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REPORT OF THE COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE

Author:
Martha E. Freeman
Principal Attorney

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HARTLEY PALLESCHI, JR., RES. ASST.
KATHRYN VAN NOTE, RES. ASST.

STATE OF MAINE
OFFICE OF POLICY AND LEGAL ANALYSIS
ROOM 101/107
STATE HOUSE STATION 13
AUGUSTA, MAINE 04333
TEL.: (207) 289-1670

NOTE

The footnotes, and all but one of the appendices, referred to in the text of this draft are being prepared. They will appear in the final report.

The majority/minority recommendations contained in this draft may be adjusted after final discussions by the Commission in October.

Any questions concerning this draft, or the work of the Commission to Examine Problems of Tort Litigation and Liability Insurance in Maine, may be referred to Martha Freeman or Carolyn Chick of the Legislature's Office of Policy and Legal Analysis.

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PART I

INTRODUCTION

Chapter 1: The Liability Insurance Crisis

Liability insurance reimburses us for the compensation we must pay to other persons for injuries we have caused them. Whether or not we are responsible for another person's injuries is determined by the law of torts. A tort occurs when injury results from the violation of a legally recognized duty to take care not to harm another.

For example, liability insurance comes into play when a patron of a restaurant slips and falls on a broken stair. The restaurant owner may agree, or a court may determine, that the improperly-maintained stair, and not the customer's clumsiness, caused the fall. The restaurant owner's liability insurance will pay the customer's damages.

These damages could amount to medical expenses for a broken leg, and lost earnings for the time spent nursing the leg in bed. If the break was a particularly painful one, the damages could include an amount for the pain the customer suffered. If the restaurant owner did not believe the injury was his fault, and contested the customer's claim in court, his liability insurance might also cover attorneys fees and other legal costs of defending the restaurant owner.

A broken leg might not occasion a contest over fault, nor give rise to large damages. However, if the patron had broken his neck and become paralyzed, the stakes in terms of medical expenses, lost earnings, pain and suffering, and legal fees could be much larger for both parties; and for the insurance companies involved.

Liability insurance protects businesses, doctors, lawyers, architects, social service organizations, and other entities and individuals. In modern society, many activities cannot economically go forward without the purchase of a liability insurance policy. Some activities may not legally go forward without a liability insurance policy in place.

The liability insurance crisis of the 1980's arose when businesses, professionals, agencies, and individuals began receiving cancellation notices from their liability insurers, or notices of hundred-fold premium increases. These actions by insurance companies occurred as the insurers sought to recover from money lost on claims paid and other business expenses, and to protect against future losses.

The insurance industry reported total underwriting losses for 1979 to 1984 of $55 billion.[1] According to the National Association of Insurance Commissioners, 21 American property/casualty insurers went out of business in 1985; in 1986, another 16 were teetering on the edge.[2] The National

Conference of State Legislatures reported the introduction of over 1,200 bills in state legislatures in 1986 seeking to address the liability insurance crisis.[3]

A liability insurance crisis arises in the "bust" portion of the "boom and bust" cycles of the insurance industry. In boom years the financial health of the industry is excellent; in bust years it declines. One source counts six such cycles in the property/casualty insurance business since 1945.[4]

Can Maine do anything to stop or ameliorate these cycles, to impact the current liability insurance crisis and avoid a future one? This report to the Maine Legislature attempts to answer that question.

Chapter 2: The Establishment of the Commission

In 1986, the 112th Maine Legislature faced complaints from Maine citizens about the unavailability and unaffordability of liability insurance.

Daycare center operators could not afford the sky-rocketing premiums of their liability insurance. White water rafting companies had their liability insurance cancelled and could find no new insurance. Shelters for the homeless feared opening without the liability insurance they could not afford. Maine municipalities felt the pinch of much higher premiums and policy cancellations. Waterslides and similar amusements could not obtain liability insurance at any cost. Obstetricians began reconsidering their career choices as their liability insurance costs rose dramatically.

The 112th Legislature and Executive Branch took steps to bring some immediate relief to those afflicted with liability insurance problems. However, the Legislature recognized that a piecemeal approach to insurance woes was not adequate. Thus, in 1986, the Legislature established the Commission to Examine Problems of Tort Litigation and Liability Insurance in Maine.

Resolve 1985, chapter 89 sets forth the Commission's duties. The Commission's charge includes:

examining the relationship among tort law, tort litigation, and liability insurance;

emphasizing questions of liability insurance and the tort system as they relate to nongovernmental entities;[1]

commenting on aspects of legislation enacted to address problems of medical and legal professional liability;[2]

creating recommendations to "assure the reasonable availability in Maine of liability insurance at a reasonable cost."

The President of the Senate and Speaker of the House appointed the legislative members of the Commission. The Governor appointed all other members. The Chief Justice of the Supreme Judical Court appointed a judge to serve as an advisor to the Commission. Serving on the Commission are: one Senator and one former Senator; two Representatives; two representatives of insurance providers; a member of the Maine Trial Lawyers Association; a member of the Maine State Bar Association; and three public members, one a lawyer in private practice and two who are executives with large Maine business corporations.

In conducting its study, the Commission had the assistance of two legislative staff attorneys and one paralegal. Employees of the Executive Branch and of the Judicial Department also provided helpful information to the Commission.

The Commission began its work in September of 1986, aiming towards its reporting date of January of 1988. It quickly determined that the liability insurance crisis does not pose problems with easy answers.

Chapter 3: The Work of the Commission

The Commission and its Subcommittees met 22 times between September of 1986 and September of 1987. The first six Commission meetings were devoted to gathering basic information on the workings of the tort system and insurance industry, the extent of the liability crisis nation-wide and in Maine, the activities of other states and the federal government on the issue, and various proposals by study and interest groups for tort reforms and insurance regulation.

In gathering this background information the Commission met with representatives of: the legal and medical communities; insurers; court administrators and insurance regulators; and small business, professional, and social service associations. The Commission held one meeting with staff from the National Conference of State Legislatures. It held two public hearings, one in Portland and one in Bangor. A list of the experts who provided information to the Commission can be found in Appendix A. A list of the interests represented at the public hearings can be found in Appendix B.

In the second phase of its work, the Commission divided into three Subcommittees. Appendix C contains a list of the Subcommittees' members. In its five meetings, the Insurance in

Maine Subcommittee further examined the Maine insurance climate, the realities of insurance regulation in Maine, and proposals for insurance regulation reform. In its seven meetings, the Maine Tort System Subcommittee looked more closely at Maine tort law, the progress of civil cases through the Maine courts, and proposals for tort and litigation reform. The third Subcommittee reviewed legislation proposing tort reform or revised insurance regulation submitted to the 1987 session of the 113th Maine Legislature.

Each Subcommittee's goal was to prepare draft recommendations in its subject area to present to the full Commission. The Subcommittee reviewing legislation recommended to the Commission and the Legislature that certain bills be held without final action until the 1988 legislative session. The other two Subcommittees presented draft recommendations concerning tort law or insurance regulation to the full Commission. This work formed the starting point for the final portion of the Commission's study.

Throughout the information-gathering stages of the Commission's study, Commission members and staff helped keep the Commission abreast of new developments in the liability insurance crisis by attending pertinent national conferences. Information was obtained from conferences conducted by the Conference of Insurance Legislators (COIL) and the National Conference of State Legislatures (NCSL).

The last phase of the Commission's work, conducted during the summer of 1987, focused on formulating the Commission's recommendations. The final Commission meetings developed the proposals contained in Part IV.

PART II

FINDINGS

Chapter 4: The Workings and Content of the Insurance Industry and Tort Law

1. Insurance Industry and Regulation

Primary Insurers

In 1986, approximately 3,500 insurance companies wrote property/casualty insurance in the United States.[1] In contending to sell consumers nearly identical insurance products, the large number of property/casualty insurers often use price-cutting as their competitive edge.

To remain solvent, insurers must retain sufficient reserves to pay claims. These reserves may be buttressed by premium income or income from other investments made by the insurers. In times of high interest rates, insurance companies generate income through investing premium dollars at the high rates of return. High interest rates thus provide another incentive for insurers to lower premium prices: the lower the premiums, the more insurance policies sold; the more policies sold, the more funds available to invest.

Selling insurance policies at premium rates too low to cover the costs of claims under the policies is called "cash-flow underwriting." During periods of cash-flow underwriting, insurers use investment income to fill their reserves. Yet, the ratio that measures financial health in an insurance company is one of claims and expenses of the company as a percentage of premium income, without investment income added in. When claims and expenses exceed premium income --when the ratio is greater than 100% -- the company is making an underwriting loss. But the consumer is receiving a break on premiums. Any insurer who tries to correct the company's ratio, by keeping premiums up and not relying on investment income, risks losing the company's market share to competitors.

Another calculation of importance to insurers as they try to determine reserve amounts, premiums rates, and investment strategies, is the types of claims insured against. If the insurer is providing fire insurance, the insurer knows that payment will most likely be made shortly after the damage occurs. Insurance of this type is known as "short-tail" business. With some liability policies, the insurer may not be called upon to pay a claim for decades after the damage occurs. The asbestosis cases are an example of "long-tail" business: disease did not appear in persons exposed to asbestos in employment situations until 30 years or more had passed from the time their injury occurred.

Regulation of Primary Insurers

Insurers are regulated by the states.[2] A state's primary concern is that the insurers permitted to do business in the state remain financially sound; only a solvent company will be able to pay claims on insurance purchased by the state's citizens. Assuring reasonable insurance rates for the state's citizens is another interest of regulators.

In Maine, as in other states, primary insurers must receive a certificate of authority to do business in this State. To receive this certificate from the Maine Bureau of Insurance, a company must meet the financial and other requirements imposed by Maine law.[3] A fundamental requirement is that the insurer maintain a minimum amount of reserve funds. The amounts of reserves required for various kinds of insurance are set forth in the Maine statutes.[4]

To do business in Maine, primary insurers must also file their rates with the Bureau of Insurance at least 30 days before the effective date of the rates.[5] Most often, an individual company does not develop its own rate filings; many companies use the services of a rating organization to analyze data and develop suggested rates for various lines of insurance. The Insurance Service Office, Inc. (ISO) is such an organization. Many insurers doing business in Maine file ISO rates with the Bureau of Insurance.[6]

The Maine Insurance Bureau operates under the "file and use" rule of rate approval. Generally, if a rate has been properly filed with the Bureau, it will go into effect. However, the Superintendent of Insurance may disapprove a rate if it does not meet the requirements of the insurance laws. For example, the Superintendent may believe the rate is "excessive, inadequate or unfairly discriminatory."[7] He may believe the rate does not give due consideration "to past and prospective loss experience within and outside the State."[8] Or he may believe the rate is not in compliance with numerous other aspects of the insurance laws. To disapprove a rate, the Superintendent must hold a hearing.[9]

Surplus Lines Insurers

Surplus lines insurers are those willing to write insurance to cover activities primary insurers will not. Surplus lines business covers specialty lines -- for example, police insurance -- and higher risks -- such as hazardous waste insurance.

The surplus lines market is not regulated by the Maine Insurance Bureau. No certificate of authority is required for surplus lines coverages.[10] If, after diligent effort, a regulated insurer cannot be found to provide certain necessary insurance coverage, that coverage may be provided by an unregulated, or surplus lines, insurer.

The coverage must, however, be procured through a licensed surplus lines broker.[11] Surplus lines brokers must seek surplus lines insurers from a list published by the Superintendent of Insurance. This list is of surplus lines insurers who appear to the Superintendent to be financially sound and to have a satisfactory claims practice. Publication of the list does not impose a duty on the Superintendent to determine the actual financial condition or claims practice of surplus lines insurers.[12] Finally, surplus lines insurers must appoint the Superintendent as agent for receipt of service of legal process.[13]

Reinsurers

Reinsurance is insurance for primary or surplus lines insurers. Reinsurance is purchased when an insurance company wishes to spread risks that are too big for it to cover on its own; for example, portions of the liability insurance for 1985's Hurricane Gloria were covered by reinsurers. Reinsurance is also purchased when a smaller company wishes to write more insurance policies than its reserves can safely allow.

The reinsurance business is international. While 70% of the reinsurance sold in the United States is sold by U.S. companies,[14] foreign reinsurers -- such as Lloyd's of London, West Germany's Munich Re, and Swiss Re -- have significant

impact on American markets through the size of their investments here, and through their investment policies which affect their American subsidiaries.

Reinsurers are not regulated in Maine. No certificate of authority is required for a reinsurer, unless the company is one formed under the laws of Maine.[15] Insurance companies regulated by Maine may reinsure all or any part of a risk with a reinsurer that meets certain standards: the reinsurer must be authorized to transact business in another state or states; the reinsurer must retain a set amount of surplus or assets in trust; the reinsurer must supply the Superintendent with certain information; and the reinsurer must appoint the Superintendent as its agent to receive service of legal process. The primary insurer must also retain control over any funds its reinsurance contract permits it to hold as security.[16]

2. Tort Law and Litigation

Theories of Liability: Negligence

The liability insurance business primarily involves insuring persons against the costs of their negligent acts that result in injury to others. "Negligence" is a doctrine in the law of torts.

Imagine a car accident: the driver of a car is injured when another car hits it. Both cars were travelling on a stretch of road being repaired by the town. As a result of the accident, and an inability to agree upon who was responsible, a lawsuit is filed.

The injured driver (the plaintiff) blames the driver of the other car (the first defendant) and the town (the second defendant) for the accident. Both defendants claim that the actions of the plaintiff caused the accident.

The plaintiff claims that the first defendant was negligent in the driving of his car: that the defendant acted unreasonably, breaching a duty to the plaintiff to drive carefully; that the actions of the first defendant were a cause of the accident; that the first defendant is therefore at fault and should compensate the plaintiff for his damages.

The plaintiff claims that the second defendant was negligent in the manner in which it was repairing the road: that the defendant acted unreasonably, breaching a duty to the plaintff to repair the road carefully; that the actions of the second defendant were also a cause of the accident; that the second defendant is therefore at fault and should compensate the plaintiff for his damages.

Both defendants claim that, on the contrary, the accident occurred as a result of the plaintiff's negligent driving: that the plaintiff acted unreasonably, breaching a duty to drive carefully; that the actions of the plaintiff were the cause of the accident; that the plaintiff is therefore at fault for his own injuries and that the defendants should not be liable to the plaintiff for his damages. One or both of the defendants may also claim that, in fact, the plaintiff should pay them for their damages.

If the plaintiff, defendants, their lawyers, and their insurance companies cannot settle the case, the case will go to trial. At trial, the factfinder (usually a jury, but possibly a judge only), hears the evidence of the accident and is instructed to apply the law of negligence to the facts to determine fault. If the jury determines that a defendant had a duty to refrain from the conduct in question (in this case, bad driving or bad repairing), that the defendant did not refrain, and that the defendant's conduct was the proximate cause of the plaintiff's harm, the jury will return a verdict finding the defendant liable to the plaintiff for a set amount of monetary damages.

The jury may determine that one defendant was entirely at fault, and thus liable to the plaintiff for the full amount of his damages. For example, the driver defendant could be found entirely to blame for the accident.

The jury may decide that both defendants were partially at fault, that each is liable to the plaintiff for a portion of the plaintiff's damages. The jury may be asked to apportion the fault between the defendants. For example, the driver defendant could be found 75% to blame for the accident, while the town defendant is held 25% to blame.

The jury may find the plaintiff entirely to blame. The jury would enter a verdict of no liability for both defendants in the accident case.

The jury may find that both defendants and the plaintiff were at fault for the accident. Under the Maine law of comparative negligence, if the jury finds that the plaintiff was at fault in an amount less than the combined fault of the defendants, the plaintiff may still recover. The jury will reduce the plaintiff's damages by an amount that seems just and equitable based on the plaintiff's degree of fault. The jury may then be asked to determine the percentage of the total fault of the defendants attributable to each defendant. For example, of the total defendants' fault, the jury may find the driver defendant 70% at fault and the town defendant 30% at fault.[17]

What happens in a situation of proportional negligence when one defendant is unable to pay his portion of the damages? Assume that the driver defendant is without assets. Under the law of joint and several liability, the town defendant would be

liable to the plaintiff for 100% of the plaintiff's final monetary damages, though the town was less at fault than the driver defendant. The law of joint and several liability causes a defendant found liable to the plaintiff to be responsible for the total amount of compensation due the plaintiff. The town defendant could, however, in a separate court action, seek a monetary contribution from the driver defendant to the town defendant for the driver's 70% portion of the damages.[18] If the driver defendant is truly impecunious, the town will have difficulty obtaining reimbursement.

This fairly simple car accident case can become complex as parties seek to determine who is responsible under the law of torts. The same tort law -- doctrines of negligence, comparative negligence, joint and several liability, and contribution -- is applied to cases even more complex. The law of negligence, and related doctrines, determine the outcome of medical malpractice and legal malpractice cases; of suits against architects for improper design and against contractors for improper construction of buildings; of suits against daycare centers for negligence in permitting employees to abuse children; and of many other cases where questions of fault and who will pay for injury arise.

Theories of Liability: Strict Liability

Commercial enterprises may also obtain liability insurance to cover being found strictly liable for an injury caused to a consumer by a product.

In general, under the doctrine of strict liability, applied in a product liability case, any person involved in the sale or manufacture of any aspect of a defective or hazardous product that is unreasonably dangerous to the consumer is liable for injury that occurs. Under the doctrine of strict liability, the jury need not determine that the seller or manufacturer was at fault, as in negligence. The jury simply determines that the product was defective, that it was unreasonably dangerous to the consumer, and that injury occurred as a result.

Maine has a statute imposing strict liability on sellers of defective products regardless of the exercise of care in the preparation and sale of the product.[19] The Maine Supreme Judicial Court has held, however, that the comparative negligence statute does apply to strict liability cases.[20] The question for the jury in such a case becomes: did the plaintiff voluntarily and unreasonably proceed to encounter a known danger?

As noted, the doctrine of strict liability is not based on a search for fault. Rather, the doctrine rests on the theory that the price of a product will include the cost of insuring

against product liability. Thus, the cost of injuries to consumers from products is, in theory, passed on to all consumers.

Litigation

How does a tort case actually proceed through court?

The plaintiff files a short, plain statement of his claim in a complaint.[21] The defendant files an answer to the complaint, denying or admitting the plaintiff's claim. If the defendant does not admit all of the plaintiff's claim, the process of discovery begins.

Through the discovery process, the plaintiff and defendant seek and exchange information about the case through written interrogatories, depositions, production of documents, medical examinations, and the like.[22] The discovery process is intended to work through the cooperation of the parties and their attorneys. However, either party may seek a court order to compel a party to comply with a discovery request, to relieve a party of an overly-burdensome discovery request, or to sanction a party for misuse of discovery.[23]

Some civil cases filed in Maine Superior Courts are placed on an expedited pretrial list. Cases are placed upon this list by a Superior Court Justice who has reviewed the complaint, answer, and any other pleadings. The judge places a case on

the expedited list if the facts and issues are not complex, discovery can be completed fairly quickly, and an extended trial will not be required. In these expedited cases, the judge sets a date by which discovery must be completed and the case will go to trial.[24]

In an expedited case, the attorneys do not write pretrial memoranda for the judge, nor do they have a pretrial conference with the judge. In a nonexpedited case, the attorneys do write memos for the judge to hone the issues, and do meet with the judge before trial. The filing of a pretrial memorandum by one party in a nonexpedited case triggers the placing of the case on a pretrial list. The court then decides when to place the case on a trial list.[25]

At trial, each side presents its evidence to the jury (or judge, if the judge is acting as the factfinder), often with the use of expert witnesses. The plaintff is trying to prove the defendant's responsibilities for his injuries, and the amount of compensation he should recover for those injuries. The plaintiff may seek to prove his ecomonic damages -- those tangible losses that can be measured with some accuracy, such as medical costs and loss of earnings. He may argue for noneconomic damages -- such as compensation for pain and suffering, or the loss of consortium of a spouse. He may seek punitive damages. These are awarded when the plaintiff's

injuries resulted from malice or deliberately outrageous conduct on the part of the defendant. They are awarded to punish the defendant and to discourage others from such behavior.

The defendant seeks to rebut the plaintiff's case. At the close of the defendant's presentation, and after the attorney for each side has made closing arguments to the jury, the judge instructs the jury as to what law they must apply to the facts. It is the application of the law to the facts as determined from the evidence by the jury that brings about the jury's verdict. The party that loses has a time period during which to determine whether to appeal.[26]

Chapter 5: Causes of the Liability Insurance Crisis

> For states there appear to be few easy answers. Two major causes for the crisis are seen: the insurance industry's own practices and an increase in liability suits combined with larger court awards for injuries.[1]

Is the insurance industry's mismanagement to blame for the liability insurance crisis? Is the industry instead plagued by a tort system run wild? Are both sides, or no sides, to blame?

Interest groups, public officials, think tanks, and journalists have been carrying on this debate over the last three or four years. Reports, articles, and speeches can be found finding fault primarily with insurance practices, and laying blame primarily on the tort system. A list of many of these materials appears in Appendix C.

No single, uncontrovertable "smoking gun" exists. Persuasive arguments and evidence are marshalled on each side. However, like a juror faced with only circumstantial evidence, each person engaged in the debate over the cause of the liability insurance crisis must use his or her own best judgment to decide who or what to believe and blame.

No matter who is presenting a side of the debate, the arguments are couched in similar terms. Two prestigious groups have directly engaged each other in the debate. A report prepared by ten federal agencies and the White House for the United States Justice Department[2] lays out arguments for placing primary responsibility for insurance problems on the tort system rather than insurers. A report prepared by six states' Attorneys General for the National Association of Attorneys General[3] sets forth a case for blaming the insurance industry, and responds to the Justice Department's criticism of the tort system. The opposing arguments, as articulated in these reports, are set forth below.

1. Blame for the Insurance Industry?

Profitability of Insurers

The state Attorneys' General report (AG report) argues that the financial problems of the insurance industry are not as great as pictured. Underwriting losses have been calculated for the industry at $21 billion in 1984 and $25 billion in 1985. The AG report points out, however, that these losses are determined by comparing premium income to claims paid and claims adjusting expenses. The AG report asserts that, instead, all income and assets of insurers should be compared

to claims and expenses to determine industry profitability. Thus, by taking 1985's investment income, realized capital gains, and tax credits into account, the property/casualty industry made a $1.7 to $2 billion profit in 1985.

Insurance companies compare only premium income to insurance claims and expenses because that is the accounting required by state regulators seeking to determine the solvency of insurers. This regulatory accounting, according to the AG report, is based on protecting against the worst case scenerio: assuming the cancellation of all insurance policies at the end of a year and assuming that all claims filed will be paid in full in the year. For state solvency concerns, this may be an appropriate accounting procedure. For determining the actual financial health of the insurance industry and whether public officials must produce reforms to assist the industry, the AG report argues that this accounting procedure is inappropriate.[4]

The Justice Department's report (JD report) argues that the $20-plus billion underwriting losses in both 1984 and 1985 are significant to the insurance industry's actual financial health: about 1/5 of the 1984 losses came from general commerical liability and medical malpractice insurance lines; in 1985, 1/4 of the losses came from these lines. Yet, these two lines represented only 7% of the property/casualty insurance lines in terms of premiums written in 1984.

Adding in premium and investment income, the JD report does calculate a profit for the insurance industry in 1985. However, this profit is less than historical levels in the insurance industry, and less than the profit levels of other comparable companies. In 1984, property/casualty insurers produced an annual rate of return on net income after taxes as a percent of net worth of 1.8%; for Fortune 500 companies the median rate of return was 13.6%. From 1975 to 1984, this rate of return for property/casualty insurance companies was 10.9%.[5]

Insurance Cycle

According to the AG report, the property/casualty insurance industry is more subject to profit and loss cycles than other industries. This is because property/casualty insurers are more flexible as to the amount of business they can do: when the economy is doing well, and investment income is up, insurance companies can increase their market shares quickly by lowering premium rates and taking greater and different risks. However, when the economy turns, and investment income decreases, their favorable premium profit margins rapidly become unfavorable.

In the late 1970's and early 1980's, interest rates increased rapidly to a high for this century of 21.5%. Insurers competed for premium dollars to invest by substantially underpricing their products. In the end, though,

these price wars failed to keep up with the costs of claims losses and economic changes. The premiums that would cover losses during periods of high returns on investments would not when investment income decreased due to falling interest rates.

Given the nature of insurance cycles, the AG report states, it is understandable that, at the point in the cycle when investment income declines, premiums must increase. However, the premiums need only increase to cover moderate existing and expected future losses. Citing the General Accounting Office, the AG report claims that general liability insurance premiums need only have increased about 30% for insurers to break even; the break even increase for medical malpractice insurance should have been 20%. Instead, in 1985 general liability insurance premiums increased (as a result, insurers claimed, of past losses) by 81%; medical malpractice premiums increased 47%. The AG report asserts that large premium increases are an over-reaction to the insurance industry-created bottoming out of the insurance cycle. Since the AG report does not agree with claims of a litigation explosion foreshadowing extraordinary future costs to insurers; since it reports that civil justice reforms enacted in response to prior insurance cycles did not ameliorate this cycle; and since it notes that insurers will not guarantee that new civil justice reforms will prevent another round of large premium price hikes, the AG report advocates caution in proceeding with reforms in the hopes of forestalling another insurance crisis.[6]

The JD report agrees that the premium reductions offered by the insurance industry in the late 1970's and early 1980's, while claim losses increased, contributed significantly to the beginnings of the liability insurance crisis. However, the current sharp rise in premium costs, and the problems of unavailability of insurance, cannot, in the view of the JD report, be explained merely by the insurance industry seeking to recoup current losses.

The JD report argues that insurers are setting premium prices today to maximize their profits tomorrow, not simply to cover past losses. That premium costs have jumped significantly indicates that something beyond concern for past downturns in investment income, and similar patterns in the future, is driving premium increases. As noted by critics of the cyclical nature of the insurance business, the JD report points out, the insurance industry is a competitive one: if some insurers were charging excessive premiums to recoup losses, other carriers would normally undercut those prices to seek to gain a larger share of the market. That premium rates are remaining higher for all insurers indicates that the whole industry is looking to something beyond its traditional competitive and investment activities as impacting future claims costs. The JD report asserts that the "something" is the tort system.[7]

2. Blame for the Tort System?

Litigation Explosion

The JD report cites several statistics that, in its view, suggest a great increase in the number of tort case filings is occurring in the United States. The number of product liability cases filed in federal district courts increased 758% from 1974 to 1985. From 1976 to 1981, the number of medical malpractice lawsuits per 100 doctors more than doubled; for ostetricians/gynecologists the number tripled. The number of claims filed against 1,200 municipal and county governments surveyed increased 141% between 1979 and 1983.[8]

The AG report does not agree with the above assessment. The AG report posits that tort litigation trends in federal courts can not be extrapolated, as the JD report does, to state courts: federal court litigation accounts for only 2% of the cases filed in this country. The AG report cites National Center for State Courts' preliminary research that finds a statewide increase in tort litigation of 9% from 1978 to 1984, which compares favorably to a population increase of 8% over those six years. Even other statistics showing a 20% rise in liability claims in state courts over the past seven years do not reflect the several hundred percent increases asserted in other reports, the AG report claims.

The AG report also asserts that increases in numbers of medical malpractice lawsuits must be measured against actual instances of medical malpractice in society. It cites a study of hospital records from the mid-1970's that reported that only 1 in 10 occurrences of medical malpractice led to a claim. Only 40% of those claims led to payment. The AG report concludes that increases in medical malpractice litigation may reflect the actual social costs of actual medical malpractice.[9]

Verdict Size

The JD report discusses growth in the average jury verdict in product liability and medical malpractice cases. From 1975 to 1985, the average medical malpractice verdict increased 363%, from approximately $220,000 to over $1 million. Over the same years, the average product liability jury verdict increased 370%, from about $390,000 to just over $1.8 million. The JD report attributed much of this increase to the growth in the number of verdicts above $1 million.[10]

The AG report disagrees with the above analysis. It suggests that, rather than looking at <u>average</u> jury verdicts, one must look at <u>median</u> jury verdicts to gain an accurate picture of what has happened to jury awards over the last several years. The median is the midpoint of all awards, showing the verdict amount below which half of all verdicts compared falls. As does the JD report, the AG report presents

statistics on jury verdicts from various studies of Cook County, Illinois. The AG report finds that, in 1983, the Cook County median jury award was $8,800, compared to an average of almost $138,00; approximately 88% of the awards were lower than the average. The median jury award, the report claims, has not increased more than the rate of inflation.[11]

The JD and AG reports disagree on the significance of the $1 million verdicts. The AG report argues that these large awards should not create a negative characterization of the reality of growth in jury awards. While the median verdict is not large, the increase in the few large awards may be appropriate for more serious cases or inflation of medical costs.[12] The JD report, on the other hand, finds that the increased number of large verdicts is representative of a socially harmful trend in tort litigation.[13]

3. The Debate Continues

Statistics v. Statistics

As the point-counterpoint of the JD and AG reports demonstrates, reasonable people can consider a variety of available evidence and come to different conclusions about causes of the insurance crisis within the insurance industry and tort system. These two reports continue in the same vein

on other pertinent topics: growth in no-fault liability, growth in noneconomic components of damage awards, growth in attorneys fees and litigation expenses.

The debate over the meaning of statistics also continues. The Justice Department issued an update of its report in March of 1987.[14] The update reviews 1987 developments in the insurance crisis and tort law, and answers some of those who criticized the rationale of its initial report. Included in its defense of the conclusions of its first report is a critique of the statistical methods used by the National Center of State Courts to reach its conclusions, cited in the AG report, that the small upward trend in litigation of recent years tracked population.[15]

Other Culprits

The British magazine The Economist points to the reinsurers as large players in the current American liability insurance crisis. New entrants into the reinsurance business, such as Fortune 500 companies, during the heyday of high interest rates withdrew their money when interest rates fell. Old players, such as Lloyd's of London, have come to distrust the American legal system and now hesitate to invest in this country. Without reinsurance, primary insurers who wrote off large portions of their reserve needs to reinsurers in recent years are left to fend for themselves through raising premiums and cutting risks.[16]

Finally, in remarks delivered to a January 1986 National Conference of State Legislatures' Conference, a representative of the National Federation of Independent Businesses points to the insurance industry, insurance regulators, and the tort system as sharing in the blame for the liability insurance crisis. However, he suggests another cause: the attitude of Americans about risk. Increasingly, he believes, Americans wish to insure against all risks. Instead, he believes we must face the fact that "the price of a risk-free environment is not acceptable." We must recognize that insurers are in the business of distributing, not absorbing, losses.[17]

Or, as the Maine Superintendent of Insurance put it to the Commission, the fundamental insurance and liability issue for society is one of resource allocation, of distributing a finite pool of money among businesses and victims.

Chapter 6: The Maine Experience

1. Insurance Problems in Maine

Initial Problems

During 1985 and early 1986 the liability insurance crisis was at its height in Maine. Maine newspapers reported large premium increases or policy cancellation notices for entities from state fairs and waterslides to municipal officials and hospitals.[1] Several Maine social service agency associations conducted surveys of their members in 1985 and early 1986 to determine their problems with liability insurance. Daycare centers, mental health agencies, facilities for developmentally disabled persons, and public transportation agencies reported large hikes in liability insurance premiums and some cancellation of liability insurance. Hundred-fold premium increases were reported in professional liability insurance and directors and officers insurance.[2]

An example demonstrates the potential harsh impacts of certain liability insurance problems on Maine life. Maine Family Day Care Association members surveyed reported a 295% increase in liability insurance premiums from 1984 to 1985. Unable to afford these increases, the members predicted that 79% of the children receiving daycare in October of 1985 were at risk of losing that care.[3]

Commission Hearings

During November and December of 1986, the Commission held two public hearings, one in Portland and one in Bangor. The hearings sought public testimony on continuing liability insurance problems and suggestions for steps to ameliorate them.

The hearings, attended by hundreds of citizens (see Appendix B), demonstrated that, by late 1986, many had found ways to cope with the higher premiums and threats of policy cancellations of the insurance crisis; that some serious problems remained; that some feared future problems without tort reform; and that some feared the impact of tort reforms.

The Commission heard that:

> County fairs were unable to afford insurance.
>
> The medical profession, especially obstetricians, was suffering from high premiums. Physicians, obstetricians, hospitals, and rural health centers testified to this point.
>
> Architects and engineers were suffering from high premiums. Some engineers could find no isurance to cover work with hazardous materials, such as asbestos, and on pollution problems.

Social service agents and agencies could not afford liability insurance. Daycare providers, Head Start programs, drug and alcohol programs, community counseling services, and foster parents spoke to this point. Social service agencies and rural health care centers were concerned about the expense of directors and officers liability insurance.

Some Maine citizens who had personal injury or medical malpractice claims, and some attorneys who represent those who bring such claims, expressed concern over suggestions that attorneys contingent fees should be eliminated. These people felt that some plaintiffs would be denied their day in court without contingent fee arrangements.

One attorney expressed concern over caps on pain and suffering damages. Such caps, he stated, would be unfair to persons who suffered serious injuries that left them in pain for the rest of their lives.

Several who testified strenuously urged the elimination of joint and several liability. Others suggested changes in the collateral source rule and caps on damages.[4]

Easing of the Crisis

At the hearings, daycare centers reported that a Market Assistance Plan (MAP), established by the Maine Insurance Bureau to help daycare providers obtain affordable insurance, had helped many centers find insurance. A May 1986 survey by the Maine Family Day Care Association, following up its intial investigation, had also indicated that the MAP had helped.

As the daycare centers were finding insurance and the Commission was holding its hearings, reports of the insurance crisis easing began to surface in newspapers, magazines, and governmental publications.[5] The articles reported increasing availability of insurance, but premiums leveling off at rates higher than before the crisis. In certain high risk lines -- such as risky amusements, medical malpractice, and pollution activities -- liability insurance remained difficult to find.[6] In Maine, doctors continued to contend with insurers seeking medical malpractice rate increases.[7] Maine ski areas continued to pay high premiums.[8]

Maine Claims Experience and Maine Premiums

A representative of the Maine Bureau of Insurance told the Commission that insurance rates for Maine enterprises do, in general, reflect the Maine experience with frequency and size of claims. However, a rate filing in Maine may be influenced by regional or national experiences if the insurer cannot

obtain enough data from Maine on which to judge. He gave insurance rates for architects and chief executive officers as examples of categories for which insufficient Maine data exists.

Others argue that Maine premium experience is not sufficiently tied to Maine loss experience. At the public hearings, many representatives of social service agencies complained about premium hikes and policy cancellations when they and their Maine colleagues had not experienced a claim against them. The Maine Trial Lawyers Association produced charts comparing Maine liability insurance premiums and periods of rapidly rising premiums to lower and fairly stable Maine loss experience.[9]

In the end, the information available about Maine experience with the insurance crisis, and with premium costs compared to actual insurance losses, is limited and often anecdotal. Still, it is clear that the crisis affected Maine citizens, some more harshly than others. It is also clear that questions about the attention paid to Maine claims experience in setting premiums will continue to be raised.

2. Litigation Experience in Maine

Civil Case Frequency

From 1980 to 1986, filings of civil cases in the Maine Superior Court dropped from 37.3% to 30.1% of all cases filed

in that court.[10] During this period, personal injury filings rose from 15.3% to 22.1% of all Superior Court civil filings, a 6.8% increase.[11] This includes an increase of 19.4% in personal injury filings in 1986 over 1980 (from 984 filings in 1980 to 1175 filings in 1986).[12] During this period, Maine's population also rose 4.2%.[13] Thus, personal injury filings did not merely track Maine's population increase.

At the same time, dispositions of personal injury cases rose from 14.1% to 22.3% of all Superior Court civil cases disposed of, an 8.2% difference.[14] In disposing of a larger percentage of pending personal injury cases in 1986 than in 1980, the Superior Court more than kept pace with the increased numbers of personal injury cases filed.

Still, it takes quite a while for the average civil case to reach a jury trial in Maine. In 1980, the average case took 2.1 years; in 1983, 2.6 years; and in 1986, 2.4 years.[15] The statewide average began to drop in 1987 to 1.5 years from the filing of a civil case to the beginning of a jury trial.[16] However, these figures should be read with those showing that approximately half of all civil cases filed were dismissed by agreement of the parties under Maine Rule of Civil Procedure 41(a) in 1984, 1985, and 1986.[17]

Is there a civil litigation explosion in Maine? The criminal caseload in Superior Court has increased over the last six years more than the civil caseload. But of the civil

cases, personal injury case filings have increased over the same period, more than the increase in the Maine population. The time period between filing a civil case and proceeding to a jury trial is decreasing. Approximately half of Maine Superior Court civil cases are dismissed by agreement of the parties; that number has been rising over the years. Thus, while Maine courts and civil parties are dealing more and more efficiently with civil cases, there are an increasing number of personal injury suits to deal with.

Verdict Amounts

No complete compilation of jury awards exists in Maine. The Superior Court Civil Statistics Reporting Form provides information on amounts sought in cases, but not amounts finally awarded. The Maine Trial Lawyers Association reports on Maine verdicts in its publication Maine Trial Practice; however, the publication does not report every Maine civil case resulting in a jury award. Newspapers are another source of verdict information, for large damage awards often make headlines in Maine.

Maine Trial Practice reports three verdicts of over $250,000 in personal injury and medical malpractice cases from November of 1984 through August of 1987. A jury entered a verdict of $2,290,255 for a plaintiff injured in a motor

vehicle accident and left untreated in a hospital emergency room for a length of time. As a result of delay in treatment, the plaintiff's serious injuries led to paraplegia.[18]

A plaintiff, while on the premises of a trucking company, was struck by a loading door, receiving permanent shoulder and back injuries. The plaintiff recovered $525,000 in damages.[19]

In a medical malpractice case, the plaintiff received $260,000 in damages due to the death of his wife. The jury found the defendant doctor grossly negligent for failing to treat the heart attack of a nurse working at a facility with him.[20]

Newspapers reported two more large verdicts in 1986. A collision between skiers, resulting in one skier losing the use of an arm, brought a $380,000 verdict against the ski resort where the accident occurred.[21]

A beer and wine distributor was found liable for $1,065,000 for a motor vehicle accident that seriously injured two people. The driver of the car that struck the plaintiffs' car was an employee of the defendant. The employee had consumed some alcohol on the defendant's premises on the day of the accident.[22]

Information on numbers and sizes of large jury verdicts in Maine is anecdotal. While million dollar verdicts have occurred in Maine, it is impossible to judge what impact the few large awards reported, and perhaps others not reported, are having on the typical Maine damage award.

3. Medical Malpractice Reform and Regulation in Maine

Maine has very recent experience with attempts to address malpractice insurance problems experienced by physicians. Public Law 1985, chapter 804 enacted reforms seeking to stabilize or lower medical malpractice premiums. The Bureau of Insurance has recently ruled in two rate hearings concerning rate hikes proposed by the two medical insurers in Maine, the Medical Mutual Company and the St. Paul Company.

Chapter 804

Chapter 804 enacts numerous reforms, touching several parts of the Maine statutes and of the elements of medical malpractice cases: statutes of limitations, regulations of physicians, prelitigation screening, expert witnesses, suits based on childbirth, structured damage awards, and attorneys contingent fees. The law also contains one provision affecting the statute of limitations for malpractice suits against attorneys. An outline of the entire law can be found in Appendix E.

Because of chapter 804's direction to the Commission to continue examining medical and legal malpractice concerns, and because of the delayed effective dates (until August, 1988) for some sections of the law, the Commission has focused on certain of the law's provisions. These provisions are described more fully here.

statutes of limitations

A statute of limitations sets the time period during which a lawsuit must be brought or be forever barred from the courts. Under current law, a medical malpractice action must be brought within two years after the cause of action accrues.[23] For a plaintiff who was a minor when the medical action complained of occurred, the statute of limitations does not begin to run until the minor turns age 18.[24]

Typically, the cause of action accrues when the act that causes the injury is done. The Maine Supreme Judical Court ruled on when the cause of action accrues in certain medical malpractice cases.[25] The Court stated that in cases involving surgery in which a foreign object was left inside the patient, the cause of action does not accrue until the person discovers or reasonably should have discovered the harm. This is called the "discovery rule."

Chapter 804 revises medical malpractice statutes of limitations in three ways. The law changes the general medical malpractice statute of limitations from two years to three years. It codifies the discovery rule existing in caselaw and prohibits the Supreme Judical Court from developing additional discovery rules for medical malpractice cases. The law also affects minors significantly: rather than having a possible maximum of 20 years to bring a medical malpractice lawsuit, a minor will have to bring the suit within six years after the cause of action accrues or within three years from the minor's 18th birthday, whichever occurs first.

Chapter 804 also modifies in part the current law concerning the legal malpractice statute of limitations. Under existing law, a legal malpractice lawsuit must be brought within six years from when the cause of action accrues.[26] Chapter 804 does not alter this time period. The law does, however, enact a discovery rule for legal malpractice cases. Under a Maine Supreme Judcial Court case, the cause of action against an attorney for negligence in preparing a real estate title opinion accrues when the problem with the title opinion is discovered, not when the opinion was prepared.[27] Chapter 804 codifies this discovery rule and also creates a discovery rule in will drafting cases. In codifying these two discovery rules, the law restricts the ability of the Supreme Judicial Court to fashion any other discovery rules for legal malpractice cases.

contingent fees

Chapter 804 sets forth a schedule for attorneys contingent fees in medical malpractice cases. A contingent fee agreement between a client and attorney states that the attorney will receive compensation for his or her work only if the work results in success for the client's claim. The amount of compensation, or the formula to determine the amount, is established by the client and attorney. Chapter 804 states that, when bringing a medical malpractice claim for a client, an attorney must not exceed the following formula for his or her contingent fee: 33 1/3% of the first $100,000 awarded as damages to the client; 25% of the next $100,000; and 20% of any amount over $200,000. Chapter 804 permits a court to approve additional attorneys fees in medical malpractice cases in special circumstances.

prelitigation screening

The prelitigation screening panels established by chapter 804 have been established. Their purpose is to reduce medical malpractice litigation costs, while preserving justice for all the parties. The composition and functioning of these panels is described in Appendix D.

The Superior Court and others reported to the Commission on the operation of these panels. Sixty-six medical malpractice cases have been filed since the screening panels went into

effect in January of 1987. Of those, four have been reviewed by the panels; the remaining cases have settled out of court or bypassed the panels and proceeded to litigation.

The Superior Court and others state that it is too early to tell if the prelitigation screening panels are a boon or a bane for medical malpractice litigation. Minor tinkering with the panel procedures may be necessary. For example, panel chairs are to be persons with judicial experience. The Superior Court is concerned that the pool of such persons may be too limited. The imposition of filing fees on parties before the screening panels, according to the Superior Court, may need clarification. The standard of proof set forth in chapter 804 for the screening panels to apply may not, in the Superior Court's view, accurately capture the standard of proof for medical malpractice.

All of those most intimately involved with the start-up of the medical malpractice screening panels agree that minor amendments to the panels' statute may be needed. But all also agree that no one can yet judge what impact the panel process will have on medical malpractice lawsuits and insurance premiums.

Other provisions of chapter 804 have come under Commission consideration. However, those set forth above have received additional attention due to the mandates of and interest in that law.

Rate Hearings

In July of 1986 Medical Mutual Insurance Company submitted a rate filing to the Maine Insurance Bureau for physician and surgeon professional liability insurance. It proposed an overall rate increase of 24.9%. After a hearing on this rate filing, the Superintendent of Insurance, in May of 1987, issued an order disapproving the filing for gynecologists; obstetricians; and thoracic, vascular, cardiovascular, and orthopedic surgeons. Medical Mutual was ordered to recalculate the premiums for this medical group. For other physicians and surgeons the rate filing was approved. The Superintendent ordered the company to file a new plan for the OB/GYN group, and, in that filing, to provide an analysis of the rate effects of chapter 804.

In July of 1987, Medical Mutual filed the required plan and analysis, together with an overall medical liability insurance rate increase of 15.9%. The company's complete analysis of chapter 804 is contained in Appendix E. The analysis concludes:

> Medical Mutual believes that the true effects of Chapter 804 of the Public Laws of 1986 on medical malpractice rates will not be known until data is generated reflecting experience under the law. Although our analysis of Chapter 804 indicates the likelyhood that it will adversely affect malpractice rates, we believe the meaningful tort reform is in

everyones best interest. Therefore, Medical Mutual has adjusted its overall rate increase downward by 2% in anticipation that on going tort reform will have a positive effect on our rates (sic).

In January of 1987, St. Paul Fire and Marine Insurance Company sought a rate increase of 57.5% for its medical liability insurance. This filing was later amended to seek, instead, a 50.1% increase. A rate hearing was begun, but recessed; the recess led to a resolution of the contested rate filing. After submission of updated Maine claims data, St. Paul agreed to, and the Superintendent accepted in an order in August of 1987, an average rate increase for physician and surgeon liability insurance of 30%. This increase was effective in September of 1987.

PART III

REFORMS BY OTHERS

Chapter 7: Impact of Prior Reforms

In the mid-1970's, the health care profession experienced a liability insurance crisis. The crisis did not impact other lines of liability insurance in the significant way medical malpractice insurance was affected: premiums in some medical specialties increased several hundred percent; many insurance companies gave up their medical malpractice insurance business.

Insurance reforms undertaken during this period included establishment of joint underwriting associations, formation of insurance companies owned by doctors and hospitals, hospital self-insurance, and creation of state-administered patients' compensation funds. Most states also enacted some form of change in the legal rules for dealing with medical malpractice claims.[1] The General Accounting Office (GAO) of the federal government recently completed a study of the impact on medical malpractice insurance of the 1970's tort reforms.[2]

The GAO surveyed officials in the interest groups involved in the 1970's reforms in each of the six states. It also collected data from the six states on insurance costs for physicians and hospitals, and on medical malpractice claims.

The GAO found that the officals surveyed in two of the states believed the 1970's changes in tort law had moderated rises in medical malpractice insurance costs and in medical malpractice claim numbers and payments. Officials in the four other states concluded that the tort reforms had little effect.[3]

The GAO also found that:

> The cost of medical malpractice insurance increased in each of the six states between 1980 and 1986. The increase was often more than the consumer price index and the medical care index.
>
> Claims against doctors increased in each of the six states between 1980 and 1986.
>
> During the 1980-1986 period, the average claim paid for medical malpractice rose sharply in five of the states. In four of those states, the increase was higher than the national average.[4]

The GAO report presents no firm conclusions about the impact of tort reform on insurance rates. The GAO used the data of its six state study to produce a list of the reforms that "appear to have been given the broadest support by those advocating tort reform as one way of eventually reducing the cost of insurance." The report lists the following advocated

reforms: shortening the statute of limitations; revising joint and several liability rules; reducing malpractice awards by collateral source payments; limiting attorney contingent fees; requiring periodic payment of awards; and placing caps on noneconomic damage awards.[5]

One of the few-existing empirical studies cited in the GAO report was produced for the Rand Corporation by Patricia Danzon. Ms. Danzon's statistical analysis of the impact of state tort reforms on medical malpractice insurance rates leads her to the following conclusions:

> States that have reduced statutes of limitations for claims by adults and set outer limits on discovery rules have experienced less growth in claim frequency than states with statutes more favorable to plaintiffs.
>
> Compared to states without collateral source offsets, states that have permitted consideration of payments to plaintiffs from collateral sources in setting damage awards, or that have mandated collateral source offsets, have reduced claim frequency and severity.
>
> Caps on damage awards have reduced the average claim amount paid.
>
> Limits on attorneys contingent fees have had no effect on number of claims filed or size of damage awards.[6]

Because so few empirical studies of the tort reform-insurance cost connection exist, GAO concludes that "there is no specific action that GAO could identify that would guarantee that insurance rates will not continue to increase."[7] GAO also has not assessed the extent to which administrative expenses, marketing costs, investment income, state regulation, and competition among insurers drive the cost of medical malpractice insurance.[8] GAO thus concludes that among the questions a state needs to address is whether data obtained by the state's insurance regulators from insurers are sufficient, necessary, and effectively used.[9]

Chapter 8: Federal Action

Enacted in 1944, the federal McCarran-Ferguson Act[1] generally exempts insurers from federal anti-trust laws as applied to their insurance business; they are not exempt as to any other type of business they engage in. Insurance companies are also not exempt from anti-trust laws when they engage in cooperation to boycott a line of insurance. The McCarran-Ferguson Act endorses state, as opposed to federal, regulation of the insurance industry.

During this decade's insurance crisis, many have proposed repealing or modifying the McCarran-Ferguson Act.[2] The National Conference of State Legislatures (NCSL) concludes that Congressional action on bills seeking to change the Act is unlikely.[3]

Congress has reviewed legislation concerning other issues related to the liability insurance crisis: civil justice reform; product liability; medical malpractice; risk retention groups; Superfund; Price-Anderson Act. Little has happened.[4]

The primary revision of insurance law by the 99th Congress occurred in the area of risk retention. Signed into law in October of 1986, the amendments to the 1981 Risk Retention Act[5] permit most similarly-situated public and private

entities to group across state lines for the purpose of self-insuring or collectively purchasing liability insurance. Any state prohibitions on such activity are preempted.[6]

Chapter 9: Other States' Activities

Several states had Maine's reaction to the liability insurance crisis; they, too, created study groups to assess the causes, extent, and cures of the crisis. The Commission gathered study reports and recommendations from nine states: Colorado, Maryland, Missouri, Nebraska, Nevada, New York, Pennsylvania, Texas, and Wisconsin. These studies were produced between January of 1986 and January of 1987.

The study done for the Governor of New York[1] proved of most value to the Commission because of its analysis of insurance problems and explanation of its recommendations. A list of all the state study reports accumulated by the Commission appears in Appendix F.

The liability insurance crisis has spawned much state legislative activity. A National Conference of State Legislatures' (NCSL) summary of liability insurance-related actions taken in state legislatures in the first six months of 1986 appears in Appendix G.

The pace of legislative activity on tort reform and insurance regulation has accelerated since the beginning of 1986. As of June of 1987, NCSL could only keep track of tort-insurance legislation introduced; compilation of what has actually been enacted must await a slowing of the pace. NCSL's

latest listing of bills introduced in state legislatures on various tort and insurance reform topics is contained in Appendix H.

In December of 1985, NCSL conducted a survey of all the states to determine the impact of court challenges to reforms enacted in response to the medical malpractice insurance crisis of the 1970's. These laws were challenged as unconstitutional under the federal and state constitutions. The statutes were most often attacked as being void for vagueness, or for violating the equal protection or due process clauses.[2]

Many state constitutions contain equal protection and due process guarantees that are interpreted somewhat differently than the same provisions of the United States Constitution. This appears to have led to different results for similar reforms in different states. For example, the California Supreme Court upheld a cap on noneconomic damages under the United States Constitution, while the Florida Supreme Court struck down a similar statute under the Florida Constitution.[3]

The results for court challenges to tort and insurance reforms are mixed: some laws were ruled unconstitutional; others were upheld; some cases are still pending.[4] A table presenting the outcomes of many of these challenges is contained in Appendix I.

The constitutionality of statutes enacted to address the liability insurance crisis of the 1980's will continue being questioned.[5] In enacting any tort or insurance regulation reforms, Maine must take heed of restrictions in the federal and its own Constitution.[6]

As the state reports, legislation summaries, and court challenges indicate, almost every conceivable tort reform or insurance regulation revision has been suggested somewhere. It is much too early in the enactment of responses to the liability insurance crisis of the 1980's to determine what proposals in other states, if any, will meet with success. In the end, informed by the judgment of others, Maine must look to the particular needs, values, and resources of its own citizens and government in shaping its responses to the liability insurance crisis.

PART IV

COMMISSION RECOMMENDATIONS

The recommendations created by the Commission are a product of balancing.

We have balanced civil justice values and the needs of Maine businesses and social service agencies. We have balanced the complexities of the national and international insurance crisis with Maine's ability to influence that arena.

The recommendations on the following pages represent Commission members' best judgment as to what reforms may reduce insurance rates and improve insurance availability, and prepare us to deal with future insurance problems. The aim of these recommendations is to address the liability insurance crisis without producing unwise changes in Maine tort law and insurance regulation.

Captives

CURRENT LAW: A captive is an insurance company that is solely owned by the organizations or individuals it insures. The owners contribute capital and pay premiums to the captive and, in general, the premiums are used to cover the administrative expenses of the captive and to pay claims. No separate law in Maine governs captives; a captive formed in Maine would be regulated in the same manner as any insurance company.

RECOMMENDATION:

1. **That any change in the regulation of captives be approached cautiously.**

Discussion: Some view encouragement of the formation of captives as a means of assisting certain enterprises to secure more affordable liability insurance. The encouragement usually takes the form of less stringent regulatory requirements for captives. For example, a captive may be required to have a lower reserve than traditional insurance companies. While lower reserve requirements and other less stringent regulations may promote lower premiums, those insured by captives will not be benefited if their claims cannot be paid. Encouragement

of the formation of captives without guaranteeing the ability of a captive to pay claims will not help the consumer.

Consumer Representation

CURRENT LAW: Currently only two or three people handle consumer complaints in the Bureau of Insurance. They do not represent consumers in insurance rate cases. The Attorney General may have the authority to intervene in rate cases on behalf of consumers.[1]

RECOMMENDATIONS:

2. **That the Bureau increase its consumer orientation through:**

   consumer education;

   market conduct studies; and

   staff to act as liaison between insurers and consumers for Market Assistance Plans (MAP's).

Discussion: The impact of the portion of the insurance cycle in which liability insurance becomes unavailable and difficult to afford can be softened by state government actions to forewarn and assist consumers.

The Bureau of Insurance should undertake more educational efforts to inform consumers of the dangers of relying on low insurance rates available in the boom portion of the

insurance cycle. This knowledge will help consumers make intelligent purchases of insurance and plan for downturns in the insurance cycle.

Market conduct studies may permit the Bureau of Insurance to gain advance knowledge of an upcoming insurance crisis. In a market conduct study, insurance companies are surveyed to determine their current behavior in the insurance market: are they beginning to cut back on the lines they are willing to insure? do they anticipate needing to increase premium income? With this information, the Bureau can warn consumers and work with insurance companies to address problem areas before they grow.

Through MAP's, the Bureau of Insurance is able to negotiate with insurers to meet the needs of a particularly hard hit insurance line. When a type of enterprise is left without available or affordable insurance, it will help those affected to know they can turn to the Bureau for help. Assigning specific staff to work with MAP's will aid all concerned.

3. **Majority:** That legislation be enacted to allow the existing Public Advocate to review insurance rate filings and intervene in insurance rate cases at his discretion. Funding for the Public Advocate's insurance activities should be supplied by the General Fund or a pooling of funds derived from all regulated insurers.

Discussion: The Public Advocate has authority to intervene in utility rate cases and certain workers compensation hearings.[2] Permitting, but not requiring, the Public Advocate to intervene in hearings on insurance rate filings can be of assistance to the public and the Bureau of Insurance.

In holding a hearing on a rate filing, the Superintendent of Insurance and his staff have two responsibilities: to protect the solvency of insurance companies and to assure that insurance is provided at a reasonable cost.

The insurer seeking the rate increase will put forward justifications of the proposal. The inclusion of the Public Advocate in important hearings will provide the Bureau with additional input on the side of what's best for the consumer. The Public Advocate's intervention may help the Bureau more easily fulfill its duties of judging between the interests of insurers and consumers,[3] since the Attorney General's Office is not poised to take much involvement in insurance matters.

Minority: That the Public Advocate not be given the authority described above.

Discussion: The intervention of the Public Advocate in insurance rate hearings would be duplicative.

The Bureau of Insurance is a public agency charged with protecting the public interest. The public has two interests regarding insurance rates: that the rates be reasonable and that insurance companies remain solvent. In independently analyzing rate increase requests, and in deciding upon an appropriate rate, the Bureau is carrying out its responsibilities to the public.

Adding the Public Advocate to this arena will give the public the misimpression that the Bureau does not look after consumer interests. If the Attorney General determines that consumer interests are in jeopardy in a rate hearing, the Attorney General may, under existing law, intervene.

Flex-Rating

CURRENT LAW: Flex-rating of insurance rates involves the establishment of a band in which rates may rise or fall without prior governmental approval. If a proposed rate hike or drop falls outside the band, prior approval must be granted for the rate to go into effect. There is no provision in Maine law which would allow the Superintendent of Insurance to institute flex-rating.

Currently, every insurer must file all rates with the Superintendent at least 30 days before the effective date

of the rates. The Superintendent may disapprove a filing by holding a hearing if the Superintendent finds that the rates are excessive, inadequate, or unfairly discriminatory or in any way do not meet the requirements of law.[4] The Superintendent may not disapprove a rate if all the requirements of the Insurance Code are met. Maine's system of having proposed rates going into effect unless specifically disapproved is termed the "file and use" method.

RECOMMENDATIONS:

4. **That the Bureau of Insurance be given statutory authority to implement a flex-rating plan for property and casualty insurance.**

Discussion: The boom period in an insurance cycle poses a problem for consumers: for the moment, underpricing of premiums produces seeming bargains; but those low premiums herald the coming of a time of retrenchment and recoupment by insurers. Establishment of a low point beyond which insurance rates typically ought not to fall can bring some control to the boom portion of the cycle.

The use of flex-rating can also provide the Bureau of Insurance with earlier information about the pulse of the insurance market. In this way, problems that may lead to crisis can be anticipated.

For Maine, it is important that the institution of flex-rating be done flexibly. No band should be placed in statute. Flex-rating should not be prescribed in statute for specific lines of insurance. Rather, the Bureau should be given general authority, in legislation containing sufficient standards or procedural safeguards, to implement a flex-rating band it determines appropriate for insurance lines it deems appropriate.

5. **That the Legislature provide adequate resources to the Bureau of Insurance to implement a flex-rating plan.**

Discussion: Implementing flex-rating will require the Bureau to initiate analyses of what insurance rates should be, as opposed to reacting to insurers assertions of necessary rates. Establishment of flex-rating may produce more rate hearings if insurers often propose rates outside the band. To accomplish flex-rating that is efficient and fair to insurers, the Bureau must have the necessary staff and other resources to do the job well.

Funding and Staffing of Insurance Bureau

CURRENT LAW: The salary of the Superintendent of Insurance is paid from the General Fund. The expense of maintaining the Bureau is paid out of the Insurance Regulatory Fund. This fund is supported by fees and other charges assessed against or collected from insurers by the Superintendent.

The Superintendent, with the approval of the Commissioner of the Department of Professional and Financial Regulation, may employ a first deputy superintendent and may employ one or more additional deputies. Subject to the Civil Service Law, the Superintendent may appoint and dismiss for cause.[5]

The Bureau is currently understaffed and operates in crowded facilities. The computer system in the Bureau is outdated.

RECOMMENDATION:

6. That the Legislature encourage and support the Superintendent of the Bureau of Insurance in his desire to make the Bureau more effective.

Discussion: The Superintendent is developing proposals for improving and restructuring the Bureau. Many of these proposals are being put forward to the Joint Standing Committee on Banking and Insurance as the Committee studies the feasibility of establishing a three-member insurance commission. The Superintendent should be supported in his efforts to improve the workings of the Bureau.

Any proposals for restructuring the Bureau put forward by the Banking and Insurance Committee or the Governor during the upcoming legislative session should be given serious consideration. If the proposals merit enactment, or additional funding, they should be acted upon. A

fully-staffed and equipped Bureau, operating efficiently, is necessary to the provision of services to the public, to appropriate regulation of insurers, and to addressing liability insurance availability and affordability problems.

Joint Underwriting Associations

CURRENT LAW: A JUA is a legislatively mandated association of all insurers in the state who must write insurance policies for those who cannot find coverage in the marketplace. Other than the temporary JUA for medical malpractice,[6] which is no longer issuing policies, no statutory provision exists allowing the Superintendent of Insurance to establish a JUA for any type of insurance.

RECOMMENDATION:

7. That the Superintendent be given statutory authority to determine that a Market Assistance Plan (MAP) is not working, thus requiring the establishement of a JUA after a notice and hearing. This authority should be general, permitting the establishment of a JUA for any line of insurance. Under this authority, the Superintendent would:

   first try a MAP;

   if he determines that there is insufficient voluntary participation by insurers through the MAP, establish a JUA;

   use his best efforts to avoid requiring insurers who have no expertise in writing a particular line of insurance to participate in a JUA for that line;

   after operation of the JUA for one year, hold a hearing to see if the JUA should continue; and

apply a penalty for failure to participate in a JUA (current law permits the revocation of an insurer's license for any failure to abide by the insurance statutes or regulations).

Discussion: Formation of a JUA is a third possible step the Superintendent of Insurance could take in an escalating attempt to deal with an insurance availability problem. The Superintendent should try two actions prior to forming a JUA.

First, the Superintendent and his staff should help individual consumers who contact the Bureau in searching for liability insurance connect with willing insurers. Second, if the Superintendent becomes aware that an insurance problem is striking an entire line of insurance rather than isolated individual consumers, the Superintendent should create a MAP for the group. Only when those voluntary efforts have failed should the Superintendent resort to forming a JUA.

The Superintendent must have statutory authority to form JUA's. This authority should be general, with proper standards or procedural safeguards, to give the Superintendent flexibility in establishing a JUA. The implementation of a JUA should be a last resort, used only for specific, intractable lines of insurance. When used in this manner, JUA's are important tools for the most troublesome times of an insurance crisis.

Managing Risk

CURRENT LAW: The federal government, through the Occupational Safety and Health Administration, has primary governmental responsibility for inspecting workplaces of private employers for hazardous conditions. In Maine, the Bureau of Labor Standards, Safety Division, has jurisdiction over workplace safety for public employees, those employed by the State government or by a political subdivision of the State. The Safety Division has a safety consultation program available to private employers. Together with the Finance Authority of Maine, the Bureau of Labor Standards also conducts a program to make low interest loans available to employers seeking to improve the safety of their workplaces.[7]

RECOMMENDATIONS:

8. **Majority: That companies and individuals be encouraged to practice risk management, as some already do, through the enforcement of personal penalties for those who intentionally or recklessly engage in or permit workplace and business practices that are dangerous to employees and consumers.**

Discussion: Federal and State inspectors seek to assure workplace safety. Intelligent business people seek to protect themselves and their businesses' financial condition, as well as their employees and customers, by practicing risk management.

Maine law contains penalties that can be applied to business people who intentionally or recklessly engage in dangerous conduct. For example, the Maine Criminal Code makes conduct that recklessly creates a substantial risk of serious bodily injury to another a Class D crime. A Class D crime is punishable by up to 364 days imprisonment and a fine of $1,000 for an individual or $5,000 for an organization. If the criminal conduct was intentional, more serious penalties would apply.

Civil law also poses a deterrence to persons who would engage in shoddy business practices. The possibility of a million dollar verdict in a negligence case brought against a business by an injured consumer looms as a potential severe penalty for misconduct.

> **Minority: That Maine enact a statute providing specifically-tailored, severe, personal penalties for companies and individuals that expose the public or their employees to known hazards without prior disclosure.**

Discussion: Insurers would experience no lossess if preventable injuries did not occur to others as a result of their insureds' actions or inactions. Injuries that occur because a business intentionally or recklessly disregards safety precautions are particularly egregious.

The threat of a civil suit or an unlikely-to-be-enforced general criminal law does not present sufficient encouragment for all businesses to engage in risk management, to take responsibility to repair a known hazard. Specific penalties, including criminal penalties, targeted at knowing or reckless unsafe business practices in the workplace and in the consumer market are needed to address one of the actual underlying causes of the insurance crisis: unexcusable injury of others.

Market Assistance Plans

CURRENT LAW: A MAP is a voluntary agreement between State government and insurance companies that the companies will write insurance at an agreed upon price for those persons or groups that cannot find coverage. Although MAP's are not specifically mentioned in Maine law, the Superintendent of Insurance has the authority to form them. One MAP for daycare centers was formed last year.

RECOMMENDATION:

9. That the Bureau of Insurance:

have a readiness to create MAP's, including a specific staffperson assigned to help consumers with market assistance;

consider what incentives could be developed for insurance carriers to participate in MAP's (including possible adjustments of fees, the avoiding of JUA's, etc.); and

consider what circumstances will trigger its seeking of a MAP for particular insurance consumers.

Discussion: The ability of the Bureau of Insurance to create a MAP for a hard hit line of insurance is an important tool in ameliorating the effects of an insurance crisis. The Bureau needs to deliver a coordinated attack to an insurance problem when it discovers that many similar enterprises are affected or that no insurer is independently writing insurance for a particular line.

If necessary, the rapid creation of a MAP can occur if, prior to a crisis arising: the Bureau has developed a relationship with insurers that will make them feel comfortable about voluntary participation in a plan to insure difficult lines; the Bureau has educated consumers about the feasibility and availability of voluntary assistance programs; and the Bureau has assessed what factors will indicate that a MAP should be put in place.

To have the ability to organize a MAP when needed, the Bureau must commit resources to market assistance education and planning before the need arises. To the extent Maine enterprises are still suffering from an inability to find insurance as a result of the most recent downturn in the insurance cycle, the Bureau should work with those enterprises and insurance companies to develop voluntary market assistance.

Reinsurance Regulation

CURRENT LAW: Primary insurers reinsure portions of the risks they insure. Primary insurers will often reinsure the more exotic or surplus lines of insurance, and the higher amounts of coverage they offer for a particular line, with companies in the business of reinsurance. Reinsurers, except for domestic insurers, are not required to obtain a certificate of authority from the Bureau of Insurance. Any primary insurer authorized to do business in the State may reinsure with a reinsurer if:

> the reinsurer is authorized to transact insurance in one or more states;
>
> the reinsurer has the required amount of surplus or assets held in trust;
>
> the reinsurer files certain information with the Superintendent of Insurance and appoints the Superintendent as its agent to receive service of legal process; and
>
> the ceding insurer retains as security some amounts that it ultimately owes to the reinsurer.[8]

RECOMMENDATION:

10. That Maine support the National Association of Insurance Commissioners (NAIC) in their efforts to create methods for greater state regulation of reinsurers.

Discussion: The NAIC is a professional organization composed of the insurance commissioners of the governments of all the states. The Maine Superintendent of Insurance is seeking to take an active role in the organization. Among other things, the NAIC grapples with insurance regulation issues that are too large or complex for many of its members to address individually.

One such issue is that of reinsurance regulation. Reinsurance is an international business. Extremely large sums of money flow in and out of the business. At times in the cycles of the insurance industry, the actions of reinsurers can have significant negative impacts on insurance affordability and availability.

But insurance cycles are dynamic. Understanding the relationship of reinsurers to insurance cycles, and the workings of the international reinsurance market, to determine how states might regulate reinsurers to protect consumers and primary insurers, is a task too large for Maine to undertake on its own.

Reporting Requirements

CURRENT LAW: Currently, insurance companies must file financial statements and statistical reports annually with the Bureau of Insurance.[9] The statistical reports may be filed through a rating organization. The reports include information on premium exposure and loss experience by line. Information on proposed rate increases or decreases is filed only when an insurer wants to change its rate. The Bureau has no prescribed format for a rate filing. Information about the insurer's experience with Maine claims must be included in a rate filing since the Superintendent may disapprove a rate if it does not give due consideration to Maine loss experience.[10]

RECOMMENDATIONS:

11. That insurance companies be required to report the following to the Bureau of Insurance: claims paid and incurred, on a line by line basis, specific to Maine experience.

Discussion: In order to assess the true financial condition of an insurer, the Bureau needs complete information. One piece of important information to the determination of the financial health of an insurer, and the appropriateness of a proposed rate hike, is the claims experience of the insurer.

To gain a full picture of this experience, the Bureau must have data showing not only claims incurred, but claims actually paid. It is important to have this information for each line of insurance and for Maine claims experience. When information on claims incurred is all that is available to a regulator, the regulator knows only of the possibility of the insurer having to pay a claim, rather than the reality of funds expended on actual claims paid.

12. **That the efforts of the National Association of Insurance Commissioners (NAIC) to gather insurance data to be available to the states be supported.**

Discussion: The Maine Bureau of Insurance cannot, on its own, gather and analyze all the data available from insurance companies which could be beneficial to solvency and rate decisions. Many states are in this same situation.

The NAIC is seeking to collect relevant data from insurers and develop a system for sharing this information with individual states in a way tailored to the needs of each state. Through these efforts, Maine could secure economical assistance in gaining better information to use in assessing causes of and remedies for insurance cycles and crises.

13. **That the National Conference of State Legislatures' (NCSL) efforts to create a model insurance data collection bill for the states be supported.**

Discussion: For a year, NCSL has been engaged in discussions with legislators, insurers, and insurance regulators aimed at creating model data collection legislation. The model bill will provide the states with a possible vehicle for eliciting from insurers insurance data pertinent to a particular state, as opposed to a region, another grouping of states, or the nation.

To the extent the states enact similar data collection legislation, the task of insurers in providing information is made easier. To the extent Maine can, within its resources, develop its own data base on Maine claims experience, the better positioned the State will be to help insurers do more than sweep Maine into information representing national claims experience.

14. **That the efforts of the Bureau of Insurance to better equip itself to collect and, especially, analyze insurance data be supported.**

Discussion: In order to assess claims information, to use NAIC data, and to seek and use more Maine data through model legislation, the Bureau must be equipped to process and analyze data. Collecting more information without the ability to sift and interpret it makes no sense.

Much of the debate during the insurance crisis of the 1980's has focused on what the dimensions of the crisis are. A complete-as-possible insurance data base, reviewed by independent insurance regulators, will assist policymakers faced with future liability insurance problems in determining where to look and what to do for solutions.

Self-Insurance

CURRENT LAW: Current law allows 10 or more municipalities or school administrative districts, or an organization representing 10 or more political subdivisions, to form self-insurance pools as long as certain audit requirements are met.[11] The liability of political subdivisions is limited under the Maine Tort Claims Act.[12] Without provisions such as these, self-insurance pools are regulated in the same manner as traditional insurance companies.

RECOMMENDATION:

15. That regulation of self-insurance not be liberalized in Maine at this time.

Discussion: In order for self-insurance to be feasible for any group, the upper limit of the group's potential liabiity must be limited. Caps on the liability of a particular type of enterprise do not seem warranted at this time. The use of market assistance plans and, in extreme cases, joint underwriting associations should first be

tried to alleviate insurance probems of various groups. If these efforts fail, a reconsideration of the need to carve out an exception, such as the formation of a self-insurance pool, for a peculiarly adversely affected line may be needed.

Alternative Dispute Resolution

CURRENT LAW: Maine has ADR procedures in statute for two different types of civil cases. Since 1984, all divorce, separation, or annulment cases involving minor children have been mediated through the Court Mediation Service prior to having a contested hearing in the case.[1] Since January of 1987, as established in Public Law 1985, chapter 804, panels of medical and legal professionals, chaired by persons with judicial experience, have been in place to screen medical malpractice claims with the aim of achieving a settlement in the case or a dropping of the claim prior to costly litigation.[2]

Small claims parties may also use the Court Mediation Service; they are encouraged to do so by the court.[3] Maine Rule of Civil Procedure 53 provides for the use of referees in civil cases by agreement of the parties or order of the judge. The Maine State Bar Association and Judicial Department are currently working on a proposal for a pilot project in two counties to implement the use of mediation in many more civil cases.

RECOMMENDATION:

1. **That funds be provided to the Maine Judicial Council for a project that would establish and evaluate an experimental Alternative Dispute Resolution procedure to be available in all civil actions in the Superior Court.**

Discussion: Attorneys fees and other court costs add to the amounts an insurance company must pay when its insured is found responsible for another's injuries. To the extent these costs are reduced, more insurance dollars can be available to pay injured persons' damages, and future premium increases may be moderated. If a civil case is resolved expeditiously, particularly if costly litigation is avoided, legal costs associated with delay and trials can be saved.

These savings should not come, however, at the expense of doing justice to the parties and their claims. The Maine medical malpractice screening panels are one attempt to encourage swifter resolution, reduce costs, and maintain justice for a particular type of civil case.

The Maine Judicial Council and Maine State Bar Association have devised a plan for extending the use of alternative dispute resolution to all Superior Court civil cases. The Maine Judicial Council is composed of the Chief Justice or Judge of the Supreme Judicial Court, Superior Court, and District Court; the Attorney General; the Dean of the University of Maine Law School; another Supreme Judicial

Court Justice, Superior Court Justice, District Court Judge, and Probate Court Judge; a court clerk; two attorneys; and six laypersons.[4]

The experimental procedure discussed with the Commission will be developed by the Council on the basis of the proposal of the Maine State Bar Association's Alternative Dispute Resolution Commission. This proposal, and a tentative budget, appear in Appendix J.

The experiment would be conducted in two counties, selected by the Judicial Council, from September 1, 1988, through March 1, 1990. The Council would report periodically on the progress of the experiment to the Supreme Judicial Court and Legislature. The Council would prepare a final report, accompanied by its recommendations, not later than July 1, 1990.

The Superior Court would be encouraged to monitor the experiment during its progress, and, at any time the Court finds appropriate, to adopt procedures by order or rule to facilitate the experiment or to implement any resulting recommendations.

Collateral Source Rule

CURRENT LAW: In Maine, if a plaintiff is compensated in whole or in part for his or her damages by some source independent of the defendant, the plaintiff is still permitted to recover full damages against the defendant. This means that, generally, evidence of a collateral source is not admissible at all at trial.[5]

RECOMMENDATIONS:

2. **Majority: That the collateral source rule remain as it is in Maine, and that insurers be encouraged to place subrogation requirements in insurance contracts and to enforce those requirements.**

Discussion: Through a subrogation clause in an insurance contract, the insurer of a plaintiff may recover its payments to the plaintiff from damages paid to the plaintiff by a defendant. For example, Blue Cross-Blue Shield pursues reimbursment for health care coverage when its insured is successful in a lawsuit based on the injuries for which health care payments were made.

No statistics exist as to how many Maine plaintiffs receive payment for injuries from sources other than defendants. No certain evidence exists demonstrating that if collateral source payments are taken into account in lawsuits,

insurance rates will be affected favorably. Without a definite link between consideration of collateral sources and insurance costs, the rule existing in Maine should not be changed.

It is not fair to an injured plaintiff, who receives some payments from insurance or other sources the plaintiff has given value for, to have his damage award reduced by the amounts of these payment. Why should the defendant at fault for the plaintiff's injuries, and the defendant's insurer, benefit from the plaintiff's provisions for himself?

> Minority: That the collateral source rule be retained to the extent that the factfinder is not to hear evidence of collateral sources, but that, after a verdict establishing liability on the part of the defendant or defendants, the judge:
>
> > hear evidence as to collateral sources;
> >
> > deduct from the damage awards any compensation the plaintiff has received for medical expenses from private sources for which the plaintiff paid premiums or gave other value; and
> >
> > reduce the above deduction by the amount necessary to reimburse the plaintiff for the premiums paid or other value given, plus interest.

Discussion: It is not fair for a plaintiff to be compensated for more than his actual loss. When a

plaintiff receives payments from his own insurer for certain injuries, and a defendant and his insurer pay the plaintiff damages for those same injuries, the whole system of limited resources loses.

Insurance costs are driven up unnecessarily when plaintiffs are made more than whole. Sufficient evidence exists showing a connection between consideration of collateral sources and reduced damage awards. Reduced damage awards can lead to reductions in insurance rates.

Dependence on subrogation clauses in insurance policies to reduce double payments to plaintiffs is misplaced. Many existing insurance contracts contain subrogation clauses that are not enforced: the insurer may not know of the insured's receipt of a damage award; unless a damage award is large, it will not be worth it for the insurer to engage in litigation to pursue the subrogation claim.

Altering the collateral source rule in Maine as proposed is a moderate reform that can ameliorate insurance problems.

> Contingent Minority: If the majority recommendation is not adopted, and the collateral source rule is altered, it should simply permit the factfinder to hear evidence of collateral sources without requiring the factfinder to deduct collateral source payments automatically from damage awards.

Discussion: If the collateral source rule is to be altered in Maine, the jury, rather than the judge, should be entrusted to determine what weight to give the evidence of collateral sources. Justice cannot be served in each case, each with different facts, by a requirement of automatic deduction of certain collateral sources. A jury should be free to disregard collateral source payments if it believes that is what a fair verdict requires.

Contingent Fees

CURRENT LAW: In Maine, the use of contingent fees is governed by Maine Bar Rule 8 (the Maine Bar Rules are adopted by the Supreme Judicial Court to regulate the practice of law). A "contingent fee agreement" is one in which the compensation for legal services is contingent upon the successful disposition of the subject matter of the agreement and the amount of compensation is fixed or to be determined by a formula. Contingent fee agreements must be in writing and signed by the client and attorney. Public Law 1985, chapter 804 proposes establishing in statute, as of August 1, 1988, a contingent fee schedule for medical malpractice actions. The elements of the schedule can be seen in Appendix E.

RECOMMENDATIONS:

3. That 24 MRSA §2961 (the contingent fee schedule established in chapter 804) be clarified as to when and how an attorney may apply to the court for

additional compensation than allowed by the contingent fee schedule. This section should also be clarified to give the court direction in how it is to determine when additional compensation is warranted.

Discussion: No clear link between establishment of attorney fee schedules in statute and insurance rate reductions has been demonstrated. However, the existence of such a schedule in chapter 804 provides the opportunity for a "pilot project" to determine if this schedule affects medical malpractice damage awards and insurance rates. It is also possible that the enforcement of this schedule may unfairly reduce the ability of plaintiffs with meritorious cases to find attorneys who can afford to take their cases on a contingent fee basis. We should test these possibilities in this limited fashion.

Before proceeding with the experimental medical malpractice contingent fee schedule, certain clarifications should be made. The statute as written does not clearly provide for an attorney's ability to seek, prior to undertaking a case, court permission to charge a higher contingent fee. The ability to seek this exceptional permission at the outset may affect the ability of plaintiffs with particularly complex cases to secure representation.

Similarly, the statute should be revised to provide more guidance as to when additional attorneys fees might be warranted. In this way, attorneys and their potential clients can be better informed as to whether it is worth

their while, in a particular case, to seek court permission for additional compensation. With this guidance, courts may be able to apply this provision more equitably.

4. That the courts provide information to the Legislature on the use of contingent fees in Maine, what the typical schedules are, and whether Bar Rule 8 or attorney fee review by the courts should be altered to better direct attorneys and inform and protect clients in the use of contingent fees.

Discussion: No statistics have been compiled to show what the average Maine contingent fee schedule is, how often and in what cases contingent fees are used, and whether an abuse of the contingent fee system appears to exist. Before any additional legislative setting of contingent fee schedules occurs, this information should be gathered. The Commission has begun this process by asking the courts to examine contingent fees and report to the Legislature.

Damage Caps

CURRENT LAW: The Maine Liquor Liability Act establishes a $250,000 cap on damages for all losses, except expenses for medical care and treatment, arising out of a single accident or occurrence.[6] The Probate Code provides a cap of $50,000 in wrongful death cases on damages for loss of the comfort, society, and companionship of the deceased person.[7] The Maine Tort Claims Act sets a limit of

$300,000 for an award of damages against a governmental entity and its employees arising out of a single occurrence.[8] In general, however, Maine law does not place a cap on possible damages in a civil action.

RECOMMENDATION:

5. **That no new caps be placed on awards for economic or noneconomic damages, but that the courts be urged to exercise their powers of additur and remittitur in appropriate cases.**

Discussion: "Additur" is the power of a trial court to assess damages or increase the amount of an inadequate damage award made by a jury. "Remittitur" is the power of a trial court to determine that damages awarded by a jury are, as a matter of law, grossly excessive and to order the plaintiff to remit a portion of the damages.

If, for example, a verdict given by a jury in a personal injury case appears to the judge to be grossly excessive in relation to the evidence presented at trial on the issue of damages, the judge should, in fairness, exercise the remittitur power. If, however, the evidence can be taken to support a large damage award then it, in fairness, should be allowed to stand.

In 1988, the Joint Standing Committee on Legal Affairs will be reviewing the damage caps in the Liquor Liability Act.[9] This review may bring to light new evidence on the relationship between damage caps and Maine insurance

rates. The other two damage caps in Maine law have been in place for many years. In particular, the cap in the Maine Tort Claims Act is necessary to the workings of the municipal self-insurance pool.[10] These caps should be left in place until evidence about their impact is available.

In general, however, caps on damages introduce an arbitrariness into the civil justice system that may lead to unfairness in certain cases. In Maine, there do not appear to be many damage awards of over $250,000 in personal injury and medical malpractice cases. The facts of the cases producing larger awards led Maine juries to conclude that such awards were justified. The plaintiffs in these few cases deserve to receive the full compensation for their injuries that plaintiffs in less serious cases receive. Claims that damage caps violate the Constitution's equal protection clause arise from this type of limitation of more severly injured plaintiffs.

Immunity

CURRENT LAW: Generally in Maine, directors and officers of profit corporations can be held liable for tortious conduct.[11] LD 208, carried over from the last legislative session by the Banking and Insurance Committee, seeks to permit corporation bylaws to be amended to provide exemptions from or limitations on the personal liability of

directors and officers to the corporation, and to expand the corporation's ability to indemnify the directors and officers for other personal liability they acquire through their duties. These provisions apply to nonprofit corporations as well.

Under current Maine case law, charitable organizations, as opposed to persons working for charitable organizations, are immune from liability under the charitable immunity doctrine.[12] A Maine statute does abrogate the charitable immunity doctrine up to the amount of any liability insurance the organization carries.[13] Maine statutes also provide specific immunity in certain cases for, for example, governmental entity employees[14] and food banks[15].

RECOMMENDATION:

6. That legislation be enacted providing immunity to directors, officers, and volunteers of nonprofit organizations, providing that:

   the nonprofit receives its primary funding from donations or dues;

   the nonprofit has a charitable purpose as delineated in 42 USC §501(c)(3) (except that the lobbying restrictions applied by that section should be more clearly defined in Maine law) or 13-B MRSA §201(1)(A) & (2)(A);

   the director, officer, or volunteer is not in any way compensated from funds of the nonprofit, except for reimbursement for expenses;

   and the immunity extends only to negligent acts or omissions of the director, officer, or volunteer.

Discussion: The ability to rely on the charitable immunity doctrine existing under Maine caselaw has been questioned.[16] Yet, the theory behind the doctrine remains valid: if society permitted the invasion of funds donated for charitable purposes to satisfy tort claims it might destroy the sources of charitable support. The work of benevolent nonprofit organizations -- in this era of homelessness, AIDS, and other social problems -- is important to all Maine citizens.

Still, the charitable immunity doctrine has not yet been repudiated by the Maine Supreme Judicial Court. Also the Joint Standing Committee on Judiciary has asked the Attorney General to review the somewhat-related Maine Tort Claims Act.[17]

The Tort Claims Act is a ten-year-old codification of the doctrine of sovereign immunity. That doctrine, like the charitable immunity doctrine, was originally judge-made. The task of codifying the charitable immunity doctrine would be similar, in some respects, to the task of codifying the sovereign immunity doctrine.

Enactment of a charitable immunity statute should await analysis of the Tort Claims Act and the success with which the Legislature accomplished its purpose of codifying the

doctrine of sovereign immunity. In the meantime, charitable organizations may still rely on existing, albeit not recent, caselaw protection.

However, no argument exists that Maine caselaw provides current protection from liability to those who serve as directors, officers, and volunteers with charitable nonprofit organizations. Without the free services of such people, nonprofit organizations cannot meet the demands for their help. The liability insurance crisis has discouraged people who wish to do charitable work from exposing themselves and their families to possible uninsured personal liability. To retain the willingness of these people to help those in need, protection from personal liability for negligent acts in the performance of charitable duties must be enacted now.

Joint and Several Liability

CURRENT LAW: Generally in Maine, each defendant found to be at fault, when the combined defendants' fault is greater than the plaintiff's fault, is jointly and severally liable for the full amount of the plaintiff's damages. A defendant who does not pay damages to the plaintiff may nevertheless have to contribute his portion of the damages if another defendant who is liable to the plaintiff

in the same case, and who has paid all the damages, seeks contribution from the first defendant.[18] Maine's Liquor Liability Law provides an exception to the general rule of joint and several liability.[19]

RECOMMENDATIONS:

7. **Majority: That the law of joint and several liability, and related doctrines, as they currently exist in Maine not be altered.**

Discussion: The purpose of Maine tort law is to make the plaintiff whole; concern about reducing insurance premiums, in light of slight evidence that tort reform will produce such a result, must remain secondary. The law of joint and several liability is a key to assuring that someone at fault, as opposed to an innocent plaintiff, bears the cost of the plaintiff's harm.

Maine law, in most instances, permits a liable defendant to bear responsibility for only that portion of the plaintiff's damages attributable to his fault. The comparative negligence statute requires a plaintiff to assume responsibility for his injuries to the extent he was at fault. It also absolves a defendant whose fault was less than the plaintiff's from responsibility to the plaintiff. Yet, under the Maine law of contribution, the absolved defendant may still be liable to any other defendants in the case when those defendants have paid damages ascribable to the absolved defendant's fault.

Thus, while in a few cases a defendant may pay more than his portion of a plaintiff's damages because another defendant at fault has no assests, this result is the fairest option. A more unfair option is to have an innocent or less blameworthy plaintiff absorb the loss.

In addition, no evidence exists demonstrating that the abolition of the law of joint and several liability will reduce Maine insurance rates. The 1988 review of the Liquor Liability Act by the Legal Affairs Committee may provide such evidence. Until better evidence exists, however, the law of joint and seveal liability, a cornerstone of the protection afforded negligently injured persons by Maine tort law, should not be further revised.

Minority: That joint liability be abolished.

Discussion: Leaving aside for the moment its impact on insurance rates, the law of joint and several liability is not fair to solvent defendants.

A defendant found liable for any portion of a plaintiff's injuries should compensate the plaintiff to the extent of the defendant's responsibility, and to the extent the plaintiff is not receiving redundant compensation. However, it is not fair to that defendant that he act as a "deep pocket" for a plaintiff, regardless of the

defendant's actual fault, simply because that defendant has assets and another blameworthy defendant does not. If society wishes to compensate plaintiffs who cannot recover from judgment-proof defendants, it should look to something other than another defendant who happens to be solvent.

The existence of the law of joint and several liability does have a negative impact on insurance rates. In setting rates for insureds that may be viewed as deep pockets -- large corporations, governmental entities, hospitals, and others -- insurers must take into account the possibility that these insureds may be required to compensate plaintiffs much more highly than the degree of the insureds' fault for the harm.

Evidence does exist that certain states' change to a rule of several liability has encouraged insurance companies to reduce insurance rates. The Maine Legislature, in adopting a rule of several liability for certain cases under the Liquor Liability Act, has demonstarated a belief that insurance rates may be impacted by such a change.

Pre- & Post-Judgment Interest

CURRENT LAW: Under Maine statutes, pre-judgment interest is assessed in most civil cases, except those involving a contract or note setting an interest amount, at 8% per year

from the time of the notice of the claim or, if none, from the time of filing of the complaint. For a judgment of less than $5,000, pre-judgment interest is assessed from the time of filing of the complaint.[20] After a judgment is entered, and including the time during which an appeal is taken, post-judgment interest is assessed at 15% per year.[21]

RECOMMENDATION:

8. **That Maine pattern its pre- and post-judgment interest statute after the new federal statute, with a slightly higher interest rate than the federal statute for added incentive to settle a case before trial or forego an unnecessary appeal.**

Discussion: Having pre- and post-judgment interest rate figures set forth in the Maine statutes permits an inflexibility that may produce unnecessarily high interest payments by defendants. Pre- and post-judgment interest rates must be set at a level that encourages expeditious resolution of a case. But, if they are unnecessarily high, they may contribute to court costs, and perhaps insurance rates, being unnecessarily inflated. A pre- and post-judgment interest rate that tracks the prevailing interest rate in society, plus a bit more for added incentive, is sufficient.

Patterned after the federal statute,[22] a new pre- and post-judgment interest statute for Maine would read:

Interest shall be calculated at a rate equal to the coupon issue yield equivalent, as determined by the Secretary of the Treasury of the United States, of the average accepted auction price for the last auction of 52 week United States Treasury bills settled immediately prior to the date from which the interest is calculated, plus 1% for pre-judgment interest and 3% for post-judgment interest.

Punitive Damages

CURRENT LAW: Under Maine case law, punitive damages may be awarded only if the defendant acted with malice, which exists when the defendant's conduct is motivated by ill will toward the plaintiff, or when the defendant's deliberate conduct is so outrageous that malice toward the plaintiff can be implied. Proof of the conduct necessary to permit an award of punitive damages must be by clear and convincing evidence.[23]

RECOMMENDATION:

9. That no change in the existing Maine law of punitive damages is warranted.

Discussion: As developed by the Maine Supreme Judicial Court, the rule of punitive damages in Maine is a strict one. Under the Court's standard, punitive damages cannot be lightly awarded in this State, and thus cannot be something which often contributes to large damage awards.

State-of-the-Art Defense (product liability)

CURRENT LAW: Generally in Maine, product liability exists when an injury is caused by a product, the injury was foreseeable by the use of the product, and there was a reasonable way by which the manufacturer or other merchant in the flow of commerce in that product could have avoided that injury. The primary causes of action that can be brought to try to establish product liability are negligence and strict liability. (The possibility of liability based on warranty would also be explored in a case involving a defective product).[24] Maine has a specific statute imposing strict liability on the seller of a product in a defective condition unreasonably dangerous to the user.[25]

Recently, the Supreme Judicial Court expressly held that "state-of-the-art" evidence is admissible in an action based on Maine's strict liability statute when the alleged product defect is a failure to warn. In that case, which concerned the manufacturer of a product, the Court framed the "state-of-the-art" question as follows: "Given the scientific, technological and other information available when the product was distributed, did the manufacturer know or should he have known of the danger."[26]

A "state-of-the-art" defense is always available in negligence cases, including product liability actions based on negligence. The "state-of-the-art" defense in these cases permits the defendant to try to show that the product was designed, manufactured, or sold through a process that met the acceptable standard of care at the time.

RECOMMENDATION:

10. That, in a suit seeking strict liability for the design, manufacture, or sale of, or failure to warn about, a defective product, evidence of the "state-of-the-art" be admissible by the defense. The availability of this defense should be established in statute.

Discussion: While most liability insurance sold in this country covers liability based on the purchaser's negligence, some policies insure against the purchaser being held strictly liable for damage caused by a product with which the insured was associated. The costs of such insurance for designers, manufacturers, and sellers of products may be lessened if the insured can use a "state-of-the-art" defense in a product liability case brought against him.

The availability of a "state-of-the-art defense" in all product liability cases in Maine will tell insurance companies that, in this state, manufacturers and merchants are measured by the standard of the times in which they were involved with a product. The question of whether it

was foreseeable that a product would cause injury will not be determined by today's knowledge, but by the knowledge actually available to the merchant or manufacturer. This could reduce the success of product liability claims.

Statistics in Civil Cases

CURRENT LAW: No Maine law specifies how court statistics relating to the filing and disposition of general civil cases are to be gathered and compiled. The Judicial Department issues an annual report that provides some general figures on numbers and types of civil filings and dispositions. While the Judicial Department is in the process of computerizing its information gathering, computers are not yet in use for civil cases.

RECOMMENDATIONS:

11. **That the case form used by court clerks be amended so that it will be used to gather verdict information as well as the ad damnum information it currently contains.**

Discussion: The Superior Court Civil Statistics Reporting Form solicits information concerning the amount of damages a plaintiff initially asks for in a civil case. This information is found in the ad damnum clause of a plaintiff's complaint. The form does not collect information on how much, if any, is actually awarded in a case. Amending the form to require this information will prove of value in future evaluations of verdict sizes in

Maine. Such information is currently not collected in any systematic way; it is thus difficult to assess trends in Maine jury awards.

12. That the Legislature appropriate additional funds to the courts to be used for a more rapid implementation of computerization for civil cases.

Discussion: In 1985, the Maine Judicial Department began computerizing the processing of criminal cases in the District Court. To date, computerization is completed at four of the 13 district court locations. Computerization of the criminal caseload in the remaining district courts is the Judicial Department's first priority. The second priority is to begin the computerization of Superior Court criminal case processing.[27]

For future evaluations of the state of civil litigation in Maine and attempts to predict the future, computerized civil case statistics would be a great asset. Computerized civil case processing might also speed the handling of cases, thus reducing the costs of litigation, always a goal of insurers.

While efficient criminal case processing and access to information in criminal cases is clearly important, the

benefits of similar efficiency and information access through computerization of civil caseloads is worth additional funding to make it a reality in Maine soon.

Statutes of Limitations

CURRENT LAW: The general statute of limitations in Maine for civil actions is 6 years.[28] A few exceptions exist: Actions for assault and battery, false imprisonment, slander, libel, and medical malpractice must be commenced within 2 years after the cause of action accrues.[29] Civil actions against licensed architects or engineers must be brought within 4 years after the negligence is discovered, but in no event later than 10 years after substantial completion of the construction contract or services.[30] Civil actions against ski areas, in tort or contract, arising out of skiing or hang-gliding must be brought within 2 years of the injury.[31] Civil actions based on sexual activities with a minor must be brought within 6 years from when the cause of action accrues.[32] Actions under the Maine Liquor Liability Act must be brought within 2 years after the cause of action accrues.[33]

Public Law 1985, chapter 804 proposes altering the medical and legal malpractice statutes of limitations as of August 1, 1988. Currently, medical malpractice actions must be brought within 2 years of when the cause of action

accrues.[34] As with other statutes of limitations, that statute does not begin to run for minors until they reach the age of 18.[35] Legal malpractice actions must be brought within 6 years of when the cause of action accrues.[36]

Under chapter 804, these statutes of limitations will become the following: Medical malpractice actions would have to be brought within 3 years after the cause of action accrues. The cause of action would accrue on the date of the act causing the injury, except in foreign object surgery cases; in these cases the cause of action would accrue on the date of discovery of the injury. Minors would have to commence a medical malpractice action within 6 years after the cause of action accrues, or within 3 years of attainment of majority, whichever occurs first. An action against an attorney for professional negligence or breach of contract for legal services would have to be brought within 6 years of the act or omission giving rise to the injury. The cause of action would accrue from the date of the act or omission causing the injury, except in real estate title opinion cases and will drafting cases; in these cases, the cause of action would accrue when the injury was discovered.

RECOMMENDATIONS:

13. Majority: That the changes in medical and legal malpractice statutes of limitations contained in chapter 804 be permitted to go into effect on August 1, 1988.

Discussion: Changes in statutes of limitations are often cited as the tort reform that will most definitely influence insurance rates. The changes in chapter 804 can operate as "pilot projects" for assessing the impact of statutes of limitations changes on liability insurance costs in Maine.

While it may seem unfair to alter meidcal and legal statutes of limitations at this time, and not others, Maine law already contains other exceptions to the general statute of limitations for civil actions. Establishing new exceptions that can be tracked will provide data for the future.

In particular, changes in statutes of limitations pertaining to medical malpractice actions should be given a chance to work on insurance rates. The high costs of malpractice insurance pose threats to patients who may not be able to find doctors to care for them. The balancing of interests these changes involve was undertaken when chapter 804 was enacted. Giving the changes some time to have an effect could provide valuable evidence, reduce malpractice premiums, and make health care more available.

Minority: That the changes in medical and legal malpractice statutes of limitations contained in chapter 804 be deleted.

Discussion: The special statute of limitations for design professionals has been in place for 12 years; yet design professionals are currently complaining about the affordability and availablity of their liability insurance.

The Medical Mutual Insurance Company has assessed chapter 804 and found the statutes of limitations changes to have an adverse effect on medical malpractice claims frequency and severity.[37] Thus, existing evidence shows the change to be far from beneficial from an insurance standpoint.

The alteration in the legal malpractice statute of limitations followed the coattails of the medical malpractice changes. Without separate evidence of the particular need for and effect of a legal malpractice statute of limitations change, this new exception to the Maine statutes of limitations should not be made.

14. **Majority:** That, despite the inconsistencies, the statutes of limitations for civil actions, other than medical and legal malpractice actions, remain as they are.

Discussion: Ideally, statutes of limitations should be consistent, with exceptions to a general rule when

warranted. However, no testimony or other information has been presented to the Commission to demonstrate why and how Maine's existing exceptions to its general civil statute of limitations should be changed.

Minority: That, despite the inconsistencies, the existing statutes of limitations for civil actions remain as they are.

Discussion: No evidence was presented to the Commission concerning changes in existing exceptions to Maine's general civil statute of limitations. Without this evidence, these statutes should not be altered at this time for reasons of stability, even though the special statutes may not have a beneficial impact on insurance rates. However, no new exceptions -- such as the meidcal and legal malpractice revisions -- should be put into effect.

Structured Damage Awards

CURRENT LAW: Public Law 1985, chapter 804 enacted a requirement that in medical malpractice cases future damage awards equal to or greater than $250,000 shall be paid periodically if either party requests this. "Future damages" are defined as damages for future medical treatment, care or custody, loss of future earnings, and loss of the economic value of services.

RECOMMENDATIONS:

15. Majority: That the structured award requirements enacted in chapter 804 be repealed.

Discussion: Judges do not have the actuarial expertise to determine how to structure damage awards. The requirements of chapter 804 in this regard are inviting a second trial after the verdict in medical malpractice cases with large damage awards. The second trial would be aimed at providing the judge with actuarial evidence supportive of a structured award most favorable to each side. This exercise will increase litigation costs. The structuring of settlements and awards is best left to negotiations between plaintiffs' and defendants' attorneys and the actuaries who assist them.

Minority: That the structured award requirements enacted in chapter 804 be retained.

Discussion: Again, chapter 804 provides the opportunity for a "pilot project" on a tort reform. Experimenting with structured award requirements in medical malpractice cases may prove that such judicially determined arrangements benefit both plaintiffs and defendants' insurers. Plaintiffs will receive a steady flow of damage payments to cover future needs, with delineated sanctions to rely upon should the flow be interrupted. Defendants' insurers will not be required to deplete current reserves to pay for a plaintiff's needs before they arise.

APPENDIX J

ALTERNATIVE DISPUTE RESOLUTION PROPOSAL

Prepared by the Alternative Dispute Resolution Commission of the Maine State Bar Association

The Commission proposes a pilot program to be introduced initially in two Maine counties. To test varying approaches, certain features of the plan would vary in each of the counties. There follows a summary of the principal features of the plan, with the variance for counties A and B indicated.

1. In each county, the Chief Justice of the Superior Court will appoint a panel of mediators consisting of experienced trial attorneys. The attorney-mediators for a county shall have their principal offices and base of practice in a county other than the subject county or counties contiguous thereto, unless specifically excepted by the Chief Justice. Notice of this program shall be given to the Maine State Bar Association and the Maine Trial Lawyers Association with the request that notice of the program be disseminated within those organizations. Application forms shall be made available by

the ADR Commission. Each applicant shall be requested to provide a summary of his relevant experience and background pertinent to serving as a mediator in civil litigation pending in the Superior Court.

2. The mediator shall be paid $250 and reasonable and necessary expenses for each mediation conducted. The mediation charge shall be paid by the litigants, with the cost divided equally between them, unless other arrangements are made. An in forma pauperis petition may be filed by any litigant and, for good cause shown, the mediation fee may be waived.

3. The pretrial scheduling statement required by paragraph 2 of the civil case flow expedition order shall state whether either or both parties request mediation.

4. When the Court reviews each case under paragraph 3 of the civil case flow expedition order, the Court shall decide whether to refer the case to mediation, regardless of whether referral has been requested by the parties.

5. a. In County A, the Court shall have full discretion to decide which cases to refer to mediation, except that where all parties have requested mediation, the case shall automatically be referred to mediation.

b. In County B, all cases where the Court estimates that damages are not reasonably likely to exceed $50,000, and all cases in which the parties have requested mediation, shall be automatically referred to mediation. The Court shall have discretion with regard to referring all other cases to mediation.

6. If a case is to be referred to mediation, the Court's order placing the case on the expedited trial list (or a separately issued order in a case not to go on the expedited trial list) shall state the date by which mediation is to be completed.

a. In County A, the parties shall be required to agree on the selection of a mediator from the panel by a certain time, after which time if no mediator has been selected, the Court shall select a mediator from the panel.

b. In County B, the Court order shall identify the mediator assigned to the case. The parties will have 10 days from the date of assignment of a mediator to challenge the assignment for cause.

7. a. In County A, no discovery shall be allowed before mediation is completed.

b. In County B, mediation shall not be scheduled until the completion of the discovery period specified in the civil case flow expedition order.

8. Before the mediation session, the parties will submit to the mediator short "best case summaries," setting forth their legal and factual contentions and construction of the evidence. The mediator will also have the pleadings, the pretrial scheduling statement, and any scheduling or pretrial order that has been entered.

9. It shall be mandatory for both the attorneys and the parties to appear at the mediation conference. The mediation shall be conducted consistent with generally accepted mediation procedure and may include the presentation of evidence. It is anticipated that mediation shall take from one-half day to one full day. The mediator, with the consent of the parties, may order any appropriate dispute resolution technique. The mediator shall have discretion as to whether and when to include the parties in the mediation discussions. The mediator may propose settlement terms orally or in writing. Counsel shall be required to present to, and to discuss with, their clients any such settlement proposal. The sanctions of the present divorce mediation statute will apply to noncompliance with any of these requirements.

10. Within 10 days after the last mediation session, the mediator shall file with the Court either a full or partial settlement agreement signed by or on behalf of the parties, or a statement signed by the mediator that no settlement has been reached.

11. If no settlement, or only a partial settlement has been reached, the case shall proceed in the normal fashion on either the expedited or regular pretrial list. All discussions and statements made in the course of mediation, and the outcome of the mediation, shall be non-binding and absolutely privileged and inadmissible in evidence.

12. Motions. a. In County A (where no discovery is to be held before mediation), a party filing a dispositive motion (such as a motion based on a statute of limitation or jurisdiction) may have the motions heard by the Court prior to mediation. In cases where such motions have been filed, the matter shall not be scheduled for mediation until the motion has been ruled upon.

b. In County B (where discovery is permitted before mediation), all dispositive and discovery motions may be filed and determined by the Court prior to mediation.

A tentative budget for the proposal follows:

Consulting services at $250 per day:	
Project design and training - 10 days	$ 2,500
Project monitoring - 20 days	5,000
Project report - 10 days	2,500
Training - mediators and judges	
3 sessions at $1,500	4,500
Travel	
5,000 miles	1,200
Phone, supplies, etc.	1,000
Printing	2,000
Reserve fund for in forma pauperis - 20 days	5,000
	$23,700

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