Approved March 6, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Robert S. Wunsch at
Chairperson

3:30 ~~a.m.~~/p.m. on February 25, 1987 in room 313-S of the Capitol.

All members were present except: Representatives Douville, Duncan and Peterson, who were excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Jane Holt, Secretary

Conferees appearing before the committee:
George Barbee, Executive Director, Kansas Consulting Engineers
Bill Henry, Executive Vice President, Kansas Engineering Society
Vance Liston, Kansas Society of Architects
Helen Stephens, Kansas Society of Land Surveyors
Ron Smith, Kansas Bar Association
Mavis A. Walters, Sr. Vice President, Insurance Services Office, Inc. Washington, D. C.
Dan Lykins, Legislative Committee, Kansas Trial Lawyers Association

The minutes of February 9, 11, and 12 were approved.

Continuation of Hearing on H.B. 2409 - Concerning civil procedure, relating to expert witness qualifications in certain actions

George Barbee testified in support of H.B. 2409 and recommended the bill be passed, (see Attachment I).

Bill Henry testified in support of H.B. 2409. He said the language in the bill is a reasonable restriction on who can testify as an expert witness in actions involving those persons who are licensed by the Kansas Board of Technical Professions, (see Attachment II). The policy statement of the Kansas Engineering Society on Tort Reform is included with the attachment.

Wayne Liston testified the Kansas Society of Architects support the passage of H.B. 2409.

Helen Stephens testified the Kansas Society of LandSurveyors support H.B. 2409.

Ron Smith testified in opposition to H.B. 2409. The said the Kansas Bar Association is opposed to legislative regulation of which persons can qualify as expert witnesses in litigation. The impact of such legislation is to unnecessarily limit both parties' ability to find and use the best possible expert witnesses in litigation. (Attachment III)

The hearing was closed on H.B. 2409.

Testimony concerning the impact of tort reform on the availability and affordability of liability insurance.

Mavis A. Walters explained the Insurance Services Office, Inc. is a nonprofit corporation that makes available advisory rating, statisical, actuarial, policy form and related services to any U.S. property/casualty insurer. I.S.O. is sponsoring a project which will review the claim data in 27 states, including Kansas, that have enacted various modifications of the tort system. The project is specially designed to provide maximum amounts of information about the relative impact on claim costs of various tort reforms. The project is expected to be completed in two years. She stated in terms of net worth, 1984 was the worst year in the history on the property/casualty insurance industry. 1985 had slightly improved returns on net worth, but the industry actually experienced the largest loss from its insurance operations in its history during 1985. Data through 1986 indicates that the industry has finally begun to turn a profit on insurance operations. This is a result of large premium increases and more restrictive underwriting, not a reduction in claim costs.

Kansas experience tracks fairly closely with the countrywide trends. Kansas combined ratios for general liability have shown improvement since 1983, however, they are still unacceptably high. She distributed Liability Insurance: A Financial Analysis and Kansas Underwriting Experience, (see Attachment IV and Attachment V). She also distributed a booklet, ISO Insurance Issues Series; Insurance Data: A Close Look.

Dan Lykins testified he will present a position paper to the Committee. He statedtort reform has not affected affordability or availability of liability insurance. No insurance representative has testified tort reform will reduce rates, or make insurance more available.

Ron Smith distributed newspaper clippings, articles and letters on the recent improvement in profitability in the insurance industry, and on the availability of liability insurance after tort reform. He also included: Testimony on the Liability Crisis Focusing on the Facts of the Insurance Crisis, August 6, 1986, Philip J. Herman, Chairman of the Board, Jury Verdict Research, Inc., (see Attachment VI).

The Committee meeting was adjourned at 5:00 p.m.

The next meeting will be Thursday, February 26, 1987, at 3:30 p.m. in room 313-S.

GUEST REGISTER

DATE Feb. 25, 1987

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
L M Cornish	Ks Assoc Crop & Com. Cos.	Topeka
Marie A. Walters	Insurance Services Office	Wash. D.C.
Kenneth J. Dill	" " "	DALLAS.
[illegible]	Observer	Topeka
[illegible]	KCCI	Sophia
[illegible]	KID	Topeka
[illegible]	KS Engineering Society	Topeka
George Barbee	Ks. Consulting Engineers	Topeka
Steve Ortmeyer	State Farm Ins.	O.P. Ks.
Dick Scott	State Farm Ins. Co.	O.P. Ks.
Patricia Henshall	OJA	TOPEKA KS
Kevin M Hill	STUDENT	"
R.E. Culbertson	KTLA	Topeka
Richard Mason	"	"
Don Fybeus	KTLA	
William L. Mitchell	Allstate Ins	Hutchinson
Ron Smith	KBA	Topeka
T. Anderson	KSCPA	Topeka
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS	"
PETER W. FRIEDMANN	ALLIANCE OF AMERICAN INSURERS	SCHAUMBURG, IL.
[illegible]	St Francis Med Center-Wichita	Topeka
Cindy Lutz	KASB	Topeka

KANSAS
CONSULTING
ENGINEERS

GEORGE BARBEE, EXECUTIVE DIRECTOR
1100 MERCHANTS NATIONAL BANK
8TH & JACKSON
TOPEKA, KANSAS 66612
PHONE (913) 357-1824

STATEMENT

DATE: February 24, 1987

TO: House Judiciary Committee

FROM: George Barbee, CAE
Executive Director

RE: HB-2409

Mr. Chairman and members of the committee, my name is George Barbee and I am President of Barbee & Associates, appearing on behalf of the Kansas Consulting Engineers.

The Kansas Consulting Engineers is an organization of 56 engineering firms performing professional engineering services in Kansas. Those services range from the actual design of buildings, roads, bridges, sewer systems, water treatment systems, soils testing and laboratory services and even expert witness services.

HB-2409 addresses the subject of qualifications for expert witnesses. It would apply to "Technical Professions" defined as those licensed by the Board of Technical Professions. That would include engineers, architects, land surveyors and landscape architects. The bill would require that in any action for damages where the standard of conduct of one of those professions is at issue, that an expert witness must have had 50% of their professional time, within the two year period preceeding the incident giving rise to the action, devoted to the same actual practice in which the defendant is licensed.

For example, if an electrical engineer is the defendant in a proceeding, then the expert witness would be required to have spent 50% of their practice in the specified time in electrical engineering.

By the way, the professional engineer's licensing statutes define the teaching of engineering to be innterpretted as practicing engineering. So, a professor teaching electrical engineering would be qualified if the professor met the time requirements.

Many of us have been presenting information to the legislature these past several months to point out the current litigation crisis in America. And engineers can certainly confirm that the problem of insurance affordability and availability and frequency of claims are factual concerns.

Attachment I
House Judiciary 2/25/87

Statistics show that 44 out of every 100 firms can expect to have a claim filed against them in 1987. As pointed out by Mr. Bill Bailey at the KCCI Caucus, only about 2% of those go to trial while the others are settled or dropped along the way. Many of those are defended within the very high deductible limits of our member's insurance policies. I believe this bill would provide for better factual representation in those proceedings.

I personally know of two cases where delays or unfair judgments were the results of testimony from witnesses that would not have been qualified under this bill. In the first case, there was a tragic accident on a construction site where an employee of the contractor was killed in a trench cave-in. The engineering firm was named because they had a construction inspector engineer on site at the time of the accident, even though he was not where the trench was located. At the trial, an expert witness, a professor, testified that the engineer had a responsibility for safety of the contractor's employees and had the authority to halt work on the site. Those statements are not true but I believe if the witness had been required to show experience in construction inspection he would have realized that an engineer has no authority over the materials, means and methods used by a contractor in constructing a project.

The other case was at the stage of taking depositions in a case over a sewer treatment plant and the connected collector system. In cross examination by the defense, the witness admitted he was not qualified to design sewer systems and treatement plants. With this bill the witness would not have been allowed to testify at the time of trial.

It is interesting to note that the 1985 interim committee on medical malpractice report included a desenting minority report regarding the interim committee recommendations. While the report cited disagreement with some of the recommendations, it did support the item suggesting the qualifications of expert witnesses. The original recommendation for medical expert witnesses was that 75% of the witnesses time should be spent in clinical practice but that was later reduced to 50%.

Mr. Chairman, on behalf of the Kansas Consulting Engineers, we respectfully request that the provisions of qualifying witnesses be extended to those in the provisions of HB-2409.

While we did not request this legislation with the thought that the problem is confined to us, we do believe that we share the same concerns as faced by the doctors and would appreciate the same considerations.

Thank you for the opportunity to appear today in support of HB-2409 and I would attempt now to answer any question should you have any.

Kansas Engineering Society, Inc.
627 S. Topeka, P.O. Box 477
Topeka, Kansas 66601 (913) 233-1867

Testimony to the House Judiciary Committee
February 24, 1987
H.B. 2409

My Chairman, members of Committee I am Bill Henry, the Executive Vice President of the Kansas Engineering Society. This afternoon I appear before you on behalf of the Society's 1000 members in support of H.B. 2409.

In recent years, members of our Society both in private practice and in government service have seen an increase of their time spent in litigation as expert witnesses in lawsuits dealing with professionals who are licensed by the Kansas Board of Technical Professions. In several instances we have received complaints from our membership about the qualifications of those who pass themselves off as experts in matters dealing with technical questions and the standard or conduct of a technical professional.

In many cases, the so-called professional expert who is allowed to testify on the standard of professional practice does not even practice or has not practiced for sometime in the profession of the defendant.

Despite fair and impartial jury instructions which should guide a jury in the weight and credibility given to such witnesses our membership fears these instructions are not followed depending upon the particular case at hand.

Because of the complexity of a negligence action involving a technical profession and the standard of conduct of a technical professional is an issue our Society feels there should be a tightening of the restrictions as to who can testify as an expert witness.

Last year this committee had a brief amount of time to look at S.B. 540. Within S.B. 540 was the language set out in this bill at lines 24-31.

The Society feels such language is a reasonable restriction on who can testify as an expert witness in actions involving those persons who are licensed by the Kansas Board of Technical Professions. We do not feel that the bill particularly discriminates against university faculty because such faculty are recognized as practicing engineering within their given fields under our state's definition of engineering. Nor, do we feel that the 50 percent requirement set out in line 28 is particularly onerous.

Attachment II

House Judiciary 2/25/87

Based upon our policy statement (attached) approved by the Kansas Engineering Society on Tort Reform we hope you will consider H.B. 2409 favorable for passage.

Submitted by

Bill Henry
Executive Vice President
Kansas Engineering Society

Kansas Engineering Society, Inc.
627 S. Topeka, P.O. Box 477
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Tort Reform

Professional licensed engineers in Kansas have always agreed that they must practice their profession in a manner to safeguard "the life, health, property, and welfare of the public." (K.A.R. 66-6-3).

For the licensed engineer the duties set out in the above regulation is the highest professional obligation of the design professional.

Negligence in the performance of this duty is unacceptable in any form and the legal liability for such negligence is clear.

However, in recent years the judicial system has evolved to the point where negligence and the legal proofs thereof are no longer the determinant in certain cases of who should be held liable or even who should be named in a lawsuit.

Like other professionals engineers' liability policies have doubled and tripled in recent years. Finally, like other professionals, availability of liability insurance of any type with any coverage has become a definite problem for the engineering professional. Six years ago there were ten firms offering professional liability insurance to Kansas design professionals. Today, for all intents and purposes, there are two.

The Kansas Engineering Society appeared before the Special Interim Judiciary Committee and made several recommendations that we feel would bring a fair and equitable balance in the determination of liability of professionals. In addition, the Society was one of three professions represented on Fletcher Bell's Kansas Citizens Committee which reviewed legal liability problems in Kansas and the corresponding effect on insurance.

Based upon its understanding of the Tort Reform issues before the legislature the Society endorses the report and recommendations of the Kansas Citizens Committee and particularly supports the following recommendations:

1. The standard of proof for punitive damages should be increased to a standard of clear and convincing evidence. Secondly punitive damages should be determined in a separate evidentiary hearing or bifurcated trial. The Society agrees that punitive damages should be not limited to a specific dollar amount but should fit the particular situation and as such damages are intended to punish the wrong doer and prevent the recurrence of misconduct these changes do not damage that concept.

2. The Society supports the concept that evidence of collateral souces of relief be provided to a jury for their consideration in setting damages for personal injury and wrongful death actions. Such a move would eliminate a possible double recovery which could be a windfall to an injured plaintiff rather than equitable relief.

3. The Society recommends that the Legislature consider amending the Kansas Arbitration Law to permit arbitration of tort actions. This action would allow individual parties by contract to agree to the settlement of disputes by arbitration. The issue of what is the standard of conduct or care for a professional and what the duty of such a professional is in a given matter is complicated and is often highly technical in nature. In litigation the issue of negligence often becomes a battle of "experts" and leads the parties involved down a hopeless path of litigation expense. The Society feels that arbitration is a fair alternative dispute mechanism that should be utilized when possible. While manditory arbitration may increase expenses in some cases the Society believes it would encourage the settlement of more lawsuits and eventually reduce the cost of litigation in the state.

4. The Society concurs with the recommendation that juries be required to itemize verdicts and categorize those awards in appropriate areas such as future economic damages, punitive damages, present and future non-economic damages.

5. The Society also feels that mandated structured awards should be required for future economic losses when the total award exceeds $100,000. Currently juries are forces to guess about future damages in order to come up with a lump sum payment and award. With the structuring of awards for future losses and the provision of annuity contracts future damage awards could be handled more efficiently.

6. The Society recommends that the Legislature consider changing the standard for proving a frivolous lawsuit by requiring that a lawsuit must have substantial merit and give the court authority to award fines and penalties against a party or attorney filing a lawsuit that lacks substantial merit. Without a doubt one of the most frustrating features of the judicial system for non-legal professionals is the frustration and legal cost involved in answering and defending "frivolous" lawsuits. Clearly, there is nothing more frustrating to the public than to have to settle a lawsuit with no meritorous claim because the legal costs of defense are more expensive than the lawsuit. The current Kansas statute, KSA 60-211, permits a court to award both expenses and attorneys fees against lawyers for filing frivolous claim. This statute is not being utilized to punish those who file such claims. The problem is that the term "frivolous" carries a connotation of "meaningless" or "totally devoid of substance." Current interpretation of this language effectively prevents an action against worthless litigation. Changing the statutory language and definition of frivolous to that of "lacking in substantial merit" would allow the courts to effectively penalize those who do bring frivolous litigation.

7. The Society believes that no person should be permitted to qualify as an expert witness unless that individual has devoted at least fifty percent of his/her time during the past two years of the expert's practice in the same or related profession as that of the defendent where the defendant's professional conduct is an issue. This provision was a part of S.B. 540 which was considered by the legislature in 1986. The Society supports this concept or similar action to tighten our current rules of civil procedure regarding expert testimony.

8. The Society believes screening panels would be of aid in determining the merits of actions against professionals. However, unless the findings of such panels are admissible in subsequent phases of litigation they only add to the cost of litigation. If the findings of such panels are non-addmissible then the Society would not support the concept.

KANSAS BAR ASSOCIATION

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February 24, 1987
HB 2409

Mr. Chairman. Members of the House Judiciary Committee. I am Ron Smith, KBA Legislative Counsel.

> KBA is opposed to legislative regulation of which persons can qualify as expert witnesses in litigation.
>
> The impact of such legislation is to unnecessarily limit both parties ability to find and use the best possible expert witnesses in litigation.

Mr. Chairman, this legislation is an area where certainly the legislature has power and authority to regulate, but should probably answer the fundamental question: do you solve the problem, or just compound it with HB 2409.

This legislation is patterned after a provision in 1986 HB 2661 for medical malpractice litigation. That provision has been in effect less than a year. KBA is already aware of complaints from defense lawyers who are concerned they cannot adequately defend their clients because of that statute.

The use of expert witnesses is generally regulated by KSA 60-456, -457 and -458. These statutes are the foundation for our case law regarding qualifications of expert witnesses.

Attachment III
House Judiciary 2/25/87

There are two basic kinds of witnesses: (1) fact witnesses, who tell what they saw, heard, touched, or smelled, and whose ability to formulate opinion testimony is highly restricted [See KSA 60-456(a)] and (2) expert witnesses, whose abilities to formulate opinion testimony is greater than a "fact witness," but nevertheless still regulated [KSA 60-456(b), (c) and (d)].

Experts are people who by reason of education or specialized experience possess superior knowledge respecting a subject about which jurors, having no particularized training, are incapable of forming an accurate opinion or deducing correct conclusions. In product liability actions, for example, experts may even testify and given an opinion on the ultimate issue of fact (was the product defective? Was the warning statement inadequate?) if it will be of special help to the jury on technical subjects as to which the jury is not familiar, and if such testimony will assist the jury in arriving at a reasonable factual conclusion from the evidence. Siruta v. Hesston Corp., 232 Kan. 654 (1983).

Generally, the rule of law is that the trial court determines whether a person is qualified to testify as an expert witness for either party, and the limits to which such testimony can go. Absent an abuse of that discretion, the admissibility of expert testimony lies within the sound discretion of the trial court. Long v. Deere & Company, 238 Kan. 767 (1986).

It should be remembered that this bill affects only the qualifications of those experts who testify at trial in a very limited number of cases, but affects very little else about the case. Nor will it have a profound effect on costs of litigation. During the discovery stage of a civil case, the parties must list their expert witnesses, or other persons who have helped the plaintiff attorney (or defendant) prepare the plaintiff or defense part of the case. Many times persons are used who are "experts" to help attorneys make value judgments on the worth of a case, or issues such as deviation from the standard of care, but those persons may or may not be used as witnesses at trial. Their depositions are often taken anyway. This bill does not regulate the discovery stage, since absent a court order limiting discovery, a party has a right to discover even irrelevant evidence so long as it may lead to relevant or admissible evidence down the road.

The other party's attorney often decides what kind of information the proposed trial expert will offer, its credibility, its value to the jury, its value to help prove the issues at trial, and its likely impact on the jury. To the extent a lawyer does not think that a given expert witness is offering scientifically valid evidence, or his training is insufficient to draw such conclusions or make such opinions on the data, or the person is an expert outside his field of expertise, that lawyer can object to the introduction of such evidence at trial or even that witness testifying at trial. This is usually done in a pre-trial conference, required under KSA 60-216 and such routine matters often lead to a discussion of which experts will offer what

testimony, and at that time the discussion of qualifications to offer such testimony are usually raised [KSA 60-216(5)]. The judge then determines whether to grant that motion.

If an expert is allowed to testify, the PIK instructions attached are often given, describing to the jury the weight and sufficiency that is to be given expert testimony. (See attachments) It is possible to fashion an instruction to the jury concerning expert testimony regarding the standard of care in a profession, patterned after PIK 15.10 on medical malpractice. I cannot find indications that such application of PIK 15.10 to malpractice actions other than medical malpractice would not be appropriate.

Statutory limitations attempting to set objective standards on expert qualifications are too rigid, and inflexible. If there is abuse of discretion on the part of the judge in engineering and architectural litigation in Kansas, it has not been brought to our attention through appellate courts.

This legislation is styled as "tort reform." I fail to see how this reforms anything. The impact of this legislation on insurance premiums is nil. It is also going to be hard to enforce:

> Example: Most professional malpractice actions require expert witnesses to establish the standard of care. A great deal of time is spent qualifying the expertise of the expert, especially to a jury.
>
> Assume a civil engineer is constructing a bridge on uncertain terrain. Rather than hire a soils or geology expert, and not

being a soils or geology expert himself, the engineer relies on his own expertise to decide how deep to set the bridge foundation. The bridge fails structurally because of faulty geological data, and people are injured. They sue the engineer, alleging failure to consider appropriate geological data in his civil engineering calculations.

The "standard of conduct of a technical professional" is the issue. Which standard of conduct? Of the geologist? Or the civil engineer? The geologist is not a technical professional. Is that geologist prohibited from rendering an opinion on what a soils sample would have told the civil engineer? A civil engineer could testify whether it is within the standard of care for a civil engineer to seek geological data when building a bridge, but why is it that public policy is to say only those civil engineers with "50% professional time" in "actual practice in the same profession" can testify to a jury for or against that evidence?

The 50% rule is a good example of the well-meaning mediocritization of the legal system, what some call the "law of the lowest common denominator."

If the technical professions have experts they feel testify too much, or are not in the actual everyday practice of their profession, then all of that information is relevant for the jury, and is brought out on cross-examination. The jury considers it and makes the appropriate decision.

There are some areas of the law where the legislature prudently should not regulate because there are too many exceptions to the general rule laid down in the statute. HB 2409 and expert witness qualifications is one such area.

Conclusion

An expert's testimony is not conclusive as to standard of care -- it only goes to the weight and sufficiency of the evidence.

This statute will hurt the defense of such professionals as much if not more than the plaintiffs. To the event that less skilled experts are allowed to testify, justice is not served.

I've enclosed a copy of a recent article from the Washington Lawyer magazine concerning recognized expert witnesses and what they do. If you'll look it over, you'll realize it should be the courts that decide who testify in their courts based on the individual facts of the case. If there are mistakes made in the qualifications of an expert witness, if the court abuses its discretion, the appellate courts are there for that protection.

G. EXPERT AND OTHER OPINION TESTIMONY

60-456. Testimony in form of opinion. (a) If the witness is not testifying as an expert his or her testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clearer understanding of his or her testimony.

(b) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.

(c) Unless the judge excludes the testimony he or she shall be deemed to have made the finding requisite to its admission.

(d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

History: L. 1963, ch. 303, 60-456; Jan. 1, 1964.

60-457. Preliminary examination. The judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.

History: L. 1963, ch. 303, 60-457; Jan. 1, 1964.

60-458. Hypothesis for expert opinion not necessary. Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his or her discretion so requires, but the witness may state his or her opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross-examination the witness may be required to specify such data.

History: L. 1963, ch. 303, 60-458; Jan. 1, 1964.

C. EVALUATION OF EVIDENCE

PIK 2.20 CREDIBILITY OF WITNESSES

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

Notes on Use

The Committee recommends that this instruction be given in every jury case.

Research References

ALR Annotations:

Use of drugs as affecting competency or credibility of a witness. 65 ALR3d 705.

Credibility of witness giving uncontradicted testimony as matter for court or jury. 62 ALR2d 1191.

American Jurisprudence:

As to the credibility of witnesses generally, see Am Jur 2d, TRIAL § 855.

Practice Aids:

For proof of religious prejudice of witness, see 20 Am Jur Proof of Facts 223, RELIGIOUS PREJUDICE § 33.

For a discussion of the physiological, psychological, social, and cultural factors in perception, see 5 Am Jur Trials 807, HANDLING PERCEPTION AND DISTORTION IN TESTIMONY.

PIK 2.50 EXPERT WITNESS

Certain testimony has been given in this case by experts; that is, by persons who are specially qualified by experience or training and possess knowledge on matters not common to mankind in general. The law permits such persons to give their opinions regarding such matters. The testimony of experts is to be considered like any other testimony and is to be tried by the same tests, and should receive such weight and credit as the jury deems it entitled to, when viewed in connection with all the other facts and circumstances, and its weight and value are questions for the jury.

Notes on Use

This instruction should follow PIK 2.20, Credibility of Witnesses in General.

Comment

See K.S.A. 60–456 of the Kansas Code of Civil Procedure; Pool v Day, 143 Kan 226, 233, 53 P2d 912, 916 (1936); Linscott v Hughbanks, 140 Kan 353, 368, 37 P2d 26, 34 (1934). In an earlier case, Hill v Union P. R. Co., 113 Kan 489, 215 P 310 (1923), it was said that a requested instruction on this subject should have been given. Ordinarily general instructions as to guides for judging evidence are adequate and it is believed that later decisions justify the omission of a special instruction on expert witnesses.

What appears to be an exception to this suggestion is the rule in malpractice cases to the effect that only expert testimony may be used to establish what is proper treatment (Pierce v Edgerton, 151 Kan 107, 98 P2d 129 (1940); Riggs v Gouldner, 150 Kan 727, 96 P2d 694 (1939)), except when outside the realm of medical evidence (McMillen v Foncannon, 127 Kan 573, 274 P 237 (1929), reh den 128 Kan 187, 276 P 820).

Research References

ALR Annotations:

Modern status of rules regarding use of hypothetical questions in eliciting opinion of expert witness. 56 ALR3d 300.

PIK 15.10 PHYSICIAN'S STANDARD OF CARE—EXPERT TESTIMONY

In determining whether a (physician) (dentist) used the learning, skill, and conduct required of him, you are not permitted to arbitrarily set a standard of your own or determine this question from your personal knowledge. On questions of medical or scientific nature concerning the standard of care of a (physician) (dentist), only those qualified as experts are permitted to testify. The standard of care is established by members of the same profession in the same or similar communities under like circumstances. It follows, therefore, that the only way you may properly find that standard is through evidence presented by (physicians) (dentists) called as expert witnesses.

[The above rule is limited to those matters clearly within the field of medical science. If what was done or not done in the treatment of a patient is within the common everyday knowledge of persons generally, such facts may be established from the general circumstances as shown by the evidence, which evidence may include testimony by persons other than experts.]

Notes on Use

This instruction should follow PIK 15.01 when the breach of duty is not a matter of common knowledge and expert testimony required to establish the duty of the physician. The bracketed paragraph may be included when applicable to the evidence particular case.

Comment

The following quotation from James v Grigsby, 114 Kan 627, 632, 220 P 267 (1923), contains a summary of the applicable principles: "What is the proper treatment to be used in a particular case is a medical question to be testified to by physicians as expert witnesses; laymen, even jurors and courts are not permitted to say what is the proper treatment for a disease or how a specific surgical operation should be handled." See Funke v Fieldman, 212 Kan 524, 530, 512 P2d 539 (1973); Tatro v Lueken, 212 Kan 606, 512 P2d 529 (1973).

For examples of cases in which lay testimony was held sufficient or was held to establish a "prima facie" case of negligence, see Bernsden v Johnson, 174 Kan 230, 236, 255 P2d 1033 (1953), (a breathing tube lodged in plaintiff's throat); Rule v Cheeseman, 181 Kan 957, 317 P2d 472 (1957), (a gauze was allowed to remain in the body of a patient after an operation); Capps v Valk, 189 Kan 287, 369 P2d 238 (1962), (failure to remove a drain tube was prima facie negligence); Collins v Meeker, 198 Kan 390, 394, 424 P2d 488 (1967); Funke v Fieldman, 212 Kan 524, 512 P2d 539 (1973).

Confusion sometimes results from a failure to keep a distinction in mind. Evidence of what took place in connection with a physician's treatment is one thing; evidence showing what a standard of care is as prescribed by law is quite another matter. Any person who perceived any of the facts embraced within the first category, and who otherwise qualifies as a witness, may tell what he perceived. Such evidence may support a judgment without the aid of expert testimony. In Funke v Fieldman, 212 Kan 524, 512 P2d 539 (1973) it is stated that in malpractice cases expert medical testimony is ordinarily required to establish negligence or lack of skill on the part of a physician or surgeon in his medical diagnosis, his performance of surgical procedures, and his care and treatment of patients. An exception to the general rule exists where the results of medical treatment are so patently bad as to be manifest to lay persons or as to come within the common knowledge and experience of mankind generally.

On competency of physician from one community to testify, in malpractice cases, as to the standard of care of defendant practicing in another community, see Avey v St. Francis Hospital and School of Nursing, Inc., 201 Kan 687, 442 P2d 1013 (1968); Barnes v St. Francis Hospital and School of Nursing, Inc., 211 Kan 315, 507 P2d 288 (1973).

WITNESS THESE EXPERTS

. . . Their views on lawyers, trials and each other.

BY JOHN GREENYA

The working definition of an expert witness sounds deceptively simple: "Someone who knows more about a subject than the average intelligent layman." While that would seem to leave an unhealthy amount of latitude, in practice expert witness testimony is a vital, functioning aspect of the law in and out of Washington area courtrooms every hour of every day. Nonetheless, as in any specialty area, there are experts and there are experts. In this issue, *The Washington Lawyer* takes a look at a handful of professionals who are more than just "qualified" to call themselves experts. One of their distinguishing marks is that you seldom see them in court—most often their pre-trial testimonies result in final disposition of their cases at that point.

These expert experts include: a medical doctor; a psychologist; two document examiners; a specialist in product liability; and, last but certainly not least, a lawyer who has just written a book about expert witnesses. Their cumulative experiences represent a glimpse into the world of the expert witness.

"I don't even think of myself in terms of an 'expert,'" says Dr. William J. Brownlee. "I view myself as the person who helps the judge and especially the jury understand something in an area in which they have little or no background. In a sense, I'm just a guy doing a job."

That may be true, but Dr. Brownlee's "job" is hardly quotidian, hardly what the rest of us run across in our daily lives. Among his 5,000 medical-legal cases are included the site investigation of the Letelier-Moffit bombing case, the Hanafi murders on 16th Street, NW, and literally thousands of rapes and murders.

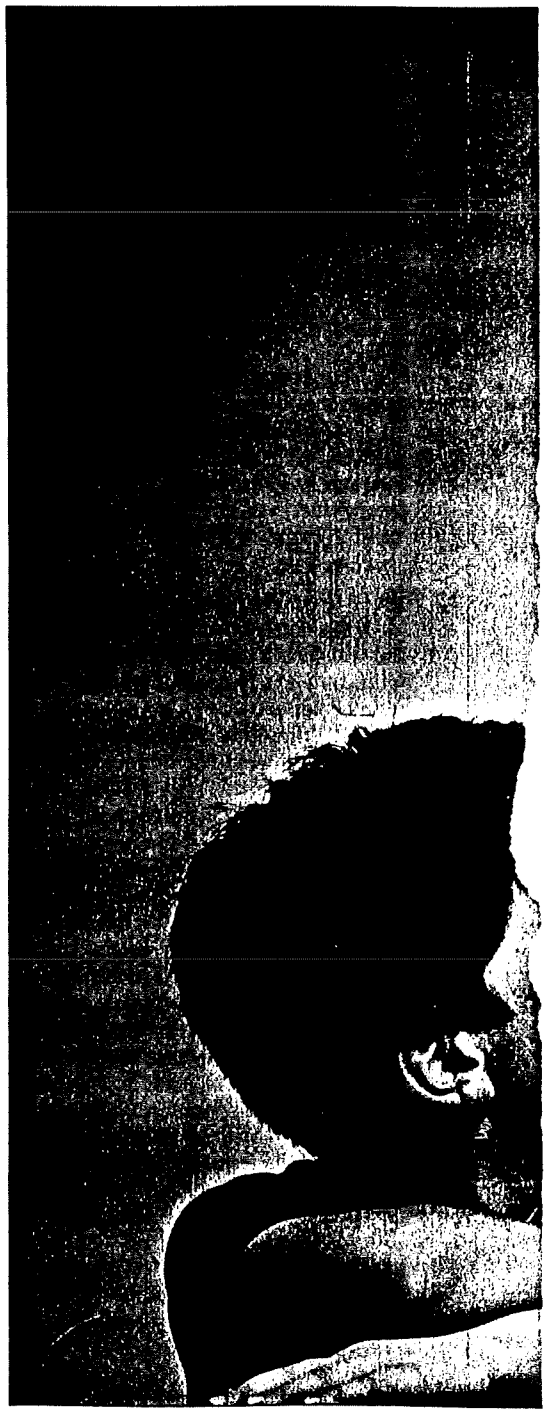
Because of his background, Dr. Brownlee is referred to by some of the attorneys who hire him as "D.C.'s Quincy." The tag fits. In addition to having been the chief medical officer of D.C. General Hospital for five years in the early 1960s—"We saw 300 to 350 patients a day in the emergency room."—Brownlee (who is trained as a surgeon) has been one of the District's deputy coroners and then, following a change in the name of that office, one of the chief medical examiners until his retirement in 1980. Today, in addition to being chief of surgery at Hadley Memorial Hospital and having his private practice, Dr. Brownlee continues to work as an expert witness in the field of forensic pathology.

"My experience comes as a combination of all of the above [positions and work]. Contrary to what people might think, most of my cases do not involve homicide. True, you have to *know* your homicide—you have to know missiles, injuries sustained by the human body and how they affect it, as well as death. And how they caused that death. But most of our cases do not involve that aspect."

Dr. Brownlee has a further explanation of why he does not think of himself as an "expert": "It's funny, but I never really considered myself as an *expert* as much as one who defines what he knows, who utilizes medicine and science—and your understanding of people—to find out the reason for something."

Unlike several of the other expert witnesses profiled in this article, William Brownlee does not advertise, preferring to work only on the basis of referrals. "If you aren't referred to me by someone I know, I probably won't get involved in your case."

His expert testimony is sought in both civil and criminal matters, and the types of cases include medical malpractice, accident reconstruction, and drug abuse and its effects. "In many cases I'm hired to determine if a patient's injuries are consistent



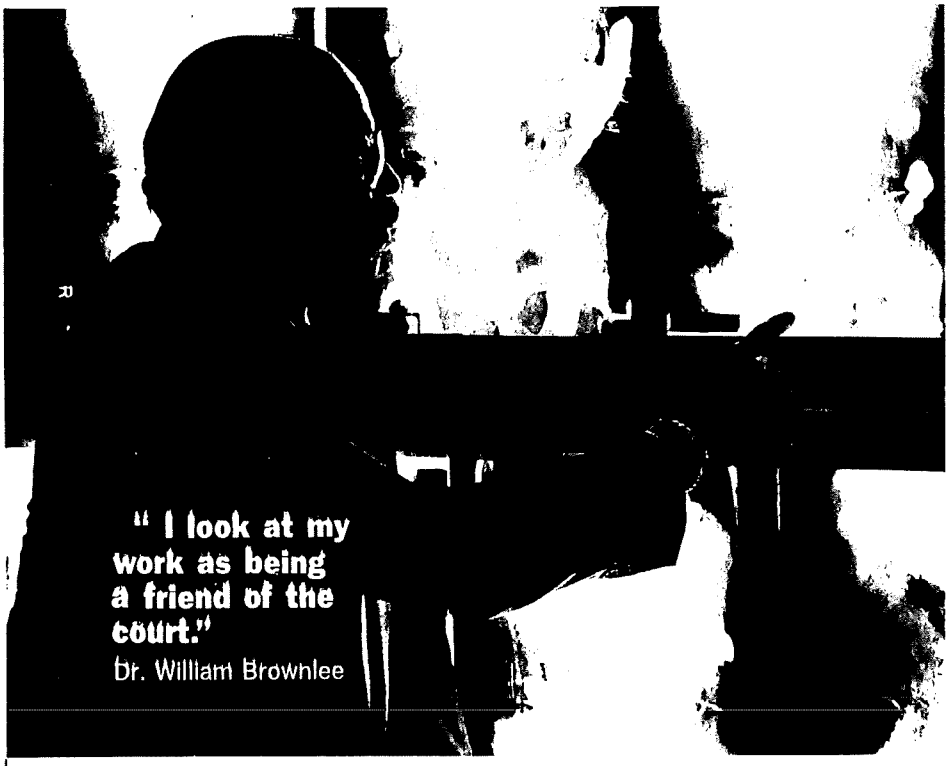
John Greenya is a Washington, D.C. writer and a frequent contributor to The Washington Lawyer.

with the manner in which they were reputedly sustained. For example, not long ago I was involved in a wrongful death case in which it was originally thought that the death was caused by the body's being struck by the car. But after we had studied the position in which the body was lying after it was struck, the injuries sustained, the roadway, the roadbed, the lighting systems, the type of asphalt or macadam, and the injuries to the automobile caused by striking the person, collectively, based on all that evidence we were able to establish that the vehicle had been traveling faster than originally was thought, *and* that the injury that caused death was striking the macadam, not the vehicle striking the person."

Dr. Brownlee has been testifying as an expert witness for more than 30 years, and in that time he has witnessed a growing sophistication on the part of attorneys as to how they use witnesses such as himself. "Of vital importance is *when* a medical expert is used. In this day and age, in this metropolitan area, an attorney taking any form of case into a courtroom that involves medical opinion without the counsel of a medical consultant is probably legally substandard."

Like the other expert witnesses mentioned in this article, Dr. William Brownlee stresses that he is hired for his honest opinion, not to support the theory or side of the case represented by the hiring attorney. "I look at my work as being a friend of the court, and not, as lawyers like to say, on one side or the other. I am responsible, on the witness stand, for conveying to the jury [the meaning of] some of the highly technical terminology and aspects of the case so that the jury understands. And then I render 'the why' of my opinion.

"In any case I've ever been involved in, I assess the case and then form an opinion about the case, and that opinion is always an honest opinion, something that I have developed myself, regardless of how the



cookie crumbles. And if the cookie crumbles according to my opinion, well then that's it."

While he hesitates to suggest ways in which attorneys can better use witnesses such as himself—stating that by now most of the attorneys he works with are "quite knowledgeable" in regard to presenting a medical witness—William Brownlee has some succinct advice for expert witnesses: "Render only your honest opinion; remain isolated from the forces generated by the opinions of the attorney; and, the more information you can gain, the better and stronger your opinion will be."

Another professional whose normal habitat is a hospital, but who also appears in a courtroom from time to time is Phyllis Magrab, Ph.D., a psychologist who heads the Child Development Center at Georgetown University Hospital.

Becoming an expert witness was, for Dr. Magrab almost a natural progression, "given the kinds of children I've been involved with over the years. In the center, we see children who are chronically ill and who have a variety of handicapping conditions, and sometimes those conditions are congenital, sometimes those are caused during the prenatal period, and sometimes by virtue of an accident. Many times the treatments are uncertain, and so people have questions regarding the treatment."

She testifies "frequently but not regularly" in custody cases where the effect on a child or several children is the issue, and also in cases that involve the environmental causes of some form of toxicology. Examples of the latter type of case would include: water pollution; problems caused by insulation that contains certain harmful chemicals; and exposure to formaldehyde and other types of toxicological substances that might—or might *not*—result in developmental effects on children.

One of the chief reasons why lawyers hire child psychologists is that there is an array of testing they can do that provides results that are more objective than those gained in a simple interview.

As Phyllis Magrab puts it, "You can assess the effects on intelligence or on language or on motor behavior or on personality changes. Even neuro-psychological features such as memory. So a psychologist can produce some kind of test evidence as well as the observable."

She cites as an example one of her earliest cases, that of "a very beautiful" five-year-old child who as a result of the care received during the neonatal period was both blind and retarded. Clearly it was a result of the care management. Both sides had been trying to determine an appropriate way of illustrating the issues involved in the case, and when it came time for Dr. Magrab to testify, she told the jury, "'I can tell you all about her developmental losses, but if you would like I could demonstrate that for you in the courtroom.' We were able to demonstrate what her developmental level was in comparison with the normal level for a blind five-year-old, and it was very overwhelming—and very moving—to the jury."

While she may be hired by either side in a case, Phyllis Magrab, like Dr. Brownlee, feels that "My client is not whoever has hired me; truth is really the client. I think that's what makes someone a good expert witness. If you become a professional expert witness, I think you're in deep trouble. But if you are available to really show and demonstrate what the facts are, to the best of your ability to do that, then you are 'ng truth. I will not take a case where ... attorney wants to program me. I am an advocate for the child."

By "professional expert witness," Dr. Magrab means one who does nothing but testify in court, and it is clear she has little use for such people.

"Being an expert witness is very time-consuming. Obviously it is not a profession. It's something you do as a public service, really, a service you provide in addition to the 80-hours-a-week job that most of us have. If you become an established expert witness, it's really a negative credential for a professional, almost like the ambulance-chasing kind of image, and you lose your credibility. What you build your credibility on is being active in the field as a researcher, as a clinician, as a service-provider, as a teacher. But if you are spending all your time being a witness, you don't have much time to enhance your own level of skill and knowledge."

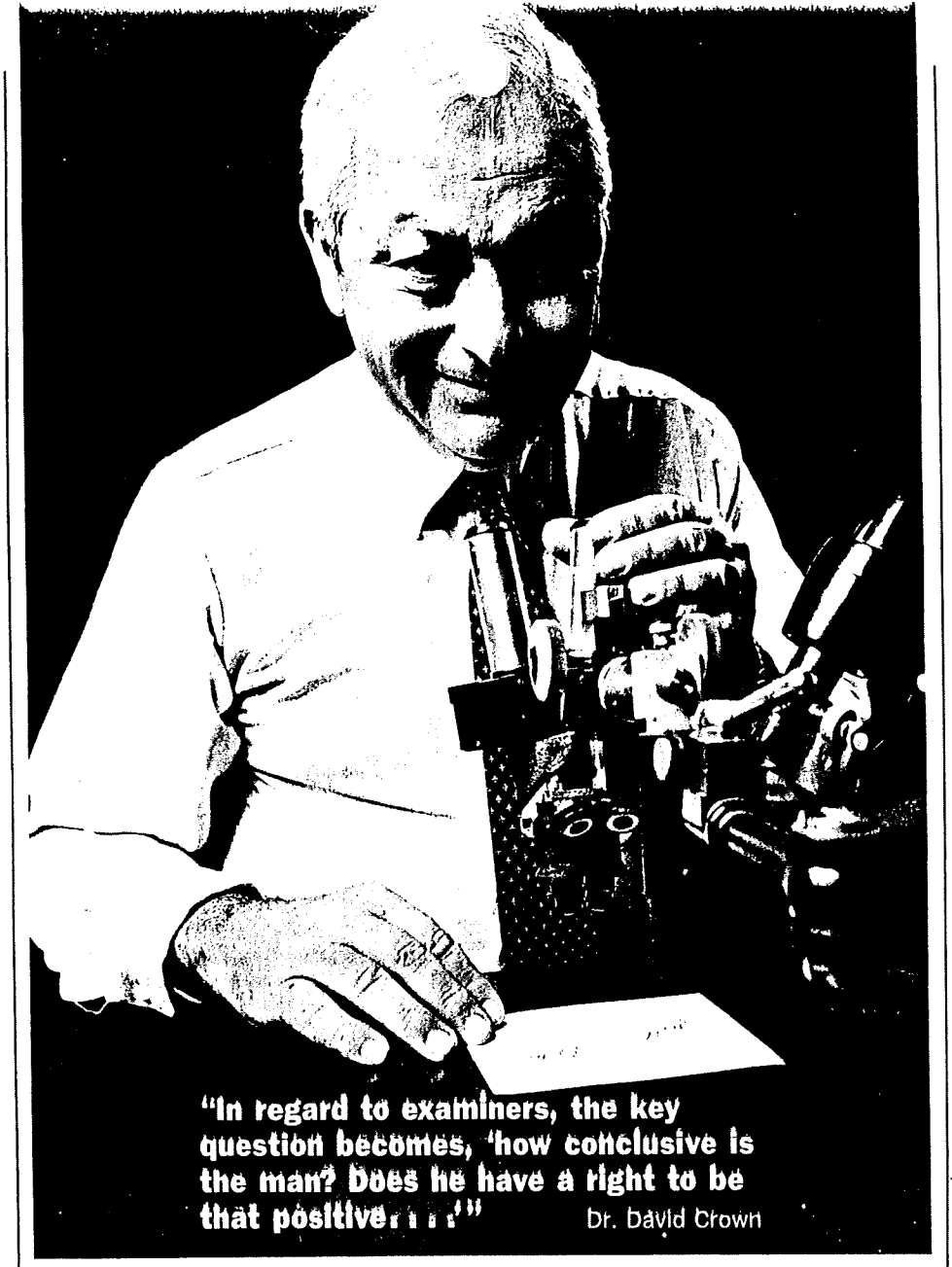
Weighing the positives and the negatives, Magrab feels that the time spent in being an expert witness "balances out." She admits that the work can be "lucrative," and has fond memories of a case that caused her to spend a week in Anchorage, Alaska. She particularly likes working as part of a team, with other professionals, because of the camaraderie that develops as they pursue the same important goal, especially when a child's health or welfare is at stake, and in situations where "the lawyer doesn't have a preconceived idea regarding a solution."

On the other hand, she finds most difficult and emotionally draining the kind of situation in which the families themselves are extremely angry, and she is expected to come up with a specific solution that will satisfy everyone. "My most unhappy cases are always the custody cases, whether they go to court or not. You have to be a little like Job [in trying to determine] what's really in the best interests of a child. For me, those are the most painful cases, because those are decisions that are not settlement issues—they have a life-long implication for all of those involved."

Dr. Magrab has the following advice for other expert witnesses, especially the neophytes: "Have confidence in what you know; be comfortable in an adversarial process; and know your limits—be ready to admit that you have 'boundaries' you should not exceed. Never agree to testify as an expert in a field in which you are *not* truly expert."

While she firmly believes that being an expert witness is "not for everyone," Magrab nonetheless views it as an opportunity to make "a real contribution to the system." She recounts with obvious pride a case in which her testimony kept two young rape suspects—who were subsequently cleared and all charges dropped—from being tried as adults and kept in an adult prison awaiting trial.

"These boys, who had just turned 14, and



on a percentage basis—ends up with one of his cases actually in court. He estimates that out of 100-plus cases, he has probably testified in court only about a dozen times.

And in about 40 percent of the cases that come to him, he is not retained as the expert witness because he either tells the client he is not qualified in that particular area, or he tells them what they don't want to hear, that his expert opinion will not support their side of the case. (In such instances, the lawyers almost always get this news verbally—a written report might be uncovered during the discovery phase of litigation, with disastrous results).

George McDuffie has learned a great deal about law, and trial strategy, in his years as an expert witness. "It turns out," he says, "that you go to court only when neither side has a clear edge."

He has some interesting advice for potential expert witnesses. "His [or her] first problem will be in dealing with the adversary process. The expert wants to do the whole show, because that is what he [or she] usually does." He once spoke to the Patent and Copyright Law Section of the D.C. Bar, and, among other things, told them, "It is [the expert technical witness's] responsibility [in their own work] to develop the facts on both sides of a question, to play off the pros and the cons against each other, and to reach a verdict. At first, I found it rather difficult to take a position on only one side of the question and to order my thinking in accord with the adversary process."

To lawyers, he offers a number of instructive points. "Tell your witness what he [or she] is expected to do; let your expert do his [or her] own thing, and don't lead him [or her]; and, remember that many engineers, and especially computer engineers, are used to speaking jargon—that's the way they talk and think. Your job is to get them to say what they mean directly and simply."

Finally, he makes a suggestion that may not be totally acceptable to all attorneys: "Let your expert in on your strategy. By do. nis you treat him or her as a member of the team, not as someone serving the team. While this could compromise the expert's objectivity, it has the added advantages of preventing surprises, and it allows the expert to make suggestions on technical aspects of the case that he [or she] might not otherwise be aware of.

"Attorneys," says Prof. McDuffie with a slight grin, "tend to hold things back. And they shouldn't, necessarily."

Asked why he works as an expert witness, he says "It's interesting because of the diversity. It's very educational, and it helps with my teaching. Of course it brings in some money. But there are two other reasons: I like to get involved, and, it's fun!"

At first glance, the reader might think it odd to see that the next two experts are both document examiners. But the field is so rich, and the variety of work so different, that it could justify several more practitioners of this field, such as the ones most people think of when they hear the term "expert witness"—the fingerprint expert; the handwriting expert; the man who says, "Sorry the signature on the will leaving everything to the wastrel son is not that of the deceased billionnaire." (*Now* we're talking expert).

David Crown and James T. Miller have been friends—and friendly rivals—for many years. Dr. Crown (he has an earned doctorate in criminology) was chief of the CIA's Questioned Document Laboratory for 15 years until his retirement four years ago, and before that was the assistant director of the U.S. Postal Inspection Services Identification Laboratory in San Francisco. He earned both his master's and his Ph.D. in Criminology at Berkeley, and has lectured or taught locally at Georgetown, George Washington, and American Universities, and at the Antioch School of Law.

Following a stint as a military counterintelligence specialist, David Crown decided to study criminology and ended up in criminalistics, the broad field of criminal investigation or the laboratory examination of evidence (which includes: toxicology; serology; firearms and tool marks; and microscopic examination of hair and fibers, among others). As for a career specialty, he puts it far more simply than a definition: "Documents grabbed me."

An indication of Dr. Crown's standing in the field is the fact that he handled the Rudolph Mengele case for the Department of Justice. Also, he was involved in verifying the historical accuracy of the now-famous photograph of Austrian President Kurt Waldheim in an SS uniform.

Speaking just of expert witnesses in his own field, David Crown says, "In regard to examiners, the key question becomes, 'How conclusive is the man? Does he have a right to be that positive, and does he have a basis for reaching that conclusion?' If we are dealing with competent people, then you won't find diametrically opposed con-

were both mildly retarded, and neither o. whom had every been in trouble before, were going to be sent home pending trial, and the state, which was represented by a very ambitious prosecutor, did not want that. I was the only witness, and I was asked if I could guarantee that if they were sent home they would not commit another crime. I said there was no way that I could guarantee anything, but I testified that if I were the boys' neighbor, I would trust their being at home. Earlier, I had been challenged for being a psychologist and not a psychiatrist, and after I gave that response, the judge, who was quite humorous, said 'Not even a psychiatrist could have guaranteed *that*.'

"And, talking about the contribution an expert witness can make to the system, I think that in that case, had I not testified, and I did so *pro bono* in that instance, those kids might have been bumped up to adult court, and who knows what might have happened to them. But I really feel that I did an important service."

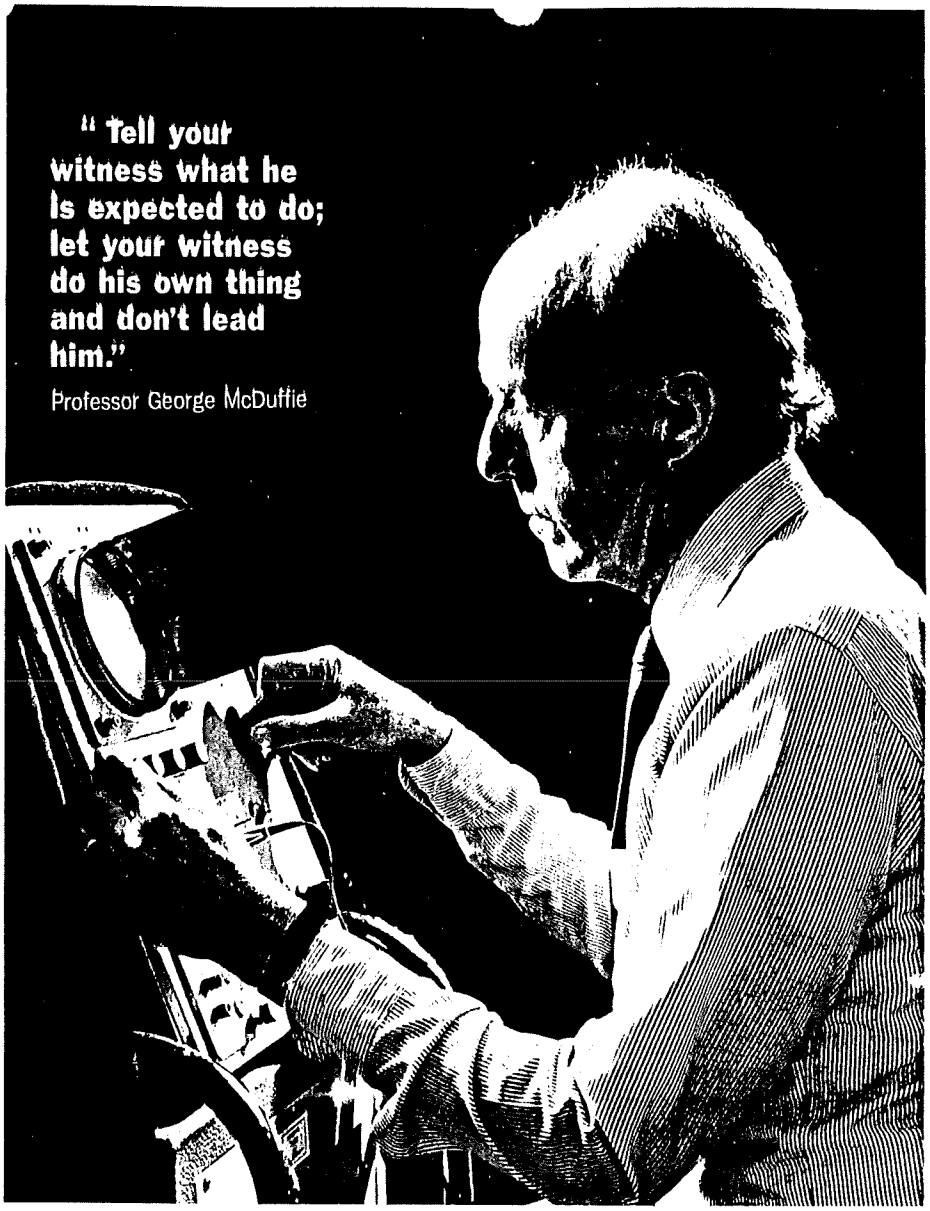
The disciplines of electrical and mechanical engineering and the fields of product liability and patents may seem light years away from child guidance or forensic pathology, but, as Professor George McDuffie points out, there are a number of similarities, not the least of which is the chance to expand one's own knowledge and then pass it on to others.

A full professor of electrical engineering (and for eight years the dean of the School of Engineering and Architecture) at Catholic University since 1963, George E. McDuffie became an expert witness almost by accident. Certainly it was not an endeavor he sought out himself.

I'd done research in various areas, mostly materials, over the years, and about 20 years ago I was asked to testify in a patent case. I did, and then didn't do much else, and then a neighbor, a guy I'd grown up with who was an attorney for a big national corporation, called me and he needed an expert in a big case, a computer case that lasted two months in Baltimore, and I got involved in that. After that I got tied up with TASA—Technical Advisory Services for Attorneys (Fort Washington, Pennsylvania)—and I went into their computer bank, and now I get about 60 percent of what I do from them. The other 40 percent I get from private attorneys and other people I have met in this city."

George McDuffie does patent work, product liability cases, personal injury cases, and fire cases. Most of these cases involve some electrical device—a stereo amplifier that may or may not have been the cause of a fire—and some mechanical devices too. "It turns out that an EE (electrical engineer) can often switch gears into mechanical engineering without too much trouble."

Like Drs. Brownlee and Magrab, Prof. McDuffie is quick to point out that, "I don't make my living at this. I make my living teaching." He spends four days of each week on campus, and another day-and-a-half involved in some aspect of expert consulting. He is not as harsh on professional expert witnesses in his fields as are Brownlee and Magrab, mentioning that there are retired firemen who now consult full-time on fire cases, and that there are firms such as Forensic Technologies International Inc. in Annapolis that provide expert witnesses especially in the fields of product liability, fire, and personal injury. Still, it is quite obvious that he prefers his own situation of teacher-scholar-expert witness.

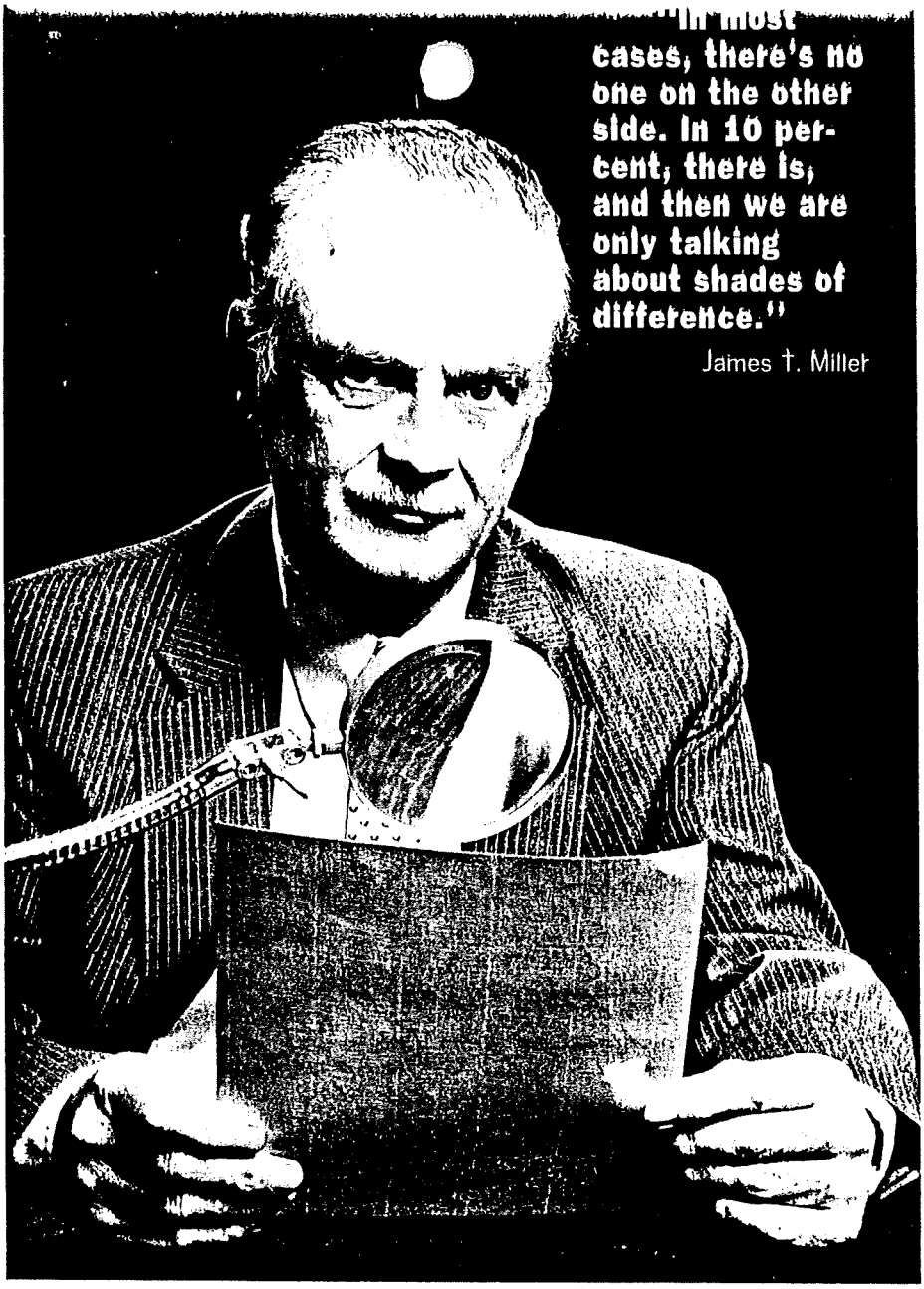


One of the things Dr. McDuffie likes most about his work as an expert witness, especially in computer cases, is that it "forces you back into the literature. In several cases I've really had to get up on the history. For one particular case I actually went back and read Jonathan von Neumann's handwritten notes. I had to review all the work of an electrical engineering professor out at the University of Minnesota, who came within a hair's breadth of inventing the first computer. In a case that came up around 1960 we were looking at stuff from back in 1910 and 1920. But I love that kind of work because I'm a history buff."

Another value that this work has for McDuffie is that he can pass the new information, the fruit of his research and involvement in a current case, on to his students.

He makes the point that consulting with a patent attorney on a case is different, if not necessarily also easier, than working on the other types of cases because the patent lawyer has a technical background. "In product liability, personal injury, and fire cases, you're talking to a guy who may have changed a light switch—and then he may not have. So how you relate to your client is really quite different. You may have to start at the very beginning. It's more like straight consulting where your client is sometimes awed by the mystique of the field, whereas in patent cases that's not true at all."

Like the other expert witnesses profiled in this article, Professor McDuffie seldom—



clusions. You may find *shadings* of opinion: positive versus highly probable—yes. Positive versus negative—no."

Dr. Crown is careful to mention the word "competent" because of the somewhat ironic fact that this very scientific field has been invaded by a group of people who came in through a rather nonscientific door. Graphologists, or handwriting analysts, the people who analyze character (and sometimes also tell fortunes) by looking at a person's handwriting, now examine documents. Indeed, they have their own national organization.

Crown reveals his attitude toward them by saying, with no attempt to hide the sarcasm, "You shouldn't get a psychological evaluation along with the verification of a document."

He explains that there are three main professional organizations in his field: the American Academy of Forensic Sciences; the American Society of Questioned Document Examiners; and the American Board of Forensic Document Examiners. He says "A person may belong to only two out of the three, and still be fine, but if he doesn't belong to *any*, then look out. Beware the unwashed. They wander into a case pretending to be qualified, and they can cost the public a lot of money."

Asked how well lawyers use experts in his field, David Crown echoes some of the other experts profiled in this article. "We are objective, not advocates. We *have to* remain objective. Half the time I disagree with my clients. Look, I can't pick the side that hires me. Lawyers must understand that."

He has several pieces of advice for attorneys who use or are thinking about using a document examiner as an expert witness. "Begin with a frank discussion of the issues involved in the case. Tell us what you hope we can do for the case. And, don't argue about money."

According to Dr. Crown, and his friend Jim Miller (in a later interview) who said the same thing in almost the same words, too often attorneys who need an expert ...iess will give the task of finding one to their secretaries. "They'll say, 'I need a handwriting expert, find me one,' and [the secretary] will immediately go to the Yellow Pages and look under 'Handwriting Analysts' and 'Handwriting Experts,' the only entries there, and try to find the cheapest guy."

(By contrast, a professional reference work, such as the 1984 Forensic Services Directory, has almost a dozen separate headings for specialities relating to handwriting and documents, and lists over 100 individuals).

Says Dr. Crown, "Be willing to give your expert all the examples and original documents that he [or she] needs," a suggestion that also has to do with economy, finance and strategy. And when the expert has finished the job, "Discuss the report before it is written. You may decide not to have it written, because if you do, it is then available to the other side through discovery."

Finally, he advises, "Never ask your expert to change his [or her] conclusion. If it is simply a matter of verbiage, that's one thing, but don't try to get him [or her] to change the findings."

A quick check of some of David Crown's current cases indicates the wide-ranging interests of this type of expert: a murder case (in a Midwestern state) in which he must examine a typewriter to determine who typed the document in question; a medical malpractice case (were the medical records altered?); several cases involving the authentication of wills; and a contract fight that will probably turn upon his identification of a photo-copied document. Apparently, documents still "grab" him.

James T. Miller spent his formative years as an expert witness with the Metropolitan Police Department. From 1954 to 1962 he was a questioned document examiner, and from 1962 to 1980 (when he retired and began his active consulting practice) he was the administrator and chief of that office. Since 1954, he has testified in over 2,000 cases. While he headed the police's questioned document office, he prepared or reviewed 800 to 1,200 cases—and analyzed 10,000 to 40,000 questioned documents—each year.

One of Miller's most intriguing, and unusual, cases involved the rape of a Gallaudet College coed whose attacker wrote out his intentions on a note pad. When the suspect abducted the woman, he ripped the top sheet off the pad. After a police officer almost destroyed the evidence by trying to "lift" the writing by using the old detective story cliche—which, incidentally, does not work—of rubbing charcoal from a pencil across the page, Miller was able to learn what had been written on the pad. Using a device known as an ESDA (Electro-Static Detection Apparatus) machine, he was able to read the sheet, and

continued on page 68

continued from page 51

that information gave them a line on the rapist.

Miller points out that when it comes to documents in general many attorneys do not realize the full extent of what a qualified document examiner can do. "And therefore he [or she] doesn't know what to prepare for them." Miller has also noticed something less than full appreciation of his skills on the part of certain judges: "One judge asked a suspected forgerer to sign the name in question right there in court—all the guy had to do was to sign it the same way he'd done it before!"

Another common failing on the part of attorneys is that they do not realize how greatly a person's physical or emotional condition can affect his or her handwriting, says Miller. "And they usually don't know that a person's handwriting can have a 'foreign accent.'"

Like most of the other experts mentioned in this article, James Miller finds that only about 10 percent of his cases end up with his testifying in court. "In most cases, there's no one on the other side. In 10 percent, there is, and then we are only talking about shades of difference."

Miller, like David Crown, always lets the attorneys who hire him know right away that all they can expect is his objective opinion. He says that this has seldom been a problem. "I've never had a U.S. attorney or a high police official ask me to testify a certain way. And I've never had a private attorney suggest a larger fee if I'd muddy up the other side's case. I really don't think most document examiners could really help, in an adversarial sense. We are not in the adversary system."

mes Miller, who does a lot of medical malpractice cases, said he began to realize just how sophisticated that field was becoming when he learned that certain law firms that handle medical malpractice now hire attorneys who used to be surgical nurses.

In general, Miller is proud of the contribution made by expert document examiners. He points out that he and his colleagues—the good ones—are seldom opposed because they can demonstrate *why* their testimony is accurate. (He recalls with horror the time he was allowed to leave the witness stand by an attorney who forgot to ask him to explain the basis for his expert opinion. "As I left the stand, I said to him, quietly, 'Hey, you didn't ask me why I have that opinion!' When he tried to recall me, the judge asked if the reason he was recalling me had anything to do with our whispered conversation, and when the attorney said 'Yes,' the judge said, 'Forget it.'")

James T. Miller has a wealth of advice for attorneys on how to use expert witnesses. In fact, he once wrote a paper on the subject. In it, he counsels lawyers to ask, regarding expert witnesses:

1. Where did they train?
2. How often, and in what states and countries, have they testified? (As a lawyer, you won't be overly impressed that they simply qualified in court. Experience has shown you that the court will often allow anyone this privilege.)
3. For what law firms have they done work?
4. Are they members of the American Society of Questioned Document Examiners and/or the American Academy of Forensic Scientists?
5. Are they certified by the American Board of Forensic Document Examiners?
6. For which universities and/or professional groups have they lectured or taught?
7. In which national and international technical journals have their writings appeared?
8. What are the terms outlined in the client agreement?

Miller adds some advice that might well apply to the selection of any expert witnesses: "Use common sense in assessing them. Do they appear professional, or merely hungry and eager to please? What kind of witness will they be? They may reach the correct conclusions, but if they can't convincingly illustrate their points in the courtroom or handle cross examination coolly and effectively, they are going to be useless. It's like selecting an attorney. You buy the complete package—reputation, ability, presentation." ■

Mark Dombroff on Expert Witnesses

Washington attorney Mark Dombroff is an expert on expert witnesses. A government trial lawyer for 15 years—he directed the Department of Justice's Torts Branch (civil section) and before that was a trial at-

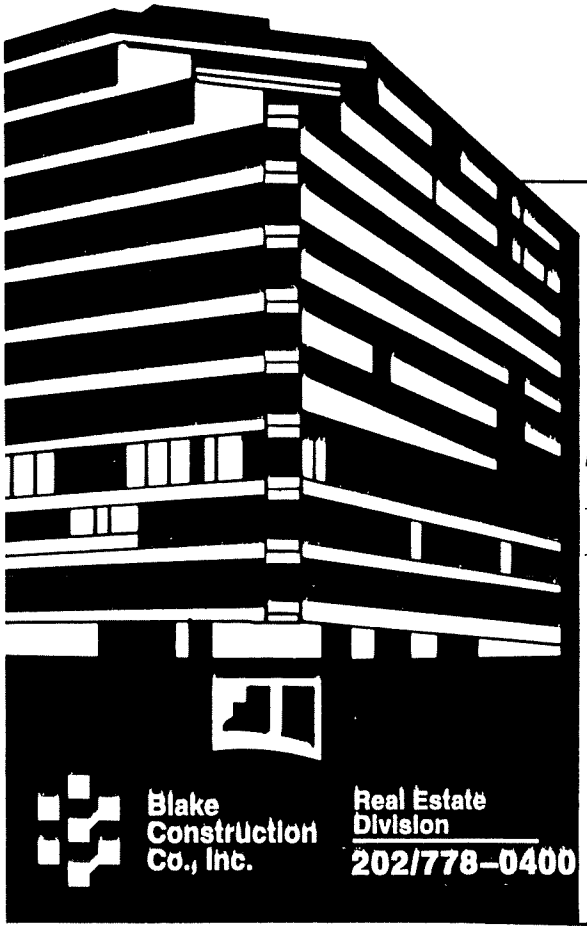
torney for the FAA—Dombroff is now of counsel to Hughes, Hubbard & Reed. While with the government, he was responsible for all aviation and maritime litigation.

Mark Dombroff is also a prolific writer. The topics of his many books include: demonstrative evidence, unfair trial tactics, direct and cross examination, trial objections, and closing arguments. Shortly after the first of the year 1987, Lawyers Co-op will publish his latest volume, *Expert Witnesses in Litigation: Tactics and Techniques.*

He gave *The Washington Lawyer* a sneak preview of the contents of that book by revealing some of the advice he imparts to lawyers on the care and feeding of expert witnesses:

- The lawyer must realize that the expert witness can be determinative of the outcome of the case. If a case goes to trial, its outcome usually depends more on the witnesses than on the lawyers.
- If you hire the right experts, generally, they will help you use them properly and effectively.
- You don't want the expert witness to come across too slickly. But you have to be aware of what "sells" the jury. Brown shoes with a grey suit is not in keeping with the image.
- You want the expert to be an expert, not an advocate.
- Hiring of an outstanding expert early on as a "consultant" can result in the expert's being unavailable to work for the other side.
- At the "packaging stage" of a case, the expert witness can be very helpful, especially in regard to demonstrative evidence.
- Let the expert witness use the narrative approach on the stand because they are generally much more comfortable with that approach.
- At the trial stage, prepare for the experts' testimony. I almost always take them into the actual courtroom the day before and let them get the feel of it. You wouldn't put on a stage play without blocking out the actors' moves. And, like it or not, a trial can be a very artificial setting, so the more practice the better.
- I never stipulate as to my expert witness's credentials. Giving his or her own credentials on the stand is the one area where the witness is the most comfortable.
- Don't put artificial financial restrictions on expert witnesses. In addition to their time, you're paying for everything the expert brings to the courtroom with them—their credibility, their presence, their ability to understand that when a question is asked they should turn to the jury and talk to the jury, and all the little touches that relate to the "packaging" of the testimony, which is so important.

Remember: the basic premise of the expert witnesses, no matter who offers them, is that the expert is there for the purpose of aiding the jury in better understanding the facts at issue. ■



Liability Insurance: A Financial Analysis

Attachment IV
House Judiciary
2/25/87

January 1987
Insurance Services Office, Inc.

Insurance Services Office, Inc. (ISO) is a non-profit corporation that makes available advisory rating, statistical, actuarial, policy form and related services to any U.S. property/casualty insurer.

OVERVIEW

A financially sound property/casualty insurance industry provides a vital service in the form of needed security to individuals and corporations. The cost of insurance affects almost every aspect of American life. Given the recent condition of the property/casualty insurance marketplace — with affordability and availability problems affecting many commercial insurance consumers — several critics have charged that the recent large liability premium increases are unnecessary. In this analysis, Insurance Services Office, Inc. provides a fact-based review of the property/casualty insurance industry's financial condition. We will show that losses have skyrocketed, especially in the liability lines. We will show that rates of return for the industry have been abysmal and, while improving, need further and sustained improvement. We will demonstrate that monies set aside to pay claims, that is, reserves, are in all probability inadequate and need to be strengthened. Finally, we will demonstrate that premiums, while growing rapidly, have not grown enough to return insurers to a position of making money on their insurance operations.

In terms of return on net worth, 1984 was the worst year in the history of the property/casualty insurance industry. Return on net worth is net after-tax income from all sources divided by total net worth, and is a critical measure of financial results which is commonly used by investors for inter-industry performance comparisons. While 1985 had slightly improved returns on net worth, the industry actually experienced the largest loss from its insurance operations in its history during 1985. Data through 1986 indicates that the industry has finally begun to turn a profit on insurance operations — albeit as a result of large premium increases and more restrictive underwriting — and **NOT** a reduction in claim costs.

Figure 1

Industry Results ($ Billions)

	1984	1985	1986 NINE MONTHS
Underwriting Income	– 21.7	– 25.0	– 12.4
Investment Income	17.7	19.5	16.0
Operating Income	– 4.0	– 5.6	3.6
Realized Capital Gains	3.1	5.5	5.0
Federal Income Taxes	– 1.7	– 2.0	– 0.3
Net Income After Tax	0.8	1.9	8.8
Return On Net Worth	1.7%	3.9%	10.2%

Figure 1 displays key industry results for 1984, 1985 and nine months of 1986. It includes operating income — the sum of underwriting income and investment income. This is the most important component of insurers' net income after taxes because it represents profit or loss from insurance operations. For only the second time in its history, the industry experienced operating losses in 1984 — a then-record $4.0 billion loss. In 1985, underwriting loss (the amount by which claim costs and expenses exceed the associated premiums) increased by more than $3 billion (despite substantial premium increases), while investment income increased by less than $2 billion. This created another record operating loss (i.e., loss from insurance operations) — $5.6 billion. During the first quarter 1986, investment income exceeded underwriting loss for the first time in ten quarters. For the first three quarters of 1986, pre-tax operating income has grown to $3.6 billion, and is estimated to have grown to $4.5 billion through year-end 1986.

After including the remaining components of net income after taxes — realized capital gains and federal income taxes — statutory net income after tax increased from $0.8 billion in 1984 to $1.9 billion in 1985 and to $8.8 billion for the first three quarters of 1986. GAAP-adjusted return on net worth rose from an abysmal 1.7% in 1984 and 3.9% in 1985 to 10.2% for the first nine months of 1986.

Statutory Accounting Principles (SAP) and Generally Accepted Accounting Principles (GAAP) are different accounting methods for measuring assets and liabilities. Insurers are required by government regulation to report their financial information on a SAP basis, which measures an insurer's ability to fulfill its financial responsibilities to the public. By its very nature, SAP is a more conservative system than the GAAP, which are used by other businesses and emphasize profitability on the transactions conducted over a given period of time. Throughout this report all results quoted, other than return on net worth, are on a statutory basis. Returns on net worth are quoted on a GAAP basis in order to be comparable to returns calculated in other industries. Statistics have been determined from data compiled by A. M. Best Company.

While the recent increase in net income after taxes is a positive development, there are concerns about the source of this income. Contributing to the $1.9 billion in income for 1985 was $5.5 billion in realized capital gains, a record amount. This was due to unprecedented stock market increases that year.

During the first nine months of 1986, this phenomenon continued as the industry realized $5.0 billion in capital gains, in sharp contrast to the average annual $0.5 billion in capital gains achieved over the preceding 10 year period. Such increases in the stock market or other sources for realized capital gains are not predictable or regularly recurring. Positive **operating income** is essential if insurers are to be able to meet the insurance needs of our growing economy.

Surplus — the difference between an insurer's assets and its liabilities — represents the uncommitted funds of an insurer. It is the security that stands behind every policy. Increases in surplus are a necessary precondition to increases in insurance written, so vitally needed to meet the current and future insurance needs of the U. S. economy. While surplus has increased 14% since the end of 1985, this encouraging result must also be viewed realistically. Figure 2 shows that while surplus increased $10.6 billion through the third quarter of 1986, it's important to note the sources of this new surplus. Capital gains, both realized and unrealized, together with new funds, totalled $9.2 billion, accounting for more than 85% of the total surplus gain. Income from actual insurance operations contributed only modestly to the increase in surplus. Surplus is estimated to have increased by $16 billion in all of 1986; however, much of this increase is again accounted for by capital gains and new funds.

Other industry financial concerns include loss reserve inadequacies, potential difficulties in collecting from reinsures, and revisions to the Federal Income Tax System.

Figure 2

Surplus Change And Its Components - Nine Months '86

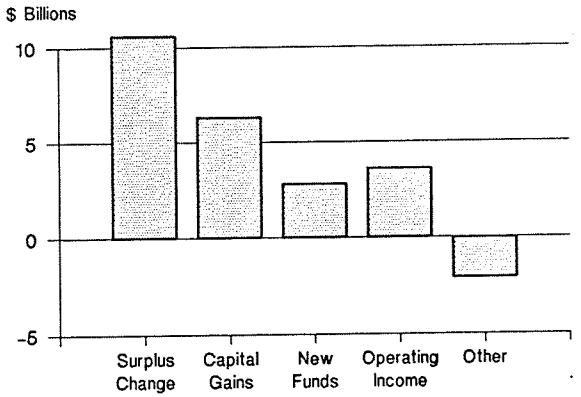


Figure 3 shows that the 13% growth in loss and loss adjustment expense reserves through the third quarter of 1986, following a 14% growth in 1985 and an average growth of 10% over the prior four years may indicate that the industry is finally making progress in correcting its loss reserve inadequacies. However, any progress in this area is just a beginning. During the last recovery, in the late 1970's, an average 20% rate of reserve growth was sustained over four years.

Dependence upon reinsurance has grown over the years, with reinsurance recoverables now representing over $70 billion — 95% of the industry's surplus. In 1982, reinsurance recoverables represented only 60% of surplus (see Figure 4). It has been estimated by some analysts that 10% to 20% of the reinsurance recoverables amount will, in fact, be uncollectible — which would effectively wipe out all the new funds pumped into the property/casualty industry in 1985, and would pose a solvency threat to many insurers.

The Tax Reform Act of 1986 will add an estimated $7.5 billion to the property/casualty industry's tax liability over the next five years, and will affect property/casualty insurers more than most other businesses due to the special provisions that apply specifically to the insurance industry. Particularly in the liability lines, it appears that insurers will have to increase rates substantially just to maintain their current level of profitability.

Figure 3

Growth In Loss And LAE Reserves

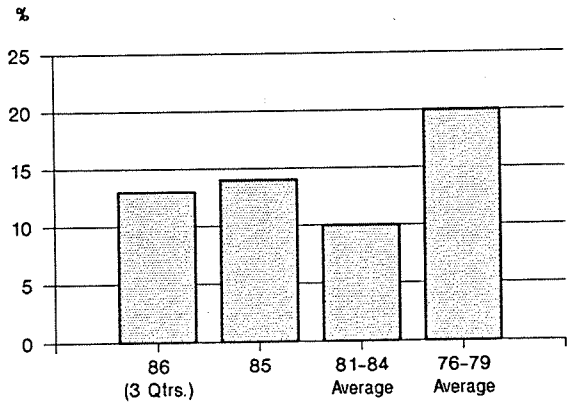
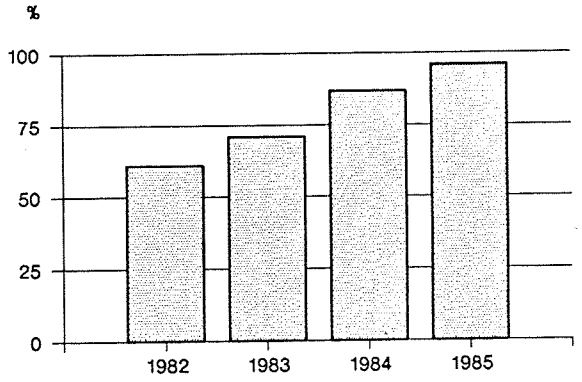


Figure 4

Reinsurance Recoverables As A Percent Of Surplus



RETURN ON NET WORTH

Return on net worth is defined as net after-tax income from all sources (income from insurance operations and realized capital gains less taxes) divided by total net worth (assets less liabilities). It is a critical measure of financial results commonly used by investors for inter-industry performance comparisons.

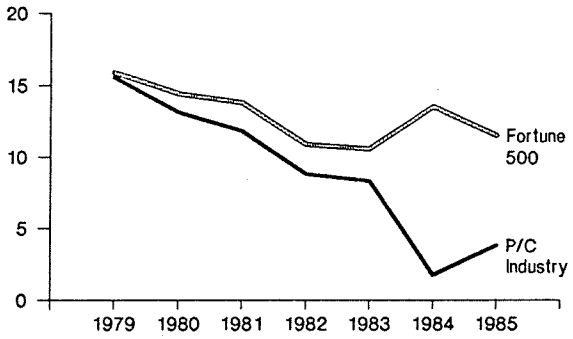
Figure 5 shows that, for the period from 1979 through 1984, the industry returns on net worth fell increasingly below the returns for the Fortune 500 companies. In 1984, this gap in returns reached nearly 12 points. The industry rate of return was 1.7% while the Fortune 500 median return was 13.5%. In 1985, industry returns continued at a sub-par 3.9%, while the Fortune 500 median return dropped slightly to 11.5%. In fact, while the industry experienced two consecutive years of returns below 4%, the Fortune 500 median return has not fallen below 10% during the last 10 years.

During the first nine months of 1986, the industry rate of return on net worth improved significantly to a non-annualized 10.2%. However, this return is not as good as it first appears, for a number of reasons. The year 1986 has seen the lowest dollar amount of catastrophe losses in the past five years, and is, in fact, less than half the catastrophe losses experienced in 1985; this situation is not likely to be maintained. The 1986 results have also been due in large part to an unprecedented amount of realized capital gains, which again cannot be counted upon for the future. Finally, primary insurers have found it necessary to retain significantly more risk than in prior years, due to the relative unavailability of reinsurance.

Figure 5

Property/Casualty Returns Have Plummetted

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



COMMERCIAL INSURERS

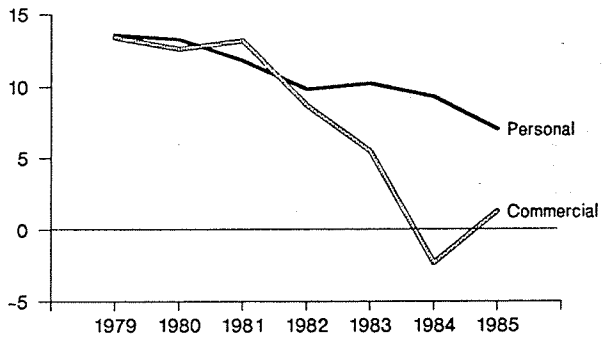
The poor results have not been spread among all insurers evenly. The companies that insure our nation's businesses have been particularly hard hit.

Figure 6 shows that returns on net worth plummeted to negative 2% in 1984 for insurers that concentrate in the commercial lines of insurance. Large premium increases have been a major reason that their returns rebounded somewhat to 1.3% in 1985. In 1986, commercial insurers have experienced continued improvement.

Figure 6

Commercial Insurers Lost Money In 1984

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



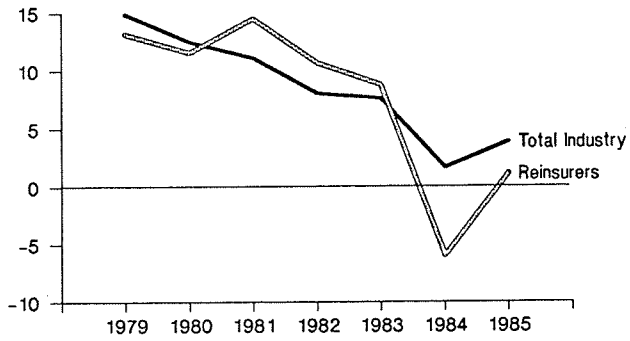
REINSURERS

As bad as the results have been for commercial insurers, the deterioration was magnified for reinsurers. This is caused by reinsurers' heavy involvement in the riskiest coverages, such as commercial liability. Figure 7 shows that reinsurers' returns on net worth, which were similar to the industry's until 1983, dropped to negative 6% in 1984 — 8 points below the industry average.

Remedial actions taken by reinsurers did result in a substantial improvement in the rate of return to 1.2% in 1985. In 1986, the improvement for reinsurers has continued.

Figure 7

Return On Net Worth: Reinsurers vs. Total P/C Industry (%)



INVESTMENT INCOME AND UNDERWRITING PROFIT OR LOSS

The most important component of insurers' net income is operating income — the sum of under writing income and investment income. Operating income represents profit or loss from insurance operations.

Underwriting income (the difference between premiums earned and claim costs and expenses incurred) has actually been an underwriting loss since 1979. However, until 1984, investment income (interest and dividends received on investments) was large enough to offset underwriting loss.

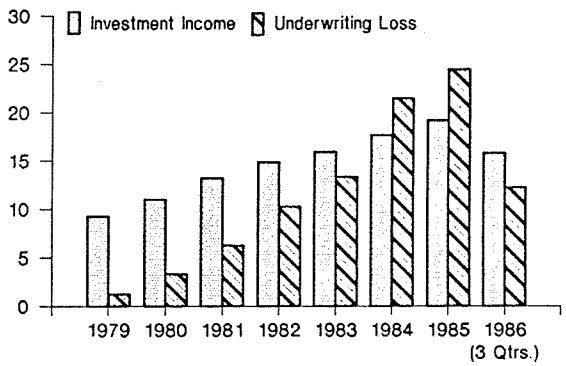
- In 1984, underwriting loss exceeded investment income by $4.0 billion (See Figure 8).
- In 1985, underwriting loss exceeded investment income by $5.6 billion.
- In nine months 1986, investment income once again exceeded underwriting loss by $3.6 billion. Year-end 1986 investment income is estimated to exceed underwriting losses by $4.5 billion.

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

In 1985, investment income continued to increase at just under $2 billion per year, demonstrating that insurers' management of their investment portfolios was reasonably effective. But the improved results can be attributed to significant premium increases, which slowed the growth in underwriting loss in 1985. The 1985 pattern was repeated in 1986, with year-end results estimated to show a $2 billion increase in investment income and a reduction in the underwriting loss to $17 billion.

Figure 8

Investment Income Did Not Offset Underwriting Losses In 1984 & 1985
($ Billions)



GROWTH IN LOSSES

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

.gure 9 shows that premiums for all insurance lines combined were generally in line with claim costs until 1979. Starting in 1979, premiums did not keep pace with costs as measured by incurred losses and expenses. The gap widened through the early 1980's and did not begin to narrow until mid-1984 when insurance prices began to rise.

During the early 1980's, interest rates were at historic high levels. Insurers recognized that high interest rates created the potential for increases in investment income. In fact, as Figure 8 showed, investment income grew at a rate of $2 billion per year. It was this growth in investment income that prompted insurers to lower the premiums to the benefit of insureds, and that created insurers' ire to compete for additional premium dollars to invest.

Thus, part of the reason for the poor underwriting results of the mid-1980's is the premium shortfall that resulted from competitive pricing. However, a second and major cause of the problem is the accelerated growth of incurred losses, which have escalated to record highs. The rising loss line on Figure 9 demonstrates that today's financial problems are not simply the result of competitive pricing. Instead, they are to a very significant extent driven by the cost of claims.

Figures 10 and 11 show that the commercial lines, and particularly general liability, have experienced the same pattern of rapidly escalating claim costs and dropping premium income, but on a more severe scale. In fact, the results for the commercial lines, including general liability, determined the poor all-lines results. Commercial insurance, which represents 42% of the total property/casualty premium volume, experienced 60% of the property/casualty underwriting losses in 1985.

Figure 9

Written Premium vs. Losses & Expenses (1967 Constant Dollars)
Countrywide - All Lines Combined

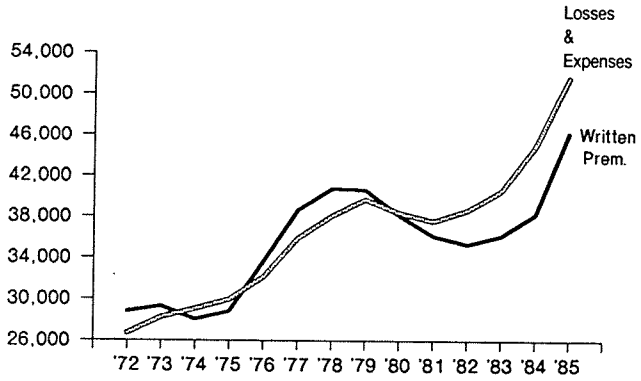


Figure 10

Written Premium vs. Losses & Expenses (1967 Constant Dollars)
Countrywide - Major Commercial Lines

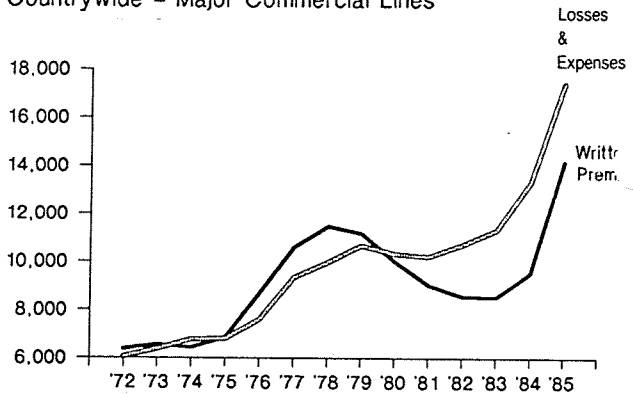
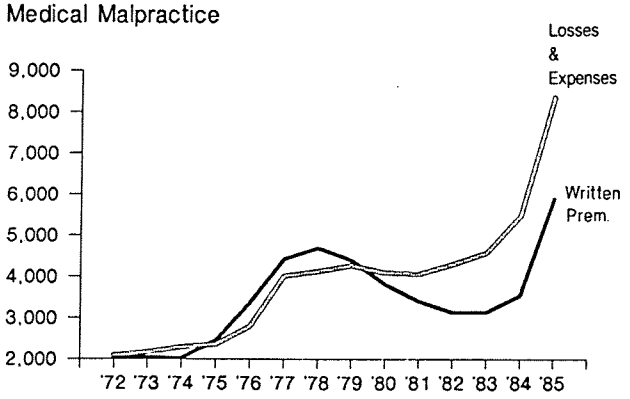


Figure 11

Written Premium vs. Losses & Expenses (1967 Constant Dollars)
Countrywide - General Liability & Medical Malpractice



LOSS RESERVES

The insurance industry is in a unique business position in that, unlike other industries, the cost of the product it sells is not known at the time of the sale, and in fact is not known for a while after the policy period has ended. For some lines, such as property insurance, this time lag is relatively short — several months at most. For liability lines, however, it can be many years until all claims are paid and final costs are known.

The analysis of industry profitability is based on incurred losses. That is, the analysis considers both claims paid during a given period of time as well as estimates of loss payments that will be made on claims that have not yet reached final judgment or settlement. It should be noted that these claims are against policies for which premiums have already been collected and reflected in the analysis. Some critics have charged that these estimates, or loss reserves, are "artificially" inflated by the industry to make the claims look worse than they are.

In fact, experience has shown that industry loss reserves have historically been understated. At year-end 1976, industry loss reserves were established at $47.1 billion. However, as of year-end 1985, $50.2 billion had already been paid out on these same claims — $3.1 billion more than the original estimate — and an additional $7.6 billion was still expected to be paid. The conclusion is that the initial 1976 reserves were deficient by nearly $11 billion, or 23%. (See Figure 12.)

Furthermore, 1976 was not unique. Figure 13 shows a similar pattern emerging for the 1979 reserves. That is, the initial reserve of $65.3 billion set at year-end 1979 has so far been estimated to be deficient by at least $5.5 billion, or 8%. As of year-end 1985, $57.5 billion had been paid out on these same claims, while an additional $13.3 billion was still held in reserve — for a total of $70.8 billion, or $5.5 billion more than initially reserved.

Figure 12

1976 Industry Reserves Fell Short

Calendar Year 1976 Loss Reserves
($ Billions)

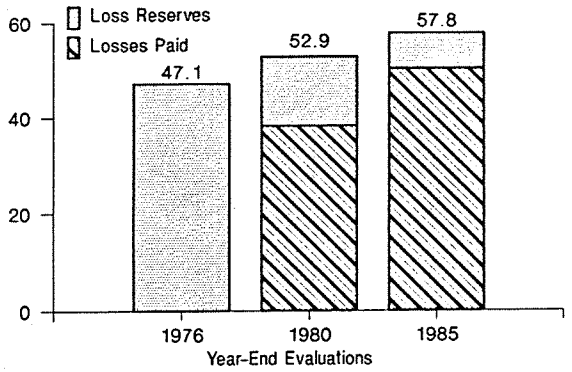
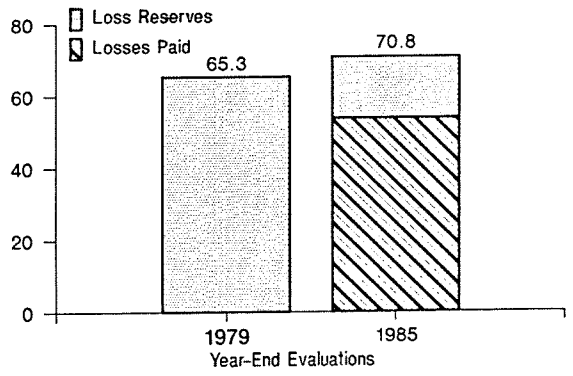


Figure 13

1979 Industry Reserves Fell Short

Calendar Year 1979 Liability Loss Reserves
($ Billions)



PAID LOSSES

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

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

From 1979 to 1985, the GNP grew 59%. During the same period, total property/casualty written premium increased 68%. However, paid loss growth exceeded the nation's overall growth by an even larger margin, increasing 100%. (See Figure 14.)

Figure 15 shows that the difference between loss growth and the nation's GNP growth was concentrated in commercial lines, where losses grew 117% in six years.

Figures 16 and 17 show that the problem is further concentrated in commercial liability (where claim costs grew 179%) and particularly general liability (including medical professional), where claim costs grew 234%, during the six year period.

For general liability and medical professional, paid losses grew at an annual rate of 22%, while GNP grew at an 8% rate, for a 14 point annual gap.

Figure 14

Loss Growth And Premium Growth vs. GNP (%)
Countrywide - All Lines

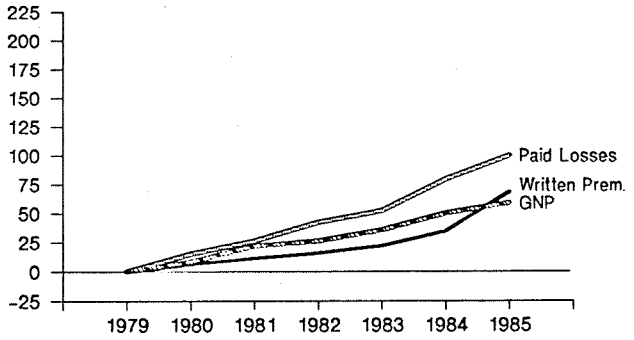


Figure 15

Loss Growth And Premium Growth vs. GNP (%)
Countrywide - Commercial Lines

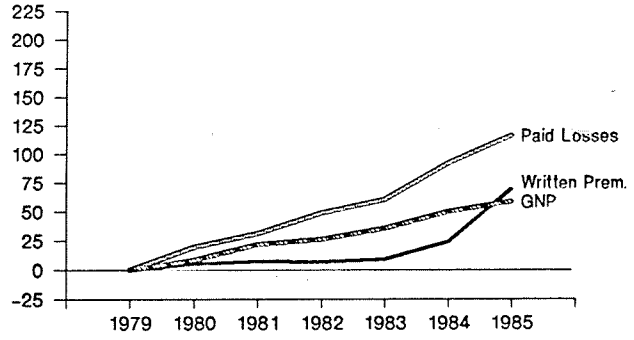


Figure 16

Loss Growth And Premium Growth vs. GNP (%)
Countrywide - Commercial Liability

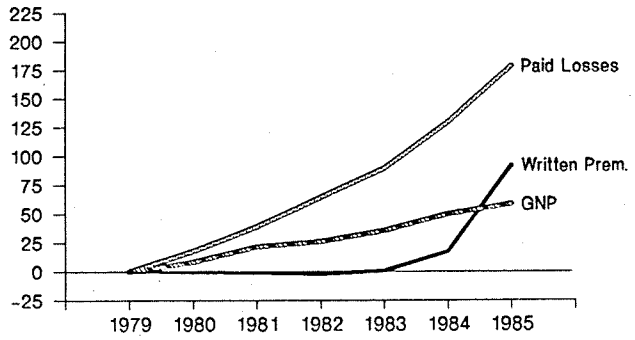
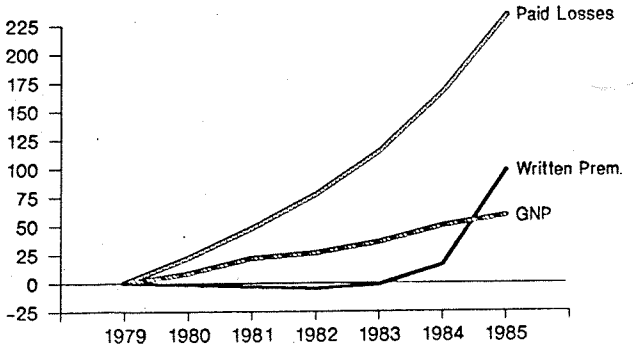


Figure 17

Loss Growth And Premium Growth vs. GNP (%)
Countrywide - General Liability & Medical Malpractice Combined



GENERAL LIABILITY PREMIUM GROWTH

It is clear from the preceding analysis that insurers needed to raise their premium levels to catch up to the growth in losses.

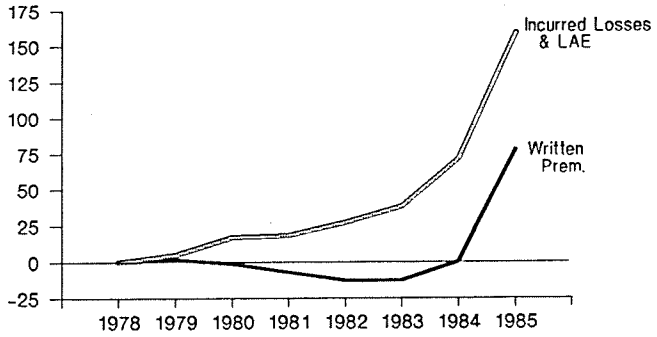
General liability written premium increased 78% in 1985. However, this growth should not be considered excessive since total loss growth since 1978 still significantly exceeds premium growth. Figure 18 shows that for the period 1978 through 1985, incurred loss and loss adjustment expense increased 160%. During this period, written premium increased only 78%. From 1978 to 1985, the rate of growth in losses was nearly double that of premiums.

The large increase in premium in 1985 did *not* recoup past losses. In fact, this rise in premium was just an attempt to get premiums more in line with losses that are still rising dramatically.

Figure 18

1985 General Liability Premium Growth Not Enough To Catch Losses

General Liability Premium Growth
vs. Loss Growth (%)



UNIQUENESS OF THIS CYCLE

The current profitability cycle is not a typical one. Several ominous new records have been set. The following figures compare 1985 results to the records set before the most recent cyclic downturn.

The then-record 1984 underwriting loss of $21.5 billion far surpassed the previous record of $4.2 billion set in 1975, and the 1985 underwriting loss of $25.0 billion set a new record, even though the 1984 combined ratio of 118.0 improved slightly to 116.4 in 1985. (See Figure 19.) These combined ratios compare to the previous record of 107.9 set in 1975. (See Figure 20.) The combined ratio is the most widely quoted measure of underwriting results, and is defined as the ratio of incurred loss and loss adjustment expenses and policyholder dividends to earned premiums, plus the ratio of underwriting expenses to written premiums.

While investment income in 1984 also hit a then-record $17.7 billion, the combined impact of underwriting and investment results was a record 1984 operating loss of $4.0 billion, which exceeded the previous record operating loss of $300 million set in 1975. Again, the 1985 operating loss of $5.6 billion was even worse, despite a $2 billion increase in investment income. (See Figure 21.)

Figure 22 shows that the record of 41 insolvencies covered by state guaranty funds for the two years 1984-85 exceeded the previous two-year record of 25 set in 1974-75.

Figure 19

Underwriting Losses ($ Billions)

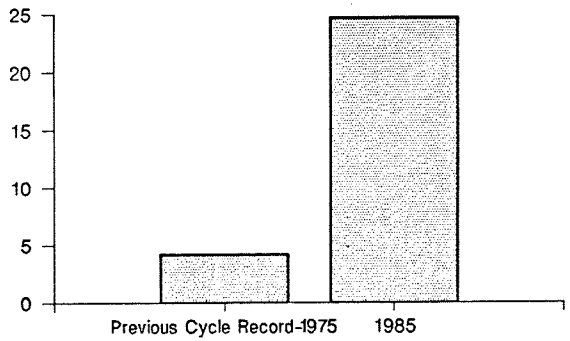


Figure 20

Combined Ratios

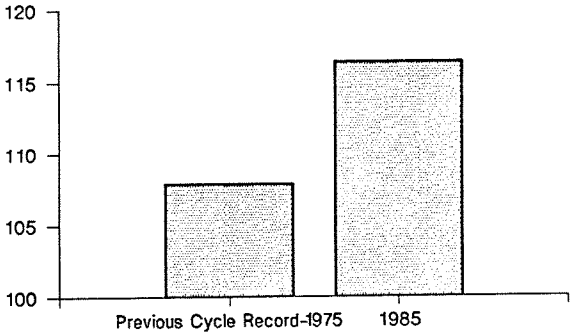


Figure 21

Operating Losses ($ Billions)

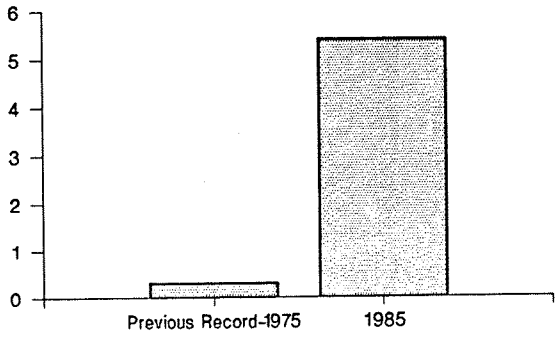
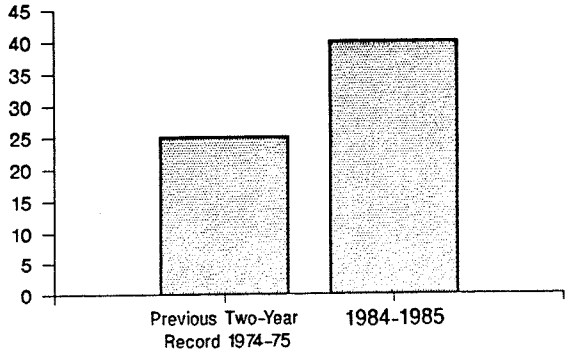


Figure 22

Insolvencies Covered By State Guaranty Funds



KANSAS UNDERWRITING EXPERIENCE

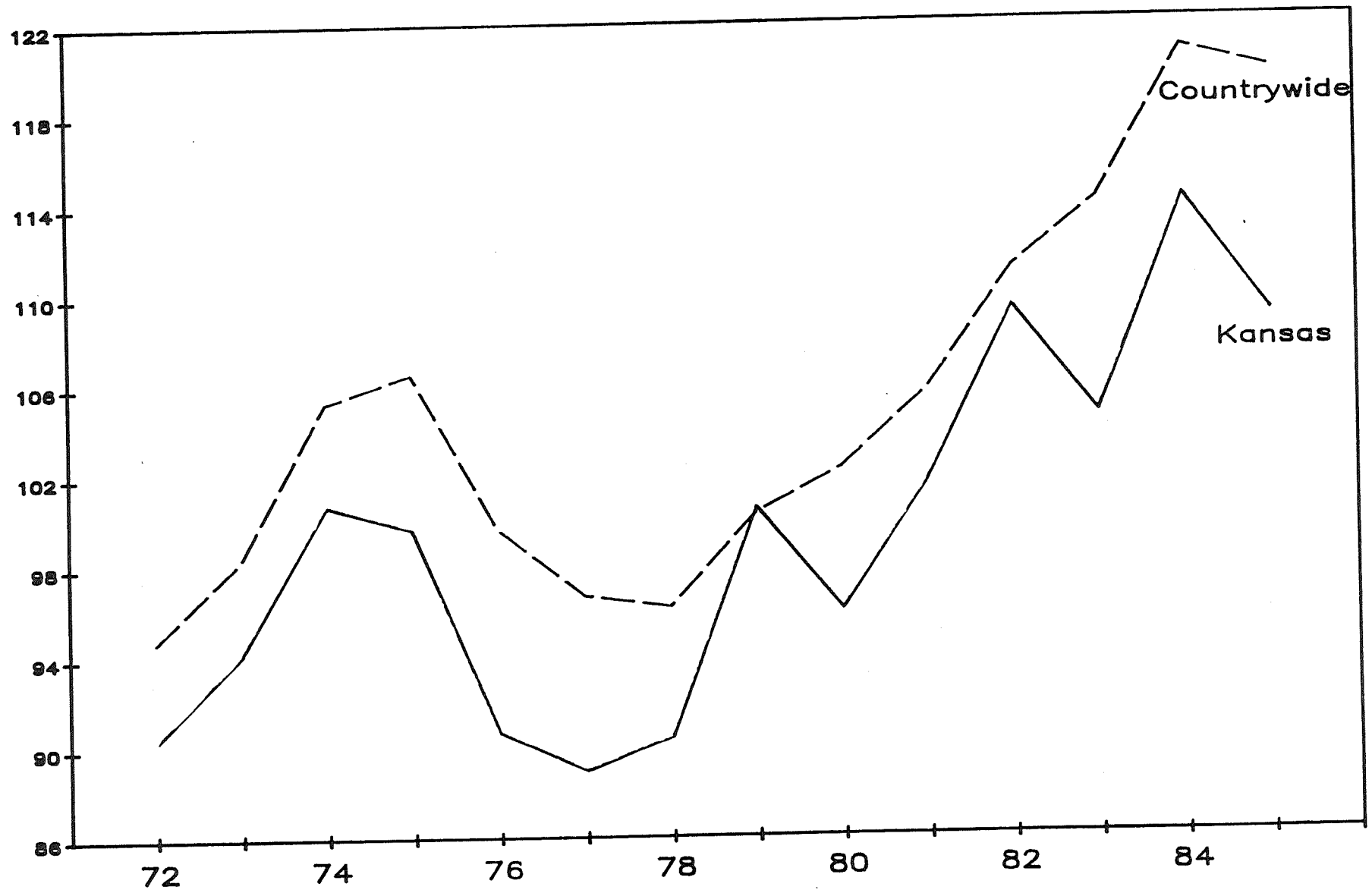
INSURER FINANCIAL STATEMENTS PROVIDE INFORMATION THAT CAN BE USED TO TRACK UNDERWRITING RESULTS BY LINE AND STATE.

FIGURES 23, 24 AND 25 COMPARE COMBINED RATIOS IN KANSAS TO COUNTRYWIDE FOR ALL LINES, MAJOR COMMERCIAL LINES, AND GENERAL LIABILITY (INCLUDING MEDICAL PROFESSIONAL). THE COMBINED RATIO (ALSO KNOWN AS THE TRADE RATIO) IS CALCULATED AS FOLLOWS: INCURRED LOSSES AND LOSS ADJUSTMENT EXPENSES DIVIDED BY NET EARNED PREMIUM PLUS OTHER UNDERWRITING EXPENSES DIVIDED BY NET WRITTEN PREMIUM PLUS DIVIDENDS TO POLICYHOLDERS DIVIDED BY NET EARNED PREMIUM.

THESE EXHIBITS SHOW THAT KANSAS EXPERIENCE TRACKS FAIRLY CLOSELY WITH THE COUNTRYWIDE TRENDS. KANSAS COMBINED RATIOS FOR GENERAL LIABILITY HAVE SHOWN IMPROVEMENT SINCE 1983, HOWEVER, THEY ARE STILL UNACCEPTABLY HIGH.

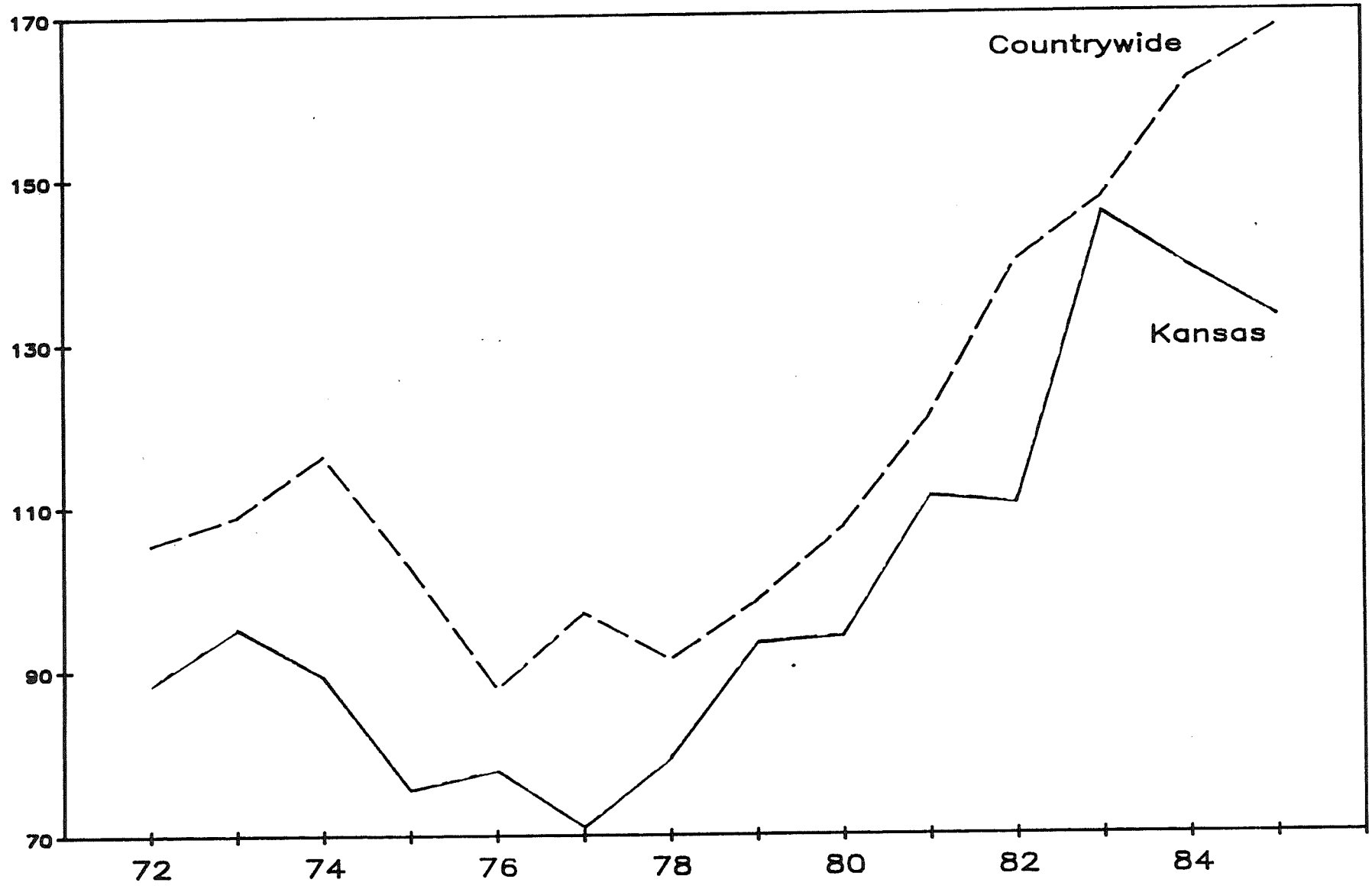
Attachment V
House Judiciary 2/25/87

COMBINED RATIO AFTER DIVIDENDS
Kansas vs. Countrywide
All Lines Combined



COMBINED RATIO AFTER DIVIDENDS
Kansas vs. Countrywide
Major Commercial Lines

COMBINED RATIO AFTER DIVIDENDS
Kansas vs. Countrywide
General Liability



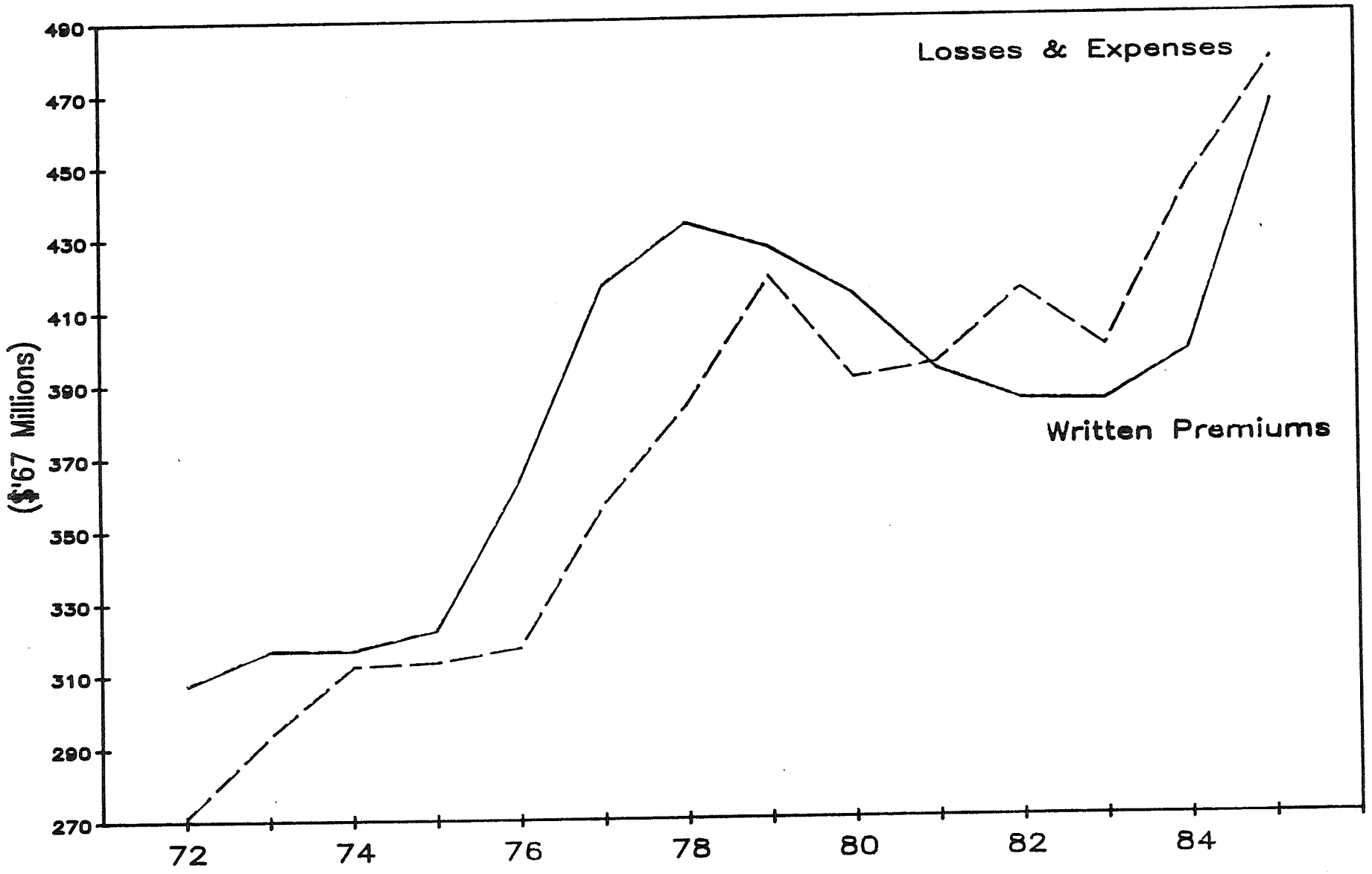
KANSAS LOSS GROWTH

FIGURES 9, 10 AND 11 ANALYZED THE COUNTRYWIDE LOSS GROWTH AGAINST PREMIUM GROWTH ON A COUNTRYWIDE BASIS FOR ALL LINES COMBINED, THE MAJOR COMMERCIAL LINES, AND GENERAL LIABILITY AND MEDICAL MALPRACTICE, RESPECTIVELY.

FIGURES 26, 27 AND 28 DISPLAY RESULTS FOR KANSAS ON THE SAME BASIS. THESE FIGURES DEMONSTRATE THAT FOR THE PAST SEVERAL YEARS, KANSAS' PREMIUMS HAVE FALLEN SHORT OF THEIR CORRESPONDING LOSSES AND EXPENSES.

WRITTEN PREMIUMS vs. LOSSES & EXPENSES

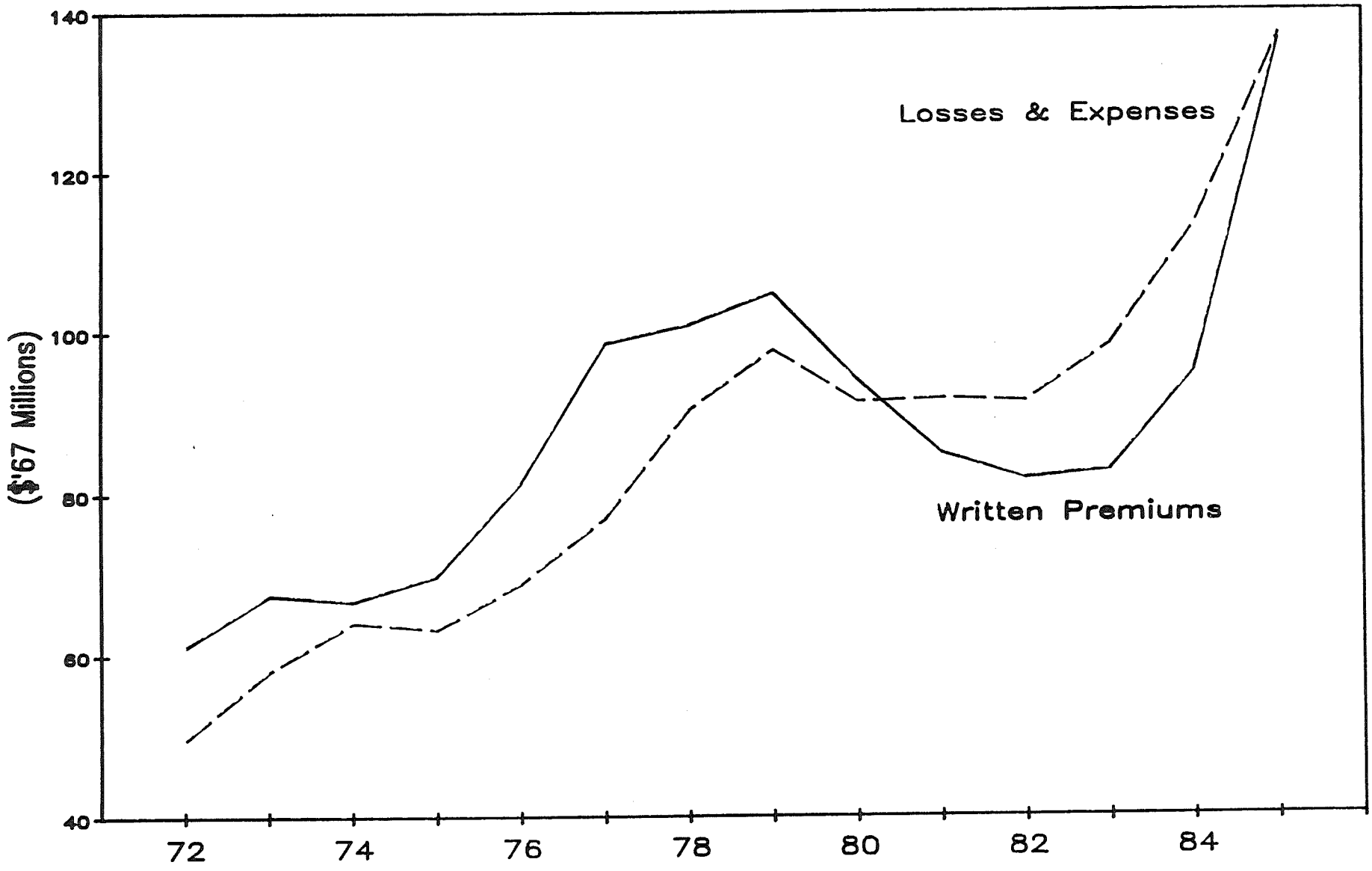
All Lines
Kansas



WRITTEN PREMIUMS vs. LOSSES & EXPENSES

Major Commercial Lines

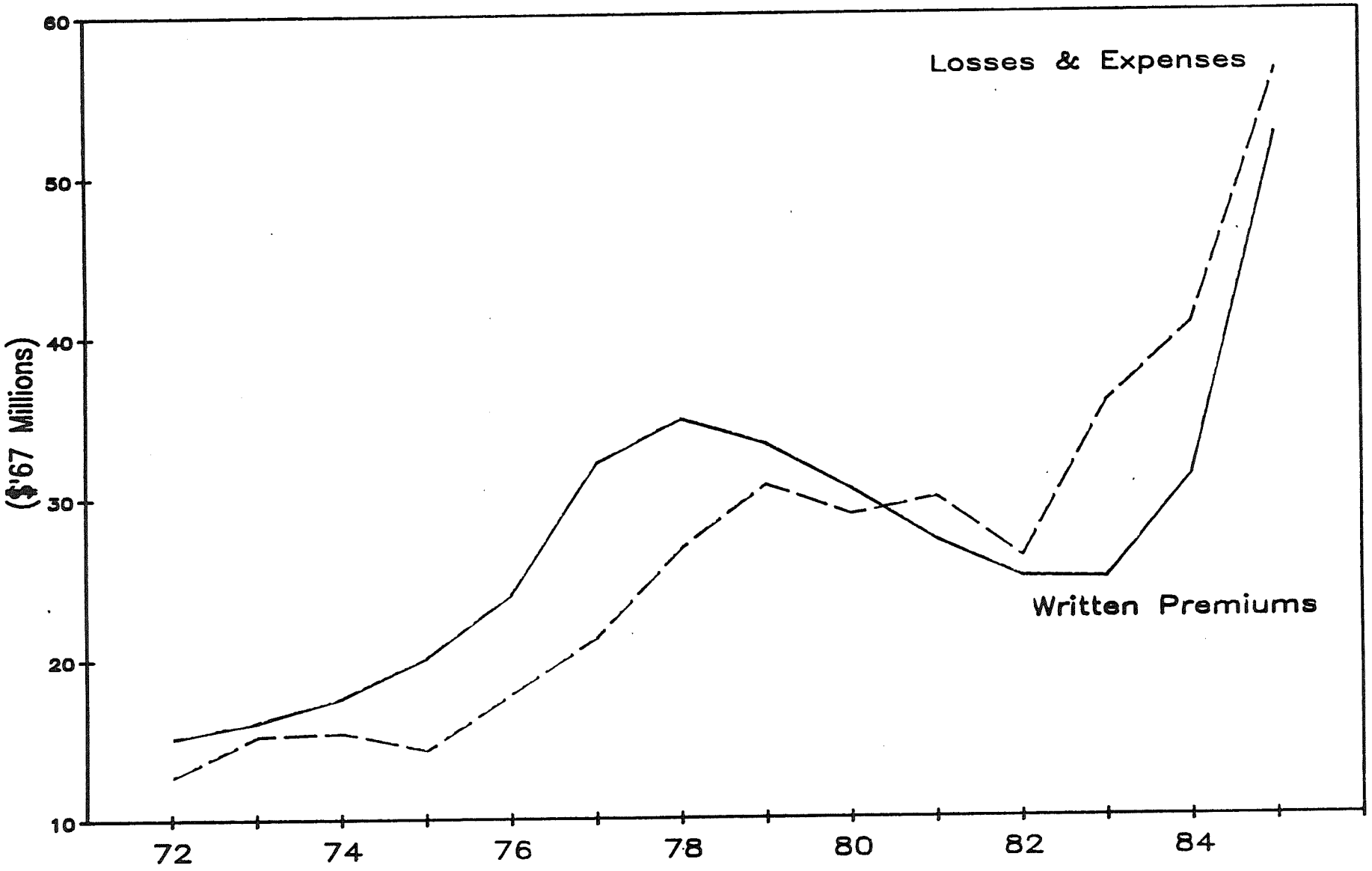
Kansas



WRITTEN PREMIUMS vs. LOSSES & EXPENSES

General Liability

Kansas

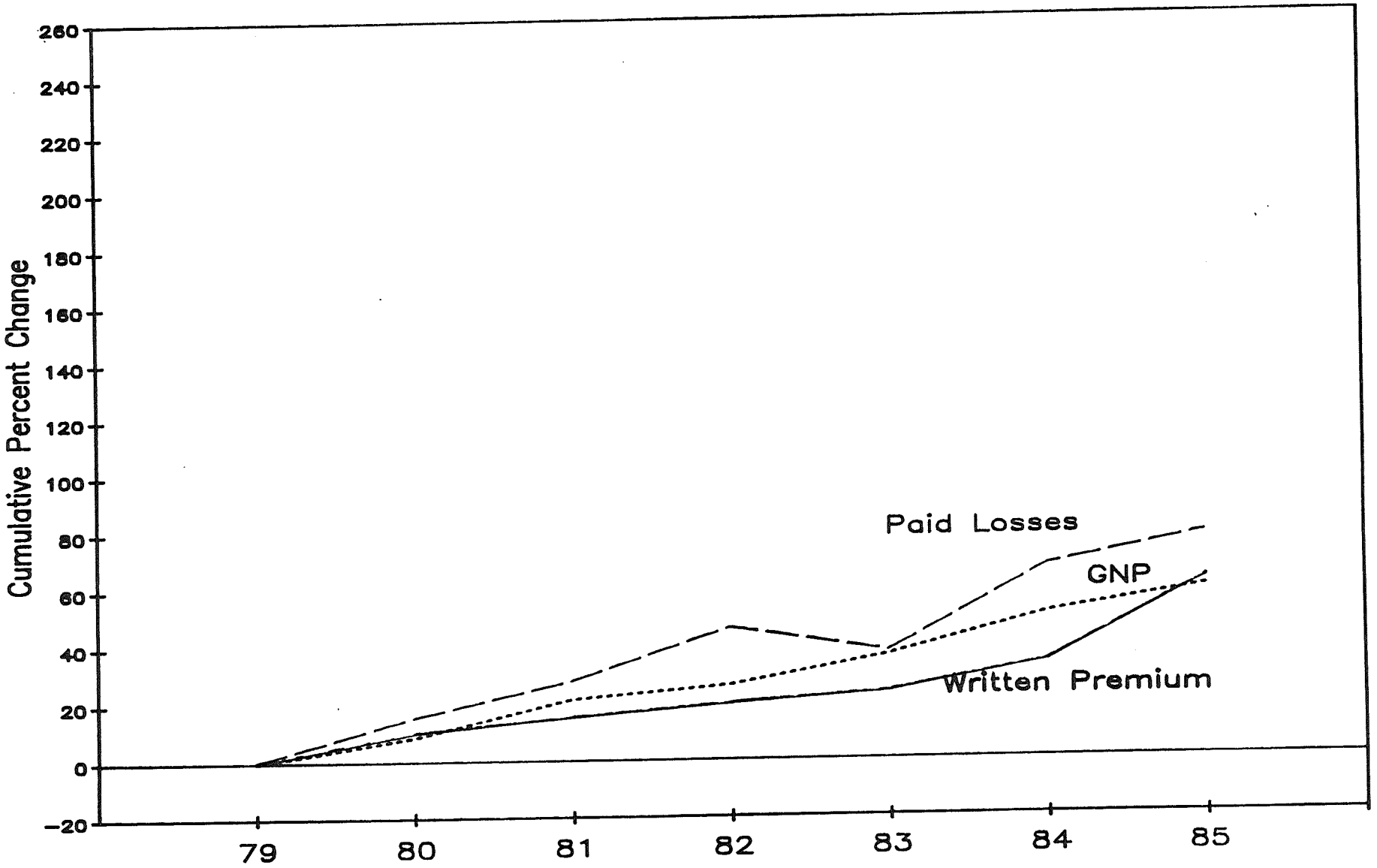


KANSAS PAID LOSSES

THE KANSAS LOSS TRENDS ARE SHOWN IN FIGURES 29 THROUGH 32 AND ARE COMPARED TO COUNTRYWIDE BELOW. THE GROWTH IN PAID LOSSES IN KANSAS, WHILE NOT AS HIGH AS COUNTRYWIDE, STILL SIGNIFICANTLY OUTPACED OVERALL ECONOMIC GROWTH.

	SIX YEAR GROWTH		
	GNP	COUNTRYWIDE PAID LOSSES	KANSAS PAID LOSSES
ALL LINES	59%	100%	78%
COMMERCIAL	59%	117%	95%
COMMERCIAL LIABILITY	59%	179%	121%
GENERAL LIABILITY & MEDICAL	59%	234%	213%

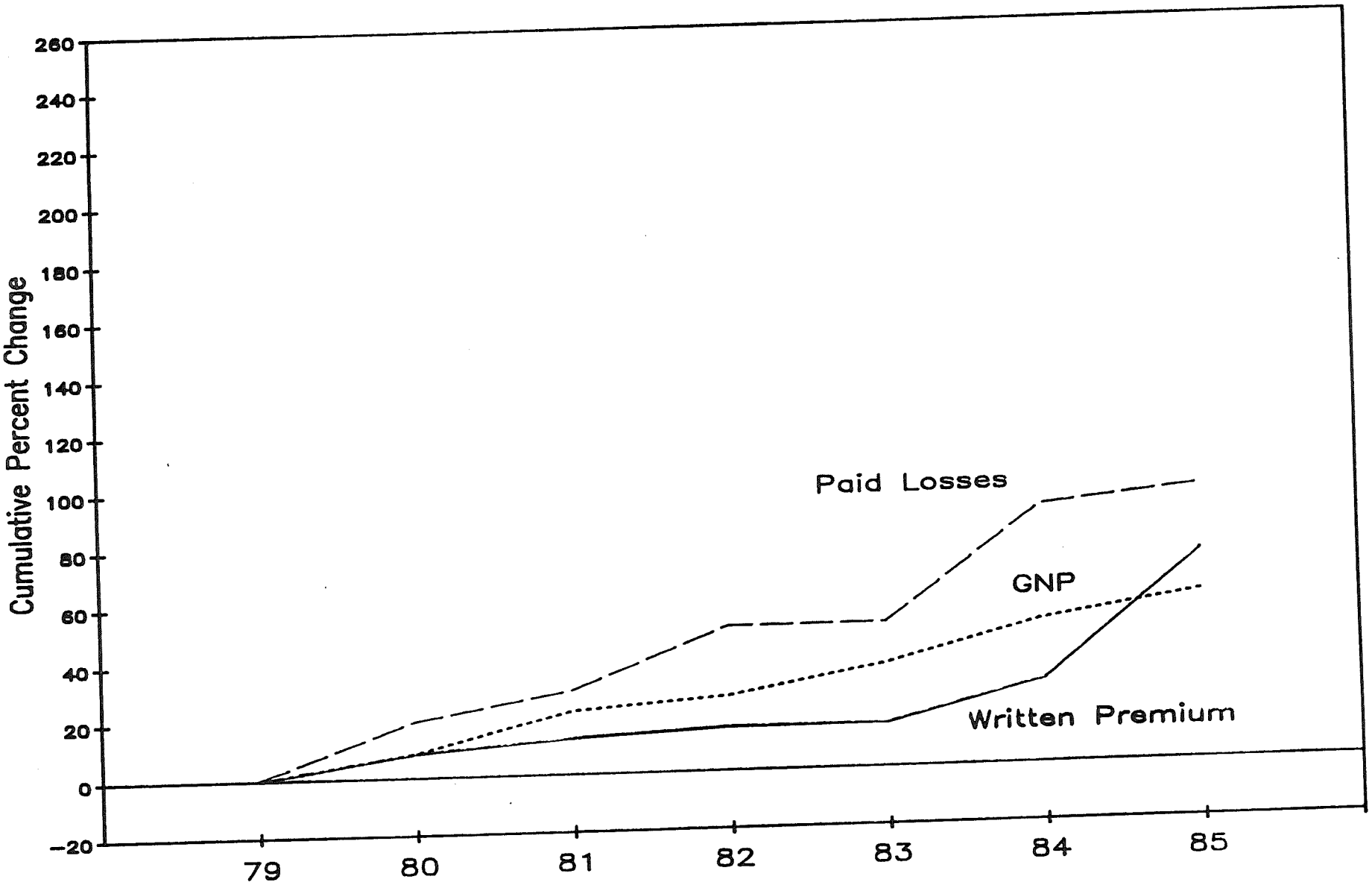
PREMIUMS vs. LOSSES vs. GNP
All Lines
Kansas



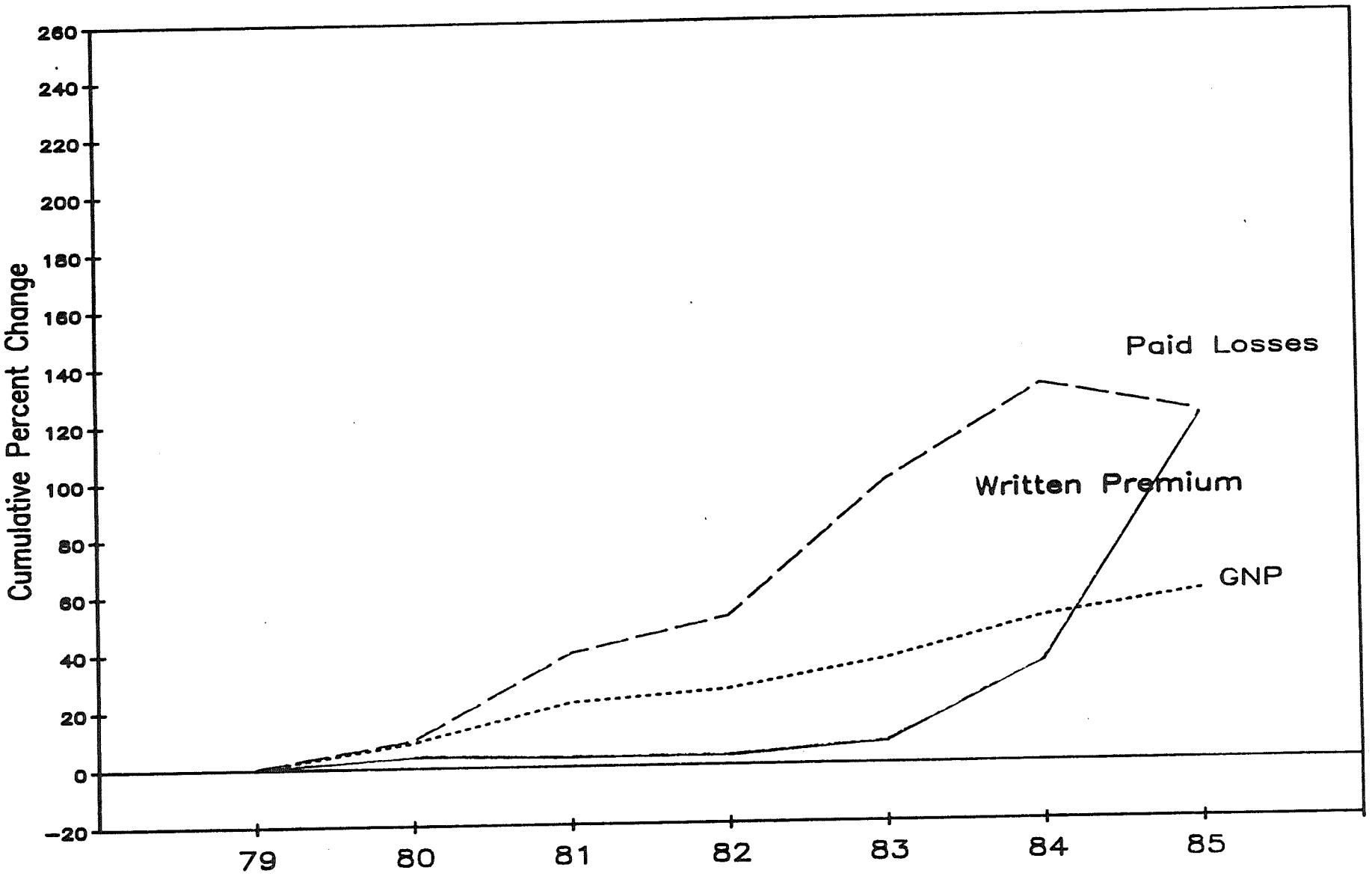
PREMIUMS vs. LOSSES vs. GNP

All Commercial Lines

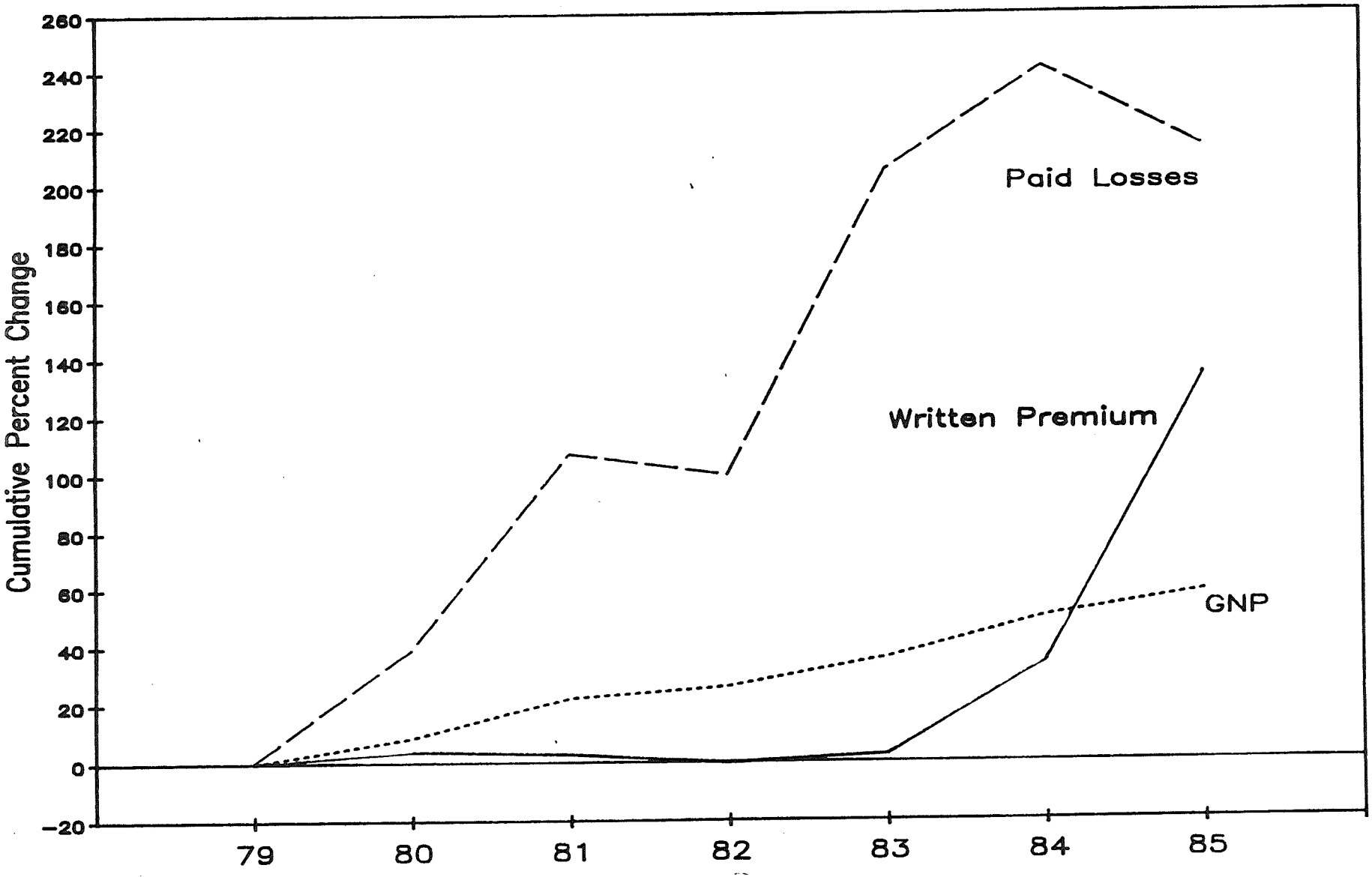
Kansas



PREMIUMS vs. LOSSES vs. GNP
Commercial Liability
Kansas



PREMIUMS vs. LOSSES vs. GNP
General Liability (including Medical Malpractice)
Kansas



KANSAS BAR ASSOCIATION

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Messick.
KC BUSINESS JOURNAL
2-16-87

Insurers show 500 percent gain in net income

With the help of a bullish stock market and premium rate hikes, property and casualty insurers nationwide rebounded last year with a 500 percent increase in net after-tax income, according to A.M. Best Co.

The insurance industry rating service recently estimated that property and casualty insurance companies together last year posted a $11.5 billion profit, compared to $1.9 billion the previous year.

Three years ago, as the amount of claims and jury awards increased, property and casualty insurers suffered historically high underwriting losses. Many insurers quit writing riskier lines of insurance and raised premiums. Others went out of business.

Best said that the industry had an estimated operating income of $4.5 billion in 1986, compared to a $5.6 billion loss the previous year. Capital gains are not included in an insurance company's operating income.

Realized capital gains — largely from soaring returns in the stock market — contributed $5.5 billion to the after-tax profit, Best reported. Federal tax credits contributed another $1.5 billion.

The industry reported $17 billion in underwriting losses last year, a 32 percent decrease from the $25 billion underwriting loss the previous year. Written premiums for the year totaled $176.4 billion.

The net after-tax income of $11.5 billion for the year represents a 12.6 percent rate of return on net worth. During the previous decade, the insurance industry averaged an annual 11 percent return on net worth, according to National Underwriter, a trade journal.

Attachment VI
House Judiciary 2/25/87

TRENDS

Remember the Crisis In Liability Insurance?

It dissolved in a flood of profits from premiums

By Nancy L. Ross
Washington Post Staff Writer

Whatever happened to the liability insurance crisis? A year ago, it was being compared to the Arab oil embargo that devastated the world economy. A lack of insurance for municipalities threatened services such as police and fire protection. Unable to afford coverage for malpractice, some obstetricians stopped delivering babies.

Newspapers overflowed with stories of day-care centers and bars, midwives and manufacturers, accountants and truckers who were unable either to afford a doubling or tripling of their insurance premiums or to obtain coverage at any price. Some businesses were forced to close; others stayed open without insurance, hoping they wouldn't be sued.

Blame for the crisis, in the insurance industry's version, was laid on juries and judges who made multimillion-dollar awards to plaintiffs suing everyone in sight. Economists, on the other hand, faulted the carriers for engaging in cut-throat rate competition during the early 1980s until mounting losses forced them to raise premiums.

The industry lobbied state legislatures vigorously to restrict the scope of liability to cut the companies' losses. Consumer advocates demanded that tort reform be accompanied by a rollback in rates. Dozens of bills were introduced in Congress to deal with tort reform and product liability. Yet, by fall, the great liability insurance crisis had vanished from the headlines.

The emergency, it seems, has dissolved in a flood of insurance company profits.

According to the Insurance Services Office (ISO), which advises carriers on rates, operating profits tripled during the first nine months of this year, compared with the same period last year. Earnings rose from $1.2 billion in 1985 to $3.6 billion. Underwriting losses will be cut back by almost a third to $12.2 billion this year.

A major factor in the renewed profitability has been huge rate increases. Premium income for all types of property-casualty insurance rose 24.5 percent in the first three quarters to $131.5 billion, according to A.M. Best Co., the authoritative source on industry data. Premiums for commercial liability insurance—which had accounted for 25 percent of the losses but only 12 percent of the revenue—rose an average of 79 percent in 1985, after only nominal increases in the early 1980s. Best projects that this year's premium increases will amount to 72.5 percent.

While the shock of premium increases that often topped 100 percent in 1985 has made the 20 percent to 30 percent increases of 1986 seem mild by comparison, rates still appear to be going up briskly.

A benefit of returning profitability has been increased availability. A report issued at a recent meeting of the National Association of Insurance Commissioners stated, "Problems with insurance availability may have eased since 1985 and early 1986 in certain lines or coverages, yet problems continue in several lines." Last May, 43 of the 50 states, the District of Columbia and Puerto Rico reported that municipalities were having trouble obtaining insurance and 42 reported difficulty with professional insurance for physicians.

By December, 55 percent of reporting states indicated slight improvement, while 43 percent saw no significant change in availability for day-care, nurse-midwives, liquor shops, governmental entities and truckers. Three found the situation greatly improved, while one judged it worse.

However, availability is sometimes a tradeoff for affordability. The Northern Virginia Regional Juvenile Detention Center, for example, which had been paying $1,400 annually for $1 million in general liability coverage, contacted 50 companies to replace its canceled policy before finding one that was willing to write $500,000 in coverage—at a $12,268 annual premium, an increase of 1,500 percent.

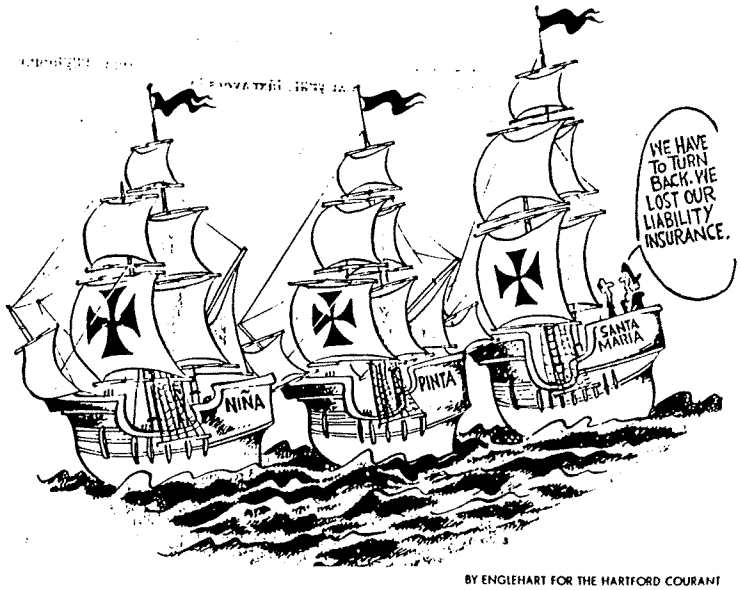
Besides higher premiums for lower coverage, companies are tightening underwriting requirements by setting higher deductibles, limiting legal defense costs and loading policies with exclusions. As a result of widespread publicity about physical abuse, the average annual premium per child at day-care centers has risen from $7 in 1984 to between $8 (in Wyoming) and $153 (in New York City), according to James Strickland of Austin, Tex., chairman of the Day Care Liability Task Force. By excluding abuse as an insurable event, one company has "reduced" the average cost per child to $50 annually, he says.

The industry hopes that future profitability will be enhanced as the result of limits on the breadth and depth of legal liability. Although Congress failed to pass insurance legislation this year, many states took action. The American Tort Reform Association says 20 states made "significant" changes in 1986, while the Insurance Information Institute lists 32.

Of those states that acted, just seven—Colorado, Connecticut, Florida, Michigan, New York, Washington and West Virginia—went the whole way and limited joint and several liability, sewing up the "deep pockets" of corporations and municipalities into which plaintiffs were thrusting their hands, or limited the amount they could recover in damages.

"The industry pressed hard, but got only bits and pieces of what it wanted," says Richard M. Page, chairman of the insurance brokerage Fred S. James & Co. in New York. The Florida experience has dampened the cry for more tort reform in other states.

There the industry's efforts misfired. The legislature in Tallahassee voted to limit joint and several liability and to cap awards. At the same time, it mandated a rollback to 1984 rates unless companies could prove hardship. The industry sued the state, claiming the law was unconstitutional. The case will soon be decided by the Florida Supreme Court.



BY ENGLEHART FOR THE HARTFORD COURANT

Tort reform has made a difference for nurse midwives in states that have set limits on recovery, says Karen Bodenhorn, acting director of the American College of Nurse-Midwives. While their colleagues in other parts of the country must pay $3,500 annually for $1 million in coverage—compared with premiums of $800 to $1,000 three years ago—a few midwives will need only $500,000 worth of coverage.

Tort reform advocates had expressed hope that it would reduce rates. In general, however, it is too early to assess its impact; some laws haven't taken effect yet, and insurance rates are calculated on experience, not projections.

"I am not sure that tort reform will have an impact on insurance pricing for some time to come," says Page. "Underwriters tell us they don't know if it will reduce claims."

Jay Angoff, general counsel of the National Insurance Consumer Organization, reports that interviews with insurance commissioners in 15 states revealed no difference in availability or rates because of tort reform.

The Washington Post contacted insurance commissions in 10 states, half of which had passed some version of tort reform. New York and Florida reported smaller increases in premiums than would have occurred had there been no legislation in their states. For example, Florida's general liability rates will go up 5 percent in January, instead of 10 to 12 percent. Officials in Michigan, which made significant changes in its liability laws, indicated rates had stabilized, as did officials in Nevada, which made no changes.

Officials in Wyoming, a tort reform state, said companies were still hesitant to write policies there, while officials in the District of Columbia, where there was no legislation, reported scattered problems, but no crisis. In Vermont—a nonreform state—liability premiums are still rising by between 50 percent and 60 percent, faster than other lines. Yet, most state commissions saw a moderating trend. "If we see an increase of 10 to 20 percent, that's stability," says Harold Headrick, a Michigan analyst.

The liability insurance crisis may be resolving itself, but the turmoil has taken its toll.

Some of the insured have rebelled. Last April, the tiny community of Norwood, Ohio, took on giant Home Insurance Co. in the courts and forced it to roll back a $205,000 premium to its 1984 level of $30,000. "We were able to buy time, but now we're in the same situation as before—shopping for insurance," says Frances Lah, the town's assistant law director. Eight other Ohio municipalities also sued Home for reductions.

Increasingly companies, professionals and localities are seeking alternatives to commercial insurance in the form of self-insurance and insurance pools. Arlington, Tex., facing annual liability premiums more than triple the $209,000 it paid three years ago, established a nonprofit corporation to insure itself and proceeded to raise $9 million in bonds for a loss reserve.

Risk manager Peter Potemkin estimates the annual cost of insurance will be $550,000 to $600,000 for $3 million in coverage, substantially less than the $760,000 demanded by its commercial insurers.

National Small Business United, a trade group that is concerned about the growing number of businesses going "bare"—without insurance—recently announced a legal referral program for those that are sued.

Self-insurance is an option for about a fifth of the largest trucking companies. But an estimated 16,000 small trucking firms—about a third of the industry—instead have leased their rigs to larger companies that have insurance, according to Kenneth Pierson, director of the Transportation Department's office of motor carrier standards. In the meantime, the industry is still waiting for the Interstate Commerce Commission to approve pool coverage.

Although there are scant data on self-insurance, Page estimates that it now amounts to $34 billion annually. If the current trend continues, he says he expects that figure to climb to $77 billion annually by 1989. That would mean 35 percent of the business community is self-insured, up from about 20 percent in 1980.

"And these clients are not eager to go back to that marketplace," he adds, noting that self-insurance provides protection against availability crises. So, warns Angoff of the insurance consumer group, while the insurance industry is enjoying prosperity again, it may end up a loser as its market share shrinks. ■

CBA

The
Colorado Bar
Association

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303-860-1112
WATS 1-800-332-6736

September 12, 1986

Laurie Hartman
Legislative Assistant
Kansas Bar Association
1200 Harrison
P. O. Box 1037
Topeka, Kansas 66601

Dear Ms. Hartman:

I am writing in response to your letter to Chuck Turner inquiring whether or not the tort reform package enacted by our state legislature has done anything to stabilize or lower premiums for various insurance.

There has been no evidence indicating a lowering of premiums or an increase in availability of insurance. On the contrary, doctors, for example, are having an increasingly bad time. Hartford has cancelled their medical malpractice coverage. We have seen nothing to indicate that the tort reform legislation will relieve the insurance crisis in any way. I do not have anything in writing to submit to you other than the legislative report issued by the Professional Insurance Agents of Colorado that I have enclosed. In our opinion, this is mere propaganda and contains no concrete changes.

If you have any other questions, please feel free to contact me.

Sincerely,

Kathy J. O'Rourke

Kathy J. O'Rourke
Director of Legislative Relations

Enclosure

cc: Chuck Turner

Kathy

COLORADO INSURANCE LEGISLATIVE REPORT

(News of changes in insurance availability and affordability in Colorado as the result of 1986 legislation.)

Brought to you by the
Professional Insurance Agents of Colorado

In a July 8th letter to Colorado Commissioner of Insurance John Kezer, Robert J. Clark, president of the AEtna Commercial Insurance Division, says:

"As a major writer of commercial lines insurance with major offices located in Colorado, we are encouraged by the Colorado legislature's passage of meaningful tort reform. We believe that the amendments to the rules of joint and several liability and collateral sources are especially important first steps in improving the availability of insurance for those most affected by the lawsuit crisis.

"With the passage of meaningful tort reform, we intend to expand our commercial writings in the state. In confirmation of your discussion with our Regional Vice President John Guldan, AEtna will take steps not only to restore its traditional market share, but to provide additional capacity for Colorado. In particular, we are now willing to underwrite and provide coverage for hotels and restaurants (including liquor liability), day care centers (with a sexual abuse exclusion), and municipalities (with a pollution exclusion). Further, we believe that this reform and the responsible administration of it will allow us to achieve cost reductions that will be passed along to consumers.

"Although we are pleased with these initial steps, we believe more remains to be done before the liability system is truly fair, efficient and predictable. We look forward to working with you and the legislature to enact other needed reforms.

"Colorado has again pointed the way for other states. We applaud Governor Lamm, the Colorado legislature, you and others in the administration for taking this significant step in bringing the civil justice system under control."

Professional Insurance Agents of Colorado
3000 Youngfield St., Ste. 167, Lakewood, CO 80215
Phone: (303) 237-5297

The PIA of Colorado is a professional association of independent insurance agents specializing in the property and casualty field. Founded in 1948, the PIA of Colorado today represents most of the major independent agencies statewide. More than half of its members hold advanced professional designations in the insurance field.

Insurers gang up on day-care centers, suit says

By GRAYDEN JONES

Fort Scott, Kan.-based Western Casualty & Surety Co. and 15 other insurance companies conspired to abandon Colorado day-care centers despite historically good results insuring those centers, according to a lawsuit filed by a pair of Colorado day-care providers.

The suit is one of a handful filed nationwide this year alleging that the property and casualty insurance industry collectively boycotted certain groups of customers, or raised rates beyond reach. Such action forced municipalities, manufacturers, day-care centers and others to overspend, go without insurance, or go out of business, the suits allege.

The day-care suit, filed earlier this year in a Colorado state court, claims that Western and the other insurers violated federal and state antitrust laws. The plaintiffs, Child Garden Inc. of Conifer and A Child's Adventure Land Inc. of Broomfield, filed the suit on behalf of the 726 licensed child-care centers in Colorado. The suit seeks unspecified damages from 16 insurance companies across the nation.

The companies disagree with the allegations of a conspiracy, and have asked the court to dismiss the suit.

"If a whole bunch of people approach a cliff and turn away, that's not a conspiracy," said Tom Ober, general counsel for Indianapolis-based American States Insurance Co., which owns Western. "The industry has been losing a lot of money on this. So why should we continue to do this business?"

Western is one of the largest employers in Fort Scott, 90 miles south of Kansas City. The firm, with $529 million in assets at the end of 1985, traditionally has sold automobile, homeowner's, workmen's compensation and general liability insurance, said Homer Cowan, a Western vice president.

Cowan said the company no longer sells day-care liability insurance. The firm, which reported a statutory net operating loss of $14.7 million in 1985, had to turn away many new customers to return to profitability. Cowan said the move is working, and the firm will be profitable in 1986.

According to the suit, however, the insurance industry sustained few losses on day-care business in Colorado from 1980-83. The industry, moreover, earned a profit on premium income from the day-care business, the suit said.

A study by the Colorado Child Care Coalition reported that 157 child-care centers paid premiums of $400,000 for coverage in 1984 while claims paid on behalf of the centers from 1974-84 totaled only $55,000.

"They (day-care centers) were being gouged by insurance companies, or having their insurance canceled," said Bill Trine, an attorney representing the day-care centers.

Trine said that Western was not one of the insurers that did business with Child Garden or Child Adventure. But the firm was named in the coalition's study as one of the insurers which canceled insurance for one or more day-care centers, he said.

Municipalities, manufacturers and day-care centers are some of the groups outraged by their inability to get insurance protection.

"You don't have to have a business relationship with a named party to have a part in a conspiracy," Trine said.

Ober said the coalition's figures are misleading for two reasons. First, insurance claims often linger in court for years, costing the industry thousands in legal fees that would not be reported as a paid claim. Second, insurers recently have paid huge jury awards on day-care cases in California and other states. Bad experiences elsewhere scare the industry away from potentially expensive customers, he said.

"It may be that it (huge claims) has not happened in Colorado yet, but the evidence shows that it is potentially very risky," Ober said. "You can't get a broad-enough standard from just one state."

The Colorado suit is similar to four or five others that have been filed in the last year, said Robert Lembo, Washington-based state legislative counsel to the Association of Trial Lawyers of America. These cases arose when the property and casualty insurance industry, suffering its worst losses in history, pulled out of certain markets or raised rates exorbitantly, he said. Municipalities, manufacturers and day-care centers are some of the groups outraged by their inability to get insurance protection, he said.

Lembo said the McCarran-Ferguson Act, which exempts the insurance industry from most antitrust laws, does not allow insurance companies to participate in a boycott. It does, however, allow the industry to fix prices.

Earlier this year, the Federal Trade Commission conducted an investigation of the liability insurance industry, but found nothing that warranted any action, an FTC spokeswoman said.

THOUGHT FOR THE DAY

In this week of elections I'm reminded of this:

God is not up for re-election.

He wrote the book. He designed the instruction manual. He knows what it takes to win. And He knows who will profit or be left out.

His is the winning team. And the neat part is, He welcomes anyone [illegible]

Leadership boosts reinsurance company

By Steve Rosen KCS 8/3/86
Star business & financial writer

Michael Fitt didn't learn to play golf until he was 45 years old. Now, the 55-year-old insurance executive is a 19 handicapper who often plays twice on weekends.

Mr. Fitt may be hoping that he can master his golf game as well as he has learned the insurance business.

As chairman, president and chief executive officer of Employers Reinsurance Corp. in Overland Park, the trim, 5-foot, 11-inch, Mr. Fitt has established an enviable track record at the nation's second-largest reinsurance company.

He's invariably described as a no-nonsense leader and a master of detail who knows his business inside out.

His style has paid off.

The reinsurance business basically involves assuming liability on policies written by other insurance companies. Like the property and casualty insurance business, the reinsurance industry has been struggling from heavy losses.

However, ERC has posted record profits for the past five years. It finished last year with record net income of $134.26 million.

Moreover, 1986 is shaping up even better for ERC, which finished the first six months of the year with earnings of $84.88 million.

ERC also posted a 56 percent increase in insurance premiums in 1985. And it is having another strong year through the first half of 1986.

Small wonder that Mr. Fitt, a 33 year insurance veteran, and ERC get high marks from many observers. ERC, which had assets of $2.17 billion at the end of 1985, is a prize possession of General Electric Co., the Connecticut-based conglomerate that paid more than $1 billion to acquire it from Getty Oil Co. in 1984 in a friendly buy-out. Today ERC is a unit of General Electric Financial Services Inc., the financial services subsidiary of GE.

GE is known as a very bottom-line-oriented company, and many Wall Street observers felt it paid too much for ERC two years ago. But those who follow the local firm say Mr. Fitt's results have been outstanding since the acquisition.

"GE sets some pretty high targets when they acquire somebody, and Fitt is either meeting or exceeding those targets," said Robert Alley, a vice president at Waddell & Reed Inc., the Kansas City-based mutual fund company.

John F. Welch Jr., GE's chairman and chief executive officer, couldn't be reached for comment. However, he said in an April interview while in Kansas City for GE's annual shareholder meeting that he was pleased with ERC's results.

"We wouldn't touch ERC with a 10-foot pole," Mr. Welch said. "It's a first-rate company."

The reinsurance business, especially in property and casualty operations, has not been easy in recent years. Many companies have been hurt by offering low premiums to lure business. That approach has increased revenue for many companies, but all the while, claims have soared. As a result, many companies have paid out more to settle claims than they have taken in from premiums.

ERC has not been immune from the trend in the industry. Despite its bottom line profitability, Mr. Fitt said ERC has not made a profit from its insurance underwriting in the past five years.

"But we're getting closer," he added.

Nonetheless, Mr. Fitt said ERC's success can be traced to several factors:

- Expenses. ERC has one of the lowest expense ratios of any company in the reinsurance industry. ERC also has achieved efficiency by shrinking. In the past 18 months, the company has sold off several unwanted pieces of its insurance business, representing $540 million in assets.

Mr. Fitt said the restructuring strategy is nearly completed, and there are no plans to sell off other parts of the company.

- Clients. ERC has had a very stable client base of blue-chip insurance firms. "Many of them have been with us for 50 years," Mr. Fitt said.
- Employees. The company has had a low turnover among executives and key technical people who handle reinsurance business. ERC now has 581 employees, including 499 in the Kansas City area.
- Investments. ERC has invested wisely, and profits from securities transactions have more than offset losses from insurance claims.
- Capital. ERC, unlike many of its competitors, is strongly capitalized, with $600 million in capital surplus. And on top of that, there are the substantial financial resources of GE. Capital surplus is what really counts in insurance because this is what governs the amount of business a company can write.

Finally, ERC manages its business conservatively and by the numbers, Mr. Fitt said.

"We don't really undercut our prices, and we have the ability to pay claims," he said. "We believe in long-term relationships with our clients. We expect to have years of large profits and large losses. And in the end, things work out."

Mr. Fitt is not resting on past achievements. ERC, which is the fourth-largest reinsurance company in the world, is putting increasing emphasis on its international business, and plans to open a London office later this year.

In addition, Mr. Fitt is not content being No. 2 in the United States behind General Reinsurance, based in Stamford, Conn. "Our goal is to be No. 1 based on size and profits," he said.

Mr. Fitt, who was born in Whitstable, England, made an early career move to the insurance business. Although his family was in the hotel business, Mr. Fitt's early ambition was to become a seaman.

But after about five years in the British Navy in which he got home twice, Mr. Fitt lost interest. After leaving the navy, he arrived in Toronto in 1953 to visit an uncle.

"I needed to eat," Mr. Fitt recalled, so he answered a newspaper ad for a clerk's position with the Canadian Underwriter Association. He got the job, which paid $28 a week.

"We expect to have years of large profits and large losses. And in the end, things work out."

—Michael Fitt, Employers Reinsurance Corp.

Several months later, Mr. Fitt moved to Royal Exchange Assurance, another Canadian insurer. There, he said he got his first big break. He developed a keen sense of strategic planning.

"I worked with a man who believed in setting five year plans," he said. "I got into a planning mode and learned to focus my attention on specific goals."

Success there led to a job in 1969 with ERC, where he founded the company's Canadian office. In 1976, he was transferred to the company's headquarters and held a series of executive jobs before becoming chief executive officer in 1980. A year later, he was named chairman of the board.

Although Mr. Fitt takes care to attribute much of the company's growth to some of his top executives, those who know him say his hands-on management style clearly puts him in charge of the company.

"I tend to be a little autocratic," Mr. Fitt said.

However, he remains personable. "He's a superb administrator, and an outstanding people-picker who knows who to pick for the right kind of job," said Larry Schwartz, a friend, who is vice president of corporate finance at Kidder Peabody & Co. in Kansas City.

Mr. Fitt routinely arrives at the office at 5200 Metcalf Ave. by 7 a.m. He doesn't leave for home until about 6 p.m. He said he rarely takes work home with him, preferring to spend time with his family. Mr. Fitt and his wife, Doreen, a native of Toronto, have three children.

The golf-loving Mr. Fitt, who collects golf caps and likes to smoke big cigars after finishing a round, said he also enjoys gardening. Despite decorating his office with a ship's painting and a model of an old sailing ship, Mr. Fitt said he doesn't sail much anymore.

As for his own future, some Wall Street analysts have speculated that Mr. Fitt may be a candidate to take over the General Electric Financial Services subsidiary in Stamford, Conn., if Robert C. Wright, the current president and chief executive, moves to the National Broadcasting Co.

NBC's parent company, RCA Corp., was acquired recently by GE, and there has been widespread speculation on Wall Street that Mr. Wright might get the task of taking over NBC, replacing Grant Tinker, who has said he plans to step down soon.

Andrea Udoff, a spokesman for General Electric Financial Services, said the company would not comment on rumors about either Mr. Fitt or Mr. Wright.

Mr. Fitt said, however, he has no plans to leave ERC.

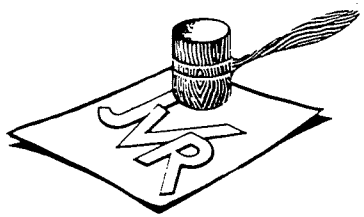
"My value to GE is here, not there," he said. "I'm allowed to do what I want to do. I'm the chief executive officer of one of the biggest reinsurance companies, and I enjoy immensely what I'm doing."

REPORT TO THE SUBCOMMITTEE ON ECONOMIC STABILIZATION of the COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS U.S. HOUSE OF REPRESENTATIVES

TESTIMONY ON THE LIABILITY CRISIS FOCUSING ON THE FACTS OF THE INSURANCE CRISIS

AUGUST 6, 1986
PHILIP J. HERMANN
CHAIRMAN OF THE BOARD

JURY VERDICT RESEARCH, INC.



JURY VERDICT RESEARCH, INC.
5325-B NAIMAN PKWY
SOLON, OHIO 44139-1065

TOLL FREE (800) 321-6910, IN OHIO (216) 248-7960 COLLECT

John J. LaFalce, Chairman
United States House of Representatives
Subcommittee on Economic Stabilization of the
Committee on Banking, Finance and Urban Affairs

Dear Representative LaFalce:

Thank you for inviting me to testify about the liability insurance crisis, focusing on the facts of the "litigation crisis." You request, **"Your testimony should cover many of the points made in your discussion with my staff."** As founder and Chairman of the Board of Jury Verdict Research, Inc., I shall respond to your request, using information collected and analyzed over the past 26 years.

Your letter stated, **"The Subcommittee is also interested in your views as to whether your figures regarding the average jury verdict can in any way be equated with the amounts actually paid out in claims by insurers."**

To this question I shall respond, not only with the insight gained in Jury Verdict Research, but also from my many years as a chairman and vice chairman of the Product Liability Subcommittee of the Product Professional and General Liability Committee of the former Insurance, Negligence, and Compensation Law Section of the American Bar Association, and also as an active, personal injury jury

coverage, some of these sources duplicate others. A full-time staff member, using mail and WATS line, contacts our sources to secure a steady flow and the best possible coverage.

The information is verified with the trial attorneys representing the plaintiff and defendant or defendants. The information furnished by mail may not be complete enough. When necessary, another staff research member makes telephone contact with the attorneys and other parties in order to obtain as complete and accurate reporting as is possible. Although we receive excellent cooperation from the clerks of courts and from other sources, busy attorneys do, in a minority of cases, fail to furnish sufficiently meaningful information for that data to be included in our research and reported to our subscribers. Although we admittedly do not receive sufficient meaningful data for all verdicts, we believe that we do for most verdicts rendered nationally, and from many areas, all, or nearly all. We are confident that the data for the hundreds of cases that JVR receives and processes each week (about 2000 a month) constitutes more than a representative sampling and enables our staff to compile valid statistical verdict information. Although we also collect information on settlements and bench judgments, only those cases tried to a verdict by a jury are used for statistical purposes.

STATISTICAL METHODOLOGY

The statistical methodology was specifically designed for JVR by Dr. Hans Zeisel and Professor Gary Kalven (now deceased) of the University of Chicago School of Law. Dr. Zeisel and Professor Kalven made many comprehensive studies of jury verdicts. Dr. Zeisel is also an internationally respected statistician. His widely-used book, Say It With Figures (How To Make Figures Make Sense), currently in the sixth edition (1984), is published by Harper and Row.

After determining that we had suficient verdict data from which to construct valid tables, Drs. Zeisel and Kalven established those tables that JVR would publish and the statistical methodology for their construction. The result is a professional service for determining verdict probabilities, trends and analyses for those who are affected by personal injury verdicts.

Their methodology suggested that JVR identify five different statistical computations for each injury and for each grouping of specials within an injury category - classified by the amount of medical, hospital, out-of-pocket, and loss of earnings expenses. The purpose of the different computations is to give the user the means of making the best possible decision of the value of personal injury.

trial lawyer for the past 40 years, who has interviewed most of the juries before whom I have appeared. I have, in the main, defended suits on behalf of both large and small insurance carriers, self insurers, as well as representing, to a lesser extent, injured people.

You state, **"In particular, I am interested in clarifying exactly what Jury Verdict Research does or does not do in order to assess whether a statistically sound basis exists for concluding that the average size of jury verdicts has recently skyrocketed, thereby causing liability insurers to incur great losses and justify calls for tort reform."**

Jury Verdict Research is an impartial research organization that has, for over 26 years, furnished verdict information nationally and internationally to personal injury lawyers representing plaintiff as well as defendant, insurance companies, trade associations, corporations, federal, local, state, and some foreign governments, and libraries. It collects, checks and analyzes verdicts from all fifty states, and maintains the only comprehensive national verdict data bank. Our research department is aided by the latest computer technology.

JVR has neither asserted nor published any conclusions that the average size of jury verdicts has recently skyrocketed. Although verdicts, as well as many other items, have increased substantially over the years, our studies do not support any claim of recently escalating jury verdict awards.

The apparent reason for this erroneous impression is that a number of highly publicized news articles quoting our statistics have grossly misstated them. Particularly misleading is the widely-quoted article that appeared in "Time" Magazine, March 24, 1986, entitled, "Sorry, Your Policy is Cancelled." Although the authors had available our complete statistics on Current Award Trends, published in January, 1986, they obviously decided to make a good story even more interesting by ignoring information indicating verdicts may have largely stabilized and publishing only the average verdict figures that are very high and, admittedly, distorted by a small number of unusually large verdicts. The authors conveniently overlooked the midpoint verdicts, which are a far more meaningful and valid indication of award trends. The article also failed to report that, analyzing representative injuries over the past 10 years, verdicts have increased at an average rate of 15.23% per year. The largest increase was 30.49% in 1981; 15.36% in 1984; and 12.24% for 1985, an incomplete figure.

THE VERDICT COLLECTION PROCESS

You wish to know the kind of information used by JVR and how it is collected. We collect verdicts rendered throughout the 50 states and District of Columbia by juries hearing personal injury cases. We are assisted by Clerks of Courts, court reporters, newspaper reporters, attorneys, law students, newspaper clipping services, and by local reporting services. To secure the best possible

Tables of Verdict Expectancy
Disc Injuries
With Spinal Nerve Involvement

Specials: $0 - 4,999

Verdict Expectancy	**$20,000**
Mid-point verdict	$13,000
Probability range	$8,500 - 40,000
Verdict range	$1,500 - 75,000
Average	$29,667

Examples of Recent Awards

Specials: $3,000 **Verdict: $8,000**

A 26-year old female bookkeeper suffered low back and spinal nerve injuries due to a probable disc injury in a head on collision with the defendant. The accident occurred as the defendant cross[illegible] wrong side of the highway and traveled into [illegible] in which the plaintiff was a p[illegible] admitted liability. The [illegible] testified that the plaintif[illegible] laminectomy. The defenda[illegible] the nature and extent of [illegible] (Cohen v. Mendoza, Los A[illegible] July, 1983.)

Specials: $634

A plaintiff sustained a [illegible]; degenerative disc dise[illegible]e in a rear end collisio[illegible]n- dant driver was oper[illegible]se

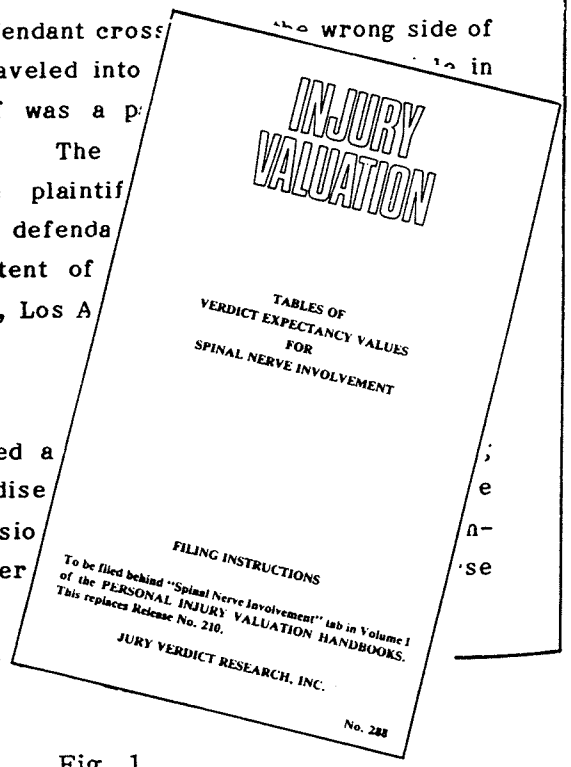


Fig. 1

alcohol and drugs as an issue, and punitive damages, to mention only a few. These make up the four volumes of Handbooks which cover Psychological Factors Affecting Verdicts and another Handbook dealing specifically with Juror Selection.

Each month one release entitled Special Research Report covers either Liability Recovery, Psychological Factors or Jury Selection. They update these seven volumes (Fig. 2).

Each month a new Injury Valuation Report and a Special Research Report are sent to our thousands of subscribers, plus thousands more as requested and as part of the Handbooks for new subscribers.

TABLES TESTED FOR VALIDITY

Before we marketed the Personal Injury Valuation Handbooks, the data was tested. As predicted by Dr. Zeisel, we found that for similar injuries with similar economic loss, most verdict awards clustered near the midpoint verdict. This, Dr. Zeisel noted, confirmed the validity of the tables and the predictions and probabilities based on them. After our subscribers used the Probability and Verdict Expectancy Tables, we asked them how they compared with their trial experience. They informed us that they were generally consistent with trial results. In addition, attorneys and professors at various law schools compared the probabilities in the Handbooks with actual verdicts rendered in similar cases.

These computations are:

1. Verdict Expectancy — the probable amount that a jury would award for an injury
2. Midpoint Verdict — the central verdict on a list of ascending awards
3. Probability Range — the middle 50% of all verdicts on a list of ascending awards
4. Verdict Range — the lowest-to-highest verdicts on a list of ascending awards
5. Verdict Average — the arithmetical Mean of all the verdicts included in a table

Where unusually high or unusually low verdicts distort the research statistics, they may be excluded, but not disregarded. Any exclusions and the amounts of the excluded verdicts are furnished for the reader's information. In many situations JVR publishes statistics both with and without distorting verdict amounts, clearly labeling each.

For years Drs. Zeisel and Kalven received and, we understand, reviewed every research release published by Jury Verdict Research, Inc. The statistical methods established by Drs. Zeisel and Kalven continue to be used by our staff for statistical analysis and calculation.

THE ANALYSIS PROCESS - PRODUCING THE PERSONAL INJURY VALUATION HANDBOOK SECTIONS

Utilizing accepted statistical methods, the verdict information is scrutinized for liability, injuries, and other factors that may influence jury awards.

Basic injury values are determined by analyzing awards for compensation rendered by juries to plaintiffs seeking damages for similar injuries with comparable medical specials and loss of earnings. These are tabulated and tables are prepared giving verdict expectancy, midpoint verdict, probability range, verdict range, and average verdict. In addition, research observations and reports of typical verdicts are provided. These reports are published monthly as **Injury Valuation Reports. They update the five volumes containing the "Injury Valuation" sections of the Personal Injury Valuation Handbooks** (Fig. 1).

Basic recovery rates are computed by examining verdicts rendered for plaintiffs and for defendants in cases involving similar liability situations; the statistical result is a percentage-based probability of a verdict award. **The collected reports make up two volumes of the Handbooks titled Liability Recovery Probabilities.**

Likewise, **psychological factors** are also analyzed to determine their effect on basic recovery and basic injury values. These include the effects of multiple defendants, age of plaintiff, witnesses, medical conflict,

TURNING COLLISIONS
422 Verdicts - 241 for the Plaintiff
57% Plaintiff Recovery Rate
General Comments

The cases used to determine the recovery rates that appear on the following pages arose from two-vehicle collisions that occurred when one or both drivers were executing turns. The majority of the cases involved allegations of improper turning maneuvers on the part of one party. These cases are subdivided according to three factors: the position of the parties' vehicles relative to each other prior to the turning maneuver; the identity of the party who executed the turning maneuver; and the type of maneuver; i.e., right or left turn. Cases involving allega[illegible]of improper U-turns or allegations of improper [illegible] of both parties are discussed separ[illegible]

The plaintiffs recovered d[illegible] cases arising from all ty[illegible] figure that is consistent [illegible] for personal injury suits [illegible] involve U-turns or turn[illegible] were tabulated accordin[illegible] turning collisions yield[illegible] turning collisions yiel[illegible]

Cases in which the p[illegible]s arising from collisi[illegible]es

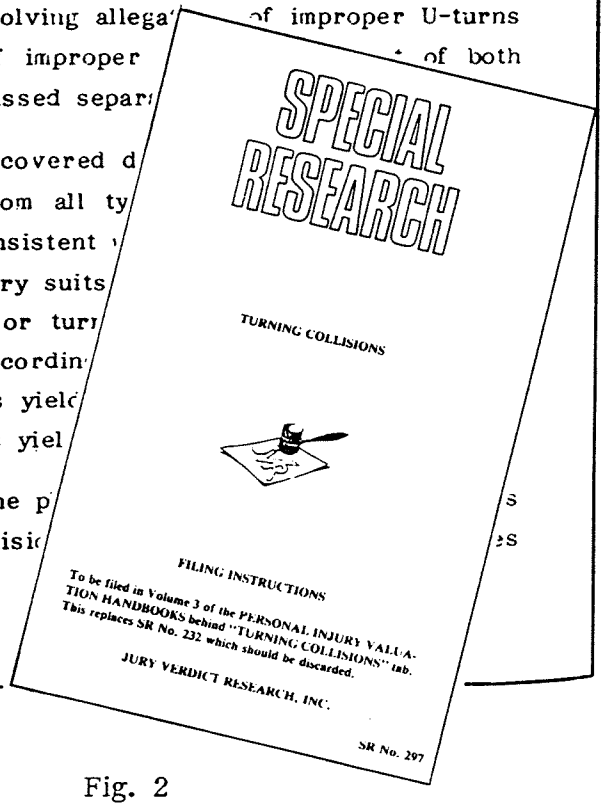


Fig. 2

They informed us that our tables "passed their tests." Additional broad experience over the years revealed that Injury Verdict Expectancy and Liability Recovery Probability Tables are as actuarially sound as are the Life Expectancy Tables that are used by life insurance companies and lawyers.

STATE VERDICT SURVEYS

Each year for each of the fifty states and the District of Columbia, we survey the verdict situation. A separate report for each state analyzes recent personal injury verdict activity and trends, and the verdicts in each geographic area within the state are compared to the national norm. The findings are illustrated with capsule reports of recent, important cases (Fig. 3). For each state, these reports are called "Personal Injury Verdict Survey." The reports for all 50 states are collected into three volumes entitled The National Verdict Survey, and are used by insurance companies, corporations and specializing lawyers who do multi-state business, to determine the local verdict situation in making evaluations of their cases. In addition, each month we publish a one-page "Personal Injury Award Comparisons By State," which is of special interest to insurance companies (Fig. 4).

CASE EVALUATION SERVICE

We evaluate specific cases for our subscribers using our research tables. We furnish them a confidential report

NEW YORK VERDICT SURVEY
General Comments

Awards Averaged 13% Above National Verdict Expectancies

To determine the deviation of the size of personal injury awards rendered within New York from national norms, each reported plaintiff verdict was individually analyzed and tabulated. The plaintiff's injury, the claimed past special damages and the gross compensatory verdict were considered. The National Verdict Expectancy for a similar injury involving comparable past special damages was determined by consulting the tables located in the appropriate Injury Valuation Reports contained in the **Personal Inju** **Handbooks.** The sum of the reported verdic of the applicable Verdict Ex yielded the deviation fro

Differences between the Verdict Expectancies ar cipated. In instances discrepancy; i.e., the one-third of or more Verdict Expectancy, calculation of the de to a case in which strain and the pas current Verdict Ex award of $20,000 w t

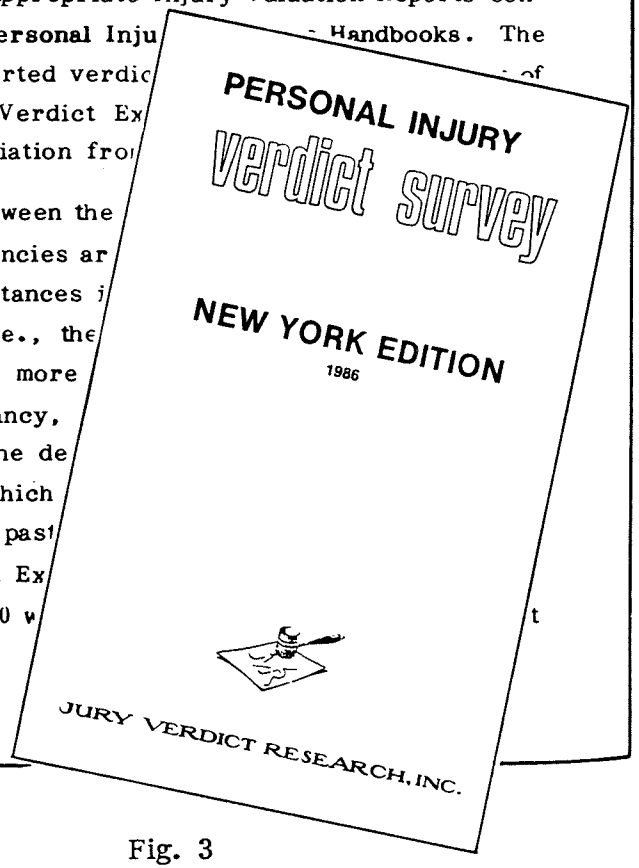


Fig. 3

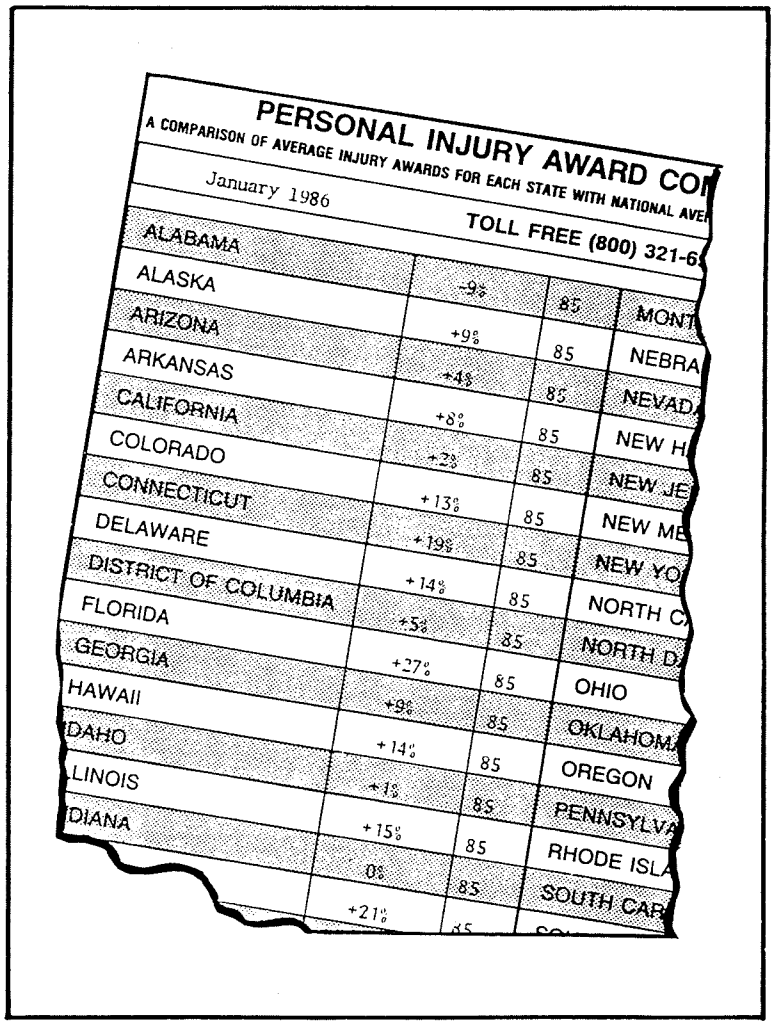


Fig. 4

on the form filled out by the subscriber and attested by our professional evaluator showing:

1. the probability of verdict for the plaintiff;

2. the probable verdict amount;

3. the actuarial verdict value.

All factors that may influence the verdict are considered and their effect is computed and shown (Fig. 5). This service is called **"The Jury Verdict Research Case Evaluation Service."** These are held in strict confidence. It is not unusual to have Case Evaluation requests on behalf of both the defendant and the plaintiff.

SPECIAL VERDICT RESEARCH

Upon request by our subscribers, which include various departments of the United States Government, attorneys, insurance companies, and trade associations, some of whom request extensive research and analysis, a staff member prepares a personalized report referred to as a **Special Verdict Research** and accompanied by synopses of recent cases consisting of an analysis of awards and trends for specific information needs, such as: products, industries, professions, injuries, localities, and other situations.

YOU FURNISH THE FACTS. IT ONLY TAKES MINUTES.

PERSONAL INJURY EVALUATION SERVICE
CONFIDENTIAL · IMPARTIAL

NOTE: This service is available to attorneys in private, corporate or government practice and insurance companies. Evaluations deal only with probable jury reaction to facts and predict compensatory damages only. Jury Verdict Research, Inc. does not pass upon legal questions and bases its findings, values and probabilities upon collected verdicts using accepted statistical methods in their analysis and application. Jury Verdict Research assumes no liability for their application. See reverse side for further explanation of evaluation.

A separate form and fee must be submitted for each plaintiff, including those who obtain loss of consortium. DO NOT INCLUDE photographs, medical reports, traffic reports or brief briefs.

CAPTION OF CASE: Doe v. Smith et al. DATE OF INCIDENT: 10-31-84 WE FURNISH THE EVALUATION BY RETURN MAIL

1. LIABILITY: _____ Admitted ✓ Contested

2. BRIEF DESCRIPTION OF INCIDENT: Plaintiff and defense contentions. Disinterested eyewitness for plaintiff, defendant or both?

Plaintiff driver eastbound on thoroughfare. Defendant's truck crossed centerline and struck plaintiff's vehicle head on. Defendant blames sudden mechanical failure.

3. INJURIES in order of decreasing importance. Explain any medical conflict, aggravation of preexisting condition, residuals, permanency, percentage of disability assigned to body as a whole. If death case, list decedent's age and sex, number, age and relationship of survivors, length of survival before death (conscious or unconscious?).

1. skull fracture
2. herniated disc

Plaintiff's treating physician states that plaintiff has a 10% permanent partial disability to the body as a whole.

4. SPECIALS: Given if paid by third party. Contested? Specify. If deceased, yearly earnings?
Medical Expenses to Date: $3,500 Future Medical Expenses:
Lost Earnings to Date $4,000 Future Lost Earnings:

5. PLAINTIFF:
Sex Female Occupation: Executive secretary
Present Age 36 Minority? Specify

6. DEFENDANTS: Last wit. Age, sex and occupation. If minority, specify. Driver? If corporation, specify what type

Truck driver and truck owner (manufacturing firm)

7. ANYTHING UNUSUAL which makes case materially different? e.g. - drinking, criminal record of plaintiff or defendant.

8. FORUM where case will be tried: State Ohio County Cuyahoga

Your Name J.J. Counselor Telephone Area Code (216) 248-7960
Firm Attorney at Law
Street 100 Lake Erie Drive
City Cleveland State Ohio Zip Code 44139 Date 1-5-85

ALL EVALUATIONS DONE WITHIN 24 HOURS OF RECEIPT
FACTS AND EVALUATION HELD IN STRICT CONFIDENCE

Enclosed with my completed form is a check or money order for:

✓ $75 for each form submitted

____ An additional $100 for a one-time enrollment fee (if you are neither a current subscriber to the PERSONAL INJURY VALUATION HANDBOOKS nor enrolled in the CASE EVALUATION SERVICE)

✓ An additional $10 and we will phone back the results.

MAIL TO:
Evaluation Service
Jury Verdict Research, Inc
5325 Naiman Parkway, Suite B
Solon, Ohio 44139-1085

RUSH EVALUATIONS available for an additional $75 (phone in the information and we will phone back the evaluation results). Call Toll Free (800) 321-8910 or in Ohio (216) 248-7980, collect

Attested: ✓ Date: 1/15/85
JURY VERDICT RESEARCH, INC

Basic Recovery Rate		
90%		
Basic Injury Values		
① $89,919		
② 9,522 (1/3 of $28,565)		
$99,441		
Adjustments for Additional Factors In:		
	+12%	+11,933
+16%	+7%	+6,961
+19%	+14%	+13,922
	+8%	+7,955
96		$140,211

PROBABLE VERDICT AMOUNT: $ 140 000

PROBABILITY OF VERDICT FOR PLAINTIFF: 96 %

140,000 x 96

ACTUARIAL VERDICT VALUE = $ 134,400

Fig. 5

We also conduct, as requested, a **Personalized Verdict File Search**, without analysis. This is often used by trial attorneys for evaluation of cases and to show courts that the verdict under challenge is consistent or out of line with similar verdicts. This is probably our most requested type of research.

PERSONAL INJURY VERDICT REVIEWS

This research publication divides the universe of personal injury verdicts into 13 different quarterly reporters, referred to as the "**Personal Injury Verdict Reviews.**" Each issue of each quarterly focuses on a specific topic and furnishes capsule reports of important, recent verdicts, settlements, and bench judgments, accompanied by statistical analyses and trend information. These reports furnish for the case cited, court docket numbers for entree to court briefs and transcripts, names of the lawyer, and expert witnesses plus other trial information. The 13 quarterlies, which are staggered so that one is published each week, are:

Commercial & Industrial Products
Physician & Hospital Negligence
Consumer Products
Food, Lodging, Sports, & Entertainment Facilities
Utilities, Construction, & Industry
Professional Negligence
Transportation Products
Public & Private Passenger Services

Trucking, Railroad, & Marine Lines
Retailing, Banking, & Other Service Establishments
Media & Government
Personal Liability
Vehicular Negligence

Subscribers may elect to receive all, or one or more of the quarterlies. These are collected into a two-volume set, along with an index (Fig. 6).

COMPREHENSIVE VERDICT SERVICE

In addition, because of requests, we will be providing weekly printouts of all new verdicts as soon as facts are collected and checked. These are also divided into 13 categories similar to Verdict Reviews. The printout is referred to as the "**Comprehensive Verdict Service**" (Fig. 7).

NEW VERDICT REPORTS

Because of numerous requests, we are getting ready to provide subscribers with a weekly eight-page computer printout of a cross-section of important verdicts and settlements covering all areas of injury litigation. This replaces our former Verdict Reports and is referred to as the "**New Verdict Reports**" (Fig. 8).

PERSONAL INJURY VERDICT REVIEWS

consumer products

Issue 10, December 23, 1985 ISSN 8755-5182

POWER SAWS

The 1984 and 1985 product liability cases analyzed in this issue were brought by plaintiffs injured while using power saws. For purposes of this report, power saws included table saws, circular saws, chain saws and radial arm saws. The plaintiffs incurred various injuries, but most frequently sustained hand or finger amputations or lacerations and nerve damage. One case involved a wrongful death action brought by the survivors of a 32-year old male who sustained a fatal laceration of his jugular vein. The verdicts ranged from $18,300 to $857,600 and the average was $300,706.

The defect most commonly cited by the plaintiffs in the cases analyzed was a lack of proper or adequate guarding. The product liability defendants advanced the arguments that the plaintiffs were negligent in their failure to purchase available guards or that the plaintiffs misused the saws.

Additional examples of product liability cases involving tools including power saws can be found in a release included in the **Personal Injury Valuation Handbooks** published by Jury Verdict Research of Solon, OH. Special Research Report No. 214, located behind the Product Liability tab in Volume 3A, indicated that plaintiffs recovered damages from the product liability defendants in 48% of the cases tried before a jury. An analysis of the 1984 and 1985 product liability cases involving power saw manufacturers yielded a 50% plaintiff recovery rate.

REVIEW of RECENT POWER SAW CASES

DEFENSE VERDICT. FINGER AMPUTATIONS.
17-year old male student injured in woodshop class while using saw mfred. by D Powermatic-Houdaille, Inc. P contended that saw defective in design in that it was not equipped with overarm guard as standard equipment and that instruction in use of saw inadequate. D contended that overarm guard could have prevented accident; that guard listed as optional equipment, that school district did not purchase guard and that school district negligent in failure to instruct P. INJURIES: amputation of 3 fingers of left, minor hand. SPECIALS: medical, $3,200; wage loss, $500,000 present value. Demand, $85,000; offer, $5,000. Date of accident, Feb., 1984. For P, Law Office of Stanley J. Bell by Robert S. Arns, San Francisco. For D, Porter, Scott et al. by Ned Telford, Sacramento. Sokolowski v. Powermatic-Houdaille, Inc., Marysville, CA, Superior Court #36957, May, 1985.

Fig. 6

Comprehensive Verdict Service
Published Weekly by Jury Verdict Research, Inc.

CONSUMER PRODUCTS

MATCH IGNITED BLOUSE - PERMANENT SCARRING - $500,000 VERDICT
A 47-year-old female suffered second and third degree burns when a hot match head fell onto her blouse, igniting the fabric. The plaintiff contended that the fabric was defective in that it burned too rapidly and intensely. She brought suit against the fabric manufacturer, the fabric converter which had the fabric dyed and tested, the dyer, the testing company, the jobber which designed, sewed and labeled the blouse, and the retailer. The defendants contended that the fabric complied with Federal Standards. All defendants except the jobber settled prior to the trial for a total of $282,500. The plaintiff sustained permanent scarring of her arm and torso, and alleged that she suffered a psychological injury. She claimed a past wage loss of $70,000. Expert witnesses for the plaintiff: Charles Beroes, Ph.D., chemist, University of Pittsburgh, Pa.; Walter Thomas, textiles, Georgia Tech. University, Marietta, Ga.; John Gaisford, M.D., burn specialist, Pittsburgh, Pa. The jury rendered a verdict of $500,000, finding the broker who sold the fabric and the jobber who sewed and labeled the blouse each 50% liable. For the plaintiff, John A. Caputo. For the defendant, WAYMAN, IRVIN & MCAULEY, by Donald J. McCormick. Basara v. Bago, Ltd., Pittsburgh, Pennsylvania, Court of Common Pleas No. GD 81-29429.

TABLE SAW - LOSS OF TWO FINGERS $650,328 VERDICT
A 30-year-old male teacher lost the index and long finger on his right hand while using a portable table saw manufactured by the defendant tool and die company and sold by the defendant department store. The plaintiff contended that the saw had a defective guard. He claimed $4,900 in medical expenses and the loss of $5,000 a year for life as a computer worker. Expert witnesses for the plaintiff: Dr. John Bell; Ralph Barnett, Triodyne. Expert witness for the defendant: Terrence J. Willis, Mechanical Engineer. Demand: $200,000. Offer: $25,000. The jury awarded $500,328 plus $150,000 in punitive damages against both defendants. For the plaintiff, RUFF, WEIDENAAR & REIDY by John J. Reidy. For the Defendant, TYRRELL & FLYNN by Marthe Clare Purmal. Platchek v. Sears Roebuck & Co., Chicago, Illinois, No. 80L-20213.

GLASS LID EXPLODED - PIERCED EYE $65,000 VERDICT
A 27-year-old female homemaker dropped the lid from a glass bowl as she was removing it from the refrigerator. The lid exploded as it

Fig. 7

New Verdict Reports

Published Weekly by Jury Verdict Research, Inc.

BATTERY - FRACTURED SHOULDER **VERDICT: $20,004**

A 43-year-old barber suffered a fractured shoulder, knee and neck injuries and lacerations when he was struck by a police officer. The plaintiff contended that he was wrestled to the ground by the defendant officer, who kicked the plaintiff's legs out from under him. He further contended that his head was forcibly pounded into the pavement without provocation. The defendants alleged that the intiff struck the defendant officer when the officer attempted issue a citation to the plaintiff for possession of marijuana. Demand: $25,000 six months before trial; $59,500 second day of trial. Offer: None. The jury awarded $20,004 to the plaintiff on his battery claim, and found for the defendant on false arrest and malicious prosecution charges. Expert witnesses for the plaintiff: Price Gripekoven, M.D., Orthopedist (Portland); Darrell C. Brett, M.D., Neurologist (Portland); Kathleen M. Galligan, D.C. (Lake Oswego); Terry Lee Tindall, Vocational Rehabilitation-Bittersweet Services (Portland); Nelson Crick, Ph.D., Economist (Portland). Expert witnesses for the defendant: Phaon Gambee, M.D., Orthopedist (Portland); Robert Dow, M.D., Neurologist (Portland); Robert Fry, M.D., Orthopedist (Portland). For the plaintiff: FREDERICK T. SMITH, by David D. Park. For the defendant: Harry Auerbach, Deputy City Attorney, Portland; J. Michael Doyle, Assistant County Counsel, Portland. Larson v. City of Portland, Portland, Oreg., No. A8312-07767.

SLIP AND FALL - FRACTURED ANKLE **DEFENSE VERDICT**

A 25-year-old female suffered a fractured ankle when she fell on ice outside the defendant's building. She claimed $3,500 in medical expenses and $400 in lost wages. Expert witnesses for the plaintiff: Dr. Robert Burdge, Orthopedic Surgeon. Expert witness for the defendant: none. Demand: $17,000. Offer: none. The ury returned a defense verdict. For the plaintiff: Alvin Wolff, . Louis. For the defendant: Harold Whitfield, St. Louis. Combs v. Food Maker, Inc., St. Louis, Mo., No. 84200346.

INSECT SPRAY IGNITED - THIRD DEGREE BURNS **VERDICT: $2,762,465**

A nine-year-old boy was suffered third degree burns to his chest, back, neck and upper arm when insect spray on his body ignited. The youth, who had just put mosquito repellant on his skin, walked across a carpeted room and turned on a television set. As he touched the set, a spark from static elctricity ignited the spray, inflicting severe burns. The plaintiff contended that the warning label on the spray, which contained 35% alcohol, failed to warn that a spark could ignite the spray after it was applied, but

Fig. 8

PERSONALIZED VERDICT REPORTING SERVICE

Each month we send all verdicts of the specific kinds that are requested by the subscriber. This may include specific liability situations, injuries, verdicts for certain areas and large verdicts, to mention a few. This is referred to as "The Personalized Verdict Reporting Service."

HAVE VERDICTS RECENTLY SKYROCKETED?

You ask for, "The trend regarding jury verdicts over the past ten years, including various categories such as product liability and medical malpractice." This question is considered in our latest issue of the Current Award Trends, which is published annually in January, and which includes nationwide verdict activity over a 10-year period. The evidence suggests that a substantial but uneven increase in verdict awards has been occurring for years. For the past 10 years, the average yearly increase in verdict awards is 15.23%. For 1984 it was 15.36%, and for 1985, the increase is 12.24% using incomplete figures. However, higher increases were recorded for five of the 10 years:

1976	16.61%
1979	17.71%
1980	24.54%
1981	30.49%
1983	27.54%

The increase in 1981 was almost twice that of 1984, and 2-1/2 times the preliminary figure of 12.24% for 1985. You will note that verdicts peaked in 1981, and have been decreasing since. Our report gives equal weight to changes in the midpoint verdict and the **unadjusted** verdict average. The unusually high verdicts rendered in some years do, unquestionably, affect the unadjusted averages. If verdicts of high and low extremes were .cluded from these calculations, we believe that the fluctuations would be smaller and the yearly average increase would also be somewhat smaller. Next year we will publish Current Award Trends that are computed both with and without the verdict extremes.

COMPARISON WITH OTHER RELEVANT INDEXES

In 1984 the average increase of the Consumer Price Index was 7.8%. Many of the largest increases in verdicts coincide with the highest increases in the Consumer Price Index; for example:

1979	17.71%	C.P.I.	11.5%
1980	24.54%	C.P.I.	13.5%
1981	30.49%	C.P.I.	10.3%

The United States Government Health Care Financing Administration, Office of the Actuary, notes the average annual growth rate for health care for 1978-1984 at:

14.4% inpatient
18.4% outpatient
14.5% physicians

In addition, over the ten-year period covered by this report, there were substantial increases in wages, salaries and earnings of the various members of the public. When injured, there may be a claim of loss of earnings, which also reflect these increases. There is no question that out-of-pocket medical and loss of earning specials are important factors entering in the size of verdict awards. Further increasing the medical expenses is the additional amount incurred due to the increased tendency to medically rehabilitate the seriously injured. This often means an increase in loss of earnings because of additional loss of time from work. Lawyers and insurance executives consider these out-of-pocket expenses in determining valuations, and so do jurors.

PRODUCT LIABILITY AND MEDICAL MALPRACTICE VERDICT TRENDS

When considering product liability and medical malpractice verdict awards, it must be noted that **Current Award Trends** considers only the size of the plaintiff verdict. We do not factor in defense verdicts, for that would be misleading as the percentage of plaintiff awards vary, depending on the specific product, and in malpractice, who the defendant is.

For example, Product Liability - % Plaintiff Recovery Rate:

41% consumer product
41% food & beverage containers
48% vehicle manufacturers
44% beauty products & toiletries
57% industrial equipment
70% presses
60% drugs & pharmaceuticals
48% tools
69% asbestos
41% household appliances

For example, in cases involving medical malpractice, the % Plaintiff Recovery Rate is:

28% against physicians
46% hospitals
39% against physicians and hospitals

Overall, the plaintiff recovery rate is 60% for 1986; 26 years ago it was also 60%. There has been some fluctuation during the years, but not much. For some years prior to this year, it was 57%. For product liability, the 1986 rate is 64%; in 1978 it was 52%. It is to be noted that the recovery rate for product liability has substantially increased in the past eight years. It is obvious that the medical malpractice plaintiff recovery rate is well under 50%.

MIDPOINT VERDICT MOST IMPORTANT CRITERIA IN DETERMINING TRENDS

Because the majority of verdicts tend to cluster around the midpoint verdict, it is the most important figure when assessing trends.

PRODUCT LIABILITY TRENDS

It is significant to note that the product liability mid-point verdict, which includes million dollar verdicts, has remained relatively stationary:

1980	$225,000
1981	325,000
1982	300,000
1983	300,000
1984	300,000

Although there is a significant upward trend in the number of plaintiff verdicts rendered for product liability (109 in 1975 to 337 in 1984), no recent surge is shown. 1984 shows a decrease over 1983:

1983	283	plaintiff verdicts plus
	90	million dollar verdicts
1984	251	plaintiff verdicts plus
	86	million dollar verdicts
1985*	71	plaintiff verdicts plus
	41	million dollar verdicts

*statistics for 1985 are incomplete

MEDICAL MALPRACTICE TRENDS

The midpoint verdicts, which include million dollar verdicts, also appear to have largely stabilized:

1980	$200,000
1981	300,000
1982	200,000
1983	260,476
1984	200,000
1985	245,000 (incomplete)

However, the number of malpractice verdicts has increased sharply over the ten-year period, from 78 in 1975 to 356 in 1984, and so have the number of million dollar verdicts, though the million dollar awards increased by only one over 1983. Surprisingly, although the number of million dollar verdicts has surged, the midpoint verdict was higher in 1981 ($300,000) than in 1984 ($200,000) or even the incomplete 1985 figure of $245,000.

Without question there are singularly large awards included in the category of million dollar verdicts for each year:

1975	$5,200,000	1980	$4,440,000
1976	9,341,683	1981	15,000,000
1977	10,150,000	1982	13,673,587
1978	127,841,000	1983	106,800,000
1979	15,650,000	1984	22,285,000

These are only the highest ones for each year that are noted herein. There are other very high awards for most of these years.

A similar range of verdicts is evident in awards for medical malpractice. Some may not be justified by the facts of each case, but they do not appear indicative of a "runaway verdict" trend.

Within the jury system there have always been verdicts that were considered either excessive or inadequate. However, our system of jurisprudence provides litigants with various review processes as a means of redress. Many of the very high verdicts used in our averages, as well as those cited, may have been decreased by the Courts and/or through settlement negotiation.

YOU ASK, "HOW ONLY THE 'BEST' CASES EVER REACH TRIAL, THEREBY CREATING JURY VERDICTS THAT ARE HIGHER THAN MIGHT OTHERWISE BE EXPECTED?"

Although young and inexperienced lawyers may proceed to trial with cases involving only minor injuries and very doubtful liability, the best trial lawyers cannot afford to do so, nor would they consider such time as well spent.

Major injury cases, particularly for product liability and malpractice, require so many expert witnesses - both medical and non-medical - and so many depositions,

hearings, and expensive exhibits, that only plaintiffs with serious injuries have sufficient potential to reasonably compensate the plaintiff's lawyer for out-of-pocket expenses, for the time of the attorney, associates, paralegals and secretaries. It must be remembered that, even with careful selection, in a large percentage of these cases the jury will find for the defendant and yield the plaintiff's trial lawyer nothing for his or her time and expenses.

You must also remember that, generally, the best trial lawyers may be opposed by equally competent defense lawyers. The verdicts that result may be high because the injuries may be serious and the economic losses large. However, regardless of size, the verdict may fall within the probability range for similar serious injury claims. This would not necessarily result in jury verdicts that are higher than might otherwise be expected. However, **JVR's study on "Outstanding Plaintiff Attorneys" (No. 186) did demonstrate that outstanding plaintiff lawyers do, with some frequency, obtain higher verdict awards for similar injuries than do their less skilled colleagues** (Fig. 9).

WHAT IS JVR's TREATMENT OF SETTLEMENTS, REMITTITURS AND ADDITURS?

Our publications clarify that, for statistical purposes, we collect and use only unadjusted verdicts. We do not attempt to follow what happens to verdicts subsequent to the jury action. This is for other services.

OUTSTANDING PLAINTIFF ATTORNEYS EFFECT ON RECOVERY RATE AND VERDICT SIZE

General Comments

An analysis of specialists in the field of personal injury was completed several years ago to determine how effective these attorneys were in recovering an award for the plaintiff, and in recovering awards that were larger than would normally be expected. The following is an up-date of that study.

For the purposes of this study, an outstanding attorney is defined as one whose name is immediately recognizable as a nationally known figure in the area of personal injury litigation. Only nationally known plaintiff attorneys were considered. The results of this stud... effectiveness of the many indoctrination pr... by plaintiff attorneys' group...

As with the last study the... illustrated that the client of... pect quite favorable conse... not so impressive as was ... lysis, cases in which an ... involved resulted in an 8... time the recovery rate ... has decreased to 77%, ... tiff recovery rate is a ... rate for all situations ...

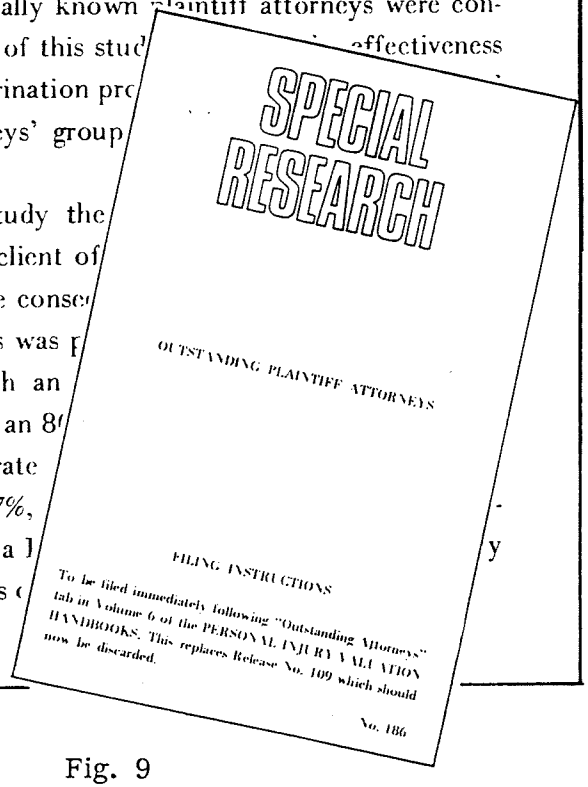


Fig. 9

JVR'S INFLUENCE ON INSURANCE COMPANY SETTLEMENTS

The Subcommittee is also interested in "Your views regarding whether your figures regarding the average jury verdict can in any way be equated with the amounts actually paid out in claims by insurers."

The answer is "yes" for many companies, and "no" for ɔme. Many companies use actuarial verdict data to help evaluate the value of claims. From my observation, I believe their evaluations are generally sound. For the very serious injury cases, they often secure a professional evaluation using the Case Evaluation Service. Other claim executives believe that they know what's going on by their trial experience (often surprisingly few cases), their local defense lawyers (likewise, directly and indirectly involved with comparatively few verdicts), augmented by reading in their news sources about verdicts - usually the very large ones - plus their settlement experience. At best, such evaluations can be scribed as the partially educated guess. Many years ago I wrote an article for the Insurance Law Journal which demonstrated that such strategy more often resulted in overpayments and also generated more litigation.

Representing insurance carriers, it has always surprised me how the evaluations of value of similar injury claims varied so widely among different companies, even for claims which they see with frequency, such as cervical strain. Of course, all claim executives believe their evaluations are sound because they have been evaluating claims for so many years. Their "experience" may be simply repeating the same evaluation philosophy - often far from the reality of what juries are really awarding. **Unfortunately for their companies, they often believe that juries award larger verdicts than they really do.**

Unless they check their beliefs with the trial of many lawsuits over a wide range of injuries, severities, and liability situations, or with actuarial verdict information, they can never know whether their evaluations are consistent with the actual world of verdicts or out of line.

I am continually amazed at the numerous settlements for far greater amounts than could be reasonably expected for a similar case by a jury. Typical of many settlements that we see is that of the insurers of two physicians in Albany, New York, who settled a recent claim of malpractice for $680,000. Had the physicians' insurance carriers consulted the actuarial tables, they would have noted that the probable verdict amount was $250,000, with a 46% probable verdict recovery rate and an actuarial verdict value of $115,000.

If such payments of almost six times the actuarial verdict value and more than twice the probable verdict amount were only occasional occurrences, it would not be as important as it is. We see many such settlements. It is obvious that the insurance carrier's representatives were influenced by the high verdict awards reported by the news media, and not through the use of a broad base of verdict information.

Ironically, many of the same claim executives, when concerned about underwriting losses, try to control costs - but so often with the wrong cases. Again, **using the partially-educated guess, they often reject reasonable plaintiff demands, only to be shocked by a much higher verdict.**

This is illustrated in the case of McKinney v. Electro Management Corporation, et. al.:

> A 13-year-old hemophiliac plaintiff, struck by a vehicle making a left turn, contended that the defendant collided with him while he was in the crosswalk. The defendant driver contended that the plaintiff rode his bicycle into the path of his vehicle, and he was unable to avoid the collision. The plaintiff sustained residual necrosis of the femoral head. He claimed medical expenses of $250,000. The plaintiff's demand for $600,000 was countered by the defendant's offer of $35,000, increased to $125,000 during the trial. A jury awarded the plaintiff $1,500,000.

The case evaluation determined an 80% probability of a verdict for the plaintiff, a $2,000,000 probable verdict, with a $1,600,000 actuarial value. It is obvious that the defendant's insurance carrier did not use actuarial tables.

I submit that if all insurance companies used actuarial verdict information in making settlement decisions, there would be a substantial effect on the amount paid out in claims - in all probability millions of dollars less. When plaintiff attorneys make realistic demands, and many do, prompter settlements with less litigation would have occurred, with substantial savings in defense costs.

JURORS GENERALLY ARE FAIR IN THEIR VERDICTS

This means that those who manage and evaluate claims, by failing to realize that much lower monetary values are often assigned by jurors than are generally believed, are needlessly paying out their companies' funds.

As a personal injury trial lawyer of some 40 years, I have tried many personal injury cases and have interviewed the jurors seated for most of those cases. I must confess that I have been impressed, with few exceptions, by the ability of the juries to resolve personal injury disputes in a fair and even-handed manner. **Juries reflect the community's prevailing social and cultural concerns and standards in their application of the law to the circumstances of each litigant in each individual case.**

I was recently invited to participate in the Warren Conference of the Roscoe Pound Foundation at Harvard University School of Law. The participants included well-known judges, outstanding trial lawyers for the plaintiff as well as for the defendant, eminent sociologists, and highly respected professors of law. It was interesting to note that the **unanimous opinion of those participants was an admiration for the jury system in action.**

Of course, juries occasionally do "go wrong," awarding money when it should not be awarded, and for outrageous sums.

In observing verdicts over the years, I can't help being impressed by the fact that they generally cluster around the median verdict for any given injury with similar economic losses as reflected by the out-of-pocket medical and wage loss, with only a handful of verdicts seriously deviating from the median.

Even in cases of liability, the similarity over the years is astounding. Overall, 26 years ago, 60% of the verdicts were for the plaintiff. A few hours ago a new calculation was made. It is still 60%. Given almost any liability circumstance (but not all), the plaintiff recovery rate is generally comparable today to what it was 26 years ago.

I submit that generally jurors are more consistent in their awards than are judges, trial lawyers, and claim executives in evaluating claim values. The problem is

not that the jurors are out of control, or, with exceptions, make ridiculous awards, but the problem is the effect that newspaper reports of very high verdicts, which may or may not be justified by the facts, have upon the public, the lawyers, and the insurance carriers. Equally important is that although jurors award money in only 60% of the cases tried, it is quite rare to see a file in litigation closed without payment or a trial.

Although we collect and process approximately 2000 verdicts each month (approximately 24,000 verdicts a year), in 1984 only 401 verdicts were awarded for one million dollars or more. Most, if not all of these million dollar awards are the subject of at least one news media story, which is featured prominently and often syndicated nationally. As a result, **a minority of large verdicts exert an exaggerated influence on settlements.** Even though the verdicts are subsequently reduced or reversed, they seldom get media attention. If they do, they rarely rate the headlines of the large verdict.

Generally, only the small amount of very high verdicts, numbering in the hundreds, are newsworthy. Often because of limited information furnished to news reporters, it would appear that the jurors for questionable liability have awarded the plaintiff a large sum of money for comparatively minor injuries. This gives the public the impression that their injuries, regardless of the facts of liability, will be compensated by an insurance carrier

and that they will be able to retire with the proceeds. The attorneys whom they engage, as well as the lawyers representing the insurance carriers, may not be any more knowledgeable.

Of course, many lawyers representing plaintiffs, defendants, and insurance company personnel do make it a point to obtain verdict information on a broad scale so that they are aware that jurors are far more conservative than their less-informed colleagues.

One fact that many people, including lawyers and insurance carrier personnel, do not realize is that only a small number of personal injury cases go through jury verdict. A number of years ago I completed a study that indicated that on a national basis, only about three of every 100 lawsuits filed proceed through jury verdict. In some jurisdictions, there may be no personal injury cases tried to a verdict for several years, while in other areas the ratio may be as high as 10%.

I do not believe that there has been a substantial change from the study referred to above. No one seems to be able to determine, other than by broad guesses, the percentage of personal injury claims that are settled or abandoned without litigation.

My experience with insurance companies is that they want to be fair. They want to promptly settle their claims for a reasonable amount without a lawsuit. They reluctantly enter into litigation. Many will pay substantial sums just to avoid litigation, even when they are convinced that the plaintiff would receive nothing at the hands of a jury.

The outstanding plaintiff attorneys do not deem it good business to handle claims that either have questionable injury or no liability. They carefully screen what they will accept, and they are not interested in handling claims simply to get an insurance settlement.

I submit that on a short-term basis, paying defense costs may be good business, but on a long-term basis it is needlessly expensive. The experience of some insurance companies reveals that once the attorneys in a locale recognize that an insurance company will pay only meritorious claims and will fight those in court that are not, it is surprising how most of the claims without merit disappear. I submit that insurance companies can save many millions of dollars in the long run by refusing to pay the defense costs on claims that are without merit.

On the other hand, lawyers representing the injured parties, especially those who are active in such representation, are anxious to settle their claims promptly and for reasonable sums, considering the facts.

They recognize that regardless of how good the liability may be, juries can, and do come in with defense verdicts. They also recognize that it costs them money and valuable time to engage in the enormously time-consuming deposition process necessary to prepare today's serious injury case. In addition, expert witnesses and exhibits are also costly. As one prominent plaintiff attorney said, "I expect to have my client settle if we can, for less than a jury would award." He would discount settlement for preparation costs not yet incurred, less the value of the time it would take to prepare and try the case.

Although insurance companies and plaintiffs' counsel are sincerely interested in prompt and fair settlements, the reason that these do not always occur is that we are in an age of information, and one side or both do not furnish sufficient valid information. Demands and offers unsupported by valid value evidence are suspect, and so often do not motivate the parties to settle.

HOW SETTLEMENTS COULD BE ARRIVED AT EARLIER, WITHOUT LITIGATION AND FOR REASONABLE BUT FAIR AMOUNTS

We submit that if all insurance companies and self-insurers used the actuarial verdict information that is available to them to evaluate their claims; then had their representatives sit down with the plaintiff's counsel and make offers based upon what a jury would most likely do, and show how they arrived at the valuations and what they are based on, this would result more often

in prompt settlements. Likewise, plaintiff's counsel should support their demands with similar data. I submit that if this is done, insurance carriers will save many millions of dollars, and plaintiff's counsel would accomplish earlier, reasonable settlements with less litigation, less of their time, and less out-of-pocket expenses. I submit that the net to the injured party would be comparable, and the hourly return of plaintiff's counsel much higher.

Another problem is often encountered. The skilled personal injury lawyer may realize that the offer is fair, but have trouble convincing his client, who believes from reading his newspaper that he is entitled to far more money than offered. If the insurance company provides actuarial data concerning the valuation, the attorney has the means to convince his client to accept the offer.

AN IMPORTANT CAUSE OF THE INSURANCE CRISIS TO SOME COMPANIES

The causes are complex and many. It is clear that the verdicts of the jurors is what sets the ultimate market for the settlement of claims.

It would appear that some companies did not bother to find out, though the information was available, that starting in 1979 verdicts began to rise rapidly. From a 6.5% increase in 1978, they rose to 17.71% in 1979, 24.54% in 1980, and 30.49% in 1981. In 1983, the

verdicts started to decline, going to 27.54%; in 1984 to 15.36%; and in 1985 to 12.24% (information for 1985 not complete).

As we all know, there is a substantial lead time in insurance from premium to payment for claims incurred. This period, especially for the more serious claims, is often years. Where the court dockets are clogged and take many years for a lawsuit to go to trial, the time period could be five or more years.

Had the underwriters of such companies kept informed, they would have known that starting in 1979 the claim market; namely, what jurors were currently awarding, started to increase substantially, more than doubling from the previous year. Had the underwriters adjusted the premiums in accordance with the yearly increase, the rise in premiums would have been gradual and they would have avoided having to recently double, triple and quadruple many premiums all at once. Unfortunately, even companies that were aware of the sharp increase in verdict size, to compete, charged smaller premiums than they had expected. More tragic to some insurance companies was that they failed to charge adequate premiums and subsequently were forced to pay out much more money in claims and claim costs, even considering investment income, than they had anticipated.

It is submitted that had all the insurance companies received the actuarial information published by Jury Verdict Research, Inc., and had they taken proper action, in all probability, although the insurance industry would still face serious problems, there would presently be less of a so-called insurance crisis.

Then, those in charge of reserving in those companies, had they known of the rise in verdicts that was occurring, would have gradually increased their reserves. They would not have found themselves as many insurance companies did in the recent period, having to increase reserves by large amounts. Many such companies suddenly discovered that they did not have the financial reserves to continue writing all of the previous lines or new business, and in fact some went into insolvency.

Further, had the people in the same companies who are in charge of assigning value and managing claims realized the large increase that was going on, they would have made greater effort to promptly dispose of claims and lawsuits.

There is some suspicion that some insurance companies earning 20% on their investments were in no hurry to pay the money out in claims. If so, such companies may have figured that less the cost of administering the claims and attorney fees, they would be earning a substantial amount of money. But because they did not realize that

while they were perhaps netting 10% on the reserves in those years, the cost of claims was going up by 30%. The results, of course, were the large, unexpected underwritng losses and overall losses incurred by such insurance companies.

The tragedy to the public, particularly business, is that such insurance companies, because of their failure to keep informed in this age of information, without realizing it, had depleted their capital and reserves and were unable to provide renewal coverage for many policy holders and write new business. Unfortunately, other companies, because of competition pressures, were also adversely influenced.

EMERGING LIABILITY AND THE NON-AVAILABILITY OF INSURANCE

One of the greatest problems facing insurance companies is that of emerging liability, especially where the premiums were based on non-liability situations that are swept away by court decisions and legislative action. Sometimes payments arise for coverage of tens of years ago that the companies had no reason to anticipate years later. Asbestos cases are an example. The evaporation of the sovereign immunity of governmental units has compounded this dilemma. Many insurance carriers are declining to write, or not continuing to write, this type of coverage because they are uncertain about how to realistically compute premium rates. Some insurance underwriters in companies that have the capacity to write but decline to do so, have little or no knowledge of jury verdicts involving governmental units.

Actually, sovereign immunity has been evaporating for many years. There is a substantial data base of information on the verdict expectancies for local and state governmental units. We have in our files hundreds of verdicts and our staff can and does analyze these for the government, including the United States Government, corporations, insurance companies, lawyers, and trade associations. We submit that if carriers that have the financial capacity wish to underwrite governmental units, that the data base presently exists to enable the insurance carrier to make a valid decision whether the risk is acceptable and to establish a realistic premium.

Likewise, many businesses, especially those for product liability coverage, also have the problem of obtaining insurance for a reasonable premium. We submit that for many product lines, our files have sufficient information to enable insurance companies that have the capacity and wish to do so to validly rate and write such product liability insurance. Likewise, our files on medical malpractice verdicts can assist underwriters.

Although the problems facing the carriers are complex, and some may need legislative or congressional action, we submit that if the insurance carriers use the actuarial jury information available to them and presently used by many carriers, they can save hundreds of millions of dollars; and can, with reasonable anticipation of underwriting profit, underwrite on a reasonable basis, many of the areas that they now either are afraid to underwrite or for which they set premiums that the market may not support.

Thank you for soliciting my views on the so-called "Insurance Crisis." I hope I have been of some assistance.

Philip J. Hermann

Philip J. Hermann
Chairman of the Board