Approved ______________________
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Mike O'Neal, Vice-Chairperson at

3:30 xxx/p.m. on February 18, 1988 in room 313-S of the Capitol.

All members were present except:
Representatives Buehler, Fuller, Peterson, Shriver, Vancrum and Wunsch, who were excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:
Jerry Slaughter, Kansas Medical Society
Representative James Lowther
Representative David Heinemann
Willaim Rein, Kansas Department of Health and Environment
Keith Landis, Christian Science Committee on Publication for Kansas
Molly Daniels, Department on Aging
Representative Elaine Hassler

Jerry Slaughter requested the Committee introduce a Concurrent Resolution amending Article 2 of the Constitution of the State of Kansas by adding a new section thereto, relating to the legislative power to enact laws related to actions for personal injury or death, (see Attachment 1.

Representative Snowbarger moved and Representative Bideau seconded to introduce the constitutional amendment requested by the Kansas Medical Society. The motion passed.

Representative O'Neal stated the Attorney General requests the Committee introduce a bill concerning injunction bonds and a bill amending the consumer protection law by adding an additional item to the list of what constitutes deceptive practices.

Representative Snowbarger moved and Representative Bideau seconded to introduce the bills requested by the Attorney General. The motion passed.

Representative Snowbarger requested the Committee introduce a bill allowing court clerks to use a rubber stamp signature on registrations for foreign judgments.

Representative Snowbarger moved to introduce the bill he requested. Representative Solbach seconded and the motion passed.

Hearing on H.B. 2754 - Concerning bonds, relating to the cancellation thereof.

Representative Lowther testified the bill allows the court to cancel a bond upon a showing of just cause by the bonding company. Just cause shall include, but not be limited to, nonpayment of a premium.

The hearing on H.B. 2754 was closed.

Hearing on H.B. 2833 - Act concerning appeals from a district magistrate judge in Kansas code for care of children

Representative Heinemann testified this bill amends K.S.A. 38-1591 to allow the appeal to be heard de nova or where a record was made of such action or proceeding, the appeal shall be tried and determined on the record, except on the motion of any interested party, additional testimony shall be heard.

The hearing on H.B. 2833 was closed.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 313-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on February 18, 1988

Hearing on H.B. 2824 - Enacting the durable power of attorney for health care act

Representative Heinemann explained durable power of attorney for health care means a durable power of attorney to the extent that it authorizes an attorney in fact to make health care decisions for the principal. This bill is patterned after a California act. He reviewed the bill for the Committee.

William Rein testified that the durable power of attorney for health care can be positive legislation to the extent it allows planning for future disability. He stated the interrelationships between the durable power of attorney for health care and legal guardianship, as well as other issues, deserve careful review, (see Attachment II).

Keith Landis trestified H.B. 2824 applies to a broad range of "health care decisions" which could be made by a previously designated attorney in fact for a principal lacking capacity to make such decisions. He requested the Committee give favorable consideration to this bill, (see Attachment III).

Molly Daniels testified Kansas would become the eleventh state to recognize the advantages of a durable power of attorney for health care if this bill is passed. This bill would be a great comfort for elderly persons in that it allows them to ensure that their wishes are carried out in the event they become disabled. She stated the Kansas Department on Aging supports H.B. 2824 because it will be a welcome planning tool for older Kansans, (see Attachment IV).

Hearing on H.B. 2851 - Concerning certain liens on personal property

Representative Hassler testified H.B. 2851 amends K.S.A. 1987 Supp. 58-210 by inserting "replacing or adding equipment" . She explained the present statute does not cover tires, (see Attachment V).

The hearing was closed on H.B. 2851.

Representative O'Neal announced the hearing on H.B. 2792 - Providing for registration of and service of process by process servers will be held at a later date.

Testimony of Gregory W. Heidrich, dated February 4, 1988, (Attachment VI); and Roger Kenny, Alliance of American Insurers, dated February 4, 1988, (Attachment VII), concerning the Medical Malpractice Liability Insurance hearings was distributed to the Committee.

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

GUEST REGISTER

DATE Feb. 18, 1988

NAME	ORGANIZATION	ADDRESS
William C. Rein	KDHE	Topeka
Marilyn Bradt	KINH	Lawrence
Molly Daniels	KDOA	Topeka
Keith R Landis	Christian Science Committee on Publication for Kansas	"
Pat Wiechman	Kansas Automotive Dismantlers & Recyclers Assn.	Topeka.
Gerhard Metz	KCCT	"
Pat Barnes	Ks. Motor Car Dealers Ass'n	Topeka

HOUSE CONCURRENT RESOLUTION NO. ______

A PROPOSITION to amend Article 2 of the Constitution of the State of Kansas by adding a new section thereto, relating to the legislative power to enact laws related to actions for personal injury or death.

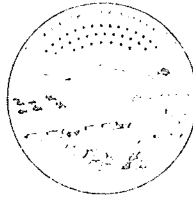
Be it resolved by the Legislature of the State of Kansas, two-thirds of the members elected to the Senate and two-thirds of the members elected to the House of Representatives concurring therein:

Section 1. The following proposition to amend the Constitution of the State of Kansas shall be submitted to the qualified electors of the state for their approval or rejection: Article 2 of the constitution of the State of Kansas is amended by adding a new section thereto to read as follows:

> Section 31. Power of the Legislature to amend, enact, modify or repeal laws relating to personal injury or death. Notwithstanding any other provision of this constitution and amendments thereto, the Legislature, in the exercise of its legislative power, may amend, enact, modify, or repeal, in whole or in part, any statute or rule of common law relating, directly or indirectly, to the determination of liability or measurement or limitation of damages for claims or suits for personal injury or death against persons, entities, or classifications thereof. Any such duly enacted legislation which establishes limits on damage awards for actual economic loss must be approved by a two-thirds majority vote of the members elected (or appointed) and qualified to each house of the Legislature.

Attachment I

STATE OF KANSAS



DEPARTMENT OF HEALTH AND ENVIRONMENT
Forbes Field
Topeka, Kansas 66620-0001
Phone (913) 296-1500

Mike Hayden, *Governor*

Stanley C. Grant, Ph.D., *Secretary*
Gary K. Hulett, Ph.D., *Under Secretary*

TESTIMONY PRESENTED TO

HOUSE JUDICIARY COMMITTEE

BY

KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

House Bill 2824

Background

House Bill 2824 would establish by statute the "durable power of attorney for health care" which is defined as a special form of legal instrument authorizing "an attorney-in-fact to make health care decisions for a principal." Although the bill will have little direct impact on the Department of Health and Environment, it will have significant impact on its licensees (medical care facilities and adult care homes).

The decision of who may give informed consent to providing or withholding medical care is among the most important legal issues facing the health care industry today. The issue is often complex when an adult either is or might be incapable of making reasonable decisions because of a mental disability due to injury, illness, or advanced age. In addition, concepts of limited guardianship have created certain areas where court involvement is required when seeking treatment for another adult, especially in the area of inpatient psychiatric treatment.

The department believes that the durable power of attorney for health care can be positive legislation to the extent it allows planning for future disability. To the extent that this legislation may simplify the process of obtaining consent from someone who the principal appointed for that purpose, it could be extremely helpful to adults needing treatment, their families, and providers charged with responsibility of making treatment available. However, the department believes that there are a few important issues which should be carefully reviewed before enacting this legislation. Those questions which merit review follow:

1 What is the relationship between the durable power of attorney for health care and legal guardianship? Specifically, would a

Attachment II

durable agent have authority to place someone in a nursing home even though a guardian could not do so without court approval?

In Section 7 of the bill, preference for the durable power of attorney for health care over "any other person to act for the principal in all matters of health care decisions" is stated. Presumably, a properly appointed durable agent for health care would have priority over even a guardian. This issue of the interplay between an attorney-in-fact and a legal guardian is important as other states have different rules concerning which representative has authority. In some states, the appointment of a guardian revokes all outstanding powers of attorney. In other states, the appointment of a guardian makes the attorney-in-fact answerable to the guardian who may revoke or otherwise enhance the powers of the agent.

KSA 59-3018(g)(1), as amended by House Bill 2050 in 1986, indicates that placement of an individual in an institution by a court-appointed guardian requires approval of the court. This means that admission of a ward to an adult care home by a guardian requires approval of the guardianship court. From reviewing Section 7 which makes authority under a durable power of attorney for health care a priority "over any other person to act for the principal in all matters of health care decisions," it appears that an agent would have greater authority than a guardian. In other words, although a guardian could not admit a person to a nursing home without approval of the court, an agent operating under a durable power of attorney for health care probably could.

2 Which "mental health treatment facilities" will be unable to admit or treat a patient upon the consent of a durable agent?

Section 8 of the bill limits the authority of an agent with respect to certain forms of treatment, including commitment to or placement in a mental health treatment facility. The term "mental health treatment facility" is not defined and, therefore, might include an ICF/MH as well as an ICF/MR. It might be helpful to specifically define the term "mental health treatment facility" with respect to state psychiatric hospitals, state institutions for the mentally retarded, private psychiatric hospitals, inpatient psychiatric services within a medical care facility, intermediate care facilities for mental health, intermediate care facilities for mental retardation, and outpatient psychiatric services such as community mental health centers.

3 How will incapacity be determined when a durable agent consents to treatment which the principal seems to be rejecting in other actions or words?

Section 11 indicates that a principal may revoke the power of an agent any time the principal has capacity. The law specifically presumes that the principal has capacity to revoke a durable power of attorney for health care. Therefore, the issue of the principal's capacity will be an important determination with respect to authority of his/her agent. In other words, if a principal appears to lack capacity but is actively objecting to admission or other forms of treatment, will a health care provider or agent need to pursue a judicial determination of the principal's capacity? This seems to be true with respect to Section 14 which states that an agent may not consent to health care if the principal objects. Providers and durable agents must have a clear understanding of what constitutes revocation, especially when the principal appears to lack capacity.

Recommendations

As stated earlier, House Bill 2824 can be positive legislation since it allows planning for future disability. However, the interrelationships between the durable power of attorney for health care and legal guardianship as well as the other issues discussed above deserve careful review. The Department of Health and Environment considers House Bill 2824 to be extremely important and will assist in those discussions to the greatest possible extent.

Presented by: William C. Rein, JD
Director of Quality Assurance/Risk Management
Bureau of Adult and Child Care

February 18, 1988

Christian Science Committee on Publication For Kansas

820 Quincy Suite K
Topeka, Kansas 66612

Office Phone
913/233-7483

To: House Judiciary Committee

Re: House Bill 2824

The natural death act enacted by the Kansas Legislature in 1979 begins with a noble statement: "The legislature finds that adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition."

As useful as this act may be, it can be applied only in narrowly defined circumstances.

The bill presently under consideration should be much more beneficial, applying to a broad range of "health care decisions" which could be made by a previously designated attorney in fact for a principal lacking capacity to make such decisions.

Certainly, an individual should give extraordinary consideration to the selection of another to make these important decisions on his behalf. This bill contains safeguards throughout to insure that the intent of the individual is clearly stated and preserved through varying circumstances.

Protection is also provided to care providers by showing clearly, in writing, who is authorized to speak for the incapacitated individual in health care matters.

The bill, as drafted, can become a law of substantial benefit to those, like myself, who have chosen a way of life in which health care does not necessarily mean medical care.

Your prompt, favorable consideration of this measure will be appreciated.

Keith R. Landis
Committee on Publication
for Kansas

Attachment III

TESTIMONY ON H.B. 2824
TO
HOUSE JUDICIARY COMMITTEE
BY
KANSAS DEPARTMENT ON AGING
FEBRUARY 18, 1988

Bill Summary:

Act provides a durable power of attorney for health care.

Bill Brief:

1. Act allows for the attorney in fact to make health care decisions on behalf of the principal.

2. Act provides a model form to be used.

Bill Testimony:

In passing this bill, Kansas would become the eleventh state to recognize the advantages of this specific power of attorney. Although Kansas has recognized living wills since 1979, this bill goes much further in allowing the patient to maintain a maximum amount of autonomy and privacy.

This will would be a great comfort for elderly persons in that it allows them to ensure that their wishes are carried out in the event they become disabled. With the use of a medical power of attorney, the patient can handpick a trusted friend or relative to act as an informed medical decision maker in his or her place, should the need arise.

Unlike the living will, this bill would apply to all health care decisions, not just those that involve terminal patients. In other words, a comatose patient, for example, whose condition is not terminal, would now be able to have his or her interests represented by a chosen designee. The presence of the medical power of attorney would alleviate the problems that often arise when there is a disagreement among family members or between family and doctors: a decision maker will have been legally designated.

The Kansas Department on Aging supports H.B. 2824 because it will be a welcome planning tool for Older Kansans.

Recommended Action:

KDOA supports the enactment of H.B. 2824.

MD:mj
6.2005
2/18/88

Attachment IV

STATE OF KANSAS

ELAINE R. HASSLER
REPRESENTATIVE, SIXTY-EIGHTH DISTRICT
DICKINSON AND MORRIS COUNTIES
ROUTE 2
ABILENE, KANSAS 67410

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: PUBLIC HEALTH AND WELFARE
MEMBER: EDUCATION
GOVERNMENTAL ORGANIZATION
CHAIRMAN: KANSAS DAY CARE COMMITTEE
MEMBER: ADVISORY COMMITTEE FOR CHILDREN AND YOUTH

House Judiciary Committee
HB 2851

February 18, 1988

Almost two years ago, an owner of a tire store in Abilene, Don Nebelsick, came to me with a problem he had encountered with tire sales. He found that when a vehicle was repossessed he had no way to make a claim for the unpaid part of the tire payments for the tires on that truck. That may not seem such a huge dollar amount if you're thinking of a couple car tires. But on an 18 wheeler we could be looking at a two or three thousand dollar amount.

His lawyer started the procedure to invoke claim on the tires only to find that the statutes don't cover tires as it does improvements, labor or repairs on vehicles in the present lien law as shown in lines 23 and 24. In the attached materials, you note the case annotation #12 where such opinion was rendered. You also have a copy of the Rouse vs. Paramount Transit Co. case from the Kansas Supreme Court where it was ruled that "a dealer who sells to customers auto vehicle tires, tubes, and rims, and installs them gratis, is not entitled to a lien on a vehicle for the price of the articles."

Thus the case for the amendments that HB 2851 brings to you. You see on the several appropriate lines the added words "or replace or add equipment" which we believe would cover tires also in the liens on personal property.

Attachment V

MAR 17 1986

register of deeds, under oath, a statement of the items of the account and a description of the property on which the lien is claimed, with the name of the owner thereof and the date upon which work was last performed or material last furnished in performing such work or making such repairs or improvements, in the county where the work was performed and in the county of the residence of the owner, if such shall be known to the claimant.

History: R.S. 1923, 58-201; L. 1947, ch. 313, § 1; L. 1961, ch. 264, § 1; L. 1969, ch. 273, § 1; July 1.

Source or prior law:

G.S. 1868, ch. 58, § 1; L. 1872, ch. 142, § 1; L. 1903, ch. 383, § 1; L. 1913, ch. 218, §§ 1, 2; L. 1917, ch. 232, § 1; Revised, 1923.

Cross References to Related Sections:

Liens of subcontractors and others, see 60-1103.

Research and Practice Aids:

Mechanics' Liens⇐132(1), 134.
Hatcher's Digest, Liens § 4.
C.J.S. Mechanics' Liens §§ 139 et seq., 150 et seq.
Liens, Kansas Practice Methods § 1339.
Statement of artisan, mechanic, etc., for lien, Vernon's Kansas Forms § 4132.

Law Review and Bar Journal References:

Case in annotation No. 15 below discussed in 1953-55 survey of debtor-creditor law, F. J. Moreau, 4 K.L.R. 196, 204, 205, 206 (1955).

Amendments of 1961 explained in 1959-61 survey of debtor-creditor law, Wesley E. Brown, 10 K.L.R. 197, 199 (1961).

Possible unconstitutionality of repairman's lien and provisions concerning security interest in goods on which services are performed discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 151, 198 (1973).

Perfecting security interests in mobile homes, 18 W.L.J. 708, 710 (1979).

"Survey of Kansas Law: Consumer Law," John C. Maloney, 27 K.L.R. 197, 210 (1979).

CASE ANNOTATIONS

1. Civil engineer has lien on field notes, maps, etc. Irrigation Co. v. Briesen, 1 K.A. 758, 767, 41 P. 1116.

2. Lien not destroyed by agreement postponing payment for labor. Olson v. Orr, 94 K. 38, 40, 145 P. 900.

3. Compliance with statute; possession held not surrendered to owner. Olson v. Orr, 94 K. 38, 40, 145 P. 900.

4. Work, etc., must be at owner's request, or with consent. Olson v. Orr, 94 K. 38, 40, 145 P. 900.

5. Automobile; lien of mechanic superior to holder of sale contract. Automobile Co. v. Dennis, 104 K. 241, 242, 243, 178 P. 408.

6. Automobile; lien of mechanic superior to prior chattel mortgage. Overland Co. v. Evans, 104 K. 632, 634, 180 P. 235.

7. Mechanic's right of possession not affected by failure to file. Overland Co. v. Evans, 104 K. 632, 634, 180 P. 235.

8. Statute gives lien to one who makes repairs; section construed. Motor Co. v. Kline, 109 K. 227, 230, 198 P. 949.

9. Section does not give lien to person having repairs made. Motor Co. v. Kline, 109 K. 227, 230, 198 P. 949.

10. Lien of mechanic prior to mortgage, when. Hockaday Auto Supply Co. v. Huff, 121 K. 113, 245 P. 1013.

11. Constitutionality of priority feature affirmed. Clark v. Davis, 123 K. 99, 254 P. 399.

12. Dealer selling tires and installing them gratis not entitled to lien. Rouse v. Paramount Transit Co., 137 K. 858, 860, 22 P.2d 429.

13. Similarity between chattel mortgages and conditional sales contracts discussed. Freuhauf Trailer Co. v. State Corporation Comm., 149 K. 465, 472, 87 P.2d 641.

14. Duration and extent of lien; amendment of lien statement; lien assignable; priority; expenses in repossessing property not lienable. National Bond & Investment Co. v. Midwest Finance Co., 156 K. 531, 534, 535, 536, 537, 134 P.2d 639.

15. Amendment of filed lien statement permitted, when. Butel Motors, Inc. v. Warsop, 176 K. 491, 492, 494, 271 P.2d 237.

16. Section does not impose lien for unpaid rent on mobile home. Reimer v. Davis, 224 K. 225, 229, 230, 580 P.2d 81.

17. Lien waived; failure to file lien statement; possession of race car voluntarily surrendered. Weatherhead v. Boettcher, 3 K.A.2d 261, 262, 263, 264, 594 P.2d 257.

18. Cited; no lien created for repairs made on stolen automobile at thief's request. United States Fidelity & Guaranty Co. v. Marshall, 4 K.A.2d 9, 601 P.2d 1169.

58-202. Same; enforcement and foreclosure. Said lien may be enforced and foreclosed as security agreements are enforced under the provisions of the uniform commercial code.

History: L. 1913, ch. 218, § 3; R.S. 1923, 58-202; L. 1965, ch. 564, § 404; Jan. 1, 1966.

Research and Practice Aids:

Mechanics' Liens⇐245(1).
Hatcher's Digest, Chattel Mortgages §§ 96 to 107; Liens § 8.
C.J.S. Mechanics' Liens § 263.

Law Review and Bar Journal References:

Survey of Kansas law on real and personal property (1965-1969), 18 K.L.R. 427, 431 (1970).

CASE ANNOTATIONS

1. Expense of repossessing chattel cannot be charged as costs of sale. National Bond & Investment Co. v. Midwest Finance Co., 156 K. 531, 537, 134 P.2d 639.

2. Lien waived; must file lien statement. Weatherhead v. Boettcher, 3 K.A.2d 261, 262, 263, 594 P.2d 257.

58-203. Lien for threshing or husking. Any person operating a threshing machine, or engaged in the business of threshing and harvesting grain or grain crops, shucking, husking or gathering of corn, either by hand

MAR 17 1986

case quite similar to the present one. There it was held, in effect, that it was competent for the mortgagor to give possession to the mortgagee of the rents and profits of the mortgaged property, and where this is done that no judicial proceeding is necessary to gain possession of that right, and that the right so acquired is superior to that of a garnishing judgment creditor. Here, the mortgagor not only stipulated that the mortgagee might possess himself of the rentals in a certain contingency but actually joined the mortgagee in carrying out the stipulation. He consented to act as trustee, and did act in that capacity for a time, collecting rentals and having them applied on the default payments due on the mortgage. Under the circumstances the loan company was in effect a mortgagee in possession with a right to the rentals, having obtained them with the consent and coöperation of both parties.

The district court committed no error in holding that the Railroad Building, Loan and Savings Association was entitled to the rentals as against the claim of a subsequent garnishing creditor.

The judgment is affirmed.

No. 31,171.

WALLACE T. ROUSE, *Plaintiff*, v. THE PARAMOUNT TRANSIT COMPANY, *Defendant*, THE MARTIN-JACKSON TIRE AND SUPPLY CORPORATION, Intervener, *Appellee*, THE C. I. T. CORPORATION, Intervener, *Appellant*.

(22 P. 2d 429.)

SYLLABUS BY THE COURT.

LIENS—*For Labor and Repairs—Construction of Statute.* Under the statute providing for an artisan's lien for services on personal property (R. S. 58-201), a dealer who sells to customers auto vehicle tires, tubes and rims, and installs them gratis, is not entitled to a lien on the vehicle for the price of the articles.

Appeal from Sedgwick district court; division No. 2; THORNTON W. SARGENT, judge. Opinion filed June 10, 1933. Modified.

Charles G. Yankey, Harvey C. Osborne, John G. Sears, Jr., and *Verne M. Laing,* all of Wichita, for the appellant.
Harold H. Malone, of Wichita, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The question in this case is whether a dealer who sells to customers auto vehicle tires, tubes and rim, and installs them gratis, is entitled to a lien on the vehicle for the price of the articles.

The question arose between intervening creditors in an action by Wallace T. Rouse against the Paramount Transit Company, in which a receiver was appointed for the transit company. The vehicle involved is a three and a half ton Dodge truck with six wheels. The C. I. T. Corporation claimed possession of the truck under a conditional sales contract having the effect, so far as this litigation is concerned, of a chattel mortgage. The Martin-Jackson Tire and Supply Corporation claimed possession of the truck by virtue of a lien duly perfected under the statute providing for a lien for services on personal property. The principal items were for tires and tubes, and for a rim. By order of court, the truck was placed in storage to await final determination of the case. After trial by the court, judgment was rendered awarding the Martin-Jackson Company a first lien for $598.26, awarding the C. I. T. Corporation a second lien for $1,632, and providing for sale of the truck and application of proceeds. The C. I. T. Corporation appeals.

The Martin-Jackson Company has an establishment consisting of a store in which it keeps a stock of merchandise comprising automobile tires, tubes, rims and other automobile supplies, a repair shop, and a parking place for vehicles to be serviced. The truck in question was used by the Paramount Transit Company for transportation of merchandise between Wichita and Kansas City, Mo. The truck made a trip to Kansas City every night and returned to Wichita the following day. On its return, it would be parked in the Martin-Jackson Company yard and would be serviced as needed—air in the tires, flat tires repaired, new tires supplied, etc.

Automobile tires and tubes are distinct articles of merchandise sold by manufacturers to dealers who distribute them to auto vehicle users. They may not as yet be purchased at drug stores, but they may be purchased of dealers in general merchandise. Certain dealers specialize in the sale of tires and tubes. The articles are sold at list prices based on manufacturer's prices, and the seller installs the tube or tire without charge for the labor. Rims are not often kept in stocks of general merchandise. Small dealers in tires and tubes seldom keep them in stock, but other dealers do. They are sold at list prices, in this instance fixed by a wheel and rim association, just as tubes and tires are sold, and a purchase of a rim is a

purchase of the article mounted. As in other commercial transactions, large buyers and some others are allowed a discount from list prices. A transportation company having a fleet of buses was a large buyer from the Martin-Jackson Company, but did its own mounting. It was given a special discount; but the Martin-Jackson Company made no charge for the labor involved in mounting the merchandise it sold.

The statute reads as follows:

"A first and prior lien is hereby created in favor of any blacksmith, horse-[illegible], wagon maker, keeper of a garage, or any other person, upon any goods, [illegible]els, horses, mules, wagons, buggies, automobiles, or other vehicles, and farm implements of whatsoever kind, which shall come into his or their possession for the purpose of having work done on said property, or repairs or improvements thereon, and said lien shall amount to the full amount and reasonable value of the services performed, and shall include the reasonable value of all material used in the performance of such services. Such lien shall be valid as long as the person claiming the same retains possession of said property, and the claimant of said lien may retain the same after parting with the possession of said property by filing within thirty days in the office of the register of deeds, under oath, a statement of the items of the account and a description of the property on which the lien is claimed, with the name of the owner thereof, in the county where the work was performed and in the county of the residence of the owner, if such shall be known to the claimant. [Revised, 1923; old sections, L. 1872, ch. 142, § 1; L. 1903, ch. 383, § 1; L. 1913, ch. 218, § 2; L. 1917, ch. 232, § 1.]" (R. S. 58-201.)

As indicated, this section is a revision. While it is based on previous statutes relating to artisan's liens, it is different from any of them, is different from the common law, and takes its place among [illegible] statutory lien statutes. Because special privileges are conferred, such statutes are strictly construed in determining to whom and for what a lien is given. (*Bridgeport Machine Co. v. McKnab*, 136 Kan. 781, 786, 18 P. 2d 186.)

The lien is for the amount and value of services performed, including value of material used in performing the service. The service is primary. The material used to effectuate the service is subordinate and collateral, and this court has so held.

"By the language of the statute and from its analogy to similar laws it is obvious that the labor upon the article intrusted to the artisan is the principal thing, the material furnished being incidental." (*Clark v. Davis*, 123 Kan. 9[illegible], 254 Pac. 399.)

[illegible]g the items for which a lien was claimed were the following:

"1 900/20 truck 10-ply casing and application........ $171.94
1 900/20 truck balloon casing, tube and application........ 81.86
2 975/20 truck balloons and application, 2 No. 60 tubes and application, 204.52
1 975/20 truck 12-ply casing and application, 2 No. 60 heavy mold tubes and application........ 102.26
1 975/20 truck balloon casing and application........ 78.61"

Some labor was involved in mounting tires on this big truck. The wheel might be an inner wheel of a rear pair, and to mount a tire might take two hours' time. However, the price of a tire was considerable, and each transaction was precisely the same as if the vehicle had been an Austin. A. E. Jackson testified on behalf of his company as follows:

"Q. What is your custom with reference to the sale of truck tires in this community? A. We sell these tires installed."

The result is, labor was not an element of value in the transactions, much less the necessary primary element.

Tires and tubes are not "material" incidentally used in the performance of labor. To illustrate, one item for which a lien was claimed was "1 900/20 section job, $12." There was a hole in a tire, but the tire was not unfit for service and it was repaired. Some material was used, but the charge was chiefly for labor. Other charges were for tube repairs, which we all know about. The mechanic puts a patch on a tube. The charge is chiefly for labor but includes a bit of material used in performance of the labor. Another charge was for casing repair, and another was for a boot repair of a casing, the price of the boot being $2.50. All these were lienable items, but the statute may not be stretched to embrace tires, tubes and rims sold out of stock, and this would be true if a reasonable charge were made for installation. (*Clark v. Davis*, 123 Kan. 99, 254 Pac. 399.) With respect to those articles, the merchant sells on the personal credit of the buyer.

The case of *Clark v. Davis* involved replacements and additions to a car already fitted with standard equipment. It was held there was no lien. The decision was based on the ground the articles were not "improvements" within the meaning of the statute. In the opinion it was said that if a worn tire had been replaced by a new one a different question would have been involved, which is true. Putting on a new tire in place of an old one would improve the car, and we have in this case the question left open in *Clark v. Davis*.

An Economic Perspective on Insurance Profitability

Gregory W. Heidrich
February 4, 1988

Testimony Presented to the Committee on the Judiciary
Kansas House of Representatives

Attachment VI

Introduction

My name is Gregory W. Heidrich. I am the Assistant Director of Research for the Alliance of American Insurers. The Alliance is a national property and casualty insurance trade association, based in Schaumburg, Illinois, which represents 175 member companies. Our members write property and casualty insurance in every state, including Kansas.

The focus of my remarks today will be on the financial performance of the property/casualty insurance industry. My aim will be to describe what has been happening in the industry for the last several years, to give you an explanation for why things happened when they did and in the manner that occurred, and to discuss the prospects for the industry's future. I plan to describe the recent underwriting and investment performance of the industry from a long-term economic perspective.

The theme underlying my remarks is my belief that the property and casualty insurance industry is, at bottom, an intensely competitive business that works hard at providing its customers with the widest variety of products at the lowest possible price over the long haul. I should point out however, that this industry does not go about its business in the safe and secure knowledge that its future is assured or that its bets will all pay off. Uncertainty, in fact, is the bedrock of this business. Uncertainty about the riskiness of the hazards underwritten; uncertainty about the scope of liability accepted; and uncertainty about the economic and legislative climate within which business is conducted.

It is ironic that an industry devoted to easing the fears of its customers for their financial security, should itself operate in such an environment of uncertainty, but it is true. This simple fact is obvious to those who study the industry and its economic, political, and legal environments.

Recent History

How has the property and casualty industry performed over the last several years and more important, over the last decade? Is this industry competitive? Has it been a source of plentiful and easy profits, as some of our critics would have it, or have things been tougher than that? From what activities has the industry gained its profits? I think an examination of our performance will show that the industry has gone through some hard times, reaching the bottom in 1984 and 1985 with a recovery beginning in 1986 and 1987.

Financial Performance in the Industry

Unquestionably, the single most important indicator of an industry's performance is its return on equity. It doesn't take a doctorate in finance to understand that without an adequate rate of return, the industry will be unable to either attract or hold the financial resources necessary to meet the insurance needs of a growing economy. Investors must be able to anticipate that they will be rewarded, commensurate with the risks they assume, for backing insurance companies or they will not do so.

The Insurance Services Office recently completed an analysis of profitability in the insurance industry over the period from 1970-1986. What the study found, and it is no surprise to those in the industry, is that returns have been cyclical over this period. The return on net worth was 9.3% in 1970, but fell to 2.5% in 1975.

From there, returns rose to a peak of 19% in 1977, when they began a long, steep slide to 1984 and 1985. The return on net worth in 1984 was an abysmal 1.8%,less than half of the return which could be obtained on an ordinary passbook savings account. In 1985, the rate "recovered" (and I put recover in quotation marks) to 3.8%, still a very low rate. In 1986, the industry felt its first real breath of recovery, when the return on net worth rose back to about 13% and 1987 also looks to be a year of solid recovery. The estimates I have seen so far (which are not yet based on the final results published by insurers I might add) call for a return on net worth of about 14%.

How do these results compare with those obtained in other industries? Reasonably well last year, but over the full 16 year period, not very well I'm afraid. The ISO study compared the insurance returns against the average return obtained by "all other industries" (as calculated by Standard & Poor). Over the period 1970 to 1985 (information on the other industries was not available for 1986), insurance had an average return of 10.1% versus an average of 11.8% for the other industries. Starting in 1979, the insurance return was below the average in every year through 1985.

From 1979 or 80 onward, the property/casualty industry has been outperformed by commercial banks, utilities, transportation industries, and financial service companies such as major stockbrokers. In looking at other industries, the ISO report found some 49 other industries which outperformed the property/casualty industry in rate of return and degree of risk (higher return and lower risk). Seventeen industries, mostly concentrated in heavy manufacturing, were outperformed by the property/casualty business. The purpose of this recitation is not to say that the property and casualty business is on the way to extinction any time soon. What it does say, however, is that times are not always good in this business. Profitability runs in cycles and when shifts occur, they happen just as fast and just as severely as they do in agriculture, housing, computers, and many other industries.

Sources of Income-A Look Behind the Rate of Return

I'd like to take a few minutes and look at some numbers behind these rate of return figures, as revealing as they are. I'd like to give you a brief perspective, first, on the national results for insurance companies and then some Kansas results. Insurance earnings come from 2 sources: underwriting income and investment income. Investment income has 2 categories: (1) the earnings from interest, dividends, and rent gained on invested assets and, (2) the profits obtained from sales of stocks and bonds.

Beginning in 1979, underwriting income declined in every consecutive year until 1986. From 1974 to 1987, the industry experienced underwriting losses in every year except 1977 and 1978. In 1985, the industry experienced an underwriting loss of $25 billion, followed by a $16 billion loss in 1986. Preliminary year-end figures indicate an underwriting loss of $9.8 billion in 1987. In Kansas, insurers experienced underwriting losses in each of the five years from 1981 through 1985. Kansas underwriting losses peaked in 1984 at $178 million, followed by a $151 million loss in 1985. In Kansas, incurred losses over the 1976-1985 period grew by about 13.5% annually while earned premiums grew by about 10.0% annually. In 1984 Kansas insurers faced liabilities and expenses equal to $1.14 for every $1.00 of premiums. In 1985, that situation improved somewhat so that the loss was $1.11 for every $1.00 of premium.

While the returns from invested assets (interest, rent and dividend income plus capital gains on the portfolio) have been a tremendous help to the industry, they have been unable to offset underwriting losses in several recent years. "Operating Income", which includes investment income, declined from 1978 to 1985 in the industry. Nationally, 1984 and 1985 were years of actual operating losses totaling almost $10 billion. In Kansas, insurers experienced operating losses in 1982, 1984, and 1985. The Kansas operating loss in 1982 was $12 million, $51 million in 1984, and about $13 million in 1985. The industry as a whole had positive operating income of $5.6 billion in 1986, and preliminary year-end figures show an operating gain of $13.7 billion in 1987.

How does the industry get from negative operating income in 1984 and 1985 to positive rates of return (albeit very low rates)? That is, what's the rest of the profit picture? After accounting for realized capital gains, federal income taxes paid or credited, and various other minor income sources, the industry's after-tax net income has been positive, even in 1984 and 1985. Nevertheless, net income also declined from 1978 to 1984.

Investment Income -vs- Underwriting Income

Much has been made in recent years of the industry's dependence on "cash-flow underwriting" and the heavy impact of investment income. Certainly it is true that insurers do compete vigorously for the business they write and that their estimates of the amount they can earn on investments play a part in their calculations. In an industry with hundreds of active players in most lines of business in virtually every state, with low or nonexistent barriers to entry, and with a product which may be indistinguishable from one supplier to the next, such a situation is almost a foregone conclusion.

Nevertheless, it is worth noting that from 1983 to 1987 (years of record capital gains), the total investment gains were never more than 16% of the total income taken in by the property/casualty industry and in 1987 fell to about 12%. Net investment income, that amount obtained from interest, dividends, and rent (rather than by a rise or drop in the stock market) typically amounted to about 11% to 13% of total industry income.

In Kansas, net investment income amounted, on average, to only about 6.5% of total Kansas insurance income from 1975 to 1985.

Some quick arithmetic with these figures will show you that in 1986, a reduction of only about 12% nationally in losses incurred, loss adjustment expenses, and other underwriting expenses would have been worth as much as the $22 billion of net investment income; a 16% reduction in the same items would have been worth the full $28 billion in total investment gains gathered by the industry. In Kansas, an average reduction of about 11% in incurred losses would have been worth as much to the industry as the full $750 million of net investment income over the decade prior to 1985. The purpose of this exercise has not been to say that investments are not important--without a doubt, they are. The point is that the bulk of the action in the property/casualty business is in the underwriting function and it is there where an insurer is either successful or not. In the underwriting area, things have not been very good over the last decade.

Conclusions

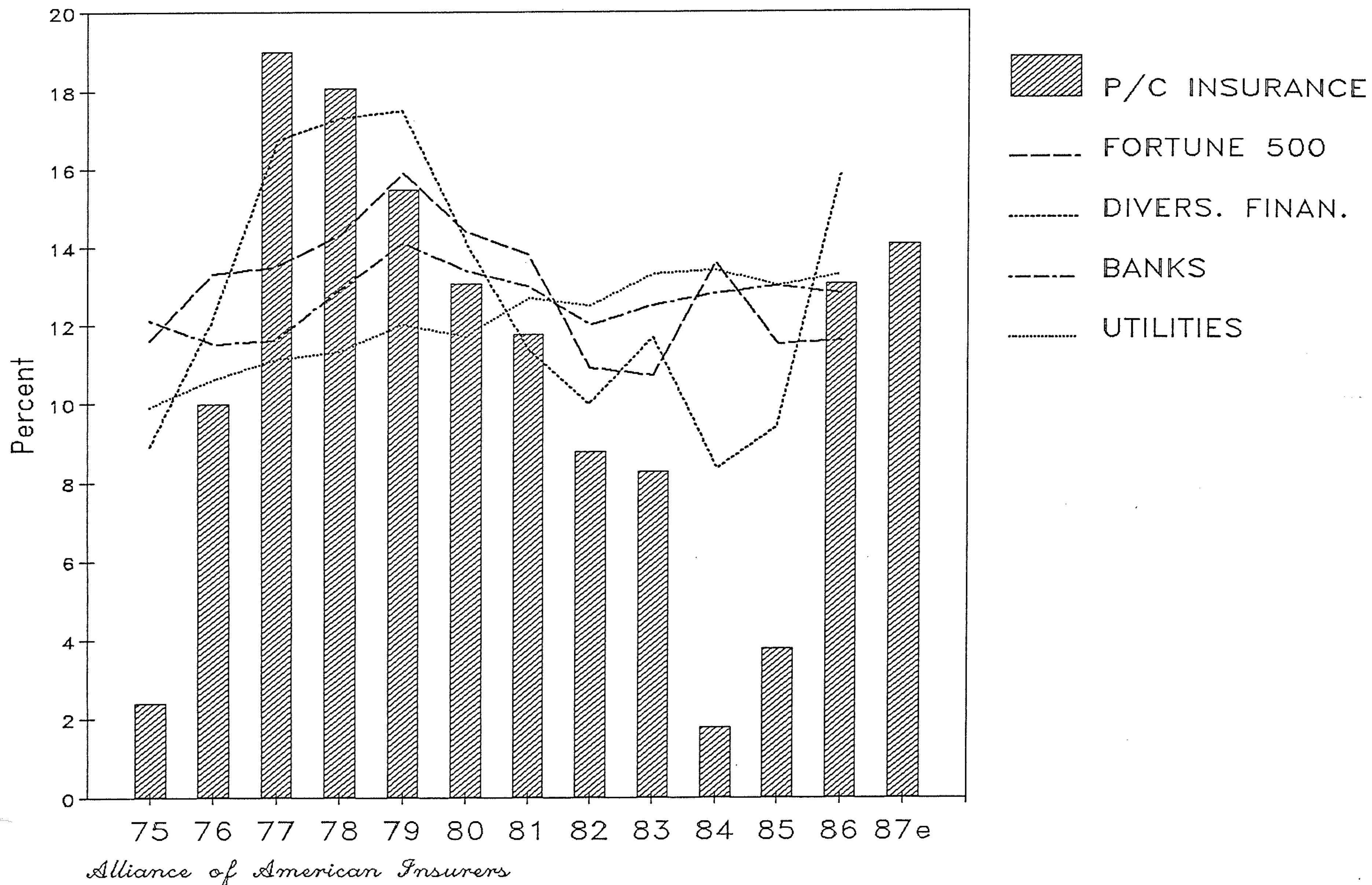
In summing up, there are several lessons which can be learned from the history of property and casualty financial performance. First, property/casualty returns are best judged over a period of time. This is a cyclical business and a good understanding of its ups and downs don't come from looking at one or two years' results. Second, conditions and results change very quickly in this business and they are very volatile.

The industry went from a 3.8% return on net worth in 1985 to a 14% return in 1987. From 1977 to 1984, returns fell from 19% to 2%, with little stability in between. Finally, uncertainty in both the actual results which will be obtained and in the factors underlying those results is a very serious problem for property/casualty insurers.

I'd like to dwell for just a few moments in closing on the uncertainty factor and, in particular, on two aspects of it: (1) the degree of improvement likely in the "liability climate", and (2) the legislative and regulatory climate for insurance. When you observe paid claims and incurred losses consistently outgrowing the Gross National Product, the Consumer Price Index, and the earned premiums of the industry, you have to be concerned about the liability climate. Although reforms of one sort or another have been adopted in many states, we don't know what the extent of future liability expansion will be. We don't yet know how effective the reforms will be, we don't know if they'll survive legislative and judicial challenges such as we've just seen in Kansas, and we don't know yet if there are new public and judicial attitudes towards compensation. All of these uncertainties are very troubling to liability insurers.

The second area of concern, of course, is the legislative and regulatory climate in which insurers operate. At a time when the industry needs to obtain adequate returns to continue to attract capital to the business, legislatures are full of proposals to regulate rates, limit profits, and generally to "reform" insurance. An understanding of how insurance works can, in many cases, improve this situation dramatically by itself. A legislature which combines such understanding with a strong commitment to an economic climate conducive to the proper functioning of insurance will provide the best financial news we've heard in a long time.

3222R


RETURN ON NET WORTH
P/C INDUSTRY VS OTHER INDUSTRIES
1975–1987e
20
18
16
14
12
10
8
6
4
2
0
Percent
75
76
77
78
79
80
81
82
83
84
85
86
87e
P/C INSURANCE
FORTUNE 500
DIVERS. FINAN.
BANKS
UTILITIES
Alliance of American Insurers
Sources: Fortune Magazine, ISO, III.

ALLIANCE INTEROFFICE MEMORANDUM

Date: February 4, 1988

To: Dee Ann Bernhard

From: Roger Kenney

Subject: Kansas Medical Malpractice Insurance Experience

Per Your Request: Attached are two exhibits showing 11 years of history for Kansas medical malpractice insurance and Kansas total property/casualty insurance.

The insurance industry lost money on medical malpractice insurance in Kansas in four out of the last five years (Exhibit 1). Operating profit, which includes investment income, for 1986 was a negative $1.6 million. Operating losses also occurred in 1982, 1983, and 1984. In 1985 the operating profit was a positive $8.9 million which was due to a combination of a substantial increase in premium volume and a reduction in incurred losses compared to 1984. These figures do not include the JUA which has had an operating loss in each of the last six years except one when it made $45,000. During the other five years, the JUA lost $11 million. The trial lawyers statement that the insurance industry is making money on medical malpractice in Kansas simply is not true.

In order to put the Kansas medical malpractice experience in perspective, Exhibit 2 presents the 11 year history of property/casualty insurance experience from 1976 to 1986. In 1986, the insurance industry made its first operating profit in three years. The improved results are due to premiums increasing faster than losses and expenses. The 1986 results are again in contrast to the trial lawyer's assertion that the insurance industry as a whole lost money in Kansas and was somehow making up that loss with medical malpractice premium dollars.

While the numbers presented here contradict the trial lawyer's assertion that the insurance industry is making a profit on medical malpractice and using that profit to offset the losses on its other lines of business, the assertion is also wrong for a more fundamental reason. Two of the three largest writers of medical malpractice insurance in Kansas, Medical Protective and PHICO, only write medical malpractice insurance. If the lawyer's assertion is true, then these companies somehow have to be giving their profits to other insurance companies to offset their losses. Did the trial lawyer offer any suggestions as to how profitable companies give their profits to unprofitable companies?

If you have any questions or comments, please let me know.

RKK:bah
2352J

Attachment VII

EXHIBIT 1

KANSAS MEDICAL MALPRACTICE INSURANCE EXPERIENCE 1976-1986
(DOLLARS IN MILLIONS)

(1) YEAR	(2) NET EARNED PREMIUM	(3) NET INCURRED LOSSES	(4) INCURRED LOSS RATIO	(5) LAE EXPENSE	(6) LAE RATIO	(7) OTHER EXPENSES	(8) EXPENSE RATIO	(9) COMBINED RATIO	(10) UNDER-WRITING PROFIT	(11) INVEST-MENT INCOME	(12) INVEST-MENT INCOME RATIO	(13) OPERATING PROFIT
1986	$28.4	$25.6	90.1%	$7.4	26.1%	$5.0	17.6%	133.8%	($9.6)	$7.9	28.0%	($1.6)
1985	$21.8	$12.2	55.8%	$4.3	19.6%	$4.1	19.0%	94.4%	$1.2	$7.7	35.1%	$8.9
1984	$14.8	$14.6	98.7%	$3.7	25.2%	$3.2	21.5%	145.4%	($6.7)	$5.7	38.2%	($1.1)
1983	$10.9	$11.2	102.3%	$4.2	38.8%	$2.4	21.9%	163.0%	($6.9)	$4.3	39.0%	($2.6)
1982	$10.0	$9.7	97.0%	$3.1	31.2%	$2.3	23.2%	151.4%	($5.1)	$4.1	41.2%	($1.0)
1981	$8.6	$5.0	57.6%	$1.6	18.7%	$1.5	17.7%	94.0%	$0.5	$2.3	26.5%	$2.8
1980	$7.4	$5.1	69.2%	$2.5	33.8%	$1.2	16.2%	119.2%	($1.4)	$1.3	18.0%	($0.1)
1979	$7.0	$5.2	74.8%	$2.9	41.6%	$1.3	18.7%	135.1%	($2.5)	$1.2	16.6%	($1.3)
1978	$7.0	$3.6	51.3%	$2.1	29.7%	$1.3	18.3%	99.3%	$0.0	$1.0	14.7%	$1.1
1977	$6.3	$2.0	31.2%	$1.1	16.9%	$1.0	15.7%	63.8%	$2.3	$0.7	11.4%	$3.0
1976	$5.9	$2.5	43.0%	$1.0	17.5%	$0.9	14.8%	75.3%	$1.5	$0.5	9.1%	$2.0
TOTAL	$128.1	$96.6	75.4%	$34.0	26.5%	$24.2	18.9%	120.8%	($26.7)	$36.7	28.6%	$10.0

SOURCES: 1976-1985 NAIC PROFITABILITY BY LINE BY STATE REPORTS
1986 LOSS RATIO FROM BEST'S REVIEW EXPENSES AND INVESTMENT INCOME ESTIMATED BY ALLIANCE OF AMERICAN INSURERS

[illegible]

[illegible] PROPERTY/CASUALTY INSURANCE EXPERIENCE 1976-1986
(DOLLARS IN MILLIONS)

(1) YEAR	(2) NET EARNED PREMIUM	(3) NET INCURRED LOSSES	(4) INCURRED LOSS RATIO	(5) LAE EXPENSE	(6) LAE RATIO	(7) OTHER EXPENSES	(8) EXPENSE RATIO	(9) COMBINED RATIO	(10) UNDER-WRITING PROFIT	(11) INVEST-MENT INCOME	(12) INVEST-MENT INCOME RATIO	(13) OPERATING PROFIT
1986	$1,691	$1,107	65.5%	$186	11.0%	$455	26.9%	103.4%	($57)	$149	8.8%	$91
1985	$1,421	$1,019	71.7%	$161	11.3%	$392	27.6%	110.6%	($151)	$138	9.7%	($13)
1984	$1,243	$910	73.2%	$135	10.9%	$375	30.2%	114.3%	($178)	$127	10.2%	($51)
1983	$1,171	$752	64.2%	$118	10.1%	$351	30.0%	104.3%	($50)	$111	9.5%	$61
1982	$1,112	$773	69.5%	$119	10.7%	$330	29.7%	109.9%	($110)	$98	8.8%	($12)
1981	$1,022	$665	64.6%	$96	9.3%	$286	27.8%	101.7%	($17)	$68	6.6%	$50
1980	$1,011	$604	59.7%	$79	7.8%	$269	26.6%	94.1%	$60	$54	5.3%	$113
1979	$935	$595	63.6%	$83	8.9%	$257	27.5%	100.0%	$0	$51	5.5%	$51
1978	$848	$467	55.1%	$68	8.0%	$236	27.8%	90.9%	$77	$42	4.9%	$119
1977	$738	$402	54.5%	$55	7.5%	$200	27.1%	89.1%	$80	$35	4.7%	$115
1976	$610	$336	55.1%	$48	7.8%	$169	27.7%	90.6%	$57	$27	4.4%	$84
TOTAL	$10,110	$6,522	64.5%	$962	9.5%	$2,866	28.3%	102.3%	($232)	$750	7.4%	$518

SOURCES: 1976-1985 NAIC PROFITABILITY BY LINE BY STATE REPORTS
1986 LOSS RATIO FROM BEST'S REVIEW EXPENSES AND INVESTMENT INCOME ESTIMATED BY ALLIANCE OF AMERICAN INSURERS