Capitol
National Indemnity	Scottsdale
Empire Fire & Marine	National Fire & Marine
Interstate Indemnity	Interstate Fire & Casualty
Ins. Co. of Evanston	Evanston Ins. Co.
International Insurnace Co.	International Surplus Lines
Midland Insurance Co.	Midland Property & Casualty
Safeco Insurance Co. of America	Safeco Surplus Lines Ins. Co.
Home Insurance & Home Indemnity	Home Ins. Co. of Illnois
AIG	Lexington Ins. Co.
Northland Ins. Co.	Northfield Ins. Co.
Reliance Ins. Co.	Reliance Ins. Co. of Illinois
(Royal Ins. Co. (Farmers & Marchants Ins. Co. (Tri-State Ins. Co. (Midwestern Ins. Co.	Royal Surplus
Monarch Ins. Co. of Ohio	General Star Indemnity Co.
Rockwood Ins. Co.	Rockwood Ins. Co. of Illinois

Attachment 10

DATE 12/31/83

KANSAS INSURANCE DEPARTMENT
EXCESS LINES PREMIUM TAX REPORT
BY COVERAGE TYPE
FOR CALENDAR YEAR 1983

COVERAGE TYPE		# OF AGENTS	# OF POLICIES	NET PREMIUM CHARGED	NET PREMIUM TAX PAID	PENALTIES PAID
00000		1	1	.00	.00	.00
010DF	DWELLING FIRE	13	230	133,527.05	5,048.91	20.00
020CF	COMMERCIAL FIRE	59	270	2,503,514.83	103,367.84	4,762.28
0280		1	1	1,250.00	50.00	.00
030EC	EXTENDED COVERAGE	1	2	4,840.00	195.60	.00
040OA	OTHER ALLIED LINES	18	30	54,442.97	2,093.66	.00
050HO	HOMEOWNERS	2	33	9,379.00	375.16	.00
060MP	COMMERCIAL MULTI-PERIL	31	83	2,400,674.60	96,090.13	.00
070XP	EXCESS PROPERTY COVERAGE	4	8	22,488.00	900.52	.00
0900M	OCEAN MARINE	1	1	335.00	13.40	.00
100IL	INLAND MARINE	37	278	864,445.69	34,527.61	976.25
100IM		1	1	4,700.00	188.00	.00
110HW	HOW INSURANCE COMPANY	1	1	287,190.00	11,487.60	.00
140PP	PRIVATE PASSENGER AUTO-ALL	24	127	85,273.99	3,420.92	726.52
150CA	COMMERCIAL AUTO-ALL	56	681	1,241,671.14	49,333.31	669.20
160AC	AIRCRAFT	19	75	2,747,767.88	111,482.93	383.84
170CL	CARGO LIABILITY	10	44	21,001.00	845.22	.00
180WC	WORKERS COMPENSATION	1	1	16,684.00	667.33	.00
210FI	FIDELITY	3	10	343,007.50	13,720.00	.00
220SU	SURETY	2	2	4,946.00	197.84	.00
230BR	BURGLARY, THEFT & ROBBERY	4	5	1,571.00	57.76	.00
240GS	GLASS	2	3	273.00	10.92	.00
250EL	PRODUCTS LIABILITY	33	77	1,776,649.50	71,176.42	.00

KANSAS INSURANCE DEPARTMENT
EXCESS LINES PREMIUM TAX REPORT
BY COVERAGE TYPE
FOR CALENDAR YEAR 1983

DATE 12/31/83

COVERAGE TYPE		# OF AGENTS	# OF POLICIES	NET PREMIUM CHARGED	NET PREMIUM TAX PAID	PENALTIES PAID
260MM	MEDICAL MALPRACTICE	19	210	68,023.25	2,755.25	10,057.60
261PR	PROFESSIONAL LIABILITY	21	77	142,658.50	5,707.70	36.00
270GL	GEN.LIAB.-OTHER THAN EXCESS	76	770	792,649.23	31,893.16	.00
280EO	ERRORS & OMISSIONS -D&O-	88	559	1,966,026.31	69,521.36	1,095.60
290GL		1	1	500.00	21.00	.00
290XL	EXCESS LIABILITY	57	279	957,121.97	38,091.65	1,115.60
300AH	ACCIDENT & HEALTH	5	33	501,102.79	20,044.12	.00
310OT	OTHER	25	65	52,425.08	1,897.72	291.65
	TOTAL	616	3,958	17,006,939.28	675,183.04	20,134.54

DATE 12/3[illegible]/84

KANSAS INSURANCE DEPARTMENT
EXCESS LINES PREMIUM TAX REPORT
BY COVERAGE TYPE
FOR CALENDAR YEAR 1984

COVERAGE TYPE		# OF AGENTS	# OF POLICIES	NET PREMIUM CHARGED	NET PREMIUM TAX PAID	PENALTIES PAID
00000		1	1	.00	.00	.00
010DF	DWELLING FIRE	19	498	339,687.50	13,586.25	92.96
020CF	COMMERCIAL FIRE	34	174	434,849.52	16,338.58	2,209.02
020CP		1	1	441.00-	17.64-	.00
020EC		1	1	1,834.00	73.36	.00
030EC	EXTENDED COVERAGE	4	9	19,819.00	793.76	.00
0400A	OTHER ALLIED LINES	5	6	28,733.13	766.47	5.66
050HO	HOMEOWNERS	3	59	17,194.00	692.56	.00
060MP	COMMERCIAL MULTI-PERIL	32	122	1,743,651.65	69,747.90	2,289.34
070XP	EXCESS PROPERTY COVERAGE	1	2	34,185.00	1,367.40	.00
100IL	INLAND MARINE	7	8	25,314.02	1,012.14	343.00
100IM	INLAND MARINE	34	290	2,347,754.19	93,912.84	95.92
130BM	BOILER & MACHINERY	4	6	399,911.00	15,996.52	.00
140PP	PRIVATE PASSENGER AUTO-ALL	22	217	199,250.52	7,973.97	.00
150CA	COMMERCIAL AUTO-ALL	49	356	704,788.44	28,183.18	6.00
160AC	AIRCRAFT	14	65	5,958,199.20	238,328.37	5,772.23
170CL	CARGO LIABILITY	10	32	17,349.00	694.96	.00
190WC	WORKERS COMPENSATION	2	3	21,017.00	840.68	.00
210FI	FIDELITY	1	1	1,800.00	72.00	.00
220SU	SURETY	4	9	1,424,386.31	56,975.46	.00
230BG	BURGLARY, THEFT & ROBBERY	5	6	5,832.00	233.28	.00
240PL	PRODUCTS LIABILITY	15	32	311,967.00	12,478.68	860.60
250MM	MEDICAL MALPRACTICE	14	103	37,490.80	1,475.76	.00

DATE 12/31/84

KANSAS INSURANCE DEPARTMENT
EXCESS LINES PREMIUM TAX REPORT
BY COVERAGE TYPE
FOR CALENDAR YEAR 1984

COVERAGE TYPE		# OF AGENTS	# OF POLICIES	NET PREMIUM CHARGED	NET PREMIUM TAX PAID	PENALTIES PAID
261MM		2	7	4,750.00	189.00	.00
261PL		1	3	16,980.00	679.20	.00
261PR	PROFESSIONAL LIABILITY	39	218	1,168,255.86	46,730.13	263.40
270GL	GEN.LIAB.-OTHER THAN EXCESS	98	1,054	4,263,645.21	91,885.02	1,312.46
280EO	ERRORS & OMISSIONS -D&O-	62	366	822,620.34	32,905.85	3,127.41
280EO		1	1	70.00	2.80	.00
290XL	EXCESS LIABILITY	70	333	1,439,780.98	57,615.03	2,079.11
300AH	ACCIDENT & HEALTH	11	65	911,054.98	36,441.29	300.00
310OT	OTHER	27	91	86,136.01	3,447.44	.00
	TOTAL	593	4,146	~~22,707,865.66~~ 22,793,063.16	831,422.26	18,696.51

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		DIRECT PREMIUMS WRITTEN	DIRECT PREMIUMS EARNED	DIRECT LOSSES PAID	DIRECT LOSSES INCURRED	PREM WRIT TO LOSS PAID	PREM EARN TO LOSS INCR
1.1	FIRE	41,614,912	35,979,858	12,396,461	11,981,573	29.8	33.3
1.2	CREDIT FIRE	74,120	65,699	2,507	2,311	3.4	3.5
2.	EXTENDED COVERAGE	25,388,549	24,426,655	12,427,818	12,900,770	49.0	52.8
3.	OTHER ALLIED LINES	8,694,879	8,097,414	7,847,596	7,580,945	90.3	93.6
4.	HOMEOWNERS MULTIPLE PERIL	167,327,035	163,515,143	107,051,785	109,817,916	64.0	67.2
5.	COMMERCIAL MULTIPLE PERIL	126,911,473	111,814,431	52,678,713	65,125,070	41.5	58.2
6.	EARTHQUAKE	229,079	214,907	572,533	521,797	249.9	242.8
7.1	GROWING CROPS ---CROP-HAIL	29,509,831	29,152,732	14,457,084	14,422,121	49.0	49.5
7.2	ADDITIONAL PERILS ON GROWING CROPS	13,650,126	13,650,126	12,907,127	13,577,213	94.6	99.5
8.	OCEAN MARINE	1,104,802	965,258	726,169	225,342	65.7	23.3
9.	INLAND MARINE	50,891,183	46,348,697	19,287,572	20,108,622	37.9	43.4
10.	FARMOWNERS	35,691,737	34,844,768	23,385,978	23,507,103	65.5	67.5
11.	MEDICAL MALPRACTICE	24,942,818	21,831,814	7,351,273	12,153,365	29.5	55.7
12.	LIVESTOCK MORTALITY	25,156	28,496	27,380	12,112	108.8	42.5
13.	CARGO LIABILITY	129,518	149,596	189,775	186,439	146.5	124.6
14.	GROUP ACCIDENT AND HEALTH	24,277,880	24,369,774	19,628,171	21,311,325	80.8	87.4
15.1	CREDIT A & H -GROUP & INDIVIDUAL-	319,886	311,689	86,100	158,604	26.9	50.9
15.2	COLLECTIVELY RENEWABLE A & H	324,886	348,496	137,669	212,905	42.4	61.1
15.3	NON-CANCELLABLE A & H	70,953	71,919	19,576	24,621	27.6	34.2
15.4	GUARANTEED RENEWABLE A & H	5,053,367	5,087,381	2,838,045	2,854,634	56.2	56.1
15.5	NON-RENEWABLE FOR STATED REASONS ONLY	11,193,410	11,481,837	5,837,651	7,074,095	52.2	61.6
15.6	OTHER ACCIDENT ONLY	1,006,878	981,927	344,016	391,732	34.2	39.9
15.7	ALL OTHER A & H	7,525,997	7,765,562	4,729,415	5,129,049	62.8	66.0
16.	WORKMENS COMPENSATION	172,985,620	170,955,138	120,755,675	147,438,366	69.8	86.2
17.1	LIABILITY OTHER THAN AUTO -B.I.-	81,361,968	70,286,052	19,559,350	59,779,857	24.0	85.1
17.2	LIABILITY OTHER THAN AUTO -P.D.-	19,745,209	16,115,569	6,420,134	11,324,270	32.5	70.3
17.3	PRODUCTS LIABILITY -B.I.-	16,947,609	7,667,297	4,717,643	11,230,614	27.8	146.5
17.4	PRODUCTS LIABILITY -P.D.-	10,939,935	5,055,526	2,477,057	6,714,087	22.6	132.8
18.	MISCELLANEOUS	832,883	376,480	336,815	349,158	40.4	92.7
19.1A	P.P. AUTO LIABILITY -R.B.I.-	118,165,574	114,585,096	69,165,986	83,375,269	58.5	72.8
19.1B	P.P. AUTO LIABILITY -P.I.P-	29,752,514	28,558,531	21,524,312	24,372,447	72.3	85.3
19.1C	P.P. AUTO LIABILITY -P.D.-	82,022,756	79,792,772	58,009,568	60,871,725	70.7	76.3
19.2A	COM. AUTO LIABILITY -R.B.I.-	56,602,671	49,500,162	22,931,299	32,485,223	40.5	65.6
19.2B	COM. AUTO LIABILITY -P.I.P.-	8,615,906	7,471,877	5,496,070	8,676,356	63.8	116.1
19.2C	COM. AUTO LIABILITY -P.D.-	20,451,375	17,689,317	15,257,602	16,736,547	74.6	94.6
20.	FLOOD	4,729	2,768	0	117	.0	4.2
21.1	P.P. AUTO. PHY. DAM.	223,407,293	216,635,843	149,216,591	152,850,454	66.8	70.6
21.2	COM. AUTO. PHY. DAM.	57,680,737	53,545,247	31,843,942	31,876,764	55.2	59.5
22.1	AIRCRAFT LIAB.	8,816,837	8,247,956	16,267,354	15,939,222	184.5	193.3
22.2	AIRCRAFT PHYS. DAMAGE	8,855,959	8,583,174	5,088,934	4,760,700	57.5	55.5
23.1	FIDELITY	6,619,519	6,146,165	5,206,991	4,102,503	78.7	66.7
23.2	SURETY	25,601,878	15,872,535	14,085,179	15,576,320	55.0	98.1
25.	GLASS	370,789	359,392	84,554	69,172	22.8	19.2
26.	BURGLARY AND THEFT	988,630	957,600	221,921	269,208	22.4	28.1
27.	BOILER AND MACHINERY	4,402,114	3,942,619	763,240	837,435	17.3	21.2
28.	CREDIT -OTHER THAN A & H-	1,010,870	874,681	795,043	765,598	78.6	87.5
29.	TITLE	7,527,700	6,244,542	682,783	977,634	9.1	15.7
30.	MORTGAGE GUARANTY	12,677,765	11,674,721	9,519,069	12,445,791	75.1	106.6
	TOTAL	1,552,427,315	1,442,645,239	885,357,526	1,033,104,501	57.0	71.6

1984

		DIRECT PREMIUMS WRITTEN	DIRECT PREMIUMS EARNED	DIRECT LOSSES PAID	DIRECT LOSSES INCURRED	PREM WRIT TO LOSS PAID	PREM EARN TO LOSS INCR
1.1	FIRE	33,432,488	31,495,979	13,117,584	12,531,154	39.2	39.8
1.2	CREDIT FIRE	38,852	14,535	4,382	2,824	11.3	19.4
2.	EXTENDED COVERAGE	20,820,842	21,176,272	10,841,502	9,246,214	52.1	43.7
3.	OTHER ALLIED LINES	6,036,883	6,326,107	3,038,579	3,193,420	50.3	50.5
4.	HOMEOWNERS MULTIPLE PERIL	161,410,706	158,875,935	98,783,131	97,999,758	61.2	61.7
5.	COMMERCIAL MULTIPLE PERIL	92,493,508	88,334,162	51,719,716	54,963,556	55.9	62.2
6.	EARTHQUAKE	215,163	245,117	65,283	101,519	30.3	41.4
7.1	GROWING CROPS --CROP-HAIL	29,825,044	29,862,928	15,766,169	16,230,175	52.9	54.3
7.2	ADDITIONAL PERILS ON GROWING CROPS	8,595,943	8,595,943	19,509,308	19,793,652	227.0	230.3
8.	OCEAN MARINE	1,141,753	1,153,386	849,182	1,999,691	74.4	173.4
9.	INLAND MARINE	41,422,166	39,350,492	20,747,084	22,941,575	50.1	58.3
10.	FARMOWNERS	34,106,645	33,770,588	26,931,133	27,598,535	79.0	81.7
11.	MEDICAL MALPRACTICE	17,339,930	14,809,255	8,083,527	14,649,924	46.6	98.9
12.	LIVESTOCK MORTALITY	100,724	413,819	496,854	540,383-	274.9	130.6-
13.	CARGO LIABILITY	37,421	35,117	6,747	11,450	18.0	32.6
14.	GROUP ACCIDENT AND HEALTH	20,266,724	19,285,110	16,972,421	16,252,659	83.7	84.3
15.1	CREDIT A & H -GROUP & INDIVIDUAL-	614,221	611,787	349,289	152,466-	56.9	24.9-
15.2	COLLECTIVELY RENEWABLE A & H	236,578	263,358	157,121	117,142	66.4	44.5
15.3	NON-CANCELLABLE A & H	61,294	61,804	21,279	22,177	34.7	35.9
15.4	GUARANTEED RENEWABLE A & H	4,732,804	4,698,857	2,840,727	3,045,438	60.0	64.8
15.5	NON-RENEWABLE FOR STATED REASONS ONLY	10,584,045	9,972,546	5,177,633	5,271,070	48.9	52.9
15.6	OTHER ACCIDENT ONLY	1,230,826	934,259	156,898	147,366	12.7	15.8
15.7	ALL OTHER A & H	8,091,803	7,725,674	4,891,950	4,903,638	60.5	63.5
16.	WORKMENS COMPENSATION	141,097,428	140,223,325	106,701,375	125,520,390	75.6	89.5
17.1	LIABILITY OTHER THAN AUTO -B.I.-	44,655,011	42,117,265	26,205,379	39,267,021	58.7	93.2
17.2	LIABILITY OTHER THAN AUTO -P.D.-	18,312,976	17,316,139	8,348,499	11,441,157	45.6	66.1
17.3	PRODUCTS LIABILITY -B.I.-	7,674,008	7,575,457	4,221,780	7,089,391	55.0	93.6
17.4	PRODUCTS LIABILITY -P.D.-	4,426,451	4,466,856	2,015,878	2,408,570	45.5	53.9
18.	MISCELLANEOUS	673,636	473,557	249,545	241,708	37.0	51.0
19.1A	P.P. AUTO LIABILITY -B.B.I.-	102,176,305	101,708,945	55,722,238	71,094,855	54.5	69.9
19.1B	P.P. AUTO LIABILITY -P.I.P-	26,830,222	26,906,735	18,142,438	18,976,090	67.6	70.5
19.1C	P.P. AUTO LIABILITY -P.D.-	84,702,862	83,469,729	61,751,128	63,649,143	72.9	76.3
19.2A	COM. AUTO LIABILITY -B.B.I.-	39,632,687	39,260,840	25,210,264	32,189,404	63.6	82.0
19.2B	COM. AUTO LIABILITY -P.I.P.-	2,313,980	2,225,525	918,948	830,247	39.7	37.3
19.2C	COM. AUTO LIABILITY -P.D.-	15,604,420	14,850,738	13,901,722	15,328,570	89.1	103.2
21.1	P.P. AUTO. PHY. DAM.	200,629,861	197,434,216	129,813,282	131,319,584	64.7	66.5
21.2	COM. AUTO. PHY. DAM.	46,193,108	44,275,876	30,642,766	31,877,942	66.3	72.0
22.1	AIRCRAFT LIAB.	6,167,817	4,584,051	12,763,446	11,310,377	206.9	246.7
22.2	AIRCRAFT PHYS. DAMAGE	6,834,400	6,837,691	8,712,062	5,423,241	127.5	79.3
23.1	FIDELITY	5,786,338	5,723,239	1,687,674	4,358,552	29.2	76.2
23.2	SURETY	22,249,687	14,174,651	8,741,436	12,073,179	39.3	85.2
25.	GLASS	500,468	551,281	109,424	101,887	21.9	18.5
26.	BURGLARY AND THEFT	914,929	1,047,609	334,434	329,279	36.6	31.4
27.	BOILER AND MACHINERY	3,186,798	2,796,957	746,329	812,757	23.4	29.1
28.	CREDIT -OTHER THAN A & H-	845,151	883,449	452,913	1,010,520	53.6	114.4
29.	TITLE	7,911,788	7,393,761	207,890	717,170	2.6	9.7
30.	MORTGAGE GUARANTY	10,858,683	9,809,873	8,077,209	10,179,363	74.4	103.8
	TOTAL	1,293,095,377	1,254,120,795	826,205,458	907,880,485	63.9	72.4

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		DIR. PREMIUMS WRITTEN	DIRECT PREMIUMS EARNED	DIRECT LOSSES PAID	DIRECT LOSSES INCURRED	PREM WRIT TO LOSS PAID	PR EARN TO LOSS INCR
1.1	FIRE	28,947,854	32,007,170	14,703,626	13,835,200	50.8	43.2
1.2	CREDIT FIRE	26,397	25,255	2,079	2,000	7.9	8.2
2.	EXTENDED COVERAGE	22,369,997	23,429,896	6,749,378	6,740,937	30.2	28.8
3.	OTHER ALLIED LINES	4,809,241	4,822,059	1,716,413	1,412,194	35.7	29.3
4.	HOMEOWNERS MULTIPLE PERIL	156,870,311	152,158,734	81,196,596	85,624,450	51.8	56.3
5.	COMMERCIAL MULTIPLE PERIL	81,590,814	79,946,326	40,559,210	41,932,134	49.7	52.5
6.	EARTHQUAKE	202,930	144,998	0	4,610	.0	3.2
7.1	GROWING CROPS --CROP-HAIL	27,515,517	27,569,204	10,455,587	10,473,163	38.0	38.0
7.2	ADDITIONAL PERILS ON GROWING CROPS	5,037,756	4,950,889	6,324,753	6,561,650	125.5	132.5
8.	OCEAN MARINE	982,169	992,576	392,179	363,840	39.9	36.7
9.	INLAND MARINE	36,213,168	36,419,375	16,320,755	15,845,447	45.1	43.5
10.	FARMOWNERS	32,588,017	32,077,958	17,627,526	17,814,721	54.1	55.5
11.	MEDICAL MALPRACTICE	11,519,415	~~11,410,256~~ 10,885,838	9,105,454	11,170,100	~~79.0~~ 79.0	102.6
12.	LIVESTOCK MORTALITY	777,165	586,120	918,923	1,847,889	118.2	315.3
13.	CARGO LIABILITY	181,993	175,676	118,998	98,733	65.4	56.2
14.	GROUP ACCIDENT AND HEALTH	21,106,991	20,595,159	17,287,797	19,206,491	81.9	93.3
15.1	CREDIT A & H -GROUP & INDIVIDUAL-	722,827	744,384	464,134	778,281	64.2	104.6
15.2	COLLECTIVELY RENEWABLE A & H	361,245	330,394	361,476	372,606	100.1	112.8
15.3	NON-CANCELLABLE A & H	67,324	67,704	20,383	20,680	30.3	30.5
15.4	GUARANTEED RENEWABLE A & H	4,455,577	4,387,902	2,656,494	2,806,311	59.6	64.0
15.5	NON-RENEWABLE FOR STATED REASONS ONLY	9,195,117	8,670,740	5,193,968	5,793,174	56.5	66.8
15.6	OTHER ACCIDENT ONLY	785,782	614,518	115,521	145,915	14.7	23.7
15.7	ALL OTHER A & H	6,164,22[illegible]	5,660,074	3,890,352	4,267,957	63.1	75.4
16.	WORKMENS COMPENSATION	147,137,981	148,669,330	96,289,968	115,282,150	65.4	77.5
17.1	LIABILITY OTHER THAN AUTO -B.I.-	35,690,587	35,579,303	19,543,589	22,215,135	54.8	62.4
17.2	LIABILITY OTHER THAN AUTO -P.D.-	11,648,098	11,437,645	6,905,172	6,445,869	58.3	56.4
17.3	PRODUCTS LIABILITY -B.I.-	6,583,778	6,992,408	4,267,075	5,651,811	64.8	80.8
17.4	PRODUCTS LIABILITY -P.D.-	4,072,160	4,243,215	1,145,823	3,220,787	28.1	75.9
18.	MISCELLANEOUS	618,131	252,580	141,408	219,001	22.9	86.7
19.1A	P.P. AUTO LIABILITY -B.B.I.-	101,007,533	99,799,869	54,459,826	61,312,259	53.9	61.4
19.1B	P.P. AUTO LIABILITY -P.I.P-	26,976,803	26,560,127	15,830,352	17,763,870	58.7	66.9
19.1C	P.P. AUTO LIABILITY -P.D.-	77,516,811	77,535,302	50,836,203	53,000,538	65.6	68.4
19.2A	COM. AUTO LIABILITY -B.B.I.-	33,204,588	32,350,639	20,495,030	27,517,949	61.7	85.1
19.2B	COM. AUTO LIABILITY -P.I.P.-	2,932,252	2,844,232	1,333,102	1,132,335	45.5	39.8
19.2C	COM. AUTO LIABILITY -P.D.-	13,485,597	13,203,959	11,422,159	12,179,923	84.7	92.2
21.1	P.P. AUTO. PHY. DAM.	188,497,175	184,757,508	114,781,687	115,559,656	60.9	62.5
21.2	COM. AUTO. PHY. DAM.	39,951,864	39,227,914	25,201,761	24,867,447	63.1	63.4
22.1	AIRCRAFT LIAB.	4,669,560	4,725,965	5,639,993	10,615,471	120.8	224.6
22.2	AIRCRAFT PHYS. DAMAGE	7,626,191	7,849,872	4,116,378	9,262,133	54.0	118.0
23.1	FIDELITY	5,516,008	5,351,699	2,310,421	3,937,781	41.9	73.6
23.2	SURETY	13,837,547	13,390,175	2,559,169	3,779,186	18.5	28.2
25.	GLASS	495,603	483,030	139,979	131,347	28.2	27.2
26.	BURGLARY AND THEFT	1,154,107	1,126,327	305,475	279,960	26.5	24.9
27.	BOILER AND MACHINERY	3,342,184	3,910,124	1,237,231	1,245,433	37.0	31.9
28.	CREDIT -OTHER THAN A & H-	703,604	893,149	355,158	299,317	50.5	33.5
29.	TITLE	7,065,001	6,603,387	302,361	350,949	4.3	5.3
30.	MORTGAGE GUARANTY	7,887,853	6,904,270	5,344,441	5,879,577	67.8	84.2
	TOTAL	1,194,911,925 321,084	1,102,035,144	601,145,843	749,268,447	57.0	63.4

8-20-84

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TESTIMONY BY LARRY W. MAGILL, JR.
EXECUTIVE VICE PRESIDENT
INDEPENDENT INSURANCE AGENTS OF KANSAS
BEFORE THE SPECIAL COMMITTEE ON TORT REFORM
AND LIABILITY INSURANCE
NOVEMBER 12, 1986

We appreciate the opportunity to comment today on the various insurance industry regulatory changes that are being contemplated by this committee. I would like to point out that this is the first time we have been given an opportunity to comment on these specific insurance industry regulatory changes.

The Independent Insurance Agents of Kansas has 620 member agencies across the state that employ approximately 2500 people, maybe two-thirds of whom are licensed agents. They are all independent, small businesses that represent a number of different insurance companies on behalf of their clients. One of the strengths of our system is the fact that our members are "more than one company agents" and in most situations consider themselves the insurance buyers or risk managers for their clients.

To save the committee's time today since there are quite a number of insurance proposals we would like to address, we will not comment on the general tort reform proposals. However, we are a member of the Kansas Coalition for Tort Reform and support their efforts to bring about constructive changes to our tort liability system.

Therefore, I will limit my remarks to the eight insurance industry proposals and offer two suggestions on possible amendments to Proposal #45 amending the Kansas Tort Claims Act.

Tort Reform
11/12,13,1986
Attachment 11

THE CYCLE VS. TORT REFORM

Without belaboring the point, the opponents of tort reform would like to blame the insurance industry cycle alone for the insurance availability and affordability problems we are experiencing today. The industry cycles are a well known fact and have undoubtedly had a small part to play in our current availability and affordability problems. But that does not explain ISO's statistics which clearly show an increase in both the frequency and severity of liabiltiy losses since 1980. It is this increase in frequency and severity of claims that tort reform seeks to moderate. To the extent that tort reform can reduce the frequency and severity of losses in the "long tail" liability lines and bring back predictability and stability to the system, it will have a positive impact on rates.

As everyone knows now, investment income from high interest rates created capacity through insurance company profits to write new business and allowed companies to reduce rates to compete for additional market share. By reducing rates, companies created even more capacity because of the three to one premium to surplus rule of thumb used by insurance industry regulators to measure a company's solvency. As rates go down, more firms can be insured with the same amount of capacity thus driving rates down even further as a free, competitive market fights for market share.

The insurance industry is not a frahchise or utility and does not enjoy a monopoly in the marketplace. Insurance companies are not guaranteed a profit and, in fact, have just experienced two of the worst losing years in their history.

Furthermore, it appears to us that the form of rating law in place in a given state has had little impact on the insurance availabiltiy and affordability problems created by the competitive marketplace. States like Texas and Kansas which have very strict prior approval rating laws have experienced much the same problems as states like Illinois which has no rating law at all.

One final general comment. We as agents would like nothing better than to find a way to control the insurance industry's cycles. During the soft market, agents performed the same services and the same work, but received less income while inflation drove our costs of business up. During the hard market, agents are unable to place coverages or lose business to the national brokers, self insurance plans or mass marketing programs and spend a great deal of additional staff time simply trying to handle their renewals. Unfortunately, there are no quick fixes for the industry's cycles unless you wish to eliminate competition. A return to cartel pricing would be contrary to the trend towards deregulation and contrary to our belief in the free enterprise system.

With those general comments, we will address four of the proposals which seem to try to moderate the effects of the industry's cycles.

PROPOSAL #58 - INVESTMENT INCOME/LIMITATIONS ON RATING PLANS.

Since our Governmental Affairs Committee and board have not had an opportunity to meet and review all of the bill drafts being considered, we do not as yet have an official position on Proposal

#58 requiring the inclusion of investment income in the rate making process and placing limitations on rating plans used on commercial insurance. However, I would like to offer a few comments.

It is interesting that opponents of tort reform have been highly critical of the insurance industry for allowing the investment income from the high interest rates of the late 70's and early 80's to "unduly" affect their pricing decisions. This is especially ironic, since if they had not, they would have realized unconscionable profits from the interest rates. At the same time those critics have demanded that rating laws be changed to require the inclusion of investment income. Somehow this seems inconsistent.

Investment income has long been implicitly included in the rate making process and is the reason that the "long tail" liability lines frequently are allowed to carry higher loss ratios by the companies since claims reserves stay on the books longer.

However, mandating the inclusion of investment income will only serve to de-stabalize rates even further as all companies will be forced to use it to an even greater extent in their rate making process.

We question whether it's worth the added expense of companies allocating different investments between different lines of insurance and whether the companies will be able to accurately forecast investment income into the future. For example, during the last hard market of the mid-seventies, it was substantially worse because of a tremendous drop in stock market prices. During the soft market, many industry observers were concerned that a number of companies were

technically insolvent if they had to sell their bond portfolio at the depressed prices caused by high interest rates. Ironically, those bonds are now worth substantially more than their face values because of the drop in interest rates. This is an excellent example of how, over the long run, investments can create both negative and positive impacts on company's financial condition.

It seems to us there are no compelling arguments to change current law, especially since investment income is implicitly considered in the rate making process. We have to ask what is broke and why we sould set Kansas apart from the rest of the country.

The new limitations on rating plans contained in Proposal #58 will have the effect of limiting competition in Kansas as companies find it difficult to change filed rating plans and will have a tendency to file conservative plans. It imposes an additional regulatory burden on the insurance companies which will ultimately be felt as an additional cost to the consumer for the insurance product.

Finally, many times it is a judgement call by an underwriter to determine how much and which credits might apply to a given risk. It will be extremely difficult for underwriters to document these decisions on such subjective areas as management ability. Again, it imposes new burdens on the companies.

PROPOSAL #34 - JOINT UNDERWRITING ASSOCIATION FOR MUNICIPAL LIABILITY COVERAGES

The IIAK is opposed to establising additional assigned risk or joint underwriting associations without a clearly demonstrated, overwhelming need. The Kansas MAP (Market Assistance Plan) experi-

ence has not indicated to date a large number of municipalities that have been unable to obtain coverage. Many have complained about the cost of coverage, but we do not believe the proposed JUA would significantly improve that picture.

We seriously question which lines of liability insurance or types of coverage the plan contemplates offering. Will insurance companies in Kansas be forced to offer types of liability coverage they have never been willing to provide voluntarily? For example, some cities need pollution liability coverage for dumps, pesticide spraying operations and utility plants. This coverage is generally not available anywhere in the marketplace because of the severe liabilities imposed by federal superfund the legislation. Very few standard markets are currently offering public official directors and officers liability coverage. To our knowledge, only two additional markets are offering the coverage, the Hartford through PENCo and Employers Mutual Casualty. Much of the public official D & O is presently written in nonadmitted markets which would not be affected by the JUA. Finally, an extreme example would be one city that was recently looking for participant liability coverage for a demolition derby. This is coverage that has not even been available from excess and surplus or nonadmitted markets and certainly has not been written by companies admitted to do business in Kansas. Why should insurance companies be forced to underwrite pollution liability, public official's D & O or the almost limitless other types of liability coverage that the imagination could dream up?

We are also concerned with how such a JUA would decide what

policy form to use, what to exclude, how much to charge and what limits should be offered.

It is virtually impossible to define what is an uninsurable risk. The only feasible way is to allow the market to decide. What is uninsurable today might well have been insurable three years ago when there was an excess of capacity in the insurance industry and competition for business drove companies to expand into new lines of coverage.

Frequently a risk in uninsurable because of bad loss experience. We do not believe the public good would be served by keeping these risks insured and forcing all businesses in Kansas to subsidize them. We question whether there would be an incentive to implement loss prevention and loss control techniques if a municipality knew they could obtain coverage for discrimination suits regardless of their loss experience.

We forsee insurance companies using a municipal JUA as a "dumping ground" for large numbers of marginal insureds that are being voluntarily insured now. As the plan grows, the assessments on the companies participating would grow and their ability to control their financial destiny in Kansas would diminish. As this happens, you would find companies leaving the state, particularly where they have a small volume in Kansas, rather than paying large assessments to a municipal JUA.

We question whether a Municipal Liability JUA would meet a constitutional test since you would have to force companies to write coverage that they have never written voluntarily. It seems to us to be an unconstitutional taking of property, especially since we are

not talking about mandatory insurance coverages. Most mandatory coverages in the state are already being provided by the existing assigned risk plans.

Finally, a municipal joint underwriting association is going to further increase the public's expectation that there will always be a "deep pocket" to pay for any suit. Since the insurance mechanism is simply a means of spreading cost, we think society would rather put reasonable limits on our tort liability system than continue paying higher and higher insurance bills.

PROPOSAL #29 - LATE RENEWALS

Our association continues to be concerned not only about the problem of late delivery of renewals but also about the potential problems that trying to legislate against late renewals may cause. It has been a continual problem in our industry and not a recent development. Of course, insureds were not upset at late renewals when prices were going down in the last soft market. The same will be true when the market cycle changes again.

We would point out that there are three parties to the renewal process, the insured, the agent and the company. Any of these three parties can cause delays and frequently all three parties contribute to the slow renewal process. The insured may be out of town or unavailable for the agent to review the renewal, the agent's office may be swamped, especially with the difficulty in placing coverages today and companies are cutting back on personnel to try to improve

their bottom line results which does not help their service problems.

Renewing a commercial account is a negotiation process among the three parties involved and may be rather complex requiring the gathering of substantial information at renewal. Inspection reports, financial statements and other information may need to be gathered all slowing down the process.

We are not aware of similar legislation being considered in other states which could hurt Kansas as it competes for the industry's limited capacity.

Finally, we are concerned that it may unfairly promote switching insurance companies. Most agents will get an early indication from the existing carrier as to what they plan on doing with the renewal of a commercial account. Based on that indication, they may approach a number of insurance companies to quote on the renewal. It is conceivable that if the renewal quote is delivered 30 days late and then the insured is given another 30 days, that the insured could actually switch coverage to another carrier at the same or higher rate and still be better off because of paying for that 60 days at the old rates with the previous carrier.

This seems unfair to the current carrier and promotes switching which most agents discourage. It is always better to develop a long track record with a single company which will help convince that carrier to stay with an account even if they have a bad year in terms of losses.

PROPOSAL #47 - BANKS FORMING REINSURORS

The IIAK is adamantly opposed to banks entering the insurance business whether it is as a reinsuror, a primary insuror or an agent. In Kansas, the law in this area has generally followed federal requirements. Currently under Title 6 of the Garn-St. Germain Act passed in 1982, bank holding companies, (BHC's) are prohibited from acting as insurance agents in towns over 5000 population or where the bank has more than 50 million in assets or under a few other limited exceptions to the prohibition.

Much of the past soft market excesses were caused by cheap reinsurance, especially from new reinsurors formed to use excess capacity. Normally one of the more staid and conservative parts of the industry, reinsurors hit all time high loss ratios of over 140 in some cases during 1984 and 1985. Alot of primary carriers found themselves in financial difficulties because their reinsurors refused to pay or became insolvent themselves.

Encouraging banks to enter the reinsurance field could add capacity, but we question whether it would be "smart" capacity or whether it would simple fuel another disastrous soft market. We seriously doubt that the banks would be interested in lending this reinsurance capacity to insurance companies writing the most hazardous lines of liability coverage and thus would not eliminate the real problem.

We predict that the additional capacity from profits in 1986, stock offerings and capital infusions that will exist by the end of this year will go a long way towards reducing insurance availability

.d affordability problems for all but the hardest to place liabili' lines.

But the basic and most compelling argument from our perspective against Proposal #47 is the continued separation of banking and commerce. Banks and savings and loans are not doing too well in their own business, why encourage them to enter an equally disastrous industry? Although banks entering the reinsurance business may only be t'e "camel's nose under the tent" and is not a direct threat to consumers through the tie-in of the credit transaction and the insurance purchase, we feel that eventually it would be. This is a national issue and we urge you to let congress and the courts settle the debate over what additional powers if, any, banks should have.

MAKING COMPANIES "PAY" FOR TORT REFORM

There seems to be an attitude prevailing in many quarters that there should be some form of quid pro quo between tort reform and insurance reform. In a sense, it's like shooting the messenger that brings bad news and could ultimately end up with Kansas shooting itself in the foot with repressive insurance regulations that only worsen our problems. There is no relationship, no matter how politically expedient, between tort reform and punitive insurance regulatory changes such as excess profits, special credits, rate freezes and, to a lesser extent, reporting and statistical plan requirements.

PROPOSAL #31 - EXCESS PROFITS

Our association is opposed to an excess profits law. Insurance

is not a utility and is not guaranteed a profit. Profits, by and large, are used to increase capacity to write insurance. Capacity is essential if we are to continue to handle the needs of a growing economy.

Proposal #31 allows profits to exceed expected by 5%. However, in the highly volatile, long tail liability lines, experience can fluctuate significantly from year to year as can been seen from reviewing the 1980 and 1981 ISO statistics compared to 1982-85. With an excess profits law, companies would be wise to avoid the volatile and more unpredictable liability lines in favor of those coverages with more predictable loss experience. This could substantially worsen the picture for hard to place liability coverages.

On long tail liability lines, experience often does not mature for 10-15 years. If companies are to be encouraged to write these coverages, it does not seem unreasonable that they be allowed an opportunity to make large profits to offset the almost certain large losses they will experience in some years.

Isolating an insurance company's experience by state could be extremely difficult. On multi-state risks, they are rated as an entity. Companies do not break out premiums and losses by state and by risk. Very large commercial accounts may be composite rated or retrospectively rated, further complicating the process.

But the strongest argument against excess profits laws is that they are inherently unfair. They offer no recoupment to the insurance companies of the losses in the bad years. If, after calculation of an excess profit a loss materializes for that policy

year, there is no recoupment as there would be none in years like 1984 and 1985 when the industry lost billions of dollars. A utility is virtually guaranteed a profit of X percentage while insurance companies are not.

Putting artificial limitations on profits but doing nothing about losses could drive insurance companies and capacity from Kansas. To our knowledge, only two states have enacted excess profits laws, New York and Florida. New York is the second largest state in the country in premium volume and Florida is the fourth largest while Kansas is 30th.

Profits are what generate the capacity through increased policyholder surplus to write additional insurance. Policyholders surplus is what forms the basis for writing insurance either on lines currently written by a company or for venturing into new fields. An excess profits law can simply worsen the situation.

PROPOSAL #48 - SPECIAL CREDIT AND RATE FREEZE

Clearly there is no way to accurately predict the impact of tort reform measures on losses and ultimately on insurance rates. Logic and good public policy should dictate which tort reform measures are enacted in Kansas and not specific rate reductions. In our competitive insurance marketplace, any savings will be reflected in rates.

Freezing rates or requiring special credits seems especially arbitrary since most tort reforms have been drafted to apply only to causes of action accruing on or after July 1, 1987. All the claims already in the pipeline will not be affected and thus it may take years for the actual impact of any tort reform measure to be felt in

the insurance rating mechanism.

Again, Kansas with its 1% of the national premium volume cannot afford to project a negative image as an insurance marketplace which this measure would clearly do.

PROPOSAL #42 - STATISTICAL PLANS AND REPORTING REQUIREMENTS

Our association remains neutral on this proposal but we would like to offer several comments. First, Kansas already has two reporting requirements for products liability which have undoubtedly increased company costs and ultimately premiums while they have provided no apparent benefits.

We suspect that the opponents of tort reform will always deny that the statistics prove the need regardless of what the industry is able to supply. Insurance companies cannot afford to maintain records that are useful in the tort reform debate when they have no direct relationship to the rate setting process. As profit making organizations, companies only maintain premium and loss statistics that they need to generate rates and have no way of anticipating what will be the hot tort reform topics of 5-10 years into the future. Changes in society's attitudes, new technological developments and discoveries of cause and effect relationships among other factors will determine what areas become problem liability lines in the future.

The costs of this type of proposal will ultimately be borne by policy holders through increased rates.

We feel ISO, the Insurance Service Office, has supplied this

committee with adequate statistics that clearly show an increased frequency and severity of losses over the last five years. We have not heard anyone clearly define the additional "proof" they need from the industry. We suspect some oponents of tort reform would be satisfied with nothing short of a closed claims study for all lines of liability coverage for all insurance companies - an extremely expensive proposition. We feel that the research by the Rand Corporation has clearly defined what many of the problems are with our current tort liability system that should enable reasonable action to be taken.

Another complication is that much of the hard to place liability lines are written by non-admitted or excess and surplus lines carriers. They would not be subject to these statistical plans and reporting requirements contemplated in Proposal #42.

We encourage the committee to wait for the NAIC to determine if a uniform statistical reporting plan can be implemented across the country. This would avoid 50 different states having 50 different requirements adding a lot of unnecessary cost to the system.

OTHER AREAS:

PROPOSAL #30 - REPORTING PROFESSIONAL LIABILITY CLAIMS

This proposal could actually be counterproductive for many professional liability insurance plans. For example, our insurance agent's E & O carrier encourages our members to report every incident that may lead to a claim even where the claimant has not contacted the agent. Knowing that all such incidents would be reported to the insurance department could significantly discourage agents from

making early reports and impair the carrier's ability to defend those that ultimately end up being claims.

We realize this is similar to a requirement contained in the medical malpractice tort reform, House Bill 2661, for health care providers. However, health care providers have a joint underwriting association and a health care stabalization fund which continues to insure, in some cases, practitioners with a serious loss history. There are no similar plans available to other professions and they will lose their coverage if they develop a frequency of losses. This seems to be a relatively good self-policing mechanism.

We also question whether the regulatory agencies for the other professions covered in Proposal #30 have the statutory jurisdiction to do anything with the information that is reported by the insurance companies. In most cases, a professional liability claim involves honest errors that would not normally lead to a practitioner's license being suspended or revoked.

Nor could the requirements of Proposal #30 be applied to non-admitted markets writing professional liability coverages in Kansas while it would be a significant administrative burden on the few admitted markets there are for most professions.

PROPROSAL #45 - TORT CLAIMS ACT CHANGES

Public entities, their legal advisors, insurance agents and insurance companies continue to be confused over what recommendation for policy limits should be made under the Kansas Tort Claims Act. The reason for this is that all public entities face exposures under

the Federal Civil Rights Act in federal courts and in many cases exposures in other states where the $500,000 cap in the Kansas Tort Claims Act clearly does not apply.

But, because of the wording on page 8 of Proposal #45, if a public entitly does carry higher limits, they waive their $500,000 cap for those claims where it does apply. This causes many entities to be confused over what they should do on their policy limits.

We would like to recommend that the committee consider ammending this to provide that the $500,000 cap is not waived by higher insurance limits unless it is specifically waived by formal action of the public entity in advance of a loss and conveyed to its insurance carriers. This would allow those public entities who feel a moral obligation to carry higher limits to do so while allowing others to insure their "non-Kansas" exposure without waiving their cap.

It should make it easier to obtain more competitive umbrella liability quotes. It would also eliminate some of the confusion on the part of the public entities buying the coverage.

We would also recommend that the committee consider amending the wording on page 9 under (2)(C) that provides that "any pooling arrangement or other agreement authorized by subsection (b)(2) shall not be construed to be an insurance company or to be otherwise subject to the laws of this state regulating insurance or insurance companies."

Such pooling arrangements are, in effect, small insurance companies. The pooling arrangements can be set up by anyone and marketed completely outside of the jurisdiction of the Kansas Insurance Department. We question the public policy decision that

would potentially subject public entities in Kansas to huge unfunded liabilities from unscrupulous operators or ill-conceived and administered pooling plans.

We are not asking that the same requirements be applied to pools as are applied to insurance companies but do feel that further study of the proper role of the Kansas Insurance Department should be made. Some minimum standards should be in the insurance statutes and regulations to protect public entities who may not be particularly sophisticated buyers of insurance.

We sincerely appreciate the opportunity to comment on some of the proposals before your committee. We would be happy to provide additional information or answer any questions you may have.

Tom Sullivan 12

7 RS 0042

PROPOSED BILL NO._____

By Special Committee on Tort Reform and Liability Insurance

Re: Proposal No. 29

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

Section 1. K.S.A. 40-937 .....Information supplied by the statistical plan shall include, but not be limited to the following:

(1) Premiums earned;

(2) Premiums written;

(3) Number of claims;

(4) Number of new claims during the reporting period;

(5) Number of claims closed during the reporting period;

(6) The number of claims paid and the amount paid in claims pursuant to:

(a) verdicts (allocated separately for judge and jury verdicts);

(b) settlements after a complaint is filed, but before verdict;

(c) settlements before a complaint is filed.

(7) The total amount rendered in verdicts, and the total amount actually paid out pursuant to verdicts.

(8) The amount paid out in economic damages, compensatory non-economic damages, and punitive damages, tabulated by size of economic damage.

(9) The average time elapsed between receiving notice of a claim and payment of the claim, by size of claim paid.

(10) The investment income earned on the amount ultimately paid between receiving notice of the claim and paying the claim, by size of claim paid.

(11) The total amount paid in defense costs in connection with claims paid:

(a) pursuant to verdict;

(b) pursuant to settlements after a complaint is filed, but before a verdict;

(c) pursuant to settlement before a complaint is filed.

(12) The total amount paid in defense costs in connection with;

(a) defense verdicts;

(b) claims resolved prior to verdict pursuant to which no indemnity was paid.

(13) The total amount of all other loss adjustment expenses paid in connection with:

(a) claims paid pursuant to verdict;

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(b) claims paid pursuant to settlements after a complaint is filed, but before a verdict;

(c) claims paid pursuant to settlement before a complaint is filed;

(d) defense verdicts;

(e) claims resolved prior to verdicts pursuant to which no indemnity was paid.

(14) In cases involving multiple defendant,

(a) the number of claims paid, and the total amount paid; and

(b) the amount by which the amount paid exceeded the amount proportional to the insurance company's insured's percentage of responsibility for the injury as determined by the jury (in cases tried to verdict) or as estimated by the insurer (in cases that are settled).

(15) Number of claims outstanding at the end of the reporting period.

(16) Total losses incurred as a percentage of premiums earned.

(17) Total number of policies in force on the last day of the reporting period.

(18) Total number of policies cancelled.

(19) Total number of policies nonrenewed.

(20) Net underwriting gain or loss.

(21) Separate allocating of expenses for commissions, other acquisition costs, general office expenses, taxes, licenses, fees and other expenses.

(22) Whether or not the company sets reserves for claims filed.

(23) Whether or not the company sets reserves for claims for losses which have been incurred, but not reported (IBNR).

(24) All reserves established in connection with the company's casualty line.

(25) How dollars reserved are treated in each of the categories listed for federal income tax purposes.

(26) With respect to amounts paid in claims for the year next preceding the filing of each annual report, each company shall provide the following information:

(a) Total amounts reserved with respect to those claims;

(b) the year in which the reserves were set; and

(c) the amounts set in each year.

(27) The value of the securities held in your investment portfolio as of December 31 of the year next preceding the filing of each annual report. Such information should be submitted in the same manner as provided by K.S.A. 40-225.

(28) Any published annual reports to shareholders or policyholders shall be submitted with the report.

KTCH 13
(7 RS 0021
Mike Sexton

PROPOSED BILL NO. _____

By Special Committee on Tort Reform and Liability Insurance

Re Proposal No. 29

AN ACT relating to civil procedure; concerning punitive damages.

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

Section 1. (a) In any civil action, except medical malpractice liability actions, in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the same trier of fact to determine the amount of such damages to be awarded. Raised constitutional

(b) At a proceeding to determine the amount of exemplary or punitive damages to be awarded under this section, the trier of fact 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.

At the conclusion of the proceeding, the trier of fact shall determine the amount of exemplary or punitive damages to be awarded and the court shall enter judgment for that amount.

(c) In any civil action where claims for punitive damages are included, the plaintiff shall have the burden of proving by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud, malice or reckless indifference.

(d) If exemplary or punitive damages are awarded pursuant to this section, attorney fees and costs related to exemplary or punitive damages will be deducted form the damages recovered and collected. Of the balance remaining, 50% of any sum over $250,000 shall be paid to the party awarded them and 50% of any sum over $250,000 shall be paid to the state treasurer for deposit in the state treasury and shall be credited to the state general fund.

(e) In no case shall punitive damages be assessed pursuant to this section against:

(1) A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or

(2) an association, partnership or corporation for the acts of a member, partner or shareholder unless such association, partnership or corporation authorized or ratified the questioned conduct.

(f) As used in this section the terms defined in K.S.A. 60-3401 and amendments thereto shall have the meaning provided by that statute.

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

Section 2. This act shall take effect and be in force from and after its publication in the statute book.

You may also wish to undertake the so-called "closed-claim"studies which require the disclosure of similar information on a case by case basis for claims that have been resolved. Attached is an example of the "closed-claim" questionnaire.

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TEXAS COMMERCIAL LIABILITY INSURANCE UNIFORM CLAIMS REPORT

DRAFT

1. a) Name of Insurer

_____

b) Name of Insurer Group

_____

c) Claim File Identification

_____

d) Name of person completing form

_____

e) Telephone number

_____

2. a) Date of Injury

___/___/___
Month Day Year

b) Date Reported to Insurer

___/___/___
Month Day Year

c) Date Closed

___/___/___
Month Day Year

3. Age of injured person at time of injury _____

4. a) Was injured person employed at time of injury? 1___ Yes 2___ No

b) If yes, did injury occur in course of employment? 1___ Yes 2___ No

5. Type of Injury
1____ Wrongful death
2____ Other Bodily Injury

6. a) Policy Type
___ O L & T (All Forms)
___ M & C (All Forms)
___ Commercial Auto
___ Medical Malpractice-Hospitals

b) Business Class
1___ Governmental entities
2___ Schools (Public & Private)
3___ Daycare centers
4___ Liquor liability
5___ Non-profit organizations
6___ Construction firms
7___ Directors and Officers
8___ Other

c) Policy Limits (Bodily Injury)
Per Person

_____

Per Occurrence

_____

Aggregate Limit, if applicable and if known

_____

Combined Single Limit (if Applicable)

_____

7. a) State where injury occurred
1___ Texas 2___ Other

b) If Texas, give county where injury occurred _____

c) If Texas, give county where suit as filed _____

d) If Texas, give county where case was tried _____

8. a) Was an attorney involved for plaintiff? 1___ Yes 2___ No

b) Was an attorney involved for insurer? 1___ Yes 2___ No

9. a) Stage of legal system at which settlement was reached or award made:

1___ Binding Arbitration

2___ No Suit Filed

3___ Suit filed but settlement reached before trial

4___ During trial, but before court verdict

5___ Court verdict

6___ Settlement reached after verdict

7___ Settlement reached after appeal was filed

b) If a court verdict is indicated in a) above, indicate result:

1___ directed verdict for plaintiff

2___ directed verdict for defendant

3___ judgment not withstanding the verdict for the plaintiff

4___ judgment not withstanding the verdict for the defendant

5___ judgment for the plaintiff

6___ judgment for the defendant

7___ for plaintiff, after appeal

8___ for defendant, after appeal

9___ all others

c) If case did go to trial, was case tried by jury?

1___ Yes (by judge and jury)

2___ No (by judge alone)

10. a) Were there defendants other than your insured?

1___ Yes 2___ No

DRAFT

DRAFT

b) If a) is yes, how many other defendants? _____

c) If a) is yes, indicate type of other defendants

1___ Individuals (Private)

2___ Individuals (Business)

3___ Partnerships, Corporations, or other business organizations

4___ Non-profit Organizations

5___ Governmental Entities

11. a) If case was tried to verdict, what percentage of fault was assigned to your insured?

_____

b) If claim was settled, estimate the percentage of fault for your insured:

_____

c) What percentage of final award or settlement was paid by you?

_____

12. Please indicate the following with respect to the total amount paid to claimant

a) Amount paid by you, the insurer

_____

b) Amount paid by insured, due to retention or deductible

_____

c) Amount paid by excess carrier

_____

d) Amount paid by insured due to settlement or award in excess of policy limits

_____

e) Amount paid by other defendants/contributors

_____

f) Total amount of settlement or award (a + b + c + d + e)

_____

13. Were collateral sources, such as medical insurance, disability insurance, social security disability, or workers' compensation, available to the injured party?

1____ Yes

2____ No

3____ Unknown

DRAFT

14. a) Was a structured settlement used in closing this claim?

1____ Yes 2____ No

b) If a) is yes, did structured settlement apply to plaintiff's attorney's fees as well as indemnity payments?

1____ Yes 2____ No

c) If a) is yes, indicate amount of immediate payment

_____

d) If a) is yes, indicate projected total future payout

_____

e) If a) is yes, indicate present value of projected total future payout (price of annuity if purchased)

_____

15. Injured person's medical expenses through date of closing

_____

16. Injured person's anticipated future medical expense

_____

17. Injured person's wage loss through date of closing

_____

18. Injured person's anticipated future wage loss

_____

19. Injured person's other expenses through date of closing

_____

20. Injured person's anticipated future other expenses

_____

21. Amount of non-economic compensatory damages

_____

22. a) Actual amount of prejudgment interest, if any, paid on award

_____

b) Estimated amount of prejudgement interest, if any, reflected in settlement

_____

23. a) What role did punitive damages play in this claim?

1____ Asked for in petition, not granted

2____ Asked for and granted by court or jury

3____ Asked for in settlement, not granted

4____ Asked for in settlement and paid by insurer

5____ Not applicable

b) If punitive damages were asked for, what was the amount?

_____

c) If punitive damages were actually awarded, what was the amount?

_____

d) If punitive damages were considered in settlement, estimate the amount.

_____

e) If punitive damages were paid by the insured, what was the amount?

_____

f) If punitive damages were paid by the insurer, what was the amount?

_____

24. a) Amount paid to outside defense counsel

b) Amount of other allocated loss adjustment expenses, such as court costs and stenographers fees

c) Total allocated loss adjustment expense (a + b)

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WRITTEN STATEMENT OF KANSAS TRIAL LAWYERS ASSOCIATION
Through Ralph E. Skoog, a Member
To
SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE
Wednesday, November 12, 1986

IN RE: ARBITRATION OF TORT CLAIMS

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear and provide to you the perspective of the Kansas Trial Lawyers Association with reference to the Proposal indicated as 7 RS 0043, an Amendment to K.S.A. 5-401.

The Kansas Trial Lawyers Association supports Alternative Dispute Resolution procedures.

From our discussion with Members of the Committee it is our belief that the proposed language would have a different effect than that which the Committee intends. As proposed the amended statute would require that any written agreement could provide that if there is a subsequent controversy arising out of a contract, including a contract for personal services, that such contract would be subject to mandatory arbitration by agreement.

It is our understanding that your Committee intends and desires to assure that persons who are parties to a controversy would have the right to voluntarily enter into a valid enforceable and irrevocable agreement to arbitrate their controversy. We suggest that you may successfully amend K.S.A. 5-401 to achieve that goal by commencing the statute with the following revised language, to-wit:

> "A written agreement to submit any existing controversy, including a claim in tort, to arbitration, or a provision in a written contract, . . ."

By making that amendment, you would clarify that you are not authorizing lawyers, accountants or other personal service providers to routinely include in their agreements for services a requirement that in the event that a tort arises out of the providing of the services, that the parties are required to enter arbitration and give up their constitutional right to a jury trial. That decision would be available to be made after they realized that a controversy exists and not in some "boiler plate" language that they might accept at a time when they have no expectation of any kind that serious problems could arise.

We would urge that the statute be amended in accordance with this proposal and recommended for adoption by this Committee.

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7 RS 0038 16

WRITTEN STATEMENT OF KANSAS TRIAL LAWYERS ASSOCIATION
Through Ralph E. Skoog, a Member
To
SPECIAL COMMITTEE ON TORT REFORM AND LIABILITY INSURANCE
Wednesday, November 12, 1986

IN RE: ITEMIZED VERDICTS in certain cases
and Amending K.S.A. 60-1903

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear on behalf of the Kansas Trial Lawyers Association on your Proposed Bill which bears the notation 7 RS 0038, relating to Itemized Verdicts.

The Kansas Trial Lawyers Association supports the movement of the Legislature to provide for itemized verdicts in certain cases, including wrongful death cases.

We understand the concern for such itemized information may well become beneficial in establishing a data base for greater public understanding of verdicts in jury cases.

We also recognize, as does the Committee, that in some cases the practical effect may be to overturn the plain intention of juries in the verdict through their misunderstanding of the instructions of the Court as was long the criticism of routine Special Questions which were common through the 1950's in jury cases in this State.

We accede to the argument that the better view would be the itemization.

In reference to the proposed amendments to K.S.A. 60-1903, the wrongful death action provisions, we are not disposed to support the idea that the Legislature will establish a monetary limitation on recovery of damages for non-pecuniary loss and then refuse to allow the jury to understand and have knowledge of the limitation. As court records have reflected, there has been regular itemization in wrongful death cases under the present statute and the only reason that we have heard for depriving the jury of the knowledge that there are limitations on non-pecuniary damages would be trick them into awarding substantial sums which would then necessarily have to be stricken by the court down to the artifical limition which the Legislature has provided.

We do support and applaud the Committee for continuing to utilize the pecuniary and non-pecuniary language in the wrongful death statute for the reason that after many years, it is now clear to all litigants as to what those terms mean and the introduction of new terms, even if they are synonymous in the minds of the Legislature, would undoubtedly cause extensive and expense litigation.

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It would be our suggestion that the inclusion of Section 2 and the subject of wrongful death in this Proposed Bill is not necessary in order to obtain the end result desired as we understand it. The question of past and future losses in death cases, as a practical matter, is quite clear from existing judgments as compared to damages in cases where the injured persons survive.

We would be happy to try to answer any questions on our position on this Proposal.

Testimony Before the Special Committee on Tort Reform
and Liability Insurance Re Proposal No. 29, 7 RS 0029

Jay Thomas, Attorney at Law, 9800 Metcalf, Overland Park, KS
November 12, 1986

In an otherwise unobjectionable act, one provision of 7 RS 0029 should be amended or stricken as unfair and unreasonable. Under no circumstances should notice to the producing insurance agent of a premium increase amount to notice to the insured.

Several reasons weigh against adoption of this provision. Conceptually, how can notice to an agent in and of itself impart notice to an insured? It simply cannot. How does notice to an agent implement the goal of the act in requiring notice to an insured of any premium increase? Again, it cannot. Is not an insurer's notice to its agent really no more than notice to itself? For all intents and purposes, yes.

A real life incident, only too familiar to your witness here, may help to illustrate the pitfalls of the provision. My wife and I purchased an automobile in July of this year. We took out a policy of insurance on the vehicle with State Farm through the Hardesty-Yeo agency in Overland Park. An advance premium was paid to cover the first quarter of the policy year. On September 23, 1986, a massive wind and hail storm struck Overland Park. It blew out the windows and did other assorted damage to our vehicle and others in an office building parking lot. Our damage was estimated to be some $3,300.

Notification of the loss and a property damage claim were promptly phoned in to the agency. At that time, we were notified by the agent that our policy had been cancelled the week before on September 16, 1986. The agency's file contained a letter that had ostensibly been sent by registered mail by State Farm notifying us of the cancellation. The only problem was that though the agent had been given notice of the cancellation, we, as the insured, had not. State Farm was unable to locate a registered mail receipt or any other proof that we had been notified.

Under the circumstances, the claim was honored. Nonetheless, had the notice provided the agent been "considered notice to the insured", we would have been out the $3,300 repair bill and been denied the opportunity to have purchased other insurance to protect the property.

It is hard to discern any satisfactory reason why an insurer should not notify its insured of a premium increase. The insurer's duty is to its insured. The insured should be provided ample opportunity to investigate and purchase alternative coverage before a policy expires. The insured should not bear the consequences of an agent's failure to timely inform the insured of a premium increase even though that agent may itself have been given timely notice by the parent company. Snafus of the sort

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described above can and do occur, and only actual notice to the insured can prevent the inequities that can result. This example is but one case in point, and different forms of potential abuse lurk behind this provision.

Should such a provision be engrafted upon our statutory scheme, will it be long before a provision permitting notice of cancellation to an agent amounts to notice to an insured? Notice and opportunity to act on the notice are fundamental to our legal and commercial world, and should not be tampered with absent the most compelling circumstances. These circumstances simply do not exist here.

For the above reasons, I urge the committee to delete that provision of the act allowing notice of a premium increase to amount to notice to the insured. As an alternative, the committee should modify the provision to require actual notice to an insured.

Thank you for your consideration.

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BEFORE THE SPECIAL COMMITTEE ON TORT REFORM
AND LIABILITY INSURANCE

November 12, 13 and 14, 1986

Mr. Chairman and Members of the Committee:

I am Mark L. Bennett and I represent the American Insurance Association. Both Lori Callahan, my associate, and I appear before Kansas legislative committees to furnish whatever assistance we can to assist those committees in their work on legislation affecting the property and casualty insurance industry.

The American Insurance Association is a trade organization representing approximately 171 property-casualty insurance companies in the United States and many of those companies are admitted and do business in Kansas. The organization of the association includes a substantial number of subdivisions with each subdivision staffed by personnel with expertise in their particular subdivision within the property and casualty insurance field.

The proposals being considered by the Special Committee on Tort Reform and Liability Insurance fall in a number of those fields. Personnel in each of the fields affected have reviewed and made recommendations on the proposed legislation to the Regional Vice President of the Government Affairs Department of the Southwest Region in which Kansas falls. The correspondence was directed to Michael D. Martin, Assistant Counsel for the Southwest Region.

In the interest of time I have attached hereto a copy of the information and recommendations we have received in regard to the bills presently pending before this committee. The information on some of the bills has come to me by telephone rather than by written remarks, and I intend to supplement the written remarks by outlining the contents of those telephone conversations.

Comments by Mr. Klotzbaugh in his written memorandum on bills numbered 7RS0021, 7RS0029, 7RS0030, 7RS34, 7RS0037, 7RS0039, 7RS0040, 7RS0041, 7RS0044, 7RS0045, 7RS0047, 7RS0049, 7RS0050, 7RS0051 and 7RS0054 are self-explanatory.

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In regard to 7RS0038, Itemized Verdicts, the comments in the attached memorandum relating to Section 2 of the bill are no longer applicable since K.S.A. 60-1903 has been amended to allow recovery for non-economic loss in a wrongful death action up to $100,000.

In regard to 7RS0047, Comparative Fault, the sentence eliminated from the original draft provided "In any such action, the doctrine of joint and several liability between joint tortfeasors does not apply." It was deleted for fear the sentence as it stood would eliminate joint and several liability in intentional tort, aggravated misconduct or wanton or reckless misconduct. We recommend reinstatement of that sentence but add to it the necessary words to avoid the objection to it so that it would now read "In any such action, the doctrine of joint and several liability between joint tortfeasors does not apply, except in cases where the loss resulted from an intentional tort, aggravated misconduct or wanton or reckless misconduct."

Subsequent to the time 7RS0053, Advisory Committee on Rates, was proposed, it was restructured and renumbered as 7RS0056. This bill, if enacted, will insert into the rate-making process for insurance companies political considerations that have nothing to do with the merits of an application for an increase or decrease in insurance rates in any line. The question will become what is politically beneficial rather than what is a rate that will be adequate but not excessive to the end that availability will become a more serious problem and, carried to extremes down the political street, dangerous to the financial stability of the insurance companies. The problem of availability at this time is being met by a market assistance program being administered by the Kansas Insurance Department with the cooperation of the insurance companies. We oppose this bill.

AMERICAN INSURANCE ASSOCIATION

By Mark L. Bennett

AMERICAN INSURANCE ASSOCIATION

85 John Street
New York, N. Y. 10038
(212) 669-0400

November 10, 1986

TO: Michael D. Martin

FROM: George R. Klotzbaugh

RE: Kansas - Special Committee on Tort Reform and Liability Insurance

As per your memo of October 28, 1986, I offer the following comments and recommendations on the bills being considered by the above Committee.

TORT REFORM BILLS

Bill 7RS0046 - Comparative Fault and Several Liability

This bill is fine if, as indicated in Mr. Bennett's memo of October 14, it is simply a response to the dicta in Federal Savings and Loan Insurance Corporation vs. Huff, 237 Ks. 873, 704 P.2d. 372 (1985), in which the Court indicated that comparative negligence is not applicable in cases where damages are solely for economic loss. However, as Mr. Bennett has noted, the Committee has deleted the following sentence from an earlier draft of 7RS0046: "In any such action, the doctrine of joint and several liability between joint tort-feasors does not apply." The deleted sentence would have had the effect of codifying the holding of Brown vs. Keill, Kansas, 580 P.2d. 867.

Proposal 7RS0046 would repeal K.S.A. 60-258a, the statute upon which Brown vs. Keill was based. Re-enacted K.S.A. 60-258a would differ from its predecessor only in the addition of the language pertaining to economic loss. Thus, one would hope that the legislative intent that the Kansas Supreme Court identified in Brown vs. Keill would be equally applicable to re-enacted K.S.A 60-258a. However, a highly technical argument based more on form than on substance would be available to support the notion that the Legislature did not intend the new statute to abolish joint and several liability.

I have not researched Kansas Law to determine the types of legislative proceedings that may be deemed to be probative of legislative intent. However, the deleted sentence could be construed as revealing a legislative intent to retain joint and several liability.

Obviously, we would prefer that the Committee be persuaded to include the deleted sentence in its final proposal. If this is not possible, every effort should be made to clarify that 7RS0046 is intended to merely specify that comparative negligence is applicable to actions for economic loss. Such

clarifying language could be added to title of 7RS0046 (following the phrase "relating to tort liability") and by appropriate statements by the Committee in its report and/or when the bills are introduced in the Legislature.

Bill 7RS0044 - Periodic Payment of Judgments

This is the model Periodic Payment of Judgments Act promulgated by the Uniform Law Commissioners. I have enclosed a copy of my memo to you discussing periodic payment of judgments statutes genetally and the model act in particular. In view of AIA's consistent opposition to the model act, I do not believe that we should be supporting 7RS0044.

Our initial position should be that periodic payment of judgments statutes are unnecessary and merely serve to add another layer of judicial proceedings to litigation at a time when society is looking for ways to free up its court system and to simplify dispute resolution. Structured, compromise settlements are available to a claimant who desires the security and tax advantages of periodic payments. Moreover, even after a jury returns a verdict and judgment is entered in a lump sum, any claimant interested in periodic payments would still be able to agree to a structured payments schedule. In short, nothing prevents the parties from agreeing to a structured payout after verdict, and no statute is necessary to "create" this option. Bringing this process into the courtroom, and creating more demand on the court calendar, is contrary to the notion of civil justice reform. The essential point here is that a periodic payment of judgments provision is not necessary. Moreover, such a statute unnecessarily complicates the proceedings.

I have enclosed a copy of the Periodic Payments of Judgments Statute proposed by the American Tort Reform Association. As a fallback position, we would prefer that ATRA's model be enacted rather than 7RS0044. Essential differences between the two are as follows. 7RS0044 has a rather unfavorable provision for applying the periodic payment schedule to liability insurance policy limits (Section 12). The ATRA proposal is silent as to policy limits. As to the effect of death of the plaintiff, 7RS0044 has a fair and equitable provision (Section 11). In fact, this provision, based on the Model Act, is superior to that enacted in many states. However, the ATRA section pertaining to the premature death of the claimant is superior (Section 9) in that the ATRA provision is more consistent with the notion that future damages never incurred should not be compensated. As to the structuring of a payment schedule for future damages, Item 2 on Page 2 of my previous memo on periodic payments discusses why AIA has found the Model Act unacceptable. The ATRA proposal affords greater flexibility. Under Section 4 of the ATRA proposal, future damages are calculated to reflect future changes in the earning power or purchasing power of the dollar. This obviates the need for a discount rate (the 3% discount rate contained in 7RS0044 is unrealistically low) and the need for a cost of living adjustment (the cost of living adjustment tied to the U.S. Treasury Bill rate in 7RS0044 is unrealistically high).

Even the ATRA proposal offers no assurance that payments thereunder would represent a cost savings when compared to paying judgments in a lump sum. However, the greater flexibility in setting up a payment schedule and the more favorable provisions pertaining to the premature death of the claimant make it more attractive to our industry than 7RS0044.

7RS0039 - Limiting Damages for Non-Economic Loss

OK. Is there any hope of removing the July, 1993 sunset provision? It would be helpful to clarify what is meant by "pain and suffering", either by defining the term in a separate subsection or by eliminating it and substituting an itemization of categories of non-economic loss. In order to be consistent with the reasons for civil justice reform, the term should include all aspects of physical and emotional/psychic trauma (embarrassment, anguish, humiliation, physical incapacity, loss of use, loss of consortium, etc.).

7RS0038 - Itemized Verdicts - Limiting Nonpecuniary Loss Damages in Wrongful Death Actions

Section 1, providing for itemization of verdicts, is fine. Section 2 purports to place a cap of $100,000 on damages "other than pecuniary loss sustained by an heir at law" in wrongful death actions. However, the existing statute, K.S.A. 60-1903, caps such damages at $25,000. Increasing the existing cap by four fold does not seem consistent with civil justice reform. Unless there are political considerations of which I am unaware, it would seem that our objection to this provision should be voiced.

7RS0041 - Statute of Limitations - Improvements to Real Property

OK.

7RS0051 - Rendering of Professional Opinion or Advice - Limiting Liability for Economic Loss

OK.

7RS0045 - Governmental Entities and Their Employees

OK.

7RS0021 - Punitive Damages

Section 1(c) would require a plaintiff to prove, inter alia, that defendant acted toward the plaintiff with "wilful conduct...." I believe that this is a typographical error of potential significance. Shouldn't the legal standard for liability by wilful "misconduct" and not wilful conduct? Surely it is not the intention of the Legislature to impose punitive damages in any case where damages resulted from such wilful conduct as the operation of an automobile. Changing "wilful conduct" to "wilful misconduct" would address this potential problem.

7RS0037 - Corporate Directors

OK.

7RS0040 - Professional Licensees and Pre-Trial Screening Panels

This may be an appropriate bill on which to remain neutral. St. Paul Insurance has had some experience with pre-trial screening panels in the medical malpractice field and the results have been inconclusive. It is not

clear whether the advisory opinions of fellow professionals facilitate settlement of claims or merely add another tier, with concomitant expenses, to the litigation process.

If I am reading Section 8(b) correctly, costs are paid by the prevailing party and not by the losing party. This makes no sense to me.

Perhaps it would be advisable to establish a pilot or experimental screening panel program applicable to one or two of the enumerated professions. In this manner the Legislature would be able to study the procedure and determine whether its results have been beneficial.

7RS0050 - Directors and Officers of Non-Profit Organizations

OK.

7RS0054 - Volunteers of Non-Profit, Charitable Organizations

OK.

LIABILITY INSURANCE REGULATION

7RS0031 (Excess Profits) and 7RS0042 (Data Collection) have been forwarded to Phil Schwartz for his comments. 7RS0048 and 7RS0058 (Rate-Making Provisions) have been forwarded to Jack Reid for his comments. I requested that they provide their comments to you in time for the Committee's November 12-14 meetings.

7RS0029 - Prior Notice of Premium Increase

As with all of the regulatory measures being considered by the Committee, we would prefer that this proposal not be enacted. However, this would appear to be a measure our companies could live with if it were enacted.

7RS0034 - Municipal Liability Insurance

This bill should be opposed as being exceedingly vague. Does it establish a market assistance program, a joint underwriting authority, or an assigned plan? If market mechanism legislation cannot be defeated, we would prefer that a MAP be enacted with stand-by JUA authority that would require a hearing prior to implementation.

Please give me a call if you can provide any details as to the Committee's support for 7RS0034 or the Committee's willingness to explore alternatives.

7RS0030 - Reports of Claims for Professional Malpractice

Section 1(e) of this proposal would only grant immunity to an insurer where the insurer has supplied the required report "in good faith". This limitation makes no sense and is completely unfair. If the insurer is required to file the report, there should be no limitation on immunity for complying. If the filing of a report is required by law, there should be no extraneous consideration of an insurer's motivation.

7RS0047 - Ownership of Stock in a Reinsurance Company by Banks and Savings and Loan Associations

This proposal should be resisted as being the forerunner of the intrusion of the banking industry into the insurance business. The public policy arguments against such intrusion (protecting the bank's investors and depositors from the risks associated with insurance ventures) are even more applicable to reinsurance, since the latter industry is less regulated and more volatile than the property and casualty insurance business.

If I can be of further assistance, please advise.

GRK:rlp

cc: Mark Bennett, Sr., Esq.
Craig A. Berrington (w/o enclosures)
George M. Mulligan (w/o enclosures)

MEMORANDUM

TO: Michael D. Martin

FROM: George R. Klotzbaugh

RE: Periodic Payments of Judgments

This will confirm our conversation as to AIA's position on periodic payment of judgments generally and, in particular, the Model Act promulgated by the National Commission on Uniform State Laws.

Periodic Payment of Judgments - Generally

After reviewing the issue with our member companies, AIA has determined to de-emphasize periodic payment of judgments. While it would be difficult to say that we oppose such legislation, we are not actively seeking or supporting measures in this area. We would prefer that structured, compromise settlements be encouraged and be permitted to develop without statutory requirements or regulatory intervention.

When a claim is settled by means of a structured settlement, there has not been a factual determination as to the "value" of the claim. A structured settlement can actually work to the benefit of both claimant and liability carrier. The claimant can receive a greater return over time than he could earn for himself by investing the figure he is demanding, because of the tax advantages of structured settlements. The liability carrier can realize a "savings", in that it may be able to fund the settlement by purchasing an annuity at a purchase price that is less than claimant's lump-sum demand.

However, after a claim is litigated to judgment, there has been a factual determination of the specific amount of claimant's past and future damages. Hence, much of the flexibility that allows for reduced costs under a structured, compromise settlement has been curtailed. For example, once a finding of future damages has been made, a court may order that the price of an annuity that is used to fund the judgment be equal to the present value of the future damages award. At best, such a transaction would be cost neutral.

Worse, a court could require that the present value of future damages be calculated (for purposes of, e.g., applying the award to policy limits or computing the purchase price of an annuity) by means of an unfavorable discount rate. The Model Act, discussed below, contains an unfavorable discount rate: 3%.

Another example of a statutory restriction that could produce an unsatisfactory result is an inflation or cost-of-living adjustment to the payment schedule.

The essential point is that structured settlements, without legislative or judicial intervention, have evolved to the point where they are producing satisfactory results for our companies. It seems unlikely that what is essentially regulation will preserve the flexibility that presently produces a benefit to both claimant and liability carrier. Moreover, if a claimant desires the security and tax advantages that come from periodic payments, an argument can be made that he should be induced to settle his claim rather than litigate it.

The Model Act

In the event that we must consider legislation dealing with periodic payment of judgments, the Model Act has some unfavorable provisions:

1) Rather than simply detemining future damages by category (i.e., all lost wages that will accrue after verdict; all pain and suffering that will accrue after verdict; etc.), the Model Act requires that findings be made for each category on an annual basis (Section 4). Some critics maintain that determining future damages, especially noneconomic damages, on an annual basis will lead to inflated awards.

2) Future damages are calculated at "today's prices", without regard to inflation, deflation, etc. (Section 5). Future damages are then discounted to present value at a discount rate of only 3% per annum (Section 10). Then, this base figure is adjusted annually by a cost-of-living factor equal to the prevailing rate of return on U.S. Treasury Bills (Section 7). From our industry's perspective, a 3% discount rate is unrealistically low and the cost-of-living adjustment to the unpaid balance is unrealistically high. These shortcomings with the Model Act provide a specific example of the concerns enunciated earlier in this memo.

3) In my opinion, the Model Act is just too confusing. It has to be read and re-read several times before it begins to make any sense. There would appear to be little assurance that it would be applied consistently, equitably or uniformly.

As I was preparing this memo, I received your memo dated September 25 pertaining to the Interim Committee. I will address any further comments on periodic payments in my response to the full range of bills under consideration.

In summary, structured settlements are working well for our companies, and it seems unlikely that legislative/judicial intervention would improve the situation. If periodic payments are only available via settlement, perhaps an incentive to settle will be created.

I hope these comments will be useful.

George R. Kloeppel

GRK:rlp
cc: Craig A. Berrington
George M. Mulligan
Mark Bennett, Sr.

Periodic Payment of Judgments Act

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short title.]

This Act may be cited as the Periodic Payment of Judgments Act.

Section 2. [Definitions.]

The following words, as used in this Act, shall have the meaning set forth below, unless the context clearly requires otherwise:

(1) "Economic loss" means pecuniary harm for which damages are recoverable.

(2) "Noneconomic loss" means nonpecuniary harm for which damages are recoverable, but the term does not include punitive or exemplary damages.

(3) "Future damages" means damages arising from personal injuries which the trier of fact finds will accrue after the damages findings are made.

(4) "Past damages" means damages that have accrued when the damages findings are made, including any punitive or exemplary damages allowed by law.

(5) "Qualified insurer" means an insurer, self-insurer, assignee, plan, or arrangement approved by the court.

Section 3. [Election for act to apply.]

(a) In order to invoke this Act, a party to an action for personal injuries must make an effective election in accordance with this section.

(b) The election must be made in accordance with the rules of the court. Any objection to the election must be made in accordance with the rules of the court.

(c) An election is effective if:

(1) all parties have consented;

(2) no timely objection is filed by any party; or

(3) a timely objection is filed; but

(i) the electing party is a claimant and shows there is a good faith claim that future damages will be awarded; or

(ii) the electing party is a party responding to a claim for future damages and shows that funding in the amount of the claim for past and future damages can be provided under this Act.

(d) If any objecting party shows that the legislative intent of this Act would not be served by conducting the trial of the claim affecting him under this Act, then the court may determine not to try the claim under this Act even though the conditions of subparagraphs (i) or (ii) of subsection (c)(3) are satisfied.

(e) If an effective election is on file at the commencement of trial, then all actions, including third-party claims, counterclaims, and actions consolidated for trial, must be tried under this Act unless the Court finds that the purposes of this Act would not be served by doing so or in the interests of justice a separate trial or proceeding should be held on some or all of the claims that are not the subject of the election.

(f) An effective election can be withdrawn only by consent

of all parties to the claim to which the election relates.

Section 4. [Special damages findings required.]

(a) If liability is found in a trial under this Act, then the trier of fact, in addition to other appropriate findings, shall make separate findings for each claimant specifying the amount of:

(1) any past damages; and

(2) any future damages and the periods over which they will accrue, on an annual basis, for each of the following types:

(i) medical and other costs of health care;

(ii) other economic loss; and

(iii) noneconomic loss.

(b) The calculation of all future medical care and other costs of health care and future noneconomic loss must reflect the costs and losses during the period of time the claimant will sustain those costs and losses. The calculation for other economic loss must be based on the losses during the period of time the claimant would have lived but for the injury upon which the claim is based. The calculation of all future damages must reflect future changes in the earning power or purchasing power of the dollar.

Section 5. [Determining judgment to be entered.]

In order to determine what judgment is to be entered on a verdict requiring findings of special damages under this Act, the court shall proceed as follows:

(1) The Court shall apply to the findings of past and future damages any applicable rules of law, including set-offs, credits, [comparative fault], additurs, and remittiturs in calculating the respective amounts of past and future damages each claimant is entitled to recover and each party is obligated to pay. The court shall preserve the rights of any subrogee to be paid in a lump sum.

(2) The judgment must specify the payment of attorneys' fees and litigation expenses in a manner separate from the periodic installments payable to the claimant, either in a lump sum or by periodic installments, pursuant to any agreement entered into between the claimant or beneficiary and his attorney.

(3) The court shall enter judgment in a lump sum for past damages and for any damages payable in lump sum or otherwise under subparagraphs (1) and (2).

(4) Upon petition of a party before entry of judgment and a finding of incapacity to pay the periodic payments, the court, at the election of the claimant or at the election of the beneficiaries in an action for wrongful death, shall enter a judgment for the present value of the periodic payments.

Section 6. [Periodic installment obligations.]

(a) A judgment for periodic payments must provide that (i) such periodic payments are fixed and determinable as to amount and time of payment, (ii) such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments, and (iii) the recipient of such payments shall

be a general creditor of the qualified insurer.

(b) Unless the court directs otherwise or the parties otherwise agree, payments must be scheduled at one-month intervals. Payments for damages accruing during the scheduled intervals are due at the beginning of the intervals. The court may direct that periodic payment shall continue for an initial term of years notwithstanding the death of the judgment creditor during that term.

Section 7. [Form of funding.]

A judgment for periodic payments entered in accordance with this Act must provide for payments to be funded in one or more of the following forms approved by the court:

(1) one or more annuity contracts issued by a company licensed to do business as an insurance company under the laws of any state;

(2) an obligation or obligations of the United States;

(3) evidence of applicable and collectible liability insurance from one or more qualified insurers;

(4) an agreement by one or more personal injury liability assignees to assume the obligation of the judgment debtor; or

(5) any other satisfactory form of funding.

Section 8. [Funding the obligation.]

(a) If the court enters a judgment for periodic payments, then each party liable for all or a portion of the judgment, unless found to be incapable of doing so under Section 5(4), shall separately or jointly with one or more others provide the

funding for the periodic payments in a form prescribed in Section 7, within 60 days after the date the judgment is entered. A liability insurer having a contractual obligation and any other person adjudged to have an obligation to pay all or part of a judgment for periodic payments on behalf of a judgment debtor is obligated to provide such funding to the extent of its contractual or adjudged obligation if the judgment debtor has not done so.

(b) A judgment creditor or successor in interest and any party having rights under subsection (e) may move that the court find that funding has not been provided with regard to a judgment obligation owing to the moving party. Upon so finding, the court shall order that funding complying with this Act be provided within 30 days. If funding is not provided within that time and subsection (c) does not apply, then the court shall calculate the lump-sum equivalent of the periodic payment obligation and enter a judgment for that amount in favor of the moving party.

(c) Upon motion by the claimant, or by the beneficiaries in an action of wrongful death, the court, in the absence of a showing of good cause, shall enter a lump-sum judgment for the present value of the future periodic payments if:

(1) a responding party elects to have this [illegible] and makes the required showing as to funding under Section 4 (3)(ii), but thereafter fails to post security; or

(2) a party fails to provide funding.

(d) If a judgment debtor who is the only person liable for a portion of a judgment for periodic payments fails to provide funding, then the right to lump-sum payment described in

subsection (b) applies only against that judgment debtor and the portion of the judgment so owed.

(e) If more than one party is liable for all or a portion of a judgment requiring funding under this Act and the required funding is provided by one or more but fewer than all of the parties liable, then the funding requirements are satisfied and those providing funding may proceed under subsection (b) to enforce rights for funding or lump-sum payment to satisfy or protect rights of reimbursement from a party not providing funding.

Section 9. [Effect of death.]

(a) In all cases covered by this Act in which future damages are payable in periodic payments, the damages for payment of any losses measured by medical or other costs of health care or noneconomic loss not yet due at the death of a person entitled to receive those damages terminates upon the death of that person. The liability for other economic losses payable after such death shall continue during the term of years of certain payments described in subsection 6(b) and shall be paid to the estate of the decedent. The liability for payment of any other economic losses or portions thereof not yet due at the death of the person entitled to receive them likewise terminates except as provided in subsection (b) below.

(b) If, in an action for wrongful death, a judgment for periodic payments provides payments to more than one person entitled to receive damages for losses that do not terminate under subsection (a) and one or more but fewer than all of them

die, then the surviving beneficiaries succeed to the shares of the deceased beneficiaries. The surviving beneficiaries are entitled to shares proportionate to their shares in the periodic payments not yet paid, but they are not entitled to receive payments beyond the respective periods specified for them in the judgment.

Section 10. [Assignment of periodic payments.]

An assignment by a judgment creditor or an agreement by such person to assign any right to receive periodic payments for future damages contained in a judgment entered under this Act is enforceable only as to amounts:

(1) to secure payment of alimony, maintenance, or child support;

(2) for the costs of products, services, or accommodations provided or to be provided by the assignee for medical or other health care; or

(3) for attorneys' fees and other expenses of litigation incurred in securing the judgment.

Section 11. [Exemption of benefits.]

Except as provided in Section 10, periodic payments for future damages contained in a judgment entered under this Act for loss of earnings are exempt from garnishment, attachment, execution, and any other process or claim to the extent that wages or earnings are exempt under any applicable law.

Section 12. [Settlement agreements and consent judgments.]

(a) Nothing in this Act is to be construed to limit or effect the settlement of actions triable under this Act. Parties to an action on a claim for personal injury may, but are not

required to, file with the clerk of the court in which the action is pending or, if none is pending, with the clerk of a court of competent jurisdiction over the claim, a settlement agreement for future damages payable in periodic payments. The settlement agreement may provide that one or more sections of this Act apply to it.

Section 13. [Satisfaction of judgments.]

A judgment under this Act is satisfied and the judgment debtor on whose behalf the funding is provided is discharged at such time as all obligations, including all periodic payments, have been paid. In the event that the judgment debtor or the liability insurer of the judgment debtor assigns the obligations to a qualified personal injury liability assignee, such assignment shall satisfy the judgment and discharge the judgment debtor.

Section 14. [Severability clause.]

Section 15. [Repealer clause.]

Section 16. [Effective date.]

BEFORE THE SPECIAL COMMITTEE ON TORT REFORM
AND LIABILITY INSURANCE

November 12, 13 and 14, 1986

Mr. Chairman and Members of the Committee:

I am Mark L. Bennett and I represent the American Insurance Association.

Yesterday I filed with the committee a memorandum relative to a number of bills drafted for consideration by the committee. I did not make a comment on three of the bills that had been drafted since I was waiting to get additional information from my people in New York.

I am now advised that AIA opposes 7RS0042, Reporting of Loss and Expense Experience; also AIA opposes 7RS0048, Rate Rollback, and 7RS0058, Rate Making.

I also call to your attention an error in the report I filed with the committee on page 2 relating to Comparative Fault. In my memorandum I misstated the number of that bill to be 7RS0047 and it should have been 7RS0944.

AMERICAN INSURANCE ASSOCIATION

By Mark L. Bennett

LEGISLATIVE INTERIM COMMITTEE
TORT REFORM & LIABILITY INSURANCE
November 13, 1986 - 9:00 a.m.

Mr. Chairman and Committee Members:

My name is Bob Runnels, Executive Director of the Kansas Catholic Conference speaking under the authority of the Roman Catholic Bishops of Kansas.

In Church there is an ever growing concern regarding liability of volunteers and liability insurance cost.

Because of the proliferation of lawsuits we are finding it more difficult to obtain good people to serve without renumeration on various Boards (e.g. school boards; parish council boards, etc.)

Additionally insurance rates for all types of liability insurance have soared far beyond what we believe experience has justified.

We ask that this committee which has a great deal of expertise in insurance matters give attention to our concerns.

The following details some areas we ask you to consider and explore:

1. Legislation to give immunity to members of boards of directors of nonprofit organizations.

2. Legislation that would require the insurance code to treat nonprofit organizations differently from for-profit operations (day care centers, health centers, etc.)

3. Legislation requiring the insurance industry to set rates by specific categories with the additional requirement that the industry keep records and make them available to the Insurance Commission.

4. Legislation requiring that the record of the insured entity be given credit for its risk management procedures by the insurance company when setting rates.

Tort Reform
11/12, 13/86
Attachment 19

5. Legislation to permit nonprofit organizations to purchase liability insurance as a group and to use risk pools.

It is entirely possible that more reasonable rates would also have to be supported with some type of limits on liabilities (e.g. municipalities $500M limited liability).

Thank you for your consideration of the above and for your service to our state.

Robert Runnels, Jr.

State Legislatures Attempt to Alleviate

These charts describe actions taken in state legislatures between Jan. 1 and June 30, 1986.

Civil Justice (tort) Reforms

	Modify Sovereign Immunity	Modify Joint and Several Doctrine	Modify Collateral Source	Limits on Non-Economic Damages	Provide for Structured Awards (Periodic Payments)	Penalties for Frivolous Suits	Modify Dram Shop Laws	Modify Statute of Limitations	Limit Attorney Contingent Fees or Modify Payment	Limit Punitive Damages	Limit Liability & Establish Immunities
ALABAMA				X	X						X
ALASKA		X	X	X		X	X				X
ARIZONA*	Not in session in 1986										
ARKANSAS		X					X	X		X	X
CALIFORNIA**		X	X	X			X	X	X		X
COLORADO		X	X		X	X	X			X	X
CONNECTICUT	X	X	X								
DELAWARE				X	X						X
FLORIDA		X				X					X
GEORGIA	X								X		
HAWAII	X						X				X
IDAHO											X
ILLINOIS		X	X			X	X				
INDIANA			X		X						
IOWA				X							
KANSAS											
KENTUCKY							X				X
LOUISIANA				X	X		X	X	X		X
MAINE				X			X			X	
MARYLAND			X	X							X
MASSACHUSETTS			X	MM X	X	X	X	MM X		X	
MICHIGAN	X	MM X	X	X		X				X	X
MINNESOTA			X						X		X
MISSISSIPPI***	X			MM X		X					X
MISSOURI							X				
MONTANA											
NEBRASKA									X	X	X
NEVADA						X	X				X
NEW HAMPSHIRE		X		X					WC X	X	
NEW JERSEY							X				X
NEW MEXICO					X	X	X				
NEW YORK		X	X								
NORTH CAROLINA											
NORTH DAKOTA	Not in session in 1986									X	
OHIO						X					
OKLAHOMA											X
OREGON	Not in session in 1986										
PENNSYLVANIA											X
RHODE ISLAND											
SOUTH CAROLINA	X			MM X	X		X				X
SOUTH DAKOTA											
TENNESSEE											X
TEXAS	Not in session in 1986			MM X	X		X				
UTAH		X									
VERMONT									X		
VIRGINIA				X	X						
WASHINGTON		X		MM X						X	
WEST VIRGINIA		X		MM X							X
WISCONSIN						X	X				
WYOMING	X	X									

MM = medical malpractice only
WC = workers' compensation only

*Arizona's tort reform package was vetoed by the governor.
**California's Proposition 51 was enacted by statewide initiative.
***Mississippi's limit on punitive damages (column 10) was vetoed by the governor.

the Liability Insurance Crisis

Insurance Industry Regulations

	Establish State Reinsurance Fund	Establish Pooling Mechanism	Rebate on Excessive Rates	Establish Joint Underwriting Associations	Provide for Self-Insurance	Prohibit Midterm Cancellation or Extend Notice	Establish Risk Management	Strengthen Rate Regulation	Establish Market Assistance Plans	Establish Study Committee
ALABAMA					X					X
ALASKA				X	X					
ARIZONA		X		X	X	X		X	X	
ARKANSAS										X
CALIFORNIA										
COLORADO						X	X		X	
CONNECTICUT				X		X		X	X	X
DELAWARE						X				
FLORIDA	X		X	X	X	X		X	X	X
GEORGIA		X			X	X		X		
HAWAII				X	WC X					X
IDAHO										X
ILLINOIS						X			X	
INDIANA		X			X				X	
IOWA		X			X		X		X	X
KANSAS						X				X
KENTUCKY									X	X
LOUISIANA										
MAINE		X		X	X	X				X
MARYLAND		X		X	X					
MASSACHUSETTS				X						
MICHIGAN									X	
MINNESOTA				X	X		X	X	X	
MISSISSIPPI									X	
MISSOURI					X		X		X	
MONTANA				X	X				X	X
NEBRASKA										X
NEVADA										
NEW HAMPSHIRE						X		X	X	X
NEW JERSEY									X	
NEW MEXICO		X			X		X	X		
NEW YORK				X	X	X		X	X	
NORTH CAROLINA				X						
NORTH DAKOTA										
OHIO		X							X	
OKLAHOMA									X	X
OREGON										X
PENNSYLVANIA						X		X	X	
RHODE ISLAND				X					X	
SOUTH CAROLINA				X						
SOUTH DAKOTA		X			X	X				X
TENNESSEE					X	X			X	X
TEXAS									X	X
UTAH				X			X	X	X	
VERMONT		X		X	X				X	
VIRGINIA									X	X
WASHINGTON			X	X	X	X		X	X	X
WEST VIRGINIA					X	X	X	X		X
WISCONSIN		X			X	X			X	X
WYOMING		X		X	X	X				

Source: NCSL survey conducted by senior research analyst Brenda Trolin

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

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

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

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

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

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