Approved 4-11-91
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative Denise Everhart a
Chairperson

3:30 ~~a.m.~~/p.m. on February 27, 19 91 in room 313-S of the Capitol

All members were present except:

Representatives Douville, Gomez, Heinemann, Sebelius, Hamilton and Hochhauser who were excused

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Office of Revisor of Statutes
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee:

Gary McCallister, Kansas Trial Lawyers Association
Bob Corkins, Director of Taxation, Ks. Chamber of Commerce and Industry
Lori Callahan, Kansas Legislative Counsel, Kansas Medical Mutual Insurance Company
Ron Smith, Legislative Counsel, Kansas Bar Association
Paul Shelby, Office of Judicial Administration
John White, Kansas Trial Lawyers Association
Timothy J. Finnerty, Kansas Association of Defense Counsel
Wayne Stratton, Kansas Medical Society
Kelly Kindscher, Director, Kansas Land Trust
Michael Davis, Professor at Kansas University Law School
Mark Eckelson, Associate Director, Iowa Natural Heritage Foundation
Allen Pollom, Kansas Nature Conservancy
Ramon Powers, Executive Director, Kansas State Historical Society

Vice-Chair, Denise Everhart, called the meeting to order and called for hearing on HB 2394, prejudgment interest in personal injury actions.

Gary McCallister, representing Kansas Trial Lawyers Association, appeared in support of HB 2394. (See Attachment # 1).

Committee questions followed.

Bob Corkins, Director of Taxation, Kansas Chamber of Commerce and Industry, appeared in opposition to HB 2394. (See Attachment # 2).

Committee questions followed.

Lori Callahan, Kansas Legislative Counsel, Kansas Medical Mutual Insurance Company, (KaMMCO) appeared in opposition to HB 2394. (See Attachment # 3).

Ms. Callahan also provided written testimony from David A. Hanson, Kansas Association of Property and Casualty Insurance Companies, Inc., opposing HB 2394. (See Attachment # 4).

Committee questions followed.

Ron Smith, Legislative Counsel, Kansas Bar Association, appeared in opposition to HB 2394. (See Attachment # 5).

Committee questions followed.

Paul Shelby, Office of Judicial Administration, appeared to express concerns regarding HB 2394. (See Attachment # 6).

Committee questions followed.

MINUTES OF THE House COMMITTEE ON Judiciary,

room 313-S, Statehouse, at 3:30 xx/p.m. on February 27, 19 91.

There being no further conferees, the hearing on HB 2394 was closed.

The Chairman called for hearing on HB 2396, pure comparative negligence.

John White, representing Kansas Trial Lawyers Association, appeared in support of HB 2396 (See Attachment # 7).

Committee questions followed.

Bob Corkins, Director of Taxation, Kansas Chamber of Commerce and Industry, appeared in opposition to HB 2396. (See Attachment # 8).

Committee questions followed.

Timothy J. Finnerty, Kansas Association of Defense Counsel, appeared in opposition to HB 2396. (See Attachment # 9). Mr. Finnerty distributed written testimony from David A. Hanson, Kansas Association of Property and Casualty Insurance Companies, Inc. (See Attachment # 10).

Committee questions followed.

Wayne Stratton, Kansas Medical Society, appeared to comment regarding HB 2396. Mr. Stratton said he does not believe there has been an outcry that our present system should be changed; it will be a great bill for both plaintiffs and defense lawyers; that the 50%-51% does make a difference in establishing whether you or the other party is responsible for your injuries. Mr. Stratton said written testimony will follow.

Committee questions followed.

Written testimony was submitted by Lee Wright, Kansas Legislative Representative, The Farmers Insurance Group, opposing HB 2394. (See Attachment # 11).

There being no further conferees, the hearing on HB 2396 was closed.

The Chairman called for hearing on HB 2370, maintenance and child support, not dischargeable.

As no one appeared to testify, the Chair called for hearing on HB 2375, uniform conservation easement act.

Kelly Kindscher, Director, Kansas Land Trust, appeared in support of HB 2375. (See Attachment # 12).

Committee questions followed.

Michael Davis, Professor at Kansas University Law School, appeared in support of HB 2375, at the request of the Kansas Land Trust. Mr. Davis said there is an existing law permitting conservation easements; that two areas of law are changed: (1) The scope of the coverage of the easement (2) The authority to enforce "even though" in Section 3 of the bill.

Committee questions followed.

Mark Eckelson, Associate Director, Iowa Natural Heritage Foundation, and Chairman of Land Trust Alliance Group, a national organization of land trusts, appeared in support of HB 2375. Mr. Eckelson explained purpose and activities of his organization and said that conservation easements have been a very important tool; that he would encourage the committee to modify the law and use the uniform act; that most states have some form of conservation easement legislation; about half have legislation equivalent; about half have legislation equivalent to the act proposed in Kansas; that video and other materials on conservation easements are available through his organization.

Committee questions followed.

Allen Pollom, representing the Kansas Nature Conservancy, appeared in support of HB 2375. Mr. Pollom said the bill enhances personal property rights, does not rely on impositions and promotes good conservation without moving land from traditional uses or historic family ownership and provides opportunity for proper conservation without undue reliance on governmental intervention and funds.

Committee questions followed.

Ramon Powers, Executive Director, Kansas State Historical Society, appeared in support of HB 2375, but noted some concerns. (See Attachment # 13).

Committee questions followed.

Janet Stubbs, Homebuilders Association of Kansas, submitted written testimony in opposition to HB 2373. (See Attachment # 14).

There being no further conferees, the hearing on HB 2375 was closed.

The meeting adjourned at 5:40 P.M. The next scheduled meeting is February 28, 1991, 3:30 P.M., in room 313-S.

GUEST LIST

COMMITTEE: HOUSE JUDICIARY DATE: 2/27/91

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
John L. White	400 Shawnee, LV	KTLA
R.G. Frey	Topeka	KTLA
Gary McCallister	Topeka	KTLA
Paul Shelby	Topeka	OJA
Lori Callahan	Topeka	KaMMCO
Bud Smoot	Topeka	KCLF
TIM FINNERTY	Wichita	KADC
Dave Hanson	Topeka	Ks Assoc P&C
Marta Linenberger	Topeka	KaMMCO
KURT SCOTT	TOPEKA	KaMMCO
LauJene Schneider	TOPEKA	STATE FARM
Mark Ackelson	Des Moines Iowa	Iowa Natural Heritage Found.
Joyce Wolf	Lawrence	Ks. Audubon Council
Darrell Montei	Pratt	KS. WLDF & PARKS
Martha Hagedorn-Krass	Topeka	KS ST. HISTORICAL SOC.
Bruce McAlister	Topeka	Ks. Insurance Dept
Kelly Kindscher	Lawrence	KS Land Trust
Bob Corkins	Topeka	KCCI
Paula Freelisen	Topeka	League of KS Municipalities
Ramon Powers	Topeka	Kansas State Hist. Society
Richard Pankratz	Topeka	Kansas State Hist. Society
William M. Henry	Topeka	Pharm. Mfgs. Assn
Jamie Corkhill	Topeka	SRS (CSE)
Kay Farley	Topeka	OJA

KANSAS
TRIAL LAWYERS ASSOCIATION
Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
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TESTIMONY
OF THE
KANSAS TRIAL LAWYERS ASSOCIATION
BEFORE THE
HOUSE JUDICIARY COMMITTEE

February 27, 1991

HB 2394 - Prejudgment Interest

Mr. Chairman and Members of the Committee, the Kansas Trial Lawyers Association, an organization whose members represent personal injury victims throughout the State of Kansas, appears in support of House Bill 2394. It will permit our courts to provide an award of prejudgment interest to a prevailing victim in a personal injury action from the date the action was filed. The granting of this interest by the trial court will compensate the successful victim for loss of use of money to which he or she is lawfully entitled as an additional item of compensatory damages.

The proposed statute is patterned after Colorado Statute 13-21-101, which has for years provided a simple, expeditious and effective method in applying prejudgment interest on unliquidated sums for successful claimants. Colorado statutes and case law have recognized the reality of the loss of use of money during litigation. The Colorado statute does nothing more than require the trial judge to assess a percentage factor to compensate for the lost use of money once a claim has been determined to be meritorious by the entry of a judgment. This statute, in its application, does not penalize an insurance company or defendant in providing a good faith defense to a claim, nor does it provide a windfall to the claimant. This statute is nothing more than a simple recognition of a debt owed to the claimant in a meritorious case, since the amount of money that has been withheld by the defendant or the insurance company has an obvious monetary value to the defendant, while at the same time posing a monetary disadvantage to the claimant who does not have the benefit of the use of the money during the pendency of the claim.

Twenty-six states recognize an award of prejudgment interest. Three of these states include our surrounding states of Colorado, Nebraska and Oklahoma. Although there are various methodologies for applying prejudgment interest, KTLA supports House Bill 2394 as it is a tried and true methodology which is even-handed in its application and which is simple in its implementation.

HJUD
Attachment #1
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K.S.A. 16-204(e) provides a time honored methodology for calculating and applying adjustable interest rates to judgments rendered in this State and, this statutory vehicle is readily available for the trial court to apply on a prejudgment interest basis to a successful plaintiff.

We all know from our everyday experience there is a time value in money. Banks, insurance companies and businesses alike recognize and take this factor into consideration in normal everyday cash management. Indeed, the Internal Revenue Service will even impute an interest rate and charge the taxpayer with income when an interest rate is not prescribed in a debt obligation. In looking at a personal injury claim in the context of a debt, once a proper adjudication has been made with respect to its merits, it is clear a successful claimant suffers a diminution in the value of the award when the judgment does not take into account the erosion in value of that award that has been occasioned by the passage of time from and after the time the claimant commenced the action.

I anticipate that the insurance industry and other economic special interests will stand before you during this hearing in opposition to this Bill. What success do you believe these individuals will have the next time they speak with their banker or life insurance company who has an outstanding loan and suggests to the company or to the bank that the interest portion of the payment should be waived or not accrue during the pendency of the obligation. Obviously, such a scenario does not occur in real life, since none of these individuals would even begin to suggest to their banker or their insurance company that there should not be interest collected on the outstanding debt. Such is true of a personal injury claim and it is time for Kansas to come into line with more than one-half of the other jurisdictions and the reality of the market place to provide for full and complete compensation to its injured victims in this State.

We urge you to favorably consider House Bill 2394 in your deliberations and to recommend its passage to the Kansas House by your affirmative vote in support of this long overdue measure.

Thank you for your consideration.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

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

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

HB 2394

February 27, 1991

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Judiciary Committee

by

Bob Corkins
Director of Taxation

Mr. Chairman and members of the Committee:

My name is Bob Corkins, representing the Kansas Chamber of Commerce and Industry and I thank you for the opportunity to express our opposition to HB 2394 and its proposal for increasing the amount of interest recoverable on judgments. KCCI opposes this proposal on the grounds of fairness embodied in the legal principles which currently deny the recovery of such interest.

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

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

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

HJUD
Attachment #2
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Quite simply, common law doctrine has established that civil defendants are liable for interest accruing only from the date the judgment is handed down. This policy is sound because -- absent a stipulation as to liability -- liability is not established until a verdict is rendered. The trier of fact analyzes all the evidence presented to determine if the defendant is the proximate cause of the plaintiff's injuries. This is a fact which is in dispute throughout the proceedings. It is the fact upon which liability for interest turns, and to impose that liability prior to resolution of the issue would be to presuppose the defendant's knowledge of his own wrongdoing (assuming any wrongdoing occurred).

The question of liability for damages prior to the verdict, we believe, is adequately addressed through other legal procedures. A verdict can include pecuniary and non-pecuniary damages which date from the time the cause of action accrued. Punitive damages, also, can address those circumstances in which evidence shows the defendant pursued a defense which was not based on a good faith interpretation of the facts. However, to make the defendant liable for pre-judgment interest when no culpable intent is evidenced is completely unwarranted.

To retreat from these established legal principles would represent an injustice upon all civil defendants. KCCI therefore strongly recommends your rejection of HB 2394.

KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY
AND
KANSAS MEDICAL INSURANCE SERVICES CORPORATION

TO: House Judiciary Committee

FROM: Lori M. Callahan, Kansas Legislative Counsel
Kansas Medical Mutual Insurance Company

SUBJECT: H.B. 2394 - Prejudgment Interest

DATE: February 27, 1991

The Kansas Medical Mutual Insurance Company, KaMMCO, is a Kansas, physician-owned, non-profit professional liability insurance company formed by the Kansas Medical Society. KaMMCO currently insures over 700 Kansas doctors.

KaMMCO opposes H.B. 2394.

Prejudgment interest penalizes defendants for pursuing their right to have matters determined by a jury. Under H.B. 2394, a defendant who refused to settle a case in a situation where a verdict was rendered in an amount greater than the last offer of settlement would be required to pay interest from the date the cause of action arose. Thus, defendants who truly believe they are not responsible for damages caused to a plaintiff are encouraged to settle with plaintiff, despite their sincere belief with regard to their lack of responsibility.

In professional liability cases involving doctors, where verdicts tend to be higher than in other types of cases, the penalty for a defendant utilizing the jury as a fact finder is even greater.

HJUD
Attachment #3
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Prejudgment interest increases costs both to insurance companies and the Health Care Stabilization Fund, which in turn results in higher premiums for health care providers. When juries make awards, they presumably compensate the plaintiff fully for all damages up to the point of trial, as well as future damages. This makes the addition of prejudgment interest unnecessary. Additionally, it is unfair for a defendant to be forced to pay interest on an award before it has been adjudicated and determined to be due and owing by the trier of fact.

KaMMCO believes the concept of prejudgment interest is unfair and serves only to increase both transaction and indemnity costs paid by professional liability insurers.

Kansas Association of PROPERTY & CASUALTY INSURANCE COMPANIES, INC.

L. M. Cornish
Legislative Chairman
Merchants National Tower
P. O. Box 1280
Topeka, Kansas 66601

February 27, 1991

House Judiciary Committee
State Capitol
Topeka, KS 66612

Re: House Bill 2394

Chairman Solbach and Committee Members:

On behalf of the domestic insurance companies in the Kansas Association of Property and Casualty Insurance Companies, we would submit the following testimony and consideration in opposition to House Bill 2394.

We believe the proposed amendment allowing the judgment rate of interest prior to judgment from the date of filing suit is unnecessary and inconsistent with interest allowed to other litigants.

Current law already allows claimants to recover the legal rate of interest for any money due from the date the amount is reasonably established under K.S.A. 16-201. These provisions have allowed recovery of prejudgment interest for medical expenses for personal injuries (see Crawford vs. Prudential Insurance, 245 Kan. 724, 737 [1989]) and for property damage claims (see Royal College Shop vs. Northern Ins., 895 F.2d 670 [1990] applying Kansas law).

The proposed amendments are therefore unnecessary and will cause personal injury claims to be treated differently than other types of claims. We believe all claims should be treated equally as they are now. We also see no basis for assessing interest from the date of filing suit where there may be a reasonable dispute as to the amount owed.

HJUD
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We also do not see any need for the inconsistent provisions for interest in the event of appeal as proposed in new subsection (c).

The proposed amendments will not only result in unequal protection, but will also cause increased litigation expense.

We therefore must oppose House Bill 2394.

Respectfully,

David A. Hanson

DAVID A. HANSON

DAH:kls

KANSAS BAR ASSOCIATION

POSITION STATEMENT

TO: Rep. John Solbach, Chair;
Members, House Judiciary Committee

FROM: Ron Smith, KBA Legislative Counsel

SUBJ: prejudgment interest; HB 2394

DATE: February 27, 1991

Mr. Chairman, and members of the House Judiciary committee. KBA's membership includes 5,300 attorneys and judges in Kansas and literally throughout the world. Our role in this legislature spans 109 years of service to Kansas.

Our views on this legislation include the attached policy statement. We oppose this legislation because it is one-sided. Only the plaintiff can benefit from prejudgment interest.

1. Trial represents the ultimate economic sanction, a verdict. To the extent that we can get lawyers and their clients to focus on liability and damage issues early in the litigation process, then KBA feels changes in statutes to encourage settlement are laudable. However, the change in the statute should equally affect defendants and plaintiffs.

2. Page 1, line 32 discusses only the right of the "plaintiff in the petition" to seek prejudgment interest. What about counterclaims by the defendant on the plaintiff?

3. In a typical auto accident at an uncontrolled intersection, sometimes "plaintiff" depends on whose attorney gets to the courthouse quickest. A "defendant" later may prove to be only 30% at fault in the action. The plaintiff files the action and is held 70% at fault and collects zip. Under this bill, defendant is denied any prejudgment interest on the 70% of his damages that he recovers by way of counterclaim.

4. Further, in cases with codefendants, a plaintiff may be 40% negligent and a codefendant 5% negligent, but that codefendant gets to pay 5% of a prejudgment interest penalty.

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HJUD
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5. Under subsection (b) the court adds on prejudgment interest to the "verdict of the jury" (page 1, line 36) but does not appear to allow the judge to apportion for comparative negligence. After a "verdict" is rendered, the judge creates a "judgment" by reducing for apportioned fault, and any caps that apply. The verdict may include the entire amount owed, without reduction due to comparative negligence. Is the interest to be apportioned on the raw verdict or on the final judgment amount?

6. This legislation penalizes defendant from the date of filing the lawsuit, without taking into account collateral actions by the parties that help, or hinder, settlement negotiations. All that is required to invoke prejudgment interest is the fact of an accident, and a later plaintiff's recovery.

7. Since interest begins running on a matter when it is filed, with the right set of facts -- an elderly nun waiting on a stop light who is hit by semi-trailer truck -- more prejudgment interest can be had by filing suit early and refusing to settle the case, taking your chance that the plaintiff will do well at trial in a case with almost certain liability. This legislation may trigger quick lawsuits with few demand letters, and inhibit settlement in a few cases especially where liability is fairly certain but it is only a matter of damages. Further, when a case is filed, the defendant counsel doesn't always know who the plaintiff's expert is, or has had an opportunity to gauge their credibility. That won't be known until depositions are taken. Yet the prejudgment interest meter is ticking.

8. 1990 SB 525, a prejudgment interest bill, also was unilateral in terms of its scope -- only a plaintiff benefited -- and KBA along with other organizations opposed it. However, it did have the virtue that at least to trigger prejudgment interest there had to be an offer to settle, and rejection of that offer. HB 2394 has no such trigger.

9. The personal injury case where injuries are great but liability thin would not lend itself to a prejudgment interest penalty. If plaintiff wants $1 million and defendant offers $200,000, if the jury for whatever reason finds liability, most would agree the damages easily will exceed $1 million. That doesn't mean the defense attorney has acted wrongly. Yet the prejudgment interest bill penalizes the defendant's insurance company for litigating the issue of liability -- which is the defendant's right.

If you're bound to pass this bill, there should be some controls on it. We suggest:

(A) It should apply both ways. If defendant makes an offer of settlement that is rejected, but plaintiff later wins a verdict that was less than the defendant's settlement, the same amount of prejudgment interest should be levied to reduce further plaintiff's verdict in a post-trial hearing subject to (B) below.

(B) The judge when he fashions the judgment and journal entry, should hold a post-verdict hearing and determine (1) whether there were good faith settlement efforts made, and (2) whether the rejected offer was based on the advice of counsel.1/

(C) Judges should then be given some guidance as to when to allow discretionary prejudgment interest, such as:

-- What objective information was available to the responding party at the time of the offer to evaluate the offerer's settlement offer?2/

-- Was discovery complete at the time of the offer?3/

---

[1]I'm not wild about this because the answer requires intrusion into the attorney-client privilege. This also adversely impacts an appeal, since the appellate court would know trial counsel recommended accepting (or rejecting) the settlement offer which could certainly have a practice impact on their review of claimed trial error unless the appeal was separately considered from other alleged trial errors. Perhaps the plaintiff's counsel can show the judge the information desired in camera in order to preserve attorney-client confidences.

[2]What information regarding liability and damages was objectively available at the time of the offer? Most lawyers would agree that a prejudgment sanction should be more appropriate in clear liability situations than where liability is tenuous.

[3]The court should probably not reward the party a makes an early settlement offer motivated principally by the de-

(Footnote Continued)

-- Would the prejudgment interest penalty be used not only for tort claims but all other types of civil litigation? Economic loss? Divorce settlements? Contract litigation containing unliquidated damages?

With the above information the trial court is in a good position to determine as objectively as possible whether the party from whom a sanction is sought should have settled, and can then award prejudgment interest. If the court makes findings of fact and conclusions of law on this issue, it should be an issue any party can appeal.

KBA is not able right now to support such an idea, but it more closely meets what our legislative position envisions than HB 2394. As you can see, however, it is a complex subject and lends itself more to interim study at this point in the 1991 session, than continuation here.

It is my understanding the Judicial Council is studying such an issue similar to this proposal to be used as part of the Offer of Compromise and Settlement statute, K.S.A. 60-2002(b). You may want to coordinate that type of study this summer. If we are to encourage settlement, however, then there must be an economic consequence to the plaintiff as well as defendant.

You need to insure that Judicial Branch appropriations get fully paid so the Judicial Council can work on this important legislation.

(Footnote Continued)
sire to either increase possible recovery or the economic pressure that he can place on his adversary. If discovery was incomplete, the judge should have authority to reduce, restrict or refuse the sanction prejudgment interest recovery. The court should be entitled to assume the timing of the offer was simply a product of the lawyer's desire to place additional pressure on the opponent.

LITIGATION

Issue: Prejudgment interest.

KBA Position: *The KBA OPPOSES the original draft of the concept known as prejudgment interest found in 1984 SB 800, or similar legislation. The KBA SUPPORTS such legislation only if the effect of the bill, taken as a whole, encourages pretrial settlement by imposing penalties on any party unwilling to make progress towards a meaningful settlement.*

Rationale: Settlement of legal disputes is preferred in the law and should be statutorally encouraged. However, it takes all parties with cooperative counsel to effect a meaningful settlement. The concept of prejudgment interest as previously drafted placed a penalty only on the defendant. The KBA does not support legislation which gives one side an upper negotiating hand in the process of finding a satisfactory settlement. Such legislation would not be in the interest of justice.

In such legislation, both parties must be given adequate time for discovery before settlement offers are made. A balanced approach to the administration of justice is required with such legislation.

House Bill No. 2394
House Judiciary Committee
February 27, 1991

Testimony of Paul Shelby
Assistant Judicial Administrator
Office of Judicial Administration

Mr. Chairman:

I appreciate the opportunity to appear today to discuss House Bill No. 2394 which relates to interest on personal injury judgments.

This bill intends to provide prejudgment interest to plaintiffs in personal injury suits resulting from tortious conduct. It ordains a "duty" of the court in entering judgment to add to damages assessed by a jury, or found by a court, interest on the amount of damages calculated from the date the suit was filed to the date of satisfying the judgment and to include the same in such judgment as a part thereof.

The direction to the court in new section (b) beginning at line 27, page 1, requires calculations which are mechanically impossible as well as being counter to the universal practice of an adversary-oriented court system. Supreme Court Rule 170, for instance, requires the drafter of a journal entry (the judgment being entered in the proposed statute) to serve it on all other counsel for approval; if approval is not forthcoming another hearing on the journal entry is provided.

In this system, litigants check one another and the court approves a journal entry (judgment) which the litigants have agreed is the judgment in the case. The problem which cannot be solved by any interest formula we know about is the requirement to calculate the interest from the date of filing the suit to the <u>date of satisfaction.</u>

The date of satisfaction is not only unknown at the time the interest calculations are to be performed, it is, more than likely, unknowable at that time. Many factors may prevent a judgment creditor from paying promptly and although the Legislature may decide that fairness requires interest to continue to accrue, the mechanics of calculating interest from a known date to an unknown date are simply too much of a problem. This problem may be avoided if prejudgment interest were to terminate at the time of judgment and then to have postjudgment interest provision of the law begin as of that time.

HJUD
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Subsection (c) beginning at line 42, page 1, on the other hand leaves calculation of interest where it belongs, that is, with the parties of the action.

If the court is to calculate interest, the State would be liable under the Tort Claims Act for every mistake made by the court in calculating interest (judges are immune from suit only for judicial determinations -- calculation of interest is an administrative function, hence miscalculation would be negligence under the Tort Claims Act).

We urge the committee to consider our concerns with this proposal.

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TESTIMONY
OF THE
KANSAS TRIAL LAWYERS ASSOCIATION
BEFORE THE
HOUSE JUDICIARY COMMITTEE

February 27, 1991

HB 2396 - Pure Comparative Fault

On behalf of the Kansas Trial Lawyers Association, the Legislature is urged to give serious consideration to the passage of House bill 2396, the simple function of which is to remove the "49 percent rule" which bars a plaintiff's recovery in a civil negligence action if the finder of fact determines under 60-258(a) that the plaintiff is 50 percent or more at fault. This system of modified comparative fault, with the 49 percent rule in place, places Kansans as residents of a state within the small minority of states who have such a quirk in their provisions for the modern concept of civil proportional liability. As best as the KTLA can determine, there are only six other states that have encoded this kind of barrier to recovery in civil negligence litigation. House Bill 2396 is designed to modernize and improve our state's system of fault apportionment to truly approach the goal stated in 60-258(a) of PROPORTIONAL LIABILITY.

There are a number of reasons which have caused most states to reject the restrictions of the present version of 60-258(a) in Kansas. The most obvious reason is that the barrier referred to above does not embrace the concept of comparative fault and contains strong vestiges of the harsh doctrine of contributory negligence which the Legislature, through a bill introduced by Representative Hoagland in 1974, intended to remedy. The present system relieves tortious liability for a party found by a fact finder to be substantially at fault. In interpreting the legislative intent behind 60-258(a) and its amendments, the Kansas supreme Court has abandoned the concept of joint and several liability, reasoning that the civil responsibility borne by a tortfeasor should be in direct proportion with its fault. Given that the decisions in Brown v. Keill and Miles v. West (citations at end*) are probably correct reflections of legislative intent, the artificial 49 percent barrier just makes no sense.

One may argue that the proposed amendment to 60-258(a) will cause automobile insurance rates to rise in our state. Experience in states which have adopted "pure" comparative fault does not support this contention. In fact, Iowa has the pure comparative

HJUD
Attachment #7
2-27-91

fault system proposed by this bill and also has the lowest automobile insurance rates in the United States. Our neighbor to the east, Missouri, has pure comparative fault and joint and several liability, and its auto rates are only slightly higher than our own, which difference can probably be attributed to the more urban nature of that state.

One of the results of our modified system is that defense lawyers are forced to try more cases if there is any chance that a jury might find the plaintiff to be substantially or 50 percent at fault. Thus, many cases are tried, which in states with the more modern approach to fault being proposed in this bill, would be settled. This may well account for the apparent lack of difference in automobile insurance rates, or even lower rates in states with pure comparative fault.

Finally, in addition to the obvious fairness of this proposal and its reflection of the correct principles of comparative fault, this Committee might be reminded that Kansas is facing today neither a litigation or an "insurance crisis". The facts are reflected in the most recent figures compiled by the Kansas supreme Court which demonstrate that the total civil verdicts awarded by juries dropped 31 percent between 1989 and 1990 and the average jury verdict dropped by about one-third.**

The time seems right to reform our comparative fault system as proposed in House Bill 2396. Your questions and serious consideration of this proposal are appreciated by me personally as well as in my capacity as representative of the Kansas Trial Lawyers Association.

*224 Kan. 195, 580 P.2d 867 (1978).
*224 Kan. 284, 580 P.2d 876 (1978).

**Source: JURY VERDICTS IN TORT CASES
District Courts of the State of Kansas,
Fiscal Year 1989-90, Office of Judicial
Administration, Kansas Supreme Court

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

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

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

HB 2396

February 27, 1991

KANSAS CHAMBER OF COMMERCE AND INDUSTRY
Testimony Before the
House Judiciary Committee
by
Bob Corkins
Director of Taxation

Mr. Chairman and members of the Committee:

Thank you for the opportunity to appear today to express our views on HB 2396. My name is Bob Corkins, representing the Kansas Chamber of Commerce and Industry, and our members wish to convey their opposition to changes in the comparative negligence standards now codified by Kansas law.

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

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

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

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Our primary argument concerns the flood of newly authorized litigation which this "pure" comparative negligence scheme would permit. Plaintiffs would no longer be barred from recovery if they are found to be more than 50% at fault. Consequently, judicial caseloads and the liability exposure of defendants will only increase under this proposal. This would simply mean an increase in the cost of doing business in Kansas.

The equity rationale for pure comparative negligence is another issue called into question. In this regard, it is important to note the distinction between damages and fault. In cases where both plaintiff and defendant are injured, but the plaintiff is primarily responsible, the plaintiff may actually get a greater recovery where his or her damages are more severe than the defendant's. Of course, an even more obvious area of questionable equity arises, for example, if a defendant deemed only 10% at fault is required to pay anything to a plaintiff found responsible for the other 90%. In such cases, the circumstances suggest that the plaintiff would have had a substantially greater opportunity to avoid the accident altogether.

The mention of "accident avoidance" dredges up memories of the common law doctrines of "last clear chance" and contributory negligence. While KCCI is not advocating a return to those principles in Kansas, those doctrines are still applied in other jurisdictions across the country and still operate to deprive plaintiffs of all recovery if they are found at fault to any degree. Our present standard of modified comparative negligence is considerably more generous to injured parties and represents the most balanced compromise between competing interests.

KCCI therefore respectfully urges you to reject HB 2396.

STATEMENT

OF

TIMOTHY J. FINNERTY

KANSAS ASSOCIATION OF DEFENSE COUNSEL

REGARDING HOUSE BILL 2396

BEFORE THE

COMMITTEE ON THE JUDICIARY

KANSAS HOUSE OF REPRESENTATIVES

February 27, 1991

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STATEMENT OF TIMOTHY J. FINNERTY
KANSAS ASSOCIATION OF DEFENSE COUNSEL

The Kansas Association of Defense Counsel, on whose behalf I present this statement, is an organization of Kansas lawyers who devote a substantial portion of their practice to the defense of litigated cases. The organization has its objectives the improvement of our judicial system and the administration of justice in Kansas.

I have been asked by the Association to address its concerns, and the concerns of its client groups, regarding House Bill 2396, the proposed adoption of "pure" comparative negligence in Kansas.

By way of background, I am a partner in the Wichita law firm of McDonald, Tinker, Skaer, Quinn & Herrington, P.A. Our firm represents a wide variety of Kansans from average individuals to business people to major manufacturers and insurance companies. My practice is almost exclusively concerned with the defense of personal injury claims against individually insured defendants, corporations and insurance companies. The firm's range of experience runs from traditional automobile negligence cases to medical malpractice and products liability litigation involving major manufacturers of automobiles and pharmaceuticals.

That background, both personal and that of our law firm, permits a practical perspective from which to evaluate the proposed change to the Kansas comparative fault statute, K.S.A. 60-258a.

Controversy in the apportionment of fault or negligence between one or more tortfeasors and the personal injury plaintiffs

has been ongoing since the origination of the contributory negligence in an early 19th century English case. The doctrine of contributory negligence has been attacked by legal scholars since at least the early part of this century for its potential to deprive a personal injury plaintiff of substantial justice when that individual's contribution to his or her harm is relatively insignificant in comparison to that of one or more tortfeasors. The growing theoretical dissatisfaction with the contributory negligence doctrine led to the adoption by Mississippi in 1910 of the first comparative negligence statute applicable to all personal injury actions. Since that time, numerous states have passed a comparative negligence statute in one form or another, whether "pure" or "modified." Kansas adopted its own version of comparative negligence in 1974 with the adoption of K.S.A. 60-258a. This statute is of course a "modified" comparative negligence statute whose effect, by judicial decision, extends to all manner of personal injury actions. The controversy over the proper allocation of fault or responsibility for injury to an individual continues both in the rarified circles of legal scholars to, if you will excuse the expression, real-world forums such as the hearings of this committee.

I would like to address my comments the theoretical goals of a comparative fault system and the practical effects of such a system as viewed in the everyday practice of a trial lawyer.

I. THEORETICAL CONSIDERATIONS

As alluded to above, the legal academic commentators have

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for many years and quite eloquently derided the contributory negligence doctrine for its often harsh and unjust results. The commentators probably correctly pointed out that the harshness of this system led to a number of exceptions to the contributory negligence doctrine, including the "last clear chance" and "assumption of risk" theories.

Of course, the theoretical underpinning for the adoption of a "pure" comparative negligence statute is the rationale that a personal injury plaintiff should be able to recover damages proportionate to the individual's fault in the causation of his or her injuries. This form of comparative negligence has been called an "exact rendering of the fault system."

The theoretical nicety of this system has been faulted in a number of respects. These include the fact that this system permits recovery even when plaintiff's own negligence is greater than that of any one or more of the defendant's, fear that juries may be feel compelled to allow plaintiff some recovery in every case and, according to one commentator, the implicit adoption of a system of absolute or strict liability allowing any recovery, even when the personal injury of plaintiff is overwhelmingly at fault for his or her own injuries. As noted by Professor Westerbeke of the University of Kansas in his 1974 article on the newly passed Kansas comparative fault statute, perhaps the most devastating indictment of the pure comparative negligence statute is that only a minority of states, numbers of only about a dozen at the present time, have passed such a system.

At bottom, the theoretical basis for a pure comparative negligence statute is an effort to conform the practical administration of civil justice to a theoretical ideal. I think it has been human experience that rarely, if ever, does practical experience ever conform itself strictly to the technical niceties of theory. In Kansas the effort to compensate the personal injury of plaintiff for a meritorious claim has already been accomplished under the present Kansas comparative fault statute, without the unwelcome baggage of the "pure" comparative negligence system.

II. THE TRIAL LAWYER'S PRACTICAL REALITY

From this trial lawyer's perspective, the implementation of a pure comparative negligence statute would impose substantial additional costs to society without any significant benefit to the personal injury plaintiff possessed of a meritorious claim. While hard evidence, in the form of statistics, is difficult to come by, nevertheless there do appear to be some emerging measures of the societal cost of our tort compensation system. The increasing societal cost of tort-based litigation is not matched, in this lawyer's opinion, by necessarily "more just" results for the personal injury plaintiff. Some observations follow.

First, by far and away most personal injury litigation is resolved short of trial. What the personal injury trial lawyer has long known is now beginning to be confirmed by statistical information from the courts of this land. All but 3 to 5% of litigation ends in some kind of pretrial disposition. Recent statistics from the judicial administrator's office of this state

confirm that Kansas is no exception to this rule. Such statistics, which include tort-based litigation, surely indicates that either personal injury litigation is being resolved on purely legal grounds, (legal defects in plaintiff's case) or by settlement.

Regardless of the form of comparative negligence in use in any jurisdiction or, for that matter, whether the jurisdiction still adheres to the contributory negligence system, the judicial policy in this country has always been to encourage settlements. Settlements, prior to trial, have always involved a frank assessment by both parties of the risk of litigation compared to the relative rewards to the parties.

In tort-based litigation, one of the ingredients for pre-trial settlements must necessarily include an assessment of the fact finder's assessment of fault between the parties. All trial lawyers involved in tort-based litigation, when considering a pre-trial settlement, invariably include in their analysis of the risks the effect that a comparison of fault may have on the likelihood of success. This leads to a further and fundamental rule known to all trial lawyers: juries are reluctant to turn away the personal injury plaintiff with a meritorious claim. All trial lawyers know this is true notwithstanding any theoretical percentage bar imposed by a "modified" fault assessment system. In other words, because juries in this state are instructed as to the effect of their comparative fault findings when coupled with their assessment damages, those juries know well enough how to tailor an assessment of fault with an assessment of damages to arrive at the "right"

result.

Every trial lawyer that has practiced in this state for any length of time and tried more than two personal injury actions knows that this is true. In short, juries have long since adopted a "pure" assessment of fault and recovery for injuries, notwithstanding the Kansas theoretical bar at the 49% level contained in our present statute. The practical reality is that juries have been in the business of dispensing practical justice for a long time. Accordingly, no substantive change needs to be made in the comparative fault law of Kansas in the theoretical quest for a more perfect administration of justice since, as a practical matter, that already exists. (A lucid, if somewhat dated, discussion of the practical side of this debate is attached as Exhibit A, an article by Lewis F. Powell, Jr. before he became a U.S. Supreme Court Justice.)

The second side of this issue that I would like to address concerns the societal costs of altering the present comparative fault system in Kansas. In this age of larger and larger federal deficits, a populace increasingly resistent to increased taxes in order to meet increased deficits, this state's own fiscal problems in the face of continuing budgetary demands with a diminished revenue stream, the cost presented by an alteration of the present comparative fault system is not defensible as a practical matter. An alteration of K.S.A. 60-258a would only serve to increase the burden of the administration of justice on Kansans while working no substantial increase in the

justice received by the personal injury plaintiff with a meritorious claim.

This legislature has dealt in past sessions with the medical malpractice liability insurance crisis with a number of enactments. This committee is undoubtedly aware of the crises looming on the horizon in other states with regard to the availability at an affordable price of automobile liability coverage. The enactment of a "pure" comparative negligence statute threatens to undo the work of this legislature in redressing the medical malpractice crisis. The enactment of the pure comparative negligence statute can only increase costs for automobile and other liability insurers and their Kansas policyholders.

One of the theoretical underpinnings of the pure comparative negligence system has been the concept of "spreading." The injuries sustained by the individual personal injury plaintiff, it is thought, can be "spread" by the liability insurance system across the society generally without the onerous personal impact on the injured individual. In the face of increasing insurance costs, one wanders how much additional "spreading" can continue before the liability insurance system becomes so onerous in terms of premiums paid that it becomes impractical. In this lawyer's experience, which undoubtedly some of the members of this committee share, physicians have "gone bare" rather than pay the extraordinary premiums necessary to insure themselves against professional malpractice. In my own experience, I have known firms of accountants who have elected to "go bare" instead of insuring

themselves against professional malpractice. Our own law firm has experienced extraordinary increases in professional liability insurance. Ordinary Kansans routinely face increasing automobile liability premiums.

I have attached as an exhibit to this statement (Exhibit B), a recent report of the Insurance Services Office concerning the large component of insurance cost comprised of legal defense. This easily digestible report, based upon claims experience of member companies of the ISO, demonstrates that in almost all aspects of liability exposures, legal defense costs have consumed more and more of each claimed dollar paid out by insurers. Despite tenacious efforts on the part of insurance companies to contain these costs, they have continued to rise. Some aspects of the report are almost shocking in the extent to which legal defense costs have consumed insurance claim dollars. In the case of medical malpractice, legal defense dollars paid out equalled the amount of indemnity paid by companies on behalf of their insureds. Other categories of liability coverage demonstrate a less frightening scenario. Nevertheless, the increasing share of each claim dollar paid by insurance companies for legal defense costs has portentous long-range implications.

The enactment of "pure" comparative fault statute would do away with, in my view, the salutary effect that a potential bar to a personal injury claim creates at the level presently set by K.S.A. 60-258a. As noted above, in practical application, the 49% bar contained in K.S.A. 60-258a is in fact not a bar at all but a

"sliding scale" adjusted by the jury during its deliberations on the allocation of fault among personal injury plaintiffs and defendants. I would challenge the proponents of the pure comparative fault system to provide any evidence that the present form of comparative fault in Kansas inequitably bars persons with meritorious claims from litigating those claims before Kansas courts.

The other aspect of the current effort to enact a pure comparative negligence statute in this state that needs to be addressed is the motivation of its proponents. No lawyer involved in personal injury litigation, whether on the traditional plaintiffs' or defendants' side of the aisle, can seriously contend that the adoption of a pure form of comparative negligence in this state will not substantially increase the number of tort-based claims brought in this state. The present form of comparative fault in this state requires that the personal injury plaintiff be free of a certain amount of comparative fault. While this is "officially" set at the 49% level, as my comments have earlier suggested, in reality juries are left with a practical task of determining just what conduct on the part of a personal injury plaintiff may lead to a bar of recovery.

The adoption of a pure form of comparative negligence would, in the opinion of this trial lawyer, cause more and more personal injury lawsuits to be filed in the hope that settlements could be extracted from personal injury defendants in light of the risks attendant to litigation, not to mention the ever increasing

cost of defense.

In addition, the adoption of such a system can only result in increased "transactional costs" for Kansas businesses. Kansas businesses have already been assaulted and continue to be assaulted by ever increasing costs of health care benefits provided to its employees, an ever increasing income tax and personal property tax burden, a recession, and most recently a proposed sales tax on services. The costs of increased tort-based litigation to Kansas business and individuals will result in an increase in insurance premiums. These premiums, as demonstrated by the attached ISO study, pay more and more for legal defense costs. In the case of individuals or businesses that are self-insured, these costs represent another increasing cost component which whittles away at a healthy bottom line for Kansas companies providing employment for all Kansans.

Further, the judicial system of the state of Kansas, already suffering under constraints of a reduced budget, will be compelled to deal with an increased amount of litigation without increased judicial personnel to efficiently and effectively handle additional cases. This, of course, not only results in direct increased costs to the state of Kansas in the administration of justice, but also increases the cost to the litigants in terms of time spent in the litigation process.

Finally, the only conceivable "winner" in such a result is the increased likelihood that the personal injury plaintiff's attorney is able to tap a larger share of the potential "market" in

claims that would otherwise not attract even a modicum of interest.

This is certainly not meant as a personal attack upon my colleagues for whom I have a great deal of respect, but can only be the practical result of a revision in Kansas negligence law. The only obvious advantage in such a revision is to that section of the bar which relies, in substantial part, for its income in substantially sharing in any recovery on behalf of a personal injury plaintiff. Such a benefit, in my view, does not justify the onerous burden placed on all Kansans by this bill.

In summary, I urge this committee to reject the proposed amendment of K.S.A. 60-258a. The need for this theoretical change has not, in my opinion, been shown by any indication that injustice is being regularly or even sporadically worked by the present "modified" form of comparative negligence established in this state. What is abundantly clear is that the adoption of this form of comparative negligence will increase the cost of the administration of justice, increase the cost of insurance premiums to Kansans seeking the protection of liability while, at the same time, not providing any benefit to the injured Kansan with a meritorious claim.

On behalf of the Kansas Association of Defense Counsel, I thank you for your time and attention to this statement.

Submitted by,

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Contributory Negligence:

A Necessary Check on the American Jury

by Lewis F. Powell, Jr. · *of the Virginia Bar (Richmond)*

Of recent years, it has been fashionable in many legal circles to attack the doctrine of contributory negligence as archaic, unreasonable and unjust. In spite of the considerable opposition to the rule, it is still well entrenched in American law, although it has been abolished in England, the country of its origin. In a paper delivered before a Joint Committee Session in Niblett Hall, London, last July, Mr. Powell argued that, whatever its theoretical disadvantages, the rule of contributory negligence in American jurisdictions is applied in such a way as to secure substantial justice and that its retention is essential, unless we are willing to abolish jury trials in negligence cases.

A lively controversy exists in America as to whether the common-law rule of contributory negligence should be replaced by a rule of comparative negligence.[1]

This controversey may seem inexplicable to British lawyers in view of the apparently overwhelming support for the Law Reform Act of 1945[2] which abolished contributory negligence in the country of its origin. Indeed, Professor Arthur L. Goodhart who participated in drafting the report on which the Law Reform Act was based has expressed astonishment that there should be any opposition to the abolishment of contributory negligence.[3]

Possibly this view is attributing to the relatively young American judicial system too large a measure of the maturity and restraint which we associate with the British system. Or possibly the situation which we face in America is actually quite different from that which exists elsewhere. In any event, the problem is an important one for us, and perhaps joint discussion by British and American lawyers may shed light upon its proper solution.

In my part of this program, I shall not review the historical origins and development of the common-law rule of contributory negligence nor discuss the theoretical refinements of an ideal system of tort law. This has often been done carefully and well by leading scholars in this field, including my distinguished colleague on the panel, Dean Prosser.[4]

There is, however, a point of view which I feel has been neglected, namely, that of the practicing American lawyer who normally represents the defendant in negligence cases. What I propose to do, therefore, is to discuss from this viewpoint the practical courtroom application of both contributory negligence and comparative negligence in America today.

Those who would eliminate the defense of contributory negligence often begin with an extreme illustration. They have as a plaintiff the breadwinner of a large family, or perhaps a charming young widow and mother, who has been gravely injured by a truck owned, of course, by a large (and undoubtedly rich) corporation. Recovery is denied despite the 99 per cent negligence of the defendant solely because of the 1 per cent contributory negligence of the plaintiff!

It is urged that a rule which permits this "injustice" is "archaic" and should be abolished.[5] But fictitious

1. The term "comparative negligence" is loosely used in the literature in this field to include various kinds of statutes which have modified or superseded the contributory negligence rule. This paper will be confined primarily to what the advocates of change call "pure" comparative negligence, meaning statutes like the Federal Employers Liability Act and those of Great Britain and Mississippi.

2. 8 & 9 George 6, c. 28.

3. Arthur L. Goodhart, Editor of the LAW QUARTERLY REVIEW and Professor of Jurisprudence at Oxford University, quoted in Eldredge, *Contributory Negligence: An Outmoded Defense*, 43 A.B.A.J. 52, note 6 (1957).

4. See Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).

5. Professors Harper and James in lurid prose condemn contributory negligence as a "Draconian rule fired by a medieval concept of cause out of a heartless laissez faire". Harper and James, THE LAW OF TORTS, 1207 (1956). These same authors appear so eager to see all injured plaintiffs recover regardless of fault that they "would allow a recovery against a master by an injured hitchhiker invited to ride by an unauthorized servant". Seavey, 66 YALE L. J. 955, 957 (1957).

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illustrations and disparaging adjectives are not reliable proof that injustice does in fact regularly result from the common-law rule. Some hardship cases undoubtedly do occur under this rule, and indeed will also occur under any comparative negligence rule. No legal rule produces flawless justice all the time. We can only seek a rule which on the average will be fairest to all concerned—both plaintiffs and defendants.

There are really two ultimate questions involved in this argument, namely (i) has contributory negligence in actual practice been generally unfair, and (ii) would comparative negligence be a more just rule?

The Jury System . . . *Plaintiff's Safeguard*

Let us now consider the first of these questions. It certainly cannot be answered by a slide rule or conclusively by any available statistics. The answer lies, as is so frequently the case, in the realm of opinion—and perhaps all that can be said for certain is that most plaintiff's lawyers have a different opinion from most defendants' lawyers.[6]

But whatever one's bias may be, all lawyers will probably agree that the theoretical harshness of the contributory negligence rule is ameliorated in America by our jury system. Indeed, in my view, this rule in actual practice is not generally unfair to plaintiffs. The American jury, backed up by a liberal attitude of our courts, has seen to this. And here I think we have the heart of this problem, namely, the manner in which the rule of contributory negligence is actually applied under our jury system.

It must be kept in mind that in America a plaintiff in a tort case has the right, under a state or the Federal Constitution, to a jury trial on issues of fact.[7] In this important and controlling respect, the American system is virtually unique and therefore not comparable with any other.

The right to a jury trial means that both the issue of a defendant's primary negligence and a plaintiff's contributory negligence are decided by the jury. The jury receives "instructions" or a "charge" from the court on these issues, and also on such incomprehensible concepts as proximate cause, burden of proof and the standard of care expected from the mythical "reasonable and prudent man". Frequently the jury is further confounded by additional instructions on "last clear chance"[8] and the esoteric differences between gross, ordinary and slight negligence.

The average jury has no idea what these instructions really mean, and judges and lawyers frequently differ among themselves. The result is that juries ignore the legal refinements of instructions and render verdicts based on their own opinions as to "justice" in the particular case. Juries just do not deny relief to otherwise deserving plaintiffs because of some minor contributory negligence. If the plaintiff's negligence seems significant, there will probably be a compromise verdict—but the average jury will usually award some damages regardless of contributory negligence. Thus in actual practice the American jury has its own system of "comparative negligence".[9]

Justice by Juries . . . *Little Court Control*

This common tendency of juries to dispense "justice", tempered with sympathy, is subject to relatively little control by our state courts due primarily to three rules of fairly wide application in America.[10]

First. The jury renders a general verdict, finding for one party or the other and assessing damages if the plaintiff prevails. Special verdicts or special findings of fact are permitted in some states, but they are rarely mandatory in negligence cases. This means that one seldom knows what a jury actually does about contributory negligence.

Second. The trial judge cannot (in most states) comment to the jury on the credibility of witnesses, the weight of the evidence, or in any way suggest to the jury what the courts thinks about any factual issue. The judge, therefore, is usually of little help to the jury in arriving at a just result.

Third. A verdict cannot be directed or set aside (either by the trial court or an appellate court) if there is any credible evidence to support the plaintiff's case.[11] This means that the issue of contributory negligence, on which the defendant has the burden of proof, becomes a question solely for the jury if the plaintiff produces *any* credible proof that he was not contributorily negligent. Often this proof will be no more than the uncorroborated testimony of the plaintiff himself. If the jury chooses to believe this and disbelieve the testimony of ten disinterested witnesses to the contrary, the court is usually bound by this occult wisdom.

It is therefore believed that many who criticize the contributory negligence rule and seek its abolition are concerned more with theoretical hardships than they are with practical results. The constitutional right of jury trial and the rules of practice which enhance the functions of the jury and minimize those of the court have produced a system of administering negligence law in America which is weighted heavily in favor of plaintiffs.

Do the actual results of tort claims and litigation corroborate this view?

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6. This paper will contain a number of generalizations as to the views of "plaintiff's lawyers" and "defendants' lawyers". Like most generalizations, there are many exceptions. There is, of course a wide divergency of views among trial lawyers—whatever their practice may be.

7. With exceptions as to small claims and other matters not presently relevant.

8. The doctrine of "last clear chance" is an effective limitation upon the defense of contributory negligence in many cases.

9. This was emphasized in the case of *Karcesky v. Laria*, 382 Pa. 227, 114 A. 2d 150, 154 (1950), where the Supreme Court of Pennsylvania stated:

> The doctrine of comparative negligence, or degrees of negligence, is not recognized by the Courts of Pennsylvania, but as a practical matter they are frequently taken into consideration by a jury. The net result, as every trial judge knows, is that in a large majority of negligence cases where the evidence of negligence is not clear, or where the question of contributory negligence is not free from doubt, the jury brings in a compromise verdict.

10. The federal courts have authority to exercise considerably more control over jury cases than most state courts although there is little uniformity in the actual exercise of such control.

11. It is assumed here, of course, that there are no errors of law, such as in the instructions to the jury, admissibility of evidence, or other incidents of trial.

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he answer seems to be clearly es". Indeed, the strong probability at plaintiffs will prevail in court gardless of asserted contributory gligence has had a massive impact the policies of casualty insurance mpanies and corporate defendants ho are self-insurers.[12]

Although no accurate statistics are ailable, it has been estimated that pproximately 50 per cent of all laims for personal injury are set- led without a suit being instituted. It is further estimated that at least 5 per cent of all personal injury ases actually instituted are settled before final judgment.[13] This means that of all claims asserted, some 85 per cent to 90 per cent are settled, and only 10 per cent to 15 per cent are litigated to conclusion.[14]

Now what happens to the cases that are litigated, bearing in mind that they are presumably those which the defendant feels are exceptionally favorable or feels that the damages demanded are higher than a jury would award? While again there are no comprehensive statistical studies available, reliable authorities agree that the plaintiff prevails in 65 per cent to 75 per cent of all litigated personal injury cases in the United States.[15] These results refute rather conclusively the exaggerated claims as to the frequency of directed verdicts for the defendants.

In terms of over-all results, the available figures indicate that of every hundred persons who assert personal injury claims, some ninety-six are compensated either by settlement or successful litigation. It is no doubt true that many have settled for small sums without advice of counsel, and others with counsel have accepted compromise settlements because of contributory negligence.

Also, one may agree that some of the claimants and plaintiffs who settle for smaller amounts or lose their cases should and would do better under a more perfect system of justice. But most plaintiffs who lose probably deserve to lose under any system. They include, for example, the reckless or grossly negligent plaintiffs who litigate just on the chance that they might win.[16] They also include, it is hoped, the fraudulent plaintiffs with their fabricated evidence and fictitious or exaggerated subjective injuries.[17]

There appear to be no reliable statistics as to what percentage of the cases won by defendants involve contributory negligence. Presumably most of them do, although defendants sometimes win because no primary negligence is proved. We can be sure, however, that without the restraining influence of the common-law rule, the amounts paid in settlement would be larger, and the percentage of plaintiff victories in court would be greater. Thus, to one who believes that plaintiffs already enjoy a privileged position, the common-law rule of contributory negligence performs a necessary function as a "check and balance" on the American jury.[18]

Lawyers Demand Change . . . *Public Not Concerned*

Further evidence that the contributory negligence rule does not in fact operate unsatisfactorily is found in the lack of public demand for a change.

There is, to be sure, a highly articulate minority who are pressing for this "reform" in America. This includes some of our legal scholars who are concerned by the theoretical inconsistencies and imperfections of contributory negligence, but the real pressure for abolition of this rule comes from the well-organized plaintiffs' Bar. Their national organization (NACCA) is aggressively sponsoring state legislation to this effect.[19] As others have pointed out, in view of the "contin-

Lewis F. Powell, Jr., has practiced in Richmond since he was admitted to the Bar in 1931. During World War II, he served in the Army Air Force for more than three years and spent thirty-three months overseas, leaving the service as a colonel.

12. Although the question of "insurance" is not a relevant fact in accident cases, juries usually assume that the individual defendant is insured and that the corporate defendant can afford to pay.

13. See Benson, *Comparative Negligence—Boon or Bane*, 23 INS. COUNSEL J. 204, 205-206 (1956); Averbach, *Comparative Negligence Legislation*, 19 ALBANY L. REV. 4, 11 (1955); James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L. J. 667, 687 (1949). Estimates as to cases settled before final judgment range as high as 90 per cent.

14. The claims being discussed here do not include those under the Federal Employers Liability Act, where statistics indicate some compensation for claimants in 999 out of every 1000 injuries. See note 25 *infra*.

15. James, *supra* note 13 at 687. In 1947 plaintiffs in New York won 60 per cent—66 per cent of all negligence cases actually litigated. 14 ANN. REP. OF THE JUDICIAL COUNCIL, Table 6, 84-9 (1948). In the same year, the Massachusetts Superior Courts reported that the plaintiff was successful in 73.5 per cent of all jury cases. *Twenty-third Report of the Judicial Council of Massachusetts*, 32 MASS. LAW Q., table 4, 84 (1947).

16. As lawyers in America customarily handle damage suits on a purely contingent basis, the plaintiff has nothing to lose and, with sympathetic juries believing that insurance companies exist to pay claims, there is always the intriguing possibility of a large recovery.

17. Considerable popular attention is now being focused on the "personal injury racket" which evidently exists in far too many American communities. See Hunt, *Damage Suits: A Primrose Path to Immorality*, HARPER'S, January 1957, page 57; Yoder, *How An Ambulance Chaser Works*, SATURDAY EVENING POST, March, 1957. The "personal injury racket" involves only a negligible number of lawyers, but it tends to discredit unjustly a large segment of our profession.

18. Plaintiffs in damage suits not only usually win, but the increasing size of jury verdicts is a source of concern to many thoughtful people. A fifteen-year study by the Judicial Conference of New York shows that the average amount of jury verdicts in the New York Supreme Court was $3,490 in 1941 and $11,576 in 1955, an increase of more than 300 per cent. The same study shows that jury verdicts have more than doubled in the last ten years. Even more significant than the average amount of verdicts is the tendency in recent years to award extremely high verdicts in particular cases. Amounts ranging from $100,000 to $200,000 are no longer unusual. An extreme example occurred as recently as July 3, 1957, when a nine-year-old Chicago boy won damages of $750,000 when he was terribly injured in an explosion.

19. 13 NACCA L. J. 301-302 (1954). See also Lambert, *NACCA Rumor and Reflection*, 18 NACCA L. J. 25 (1956).

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gent fee" arrangen ustomarily employed by plain lawyers in America, these lawyers have a "self-serving pecuniary motive in advocating" comparative negligence.[20] While it is not suggested that this motive is an unworthy one, it may be relevant in evaluating the extent to which the cry for "reform" reflects a disinterested public concern for a more perfect system of justice.

But whatever the interest of lawyers may be, there is little evidence that the public generally is concerned. If indeed the present rule is as "archaic" and "unjust" as is contended, one would normally expect much greater support for the organized efforts being made to abolish it.[21]

Comparative Negligence . . . *Would It Be Better?*

The discussion up to this point has been addressed to the view that the contributory negligence rule has not in actual practice been harsh or unfair to plaintiffs, and is not generally unsatisfactory to the public. But even if the contrary be assumed, what evidence is there that a comparative negligence rule would in fact be better?

Those who urge comparative negligence cite the law of other countries,[22] including Great Britain and the English-speaking Dominions. While we should not ignore experience elsewhere, we certainly do not have to rely on the experience of others to evaluate comparative negligence. In no sense is this a new idea to American law, as one or more of our states has experimented with comparative negligence since it was adopted in Georgia in 1863. Moreover, the favorite example of those who advocate comparative negligence is the Federal Employers Liability Act (FELA), enacted by Congress in 1908 for the benefit of railway employees.

The American Prototype . . . *FELA in Practice*

Since the organized plaintiffs' Bar is advocating a "pure" comparative negligence rule like that o e FELA, it is well to consid act and particularly the manne in which it has actually operated in practice. The relevant part of the FELA provides that in personal injury cases:[23]

> . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

The language quoted has been followed in substance by the comparative negligence statutes in several of our states.[24] Indeed, while the language of the Law Reform Act of 1945 is different, the intent seems to be substantially the same with the vital difference that the *court*, rather than the *jury*, is to diminish the damages.

Now what has happened under the FELA? It is suspected that few American lawyers have any accurate conception of how far we have gone under the FELA toward a system—not merely of comparative fault—but of liability without fault.

The truth of this assertion is strikingly demonstrated by actual experience which has been carefully documented. Of every 1000 claimants under the FELA, 999 receive some compensation either by settlement or successful litigation.[25]

Although the Act specifies negligence as a prerequisite to r controlling decisions of the S Court have diluted the required proof of negligence almost to the vanishing point. One of the most recent of these decisions is *Rogers* v. *Missouri Pac. R. R.*, decided February 25, 1957.[26] The Supreme Court of Missouri had held that there was insufficient evidence to support a jury's verdict for a plaintiff under the FELA. The United States Supreme Court reversed the Missouri court on the ground that its decision had "invaded the jury's function". In so doing, Mr. Justice Brennan, speaking for a majority of the Court, said:[27]

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence *played any part, even the slightest*, in producing the injury or death for which damages are sought. [Italics added.]

The plaintiff is thus entitled to recover if the defendant's "negligence played any part, *even the slightest*, in producing the injury". This is an interesting result in view of the argument used by those who condemn the contributory negligence rule. They say that it is manifestly unjust for a plaintiff who is guilty only of the "slightest negligence" to be denied recovery against

(Continued on page 1061)

20. Palmer, *Let Us Be Frank About Comparative Negligence*, Los Angeles Bar Bull. (November, 1952).

21. Only seven states have comparative negligence rules of general application. While comparative negligence legislation is regularly proposed in many other states, Arkansas is the only state to have adopted comparative negligence during the past fifteen years. See Institute of Judicial Administration, Comparative Negligence, 1-12 (August 15, 1955).

22. The "civil law" countries are also cited, although their legal systems are sufficiently different from our own to render them of little value as precedents.

23. 35 Stat. 66 (1908), 45 U.S.C. §53 (1952).

24. See Miss. Code Ann. §1454 (1942); cf. Neb. Rev. Stat. §25-1151 (1956); Wis. Stat. §331.045 (1949); Ark. Stat. Ann. §§27-1742.1-1742.2 (Supp. 1955).

25. The Claims Research Bureau of the Association of American Railroads maintains detailed statistics on FELA claims. An analysis for 1955-56 discloses that 3641 FELA cases were actually instituted against railroads. Of these, 3153, or 87 per cent were settled by compromise prior to judgment; the plaintiffs won another 413 cases; and the defendants won only 75 cases or about 2 per cent of the total cases instituted. The AAR estimates that 95 per cent of all claims are settled before suit is instituted. Thus, of every 1,000 employees who assert claims under FELA, 950 are compensated without suit; and of the 50 who institute suit, 49 receive compensation either by settlement or plaintiff's judgment. Only 1 out of 1,000 fails to receive any compensation. These figures include, of course, the many claims acknowledged to be just and paid promptly by the railroads. They also include many unjust claims paid to avoid the risk of excessively high jury verdicts—a risk greatly enhanced by the shocking "solicitation" and "transportation" of FELA cases which occur so frequently.

26. 352 U. S. 500 (1957). The disquieting extent to which the Supreme Court permits juries to find "negligence" where none exists under common law standards is illustrated by the facts in the *Rogers* case and three other cases decided in 1957, namely: *Webb* v. *Illinois Central RR Co.*, 352 U.S. 512 (1957); *Arnold* v. *Panhandle & S. F. Ry. Co.*, 353 U.S. 360 (1957); *Ringhiser* v. *Chesapeake & Ohio Ry. Co.*, 17 CCH Supreme Court Bulletin, part 2, page 1491 (1957).

27. 352 U. S. at 506-507. The Court also emphasized that "*for practical purposes*" the sole inquiry in an FELA case is "whether negligence of the employer played any part, however small, in the injury or death . . ." 352 U. S. at 508. The Supreme Court had earlier held that "speculation and conjecture" by the jury is justified—indeed sometimes "required"—in finding this minimum negligence. *Lavender* v. *Kurn*, 327 U. S. 645, 653 (1946).

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Contributory Negligence
(Continued from page 1008)

a defendant who may be grossly negligent. We now see, in the words of the Supreme Court, that under the comparative negligence rule a plaintiff guilty of the grossest negligence is nevertheless entitled to recovery from a defendant guilty only of the "slightest negligence".[28]

If this is "archaic" and "unjust" in one case, surely it is equally so in the other—unless we are willing frankly to concede that plaintiffs in tort cases are privileged persons entitled not merely to equal justice under the law but to preferential justice.[29]

Diminution of Damages . . . *A Theory—Not a Fact*

At this point one can visualize the plaintiffs' lawyers sitting on the edges of their chairs eager to give their answer. It is true, they admit, that the grossly negligent plaintiff will recover from the slightly negligent defendant, but this is right and just, they say, because under comparative negligence the damages are diminished in proportion to the negligence attributable to the plaintiff.

There is one major flaw in this pat answer. It just is not true in America. In Great Britain the Law Reform Act of 1945 requires that the *court* diminish the damages. Although the term *court* may include both judge and jury, in actual practice the use of a jury in accident cases is virtually unknown in Great Britain. The judges there do in fact diminish damages as required by the act. But in America where the *jury* has this authority and exercises it behind the smoke screen of a general verdict, damages are either not diminished at all or the diminution is not in proportion to anything that can be measured or verified.

The amount of damages determined by a jury is presumptively correct. While trial and appellate courts have the power of remittitur, the rule is that a court may not invade the jury's function by "weigh-[ing] the evidence" but may consider "only the evidence and inferences most favorable to the plaintiff" in deciding whether a verdict is excessive.[30] Indeed, the Supreme Court has indicated in FELA cases that the amount of damages must be "monstrous" to justify interference with the jury's award.[31]

Comparative Negligence . . . *Experience in the States*

While the FELA does involve a special class of plaintiffs, the substantive rule of decision is exactly the same under any "pure" comparative negligence statute, and the power of the jury is equally great unless restricted by a mandatory requirement for a special verdict.[32] Mississippi has had a comparative negligence statute applicable to all injuries to persons since 1910. Its provisions in this respect are exactly like the FELA, being the "pure" type of statute advocated by the organized plaintiffs' Bar.

Let us look briefly at the practical operation of the Mississippi statute. It is said to have been the "brain-child of a small group of damage suit lawyers", and a "boon to plaintiffs".[33] Studies by casualty insurance companies also indicate that it has increased litigation and the size of jury verdicts.[34] As in the case of the FELA, there is no effective way to assure the diminution of damages required in theory by the law.[35]

A comment on Mississippi prac-

28. The rule seems to be the same under the Mississippi statute. See *Yazoo & M. V. R. R. v. Carroll*, 103 Miss. 830, 60 So. 1013 (1913).

29. The "privileged" status of damage suit plaintiffs in spite of the rule of contributory negligence is demonstrated by the available statistics, as has already been discussed.

30. *Scneder v. Wabash R. R.*, 272 S.W. 2d 198, 208 (Mo. 1954). See *Neese v. Southern Ry.*, 350 U.S. 77 (1950); *Union Pacific R. R. v. Hadley*, 246 U.S. 330, 333-334 (1918); and *Southern Ry. v. Bennett*, 233 U.S. 80, 86-87 (1914).

31. *Affolder v. New York, C. & St. L. RR.*, 339 U.S. 96, 101 (1950). Although there are cases of remittitur by lower courts, it is believed that the Supreme Court has never diminished damages awarded in an FELA case. The general solicitude for plaintiffs under this law is further illustrated by the fact that of the forty-eight FELA cases decided by the Supreme Court in the past twenty years (through the term ending in June, 1957), involving sufficiency of the evidence to support a verdict, the plaintiffs won forty-two cases or 88 per cent.

32. Cf. Ark. Stat. Ann. §§27-1742. 1—1742.2 (Supp. 1955); Miss. Code Ann. §1454 (1942). Both the Arkansas and Mississippi statutes are modeled after the FELA, but Arkansas has wisely imposed the minimum restraint of a mandatory special verdict.

33. Shell and Bufkin, *Comparative Negligence in Mississippi*, 27 Miss. L. J. 105, 111 (1956). This recent article reviews the Mississippi cases, and although it does not purport to evaluate or compare the Mississippi experience, the article indicates that the Mississippi courts have attempted to exercise more control over the jury function than have the federal courts under FELA.

34. See Gilmore, *Comparative Negligence From a Viewpoint of Casualty Insurance*, 10 Ark. L. Rev. 82, in Symposium, *Comparative Negligence*, 10 Ark. L. Rev. 54 (1955-56).

35. Judge William J. Palmer, Los Angeles, in discussing experience under the Mississippi law, quoted a leading Mississippi practitioner as follows: ". . . there seem comparatively few (cases involving contributory negligence) where it can be said with any degree of certainty that the jury has actually reduced plaintiff's damages". Palmer, *Comparative Advocacy, Doctrine and Negligence*, mimeographed, 7-8, 1953.

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tice will be especially meaningful to trial lawyers. It is that defendants' lawyers there rarely argue to the jury that plaintiffs' damages should be diminished. Such an argument involves the implied concession that the defendant was guilty of some negligence, and the trial lawyer knows from experience that once a jury detects that concession his case is not only lost but the jury alone will probably determine to what extent, if any, the damages will be diminished.

The experience in my native state of Virginia is much the same. Whether in the rare case actually litigated under the FELA[36] or in a case under our comparative negligence statute applicable to railroad grade crossing accidents,[37] few experienced defense lawyers would dare argue diminution of damages to a jury—except where liability is admitted and the case is tried solely because the plaintiff's demand for damages exceeds what a jury might be expected to award.

In 1955 Arkansas adopted comparative negligence but with a special verdict requirement intended to minimize the uncontrolled excesses of the general verdict.[38] A survey of Arkansas judges made after the first year of experience under the new law indicated a wide difference of opinion as to its desirability. One Arkansas judge stated, quite realistically, that juries "try to juggle the percentages [of comparative negligence]" so that the plaintiff will be sure to receive what the jury wants him to receive.[39] Thus, juries circumvent the special verdict procedure by the simple device of anticipating (and allowing for) the amount to be subtracted in diminution.

The Arkansas experience with pure comparative negligence must have proved disappointing—even with the tempering influence of mandatory special verdicts. In March, 1957, the Arkansas law was changed to conform substantially to the Wisconsin rule which applies comparative negligence only when the jury finds by a special verdict that the plaintiff's negligence was not as great as that of the defendant. An obvious compromise, both with principle and practice, this can only result in a flood of inconclusive litigation on the impossible question whether plaintiff's negligence was more or less than 50 per cent.

In summary, I find no justification—based on the considerable experience we have already had in America—for following our English friends further along the road to comparative negligence. In theory it may be an attractive and equitable doctrine. Administered by courts, rather than juries, it would possibly work fairly well in America as it apparently has in England.

But there is little if any chance of our abolishing the jury system.[40] So long as we have this system there is no effective way to prevent pure comparative negligence from becoming, in actual practice, a system based on liability without fault.[41] The time may come when social concepts will require compensation for all who are injured in accidents regardless of fault. A change of such far reaching social and economic consequences should not come indirectly—indeed almost surreptitiously—under the guise of comparative negligence. It should be faced frankly and implemented, as the workmen's compensation laws were, with appropriate provision for insurance, statutory limitations on liability and uniform administration by special tribunals.

In short, so long as we in America must rely upon the jury to determine who shall bear the staggering loss from accidental injuries, the contributory negligence rule is a necessary—indeed virtually the only—means of exercising some limited judicial control. With all of its theoretical faults, this rule does maintain a degree of balance between judge and jury which would be lost entirely under comparative negligence.

36. Because of the extreme difficulty of defending successfully an FELA case, the railroads settle almost all claims except those where some legal question exists (such as existence of interstate commerce) or where the damages demanded are considered exorbitant. See note 23 *supra*.

37. Va. Code §56-416 (1950).

38. Ark. Stat. Ann. §§27-1742.1—1742.2 (Supp. 1955). This statute modeled, in this respect, after the Wisconsin practice, requires the jury expressly to state (a) the amount of damages recoverable without contributory negligence, and (b) the extent to which such damages are diminished by contributory negligence.

39. Heilbron, *Comparative Negligence in Action*, NACCA TENTH ANNUAL CONVENTION PROCEEDINGS 20, 22 (1956).

40. Not only is the jury system venerated in America and guaranteed in state and Federal Constitutions, but the lawyers who clamor most for comparative negligence are opposed to trusting judges to administer it. Their quest is for the "more abundant verdict", and they had rather retain contributory negligence (and the jury) than be compelled to accept judicial justice. It is interesting to note that Congress, in permitting tort actions against the United States under the Federal Tort Claims Act, was careful to protect the Federal Treasury by providing that such actions "shall be tried by the court without a jury". 28 U.S.C. §2402 (1952). Plaintiffs' lawyers consider this elimination of the jury as a "deficiency" in the Act. Greenstein, *Experience under the Federal Tort Claims Act*, NACCA TENTH ANNUAL CONVENTION PROCEEDINGS 113, 115 (1956).

41. The late Mr. Justice Robert Jackson (like many others) recognized that the FELA results in a system closely approaching liability without fault. See *Wilkerson v. McCarthy*, 336 U.S. 53, 76 (1949) (dissenting opinion).

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ISO Insurance Issues Series

Legal Defense: A Large and Growing Insurance Cost

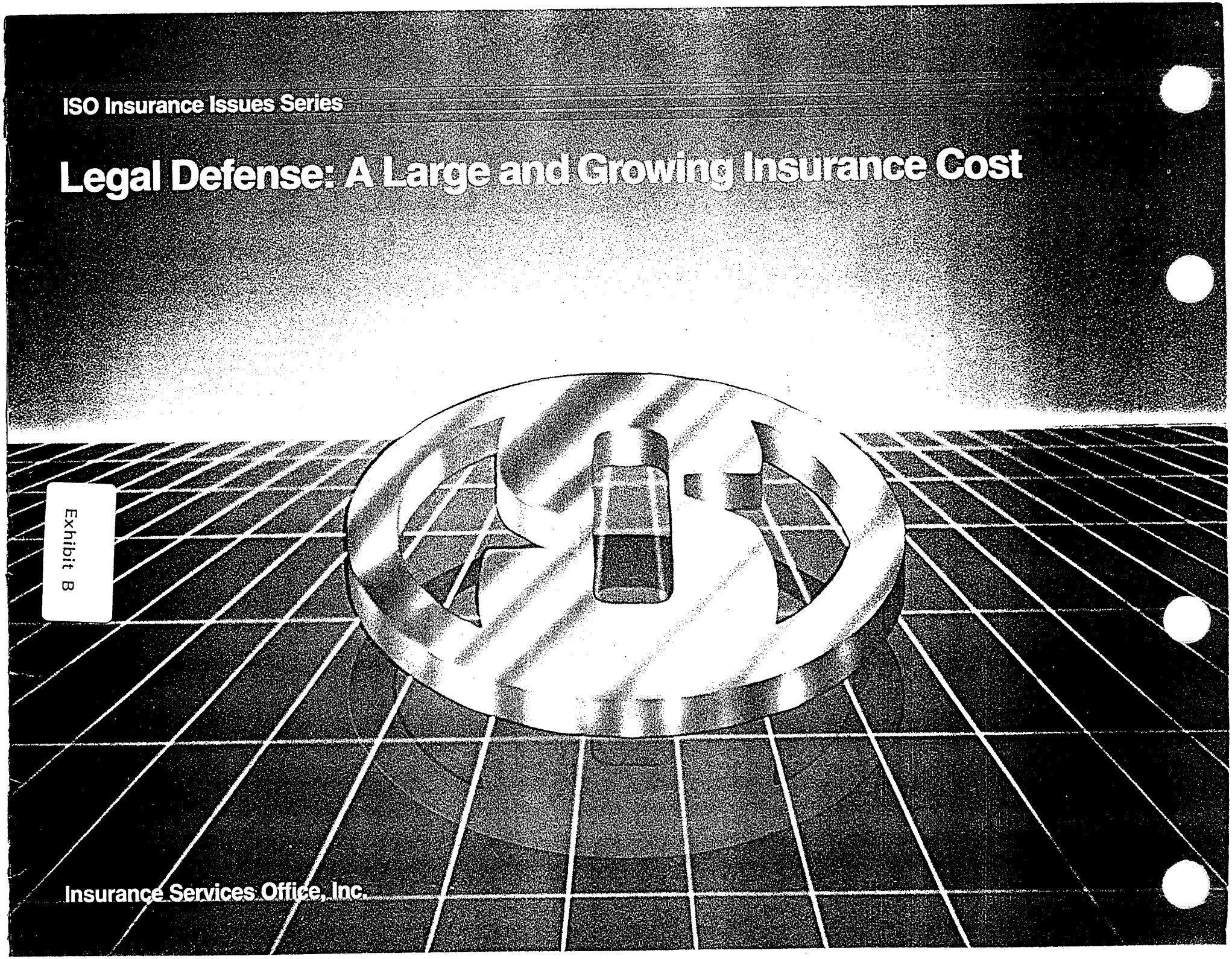

Exhibit B

Insurance Services Office, Inc.

9-28-6

ISO Insurance Issues Series

Legal Defense: A Large and Growing Insurance Cost

Insurance Services Office, Inc.

December

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.

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Contents

Executive Summary

Why do people and businesses buy liability insurance? If the policyholder, through negligence or fault, causes injury to others or damages the property of others, the policyholder faces financial loss. Liability insurance provides financial protection against such a loss. In addition, most standard liability policies also provide for unlimited legal defense of the policyholder (until policy limits are exhausted by payments to those with injuries or damaged property) if a lawsuit results from an accident.

To shed some light on the legal defense cost component of liability insurance, Insurance Services Office, Inc. (ISO) examined insurer data—both financial and statistical. This study's findings can be divided into two areas: (1) an analysis of the casualty lines of insurance that quantifies the magnitude of legal defense costs; and (2) an analysis of the variability of general liability legal defense costs. The general liability analysis expands on some issues raised in the 1986 ISO study, *The Rising Costs of General Liability Legal Defense*.

The specific findings relating to the magnitude of legal defense costs are:

- For calendar year 1988, legal defense costs for the casualty lines of insurance amounted to $12 billion, while insured losses for the same lines were $95 billion.
- On an accident year basis, legal defense costs increased from 9.6% of losses for 1978 to 13.9% of losses for 1988—a 45% rise in the ratio of legal defense costs to indemnity costs—for all casualty lines of insurance combined.
- While legal defense costs affect all casualty lines of insurance, they are a proportionately larger cost for the longer-tailed general liability and medical malpractice lines.
- Indicated deficiencies in total loss adjustment expense reserves, which far exceed the estimated shortfalls in loss reserves, suggest that the true cost of insurance legal defense may be greater than insurers' current estimates of incurred legal defense costs.

The specific findings relating to legal defense costs for general liability are:

- Over the past 40 years, the ratio of legal defense costs to indemnity costs has tripled, indicating significantly more growth in defense costs than in indemnity costs.
- For all claims, the ratio of legal defense costs indemnity costs increased the longer it took to settle claims.
- Claims closed without payment generated one-third of total legal defense costs. For most general liability claims, insurers incurred indemnity costs but paid zero legal defense costs.
- For claims where insurers paid both indemnity costs and legal defense costs, the ratio of legal defense costs to indemnity costs decreased as the size of the loss increased.

Background

Under most standard liability contracts, an insurer commits itself to unlimited legal defense of any covered claim until a settlement is reached, a judgment is entered, or the policy limits are exhausted by claim payments—regardless of the cost of providing that defense. The insurer is responsible for the defense of *any* suit by a third party against an insured, if the third party is claiming monetary damages that might be covered by the insurance. In the case of multiple claimants whose claims fall under the same limit on an insured's policy, the insurer must defend all the claims until settlements with, or judgments for, one or more of the claimants exhaust the policy limit. Only then may the insurer stop defending the remaining cases.

This study explores costs associated with providing legal defense for the casualty lines of insurance, which appear on Schedule P of insurers' Annual Statements:

- workers' compensation
- auto liability (personal auto and commercial auto)
- multi-peril (farmowners multiple peril, homeowners multiple peril, commercial multiple peril, ocean marine, aircraft, and boiler and machinery)
- general liability
- medical malpractice

Insurers are required to submit information about their business for several purposes in several forms. No one source provides adequate information with which to study insurance legal defense costs. Consequently, for this study, Insurance Services Office, Inc. (ISO), used information from several sources:

- insurer financial statements compiled and published by A.M. Best Company
- statistical data regularly reported to ISO
- special ISO calls for insurer expense data

These data were gathered and summarized on different bases—accident year, calendar year, and policy year. (See the Appendix for a more complete description of data sources and data organization.)

Loss Adjustment Expenses

Insurers incur two types of expenses when settling claims:

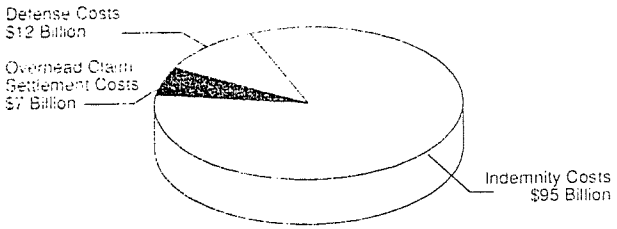
- Unallocated loss adjustment expenses (ULAE) include claim settlement functions ranging from claim reporting, processing, and investigation to issuing a check in settlement of a claim. These expenses are generally viewed as overhead claim settlement expenses. ULAE is not attributable to a particular case or claim.
- Allocated loss adjustment expenses (ALAE) are the direct costs attributed to settling specific claims. For liability insurance, the primary components of ALAE are the costs of attorneys and expert witnesses—legal defense costs, the focus of this study.

Legal Defense Costs in 1988

In calendar year 1988, the property/casualty insurance industry's legal defense costs for the casualty lines of insurance amounted to about $12 billion, compared with $95 billion for incurred losses. ULAE added $7 billion. (See Figure 1.) That is, for every dollar spent on indemnity for liability insurance, another 13 cents went to legal defense costs. But defense costs differed by line of insurance.

Figure 1

Legal Defense Costs, Overhead Claim Settlement Costs, and Indemnity Costs
Liability Lines-1988



In 1988, legal defense costs amounted to $12 billion, overhead claim expenses were $7 billion, and incurred losses totaled $95 billion.

Figure 2

Legal Defense Costs as a Percentage Of Incurred Losses
Calendar Year 1988

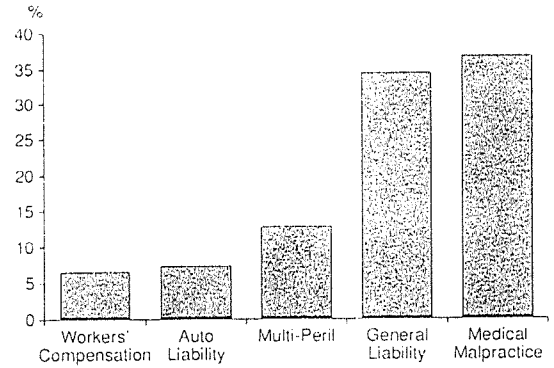
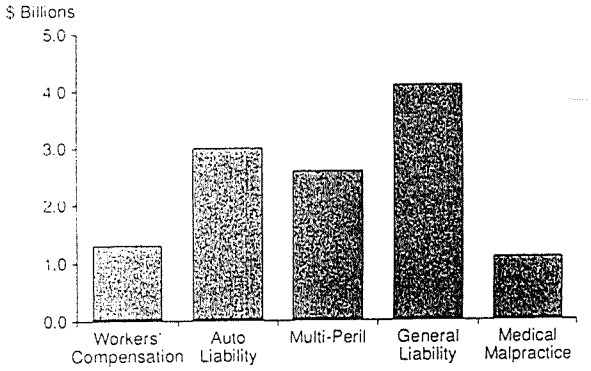


Figure 3

Legal Defense Costs by Line of Business
Calendar Year 1988



Legal defense costs vary for the casualty lines of insurance, but are particularly significant in the longer-tailed lines of general liability and medical malpractice.

Workers' compensation settlements are usually determined by statute. In calendar year 1988, legal defense costs amounted to $1.3 billion, or 6.6% of indemnity costs.

For auto liability, legal defense costs amounted to 7.4% of indemnity costs in calendar year 1988. Because auto liability indemnity costs are so large, legal defense costs represented an expenditure of $3.0 billion, more than for any other line of insurance except general liability.

Multi-peril includes both property and liability coverages. While liability claims covered under multi-peril insurance often involve litigation, property claims by policyholders themselves involve investigation and settlement expenses but usually do not require litigation. Multi-peril legal defense costs were 12.9% of indemnity costs in calendar year 1988, or $2.6 billion.

General liability legal defense costs in calendar year 1988 amounted to $4.1 billion, or 34.3% of indemnity costs. Legal defense costs for medical malpractice totaled $1.1 billion, or 36.6% of indemnity costs, in calendar year 1988. (See Figures 2 and 3.)

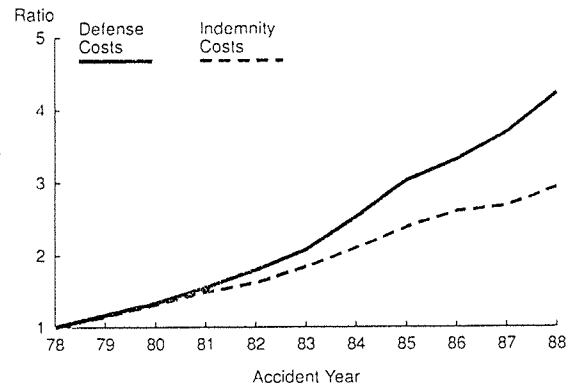
Legal Defense Costs Have Grown More than Indemnity Costs

Calendar year figures are a mixture of new and old costs. In practice, dollars earmarked or set aside for the payment of each claim already reported to the insurance company, but not yet settled, may be revised on a regular basis. Meanwhile, other new claims are continually reported to the insurer. Some liability claims can take more than a decade to settle, while many others settle in as little as one or two years. Accident year information—grouping together claims from accidents in a particular year—more accurately matches claim adjustment expenses with indemnity costs.

For all casualty lines of insurance combined, ultimate incurred legal defense costs rose an average of 16% per year from $2.8 billion to $11.8 billion—a 320% increase—from accident year 1978 to accident year 1988. During that same period, indemnity costs (losses) grew an average of 11% per year from $28.9 billion to $84.9 billion—a 190% rise. (See Figure 4.) Put in terms of the ratio of ALAE to indemnity, legal defense costs for the casualty lines of insurance increased from 9.6% of losses in accident year 1978 to 13.9% of losses in accident year 1988. (See Figure 5.)

Figure 4

Rise of Legal Defense Costs and Indemnity Costs, 1978-1988
Schedule P Lines



Legal defense costs for accidents occurring in 1988 were 320% greater than legal defense costs for accidents in 1978. Indemnity costs rose 190% over the same period.

Figure 5

Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
Schedule P Lines

Legal defense costs for accidents occurring in 1988 were 13.9% of indemnity costs for all casualty lines of insurance—45% greater than the 9.6% legal defense cost ratio for accident year 1978.

The legal defense cost ratio for workers' compensation remained almost constant at 5% to 6% of indemnity costs from accident year 1978 to accident year 1985. The latest three accident years (1986–1988) saw a rise in these costs, and analysis of the financial data indicates that accident year 1988 will have a legal defense cost ratio of 8.0% when all payments have been made. (See Figure 6.)

The legal defense cost component of auto liability insurance was relatively stable during this 11-year period, increasing from 6.9% of indemnity costs in accident year 1978 to 8.0% in accident year 1988. (See Figure 7.) But that one percentage point translates to $400 million of additional legal defense costs for accident year 1988.

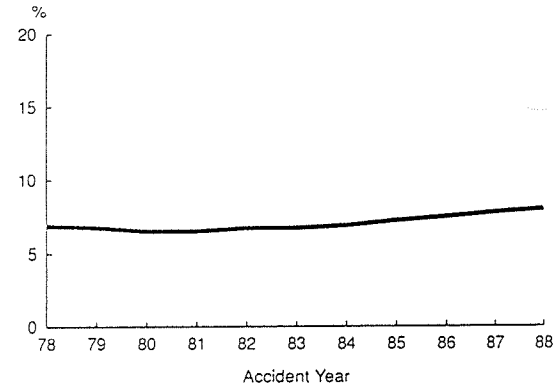
Figure 6

Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
Workers' Compensation

Legal defense cost ratios for workers' compensation accidents have risen significantly since accident year 1985.

Figure 7

Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
Auto Liability



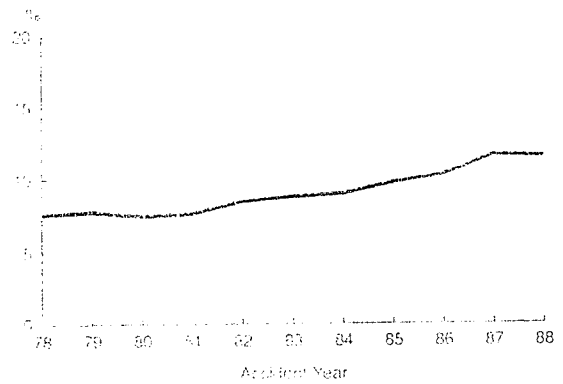
Legal defense cost ratios were relatively stable for auto liability from accident year 1978 through accident year 1988.

The ratio of legal defense costs to indemnity costs for multi-peril increased from 7.6% for accident year 1978 to 11.6% in accident year 1988. (See Figure 8.) This rise was significant for two reasons: (1) the legal defense cost ratio increase of more than 50% means that legal defense costs grew much faster than losses; and (2) multi-peril includes a large amount of property losses for which the legal defense cost component was very small. That is, the "ballast" of the property losses masked a significant jump in the legal defense cost component of the multi-peril liability coverage.

In accident year 1978, the ratio of legal defense costs to indemnity costs for general liability was 31.0%, and 24.3% for medical malpractice. For accident year 1978, legal defense costs amounted to approximately $800 million for general liability and approximately $250 million for medical malpractice. For accident year 1988, the general liability legal defense cost ratio is projected to exceed 40%, with ultimate legal defense costs of more than $3.7 billion. (See Figure 9.) The medical malpractice legal defense cost ratio will also exceed 40%, with ultimate legal defense costs exceeding $1.5 billion. (See Figure 10.)

Figure 8

Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
Multi-Peril



Legal defense costs for multi-peril grew faster than indemnity costs.

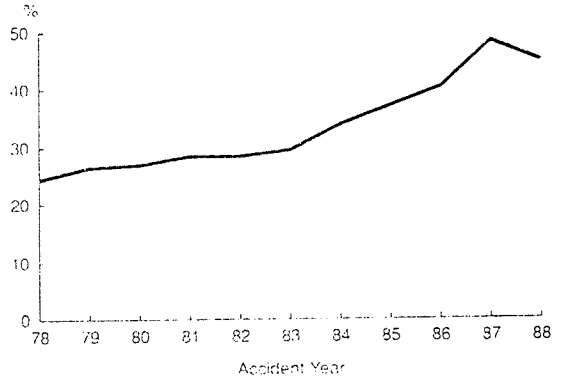
Figure 9

Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
General Liability

General liability legal defense costs have risen steadily.

Figure 10

Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
Medical Malpractice



Legal defense cost ratios for medical malpractice accidents have risen dramatically since 1983.

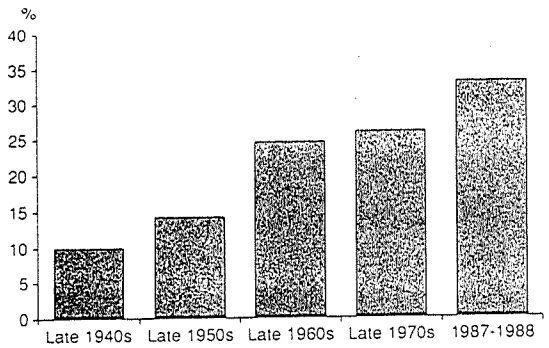
General Liability Legal Defense Costs Have Risen Steadily

Legal defense costs were not always so large. The cost of legal defense has risen steadily over the years. An examination of general liability legal defense cost data from the ISO special calls for expenses over the past four decades illustrates this movement. In the late 1940s, insurers spent about 10 cents on legal defense costs for every dollar spent on indemnity. By the late 1950s, this expense reached 14 cents for every dollar of indemnity payments. During the 1970s, that figure rose to 26 cents per dollar of indemnity. The ratio for calendar years 1987 and 1988 was 33%. (See Figure 11.)

In contrast, ULAE has decreased as a percentage of indemnity for general liability through the years. ULAE declined from 18% of indemnity costs in the 1940s to 9.9% of indemnity costs for 1987 and 1988. (See Figure 12.) But the growth in legal defense costs more than offsets these savings, causing total loss adjustment expenses to increase as a percentage of indemnity. (See Figure 13.)

Figure 11

The Growth of Legal Defense Costs as a Percentage of Indemnity Costs
General Liability



Over the past 40 years, general liability legal defense costs have risen steadily.

Figure 12

Overhead Claim Settlement Expenses as a Percentage of Indemnity Costs
General Liability

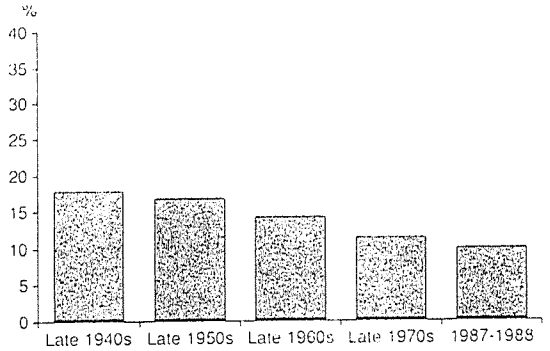
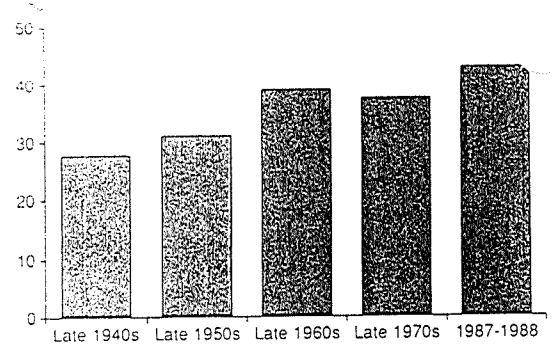


Figure 13

Total Loss Adjustment Expenses as a Percentage of Indemnity Costs
General Liability



For general liability, while overhead claim settlement expenses have decreased steadily over the past 40 years, relative to indemnity costs, total loss adjustment expenses (including legal defense costs) have increased.

General Liability Legal Defense Costs Have Varied with the Size of the Loss

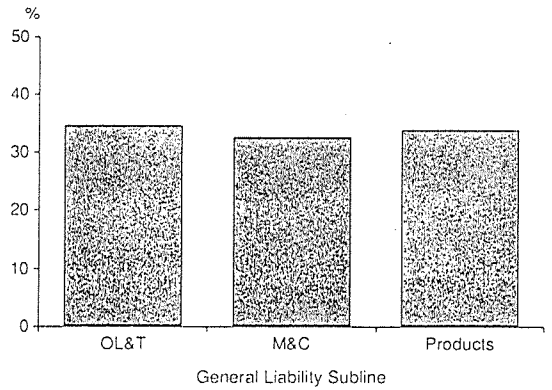
ISO studied the variability of legal defense costs by size of loss for the general liability line of insurance, separately examining a sample of loss statistics reported to ISO for the three general liability sublines—accident years 1980 through 1985 for owners', landlords', and tenants' liability (OL&T) and manufacturers' and contractors' liability (M&C); accident years 1974 through 1985 for products liability (products). The average cost (in dollars) of defending a large claim was greater than the average cost of defending a small claim. But the relative cost of defending a claim—the ratio of legal defense costs to indemnity payments—generally decreased as the size of the loss increased.

In addition to the cost of defending claims settled with a payment to a claimant, insurers spent significant amounts to defend policyholders successfully. In fact, one-third of total legal defense costs for general liability were attributed to claims closed without payment. This proportion was essentially the same for all three sublines examined. (See Figure 14.)

Just as there were claims for which insurers paid legal defense costs but incurred no indemnity costs, there were also many claims for which insurers incurred indemnity costs but paid no legal defense costs. In fact, this was the most common type of claim in all three sublines of general liability examined.

Figure 14

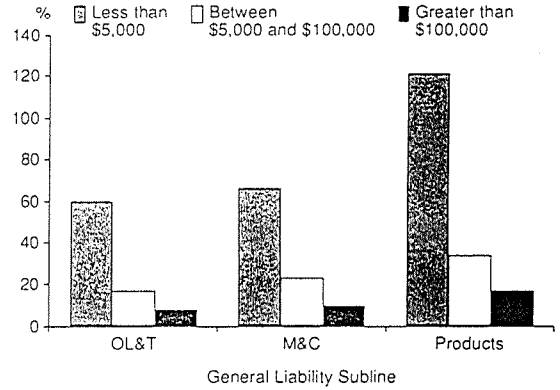
Percentage of Legal Defense Costs for Claims Closed without Indemnity Payment
General Liability Sublines



One-third of total legal defense costs for general liability are attributed to claims closed without payment.

Figure 15

Legal Defense Costs as a Percentage of Indemnity Costs for General Liability Sublines
Size of Loss



For general liability claims with both an indemnity payment and a legal defense cost payment, the legal defense cost ratio decreased as the size of loss increased.

For example, in OL&T, approximately 76% of the claims did not have associated legal defense costs. Restricting analysis to the 12% of OL&T claims with both an indemnity payment and a legal defense cost payment, ISO found that the ratio of legal defense costs to indemnity costs for claims less than $5,000 was approximately 60%. For claims greater than $100,000, this ratio was approximately 8%, with a ratio of approximately 17% for claims between $5,000 and $100,000.

In M&C, approximately 82% of the claims did not have associated defense costs. For the 9% of the M&C claims with both an indemnity payment and a legal defense cost payment, the ratio of legal defense costs to indemnity costs for claims less than $5,000 was approximately 66%. For claims greater than $100,000, this ratio was approximately 10%, with a ratio of approximately 23% for claims between $5,000 and $100,000.

In products, approximately 65% of the claims did not have associated legal defense costs. For the 17% of products claims with both an indemnity payment and a legal defense cost payment, the ratio of legal defense costs to indemnity costs for claims less than $5,000 was 121%. For claims greater than $100,000, this ratio was 17%, with a ratio of 35% for claims between $5,000 and $100,000. (See Figure 15.)

General Liability Legal Defense Costs Have Varied by Settlement Lag

Using the same sample of general liability statistical data, ISO examined the relationship between the cost of legal defense coverage and the length of time between the accident and the settlement of the claim. A significant portion of the indemnity dollars paid within the first two settlement years had no associated legal defense costs. The remaining claims that closed in the first two settlement years had associated legal defense costs, but at a lower level than the claims that closed after the second settlement year.

For OL&T, the ratio of legal defense costs to indemnity costs for all claims that closed in the first two settlement years was about 5%. In settlement years three through five, the ratio rose to 19%. For later settlement years, it climbed to almost 29%.

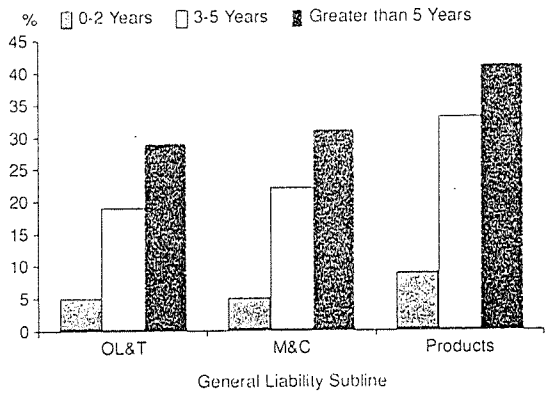
For M&C, the ratio of legal defense costs to indemnity costs for all claims that closed in the first two settlement years was also about 5%. In settlement years three through five, the ratio escalated to 22%. For later settlement years, it jumped to 31%.

For products, the ratio of legal defense costs to indemnity costs for all claims that closed in the first two settlement years amounted to 9%—almost double the ratio for OL&T and for M&C. In settlement years three through five, the ratio jumped to 33%. In settlement periods beyond year five, it shot up to 41%. (See Figure 16.)

Figure 16

Legal Defense Costs as a Percentage of Indemnity Costs for General Liability Sublines

Years until Settlement



For general liability claims, legal defense cost ratios increased the longer it took to settle claims.

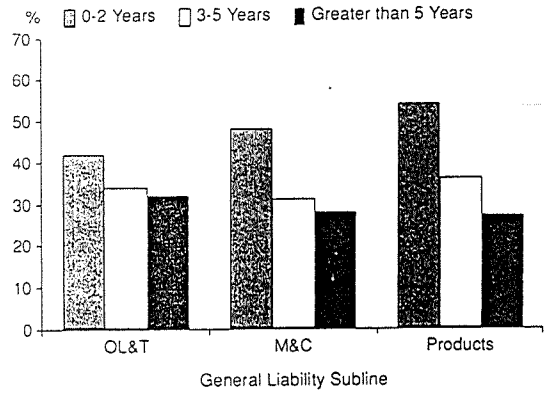
While larger claims tended to take longer to settle, some claims closed without indemnity payment also took many years to settle. The proportion of legal defense costs associated with such claims remained significant, even at very late settlement dates.

For OL&T, 42% of legal defense costs in the first two settlement years involved claims closed without indemnity payment. In settlement years three through five, the percentage fell to 34%. It dropped to 32% in later settlement years.

Figure 17

Percentage of Legal Defense Costs for Claims Closed without Indemnity Payment

Years until Settlement



The proportion of general liability legal defense costs for claims closed without an indemnity payment remained significant even when such claims took years to settle.

For M&C, 48% of legal defense costs in the first two settlement years involved claims closed without payment. For years three through five, the percentage dropped to 31%. It slipped to 28% for later settlement years.

For products, the percentage of legal defense costs spent on claims closed without payment was almost 54% for the first two settlement years. The percentage plummeted to 36% for years three through five. It dropped to 27% thereafter. (See Figure 17.)

Perspective: Loss Adjustment Expense Reserves

State regulations and accounting standards require that insurance companies establish reserves for unpaid losses and associated loss adjustment expenses (ALAE, or legal defense costs, plus ULAE, or overhead claim expenses). These reserves are reflected in company financial statements. In calendar year 1988, payments for losses and loss adjustment expenses for casualty lines of insurance amounted to approximately $90 billion. At the end of calendar year 1988, the financial statement reserves for losses and loss adjustment expenses for these lines of insurance were approximately $210 billion.

ISO analyses indicated that loss adjustment expense reserves were generally more deficient than loss reserves. Loss reserves for casualty lines at the end of calendar year 1988 were less than 10% deficient, while total loss adjustment expense reserves (ALAE plus ULAE) were at least 50% deficient at the end of calendar year 1988. These results are consistent with those at the end of calendar year 1987.

Factors such as different treatments of losses and loss adjustment expenses among reinsurance agreements and the practices of some insurers—including reserves for these loss adjustment expenses with the loss reserves, instead of establishing separate loss adjustment expense reserves—complicated the analysis. But the indicated deficiencies in loss adjustment expense reserves, which far exceed the shortfalls in loss reserves, suggest that the true cost of insurance legal defense may be greater than insurers' current estimates of incurred legal defense costs as presented in other sections of this study.

Figure 18

Industry Payout Patterns for Indemnity and Legal Defense Costs

Workers' Compensation

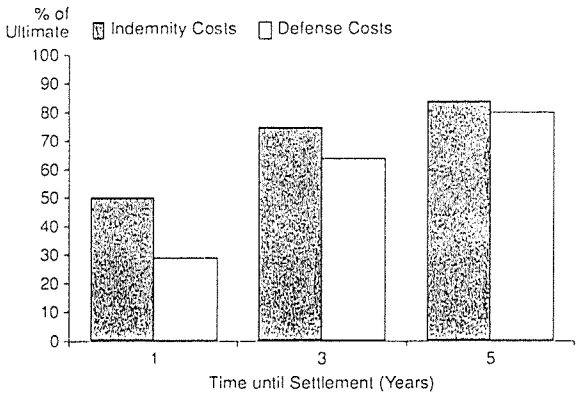
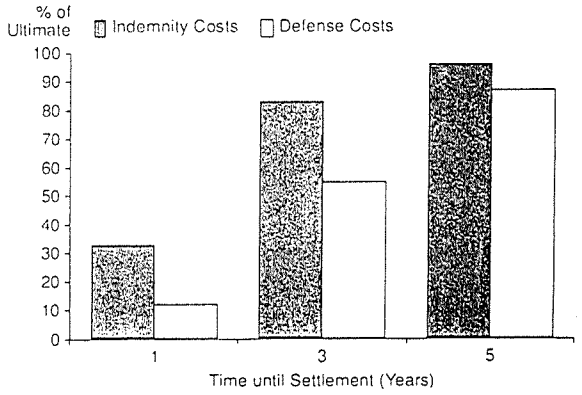


Figure 19

Industry Payout Patterns for Indemnity and Legal Defense Costs

Auto Liability



Legal defense cost payments for most casualty lines of insurance were made later than indemnity payments. That is, legal defense costs emerged more slowly than indemnity costs.

Furthermore, reserving for loss adjustment expenses is difficult because of the long-tail nature of the payments. Generally speaking, legal defense cost payments are made later than indemnity payments and, consequently, emerge more slowly. For example, according to ISO's analysis, 12% of total general liability indemnity for an accident year was paid in the first 12 months. At that same maturity, only 3% of legal defense costs was paid. For automobile liability, 83% of incurred indemnity was paid in the first three settlement years. At that same maturity, only 55% of the accident year's legal defense costs had been paid. (See Figures 18 through 22.)

Figure 20

Industry Payout Patterns for Indemnity and Legal Defense Costs

Multi-Peril

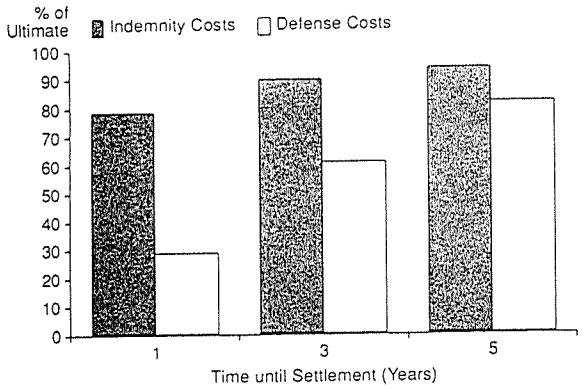


Figure 21

Industry Payout Patterns for Indemnity and Legal Defense Costs

General Liability

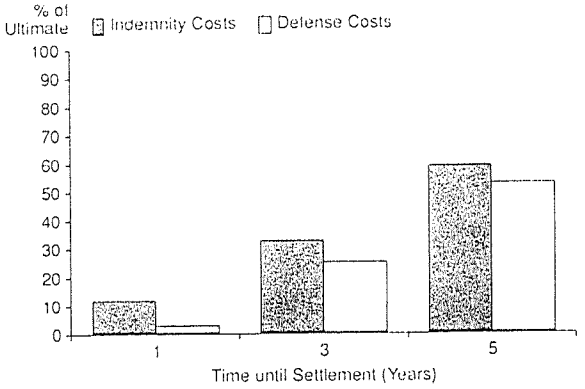
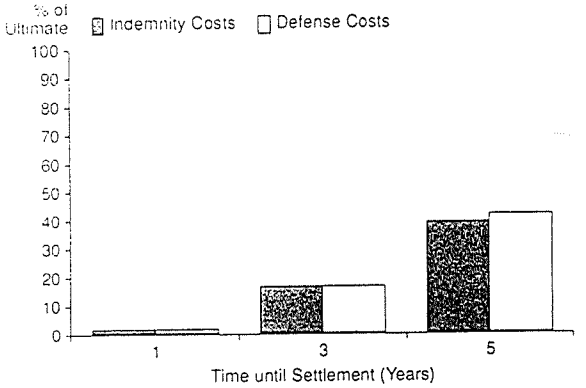


Figure 22

Industry Payout Patterns for Indemnity and Legal Defense Costs

Medical Malpractice



Legal defense cost payments for most casualty lines of insurance were made later than indemnity payments. That is, legal defense costs emerged more slowly than indemnity costs.

Appendix: Data Sources and Data Organization

Data Sources

This study used several different types of data. In each case, the best data available to analyze a particular area were chosen. These data were the most recent or the broadest based. At times, the data used were the only data available.

The three major sources of data used were:

- financial data
- statistical data
- special call data

Financial data through 1988 used in this analysis were compiled and published by A.M. Best Company.

Statistical data were extracted from the ISO aggregate data base. This data base reflects the combined experience of all companies reporting data regularly to ISO, in accordance with the ISO statistical plan. This study used statistical data for general liability only.

Special call data provide loss and expense information that insurers report to ISO on a calendar year basis. This sample information from a subset of all insurers summarizes expenses in greater detail than is available in financial data.

Data Organization

Data used in this study were organized in three ways:

- *Calendar year data* measure the financial effect of all activity during a particular period of time. This type of summary includes adjustments associated with claims from prior years made during the calendar year.
- *Accident year data* organize information according to the year in which an insured loss occurred.
- *Policy year data* present information according to the year in which the insurance policy was issued or renewed.

The following reports in the ISO Insurance Issues Series are available upon request:

Insurance Data; A Close Look

Insurer Profitability: A Long-Term Perspective

Using the Past to Predict the Future: Historical Data, Loss Development and Trend

1988 Insurer Financial Results

Tax Law Changes and Property/Casualty Insurers: A Comprehensive Analysis

Personal Auto Insurance: Costs and Profits in Perspective

Other research reports available from ISO are:

Claim File Data Analysis (conducted by ISO DATA, Inc.)

- *Overview*
- *Public Policy Issues*
- *Governmental and Municipal Liability*

Factors Affecting Urban Auto Insurance Costs (a joint study of ISO and the National Association of Independent Insurers)

For copies of any of these reports, write to:

Corporate Communications Department
Insurance Services Office, Inc.
160 Water Street—12th Floor
New York, New York 10038

Kansas Association of PROPERTY & CASUALTY INSURANCE COMPANIES, INC.

L. M. Cornish
Legislative Chairman
Merchants National Tower
P. O. Box 1280
Topeka, Kansas 66601

February 27, 1991

House Judiciary Committee
State Capitol
Topeka, KS 66612

Re: House Bill 2396

Chairman Solbach and Committee Members:

On behalf of the Kansas Association of Property and Casualty Insurance Companies we would oppose House Bill 2396.

Removing the existing language from K.S.A. 60-258a as proposed in House Bill 2396 will result in the application of a pure comparative fault test in every liability claim. Obviously, this will substantially increase the amount of time and expense involved in litigation, as well as the number of claims and counterclaims in our courts.

Every case would require an apportionment of fault to each party. Claimants would be allowed to pursue their claims, even if they were 95% at fault. Thus, a party who may have only been minimally at fault, maybe 1%, would be forced into expensive litigation. A bad driver who was 90% at fault could be sued and then counterclaim for substantial damages. The original plaintiff, being only 10% at fault, may then end up having to pay the bad driver.

Certainly, this is not in the best interests of consumers. Settlements will be discouraged and recoveries delayed while the need for more courts and trial lawyers expands.

We therefore oppose House Bill 2396.

Respectfully,

David A. Hanson

DAVID A. HANSON

DAH:kls

HJUD
Attachment #10
2-27-91

THE

Farmers Insurance Group of Companies

February 26, 1991

10850 Lowell
Shawnee Mission, Kansas 66210-1613
Mailing Address: P.O. Box 387
Shawnee Mission, Kansas 66201-0387

Honorable John Solbach
Chairman, House Judiciary Committee
State Capitol, Room 115S
Topeka, Kansas

RE: HB-2394
Prejudgement Interest

Farmers position: OPPOSE

Dear Representative Solbach:

Farmers is committed to keeping the premiums of our policyholders as low as possible. As such we are particularly sensitive to the additional costs litigation brings, especially unnecessary litigation.

It is our concern that with this type of prejudgment interest legislation, plaintiff attorneys may be encouraged to litigate rather than negotiate, in order to avail themselves of the interest on the claim.

It is to our policyholder's benefit that we strive to settle fairly, expeditiously and without litigation the claims we owe. This is one of the reasons why we go to the lengths we do to train our claims representatives and claims management in effective claims investigation and evaluation procedures.

To incur the considerable costs of hiring defense counsel for litigated claims, when reasonable and fair unlitigated settlements could and should be made, will only add to the overall cost of insurance.

Sincerely,

FARMERS INSURANCE GROUP OF COMPANIES

Lee Wright
Kansas Legislative Representative

cc: Members House Judiciary Committee

LW/skb

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Attachment # 11
2-27-91

FAST, FAIR, FRIENDLY SERVICE

February 27, 1991
Kansas Land Trust
Rt. 2, Box 394A
Lawrence, KS 66046
913-842-1203

Dear House Judiciary Committee Members,

We appreciate the opportunity to speak to you concerning conservation easements. The Kansas Land Trust is a non-profit organization that was incorporated in July 1990. Our stated purpose is "to promote, for the benefit of the general public, the preservation of the natural, recreational, scenic, and agricultural values of land."

One of the goals of the Kansas Land Trust is to allow the State of Kansas to have the same options that other states use to protect land resources. Therefore in order to that, we recommend that the current conservation easement Kansas Statute (KSA 58-3803) be repealed and that the Uniform Conservation Easement Act (House Bill No. 2375) be adopted.

A conservation easement is a legal agreement a landowner makes to restrict the type and amount of development that may take place on his or her property. People grant conservation easements to protect their land from inappropriate development while retaining private ownership. This assures the owner that the natural character of the property will be protected indefinitely, no matter who the future owners are. Donors of a conservation easement retain title to the property and continue to possess and manage it. Granting an easement can also yield federal tax savings. Each easement's restrictions are tailored to the particular property and to the interests of both the easement holder and the property owner.

Current Kansas law allows easements to be held only by governmental agencies and only for wetlands and riparian areas. In order to give landowners the right to protect their land, legislation is needed to allow for the use of conservation easements by non-profit organizations (such as the Kansas Land Trust and the Nature Conservancy) and to allow easements to be held for other types of land--prairies, woodlands, other natural areas, and farmland. These limitations to our existing statute can be remedied through adoption of House Bill No. 2375.

Since 1981, the Uniform Conservation Easement Act has been adopted by 11 other states. Many other states had enacted laws similar to it before the Uniform Act was established. Conservation easement laws in other states have been non-controversial, and have provided landowners additional land protection rights and benefiting the public through protection of natural areas, open space, and farms.

The adoption of the Uniform Conservation Easement Act will not cost the State of Kansas money because there are no funds

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needed for a program accompanying this statute change. Costs associated with management and oversight of conservation easements can be borne by non-profit organizations, such as the Kansas Land Trust and the Nature Conservancy. In fact, from a conservation perspective, this program will save the state of Kansas money, as protection of natural areas and creation of recreational opportunities will be able to occur without the need for money from the state government. Also, non-profits are needed for protecting land through conservation easements as they do not have the appearance of conflicts of interest that government entities do related to partisan politics and the helping of developers and farmers to receive federal tax breaks.

BENEFITS OF CONSERVATION EASEMENTS

The benefits of conservation easements that the Uniform Conservation Easement Act will allow, will include:

1) land can be protected while still remaining as private property; only the development rights have been given or sold to a governmental body or non-profit conservation organization;
2) the landowner can get federal tax advantages and can reduce their inheritance tax;
3) easements will benefit wildlife, wildlife habitat, and will protect endangered species;
4) easements can only be granted on a voluntary basis; that is, only willing landowners can grant an easement;
5) easements can protect farming operations in areas where they are threatened by urban sprawl;
6) easements do not cost the state money and the land is maintained on the local tax rolls.

AN EXAMPLE OF A POTENTIAL CONSERVATION EASEMENT

An example of an easement that the Kansas Land Trust would like to obtain would be for a 30-acre natural area, a native prairie hay meadow. This land is similar to the Elkins Prairie, located near Lawrence in an area that due to its proximity to the Kansas Turnpike is experiencing rising land values and housing development. This is one of the few native prairie tracts remaining in the area and has rare plant species on it. With the passage of this statute, we would approach the absentee land owner and explain to them what conservation easements are, and how they could potentially receive a tax advantage on their federal taxes by donating us their development rights. At the same time, the land would remain as their private property. If they were interested in granting us an conservation easement, we would also discuss how they would manage the land to suit our mutual purposes, and explain that we would inspect the land once a year to make sure that the management agreement would be upheld.

USE OF CONSERVATION EASEMENTS IN OTHER STATES

There are over 850 land trusts nationwide working to protect land through a variety of means--purchase and conservation easements being the two main ones. Some of these organizations are decades old and they have a track record of good management.

These organizations have worked quietly and effectively. Examples from other states include:

1) Pennsylvania: The Lancaster County Agricultural Preservation Board is directed by a former Kansas State University professor--Tom Daniels. He administers their county program as part of the Lancaster Farmland Trust, which protects 9,000 acres of farmland (half of this acreage is protected by conservation easements). The nine year-old program covers approximately 95 farms. They do not have any major opposition to this program which is working with farm organizations to protect farmland in their county.

2) New Hampshire: The Trust for New Hampshire land has over 71,000 acres of land (primarily forested) protected through easements across the state. They receive donations for their program from many individuals, banks, and utilities, such as New England Power Company and New England Telephone Company.

3) Montana: The Montana Land Alliance has 36 large conservation easements that are protecting 78,000 acres of agricultural land. This organization has also received broad support. Its board of directors is primarily composed of ranchers and the organization receives donations from many individuals, the Burlington Northern Railroad, Chemical Bank, Rockwell (Aerospace) Foundation, and the Bank of Montana. They have reported no opposition to the easements that they have received.

POTENTIAL QUESTIONS

Q. Will an easement protect the land for future generations?
A. Yes, it is a legal interest in the land that is binding in perpetuity. An organization, such as the Kansas Land Trust, can make sure that the easement is honored.
Q. Do conservation easements condemn land in private ownership?
A. Emphatically not. Easements are a completely voluntary arrangement. They do not require any change in ownership, and the land remains privately owned.
Q. Can conservation easements block development?
A. No. Even if some organization would try, conservation easements would not be able block development projects because easements can only be given on a voluntary basis and the rights of eminent domain supersede conservation easements and can be used by utilities, and by governments to build public projects such as roads, schools, and hospitals.
Q. Can conservation easements encourage economic development?
A. Yes, conservation easements can stimulate a higher quality of development, with low development costs and a higher return on neighboring lands (much like golf courses increase the value of land immediately surrounding them, while reducing the developers up-front costs by not constructing as many streets and utilities). By making a community more attractive to live in, they can attract new residents and businesses.
Q. Will conservation easements interfere with public utilities?
A. No, utility companies will retain all rights of access.

Sincerely,

Kelly Kindscher

STATEMENT OF DR. RAMON POWERS, EXECUTIVE DIRECTOR, KANSAS STATE HISTORICAL SOCIETY, BEFORE THE HOUSE COMMITTEE ON JUDICIARY IN RE HB 2375, FEBRUARY 27, 1991

The State Historical Society has consistently supported and testified in favor of legislation that permitted conservation easements for properties of historical, architectural, archeological, or cultural importance.

My comments on House Bill 2375 today will be limited to its relationship to easements on those types of properties. House Bill 2375 would replace the existing conservation easements legislation with the uniform conservation easement act. This agency can support that act in concept but we have one concern which I will identify shortly.

An easement is a legal agreement between a property owner and the holder of the easement. It governs the current and future owners' treatment of the property and transfers an interest or right in a property that falls short of outright ownership. For example, a property owner concerned about the long term preservation of a historic building in his or her ownership could by sale or donation transfer the development rights on that property to an easement holding entity. That entity would thus be given the right by the instrument of easement to protect the historic qualities, features, materials, etc., identified in the easement document and to enforce proper maintenance and care of the property.

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A conservation easement is presently one of the tools available to people, communities, and groups seeking to preserve historic properties. Currently state statutes recognize the validity of such conservation easements but only permit governmental entities to hold easements. House Bill 2375 would permit charitable corporations to hold easements. This agency supports that principle, believing that local preservation groups, such as the Lawrence Preservation Alliance or Historic Topeka, Inc., are fully capable of managing and enforcing easements for historic buildings in their own community.

The State Historical Society would request one amendment to House Bill 2375. Lines 21 and 22 state that conservation easements can be used to preserve ". . . the historical, architectural, archaeological or cultural aspects of real property." The bill does not provide a standard for what constitutes a historical property. The current statute defines it as a property listed on either the national register of historic places or the state register of historic places. We would find that an acceptable standard but would also be willing to make eligible those properties designated as local historic landmarks through a process established by local historic preservation ordinances.

HOUSE
JUDICIARY COMMITTEE
HB 2375
February 27, 1991

The Home Builders Association of Kansas is submitting this written testimony in opposition to House Bill 2375 which expands the purposes for which Conservation Easements may be granted from the "Wetlands and Riparian Areas" contemplated by the Conservation Section of the Kansas Water Plan. Some of the stated values are assuring land availability for agriculture, forest, recreational uses or maintaining or enhancing air or water quality and preserving the historical, architectural, archeological or cultural aspects of real property.

Current law protects the public's interest in natural, scenic or open spaces, wildlife habitat, agricultural, horticultural, recreational and forest values. Historical, architectural, archeological or culturally significant properties on the national or state registers of historic places are also currently protected. There has been no demonstration of the need for the additions found in section 1(a) of HB 2375.

HB 2375 would permit any charitable corporation, association or trust to create and hold conservation easements whereas current law permits only governments to be grantees of conservation easements. This issue was enjoined in 1987 when we testified that the Kansas Water Plan recommendation for creating conservation easements envisioned an exchange of the easement right for the expert advice and assistance of the state in preparing and implementing management plans for the wetlands and riparian areas covered by the grants. We testified that the ability to qualify as a charitable organization was no indicator of an organization's ability to administer such grants of real property interests.

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We also expressed concern that since conservation easements are transferable, it would be possible for such an organization to acquire and assemble conservation easements in a pattern which could be used to effectively block extension of public facilities such as streets, sewers and other utilities to areas which are not subject to conservation easements and thereby hold hostage the rights of private property owners unwilling to convey such easements to the organizations. Nothing in HB 2375 or in the testimony of proponents allays those concerns. Suggestions that powers of eminent domain override conservation easements are no assurance that a governing body would consider using its power of eminent domain to extend services to a proposed development landlocked by conservation easements.

Another new element which HB 2375 introduces into the conservation easement matter, is the creation of the authority for any person or organization eligible to hold conservation easements to enforce any of the terms of an easement regardless of the wishes of the grantor or grantee. We see this provision as an open invitation for groups to use the class action approach to descend on any proposed project or development with the hope of finding some flaw in the compliance with the terms of any conservation easement in the vicinity.

In closing, we urge your consideration of the concerns which we have expressed in this testimony and ask that you afford the state agencies time to test the provisions of the 1987 act which implemented the recommendation of the Kansas Water Plan.