IOWA LIABILITY AND LIABILITY INSURANCE STUDY COMMISSION

FINAL REPORT

December, 15, 1986

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Final Report

Co-Chairpersons
Senator Donald V. Doyle
Representative Daniel J. Jay

Legislative Members
Senator Richard F. Drake
Senator Julia B. Gentleman
Senator William D. Palmer
Representative John Groninga
Representative Roger Halvorson
Representative Kyle Hummel

Public Members
Mr. Frank Alexander
Mr. Donald C. Byers
Dr. William W. Eversmann, jr.
Mr. Thomas J. Vilsack

Ex Officio Members
The Honorable Thomas Miller, Attorney General
William Hager, Insurance Commissioner

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The Iowa Liability and Liability
Insurance Study Commission
c/o Legislative Service Bureau
State Capitol Building
Des Moines, IA 50319
(515) 281-3884

The Honorable Bill Hutchins, Chairperson
The Honorable Donald Avenson, Vice Chairperson
Members of the Iowa Legislative Council

Dear Council:

The Iowa Liability and Liability Insurance Study Commission, created pursuant to Senate File 2265, section 44, does hereby state that the Commission has concluded its work and respectfully submits this, its final report, as mandated by the above referred Act of the Iowa General Assembly.

In preparatory remarks to the body of this final report the Co-chairpersons of the Commission would formally issue the following opinions and observations:

MEMBERSHIP

We wish to express our appreciation and commend the Legislative Council for its choices in appointments to the Commission. The extensive knowledge and varied backgrounds and viewpoints represented on the Commission ensured vigorous and well rounded debate of the difficult issues before the Commission and ensured the quality of its final work product. We would express special appreciation for the appointments of the public members - Mr. Alexander, Mr. Byers, Dr. Eversmann, and Mr. Vilsack. Their competence, experience, and integrity added greatly to the work of this Commission.

EX OFFICIO

We would note with appreciation that although the Attorney General and Insurance Commissioner were each authorized to designate another to serve on this Commission, both chose to serve personally. Their assistance and cooperation has proven invaluable to the Commission and to its final work product. The citizens of this state should be encouraged by having persons of such quality and character serving them in state government.

STAFF

Contained within this report is a list of those persons who devoted considerable time and effort to the Commission as its staff. Each is to be commended for their diligent efforts and for the quality of advice, information, and assistance they provided. It is inconceivable that the Commission could have completed its work without their assistance.

PROCEDURES FOR FINAL REPORT

Contained within this final report are recommendations of the Commission. The approval of a Commission recommendation for inclusion in this final report required the affirmative vote of at least seven members of the Commission

(excluding the votes of ex officio members). To ensure that dissenting opinions received proper recognition, the Commission has authorized the inclusion of minority recommendations within the report on the affirmative vote of three members (excluding ex officio members). Additionally, ex officio members, who were allowed voting authority on day-to-day Commission activities and drafting but who were not allowed voting authority on final recommendations have been invited to submit their position on any and all final recommendations of the Commission.

SUMMARY

We would like to bring to your attention the dedicated efforts of each and every Commission member in attending Commission meetings, providing direct opinions and insight, and forging a strong working relationship despite divergent professional and personal viewpoints. Only these efforts made it possible for the Commission to make progress on the numerous and complex issues it was mandated to study. However, even considering the ten formal meetings and the nearly one thousand member hours devoted to the task of the Commission, we must concede that much important work on these issues remains. It is hoped, however, that this final report and the material contained herein will provide assistance to the members of the Iowa General Assembly in making their own independent judgments as to the proper future courses of action.

The members of the Liability and Liability Insurance Study Commission would like to thank the Legislative Council and all the members of the Iowa General Assembly for the opportunity and privilege to serve you and the citizens of the state of Iowa.

Respectfully submitted,

Senator Donald V. Doyle,
Co-chairperson

Representative Daniel J. Jay,
Co-chairperson

LIABILITY AND LIABILITY INSURANCE STUDY COMMISSION

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LIABILITY AND LIABILITY INSURANCE STUDY COMMISSION

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Senate Republican Caucus
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House Republican Caucus
Margaret Thomson, Research Analyst

Division of Insurance
Denise Horner, Deputy Commissioner

Office of the Attorney General
Brent Appel, Deputy Attorney General

* The Staff would like to express its appreciation to the members of the National Conference of State Legislatures for their assistance throughout the work of this Commission. Their materials have been invaluable.

FORMATION OF AND CHARGE TO COMMISSION

The Liability and Liability Insurance Study Commission was created pursuant to statutory mandate in section 44 of Senate File 2265, which became law by publication on June 7, 1986.

Section 44 set out the size, membership requirements, mandatory study issues, assistance and expenses authorization, and required first meeting and final report dates. That section reads as follows:

Sec. 44. STUDY COMMISSION CREATED.

1. There is established a commission to study the issues involved in liability and liability insurance concerns. The commission shall be composed of twelve voting members and two ex officio members who shall be appointed as follows:

a. Two members of the house of representatives, by the speaker of the house.

b. Two members of the senate, by the senate majority leader.

c. Two members of the house of representatives, by the house minority leader.

d. Two members of the senate, by the senate minority leader.

e. Four members of the public as representatives of the public or private sector for industries, professions, local governments, or other particularly affected groups, appointed by the chairperson and vice chairperson of the legislative council, in consultation with the senate and house minority leaders and with the approval of the legislative council.

f. The attorney general or the attorney general's designee, who shall be an ex officio member.

g. The commissioner of insurance or the commissioner's designee, who shall be an ex officio member.

2. The commission's study shall include, but is not limited to, the following:

a. The implementation of maximum caps on liability payments.

b. The elimination of the collateral source rule.

c. The review of present insurance practices, including:

(1) A review and report on the feasibility and advisability of enacting a mandatory insurance disclosure Act.

(2) A review and report on the present level of industry regulation and the potential for increasing such regulation. This report should approximate the cost of any recommendations made.

(3) A review and report on the present powers, authority, and staffing of the insurance department.

(4) A review and report on the feasibility and advisability of enacting insurance assistance and risk management programs.

(5) Review and report on the advisability of implementing a claims-made form of insurance practice.

d. The review of alternative methods of litigating actions.

e. The review of alternatives to reduce nonmeritorious suits.

f. Review and report on the advisability of limiting tort liability of the state and municipalities arising from regulatory and licensing activities.

g. Review and report on the advisability of enacting a statute of repose for actions arising from improvements to real property.

h. Monitor and report on any operation savings in the insurance industry due to tort liability reform for the period from July 1, 1983 to present, including the effects of this Act, and the feasibility of mandatory rate adjustments for insurers to reflect such cost savings.

i. Other issues necessary to ensure fairness in the operation of the tort liability system.

3. The legislative council shall authorize the legislative fiscal bureau and the legislative service bureau to provide assistance to the study commission and may authorize funds for the study commission, which may be used for the following commission purposes:

a. Employment of a full-time staff person for the commission.

b. Employment of actuarial, insurance, and legal consultants.

c. Compilation, printing, and distribution of materials prepared by the commission.

d. Necessary expenses of travel, attendance, and participation in regional or national programs.

4. Public members of the study commission shall receive a per diem of forty dollars and be reimbursed for their travel and other necessary expenses actually incurred in the performance of their official duties. Public employees who are members of the study commission shall be reimbursed for travel and other expenses actually incurred in the performance of their official duties.

5. The study commission shall hold its first meeting within sixty days of its formation and shall transmit copies of its final report to the legislative council by December 15, 1986.

On June 18, 1986, the Senate Majority Leader, Senate Minority Leader, Speaker of the House, and House Minority Leader made their membership appointments to the Commission pursuant to the legislative mandate, the appointments of the public members were as representatives of the public or private sector for industries, professions, local governments, or other particularly affected groups. It was noted in their appointments that Dr. Eversmann was a practicing physician, Mr. Byers was Secretary and General Counsel to the Maytag Corporation, Mr. Vilsack was a practicing attorney, and Mr. Alexander was a United Auto Workers official.

The Commission held its organizational meeting on June 22, 1986. Included within its organizational preparations were the following:

I. ADOPTION OF RULES

The following were adopted as the Rules of Procedure for the Liability and Liability Study Commission by a unanimous vote of the members:

1. The Study Committee shall be composed of twelve voting members and two ex officio members, pursuant to the mandate of S.F. 2265.

2. Ex Officio members shall be considered members for purposes of the following rules 3 and 4, but shall not be considered members for purposes of the following rules 5, 7, 8, and 11.

3. Eight members shall constitute a quorum, but a lesser number of members may adjourn or recess the Commission in the absence of a quorum.

4. A majority vote of these present is necessary to carry all actions, other than actions with rules 5, 7, 8, and 11.

5. No recommendation to the Legislative Council may be adopted without the affirmative vote of at least seven members.

6. The final report of the Commission may include a majority and a minority report, but only the majority report shall be accompanied by recommended drafted legislation.

7. No recommendation relating to the majority report of the final report shall be adopted without the affirmative vote of at least seven members.

8. No recommendation relating to the minority report of the final report shall be adopted without the affirmative vote of at least three members.

9. Whenever Mason's Manual of Legislative Procedure does not conflict with the rules specifically adopted by the Commission, Mason's Manual of Legislative Procedure shall govern the deliberations of the Commission.

10. Meetings shall be set by motion before adjournment, or by the call of the Co-chairpersons of the Commission if meetings are necessary before the date set in the motion.

11. Rules of procedure may be changed or suspended by an affirmative vote of not less than seven members.

II. FUTURE MEETING DATES AND AGENDAS

The Commission unanimously approved seven additional proposed meeting dates from July through December. The Commission also unanimously approved the structural outline of the agendas for each of the future meeting days. (*Although it was proposed to complete the work of the Commission with eight meeting days, a total of ten formal Commission meetings were held.)

III. COMMISSION STAFF

Although statutorily authorized to hire outside staff, the Commission chose staffing from in-house counsel of the Legislative Service Bureau. The stated reasons for the choice were the extra time it would take to seek out and hire outside staff and the additional expenses which outside staff would necessitate from state funds.

IV. HIRING OF ACTUARIAL, INSURANCE, AND LEGAL COUNSULTANTS AND EXPERTS BY THE COMMISSION

Although statutorily authorized to contract with outside consultants and experts, the Commission chose to work instead with existing state experts for the following reasons:

1. Private consultants and experts of this nature were extremely costly.

2. State based resources were available for similar assistance.

3. The Commission would be working within time constraints prohibiting full actuarial or closed-claims study formats.

4. Contracting with private concerns would not be cost effective until greater detail and specificity about information needs were developed.

V. REVIEW OF ISSUES TO BE STUDIED

The Commission noted that the following issues were statutorily mandated to be studied by the Commission:

1. Maximum caps on liability payments.
2. Elimination of the collateral source rule.
3. Alternative methods for litigating actions.
4. Alternatives for reducing nonmeritorious suits.
5. State and municipal liability for regulatory activities.
6. Statute of repose in improvements to real property.
7. Mandatory insurance disclosure.
8. Increasing level of industry regulation.
9. Review of present powers, authority and staffing of state insurance department.
10. Claims-made form of insurance practice.
11. Mandatory rate adjustments for insurers to reflect tort reform cost savings.

Included within the statutorily mandated issues of study was the requirement that the Commission's study include "other issues necessary to ensure fairness in the operation of the tort liability system".

Following Commission discussion on this requirement, the following list of additional issues was adopted by the Commission for consideration:

12. Civil liability consequences of failure to wear a seatbelt.
13. Statute of repose for products liability.
14. Impact of prejudgment interest.
15. Establishment of cap on noneconomic damages.
16. Further restrictions on punitive damages.
17. Return to fault-based liability.
18. Effects of insurance crisis on economic development.

19. Isolation of statutory and case law changes in Iowa tort liability system since 1970.
20. Limitations on contingency fees.
21. Mandatory structured judgments.
22. Statutes of limitations for minors and incompetents.
23. Workers compensation system improvement and expansion.
24. Mandatory arbitration and/or mediation at minimum dollar level.
25. Impact of tort reform on the availability and affordability of liability insurance.

During subsequent meetings, additional study issues were added. These issues included, but were not limited to, the following:

26. State-based insurance experience rating requirement.
27. Insurance system data collection programs.
28. Judicial department and district court litigation data collection programs.
29. Plaintiff and defense attorney fees and costs reduction.
30. Discretionary function exemption redrafting for municipal entities.
31. 613A.5 notice provision redrafting for municipal entities.
32. Interface of Workers' Compensation System with Comparative Fault Act.
33. Market regulation of insurance rate making.
34. State created insurance availability mechanisms.
35. Flex-band rating regulation system.

REGULATORY REFORM OF THE INSURANCE INDUSTRY

There is little argument that regulation reform has become a major issue for states attempting to work through the present "insurance crisis", and to protect against the reoccurrence of similar problems in the future. There are several reasons most often given for the reason why states have become so involved with insurance industry regulation:

1. Federal Inactivity: In 1944, the United States Supreme Court held that the insurance industry was subject to federal regulation (United States vs. South-Eastern Underwriters Association, 322 U.S. 533). However, immediately following that decision Congress enacted the McCarren Act of 1945 (59 Stat. 33, U.S.C. section 1011 et seq.) which essentially stated that the federal position on insurance regulation was to leave it to the states.

2. Industry Size: Recent estimations place the number of individuals directly employed within the insurance industry at 1,895,000. The liability interests are most often confined to the category of property and casualty insurances. Recent estimations place direct employment of P & Cs at 500,000, with an additional 250,000 persons indirectly employed. The P & C segment of the insurance industry is responsible for assets of approximately 300 billion. Of the 5,000 to 6,000 insurance companies based in the United States and operating under the supervision of regulatory authority in the various states, approximately 3,500 of these companies sell some form of P & C coverage. However, the vast majority of the business written is by approximately 900 companies operating nationwide.

3. Nature of Insurance: An insurance policy, by its nature is an anticipatory contract for future protection/services. Due to its anticipating nature, consumers must be assured that the protection paid for will be available when needed (solvency) in order to use the product. Further, consumers must be assured that there will be recourse if paid for protections do not become available.

4. Complexity: The complex nature of insurance industry activities and the financial, economic, and legal foundation upon which it operates make it impossible for the ordinary consumer to have sufficient personal knowledge upon which to base all purchase decisions relating to the form and substance of the insurance policy.

5. Resource Availability: The shear size and resources available to an insurance company or industry, as compared with that of the ordinary consumer, make it impossible for the consumer to deal with the insurer on a ground of equal footing thus increasing the regulatory role of assistance to the customer for purposes of leverage.

6. Pervasiveness: The extent to which insurance has become and is promoted as an integral part of daily individual and business, public

and private, dealing statewide and nationwide requires that regulation take into consideration the needs of society in general; as well as the needs of the contracting parties.

The above setout rationales for state regulation of the insurance industry make it apparent why the state insurance departments and legislatures have become the focus of insurance industry regulation reform debate. The increasing "crisis" nature of calls for reform require that these state entities increase their public duties relating to insurance regulation -- both for the protection of individuals and society and for the protection of the insurance industry. These increased duties seem to fall within six areas of activity:

1. Stability of system.
2. Solvency of companies.
3. Review for excessive rates.
4. Review of adequacy of rates.
5. Market availability.
6. Redress availability.

A review of state direction in insurance industry regulation reveals that every state has a department of insurance, administered by a commissioner, director, or superintendent. The authority by which the commissioner, director, or superintendent is placed in office and the applicable term of the office differ among the various jurisdictions.

Those appointed by the Governor, and term, include:

Alabama (indefinite)
Alaska (indefinite)
Arizona (indefinite)
Arkansas (indefinite)
California (term of gov.)
Colorado (indefinite)
Connecticut (4 years)
Idaho (indefinite)
Illinois (indefinite)
Indiana (indefinite)
Iowa (4 years)
Kentucky (indefinite)
Maine (5 years)
Massachusetts (4 years)
Michigan (4 years)
Minnesota (indefinite)
Missouri (indefinite)
Nebraska (indefinites)
Nevada (indefinite)
New Hampshire (5 years)
New Jersey (indefinite)
New York (4 years)
Ohio (indefinite)
Pennsylvania (indefinite)
Rhode Island (indefinite)
South Dakota (indefinite)
Tennessee (4 years)
Utah (4 years)
Vermont (2 years)
West Virginia (indefinite)
Wisconsin (4 years)
Wyoming (indefinite)

Those elected, and term, include:

Delaware (4 years)
Florida (4 years)
Georgia (4 years)
Kansas (4 years)
Louisiana (4 years)
Mississippi (4 years)
Montana (4 years)
North Carolina (4 years)
North Dakota (4 years)
Oklahoma (4 years)
Washington (4 years)

Those appointed by authority other than governor, and term, include:

Hawaii (appointed by Director of Commerce and Consumer Affairs, indefinite)
Maryland (appointed by Governor and Secretary of Licensing & Regulation, indefinite)
New Mexico (appointed by State Corporation Commission, indefinite)
Oregon (appointed by Director of Commerce, indefinite)

South Carolina (appointed by Insurance Commission, indefinite)
Texas (appointed by Board of Insurance, indefinite)
Virginia (appointed by State Corporate Commission, indefinite)

The central duty of the insurance commissioner, director, or superintendent is to ensure implementation of insurance law as enacted by state legislators and interpreted by the courts. However, as such, the commissioner, director, or superintendent may also exercise broad discretionary power in emergency situations. Within their primary charge is to ensure the solvency of insurance companies and provide oversight so that rates are adequate but not excessive or discriminatory, through financial exclamations and trade practice regulation. Within this primary charge is the legislated function of implementing state rating laws, which provide the means by which insurance companies are allowed to change their rate schedules. The type or manner of this rate regulation differs from jurisdiction to jurisdiction, but generally falls within one of five types:

(1) Prior Approval -- where rates must be filed with and approved by the state insurance department before they can be used, although approval may be "deemed" if rates are not disapproved within a specified number of days.

Arkansas
Colorado - if noncompetitive market
Connecticut - personal lines, noncompetitive market only
Delaware
District of Columbia - property
Hawaii - except automobile
Iowa
Kansas
Mississippi - alternate methods for fire and casualty
Missouri
Nebraska
New Hampshire - automobile only
New Jersey - personal lives and commercial noncompetative market
New York
North Dakota
Ohio - property, except automobile
Oklahoma - except homeowners
Oregon - commercial casualty
Pennsylvania - except automobile
Rhode Island
South Carolina
South Dakota - except automobile
Tennessee - personal lines
Texas - except some rates set by state
Vermont - noncompetitive personal lines only
Washington - personal lines and professional liability
West Virginia

(2) Modified Prior Approval -- rate revisions involving change in expense ratio or rate relatively require prior approval. Rate revisions based on experience only are subject to "file and use" laws:

Alabama
Indiana

Louisiana

(3) File and Use -- rates must be filed with the state insurance department prior to their use. Specific approval is not required, but most often the insurance department retains the right of later disapproval.

Arizona - noncompetitive market
Arkansas
Connecticut - except personal lines, noncompetitive market
District of Columbia - casualty
Kentucky - noncompetitive market
Maine
Maryland - except medical malpractice
Massachusetts - except medical malpractice rates set by commission
Michigan
Minnesota
Montana
Nevada
New Hampshire - except automobile
North Carolina
Ohio - casualty, except automobile
Oklahoma - homeowners only
Oregon - except commercial casualty
South Dakota - automobile only
Virginia - except medical malpractice, uninsured restraints
Washington - commercial lines

(4) Use and File -- rates must be filed with the state insurance department within a specified period after they have been placed in use.

Arizona - competitive market
Florida
Georgia
Hawaii - automobile only
Illinois - by regulation
Kentucky - competitive market
Missouri
New Jersey - commercial, unless noncompetitive market
New Mexico
Tennessee - commercial lines
Utah
Vermont - competitive market, personal lines only
Wisconsin
Wyoming

(5) No File -- rates not required to be filed with or approved by the state insurance department. However, a company is required to maintain records of experience and other information used in developing rates and make these available to the commissioner upon the commissioner's request.

California
Colorado - except when noncompetitive market
Idaho
Vermont - commercial
Wyoming - if competitive market

Current debate regarding the various types of rating laws of recent years seems to focus on the inadequacy of rates for the last several years and the best type of rating law. Progressing from prior approval to no file, critics contend that the further from prior approval a state gets, the less control the state has in discouraging collusion or discouraging underpricing of the product under conditions of increased competitiveness. Due to the facts and statistics now available regarding the past several insurance years, the fear of inadequate rates may have had a rational basis. However, problems due to inadequate rates seem to have afflicted states of all rating types; indicating that other factors must be involved.

Issues Addressed Through Efforts of States in Recent Years

(1) Undercapitalization: Development of state laws which regulate the entrance of new companies into the field through the issuance of charters which set minimum capital requirements for new companies on the rationale that one of the major causes of financial difficulties of some insurance companies is that they were undercapitalized when they entered the market in the early 1980's.

(2) Understaffing: Development of insurance department staffing patterns which increase the number and use of staff actuaries to provide effective oversight of the insurance industry. The primary function of the actuaries is to calculate insurance and annuity premiums, reserves and dividends. Their ability to analyze the cost of insurance coverage through assessment of the probability of loss occurrences enables them to oversee prices which are fair to the consumer and also enables companies to make reasonable profits. Continuing criticisms are leveled against insurance departments which continue to rely on insurance reports, rather than actuarial analysis; and for the failure to have few if any actuaries on staff.

(3) Reporting: Major concern has risen that evaluating problems in the industry relates to the need for the collection of adequate data and its compilation in a form that is usable and understandable. It is said that often insurance data is a collection of aggregate data that does not allow an analysis of individual lines of insurance.

The method and manner of the industry, including such key items as accounting methods, differs between companies and causes confusion in overall reporting. For example, reports issued regarding the insurance industry loss/profit for 1985 range from a low of $5.5 billion loss to a high of $1.7 billion profit. This wide swing is easily seen as the result of such variables as the treatment of returns on investment, insurer IRS reports relating to future losses on present underwriting, and other similar items. In response to these differences, many states have begun to hear the call for expanded financial reporting requirements and uniform analysis of such information.

A list of primary indicators of insurance practices, determined useful in the uniform reporting and analysis of insurance data, include, but are not limited to, the following:

Premiums earned
Premiums written
Number of claims
Number of new claims during reporting period
Number of claims closed during the reporting period, and actual payouts
Number of claims outstanding at the end of the reporting period
Total losses incurred
Total losses incurred as a percentage of premiums renewed
Total number of policies in force on the last day of reporting period
Total number of policies canceled
Total number of policies nonrenewed
Net underwriting gain or loss
Separate allocations of expenses for commissions, other acquisition costs, general office expenses, taxes, licenses and fees, and other expenses

(4) Claims-made Practice: Claims-made policies cover only claims submitted during the term of the policy. Generally, insurance companies have issued occurrence policies, which cover any incident occurring during the policy period. This creates difficulty in calculating the losses to be paid out since claims may be filed many years after the expiration of the policy. However, a key problem that needs to be solved in any shift from "occurrence" to "claims made" is how to fill the "windows of time" in coverage for those few claims that occur after the policy but before the applicable statute of limitations. Such a shift must be accompanied by some form of discussion concerning excess protection, guarantee funds, or canceled policyholder protections.

(5) Mid-term Cancellations: Recently, the occurrence of cancellations of insurance policies during the middle of the policy term, including mass cancellations of entire lines of insurance with little respect for individual risk records, has not been uncommon.

Mid-term cancellations create difficulties during normal years of the insurance cycle, but can be especially troublesome in periods when the markets are already tight. Of particular concern to those canceled is the frequent lack of loss data presented to justify cancellations. Most prevalent among the proposals to alleviate this problem are: (1) the extension of notice requirements for cancellations, (2) prohibitions against cancellation unless specific justification is presented (i.e., failure to pay premium or a substantial change in the risk involved), (3) including mid-term cancellations, short notice cancellations, redlining, and nonrenewals without cause or for other than specified conditions as unfair trade practices. On the specific issue of mid-term cancellations, the following states have taken action to modify cancellation procedures as of May 1, 1986.

State	Method	Covering
Alabama	Administrative Bulletin	Property/casualty
Arizona	Circular letter, 8/15/85 Legislative enactment (H.B. 2375)	Commercial lines

Arkansas	Administrative Directive No. 1-85, 1/7/85	Property/casualty
California	Administrative letter, 7/26/85	Commercial lines
Connecticut	Legislative enactment (H.B. 5400)	Commercial lines
Delaware	Administrative Bulletin No. 85-7, 9/18/85	Commercial lines
Florida	Administrative Bulletin 85-279, 8/13/85	Property/casualty
Idaho	Administrative Bulletin No. 85-1	Property/casualty, commercial
Illinois	Legislative enactment (S.B. 907)	Property/casualty
Indiana	Bulletin 50, 8/21/85	Property/casualty, commercial
Kansas	Legislative enactment (S.B. 512)	Commercial lines
Kentucky	Legislative enactment (S.B. 339)	Commercial lines
Louisiana	Administrative Directive No. 58, 7/12/85	Commercial lines
Maine	Legislative enactment (Public Law 671)	Commercial lines
Maryland	Administrative Bulletin	Commercial lines
Massachusetts	Administrative case-by-case basis, according to policy language	Property/casualty
Michigan	Administrative - voluntary standards effective 1/1/86 through 12/13/86	Commercial lines
Minnesota	Legislative enactment (S.F. 2078)	All lines
Montana	Administrative emergency rules, 7/19/85	Property/casualty
Nevada	Administrative Amendment to Rules 687B.510, 6/20/85	Commercial, all property/casualty
New Jersey	Emergency Regulations N.J.A.C. 11:1-20.1; amended 11/16/85 (limited scope of regulation by deleting surplus lines, fidelity and surety bonds). Proposed regulation (3/3/86) would exempt personal lines.	Property/casualty

New Mexico	Insurance Code (1984) sec. 95A-18-29	Commercial lines
North Carolina	Administrative Bulletin, 12/85	Commercial lines
North Dakota	House Concurrent Resolution No. 3082	Property/casualty
Ohio	Emergency Rule 10/23/85 become permanent 1/18/86	Property/casualty
Oklahoma	Legislative enactment (H.B. 1424), 1985	Commercial lines
Oregon	Administrative Rules Chapter 836, Division 85 - Insurance Division, 9/19/85	Commercial lines
Pennsylvania	Administrative Rules, 8/9/85	Property/casualty
Rhode Island	Statutory	Property/casualty
South Carolina	Emergency Rule 10/17/85, expires 11/17/86; legislation pending, companion bills S. 797, H. 3234	Property/casualty
South Dakota	Enacted legislation (H.B. 1265) amends provisions of mid-term cancellation law enacted in 1985	Property/casualty
Tennessee	Enacted legislation (H.B. 1582)	
Texas	Bulletin, 6/25/85	Commercial lines
Utah	Legislation enacted	
Virginia	Legislation enacted (H.B. 140)	Commercial lines
Washington	Legislation enacted (S.B. 4541)	Commercial lines
West Virginia	Legislation enacted (S.B. 714)	Property/casualty
Wisconsin	Administrative Bulletin, 8/31/85	Commercial lines
Wyoming	Legislation enacted (Enrolled Act No. 49)	Property/casualty

(6) Market Assistance: Many states have moved toward the establishment of market assistance plans to help specific lines obtain coverage. Generally, a market assistance plan involves a request from a state insurance department to insurance companies operating within the state to voluntarily write certain types or classes of risks. Communication is then established between those in need and those who may write. The method of the establishment of such assistance plans varies, but includes the following:

Alaska	- Administrative implementation of information plans enabling those with strong risk management programs to obtain insurance coverage.
Arizona	- Administrative action 1/15/86
Arkansas	- Administrative 1/87
California	- Implemented for day care lines only
Colorado	- Administrative 5/1/86
Connecticut	- Legislative
Florida	- Administrative 2/1/86
Illinois	- Administrative 12/2/85
Indiana	- Administrative V-mp 3/1/86
Iowa	- Legislative (authority for insurance commissioner to begin)
Kentucky	- Administrative (still proposal stage)
Michigan	- Administrative (open line) (1984)
Mississippi	- Administrative 10/85
Missouri	- Administrative 3/86
New Hampshire	- Administrative 8/1/85
New Jersey	- Administrative 3/3/86
New York	- Voluntary market assistance plan for municipal liability coverage already in place
North Carolina	- Administrative 12/85
Ohio	- Administrative 11/1/85
Pennsylvania	- Administrative 1/6/86
Rhode Island	- Administrative 1/7/86
South Carolina	- Administrative 9/85 (created by South Carolina Department of Insurance and operated jointly with Independent Insurance Agents of South Carolina)
Tennessee	- Administrative 6/85
Texas	- Administrative 3/86

Utah	- Legislative
Vermont	- Administrative 1/20/86
Virginia	- Administrative 1/17/86
Washington	- Legislative

(7) Joint Underwriting Associations: Institution of a statutory plan which designates a limited number of insurance companies as servicing carriers for particular lines. There is also a movement toward considering standby authority for the insurance department to require mandatory participation in joint underwriting authority in critically underserved areas. The past history of JUAs has been somewhat sparse, with the exception of the medical malpractice area. States with this type of approach include:

Arizona	- Legislative enactment
Connecticut	- Legislative enactment
Delaware	- Legislative enactment
Kentucky	- Legislative enactment
Maine	- Legislative enactment
Minnesota	- Legislative for dram shop and medical malpractice, general proposes to be implemented later
Montana	- Legislative enactment for general coverage
New York	- Proposed - effective date 1/1/87, with possibility of establishment of discretionary JUA
North Carolina	- 1977 North Carolina supreme court struck down state's authority to mandate insurance company participation in JUAs, but legislature recently enacted legislation which authorizes, on a standby basis, the Insurance Commission to establish JUAs
Rhode Island	- JUA for medical malpractice
South Carolina	- Insurance Commissioner has been empowered to establish a JUA for any professional group unable to obtain coverage
Utah	- JUA triggered if market assistance plan fails
Vermont	- Legislation effective 6/1/86
Washington	- Enacted legislation establishing a task force to study the effectiveness of JUAs through the United States to specifically determine (1) the price as it relates to a filed insurance services organization rate; (2) the solvency of such mechanisms; (3) the effect it has on the admitted market; (4) the effect it has on the nonadmitted

market; (5) the effect or availability on the voluntary market; (6) what effect it has on lines or classes of insurance not designated

(8) Review of standards to address the practice of underpricing premiums to obtain larger market shares:

Responsibility for the current crunch is said to be due in part to cash flow underwriting. Misclassification, misrating, and an abuse of individual risk premium modification plans were possible due to broad regulatory and statutory language. Many states are reviewing language related to adequacy of rates as well as changing reporting requirements in order to avoid such occurrences in the future. However, the political feasibility of mandating higher insurance premiums has been questioned.

(9) Tie Rate Schedules to Risk Management Efforts: In some cases, higher rates are justified by increases in risks of negligent activities and a general past disregard for safety practices. Many states are emphasizing improved risk management through adoption of risk management programs. (Alaska has actively pursued this course and reports significant success).

(10) Other Issues: Currently the number and range of additional proposals being considered is only restricted by the imagination and innovation of those involved. Examples of such other proposals include:

a. Increased professional staffing, particularly the addition of actuaries;

b. Creation of a state insurance fund to provide coverage for groups where coverage is deemed essential to the public welfare;

c. Establishment of reinsurance mechanisms (public and private); and statutory authority for banks and brokerage houses to enter the reinsurance portion of the insurance industry in several states (perhaps in under-served under-served lines only);

d. Authorization of group commercial liability insurance for companies meeting minimum capitalization standards;

e. General review of capitalization requirements for all new companies; requirements related to excess profits;

f. Providing funding of an alternative insurance unit in the department of insurance to affirmatively assist groups looking to "self-insurance" or "bulk purchase"; and

g. Designation of "critically under-served lines" and statutory authority to allow premium tax offset for insurers willing to write these lines for a prescribed period of time (to be phased out as crisis abates).

USE OF REGULATION RESOURCES

PRESENT STAFFING PATTERNS

One of the major concerns which came to the attention of this Commission is the ability for the present staffing pattern, and indeed the staff itself, of the insurance department to adequately oversee and regulate the business of insurance within the state.

This concern, however, is not limited to the state of Iowa. Many other states have been urged to adopt - and are at least moving toward the development of insurance department staffing patterns which increase the number and use of staff actuaries to provide effective oversight of the insurance industry. The primary function of the actuaries would be to calculate insurance and annuity premiums, reserves, and dividends. Their technical expertise to analyze the cost of insurance coverage through probability assessment of future loss occurrences in theory provide the actuaries with sufficient information to oversee prices which while fair to the consumer - also allow the insurance companies to make a reasonable return on investment. The bulk of the criticism comes when insurance departments rely upon insurance reports - rather than self-gathered and verified actuarial analysis.

Presently, Iowa does not have actuarial expertise or staff for property/casualty insurance review purposes. This may be for many reasons, but we can assume that the major two are the past disinterest with self-generated actuarial data and the somewhat prohibitive cost of top flight actuaries.

Whatever the reasons for the <u>past</u> reluctance to use actuaries, it would seem that there is at least now a renewed interest in the concept. Included within the scope, expertise and operation of proposed actuaries could be the following items - each of which the Commission expresses interest in:

1. Actuarial analysis of rate filings.
2. Auditing of submitted loss data.
3. Conducting of rate hearings and performance as an expert witness.
4. Formatting and dispensing of data.
5. Public education.
6. Identification of impending problem areas.
7. Assisting in the company examination process.

Of course, the costs may still seem prohibitive - but can be spread amongst those taking advantage of the rate reviewed increases or decreases.

CHOICE OF RATING LAW TYPE

The state department of insurance then is charged with reviewing the rates charged and proposed by insurance companies. The legislature, however, must first indicate to the insurance department the type or method of rating law which they wish the insurance department to use in reviewing rates.

In any type of rating law, the emphasis of the insurance department will in essence remain the same:

First - Solvency of the insurer

Second - Reasonableness of the rate

Third - Prohibition of discrimination

However, the mandated method of rating law type can impact the insurance system in a number of ways - with two specific items being:

First - speed with which insurer can implement rates reflective of current market conditions and solvency requirements

Second - extent to which an insured can rely upon the fact that a particular rate has been reviewed for reasonableness with expertise beyond individual insured's capacity

For example, if the mandated method of rating law type is prior approval for a specified insurance line - the speed with which a new rate can be implemented is reduced but the extent to which the insured can be assured of expert review is increased.

There presently exist five theoretical types of rating law:

Prior Approval - the insurance department must approve any rate changes prior to their implementation

Modified Prior Approval - substantial (%) or fundamental (character) rate changes musts receive approval prior to implementation, while other rate changes are subject to rate laws of lesser degrees of scrutiny

File and Use - proposed rate changes must be filed with the insurance department prior to their implementation, with the department retaining the right of refusal for a specified number of days. (Refusal automatically reverts the rate back to its previous

level either from the date of implementation or the date of refusal

Use and File - proposed rate changes may be implemented immediately, but the change must be filed with the insurance department within a specified number of days after its implementation, with the department retaining the right of refusal for a specified number of days after filing (refusal automatically reverts the rate back to its previous level either from the date of its implementation or the date of refusal

Open Competition - Proposed rate change need not be approved by nor filed with the insurance department - rather, the insurers must maintain rate development records and make such records available to the insurance department upon request - with the insurance commissioner authorized to take action when necessitated by solvency, reasonableness, or discrimination.

Placed upon a spectrum representing, for the lack of more appropriate words, the least restrictive to the most restrictive type of rate law method, the types would be located as follows:

Open Competition	Use and File	File and Use	Modified Prior Approval	Prior Approval

Additionally, rating law methods may differ by insurance lines - for example, one rating law method used for medical malpractice while another is used for personal lines. The more lines covered by a particular rate law method dictate its character on the above spectrum, and the resources necessary for review.

Discussion presently centers around the issue of whether adequate insurance department resources exist to effectively carry out the full intent of the mandated rate law method. However, the central focus for this debate must reside with the insurance department in order to determine whether resources can be effective at the mandated level.

If the focus of our present discussion is increasing the effectiveness of insurance department regulation, one might review the effect of the present mandated rating law method in Iowa on the resources of the insurance department.

Iowa is presently a full prior approval state for all lines -meaning that the insurance department is statutorily charged with fully reviewing all rate filings prior to their implementation. In order to determine whether the statutory mandate is being met is fairly simple. We ask the insurance commissioner a question:

"Mr. Commissioner, is it your opinion that the prior approval review of rate filings is presently being conducted in a manner which fulfills the legislative intent of full rate review?"

If the answer is yes - then there would seem little need to change our state status as a full prior approval system.

If the answer is no - (which it was) then there exist several alternatives to assist in helping the insurance department achieve the legislative intent of rate regulation.

First - increase the resources available to enable the department to fully review over six thousand rate filings a year prior to their implementation.

Second - decrease the mandate from full prior approval review to a lesser mandate of partial review or review of lesser scope and severity for all lines.

Third - decrease the mandate of review from full prior approval for all lines to only certain lines, with the others to receive a less severe and less time consuming review.

Again, perhaps the most appropriate way to begin consideration as to which of these options are correct choices is to ask the Insurance Commissioner a question regarding each:

"Mr. Commissioner, in regards to the first option, is it your opinion that it would be a cost effective use of funds to appropriate funds to the department sufficient for a full actuarial review of over six thousand rate filings a year prior to their implementation?" (The answer to which was no.)

"Mr. Commissioner, in regards to the second option is it your opinion that it would be advisable and feasible to reduce the degree of scrutiny of review for all lines of insurance presently mandated at prior approval?" (The answer to which was no.)

"Mr. Commissioner, in regards to the third option is it your opinion that it would be cost effective, advisable and feasible to reduce the degree of scrutiny of review of certain lines of insurance presently mandated at prior approval?" (The answer to which was no.)

Now, moving back to the goal of developing a rating law method which achieves the desired regulatory results yet which is such that the insurance department can meet the legislative mandate and intent - we can begin development of the possible alternatives in light of the insurance commissioner's prior opinions.

It seems apparent that if the movement is toward identifying which insurance rating lines are to be maintained at a full prior approval status and which are to be lessened in regards to review scrutiny - a benchmark must be created.

Some jurisdictions which have in the past experimented with such a bifurcated review system have not set benchmarks, but have instead specified the individual rating lines to be the subject of a specified rating law method.

For example, some jurisdictions have specifically identified the method for automobile, homeowners, personal lines, medical malpractice, commercial lines, casualty lines, fire and casualty, etc.... etc.

Others, however, have begun to move to a more flexible "benchmark" system. One promising movement is towards the Commissioner of Insurance designating which lines are presently noncompetitive, with competitive lines being assigned to a lower or less severe rate law method. This approach seems to generally follow the logical reasoning involved with insurance markets - i.e., when competition is strong - it creates the regulatory force but when competition is weak the insurance department needs to create the regulatory force. Although this seems the most logical approach, it does have one drawback that may need to be considered. In the last insurance cycle fierce competition, in conjunction with other factors, forced the rates too low - creating a particularly vicious backlash at the bottom of the cycle. Due consideration may need to be given to creating a watchdog mechanism for competitive lines regulated by less severe rate law methods to insure not that the rates are not unreasonably high -but rather that competition has not forced the rates unreasonably low.

CANCELLATION/NONRENEWAL

Through these Commission hearings, it became apparent that an occurrence causing major concern to insured individuals and entities was cancellation, nonrenewal, or end of policy term coverage decreases or premium increases. Such occurrences can be problematic even in times of soft insurance markets - but in these days of hard insurance markets such occurrences can be paralyzing to the insureds.

The current hard market has been especially troublesome in these respects. The measures which insurers and reinsurers have taken to stabilize losses and reestablish profitability in property/casualty underwriting have been particularly drastic due to the extended length and scope of the last insurance cycle. Not only is it now common for insurers to drop particular individuals or entity insureds - it is also now not uncommon for this to occur by means of mass cancellations or nonrenewal of entire lines of insurance. The problematic nature of such occurrences is exacerbated by the fact that such actions are now often based upon general industry perceptions - rather than on the individual claims history or risk exposure of the particular insureds.

There are, however, two sides to this story. The one we see most often is the insured complaining that they were cancelled or nonrenewed without justification. The other is the insurer who, based upon sound business judgment, must take action to cancel or nonrenew. An example on this side of the story is where the insurer receives notice from their reinsurer that coverage at the end of the present term will not include a previously covered risk. Insurance companies then are faced with two choices - attempt to find another reinsurer at short notice, or attempt to renew all present insureds to except the coverage excluded by the insurers reinsurer. On one hand the

insurers maintain that they must be allowed to cancel or nonrenew freely and according to their best business judgment on acceptable loss exposure - on the other hand the insureds maintain that cancellation or nonrenewal is unjustified according to their history of lack of loss exposure. Between these extremes is where state regulatory attempts to operate occur - and where a balance fair to both sides is attempted to be achieved.

In determining the appropriate nature and method of a state's regulation of cancellations and nonrenewals - the state needs to make many decisions. Most of the decisions have in the past been left with the insurance department, acknowledging the department's greater expertise and flexibility regarding regulation. However, there do exist several core considerations and decisions that lie with the legislative process that when enacted, provide the framework for the insurance department's individual and precise modifications.

These framework elements include:

1. Scope - extent of activities to be regulated

2. Notice -
   a. what type of notice will be required
   b. when notice will be required

3. Claims Information - insured's claims history notification

4. Enforcement - extent of powers and responsibilities of state regulatory enforcement for noncompliance

Moving to discussion of these core or framework elements, we attempted to analyze the necessary attributes of each.

#1 - SCOPE

Not only cancellation and nonrenewal can cause substantial problems for insureds. A more complete problem list includes:

Cancellation - complete revocation of coverage occurring prior to the expiration of policy term.

Partial Cancellation - Revocation of a portion of present coverage occurring prior to the expiration of policy term (also known at times as mandatory renegotiation).

Nonrenewal - Revocation of offer to continue coverage at the expiration of policy term.

Partial Nonrenewal - Revocation of offer to continue portion of coverage at the expiration of policy term.

Substantial Renewal Modifications - Requirement of new and substantial renegotiation of major provisions of renewal

Studies

There exist few recent studies regarding the effect of reducing the statute of limitations for minor plaintiffs in medical malpractice actions. Of the few that do exist, - there are none which conduct any type of substantive analysis.

We have attached an excerpt from the 1985 ACOG Survey of its members. The figure of 3.6 percent of cases (brought against OBGYN's more than five years after an act or omission) for the district including Iowa generally conforms to the information we have received from other sources. Please remember that the percentage will in actuality be slightly higher when suits against non-OBGYN members are considered, and slightly lower when adult plaintiff OBGYN suits are not considered.

Therefore, all that can statistically be said about a proposal such as this is that it will effect probably between 1 and 3 percent of OBGYN medical malpractice actions in this state if the statute of limitations for minors is reduced to the existing 6 year absolute maximum in Iowa law.

Consideration may be given to consulting the Iowa Medical Society for their figures if it is felt that these projections are unreasonably low.

Expected Constitutional Challenges

If action regarding the shortening of statutes of limitations for minor victims of alleged malpractice is to be contemplated - the constitutional challenges should also be considered.

The most prominent (and successful) form of challenge to this type of legislative enactment revolves around both state and federal constitutional guarantees of equal protection and due process.

The forms of the individual challenges differ according to the statutory distinctions made. Equal protection and due process claims have been made based upon:

1. Distinction between minor victims of malpractice versus minor victims of other torts.

2. Distinction between rights of minors who may be below the affected age and those who may be above the affected age.

3. Failure of such legislation to further any important social goal (usually health care affordability and insurance availability are cited) due to the limited number of cases in which the distinction would be involved.

A second area of constitutional challenge used is violation of state constitutional protections of right to access to redress for injury.

Citations to cases in which statutes modifying the statute of limitations for minor victims of alleged medical malpractice were constitutionally upheld include:

Statutory Review of Statutes of Limitations Regarding Medical Malpractice -with Special Reference to Minors. (*Please note that court interpretations vary according to terminology used -and various individual state case law rulings. Additionally, common-law exceptions may exist to statutory language.)

Iowa's present statutes relating to this issue provide as follows:

614.1 PERIOD.

"Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

...

9. Malpractice. Those founded on injuries to the person or wrongful death against any physician and surgeon, osteopath, osteopathic physician and surgeon, dentist, podiatrist, optometrist, pharmacist, chiropractor, or nurse, licensed under chapter 147, or a hospital licensed under chapter 135B, arising out of patient care, within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of, the injury or death for which damages are sought in the action, whichever of the dates occurs first, but in no event shall any action be brought more than six years after the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death unless a foreign object unintentionally left in the body caused the injury or death.

...

614.8 MINORS AND MENTALLY ILL PERSONS.

The times limited for actions herein, except those brought for penalties and forfeitures, shall be extended in favor of minors and mentally ill persons, so that they shall have one year from and after the termination of such disability within which to commence said action."

Iowa General Rule - within 2 years of discovery.

Absolute Limit - Within 6 years of act or omission.

Exceptions:

1. Foreign objects, general rule not applicable.

2. Minors and disability ill - within one year of removal of disability.

A similar review of the general rule, absolute limit, and exceptions contained within the statutes of the other states has been attached.

at expiration of policy term. Substantial renewal modifications include, but are not limited to, significant premium increases, significant coverage decreases, and the creation of policy exceptions - each or all of these substantial renewal modifications being imposed as a condition of renewal.

Nonsubstantial Renewal Modifications - Requirement of new renegotiation considerations at the end of the policy term which although increasing cost or decreasing protection, are considered nonsubstantial. Nonsubstantial in this area can normally be defined as those changes which should be absorbable by the insured, to which ready alternatives exist, or which are the direct result of the insured's individual claims history or risk exposure.

(*NOTE - Partial nonrenewals and those items included within substantial renewal modifications are often referred to in area literature as "Effective Nonrenewal".)

Using the severity of the immediate impact upon the insured as the key consideration, these problem items can be placed upon a spectrum of highest to lowest impact as follows:

Cancellation	Partial Cancellation	Nonrenewal	Partial Nonrenewal	Substantial Renewal Modifications	Nonsubstantial Renewal Modifications

Therefore, in determining the scope (or extent of activities covered) of a cancellation/nonrenewal regulatory system - this Commission needed to determine how much of the above spectrum was to be within the regulation.

Presently, Iowa law provides for the inclusion of cancellation, partial cancellation, and nonrenewal within its cancellation/nonrenewal regulatory provisions.

#2 - NOTICE

Short of prohibiting cancellations and nonrenewals or any of the other problem items, such problems will continue to occur. When such problems do occur two more regulatory core or framework elements appear.

a. What type of notice must be given regarding the impending cancellation/nonrenewal?

b. How far in advance of actual cancellation/nonrenewal must

the notice be given.

A. TYPE

Presently, in almost all circumstances and jurisdictions there exist no specific requirements on the notice which is required to be given an insurer to an insured who is about to be canceled or nonrenewed - other than the fact of impending cancellation/nonrenewal. This has been advanced as one of the leading reasons for the uncertainty and confusion which insureds are feeling during this most recent cycle.

There do exist alternative notice requirements. Examples include:

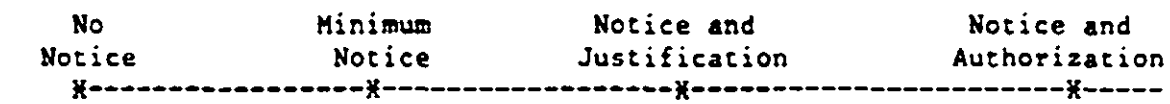
No Notice - where notice requirement is only to notify of impending cancellation

Minimum Notice - where notice requirement is only to notify of impending cancellation or nonrenewal

Notice and Justification - where notice requirement is to both notify of impending cancellation or nonrenewal and to present the justifications or rationale for the cancellation or nonrenewal

Notice and Authorization - where notice requirement is to notify of impending cancellation or nonrenewal and to inform the insured of the statutory or rule authority for such action. (*NOTE: This N & A system subsumes legislative or rule delineation of what reasons certain cancellations or nonrenewals may occur for.)

Again, placed upon a spectrum representing the least to most restrictive notice requirements - the options would be located as follows:



Presently, Iowa generally only requires notice of impending cancellation (i.e., no notice state). We do, however, have specific attributes approaching both minimum notice and notice and authorization in regards to automobile insurance.

B. TIMING

Determination of how far in advance of actual cancellation or nonrenewal notice must be given is the second half of the notice element of the cancellation/nonrenewal regulatory framework.

In theory, the rationale for timing requirements is to allow the insured to take steps to object to and seek rescission of the impending cancellation/nonrenewal or alternatively to take steps to obtain adequate coverage from other sources.

There generally seem to be two sets of timing requirements in any system.

First - short timing requirements for cancellations/nonrenewals of immediate justification (for example, failure to pay initial premiums).

Second - longer timing requirements for cancellations/nonrenwals of nonimmediate justification (for example, business decision that the insurer no longer chooses to write a particular line of insurance.)

Again, the alternatives for timing requirements are many. A review of other jurisdictions finds at least one state which imposes timing requirements as follows:

"IMMEDIATE JUSTIFICATION"

0 days	5 days	10 days	15 days	20 days	30 days	45 days

"NON-IMMEDIATE JUSTIFICATION"

10 days	15 days	30 days	45 days	60 days	90 days	120 days

Of course many of the differences depend upon individual approaches to such issues as:

1. cancellation only;

2. nonrenewal only;

3. nonrenewal and effective nonrenewal only;

4. particular insurance lines; and

5. particular insureds.

Presently, Iowa has a general 5 day (immediate justification) and 30 day (nonimmediate justification) rule applying only to cancellations. Iowa also has a specific rule relating to automobile insurance, contained in 515D of the Code of Iowa.

#3 - CLAIMS HISTORY

Another reoccurring complaint regarding insurance regulation is its failure to address the insured's right to data regarding their policy and claims history held by the insurer.

Presently, Iowa, as do most states, does not clarify what right an insured has to information regarding the insured held by the insurer. An included concern is the extent of the information held by the insurer which the insured can rightfully expect to receive.

This issue most often crops up when a cancellation/nonrenewal has occurred. If an insured is forced to seek new coverage from another insurer - that process is expedited if the insured has all relevant previous claims data with them. However, insurers have expressed reluctance to opening their books and records for the purpose of allowing another insurer to review the records in an attempt to undercut suggested premiums.

Recent legislative activity has occurred in this area, with some of the proposals including:

Discretionary Dissemination - where the insured has the right to request claims data and records, but the release of copies of such records is discretionary with the insurer.

Mandatory Dissemination - when the insurer must provide the insured with all relevant records and claims data upon request.

Discretionary Distribution - where the insurer must not only provide all relevant records and claims data upon request, but must include in a notice of cancellation/nonrenewal that the insured has the right to request and receive such records and data.

Automatic Distribution - where the insurer must not only provide all relevant records and claims data upon request, but must send such data to the insured as part of any cancellation/ nonrenewal notice.

Again, placing these alternatives on a spectrum representing the lowest to highest requirement of record release, they would be located as follows:

Discretionary Dissemination	Mandatory Dissemination	Discretionary Distribution	Mandatory Distribution
X----------X		X----------X	

#4 - ENFORCEMENT

Enforcement mechanisms for almost any cancellation/nonrenewal regulatory system are usually built in. For example, an enforcement technique for failure

to notify within the required number of days of an impending nonrenewal will prohibit nonrenewal on the part of the insurer - usually also requiring that the renewal also be substantially similar to the previous policy.

The choice of enforcement mechanisms seems fairly unlimited - and depend largely upon the scope and justification provisions of the cancellation/nonrenewal system which have been violated. Examples provided by issues we have already discussed include:

1. Failure to notify of impending cancellation - prohibition against cancellation until notice requirements are met.

2. Failure to notify of impending nonrenewal - requirement to renew at substantially equivalent policy level.

3. Failure to notify of substantial renewal modifications - prohibition against imposition of modifications.

4. Failure to provide required justification for cancellation/ nonrenewal - prohibition against cancellation/nonrenewal.

etc.....etc.....

Additionally, it has been suggested that a more general enforcement mechanism be developed. For example - if the failure was willful, civil fines or penalties could be imposed. Also, if the Insurance Commissioner determined that such violations on the part of an insurer were recurrent - the Unfair Trade Practices Act could be held to apply, giving the Commissioner sanction authority.

Put on a spectrum, the severity of enforcement alternatives available might include, from generally least to most severe, as follows:

Prohibition against taking action notice	Availability of general civil penalties	Criminal sanctions

Availability of set civil penalties	License or authority sanctions

Recent activity of other states on these four issue areas includes:

Arizona - Placed conditions for nonrenewal of policies for commercial and industrial risks.

California - Added a 45 day notice of intent not to renew or premium percentage increase.

Colorado - Increased midterm cancellation notices for commercial and medical from 45 days and 60 days to 90 days. Requires 90 day notice of unilateral premium increase or coverage reduction -

and justification for such action. Allows midterm cancellation or coverage reduction only for specific cause.

Connecticut - Increased from 30 days to 60 days the notice required for nonrenewal of commercial and personal liability lines.

Increased from 30 days to 60 days the notice of rate or coverage changes of insured risks of an annual premium of less than $50,000.

Establishes 8 specific grounds for cancellations - with cancellation prohibited unless specific grounds are substantial.

Florida - Increased notice requirements for cancellation/nonrenewal and substantial premium changes for commercial lines.

Georgia - Increased restrictions on cancellation/nonrenewal and renewal increase for all lines.

Illinois - Requires 90 day notice for state of intent to terminate entire lines.

Requires 60 day notice for cancellation, nonrenewal, or premium increases of 30% or more.

Kansas - Prohibition of coverage cancellation for business or professional liability policies unless one of five causes is proved.

Requires new 60 day notice for nonrenewal.

Maine - Prohibits midterm cancellations unless cause can be confirmed. Increases cancellation and nonrenewal notice time periods. Authorizes policyholders to request Insurance Department review establishment of cause for nonrenewal.

New Hampshire - Increase cancellation notice to 60 days.

New Jersey - Established new prohibitions on cancellation and nonrenewals.

New York - Prohibition against unwarranted midterm cancellations. Requires Property/Casualty insurers to extend present coverages for one year. Increase notice to not renew or premium hike of 10% to 60 days. Mandates that policyholders receive claims history.

South Dakota - Imposes a two-step, three-year, increase in all notice times.

Washington - Increased notice requirements for cancellation, nonrenewal, and renewal increase.

West Virginia - Prohibition of cancellation or nonrenewal of health care providers without specific cause.

Authorizes public hearings on rate increases above 10%.

Wisconsin - Increases cancellation notice from 30 to 60 days.

Wyoming - Prohibits midterm cancellations with only limited exceptions.
Requires 10 to 45 days notice for authorized cancellations.
Require 45 notice of nonrenewal and justification statements.

CLAIMS-MADE INSURANCE

"Claims-made" liability insurance policies are those which provide coverage for the insured only on claims that occur and are reported during the policy period. The alternative to the "claims-made" form is the "occurrence" form, which covers all claims stemming from injuries/damages sustained during the policy period regardless of when the claims are filed.

Traditionally, the "claims-made" form, to the extent that it has been written, has been limited to professional liability (malpractice) policies. However, in January of 1986, the Iowa Department of Insurance approved the "claims-made" form of the Insurance Services Office's (ISO) commercial general liability (CGL) policy. Iowa is one of at least 36 states to have authorized the new policy form, and there is a consensus within the industry that eventually all states will permit the "claims-made" CGL policy. But there also seems to be an expectation that the mainstream of commercial liability lines will continue to be written an "occurrence" basis, primarily for the reason that, whereas a professional field such as the practice of medicine is thought of as having long "tails" (i.e., prolonged potential for the filing of claims long after the fact of surgery or other treatment), and therefore a greater need to minimize the exposure to liability, more routine commercial businesses such as clothing stores can reasonably anticipate that injuries/damages sustained through provision of their services will manifest themselves more readily, and consequently, remedies will be sought in a more timely fashion. In other words, most businesses do not require the minimized liability exposure offered by "claims-made" policies. Exceptions to the foregoing, in addition to the professional fields, would probably include manufacturers subject to products liability claims. A good example here is the asbestos industry, where manufacturers are being sued today on the basis of "occurrence" form liability policies written decades ago.

Development of this new "claims-made" CGL policy can be traced to the mid-1970's when carriers began seeking an alternative to the open-ended liability of the "occurrence" form. Premium ratings for these traditional policies increased drastically in the face of the possibility that courts would rule the policies to be providing coverage for virtually unlimited liability of the policy-holders.

Listed below are the significant features of the ISO's "claims-made" CGL policy:

I. Retroactive Date

The retroactive date marks the beginning of the period covered by the policy. It usually coincides with the start of the policy period for the first in a series of "claims-made" policies. The date is subject to advancement only with the written approval of the insured, and under one or more of the following conditions:

A. If the policy carrier changes.

B. If there is a change in the insured's operations that materially increases hazards.

C. If the insured fails to supply adequate information about the nature of the insured's operations to the carrier.

D. If the insured requests an advancement of the date.

A change in the retroactive date automatically grants the insured a five-year extension, at no additional premium, which responds to claims for injury/damage sustained during the period between the old and the new retroactive dates, as long as the incident from which the claim arises was reported to the carrier either during the policy term or within 60 days of its lapse.

II. Extended Reporting Periods

This dimension of the policy provides for purchase of supplemental "tail" coverage in the event of a cancelled or non-renewed policy. This paid endorsement option must be exercised within 60 days of the policy's termination, and the charge for it may not exceed 200% of the discontinued policy's annual premium. Coverage extends for an unlimited time period.

The policy also provides automatic 60 day reporting "tails" for terminated policies (exception: cancellation due to nonpayment of premiums) at no additional charge if no subsequent policy is in place to cover occurrences first reported during the 60 days following termination of the CGL policy. In addition to the 60 day reporting "tail", a five-year policy "tail" for filing of claims, similar to the one mentioned earlier with regard to advanced retroactive date, also applies in the case of non-renewed or cancelled policies, again with the exception of policies cancelled due to nonpayment of premiums.

III. Premium Rating

It is anticipated that a "claims-made" CGL policy would be offered for lower rates than an "occurrence" policy offering the same scope of coverage. However, the difference in premiums could narrow over the course of renewals of the "claims-made" policy, particularly if the unlimited extended reporting endorsement were purchased by the insured at the policy's final termination. If, on the other hand, the five-year "tail" provided at no additional charge

upon termination of the policy were deemed sufficient by the insured, the insured would probably, in effect, have realized a reduction in liability insurance costs.

MAJORITY RECOMMENDATIONS

RELATING TO INSURANCE

#1. INSURANCE DEPARTMENT REGULATORY RESOURCES AND PRIORITIES.

The Commission determined that insufficient resources had been made available to the Department of Insurance to assure accurate and reliable regulation of the industry by the state. The Commission also determined that the legislature had provided the Department of Insurance with inadequate direction as to the legislative priorities for the use of such resources as the Department had previously been provided with.

As a result of these determinations, the Commission recommends that the Iowa Legislature review and adopt the attached draft legislation relating to the resources available to the Insurance department - which includes legislative delineations of priorities to be given to the use of such funds.

In addition to the attached drafted legislation, the Commission would further advise and recommend that legislative leadership and support be given to any and all efforts to accomplish the adequate funding of the department, in order for it to carry out the additional mandates required by the attached legislative directives. The Commission would also note to the legislature that the Commissioner of Insurance was requested by the Commission to amend the Department's budgetary request to the Governor to adequately reflect the budgetary needs of the attached legislative directives, in a minimum amount of $150,000.00.

Section 1. Section 505.13, Code 1987, is amended by striking the section and inserting in lieu thereof the following:

505.13 OTHER INSURANCE -- REPORTS BY THE DIVISION.

1. The commissioner shall semiannually cause the preparation and printing of a report to be delivered to the governor. The report shall contain information from the statements required of insurance companies, other than life insurance, organized or doing business in the state. The reports shall be delivered on or before the first day of February and the first day of August each year.

2. The commissioner shall cause the preparation and printing of a report to be delivered to the general assembly on or before the thirty-first day of December each year. The report shall contain information on the state of the insurance business and any impending problems foreseen by the commission which would affect the insurance business conducted in the state or the regulation of that insurance business by the division.

Sec. 2. NEW SECTION. 505.15 ACTUARIAL STAFF.

The commissioner is authorized to appoint a staff of actuaries as necessary to carry out the duties of the division. The actuarial staff shall:

1. Perform analyses of rate filings.
2. Perform audits of submitted loss data.
3. Conduct rate hearings and serve as expert witnesses.
4. Prepare, review, and dispense data on the insurance business.
5. Assist in public education concerning the insurance business.
6. Identify any impending problem areas in the insurance business.
7. Assist in examinations of insurance companies.

Sec. 3. Section 515.80, Code 1987, is amended by striking the section and inserting in lieu thereof the following:

515.80 CANCELLATION OF POLICY OR CONTRACT.

1. A policy or contract of insurance which has not been previously renewed may be canceled by the insurer if it has been in effect for less than sixty days at the time notice of cancellation is mailed or delivered.

2. A commercial line policy or contract of insurance which has been renewed or which has been in effect for more than sixty days may not be canceled unless at least one of the following conditions occur:

a. Nonpayment of premium.

b. Misrepresentation or fraud made by or with the knowledge of the insured in obtaining the policy or contract, when renewing the policy or contract, or in presenting a claim under the policy or contract.

c. Actions by the insured which substantially change or increase the risk insured.

3. A policy or contract of insurance may be canceled at any time if the insurer loses reinsurance which provides coverage to the insurer for a significant portion of the underlying risk insured and if the commissioner determines that cancellation because of loss of reinsurance is justified. In determining whether a cancellation for loss of reinsurance is justified or not, the commissioner shall consider the following factors:

a. The volatility of the premiums charged for reinsurance in the market.

b. The number of reinsurers in the market.

c. The variance in the premiums for reinsurance offered by the reinsurers in the market.

d. The attempt by the insurer to obtain alternate reinsurance.

e. Any other factors deemed necessary by the commissioner.

4. A policy or contract of insurance shall not be canceled except by notice to the insured as provided in this section. A notice of cancellation shall include the reason for

cancellation of the policy or contract. A notice of cancellation is not effective unless mailed or delivered to the named insured and a loss payee at least ten days prior to the effective date of cancellation, or if the cancellation is because of loss of reinsurance, at least thirty days prior to the effective date of cancellation. A post office department certificate of mailing to the named insured at the address shown in the policy is proof of receipt of the mailing.

Sec. 4. Section 515.81, Code 1987, is amended by striking the section and inserting in lieu thereof the following:

515.81 NONRENEWAL OF POLICY OR CONTRACT.

An insurer shall not fail to renew a policy or contract of insurance except by notice to the insured as provided by this section. Nonrenewal of a policy or contract includes a decision by the insurer not to renew the policy or contract, an increase in the premium of twenty-five percent or more, an increase in the deductible of twenty-five percent or more, or a reduction in the limits or coverage of the policy or contract. However, a premium charge which is assessed after the date of the policy period for which the premium is due shall not be deemed a premium increase for the purpose of this section.

A notice of nonrenewal is not effective unless mailed or delivered by the insurer to the named insured and any loss payee at least forty-five days prior to the expiration date of the policy. If the insurer fails to meet the notice requirements of this section, the insured has the option for continuing the policy for the remainder of the notice period plus an additional thirty days at the premium of the existing policy or contract. A post office department certificate of mailing to the named insured at the address shown in the policy is proof of receipt of the mailing.

This section does not apply if the insurer has manifested an intention to renew or if the insured fails to pay a premium due or any advance premium required by the insurer for renewal.

Sec. 5. Section 515A.4, subsection 3, Code 1987, is amended to read as follows:

3. The commissioner shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this chapter. The commissioner shall classify the filings as competitive or noncompetitive according to a determination by the commissioner as to whether those lines of insurance covered by the filings are in a competitive market or noncompetitive market. In determining whether a line of insurance is competitive or noncompetitive, the commissioner shall consider the following factors:

a. The number of insurers writing a line of insurance.

b. The market share of those insurers writing a line of insurance.

c. Price variance on premiums offered on a line of insurance.

d. Consumer complaints regarding a line of insurance.

e. Other factors as determined by the commissioner.

Sec. 6. Section 515A.4, subsection 4, Code 1987, is amended by striking the subsection and inserting in lieu thereof the following:

4. Subject to the exception specified in subsection 5 of this section, filings shall be reviewed according to their classification as competitive or noncompetitive as determined by the commissioner. A competitive filing shall become effective when filed and shall be deemed to meet the requirements of this chapter as long as the filing remains in effect unless it is disapproved on review by the commissioner. The commissioner shall have thirty days to review a competitive filing from the date the filing is submitted, unless the commissioner notifies the insurer within five days of submission of the filing that the thirty-day review limitation will not apply to that filing. A noncompetitive filing shall become effective upon review and approval by the commissioner.

Sec. 7. Section 515A.5, subsection 1, Code 1987, is amended to read as follows:

1. If within the ~~waiting~~ review period or any extension thereof as provided in subsection 4 of section 515A.4, the commissioner finds that a filing does not meet the requirements of this chapter, the commissioner shall send to the insurer or rating organization which made ~~such~~ the filing, written notice of disapproval of ~~such~~ the filing specifying ~~therein~~ in what respects the commissioner finds ~~such~~ the filing fails to meet the requirements of this chapter and stating that ~~such~~ the filing shall not become effective. If a filing which was disapproved was for a competitive line of insurance, the rate under the filing shall be rolled back to that under the previous approved filing, or if there was not a previously approved filing for that insurer on that line of insurance, the rates shall be set at the rate approved in a subsequent filing, or if there is not a subsequent filing, the rates shall be set by the commissioner. When a competitive filing is disapproved, the commissioner may order the insurer to make refunds to those insured under the disapproved rate according to the approved rate under this subsection as necessary.

Sec. 8. Section 515A.5, subsection 3, Code 1987, is amended to read as follows:

3. If at any time subsequent to the ~~applicable review period provided for in subsection 1 or 2 of this section~~ review and approval of a filing the commissioner finds that a filing does not meet the requirements of this chapter, the commissioner shall, after a hearing held upon not less than ten days' written notice, specifying the matters to be considered at ~~such~~ the hearing, to every insurer and rating organization which made ~~such~~ the filing, issue an order specifying in what respects the commissioner finds that ~~such~~ the filing fails to meet the requirements of this chapter, and stating when, within a reasonable period thereafter, such

filing shall be deemed no longer effective. Copies of ~~said~~ the order shall be sent to every ~~such~~ insurer and rating organization affected. ~~Said~~ The order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in ~~said~~ the order.

EXPLANATION

This bill makes certain changes relating to the duties and resources of the insurance commission regarding the regulation of the insurance business conducted in the state.

The bill requires the insurance commissioner to semiannually make a report to the governor with information from statements required of insurance companies, other than life insurance, doing business in the state. The commissioner is also required to make a report to the general assembly each year with information on the state of the insurance business and any problem areas foreseen.

The bill authorizes the commissioner to appoint a staff of actuaries to perform analyses of rate filings, perform audits of submitted loss data, conduct rate hearings, prepare data, assist in public education, identify impending problem areas, and assist in examinations of insurance companies.

The bill imposes new restrictions on cancellation or nonrenewal of insurance policies. Cancellation of insurance policies after they have been renewed or 60 days after first going into effect is prohibited except for certain express reasons. Notice of cancellation is required at least ten days prior to the date of cancellation and the notice must include the reason for cancellation. Notice of nonrenewal is required to be delivered at least 45 days prior to termination of the policy. Nonrenewal is deemed to include not only a decision by the insurer not to renew the policy, but also to include an increase in the premium of 25 percent or more, an increase in the deductible of 25 percent or more, and any reduction in coverage or limits on the policy.

The bill also changes procedure regarding rate filings.

The commissioner will determine which insurance lines are competitive and which are noncompetitive. Competitive insurance rate filings will be deemed to meet the requirements of the Code and will go into effect when filed subject to later review by the commissioner. If on review the rate filings are disapproved, the rates will be rolled back to those approved previously or to new approved rates, and refunds will be made to the purchasers of the insurance. Noncompetitive insurance rate filings will not go into effect until reviewed and approved by the commissioner. All rate filings will remain subject to disapproval after review after ten days' written notice and a hearing.

#2. MANDATORY INSURANCE DISCLOSURE ACT

Pursuant to the statutory mandate of S.F. 2265, the Commission has reviewed the enactment of a Mandatory Insurance Disclosure Act. In consideration of the following, the Commission finds that at this time it would not be advisable or feasible to recommend such Act:

(1) The Commissioner of Insurance, an ex officio member of the Commission, has informed the Commission that the Division of Insurance presently receives all information which a mandatory insurance disclosure Act would have required.

(2) The only difficulty in insurance information dissemination is the resources available to the Division of Insurance to format and distribute the information in a manner easily understood and used by nonindustry entities. However, pursuant to other recommendations of this Commission, the Division should be able to overcome format and distribution problems. The Division has been urged to conduct continual monitoring of industry information and to make such information available to both the General Assembly and the general public. The Division has pledged cooperation to all requests for specific information which may be made of it.

#3. INSURANCE DEPARTMENT DATA COLLECTION

In terms of resources already available to the Iowa Insurance Division and priorities which this Commission will be suggesting, the Commission recommends that a continued insurance data collection program be developed and conducted by the division, including but not limited to, the following items:

1. Continual monitoring and six month periodic report of loss, insurer, and insured data for noncompetitive lines.

2. That to the extent possible, this monitoring be state experience based.

3. That to the extent possible, this monitoring include data collection relating to settlement practices - to augment litigation data collected by the judicial department.

4. To the extent possible, this data collection be conducted by use of a uniform format approach - to be developed by the Commissioner of Insurance after consultation with the industry.

5. That the Insurance Commissioner collect and report similar data collection efforts of other states.

#4. INSURANCE AVAILABILITY MECHANISMS

It is recommended that the Division of Insurance be required to identify those areas of risk where insurance or reinsurance is not currently available or affordable and study the feasibility and alternative procedures for the establishment of mandatory risk pools, state based insurance pools, state based reinsurance, or other similar insurance availability mechanisms. It is further recommended that this review be conducted by February 1, 1987 and that the resulting report be conveyed to the chairpersons, vice chairpersons, and ranking members of the standing Committees on Judiciary and Commerce on or before that date.

#5. RATING REGULATION

It is recommended that the Division of Insurance be required to identify those areas of risk where insurance activity is presently noncompetitive and study the feasibility and alternative procedures for the implementation of a flexible minimum and maximum swing rating overview system. It is further recommended that this review and study be conducted by February 1, 1987, and that the resulting report be conveyed to the chairpersons, vice chairpersons, and ranking members of the standing Committees on Judiciary and Commerce on or before that date.

#6. IMPACT OF REFORMS

It is recommended that the Division of Insurance request that all insurance companies doing business in Iowa submit to the Division explanations of and statistics for their past, present, and projected future premium actions taken or to be taken as a result of legislative tort reform efforts since 1983. It is recommended that the Commissioner of Insurance, to the extent possible, device a uniform and feasible format for the submission of such data from the insurance companies. Additionally, to the extent possible, it is recommended that such data submission include an explanation of projected future premium actions to be taken for those various tort reform proposals submitted to and discussed by the Iowa Liability and Liability Insurance Study Commission. It is also recommended that the Commissioner of Insurance be allowed to authorize the submission of such data on the part of like-grouped insurers as deemed appropriate by the Commissioner. Finally, it is recommended that these required submissions be completed within such times as the Commissioner of Insurance shall deem appropriate and that the results of such submission be conveyed to the chairpersons, vice chairpersons, and ranking members of the standing Committees on Judiciary and Commerce as soon as practicable after the completion of such submissions.

#7. CLAIMS-MADE FORMS OF INSURANCE

This Commission has reviewed the issue of increasing usage of "claims-made" forms of insurance, and finds that although such increasing use causes concern and "occurrence-based" forms of insurance may be preferable - any action to restrict the use of "claims-made" could place further pressure on already restricted capacity within the insurance industry. It is hoped that the Division of Insurance rule-making on the issue will continue to provide protection to those insureds forced to purchase claims-made policies. However, the Commission would recommend that the Division of Insurance continue its monitoring of claims-made insurance in this state, with special attention to its use in medical malpractice and municipal liability, and periodically report to the legislature any new developments and/or concerns which may arise.

MINORITY REPORTS RELATING TO INSURANCE

MINORITY REPORT - INSURANCE

By: DOYLE, JAY, VILSACK, and ALEXANDER

1. CONSUMER ADVOCATE OFFICE
2. STATE BASED INSURANCE RATING

1. CONSUMER ADVOCATE

THE MINORITY RECOMMENDS THAT AN INSURANCE CONSUMER ADVOCATE BE CREATED TO ASSURE THAT THE INSURED'S INTERESTS ARE BEING ADEQUATELY REPRESENTED IN ADJUSTMENT OF INSURANCE RATES.

The majority report does not contain a recommendation for the establishment of a Consumer Advocate's Office within the Attorney General's office or the Division of Insurance. The minority recommends to the legislature that a Consumer Advocate's Office be established for the purposes of overseeing the operations of the Insurance Division as it relates to rate making and rate approval. We are concerned that for a substantial number of years, Iowans were laboring under the belief that the Insurance Commissioner's office was reviewing and examining critical rate requests which were received by it. The fact that such critical evaluation and examination was not being conducted and was not publicized, leads us to believe that an independent agency should be established for purposes of insuring compliance within the Insurance Division of the rules and regulations imposed by the legislature on insurers and the duties imposed upon the Iowa Insurance Division to see to it that such rules and regulations are followed.

2. STATE BASED EXPERIENCE RATING

THE MINORITY RECOMMENDS THAT INSURANCE PREMIUMS PAID BY IOWANS BE BASED UPON IOWA EXPERIENCE EXCEPT IN CASES WHERE THE IOWA INSURANCE COMMISSIONER MAKES A FINDING THAT THE IOWA EXPERIENCE IS INADEQUATE TO BE ACTUARIALLY SOUND.

The Final Report does not contain a recommendation for the institution into Iowa law of the requirement that insurance premiums to be paid by Iowans be based upon Iowa experience unless the Insurance Commissioner determines that such experience was an insufficient base to be actuarially sound. We believe that a strong case has been made during the Commission hearings that Iowans are paying for and subsidizing the mistakes of others in other states through higher premiums than those which would be justified based upon Iowa experience alone. Currently, Iowa experience is only one of many factors which can be considered and taken into consideration in the rate making process.

REFORM OF THE CIVIL LIABILITY SYSTEM

The Commission undertook examination of many proposals which ran the entire gamut of the liability system. Considering the statutory mandate given to the Commission, discussion within the Commission, and legislative activity over the past several years -- it seemed that the entire tort liability system was to be put under scrutiny. Therefore, the Commission considered nothing sacred or unnecessary and no new approach without merit for review.

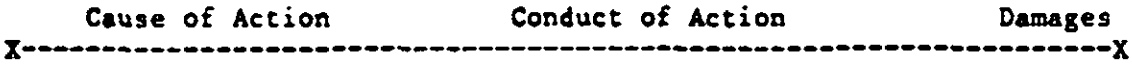
In approaching the proposals which were considered, the existing tort liability statutes and case law was viewed as a systematic approach to injury prevention and victim compensation. A state cannot selectively deal with tort liability proposals in a vacuum, although that seems to be the understanding of many of the authors of the proposals. This type of approach only increases the chances that modifications or reforms will not have the intended effect -- or worse, may have unintended effects upon another part of the system that are in fact counter-protective to the original intent. To protect against this happening it seemed that first the proposal must be viewed as to its effect upon its immediate impact area on the system -- and then to its effect upon the system as a whole.

The full tort liability system runs the range of actions from the activity of one person which may or may not cause injury to another -- to the resulting social benefits of compensation to injured individuals or deterrence of future wrongful conduct.

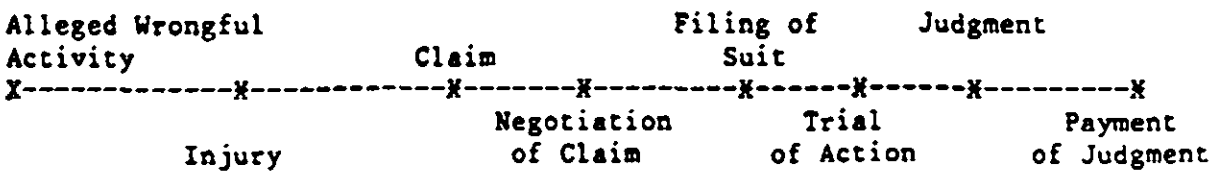
Generally speaking, the tort liability system which lies between these two ends is composed of three elemental areas:

1. *Cause of action;*
2. Conduct of action; and
3. Damages.

Represented on a spectrum, these three elemental areas are located as follows:



Now, filling in the steps which occur in the tort liability system, that same spectrum is set out as follows:



Cause of action proposals run from the alleged wrongful activity to the

filing of suit.

Conduct of action proposals run from the filing of suit to judgment.

Damages proposals run from judgment to payment of judgment.

Now, having set out the spectrum and the elemental areas -- there remains one last set of spectrum classifications to make. Those classifications are related to the system indicators used as justification for proposals to modify the tort liability system. These system indicators fall into three categories:

Frequency - where the tort system is overused on the front end of the system.

Transaction Cost - where the costs of the litigation system are oppressive.

Severity - where the extreme nature of the judgmental effects of the system are out of balance with the interests of society as a whole.

Overlaying these system indicators on the tort system, the full spectrum is represented as follows:

Cause of action/Frequency				Conduct of Action/ Transaction Costs			Damages/Severity
Alleged Wrongful Activity	Injury	Claim	Negotiation of Claim	Filing of Suit	Trial of Action	Judgment	Payment of Judgment

As you can see, the general effects of certain types of proposals are felt first in their primary area. The earlier on the spectrum a legislative response impacts the system, the greater its potential to effect the entire spectrum. For example, risk management efforts impact the cause of action/ frequency area of the spectrum - actually at its first point. If successful, the response not only will act to reduce the frequency indicator - but will correspondingly reduce transaction costs and severity indicators. If we use a statute of limitations response, that also has its impact in Cause of Action/Frequency - i.e., in potentially cutting off the ability to file a suit. The response, if successful, would reduce a portion of Cause of Action/Frequency and also reduce Conduct of Action/Transaction Costs and Damages/Severity. However, it would not directly impact those areas of Cause of Action/Frequency represented by alleged wrongful conduct, injury, claim, and negotiation of claim. A third sample could be caps on damages. The response, if successful, would reduce Damages/Severity, but would not directly reduce those areas under Cause of Action/Frequency or Conduct of Action/Transaction Costs.

Moving to examples of placement of some of the Commission mandated and suggested study proposals - they would fall within our categories, at least as to primary effect, as follows:

Cause of Action/Frequency

General
- Alternative methods of reducing nonmeritorious suits
- Fault based system of torts
- Expanded workers' compensation type system

Specific
- State & municipal regulatory liability
- Statutes of repose in real property improvement
- Statutes of repose in products liability
- Statutes of limitations for minors/incompetents

Conduct of Action/Transaction Costs

- Contingency fee limitations
- Alternative methods for litigating actions
- Mandatory arbitration/mediation

Damages/Severity

- Maximum caps on all payments
- Maximum caps on noneconomic damages
- Elimination of collateral source rule
- Failure to wear seatbelts
- Prejudgment interest
- Restrictions on punitive damages
- Mandatory structured judgments

Knowing all of the impact areas and spectrum interaction - decision-making can be put into the following model:

1. What is the specific problem proposal authors are wishing to have addressed?
2. What system indicator is the proposal/problem located within?
3. What potential alternatives exist within the elemental area?
4. Will the alternative suggested impact the system indicator/ elemental area as expected?
5. Will the alternative have a positive or negative effect on the remaining areas of the spectrum?
6. Will the alternative be procedurally and constitutionally acceptable?

7. What additional modifications will be necessary to cure defects or increase effectiveness, both within and outside the system indicator/elemental area?

8. What measures can be taken to assure or require intended effects?

9. Can a procedure for review be established to measure the effectiveness of adopted proposals.?

DAMAGES

Considerable arguments are made today that damages rather than liability is the central issue in tort litigation. The reasons for these arguments do at times have merit to a certain extent. This may be because several characteristics of the civil justice system have pervasive influence:

1. Damages are not determined by a concrete legislative schedule as in Worker's Compensation, but are left to the jury to measure on a case-by-case basis under a general formula which gives the jury wide discretion and considerable opportunity to apply here various normative notions of its own.

2. The formula rule is that damages are an issue separate from liability and are not to be affected by the jury's doubts as to liability or, except in limited instances like punitive damages, by the jury's evaluation of the moral quality of the defendant's conduct (although it is evident that such considerations do effect juries under certain circumstances).

3. The system pretty much insists that the entire case be disposed of once and for all in a single trial, even though in many cases this involves difficult issues of predicting future developments.

When the major legal considerations surrounding damages were being developed there were only a handful of cases used repeatedly as benchmark authority. Each case had the same basic tenant:

"The rule of damages is a practical instrumentality for the administration of justice. The principle on which it is founded is compensation. Its object is to afford the equivalent in money for the actual loss caused by the wrong of another. Recurrence to this fundamental conception tests the soundness of claims."

For years there was only one major debate which continued in the area of damages. That was over which of the new and widening areas of claimed and provable injuries would be compensable damages under the tort system. We might add that this debate continues in specified areas today, including emotional suffering, loss of parent/child consortium, fear of future injury, etc. . . . etc. Today, however, criticisms and calls for changes have expanded beyond simply the issue of what will be compensated to issues of who must compensate, how compensation will occur - and even the amounts which can be required to be compensated. Each of these have common manifestations in legislative proposals today, for instance:

Who must compensate - collateral source
How compensation will occur - structured judgments
Amounts required - maximum caps on liability

Moving back to the original statement - We think it is safe to say that damages have become a central focus - particularly in today's state legislatures.

MAXIMUM CAPS ON LIABILITY

Presently, approximately 38 states have a maximum limitation of damages - of one form or another.

However, a cap is a cap is a cap. But no two caps are the same. They differ according to numerous issues, including but not limited to:

Amount of cap.
Nature of cap.
Damages affected.
Cause of action affected.

Under amount, we have a range from 50,000 to 5,000,000.

By nature, we have ranges from the limit of insurance policies to maximums with pinholes and formula caps.

Regarding damages affected we have ranges from punitive damages to all damages.

In causes of action, we range from only those against the state to all causes of action.

A number of states also differ on whether an alternative compensation method is developed to assist those who are adversely affected by caps on liability.

The major two constitutional challenges which have proven successful against caps on damage are:

1. Denial of equal protection if imposed only for certain causes of action.
2. Arbitrarily discriminatory against those who are most severely injured - but most in need of compensation.

STUDIES

Rand ICJ - The Frequency and Severity of Medical Malpractice Claim: New Evidence (R-3-110-ICJ)

Caps on awards appeared to reduce severity indicates by 23 percent (and contrary to popular opinion - the results were to appear within two years).

FUTURE COST ANALYSTS

Potential savings due to the cap ranging up to 20% of premiums otherwise payable (with reservations).

ADDITIONAL RAND STUDIES

- Reduce trial awards by 30 percent.
- Cut average out-of-court settlements 25 percent.
- Raise portion of cases dropped from 43% to 48%.
- Reduce the number of cases going to actual verdict from 5.1% to 4.6%.

MAXIMUM LIMITS ON LIABILITY

STATE	LIMIT	DAMAGES EFFECTED	ENTITIES RECEIVING
ALABAMA	100,000/person	All	State/local
ALASKA	500,000	Non-economics	All
CALIFORNIA	250,000	Pain/suffering	Health care providers
COLORADO	250,000 to 500,000	Non-economics	All
	150,000	All	Dram shop
	100,000/400,000	All	State/local
DELEWARE	300,000	All	Local
FLORIDA	450,000	Non-economics	All
	100,000/200,000	All	State/local
GEORGIA	Ins.policy link	All	State/local
HAWAII	350,000	Non-economics	All
IDAHO	100,00/300,000	All	State/local
ILLINOIS	100,000	All	State
INDIANA	500,000	All	Med.Malpractice
	300,000/5,000,000	All	State/local
KANSAS	250,000 (C.O.L.) (pinhole to 3,000,000)	All	Med.Malpractice
	500,000	All	State/local
KENTUCKY	50,000	All	State
LOUISIANA	500,000	All	State/local
MAINE	Unlimited	Non-economics	Med.Malpractice
MARYLAND	350,000	Non-economics	All
	100,000/500,000	All	State
MASSACHUSETTS	500,000		
	100,000	All	State/local
MICHIGAN	225,000	All/exceptions	Med.Malpractice
MINNESOTA	400,000	Intangibles	All
	200,000/600,000	All	State/local

MISSISSIPPI	Ins. policy limit	All	State/local
MISSOURI	350,000	Non-economic	Med.Malpractice
	100,000/800,000	All	State/local
MONTANA	300,000/1,000,000	All	State/local
NEVADA	50,000	All	State/local
NEW HAMPSHIRE	875,000	Pain/suffering	All
	150,000/500,000	All	Municipalities
	100,000	All	State
OHIO	250,000	Non-compensatory	State/local
OKLAHOMA	100,000/1,000,000	All	State/local
OREGON	100,000/300,000	All	State/local
PENNSYLVANIA	200,000/person	All	Med.Malpractice
	250,000/1,000,000	All	State/local
RHODE ISLAND	50,000	All	State functions
TENNESSEE	12,000/40,000	All	State/local
TEXAS			
	100,000/300,000	All	State/local
UTAH	250,000	All	Med.malpractice
	100,000/300,000	All	Liquor liability
	250,000/500,000	All	State/local
VERMONT	75,000/300,000	All	State
VIRGINIA	25,000 or Ins. policy limit	All	State
WASHINGTON	Formula cap (117,000 to 493,000)	All	All
WEST VIRGINIA	1,000,000	All	Med.malpractice
	500,000	Non-economics	State/local
WISCONSIN	1,000,000	Non-economics	Med.Malpractice
	500,000	Non-economics	State/local
WYOMING	500,000	All	State/local

COLLATERAL SOURCE RULE

The Collateral Source Rule is the widely-recognized rule for computation of damages which provides that damages awarded to a successful plaintiff will not be reduced by any sums which the plaintiff has received, or is scheduled to receive, from another or "collateral" source on account of the injury that is the subject of the case at hand.

The rule itself operates both as a Rule of Evidence and as a Rule of Damages. As a Rule of Evidence - the defendant is prevented from presenting to the jury any evidence of collateral payments. As a Rule of Damages, it provides that an award against the defendant at trial will not be reduced by reason of collateral payments.

As a result of legislative action in the mid-1970's, Iowa has already enacted a partial abolition of the rule. Section 147.136 eliminates the Collateral Source Rule for medical malpractice cases. In this situation then, Collateral Source payments - unless they are the assets of the plaintiff or of the members of the plaintiffs immediate family - are admissible for consideration of the Court and requires the Court to reduce any award by the amount of such Collateral Source payments.

It seems then that Iowa faces the same uncertainty with the continued validity of the Collateral Source Rule as do many of the other jurisdictions. In the debate surrounding the Rule - there seems to be three general schools of thought operating:

Deterence School

If the primary rationale for the tort system is to create incentives to deter defendants from undesirable or dangerous conduct - there is little reason to eliminate the Rule and allow culpable defendants to escape liability, thereby lessening the deterence of the system.

Compensation School

If the primary rationale for the tort system is to provide a system whereby injured individuals are compensated for their injuries - there is little reason for continuance of the Rule in light of potential recoveries beyond full compensation.

Complexity School

The evolution of any tort system has necessarily laid out the Rules regarding Collateral Sources. In some instances the Rule will work a perceived injustice on a party. However, considering the hundreds of impacting factors potentially involved with Collateral Sources - any change in the existing Rule will increase the complexity of an already overly complex tort action.

For example, a Collateral Source Rule change which opens its use for new areas should necessarily evoke discussion relative to the following differing types of "Collateral Sources" and their future treatment:

- Continued salary payments.

- Pension and Welfare benefits.
- Proceeds of Plaintiff's own hospitalization or accident insurance.
- Gratuitous medical or nursing care.
- Tax advantages from the substitution of tax exempt awards for plaintiff's normally taxable salary.
- Savings from plaintiff's reduced cost of living while hospitalized.
- Savings in normal and business related expenses during care and convalescence.
- The increased funds available to a widowed plaintiff due to remarriage after wrongful death of spouse to another spouse of greater earning capacity.

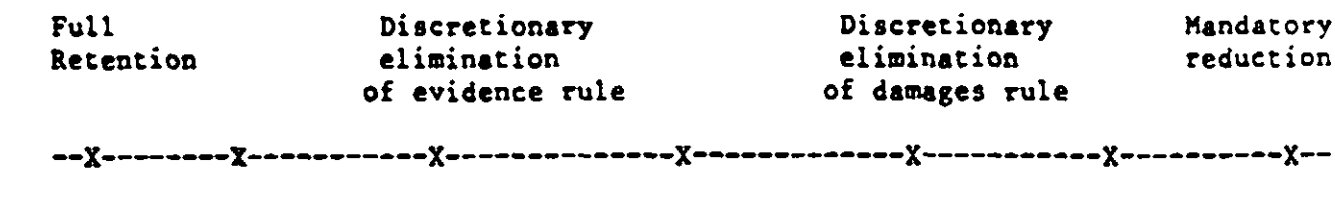
Case law review of Iowa and surrounding states would show that there are perhaps as many as forty additional considerations.

We note these due to the fact that they have been the subject of Collateral Sources Reduction Arguments in other jurisdictions.

In reviewing current state activity and academic article on this issue, a rough set of Collateral Source Alternatives is available:

1. Full retention - Where there is no allowed introduction into evidence or award reduction for collateral source payments.
2. Retention with subrogation/indemnification - Where the Rule is preserved, but with the requirement of subrogation/indemnification rights to third-party payors.
3. Discretionary elimination of evidence rule - Permit pre-trial hearings where judicial determination is made to allow or prohibit the introduction of collateral source evidence at trial. (According to statutory or judicial rule statements of justice).
4. Elimination of evidence rule - Permitting introduction of all collateral source payments.
5. Discretionary elimination of damages rule - Where a judicial determination is made following jury findings as to whether, according to statute or rule, a collateral source reduction will be allowed.
6. Elimination of damages rule - Where the judge or jury are free to make award reductions for collateral source payments received.
7. Mandatory reduction - Where the collateral source rule is eliminated in favor of mandatory reductions for all collateral source payments.

Placed upon a spectrum of least to most radical change from common law, the alternatives would be located as follows:



Indemnification

If a state adopts a system located at either end of the spectrum, i.e. full retention or full mandatory reduction, that is for the most part the end of the discussion. However, if a state chooses to adopt a system located on the spectrum between these two extremes, a second important discussion must occur -

"To what types of collateral sources or benefits will the new rule be held to apply or not apply."

We earlier referred to a wide variety of payments which have been involved in collateral source litigation, from private insurance to tax considerations. The wide variety of specific sources does not allow for individual explanation/consideration without hundreds of additional pages of material. However, to begin decision-making we will set out several general classifications which contain what we generally refer to as collateral source variations of character - or classifications which may provide rationale for differing treatment.

#1. Collateral source payments verses collateral source benefits.
#2. Collateral sources for which consideration has been provided versus those for which no consideration has been provided (purchased versus gratuitous).
#3. Collateral sources which are arranged by self-contribution versus sources arranged by third parties (benefit of one's own bargain).

There is also a fourth emerging rationale, generally referred to as functional differentiation - where collateral sources are considered and deducted according to the function for which they are provided. The generic model used during functional analysis is :

Loss minus benefits accruing due to injury plus funds expended by claimant to obtain accruing benefits equals judgment.

This model is used once it is determined that the function of the collateral source is to reduce the defendant's cost irregardless of the defendant's conduct - i.e., based solely upon the event and a loss for which, in the absence of the benefit, the plaintiff would have to claim against the defendant.

An example of how these two collateral source decisions interact could be shown as follows:

A state chooses a collateral source system which provides for discretionary elimination of the evidence portion of the rule - i.e., allowing the judge to permit the jury to hear evidence relating to certain collateral sources. The basis for the discretionary decision that would be either a rule or statute which generally differentiates between those types of collateral sources which may be evidenced and those which may not. If the system chosen is discretionary elimination of the evidence portion - the differentiation could be between those sources for which consideration has been provided (purchased) and those for which no consideration has been provided (gratuitous). If the judge determines that the "source" more generally falls within the purchased

area - the evidence portion of the rule might continue to apply. If the judge determines that the "source" more generally falls within the gratuitous area - the evidence portion of the rule might be lifted.

We would also make several quick observations concerning our review in the area:

Mid 1960's Study

55% of tort victim compensation comes from tort feasors.
38% of tort victim compensation comes from victim's own insurance.
7% of tort victim compensation comes from other sources (Soc. Sec., Workers Comp. etc.).

Mid 1970's Study

44 cents on premium dollar reaches victim.
Of 44 cents, 8 cents reimburses in collateral source areas.
Only 14.5 cents reimburses actual losses not compensable from other sources.

General judicial decision review

A review of several recent case law decisions seems to make another point we would raise. The role of the collateral source rule as an evidentiary bar has been often criticized as a denial of the adequate review to be provided by the jury - or at least as an indicator that left up to the jury, collateral source information would lead to a collateral source reduction.

In response to this general criticism, the courts seem to rely on two arguments:

1. If someone is to benefit from a collateral source, it might as well be the plaintiff.
2. As a compensatory system, the tort law is not perfect - and often unable to compensate adequately. Therefore, any rule which has as its impact the ability to funnel compensation to the plaintiff will be welcome.

Savings estimate attempts

Recent Rand Institute on Civil Justice study estimates, in medical malpractice, that mandatory collateral source reductions result in a 14 percent reduction in claims frequency and a 11-18 percent reduction in claims severity. (Rand ICJ, The Frequency and Severity of Medical Claims: New Evidence (R-3410-ICJ) 1975-1984.

A mid-seventies study conducted by Professor Frank Sloan and reported in the Duke Journal of Health Policy, Politics and Law reports that mandatory collateral source reduction rules have had negligble effects on premium rates in medical malpractice.

Constitutional Challenges

Changes to the Collateral Source Rule are most often subject to successful constitutional challenge on three fronts -

1. As a denial of equal protection under the fifth & fourteenth amendments to the United States Constitution (corresponding Iowa

Constitutional provision would be Article I, Section 6).

2. As a violation of Article I, Section 10, Clause 1, of the United States Constitution prohibiting the impairment of contractual obligations (corresponding Iowa constitutional provision would be Article I, Section 21).

3. As a violation of Article I, Clause 2, of the United States Constitution by diverting the benefit of federal programs to persons other than intended beneficiaries or the federal government itself in derogation of the supremacy of federal law. (Although Iowa would not have a corresponding state constitutional prohibition there are other state laws which would conflict with certain collateral source changes).

Of these three most common challenges, it should be noted that the first has for all intensive purposes been raised and decided in Iowa. In the case of Rudolph vs. Iowa Methodist Medical Center [293 NW2d 550 (1980)] the Iowa Supreme Court was asked to strike down the 1975 action of the legislature in partially eliminating the collateral source rule in actions against certain health care providers. Using a less severe "rational basis" test, the court found that the state had a legitimate interest in assuring available and affordable health care to its citizens - and ruled the partial elimination of the collateral source rule not in violation of the states equal protection constitutional provisions.

Great care, however, should be taken in drafting any proposed legislation to avoid the supremacy and contractual obligations challenges.

Activities in other states -

The following states have acted to modify the existing collateral source common law rules; with at least application to medical malpractice if not all torts:

Alaska	Indiana	Ohio
Arizona	Iowa	Pennsylvania
California	Kansas	Rhode Island
Colorado	Michigan	South Dakota
Connecticut	Minnesota	Tennessee
Deleware	Nebraska	Washington
Florida	New Hampshire	
Idaho	New York	
Illinois	North Dakota	

However, it should be noted that all have or are presently being subjected to constitutional challenges - with several having already been struck down on one of the three previous Constitutional grounds listed. If Iowa is to further modify the collateral source rule, it will be important to review all such challenges to avoid similar challenges of unconstitutionality.

CONTINGENT FEES

Contingent fees are by far the most prevalent form of payment for plaintiff attorneys in personal injury litigation in Iowa and nationwide. Under a contingent contract, the attorney's fee is contingent on the outcome of the case: If the plaintiff wins, the attorney is paid a predetermined and contracted for fraction of the award; if the plaintiff loses, the attorney receives no fee. In all other types of cases - the usual form of payment to the plaintiff attorney is an hourly wage contract, where the plaintiff pays the attorney an hourly rate for time spent on the case, regardless of the outcome of the case.

The major focus of the contingent fee is the shifting of the risk of zero return on the investment in litigation from the plaintiff to the attorney.

THE TRADITIONAL ARGUMENTS FOR AND AGAINST CONTINGENT FEE CONTRACTS INCLUDE:

For	Against
Contingency contracts allow poor or severely injured plaintiffs access to the judicial system	Giving the attorney the right to finance litigation promotes "nuisance" suits with little legal merit
Attorneys are deterred from taking nonmeritorious suits where all costs of unsuccessful litigation will be borne by the attorney	Contingent contracts provide excessive fees for plaintiff attorneys
Contingency contract assures that attorney/client interests will be aligned and maximize work input to the client's advantage	The attorney's stake in the claim creates a conflict of interest with the client which impedes settlement
	The attorney's fee is more directly related to the severity of the plaintiff's injury than it is to the attorney's skill or performance

If the merits and efficiency of contingent fees is to be reviewed, it most often is measured based upon its effect on the following three socio-economic factors:

1. Its effect on attorney effort per case, plaintiff's expected gross recovery, and the division of the gross recovery between the net award to the plaintiff and the attorney's fee.

2. Its effect on risk aversion for plaintiffs and plaintiff attorneys.

3. Its effect on the number of claims filed.

Reviewing the studies in the area - and breaking down the conclusions on the above three factors, it seems apparent that:

1. The contingent fee system induces the same amount of attorney effort that would be chosen by a fully informed, risk-neutral plaintiff who was paying an attorney by the hour.

2. Creation of risk neutrality by use of contingent contract yields identical attorney effort, expected outcome, and expected fee as an hourly wage contract.

However, with plaintiff risk aversion, the plaintiff's expected utility is higher with a contingent fee since aversion is reduced. Risk aversion remains when hourly contracts are imposed - resulting in suboptimal investment in pursuing claims. Rough estimates by academicians suggest that severe restrictions or prohibition of contingent fees which result in a 50% reduction in fee percentage would lead to a 25% reduction in the expected gross recovery of the plaintiff.

3. An analysis of whether the potential effect of contingent fees in moving a plaintiff from risk aversion to risk neutrality induces unacceptable levels of litigation is simply too subjective for any author or academician to conduct satisfactorily. However, research articles studying the responses of plaintiffs show that post injury information about negligence which is nonperfected and which is matched with a plaintiff's positive costs of bringing suit, creates risk aversion. Risk aversion which cannot be reduced will create incentives insufficient to litigate. Comparing these studies to those which analyze societal cost savings and benefits resulting from the enforcement of tort standards - we arrive at our nonconclusion.

That nonconclusion states that only if the noninternalized benefits of a plaintiff seeking enforcement of tort standards are exceeded by the noninternalized costs of defense and costs of operating the courts, does the contingent fee impose excessive costs on society.

How Do Contingency Restrictions Work?

TYPE #1. According to amount

At least a half-dozen states have enacted laws limiting the attorney's contingent fee to a percentage determined by a sliding scale. The larger the award, the smaller the percentage.

Example - California, where contingency fees are limited to 40% of the first $50,000, 33% of the next $50,000, 25% of the next $100,000, and 10% of anything over $200,000. If, for instance, a claimant was awarded $1 million, the contingent fee maximum would be $142,000 - estimated at about 1/2 of the normal California contingency fee award on a $1 million verdict.

TYPE #2: According to Resolution form

A couple of states have enacted laws limiting the attorney's contingent fee to a percentage arbitrarily assigned to the judicial mechanism making the award. The earlier the resolution occurs in the judicial system, the smaller the percentage.

Example - Florida, where the contingent fee maximum for a case settled prior to litigation is 15% - with a percentage range maximum of 45% if the case proceeds through trial and appeal before final verdict.

TYPE #3: Flat caps

At least a half-dozen states have enacted laws which limit contingent fees at an absolute maximum percentage - usually 33 1/3% - regardless of award amount or resolution mechanism.

TYPE #4: Judicial mediation

At least a dozen states have enacted laws which require or authorize the courts to review all contingent fees (usually also defense fees) to determine reasonableness prior to payment. Hearing mechanisms are usually provided for fee "reasonableness" disputes.

TYPE #5: According to type of damages awarded

At least one state has adopted, and several have proposed, contingent fee restrictions or prohibitions according to the nature of the plaintiff's award. The more economic (i.e., essential for compensation) the award is, the smaller the contingent fee percentage allowed.

Example - Wisconsin, where a plaintiff's attorney cannot receive contingent fees for awards, or portions of awards, representing past medical expenses or the first $25,000 awarded for future health-care needs.

Associated data of interest:

1. Malpractice cases are risky endeavors for plaintiff's lawyers.

According to statistics compiled by the National Association of Insurance Commissioners; in a study of claims closed by 127 medical-liability insurers from 1975-1978, approximately 62% of all claims and 86% of those tried to verdict resulted in no payment.

More recent estimates made by St. Paul Fire and Marine Insurance Co. show that 65 to 70% of claims filed against its policyholders go unpaid.

2. Malpractice cases are expensive.

According to a 1978 published study by the Department of Health and Human Services (in which both plaintiffs and defense attorneys were surveyed) there was evidence that it takes four times as long to prepare and try a medical malpractice action than it does to handle other cases.

3. Do contingency fee restrictions or prohibitions reduce frequency and severity of claims?

Recent studies admit that it is impossible to isolate the impact of contingency fee limitations from those of other reforms or changes usually enacted at the same time. However:

(A) A spot check of medical information and insurance information in states that restrict plaintiff's attorney's fees indicated that all have experienced similar frequency and severity increases to states which have not restricted such fees.

(B) St. Paul, for one, has tabulated the frequency of claims per 100 policyholders in a number of states for the past decade and found no discernable pattern in those that cap fees versus those that don't.

4. Do contingent fee contracts promote attorney screening of non-meritorious cases - or attorney prompted litigation of non-meritorious cases?

A majority of legal and socio-economic academicians express the opinion that contingent contracts provide direct incentive for attorneys to screen and refuse non-meritorious suits.

The 1973 H.E.W. Commission on Medical Malpractice, the 5-year study of the American Bar Association Special Committee on the Tort Liability System, and both recent Rand Institute on Civil Justice Reports on Contingent Fees conclude that contingent fee contracts promote plaintiff attorney screening of tort claims.

The American Medical Association's Special Task Force on professional Liability and Insurance, in a statement made early in its deliberations in 1985, stated that "regulating contingency fees may not reduce the number or severity of suits."

5. Do contingent fee contracts increase the number of claims a plaintiff is willing to pursue?

According to the majority of authors and legal experts in the area, plaintiff's in those cases usually covered by contingency fee contracts are generally more risk-averse than in other areas of litigation - where plaintiffs are normally risk-neutral. In areas where contingent fees are perceived with the highest degree of hostility (medical malpractice, products liability and tortious class-actions) plaintiff risk aversion is greatest - due to the expensive and prolonged nature of litigation and the higher percentage of nonawards. Whereas, plaintiff attorneys who normally work pursuant to contingent fee are risk neutral - or even risk-preferring.

This combination which results in risk aversion transfer, while reducing nonmeritorious actions, is perceived as potentially increasing the number of cases filed which have merit but which may not have been brought due to severe risk aversion.

However, even given the foregoing - it seems the majority opinion that contingency fee restrictions or prohibitions would have a negligible effect, if any, on claims frequency.

Pre - 1985/86 Session legislative Activity on Attorneys Contingency Fees. (*majority application only to medical malpractice)

TYPE #1:

California (Recently ruled constitutional)
Delaware
New Hampshire (Ruled unconstitutional)
New York
Pennsylvania

TYPE #2:

Florida

TYPE #3:

Idaho
Indiana
Oregon

TYPE #4:

Arizona
Hawaii
Iowa
Kansas
Maryland
Nebraska
Rhode Island (Repealed)
Tennessee
Washington

TYPE #5:

Wisconsin

1985/86 State Legislative Activity on Legal Fees

Arizona: H.B. 2376 - Provides for scheduled attorney contingency fees. (VETOED)

California: (upheld in 1985 S. Ct. decision) - restricts attorney contingency fees.

Connecticut: Substitute H.F. 6134 - schedule attorneys contingency fees (a five-tiered approach commencing at 33% of the first $300,000 and finishing at 10% of any amount exceeding $1.2 million).

Idaho: H.F. 1469 - places limits on attorney contingency fees.

Massachusetts: Sent to Governor H.F. 6172 - schedules attorneys fees (40% of first $150,000 down to 25% of excess over $500,000).

Missouri: S.B. 742 - limits attorneys contingency fees.

New Hampshire: H.F. 513 - requires contingency fee agreements to be in writing with final costs set out at the end of litigation. Attorneys will be required statutorily to offer hourly rate and contingency fee options. Judges will be permitted to review contingency fee costs in all judgments exceeding $200,000.

New Mexico: S.B. 110 - caps attorneys fees for workers compensation cases at 20% of the first $5,000; 15% of next $5,000 and 10% of remaining benefits.

Wisconsin: Medical Malpractice Omnibus Bill - sliding scale for attorney contingency fees (from 1/3 of first $1 million if proving negligence, to 25% of damages if defendant admits negligence, to 20% of damages exceeding $1 million).

NONMERITORIOUS ACTIONS

Background

Commentators continue to argue that there is no single device existing that provides a defendant in a frivolous suit with adequate relief. They cite the major reason for this lack of legal device as the basic conflict that such proposals have with the high value American society places upon free and open access to the courts.

This right of unrestrained access is founded upon the United States Constitution and corresponding provisions exist in almost every state constitution. These provisions are perceived as a basic tenet of citizen equality in America.

A majority of legal academicians and practitioners are of the opinion that for the most part the present systems adequately respond to low or nonmerit actions in theory - but that the forms of available relief are cumbersome and really provide no simple relief to a party forced to defend a "marginal at best" claim.

Traditional Common-Law Remedies

The common law has created a number of forms of relief to a defendant who feels that they have been subjected to a nonmeritorious action. Included within this list are:

1. Malicious Prosecution:

An action in favor of a defendant who has been wrongfully sued will lie when the following four factors can be alleged and proven:

-A claim was instituted or was continued to be pursued;

-Which terminates in favor of the defendant;

-When the plaintiff had no probable cause to believe in the validity of the proceeding or pursued the claim with malice toward the defendant; and

-The defendant is thereby injured.

2. Abuse of Process:

An action, similar to malicious prosecution, will lie in favor of the defendant if the defendant can bring forward evidence on the following three elements:

-The misuse of a court process in proceeding;

-Improper purpose in using the process; and

-Resulting harm to the defendant.

Although similar to malicious prosecution, there are several additional key factors to abuse of process.

-It may be filed before the termination of the original action.

-It has a flexible "benchmark" by requiring only that a court process was used in a manner not contemplated by law.

Abuse of process seems most often used in cases involving extensive discovery mechanisms and counter-claims.

3. Defamation

An action created to protect parties from abusive court proceedings or strategies, by providing an action in favor of the abused party if the following can be shown:

-Defamatory statement.

-Publication of the statement.

-Inducement (extrinsic facts that place the statement in a defamatory context).

-Colloquialism (allegation that the defamatory statement referred to the defendant).

-Innuendo (allegation of the defamatory meaning of the statement)

-Injury

4. Intentional Infliction of Emotional Distress

General action recognition of liability for extreme and outrageous conduct that intentionally or recklessly causes severe emotional distress. However, it is recognized that this method of protection is difficult to prove given the difficulty in establishing "outrageous conduct" sufficient to meet the standards of this tort.

5. Prima Facie Tort

The general common law action which lies for any person who can show:

-An intentional act.

-Intent to injure.

-Subsequent injury.

Other Nonstatutory Responses

In addition to common law protection, there have been additional frivolous suit protections developed of a nonstatutory nature.

1. Federal Rule 11

This federal rule is the most commonly used device for frivolous suit protection in the federal courts. The rule provides:

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Perhaps the benchmark interpretation of the purpose and intent of Rule 11 is contained in the following paragraph taken from the 9th circuit court.

"Before filing a civil action, the attorney has a duty to make an investigation to ascertain that it has at least some merit, and further to ascertain that the damages sought appear to bear a reasonable relation to

injuries actually sustained."

2. Federal Exceptions to the American Rule

The American Rule is that attorney's fees of the prevailing party will not generally be shifted to the nonprevailing party in the absence of the statute or an enforceable contract. The federal courts have created at least three exceptions to this rule:

-Common fund exception.

-Prior litigation exception

-Bad faith exception

It is only the third exception that has direct application to tort actions. According to the United States Supreme Court ... "It is unquestioned that a federal court may award counsel fees to a successful party when the parties opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons."

Although an award of fees based on the bad faith exception are strictly punitive, its standards, like those of Rule 11, are less burdensome for a party seeking an award than those of the traditional common law actions.

3. Federal Rules 36 and 37(c)

Federal Rule 36 provides the means by which low or nonmerit issues may be removed from a case to reduce the expense of defending such issues. The Rule in pertinent part provides:

> "A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters ... set forth in the request that relate to statements or opinions of fact or of the application of law to fact ..."

If a party fails to abide by the spirit of Rule 36, sanctions may be imposed pursuant to Rule 37(c):

> "If a party fails to admit ... any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the ... matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees ..."

4. Federal Rule 68

This rule has the least complicated approach to the issue than any other federal rule, but the relief offered is more limited than most rules. The rule provides that if a defendant offers to submit to judgment for a specified amount, and if the plaintiff refuses the offer and subsequently receives a

judgment in an amount less than the offer, the plaintiff must pay costs incurred after the date of the offer. However, this rule may be of limited application until the federal courts determine finally whether these "costs" contemplated include "reasonable attorney's fees".

Statutory Responses to Frivolous Claims

1. Federal Responses:

Section 1927 of the Judicial Code provided that costs could be assessed against any attorney who "multiplies the proceedings in any case as to increase costs unreasonably and vexatiously."

In 1980, this was amended to provide that both costs and attorney fees can be assessed. Additionally, the words "increase costs" were removed, showing a shift from penalties for increasing costs to penalties for unreasonable delays.

Original section 262 of the Judicial Code, known as the All Writs Act. In response to a demonstrated pattern of frivolous, repetition, malicious, vexatious, or harassing litigation, the All Writs Act may be invoked to enjoin plaintiff and attorney from future filings in pursuit of frivolous claims.

2. State Responses:

Over one-quarter of the states have enacted statutes imposing sanctions, generally in the form of attorney's fees, on parties who assert frivolous claims.

No two statutes are the same, and they tend to vary in two major respects:

First, according to the standard of conduct for which sanctions may be imposed.

Second, according to whether the application of sanctions is mandatory or discretionary with the court.

Standard of Conduct

The majority of state statutes describe the prohibited conduct as the assertion of claims or defenses that are either frivolous, groundless, not in good faith, or some combination of the three.

Examples of states imposing strict standards, and their operative language, include:

Florida - "Finding of Complete absence of a justiciable issue of either law or fact raised by the losing party."

Hawaii - "Finding that all claims made by the party are completely frivolous and are totally unsupported by the facts and law."

Examples of states imposing less stringent standards, and their operative language, include:

North Dakota - "Whether or not a reasonable person could believe that a claim would be adjudicated in his favor."

Michigan - "When the opposing party asserts an unreasonable allegation or denial."

Discretionary versus Mandatory

The second major respect, upon which states differ is whether the judge may or must impose the sanctions provided. A cursory review of state statutes reveals the following split:

Discretionary use of Sanctions	Mandatory Use of Sanctions
Connecticut	Arizona
Georgia	Colorado
Indiana	Florida
Maryland	Hawaii
Michigan	Kansas
Minnesota	Massachusetts
New Hampshire	Oklahoma
North Dakota	Wisconsin
South Dakota	
Utah	
Washington	
Wyoming	

It also seems apparent that these two differences (standard of conduct and discretionary versus mandatory imposition) are somewhat interrelated. Generally, the stricter the standard of proof required - the more likely it is that the sanctions will be mandatory. Conversely, the less stringent the standard of proof - the more likely it is that sanctions will be discretionary.

Recent/Unusual Actions Regarding Frivolous Suits

We would also like to take a moment to briefly outline those state statutes which are of a very recent nature or which take an unusual approach to the issue. Those statutes include:

Arizona - (H.B. 2377) Penalties for "unjustified" actions.

Connecticut - (H.B. 6134) Filing in absence of "probable cause".

Idaho - If claim or counterclaim does not exceed $2500.

Indiana - Judicial determination of frivolousness or assertion or defense in "bad faith".

Michigan - (H.B. 5154) Penalties including affidavit of noninvolvement dismissal

Nevada - If plaintiff recovers less than $10,000, may receive attorney's fees. If plaintiff seeks less than $10,000, defendant may receive attorney's fees.

New York - (S. 9470) Requirement of certificate of merit.

Oklahoma - (S.B. 488) Allows prevailing parties to recover up to an aggregate of $10,000 in attorney's fees in judicially determined frivolous suits.

Vermont - (Rule) For "vexatious" commencement.

Attorney Liability

To this point we have discussed generally only the imposition of sanction. Given the recent actions of the federal government and the many states, including Iowa, it may also be necessary to review the issue of who will be sanctioned. The principal issue involved in this debate is whether or not the common law, rule, or statutory recourse for frivolous or low merit actions may be made directly against the opposing party's attorney.

In reviewing the cases and articles in the area, we have tried to roughly outline those factors counseling attorney nonliability and those counseling attorney liability.

Factors for Nonliability

The relationship between a client and his attorney is governed largely by two sets of considerations.

The first set of considerations are those of agency, which mandate that an attorney:

1. Be loyal to a client.

2. Remain within the boundaries of the attorney's authority.

3. Obey the client's instructions.

4. Exercise due care.

5. Account for all moneys entrusted.

6. Disclose interests which may conflict with those of the client.

7. Keep communications confidential.

Attorneys generally have control over the procedural aspects of a lawsuit - which means the client must place his trust in the attorney's expertise. It is then essential that the client feel free to discuss all relevant information with the attorney. Conversely, the attorney must rely to a great extent upon the information disclosed to him by his client. If that information is false or incomplete, it may be unfair to hold an attorney liable since there would have been insufficient knowledge to form malice or intent. In all but a very few cases, it would be at least difficult to impute a client's false statements to the attorney.

It would appear, then, that society's basic approach to the legal system would shield attorneys from possible liability in all cases except where the attorney assumes an active role in wrongful conduct.

Canon 2

A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.

There are 34 ethical considerations under this Canon, ranging from:

EC 2-28 "... this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally."

To

EC 2-34 "A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances ..."

There are also 10 Disciplinary Rules under Canon 2.

Also to be considered in attorney liability is Canon 7:

Canon 7

A lawyer should represent a client zealously within the bounds of the law.

There are 39 Ethical considerations set out under Canon 7, which include:

EC 7-1 "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes disciplinary rules and enforceable professional regulations ..."

EC 7-2 "The bounds of the law are difficult to ascertain ..."

EC 7-3 "... While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law ..."

There are also 10 disciplinary rules set out under this Canon. Most important of those Canon 7 disciplinary rules, in relation to frivolous suits and claims, is D.R. 7-102.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
(4) Knowingly use perjured testimony or false evidence.
(5) Knowingly make a false statement of law or fact.
(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
(8) Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

(B) A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal in all circumstances except when barred from doing so by section 622.10, The Code. If he is barred from doing so by section 622.10, he shall immediately withdraw from representation of the client unless the client fully discloses the fraud to the person or tribunal.
(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal. [Court Order January 21, 1980]

Referred to in DR 7-101

Two additional considerations also exist which call into question the advisability of attorney liability.

The adversary trial system significantly effects the conduct of an attorney. The theory underlying this system is that the presentation of each side of an issue by conflicting parties is most likely to uncover the truth. This goal may be realized only if both parties and their advocates are able to state their positions freely and forcefully. Although this sometimes may make over zealous advocacy difficult to avoid, it is submitted that levying penalties for any but the most flagrant abuses would create the risk that attorneys would argue their client's positions with less force than is needed in our system.

The expansions of tort liability causes of action or defenses in our system also seems to militate against the imposition of liability on attorneys for all but the most groundless actions. Since persons seeking novel interpretations of the law face equivocal results, it would appear that uncertain claims must arise frequently in a legal system constantly recognizing new causes of action or defenses. Although an attorney is required to resolve doubts in favor of their client, they may be hesitant to do so if too readily found liable.

Factors for Liability

The cases and articles in the area take a somewhat less esoteric approach to the enumeration of factors counseling for attorney liability. These straight forward opinions include:

1. An attorney's own actions can constitute a misuse of the judicial process when he knowingly serves as his client's vehicle for unjustly making a claim against another. If the fear of professional sanctions does not deter - perhaps the fear of personal liability will.

2. Attorneys are allegedly unrestrained in advising a client as to the attorney's judgment of the case. If the attorney advises action where he knows or should know that no merit exists - or where action is advised for an improper purpose (i.e., intent to force insurance settlement) the client may be able to gain redress of losses incurred in litigation on the basis of professional malpractice. The defendant, however, would have difficulty in gaining redress due to privity problems (lack of a contract with plaintiff's attorney). Therefore it would be helpful for the defendant - and perhaps the client - if recourse were available for the attorney's meritless advice.

3. Making an attorney potentially personally liable should increase the attorney's pre-suit review and screening of cases - for which the client may have no expertise with which to make a judgment of legal merit. This incentive increases the attorney's role in "weeding out" nonmeritorious claims to protect the assets of plaintiff, defendant, and the court system generally.

Summary of Review

In summary, although the shifting of attorney's fees or increasing the liability of attorneys for abuses of the judicial system holds out the promise of alleviating unnecessary burdens upon plaintiffs, defendants, and the court system generally, it also holds out the threat of intimidating litigants with potentially meritorious claims and inhibiting the growth and refinement of the substantive law.

Any exception to the no-fee shifting rule or an increase in attorney liability needs to be reviewed as to its potential to strike the delicate balance between deterring the abuse of the system and maintaining unrestrained access to the courts which is a cornerstone of the system.

State of the Issue in Iowa

Iowa has historically provided avenues of redress in the area of frivolous claims.

Traditional common law remedies open to Iowa defendants include:

Malicious Prosecution

Abuse of Process

Defamation

Intentional Infliction of Emotional Distress

Prima Facie Tort

Although the federal nonstatutory remedies had historically not been available in Iowa state courts, both judicial and legislative actions have recently opened corresponding remedies for Iowa courts. These include:

Rule 80A (Judicial) and Section 619.19 (Legislative)

This rule and statute create a state remedy synonymous with the remedy provided by federal rule 11.

Rule 80A (Judicial) and Section 617.16 (Legislative)

This rule and statute create a state remedy including more than that contemplated in the federal All Writs Act.

Chapter 677 (Legislative)

This chapter corresponds to Federal Rule 68, but suffers from the same perceived defect of being perceived as not including attorneys fees as costs to be covered by offers to confess judgment.

Iowa attorney's are also governed by Disciplinary Rule D.R. 7-102, providing professional sanctions for attorneys violating the rule.

Iowa Comparison to Other States

Although Iowa laws, rules, and professional regulations may be more extensive than those of most states - they do follow the general pattern of imposing less strict standards of conduct (thereby covering more activity) with judicial discretion as to sanction (thereby eliminating some cases in which the sanction is technically enforceable).

Liability of Attorneys in Iowa

Within judicial discretion, the recent enactments in Iowa allow for the imposition of attorney liability.

Shifting of Attorney Fees

As noted in the previous review of historical status and the legislatively enacted chapter 677, Iowa still follows the general American rule where attorney fees are not shifted unless it is pursuant to statute, pursuant to an enforceable contract, or falls within a judicial exception to the rule such as common fund, prior litigation, or bad faith.

Sec. 36. NEW SECTION. 617.16 FRIVOLOUS ACTIONS.

If a party commencing an action has in the preceding five-year period unsuccessfully prosecuted three or more actions, the court may, if it deems the actions to have been frivolous, stay the proceedings until that party furnishes an undertaking secured by cash or approved sureties to pay all costs resulting to opposing parties to the action including a reasonable attorney fee.

Sec. 38. NEW SECTION. 619.19 VERIFICATION NOT REQUIRED -- AFFIDAVITS.

Pleadings need not be verified unless otherwise required by statute. Where a pleading is verified, it is not necessary that subsequent pleadings be verified unless otherwise required by statute.

The signature of a party, the party's legal counsel, or any other person representing the party, to a motion, pleading, or other paper is a certificate that:

1. The person has read the motion, pleading, or other paper.

2. To the best of the person's knowledge, information, and belief, formed after reasonable inquiry, it is grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

3. It is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation.

If a motion, pleading, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

If a motion, pleading, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose upon the person signing, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee.

CHAPTER 677

OFFER TO CONFESS JUDGMENT

677.1 Offer to confess before action brought.

Before an action for the recovery of money is brought against any person, the person may go before the clerk of the county of the person's residence, or of that in which the person having the cause of action resides, and offer to confess judgment in favor of such person for a specified sum on such cause of action, as provided for in chapter 676.

[R60, §3403; C73, §2898; C97, §3817; C24, 27, 31, 35, 39, §12672; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.1]

677.2 Nonacceptance — costs.

If such person, having had the same notice as if the person was a defendant in an action that the offer would be made, of its amount, and of the time and place of making it, refuses to accept it, and afterwards commences an action upon such cause, and does not recover more than the amount so offered to be confessed, the person to whom the offer was made shall pay all the costs of the action.

[R60, §3403; C73, §2898; C97, §3817; C24, 27, 31, 35, 39, §12673; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.2]

677.3 Effect of nonaccepted offer.

On the trial thereof the offer shall not be treated as an admission of the cause of action or amount to which the plaintiff was entitled, nor be given in evidence.

[R60, §3403; C73, §2898; C97, §3817; C24, 27, 31, 35, 39, §12674; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.3]

677.4 Offer to confess after action brought.

After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action.

[R60, §3404; C73, §2899; C97, §3818; C24, 27, 31, 35, 39, §12675; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.4]

677.5 Nonacceptance — costs.

If the plaintiff, being present, refuses to accept judgment for such sum in full of the plaintiff's demands in the action, or, having had three days' notice that the offer would be made, of its amount, and of the time of making it, fails to attend, and on the trial does not recover more than was offered to be confessed, the plaintiff shall pay the costs of the defendant incurred after the offer.

[R60, §3404; C73, §2899; C97, §3818; C24, 27, 31, 35, 39, §12676; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.5]

677.6 Effect of nonaccepted offer.

The offer shall not be treated as an admission of the cause of action or amount to which the plaintiff was entitled nor be given in evidence upon the trial.

[R60, §3404; C73, §2899; C97, §3818; C24, 27, 31, 35, 39, §12677; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.6]

677.7 Offer to confess after action brought.

The defendant in an action for the recovery of money only may, at any time after service of notice and before the trial, serve upon the plaintiff or the plaintiff's attorney an offer in writing to allow judgment to be taken against the defendant for a specified sum with costs.

[R60, §3405; C73, §2900; C97, §3819; C24, 27, 31, 35, 39, §12678; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.7]

677.8 Acceptance — judgment.

If the plaintiff accepts the offer, and gives notice thereof to the defendant or the defendant's attorney within five days after the offer is made, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance with a copy of the offer, verified by affidavit; and in either case a minute of the offer and acceptance shall be entered upon the judge's calendar, and judgment shall be rendered by the court accordingly.

[R60, §3405; C73, §2900; C97, §3819; C24, 27, 31, 35, 39, §12679; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.8]

677.9 Effect of nonaccepted offer.

If the notice of acceptance is not given in the period limited, the offer shall be treated as withdrawn, and

shall not be given in evidence or mentioned on the trial.

[R60, §3405; C73, §2900; C97, §3819; C24, 27, 31, 35, 39, §12680; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.9]

677.10 Costs.

If the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff cannot recover costs, but shall pay the defendant's costs from the time of the offer.

[R60, §3405; C73, §2900; C97, §3819; C24, 27, 31, 35, 39, §12681; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.10]

677.11 Conditional offer.

In an action for the recovery of money only, the defendant, having answered, may serve upon the plaintiff or the plaintiff's attorney an offer in writing that, if the defendant fails in the defendant's defense, the amount of recovery shall be assessed at a specified sum.

[R60, §3406; C73, §2901; C97, §3820; C24, 27, 31, 35, 39, §12682; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.11]

677.12 Acceptance — effect.

If the plaintiff accepts the offer, and gives notice thereof to the defendant or the defendant's attorney within five days after it was served, or within three days if served in term time, and the defendant fails in the defendant's defense, the judgment shall be for the amount so agreed upon.

[R60, §3406; C73, §2901; C97, §3820; C24, 27, 31, 35, 39, §12683; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.12]

677.13 Nonacceptance — effect.

If the plaintiff does not accept the offer, the plaintiff shall prove the amount to be recovered as if the offer had not been made, and the offer shall not be given in evidence or mentioned on the trial, and if the amount recovered by the plaintiff does not exceed the sum mentioned in the offer, the defendant shall recover the defendant's costs incurred in the defense.

[R60, §3406; C73, §2901; C97, §3820; C24, 27, 31, 35, 39, §12684; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.13]

677.14 No cause for continuance.

The making of any offer pursuant to the provisions of this chapter shall not be cause for a continuance of the action or a postponement of the trial.

[R60, §3407; C73, §2902; C97, §3821; C24, 27, 31, 35, 39, §12685; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §677.14]

STATUTES OF LIMITATIONS (with special reference to medical malpractice and claims of minors/incompetents)

Background

A statute of limitations is a law cutting off the right to sue after the expiration of a specified period of time following injury or discovery of injury.

The primary purpose of a statute of limitations is to prevent the prosecution of stale claims. With the passage of time, evidence may be lost or witnesses may disappear. To ensure fairness to defendants it has been deemed necessary to place a limit on the period of time during which an action may be brought. A second general premise of such statutes is to lift the spectre of undefined future liability from over the heads of individuals often involved as defendants.

The issue of statutes of limitations is the subject of one general rule:

"The time period for the bringing of a tort claim starts to run on the date of the alleged act or omission which forms the basis for the claim, regardless of the plaintiff's knowledge of his injury. Courts following this rule emphasize that it is an act or omission, and not resulting damage, that gives rise to a cause of action."

The original notion of a statute of limitations, then, imposed an absolute bar on bringing a cause of action. The traditional rule, however, has been the subject of a number of judicially and statutorily created exceptions. Those exceptions fall generally into two categories:

1. Those which change or modify the date on which the statute begins to run.

2. Those which stay or "toll" the statute during the period in which it would normally run.

Examples of exceptions which change or modify the date on which the statute begins to run include:

Subject of contract rule - If the action which arose was also the subject of a contract, a plaintiff may plead the action as a breach of contract and thus take advantage of a longer statute of limitations controlling contracts than those controlling tort actions.

Discovery Rule - The applicable statute of limitations does not run from the date of the action or omission, but rather from the date the plaintiff discovers the injury or should have discovered it through the exercise of due diligence.

Examples of exceptions which stay or "toll" the statute during the period in which it would normally run include:

Fraudulent Concealment - Where the defendant has knowledge of the error or omission toward the plaintiff and fraudulently conceals that error, the statute is tolled until the fraud is exposed.

Termination Rule - Where the defendant continues the relationship with the plaintiff after making the error or omission, and the defendant continuously fails to discover the previous error or omission.

Those exceptions document the general judicial attitude toward statutes of limitations, especially in the medical malpractice area, as being one of hostility. The opinions creating such exceptions indicate that the judiciary viewed the danger of stale claims as being outweighted by the injustice to plaintiffs who find their legal recourse cut off through no fault of their own.

This judicial trend toward exceptions continued until the 1974/1975 insurance cycle crisis in medical malpractice. At that time the crisis prompted legislatures to take action regarding the judicial exceptions. The legislative trend was toward enactment of shorter limitations and the imposition of absolute maximum limits which could not be exceeded - except as statutorily authorized.

Special Application to Minors

Most existing state statutes of limitations continue to recognize at least one exception which tolls the otherwise absolute character of the statute. The exception provides that if an injury is incurred by a minor, the statute is tolled (i.e., stops running) on the minor's cause of action until the minor reaches the age of majority.

The one area of tort law where this exception has been eroded is that of medical malpractice. Several states have amended their statutes of limitations in medical malpractice. typically by providing that the statute applies to a minor upon reaching a certain age (not necessarily majority).

The most common manifestation of this modification is a statute which provides that actions which accrue to a minor before the age of six must be brought before the minor's eighth birthday.

Some states, however, have modified their statutes to hold minors subject to the same statutory limitation period as applies to adults (typically two or three years).

Some states have modified their statutes only slightly. For example, several states provide that a person who has been injured as a minor must pursue the claim either within the general limitation period - or within one year after reaching the age of majority, whichever period is longer.

Alabama: Reese v. Rankin Fite Memorial Hospital [403 so. 2nd 158 (1981)]

Indiana: Rohrabaugh v. Wagoner [413 N.E. 2nd 891 (1980)]

Kansas: Wheeler v. Lenski [658 P. 2nd 1059 (1983)]

Citations to cases in which statutes modifying the statute of limitations for minor victims of alleged medical malpractice were constitutionally struck down include:

New Hampshire: Carson v. Maurer [424 A. 2nd 825 (1980)]

Ohio: Schwan v. Riverside Methodist Hospital [6 Ohio St. 3rd ___ (1983)]

Texas: Sax v. Votteler [648 S.W. 2nd 661 (1983)]

Summary

The activity of the many states, as set out in the referred to statutes, seems to indicate a single purpose - that of protecting defendants from stale claims while not cutting off a plaintiff's right to bring a clearly meritorious one. Therefore, again we are faced with the need to carefully construct a delicate balance between the competing considerations.

As a closing point, we might add that there is now discussion in academic circles of the use of a presently existing mechanism, in a clearly more limited manner, to protect potentially aggrieved plaintiffs in such enactments to modify the statutes of limitations of minor victims of medical malpractice.

This proposal envisions the creation of a compensation system (funded by medical malpractice or OBGYN insurance premium surcharges) from which minor plaintiffs could seek actual economic damages if their claim were barred by a modified statute of limitations.

STATUTORY REVIEW OF APPLICABLE STATUTES OF LIMITATIONS

Alabama:

General Rule - Within two years of act or omission, or within six months of discovery - whichever is earlier.
Absolute Limit - Four years of the act or omission.
Exceptions:
1. Additional year for discovery of fraudulent concealment
2. Minors under four, until eighth birthday.
3. Minors 4-19, insane, imprisoned - subject to general rule and absolute limit.

Alaska:

General Rule - within two years of act or omission.
Exceptions:
1. Minors, incompetent and imprisoned not subject to general rule until disability removed.

Arizona:

General Rule - within two years of accrual of cause of action.
Exceptions:
1. Minors, incompetents - not subject to general rule until disability removed.
2. Imprisoned - not subject to general rule until cause of action discovered.

Arkansas:

General Rule - Within two years of accrual of cause of action.
Exceptions:
1. Foreign objects - additional year from discovery.
2. Minors - until 19th birthday.
3. Incompetents - not subject to general rule until disability removed.

California:

General Rule - Within 3 years of date of injury or 1 year of discovery, whichever occurs first.
Exceptions:
1. Fraud, concealment, foreign bodies-tolls general rule until discovery.
2. Minors under six, within three years or prior to 8th birthday whichever is longer.
3. All minors, tolled for any period during which parent or guardian and defendant or insurer conspire or collude in the failure to bring an action on behalf of the minor.

Colorado:

General Rule - Within 2 years of discovery of, or when the person should have discovered, the injury.
Absolute Limit - Within 3 years of act or omission.
Exceptions:
1. Knowing concealment and foreign bodies - within two years of discovery of such act or omission.
2. Incompetents, imprisoned - within 2 years of removal of disability.
3. Minors under 6, within 2 years of reaching age 6.
4. Minors under 18 without natural or legal guardian:
    a. Within 2 years of turning 18 or
    b. Within 2 years of appointment of guardian.

Connecticut:

General Rule - Within 2 years of injury or when injury was or should have been discovered.
Absolute Limit - Within 3 years of act or omission.
Exceptions:
1. Fraudulent concealment, within 2 years of discovery of fraud.

Delaware:

General Rule - Within 2 years of injury if discoverable.
Absolute Limit - Within 3 years of injury.
Exceptions:
1. Minors under 6, within 2 years if discoverable or, 3 years absolute limit of 6th birthday.

Florida:

General Rule - Within 2 years of injury or discovery of injury.
Absolute Limit - Within 4 years of act or omission.
Exceptions:
1. Fraud, concealment, intentional misrepresentation - availability of additional 2 years - but not to exceed 7 years from act or omission.
2. Incompetency - tolled for period not to exceed 7 years from act or omission.

Georgia:

General Rule - Within 5 years of act or omission.
Absolute Limit - Within 7 years of act or omission.
Exceptions:
1. Foreign bodies - additional 1 year after discovery.
2. Minors, incompetents - no application of general rule until after disability removed.
3. Fraudulent concealment - no application of general rule until after fraud discovered.

Hawaii:

General Rule - Within two years of discovery.
Absolute Limit - Within six years of act or omission.
Exceptions:
1. Intentional concealment, no application of absolute limit until discovery of fraud.
2. Infancy, insanity, imprisonment - no application of general rule or absolute limit until disability removed.

Idaho:

General Rule - Within 2 years of act or omission.
Exceptions:
1. Foreign objects, fraudulent concealment - additional 1 year from discovery.
2. Minority, insanity, imprisonment - until disability is removed, but not to exceed six years.

Illinois:

General Rule - Within 2 years of discovery or of when discovery should have occurred.
Absolute Limit - Within 4 years of act or omission.
Exceptions:
1. Fraudulent concealment - within 5 years of discovery of fraud.
2. Minors, legal disabled, imprisoned - within 2 years of removal of disability.

Indiana:

General Rule - Within 2 years of act or omission.
Exception:
1. Minors under 6, until 8th birthday.

Kansas:

General Rule - Within 2 years of injury or of ascertainability of injury.
Absolute Limit - Within 4 years of act or omission.
Exceptions:
1. Minority, disability, imprisonment - within one year of removal of disability, but not to exceed 8 years of act or omission.

Kentucky:

General Rule - Within one year of discovery or when injury should have been discovered.
Absolute Limit - Within five years of act or omission.
Exceptions:
1. Minority and Insanity, within one year after removal of disability.

Louisiana:

General Rule - Within one year of act or omission, or discovery of act or omission.
Absolute Limit - Within 3 years of act or omission.

Maine:

General Rule - Within 2 years after cause of action accrues.
Exceptions:
1. Fraudulent concealment, within 6 years of discovery.
2. Minors, incompetents, imprisoned - general rule not applicable until disability removed.

Maryland:

General Rule - Within 5 years of act or omission or within 3 years of discovery of injury, whichever is shorter.
Exceptions:
1. Minors under 16, general rule does not apply until 16th birthday.
2. Minors or incompetents, within 3 years of removal of disability.
3. Fraud, general rule not applicable until fraud discovered.

Massachusetts:

General Rule - Within 3 years of accrual of cause of action.
Exceptions:
1. Minors under 6, until 9th birthday.
2. Other minors, within 3 years of appointment of representative.
3. Insanity, imprisonment - general rule not applicable until disability removed.
4. Fraudulent concealment - general rule not applicable until fraud discovered.

Michigan:

General Rule - Within 2 years of discontinuation of treatment or within 6 months after the plaintiff discovers.
Exceptions:
1. Minors, insane, imprisoned - within 1 year of removal of disability.
2. Fraudulent concealment, within 2 years of discovery of fraud.

Minnesota:

General Rule - Within 2 years of act or omission.
Exceptions:
1. Infancy, Insanity, Imprisonment - within 1 year of removal of disability with a maximum of five years, except for infancy.

Mississippi:

General Rule - Within 2 years of act or omission, on discovery of act or omission.

Exceptions:
1. Minors under 16, within two years of turning 16.
2. Insane - within 2 years of removal of disability.
3. Fraudulent concealment - general rule inapplicable until discovery of fraud.

Missouri:

General Rule - Within 2 years of act or omission.
Absolute Limit - Within 10 years of act or omission.
Exceptions:
1. Minors under 10, until 12th birthday but subject to absolute limit of 10 years.
2. Foreign object, within 2 years of discovery, - but subject to absolute limit of 10 years.
3. Fraudulent concealment, general rule does not apply until discovery of fraud.

Montana:

General Rule - Within 3 years of injury or discovery of injury.
Absolute Limit - Within 5 years of act or omission.
Exceptions:
1. Fraudulent concealment, general rule not applicable until fraud discovered.
2. Minors, insane, imprisoned - maximum extension of five years except for minors who shall have additional one year for removal of liability.

Nebraska:

General Rule - within 2 years of act or omission, or if not discoverable - within 1 year of discovery.
Absolute Limit - Within 10 years of act or omission.
Exceptions:
1. Minors, insane, imprisoned, - general rule not applicable until removal of disability.

Nevada:

General Rule - within 4 years of act or omission, or if not discoverable - within 2 years of discovery.
Exceptions:
1. Minors held to same rule if guardian should have brought action, unless:
   -brain damage or birth defects appear, with extension to 10 years of age.
   -sterility results, with extension of 2 years from discovery by child.
2. Fraudulent concealment, general rule not applicable until discovery of fraud.

New Hampshire:

General Rule - within 6 years of accrual of cause of action.
Exceptions:
1. Minors, incompetents - with 2 years of removal of disability.

New Jersey:

General Rule - Within 2 years of accrual of cause of action.
Exceptions:
1. Minors and Insane, general rule not applicable until disability removed.

New Mexico:

General Rule - Within 3 years of act or omission.
Exceptions:
1. Minor under 6 has until 9th birthday.

New York:

General Rule - Within 2 1/2 years of act or omission, or termination of treatment.
Exceptions:
1. Foreign objects, within 1 year of discovery.
2. Infant, Insane - general rule not applicable until disability removed, with 10 year maximum extension.

North Carolina:

General Rule - Within two years of last treatment or within 1 additional year for discovery.
Absolute Limit - Within 4 years of act or omission.
Exceptions:
1. Foreign objects, within 1 year of discovery but not to exceed 10 year extension.
2. Minors, within general rule but extendable to 19th birthday.
3. Insanity, general rule not applicable until disability removed.

North Dakota:

General Rule - Within 2 years of accrual of cause of action.
Absolute Limit - Within 6 years of act or omission, unless fraud proven.
Exceptions:
1. Fraudulent concealment, within one year of discovery.
2. Minors, within 1 year after removal of disability - but 12 year limit on extension.
3. Insane, imprisoned - general rule not applicable until disability removed - but 5 year limit on extension.

Ohio:

General Rule - Within 1 year of accrual of cause of action.
Absolute Limit - Within 4 years of act or omission.

Oklahoma:

General Rule - Within 2 years of discovery.
Exceptions:
1. Minors, incompetents - general rule not applicable until disability removed.

Oregon:

General Rule - Within 2 years of discovery.
Absolute Limit - Within 5 years of act or omission
Exceptions:
1. Fraud, within 2 years of discovery of fraud.

Pennsylvania:

General Rule - within 2 years of act or omission.
Exceptions:
1. Minors, general rule not applicable until disability removed.

Rhode Island:

General Rule - Within 3 years of act or omission or 3 years of discovery.
Exceptions:
1. Minors, incompetents - general rule not applicable until disability removed.
2. Fraudulent concealment - general rule not applicable until discovery of fraud.

South Carolina:

General Rule - Within 3 years of act or omission or 3 years of discovery.
Absolute Limit - Within 6 years of act or omission.
Exceptions:
1. Foreign objects, within 2 years of discovery.
2. Infancy, within one year of removal of disability.
3. Insane, Imprisoned - within one year of removal of disability, but not to exceed five year extension.

South Dakota:

General Rule - Within 2 years of act or omission.
Exceptions:
1. Minors under 6, within 2 years of 6th birthday.
2. Other minors, within 3 years.
3. Mental illness, imprisonment - within one year of removal of disability - not to exceed five year extension.

Tennessee:

General Rule - Within 1 year of act or omission, or 1 year of discovery.
Absolute Limit - Within 3 years of act or omission.
Exceptions:
1. Fraudulent concealment, within one year of discovery of fraud.
2. Foreign objects, within one year of discovery.
3. Minors, insane - within one year of removal of disability.

Texas:

General Rule - Within 2 years of discovery.
Exceptions:
1. Minors under 12 have until 14th birthday.

Utah:

General Rule - Within 2 years of discovery.
Absolute Limit - Within 4 years of act or omission.
Exceptions:
1. Foreign objects, within 1 year of discovery.
2. Fraudulent concealment, within 1 year of discovery of fraud.

Vermont:

General Rule - Within 3 years of act or omission, or 2 years of discovery, whichever is longer.
Absolute Limit - Within 7 years of act or omission.
Exceptions:
1. Foreign objects, within 2 years of discovery.
2. Fraudulent concealment, general rule not applicable.
3. Minor, insane, imprisonment - general rule not applicable until after disability removed.

Virginia:

General Rule - Within 2 years of accrual of action.
Exceptions:
1. Minors and incompetents - general rule not applicable until disability removed.

Washington:

General Rule - Within 3 years of act or omission, or discovery, whichever occurs later.
Absolute Limit - Within 8 years of act or omission.
Exceptions:
1. Minors, incompetents - imprisoned, general rule not applicable until disability removed.

West Virginia:

General Rule - Within 2 years of accrual of cause of action.
Exceptions:
1. Infancy, Insanity - general rule not applicable until disability removed, but subject to 20 year maximum extension.

Wisconsin:

General Rule - Within 3 years of act or omission or 1 year of discovery.
Absolute Limit - Within 5 years of act or omission
Exceptions:
1. Fraudulent concealment, foreign objects - within 1 year of discovery.
2. Minors, by 10th birthday or within 3 years.
3. Insane and imprisoned - within 2 years of removal of disability, not exceeding a five year extension.

Wyoming:

General Rule - Within 2 years of act or omission or within 2 1/2 years of discovery.
Exceptions:
1. Minors, within two years or by 8th birthday - but must be within 2 years of discovery.
2. Legal disability, within one year of removal of disability.

PROFESSIONAL LIABILITY INSURANCE AND ITS EFFECT: REPORT OF A SURVEY OF ACOG'S MEMBERSHIP

November 1985

Prepared for:

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NEEDHAM HARPER WORLDWIDE, INC.

THE NINE GEOGRAPHICAL DISTRICTS OF

The American College of Obstetricians and Gynecologists

Armed Forces District includes all Fellows on active duty in the Military Services of the United States who, upon retirement, maintain membership in this District.

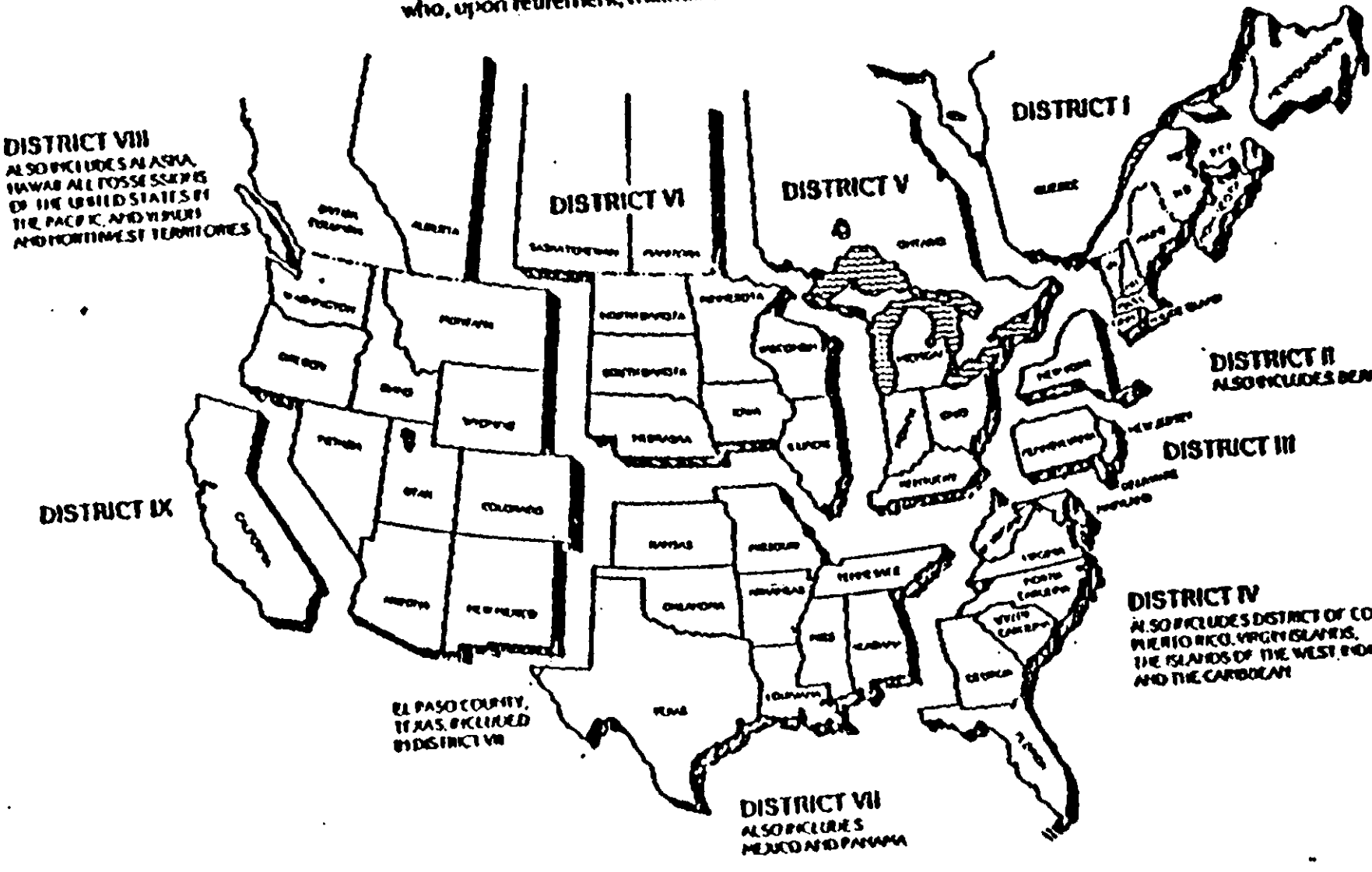


TABLE 20: LENGTH OF TIME BETWEEN INCIDENT AND FILING OF CLAIM

Subsample: Respondents who have experienced liability claims

	TOTAL	REGION									
		New Eng.	New York	Mid Atl.	So. East	Grt Lks.	Mid No.	Mid So.	West	Ca.	Fla.
Less than 6 months	10.4	7.7	5.6	8.8	8.7	10.4	10.0	8.2	18.7	14.1	16.5
More than 6 months but less than 1 year	19.1	19.8	15.7	16.5	17.5	24.5	18.2	19.7	13.1	27.3	12.4
More than 1 year but less than 3 years	33.1	31.9	22.2	49.5	32.5	31.1	30.9	32.8	31.8	28.3	44.3
More than 3 but less than 5 years	4.7	2.2	5.6	4.4	7.1	0.9	5.5	3.3	10.3	5.1	3.1
More than 5 years	4.5	2.2	7.5	5.5	4.8	3.9	3.6	2.4	3.9	8.1	0.0
Don't know	28.3	36.3	43.5	15.4	29.4	29.2	31.8	33.6	22.4	17.2	23.7

STRUCTURED JUDGMENTS

Background

In most states, unless otherwise agreed upon by the parties, authorized by case law, or allowed by statute, judgments can only be rendered as a lump sum award.

Recently, movement has occurred on the state level to authorize (if not mandate) that judgments of a certain type or above a certain amount be satisfied using periodic or other nonlump sum payment methods. The major thrust of the legislation is to reduce the impact on defendants of large up-front outlays of necessary capital.

There are, however, many other rationales advanced for increasing the use of structured judgments:

1. Advantages to Plaintiff

The most common argument advanced within this heading is the fact that traditional lump sum payments are subject to dissipation by the claimant through mismanagement or bad investments. Studies conducted in the 1960's and 1970's estimated that upwards of 90% of substantial future damage awards are incapable of providing future compensation, as planned in the award, within five years of payment. Structured judgments may then arguably protect the plaintiff - even from himself.

A second common argument is the favorable tax treatment afforded structured settlements and judgments by the I.R.S. in section 104(a)(2) of the Internal Revenue Code. If certain basic requirements are met, every payment made pursuant to the structured judgment is tax free.

Third, the plaintiff is relieved of the costs and risks involved in the management of an investment portfolio - providing additional guarantees that income for life will be available.

2. Disadvantages to Plaintiff

Once structured payments are fixed, the payments cannot be changed. Inflation or unexpected early requirements for the funds may erode the benefits to such an extent that necessary compensation levels are not met.

Disadvantages to the plaintiff are in understanding economic components of structured judgments. If focus is placed on the total payout instead of the present value, the claimant may settle for less than that to which he is entitled.

Financially sophisticated or experienced plaintiffs may indeed be able to generate larger yields by investing a lump sum themselves.

3. Advantages to Defendant Insurer

In almost all structured settlements or judgments the costs are usually less than the actual cost of a verdict or lump sum settlement.

The mechanics of a structured judgment permit the insurance industry the continued use of the money. (Since the normal method is for the defense casualty insurer to pay a life insurance company for an annuity.)

Increased use of structured judgments will be reflected in practice by increased use of periodic payment on settlements. This results in shorter periods of open claims and increases an insurer's confidence in its premium rating practice.

4. Disadvantages to Defendant Insurers

The only possible disadvantage to insurers for structured judgments is if the insurer is required to guarantee the annuity payment in the case of an annuity-issuing life insurance company that goes bankrupt. This can theoretically keep the claim "open" as to potential top-end liability.

5. Advantages/Disadvantages to Attorneys

The chief advantage is the possibility for the plaintiff's attorney to use tax advantage and income continuity to his advantage in also structuring his fees.

The chief disadvantage is the loss of the use of the money if the attorney feels he could produce a greater income than the annuity.

There is no advantage or disadvantage to defense attorneys directly involved in structured judgments.

Pretrial Effects

One additional point on this subject, however, might be the realization of long-term effects of ingrained structured judgment practices. Commentators in the area cite many examples where substantive modifications to trial practice and procedure become so ingrained - that they substantially effect pretrial practices and procedures. The theory goes that if structured judgments become so predominate and consistent at trial, insurers will use this knowledge to develop overwhelming approaches to structured settlements - increasing their leverage in settlement negotiations and reducing the number of cases and issues for which attorney hours are billable.

However, as we have pointed out, this is the theoretical analysis.

Constitutional Challenges

Constitutional challenges to structured judgments statutes usually only occur when the statute mandates that the structuring take place.

Again, the most prominent base for such challenges are due process and equal protection arguments. Holdings of unconstitutionality have cited specific distinctions (due process and equal protection) as the basis for striking down structured judgments, including:

Discrimination against plaintiffs with higher damage awards (usually the most severely injured).

Discrimination in favor of only health care or product liability defendants.

Failure of the statute to have any effect upon purposes for which enacted.

There are no constitutional challenges expected to the present Iowa structured judgment statute. However, movement to mandatory imposition may invite challenges based upon all three of the above considerations.

Modification Checklist

If modification toward mandatory imposition is contemplated, the following issues should be contained on the decision-making checklist:

1. Discretionary vs. mandatory nature.
2. Causes of action to which applied.
3. Damages to which applied (type).
4. Damages to which applied (amount).
5. Method for payment of contingency fees.
6. Requirements of payment guarantees.
7. Fixed or adjustable installment obligations.
8. Effect of death or other loss reducing occurrences.
9. Insurance Commissioner or other official designation of authorized modes.

Uniform Act

There exists the "Uniform Law Commissioners' Model Periodic Payment of Judgments Act" (1980) for your review.

There is also a short critique of specific provisions of the Model Act, available in 4 American Journal of Trial Advocacy 657, (1981).

Status of Structured Judgments in Other States

Alabama	Authorized
Alaska	Authorized for future damages
Arizona	Vetoed
Arkansas	Authorized
California	For future losses in medical malpractice exceeding $50,000
Connecticut	Future and noneconomic losses exceeding $200,000
Delaware	Authorized for future damages
Florida	Future losses in medical malpractice exceeding $250,000
Illinois	For patient compensation fund payments exceeding $300,000
Indiana	Authorized
Kansas	Authorized
Louisiana	Authorized
Maryland	State sanctioned arbitration
Michigan	If judgment for future damages exceeds $250,000 gross present cash value
Minnesota	Authorized
Montana	Authorized generally, specifically required in workers compensation
New Hampshire	If future losses for medical malpractice exceeding $50,000
New Jersey	If award exceeds $300,000
New Mexico	Authorized
New York	For medical and dental malpractice
North Dakota	Authorized from patient compensation payments exceeding $100,000
Oregon	Payments from patient compensation fund (at discretion of Insurance Commissioner and with approval of court)
Rhode Island	Authorized
South Carolina	Authorized
South Dakota	If award exceeds $100,000
Tennessee	Authorized
Utah	In medical malpractice cases only
Washington	For judgments over $100,000
Wisconsin	For payments from patient compensation fund exceeding $25,000

The present Iowa statute on the subject reads as follows:

Sec. 39. Section 668.3, Code 1985, is amended by adding the following new subsection:

NEW SUBSECTION. 7. When a final judgment or award is entered, any party may petition the court for a determination of the appropriate payment method of such judgment or award. If so petitioned the court may order that the payment method for all or part of the judgment or award be by structured, periodic, or other nonlump-sum payments. Structured, periodic, or other nonlump-sum payments may include appropriate interest if such interest was not included in the determination of the initial judgment or award. However, the court shall not order a structured, periodic, or other nonlump-sum payment method if it finds that any of the following are true:

a. The payment method would be inequitable.

b. The payment method provides insufficient guarantees of future collectibility of the judgment or award.

c. Payments made under the payment method could be subject to other claims, past or future, against the defendant or the defendant's insurer.

SEAT BELTS AND LIABILITY

Background Generally

In 1984, Congress passed Public Law 89-563 (mandating automatic restraint systems in motor vehicles).

On July 11th of 1984 the secretary of transportation issued rules pursuant to 89-563 regarding occupant crash protection. Those rules provided that the mandate of automatic restrain system installation could be lifted if states comprising 2/3rds of the U.S. population passed mandatory safety belt usage laws by September 1, 1989. The rules also set out the minimum criteria which had to be met for state MULs. (See attached excerpt from federal register.)

Iowa Background

In response, the Iowa Legislature passed S.F. 499 early in the 1986 legislative session (see attached S.F. 499). A major point of contention in that bill was whether or not the nonuse of the safety belt in derogation of the law could be used to reduce a plaintiff's recovery in a future legal action for damages. The approach taken in S.F. 499 was the repeal of the prohibition against introduction of such evidence, thus leaving the issue to the courts and juries. Late in the 1986 session this issue reappeared. The final form of S.F. 2265 was passed containing a new approach to the question of effect of nonuse on civil liability. (See attached section 43, S.F. 2265.)

With the enactment of S.F. 2265, Iowa has adopted an approach to civil liability for nonuse of a safety belt as follows:

1. Nonuse is not admissible for causes of action arising prior to July 1, 1986.

2. Nonuse cannot be considered evidence of comparative fault.

3. Nonuse may be admissible on the issue of mitigation of damages claimed, subject to two limitations:

a. Substantial evidence must first be introduced that nonuse contributed to injury.

b. Reductions for nonuse cannot exceed five percent of damages awarded after any reduction for comparative fault.

Statutory Consequences For Failure To Wear Seat Belts In Jurisdictions With Mandatory Use Laws

State	Maximum Criminal Fine	Civil Liability Provision
California	$20 (1st) $50 (2nd & subsequent)	None Per Se
Connecticut	$15	No Liability

Dist. of Columbia	$15	No Liability
Florida	$20	No Liability
Hawaii	$15	No Liability
Idaho	$ 5	No Liability
Illinois	$25	No Liability
Indiana	$25	No Liability
Kansas	$10	No Liability
Lousiana	$25	Admissible, maximum 2% reduction
Maryland	$25	No Liability
*Massachusetts	$15	Not admissible
Michigan	$25	Admissible, maximum 5% reduction
Minnesota	$ 0	Not admissible
Missouri	$10	Admissible, maximum 1% reduction
*Nebraska	$25	Admissible, maximum 5% reduction
Nevada	$25	No Civil Liability
New Mexico	$50	No Liability
New Jersey	$20	Admissible
New York	$50	Admissible
North Carolina	$25	No Civil Liability
Ohio	$30	No Civil Liability
Oklahoma	$25	No Civil Liability
Tennessee	$25	No Civil Liability
Texas	$50	No Civil Liability
Utah	$10	No Civil Liability
Virginia	$25	No Civil Liability
Washington	Infraction Fine	No Civil Liability

* - MUL repealed by voter initiative/referendum

Closing Notes

There seems, then, to be three general approaches to the issue of nonuse effecting civil liability:

1. No admissibility
2. Admissibility with restriction on use
3. Admissibility with no restriction on use

An interesting aside might be that this issue may not be one in which the legislature gets the final say. For example, several states where MULs, have been enacted now find themselves faced with public referendums and initiatives which remove such legislation, including Nebraska and Massachusetts. To say the least, there is still some public hostility to any form of MUL that may be chosen.

EXCERPT FROM FEDERAL REPORTER REGARDING MINIMUM REQUIREMENTS OF STATE ADOPTED MANDATORY USE LAWS FOR SEATBELTS

Mandatory Use Law Alternative

The rule requires the rescission of the automatic occupant protection requirement if two-thirds of the population of the United States are residents of states that have passed MULs meeting the requirements set forth in the regulation. The requirement would be rescinded as soon as a determination could be made that two-thirds of the population are covered by such statutes. However, if two-thirds of the population are not covered by MULs that take effect by September 1, 1989, the manufacturers will be required to install automatic protection systems in all automobiles manufactured after September 1, 1989. As discussed in an earlier section, use of the three-point seatbelt (which our analysis indicates is exceeded in its effectiveness range only by an airbag with a three-point belt) is the quickest, least expensive way by far to significantly reduce fatalities and injuries. "We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries." 103 S. Ct. at 2871. As set out in detail earlier in the preamble, coverage of a large percentage of the American people by seatbelt laws that are enforced would largely negate the incremental increase in safety to be expected from an automatic protection requirement.

The rule also contains minimum criteria for each state's MUL to be included in the determination by the Secretary that imposition of an automatic protection standard is no longer required. Those minimum criteria are as follows:

(1) A requirement that each outboard front seat occupant of a passenger car, which was required by Federal regulation, when manufactured, to be equipped with front seat occupant restraints, have those devices properly fastened about their bodies at all times while the vehicle is in forward motion.

(2) A prohibition of waivers from the mandatory use of seatbelts, except for medical reasons.

(3) An enforcement program that complies with the following minimum requirements:

(a) *Penalties.* A penalty of $25 (which may include court costs) or more for each violation of the MUL, with a separate penalty being imposed for each person violating the law.

(b) *Civil litigation penalties.* The violation of the MUL by any person when involved in an accident may be used in mitigating any damages sought by that person in any subsequent litigation to recover damages for injuries resulting from the accident. This requirement is satisfied if there is a rule of law in the State permitting such mitigation.

(c) *The establishment of prevention and education programs to encourage compliance with the MUL.*

(d) *The establishment of an MUL evaluation program by the state.* Each state that enacts an MUL will be required to include information on its experiences with those laws in the annual evaluation report on its Highway Safety Plan (HSP) that it submits to NHTSA and FHWA under 23 U.S.C. 402.

(4) An effective date of not later than September 1, 1989.

SENATE FILE 499

AN ACT

ESTABLISHING APPLICABLE STANDARDS FOR MOTOR VEHICLE SAFETY BELTS AND SAFETY HARNESSES, MANDATING SAFETY BELT AND SAFETY HARNESS USE WITH CERTAIN EXCEPTIONS, REQUIRING THE ESTABLISHMENT OF EDUCATION PROGRAMS, AND MAKING PENALTIES APPLICABLE.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section 321.210, Code 1985, is amended by adding the following new unnumbered paragraph:

NEW UNNUMBERED PARAGRAPH. The department shall not consider nor assess points for violations of section 321.445 in determining a motor vehicle license suspension, revocation or cancellation.

Sec. 2. Section 321.445, Code 1985, is amended by striking the section and inserting in lieu thereof the following:

321.445 SAFETY BELTS AND SAFETY HARNESSES -- USE REQUIRED.

1. Except for motorcycles or motorized bicycles, 1966 model year or newer motor vehicles subject to registration in Iowa shall be equipped with safety belts and safety harnesses of a type and installed in a manner approved by rules adopted by the department pursuant to chapter 17A. The department

shall adopt rules regarding the types of safety belts and safety harnesses required to be installed in motor vehicles and the manner in which they are installed. The rules shall conform with federal motor vehicle safety standard numbers 209 and 210 as published in 49 C.F.R. §§ 571.209-571.210 and with prior federal motor vehicle safety standards for seat belt assemblies and seat belt assembly anchorages applicable for the motor vehicle's model year. The department may adopt rules which comply with changes in the applicable federal motor vehicle safety standards with regard to the type of safety belts and safety harnesses and their manner of installation.

2. The driver and front seat occupants of a type of motor vehicle which is subject to registration in Iowa, except a motorcycle or a motorized bicycle, shall each wear a properly adjusted and fastened safety belt or safety harness any time the vehicle is in forward motion on a street or highway in this state except that a child under six years of age shall be secured as required under section 321.446.

This subsection does not apply to:

a. The driver or front seat occupants of a motor vehicle which is not required to be equipped with safety belts or safety harnesses under rules adopted by the department.

b. The driver and front seat occupants of a motor vehicle who are actively engaged in work which requires them to alight from and reenter the vehicle at frequent intervals, providing the vehicle does not exceed twenty-five miles per hour between stops.

c. The driver of a motor vehicle while performing duties as a rural letter carrier for the United States postal service. This exemption applies only between the first delivery point after leaving the post office and the last delivery point before returning to the post office.

d. Passengers on a bus.

e. A person possessing a written certification from a physician on a form provided by the department that the person is unable to wear a safety belt or safety harness due to physical or medical reasons. The certification shall specify the time period for which the exemption applies. The time period shall not exceed twelve months, at which time a new certification may be issued.

f. Front seat occupants of an authorized emergency vehicle while they are being transported in an emergency. However, this exemption does not apply to the driver of the authorized emergency vehicle.

During the six-month period from July 1, 1986 through December 31, 1986, peace officers shall issue only warning citations for violations of this subsection, except this does not apply to drivers subject to the federal motor carrier safety regulation 49 C.F.R. § 392.16.

The department, in cooperation with the department of public safety and the department of public instruction, shall establish educational programs to foster compliance with the safety belt and safety harness usage requirements of this subsection.

3. The driver and front seat passengers may be each charged separately for improperly used or nonused equipment under subsection 2. The owner of the motor vehicle may be charged for equipment violations under subsection 1.

Sec. 3. Section 321.555, subsection 2, Code 1985, is amended to read as follows:

2. Six or more of any separate and distinct offenses within a two-year period in the operation of a motor vehicle, which are required to be reported to the department by section 321.277 or chapter 321C, except equipment violations, parking violations as defined in section 321.210, violations of registration laws, violations of section sections 321.445 and 321.446, operating a vehicle with an expired license or permit, failure to appear, weights and measures violations and

speeding violations of less than fifteen miles per hour over the legal speed limit.

ROBERT T. ANDERSON
President of the Senate

DONALD D. AVENSON
Speaker of the House

I hereby certify that this bill originated in the Senate and is known as Senate File 499, Seventy-first General Assembly.

R. MARIE THAYER
Secretary of the Senate

Approved _____, 1986

TERRY E. BRANSTAD
Governor

Present Iowa statute on issue of civil liability for the failure to wear a seat belt.

Sec. 43. Section 321.445, Code 1985, as amended by 1986 Iowa Acts, Senate File 499, section 2, is amended by adding the following new subsection:

NEW SUBSECTION. 4. a. The nonuse of a safety belt or safety harness by a person is not admissible or material as evidence in a civil action brought for damages in a cause of action arising prior to July 1, 1986.

b. In a cause of action arising on or after July 1, 1986, brought to recover damages arising out of the ownership or operation of a motor vehicle, the failure to wear a safety belt or safety harness in violation of this section shall not be considered evidence of comparative fault under section 668.3, subsection 1, Code 1985. However, except as provided in section 321.446, subsection 6, the failure to wear a safety belt or safety harness in violation of this section may be admitted to mitigate damages, but only under the following circumstances:

(1) Parties seeking to introduce evidence of the failure to wear a safety belt or safety harness in violation of this section must first introduce substantial evidence that the failure to wear a safety belt or safety harness contributed to the injury or injuries claimed by the plaintiff.

(2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt or safety harness in violation of this section contributed to the plaintiff's claimed injury or injuries, and may reduce the amount of plaintiff's recovery by an amount not to exceed five percent of the damages awarded after any reductions for comparative fault.

ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

There are a number of various types and forms of alternative dispute resolution mechanisms. Included within these mechanisms are:

NEGOTIATION - A process where two or more disputing parties meet by mutual agreement, first set out the structure of the negotiation process (i.e., rules of the game), then issues are discussed, facts presented, and the outcome or solution is abided by voluntarily.

CONCILIATION - A process whereby a third-party brings the disputing parties together in order for them to begin discussing the issues and resolving problems. The conciliator does not take part in the process or settlement discussions, nor does the conciliator have any decision making power. A conciliator's main task is to act somewhat as a calming influence in arranging the parties formal negotiations.

MEDIATION - A process that provides for the intervention of an acceptable neutral mediator to assist and persuade the contesting parties to reach a mutually acceptable settlement through means of reconciliation, interpretation, suggestion and advice. However, at anytime in the process either party can refuse to participate and the mediation process is ended. The mediator can also excuse himself, and the mediator operates without formal tenure. The mediator has no power to make decisions or to force the parties to accept recommendations. The mediator cannot value the dispute.

FACT FINDING - An investigative process whereby a neutral is selected who determines and studies the major issues of dispute between parties facing an impasse. The fact finder is sometimes empowered to make recommendations on the basis of the facts presented, and sometimes only reports determinations and findings in hope that parties will understand and accept the resolution suggested. However, whether empowered to recommend or not - fact finding recommendations are not binding on the parties. Recommendations are only designed to serve as the basis for further negotiation and subsequent agreement.

MINI-TRIAL - Process by which the disputing parties and their attorneys present their side of a dispute through argument to a pre-selected judicial expert (usually a retired judge). After both sides present their case, further negotiation occurs. The mini-trial "judge" gives his/her opinion as to the outcome of the dispute, but the parties are free to choose their course of action - be it negotiation, mediation, arbitration, or court.

ARBITRATION - Process whereby parties agree to subject their dispute to an impartial third-party, who is empowered to render a final and binding decision based on the facts and evidence presented by the parties in full settlement of all issues. Usually judicial type rules of procedure and evidence are used - but they are flexible and do not control issues, only guide them. An arbitrator's award is enforceable in court and is usually not reviewable substantially, just procedurally on narrow statutory grounds.

STATES HAVING ESTABLISHED ALTERNATIVES TO TRADITIONAL LITIGATION. (Binding and/or nonbinding) Effecting at least one cause of action or cases based upon estimated claims value.

Alabama
Alaska
California
Connecticut
Delaware
Florida
Georgia
Hawaii
Idaho
Illinois
Iowa
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Missouri
Montana
Nevada
New Hampshire
New Jersey
New York
Ohio
Oklahoma
Oregon
Rhode Island
South Carolina
Tennessee
Texas
Vermont
Virginia

RECENT STATE LEGISLATIVE ACTIVITY

Arizona - Extended monetary limits on mandatory arbitration.

Hawaii - Establishes a court annexed arbitration program for cases having a probable jury award of $150,000 or less.

Appropriates $200,000 to implement court annexed arbitration program.

Provides for the chief justice to prepare a report on court annexed arbitration prior to the 1987 regular session.

Michigan - Implementation of pretrial mediation in all medical malpractice claims.

New Mexico - Creation of a district court arbitration fund, and provides for collection of an arbitration user fee.

Creation of a metropolitan mediation fund, and provides for collection of certain costs to fund mediation programs.

Wisconsin - Elimination of pretrial screening panels to be replaced with a voluntary, nonbinding mediation process.

CHAPTER 679A

ARBITRATION

This chapter applies to agreements made after July 1, 1981; see §679A.18

679A.1 Validity of arbitration agreement.

1. A written agreement to submit to arbitration an existing controversy is valid, enforceable, and irrevocable unless grounds exist at law or in equity for the revocation of the written agreement.

2. A provision in a written contract to submit to arbitration a future controversy arising between the parties is valid, enforceable, and irrevocable unless grounds exist at law or in equity for the revocation of the contract. This subsection shall not apply to any of the following:

a. A contract of adhesion.

b. A contract between employers and employees.

c. Unless otherwise provided in a separate writing executed by all parties to the contract, any claim sounding in tort whether or not involving a breach of contract.

[C51, §2098, 2101; R60, §3675, 3678; C73, §3416, 3418; C97, §4385, 4387, C24, 27, 31, 35, 39, §12696, 12697; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.1, 679.3; 81 Acts, ch 202, §1]

679A.2 Proceedings to compel or stay arbitration.

1. On application of a party showing an agreement described in section 679A.1 and the opposing party's refusal to arbitrate, the district court shall order the parties to proceed with arbitration. However, if the opposing party denies the existence of a valid and enforceable agreement to arbitrate, the district court shall proceed to the determination of the issue and shall order arbitration if a valid and enforceable agreement is found to exist. If no such agreement exists, the court shall deny the application.

2. On application, the district court may stay an arbitration proceeding commenced or threatened on a showing that there is no valid and enforceable agreement to arbitrate. The issue, when in substantial and bona fide dispute, shall be tried and the stay ordered if a valid and enforceable agreement to arbitrate does not exist. If an agreement is found to exist, the court shall order the parties to proceed to arbitration.

3. If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a district court, the application shall be made to that court. Otherwise, the application may be made in a district court as provided in section 679A.16.

4. An action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application for an order to arbitrate has been made under this section or, if the issue is severable, the stay may be made with respect to the part of the issue which is subject to arbitration only. When the application is made in such an action or proceeding, the order for arbitration shall include the stay.

5. An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or because any fault or grounds for the claim sought to be arbitrated have not been shown.

[C51, §2102; R60, §3679; C73, §3419; C97, §4388; C24, 27, 31, 35, 39, §12698; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.4; 81 Acts, ch 202, §2]

679A.3 Appointment of arbitrators by district court.

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence of a method of appointing, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and a successor has not been appointed, the district court on application of a party shall appoint one or more arbitrators. An arbitrator appointed by the district court has the same powers as an arbitrator specifically named in the agreement.

[C97, §4395; C24, 27, 31, 35, 39, §12712; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.18; 81 Acts, ch 202, §3]

679A.4 Majority action by arbitrators.

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this chapter.

[81 Acts, ch 202, §4]

679A.5 Hearing.

Unless otherwise provided by the agreement:

1. The arbitrators shall determine a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing waives the notice. The arbitrators may adjourn the hearing as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award. The arbitrators may hear and determine the controversy upon the evidence produced even if a party duly notified fails to appear.

2. The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

3. The hearing shall be conducted by all the arbitrators. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy.

[C51, §2105; R60, §3682; C73, §3422; C97, §4391; C24, 27, 31, 35, 39, §12701; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.7; 81 Acts, ch 202, §5]

679A.6 Representation by attorney.

A party has the right to be represented by an attorney at any proceeding or hearing under this chapter. A waiver of this right before the proceeding or hearing is ineffective.

[81 Acts, ch 202, §6]

679A.7 Witnesses, subpoenas, depositions.

1. The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence, and may administer oaths. Subpoenas shall be served, and upon application to the district court by a party or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

2. On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

3. All provisions of the law compelling a person under subpoena to testify are applicable.

4. Unless otherwise agreed, fees for attendance as a witness shall be the same as for a witness in the district court.

[C51, §2103; R60, §3680; C73, §3420; C97, §4389; C24, 27, 31, 35, 39, §12699; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.5; 81 Acts, ch 202, §7]

679A.8 Award.

1. The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally, by registered mail, or as provided in the agreement.

2. A party waives the objection that an award was not made within the proper time unless the party notifies the arbitrators of the party's objection before the award is received.

3. Unless otherwise agreed, an award shall be made within thirty days after the arbitration hearing.

[C51, §2106-2108; R60, §3683-3685; C73, §3423-3425; C97, §4392-4394; C24, 27, 31, 35, 39, §12702-12704; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.8-679.10; 81 Acts, ch 202, §8]

679A.9 Change of award by arbitrators.

On application of a party or, if an application to the district court is pending under sections 679A.11 to 679A.13, on submission to the arbitrators by the district court under the conditions the district court orders, the arbitrators may modify or correct the award upon the grounds stated in section 679A.13, subsection 1, paragraphs "*a*" and "*c*", or for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. Written notice of the application shall be given to the opposing party, stating that the opposing party must serve any objections to the application within ten days from the notice. The modified or corrected award is subject to sections 679A.11 to 679A.13.

[C51, §2110; R60, §3687; C73, §3427; C97, §4397; C24, 27, 31, 35, 39, §12706; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.12; 81 Acts, ch 202, §9]

679A.10 Fees and expenses of arbitration.

Unless otherwise provided in the agreement to arbitrate, and except for council fees, the arbitrators' expenses and fees and any other expenses incurred in the conduct of the arbitration shall be paid as provided in the award.

[C51, §2114; R60, §3691; C73, §3834; C97, §3873; C24, 27, 31, 35, 39, §12711; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.17; 81 Acts, ch 202, §10]

679A.11 Confirmation of an award.

Upon application of a party, the district court shall confirm an award, unless within the time limits imposed under sections 679A.12 and 679A.13 grounds are urged for vacating, modifying, or correcting the award, in which case the district court shall proceed as provided in sections 679A.12 and 679A.13.

[81 Acts, ch 202, §11]

679A.12 Vacating an award.

1. Upon application of a party, the district court shall vacate an award if any of the following apply:

a. The award was procured by corruption, fraud, or other illegal means.

b. There was evident partiality by an arbitrator appointed as a neutral, corruption in any of the arbitrators, or misconduct prejudicing the rights of a party.

c. The arbitrators exceeded their powers.

d. The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or conducted the hearing contrary to the provisions of section 679A.5, in a manner which prejudiced substantially the rights of a party.

e. There was no arbitration agreement, the issue was not adversely determined in proceedings under section 679A.2, and the party did not participate in the arbitration hearing without raising the objection.

f. Substantial evidence on the record as a whole does not support the award. The court shall not vacate an award on this ground if a party urging the vacation has not caused the arbitration proceedings to be re-

ported, if the parties have agreed that a vacation shall not be made on this ground, or if the arbitration has been conducted under the auspices of the American arbitration association.

2. The fact that the relief awarded could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

3. An application under this section shall be made within ninety days after delivery of a copy of the award to the applicant. However, if the application to vacate an award is predicated upon corruption, fraud, or other illegal means, it shall be made within ninety days after those grounds are known or should have been known.

4. In vacating the award on grounds other than stated in subsection 1, paragraph "e", the district court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence of a method in the agreement, by the district court in accordance with section 679A.3, or if the award is vacated on grounds set forth in subsection 1, paragraph "c" or "d" of this section, the district court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with section 679A.3. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

[C51, §2110; R60, §3617; C73, §3427; C97, §4397; C24, 27, 31, 35, 39, §12706; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.12; 81 Acts, ch 202, §12]

679A.13 Modification or correction of award.

1. Upon application made within ninety days after delivery of a copy of the award to the applicant, the district court shall modify or correct the award if any of the following apply:

a. There is an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award.

b. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted.

c. The award is imperfect in a matter of form, not affecting the merits of the controversy.

2. If the application is granted, the district court shall modify and correct the award to effect its intent and shall confirm the award as modified and corrected.

[81 Acts, ch 202, §13]

679A.14 Judgment or decree on award.

Upon the granting of an order confirming, modifying, or correcting an award, a judgment or decree shall be entered in conformity with the order enforced as any other judgment or decree. Costs of the application and the subsequent proceedings and disbursements may be awarded by the district court.

[C51, §2111, 2113; R60, §3688, 3690; C73, §3428, 3430; C97, §4398, 4400; C24, 27, 31, 35, 39, §12707, 12709; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.13, 679.15; 81 Acts, ch 202, §14]

679A.15 Applications to district court.

Except as otherwise provided, an application to the district court under this chapter shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of civil procedure, for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by the Iowa rules of civil procedure for the service of original notice in an action.

[81 Acts, ch 202, §15]

679A.16 Venue.

An initial application shall be made to the district court of the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the district court of the county where the adverse party resides or has a place of business or, if the adverse party has no residence or place of business in this state, to the district court of any county. All subsequent applications shall be made to the district court hearing the initial application unless the district court otherwise directs.

[81 Acts, ch 202, §16]

679A.17 Appeals.

1. An appeal may be taken from:

a. An order denying an application to compel arbitration made under section 679A.2.

b. An order granting an application to stay arbitration made under section 679A.2, subsection 2.

c. An order confirming or denying confirmation of an award.

d. An order modifying or correcting an award.

e. An order vacating an award without directing a rehearing.

f. A judgment or decree entered pursuant to the provisions of this chapter.

2. The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

[C51, §2112; R60, §3689; C73, §3429; C97, §4399; C24, 27, 31, 35, 39, §12708; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §679.14; 81 Acts, ch 202, §17]

679A.18 Chapter not retroactive.

This chapter applies only to arbitration agreements made on or after July 1, 1981. Sections 679.1 to 679.18, Code 1981, do not apply to agreements to arbitrate entered into after July 1, 1981.

[81 Acts, ch 202, §18]

679A.19 Disputes between governmental agencies.

Any litigation between administrative departments, commissions or boards of the state government is prohibited. All disputes between said governmental agencies shall be submitted to a board of arbitration of three members to be composed of two members to be appointed by the departments involved in the dispute and a third member to be appointed by the governor. The decision of the board shall be final.

[C62, 66, 71, 73, 75, 77, 79, 81, §679.19; 81 Acts, ch 202, §19]

PREJUDGMENT INTEREST

Background

One of the primary purposes of awarding damages in tort proceedings is to place the injured party in a position as close as possible to the party's position prior to the Commission of the tort. Thus, the law attempts to impose money damages to equal the loss or injury - with the ultimate goal of total compensation.

The primary purpose of the payment of interest is to compensate for the use, detention, or forbearance of money. Therefore, interest as an element of damages would compensate a plaintiff for delay in the payment of a fixed sum or delay in the assessment and payment of damages. Hence, courts award prejudgment interest to compensate plaintiff for the loss of the use of money due the plaintiff from the date of injury until the date of judgment - and its payment.

The awarding of prejudgment interest as an element of tort damages is a continuing point of legal debate.

Those who advocate for the use of prejudgment interest cite two specific injuries which are incurred by the victim beyond initial injury:

(1) The loss of the use of money due to the plaintiff from the defendant from its loss at the time of injury until it is paid.

(2) The loss which occurs when the plaintiff incurs a loss of money in x year dollars and is repaid for that loss with inflated x plus number of years for resolution dollars.

Closely related to these arguments is another advocacy argument that approaches the issue from another direction - that of restitution. It states that a defendant is unjustly enriched by retaining funds theoretically due plaintiff from the date of injury - while during the time after the injury the defendant being free to invest and use the funds and recoup their fruit without charge - i.e., paying the interest normally necessary to have use of such funds. It is then concluded that a defendant should be required to disgorge the benefits derived from the defendant's inequitable detention of funds.

A second major argument urged by advocates is generally termed the "judicial efficiency approach." This argument asserts that defendants have a financial incentive to delay if they can continue to earn and retain interest on funds that are due to plaintiff but will not be awarded until sometime in the future. Requiring defendant to pay plaintiff an amount equivalent to this prejudgment interest will, it is argued, remove this incentive for the defendant to delay the disposition of a case. This elimination of incentives to prolong disposition thereby reduces the number of claims in an already overcrowded court system. This improved caseload management thus benefits all plaintiffs and defendants generally.

Opponents of prejudgment interest argue that such interest is only justifiable when the claim is one of a liquidated - or easily ascertainable nature. This argument relies upon early common law decisions which argued that interest awards should be limited to those cases where a defendant actually has the option to pay a known amount, thereby staying the accrual of interest. They argue that to award prejudgment interest in nonliquidated or noneasily ascertainable cases where the amount of the claim is disputed, and thus when a normal payment option does not exist, penalizes defendant for disputing damages in good faith. This puts the defendant in the unfair position of being assessed further damages for exercising the right to have a jury assess liability.

Additionally, opponents of extending the awarding of prejudgment interest to all tort cases also claim that juries already implicitly award prejudgment interest in their verdicts. Therefore, to award additional interest would result in a windfall to plaintiff and a penalty to defendant.

Third, opponents argue to counter the advocates argument of "judicial efficiency" by pointing out that the award of prejudgment interest may actually make the caseflow situation worse by providing plaintiffs with financial incentives to file too many cases too early in order to qualify for interest - as well as financial incentive to delay when statutory interest is being computed at a rate greater than that available in normal financial markets.

The status of prejudgment interest in any individual state is a reflection of the extent to which the judiciary or the legislature stresses one or more of the foregoing arguments. These differences are not limited to the narrow issue of whether or not prejudgment interest is allowed.

In fact, approaches differ on at least seven major issues in the subject area:

1. Whether prejudgment interest is allowed.

2. What causes of action prejudgment interest will be allowed for.

3. What damages prejudgment interest will be allowed for.

4. When interest begins to accrue.

5. What actions may start accrual.

6. What actions may stay accrual.

7. The rate at which interest accrues.

etc. etc...

Allowance of prejudgment interest

At least 3 out of 4 states and the federal courts allow prejudgment interest in one form or another. Of the remaining one quarter, at least one-half of those provide some common law procedure for the awarding of prejudgment interest in restricted circumstances.

Once a state determines that prejudgment interest will be allowed - it must then determine the circumstances in which it will be allowed.

Causes of action

States which allow prejudgment interest differ as to the causes of action for which it can be awarded. For example, some states provide that it may only be awarded if the cause of action is based in contract or tortious breach of contractual relations. Others choose a more nebulous restriction, allowing the award only if the cause of action is based upon liquidated (contractually or statutorily set) or easily ascertainable damages. Others, who seem to be becoming a slight majority, allow prejudgment interest for all causes of action.

Damages for which allowed

Closely related to differences by cause of action are those related to damages. Some jurisdictions hold the authorization of prejudgment interest only if the damages sought are liquidated on easily ascertainable. Others attempt to provide the judicial system with leeway to grant interest when the damages are "actual" or "economic" - seemingly an offshot of the easily ascertainable line of reasoning.

Perhaps a more basic point of consideration under damages is whether the interest provision distinguishes between "past" and "future" damages. Most jurisdictions do not - but forceful arguments are made that if compensation is the primary factor of the provision - then it makes no sense to "compensate" a plaintiff for an interest loss which has not and probably will not occur.

Accrual

Generally contained within the sub-issue of accrual are three decisions:

1. When should the accrual of interest begin.

2. What must the plaintiff do to begin the accrual process.

3. What may the defendant do to stay the accrual process.

States differ widely on the issue of when interest begins to accrue. Examples include:

1. From date of injury.

2. Within x days after injury.

3. From the date a claim is filed.

4. Within x days after a claim is filed.

5. From the date of commencement of an action (suit).

6. Within x days after commencement.

7. From date of judgment (no prejudgment interest).

Contained within the above list are states which require a plaintiff to take action to qualify or start the accrual process. For example, accrual may not start until:

1. Plaintiff presents evidence of the injury to defendant.

2. Plaintiff makes a reasonable and good faith offer to settle for a specific dollar amount to the plaintiff.

3. Plaintiff commences the action.

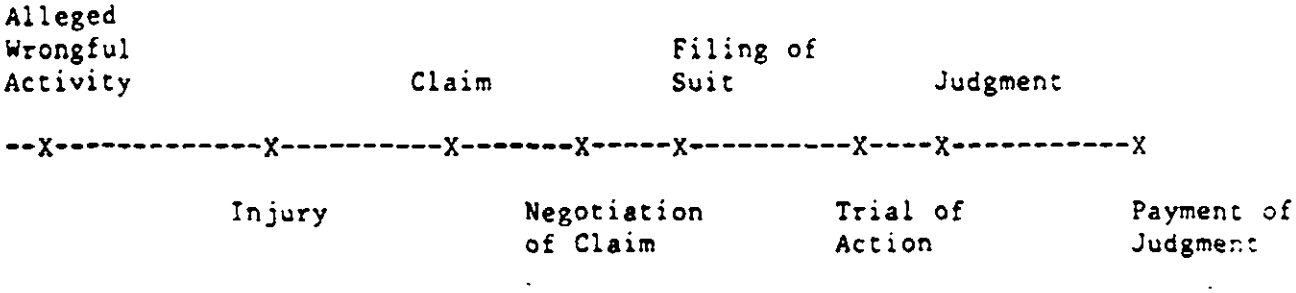
Impliedly contained within the same above list are states which allow a defendant to take action to stay or stop the accrual process once it has begun. For example, accrual may be stayed when:

1. Defendant provides evidence proving that a reasonable and good faith dispute as to liability exists.

2. Defendant makes a reasonable and good faith offer of settlement on the plaintiff's claim.

3. Defendant makes a reasonable and good faith counter-offer to an offer by plaintiff.

If we return to our earlier spectrum representing the tort liability system:



We find that the timing of accrual or stay of accrual may be placed at any of the following points:

Injury
Claim
Negotiation of Claim
Filing of suit

Rate

If interest is to be allowed, some guidance must be given as to the rate at which it accrues.

The general approach seems to be the setting of an accrual rate at a fixed statutory level. These levels run from 3.5% to 15%. The rising approach leans

toward tying accrual rate to a more definite "market" indicator. Proposed indicators include passbook savings rates, federal discount rate, prime rates, commercial paper, certificate of deposit, and treasury bills.

Advocates for a more "market oriented" interest rate argue that failure to tie interest flexibly to changing market indicators creates the potential for under - or over-compensation for the "interest" loss and also creates the potential for one of the parties to have a financial incentive for case disposition delay. For example, if the fixed statutory rate is 10% and the actual market is 21%, a plaintiff may be under-compensated and the defendant may be induced to prolong litigation due to the advantageous use of funds still held. However, if the fixed statutory rate is 10% and the actual market is 6%, the plaintiff may be over-compensated and the plaintiff may be induced to prolong litigation due to the advantageous statutory rate.

To review the alternative rationales for interest rate setting, there seem to be three primary options.

1. Fixed statutory.

2. Evidence.

3. Flexible tie.

Fixed Statutory is nothing more than statutorily choosing the percentage rate that will be applied.

Evidence allows both sides to present relevant evidence on the issue of applicable interest rates in the market, with the court authorized to weigh the evidence and apply an interest rate.

Flexible tie provides a statutory outline of how a flexible interest rate is to be computed - with that computation setting the interest for each case as appropriate.

One of the more interesting examples of recently proposed flexible tie statutes is what is referred to as a "weighted average method". This method provides a statute which requires an official (perhaps the state treasurer) to compute an applicable average interest rate as follows:

(1) Calculation of statutorily identified interest instruments proportional share of all noncommercial investment dollars.

(2) Multiplication of each instrument's interest rate by the fraction representing its proportional share of all noncommercial investment dollars.

(3) Addition of the results for each type of instrument.

(4) Division of that sum by the number of investment instruments identified by statute.

This results in a percentage figure which would be used in the prejudgment interest rate.

Additional information is available on each of these three approaches. However, due to time and complexity, we will not elaborate further at this point.

It might be appropriate to return to our original starting point. There is one primary decision and one secondary decision to be made.

The primary decision is "if prejudgment interest is to be allowed, when and how will be it awarded?"

The secondary decision is "Can the method and manner of a prejudgment interest system produce corresponding beneficial effects on the system as a whole?"

Although there are many other factors to take into consideration, we would like to open discussion by presenting a number of issues:

1. Is prejudgment interest of any type to be allowed? (Presently, Iowa law provides for prejudgment interest.)

2. If allowed, what causes of action should it apply to? (Presently, Iowa law applies prejudgment interest to all causes of action - except those against the state government.)

3. If allowed, what damages should it apply to? (Presently, Iowa law does not distinguish between past and future damages on this issue).

4. If allowed, when should prejudgment interest begin to accrue? (Presently, Iowa law provides for accrual from the date of the commencement of the action.)

5. If allowed, should the plaintiff be required to take affirmative action to qualify? (Presently Iowa law requires only that the plaintiff commence the suit.)

6. If allowed, should the defendant to be allowed to take affirmative action to stay or stop the accrual of interest? (Presently, Iowa's offer to confess judgment statute does not allow a defendant's offer to stay or stop the accrual of interest.)

7. If allowed, should the interest calculation method be fixed statutory, evidence, or flexible-tie? (Presently, Iowa provides for a fixed statutory method of 10%.)

8. If allowed, is it possible to beneficially effect the liability system by the interest method choosen, i.e., reducing incentives to delay? (Presently, Iowa law can be generally perceived as providing plaintiff with a disincentive to delay when interest rates are high - and providing defendant with a disincentive to delay when interest rates are low. However, it is also argued that Iowa law works in the reverse by providing plaintiff with delay incentive when interest rates are low and providing defendant with delay incentive when interest rates are high.)

Studies

To our knowledge, there is only one major study specifically conducted on the issue of prejudgment interest. That study is:

"Jury Awards and Prejudgment Interest in Tort Cases," Stephen J. Carroll, N-1994-ICJ, 1983

This study was based upon the 1981-82 action of the California legislature in enacting a prejudgment interest statute. The main focus of substantive analysis was the potential effect of the statute on existing incentives to delay disposition of a tort case. It appears that no specific data was made available due to the number of other variables which effect incentives or disincentives to delay. Chief among the "non-control group inclusion" variables were:

1. The method and manner by which plaintiff vs. defense legal costs are incurred.

2. The various ways in which "opportunity cost" factors may impact a particular case.

3. The various behaviors of juries in regard to the implicit awarding of prejudgment interest. We might note that this variable prompted the study author to cite an addition ICJ study which suggested the even without a prejudgment interest statute, juries implicitly awarded prejudgment interest on verdicts at a rate of approximately 3.7% over inflation.

Perhaps the most important conclusion observable in the study is the suggestion that completely removing all parties incentives to delay is a nearly impossible task.

*As one last aside, we would like to make an observation which became apparent from discussion with persons long involved with actual litigation pressures prompted by such items as prejudgment interest statutes.

The observation we would make is that counsel for both the plaintiffs and the defendants are aware of the impact such a provision would have on their clients. However, the impact is not so much one that a conscious decision to delay is made - but rather that in certain cases, a conscious decision is made that delay is not in the client's best interest. If a conclusion can be drawn from this observation - it would be that an item like prejudgment interest does not reduce the incentive to delay - but can, in certain circumstances, force a party to acknowledge the incentive to seek a more expedited disposition of the case.

The point may be a fine one, but might suggest that the overall effect of an item such as prejudgment interest is not "system effective" so much as "case effective" when it comes to the secondary decision of benefits to the liability system.

APPENDIX A

Those states adopting a compensatory policy authorizing prejudgment interest awards (35):

Alabama
Alaska
California
Colorado
Connecticut
Georgia
Hawaii
Idaho
Iowa
Kansas
Kentucky
Maine
Massachusetts
Michigan
Minnesota
Montana
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Pennsylvania
Rhode Island
South Carolina
South Dakota
Tennessee
Utah
Virginia
West Virginia
Wisconsin
Wyoming

OTHER ISSUES

In addition to the previously reviewed issues, the Commission also reviewed the following additional issues - for which specific Commission recommendations have been made:

Punitive Damages

Statutes of Repose (Products Liability/Professional Services)

Statutes of Repose (Improvements to Real Property)

Directors and Officers Liability

Worker's Compensation Interface with Comparative Fault Chapter

Judicial Department Data Collection

State/Municipal Liability (Discretionary Function)

State/Municipal Liability (613A.5 Notice Provisions)

Funding of the Iowa Board of Medical Examiners

There has also been included in the majority recommendations of the Commission several letters of support for certain state functions relating to liability and liability insurance.

MAJORITY RECOMMENDATIONS RELATING TO LIABILITY

#1. MAXIMUM CAPS ON NONECONOMIC DAMAGES

The Commission reports and recommends the attached draft language relating to a maximum limitation on the amount which can be awarded for noneconomic damages for pain and suffering, loss of consortium, or loss of chance. The draft contains the following concepts:

1. A $200,000 limitation per defendant.

2. Instructions to the jury regarding the cap.

3. Provision for the itemization of verdicts which include awards for such damages.

4. Provision for the cap to be waived and exceeded, if required conditions are met.

5. Automatic biannual indexing of the cap figure.

The Commission also recommends that if maximum caps on liability are to be considered, that strong consideration also be given to the development of a separate compensation system to protect those individuals who find their rights impaired by this legislation. The type of fund contemplated would be similar to that set out in the statute of repose for products recommendation.

S.F. _____ H.F. _____

Section 1. NEW SECTION. 668.13 MAXIMUM LIABILITY FOR NONECONOMIC DAMAGES.

1. In a verdict issued pursuant to this chapter, that portion of a verdict attributable to noneconomic damages for pain and suffering, loss of consortium, or loss of chance against any one defendant shall not exceed two hundred thousand dollars, except as otherwise provided pursuant to subsection 4.

2. In an action pursuant to this chapter and tried to a jury, and in which noneconomic damages for pain and suffering, loss of consortium, or loss of chance are sought or argued, the court shall, unless otherwise agreed to by all parties, instruct the jury that the portion of a verdict attributable to noneconomic damages for pain and suffering, loss of consortium, or loss of chance against any one defendant shall not exceed two hundred thousand dollars.

3. In an action brought pursuant to this chapter and tried to a jury, and in which noneconomic damages for pain and suffering, loss of consortium, or loss of chance are sought or argued, the court shall, unless otherwise agreed to by all parties, require that the jury return a verdict itemizing the injuries and damages awarded pursuant to the verdict.

4. In an action brought pursuant to this chapter and in which noneconomic damages for pain and suffering, loss of consortium, or loss of chance are awarded in the maximum amount allowed pursuant to subsection 1, the claimant may petition the court which heard the original action for a waiver of the maximum limitation and for a granting of an increase in that portion of the original verdict attributable to noneconomic damages for pain and suffering, loss of consortium, or loss of chance. Any waiver of the maximum limitation and subsequent increase in that portion of the original verdict attributable to noneconomic damages for pain and suffering, loss of consortium, or loss of chance shall be subject to the following requirements:

a. A hearing shall first be granted at which all parties may appear and present evidence and argument relating to any waiver of the maximum limitation and subsequent increase in the original verdict.

b. A waiver of the maximum limitation and subsequent increase in the original verdict shall only be made upon a determination that the portion of the original verdict attributable to noneconomic damages for pain and suffering, loss of consortium, or loss of chance is clearly insufficient based upon the evidence presented to the court in the original action and that the failure to waive the maximum limitation would result in significant hardship upon the claimant.

c. Any increase in that portion of the original verdict attributable to noneconomic damages for pain and suffering, loss of consortium, or loss of chance shall be consistent with the percentages of fault and evidence as to total damages determined in the original action.

5. The limitations on the amount recoverable for noneconomic damages for pain and suffering, loss of consortium, or loss of chance pursuant to this section shall be indexed biannually on July 1 by rule of the commissioner of the Iowa division of insurance in proportion to the net change in the United States city average consumer price index for all urban consumers during the preceding twenty-four months. The supreme court shall implement the biannual indexing by the issuance of rules as deemed necessary.

#2. COLLATERAL SOURCE RULE

The Commission has reviewed the present state of the collateral source rule in Iowa. That rule bars the introduction of evidence, in all cases except medical malpractice, that a plaintiff has received compensation for some or all of the financial loss that is the subject of the action.

The Commission would recommend the attached drafted language which provides for the introduction of such evidence - and for the procedures necessary to implement this proposed new rule.

S.F. _____ H.F. _____

Section 1. NEW SECTION. 668.14 COLLATERAL SOURCES.

1. In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the replacement or indemnification of actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury by insurance, or by governmental, employment, or service benefit programs, except to the extent that the replacement or indemnification is pursuant to state or federal payments for disabilities, or from any other source except the proceeds of any insurance policy on the life of a deceased or the assets of the claimant or the members of the claimant's immediate family.

2. If evidence and argument regarding replacement or indemnification is presented pursuant to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring such replacement or indemnification and as to any existing rights of indemnification or subrogation relating to such replacement or indemnification of losses.

3. If evidence or argument is permitted pursuant to subsections 1 or 2, the court shall, unless otherwise agreed to to by all parties, instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating the effect of such evidence or argument on the verdict.

4. This section does not apply to actions governed by section 147.136.

#3. CONTINGENT FEES

The Commission would recommend against legislative action to restrict or prohibit the use of contingent fees at this time for the following reasons:

1. Attorney fees are a matter of private contractual relations.

2. No similar movement to restrict defense fees exists.

3. Studies conclude that contingent fees result in optimal investment in litigation and result in optimal performance by plaintiff attorneys.

4. Studies conclude that contingent fee prohibition or restriction will have little or no effect on insurance availability or affordability.

#4. NONMERITORIOUS/FRIVOLOUS ACTIONS

The Commission finds that the present Iowa law and practice relating to remedies for frivolous actions meets and/or exceeds the law and practice of other states and the federal courts. Those provisions presently in place in Iowa as potential remedies include:

Malicious prosecution
Abuse of process
Defamation
Intentional infliction of emotional distress
Prima facie tort
Rule of Civil Procedure 80A
Section 617.16, Iowa Code
Section 619.19, Iowa Code
Ethical considerations and disciplinary rules of the Iowa Code of professional conduct for attorneys

Additionally, the Commission finds that the Judicial Department efforts to implement mandatory case processing time standards will also assist in handling any remaining problems in this area.

Given these existing remedies and the potential threat that further unwarranted action in this area will chill the bringing of meritorious suits, the Commission makes no recommendations relating to further actions regarding nonmeritorious/frivolous actions.

However, the Commission does find that the issues of low merit actions and unnecessary litigation of actions subject to settlement may need legislative review. The Commission recommends that the key element of review for possible legislative action on these issues be the potential to avoid the unnecessary costs, expenses, and time of bringing and defending to judgment such actions.

The Commission finds that several areas of effective legislative action include, but are not limited to:

1. The authorization of the taxing of plaintiff and defendant attorney fees under Chapter 677 (offers to confess judgment).

2. Institution of a certificate of merit procedure and hearing in professional negligence/malpractice cases to provide early merit reviews of marginal cases. The Commission recommends that on this issue, the attached draft language on certificates of merit be used as a guide.

3. Institution of an affidavit of noninvolvement procedure and hearing in cases brought against more than one defendant (perhaps limited to medical malpractice and/or products liability) to provide early consideration of whether all parties should actually be subject to suit.

However, relating to these three potential action areas, the Commission would urge that the assistance and cooperation of the Judicial Department be obtained in order to assure procedural specificity and clarity and to ensure that such remedies would not be used in an offensive or abusive manner by either or both sides to the dispute.

Sec. 10. NEW SECTION. 147.144 AFFIDAVITS OF MERITORIOUS MALPRACTICE CLAIMS.

1. In an action in which the plaintiff seeks damages against a physician and surgeon licensed pursuant to chapter 148, osteopath licensed pursuant to chapter 150, or osteopathic physician and surgeon licensed pursuant to chapter 150A for injuries or death by reason of medical malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall sign an affidavit, attached to the original and all copies of the complaint or petition, declaring one of the following:

a. That the affiant has consulted and reviewed the facts of the case with a physician and surgeon or osteopathic physician and surgeon who the affiant reasonably believes is knowledgeable in the relevant issues involved in the particular action, who practices in the same specialty as the defendant if the defendant is a specialist, and who meets the expert witness standards contained in section 147.143; that the consulting physician has determined in a written report, after a review of the medical record and other relevant material involved in the particular action, that a reasonable and meritorious cause exists for the filing of such action; and that the affiant has concluded on the basis of the physician's consultation and review that a reasonable and meritorious cause exists for the filing of such action. A copy of the written report, clearly identifying the plaintiff and the reasons for the consulting physician's determination that a reasonable and meritorious cause for the filing of the action exists, shall be attached to the affidavit.

b. That the affiant was unable to obtain a consultation required by paragraph "a" because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations.

c. That a request has been made by the plaintiff or the

plaintiff's attorney for examination and copying of records and the party having custody of the records has failed to produce the records within sixty days of the receipt of the request.

2. If an affidavit is executed pursuant to subsection 1, paragraph "b" or "c", the affidavit and written report required by paragraph "a" shall be filed within ninety days following the filing of the complaint or petition or following receipt of the requested records. All defendants, except those whose failure to produce records is the basis for the signing of an affidavit under subsection 1, paragraph "a", shall be excused from answering or otherwise pleading until thirty days after being served with the affidavit required by paragraph "a".

3. If an affidavit and written report are required pursuant to this section, a separate affidavit and written report shall be served on each defendant named in the complaint or petition and each defendant named at a later time.

4. If a plaintiff intends to rely on the doctrine of res ipsa loquitur, the affidavit and written report must state that, in the opinion of the consulting physician, negligence has occurred in the course of medical treatment. The affiant shall certify upon filing of the complaint or petition that the affiant is relying on the doctrine of res ipsa loquitur.

5. If a plaintiff intends to rely on the doctrine of failure of informed consent, the attorney for the plaintiff shall certify upon the filing of the complaint or petition that the consulting physician has, after reviewing the medical record and other relevant materials involved in the particular action, concluded that a reasonable physician would have informed the patient of the consequences of the procedure.

6. Allegations and denials in an affidavit signed pursuant to this section, which are made without reasonable cause and found to be untrue, subject the party pleading them or the party's attorney, or both, to the payment of reasonable

expenses actually incurred by another party by reason of the untrue pleading, together with reasonable attorneys' fees to be summarily taxed by the court upon motion made within thirty days of the judgment or dismissal. The award for attorneys' fees and expenses shall not exceed those actually paid by or on behalf of the moving party. In a proceeding under this subsection, the moving party may depose and examine any and all consulting physicians who prepared reports used in conjunction with an affidavit required by this section.

7. A consulting physician who in good faith prepares a report used in conjunction with an affidavit required by this section is not civilly liable as a result of the preparation of the report.

8. The failure to file an affidavit required by this section is grounds for dismissal of the medical malpractice action.

#5. STRUCTURED SETTLEMENTS/JUDGMENTS

This Commission finds that of any of the proposals advanced, having as their impetus the reduction of costs in civil litigation and injury compensation, those relating to the increased use of structured settlements and judgments may hold the greatest promise for cost reduction without significant impairment of the rights of the injured individuals.

Since the use of structuring mechanisms in settlement practice is for the most part a contractual consideration between the parties, there would seem to be little which can be done legislatively to increase such practices. Relating to structured settlements, however, the Commission would recommend that chapter 677 (offers to confess judgment) be reviewed to ensure that structured settlement offers are contemplated within and covered by those provisions.

Relating to the use of structuring mechanisms in judgments by the court, the Commission finds that the present statutory provisions of Iowa law enacted pursuant to S.F. 2265 place Iowa among those states increasing such use in their courts.

The Commission recommends that further consideration be given to the implementation of structured judgment practice of a more mandatory nature for all causes of action involving future damage awards exceeding $100,000.

The Commission would also recommend that if structured judgments are going to be mandated, that the enacting statute also contain the following two provisions:

1. Requirement of jury instructions prohibiting the discounting of future damages to present value.

2. Authorization for the use of reversionary clauses on those portions of structured judgments relating to damages paid for the future care and maintenance of the injured party.

However, the Commission further recommends that before the institution of mandatory structured judgments, that action be taken to alleviate those problems associated with intervening insolvencies of defendants and/or annuity issuers and problems with differing potential tax ramifications of structured awards. Included within this review should be the possibility of instituting guarantee mechanisms for life insurance companies (primary issuers of structured judgment annuities) similar to that presently existing for property and casualty insurance companies.

#6. SEATBELT LIABILITY

The Commission finds that in the area of civil liability for the failure to wear seatbelts, as in all other areas of civil litigation, there exists no legal or logical rationale for the imposition of an arbitrary maximum or minimum outcome on the factual considerations of juries or the court.

The Commission would recommend that consideration should be given to the removal of the 5% maximum cap on the effect of non-use on civil liability. However, if such action is considered the Commission would also recommend that the legislature review the potential of legislatively providing a direct cause of action against an insurer for improper activity relating to assignments of comparative fault for common actions such as failure to use seatbelts.

S.F. _____ H.F. _____

Section 1. Section 321.445, subsection 4, paragraph b, subparagraph (2), is amended to read as follows:

(2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt or safety harness in violation of this section contributed to the plaintiff's claimed injury or injuries, and may reduce the amount of plaintiff's recovery ~~by an amount not to exceed five percent of the damages awarded after any reductions for comparative fault~~.

#7. ALTERNATIVE DISPUTE RESOLUTION

The Commission finds that Alternative Dispute Resolution mechanisms hold the promise of assisting the present judicial process by increasing the speed with which disputes are resolved, decreasing the costs to all parties in resolving disputes, and shifting some of the litigation burden from an already taxed civil court system.

The Commission would recommend:

(1) That the Judicial Department be requested to review Chapter 679A and other alternative dispute resolution mechanisms presently contained within Iowa law, for the purpose of advising means to increase the number and scope of disputes to be handled by such mechanisms. Such review and advice may include, but is not limited to, suggested legislation, rule making, funding, and personnel. It is further recommended that such review and advice be made available to the chairpersons, vice chairpersons, and ranking members of the standing Committees on Judiciary and Commerce by March 1, 1987.

(2) That the Judicial Department be requested to review alternative dispute resolution mechanisms not presently in use in Iowa for the potential effectiveness and feasibility of implementing such mechanisms in Iowa. It is requested that such review cover those areas including, but not limited to, negotiation, conciliation, mediation, fact-finding, mini-trial, and arbitration (both binding and nonbinding). The review and advice may include, but is not limited to, suggested legislation, rule making, funding, and procedures. It is further recommended that this review be conducted by October 1, 1987, and that the results of such review be conveyed to the chairpersons, vice chairpersons, and ranking members of the standing committees on Judiciary and Commerce on or before that date.

#8. PREJUDGMENT INTEREST

It would appear that the consensus of the Commission is that an insufficient case has been made to warrant the complete elimination of prejudgment interest in the state of Iowa.

However, the Commission would recommend that the following three issues be the subject of legislative action.

I. It would be appropriate to review the feasibility of differentiating between past and future damages in the award of prejudgment interest. However, to implement this recommendation may require the movement toward itemization of jury verdicts.

II. Consideration should be given to whether the present 10% interest mandate of the Iowa Code sufficiently reflects actual market rates and if not, the feasibility of creating some form of a flexible tie to current and future market rates (such as presently exists in federal court) should be reviewed.

III. Consideration of the present prohibition of prejudgment interest for state entities versus the allowance of prejudgment interest against municipal entities.

#9. PUNITIVE DAMAGES

The Commission has received presentations, testimony, and a "model" proposal from various groups seeking a change in Iowa law relating to the issue of punitive damages.

However, the Commission must express the following reservations regarding the information received and the changes proposed:

1. The "model" Act has not been adopted by any jurisdiction and thus has no history or use from which to judge potential effectiveness and potential problems.

2. Many of the aspects of change advocated in this proposal were already enacted in some degree with the passage of S.F. 2265. Insufficient time has passed to gauge the effectiveness or problems of the legislative changes already made.

3. If the true reason for the advocacy of this proposal is to make insurance more available and premiums more affordable (given the fact that those advocating the approach cite the inability to actuarially predict punitives as a major reason for recent increases) it would seem the more logical approach would be to simply make punitive damages uninsurable as a matter of public policy.

4. There is presently being conducted a national study on the nature and extent of any problems relating to punitive damages. Since that study will include all pertinent data relating to punitive damages in the state of Iowa, it may be wise to await the results of the study (anticipated in late 1987).

However, the Commission does find that the threat of punitive damages is perhaps more serious than actual litigation figures. The problem is exacerbated by the fact that most insurance policies do not cover punitive damages, resulting in a personal threat to the defendant to settle. This increases the propensity to plead for punitive damages, and increases the cost of settling such cases. A change in the standard of proof for punitive damages to a standard of willful and wanton acts of the defendant or actual malice on the part of the defendant would reduce many objectionable uses of these pleadings.

It light of the foregoing concerns, the Commission does not at this time recommend any changes in Iowa law relating to punitive damages. However, the Commission does recommend that the judicial department be requested to update the legislature in regards to the use of S.F. 2265 provisions on the subject and that a copy of the national study on the subject be made available to the chairpersons, vice chairpersons, and ranking members of the standing Committees on Judiciary and Commerce as soon as it is completed.

#10. STATUTE OF REPOSE - PRODUCTS LIABILITY/PROFESSIONAL SERVICES

The Commission has reviewed the feasibility and advisability of a statute of repose which would limit the number of years after the purchase for use or consumption of a product during which a lawsuit based on an alleged product defect may be brought.

The Commission acknowledges that a similar statute has been enacted by a number of other jurisdictions, and that two examples of such an approach already exist in Iowa law - relating to improvements to real property and medical malpractice.

Although no documented evidence exists that an action such as this will have a significant effect on liability insurance premiums for those persons and entities covered, the Commission does find that merit exists for further legislative action along these lines. Therefore, the Commission recommends as follows:

1. That the attached draft language for a ten year statute of repose, with exceptions, for products liability be used as a guide by the Iowa legislature in approaching this issue.

2. That in conjunction with the development of the above statute, a separate potential compensation mechanism be developed for those individuals whose rights may be effected by the statute of repose. By way of example, the Commission would advise that any or all of the following funding mechanisms be considered in creating this separate compensation fund:

a. State appropriation.

b. Assessments or fees charged to those entities receiving the protection (ex., premium surcharge on product liability policies).

c. Diversion of funds presently going to state through the implementation of the punitive damages provision of S.F. 2265.

3. That the legislature, in conjunction with the development of the above statute, review the feasibility and advisability of expanding such a statute to also provide for a statute of repose for licensed professionals. As a guide for discussion, the Commission would recommend that such expansion include the following items:

a. That it apply to professionals licensed or regulated pursuant to the Code of Iowa.

b. That the statute of respose be 10 years after the date of the last professional service alleged to have caused the injury or death.

c. That those individuals whose rights are impaired pursuant to the expansion also be given the opportunity to seek redress from a separate compensation mechanism developed in a similar manner to that developed for the product liability statute of repose in paragraph 2 above.

The Commission would note, however, that concerns have been raised regarding the potential subsidization of claims, and its effect on the general fund of this state.

S.F. _____ H.F. _____

Section 1. Section 614.1, Code 1987, is amended by adding the following new subsection:

NEW SUBSECTION. 11. PRODUCTS. Those founded on injuries to the person or wrongful death against an assembler, designer, supplier of specifications, distributor, manufacturer, or seller for damages arising from an alleged defect in the design, testing, manufacturing, formulation, packaging, warning, or labeling of a product, within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, of the injury or death for which damages are sought in the action, whichever date occurs first, but in no event shall any action be brought more than ten years after the date that the product that is alleged to have caused the injury or death was first purchased for use or consumption unless one of the following is true:

a. The assembler, designer, supplier of specifications, distributor, manufacturer, or seller expressly warranted that the product could be utilized safely for a period longer than ten years, in which case the period of repose shall be deemed to be that period expressly warranted.

b. The assembler, designer, supplier of specifications, distributor, manufacturer, or seller intentionally misrepresents facts about the product, or fraudulently conceals information about the product, and that conduct was a proximate cause of the injury or death upon which the claimant's action is based.

c. The injury or death was caused by prolonged exposure to a defective product for a period exceeding ten years.

d. The nature of the injury or cause of death was such that it would not naturally manifest itself within ten years.

#11. STATUTES OF REPOSE

The Commission has taken notice of the fact that subsequent to the action of the legislature placing this issue within the mandate of the Commission, the legislature enacted H.F. 2442 (creating a 15 year statute of repose for improvements to real property).

The Commission has reviewed the issue area and, in consideration of the passage of H.F. 2442, makes no further recommendations at this time. However, the Commission urges that this issue, as with all other recent tort reform actions, be subject to monitoring and study in the future to determine whether the desired results are being obtained.

#12. DIRECTORS AND OFFICERS LIABILITY

The Commission recommends legislative support for the forthcoming draft proposal of the Iowa State Bar Association relating to the limitations on liability for directors, officers, and volunteers of both profit and nonprofit institutions. It is the Commission's understanding that this proposal follows the action taken in the state of Delaware during their 1986 legislative session.

#13. WORKER'S COMPENSATION INTERFACE WITH CHAPTER 668

The Commission finds that although on its face the proposal to interface the worker's compensation system with chapter 668 (for the limited purpose of providing recovery by third party payors to the extent of fault or worker's compensation benefits paid by the employer) has merit for review, several concerns exist which counsel the Commission to make no formal recommendations at this time. These concerns include:

1. The extent to which such interface system would infringe upon the existing "sole remedy" theory of worker's compensation.

2. Information is lacking as to the approach taken by other comparative fault jurisdictions on this issue, and the effectiveness and/or problems raised in such interface.

3. Information is lacking as to whether such interface would create additional considerations in the debate regarding collateral source reductions.

4. The extent to which adding this additional consideration to the worker's compensation system would increase the complexity and associated costs of that system.

However, should information be forthcoming which may alleviate these above concerns, the Commission would concur in a legislative decision to reopen the issue for further discussion.

#14. JUDICIAL DEPARTMENT DATA COLLECTION

The Commission supports the efforts of the Judicial Department to develop and conduct a continued litigation data collection program. The Commission requests that the department's final progress report be made available to the Commission for inclusion in its final report. In addition, the Commission recommends the following:

1. That a periodic report mechanism for the results of this data collection be developed to coincide with such reporting from the Division of Insurance.

2. That to the extent possible, such data collection efforts should include information on pleadings and pre-trial, trial, and post-trial settlement practices.

3. That to the extent possible, such data collection efforts include information relating to modifications of judgments on appeal.

4. To the extent possible, the department is urged to make use of existing resources and central hardware to perform this function, and that such work be conducted in consultation with other centralized telecommunications efforts of the state.

5. That the judicial department collect and report similar data collection efforts of other states.

6. That the judicial department also collect and report data relating to the use of Rule of Civil Procedure 80A, section 617.16, section 619.19, and other such sanctions for frivolous suits.

In addition, the Commission recommends support for the current efforts of the Judicial Department to develop and implement case processing time standards and requests that the Department periodically report to the legislature the progress and results of such efforts.

#15. STATE/MUNICIPAL LIABILITY (Discretionary Function)

The Commission was mandated to study the liability of state and municipal entities for regulatory activities. However, with the passage of S.F. 2265, much of the liability for regulatory activities has already been removed.

After consultation with municipal representatives, it was determined that the one additional area of interest related to the present immunity of the state and municipalities for the performance of discretionary functions, and the alleged erosion of that immunity by the state's courts.

The Commission is unclear as to the extent of the effect of legislation proposed by the municipal entities relating to the discretionary function, and as to those factual situations which the municipalities wish it to apply. However, the municipalities have provided sufficient information relating to liability to warrant consideration of the issue.

Therefore, the Commission does not recommend legislative change at this time. Rather, the Commission recommends that the municipal representatives be requested to brief the federal case decisions relating to federal court treatment of the discretionary function and develop legislation similar to those decisions. These briefs and the proposed legislation should be forwarded to the chairpersons, vice chairpersons, and ranking members of the standing Committees on Judiciary by January 15, 1987.

#16. STATE/MUNICIPAL LIABILITY (613A.5 Notice Provisions)

Althcugh not specifically within the Commission's mandate, the Commission felt that the issue of the Supreme Court's rejection of the section 613A.5 notice provision relating to tort actions brought against municipalities was of sufficient importance for Commission review.

The Commission requested and received from the municipal representatives a briefing on the issue and their proposals for legislative reaction to the Supreme Court's decision in Boone County Memorial Hospital. The initial request of both the Iowa League of Municipalities and the Iowa State Association of Counties was to enact similarly restrictive notice and suit provisions for all tort actions - in an attempt to remove the constitutional equal protection and due process arguments from the "municipal only" approach. During consideration of the issue a second proposal was voiced - redrafting and reenactment of the provision relating only to municipalities based upon discovery and redefined legislative intent.

The Commission finds that both approaches may be cause for constitutional and procedural concern. The Commission is not yet persuaded that the enactment of restrictive notice and suit provisions for all tort actions is advisable or constitutional. Further, the Commission is also not persuaded that the more narrow redraft for discovery approach is constitutional in light of the Boone County case, but does find this second approach to be generally less enerous that the first.

Therefore, the Commission would recommend as follows:

(1) That the municipal associations be requested to gather information relating to the number of actions effected by the Boone County case relating to causes of action which have already arisen.

(2) That the municipal associations also gather similar information and approximate, to the best of their ability, the percentage increase in litigation for municipalities relating to causes of action which may arise in the future. Further, to the extent possible, the municipal associations should approximate the effect of the decision on future insurance availability and affordability, with specific concerns relating to claims-made policies outlined.

(3) That the above information together with a proposed redrafting of 613A.5 notice and suit provisions relating to discovery - and applicable only to municipal tort claims -be submitted to the chairperson, vice chairpersons, and ranking members of the standing Committees on Judiciary by January 15, 1987.

#17. IOWA BOARD OF MEDICAL EXAMINERS

The Commission would express its support for the activities and planned actions of the Iowa Board of Medical Examiners. The Commission would recommend legislative support for the requests by the Board for additional staff and resources necessary for the Board to fulfill its mandated functions. The Commission would also recommend that the legislature review the present information submission requirements of medical malpractice claims to the Board, and review the feasibility and procedural necessities for further requiring that all information relating to medical malpractice allegations, claims, settlements, suits, and judgments be submitted to the Board of Medical Examiners.

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December 2, 1986

TO: MR. DAVID MURPHY, IOWA STATE RISK MANAGER

FROM: Chairpersons Doyle and Jay, and the Members of the Liability and Liability Insurance Study Commission

RE: State Efforts Toward Centralized Risk Management

The Commission would like to express its support for your direct and extensive approach to the provision of risk management efforts on the state level. Understanding that at the time you spoke with us in October, you had only recently assumed the position of Risk Manager, the Commission would invite you to submit additional observations and/or recommendations regarding planned and potential directions which centralized risk management should take in this state.

It would be helpful if those materials could be conveyed to the Chairpersons, Vice Chairpersons, and Ranking Members of the Standing Committees on Judiciary and Commerce on or before January 15, 1987.

DL:cf

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November 11, 1986

Ms. Phyllis Kane
Program Assistant
Robert Wood Johnson Foundation
P.O. Box 2316
Princeton, N.J. 08543-2316

RE: Grant Application #235
(Iowa Board of Medical Examiners)

Dear Ms. Kane:

It has come to our attention that the Robert Wood Johnson Foundation is accepting grant applications for research and demonstration projects relating to several extremely important aspects of the current and continuing "crisis" in the medical malpractice liability and liability insurance area. It has also come to our attention that the Iowa Board of Medical Examiners will be submitting a grant application to the Foundation for assistance in collecting and dispensing data relating to the full spectrum of the medical malpractice complaint system in Iowa, including the nature and cause of complaints, final disposition/adjudication of complaints, the impact of intervention on final disposition, and the effects of disciplinary actions on future complaint levels.

We would like to express our full support and urge your consideration of this grant application. We not only feel that the research is important to Iowa and other states, but also feel that it is particularly timely for several reasons, including:

(1) Iowa is presently in the midst of a massive effort for the compilation and dissemination of factual data on the liability and liability insurance "crisis". We have completed a National Center on State Courts

November 11, 1986

Litigation Study (the first of its kind in the nation) which reviewed the Iowa liability system both generally - and with particular reference to medical malpractice. We are also in the process of developing an ongoing data collection system on litigation within our judicial department. Further, steps have been taken to begin a similar data collection and analysis system within our insurance department.

(2) We, like the majority of other states, are in the midst of developing and implementing legislation to assist in solving perceived problems, but are not yet satisfied that sufficient information exists to accurately determine the precise cause of such problems, and are even less satisfied that particular suggested reforms can be documented as having positive impacts on the problems. There is simply a tremendous need for further factual information to ensure that legislative efforts will have intended effects.

(3) The Iowa Board of Medical Examiners is in a unique position to gather extensive information not available from other sources within the state of Iowa, and occupies a more centralized role on the issue of medical licensing and discipline than do corresponding units of government in other states.

Again, we would like to express our total support for Mr. Vanderpool and the Iowa Board of Medical Examiners - and pledge our assistance in any manner which you may find of assistance. We respectfully urge that you give full consideration to the merits of application #235.

Sincerely,

SENATOR DONALD V. DOYLE, Chairperson
Senate Standing Committee on Judiciary,
Co-chairperson, Liability and Liability
Insurance Study Commission

REPRESENTATIVE DANIEL J. JAY, Chairperson
House Standing Committee on Judiciary
and Law Enforcement,
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MINORITY REPORTS RELATING TO LIABILITY

MINORITY REPORT

By: EVERSMANN, BYERS, HALVORSON, GENTLEMAN, and DRAKE

ISSUE: STATUTE OF LIMITATIONS FOR MINORS -- WITH SPECIFIC REFERENCE TO MEDICAL MALPRACTICE

The Final Report of this Commission shows no formal recommendation relating to the issue of the reduction of the statutory period in which minor claimants in medical malpactice may bring their actions.

Presently, a minor may have up to nineteen years to bring an action. The Iowa legislature should acknowledge that of any area presently in crisis due to lack of liability insurnace, the plight of OBGYN practice in this state is one of the most severe. The ever increasing availability and affordability crisis for the OBGYN is a direct result of insurers being unable to accurately predict liability losses over such a long period of time.

The legislative response most often taken by other jurisdictions, many of which are midwestern, and for which specific liability reductions have been acknowledged, is the reduction of the period of limitation to six plus two years. It is critical for such similar action to be taken in this state to keep both general and specialist OBGYN practices available, particularly for rural patients who are most put at risk by the present crisis.

When a proposal for such a recommendation was put to the Commission, it received six affirmative and four negative votes. Only the procedural rule requiring seven affirmative votes denied its inclusion as a formal recommendation of this Commission.

A recommendation for legislative enactment of a six plus two-year statute for minor plaintiffs in medical malpractice actions should have been the recommendation of this Commission if significant and effective action to alleviate the present crisis for Iowa OBGYNs was to be taken.

MINORITY REPORT - LIABILITY

By: DOYLE, JAY, VILSACK, and ALEXANDER

ISSUES:

1. CAPS ON NONECONOMIC DAMAGES
2. COLLATERAL SOURCE RULE
3. STATUTE OF REPOSE FOR PRODUCT LIABILITY
4. CIVIL LIABILITY FOR FAILURE TO WEAR SEATBELTS
5. PREVENTION EFFORTS

1. CAPS ON NONECONOMIC DAMAGES

The Final Report of this Commission contains a recommendation relating to placing a limitation of $200,000 on noneconomic damages for pain and suffering, loss of consortium, and loss of chance.

The majority premised the adoption of this recommendation on the fact that helping the ailing insurance industry and obtaining reductions in insurance premiums for Iowa citizens would offset the impairment of individual rights and the institution of civil justice "reforms" counter productive to the public policy of protecting those citizens who are injured through the wrongful acts of others.

We would respectfully dissent from this recommendation on the basis that its premise is flawed by the fact that such actions do not obtain the results necessary to outweigh the need for protecting individual rights and fostering a public policy of protecting the citizens of this state who are injured by the wrongful conduct of others. Based upon the information submitted to and reviewed by the Commission, we would offer the following observations in support of our dissent:

A. THE INSURANCE INDUSTRY IS NOT IN SUCH A CONDITION THAT SUBSTANTIAL INFRINGEMENT OF INDIVIDUAL RIGHTS AND PUBLIC POLICY IS WARRANTED.

Information received from the Iowa Insurance Services Office indicated that the property/casualty industry nationwide, when considering all income and expenses in reserve, has never lost money in its history.

Information received from the Iowa Insurance Commissioner's Office and specifically the 1986 report of the Iowa Insurance Department indicated that property/casualty insurance companies doing business within the state of Iowa contributed $66,659,444 to surplus in 1985, a year considered by some experts to be the worst year in the industry's history. These moneys represent sums above and beyond moneys necessary for the payment of losses paid out in 1985, moneys for expenses paid out in 1985, and moneys set aside in reserve for future claims based upon actuarial projection conducted and made in 1985.

Information received from the Insurance Services Office on page 13 of its report on insurance liability crisis in Iowa indicated that the combined ratio in Iowa for all lines based upon Iowa experience was more favorable than the countrywide ratio.

Information received from the Insurance Services Office's report on the insurance liability crisis in Iowa on page 15 indicated that the combined ratio in Iowa for major commercial lines has dramatically decreased in the last two and one-half years in the major commercial line, and on page 16 the same decrease has been noted in general liability and medical malpractice lines.

The information received from the Insurance Services Office's report on insurance liability crisis in Iowa on page 35, showed that Iowa's paid loss grew at a rate approximately 20 percent less than the gross national product. Iowa's paid loss growth rate for commercial liability and general liability in medical negligence grew at a rate in excess of the gross national product at approximately 50 percent of the countrywide growth rate.

Information received from the Insurance Services Office's report on insurance liability crisis in Iowa on page 36 through 39 indicate no correlation between the paid loss experienced in Iowa and premium costs to Iowa's insureds.

Information received from the General Accounting Office study of property/casualty insurance company profits in the preceding ten years supported the conclusion that the industry netted, after the payment of all expenses and reserves, over $50 billion in profit.

B. THERE IS NO REASON TO BELIEVE THAT EVEN THIS RADICAL SHIFT AWAY FROM PRESENT LAW WOULD RESULT IN ANY PREMIUM REDUCTIONS IN IOWA.

Information received from a closed-claim study performed by Aetna and by St. Paul in relationship to Florida tort law changes indicated that changes in the collateral source offset, changes in joint and several liability, limitations of noneconomical damages to $450,000, altering punitive damage award, and mandating structured payments for future economic damages over $250,000 would produce little or no savings which would result in reduced premiums to Florida's insureds.

From information received from representatives of the Iowa day care center industry, the Commission learned that in 1986 day care centers experienced a 500 percent to 1,000 percent increase in premium despite the fact that no claim greater than $500 was paid in 1985 and the aggregate amount of moneys paid out in 1985 represented 13 percent of the premiums collected in 1985.

The Commission received no information from any source that would indicate that any or all of the tort proposals being proposed by the majority would result in specific short-term long-term savings to Iowa insureds.

Information provided to the Commission by representatives of the National Insurance Consumer Organization indicated that current premium increases and cancellations experienced by Iowa insureds were and are a result of an

unprecedented price cutting war in the property/casualty insurance industry in the late 1970s and early 1980s, when the industry was attempting to take advantage of high interest rates. In addition, evidence was presented to the Commission which indicated that in a number of lines such as day care and product liability, Iowa insureds' rates were based not on Iowa experience or Iowa losses but on regional or countrywide experience.

C. SUCH ACTION WOULD ONLY INCREASE THE BURDEN ON INJURED INDIVIDUALS.

The Rand Corporation presentation referenced a mid-1970s Department of Transportation study which demonstrated the relationship between severity of injury and the award for pain and suffering. The conclusion of that report was that the most severely injured victims are actually under compensated for pain and suffering.

D. SUCH ACTION WOULD MARK A DANGEROUS DEPARTURE FROM CORRECT PUBLIC POLICY.

From a public policy standpoint, there are several reasons why a cap or limitation on damages would be detrimental. A cap or limitation on noneconomic damages would substantially reduce the deterrent mechanism built into our civil justice system. A limitation on noneconomic damages would allow wrongdoers to make economic decisions on whether to continue unsafe practices. Recent examples of such conduct within corporate America were discussed during the Commission hearing in relationship to the Ford Pinto cases, Johns Manville asbestos cases, and A.H. Robins' IUD cases.

A cap or limitation on noneconomic damages further infringes the right to trial by jury, constitutionally mandated and protected in the state of Iowa. Such a cap indicates a lack of confidence in the people of Iowa to exercise common sense in making judgments concerning appropriate, fair and adequate awards. A recent decline in the average and median verdicts reflected in the Iowa court study and the decline in the number of suits filed by Iowans supports the belief that Iowans are acting responsibly with common sense in this area.

SUBSTITUTE RECOMMENDATION

Based upon this information, we feel the Commission's recommendation should have been as follows:

"The Commission advises that insufficient evidence exists upon which to recommend the adoption of a limitation provision on noneconomic damages. The Commission would advise that prior to legislative action on this issue, that the General Assembly consider the following:

1. That further evidence or guarantee should be brought forward that the enactment of such a limitation would result in more affordable and more available insurance for the citizens of Iowa.

2. That further development be done on mechanisms which would provide recourse to individuals whose rights are impaired by such a limitation.

3. That when and if such a limitation is enacted, it apply only to those noneconomic damages shown to be out of proportion to the injuries sustained. This information should be available within the near future due to the creation of data collection programs in the Iowa judicial system and division of insurance."

2. COLLATERAL SOURCE

The final report of this Commission contains a recommendation for the elimination of the collateral source rule in Iowa.

We feel that the nearly complete elimination of the collateral source rule in Iowa is an over reaction to a limited problem of plaintiff double recoveries. We feel that in this area, as with all areas of civil justice, action impairing the rights of individuals should be taken in the least restrictive manner necessary to obtain the desired results. Therefore, we would dissent in part from the recommendation as it is contained in the final report. We recognize that under the current collateral source rules, a plaintiff could conceivably, under some limited circumstances, receive double recovery. However, we feel the most effective way to avoid a double recovery is by providing for a system in which an in-camera review would be conducted by the court prior to a trial relating to collateral sources. To the extent that such a review would identify benefits and collateral sources that would allow a plaintiff a double recovery, the court would be entitled to allow into evidence the existence of the collateral source.

SUBSTITUTE RECOMMENDATION

Therefore, in order to take the least restrictive approach to the limitation of an individual's rights, and yet accomplish the objective of eliminating double recoveries, we feel that the Commission's recommendation for draft language to be used as a guide by the legislature should have been as follows:

COLLATERAL SOURCES

1. In an action brought pursuant to this chapter seeking damages for personal injury, the court shall, upon motion of either party, permit an in-camera hearing at which evidence and argument may be had as to the replacement or indemnification of actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury by insurance, or by governmental, employment, or service benefit programs, except to the extent that the replacement or indemnification is pursuant to state or federal payments for disabilities, or from any other source except the proceeds of any insurance policy on the life of a deceased or the assets of the claimant or the members of the claimant's immediate family.

2. If evidence and argument regarding replacement or indemnification is presented pursuant to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring such replacement or indemnification and as to any existing rights of indemnification or subrogation relating to such replacement or indemnification of losses.

3. If evidence or argument is permitted pursuant to subsections 1 or 2, the court shall determine whether the evidence or arguments show a substantial likelihood of over compensation to the claimant. If the court finds that such a substantial likelihood does exist, the court shall permit evidence and argument to the jury as it deems appropriate.

4. If evidence or argument to the jury is permitted pursuant to subsection 3, the court shall, unless otherwise agreed to by all parties, instruct the jury to answer special interrogatories or, if there is no jury, make findings indicating the effect of such evidence or argument on the verdict.

3. STATUTE OF RESPOSE FOR PRODUCTS/PROFESSIONAL SERVICES

The report recommends the establishment of a statute of repose of ten years for product manufacturers, distributors, assemblers, designers, laborers, and professionals. The statute of repose of ten years arbitrarily cuts off the rights of consumers of products and services and laboring people to receive adequate and full compensation for injuries which result from defectively manufactured or designed products and negligently performed services. It is conceivable that under the proposed statute of repose such rights might be cut off by law prior to injury or damage occurring. This would create an exception to the general rules which apply to all other potential defendants. There is no indication in the record before the Commission that would support the conclusion that the establishment of a statute of respose of ten years for Iowa manufacturers, distributors, labelers, assemblers, or professionals will result in more affordable or more available insurance for those doing business in the state of Iowa. The evidence presented to the Commission is that product liability insurance is based on countrywide experience and not statewide or regional experience. Further evidence received relating to this issue included:

The Iowa Tort Liability Study conducted by the National Center for State Courts concluded that medical malpractice filings from 1981 have increased, but that product liability cases have decreased.

The Iowa Tort Liability Study conducted by the National Center for State Courts concluded that in 1985, 6.8 percent of the case filings involved medical malpractice, while only 2.9 percent of the case filings in 1985 were product liability cases.

The Iowa Tort Liability Study conducted by the National Center for State Courts concluded, in relationship to the total number of tort awards reviewed from 1981 through 1985 that relatively few of the awards were from the malpractice or product liability area. In fact, the study concluded that, from 1980 through 1986 there were only 26 medical malpractice awards in the state and only 47 product liability awards.

The Seventh Annual Study of General Manufacturing Climates of the 48 Contiguous States of America conducted by Grant Thornton and prepared as of June 1986, utilized 22 factors selected by manufacturers as important to business success. None of the factors listed involved tort reform and/or the civil litigation system.

We have great concern for any statute of repose which would establish a cutoff based upon an arbitrarily selected number of years after a product was manufactured or placed into the stream of commerce or a professional service was rendered. If the legislature were to consider a statute of repose in product liability cases, we would suggest and recommend: That such statute of repose should not be less than ten years, and for products that have a useful life of more than ten years that the statute of repose be linked to and based upon the useful life of the product as represented by the manufacturer, assembler, labeler, or designer.

In addition, the statute of repose should be linked to the establishment of labeling requirements for manufacturers, labelers, designers, and assemblers of products expressly indicating to the consumer the useful life of the product. This information concerning useful life should then be reported to a common depository for use by consumers and purchasers of these products.

If the statue of repose recommended in the Final Report would be considered by the legislature, we would suggest inclusion of language which would require a manufacturer, labeler, designer, or assembler of a product where the useful life reasonably would be expected to exceed ten years to label that product of that fact and report that information to a common depository. We would recommend that an exception to the ten-year statute of repose be established for those products which are represented to have a useful life in excess of ten years.

We would further recommend that in the event a product is found to be defective prior to the ten-year period, that the manufacturer could either, (1) adequately warn consumers of the defect and offer adequate repair or replacement at no cost to the consumers, or (2) lose whatever protection might be afforded to the manufacturer, assembler, designer, or labeler of the product by virtue of the statute of repose.

4. SEAT BELT LIABILITY

Whereas we strongly agree that every incentive should be made to encourage the use of seat belts, we disagree with the removal of the maximum five percent reduction in recovery for failure to wear a seat belt. During Commission hearings, the Commission heard testimony that the jury should not be limited in its allocation of damages, and therefore, it should be free to allocate damages for failure to wear a seat belt in whatever proportion it desired.

The rationale for the limitation in case of seat belts is that the failure to wear a seat belt is never a proximate cause to the incident that caused the injury. Therefore, the failure to wear a seat belt should not be allowed to deny an injured person's recovery.

5. PREVENTION EFFORTS

THE MINORITY IS CONCERNED THAT INADEQUATE ATTENTION HAS BEEN PAID TO THE PREVENTION AND CONTROL OF LOSSES, AND THAT MANY OF THE RECOMMENDATIONS OF THE MAJORITY RELATE ONLY TO THE AMOUNT OR METHOD OF PAYMENT FOR LOSSES.

We are concerned by the fact that many of the recommendations in the Final Report relate directly to when, how, and if injuries sustained will be recompensed. Perhaps the best (or worst) of these is the recommendation for a cap on noneconomic damages. The limitation of a payment to $200,000 for a $300,000 injury does not result in a savings of $100,000 to society -- rather, it simply shifts that $100,000 loss to an individual member of society in the person of the injured party.

We would counter that the only real savings to society would result from the prevention of the injury itself. We feel that the better approach for state efforts lies in areas such as risk management and early and efficient claims settlement procedures which directly impact the civil justice system positively and at a point near the beginning of the process -- and not with efforts to reduce the payments required of one particular entity or another only at the very end of the process.

I. FEDERAL LEGISLATION

The following is a brief analysis of content and "current" status of introduced federal legislation relating to subject matters within the purview of this commission. They are categorized according to general subject matters of Civil Justice Reform, Insurance Regulation Reform, Alternative Financing/Risk Management, and studies - as will be the material relating to state initiatives.

(Source - National Conference on State Legislatures, United States Senate and House information offices.)

I. CIVIL JUSTICE REFORM

HR 4385 (Gray - IL)	Requires periodic payments, collateral source reductions, $100,000 noneconomic damage cap, scheduled attorneys fees, transmittal of punitive damages to the U.S. Treasury in all civil actions unless otherwise governed by a state or federal law.	No hearings or action.
HR 4524 (Schulze - PA)	Creates 35-member Insurance Availability Crisis Commission, to provide Congress, within 6 months, a report on and recommendations for reforming our tort system and insurance industry practices.	No hearings or action.
HR 4406 (Hyde - IL)	Local government liability limited to proportionate negligence in actions brought before any courts; limits punitive damages and attorneys fees.	No hearings or action.
HR 4770 (Kindness - OH)	Amends Federal Tort Claims Act to modify joint and several liability, to reduce awards by sums received from collateral sources, to limit noneconomic damages to $100,000; to provide for periodic payments of judgments and schedule attorneys fees (Administration legislation).	
HR - 4874 (Ritter - PA)	Requires states, within 4 years, to comply with the following tort liability standards: pretrial screening panels; structured settlements; collateral source reductions; $250,000 noneconomic damage caps; scheduled attorneys fees; modified joint and several liability; state court administrative use of punitive damages and payment of frivolous suit expenses. Encourages establishment of risk management programs.	No hearings or action.

S. 436 (Hatch - UT)	Amends Section 1983 of Civil Rights Act to prohibit award of damages against any governmental entity if officials are found to have acted in good faith.	Hearing in February, 1986.
S. 1580 (Thurmond - SC)	Establishes a $75 hourly attorneys rate to be authorized in awards in judicial or administrative hearings to which any Federal fee-shifting statute applies. Applies to prevailing parties only awards against Federal, state or local governments.	Hearings in Senate Judiciary - October, 1985.
S. 2038 (McConnell - KY)	Encourages the use of alternative dispute resolution techniques and establishes federal rules of procedure for the same.	Several previous hearings. Others expected.
S. 2046 (McConnell - KY)	Requires periodic payments, collateral source reductions, $100,000 noneconomic damage cap, scheduled attorneys fees, transmittal of punitive damages to the U.S. Treasury in all civil actions unless otherwise governed by a state or federal law.	Several previous hearings. Others expected.
S. 100 (Original bill, (Kasten - WI)	Preempts all state laws inconsistent with the following federal product liability standards: (1) eliminates strict liability, (2) exempt most sellers from liability in construction defect cases, (3) expands manufacturers defenses for "misuse" of product, "contributory negligence: and "assumption of risky", (4) severely restricts joint and several liability, (5) provides for collateral source reductions of damage awards, (6) bars evidence of subsequent remedial measures, (7) largely eliminates punitive damages, and (8) imposes statute of response on suits involving capital goods.	Motion to report bill defeated in Senate Commerce Committee in May 1985.

S. 100 - Substitute (Kasten - WI)	Preempts all state laws inconsistent with the following product liability provisions: fault-based liability; modified joint and several liability; $100,000 limits on noneconomic damages; periodic payments of judgments; collateral source reductions; scheduled attorneys fees. U.S. Attorney General to implement alternative dispute resolution techniques. (Administration legislation.)	Heard in late May. One option for consideration in June mark-up.
S. 1999 (Danforth - MO)	Establishes an expedited claims procedure to resolve product liability disputes. Caps non-economic awards at $250,000 and limits punitive damages to two times the plaintiffs compensatory damages.	Mark-up will be scheduled in early June.
HR 4425 (Roth - WI)	Requires claimants to establish that manufacturers and sellers are negligent by a preponderance of the evidence and restricts award of punitive damages in product liability action. Pre-empts state law.	No hearings or action.
HR 4766 (Fish - NY)	Preempts all state laws inconsistent with the following product liability provisions: fault-based liability; modified joint and several liability; $100,000 limits on noneconomic damages; periodic payments of judgments; collateral source reductions; scheduled attorneys fees. U.S. Attorney General to implement alternative dispute resolution techniques. (Administration legislation.)	No hearings or action.
HR 4832 (Dannemeyer - CA)	Preempts state law by providing for uniform federal standards of liability; sanctions comparative responsibility and several liability; caps punitive damages and provided for structured settlements.	No hearings or action.

HJR 386 (Porter - IL)	Recommends noneconomic damage caps, periodic payments, enhanced risk management, state access to settlement data, alternative dispute resolution and other ways to address medical malpractice actions and quality control.	No hearings or action.
HR 2559 (Hansen - UT)	Appropriates $500 million to fund state medical malpractice programs which establish screening panels, limit noneconomic damages, provide for periodic payments, schedule attorneys fees, etc.	No hearings or action.
HR 3084 (Moore - LA)	Establishes an alternative liability system for malpractice - provides for out-of-court claims settlement. Recovery limited to net economic loss including lost wages and medical costs.	No hearings or action.
HR 3865 (Lent - NY)	Appropriates $12.5 million for FY 87 for payment development grants to states to accomplish the following malpractice-related state reforms: periodic payments of damages exceeding $100,000, reduction of awards by collateral source sums, $250,000 noneconomic damage caps, scheduled attorneys fees, risk management programs, and provision of judicial disposition data. An additional $3.1 is appropriated for FY 87 for related state incentive grants.	
HR 4390 (Wyden - OR)	Provides for states committees to analyze good faith professional review committees of health care entities, require collection and dissemination of malpractice payments data and report sanctions against health care providers taken by state licensing boards.	No hearings or action.

S. 175 (Inouye - HA)	Encourages states to establish medical malpractice screening panels to hear claims, schedule attorneys fees and develop health care facility risk management programs. Authorizes annual payments of $250,000 to each state complying with this act.	No hearings or action.
S. 1372 (Heinz - PA)	Provides incentives for establishment of statewide insurance pools to provide health insurance to high-risk individuals.	No hearings or action.
S. 1804 (Hatch - UT)	Appropriates $12.5 million for FY 87 for payment of development grants to states to accomplish the following malpractice-related state reforms: periodic payments of damages exceeding $100,000, reduction of awards by collateral source sums, $250,000 noneconomic damage caps, scheduled attorneys fees, risk management programs, and provision of judicial disposition data. An additional $3.1 is appropriated for FY 87 for related state incentive grants.	Several past hearings. Future hearings likely.
S. 1960 (Durenberger - MN)	Establishes an alternative liability system for malpractice - provides for out-of-court claims settlement. Recovery limited to net economic loss including lost wages and medical costs.	No hearings or action.

S. 2458 (Simon - IL)	Makes the Federal Trade Commission Act applicable to the insurance industry to the extent the industry is not state regulated; Permits insurers to collectively gather loss data, prepare premium rate data, etc; Prohibits insurers from establishing guidelines including final rates and final rate must reflect each insurers own expense component; Allows insurers to act collectively when participating in j.u.a.'s, and pools.	No hearings or action.
S. 2497 (Simon - IL)	Requires property and casualty insurers to submit annual reports to the Secretary of Commerce including data on: premiums, claims paid, direct legal costs, administrative overhead, reserves units of exposure, classifications of business, investment income, etc. The Secretary would analyze the reports and share them with Congress and the states.	No hearings or action.
HR 4500 (LaFalce - NY)	Repeals the McCarran-Ferguson Act	No hearings or action.
HR 4501 (LaFalce - NY)	Applies various federal laws to the regulation of insurance if said industry is not effectively regulated at the state level.	No hearings or action.
HR 4502 (LaFalce - NY)	Removes the regulation of the insurance industry from present exemptions from certain federal laws.	No hearings or action.

HR 4503 (LaFalce - NY)	Repeals the McCarran-Ferguson Act and calls upon the Federal Trade Commission to affirm the legality of collective activities of the insurance industry.	No hearings or action.
HR 4504 (LaFalce - NY)	Amends McCarran-Ferguson and defines business of insurance (for state regulatory purposes) to be matters regarding solvency, reliability and underwriting.	No hearings or action.
HR 4877 (Schumer - NY)	Requires commercial insurers to annually report value of premiums written and earned; value of claims paid; value of administrative expenses, reserves, attorneys fees, actual economic loss and premium increases by class of business. An analysis would be made by the Secretary of Commerce and shared with Congress and the states.	No hearings or action.

III. ALTERNATIVE FINANCING/RISK MANAGEMENT

SR 2129 (Kasten WI)	Expands 1981 Risk Retention Act to permit similarly situated public and private sector entities to self-insure and/or collectively purchase most lines of liability coverage regardless of state prohibitions. State commissioners can examine a group's financial condition, various unfair trade practices. Policies must spell out that state insolvency guaranty funds are unavailable for these groups.	ENACTED
HR 4301 (Wyden - OR)	Permits private and public sector entities to self-insure and/or collectively purchase most types of liability insurance.	Risk retention grouping subject of late-June hearing by House Subcommittee on Commerce, Transportation & Tourism.
HR 4442 (Lent - NY)	Permits private and public sector entities to self-insure or collectively purchase most types of liability insurance; permits state insurance commissioner financial examinations; requires notice of non-participation in insolvency guaranty funds.	Risk retention grouping subject of late-June hearing by House Subcommittee on Commerce, Transportation & Tourism.
HR 4506 (LaFalce - NY)	Permits private and public sector entities to self-insure or collectively purchase most types of liability insurance; permits state insurance commissioner examinations; requires notice of non-participation in insolvency guaranty funds.	Risk retention grouping subject of late-June hearing by House Subcommittee on Commerce, Transportation & Tourism.
HR 4796 (Schulze - PA)	Permits private and public sector entities to self-insure or collectively purchase most types of liability insurance; requires groups to be similarly situated and in compliance with state unfair trade practices laws; allows tax deductions for contributions to qualified liability trusts.	Risk retention is subject of late-June hearing by House Subcommittee on Commerce, Transporation & Tourism.

IV. STUDIES

HR 4655 (Frank - MA)	Creates a National Commission on the Liability Crisis to investigate causes and to report in 6 months on its fundings and recommendations.	No hearings or action
HR 4499 (LaFalce - NY)	Creates a Federal Insurance Commission.	No hearings or action.

II. STATE INITIATIVES (1986 -- A Very Busy Year)

During 1986, almost every state legislature in session was faced with an avalanche of liability and liability insurance legislative proposals, many of which were passed and/or enacted.

Again, breaking the analysis into its three component parts: civil justice reform, insurance regulation reform, and alternative financing/risk management; the following three documents are a review of major legislation and legislative proposals nationwide, with an additional attachment relating to the institution of various legislative studies.

I. Civil Justice Reform

ALABAMA (1986 Session Completed)

Enacted

HB 178 - Grants immunity from suit to the Board of Medical Examiners and the Medical Licensure Commission.

SB 369 - Grants immunity to Board of Dental Examiners, certain members, agents, employees, consultants and others in connection with hearing investigations.

ALASKA (1986 Session Completed)

Enacted

SB 377 - Places limits of $500,000 for noneconomic damages for each claim based on a separate injury or accident.

Bars a person who suffers personal injury or death from recovering damages if the injury or death occurs in the commission of a felony.

Provides for itemization of damages between economic and noneconomic losses.

Provides for periodic payment in certain circumstances.

Limits liability of members of board of directors of non profit corporations; public or nonprofit hospitals; school districts; citizens advisory committees of a municipality.

Modifies joint and several liability by making contributory fault (chargeable to the claimant) diminish the amount of damages proportionate to the claimant's fault.

Allows a defendant to introduce into evidence the amount of compensation from collateral sources.

Establishes prejudgment interest accrual principle.

ARIZONA (1986 Session Completed)

Enacted

Seven tort reform bills were sent to the Governor. Five vetoed. The two which have been enacted into law include:

HB 2377 - establishes penalties for unjustified actions and raises limits for mandatory arbitration.

HB 2170 - prescribes liability for liquor to a certain intoxicated person or minor; defines "obviously intoxicated" and prescribes certain liability limitations.

Among the legislation vetoed were bills calling for structured settlements (SB 1378), limitation of joint and several liability (HB 2013), collateral source rule modification (HB 2163) and scheduled contingent attorneys fees (HB 2376).

CALIFORNIA (Ongoing)

Previous Action

Proposition 51, which passed by a margin of 62 percent - 38 percent, will eliminate joint and several liability in all suits seeking noneconomic damages.

Restricted attorneys' contingency fees, an issue upheld by the U.S. Supreme Court in 1985.

Under Consideration

No less than 40 bills have been introduced thus far, including legislation extending all provisions of the state's medical malpractice laws to general tort liability.

COLORADO (1986 Session Completed)

Enacted

SB 67 will reduce awards by sums from specific collateral sources.

SB 67 will limit damages for non-economic loss to $250,000 unless court funds "clear and convincing evidence," in which case up to $500,000 can be awarded. Eliminates awards for derivative noneconomic loss except when court finds "clear and convincing evidence" and may award up to $250,000. Provides that an action against an architect, engineer or land surveyor must be certified by similar professionals.

SB 69 will make uniform most statutes of limitations at three years. Time limits for bringing tort actions are either 1 or 2 years.

SB 70 will eliminate the doctrine of joint and several liability. Limits liability of a defendant to his proportionate share of negligence or fault.

SB 76 extends "good Samaritan" laws to limit the liability of individuals, businesses and corporations, directors of nonprofit

organizations and government entities when they volunteer their time without pay or enforce a policy or regulation to protect another person.

SB 86 limits the liability of vendors to $150,000 if liquor has been served to an intoxicated patron or a minor. (Became law without Governor's signature). Actions can be brought only by individuals other than the intoxicated person.

HB 1185, 1186 and 1187 limit liability for employers, shareholders, officers and board members resulting from the flow of water from a reservoir. Establishes immunity for state engineers and employees when monitoring reservoirs.

HB 1192 limits liability of manufacturers of firearms when products are operated properly.

HB 1196 clarifies the immunity of public entities and their employees.

HB 1197 ties punitive damages to actual damages in a one-to-one ratio with two-thirds paid to injured parties and one-third to the state general fund.

HB 1201 limits liability for mental health professionals when they use an accepted standard of care but fail to anticipate a patient's violent behavior.

HB 1205 limits a homeowner's liability when property is entered illegally.

CONNECTICUT (1986 Session Completed)

Enacted

Substitute HB 6134 would accomplish the following civil justice changes:

Modify joint and several liability; reimpose modified sovereign immunity for municipal governments; allow all judgments (currently limited to medical malpractice) to be reduced by sums awarded through collateral sources; impose a penalty, which could award defense costs, for filing suits in absence of probable cause; impose periodic payments on future economic and noneconomic damages exceeding $200,000; and schedule attorneys contingency fees.

DELAWARE

Sent to Governor

SB 533 - limits personal liability of directors of corporations in cases where directors are accused by shareholders of violating their "duty of care."

FLORIDA (1986 Session completed)

Enacted

The tort reform and insurance act accomplish the following:

Modifies the application of the doctrine of joint and several liability; limits when punitive damages may be pled, specifies to whom they are to be distributed, and caps the maximum amount of such damages in certain cases; caps noneconomic damages in civil actions at $450,000; requires, under certain circumstances, periodic payment of future damages exceeding $250,000.

GEORGIA (1986 Session Completed)

Enacted

HB - (Act No. 1670) compels plaintiffs found to have filed frivolous suits to pay fees and costs incurred by defendants.

HB 1185 - (Act No. 1486) regards dismissal of actions for frivolous suits.

HB 1471 - (Act No. 1619) clarifies sovereign immunity of municipal corporations.

HB 1549 - (Act No. 1422) and HB 1526 (Act. No. 1621) establish immunity for governmental employees and officials.

HAWAII (1986 Session Completed)

Enacted

HB 1993-86 - provides for additional exceptions to the state's tort claims act.

IDAHO (1986 Session Completed)

SB 1439 - limits dram shop and social host liability.

HB 1469 - places limits on attorney contingency fees.

ILLINOIS (Ongoing)

Sent to Governor

Joint and several liability. It retains joint liability in cases of medical malpractice, environmental concerns and medical costs. Defendants who are less than 25 percent at fault for an injury would not be jointly liable for other damages.

Collateral sources. Any judgment against a defendant would be reduced by any insurance reimbursements to the plaintiff above $25,000.

Comparative negligence. A plaintiff who is more than 50 percent responsible for his injury would not be permitted to collect damages in cases of negligence or product liability.

Municipal immunity: Grants broad immunity from liability suits to municipalities; exempts present or former public employees from punitive damages for actions arising from official duties; exempts public entity from liability for "hazardous recreational activities" when warning of the hazard is posted.

INDIANA (1986 Session Completed)

Enacted

SB 393 authorizes judges to determine what are frivolous suits and to assess fees for such suits.

SB 394 modifies the state's collateral source rule. Juries are to be instructed not to take into account taxes to be paid on potential awards.

SB 85 dealing with dram shop, asserts that licensed sellers are not liable for the actions of their customers unless they know customers making purchases are intoxicated.

HB 1284 grants volunteers immunity from liability unless the entity which they assist has insurance.

KANSAS (1986 Session Completed)

Enacted

HB 2661 - caps damages awards against health care providers at $1 million. Noneconomic damage awards in these same medical malpractice judgments are capped at $250,000 (subject to cost of living adjustments). Juries must itemize noneconomic damage awards and all settlements are to be paid periodically.

A "pinhole" provision permits claimants to petition courts to award supplemental benefits for medical related expenses up to a maximum of $3 million.

LOUISIANA (Ongoing)

Enacted

HB 2155 - limits liability of servers and sellers of liquor.

Under Consideration

Fourteen pieces of House legislation have been introduced including:

HB 339-341 (structured settlements); HB 206 (political subdivision immunity); HB 1457 (collateral source doctrine); HB 1455 (prejudgment interest); HB 1465 ($150,000 cap on noneconomic damages); HB 1452 (comparative negligence); HB 1932 (professional and public liability trust); HB 1459 (scheduled contingent attorneys fees).

In the Senate, SB 719 proposes to establish a medical review panel to evaluate medical malpractice claims made against the state.

MAINE (1986 Session Completed)

Enacted

LD 2080 grants immunity to servers unless minors they serve can prove they were negligently served. Servers who are negligent or reckless in serving minors or visibly intoxicated adults could be sued. Per occurrence caps of $250,000 on awards against alcohol servers are established. These caps exclude medical care and treatment expenses.

Public Law 804 shortens statute of limitations for suits related to medical and legal professional liability.

MARYLAND (1986 Session Completed)

Enacted

Awards for noneconomic damages would be capped at $350,000 per SB 558.

SB 600 provides personal immunity for directors of charitable organizations

MICHIGAN (Ongoing)

Under Consideration

No less than two dozen tort reform proposals are presently under consideration, relating to full range of civil justice issues.

MINNESOTA (1986 Session Completed)

Sent to Governor

HF 1950 contains the following civil justice system modifications:

Imposition of a $400,000 cap on "intangible losses"; provision for the automatic reduction from judgments of payments made from collateral sources; prohibition of victims seeking punitive damages in original complaints; allows the court to award costs in frivolous suits; exempts future damages from prejudgment interest.

MISSOURI (1986 Session Completed)

Enacted

SB 663 - caps noneconomic damages awardable in medical malpractice suits at $350,000. This legislation also requires certain doctors to carry medical malpractice insurance and adds additional reporting requirements regarding disciplinary actions taken by hospitals against doctors. SB 663 requires submission to court of an affidavit from a licensed health care provider averring that a medical malpractice action is not frivolous.

SB 739 - authorizes payment of prejudgment interest.

SB 742 - limits attorneys contingency fees and establishes a products liability act.

SB 647 - reestablishes sovereign immunity with several exceptions.

NEW HAMPSHIRE (1986 Session Completed)

Enacted

HB 513 - will accomplish the following:

Place a $875,000 cap on pain and suffering awards; reduce the statute of limitations from six to three years; permit judges to assess costs and attorneys fees from frivolous lawsuits and frivolous defenses; apply liability caps of $500,000 (per occurrence) and $150,000 (per person) to municipalities. When municipalities are found over 50 percent liable, joint and several liability will apply with only several liability applying when municipalities are 50 percent or less liable; defines "good business practice" for purposes of defense in liquor liability lawsuits. Intoxicated drivers will need to show "gross" negligence in future suits against sellers and servers; requires contingency for agreements to be in writing with final costs set out at the end of litigation; attorneys will be required

statutorily to offer hourly rate and contingency fee options; judges will be permitted to review contingency fee costs in all judgments exceeding $200,000; outlaw punitive damages (existing practice); set out the burden of proof in medical malpractice actions; and limit the liability of directors and officers of charitable organizations and societies.

NEW JERSEY (Ongoing)

Enacted

SB 1678 - grants immunity to volunteer unpaid athletic coaches' provided these individuals have participated in league-established safety and training programs.

Under Consideration

Legislation has been introduced in the Assembly proposing the following: structured settlements for awards exceeding $300,000; a $500 million per claimant or $1 million per occurrence cap on judgments entered against a public entity; immunity for volunteers and public officials; arbitration for all liability claims of $20,000 or less; rate filings based on New Jersey loss experience; and a graduated cap on "pain and suffering" awards in the private sector.

Assemblyman Bills 2357-2365 would apply various tort and regulatory reforms in the area of municipal liability. Besides establishing an excess insurance fund, the bills would modify joint and several liability and provide for structured settlements.

Other Senate legislation seeks to provide indemnification of hazardous waste contractors and modify standards of negligence.

SB 346 - now in the Assembly would grant immunity to boards of trustees of nonprofit corporations carrying out their official duties.

NEW MEXICO (1986 Session Completed)

Enacted

SB 108 - creates District Court Arbitration Fund and provides for collection of an arbitration user fee.

SB 110 - caps attorneys fees for workers compensation cases at 20 percent of the first $5,000; 15 percent of next $5,000 and 10 percent of remaining benefits.

HB 244 - provides for certain limitations on liability for alcoholic liquor sales or service. Establishes caps of $20,000 for property damage, $50,000 for injury to or death of one person;

$100,000 for injury to or death or two or more persons for each transaction or occurrence.

SB 137 - creates Metropolitan Court Mediation Fund; provides for collection of certain costs to fund mediation programs for certain civil and criminal actions.

NEW YORK (Ongoing)

Enacted

Insurance and civil justice reforms are both included in omnibus legislation signed by the Governor in late June. SB 9351-A and A-10663 (Chapter 220, 1986 Session Laws) accomplish the following tort reforms:

Compels courts to offset awards by amounts received from collateral sources (similar 1985 legislation regarding medical malpractice); allows recovery of up to $10,000 in court costs and attorney fees for frivolous suits and defenses in personal injury, property and wrongful death actions; establishes "gross negligence as the determinant of liability of directors, trustees, officers of nonprofits".

Sent to Governor

A. 10664 and S. 9391 A, "toxic tort" legislation, includes the following proposals related to toxic torts and torts generally:

Extension of statute of limitations for filing toxic tort actions from three years after exposure to three years after discovering an injury; in personal injury actions, joint and several liability is inapplicable if the plaintiff is 51 percent or more liable (with some exceptions); authorization of structured settlements when awards exceed $250,000.

A. 11584 and S. 9470 affect medical malpractice as follows:

a. Allow the Insurance Superintendent to establish medical malpractice rates.

b. Phase in issuance of claims - made policies.

c. Require certificates of merit and encourage arbitration in order to discourage frivolous suits.

d. Enhance examination processes regarding physician misconduct.

OHIO (Ongoing)

Under Consideration

Over two dozen legislative proposals covering for range of civil justice system.

OKLAHOMA (1986 session Completed)

Enacted

SB 488 accomplishes the following civil justice system changes:

Limits punitive damages to actual damages and applies a stricter standard for justifying consideration of punitive damages; allows judges to direct juries to itemize verdicts (constitutional prohibition on a mandate); allows prevailing parties to recover up to an aggregate of $10,000 in attorneys fees and court costs in judicially-determined frivolous suits; amends the interest payable on actual damages sought from 15 percent to the T-bill rate plus four percent.

PENNSYLVANIA (Ongoing)

The house has completed a comprehensive hearing process, begun last September. Reportedly, a comprehensive tort reform package may emerge from this effort.

SOUTH CAROLINA (1986 Session Completed)

Enacted

HB 2266 restores some of the state's sovereign immunity by reestablishing approximately 20 categorical, qualified immunities.

It also places monetary liability limits on the state and its political subdivisions of $250,000 per incident and $500,000 per occurrence.

SOUTH DAKOTA (1986 Session Completed)

Enacted

SB 280 which will require pre-discovery, fact-finding hearings before a judge to prove that there was willful and malicious conduct in order to file for punitive damages.

SB 281 authorizes structured settlements for awards exceeding $100,000.

SB 282 will cap medical malpractice awards at $1 million. (Includes all recoverable damages).

Waiver of sovereign immunity for public entities, other than state, will occur only to the extent that said entities have purchased liability coverage (SB 233).

TENNESSEE (1986 Session Completed)

Enacted

Immunity from suit for directors of nonprofit organizations (exempt from federal taxation), of governing bodies of electrical cooperatives and electrical membership corporations is authorized in HB 1940.

Regarding dram shop, HB 1199 prohibits any judge or jury from pronouncing any damages against an alcohol seller unless it is ascertained that the sale of intoxicating beverages was the proximate cause of subsequent injury or death.

SB 1702 (Public Chapter No. 726) - all members of boards, commissions, agencies, authorities, and other governing bodies of any governmental entity, created by public or private act, whether compensated or not, shall be immune from suit arising from activities of the entity unless conduct amounts to willful, wanton or gross negligence.

SB 1854 (Public Chapter No. 730) - provides for immunity for local education agency employees, including board members, superintendents, teachers and management, or removal of asbestos.

HB 1199 (Public Chapter No. 519) - prohibits any judge or jury from pronouncing damages against an alcohol seller unless it is ascertained that the sale of intoxicating beverages was the proximate cause of subsequent injury or death.

UTAH (1986 Session Completed)

Enacted

Repealed joint and several liability (SB 64).

Established a $100,000/$300,000 cap on dram shop liability and set a 2-year statute of limitation (SB 182).

SB 111 limits noneconomic damages to $250,000 in medical malpractice judgments while SB 155 establishes structured settlements for medical malpractice judgments only.

Limited directors' and officers' liability through revamped standards of care (SB 214). Governor vetoed.

WASHINGTON (1986 Session Completed)

Sent to Governor

SB 4630 - accomplishes the following:

Caps, noneconomic damages per a statutory formula. The estimated cap range is $117,000 - $493,000. The formula is .43 x average annual wage (currently $18,029) x plaintiff's life expectancy (no less than 15 years; use Insurance Commissioner's mortality table).

Abolishes claims involving joint and several liability except for the following:

a. hazardous waste and solid waste disposal sites;

b. business torts; and

c. manufacturers of generic products.

Accelerates the statute of limitations for contractors.

Authorizes structured settlements for all judgments exceeding $100,000.

WEST VIRGINIA (1986 Session and Special Session Completed)

Sent to Governor

Regular session legislation (SB 714) caps noneconomic damages and pain and suffering awards in medical malpractice judgments at $1 million per incident. HB 149 (special session) permits a judge to instruct a jury regarding these caps.

HB 149 eliminates joint and several liability for individual defendants who are 25 percent or less responsible.

SB 3 also limits noneconomic damages in suits involving political subdivisions to $500,000, deploys the 25 percent rule (see HB 149 above) regarding joint and several liability and lays out standards for liability immunity of political subdivision employees.

WISCONSIN (1986 Session Completed)

Sent to Governor

The legislature has approved medical malpractice legislation during its recent special session. Major ingredients of the medical malpractice legislation include:

$1 million cap on noneconomic damages; sliding scale for attorney contingency fees (from one-third of first $1 million if proving negligence, to 25 percent of damages if defendant admits negligence, to 20 percent of damages exceeding $1 million); elimination of pretrial screening panels to be replaced with a voluntary, non-binding mediation process.

Sent to Governor

HB 12 will modify the standards of care used to determine medical malpractice.

HB 13 will remove individuals legally supplying alcoholic beverages from liability for resultant damages caused by an individual's consuming the alcoholic beverage.

HB 14 will authorize courts to determine frivolous suits. Plaintiffs in frivolous suits could be made liable for payment of reasonable court expenses and attorneys fees.

HB 15 provides for an affidavit of non-involvement as a summary means to obtain early dismissal of suits against defendants who are clearly not involved in the occurrence giving rise to the tort claim.

HB 38 creates statutory definitions of unfair insurance claims practices.

HB 39 grants any officers, commissioners or board members of government and nonprofit entities immunity from liability for any action, omission or inaction of the respective government or corporate body.

HB 40 establishes pretrial screening panels for medical malpractice suits.

HB 44 modifies the state's sovereign immunity and liability limits.

HB 59 makes certain entities not liable for injuries incurred at amateur rodeos unless there is willful neglect.

SF 17 repeals the doctrine of joint liability.

II. INSURANCE REGULATION REFORM

ALABAMA (1986 Session Completed)

Enacted

HB 202 - Requires insurance companies which sell medical liability insurance to report to the appropriate state licensing agencies any judgment or settlement resulting from a claim for personal injury caused by an error, omission or negligence in the performance of professional services.

ALASKA (1986 Session Completed)

Enacted

SB 442 - authorizes the department of commerce to provide technical assistance to individuals intending to form reciprocal insurers for provision of marine liability insurance.

HB 2418 - authorizes the establishment of a joint underwriting association for provision of medical malpractice coverage.

ARIZONA (1986 Session Completed)

Enacted

HB 2375 - modifies insurance regulation as follows: (1) conditions for noncancellation of policies for commercial and industrial risks; (2) a temporary joint underwriting association for all lines; (3) the department of insurance to set rules and regulations for disclosure of loss experience; and (4) establishes a study commission on insurance.

HF 2418 - authorizes the establishment of a joint underwriting association for provision of medical malpractice coverage for licensed midwives and registered nurses.

CALIFORNIA (Ongoing)

Under Consideration

AB 4406 - would expand the annual information provided by insurers to the insurance commissioner to include total premiums paid (by individual lines of coverage), total reinsurance ceded and premiums paid, claims made or occurrence base policy identification, trial and judgment incidence, lines of coverage provided, average settlements and judgments, etc.

AB 4407 - would compel all admitted insurers to offer, in California, every category of direct commercial liability

insurance or reinsurance for commercial liability insurance offered by the insurer anywhere in the United States. Similar provisions are stipulated for surplus line providers.

AB 3875 - would require 45 days notice of intent to renew a policy conditioned upon a premium increase.

SB 1538 - seeks to establish an assigned liability risk pool and SB 1581 would create a rate review board.

COLORADO (1986 Session Completed)

Enacted

1193 - lengthens notice provisions for midterm cancellations of commercial and medical malpractice policies from 45 or 60 days to 90 days. Requires 90 days notice of a unilateral premium increase or coverage reduction and an explanation for said action. Allows cancellations and coverage deductions only with cause.

HB 1358 - authorizes the insurance commissioner to promulgate rules requiring insurers to file supplemental reports or closed-claim files or both for any line, class or subclass, authorizes permissive public hearings to review rates and investigations of availability affordability problems. Sunsets July 1, 1989.

HB 1204 - permits exemptions to notice of intent to cancel, nonrenew, change benefits or increase rates. Authorizes the insurance commissioner to inspect any rate, underwriting rule, policy form or contract and prohibit those deemed hazardous to the public/policyholders. Also requires claims-made policy forms to be filed on or after 1-1-87 except for public entity self-insurance pools.

HB 1206 - changes the regulation of investments of assets by domestic insurers based upon model NAIC legislation.

CONNECTICUT (1986 Session Completed)

Enacted

HB 5400 - accomplishes the following: (1) increases from 30 days to 60 days notice of nonrenewal of commercial and personal liability insurance policies; (2) increases from 30 days to 60 days notice of rate or coverage changes for insured risks paying an annual premium of $50,000 or less; (3) establishes eight grounds for cancellation of policies including nonpayment of premiums, substantial loss of reinsurance, material misrepresentations, etc., cancellations are prohibited unless one or more of these grounds are substantiated and; (4) requires insurers to submit data on multi-peril, general liability and auto coverage lines which would include information comparing aggregate premiums charged and premiums established through rating mechanisms.

FLORIDA (1986 Session Completed)

Enacted

The Tort Reform and Insurance Act accomplishes the following: (1) It freezes rates for all commercial property and liability coverages in Florida at their May 1, 1986 levels from July 1, 1986 until January 1, 1987; (2) it requires a 40 percent roll-back of insurance premiums applicable to one-fourth of the policy-term premium of all commercial liability policies in Florida, prorated for the period that such policies are in effect from October 1, 1986 until January 1, 1987; (3) it requires that all commercial property and liability insurers file new rates with the department which are based upon the rates that were in effect on January 1, 1987. During the period from July 1, 1986 until January 1, 1987, the applicable insurers would be prohibited from cancelling or nonrenewing their insureds at a rate greater than 30 percent of their cancellation and nonrenewal rates for the previous 24 months during any 30-day period. Insurers would be permitted to escape the roll-back provisions to the extent that they could show that the resulting rates would be inadequate or would impair their solvency, and, lastly, the rates to be implemented on January 1, 1987 would be based on 1984 rates but would be adjusted upward (or downward) as justified by each insurer to comply with actuarial principles; (4) increases the department's rate review and enforcement authority; (5) creates a property/casualty insurance excess profits law; (6) authorizes creation of a commercial property/casualty joint underwriting association; (7) authorizes financial institutions to participate in reinsurance and Florida insurance exchanges; (7) establishes notice requirements for cancellation, nonrenewal, and renewal of premium of commercial liability policies; and (8) mandates a limited freeze and reduction, and a filing, of insurance rates for certain commercial lines of insurance.

GEORGIA (1986 Session Completed)

Enacted

HB 1503 - (Act No. 1456) places tighter restrictions on cancellation and renewal of policies by insurance companies.

SB 553 - (Act No. 1457) establishes assigned risk pools for certain property/casualty insurance risks and authorizes insurance commissioner to order a refund of portions of premiums.

SB 384 - (Act No. 1518) requires insurers to file itemized annual reports.

ILLINOIS (Ongoing)

Sent to Governor

Requires insurer to provide loss information with notification of cancellation or at request of insured; requires 90-day notice to state of termination of any line of insurance in the state; requires 60-day notice to insured of cancellation, nonrenewal or premium increase of 30 percent or more.

KANSAS (1986 Session Completed)

Enacted

SB 512 - prohibits cancellation of business and professional liability insurance policies unless one of five causes for cancellation can be determined (as nonpayment of premiums, material misrepresentations, etc.). This legislation also requires insurers to give policyholders 60-days notice of a decision to nonrenew.

KENTUCKY (1986 Session Completed)

Enacted

SB 309 - will permit the insurance commissioner to establish a voluntary risk sharing association for hard-to-get lines of commercial liability coverage.

MAINE (1986 Session Completed)

Enacted

Public Law 671 - prohibits midterm cancellations unless cause (such as nonpayment of premiums, fraud, breach of contract, potential insurer insolvency, etc.) can be confirmed. Notice of cancellation must be made 10 days prior to the cancellation. Notice of a nonrenwal must be made 30 days prior to a policy's expiration date. Policyholders can request that the superintendent of insurance verify that the insurer has established cause for the nonrenewal.

MARYLAND (1986 Session Completed)

Enacted

Prior approval of premium rates would not be required for three additional years per HB 329.

SB 899 will require that personal lines providers make coverage available to licensed operators of in-home day care facilities.

MINNESOTA (1986 Session Completed)

Sent to Governor

SF 2078 - accomplishes the following insurance regulation and provision modifications: (1) requires P/C insurers to submit annual reports on liquor and product liability and medical malpractice and any other line designated by the commerce commissioner. These reports shall contain: written and earned premiums, investment income, incurred claims, operating and underwriting gains and losses; (2) creates a state-run joint underwriting association (specifically for day care providers, foster homes, group homes, and sheltered workshops).

In determining whether rates are or are not excessive, the commissioner will be authorized to utilize a definition of "less than 5 insurers writing more than 75% of the coverage" as noncompetitive.

SF 1612 - authorizes the state's temporary J.U.A. to issue medical malpractice insurance to hospitals and nursing homes unable to get coverage.

MISSISSIPPI (1986 Session Completed)

Enacted

HB 755 - authorizes the commissioner of insurance to establish a plan for the availability of certain general liability insurance policies.

MISSOURI (1986 Session Completed)

Enacted

SB 701 - establishes a market assistance plan and authorizes establishment of joint underwriting associations for hard-to-get property insurance.

MONTANA (1986 Special Session Completed)

Enacted

HB 16 - authorizes the insurance commissioner to establish a market assistance plan, and, if necessary, a joint underwriting association for provision of liability insurance coverage.

NEW HAMPSHIRE (1986 Session Completed)

Enacted

HB 513 - prohibits policy cancellations unless 60-days notice is given.

HB 479 (Chapter 59) - relates to regulation of surplus lines insurance coverage.

HB 414 FN (Chapter 58) - provides for licensing of insurance consultants.

HB 360 - relates to credits for reinsurance.

NEW JERSEY (Ongoing)

Under Consideration

The assembly insurance committee is reviewing the feasibility of having premium increases justified through state claims experience in New Jersey.

Previous Actions this Session

The insurance commissioner prohibited midterm cancellations and nonrenewals unless notice is given.

A market assistance plan aimed at making liability insurance available for municipalities, day care centers, taverns and restaurants has been established.

NEW MEXICO (1986 Session Completed)

Enacted

Committee substitute for HB 226 - requires most insurers to submit quarterly financial reports to the superintendent of insurance. Based on these reports, the superintendent is required to compile an annual report for legislators.

NEW YORK (Ongoing)

Enacted

SB 9351-A and A-10663 accomplishes the following insurance reforms: (1) creates a flex rating system to replace open, competitive ratemaking. Insurers must file rates to reflect enacted tort reforms within 90 days; (2) authorizes the insurance department to conduct a selected review of rates for the period June, 1985-June, 1986. Mandates that every rate authorized since June 1, 1986 be reviewed; (3) the flex rating system includes commissioner-imposed "bands" on rate increases/decreases by line. If a proposed rate increase/decrease falls within the band, rates are filed and used. If the proposed rates are outside the band, rates are filed and subject to approval. Bands can be changed.

Commercial, professional, and public entity lines are included in flex-rating (not homeowners or automobile); (4) authorizes a discretionary joint underwriting association for troubled commercial, public entity, and professional liability lines pursuant to insurance department determination of unavailability; (5) requires establishment of a J.U.A. for public entitles by October 1, 1986 unless the department determines that coverage is available; (6) prohibits unwarranted midterm cancellations; (7) requires P/C policies to extend a minimum of one year; (8) prohibits policy cancellations unless warranted (as when there is fraud - nonpayment - material charges, etc.). Lack of reinsurance is not in and of itself a reason to cancel unless solvency is threatened; (9) requires at least 60-days notice of notice to not renew or to affectuate a premium increase exceeding 10 percent; (10) enables policyholders to secure claims loss history; (11) permits municipalities, school districts, and other public entities to form reciprocal insurers; (12) permits certain nonprofits and charitable/religious organizations to collectively purchase P/C coverage; (13) authorizes, through a "sunshine" provision, the insurance superintendent to report financial, and loss data and codefendants in suits regarding recreational, child care, dram ship, municipalities owners, landlords and tenants, etc.; and (14) expedites access to provision of excess and surplus lines.

OHIO (Ongoing)

Under Consideration

More than two dozen legislative proposals covering the entire ground of insurance regulation reform.

OKLAHOMA (1986 Session Completed)

Enacted

SB 488 - accomplishes the following insurance regulation changes: (1) requires the 10 largest P/C insurers to annually submit reports on premiums, losses, settlements, judicial dispositions, etc. among 11 coverage categories; (2) requires the 50 largest P/C insurers to annually submit data on premiums, losses, judgments over $250,000, etc. on a less detailed, more restructed basis than for the 10 largest insurers; and (3) implements unfair claims settlement practices statutory language and permits the insurance commissioner to require periodic reports from violators.

HB 1983 - authorizes the insurance commissioner to establish a market assistance plan.

PENNSYLVANIA (Ongoing)

'nder Consideration

Senate Bills 1939-95 have been introduced. Collectively, they propose to accomplish the following: (1) authorize establishment of a joint underwriting association for all lines of unavailable liability coverage; (2) require 60 days of notice of insurance premium rate increases; and (3) require disclosure of insurance company loss experience within the state.

SOUTH CAROLINA (1986 Session Completed)

Enacted

South Carolina's insurance commissioner has been empowered to establish a joint underwriting association for any professional group unable to secure liability insurance coverage. This authority was previously restricted to J.U.A. formation for health care providers.

SOUTH DAKOTA (1986 Session Completed)

Enacted

HB 1106 - revises provisions relating to property insurance policy nonrenewal notice. Increases notice time from 20 days to 30 days, effective July 1, 1988 and from 20 days to 45 days for the period July 1, 1986 to June 30, 1988.

TENNESSEE (1986 Session Completed)

Enacted

HB 1582 - (Public Chapter No. 656) will prohibit cancellation of or failure to nonrenew commercial risk insurance policies with some exceptions.

SB 1458 - (Public Chapter No. 535) raises the capital and surplus requirements of insurance companies in Tennessee.

UTAH (1986 Session Completed)

Enacted

Authorized establishment of market assistance plans and joint underwriting associations (SB 91).

VERMONT (1986 Session Completed)

Enacted

HB 8657 - empowers the insurance commissioner to establish a joint underwriting association for a broad array of hard-to-get lines of liability insurance coverage.

WASHINGTON (1986 Session Completed)

Enacted

Establishes a voluntary market assistance plan requiring participation of 25 admitted or nonadmitted companies.

HR 2080 and 2083 - respectively authorize the establishment of a joint underwriting association and self-insurance mechanism for provision of liability coverage for day care providers.

SB 4541 - requires prior notice to policyholders of cancellation and further requires 20-days prior notice of rate and form changes before policy renewal anniversary dates.

SB 3636 - enables the insurance commissioner's office to be funded from dedicated rather than general revenue sources.

WEST VIRGINIA (1986 Session and Special Session Completed)

Sent to Governor

SB 714 - prohibited insurers from cancelling or nonrenewing health care provider policies unless insurers could prove that the risk of loss had increased or that they could not back up their own risk with reinsurance. HB 149 removes most causal and durational restrictions on nonrenewals.

SB 714 - required expanded disclosure of claims, investments, judicial dispositions, etc. related to west Virginia. The legislation further required the insurance commissioner to conduct public hearings whenever rates were expected to increase 10 percent or more with verification of past loss experience in medical malpractice settlements and judgments required. HB 149 reduced reporting requirements to profit and loss, reserve and surplus data on an aggregate rather than company basis. Public hearings on rate increases exceeding 10 percent must be held within 60 days of the rate filing.

WISCONSIN (1986 Session Completed)

Enacted

Increases minimum capital and surplus requirements; increases from 30 days to 60 days, the notice period for mid-term cancellations.

WYOMING (1986 Session Completed)

Sent to Governor

SF 73 - places tighter restrictions on cancellations and renewal of policies.

SF 69 - prohibits midterm cancellations with some exceptions, such as nonpayment of premiums. Authorized cancellations must be preceded by a 10 to 45-day notice to policyholders. A 45-day notice with statement of reasons is required for nonrenewals.

III. ALTERNATIVE FINANCING/RISK MANAGEMENT

ALABAMA (1986 Session Completed)

Enacted

SB 239 - Authorizes two or more counties to establish self-funded insurance funds for the purpose of providing liability protection for member counties and employees acting in the line and scope of their employment.

ALASKA (1986 Session Completed)

Enacted

HB 506 - authorizes municipalities, school districts and regional educational areas to self-insure jointly or purchase coverage on a group basis.

ARIZONA (1986 Session Completed)

Enacted

HB 2375 - provides for alternative insurance options as follows: (1) Self-insurance for boards of directors of non-profit organizations; (2) Pooling for political subdivisions; (3) Self-insurance for schools; and (4) Provides authority for profit and non-profit corporations to ensure directors and officers against certain liability.

CALIFORNIA (Ongoing)

Under Consideration

SB 3554 would establish a state fund for providing excess liability coverage for local governments and liability insurance for nonprofit organizations.

COLORADO (1986 Session Completed)

Enacted

SB 1167 permanently extends the division of risk management and its fund which were scheduled to expire June 30, 1986. Requires purchase of property or liability insurance policies by state agencies to be approved by the division.

FLORIDA (1986 Session Completed)

Enacted

The tort reform and insurance act would accomplish the following: authorizes commercial liability risks to be group insured; authorizes the creation of commercial self-insurance funds; expands the types of health care providers that can self-insure and authorizes CPAs, architects, engineers, veterinarians, land surveyors, and insurance agents to self-insure.

GEORGIA (1986 Session Completed)

Enacted

SB 369 and SB 440 - respectively authorize local governments and school boards to join together for purposes of securing liability insurance.

HAWAII (1986 Session Completed)

Enacted

HB 2238-86 - provides a statutory mechanism for ensuring that child care providers will be able to secure liability insurance.

HB 1695-86 - authorizes mass merchandising of motor vehicle, property casualty insurance to the employees of any employer or to the members of any association or organization under a mass merchandising plan audited by the insurance commissioner.

HB 1694-86 - authorizes the licensure and operation of pure captive insurance companies and association captive insurance companies.

HB 2549-86 - allows for the formation of workers' compensation self-insured groups.

INDIANA (1986 Session Completed)

Enacted

HB 1255 allows the state to administer insurance pools for local governments.

KANSAS (1986 Session Completed)

Enacted

SF 330 - allows deductible health care provider liability insurance.

MAINE (1986 Session Completed)

Enacted

Public Law 713 authorizes political subdivisions to participate in public self-funded pools.

MARYLAND (1986 Session Completed)

Enacted

SB 1015 authorizes pooling and self-insuring for certain types of casualty risks, particularly local governments and nonprofit organizations.

MINNESOTA (1986 Session Completed)

Sent to Governor

SF 2078 creates a risk management fund.

MISSOURI (1986 Session Completed)

Enacted

HB 1435 and HB 1461 - creates a Missouri Public Entity Risk Management Fund for local entities.

MONTANA (1986 Special Session Completed)

Enacted

SB 2 - authorizes bond issues for local government self-insurance funds.

NEW JERSEY (Ongoing)

Previous Actions

Counties, municipalities and school boards may self-insure or join together in regional insurance pools.

Under Consideration

Senate legislation already introduced would create an excess insurance fund and require all public entities, except the state,

to join. All public entities would be indemnified for claims exceeding $500,000.

NEW MEXICO (1986 Session completed)

Enacted

HB 242 - creates a public child contractor liability fund.

HB 178 - provides school districts with insurance coverage ATA cost savings and clarifies statutes related to the public school insurance authority.

SB 105 - expands the applicability of the self-insurance and risk pooling provisions of the Municipal Code to include other political subdivisions and local public bodies.

HB 317 - extends the coverage which the risk management division is able to provide to school districts through the public school insurance authority.

NEW YORK (Ongoing)

Enacted

SB 9351-A and A-10663:

Permits municipalities, school districts and other public entities to form reciprocal insurers; permits certain nonprofit and charitable/religious organizations to collectively purchase P/C coverage.

OHIO (Ongoing)

Enacted

HB 875 permits political subdivisions to participate in joint liability insurance pooling arrangements.

Other alternative financing methods under consideration.

PENNSYLVANIA (Ongoing)

Under Consideration

Establish a central risk management agency - provide advice to local governments; establish a joint self-insurance fund for municipalities and authorize cities to join.

SOUTH DAKOTA (1986 Session Completed)

Enacted

SB 216 permits establishment of self insurance pools for public entities for purposes of securing liability coverage. This can occur only if a master insurance contract is not purchased.

UTAH (1986 Session Completed)

Enacted

Authorized establishment of market assistance plans and joint underwriting associations (SB 91).

VERMONT (1986 Session Completed)

Enacted

Pooling by municipal governments is authorized via HB 8641.

WASHINGTON (1986 Session Completed)

Enacted

HB 1972 - authorizes local governments to self-insure.

WEST VIRGINIA (1986 Session and Special Session Completed)

Sent to the Governor

Special session legislation, SB 3, authorizes the following regarding the state's political subdivisions: individual or collective self-insurance; and purchase of liability insurance through the State Board of Insurance and Risk Management.

WISCONSIN (1986 Session Completed)

Sent to Governor

Special session legislation (AB 8) authorizes the establishment of risk sharing pools for liability insurance coverage for public and private sector entities. Risk sharing pools cannot be authorized to produce coverage for risks the Insurance Commissioner determines to be "uninsurable".

WYOMING (1986 Session Completed)

Sent to Governor

SF 21 and SF 26 respectively create state and local government self-insurance programs and establish pools for state and local government entities.

IV. LEGISLATIVE STUDIES

CONNECTICUT (1986 Session Completed)

HB 5400 - instructs a legislative committee to analyze underwriting standards, classification systems and premium development techniques. It further instructs the committee to make recommendations re: the claims-made form and potential return to prior approval.

FLORIDA (1986 Session Completed)

The Tort Reform and Insurance Act creates a five-member academic task force for review of the insurance and tort systems.

KANSAS (1986 Session Completed)

A joint subcommittee on liability will likely recommend to the joint coordinating council that an interim study on liability insurance be undertaken.

KENTUCKY (1986 Session Completed)

A special session might occur.

Legislative leadership authorized the creation of a task force to review the entire issue which will include authority to investigate the state insurance department and the insurance industry.

MAINE (1986 Session Completed)

An interim commission comprised of legislators, legal and insurance representatives will explore tort liability.

MONTANA (1986 Special Session Completed)

SJR 1 - authorizes an interim study commission to review public and private sector problems regarding liability insurance.

NEBRASKA (1986 Session Completed)

Established a major study commission to review the scope of the entire issue during the 1986 interim.

NEW HAMPSHIRE (1986 Session Completed)

EB 513 - also creates a tort reform commission to evaluate the workability of the new law and to study issues, as the collateral source rule, not resolved in this session. The commission will report in December, 1986 and December, 1987.

NEW MEXICO (1986 Session Completed)

Establishing a legislative liability insurance study committee.

OKLAHOMA (1986 Session Completed)

SB 488 - creates an 18-member (10 legislators, 8 public members) select committee on insurance rates and tort claims.

SOUTH DAKOTA (1986 Session Completed)

1986 summer interim judiciary committee - A study of the entire area of liability insurance, including relative legislation considered by the Sixty-first Legislative Session; a review of what information is needed by the division of insurance to regulate insurance companies' rates; and a study of alternative ways to regulate costs of defending tort claims lawsuits. The committee has met once with a second meeting scheduled for early July.

TENNESSEE (1986 Session Completed)

SR 43 - directs a special committee to study liability insurance issues including (but not limited to) availability, coverage cost, liability limits, and litigation.

TEXAS (No 1986 Session)

A joint legislative committee on liability insurance and tort law and procedure reform has been established and conducted five meetings to date. Four more meetings are currently scheduled with November 15, 1986 targeted as a final reporting date.

The state board of insurance has initiated a closed claims survey that will review about 73 percent of the liability coverage provided in the state for the years 1983-1985.

Examination of the state's liability to create a state insurance pool for governmental units is underway by the state board of insurance.

UTAH (1986 Session Completed)

An interim committee tackled this subject in 1985 and another has been formed for 1986.

VIRGINIA (1986 Session Completed)

Will establish an interim study committee on the entire liability insurance issue.

WEST VIRGINIA (1986 Session and Special Session Completed)

A legislator/citizen interim committee on liability insurance will be organized in late June.

WISCONSIN (1986 Session Completed)

A final report from an insurance commissioner's task force on property/casualty insurance is due in July, 1986. The final report will include recommendations. Three subcommittees, on civil justice reform, pools and MAPs, and industry actions, have already reported.

The legislative council is considering an interim study of the civil justice system.

OUTLINE OF THE JULY 22ND ORGANIZATIONAL MEETING OF THE LIABILITY AND LIABILITY INSURANCE STUDY COMMISSION

PRELIMINARY BUSINESS

The first meeting of the Liability and Liability Insurance Study Commission was called to order on July 22, 1986, by Co-Chairperson Donald Doyle. The meeting convened at 10:15 a.m. In addition to Co-Chairperson Doyle, other Commission members present included the following:

Co-Chairperson Representative Dan Jay
Senator William Palmer
Senator Julia Gentleman
Representative John Groninga
Representative Kyle Hummel
Representative Roger Halvorson
Dr. William Eversman, Jr.
Thomas J. Vilsack
Donald C. Byers
Frank Alexander
Attorney General Thomas Miller
State Insurance Commissioner William Hager

A list of Commission staff persons and a list of interested persons attending the meeting are on file with the Legislative Service Bureau.

ADOPTION OF RULES

Co-Chairperson Doyle commented that Senate File 2265 had created the Study Commission. He continued that section 44 of the bill sets out the mandate for the Commission. Co-Chairperson Doyle stated that he anticipated at this point that there would be seven additional meetings held by the Study Commission. He noted that he and Co-Chairperson Jay had been giving some thought to dividing the Commission into two subcommittees to look at the areas of civil justice reform and reform in the area of insurance regulation. Co-Chairperson Doyle called the Commission's attention to the rules that were proposed for the Commission. He commented that the rules are very similar to those of other interim study committees. However, he noted that there were some modifications in the rules as they relate to the duties and powers of ex officio members, since the Commission has two ex officio members in the Attorney General and the State Insurance Commissioner, and to the manner and method of the Commission's final report. Senator Palmer moved that the rules be adopted. The proposed rules were adopted unanimously by the Commission members.

DISCUSSION OF STAFFING NEEDS

Co-Chairperson Doyle stated that the materials that had been prepared for the Commission also set forth some tentative dates and agenda outlines for the Commission's seven proposed additional meetings. A list of the meetings and their tentative agendas is attached. He then introduced staff members to the Commission, including members of the Legislative Service Bureau, Legislative Fiscal Bureau, and Senate and House Caucus Staffs. Senator Doyle stated that Senate File 2265 authorizes the hiring of independent staff. However, he remarked that Co-Chairperson Jay and he felt that to hire independent staff would slow matters down and that for that and other reasons, the Co-Chairpersons would prefer to use in-house staff of the Legislative Service Bureau. There were no objections voiced by the Commission members to this proposal.

Senator Doyle requested that David Lyons of the Legislative Service Bureau explain to the Commission the Commission's authority to hire actuarial, insurance, and legal experts. Mr. Lyons explained that Senate File 2265 did grant the Commission the authority to hire such experts and review the grant of authority with the members. He suggested that there might be some potential problems in hiring such experts. One problem related to the period of time involved, which would be very short. In addition, many of the large national consulting firms might have conflicts of interest due to the fact that many of the firms do consulting work for large insurance businesses, and legal concerns. Finally, hiring such experts to do all of the actuarial, insurance, and legal analysis the Commission might find necessary would be quite expensive. Mr. Lyons suggested three alternatives that might be used. The first alternative related to searching out and hiring consultants with a national reputation and focus. The second alternative would be to search out local consultants to do the primary work and to fill in those areas where the local consultants were unable to do the work or analysis with national consultants. Finally, Mr. Lyons suggested that a third idea would be to bring in experts and additional staff to work with the courts, the Attorney General's Office, and the Insurance Division on specific problem areas.

Representative Hummel asked Commissioner Hager what types of actuaries would be needed. Commissioner Hager responded that there are essentially two types of actuaries. One deals in the area of life and accident and health, the other deals in the area of property and casualty. He suggested that the sort of actuarial expertise that would be needed would be in the area of property and casualty. Mr. Vilsack asked Commissioner Hager how many

actuaries there are in the country relating to property and casualty actuarial expertise. Commissioner Hager estimated that there are approximately 1200 actuarial fellows that specialize in casualty matters. He said of those 1200 approximately 50% act as in-house counsels for insurance companies while the remainder work for consulting firms. In response to a question by Mr. Miller, Commissioner Hager continued that in Iowa there would be approximately 100 casualty actuaries of which approximately 90% would work as in-house counsel to insurance companies. Representative Groninga asked whether a consulting actuarial primarily works with insurance companies. Commissioner Hager replied in the affirmative but stated that the percentage of work done by a consulting actuary for an insurance company would vary considerably from firm to firm.

Co-Chairperson Doyle stated that he would expect that there would be some actuarial expertise available within the university system in the state. Commissioner Hager replied that he was not sure of the extent of such actuarial experience or expertise in the state, however he did state that both the University of Iowa and Drake University do have schools of actuarial science. He noted that the insurance division does not have a casualty actuary on its staff. Co-Chairperson Doyle asked if Commissioner Hager would be willing to screen actuary candidates for the Commission if the Commission would authorize Commissioner Hager to do so. Commissioner Hager responded that he would be willing to undertake such a project with the Commission's authorization. Senator Palmer stated that he felt there was a need for the Commission to determine information and questions that the Commission would be wanting addressed prior to actually deciding on hiring an actuary. Commissioner Hager commented that one function of an actuary would be to guide the Commission in the proper areas of inquiries including a determination of whether a question is feasible to examine.

Representative Hummel stated that he would like a better definition of the areas which the Commission would be examining. He asked whether the Commission would be investigating issues relating to workers' compensation and methods of insuring real property. Co-Chairperson Jay responded that the parameters on the Commission had not as yet been established.

DISCUSSION OF INSURANCE DIVISION'S PRACTICES

Representative Halvorson asked Commissioner Hager about the practice of the Insurance Division in hiring an actuary to evaluate rate filings. Commissioner Hager responded that in the past the Insurance Division has very seldom hired an actuary to review a rate filing. He stated that such a practice was used in only very complex filings. However, he did note that there are some staff people in the Division who, while not actuaries, do have some rate-making expertise. Representative Halvorson asked whether this practice of not having on-staff actuaries is similar to that in other states. Commmissioner Hager answered that the practice was similar in other states and it is an area in which state departments of insurance are frequently criticized. He continued that he was not comfortable with the Division's actuarial expertise. Senator Palmer inquired as to the number of rate filings that have been made with the Insurance Division this year. Commissioner Hager responded that there are approximately 6000 rate filings a year and there are three paraprofessionals who review those filings. He stated that approximately one and one-half individuals reviewed the rates and one and one-half individuals review the form of the rates. Senator Palmer asked what was the test utilized in reviewing the rates. Commissioner Hager responded the statutory test is that the rates have to be fair, adequate, and not unreasonable. Senator Palmer asked how such a task would be possible utilizing only 1.5 people in reviewing 6000 rate filings a year. Commissioner Hager responded that it was a very difficult situation. He stated that in many situations market conditions really set the rate. He noted that in the past, the Department had requested funds from the legislature for actuarial services but had been denied.

Senator Palmer stated that he felt a priority of the Commission should be to recommend adequate funding for the Insurance Division for actuarial services.

Representative Hummel stated that the Insurance Division's responsibility is to ensure that there are adequate rates. Thus, frequently the rate that is approved constitutes a minimal rate and that a company can set a higher rate if it wishes. Commissioner Hager responded that for all practical purposes the Insurance Division does only approve property and casualty rates. He stated that the emphasis was to make sure the rates are adequate enough to keep the property and casualty insurance companies solvent. Commissioner Hager continued by remarking that there are approximately 750 property and casualty companies doing business in the state. He noted that in some lines of insurance, in particular personal liability lines, there was adequate competition. However, in other lines of insurance there is much less competition and pricing can be much more of a problem.

Dr. Eversman asked whether, in light of the fact that some lines operate in a competitive atmosphere, whether it is necessary to examine the problems in those areas. Commissioner Hager responded that he did not think high priority should be given to the lines of insurance in which there is sufficient competition among insurance companies.

Attorney General Miller asked Commissioner Hager to identify those lines of insurance in which there is less competition or in which rates are more volatile. Commissioner Hager responded that there have been problems in the area of dram shop, day care center insurance, umbrella liability policies, medical malpractice insurance, asbestos liability, and director or officer liability insurance.

Representative Hummel observed that the public might be misled by the notion of rate approval. He suggested that there is a need to determine the policy of the Division regarding rate approval. Commissioner Hager noted that rate approval by the Insurance Division cannot be done without adequate resources in the Division.

Representative Halvorson asked whether there has been a trend in the other states toward various types of rate approval. Commissioner Hager observed that many states have been beefing up their insurance staffs. He said that this was in response to higher insurance premiums.

DISCUSSION OF STATE INSURANCE REGULATION

At this point Co-Chairperson Doyle called the Commission's attention to Overview 2 prepared by David Lyons relating to the regulatory aspects of the insurance industry. Co-Chairperson Doyle asked Mr. Lyons to briefly summarize the contents of that overview. Mr. Lyons noted that most regulatory efforts on insurance matters are done at the state level. He observed that this was a result of the federal McCarren-Ferguson Act in which the federal government stated that insurance regulation would be left up to the states. Mr. Lyons observed that there are six basic reasons for state regulation. These included the following:

1. Federal inactivity in the area of insurance regulation.
2. The size of the insurance industry.
3. Nature of insurance as an anticipatory contract.
4. Complexity of insurance.
5. Resource availability of consumers.

6. Pervasiveness of insurance in our society.

Mr. Lyons observed that the increasing "crisis" nature of calls for reform relating to insurance prompted state regulatory entities to increase their public duties and functions relating to insurance regulation both for the protection of individuals and society and for the protection of the insurance industry. These increased duties generally fall into six areas of activity:

1. Stability of system.

2. Solvency of companies.

3. Review of excess rates.

4. Review of adequacy of rates.

5. Market availability.

6. Redress availability.

Mr. Lyons continued in his summary of Overview 2 by observing the types of regulation of the insurance industry in the various fifty states.

Mr. Lyons characterized the types of regulation for insurance rates in five different manners. In declining levels of government regulation these methods are as follows:

1. Prior approval.

2. Modified prior approval.

3. File and use.

4. Use and file.

5. No file.

He stated that many states move up and down the scale and that some states use different levels of review depending on whether the type of insurance is being written in a competitive market or in a noncompetitive market place.

Mr. Lyons also identified several different issues that are being addressed by states in regard to insurance regulation and discussed each. The issues are as follows:

1. Under capitalization.

2. Under staffing.

3. Reporting requirements.

4. Claims made practice.

5. Midterm cancellations.

6. Market assistance plans.

7. Joint underwriting associations.

8. Review of standards.

9. Risk management.

10. Miscellaneous issues.

Mr. Lyons commented that many experts feel that the insurance crisis is winding down and will be fully abated in approximately fourteen to eighteen months. However, he added that the speed in which the crisis will wind down will vary from state to state depending partially upon the willingness of insurance companies to put increased capacity and dollars into the insurance market of a particular state. Mr. Lyons noted that that willingness might be affected by the perception of the insurance industry as to whether a particular state is deemed to be "friendly" to the insurance industry by being active in tort reform and not overly restrictive in insurance regulation reform.

Representative Halvorson asked whether mediation and arbitration are being increasingly used to resolve insurance disputes. Mr. Lyons stated that there is some increase, but there are constitutional concerns about mandating mediation and arbitration.

DISCUSSION OF DATA COLLECTION

Attorney General Miller, referring to the earlier discussion on hiring experts, stated that he thought the Commission should take a good look at the available resources at the universities in the state. Co-Chairperson Jay inquired as to whether the schools in the state would have adequate computer capabilities to handle the actuarial studies that might be necessary. Commissioner Hager responded that he did not know for sure but anticipated that such capacity would be available.

Mr. Vilsack inquired whether it is known if there is sufficient data available for an actuary to use in order to come up with a statistically valid study. Co-Chairperson Doyle responded that the Iowa Supreme Court has allocated resources to review tort cases on file in the state. It is hoped this information gathering will be done by September 15th. Co-Chairperson Doyle

introduced Nancy Shimanek who is on the staff of the Iowa Supreme Court to talk about the study. Ms. Shimanek stated that the Court has contracted with the National Center of State Courts and has nine data collectors who are looking at filings in the areas of medical malpractice, other malpractice, automobile tort claims, other tort claims and non-tort insurance claims. They are also looking at all cases where a governmental entity is a defendant. A second review is being done of filings in the years 1981, 1983, and 1985 in nine specified counties. These counties include three large population counties, three medium population counties and three small population counties. Every judgment award in the nine counties is being reviewed during the period of January, 1980 through May, 1986. Finally, Ms. Shimanek stated that the federal cases in Iowa are also being surveyed and judgment awards are being noted for the same period of time.

Representative Groninga noted that in a closed claim study it might be difficult to get information relating to privately negotiated settlements. Representative Hummel observed that there were confidentiality problems of a similar nature relating to the collection of health data. He continued that the health data commission was established in an attempt to overcome those problems and that a similar approach might be utilized in this situation. Representative Groninga asked whether under current law if an agreement of confidentiality is binding in all situations. Commissioner Hager responded that the Insurance Division does not have any authority to require disclosure of negotiated settlements. Attorney General Miller stated his agreement that there is currently no such authority.

Mr. Byers stated that he felt there was a real hole in the factual data if the Commission was not able to get information about the intimidation factor of lawsuits in the civil justice system.

Mr. Alexander stated he felt there was an underlying assumption in the beginning discussions of the Commission that the property and casualty insurers are losing money. He stated that in labor negotiations, unions frequently ask companies making similar assertions to show their profits and losses. He asked that the Commission have representatives from the insurance industry come and explain their profit and loss situations. Co-Chairperson Doyle responded that there would be representatives from several insurance companies appearing before the Commission, especially if the Commission breaks into subcommittees to examine various issues in more depth. Representative Hummel questioned whether a subcommittee approach would be beneficial because Commission members would not be able to listen to all of the information if simultaneous meetings are held.

Mr. Byers stated that there was a dual problem that the Commission must study relating not only to insurance regulation

but also to the civil justice approach to liability. He thought the Commission should take a balanced approach between the two subjects and not focus just on insurance regulation. Co-Chairperson Doyle called the Commission members' attention to section 44 of Senate File 2265 which enumerated a list of topics that the Commission is mandated to study. He asked Commission members to give some thought to any additional topics that the Commission members felt should be examined.

Representative Halvorson asked Ms. Shimanek if it was possible to get settlement information in the study that the Supreme Court was conducting. Ms. Shimanek stated that they do not have access to such information since it is not reported to the courts. Co-Chairperson Jay observed that the information obtained from the court study would be helpful in itself and addresses a different issue than information relating to out-of-court settlements.

Senator Palmer noted that the Insurance Division does receive annual reports from insurance companies operating in the state that do provide profit and loss information. He suggested that this information be reviewed and compiled.

The Committee recessed for lunch at 12:00 p.m.

DISCUSSION OF TOPICS OF COMMITTEE INQUIRY

The Commission reconvened at 1:45 p.m. Co-Chairperson Jay asked Commission members whether there were any other issues under the civil justice topic that Commission members wished the Commission to address. Attorney General Miller asked that the Commission look at the consequences for failure to wear a seat belt. Mr. Byers suggested several additional matters of inquiry including a statute of repose for products liability, the impact of prejudgment interest, the establishment of a cap on noneconomic damages, restrictions on punitive damages, a return to fault-based liability, effects of the insurance crisis on economic development and job creation, a list of changes in Iowa tort liability law since 1970, and a limitation on contingency fees. Dr. Eversman suggested the issue of mandating structured settlements, particularly in relationship to certain aspects of injury in medical malpractice, and a review of the statute of limitations regarding minors and incompetents. Representative Hummel asked that the Commission look at issues relating to workers' compensation, including the establishment of a minimum premium and incorporating the workers' compensation concept into automobile accident cases as it relates to medical injuries and loss of income. Representative Halvorson also suggested a review of mandatory arbitration or mediation, with an appropriate threshold amount.

Co-Chairperson Jay said that he had noted these additional topics, and to the extent possible they would be reviewed. He suggested, however, that the statutory mandates in Senate File 2265 would have to take precedence over any additional topics.

Co-Chairperson Jay called the members' attention to the list of topics mandated by Senate File 2265. These are as follows:

"Reform" of civil justice system -

-Maximum caps on liability payments
-Elimination of collateral source rule
-Alternative methods of litigating actions
-Alternatives for reducing non-meritorious suits
-State & municipal liability for regulatory activities
-Statute of repose for improvements to real property
-Other issues to ensure fairness

"Reform" of Insurance Regulation System -

-Mandatory insurance disclosure
-Potential for increasing level of industry regulation
-Review present powers, authority and staffing of state insurance department
-Claims-made form of insurance practice
-Mandatory rate adjustments for insurers to reflect tort reform cost savings

Co-Chairperson Jay then inquired whether any of the Commission members would have additional topics relating to insurance regulation beyond those mandated in Senate File 2265. Mr. Vilsack stated he thought that any proposed revision to the civil justice system should be coupled with a study as to its anticipated impact on the availability and affordability of insurance, since civil justice revisions frequently result in taking away rights of citizens to their day in court. Senator Gentleman asked how these impacts can be measured. Mr. Vilsack responded that by utilizing a closed claim study it would be possible to measure the amount of savings that might have resulted from a reform being enacted. He stated that this information is available if the insurance companies will provide that information. Senator Gentleman stated that it was her understanding that the Commission could not force such disclosure. Commissioner Hager commented that there is no statutory authority but the Commission certainly could ask for the information. However, most settlements are in a lump sum and do not delineate the basis for which the lump sum was derived. He stated most closed claim files will contain much documentation on both sides relating to the value of the claim and it might be difficult, if not extremely arbitrary, to assign values at this date.

Mr. Byers stated that the Commission needs to try to reshape the parameters on which reparations are made. He stated it is necessary to get reparations into line with the losses of victims. He stated he did not feel this constituted "taking away the rights" of victims.

Representative Hummel stated he would like to see mandatory insurance disclosure be made a priority of the Commission. He reiterated that he felt this could be done in a confidential manner similar to that done by the Health Data Commission.

David Lyons stated that the staff of the Commission would do a short overview relating to each of the issues addressed. He requested that if any of the Commission members have any special sources of information they wish the staff to review, please identify them as quickly as possible to the staff. After a brief discussion, the Commission members decided they would like the overviews, if at all possible, prior to the next meeting.

DISCUSSION OF STATE AND FEDERAL INITIATIVES

Co-Chairperson Jay asked Mr. Lyons to review activity undertaken by either the federal government or various state legislatures in the last year relating to liability and insurance issues. Mr. Lyons commented that there have been several bills introduced relating to the possibility of the federal government overriding state action in this area, in particular dealing with amendments to the McCarren-Ferguson Act. He commented that at a recent conference he attended some concern was expressed that the federal government might take an approach similar to that taken relating to drunk driving and raising the drinking age by linking funding to certain enactments by the legislature. He observed that it appeared doubtful that a major Federal tort liability law would be passed this year. He commented that on the federal level the bill which appears to have the best chance of passing is S-2129 by Senator Kasten which relates to risk retention. This bill has been voted out of the United States Senate.

Mr. Alexander asked Mr. Lyons whether there have been any follow-up studies relating to the effects and impacts of changes in the civil justice system. Mr. Lyons answered there have been some studies, however, these have not been done on the federal level. He also emphasized that many people feel that the true impacts cannot be measured in a short period of time, and perhaps as long as a ten-year period of study would be necessary. Mr. Lyons noted that virtually every state, including states in which the legislature did not meet this year, have been undertaking some sort of legislative action or study to review that issue and other issues that are before the Commission.

Representative Hummel asked whether the premiums paid in Iowa are representative of claims paid in Iowa rather than claims paid on a national basis. He suggested that the Commission should look at a state approach, however noting that he was not sure of the constitutionality of such an approach. Mr. Lyons responded that insurance companies do group risks within geographical areas and that some states have tried to tie rate increases and mid-term cancellations or renewals to state experience. Commissioner Hager stated that state law permits an insurance company to use both in- and out-of-state losses for determining rates. He noted that for automobile insurance, typically the in-state rates are used because there is a broad base of customers and losses to determine adequate premiums. However, he noted that in some smaller types of lines, national statistics are used. Co-Chairperson Jay asked whether any of the initiatives tried by other states have been scrutinized by the courts. Mr. Lyons responded that many of the initiatives have been challenged in court and many of those cases are currently pending. Representative Halvorson questioned how states have gotten around constitutional issues relating to mandatory mediation. Mr. Lyons responded that this has often been done by how "mandatory" has been defined and whether there is a way out of that system. Mr. Lyons concluded his presentation by noting that most of the initiatives enacted by the Iowa Legislature in 1986 can be found in Senate File 2265. He remarked that one such program called for the creation of a marketing assistance program by the Insurance Division and suggested that Commissioner Hager advise the Commission as to its current status. Commissioner Hager commented that the program has been put in place. Commissioner Hager, however, continued that there is also authority in Senate File 2265 to create a mandatory risk assignment program in which the Commissioner can declare certain lines of insurance to be in need of more competition or carriers to participate and thus create a pool of property and casualty insurers doing business in this state to take a proportionate share of the insurance relating to those lines of insurance.

Co-Chairperson Jay asked Mr. Lyons whether any municipality or other local governmental unit has done anything regarding bonding and pooling as a method of alternative financing for insurance. Mr. Lyons responded that it is his understanding that three cities in the state are currently working toward such an approach. However, to date this has not been completed.

DISCUSSION OF FINAL REPORT

Co-Chairperson Jay asked Mr. Lyons to explain the format which the Commission's final report will take. Mr. Lyons responded that there will be four major parts in the final report. These include:

1. A report on the issues reviewed by the Commission.

2. Testimony and evidence presented at public hearings.

3. A majority report including bill drafts.

4. A minority report, if there is a minority report.

Mr. Lyons stated it is possible that there will be a small charge to pay for the cost of printing of the final report for interested persons other than members of the Commission and the General Assembly requesting a copy.

DISCUSSION OF AGENDA FOR FUTURE MEETINGS

Co-Chairperson Jay called the Commission's attention to the proposed schedule for future meetings. He stated that currently it is proposed that back-to-back meetings be held on September 2nd and 3rd, and asked if there was any problem with Commission members with holding the meetings at such times. No objections were voiced by the Commission members. Co-Chairperson Jay stated that he would try to line up an expert in actuarial science to talk to the Commission at that time. He also asked to have people from Drake and the University of Iowa present to indicate how much work those institutions can provide. In addition he will also try and get some information from the insurance industry by having a representative present and asked that Nancy Shimanek of the Supreme Court also be present to update the Commission on the status of the Supreme Court's study.

Dr. Eversman asked that Commissioner Hager give a short presentation relating to insurance and terminology that is used. Co-Chairperson Jay seconded that idea and asked Commissioner Hager if he would have any objections to giving a presentation. Commissioner Hager agreed to do so. Co-Chairperson Jay also asked Attorney General Miller if he would be willing to give a short presentation regarding the legal terminology and the civil justice system. Attorney General Miller also agreed to make this presentation.

Representative Halvorson emphasized that he was interested in testimony from local insurance experts since it was a local problem which they were attempting to resolve and not focus totally on national experts to the exclusion of local experts. Representative Groninga commented that he would like information on historical trends in tort theory and suggested perhaps a law professor could be brought in to provide that objective information. Mr. Byers emphasized that he would like the person making such a presentation to take an objective position. Mr. Vilsack remarked that he felt the Commission should also get input from consumers and from a victim's perspective. He cautioned the

Commission against getting only statistics but also to take a look at the human aspects of the problem.

Representative Hummel noted that he has repeatedly heard inferences that there may be impacts on Iowa's economic development and the insurance industry in Iowa, depending upon what legislation is enacted. He continued that he thought the Commission should get some information upon these potential impacts and the conditions under which these impacts might be felt. He asked that a speaker be located that might be able to address these matters. David Lyons responded that he would attempt to obtain such a speaker. He remarked that it might be possible to review insurance companies' reactions to various civil justice or insurance regulatory legislation in other states. Attorney General Miller suggested that one approach would be to get strong advocates from each side of the various issues and then to move towards an objective analysis.

Representative Halvorson stated that he would like to see someone give information on market place regulation of insurance industry and insurance rates as opposed to state regulation. He noted that in some lines of insurance, market place regulation seems to be working quite well.

Senator Gentleman suggested that representatives of the local governmental units or their associations appear and state their experience including any implementation of the bond or pooling concepts. Mr. Vilsack interjected that he would like to see some information from across the nation relating to filings and settlements.

The Commission adjourned at 3:35 p.m.

Respectfully submitted,

RONALD R. ROWLAND
Legal Counsel

OUTLINE OF THE VIDEO RECORDING OF THE SEPTEMBER 2nd MEETING OF THE IOWA LIABILITY AND LIABILITY INSURANCE STUDY COMMITTEE

VCR Reading	Recording #1
@0000 @0070	Roll Call and Preliminary Business
@0070 @1258	Formal presentation by Iowa Insurance Commissioner William Hager - Insurance System and Regulation Overview Witten material submitted S.F. 2265, sec. 7, Memorandum Glossary of Insurance Terms Attached exhibits memorandum 1986 Report of the Insurance Department Formal Presentation (1) Terminology (2) Overview of the Insurance Industry a. Elements of the Insurance Mechanisms b. Legal Environment c. Underwriting and Ratemaking d. Role of Reinsurance (3) Regulation of Insurance a. Goals b. Iowa: authority, functions, and staffing c. Current issues and trends (4) Information a. Financial statements b. Rate filings
@1260 @2735	Question and answer period with Insurance Commissioner Hager - Round table discussion with Commission on following items: -State and department liability for failed insurers -Feasibility of additional solvency review mechanisms -Trend toward claims-made form of insurance -Regionalization of insurers and premium rates -Savings and cost adjustments in claims-made -Rule-making in relation to claims-made -State based vs. national based experience rating -Cyclical nature of industry and profits -Market place rate regulation -Effect or noneffect of "tort reform" on premiums -Ability or inability for state to control insurance cycle savings -Monetary needs of rate review process -Future projections concerning insurance cycle -Ability or inability to separate premium changes of tort system on insurance cycle impetus -Ability or inability of state based experience to explain 1985-86 premium increases -Number and type of insurers offering particualr P&C coverages -Effect of availability and affordability in Iowa

-Nonregulation of reinsurers on state level
-Differences or similarities of state premium experience as a result of intense or relaxed regulatory structures
-Pro's and con's of claims-made
-Clarifications on insurance cycle and unpredictability of tort system
-Potential for over regulation to affect availability
-Effect of pull-out of international reinsurers
-Use of state based experience to set rates
-Status of Iowa as a conservative civil justice state

VCR Reading	Recording #2
@0000 @0060	Intermission
@0062	Presentation by Jon Neiderbach (Legislative Fiscal Bureau) and Professor Glen Meyers (University of Iowa) Written material submitted Texas Closed-claims Study Michigan Actuarial Study & Contract Formal presentation -Review of actuarial experts contacted and assistance available both on the state and national level -Need to refine requests to actuarial experts -Data which actuarial experts review -Review of handouts -Key issues .Scope .Use of developed or undeveloped data
@0425 @0776	Question and answer period - roundtable discussion with Commission on following items: -Sufficient or insufficient similarity for Iowa to use other state studies, and therefore avoid costs -A review of recent statutory change impacts is unfortunately the best focus but also the most difficult -What has been described is not a loss problem, but a pricing problem -Any eventual study should focus on Iowa civil law changes (even though not main problem) -Operative pre-study questions are: 1. What do we want to find out 2. Can we find it out 3. What can we do with it once we get it -Need for FCAS expertise -Need for increased regulatory resources -Information items which are likely study candidates -Civil justice change data should be state date, possibly collected by closed claims study
@0776 @0800	Panel change
@0800 @1830	Formal presentation by Mr. Philip Miller, Vice President and Actuary, Insurance Services Office, New York, N.Y. Written materials submitted Testimony outline Report on the insurance crisis in Iowa

Insurer profitability
Property/Casualty Insurance Industry data availability
Countrywide results for selected commercial liability classes
Rising costs of general liability legal defense

Formal presentation
-What ISO is and does
-Industry results for 1984, 1985, and 1st quarter 1986
-Industry returns on net worth (1979-85)
-Personal vs. Commercial lines (1979-85)
-Reinsurers data and results (1979-85)
-Iowa combined ratio (premium to loss) (1972-84)
-Year end reserves for industry (1976, 1980, 1984)
-Loss growth and premium growth vs. GNP (1979-85)
  Commercial lines
  Commercial liability
  General liability and medical malpractice
-Iowa paid losses (1979-85)
-Allocated loss adjusted expense (defense costs) (1956-84)

-Insurance data availability discussion
-ISO data processing
-Reproducing data as information
-Emerging data needs
-Drawbacks to reliance on closed-claims study

@1830 Speaker change
@1838

@1838 Formal presentation by Mr. Steve Carroll, Deputy
@2200 Director, RAND Institute for Civil Justice, Santa Monica, CA

Written material submitted
An overview of the first six program years -ICJ

Formal presentation
-What RAND ICJ is and does
-Civil Justice Data (1960-84), using San Francisco and Cook County as examples
-Caveat: defense verdicts not included, all figures adjusted for inflation
-Large awards results vs. median verdicts (1960-84)
-Award characteristics for serious vs. non-serious injuries (1960's & 1970's)
-Injury cause as factor in injury compensation
-Problematic vs. non-problematic cases a increasing percentage of litigation
-Compensation characteristics for problematic cases
-Punitive damages frequency
-Punitive damages, median vs. mean
-Conclusion - Civil Justice System contains two tracks
  (1) large majority are typical cases with little

historical change
(2) small minority are atypical cases with historical increase trend

@2200 Speaker change
@2205

@2205 Formal presentation by Mr. Tom Goddard, President,
@2770 Goddard Public Affairs Corporation, Tuscon, AZ

Written materials submitted
Written presentation and documentation

Formal presentation
-Viewpoints
-Approval on basis of local and state claims experience
-Recommendation choices open to commission
-Stockholder prespective of industry
-Regulation history, methods & concerns
-Effect of taxing system
-Differing uses for "reserves"
-Iowa losses, adjusted for inflation/consumer price index (1978-84)
-Effect of increase in health care cost
-Cause of insurance crisis
-Studies regarding litigation increase or decrease
-Studies regarding verdict size increase or decrease
-Studies regarding relationships between civil justice reform and insurance premiums rate-making
-Feasibility of creating alternative insurance mechanisms
-Need for additional state insurance staff
-Insufficiency of data

VCR Reading	Recording #3
@0000 @1021	Formal presentation by Mr. Jay Angoff, Counsel, National Insurance Consumers Organization, Washington, D.C.
	Written material submitted How to tame the insurance industry cycle and make the legal system more efficient. Texas inform claims reporting outline
	Formal presentation -What NICO is and does -What Data needs to be developed and what it can be used for -Five purposes for data (& present sufficiency) Solvency (sufficient) Profitability (insufficient) Validity of Common Assumptions re Legal system (insufficient) Effect of "Tort Reform" on Insurance payouts and premiums (insufficient) Effect of "Legal Changes" on insurance payouts and premiums (insufficient) -Review of existing studies -Conclusion .Get data .Put in workable and publicly available form .Take measures to insure that all offsetting benefits upon which change is premised are mandated
@1068	Rebuttle discussion by panelists
	Mr. Phil Miller (ISO) -Accounting methods -Cash flow vs. profitability -Taxing of Insurance industry -Subsidization of high risk specialists -Availability of Insurance data -Clarification of Iowa loss data -Paid loss increases -Settlement and verdict losses -Closed-claim data limitations
@1404	Mr. Steve Carroll (RAND) -Expenses of developing data -What must be shown to prompt response, and can it be obtained -What didn't happen in claims and cases often as important as what did happen

-Data development difficulties for individual states
-Difficulty of comparing various state's data
-New studies nearing completion
  .Joint and several
  .Percent of verdicts paid
  .Punitive damages
-State's numbers may differ, but trends probably the same
-Results of recent lawyer's fees study

@1509 Mr. Tom Goddard (Public Affairs Corporation)
-Accounting methods
-"Expense" and other issues affecting reported profits
-Differing interpretations according to perspective
-Difficulty of legislation on specialization by sub-line
-Declining losses in Iowa
-Systematic data needed for systematic changes
-Localized data needed for localized changes
-Problematic nature of state comparisons
-Need for cross-section approach to consultants

@1825 Mr. Jay Angoff (NICO)
-Analysis of data
  .Statutory
  .GAPP
  .Cash flow
-New mechanisms
  .Additional writers and types of writers
  .Self & pool insurance
-Changing tax law will effect Insurance Companies
-Reinsurance Collapse
  .Dollar strength
  .Insurer scandals
-Percentage of dollars actually paid of verdicts is low
-Insurance Companies doing far better in Iowa (3 to 4 time) as nationwide
-Shouldn't limits rights without development of Iowa data
-State Insurance regulators need more resources to be effective

@1970 Question and answer period with panelists. Roundtable discussion with Commission on following items:

-Alternative mechanisms to traditional insurance, and possible pitfalls
-Risk management efforts
-State involvement in reinsurance and pools
-Treatment of reserves according with profitability
-Discounting of resources
-Keeping Iowa's good history reflected in premiums
-State based rating
-Self insurance
-Additional sources for insurance capitol
-State assisted programs
-Possible use of favorable history for economic development
-Relationship (or lack thereof) between tort reform and

insurance premiums
-Effect of insurance regulation on premiums
-Potential for increasing percent of premium dollar and verdict dollar going to victim
-Role of civil justice system as reflects compensation or deterrence rationales
-Loss increases
-Reduction of transaction costs
-Inefficiency of civil joint system as compensation system
-Poor history of medical mutuals
-Reliability of ISO data (dividends/reserves)
-Problems of insurance data interpretation
-Responsibility of insurers for portion of "crisis"
-State experience vs. premium activity
-Profitability vs. stock activity
-Difficulty with individual study breakdowns of economic vs. noneconomic damages in RAND studies
-Compensation levels in relation to injury severity
-Percent of litigation dollars getting to victims

@2910 End of Video Recording #3 (Discussion continued on Video Recording #4)

VCR Reading	Recording #4
@0000 @0735	Continuation of question and answer period. This portion of roundtable discussion included following items -Cyclical nature of industry, and resulting effects on profitability -Inability to predict effect of tort reform on insurance profitability -Effect of over specialization of risk categories -State vs. nationwide rate setting basis -Impact of costs of reinsurance, as the cause of a distortion of state premiums - if supposedly linked to state experience -Integral nature of reinsurance availabilty, and state assistance to assure availability -Actions available to reduce threat that insurers will withdraw from state market if insurance regulation passes -Interstate compact approach to insurance regulation and practice
@0745	Formal presentations on Civil Justice data availability and interpretation
@0747 @0959	Iowa Attorney General Thomas Miller -Purpose of tort system .Deterrence .Compensation -Nature and sources of present tort law -Goal of Commission in reviewing tort system -Recent developments and legislative action and positive effects -Efforts of other states to follow Iowa
@0960 @1365	Professor Keith Miller (Drake University College of Law) Status of Iowa law -Iowa viewed as conservative -Products liability on state and federal level -Medical malpractice, state law and procedures -Punitive damages, new Iowa approach -Collateral source rule -Contingent fee system -Damages cap or limitation systems
@1370 @2018	Professor David Walker (Drake University College of Law) Review of activity of Iowa Supreme Court Advisory Committee on civil rules and procedure Review of Civil Litigation Study of Iowa District Courts

Review of frivolous suits and potential rules

Conclusory comments regarding civil justice system

@2020 Ms. Nancy Shimanek (Judicial Department)
@2095

Review of progress on the ongoing judicial study being conducted by the National Center for State Courts

@2100 Question and answer period with panelists, roundtable
@2365 discussion with Commission including following items:

-Prejudgment interest rule and potential effect of elimination
-Effect of new 25%/75% punitive damages rule
-Acceptable civil justice practice as it relates to great majority of cases
-Punitive damages resulting from largely institutional misconduct
-Conservative court action as regards to punitive damages claims
-Potential use of punitive damage claims to "personally" threaten defendants into premature and low warranted settlement (i.e., non-legitimate uses)
-State involvement in collateral source payments

@2366 End of Video Recording #4

OUTLINE OF THE VIDEO RECORDING OF THE SEPTEMBER 3rd MEETING OF THE IOWA LIABILITY AND LIABILITY INSURANCE STUDY COMMITTEE

VCR Reading	Recording #5
@0000	Beginning (second day)
@0155	Commission opening comments
@0268	Government Services Section
	Dennis Donohue (Alexander & Alexander Inc.) -Alternative financing mechanisms now being developed and utilized pursuant to S.F. 2265 (particularly the Iowa Communities Assurance Pool)
@0449	Roger Nowadzky (Iowa League of Municipalities) -Particular risks placed upon governmental entities by mandated functions and by tort system
@0580	Terry Timmins (City Attorney - Iowa City) -Particular problems brought upon by the eroding "discretionary function" exemption, and potentials for redefinition
@0810	Phil Dunshee (Iowa Association of School Boards) -Present status of IASB insurance programs. Suggestions for change
@1200	Questions and answer period with panelists. Roundtable discussion with Commission covering following items: -Who is eligible to participate in assurance pool -Function of S.F. 2265 concept involved in assurance pool -Why others may or may not have joined pool -Premium to loss payout regarding schools -Differing treatment of governmental entities versus private entites -Potential standards for discretionary function doctrine -Efforts for stablization of assurance pool -Past pool history with counties -Use of actuarial data in assurance pool -Rationale for forty-nine percent assurance pool premium savings -Similarity or dissimilarity of many of the risks faced by public and nonpublic entities -Structured settlements and consortium claims suggestions by ISAC -Capitol risk financing alternatives and difficulties of system for particular public entities -Relationship of asbestos claims to IASB claims for limited liability, similarity to other claims - especially medical malpractice -Discretionary function exemption in policy vs. operational decision-making -Review of sidewalk liability as case in point of recent

supreme court action threatening discretionary function exemptions

- Possibility for any collateral source change to have a "self-contribution" exception
- Recent legislative exception for municipalities in inspection liability
- Discussion of assurance pool
  - .Occurrence forms
  - .Withdrawal provisions
  - .Actuarial projections
  - .Experience based approach
    - (1) Capital budget of city
    - (2) Physical exposure/risk
    - (3) Loss/claims history (5 year review)
  - .Right to reject
  - .Reinsurance and excess provisions
  - .Contingency for free-market raiding of pool
- Effect of decreasing revenues on municipal service delivery decisions
- Liabilities faced by counties and schools
- Claims settlement based upon prior approval
- Impact of Federal Tax Bill on capital financing
- Restricted effect of contingency fee limitations, potential for use of defense limitations

VCR Reading	Recording #6
@0000 @0030	Introduction of panelists
@0030 @0730	Presentations by Human Services Section
@0040	Mr. Ted Michaelfelder (Profit day care centers) Written testimony provided -Impact of insurance crisis on day care providers -Change to claims-made coverage -Lack of cancellation or nonrenewal notice -Effect on provision of services
@0180	Ms. Karen Thelin (Nonprofit day care providers) Written testimony provided -Impact of insurance crisis on nonprofits, with emphasis on problems for nonprofit purchase of service contractors who provide services to state eligible clients -Effect of D & O insurance on nonprofit boards
@0405	Ms. Jill June (Chairperson - DHS Provider Advisory Council) Written testimony provided -Explanation of what council is, and who they assist -Particular problems in state purchased services area -Effect of insurance increases on providers since they are not an item open to passace onto consumers, since already sliding fee scale at best. Result is reduction of necessary services -Review of suggested changes
@0612	Ms. Jody Tomlonovic (Executive Director, Family Planning Council of Iowa) Written testimony provided -Review of what family planning council is and who is served and how -Effect of insurance crisis on council members in area of medical malpractice and director and officer -Lack of alternatives to closing doors if insurance becomes completely unavailable, with self-insurance a nonuseable option
@0730 @1640	Question and answer period with panelists. Roundtable discussion with Commission, including following items: -Directors and officers liability claims frequency

(or infrequency)
-State day care experience vs. premium rates set
-Potential use of Illinois Trust in day care insurance coverage
-Options for changing present short-nonrenewal notice problem
-Availability and conflicts of data gathered on Iowa Experience in day care liability (P/L ratio differing by as much as 13% to 60%)
-Authority and resources of Insurance Commissioner to investigate and take action on unjustified increases
-Nonutilization of grievance and review mechanism, and lack of resources for insurance department to do on own.
-Difficulty of tracking premium changes as result of Iowa experience
-Effect on private human service providers of being cancelled or nonrenewed on personal insurance due to involvement in child care (with additional difficulties in tracking problem for nonregistered providers)
-Costs of day care insurance as flat dollar, per student, and as % of income
-Clarification on low dollar cost of litigation or claims in area
-Additional problems with protecting volunteers needed in human service fields
-Present protections in statute to protect individuals involved in nonprofit services

@1660 Presentations by Health Services Section

@1662 @2477 Ms. Jeanine Freeman (Vice President-Counsel to the Iowa Hospital Association

Mr. Phil Latessa and Mr. Jack McClellan - Written testimony provided

Present hospital delivery system and statistical data relating to the delivery of such services. Review of claims activity and particular liability and liability insurance problems facing Iowa hospitals. Present activities of Pennsylvania Hospital Insurance Company (PHICO) in Iowa. Effect of other professional liability insurance problems in addition to medical malpractice.

@2480 @2609 Mr. Paul Pietzsch (President, Health Policy Corporation of Iowa) Written testimony and materials submitted

Explanation of what the HPCI is and what it does, and creation and initial efforts of HPCI. Recent HPCI efforts at data collection and analysis regarding professional liability of medical malpractice. Need for multiple efforts by all parties to add

fairness and stability to system, and explanation of (5) potential steps which might be used.

@2613
@2830 Question and answer period with panelists, roundtable discussion with Commission, including following items:

-Pro's and con's to high insurance dollar policy limits being carried today
-Increase of liability costs in reference to large component which is increasing cost of health care
-Stable nature of % of income, inflation, health care -- as reflected in tort judgments
-Cost of defensive medicine
-Whether present premiums are viewed as fair premiums
-Whether medical malpractice is so unique as to require individualized and specialized liability treatment
-Lack of data regarding individually large cases

VCR Reading	Recording #7
@0000 @0070	Introduction of panelists for second half of Health Services Section
@0075	Steve Beldon (Financial Services Officer, St. Paul Fire and Marine) Material Submitted Presentation document on ratemaking process Formal Presentation Subject Matter Trends in losses and claims frequency and severity in medical malpractice - and EFFECT ON RATEMAKING. Also, review of investment income interrelationship with premium rates
@0817 @1340	Dave Murray (Medical Protective Company) Material Submitted Review document of Indiana Medical Malpractice Act Outline of formal presentation Formal Presentation Subject Matter Review of Iowa medical malpractice figures. Review of Indiana Malpractice Act, and potential affect if adopted in Iowa. Discussion of guarantee fund assessments. Effect of recent tort liability changes
@1345 @2205	Question and answer period with Beldon and Murray, roundtable discussion concerning following items: -Potential reduction (or lack thereof) that could be expected if Iowa were to adopt Indiana approach -Use or nonuse of state experience rating -Potential for loss experience data review -Explanation of recent state activity in other states, and relationship to Iowa premiums -Long term contingency costs when cap reduces availability for economic damages compensation -Suggestion that only damage cap would effectively reduce payouts and premiums -Lack of "suggested cap exceeding awards" in Iowa -Limitations upon defense as well as plaintiff attorney fee system -Submission of data for Iowa ratemaking activity -Potential for closer working relationship between medical insureds and there insurers -Review of use of a surcharge system for patient compensation funds

-Effect on Insurance availability by passage of Indiana Act
-Low percent of funds over time paid to victims, as percent of premium dollars invested
-Profitability of medical malpractice insurers
-Relationship savings between state and countywide experience

@2208
@2365 Dr. Emmett Mathiasen

Material Submitted

Statement of the Iowa Medical Society regarding Iowa medical malpractice liability crisis. Additionally, attached letters regarding obstetrics have been included.

Formal Presentation Subject Matter

IMS data and review of actuarial studies, deteriorating liability situation, actions to improve self-discipline, defensive medicine, threat to accessibility to health care, suggestions for tort reform legislative enactments:
-Noneconomic damage cap
-Mandatory structured awards
-Prohibition against punitive damages
-Limitation on contingency fees
-Shortening of statutes of limitations
-Eliminate special damages for counter suits.

@2370
@2468 Dr. Clarence Denser (Iowa Physicians Mutual Insurance Trust)

Material Submitted

Statement of the Iowa Physicians Mutual Insurance Trust regarding availability of medical liability insurance.

Formal Presentation Subject Matter

Historical perspective on availability crisis, creation of the IPMIT/AMACO system, special availability actions in Iowa, overview of system claims and premiums to payouts, and support for IMS advanced tort reforms.

@2570
@2785 Mr. Donald Fager (President, Physicians Insurers Association of America). Written testimony submitted.

Formal Presentation Subject Matter

Review of association creation and activity, data collection on liability problems, difficulties to certain doctors and/or doctor services area, problematic trends in liability system, creation and rationale for

doctor-owned companies, activities of doctor-owned companies, problems faced by doctor-owned companies.

@2787
@2892 Question and answer period with panelists, roundtable discussion with Commission, including following items:

-Lack of information and numbers on large verdicts in Iowa
-Small percentage of doctors involved in large percentage of claims
-Request for further information regarding medical discipline

VCR Reading	Recording #8
@0000 @1365	Continuation of roundtable discussion with Health Services Section panelists Mathiasen, Denser, Fager.
	-Possible use of JUA's or self-insurance -IPMIT extensive review and application requirements for membership -Lack of specific case citations on alleged problematic case areas in Iowa -Request for medium, median and average costs/losses for IPMIT -Percent of income historically and presently devoted to insurance -Savings differences between IPMIT and private insurers -Open ended consequences of liability system - for example the unavailability of goods/services, defensive medicine, and other indirect costs to society as a whole -Use of self disciplinary activities (example: Indiana) as premium reduction method, and problems with local control of local activities -Underlying "market" regulation of doctor activity -Suggested need to follow lead of other states to deal with affordability and availability and suggestion that cap is most important -Discussion of alternative treatment/compensation transfer systems to victims -Lack of data regarding use of caps vs. premium reduction -Compensation, in relation to injury severity -Whether there would be pratical effect to capping damages in Iowa -Compensation theory of recovery, in relation to deterrence -Available resources to "self-police"
@1375 @2255	Presentations by Business Services Section
@1377 @1545	Ms. Judy Krueger (Regional Advocate, U.S. Small Business Administration)
	Written Material Submitted White House Conference on Small Businesses - Final recommendations. Written testimony
	Formal Presentation Subject Matter Importance of small business to Iowa economy, effect of unavailability of insurance, review of administration's proposals, new proposals in the area of Insurance

Industry Regulation, and federal/state interaction on issue area

@1547
@1600 Mr. John Dodgen (Co-chair, Iowa Delegation to White House Conference on Small Business)

No written material submitted

Formal Presentation Subject Matter

Personal experience of bulk feed bodies and motor home manufacturing, unavailable insurance without significant claims history. Crisis has resulted in no insurance - threatening the viability of this and may other small businesses and products.

@1608
@1820 Dr. Don Denman (Iowa Society of Certified Public Accountants) Written materials submitted

Formal Presentation Subject Matter

Overview of ISCPA - and particular threats which liability system poses to the profession. Review of recent court activity. High exposure in failed business situations. Proposals relating to highly problematic liability situations including privity, statutes of repose, frivolous suits, and punitive damages.

@1822
@1938 Mr. David Brasher (State Director, National Federation of Independent Business)

Written Testimony submitted

Formal Presentation Subject Matter

Present problems caused for business as a result of both the insurance system and the civil justice system. Proposals of recent Small Business White House Conference. Studies already conducted which may assist Commission. Review of suggested State Law Reforms (22) being reviewed by business groups. Review of suggested State Insurance Reform (12). Call for federal action on insurance reform.

@1940
@2195 Mr. Russell Samson (Counsel, Iowa Association of Business and Industry). Written material submitted on overview of presentation and recent ABI liability survey.

Formal Presentation Subject Matter

Nature of ABI and recent activities, support for White House Conference, suggested changes to present tort system - including $200,000 cap, elimination of

punitive damages, regulation of attorney's fees, six year product liability statute of repose, codification of a number of Product Liability Rules. Discussion of court action increasing liability exposure.

@2197 Mr. Bob Hand (Iowa Retail Food Dealers Association)
@2255 Written statement submitted

Formal Presentation Subject Matter

General liability problems faced by business and specific application of such problems to IRFDA members. Support for White House Conference, with proposals to eliminate joint and several liability, $250,000 cap on noneconomic damages, restrictions of punitive damages, limitation on contingent fees, remove collateral source rule and mandate reductions, shorten statutes of limitations, mandate structured payments, develop alternative dispute resolution systems.

@2255 Question and answer period with panelists, roundtable discussion with Commission, including following items:

-Percent of businesses going bare of Insurance Coverage (6%-13%)
-Percent of business expense/profit going to insurance coverage, and change over recent years
-Lack of data relating to claims frequency arguments
-Improvement of manufacturing climate in Iowa, and lack of tort law considerations in the improvement
-Specific problems resulting in reduced product development and refusals to market
-Trade off between liability exposure and resulting damages and payment
-Lack of contingent fee proposal supporting data
-Review of RAND material on effect of $250,000 cap
-Working relationship between insurers and insureds
-Lack of reflection in premium of recent liability law changes

@2510 Short follow-up discussion with Ms. Jeanine Freeman (IHA)
@2618

@2655 End of the Video Recording #8. End of September 3rd meeting with the Commission.

OUTLINE OF THE VIDEO RECORDING OF THE SEPTEMBER 22nd MEETING OF THE IOWA LIABILITY AND LIABILITY INSURANCE STUDY COMMISSION

VCR Reading	Recording #9
@0000 @0080	Preliminary Business
@0080 @0675	Consumer Services Section (it was noted that the first scheduled speaker of the day - Mr. Mike Lux, Executive Director, Iowa Citizens Action Network - would be unable to attend due to health reasons). Ms. Bonnie Hilburn (appearing personally as potential plaintiff/victim effected by "tort reform" -Need for retaining contingency fee system -Need for retaining punitive damages -Lack of effective oversight of insurance industry -Resource disparity between victims and insurers -Lack of proper insurance data reporting -Personal experiences and expenses shown by tort litigation system Question and answer period with Ms. Hilburn.
@0700 @2040	Insurance Services Section
@0705	Mr. Lou Schoerdel, Iowa Insurance Institute (representing Iowa based property/casualty insurers) -Background on Insurance Institute -Economic impact of Iowa insurers -Recent problems in property/casualty area -Resulting crisis in insurance availability and affordability -Civil liability expansions by courts -Impact of threat of million dollar verdicts on premium rate-setting of insurers -Impact of changes in societal attitude regarding normal risks of activities -Need for consideration of civil liability reforms: .Capping noneconomic damages .Elimination of collateral source rule .Elimination of prejudgment interest .Limitation on punitive damages (Mr. Schroedel also submitted an exhibit outlining recent Supreme Court actions expanding causes of actions or damages in civil liability)
@1320 @1620	Mr. Mark Afable (National Association of Independent Insurers)

-Nature of NAII
-Iowa connections of NAII
-Expansion of liability doctrines, erosion of defenses
-Result on insurance losses
-Loss and loss expense data (statistical chart)
-Collective effect of trend toward "no-fault" liability and outcome of trend on availability and affordability of insurance
-Difficulty of state attempts to require mandatory rollbacks as part of tort reform packages
-Need for meaningful tort reforms
-Cause and effect in rate-making practice
-Unpredictability of present civil justice system
-Nationwide nature of the risks faced by insurers
-Review of tort reform interrelationship with rate-making process

@1644 Ms. Debra Wozniak (Alliance of American Insurers)
@1840

-Nature of the Alliance
-Status of insurance/liability studies in other states
-Negative and unneeded nature of mandatory insurance disclosure acts
-Review of present insurance disclosure practices
-Review of alternative sources of insurance industry data
-Problems and costs associated with mandatory closed-claims studies
-Factoring in of tort reform savings into insurance rate-making practices presently.

@1850 Mr. Fred McGarvey (American Insurance Association)
@2035

-Impact of "regulatory reforms" on potential increase of availability problems
-Nature of "restrictive" insurance reform practices
-Impact review of exemplary negative and positive regulatory actions in other jurisdictions:
  .Florida - negative impact and threat to P/C availability in state (rollbacks, freezes, and justification requirements)
  .West Virginia - negative impact and threatened market withdrawal (nonrenewal restrictions, disclosure requirements)
  .Connecticut - positive impact and new capacity and underwriters (tort reform with nonsubstantive insurance regulation
  .California - positive impact and new insurers in hard markets (proposition 51)
  .Washington - positive impact and new insurers (substantive tort reform)
-Review of nature of availability/affordability impacts brought about by negative or positive regulatory approaches
-Lack of resources in Iowa regulatory system

@2040 Commission panel discussion with Insurance Services Section members Schroedel, Afable, Wozniak, and McGarvey.

VCR Reading	Video Recording #10
@0000 @0465	Continuation of panel discussion with Insurance Service Section Panelists Schroedel, Afable, Wozniak and McGarvey
@0470	Beginning Legal Service Section
@0475 @1189	Ms. Claire Carlson, President of Iowa Defense Counsel Association -Nature of Defense Association -Liberalization of liability system and resulting impacts on society -Focus upon four major legislative positions .Limiting punitive damages, with explanation of request .Elimination of prejudgment interest, with explanation of request .Elimination of the collateral source rule, with explanation of request .Interfacing of tort system with workers compensation system -Additional items needing consideration .Nuisance or collusive lawsuits (using questionable consortium claims as an example) .Co-employee gross negligence suits
@1192 @1595	Mr. David Wiggins, Iowa Trial Lawyers Association -Nature of ITLA -Review of mid 70's legislative action in major civil liability changes -Review of 1983/1984 legislative actions to modify comparative negligence, expand to fault, modify joint and several liability, and imposition of numerous immunities and defenses -Review of 1986 legislative actions (S.F. 2265) containing numerous additional civil liability restrictions and immunities -Failure of legislative actions to reduce injuries and costs, and failure of insurance companies to reduce premiums reflective of past tort reforms -Effect of tort "reform" simply to shift losses back to injured individuals, or other payors -Arguments against changing collateral source rule -Creation of "crisis" by insurance company practices -Effect of past legislative actions in reducing court cases and court awards, with no premium reductions by insurance company. -Need for further legislation to regulate insurance companies
@1600	Mr. Nick Critelli, Iowa Academy of Trial Lawyers

@1805

-Nature of Academy
-Representing those who must carry-out legislation
-Constitutional basis of tort law
-Tension existing between a common-law tort system and recent legislative efforts to codify the law
-Positive aspects of common law system:
  .Removal from political arena
  .Day to day ability to continue regulation
-Need to use experience as information to base legislative activity
-Negative aspects of calls for caps on economic or noneconomic damages
-Need to see what effect past legislative efforts are having before continuing

@1822 Mr. John McClintock, Iowa State Bar Association
@2235

-Nature of Association
-Review of actual Iowa changes versus those which have been arbitrarily reported as being changed in Iowa.

Explanation

of Iowa actions on:
  .Collateral source
  .Damage caps
  .Frivolous lawsuits
  .Nonmeritorious suits
  .Dram shop
  .Reduced statutes of limitation
  .Contingent fees
  .Punitive damages
  .Establishment of new immunities
-Review of additional Iowa efforts
-Review of new officer/director proposal pending in the Associations Committee on Corporations
-Need for loss prevention/deterrence component of civil liability system to be retained for good of society
-Need for cost/savings review before major changes are proposed

@2240 Question and answer period with legal services section panelists Ms. Carlson, Mr. Wiggins, Mr. Critelli, and Mr. McClintock.

VCR Reading	Video-Recording #11
@0000 @0060	Ms. Nancy Shimanek (Iowa Judicial Department) -Explanation of actions taken in regard to statutory mandate to conduct Iowa tort liability litigation study
@0065 @0598	Mr. Samuel Conti (Northeast Regional Director for the National Center on State Counts) Mr. Robert Tobin (NCSC Senior Staff Attorney, and Iowa Project Director) -Background of NCSC -Presenting as reporter, not advocate -Opinion that tort litigation study "in-state" is prudent and necessary step -Iowa project first of its kind in nation -Explanation of project program and form of report -Explanation and review of exemplary findings for Iowa: .In contrast to media reports, there has been a decline of 12% in tort filings .Medical malpractice actions up .Amount of tort judgments - both medians and means - for state of Iowa .Inability for researchers to draw substantive recommendations from raw data .However, significant changes are taking place - perhaps due to past legislative and judicial actions -Offer of continuing assistance
@0600 @1500	Panel discussion with Commission and NCSC Representatives Conti and Tobin (Discussion with Ms. Shimanek relating to potential full future data collection capability in Judicial Department.)
@1510 @2777	Return to panel discussion of Commission and Legal Service Section representatives Carlson, Wiggins, Critelli, and McClintock.
@2780	Other business (David J. Lyons) to come before the Commission (Continued on Tape #12)

VCR Reading	Video Recording #12 (Short Tape)
@0000 @0155	Report of Insurance Commissioner regarding section for further insurance information on day care loss to premiums. -Iowa loss ratio at 48.9% -Number of Iowa claims at 25 -126% loss ratio nationwide -Discussion of possible reasons for earlier cited study understatement of 15% loss -Request was made for similar data for 1985
@0160	Report of Insurance Commission relating to request for additional "pre-actuarial" study data -Future Cost Analysts Inc. contacted -Review of FCA review of California and New York and accompanying findings -Submission of actuarial observations of FCA -More information available from source
@0270	Report by John Niederbach (LFB) on additional information regarding actuarial studies -Casualty Actuary's Inc. -Tillinghast, Nelson and Warren -Report cetners on what type of questions need to be asked for proper actuarial study and survey -Majority of information necessary for actual study on primary level already in public domain
@0390 @0450	Concluding business for meeting of September 22nd

OUTLINE OF THE VIDEO RECORDING OF THE OCTOBER 7th AND OCTOBER 8th MEETING OF THE IOWA LIABILITY AND LIABILITY INSURANCE STUDY COMMISSION

*Please note that a back-up recording system was in use during the meeting of the 7th and a small portion of the meeting of the 8th. Malfunctions in both video and audio clarity may be apparent.

Please also note that the meeting of the 7th has been recorded on extra-long play tape speed. with the VCR Reading numbers correspondingly containing more commission time.

VCR Reading	Video Recording #13
@0000 @0025	Preliminary Business
@0028 @0243	Mr. Mike Lux (Executive Director, Iowa Citizens Action Network)
	-Background of ICAN -Four major perspectives are focus of ICAN: .Victim's rights in civil justice system .Controlling profit motive of insurers to make society safer .Unjustified insurance practices are hurting Iowa citizens, regulatory reforms are necessary, including -Price regulation -Limiting cancellations -Providing more regulatory resources -Appointing of Insurance Consumer Advocate -Letting groups pool their risks -Review of changes in public opinion on liability issues -Review of recent Aetna study that refuse to reduce premiums even when tort reform enacted -Recent studies showing disproportionate profits in insurance industry
@0245 @0600	Commission panel discussion with Mr. Lux
@0602	Mr. David Murphy (New Iowa State Risk Manager)
	-Personal background -Duties of the office of state risk manager .State .Local government -Explanation of activities of office in working on state risk management and insurance programs -Opinion that insurance is only one part of risk management -Explanation of activities in regards to local government -Problems of insurance availability, lack of cancellation or nonremoval notice and additional problems in premium increase or coverage decrease with little or no notice -Present activities of office to carry out new duties and responsibilities mandated in S.F. 2265
@0672 @1024	Commission discussion with Mr. Murphy
@1025 @1153	Mr. William Vanderpool (Executive Director, Iowa Board of Medical Examiners)
	-Need to do better job policing the medical profession

-Background of the I.B.M.E., and process by which it attempts to carry out its mandated functions
-Licensing aspect as important as disciplinary aspect
-Preventive measure employed
-Review of statistical data related to claims against medical professionals and disciplinary actions
-Budget review of I.B.M.E.
-Benefit of and need for public trust in examiners work
-Various funding aspects and approaches of Iowa versus other jurisdiction

@1153 @1330 Commission discussion with Mr. Vanderpool

@1333 @1512 Mr. Jerry Miccolis (F.C.A.S., M.A.A.A. - Tillinghast, Nelson & Warren)

-Background on Tillinghast, Nelson & Warren
-Extensive overview of actuarial analysis of present insurance market
-Influences on Insurance market this cycle
  .Investment Income (with underlying influences)
  .Underwriting by reinsurers (with underlying influences)
  .Broadening focus of coverage and liability (with underlying influences)
-Review of Tillinghast Actuarial Study of medical malpractice insurance in Iowa. (This entire study is available from the Legislative Service Bureau).
-Interrelationship of increasing underwriting costs and increasing liability base as cause of current crisis
-Highlights of results of Iowa Medical Society Acturial Study (Exhibits A,B,C,D,E,F, and G)
-Opinion as to actions which can be taken to get insurance capacity up and rates down

@1515 @2020 Commission question and answer period with Mr. Miccolis

@2028 @2438 Presentations and Commission discussion regarding Insurance Department regulatory resources and legislative decision-making on regulatory priorities. (David Lyons, Commission Counsel)

(1) Present resources and staffing patterns of the Insurance Department

-Ability to adequately oversee insurance industry
-Increasing need for actuaries
-Function of actuaries
  .Actuarial analysis of rate filings
  .Auditing of premiums
  .Conducting of rate hearings and performance as expert witnesses
  .Formatting and dispensing data

.Public education
.Identification of impending problem areas

(2) Resource use priority - choice of rating law type

-Primary purpose of rating law
.Insure solvency of insurers
.Insure reasonableness of rates
.Prohibit discriminatory practices
-Two-fold effect of rating law type
.Speed in implementing new rates reflective of market
.Extent to which insured can rely on expert review
-Five different rating law choices:
.Prior approval
.Modified prior approval
.File and use
.Use and file
.Open competition
-Spectrum analysis of rating law types
-Inability for present resources to meet statutory mandate of full prior approval
-Alternatives existing
.Increase resource fully
.Decrease mandate fully
.Partial increase in resources combined with partial decreases in mandate
-Creation of a mechanism to distinguish between insurance lines in various need for full regulation

(3) Cancellation/nonrenewal

-Current impact of such activities made more severe by hard market
-Increased use of activities as regards general risks rather than individual insureds
-Review of problem from insured's viewpoint
-Review of problem from insurer's viewpoint
-Framework elements of any cancellation/nonrenewal regulatory system
1. Scope
2. Notice (type and timing)
3. Information
4. Enforcement
-Discussion of alternatives under scope
1. Cancellation
2. Partial cancellation
3. Nonrenewal
4. Partial nonrenewal
5. Substantial renewal modifications
6. Nonsubstantial renewal modifications
-Spectrum analysis of scope alternatives as reflecting impact on insureds
-Discussion of alternatives under notice (type)
1. Notice
2. Minimum notice

3. Notice and justification
4. Notice and authorization

-Spectrum analysis of least to most restrictive notice types
-Discussion of alternatives under notice (timing)
.For reasons of immediate justification (0 to 45 days)
.For reasons of nonimmediate justification (10 to 120 days)
-Discussion of insured's right to claims history
-Alternatives for information:
1. Discretionary dissemination
2. Mandatory dissemination
3. Discretionary distribution
4. Automatic distribution
-Alternatives in enforcement
-Examples of activity in area by other states

(*Note - The above presentations and commission discussion resulted in a motion for a regulatory resource and priority bill draft - which motion carried)

@2440 Closing Business

VCR Reading	Video Recording #14
	(Due to camera difficulties, the 30 minutes of this meeting were not recorded. A written copy of the testimony deleted is available from the Legislative Service Bureau)
@0000 @0120	Second half of Full Liability system overview (David Lyons, Commission Counsel)
@0121	Damages Overview (David Lyons, Commission Counsel) -Placement of damages considerations on full liability system spectrum -Centrality of damages as tort issue .No concrete legislative schedule .Separation of damages decision from liability decision .Requirement of resolution of all issues in one case -Basic principles of damages -Increasing number of issues now open for legislative debated damages
@0225	Collateral Source Rule Overview (David Lyons, Commission Counsel) -Explanation of collateral source rule -Different dimensions of the rule -Past legislative action -Different schools of thought: .Deterrence school .Compensation school .Complexity school -Examples of many types of collateral source benefits -Spectrum review of alternative legislative responses available: .Full retention .Retention with Subrogation/Indemnification .Discretionary elimination of evidence rule .Elimination of evidence rule .Discretionary elimination of damages rule .Elimination of damages rule .Mandatory reduction -Spectrum analysis of alternatives -If system other than full retention or mandatory reduction is to be chosen, must decide what collateral sources are to be effected -Examples of differentiations between various classes of collateral sources -Interaction on different levels of decision-making -Review of studies and study results available on issue of collateral source -Review of recent case law decisions on collateral source -Review of estimated savings, or lack thereof, in collateral source reductions

-Prevalent constitutional challenges to collateral source modifications
-Review of Iowa case holding collateral source reductions in medical malpractice constitutional.
-Review of actions taken in other states to modify collateral source doctrine

@0940 Commission discussion regarding collateral source rule. (Mr. Jack Grier, author of the Collateral Source Rule position paper of the Iowa Defense Counsel Association, joined the Commission for discussion).

-To what extent insurance policies have subrogation clauses for collateral sources
-Review of Blue Cross/Blue Shield subrogation system, and subrogation and indemnification figures for that group
-Concern for drafting to only limit true "double" recoveries
-Concern that purchased coverages by victims will in essence only benefit defendants
-Request that courts and juries at least be allowed to consider such circumstances
-Need to consider carefully the types of collateral sources which will be effected
-Problem that failure to allow juries to consider is increasing in severity given the present increase in purchase and use of collateral sources
-Whether fairness would require giving all defendant insurance information to plaintiffs as well
-Inherent conflict of "deterrence" and "compensation" approaches to tort liability system when considering collateral source rules
-Probable impacts of any change on the way cases are presently conducted
-Agreement that no rule can cover all circumstances - showing need for some judicial discretion to be built in
-Return to review of collateral sources as only one consideration in entire damages spectrum
-Procedural framework of intended system.
-Difficulty in handling evidentiary arguments on collateral source
-Difficulty of handling governmental benefits which may act as collateral sources
-Requests to open collateral sources to allow judicial consideration and determination
-View that any proposed system not be be a mandatory reduction system
-Illinois cases involving governmental benefits as relating to collateral sources
-Percentage of cases where collateral sources rule is actually involved versus larger percentage where it is potentially available
-Effect of collateral source rule on settlement practice of the ninety percent of cases not going to trial
-Potential need for more information regarding defendants

insurance if balance requested is to be assured
-Notation to recent supreme court case (September) requiring full subrogation in collateral source area
-Compensation and payment according to fault, rather than according to resources available
-Failure to see accurate cost/benefit analysis for requested change
-Unjustified actions on collateral source will simply shift burden to plaintiff or to society - and any from defendant
-Review of available information relating to collateral source savings
-Request for more documented evidence on subrogation savings
-Range of collateral sources which may not be effected by carefully drafted statute
-Return to basic argument that jury should be able to hear arguments relating to normal, nongovernmental collateral sources
-Centering of issue on insurancy policy benefits versus insurance policy benefits
-Need to limit application to only easily handled sources, due to problems of proof.
-Example using wage continuation plans
-Availability of information on defendant judgment capability
-Continuation of payments gratuitously is example of damages which plaintiff will not request in a case, making collateral source considerations moot.
-Review of example of V.A. hospital benefits as involved issues for collateral source
-Requests for additional information on collateral sources
  .Extent of subrogation in health plans
  .Additional 43 examples of types of collateral sources
  .Copy of recent Supreme Court Case referred to
  .Copies of all materials used for LSB presentation

@2835 Luncheon Recess
End of Tape 14

VCR Reading	Video Recording #15
@0000 @0630	Preliminary Afternoon Business -Dissemination and review of NICO study cited as showing 1227% profit increase for Insurance Industry -Dissemination and review of recent tort and insurance legislation in Florida, pursuant to earlier requests. -Dissemination and review of follow-up information received from the Medical Protective Insurance Company -Dissemination and review of Ludwig vs. Farm Bureau Bureau Insurance (Recent Iowa Supreme Court case on subrogation, which was the issue of earlier discussions). -Review of information gathered on issue of subrogation, using veterans administration system as an example. -Dissemination and review of additional materials relating to different types of collateral sources.
@0635 @1145	Collateral Source Rule Decision-making -Request for draft to repeal collateral source rule except in cases of federal and state disability and social security payments. -Clarification that proposal is only for elimination of evidence portion of rule. -Opinions regarding need to trust jury to be able to handle complex issue of collateral sources, as we do with other similarly complex issues. -Opinion that removing evidence portion of rule creates best chance for system equally fair to both sides. -Clarifications that it is proposed elimination of evidence rule with specific exceptions. -Discussion of whether to include medical payments. -Addition of allowing "cost of procuring" evidence to be introduced to jury, as corresponding adjustment. -Addition of allowing "rights of subrogation" evidence to be introduced to jury, as corresponding adjustment. -Discussion of potential court rule amendments and techniques to handle necessary procedural modifications for new collateral source rule. -Review of constitutional issues and potential challenges. -Summary review of rule being proposed. -Passage of recommendation (with additions) for drafting on voice vote.
@1150	Additional review of subrogation conversation with veterans administration officials
@1185	Maximum Caps on Liability -Location of issue on liability spectrum. -Review of cap systems in effect in all other states. -Basic points of difference of the many caps: .By type of damages

.By causes of action
.Use of alternative compensation methods
-Prominent constitutional challenges.
-Review of studies in the maximum caps issue area.
-Lack of specific data on the issue.
-Review of use of "pin-hole" and other cap-exceeding provisions.
-Various effects on economic versus noneconomic damages.
-Concern of allowing supposedly complete "caps" to be exceeded.
-Review of specific types of caps in place in other states.
-Particular approaches for funding of compensation funds.
-Discussion of various types of damages which may be effected.

@1780
@2904

Maximum Caps Decision-making

-Motions to draft entertained.
-Recommendation for a $200,000 cap, not effecting medical damages or wages.
-Different damages which may be include under economic versus noneconomic cap systems.
-Request to have additional information on spectrum of issues potentially involved set out for Commission, prior to final decision-making on caps.
-Request to move to limit number of options to be reviewed.
-Discussion of potential to include intent language in any proposed draft.
-Review of potential for determination whether proposal would in actuality have an effect on the problems.
-Discussion of previous presentations which requested or proposed caps.
-Review of evidence before Commission which fails to show or document a need for caps and proves a failure of caps to significantly effect premiums.
-Opinion that level of damages, as with all other damage issues, is issue best left to juries according to the facts.
-Search for balance in the civil justice system shows that while there were problems with the clouding of fault, juries and judges are beginning to reestablish needed stability.
-Assumable effects of caps, and failure of any court to ever impose such caps.
-For sake of affordability and availability of insurance, may need to take such a drastic step.
-Absence of limits destructive for society.
-Counter-point of lack of need shown by Iowa tort litigation study.
-Works heaviest burden on those most severely injured, creating a second victimization of the plaintiff.
-Increasing difficulty in "noneconomic" definitional distinctions.
-Purpose of establishing stability in civil justice and insurance system.

-Stressing that what is being discussed is only a preliminary draft - not an affirmative recommendation of any type.
-Review of legislative history on issue in Iowa.
-Discussion of refining motion as to defining more clearly those items potentially effected.
-Recasting of motion as a $200,000 cap on noneconomic damages for pain and suffering, loss of consortium, and loss of chance.
-Discussion of drafting alternatives.
-Potential for loss of deterrence, and creation of ability for defendants to analyze cost/effect and choose to continue unsafe or wrongful activities.
-Opinion that there exists no evidence that caps will significantly effect insurance premiums, which are driven almost totally by marketplace competition and the existing insurance cycle.

@2904 End of Tape 15.

VCR Reading	Video Recording #16
@0000 @0713	Continuation of discussion of proposed draft on limitations on noneconomic damages: -Interplay with punitive damages could get to issues not covered in noneconomic caps. -Reiteration that proposal is just that, a proposal. Not to be considered an affirmative recommendations until draft is later approved by Commission. -Motion to prepare proposed draft for a $200,000 cap on noneconomic damages for pain and suffering, loss of consortium, and loss of chance approved in voice vote (commission members Vilsack, Alexander and Jay voting nay).
@0175 @0368	Commission final consideration and decision-making on claims-made forms of insurance: -Review of claims-made forms. -Review of Insurance Department rules regulating claims-made insurance in Iowa. -Explanation of ISO claims-made policy forms. -Recommendation that final report show Commission review of issue, with the only affirmation recommendationthat "The Insurance Department continue its monitoring of claims-made and report to the legislature any new developments which may arise."
@0370	Commission consideration and decision-making on mandatory Insurance Disclosure Acts. -Review of mandatory insurance disclosure issue. -Review of S.F. 2103 (original form) of insurance disclosure bill. -Review of ability of Insurance Department to get all relevant data. -Ability or inability to receive data on a line-by-line breakdown. -Actuarial staff ability to target problem areas if line-by-line reporting was to be mandated. -What information won't be available even with increased staffing, due to poor reporting. -Requirement of company reporting could lessen resource needs of Insurance Department, by placing data burden on insurers. -Review of types of information already available. -Need for information to find out if caps would effect availability and affordability, and corresponding need for actuarial assistance in determining such effects in Iowa. -No specific recommendations at this time, with issue to

reappear on next meetings agenda.

@0916 Closing Business
@1220

-Municipal regulatory liability, to be moved to next meeting agenda.
-A real property improvement statute of repose, to be moved to next meeting agenda.
-Review of needed information necessary to determine if tort reforms discussed will actually effect insurance premiums.
-Review of further information needs.
-Discussion of next meeting dates.
-Distribution of earlier requested information.

@1222 End of meeting (end of tape #16).

OUTLINE OF THE VIDEO RECORDING OF THE NOVEMBER 6th AND 7th MEETINGS OF THE IOWA LIABILITY AND LIABILITY INSURANCE STUDY COMMISSION

VCR Reading	Outline of Video Recording #17
@0000	Preliminary Business
@0080	Report on the progress of the Commission regarding mandated and nonmandated study issues. (A written copy of this report is available from the Legislative Service Bureau.)
@0218	Regulatory and Licensing Liability of governmental entities (previously narrowed to subissues of "Discretionary Function" and "Municipal Tort Claims Notice Provisions". Review of issues by David Lyons of the Legislative Service Bureau.)
@0340	Panel discussion with Mr. Lee Gaudineer (Iowa State Association of counties), Mr. Roger Nowadzky and Mr. Terry Timmons (Iowa League of Municipalities).
@0355	Summary review of issues by Lee Gaudineer (ISAC) -Appreciation for past legislative efforts -Persistent liability concerns with discretionary function exemption. -Difference between federal (broad) and state (narrow) application of discretionary function. -Review of Iowa Supreme Court cases limiting further the availability of discretionary function exemption. -Request for legislative reconsiderations and reenactment of original purposes of discretionary function exemption. -Need for more concrete and straight-forward definition. -Review of impact of Miller v. Boone County Hospital (striking down notice provisions in 613A) -Review of previous municipal use of section 613A.5 -Expansion of claims as a result of court's action -Request to have new notice provision redrafted and placed in chapter 668 (comparative fault) to apply to all cases, in attempt to avoid constitutional equal protection arguments
@0560	Summary review of issues by Roger Nowadzky (LIM) -Appreciation for past legislative action. -Review of present case law on discretionary function -Difficulty in providing services once this exemption is eroded -Request for Service Bureau draft to enact original application of the discretionary function exemption, as articulated by the federal courts -Also stress need for some concrete examples of exempted functions need to be set out -Review of nature and impact of Boone County case

-Extent of undermining which will result from decision
-Interest in protecting cities from stale claims is still valid
-Interest in allowing cities to accurately plan and budget is still valid
-Interest in city settling meritorious claims is still valid
-Interest in having city quickly repair defective conditions is still valid
-Court's action as superlegislature
-Need to reinstate 613A.5 protection, with applicability to all claims

@0768 Additional Review of 613A.5 Notice Provisions by Terry Timmons (LIM)

-Still exist justifications for treating governmental entities differently in civil litigation system (with enumeration of examples)
-Potential impact of Boone County
  .Increased time to bring suit will result in more claims
  .More claims will increase insurance difficulties
  .Insurance problems will increase budgetary nightmare
  .Increased difficulty with claims-made forms of insurance in municipal field, due to immediate increase in "tail" liability because of case
  .Inability to do accurate risk management without quick notification of defects
  .Inability of city to defend itself against stale claims, or claims which cannot be proven to have arisen due to intervening factors
  .Inability to defend will result in more manufactured claims
  .Belief that legislative response should be to reenact shortened notice period and make it applicable to all claimants

@1225 Roundtable Discussion with Commission and Panelists

-Impending problems with claims made practice
-Constitutional alternatives in redrafting of notice provisions struck down in Boone County case
-Potential for redrafting away from "date of injury" provision to "discovery of injury" provision, with careful analysis required
-Need for legislature to redefine and reestablish its position of support for the notice provisions
-Difficulty presented by Boone County Case for legislative determination of effect of statutes enacted
-Difficulty with discretionary function presented by the fact that it is most needed where it is least effective
-Discussion of operationl versus planning functions within discretionary function area
-Applicability of concerns facing municipalities to the present potential liability of the state.
-Discussion of difficulties faced by state in discretionary

function restrictions being imposed by court
-Potential "two systems" court rules in municipal and state versus federal treatment of discretionary function, with municipal and state facing harsher court interpretations
-Review of legislation requested, both pertaining to discretionary function and statutory notice provisions
-Potential alternative to notice provision of shortening notice periods and making applicable to all tort cases, rather than just those relating to governmental entities
-Discussion of disseminated memorandums relating to discretionary function and notice provisions
-Applicability or inapplicability of alternatives for use in nongovernmental entity cases
-Review of present thoughts and approaches to treatment of governmental entities which negligently injure citizens
-Difficulty with specifically deliniating what rules or exceptions will apply for each and every possible fact situation, stressed need of flexibility
-General discussion of negligent activities in areas of both "operational and implementational" impact (using highway construction as example)
-General agreement that as relates to discretionary function the best approach is to draft Iowa's statute as following the federal court decisions on the issue
-Review of entities which would be covered by such a provision
-Discussion as to whether accurate and specific definition of "discretionary function" could be developed
-Potential additional dollars lost due to unrestricted notice provision
-Additional problems created in already tight insurance market by such an extension in notice provisions
-Applicability of alternative to private sector
-Potential effect of Boone County decision on recent efforts of municipalities to self-insure

@2075 Review of issue of statutes of repose for improvements to real property. Notice that provision on issue enacted during last session. Review of potential impact of enacted statute (H.F. 2442). Commission recommendation that final report show review - with no draft, considering passage of H.F. 2442.

@2150 Review of issue of Mandatory Insurance Disclosure Acts
-Available methods to presently obtain individualized date from the Department of Insurance
-Available methods to presently petition for data submission requirements changes
-General limitation of resources on data-gathering, but no limitation of authority to conduct additional data gathering
-Format difficulties in working with so many different insurance companies and insurance lines

-Past difficulties with data collection and distribution in insurance data promised to be avoided in the future
-"Open" approach now being taken by insurance department
-Future approaches possible to be taken in industry survey and/or data review relating to positive or negative impacts of tort liability modification by the legislature. Stressed difficulty with, and possible limitations of such approaches
-Potential for data isolation and collection of insurance and liability facts in that large percentage of cases that are settled, with incumbent difficulties. Individual data consideration needing to be taken into account if a "closed claim" study approach is to be advocated.
-Potential resistance from insurance industry. Necessity for such information to accurately track progress in liability area
-Difficulty in developing workable format for closed claim type studies

@2540 Punitive Damages

@2545 Review of Iowa Defense Counsel position paper on Punitive Damage Restrictions (Mr. Elgar).
-Fact that punitive damages is issue of national scope
-Appreciation of issues passed during last session in S.F. 2265
-Support for "model" act introduced but not passed last session
-Review of "model" act approach:
.Verdict must be unanimous
.Inadmissibility of financial condition
.Specific limitations on assessment
.Increasing standard of proof
.Bifrication of trial system
.Increasing burden of proof
.Restrictions of $ awards, and disbursement to state
.Ability to penaltize plaintiff's and plaintiff attorneys
-Review of rationales for implementation of "model" act approach

@2650 Question and answer period with Mr. Elgar and Commission members

-Discussion of monetary limitations on punitive damages
-Discussion of lack of data on extent of problem
-Potential for punitive damages to skew insurance industry view of liability potential
-Potential unfairness of imposition of punitive damages on different types of defendants
-Review of standards for punitives set out in suggested Model Act (and using Ford Pinto case as example)
-Interplay of punitive provisions with possible criminal provisions, and potential for providing that those items sometimes covered in civil arena will now be covered in

criminal arena
-Difficulty posed with low standards of proof in civil area to hold someone quasi-criminally liable for a punitive award - which is more like a criminal fine than it is recompense for personal injury
-Potential for solving some concerns for punitives by imposing criminal standards - and criminal judgments
-Review of background of proposed "model" act
-Problems associated with bifricated trial approach, and discussion of potential positive aspects of bifrication
-Discussion of whether the 10% limitation (punitive to actuals) is in effect a cap, although the defense counsel is not advocating a monetary cap
-Concern that no flexibility in punitive system may allow defendant's to continue to make dollar based decisions on liability risks they impose on the general public
-Punishment versus compensation basis of punitive awards

@2940 (End of Tape)

VCR Reading Recording #18

@0000 (Continuation of discussion relating to punitive damages)

-Concern for removing juries from only one aspect of trial
-Discussion of limiting punitives to one award for single occurrence
-Concern over mandating direct relationship between "actual damages" and punitive damages"
-Counter argument that insurance companies cannot actuarially build such a large unknown into rate-making
-Belief that punitive damages is way to keep persons from profiting from wrongful actions.
-Fear that "model" act would result in lessening of punishment and deterrence value of punitive damages
-Fact that punitive damages are awarded in only 7% of cases and result in only 11% of judgment awards.
-Discussion on whether Iowa study exists, or Iowa data could be collected, as to whether enactment of "model" would have premium impact
-Statement that defense group is planning to conduct a study to review such issues
-Result of criminal approach resulting in two trials and use of criminal sentencing, and general discussion of drawbacks of movement toward criminal system
-Review of lack of data on issue in Iowa and for nation as a whole
-Review of dissimilarities between punitive system and existing criminal system
-Fact that threat of punitive damages is perhaps more serious then actual litigation figures. Problem exascerbated by fact that most insurance policies make them uninsurable, resulting in personal threats to defendant to settle
-Discussion of whether removal of punitive would result in 11% reduction on liability insurance in state
-Belief that propensity to request punitive damages would decrease with movement toward criminal type system
-Possibility that recent legislative action (S.F. 2265) is already lessening propensity to request
-Potential that even if punitives restricted, court or jury could avoid restriction by making "punitive" award under different name. Discussion of how "model" act might protect against such award skew
-Discussion of whether legislative prohibition against insuring punitive damages would reduce propensity to request, with opinion that it would
-Discussion of whether legislative requirement of money to go to state would effect propensity, with opinion that it would
-Effect of contingent fees in civil system as potential

increasing factor for propensity to request punitive damages
-Failure of advocates to produce figures or facts to back up personal opinions given to the commission
-Opinion that figures may be produced within a year as result of large scale national study
-Statement that advocates of "model" bill are not requesting complete prohibition against punitive damages, reserving the issue for those extreme type cases
-Increasing problem of ulterior motives being behind preceived increased

@1408 Prejudgment Interest

Overview of issue (David Lyons - Legislative Service Bureau)

-Historical basis
-Rationales in favor of prejudgment interest
-Rationales against prejudgment interest
-Outlining of seven major subissues regarding prejudgment interest
-Status of issue in other states and in federal system
-Causes of action to which it may apply
-Damages to which it may apply
-When its accrual may begin, may be stayed, or may be restarted
-Location of issue on liability spectrum
-How rates are and may be fixed
  .Fixed statutorily
  .Evidence
  .Flexible tie
-New "weighted average method"
-Discussion of seven subissues, and explanation of present treatment in law
-Review of studies in area

@1800 Summary presentation and explanation of issue as advocated by Iowa Defense Council Association (Mr. Marvin Heideman)

-Position that prejudgment interest should be eliminated
-Opinion that prejudgment interest increases judicial caseloads and general claim filing practices
-Present 10% mandate does not reflect market
-Imposition does not differentiate between past and future damages
-Rewards plaintiffs for dragging case out
-Unjustifiably increases costs of settlements

@1940 Commission discussion on issue (with Mr. Hiedeman)

-Present statutory level set in Iowa at 10%
-Potential for both sides to be able to manipulate interest provisions for their own uses
-Potential for use in settlement, but no great effect in any but largest cases

-Removal of provision may result in increased defense manipulation of case
-Possibility of allowing interest issue to be determined by the jury, with corresponding removal of statutory provision setting interest
-Possibility of limiting effect of prejudgment interest to those damages where interest is actually lost. For example, pre- versus post-judgment damages
-Existence of a number of alternatives, and corresponding complexities
-Option to allow judge or jury to act as interest authorizer
-Difficulty of responding to different money values by legislation each time marketplace interest rates change
-Impossible to accurately estimate direct effect or number of cases filed which prejudgment interest provisions may apply to
-Different perspectives on effect of prejudgment interest on settlement practices
-Potential need for special interrogations or mandating itemized verdicts
-Need to create ability for rate to flex up as well as down
-Use of flexible tie system in federal court
-Exemption of state from prejudgment interest, and corresponding rationales for different treatment for state
-Potential to allow jury to have all sufficient information, and then also have them figure it in on awards
-Note that municipalities have requested exemption from prejudgment interest
-Opinion that mandating interst in all cases and for all damages may not be correct or fair

@2400 <u>Effect of failure to wear seatbelts on civil liability</u>

Overview of issue (David Lyons - Legislative Service Bureau)

-Review of congressional action on seatbelt requirements
-Review of Iowa actions in response to congressional action
-Present state of the issue in Iowa (S.F. 2265)
  .Not admissible in pre July 1986 causes of action
  .Not evidence of comparative fault
  .Can result in mitigation, but only if first introduced by substantial evidence - and then only to a maximum of 5% of damages
-Consequences to civil liability in other states having mandatory use laws
-Three general approaches

@2470 Commission Discussion of Issue

-Summary review of need for change (attorney general)
  .Need for personal responsibility
  .Creates conflicting message to that of criminal law

on issue
.Contrary to concept of comparative fault
.Creates inbalance between parties
.Goes against concept of trust in juries
.Not a rationale reason for 5% ;being chosen
-Clarification that all that is being suggested is removal of the 5% cap
-Potential for unexpected effect on settlement practices needed by insurance companies
-Ability of settlement negotiation process to handle issue as it does all other issues
-Review of history of issue in Iowa, and potential rationale being the existence of contributory negligence
-Position that jury should make award is also applicable to other areas discussed

@2652 Statutes of Limitations (with special reference to minors and medical malpractice)

Overview of issue (David J. Lyons - Legislative Service Bureau
-Background of issue, with general rule
-Creation of exceptions to general rule (specifically enumerated)
-Special application of certain statutes to minors, with examples
-Statutory review of statutes (and those referring to minors) in Iowa
-Review of status of issue in other 50 states
-Review of studies, and their findings, on issue
-Expected constitutional challenges to such a provisions enactment in Iowa (with case citations)
-Summary of potential effects, and alternatives in implementation strategies

@2775 Commission discussion of Issue

-Summary review of need for change (Dr. Eversmann)
.Obstetric practice in Iowa near collapse
.Long tails are unpredictable and cause insurance increase
.Tails not actuarily rational, with most injuries appearing within 2 years
.Room for compromise on issue
.Unfortunately, it is an economic problem
-Large cash outlays necessary to even quit practice, due to high cost of tail buy-outs on claims made insurance
-Failure of premiums to reflect state practices and laws within even the same region (using Iowa and Arkansas as examples)
-Fact that high Iowa premium is a result of high number of suits in obstetrical area in Iowa (explanation of IPMIT handling of obstetric insurance)

VCR Reading	RECORDING #19
@0000	(Continuation of discussion on statutes of limitations) -If length of time for injury manisfestation is short, compromise is available. Response was six years plus two years, as exists in number of other states -Recent activity of large insurers to remove from OBGYN area based specifically on high volume of losses -Fact that major OBGYN insurer is wholly-owned by doctors, and are not an insurance company trying to gouge the market -Lack of facts or proof that this type of action would result in premium decreases -Assumption that with this action, in conjunction with other actions, you will get a resulting premium drop to that of Indiana - or at least slow increases
@0330	End of November 7th meeting
@0335	Beginning of November 8th meeting
@0335	Preliminary Business
@0360	Structured Judgments (with special reference to medical malpractice) Overview of issue (David Lyons - Legislative Service Bureau) -Background of issue in Iowa -Advantage of use to plaintiffs -Disadvantages of use to plaintiffs -Advantages to defendant/insurer -Disadvantages to defendant/insurer -Advantage/disadvantage to attorneys -Expected constitutional challenges -Checklist of nine items for consideration in modification of present system -Review of Uniform Periodic Payments Act -Status of issue in other 50 states -Review of Iowa section 668.3, subsection 5 (S.F. 2265, section 39)
@0750	Commission discussion on issue -Use of structured settlements and judgments by state -Difficulty with structured settlements is securing their payment in future when insolvency of annuity issuer intervenes -Fact that only guarantee mechanisms in Iowa are in property casualty -- not life companies that are annuity issuers -Opposition to guarantee fund existing in life insurance companies

-Explanation of how Iowa guarantee mechanism would work
-Ability for structured settlements and judgments to restore stability that insurance companies want
-Extensive discussion of interrelated problems of future payments, interviewing insolvency, insurance law and tax law on the actual usefulness of structured payments. It is difficult to absolutely guarantee - and if you do, it is unfairly taxed as the asset of the plaintiff
-Commission discussion on methods to avoid preceding problem
-Effect on contingency fees
-Review of conditions required under the Uniform Periodic Payments Act
-Need to delineate guarantee method in any mandatory structuring statute
-Potential concerns relating to reversion of payments upon happening of event (for example, death of injured person)
-Studies citing cost savings of 9% to 11% where structured judgments with reversion clauses introduced.
-Current prevalency of structured settlement practice
-Recent failure of insurance companies to reduce premiums in states mandating structuring
-Discussion of Florida study, with failure to reflect any premium changes due to structuring mandate
-Effect of authorizing structured judgments or increasing use of structured settlements
-Complex nature of determining tax questions and results in relation to structured payments
-Clarification that tax questions relate to how to avoid paying taxes normally required, and not issue of being unfairly taxed
-Potential alternatives (trusts, bonds, etc.) for avoiding tax questions
-Importance of structured payments in protecting self-insured and insurance pooling arrangements
-Need for further tax and alternatives to guarantee information

@1885 Nonmeritorious Actions

Overview of Issues (David Lyons - Legislative Service Bureau)

-Historical background
-Traditional common law reviewed (with explanations)
  .Malicious prosecution
  .Abuse of process
  .Defamation
  .Intentional infliction of emotional distress
-Other possible nonstatutory responses (with explanations)
  .Federal rule 11
  .Rule exceptions for "common fund", "prior litigation", and "bad faith"
  .Federal rules 36 and 37(c)
  .Federal rule 68

-Statutory response (with explanations)
  .Sec. 1927 (Judicial Code)
  .Sec. 262 (Judicial Code)
-State responses, with major variations concerning:
  .Standard of conduct for which imposed
  .Whether imposition discretionary or mandatory
-List of states taking recent or innovative actions on issue
-Potential for attorney liability, with corresponding rationale for and against such liability
-State of the issue in Iowa
-Iowa comparison to other states

@2290 Commission Discussion on Issue

-Possibility of researching ability to develop certificate of merit approach
-Present activities now taking place in court system to alleviate problems with low merit cases
-Request for statistics on prevalence of frivolous suits, with recognition of factual versus political considerations
-Expense of defense in low merit cases is problem in and of itself
-Difficulty of data collection in area
-Fact that much, if not large majority, of frivolous action taking place is in nontort areas
-Potential for erosion of public trust in system vs. going too far and chilling meritorious actions
-Difficulty in defining "frivolous" or "nonmeritorious", and inability to operate effectively without such definitions
-Potential for further burdening court system
-Increased difficulty of problems in medical malpractice area
-Ability for increased specialization in legal field to assist in keeping low merit cases out of system
-What is needed is not to bar "low merit" cases, but to create a system where these cases are weeded out of the system as soon as possible
-Discussion of "early review" mechanisms and how burden may be directed differently (for example - certificates of merit (plaintiff burden) versus affidavits of non-involvement (defendant burden))
-Review of problems with present system as regards early or summary dismissals
-Problem with early review mechanisms as coming before necessary discovery to base claim can be completed
-Discussion of possible help in the area due to Supreme Court efforts to establish mandatory time procedures for cases

@2750 Return to Discussion of Effect on Nonuse of Seatbelts on Civil Liability

-Review of position by attorney general
-Clarification that only five percent maximum is to be removed
-Effect on insurance practice which could result
-Request for information on insurance practice issue
-Possible effect or extension to those not legally required to use seatbelts

@2912 (end of Tape #19)

VCR Reading	Outline of Video Recording #20
@0000	(Continuation of discussion relating to effect of nonuse of seatbelts on civil liability)
	-Reduction in recent questionable "comparative fault" actions by insurance companies. -Need for there to be direct action available against insurance companies who engage in the questionable practices -Review of present mechanisms of Insurance Department to control such practices -Publicity available for department actions -Discussion of Iowa history on issue of automobile or cycle safety, which history bearing little relation to logic
Motion adopted	-Motion to draft recommendation proposed to remove 5% cap on seatbelt liability adopted
@0615	Defense/Plaintiff Costs and Fees (with specific reference to contingent fees)
	Overview of issue (David Lyons - Legislative Service Bureau) -Review of contingent fee system -Traditional arguments for and against contingent fee contracts -Measurement of merits and efficiency according to three major socio-economic factors .Attorney effort .Risk aversion .Effect on caseload -Analysis of contingent fee contracts according to socio-economic factors -Review of alternatives in contingency fee restrictions .According to amount .According to form of resolution .According to judicial mediation .Flat caps .According to types of damages -Associated data of interest regarding contingency fees in medical malpractice area -Review of studies and findings in area -Recent legislative activity of other states on issue -Status of issue in other states -Summary of findings by academicians
@1170	Commission Discussion on Issue
	-Problems are more with high costs of defense rather than high costs of contingent fees -Doubts as to whether contingent fee limitations would have any result on insurance affordability or availability -Present practices in Iowa relating to reduction of

contingent fee by attorneys themselves, or by the courts generally
-Review of present attorney fee rollback provisions in medical malpractice. Question as to whether it is actually being used, and perceived unjustified levels of attorney renumeration for services rendered
-Need for attorneys to police their own on issue of fees
-Philosophical problems with arbitrarily setting fees
-Policing mechanisms and suggested guidelines now in place (both state and federal)
-Extensive costs of bringing malpractice actions and high risk of losing make larger contingent fees reasonable
-Question of "up front" requirements from plaintiffs even before contingent fee evaluation is finished
-Request that the Iowa Bar Association establish more extensive contingent fee policing and practice suggestions
-Potential problems with minimum fee schedules
-Available triggers for contingent fee review by courts, and to lesser extent by the bar association grievance committee
-Inability for court to review defense fees
-Discussion of contingent fee reductions for structures judgment cases

Motion

-Motion to draft recommendation to cap contingent fees at 33% of first $100,000, with 25% cap for amounts above $100,000
-Little concern now existing in clients, who are really paying the bill
-Contingent fees not paid by defendants, so little
that evidence will effect insurance premiums
-Question of whether arbitrary contingent fees by contract actually relate to work performed - or are more 880
-Lack of similar restrictions on other professionals, including insurance companies and their agents
-Poor leverage and information of clients to afford to negotiate in contingent fee systems. Protection provided by restrictions goes to plaintiffs most in need of protection
-More direct effect of defense fees on insurance costs than plaintiff fees
-Different bargaining power to plaintiffs versus defendants, and difficulty with trying to handle defense fees by statute
-Effect of competition on contingent fee system
-Implicit assumption that juries already award amounts to cover what they feel will be needed for the contingent fee
-Discussion of whether sliding scale renumeration already exists in other aspects of insurance industry (insurance agents as example)
-Protective state attitude in private negotiations may be poor recommendation
-Unless similar restrictions are going to be made on other areas of system, we may be unfairly effecting plaintiffs
-Potential for extending judicial review available in

medical malpractice to all cases - with availability to review defense fees also
-Complexity with including defense fees, which are not on a contingent basis
-Potential for problem to lie with failure of contingent fee to reflect work of attorney, where defense fees are justified on an hourly basis. However, problems do exist in documenting defense fees as well
-Difficulty in comparing plaintiff and defense fee systems
-Fact that contingent fees cut into victim compensation
-Fact that restrictions exist in other areas, especially on what doctors may charge in fees
-Reitration that 33%/25% option applies to all suits pursuant to chapter 668

Vote -Motion fails on vote of 5 ayes, 7 nays

@2420 Judicial Data Collection

Review of issue (David Lyons - Legislative Service Bureau)
-Present status of judicial information
-Current efforts of judicial department to update and streamline data collection (Ms. Nancy Shimanek)
-Potential effectiveness of data collection, and potential costs of system
-Final progress report available by last commission meeting
-Ability or inability for court to gather settlement information
-Central hardware mechanisms to assist in data collection integration
-Availability of other uses for judicial date in the legislative area
-Technical problems and potential solutions in actual hardward and dissemination situations
-Work with telecommunications council
-Discussion of mandatory case processing guidelines presently being developed within judicial department
-Observation that data gathering is important, but that logical decision making can and should occur even if absolute data is not available - especially since many of the issues being discussed are not subject to absolute data
-Difficulty of only making decisions in microism, and still getting accurate results system wide
-Dynamics of legal system often create changes based only on available data, not absolute data, and therefore there is a similar need for such action on the legislative level
-Opinion that at most basic level, if you are taking away substantive rights you should have some assurance that the identified benefit will be obtained
-Opinion that failure to take any action will simply worsen the problem for all citizens, while only partially protecting those individuals using the system
-Fact that voters in Arizona refused to remove constitutional prohibition of such items as caps

VCR Reading	Recording #21
@0000	(Judicial data collection continued)
	-Need for information that was presented in NCSC study to be continued to be collected by judicial department
Unanimous consent	-Support for judicial department efforts on data collection
@0140	Insurance Department Data Collection
	Review of issue to date (Dave Lyons - Legislative Service Bureau)
	Commission Discussion -Need for state experience to be center of data collection -Potential to protect state from being rated with states of greater insurance losses -Review of potential for closed claims (large effort up front versus collection system overtime) -Best use of resources, since closed claim is expensive proposition -Need for legislature to receive Iowa based loss data, especially in the volitile lines -Potential for 6 month periodic reporting of loss data, insured data, and volitile lines -Less need for such efforts in competitive lines -Need to have mechanism to alert the legislature when upcoming problems are received -Review of Wausau type insurance insolvencies -Ability for insurance department to collect settlement data to augment that litigation data being collected by the judicial department -Difficulty for formatting approach to doing on-going closed claims or settlement research (using AETNA Florida survey as example) -Difficulties and expenses of one shot closed claims versus ongoing monitoring system using existing department resources. -Potential for survey to at least predict whether proposed reforms will have any effect -Need for itemized information from insurance companies, and incumbent difficulties with formatting such process -Opinion that ongoing monitoring program is best use of available resources -Difficulties presented by different reporting methods and different reporting abilities of the various size insurance companies in Iowa -Agreement that there is no magic format, but opinion that format should be available up front.
@0890	Closing Business
	-Future meeting dates -Difficulty with finishing work in only two meetings

OUTLINE OF THE VIDEO RECORDING OF THE NOVEMBER 24, 1986 MEETING OF THE IOWA LIABILITY AND LIABILITY INSURANCE STUDY COMMITTEE

VCR Reading	Video Recording #22
@0000	Preliminary business
@0125	Issue: Statute of Repose for products liability -Dissemination of ABI position paper -Introduction of Mr. Robert Fanter (Whitfield Law Firm) and Mr. Steve Frankel (Deere and Company) appearing on behalf of industry interests Review of Issue area and industry approach to problem (Fanter) -What a statute of repose is designed to do -Reasons for supporting a product liability statute of repose -Ability for statute of repose to address specific problems, including: .Present "penalty" for building "long-life" product .Would place maintenance burden on owner, not manufacturers who no longer control product .Would decrease extreme difficulty to presently defend against such claims .Decreases unpredictability of claims chills new product ventures .Would reduce costs of product liability insurance -Request for legislative action on statute of repose
@0410	Commission discussion of issue with Mr. Fanter, Mr. Frankel and Mr. Sampson (ABI) -High % of cases appearing within 10 year limit -Observations of factual instances in which these reform issues appear .Burden of proof shifts over time to defendant, for all practical purposes .Difficulty of documentation after 10 years .Disappearance or transfer of involved individuals needed for defense .Design is for existing societal needs versus juries down the road looking at societal needs at time of later trial .Potential uses of injury instructions lessened by juries refusal to abide by them -Review of costs associated with product liability over time, by example -Increased difficulty created for manufacturers when their products are made too well - and thus remain in use for extremely long time -Allegations that costs of awards and settlement significantly up -Allegation that 10 year statute of repose has significant effect in those states enacting

-Increased difficulty of historical manufacturers to compete against new comers due to fact that liability for historical company is high
-Review of practical effect of "state-of-the-art" defense enacted by legislature, with allegation that the defense does not go far enough
-Bottom line observation that these issues cannot be left to jury
-Competing interest of balance versus complete bar of rights
-Review of interplay with issues such as prolonged exposure, delayed manifestation, or other safety issues which naturally involved "harm" periods over ten years long
-Review of ability to handle such issue with exceptions such as delayed manifestation or intentional misrepresentation or concealment
-Comparison with medical malpractice repose
-Addition of Mr. Russel Sampson (ABI) to panel discussion
-Representing extended life of product (waranty) by manufacturer should open up the liability for the warranted period of years, not a simple 10 years across the board
-Potential conflict between warranty statutes and proposed repose statutes
-Review of case examples of interplay between tort theories and statutes of repose. (Reuse and return of product to stream of commerce, as example)
-Difficulty with manufacturer tracking and reviewing product once it enters the stream of commerce
-Potential to develop a "presumption" system regarding product safe -lives, which would be rebuttable, instead of 10 year statutes of repose
-Discussion of reservations regarding a presumption system
-Opinion that 10 years of liability is more than enough incentive to develop and market safe products
-Review of approach involving statute of repose versus statute of limitations
-Problem of open-ended perpetual liability on product costs and costs passed on to society
-Allegation that those most helped by presumption system are the attorneys, since claims would still be litigated
-Discussion of lack of information that such legislative actions would have an impact on manufacturer's insurance premiums, with opinion that although no specific information of premium decreases exists - manufacturer's would expect rate decreases
-Desirability of tieing reforms to premium rollbacks
-Review of collateral goal of getting more of the awards into the hands of the victims to assure compensation
-Review of "full bar" mechanism being sought
-Discussion of fact that federal action on this issue is the optimum approach, due to the fact that products cross state lines

-Review of present insurance premium setting policies, with recognition that the longer your product lasts - the higher your risk and therefore the higher your premium
-Examples of effects of such policies on small manufacturers
-Without federal initiative, could create false sense of security. Retort that small manufacturers are not "nationwide" risk, and would therefore be assisted by statute in state
-Competition is in an international market place, and whether tort system deters or chills necessary extreprenurial risk-taking
-Review of particular problems faced by such Iowa manufacturers as Deer and Company, Case, Maytag, etc.
-Interplay with product strict liability
-Complexity of product liability issues when reviewing acquisition or mergers in todays business climate
-Although nationwide approach is best, do need to take state action to begin remedy of problem
-Clarification that repose would start at entry in commerce (sale or purchase) and that repose would not change workers compensation system
-Insufficient information relating to Iowa Cases, Iowa losses, and "runaway" Iowa juries
-Need to create a system that ensures insurance availability so that persons who are injured can collect. Creating system where persons going uninsured creates system where no compensation will be made
-Review of Iowa data which is available, and review of hoped premium reduction that would result from proposals
-Ability to look at economic incentives as factor for actions based on societies needs. Perhaps the creation of an alternative compensation system for those cut off by law, to be administered by state. This system could protect both the manufacturer and the injured person.
-No definitive proof to date on premium reaction to reforms

@2360 End of Panel Discussion

Further Commission discussion on Issue:
-ABI material makes no legislative proposal
-Ability to get working papers on statute of repose
-Request to staff to do mailing of options and other state actions on repose issue
-Potential addition of professional statute of limitations material in the mailing
-Difficulty in completely distinguishing between statutes
-Request to ABI to send additional statute of repose language proposal to Commission

@2475 End of Tape 22

VCR READING	RECORDING #23
@0000	Preliminary afternoon business
@0115	Issue: Workers' compensation system interface with chapter 668 -Dissemination of defense counsel position paper on issue -Introduction of Mr. David Phipps, appearing on behalf of Defense Counsel Association -Presentation by Mr. Phipps .Present comparative fault system incomplete .Inequities exist in that "at-fault" employer can still escape liability while "at-fault" manufacturer can still be held to pay more than their percentage of the damages -- in contravention of principles set out in chapter 668 .Explanation of proposal, and procedures for implementing it .Examples of outcome of proposed interface .Review of suggested statute
@0455	-Potential for proposal to create additional conflicts in the employer/employee relationship that do not presently exist. Reply that could in fact foster better relationship since employer's workers' compensation carrier would need to be involved and active at earlier time, thus being beneficial to employee -Potential for proposal to create interplay and conflict with the collateral source proposals being brought forward -Request for information on states which have already attempted the interface -Explanation of where proposal language originated, as original Iowa comparative fault proposal provision -Review of concerns which arose when issue first discussed by Comparative Fault Committee in 1984 -Review of discussion on issues within the various industries -Review of prospectives of employers, employees, and third party insurance companies -Present state of workers' compensation insurance in Iowa -Potential for present system to still allow deep-pocket recoveries in conflict with intent of chapter 668 -Concern with undermining the "sole remedy"theory of recovery in workers compensation -Potential effect of system on Iowa market for workers compensation -Estimate by insurance representatives that effect of proposal would be negligible
@1040	Issue: Alternative Litigation Methods/Systems

Overview of issue area (David Lyons, Legislative Service Bureau)
-Outline of different approaches available, including:
  .Negotiation
  .Conciliation
  .Mediation
  .Fact-finding
  .Mini trial
  .Arbitration
-Distribution of explanation memorandum
-Distribution of outline of recent activities of other states
-Review of present status of alternative litigation systems in Iowa, with specific review of Iowa Model Arbitration Act (chapter 679A)

@1280 Commission Discussion on Issues

-Need to avoid creating a system that would simply provide that cases get tried twice
-Review of chapter 679A toward possibly increasing the scope and number of cases which would be subject to binding arbitration
-Opinion that efforts in this area will result in abuse or misuse of process if not done carefully
-Opinion that changing confessions of judgment system would have better result in this area
-Potential to tie mandatory arbitration to those cases below a certain dollar value, similar to approach in small claims system
-Potential to achieve same result by increasing dollar limits on small claims
-Concerns regarding making major changes in civil jurisdictions
-Problem with dollar valuations, and potential that the increase in use of a new procedure could result in a reduced use of preclaim or pretrial settlement
-Discussion of procedural items in 679A
-Expression of hope that Commission can at least start the process to increase the use of litigation mechanisms that speed resolution, decrease costs, and relieve burden in district court
-Analogy to small claims court on speed, costs, and lifting of some of civil court burden
-Need to review the concept in two forms -- to help present system and to develop new approaches
-Difficulty of exploring issue in Commission, raising potential need for further study commission or committee
-The recommendation for further action may be exact type of thing that commission should be doing. Need to get issue before the legislature
-Potential concerns with making too specific a recommendation without first doing the needed research
-Potential for having supreme court review of existing alternative dispute resolution mechanism in place, and review for additional mechanisms

-Potential for recommending raise in small claims system to get some of these possible gains
-Current efforts in other jurisdictions to waive small claims limit and in essence expand on their own
-Difficulty of limits since we also limit district associate judges to $5,000
-Observation that court congestion comes from civil filings other than torts
-Effect of alternative dispute resolution mechanisms are to undermine jury system
-Positive aspect of having supreme court involved in review

@1815 Mandatory Insurance Rate Adjustments

-Noted that perhaps rate adjustment discussion best left until after tort reform proposals are finalized
-Need for starting discussion on issue in preparation for final reports
-Review of present court action regarding Flordia mandated rollback, which has been upheld to this point
-Need for specific data on premium reductions and availability effects of tort reform
-Review of lack of evidence on tort reform impact versus large effect of insurance cycle
-Lack of administrative code references to property casualty industry
-Need to look into:
  .Passing legislation requiring insurance companies to report on premium reductions for tort reforms
  .Empowering insurance commissioner to develop flex-rating system of overview of rationales for 25% or greater swings
  .Empowering specific use of state experience rating
  .Empowering the collapsing of high risk areas
  .Empowering authority for state funded underwriting program for unavailable lines, with same potential in reinsurance programs
  .Require constant updating on insurance problems, such as closed claims monitoring
  .Iowa rating on Iowa experience requirement, unless level of experience not significant in Iowa
  .Potential for consumer advocate position aligned with insurance department
-Response by insurance commissioner:
  .Lack of administrative rules is result of rate regulation in P/C being statutory
  .Flex band issue is okay to propose, but difficult to implement
  .Reviewing state based insurance and reinsurance fund for hard to place is good idea and power may already exist
  .Market place of doctor-owned companies adequately works in state and individual rating of malpractice
  .Discussion of funding mechanisms

.Closed claims studies, will try
.State based experience is already authorized, and further restrictions will be two-edged sword
.Consumer advocate would increase difficulty in department carrying out its job

-Difficult nature of insurance department work, and potential additional burdens which Commission recommendations might make
-Should be centering on those who cannot get insurance at all
-Potential existing powers provided to insurance department by S.F. 2265
-Review of powers in state-based pools, and request to have pool concept confined to those areas where no availability exists -- the pool should not compete with private market.

Motion — Motion for such a draft recommendation

-Review of S.F. 2265 powers which exist
-Suggestion that should be setting up these mechanisms, not just recommending
-Possibility that even if pool set up, the premium could still be somewhat prohibitive
-Potential for there to be a need for the state to subsidize the rates or losses somehow
-Risks involved when state subsidization begins occurring
-Recent trends in Iowa affordability and availability issues, and adverse consequence that pool will have unless liability is stabilized.

@2685 — End of Tape #23

VCR Reading	Recording #24
@0000	(Continuation of discussion regarding insurance reforms) -Review of motion regarding insurance recommendations -Decision that date of required reporting be February 1st
Adoption	-Motion, as restated, adopted -Return to issue of evaluation of tort reform efforts, as relating to premiums, and request to have Insurance Commissioner solicit and review such data for insurance companies for post 1983 reforms -Discussion of possible specifies for recommendation, using New York law as example -Concerns that there are too many variables to simply separate out "tort reform" -Difficulty in data collection format structuring -Need to allow flexibility in reporting and timing requirements to commissioner as appropriate -Review of concerns with such request, and potential for data to mislead or fail to isolate on particular issues. Additional review of cost requirements and resource requirements -Need to take into consideration other restrictions on impacts on rate making practices -Review of similar information which does exist, using medical malpractice information as the example
Adoption	-Review of recommendation, motion adopted
@0900	Commission discussion regarding remaining issues -Judicial department data collection -Objection to review of drafts without further time for review -Adjournment of meeting, remaining issues to appear on next meeting's agenda
@0960	End of Tape 24

OUTLINE OF THE VIDEO RECORDING OF THE DECEMBER 2, 1986 MEETING OF THE IOWA LIABILITY AND LIABILITY INSURANCE STUDY COMMITTEE

VCR Reading	RECORDING #25
@0000	Preliminary Business -Roll call -Requirements for final report drafting -Compliments to commission -Unique nature of commission
@0114	Review of those recommendations already made, pending final approval
@0116	(1) Alternative dispute resolution mechanisms recommendation -Review of drafted recommendation by staff -Review of interplay with judicial council -Planned activities on judicial review mechanism -Review of underlying rationale behind form of recommendation -Need to notify courts quickly of this recommendation -Discussion of different uses of alternatives to remove nontort cases from crowded civil system Adopted with unanimous consent
@0500	(2) Insurance availability (state based assistance) -Review of drafted recommendation by staff -Motion to amend to include "functional unavailability" as well as factual unavailability -Concern over number of issues being brought within responsibility of Insurance Commission -Clarification that notation should be to insurance "not currently available or affordable" Adopted with unanimous consent
@0665	(3) Rate regulation overview (flex band system) -Overview by staff -Problems forseen in flex band, especially where it could prohibit insurers from decreasing rates -Potential effect of band to drive insurers out of market -Ability of insurers to seek waiver or exception of band prohibitions as necessary -Reservations regarding flex-rating as far as practicalities of system are concerned -Review of past premium reductions below what would trigger flex band system -Fact that if you continue to rely solely on market to set prices, you will continue to have a destructive insurance cycle. Fact that flex band could result in stability, but could bring heat on the insurance department -Potential that market concerns are not of bearing, since recommendation only goes to noncompetitive areas Adopted with unanimous consent
@1115	(4) Impact of reforms (premium actions as a result of tort

reform)

-Review of recommendation by staff
-Discussion of how long "as such times as appropriate" would be in requiring the submission of such data
-Review of previous type study by Attorney General's office
-Need for funding discussion in order to give Insurance Department sufficient funds to carry out these new recommendations
-Review of similar date submissions in other states
Adopted by unanimous consent

@1350 Review of Aetna/St. Paul studies being referred to, and Mr. Byers' observations as to the reasons why prior information received has been misleading or at least has conveyed less than the full picture to the Commission. Includes responses by Mr. Vilsack and Dr. Eversmann regarding both Florida and Washington state data

@1730 (5) Letter of support for and request for further material from state risk manager
-Review by staff
Adopted by unanimous consent

@1745 (6) Letter of support for grant application of state board of medical examiners
-Review by staff
-Note that Insurance Department hs done likewise
Adopted by unanimous consent

@1760 (7)Recommendation relating to statutes of limitations for improvements to real property
-Review by staff
-Review of history of issue during last session
-Note that product reprose is contained elsewhere
Adopted by unanimous consent

@1800 (8) Contingent fee recommendations
-Review by staff
Adopted by unanimous consent

@1820 (9) Claims made forms of insurance
-Review by staff
-Note that GAO study presently under way on issue and should be available shortly
Adopted by unanimous consent

@1850 (10) Judicial department data collection
-Review by staff
-Note that several federal rule 11 studies show that process is working
-Review of timing implementation for full data collection program by the state
-Continuation on NCSC study data collection efforts on state level

-Data of this type should be forwarded to the Insurance Department to assist in their rate-making review process
-Would like to see pleadings also reviewed by this system
Adopted unanimous consent

@1900 Concern expressed that should be moving more quickly to substantive issues

@2040 (11) Insurance division data collection
-Review by staff
-Concern over state based loss data isolation capability
Adopted by unanimous consent

@2076 (12) Prejudgment interest
-Review by staff
-Note that should include the recommendation to look at prejudgment interest for municipalities
-Concern that this issue should be a strong recommendation, boarding on an actual draft. Opinion that something more than a simple consensus exists
-Discussion on extent of commission progress to date
-Potential need for special interrogatory approach
-Review of potential to redraft recommendation
-Wish to recommend action rather than study
-Review of additional alternatives for redrafting
*-Deferral of issue for redrafting of alternatives

@2430 (13) State and municipal liability (discretionary function)
-Review by staff
-Notation that recent Nordbroke case may have significance in this area, moving in direction of federal case law decisions
-Concern expressed that only another study
Adoption by unanimous consent

@2480 (14) State and municipal liability (613A.5 notice provisions)
-Review by staff
Adoption by unanimous consent

@2520 (15) Mandatory Insurance Disclosure Act
-Review by staff
Adoption by unanimous consent

@2550 (16) Nonmeritorious actions/frivolous suits
-Review by staff
-Concern that chapter 677 part of recommendation should apply to both defendant and plaintiff attorneys
-Concern that requested language on certificates of merit should have been made available

@2620 -Deferral until language available on certificates of merit

End of Tape 25

VCR Reading	Recording #26
@0000	(Afternoon session)
@0010	Return to issue (16) and dissemination of example Certificate of merit draft for medical malpractice -Review of draft by staff -Notation that language taken for medical society bill of 1985/86 -Commission discussion of form of inclusion for this draft in final report -Commission review and modification of draft -Concern regarding whether certificates are subject to persons changing their information, thus slowing process Adoption by unanimous consent of recommendation as proposed and modified
@0510	Return to issue (12) and distribution of four redrafts requested of prejudgment interest recommendation -Review of differences in drafts -Motion to adopt Halvorson redraft, and review of redraft -Review of "itemization of verdicts" language, and request to reverse the order of the two sentences - with request adopted Adoption of recommendation (12) as amended
@0748	(17) Workers Compensation Interface -Review of drafted recommendation -Adoption of recommendation
@0777	(18) Punitive Damages -Review of drafted recommendation -Request to remove paragraph #4 -Concern that recommendation does not properly reflect earlier discussions or extent of existing problem -Need to include language to note concern over use of punitive damages as threat device to force expensive settlements *-Deferral of issue until amendment drafted
@0925	(19) Civil Liability For Failure to Wear Seatbelts -Review of draft recommendation -Concern raised that preparatory language to proposed draft did not approach the issue strongly enough -Review of rationales for adoption of such a proposal -Request for modification of drafted preparatory language -Review of contained issue on direct cause of action Adoption of recommendation (19) as modified
@1120	(20) Statute Of Repose For Products Liability -Review of draft (as requested by Mr. Byers)

-Basis of draft language used
-Overview of approach taken by Mr. Byers
-Review of earlier discussion relating to development of fund to protect those cut off by arbitrary statute
-Analysis of earlier discussion on state created fund and fact that manufacturer will take subsidization, but this approach could be expensive and difficult to administer
-Potential use of S.F. 2265 punitive damages fund previously set up
-Concern that to water down the statute of respose would be to fail to cut off any of the expensive litigation
-Opinion that there may be need for state clearinghouse on defective product information
-Adoption of compensation fund concept for inclusion with this draft in final report
-Clarification of motion and discussion of where it will appear in final report
-Reiteration of need for protectionary device to protect individuals inured by tort reforms
-Effect of secondary fund use in Iowa
-Need for finality in tort system
-Wish of Mr. Vilsack to be noted as disagreeing with concept unless clearinghouse included
Adoption of proposal as amended

@1700 (21) Collateral Source Rule
-Review of draft by staff
-Proposal to apply new rule only where $100,000 minimum value involved
-Fact that this proposal is based on trusting juries
-Review of factual examples of how system might or might not cover specific circumstances
-Potential need for special interrogatory requirement, discussion of issue
-Discussion of treatment of group life insurance in proposal
-Proposal to specifically exempt group life insurance from coverage
-Review of $100,000 trigger proposal
-General commission concerns with entire approach
-Rejection of amendment
-Review of interrogatory proposal
-Amendment adopted
-Review of life insurance exemption amendment
-Amendment adopted
-Review of final proposal as amended
Recommendation adopted as amended

@2150 Return To Consideration of Recommendation (18) On Punitive Damages
-Review of substitute language for removed paragraph #4
-Deferral until language drafted

@2200 Return To Consideration of Recommendation (20) Statute of Repose

-Proposal to expand concept to 10 year statute of repose on professional services
-Review of potential drafting approach for such a statute
-General Commission review, potential for inclusion of compensation fund coverage
-Review of final form of recommendation
Adoption of recommendation as (20A)

@2310 (22) Caps on Noneconomic Damages
-Review of draft proposal by Commission Staff
-General Commission discussion on approach
-Request to move language through the sections to provide that instructions and interrogations necessary unless all parties agree otherwise
-Request adopted
-Proposal to amend to allow judge to authorize exceeding cap when necessary to avoid economic hardship (Pin-Hole)
-Review of "pin-hole" proposal
-General discussion of proposed amendment as to use, procedure, and negative effect on cap implementation
-Doubt that this whole proposal would have intended effect on premiums, or is in line with Iowa experiences
-Proposal effects only those most severely injured
-Proposal takes away right of juries to decide issues based on facts presented
-Additional amendments proposed:
  .Limit to pain and suffering
  .Raise limit to $400,000, as suggested by Governor
  .Escape mechanism when judge deems appropriate, or tie to alternative compensation fund
  .That limit applied "per defendant" not "per plaintiff"
-General review of issues, combination of two amendments relating to court discretion
-Individual discussion and stand points on caps
  .Caps put system out of balance on other side
  .Takes away power of juries
  .Concept is doubtful for success
-Substitute motion to make no recommendation, but advise on correct approach if action is taken legislatively
-Concern that recommendation needs to be made one way or another by Commission
-Concern over lack of information on specific problems with noneconomic damages in Iowa
-Proposal runs counter to "trust juries" arguments used for earlier proposals adopted by Commission
-Review of impact of unpredictability of noneconomics on whole problem area
-Clarification that proposal does not apply to any economic damages, and review of estimated savings advanced in review studies
-Potential for proposal to lessen deterrent effect on wrongful activities
-Restatement of substitute motion for no recommendation, but advisement if legislative action to be taken
-Substitute motion fails on roll call vote (5 ayes, 7 nay)

-Restatement of judicial discretion amendment,
"Pin-hole",
and review of pin-hole mechanisms and compensation fund systems
-Amendment adopted on voice vote
-Restatement of limiting application to only pain and suffering, and explanation of rationale

@2930 End of Tape 26

VCR Reading	RECORDING #27
	(Continuation of discussion of noneconomic caps proposals)
@0000	-Commission discussion on judicial decisions relating to "loss of chance" doctrine -Review of drafting style of proposal -Rejection of proposed amendment to reduce to only pain and suffering on voice vote -Restatement of amendment to raise cap level to $400,000, similar to recent governor's suggestion -Review of information on issue as proposed -Discussion of tying to mandatory insurance rollback -General discussion of approach to noneconomic damages -Fact that $200,000 level as proposed would be most restrictive of any system in place in all 50 states -Rejection of $400,000 amendment on roll call vote (6 aye, 8 nay) -Restatement of proposal to amend to apply cap "per defendant" rather than "per plaintiff" -Adoption of proposed amendment on voice vote -Discussion of possibility to increase jury instruction directions to juries, with explanation of potential use of such instructions -Review of "pin-hole" mechanisms -Withdrawal of instructions proposal -Proposal to amend the draft to include a two-year indexing mechanism for the $200,000 cap -Adoption of indexing amendment by unanimous consent -Proposed amendment to sunset cap provision after four years of enactment -Discussion of sunset amendment, and ability to show effect within such a time period -Proposed amendment fails on voice vote Final cap proposal as amended, adopted on roll call vote (8 ayes, 4 nays)
@1290	Return to discussion of (18) punitive damages -Distribution of proposed new paragraph #4 -Discussion of new proposed paragraph #4 -Review of potential to redraft to also note concerns with standard of proof, as well as burden of proof -Motion to redraft for standard of proof fails on voice vote -Proposed new paragraph #4 adopted by voice vote Recommendation (18) adopted as amended on voice vote
@1540	(23) Insurance resource and regulating priority draft -Review of recommendation by staff -Review of whether appropriations will be necessary to accompany bill -Recommendation to add language asking authorization of sufficient funds to carry out new responsibilities and duties imposed

-Review of funding levels necessary to implement commissioner approach (roughly $150,000)
-Notation that insurance division budget already submitted to Governor
-Review of potential legislative process on issues of substantive power and/or funding provisions
-Note that Commissioner may need to amend budget submitted to Governor in this respect
-Review of drafted proposal
-Proposal to amend draft to include requirement of Iowa based experience rate-making, unless Iowa base is insufficient
-Problem with amendment when national average lower
-Amendment fails on voice vote
-Return to proposal as drafted, adopted on voice vote
-Proposal to recommend that adequate funding be authorized and that budget be amended
-Additional proposals adopted on voice vote

@1990 (24) Structured settlements/judgments

-Review of drafted recommendation by staff
-Proposed amendment
  .Elimination of paragraph (2)
  .Elimination of paragraph preceding and subparagraphs "a" and "b"
  .Would apply to all torts and $100,000 and above
  .Make more positive in the final paragraphs to show it is a recommendation
-Discussion of proposed amendment and effect of structuring mechanism mandates
-Unanimous consent to go to application to "future damages"
-Review of language, incorporating proposed amendments
-Review of use of such mechanisms in Iowa and other states, and discussion of how they may or may not generate savings
-Interplay with concept of discounting future damages, which already occurs on basis of present value
-Discussion of reversionary aspects of the structured judgment system contemplated
-Unanimous consent to have prohibition of discounting of future damages, but allow reversion of care and maintenance
-Review of rationales behind increasing mandatory nature of structuring mechanisms
Adoption of recommendation as amended

@2500 (25) Statute of limitations for minors (with special reference to medical malpractice)
-Review of recommendation
-Impact of issue on OBGYN practice in Iowa
-Motion to substitute only the first two paragraphs of the recommendation, and to advocate for legislative activity
-Potential interplay or conflict with earlier passed recommendation that a 10 year statute of repose for professional services be implemented
-Failure for previous action to be documentable for these types of actions, or even of any great extent of any impact

due to small percentage of cases effected
-Restatement of proposed substitute
-Potential for making it an affirmative legislative suggestion
Rejection of recommendation on roll call vote (6 ayes, 4 nays)

@2825 (26) New issue of recommending increase in staff and resources for board of medical examiners and to increase information and data to be required to be submitted to the board of medical examiners in civil actions, claims, and verdicts
-Review of existing requirements for submission of data to IBME

@2907 End of Tape #27

VCR Reading	Recording #28
@0000	(Continuation of Discussion on Information Submissions to Iowa Board of Medical Examiners) -Potential problems with confidentiality issues, perhaps mandating that the feasibility be reviewed first Adopted by unanimous consent, including feasibility amendment
@0086	(27) Directors and Officers -Refers to both profit and nonprofit -Review of final report reference to the Commission discussion, review of approach, and support for Iowa State Bar Association proposal -Discussion with Iowa State Bar Association representative regarding progress of and form of their final proposal -Reservations regarding authorizing the exception to paid employees -Nature of ISBA proposal following form and content of recent Delaware enactment -Review of D & O's covered or not covered by ISBA proposal -Request to have ISBA proposal mailed to Commission members just as soon as available Adopted with unanimous consent
@0330	Review of procedures for Final Report of Commission -Notice of minority reports must be in by December 5th, and report to LSB by December 9th -Inclusion of 27 recommendations -Commission members will receive the report about same time as Legislative Council -Request for a disclaimer paragraph on the final report to show that members haven't seen printed copy -Discussion of form of disclaimer -Wish to recognize the filing of a minority report if form of final report is objectionable
@0560	Closing Commission Business -Compliments to camera personnel -Compliments to staff -Compliments to Commission members
@0580	End of Tape 28

DATA AND MATERIALS

During the course of its review of relevant issues, the Commission compiled well over 300 research and review documents and received and placed on file correspondence from interested individuals and groups -- exceeding 1000 pages in all.

In addition to those materials gathered informally by the Commission, the following additional materials were formally placed on file with the Commission during its ten meetings:

Analysis of content and current status of federal legislation relating to subject matters within the purview of the Commission:

-Civil Justice Reform
-Insurance Regulation
-Alternative Financing/Risk Management
-Studies

Analysis of content and current status of recent liability and liability insurance legislative proposals of the fifty states:

-Civil Justice Reform
-Insurance Regulation Reform
-Alternative Financing/Risk Management
-Studies

Analysis of regulatory reform alternatives and efforts for the Insurance Industry, covering the following topics:

-Federal inactivity
-Industry size
-Nature of insurance
-Complexity of system
-Resource availability
-Extent of effect on economy
-Rationales for state regulation
-Increasing duties and responsibilities of insurance regulators
-Rating regulation types:
.Prior Approval
.Modified prior approval
.File and use
.Use and file
.No file
-Review of current issues being addressed in regulation:
.Undercapitalization
.Understaffing
.Reporting requirements
.Claims-made forms
.Midterm cancellations
.Market assistance programs
.Joint underwriting programs

.Premium underpricing restrictions
.Risk management enhancement
.State insurance funds and mechanisms
.Reinsurance
-Market capital and capacity requirements

Senate File 2265

Insurance Division memorandum regarding S.F. 2265 rulemaking authorization for data collection programs

Insurance regulation overview presentation by the Commissioner of Insurance, with following attachments:

-Market shares by lines
-Insurance regulatory information system
-Analysis of data currently collected

Glossary of insurance terms

1986 Insurance Division Report to the Governor

Outline of the thirty-one year study (all stock property/casualty companies of the U.S., underwriting profit/loss)

Texas Commercial Liability Insurance closed-claims survey (form)

Michigan Actuarial Study Proposal and Contract

Remarks of Mr. Philip Miller of the Insurance Services Office (ISO - New York)

ISO Report on the Insurance Liability Crisis in Iowa

"Insurance Profitability -- The Facts" (ISO)

"Property/Casualty Insurance Industry Data Availability" (ISO)

"Country-wide Results for Selected Commercial Lines and Liability Classes" (ISO)

"The Rising Cost of General Liability Legal Defense" (ISO)

"Civil Justice -- Reform Data" (Alliance of American Insurers)

"Questions and Answers on Availability" (Alliance of American Insurers)

"Sharing the Risk -- How the Nation's Businesses, Homes and Autos are Insured" (Insurance Information Institute)

"Insurance Facts -- 1985/86 Property/Casualty Fact Book" (Insurance Information Institute)

Testimony of Thomas G. Goddard, Goddard Public Affairs Corporation (Tucson, AZ)

"How to Tame the Insurance Industry Cycle and Make the Legal System More Efficient: A Suggested Legislative Agenda for 1987" (Mr. Jay Angoff, National Insurance Consumers Organization)

"Civil Litigation Study of the Iowa District Court" (National Center on State Courts)

Written testimony of Mr. Dennis Donohue (Alexander & Alexander)

Written testimony of Mr. Roger Nowadzky (Iowa League of Municipalities)

Written testimony of Mr. Terry Timmins (City Attorney, Iowa City)

Written testimony of Mr. Vic Elias (Iowa State Association of Counties)

Written testimony of Mr. Phil Dunshee (Iowa Association of School Boards)

Written testimony of Mr. Ted Michaelfelder (Profit/Proprietary Day Care)

Written testimony of Ms. Karen Thelin (Nonprofit Day Care)

Written testimony of Ms. Jill June (Chairperson, DHS Provider Advisory Council)

Written testimony of Ms. Jody Tomlonovic (Executive Director, Iowa Family Planning Council)

Written testimony of Ms. Jeanine Freeman and Mr. Phil Latessa (Iowa Hospital Association)

Written testimony and documentation of Mr. Paul Pietesch (Health Policy Corporation)

Presentation document on Insurance Ratemaking Process (St. Paul Fire and Marine)

Review document of Indiana Medical Malpractice Act

Outline of formal testimony (Medical Protective Company)

Statement of the Iowa Medical Society regarding Iowa Medical Malpractice Liability Crisis; Attached letters from obstetrical personnel (Iowa Medical Society)

Statement of the Iowa Physicians Mutual Insurance Trust regarding availability of Medical Liability Insurance

Written testimony of Mr. Donald Fager (Physician Insurers Association of America)

White House Conference on Small Business -- Final Recommendations Report

Written testimony of Ms. Judy Krueger (Regional Advocate, U.S. Small Business Administration)

Statement of the Iowa Society of Certified Public accountants

Statement of the National Federation of Independent Business

Presentation materials of the Iowa Association of Business and Industry

ABI Liability Survey

Statement of the Iowa Retail Food Dealers Association

Statement of the American Institute of Architects

Statement of the Consulting Engineers Council of Iowa

Written testimony of Ms. Bonnie Hilburn (potential plaintiff/victim effected by "tort reform")

Iowa Insurance Institute Report on Liability and Liability Insurance -- Exhibit on recent changes in Iowa tort law increasing liability insurance crisis

Statement of Mr. Mark Afable (National Association of Independent Insurers)

Statement of Ms. Debra Wozniak (Alliance of American Insurers)

Statement of Mr. Fred McGarvey (American Insurance Association)

"Litigation Cost Containment and Fairness in Litigation" (Iowa Defense Counsel Association)

Presentation of the Association of Trial Lawyers of Iowa -- Exhibit on recent changes in Iowa tort law limiting the rights of injured individuals

Report of the Commissioner of Insurance on day care premium to loss ratio in Iowa

Report of the Commissioner of Insurance on "preactuarial study" data needs

Report of Jon Neiderbach (Legislative Fiscal Bureau) on the formation and conduct of actuarial studies

Written statement of Mr. Mike Lux (Executive Director, Iowa Citizens Action Network)

Report on first quarter 1986 property/casualty insurance industry profitability (NICO)

Actuarial study outlines of Tillinghast, Nelson & Warren, Inc.

Iowa Board of Medical Examiners Report to the Liability and Liability Insurance Study Commission

Analysis of Insurance Division Regulatory Resources and Discussion of Legislative Priorities and Alternatives:

-Present resources and staffing patterns of the Iowa Division of Insurance

-Rating law types

-Cancellations and nonrenewals

.Scope of coverage

.Notice, type and timing

.Claims information

.Enforcement

-Listing of state activities nationwide

Overview of the Civil Justice System in Iowa:

-Elemental areas of the system

-System indicators, and their use as justification for tort reform proposals.

Overview of Damages portion of Iowa Liability System

Overview of Collateral Source Rule and Alternatives:

-History in Iowa

-Examples of effect of rule

-Outline of alternatives

-Studies conducted on issue

-Savings estimates

-Constitutional challenges

-Legislative activity in other states

Position paper of the Iowa Defense Counsel Association on the Collateral Source Rule

Ludwig v. Farm Bureau Mutual Insurance Company (Subrogation case)

Subrogation and indemnification data for Iowa Blue Cross/Blue Shield.

Am. Jur. rendition of collateral source types

Overview of issue of maximum caps on liability payments:

-Alternatives

-Constitutional challenges

-Studies conducted on issue

-Outline and review of various maximum caps in place in other states.

Overview of claims-made forms of liability insurance

Testimony of the Iowa State Association of Counties on the Discretionary Function Exemption and the 613A.5 notice provisions for claims against Iowa municipalities.

Testimony of the League of Iowa Municipalities on the Discretionary Function Exemption

Testimony of the League of Iowa Municipalities on the Miller v. Boone County Hospital case (613A.5 notice provisions)

Miller v. Boone County Hospital case, amicus curiae, appeal, request for rehearing, and numerous attachments

House File 2442 (statutes of repose for improvements to real property)

Position paper of the Iowa Defense Counsel Association on Punitive Damages -- review of proposed model Act.

Outline of recent state activities on issue of punitive damages

Analysis of the issue of prejudgment interest:

-Background

-Arguments for and against

-Variations in alternative approaches

-Setting of applicable rates

-Studies on issue

-State activities on issue

Position paper of the Iowa Defense Counsel Association on Prejudgment Interest

Overview of issue of effect of failure to wear seatbelts on civil liability:

-Background

-Recent Iowa legislation

-Activities in other states

-Alternatives

-Federal law on issue

Analysis of issue of statutes of limitations -- with special reference to medical malpractice and the claims of minors and incompetents:

-Background

-Special application to minors

-Review of Iowa law on issue

-Studies on issue

-Constitutional challenges

-Review of the law of other states on issue

Analysis of structured judgments -- with special reference to medical malpractice:

-Background

-Advantages/disadvantages

-Constitutional challenges

-Modification checklist

-Status of structured judgments in other states

-Iowa law on issue

Uniform Law Commissioner's Model Periodic Payment of Judgments Act

Analysis of Nonmeritorious Actions:

-Background

-Traditional common law remedies

-Court-rule remedies

-Statutory remedies and alternatives

-Recent activity of other states on issue

-Attorney liability

-Status of issue in Iowa

Overview of defense/plaintiff attorney costs and fees -- with special reference to attorney contingency fees:

-Background

-Traditional arguments

-Socioeconomic review

-Alternatives

-Studies on issue

-Review of status of issue in other states

Position paper of the Iowa Association of Business and Industry on Product Liability Statute of Repose

Position paper of the Iowa Defense Counsel Association on the Interfacing of Comparative Fault and Workers' Compensation

Dispute resolution review paper:

-Alternatives

-Activity in other states

-Iowa approach to arbitration

Division of Insurance response to request for information on abusive insurance industry use of comparative fault assignments.