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and Liability Insurance in Maine

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Report of

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

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PREFACE

The Commission to Examine Problems of Tort Litigation and Liability Insurance and its staff wish to acknowledge the assistance of all those who contributed to informing us. Several government employees offered us generous portions of their workdays to answer our questions. Representatives of various interest groups supplied us with helpful materials and reactions.

We particularly wish to express appreciation to the number of private citizens who gave of their time to provide us with information.

Two persons who were not members of our original staff provided assistance. Joan Sturmthal, J.D., of Hallowell was of great help to our subcommittees. Peter Siegel, the State Law Librarian, and his staff supplied us with mountains of needed materials.

Another staffperson merits special thanks. Without the skill and good humor of Laurette Knox, Senior Secretary, Office of Policy and Legal Analysis, this report could not have been produced.

Finally, we thank Justice Robert Clifford for the time and instruction he gave to our efforts. His knowledge proved of importance in helping us understand many complex questions.

EXECUTIVE SUMMARY

Introduction

Liability insurance funds the damages and defense costs an insured must pay to others for injuries he or she caused them. The law of torts determines whether or not a person is obligated to another for the costs of that person's injuries.

When the "bust" portion of the "boom and bust" cycles of the liability insurance industry occurs, insureds experience policy cancellations and hundred-fold premium increases. Some argue that a cumbersome, unfair, and expensive system of tort law and litigation contributed significantly to the liability insurance crisis of the 1980's. Others point to the business practices of the national and international insurance industry as the source of the problem.

The Maine Legislature established the Commission to Examine Problems of Tort Litigation and Liability Insurance in Maine to investigate the liability insurance crisis and its impact on Maine citizens. Since September of 1986, the Commission has gathered materials, held public hearings, talked to legal and insurance experts, reviewed other states' activities, and discussed proposals for tort and insurance reform.

Background

Insurance Industry and Regulation

Interest rates affect the liability insurance business. When interest rates are high, insurers seek to attract more income to invest by reducing premiums and issuing more coverage. When interest rates drop, and the costs of claims and expenses exceed premium income, insurance companies raise premiums and pull back from the riskier insurance lines.

Primary insurers are regulated by the states. Minimum reserve amounts -- the funds set aside by insurers to cover claims -- are established by statute. The Maine statutes direct the Superintendent of Insurance to assure that insurance rates are adequate to keep carriers solvent, and that insurance rates are not excessive or unfairly discriminatory.

Maine operates under the "file and use" method of insurance rate approval. When an insurer files a rate with the Bureau of Insurance, the rate will go into effect, unless the Superintendent finds that it may not meet the requirements of our insurance laws. For example, the rate may be excessive or it may not take into account Maine experience. To disapprove a rate, the Superintendent must hold a hearing.

Surplus lines insurers -- those that insure unique lines or lines with frequent claims -- are not regulated by the State. Reinsurers -- those, often foreign, insurers in the business of providing insurance for primary or surplus lines insurers who wish to spread their risks -- are also not regulated by states.

Tort Law and Litigation

Liability insurance primarily insures persons against the costs of their negligent acts that proximately cause injury to others. Under the Maine law of comparative negligence, if the jury finds that a plaintiff was at fault in an amount equal to or greater than the defendant, or than the combined fault of multiple defendants, the plaintiff may not recover. If the multiple defendants are liable, the Maine law of joint and several liability makes each defendant potentially responsible for 100% of the damages due the plaintiff.

The jury may be asked to apportion the defendants' fault between them. If a defendant pays more than his percentage of damages, that defendant may, under the law of contribution, seek reimbursement for the extra paid from the other defendant or defendants.

Finally, Maine law does not permit a plaintiff's damages to be reduced by any compensation the plaintiff has received from collateral sources for his or her injuries.

Product liability may also be insured against by certain commercial enterprises. Under the Maine product liability statute, any person involved in the sale or manufacture of a defective or hazardous product that is unreasonably dangerous to the consumer is liable for injury that occurs. In such a case, the jury does not find fault, but imposes liability if the product was defective, unreasonably dangerous, and injury occurred.

Tort litigation in Maine involves a pretrial discovery process in which the parties seek and share information. This process is intended to work without court intervention, but in some cases the court may need to enforce or limit discovery.

Most Maine Superior Court civil cases are placed on an expedited trial list that avoids the submission of pretrial memoranda to the judge and the holding of pretrial conferences with the judge. These expedited cases come to trial faster than the more complex cases treated in a nonexpedited fashion by the courts.

At trial, the plaintiff seeks to prove the defendant's liability for the plaintiff's damages. These damages may include economic ones, such as medical expenses or lost wages; noneconomic ones, such as compensation for pain and suffering or the inability to lead a normal life; or punitive damages for malice by the defendant.

Any civil case must be filed with the courts within the limitation period set in statute for bringing that type of action. Failure to file a suit within the statute of limitations forever bars it from the courts.

Some civil cases are brought to court under contingent fee agreements between attorneys and clients. A contingent fee agreement provides that compensation for legal services is dependent upon the successful disposition of the case. The agreement sets the method of determining the amount of compensation. These agreements are regulated by the Supreme Judicial Court, through the Board of Bar Overseers, under Maine Bar Rule 8.

Causes of the Liability Insurance Crisis

Knowledgeable, respectable sources argue both sides of the liability insurance debate. For example, a report prepared for the National Association of Attorneys General criticizes the insurance industry for practices that contribute to the liability insurance crisis, or the perception of a crisis. This report objects to the accounting method used by insurers to portray lack of profitability in the mid-1980's. It objects to insurance company investment practices that ride high interest rates, and then, excessively, raise premiums to recoup losses when interest rates fall. Others refute these views.

As another example, a report prepared by the United States Justice Department criticizes tort litigation for contributing to insurance problems. This report argues that tort case filings have increased dramatically in recent years, and that the size of damage awards has grown disproportionately. Others disagree with these views. The Commission's resources did not permit an independent assessment of the myriad data used in these debates. Instead, the Commission assimilated as many views of the question from reputable sources as possible.

Similarly, the Commission took note of, but could not independently investigate, claims that reinsurers have contributed to the 1980's liability insurance crisis by retreating from the American market. Finally, the Maine Bureau of Insurance does not have the resources to compile and analyze data from insurers that would provide a clear picture of Maine premium costs and insurance losses.

The Maine Experience: Insurance

During 1985 and early 1986, the liability insurance crisis was at its height in Maine. Businesses, professionals, and social service agencies experienced policy cancellations or large premium hikes. The liability insurance crisis appears to have eased for some. However, premiums appear to have levelled

off at rates higher than before the crisis, and, in some high risk lines, problems of availability and affordability of insurance remain.

The Maine Experience: Litigation

The criminal caseload of the Maine Superior Court has increased over the last six years more than its civil caseload. However, of the civil cases, personal injury case filings have increased over the same period. At the same time, the Superior Court has increased its personal injury case dispositions, more than keeping pace with the increased personal injury filings.

Over the last six years, the average civil case in Maine took over two years to reach a jury trial; this time period is decreasing in 1987. Almost half of the civil cases are dismissed by agreement of the parties. A few large damage awards -- with damages of over $250,000 -- have been granted by Maine juries in recent years.

Medical Malpractice in Maine

In 1986 the Maine Legislature enacted reforms seeking to stabilize or lower medical malpractice premiums. In July of 1987, the Medical Mutual Insurance Company provided the Bureau of Insurance with its analysis of the rate effects of these

reforms. While Medical Mutual concluded that the reforms will likely impact malpractice rates adversely, it dropped its proposed rate increase by 2% in the belief that ongoing tort reform will have positive effects.

Recommendations

The evidence of the effect of reforms adopted in other states to impact a liability insurance crisis of the 1970's is limited. The evidence that exists does not demonstrate that any reforms will have a favorable impact on liability insurance availability and affordability; it suggests that some may.

The majority of Commission members find the existing evidence too slight and inconclusive to justify changes in Maine law. A minority of the Commission members find the evidence sufficiently promising to support adoption of certain reforms. Thus, certain recommendations of the Commission present majority and minority proposals which reflect these differing views.

The Commission's recommendations are listed below:

Insurance Reforms

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

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).

3. That the Public Advocate not be given authority to review insurance rate filings and intervene in insurance rate cases at his discretion.

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

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

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

7. That the Bureau of Insurance:

   have a planned ability 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.

8. That the Superintendent be given statutory authority to determine that a MAP is not working, thus requiring the establishement of a Joint Underwriting Association (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).

9. 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.

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

11. That, as soon as feasible, the Bureau of Insurance acquire the capacity to collect more refined insurance data pertinent to the Maine experience through:

    acquiring the equipment and staff to analyze insurance data;

    reliance on the efforts of the NAIC to gather insurance data to be available to the states; and

    reliance on the efforts of the National Conference of State Legislatures' (NCSL) efforts to create a model insurance data collection bill for the states.

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

Minority reports

3. Minority: 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.

9. 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.

11. Minority: That more emphasis be placed on the widely recognized need for more detailed and efficient collection of insurance data.

Tort Reforms

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.

2. 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.

3. That 24 MRSA §2961 (the contingent fee schedule established for medical malpractice cases in Public Law 1985, 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.

4. That the Board of Overseers of the Bar provide information to the Legislature's Judiciary Committee 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.

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.

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

    the nonprofit has a charitable purpose as delineated in:

42 USC §501(c):

(3) - charities (except that the lobbying restrictions applied by that section should be more clearly and less restrictively defined in Maine law),

(4) - civic groups,

(10) - fraternal groups, or

(13) - cemeteries; or

13-B MRSA §201:

(1)(A) - charities, civic, fraternal, and other groups,

(2)(A) - church groups,

(3)(D) - cemeteries, or

(3)(E) - agricultural fairs; or

the organization of chambers of commerce;

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.

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

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.

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

10. That the law of product liability as it currently exists in Maine not be altered.

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.

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

13. 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.

14. That, without reference to medical and legal malpractice, and despite the inconsistencies, the statutes of limitations for civil actions remain as they are.

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

Minority reports

2. 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 public and private collateral sources to which the plaintiff is entitled;
>
> deduct from the damage award any compensation the plaintiff has received from these collateral sources for which the source does not have a subrogation right; and
>
> reduce the above deduction by the amount necessary to reimburse the plaintiff for any premiums paid or other value given for the collateral sources, plus interest.

3. Minority: That the contingent fee schedule established for medical malpractice cases in Public Law 1985, chapter 804 be extended to cover all tort cases prosecuted under a contingent fee agreement.

3. Minority: That the contingent fee schedule established in chapter 804 be abolished.

5. Minority: That a $250,000 cap be placed on noneconomic damages in all tort cases.

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

> the nonprofit has a charitable purpose as delineated in:

42 USC §501(c):

(3) - charities (except that the lobbying restrictions applied by that section should be more clearly and less restrictively defined in Maine law),

(4) - civic groups,

(10) - fraternal groups, or

(13) - cemeteries; or

13-B MRSA §201:

(1)(A) - charities, civic, fraternal, and other groups,

(2)(A) - church groups,

(3)(D) - cemeteries, or

(3)(E) - agricultural fairs; or

the organization of chambers of commerce;

the nonprofit receives its primary funding from donations, membership dues, government grants or awards, fees for the provision of services related to its charitable purpose, or a combination thereof;

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.

7. Minority: That joint liability be generally abolished.

10. Minority: 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.

10. Minority: That the Maine case law permitting a state-of-the-art defense in product liability cases alleging a failure to warn of the product's dangerousness be negated by statute.

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

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

PART I

INTRODUCTION

Chapter 1: 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. Whitewater 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. Liability premiums for many Maine businesses increased so that insurance often was either unavailable at any price or unaffordable.

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. Governor Brennan 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.

NOTES

1. Nongovernmental entities were excluded because of other efforts underway to address some of their liability insurance problems. See, e.g., ME. REV. STAT. tit. 30, c. 203-B (West Supp. 1986) (self-insurance pools).

2. This part of the Commission's duties is set forth in Public Law 1985, chapter 804, section 21. That public law is entitled "AN ACT Relating to Medical and Legal Professional Liability." It was enacted during the legislative session that established the Commission.

Chapter 2: 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 is proximately caused[1] by 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 recovering. 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, the restaurant owner's liability insurance might also cover attorneys fees and other legal costs of defending him.

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.[2] According to the National Association of Insurance Commissioners (NAIC), 21 American property/casualty insurers went out of business in 1985; in 1986, another 16 were teetering on the edge.[3] The National

Conference of State Legislatures (NCSL) reported the introduction of over 1,200 bills in state legislatures in 1986 seeking to address the liability insurance crisis.[4]

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.[5]

Can Maine do anything to stop or ameliorate these cycles, to impact the current liability insurance crisis and avoid a future one? The work of the Commission to Examine Problems of Tort Litigation and Liability Insurance in Maine sought to answer that question.

NOTES

1. "Proximate cause" is the primary or moving cause of an injury. It is the legal cause of a harm, a substantial factor in bringing about the injury. See PROSSER & KEETON ON TORTS 263-80 (5th ed. W. Keeton, D. Dobbs, R. Keeton & D. Owen 1984).

2. Knapp, The Liability Crisis: Who's to Blame?, STATE GOVERNMENT NEWS, March/April 1986, at 4.

3. Insurance: After the Storm, THE ECONOMIST, June 6-12, 1987, at survey 3.

4. Id. at survey 1.

5. G. Heidrich, What Can State Legislators Do To Control Insurance Cycles, at 2 (delivered to National Conference of State Legislatures 1987 annual meeting as representative of Alliance of American Insurers).

Chapter 3: The Work of the Commission

The Commission and its Subcommittees met 27 times between September of 1986 and November 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 (NCSL). 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. 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 a conference conducted by the Conference of Insurance Legislators (COIL), and from one conducted by NCSL.

The last phase of the Commission's work, undertaken during the summer and autumn of 1987, focused on formulating the Commission's recommendations. Included in this work were two meetings at which the Commission received public comments on its draft report. The final Commission meetings developed the proposals contained in Part IV.

PART II

BACKGROUND

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 competing 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 are more likely to use income derived from investments to cover 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 premium benefit. 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, premium rates, and investment strategies, is the types of claims insured against. If the insurer is providing fire insurance, for example, the company knows soon after the close of a policy year the sum of all claims it will be called upon to pay. Insurance of this type is said to have a "short tail." Under the terms of most liability policies, however, the insurer may not be called upon to pay a claim for decades after the policy year has ended. Asbestos litigation is an example of "long tail" liability: the disease may not manifest itself in an individual until 10,

20, or 30 years after the time of exposure. Toxic waste clean-up cases are another example of how insured business operations may not present claims against an insurance company for many years after the policy has expired. Properly reserving to pay claims of this nature is difficult for insurance companies.

Regulation of Primary Insurers

Insurers are regulated by the states.[2] A state regulator's concern is three-fold: that insurance rates charged be adequate to allow the carrier to remain financially sound; that those same rates not be excessive; and that the rates not be unfairly discriminatory.

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. The type of business considered as surplus lines may vary depending upon how aggressively primary carriers pursue business. However, surplus lines are generally confined to those types of business that have frequent claims or that require unique skills to underwrite. Police professional liability, environmental impairment liability, insurance for ski resorts, and insurance for county fairs are examples of surplus lines business.

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, an insurance company may wish to retain only 25% of all the liability it insures for an entire book of business. It may purchase insurance for the remaining 75% from a reinsurer. Reinsurance may also be used when a carrier wishes to purchase only a certain percentage of insurance on a particular risk. 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 proximately cause injury to others.[17] "Negligence" is legal fault, a breach of duty which may result in a civil wrong or tort.

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 proximate 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 proximate 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 proximate 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 (either a jury or a judge) 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. In that instance, neither defendant would be liable 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.[18]

What happens in a situation of apportioned 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. Under the law of joint and several liability, a defendant found liable to the plaintiff is 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.[19] 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: Product Liability

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

In general, under the doctrine of product liability, 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 product 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 product liability on sellers of defective products regardless of the exercise of care in the preparation and sale of the product.[20] The Maine Supreme Judicial Court has held, however, that the comparative negligence statute does apply to product liability cases and that the conduct of the plaintiff can be considered by the factfinder.[21] 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 product 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.[22] 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.[23] 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.[24]

Most 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.[25]

In an expedited case, the attorneys do not submit pretrial memoranda, nor do they have a pretrial conference with the judge. In a nonexpedited case, the attorneys are required to submit memos to identify witnesses and define the issues in dispute, and do meet with the judge at a pretrial conference. The filing of a pretrial memorandum by one party in a nonexpedited case triggers the placing of the case on a pretrial list. The pretrial conference results in a pretrial order which defines the issues, places the case on a trial list, and generally governs the conduct of the case.[26]

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. The jury determines the facts from the evidence presented, applies the law to those facts, and determines whether the defendant is liable to the plaintiff for the plaintiff's injuries or damages. If the defendant is liable, the jury determines the extent of the plaintiff's injuries or damages. The party that loses has a time period during which to determine whether to appeal.[27]

NOTES

1. Maine Liability Crisis Alliance, Insurance Industry Information, at m-6 (background paper presented to Commission).

2. See Part III, Chapter 8, for a discussion of federal involvement with the insurance industry.

3. The necessity of a certificate of authority for primary insurers is set forth in ME. REV. STAT. tit. 24-A, §404 (West 1974). Insurers exempt from this requirement are set forth in §405. Eligibility for a certificate of authority is described in §406.

4. ME. REV. STAT. tit. 24-A, §410 (West Supp. 1986).

5. Id. at §2304 (West 1974).

6. See id. at §2309 (West Supp. 1986).

7. Id. at §2303(1)(B) (West 1974).

8. Id. at §2303(1)(C)(1) (West Supp. 1986).

9. Id. at §2306.

10. Id. at §405(3) (West 1974).

11. Id. at §2004.

12. Id. at §2007.

13. Id. at §2019.

14. Maine Liability Crisis Alliance, supra note 1, at m-17.

15. ME. REV. STAT. tit. 24-A, §405 (West 1974).

16. Id. at §731(2-A) (West Supp. 1986).

17. Liability insurance policies may cover claims based on legal theories of strict liability or breach of warranty also. Most insurance policy language is also broad enough to provide defense coverage for claims that may be groundless, false, or fraudulent.

18. ME. REV. STAT. tit. 14, §156 (West 1980).

19. See Otis Elevator Co. of Maine, Inc. v. F.W. Cunningham & Sons, 454 A.2d 335 (Me. 1983).

20. ME. REV. STAT. tit. 14, §221 (West 1980)

21. See Austin v. Raybestos - Manhattan, Inc., 471 A.2d 280 (Me. 1984).

22. ME. R. CIV. PRO. 8.

23. Id. 26-37.

24. Id. 37.

25. Maine Superior Court, Administrative Order in Regard to Civil Case Flow Expedition in All Counties of the State (Feb. 1, 1986).

26. ME. R. CIV. PRO. 16.

27. Id. 73.

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, research organizations, 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 six 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 United States General Accounting Office (GAO), 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 average jury verdicts, one must look at median 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 $138,000; 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 are reluctant to provide liability insurance. 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' (NCSL) conference, a representative of the National Federation of Independent Businesses (NFIB) 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 advises, 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.

NOTES

1. Knapp, supra, Chapter 1, note 1.

2. REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (Feb. 1986).

3. BELLOTI, VAN DE KAMP, THORNBURG, MATTOX, BROWN, LAFOLLETTE, AN ANALYSIS OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE (prepared for the Nat'l. Assoc. of Att'ys. Gen. May 1986) (hereinafter cited as ATTORNEYS GENERAL).

4. Id. at 9-20.

5. TORT POLICY WORKING GROUP, supra, note 2, at 1, 17-19.

6. ATTORNEYS GENERAL, supra, note 3, at 38-44.

7. TORT POLICY WORKING GROUP, supra, note 2, at 25-29.

8. Id. at 46-47.

9. ATTORNEYS GENERAL, supra, note 3, at 22-25.

10. TORT POLICY WORKING GROUP, supra, note 2, at 35-39.

11. ATTORNEYS GENERAL, supra, note 3, at 25-27.

12. Id. at 27-31.

13. TORT POLICY WORKING GROUP, supra, note 2, at 36-39.

14. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS (March 1987).

15. See Nat'l. Center for State Courts, A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 1978, 1981, and 1984 (April 1986); NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1984 (June 1986).

16. THE ECONOMIST, supra, Chapter 1, note 2, at survey 10-15.

17. W. Campbell, NFIB's View of the Liability Insurance Crisis, at 4-5 (Jan. 1, 1986) (presented to National Conference of State Legislatures Conference on Controlling Liability Insurance Costs: State Strategies, Denver, CO.).

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 increases 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 insurance to cover work in high risk areas, such as asbestos removal and toxic waste site clean-up.

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 exist.

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 1,175 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 in Maine state courts exists. 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 state court 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, a nurse. The

jury found the defendant doctor grossly negligent for failing to treat the heart attack of the nurse working at a facility with him.[20]

Newspapers reported two more large state court 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 D.

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 act 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 case law 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.

NOTES

1. See M. Freeman, J. Gautschi, M. Reinsch, C. Chick, Background Paper: The Insurance Crisis, at 11-12 (Sept. 1986) (prepared for the Commission) for several examples of accounts of insurance problems from Maine newspapers.
2. Id. at 13-16.
3. Id. at 13.
4. See Commission Notebook, Written Testimony, Public Hearings.

5. Insurance Rebound Eases Crisis, Portland Press Herald, Oct. 6, 1986; Liability Crisis May Be Over, New York Times, Feb. 9, 1987, at sec. 1, 1; Getting Over Liability Crisis, Maine Sunday Telegram, Feb. 15, 1987, at 1C; Liability Insurance Reported Easier to Get Than Year Ago, New York Times, March 17, 1986; TORT POLICY WORKING GROUP, supra, Chapter 5, note 14.

6. The Crisis is Over -- But Insurance Will Never Be the Same, BUSINESS WEEK, May 25, 1987, at 122.

7. See text at 48-49.

8. Maine Businesses Bear Costs, Maine Sunday Telegram, Feb. 15, 1987, at 1C.

9. See Maine Trial Lawyers Association, Maine Has An Insurance Problem Not A Jury Problem (draft), Figures IV and IX (May 26, 1987).

10. STATE OF ME. JUDICIAL DEP'T., ANNUAL REPORT 1986, at 72, graph SC-3.

11. Id. at 77, table SC-8.

12. Id. Personal injury filings actually were less in 1986 than they were in the three prior years: 1983 - 1,199 filings; 1984 - 1,180 filings; 1985 - 1,265 filings.

13. Phone conversation with Me. State Planning Office based on U. S. Bureau of the Census, Current Population Reports.

14. ME. JUDICIAL DEP'T, supra, note 11.

15. Id. at 98, table SC-13.

16. Id. at 51.

17. Id. at 86, table SC-9. The percentage of cases dismissed by agreement of the parties is increasing over the years: 1983 - 45.4%; 1984 - 48%; 1985 - 49.9%; 1986 - 51.8%.

18. Prescott v. Maine Medical Center (Cumberland County Superior Court, CV 83-313), 2 MAINE TRIAL PRACTICE 55 (Aug. 1986).

19. Pine v. Coles Express, Inc. & International Door Corporation (Washington County Superior Court, CV 82-90), 3 MAINE TRIAL PRACTICE 3 (Nov. 1986).

20. Miller v. Szelenyi; (Cumberland County Superior Court, CV 83-616), 3 MAINE TRIAL PRACTICE 49 (Aug. 1987).

21. Sugarloaf May Appeal $385,000 Damage Suit, Waterville Morning Sentinel, Oct. 30, 1986.

22. Beer Distributor Liable for Drinking Driver, Waterville Morning Sentinel, Nov. 1, 1986.

23. ME. REV. STAT. tit. 14, §753 (West 1980).

24. Id. §853 (West Supp. 1986).

25. Myrick v. James, 444 A.2d 987 (Me. 1982).

26. ME. REV. STAT. tit. 14, §752 (West 1980).

27. Anderson v. Neal, 428 A.2d 1189 (Me. 1981).

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 affect 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]

NOTES

1. U. S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS, at 8-9 (Dec. 1986).

   In response to this medical malpractice insurance crisis, Maine enacted Public Law 1977, chapter 492, the Maine Health Security Act "to insure the availability of medical and hospital malpractice insurance to physicians and hospitals throughout the State and to develop a more equitable system of relief for malpractice claims." Statement of Fact, LD 727, 108th Maine Legislature, p. 21.

   Chapter 492 enacted provisions concerning professional competence reports, liability claims reports, medical

malpractice arbitration, malpractice advisory panels, and general tort reforms. The tort reforms addressed ad damnum clauses, statutes of limitations for hospitals and employees, notices of claim before suit, immunity from civil liability for volunteer activities, and informed consent to health care treatment. Some of the provisions of the 1977 Health Security Act were revised or repealed by Public Law 1985, chapter 804.

2. U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: A FRAMEWORK FOR ACTION (May 1987); id., MEDICAL MALPRACTICE: SIX CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (Dec. 1986); id., MEDICAL MALPRACTICE: CASE STUDY ON ARKANSAS, CALIFORNIA, FLORIDA, INDIANA, NEW YORK, NORTH CAROLINA (six separate reports) (Dec. 1986).

3. G.A.O., supra, note 1, at 2-3.

4. Id. at 4-5.

5. G.A.O., FRAMEWORK, supra, note 2, at 4.

6. P. Danzon, The Frequency and Severity of Medical Malpractice: New Evidence, 49 LAW & CONTEMPORARY PROBLEMS 57, 58 (Spring 1986).

7. G.A.O., FRAMEWORK, supra, note 2, at 2.

8. Id. at 31.

9. Id. at 33.

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]

NOTES

1. U.S.C.A. tit. 15, c. 20 (West 1976).

2. M. Bird, Liability Insurance: Summary of the 99th Congress' Legislation, NAT'L. CONFERENCE OF STATE LEGISLATURES STATE-FEDERAL ISSUE BRIEFS, at 3-4 (May 30, 1986, updated Sept. 22, 1986).

3. M. Bird, S. Lawrence, D. Lovison, N. New, W. Warren, Liability Insurance: Federal Jurisdiction and Initiatives, NAT'L CONFERENCE OF STATE LEGISLATURES STATE-FEDERAL ISSUE BRIEFS, at 2-3 (Aug. 1, 1986).

4. Id. at 2-12; M. Bird, supra, note 2, at 3-14.

5. Risk Retention Act Amendments of 1986, PL 99-563.

6. M. Bird, Risk Retention Amendments of 1986, Nat'l Conference of State Legislatures (Nov. 1986). The Insurance Information Institute reports an ongoing court challenge in New York on the issue of the extent to which the Risk Retention Amendments preempt state laws. State Powers Under Risk Retention Act Challenged, 20 THE EXECUTIVE NEWSLETTER 1 (Sept. 14, 1987).

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 the September 1986 issue of State Legislatures.[2].

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 its most recent liability insurance legislative summary.[3].

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.[4]

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.[5]

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.[6] A

Southern California Law Review table presents the outcomes in 19 states of equal protection challenges to the medical malpractice reforms of the 1970's.[7]

The constitutionality of statutes enacted to address the liability insurance crisis of the 1980's will continue being questioned.[8] In enacting any tort or insurance regulation reforms, Maine must take heed of restrictions in the federal and its own Constitution.[9]

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.

NOTES

1. REPORT OF THE N.Y. GOVERNOR'S ADVISORY COMMISSION ON LIABILITY INSURANCE, INSURING OUR FUTURE, Vol. I (April 7, 1986) & Vol. II (July 1, 1986).

2. Proffer, Coping with a Crisis, STATE LEGISLATURES, Sept. 1986, at 20-21.

3. NAT'L. CONFERENCE OF STATE LEGISLATURES, SUMMARY: LIABILITY INSURANCE, at 202-14 (June 30, 1987).

4. Constitutional Issues in Civil Justice Reform, STATE LEGISLATURES, Feb. 1986, at 10-11.

5. Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985), cert. denied 474 U.S. 892, 106 S. Ct. 214, 88 L.Ed.2d 215 (1985); Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987).

6. See R. Jenkins & W. Schweinfurth, California's Medical Injury Compensation Reform Act: An Equal Protection Challenge, 52 S. CAL. L. REV. 829 (1979); E Karzon, Medical Malpractice Statutes: A Retrospective Analysis, 1984 ANNUAL SURVEY OF AMERICAN LAW 693.

7. R. Jenkins & W. Schweinfurth, id., at 867.

8. See, e.g., D. Schwarz, Potential Constitutional Challenges To the Noneconomic Loss Limit Imposed by N.H. RSA 508:4d, 28 N.H. BAR J. 179 (Winter 1987).

9. The Maine Constitution contains its own due process and equal protection clauses. ME. CONST. art. 1, §6-A.

PART IV

COMMISSION RECOMMENDATIONS

Chapter 10: Majority and Minority Views

Majority Views of Mr. Stinson, Ms. Chalmers, Mr. Plouffe, and Sen. Bustin

We extend our thanks and congratulations to the Commission staff for the excellent job they did in obtaining and disseminating information to the Commission members, and, particular, for the excellent distillation of this vast body of material into the foregoing report. The report is a well-balanced analysis of the many issues and positions held by various parties concerned with the conditions existing in the insurance industry in the last several years. Since the report is in a very well-balanced format, we fear that it may not adequately highlight the underlying basis for the recommendations for the majority viewpoint.

While we do not pretend to speak for all Commission members who voted in the majority on the various recommendations, we did feel constrained to set forth certain thoughts which we feel justify the positions we have taken.

In the past several years, every serious review of the civil justice system and its underlying doctrine has been precipitated by a "crisis" in insurance cost or availability. One need only look at past studies relating to municipal

liability, medical malpractice, and products liability. Today we have completed yet another study precipitated by those very same forces.

The minority concedes that the insurance industry is cyclical and is driven by forces unrelated to the judicial system, such as competition between companies and the economic climate surrounding interest rates. Nevertheless, they contend that the judicial system must share an equal portion of the blame for the dramatic impact of the most recent liability insurance crisis.

Ten years ago, legislation was passed to require screening panels in medical negligence cases and a notice of claim procedure to facilitate settlement. The Maine Tort Caims Act was passed and, for practical purposes, nearly eliminated most municipalities' liability unless they carried insurance. These reforms, among other proposals, were viewed as holding out hope of avoiding a future "crisis."

In the period 1976 to approximately 1984, these reforms were essentially disregarded. That is, insurance companies refused to participate in the medical negligence screening panels and there is no evidence that the notice f claim procedure facilitated settlement of cases. Most municipalities continued to maintain liability insurance and therefore, to the

extent of their insurance, remained subject to claims. However, the cost and availability crisis of the mid-70's disappeared. It did so because economic conditions changed. As those conditions changed, the insurance industry responded with the practice of "cash-flow underwriting." (See page 11 of this report.)

The conclusion is inescapable that the cycles of high cost and low availability of liability insurance occur independently of changes in the civil justice system.

As these cycles have occurred over the years, the insurance industry has taken the opportunity to blame the judicial system for the high cost and lack of availability of insurance. This has included attacks on "runaway juries" granting verdicts in frivolous cases; a lawsuit explosion; and upon substantive judicial doctrines of joint and several liability, collateral source, and the contingent fee system. These allegations were repeated so frequently and with such authority, in the press and on television, by the multi-million dollar advertising campaigns of the insurance industry, that the public began to accept them as true. It was the Commission's duty to attempt to sift through these allegations to determine their merit.

Christopher Farrell, a reporter for Business Week, followed the insurance industry in 1986-87. In a recent article, he

points out that case filings in personal injury, real estate, and contract suits reported to the National Center for State Courts actually went down in the period from 1981 to 1984. He goes on to state regarding this Center for State Courts study that "this most complete study reveals that tort filings were up only 10 percent in a six year period ending in 1984 -- just two percentage points higher than the population growth rate in the 14 states that keep track of tort filings. The Center's new data updates a previous study often cited by tort reformers." "The Explosion in Liability Lawsuits in Nothing but a Myth," Business Week, April 21, 1986.

A year later, after having followed the "crisis," Farrell, along with others at the Business Week News Bureau, stated:

> ... and next time around, insurers are likely to be hard pressed for excuses when they plan the Blame Game. During the 1986 crisis, the insurance industry embarked on a splashy public relations campaign proclaiming that the "insurance crisis" was really a "lawsuit crisis." Some three dozen states did make minor changes in the law. But the insurance crisis has abated without help from an overhaul of the nation's civil justice system.

> Cool analysis is discrediting last year's horror stories about an epidemic of multi-million-dollar jury awards for relatively little cause.... "The civil litigation system is stable," says Mark Peterson of the Rand Institute for Civil Justice.
>
> Even insurance executives are finding it harder to pass on the blame.... The legacy of the insurance crisis is that insurance is becoming everybody's business.
>
> ("The Crisis is Over -- But Insurance Will Never be the Same" Business Week, May 25, 1987. (emphasis added))

Finally, in testimony before the Commission, we heard Herbert Moulton of the Fort Hill Insurance Agency in Portland, Maine tell us that there was no liability problem in Maine and that the media really blew the crisis out of proportion. He indicated that availability was not really a problem in 1985, but that price was. He indicated that the reason price appeared to be a problem was that the industry had, in many lines, cut its rates to prices which were below what they were in the mid- to late-70's. During the price cutting competitive period, people had become accustomed to much lower rates, which the industry had now precipitously increased, and it was the shock effect of the rapid increases, and not the absolute cost, that was causing the furor among the public (testimony before the Commission on October 16, 1986).

On November 20, 1986, the Commission heard testimony from Brenda Trolin of the National Conference of State Legislators. She reported on state legislative action on liability insurance problems during 1986. She noted that there were three areas of inquiry that we should explore: risk management, insurance regulation, and tort reform. She suggested that risk management was really the only way to address the underlying causes of problems with liability insurance. Her conclusion relative to insurance regulation was that flex-rating held out the best hope for dampening the fluctuations in the cost of purchasing liability insurance. She indicated the lowest priority to be tort reform because of a lack of evidence that it would result in lower rates or increased availability. Here she cited the Florida experience, where two insurance companies indicated that certain tort reforms would have no effect on the cost or availability of liability insurance.

The study which Ms. Trolin referred to concerned a request of the Florida Department of Insurance to various insurance companies to analyze the effects of Florida laws which abolished the collateral source doctrine, the joint and several liability doctrine, and limited noneconomic damages to $450,000. The companies were asked to study closed claims, that is claims which had been made and either settled or gone to a verdict and whose files were closed. It should be noted that during this entire debate over the causes of the crisis, this is one of the few, if not the only, studies which looked

at the actual impact of changes in the law on actual cases. Only two companies responded to the Florida Department's request.

The Commission requested and received data on the Florida study. The response of Aetna Insurance Company showed that, after the abolition of the collateral source doctrine, the effect on premiums would be .4% for claims which were settled for over $25,000 and 0% for claims which were settled for under $25,000. In terms of the abolition of the doctrine of joint and several liability, Aetna concluded that there would be no net change in the cost of insurance as a result of the elimination of that doctrine. Aetna further concluded that limiting noneconomic damages to $450,000 would likewise have no impact on their rates in Florida. Finally, it should be noted that this study was submitted in conjunction with a claim for a premium increase of 17.2%.

The second company that responded to the Florida request was the St. Paul Fire and Marine Insurance Company. They responded only in the area of medical malpractice liability. Their conclusion was:

> The conclusion of the study is that the non-economic cap of $450,000, joint and several liability on the non-economic damages, and mandatory structured settlements on losses

above $250,000 will produce little or no savings to the tort system as it pertains to medical malpractice.

With regard to the elimination of the collateral source rule, St. Paul stated as follows:

> The medical malpractice provisions prior to this act provided for subrogation against collateral providers. The effect of this subrogation would be similar to the effect of the collateral source rule. Therefore, the net effect of eliminating the subrogation and allowing collateral sources is negligible.

Based on the foregoing studies and her other studies and experience with various states' attempts to deal with the liability insurance crisis, Ms. Trolin concluded "some states that have enacted civil justice reform have backed away from it. The civil justice system should be studied on its own merit. The connection with affordability/availability of insurance cannot be made at this time." (emphasis added) (Minutes of Proceedings before the Commission, November 25, 1986)

In testimony before the Commission on October 16, 1986, David Gregory, professor of law at the University of Maine Law School, urged that the substantive law of the State of Maine did not need to be changed.

As the Commission pursued its inquiry, it became clear that one's perception of the depth of the insurance industry's financial problems depended greatly upon how one defined the terms of analysis. William J. Anderson of the General Accounting Office, testifying before the House Commerce Subcommittee on April 27, 1987, drew the following conclusions:

1) The property/casualty industry although cyclical has been profitable over the 10 year period from 1976-1985;

2) The medical malpractice line of insurance incurred a loss from 1975 to 1985 <u>if reserved for future payments are booked at their full pay out value. If, however, these reserves are discounted to present value, a procedure recommended by the GAO and now required for tax purposes, the medical malpractice line showed an after-tax profit of $2.1 billion</u> for a rate of return of about 15.3% (emphasis added);

3) The general liability line produced an after-tax profit from 1975 through 1985. If reserves are discounted to present value, the line's profitability increases significantly to $8 billion and results in a rate of return of about 13.4%;

4) In 1986, the industry's profitability was closer to $19 billion when reserves are discounted and policyholder dividends and unrealized capital gains are considered, rather than the $12.7 billion reported by ISO (Insurance Services Office);

5) For the 10 year period from 1976 through 1985, the industry's total after-tax gain was $81.1 billion. Investment income and capital gain for the same period was approximately $144 billion.

A recent report by the Conference Board, a business information service composed of 3,600 corporate entities, drew the following conclusion:

A careful reading of the insurance press reveals that doubts about the extent or severity of the liability situation have been voiced on different occasions by experts. In May, a corporate risk manager speaking at the 50th annual Chicago Insurance Day announced: "We really

don't see this as a crisis. It's just another manageable problem." In June, an advisory committee of the National Association of Insurance Commissioners (NAIC) consisting of representatives of several insurance trade associations, issued a report asserting that the crisis is not anywhere as widespread as generally believed, even for such "high risk" entities as liquor stores, daycare centers and municipalities.

The findings of the present survey also refute the general contention of a severe and deepening crisis in tort liability and insurance availability, at least for the nation's large corporations. The impact on the general economy, likewise, is believed to have been minor.... Product Liability: The Corporate Response, Nathan Weber, ISBN No.: (0-8237-0335-5).

It should further be noted that during 1985, when the "crisis" was its severest, insurance stocks were selling at high levels and were very attractive to investors. The situation was described as "acres and acres of diamonds for owners of insurance stocks.... Unless, of course, 1986 turns out to be just as good or even better than last year. (forgive me -- I'm only dreaming because the New Year is off to such a good start)." "1985: A Year of Glittering Glory," 2 National Underwriter, January 24, 1986.

The people of the State of Maine have been asked, and will be asked in the future, to alter such substantive rules of law as joint and several liability and collateral source, to impose limits on the amount of compensation injured people can receive from juries and their peers, to limit the amount that an injured party can agree to pay his attorney on a contingent fee basis, and to change the law of liability for corporations who place dangerous products in commerce. However, the case has not been established that any of these changes would result in any reduction in the cost of liability insurance or in any increase in its availability.

It has been demonstrated through testimony and other evidence presented to the Commission that the insurance industry is unquestionably cyclical. Flex-rating has been held out as the one regulatory mechanism which could have an effect in dampening the peaks and valleys of this cycle and the resultant crises in price and availability of insurance. The Superintendent of Insurance has requested support for additional data gathering capacity in his bureau in order to better analyze the true causes and solutions of the cost and availability problems. He seeks support for a greater consumer education program. Nearly everyone on the Commission agrees that these goals should be pursued, and recommendations have been proposed to that effect. The majority o the Commission does not believe that changes in substantive law are necessary;

nor should they be made until an adequate data collection system, or the insurance industry, can establish that such changes in substantive law will result in improved availability or lower cost of insurance.

While there may be isolated pockets of difficulty in obtaining insurance, or the cost of it in certain lines of insurance may be excessive, the so-called tort reformers are asking the Commission to consider wholesale solutions. These will inevitably be either over-inclusive or under-inclusive. These suggested reforms will result in more inequity for most people in society while they hold out a mere possibility of relief to a few.

In other states, many responsible public officials and private citizens have indicated a willingness to restructure settled principles of law because of the terrifying threats of underwriters and insurance companies to withdraw from their state. It is alarming to realize that the definition of harmful conduct in society may be determined by considerations of whether insurance is available. In this State we have shown a willingness to define culpable municipal conduct as dependent upon the existence of insurance. The rights and duties of citizens toward one another should be determined by the merits of public and social policy and not by the threats and financial practices of the insurance industry.

Our judicial system has the advantage of flexibility in an age of constant development of new products and new hazards to the public and the environments. Our law has proved to be effective in adapting to changing times. The system has proved to be deliberative and cautious in its adaptation of law to changing concepts of justice and social responsibility. The system provides a method whereby a jury can balance competing interests and reflect the conscience of its community in its decisions.

The burden of proof must rest with those who would radically alter this carefully balanced legal system. Many of the proposed changes in tort law would erode this finely crafted system of checks and balances which has developed and served us well for over 200 years. Changes in tort law should only occur if a countervailing social benefit exists which justifies altering laws which have worked to be fundamentally fair and just in balancing society's conflicts. Those who advocate restrictions on the rights of people coming before the courts to seek justice for harms they have suffered simply have not made the case.

Minority Views of Mr. Andrews, Mr. Woodman, Mr. Koppang, and Mr. Cianchette

When the work of the Commission began in 1986, Maine and the nation were in the midst of a crisis that severely affected the availability and the affordability of liability insurance. The evidence makes it clear that this was not the first such crisis in liability insurance. History points out that insurance availability and affordability are cyclical in nature and that during a "soft" insurance market carriers compete vigorously for premium dollars. This translates to favorable conditions for consumers -- low premiums, lower deductibles, higher insurance limits, and, oftentimes, broader coverage. These "soft" market periods have been followed by "hard" markets with the symptoms experienced recently by business and professional consumers in particular.

This downturn in the market was so dramatic and the effects so profound, however, that it produced a veritable crisis in many sectors of the state and national economy. Because of the cyclical nature of the insurance business, the Commission agreed at the outset that before its work was completed and a report submitted to the Legislature, a "soft" or "buyers" market might once more prevail. We agreed to proceed, undaunted by any lessening in the crisis, to address the long-term objective of removing the causes for the drastic swings from the insurance marketplace.

A reading of the recommendations of the majority of the Commission members leaves you with the impression that there was no crisis at all; or, that if there was, it was caused by the insurance industry alone, and could be resolved, and recurrences prevented, simply by requesting more data from insurance companies, increasing the consumer orientation of the Bureau of Insurance, setting parameters on changes in the insurance rating structure, and increasing the size of the Bureau of Insurance.

It is true that insurance regulation needs to be more proactive in its approach to the market cycles, and that the Bureau of Insurance must have the resources to react to crises as they occur. It is, likewise, true that improved access to insurance data unique to Maine experience in terms of premium writings, investment income earned, and loss dollars paid can greatly assist the Bureau in its regulatory role. However, the roots of the liability insurance crisis run much deeper than the recommendations of the majority indicate.

The tort system must share an equal portion of the blame for the dramatic impact of the most recent liability insurance crisis. Our legal system has served us well over the years and continues to be the forum in which American freedoms are preserved and individual rights maintained. However, several procedural rules have developed which have begun to distort the

meaning of justice in the legal system and, in combination with the expansion of some questionable legal theories, have decidedly tipped the balance away from fairness. These developments are of such a nature as to cause any interested outside observer to query, "How did we ever get to this point?" And to conclude, "Something should have been done about this long ago."

One such legal theory requires one of two or more defendants to pay the entire court judgment even if found only marginally responsible for what may have happened to the injured party. Maine law has become so unfair as to make it possible for one of two or more defendants to be half as negligent as the plaintiff and still be liable for all of plaintiff's damages attributable to the defendant. This "deep pocket" doctrine has almost single-handedly destroyed the principles of fairness by allowing people who bring lawsuits to involve a multitude of defendants hoping to find one who is rich (or who is insured), regardless of the degree of fault, so that the plaintiff can be "made whole." Since insurance companies are in the business of paying claims anyway, and since the defendant who really caused the problem has no insurance, the insurer for one of the other defendants must pay. Such is the operation of the doctrine of joint and several liability.

If the purpose of the legal system is to allow those who have been wronged to find justice and to allow those who have been injured to be made whole, then the collateral source rule is a procedural device which has evolved to guarantee that neither of those purposes is carried out. The application of the rule precludes either the judge or the jury from hearing any evidence about the fact that the plaintiff has already been made whole. It often happens that the person seeking recovery from one or more of the defendants mentioned above has already had medical bills paid, lost income restored, and has otherwise been "made whole." Yet evidence that the plaintiff has already been compensated is still kept from the judge and jury out of concern that it might "prejudice" the case, or that this kind of information may be too complicated for jurors to handle. As a direct result, plaintiffs are allowed to receive multiple recoveries and to become unjustly enriched at a tremendous expense to the system.

Other legal theories, such as the one that holds manufacturers of yesterday's goods and services to today's standards of technology and care, and another that says "the sky is the limit" on how much the court will award, have helped foster within the legal system the notion that the filing of a lawsuit is akin to the purchase of a Megabucks ticket.

It is no small wonder the insurance world has been rocked by the impact of tort litigation. Consider, for example, the rapid expansion of the doctrine of strict liability, the popularity of which is enhanced by the fact that it requires no proof of fault, and its application to such fertile litigation grounds as toxic waste disposal sites, asbestosis, toxic shock syndrome, pollution liability, etc.

The cost associated with these types of liability claims have forced corporate giants into bankruptcy and have taken many respected insurance carriers with them. The magnitude of these unforeseen claims, the tremendous growth in litigation generally, and the broad interpretation by the courts of the liability insurance contract have all been significant contributors to the liability insurance crisis.

The majority of the Commission would have you believe that to make some adjustments in fine-tuning the legal system would deny some innocent victims their day in court. That is not the case. Maine businesses, professionals, and social service agencies, and Maine's people, generally, have lost because the majority report offers no solution to the liability insurance crisis or to future crises.

All of Maine's people are the victims of the insurance crisis. That is why the Commission was originally established. As owners and employees of Maine businesses, providers and recipients of social service agencies, and

insurance consumers together, it is time to take a stand. Enough is enough. There is a need for relief from onerous liability insurance costs and from the expensive legal system which drives those costs.

We strongly urge you to seriously consider the following minority recommendations:

(1) abolition of the collateral source rule;

(2) elimination of joint and several liability;

(3) placing a limit on noneconomic damage awards;

(4) placing reasonable limitations on attorneys' contingent fees; and

(5) permitting a "state-of-the-art" defense in all product liability cases.

We believe that implementation of these recommendations will help to restore balance to our tort system and minimize the effects of any future liability insurance market swings.

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. That the Public Advocate not be given authority to review insurance rate filings and intervene in insurance rate cases at his discretion.

(see a Minority Recommendation at this chapter's end)

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 not be excessive or unfairly discriminatory, 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 add another layer of regulatory expense and 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.

Also, no one currently employed by the Public Advocate's Office has the qualifications to intervene in insurance rate cases and provide an actuarial evaluation of the impact of filed rates. Public Advocate reviews of these filings will duplicate the reviews conducted by the Bureau of Insurance.

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.[2] 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.[3]

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.

Market Assistance Plans

CURRENT LAW: A Market Assistance Plan (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:

7. That the Bureau of Insurance:

   have a planned ability 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.

Joint Underwriting Associations

CURRENT LAW: A Joint Underwriting Association (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,[4] 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:

8. That the Superintendent be given statutory authority to determine that a MAP is not working, thus requiring the establishment 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).

2

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.

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.[5]

RECOMMENDATION:

9. 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.

(see a Minority Recommendation at this chapter's end)

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 unsafe 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.

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.[6]

RECOMMENDATION:

10. That Maine support the National Association of Insurance Commissioners (NAIC) in its 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 a small state such as Maine 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 annually file financial statements and statistical reports with the Bureau of Insurance.[7] 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.[8]

RECOMMENDATION:

11. That, as soon as feasible, the Bureau of Insurance acquire the capacity to collect more refined insurance data pertinent to the Maine experience through:

    acquiring the equipment and staff to analyze insurance data;

    reliance on the efforts of the NAIC to gather insurance data to be available to the states; and

    reliance on the efforts of the National Conference of State Legislatures' (NCSL) efforts to create a model insurance data collection bill for the states.

(see a Minority Recommendation at this chapter's end)

Discussion: 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.

In order to assess the true financial condition of an insurer, the experience of the insurer with Maine claims, and the rate requirements of the insurer, the Bureau needs complete information. Important information includes the claims experience of the insurer, including claims paid and incurred; the exposure to claims in Maine; the premiums earned; and the reserves kept.

Maine must have the capacity to collect more precise insurance data pertinent to the experience of insurers in Maine. Such an effort will require greater resources within the Bureau of Insurance. The Bureau may also be able to benefit from the efforts of the NAIC.

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.

In requesting more insurance data from insurers, Maine's chances of success will be improved if its requests match those of other states. 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 uniform 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.

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.[9] The liability of political subdivisions is limited under the Maine Tort Claims Act.[10] Without provisions such as these, self-insurance pools are regulated in the same manner as traditional insurance companies.

RECOMMENDATION:

12. 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 liability must be limited. Caps on the liability of a particular type of enterprise do not seem warranted at this time. The use of MAP's and, in extreme cases, JUA's should first be tried to alleviate insurance problems 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.

Consumer Representation

(Rep. Stevens, Rep. Allen, Sen. Bustin, Mr. Stinson, Ms. Chalmers)

3. Minority: 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.[11] 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 is 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,[12] since the Attorney General's Office is not poised to take much involvement in insurance matters.

Managing Risk

(Mr. Stinson, Sen. Bustin)

9. **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 losses 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 encouragement 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.

Reporting Requirements

(Mr. Stinson)

11. Minority: That more emphasis be placed on the widely recognized need for more detailed and efficient collection of insurance data.

Discussion: This should include a line by line, state-specific collection of data, including, but not limited to: reserves, claims incurred, claims paid, and loss adjustment expense, all on a per claim basis.

The object of the data collection system should be to assist the Insurance Bureau in its regulatory functions and to enable the public to see which lines are most costly and which most profitable for the insurance industry.

While it is desirable to have data collected in a national, uniform format, Maine must begin immediately to implement such a program if national programs (such as those supported below) are not ready for adoption by early 1988:

efforts of the National Association of Insurance Commissioners (NAIC) to gather insurance data to be available to the states; and

efforts of the National Conference of State Legislatures (NCSL) to create a model insurance data collection bill for the states.

The efforts of the Bureau of Insurance to better equip itself to collect and, especially, analyze insurance data must be supported.

NOTES

1. Cf. Central Maine Power v. Public Utilities Commission, 382 A.2d 302, 315 (Me. 1978).
2. ME. REV. STAT. tit. 24-A, §2306 (West 1974).
3. Id. c. 3 (West 1974 & West Supp. 1986).
4. Id. tit. 24, c. 20 (West Supp. 1986).
5. Id. tit. 26, c. 3 & c. 4 (West Supp. 1986).
6. Id. tit. 24-A, §731 (West Supp. 1986).
7. Id. §2323 (West 1974 & West Supp. 1986).
8. Id. §2303(1)(C)(1) (West Supp. 1986).
9. ME. REV. STAT. tit. 30, c. 203-B (West Supp. 1986).
10. Id. tit. 14, §8105 (West 1980).
11. ME. REV. STAT. tit. 35, §1-A (West Supp. 1986); id. tit. 24-A, §§2338(2)(C) and 2350(3)(B) (West Supp. 1986).
12. See M. Simons, Chief Casualty Actuary for S.C. Dep't. of Insurance, Testimony before Conn. Legislature concerning Benefits of a Consumer Advocate (supplied to Commission by Maine Public Advocate's Office).

Chapter 12: Tort Reforms

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 G.

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]

RECOMMENDATION:

2. 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.

(see a Minority Recommendation at this chapter's end)

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. Peat, Marwick, Mitchell & Co., an accounting firm, prepared assessments of proposed medical malpractice reforms in Pennsylvania. Peat Marwick estimated medical malpractice insurance cost reductions of 2% to 10% for collateral source rule changes. However, the letter providing this estimate cautions that "actuarial projections in malpractice insurance are uncertain, and this is even more true when projecting the effect of significant changes in the liability system."[6]

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 compensation from insurance or other sources, to have his damage award reduced by the amount of this compensation. Why should the defendant legally at fault for the plaintiff's injuries, and the defendant's insurer, benefit from the provision for the plaintiff by the taxpayers, an employer, or others?

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 D.

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.**

(see two Minority Recommendations at this chapter's end)

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 Board of Overseers of the Bar provide information to the Legislature's Judiciary Committee 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. This information should be gathered by the Board of Overseers of the Bar. The Board, appointed by the Supreme Judicial Court, supervises the practice of law in Maine under the Maine Bar Rules. Bar Rule 4 empowers the Board to study continuously the Bar and its relation to the public for the purpose of recommending any needed changes in the Bar Rules. The Commission has begun the process of seeking a study of Bar Rule 8 by asking the Board to examine contingent fees and report to the Legislature's Judiciary Committee.

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.[7] 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.[8] 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.[9] 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.**

(see a Minority Recommendation at this chapter's end)

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.[10] 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.[11] 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.[12] 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.[13] A Maine statute does abrogate the charitable immunity doctrine up to the amount of any liability insurance the organization carries.[14] Maine statutes also provide specific immunity in certain cases for, for example, governmental entity employees[15] and food banks.[16]

RECOMMENDATION:

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

the nonprofit has a charitable purpose as delineated in:

42 USC §501(c):

(3) - charities (except that the lobbying restrictions applied by that section should be more clearly and less restrictively defined in Maine law),

(4) - civic groups,

(10) - fraternal groups, or

(13) - cemeteries; or

13-B MRSA §201:

(1)(A) - charities, civic, fraternal, and other groups,

(2)(A) - church groups,

(3)(D) - cemeteries, or

(3)(E) - agricultural fairs; or

the organization of chambers of commerce;

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.

(see a Minority Recommendation at this chapter's end)

Discussion: The ability to rely on the charitable immunity doctrine existing under Maine case law has been questioned.[17] 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.

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.[18]

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, case law protection.

However, no argument exists that Maine case law provides current protection from liability to those who serve as directors, officers, and volunteers with charitable or social service 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 or civic 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, social service, or civic 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.[19] Maine's Liquor Liability Law provides an exception to the general rule of joint and several liability.[20]

RECOMMENDATION:

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

(see a Minority Recommendation at this chapter's end)

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. When the plaintiff is less than equally responsible for his injuries, the comparative negligence statute requires him to assume responsibility for his damages to the extent of his fault. The jury will deduct from the damages an amount representative of the plaintiff's fault.

When the plaintiff is equally or more responsible for his injuries, the statute absolves the defendant or defendants whose fault or combined fault was less than the plaintiff's. With multiple defendants whose combined fault is more than the plaintiff's, the law of joint and several

liability makes each potentially responsible for the damages owed the plaintiff. Again, the damages will have been reduced by an amount attributable to the plaintiff's fault, if any.

Under the Maine law of contribution, a defendant who does not pay the plaintiff the damages the defendant owes may still be liable to any other defendants in the case when those defendants have paid damages ascribable to the nonpaying 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 assets, this result is the fairest option. A more unfair option is to have an innocent plaintiff or one with less fault than the defendants absorb the loss.

In addition, no empirical 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 several liability, a cornerstone of the protection afforded negligently injured persons by Maine tort law, should not be further revised.

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.[21] After a judgment is entered, and including the time during which an appeal is taken, post-judgment interest is assessed at 15% per year.[22]

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, but is somewhat higher for added incentive, is sufficient.

Patterned after the federal statute,[23] 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.[24]

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: Under a Maine statute,[25] product liability exists when injury is caused to a consumer by a defective or hazardous product that was unreasonably dangerous. The manufacturer or other merchant in the flow of commerce in that product is liable for that injury without a finding of fault. Under Maine case law, if the product is alleged to be unreasonably dangerous because of a failure to warn of danger, whether the defendant knew or should have known of the danger becomes relevant. The question becomes: "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] The knowledge is measured according to that available at the time the product was distributed. Permitting the measurement of a defendant's knowledge in this way in a product liability case authorizes a "state-of-the-art" defense.

RECOMMENDATION:

10. That the law of product liability as it currently exists in Maine not be altered.

(see two Minority Recommendations at this chapter's end)

Discussion: The law of product liability is complex, and especially important to those injured by a product long after it was sent into the marketplace. For example, persons injured by toxic wastes from products sold long ago and now disposed of near the injured persons use product liability law in seeking compensation from the products' manufacturers. These plaintiffs must prove that the products were hazardous when produced, are unreasonably dangerous, and caused their injuries.

Permitting the general use of a "state-of-the-art" defense in product liability cases, in essence, abandons product liability law and replaces it with the law of negligence. The plaintiffs and defendants would then contend about what

a manufacturer knew or should have known about the hazard at the time of manufacture. Carrying the burden of their side of that argument would be extremely difficult for plaintiffs.

The statute in Maine and related case law have permitted the cautious development of product liability law. Though defendants and their insurers find product liability litigation burdensome, the law in Maine should not be altered at this time. Further developments in this area should be left to the gradual approach of case law.

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. **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.**

(see a Minority Recommendation at this chapter's end)

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 medical 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.

14. That, without reference to medical and legal malpractice, and despite the inconsistencies, the statutes of limitations for civil 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. Without this evidence, for reasons of stability, these statutes should not be altered at this time.

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.

RECOMMENDATION:

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

(see a Minority Recommendation at this chapter's end)

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.

Collateral Source

(Mr. Andrews, Mr. Cianchette, Mr. Koppang, Mr. Woodman)

2. 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 public and private collateral sources to which the plaintiff is entitled;

deduct from the damage award any compensation the plaintiff has received from these collateral sources for which the source does not have a subrogation right; and

reduce the above deduction by the amount necessary to reimburse the plaintiff for any premiums paid or other value given for the collateral sources, plus interest.

Discussion: The common law collateral source rule prohibits a defendant from introducing evidence that the plaintiff has received or will receive payments from another source for some or all of the economic losses he has alleged as damages. As Justice Clifford has noted during our deliberations, the collateral source rule applied by Maine courts is particularly broad and precludes consideration by the jury of virtually all payments already received by the plaintiff. The ultimate effect of the collateral source rule is that plaintiffs receive double

payment for economic loss because the economic damages alleged by the plaintiff are not diminished by the amount of other benefits or compensation received.

Courts have historically justified the collateral source rule by reasoning that the defendant is a wrongdoer who should not benefit from the victim's prudence in insuring himself against injury. This rationale was sound under the traditional concept of fault where the defendant was not liable if the injured party's acts contributed to the injury, and, in the absence of insurance, defendants were personally responsible for payment of damages. However, the traditional view of fault has changed drastically in recent decades. Today, comparative negligence doctrines allow plaintiffs to recover regardless of their own culpability. Product liability theories allow manufacturers to be held liable when they are not at fault. The philosophy of allocating responsibility based on "fault" has been replaced by a philosophy of compensating the injured party regardless of fault. Because of these changes, the historical rationale for the collateral source rule is no longer valid.

Courts have also barred evidence of payments from collateral sources because they believed that juries would misuse the evidence when determining damages. This

argument removes one of the jury's essential purposes, determining what amount will compensate the plaintiff for his actual economic loss. If the goal of personal injury law is compensation of economic loss, the plaintiff should receive no "windfall."

Over 30 states have enacted statutes that eliminate the collateral source rule, allowing evidence to be admitted about payments from other sources or requiring the court to deduct from the jury award amounts equal to payments from other sources. Such statutes have withstood constitutional challenges in California and Florida.

Both the federal Tort Policy Working Group and the DHHS Report of the Task Force on Medical Liability and Malpractice have recommended that the collateral source rule be altered. Studies by the national accounting firm of Peat, Marwick, Mitchell, & Co., prepared for the Pennsylvania Medical Society, have indicated an insurance premium savings of up to 10% for such a change.

The present collateral source rule should be modified to be consistent with current tort law doctrines. Modification can be achieved by allowing the judge to deduct from the final verdict any amounts paid by collateral sources.

Contingent Fees

(Mr. Andrews, Mr. Woodman, Mr. Cianchette, Mr. Koppang)

3. Minority: That the contingent fee schedule established for medical malpractice cases in Public Law 1985, chapter 804 be extended to cover all tort cases prosecuted under a contingent fee agreement.

Discussion: Unconstrained contingent fees provide windfalls to plaintiffs' lawyers who win excessive verdicts. Such fees also encourage lawyers to take high risk-high reward cases to trial rather than reach settlement agreements based on a reasonable assessment of damages. To the extent that the speculative case which yields an excessive award is a fundamental problem with the tort system, the incentives for such cases should be removed.

Limits on contingent fees remove such an incentive. But such limits must be constructed in order to ensure access to courts for people of low or moderate means.

Although generally unlawful or unused in most foreign jurisdictions, contingent fee arrangements are common in tort suits in this country and are thought to serve an important purpose: they provide access to the civil justice system for those of limited and moderate income who could not afford to pay lawyers' fees and costs.

In providing access to the court system, contingent fee arrangements serve two of the fundamental goals of the tort system:

- They advance the goal of compensation, to the extent that they allow the wrongfully injured to have a chance to recover in court; and

- They advance the goal of deterrence by allowing the wrongfully injured to bring a wrongdoer to the bar of justice.

The current, largely unconstrained, contingent fee arrangements are thought to have created three problems with the existing tort system:

- Contingent fees provide windfalls to lawyers who make more -- or much more -- than warranted by their time and effort. In other words, contingent fees are often not "reasonable." This "unreasonableness" has two related effects, beyond depriving plaintiffs of part of their award:

  - Contingent fees encourage the filing of frivolous or near frivolous suits.

- Contingent fees discourage reasonable settlements.

We four would recommend a sliding scale of contingent fee awards, as set forth in chapter 804, as both reasonable and necessary. The schedule in chapter 804, providing for 33% of the first $100,000 recovered, 25% of the second $100,000 recovered, and 20% of the third $100,000, is substantially higher than the fee schedule proposed by the federal Tort Policy Working Group.

(Rep. Allen)

3. **Minority: That the contingent fee schedule established in chapter 804 be abolished.**

Discussion: Since the establishment of a contingent fee schedule in statute has not been demonstrated to impact insurance premiums, chapter 804's schedule for medical malpractice attorneys fees should be eliminated.

No evidence exists that Bar Rule 8 is insufficiently governing and restraining contingent fee agreements. Such methods of payment are important to clients who cannot afford to pay a lawyer at an hourly rate, but who deserve to have their claim presented.

Contingent fee agreements are particularly important to the prosecution of complex cases; medical malpractice claims can be among the most complex. Therefore, it is inappropriate to restrict statutorily contingent fee agreements in the one area of litigation which they may best serve.

Damage Caps

(Mr. Andrews, Mr. Cianchette, Mr. Koppang, Mr. Woodman)

5. Minority: That a $250,000 cap be placed on noneconomic damages in all tort cases.

Discussion: A fundamental cause of the current liability crisis is the increasing and unpredictable size of damage awards. The primary problem with awards lies in the jury's relatively unconstrained ability to award damages for intangible injuries such as pain and suffering, inconvenience, mental anguish, disability and emotional stress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and destruction of the parent-child relationship. These intangible injuries are in contrast to economic or "actual" damages which compensate victims for medical expenses, loss of earnings and earning capacity, loss of use of property, etc.

To ensure a crucial degree of certainty in damage awards, awards for intangible injuries should be limited. The rationale for this limitation is that such "costs" are more subjective in nature and have been the source of dramatically high awards.

Damages for "pain and suffering" are designed to give the victim some solace for his pain and inconvenience, and to make the negligent party acknowledge the victim's pain and inconvenience through an additional monetary payment. It has always been recognized that the payment of money for pain and inconvenience was both inadequate and imprecise; it was simply an attempt in the law to achieve a measure of rough justice. Nonetheless, common sense dictates that, although difficult to measure, intangible injuries -- e.g., disfigurement of a teenager -- are real.

The standards used to judge how much compensation is proper to achieve these goals have been the focus of much discussion. Juries have commonly been instructed to award damages based on past, present, and so much of future suffering as is "reasonably probable," given the plaintiff's life expectancy and taking into account the intensity and duration of the pain. Most jurisdictions allow a per diem argument to be made to the jury. Thus, the plaintiff's attorney suggests an appropriate figure

based on the "worth" of suffering for a short period (an hour, a day, a week) multiplied by the plaintiff's life expectancy. Absence of a more definite standard has made appellate review of excessive awards difficult, with uneven results. Given our very generous standard of economic damages, a limit on noneconomic damages is reasonable and will lead to a more appropriate balance in Maine's civil justice system.

Such a limitation has ample precedent in Maine law. The liquor liability statute imposes a cap of $250,000 for all damages except future medical expenses, and caps on awards exist for wrongful death awards. At least 22 other states have imposed various caps for noneconomic damages ranging from $225,000 to $875,000.

In its 1986 report, the federal Tort Policy Working Group recommended that noneconomic damages be limited to "a fair and reasonable amount" and proposed $100,000 as such an amount. In the 1987 Update on the Liability Crisis, the Tort Policy Working Group raised its recommended limit on noneconomic damages to $200,000. A limit of $250,000 for medical malpractice awards in California has been upheld by the State Supreme Court and a review of the decision denied by the United States Supreme Court.

Where malpractice award limits have been enacted, they appear to have had their intended effect. One Danzon study showed that such a cap reduced average claim severity by 23%.

Immunity

(Rep. Allen, Rep. Stevens, Mr. Stinson)

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

the nonprofit has a charitable purpose as delineated in:

42 USC §501(c):

(3) - charities (except that the lobbying restrictions applied by that section should be more clearly and less restrictively defined in Maine law),

(4) - civic groups,

(10) - fraternal groups, or

(13) - cemeteries; or

13-B MRSA §201:

(1)(A) - charities, civic, fraternal, and other groups,

(2)(A) - church groups,

(3)(D) - cemeteries, or

(3)(E) - agricultural fairs; or

the organization of chambers of commerce;

the nonprofit receives its primary funding from donations, membership dues, government grants or

awards, fees for the provision of services related to its charitable purpose, or a combination thereof;

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.

Joint and Several Liability

(Mr. Andrews, Mr. Koppang, Mr. Cianchette, Mr. Woodman)

7. Minority: That joint liability be generally abolished.

Discussion: Originally, joint and several liability meant that people who act with a common purpose, in concert, to commit an unlawful action against one party, would have the actions of one considered as the actions of all. Juries were not allowed to apportion fault between tortfeasors, because it was considered impossible to divide what was seen as an indivisible wrong. Each was therefore liable for the entire damage, although one person may have contributed more or less than the other.

Today, joint and several liability has been greatly expanded in Maine and elsewhere. Joint and several liability has been applied in the absence of concerted action to make all defendants who have had any part in an action jointly and severally liable. All that is required is that there be a tacit understanding that the action is

or will be occurring. In some instances, statements of mere knowledge by each party of what the other is doing is sufficient "concert" to make each liable for the acts of the other.

Modern joint and several liability can be inequitable because a defendant with only a small or de minimus percentage of fault can become liable for 100% of the damages owed the plaintiff. Joint and several liability leads to a search for a "deep pocket" and has made Maine municipalities, businesses, and other insured entities bear the greatest burdens of liability when their involvement in an injury is minimal.

We four would adopt pure several liability. Under pure several liability, in any case involving unintentional torts, the trier of fact would apportion to each person or entity, whether or not a party to the action, the percentage for which he or she is responsible for the damages awarded. Each party to the suit would be liable only for the portion of damages assessed to them.

The only exception to several liability should be when the defendants acted in concert. Joint liability should be imposed on all who pursue a common plan or design to commit a tortious act or actively take part in it. Any person

held jointly liable for actions in concert should have a right of contribution from his fellow defendants acting in concert.

Pure several liability, in holding each person responsible for his actions, leads to greater overall deterrence. No one can deter the actions of those over whom they exercise no control. A theory of joint liability, holding one party liable for the actions of all defendants, reduces deterrence because such liability will be imposed regardless of any measures taken to foresee and prevent accidents.

Pure several liability will restore a measure of predictability to damage awards. People and businesses can better judge their potential liability knowing that they are responsible only for their own negligence. This results in more efficient business planning and cost estimates, as well as proper assessments of the value of investments or new technologies, which can only be made when future costs can be predicted with accuracy.

The federal Tort Policy Working Group, the Report of the Task Force on Medical Liability and Malpractice (August 1987, DHHS) and several other studies have recommended eliminating the doctrine of joint and several liability.

Several states (at least 20) have already done so in some types of cases -- usually limiting a defendant's responsibility for payment for an award to the proportion of the defendant's fault (Arizona, Georgia, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Alaska, California, Colorado, Florida, Connecticut, Utah, Wyoming, Hawaii, Michigan, Missouri, New York, Washington).

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

(Mr. Koppang, Mr. Andrews, Mr. Cianchette, Mr. Woodman)

10. Minority: 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 be an issue, and will be determined by the knowledge actually available to the merchant or manufacturer. This could reduce the success of product liability claims.

(Mr. Stinson)

10. Minority: That the Maine case law permitting a state-of-the-art defense in product liability cases alleging a failure to warn of the product's dangerousness be negated by statute.

Statutes of Limitations

(Rep. Allen)

13. 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.

Structured Damage Awards

(Rep. Stevens, Rep. Allen)

15. Minority: 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.

NOTES

1. ME. REV. STAT. tit. 19, §§214(4), 581(4), 752(4) (West Supp. 1986).

2. Id. tit. 24, c. 21, subc. IV-A (West Supp. 1986).

3. ME. JUDICIAL DEP'T., supra, Chapter 6, note 10, at 185.

4. ME. REV. STAT. tit. 4, §451 (West Supp. 1986).

5. Werner v. Lane, 393 A.2d 1329, 1335 (Me. 1978).

6. Letter from Allan Kaufman, F.C.A.S., Peat, Marwick, Mitchell & Co. to James E. Paxton, Administrative Vice President, Pennsylvania Medical Society (April 18, 1982) (in Commission files).

7. ME. REV. STAT. tit 28-A, §2509 (1987 Me. Legis. Serv.).

8. Id. tit. 18-A, §2-804(b) (West Supp. 1986).

9. Id. tit. 14,§8105 (West 1980).

10. Id. tit. 28-A, §2518 (1987 Me. Legis. Serv.).

11. See text p. 79.

12. Cf. ME. REV. STAT. tit. 13-A, §719 (West 1981).

13. See Thompson v. Mercy Hospital, 483 A.2d 706 (Me. 1983); Rhoda v. Aroostook General Hospital, 226 A.2d 530 (Me. 1967); Mendall v. Pleasant Mountain Ski Development, Inc., 191 A.2d 633 (Me. 1963). Distinguish the immunity the charity enjoys for the negligent acts of its employees, officers, and directors from the personal liability that may exist for the employees, officers, and directors because of those same acts. See Rhoda v. Aroostook General Hospital, 226 A.2d at 532.

14. ME. REV. STAT. tit. 14, §158 (West 1980).

15. Id. tit. 14, §8111 (West 1980).

16. Id. §1616 (West 1980).

17. G. Sample, Att'y. Gen. Memorandum: L.D. 1787 and the Charitable Immunity Doctrine (March 11, 1986).

18. Letter from Judiciary Committee to Attorney General Tierney (April 22, 1987).

19. See ME. REV. STAT. tit. 14, §156 (West 1980), Otis Elevator Co. of Maine, Inc. v. F.W. Cunningham & Sons, 454 A.2d 335 (Me. 1983).

20. ME. REV. STAT. tit 28-A, §2512(2) (1987 Me. Legis. Serv.).

21. Id. tit. 14, §1602(1) (West Supp. 1986).

22. Id. §1602-A.

23. U.S.C.A. tit. 28, §1961(a) (West Supp. 1987).

24. Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985).

25. J. Simmons, Product Liability -- An Overview, 19 ME. BAR J. 41 (March 1985).

26. Bernier v. Raymark Industries, Inc., 516 A.2d 534, 538 (Me. 1986).

27. ME. JUDICIAL DEP'T., supra, Chapter 6, note 10, at 26.

28. ME. REV. STAT. tit 14, §752 (West 1980).

29. Id. §753.

30. Id. §752-A.

31. Id. §752-B.

32. Id. §752-C (West Supp. 1986).

33. Id. tit. 28-A, §2514 (1987 Me. Legis. Serv.).

34. Id. tit. 14, §753 (West 1980).

35. Id. tit. 14, §853 (West Supp. 1986).

36. Id. §752 (West 1980).

37. Medical Mutual Rate Filing with Maine Bureau of Insurance, at 5 (July 16, 1987).

CONCLUSION

The liability insurance crisis of the 1980's has many facets. Differing views exist as to the extent and causes of problems of insurance availability and affordability. Chapters 4 through 7 and Chapter 10 highlight these differing views. Appendix I sets forth how these differing views translate into positions on the insurance and tort bills carried over from the First Regular Session of the 113th Maine Legislature.

No hard data exist demonstrating a reliable solution to liability insurance woes. Some tentative data, and many knowledgeable opinions, do exist; and these suggest different solutions to different persons.

It is also difficult to assess the impact any reforms adopted in Maine would have on insurance rates in our State. The premiums paid in Maine represent a tiny fraction of those paid in this country.

The Commission members generally agree that insurance companies and insurance consumers can only benefit from the

recommendations for insurance reforms presented in Chapter 11. However, opinion divides on the Commission as to the desirability of broad tort reform as a solution to liability insurance availability and affordability problems. Chapter 12 presents Commission members' differing views.

In October 1987, the Commission solicited comment on a draft of this report from interest groups and the public. Among many others, the St. Paul Fire and Marine Insurance Company provided the Commission with helpful reactions.

In particular, in an October 14, 1987, letter to the Commission, written by Shirley Brantingham, Senior Government Affairs Manager of the St. Paul Companies, St. Paul supplied its views on tort reform. This portion of the St. Paul letter appears in Appendix H.

The majority of the Commission, who believe Maine should not engage in broad tort reform as an uncertain solution to the liability insurance crisis, find support in the St. Paul letter. A minority of the Commission, who recommend that Maine try tort reform in the belief that it will impact liability insurance problems favorably, find hope in St. Paul's words.

All Commission members acknowledge that St. Paul is correct in at least one assessment: that the final answers on tort

reform must come from the Maine people and their elected representatives. The Commission to Examine Problems of Tort Litigation and Liability Insurance in Maine is pleased to present its final report to the 113th Maine Legislature.

APPENDICES

APPENDIX A

Experts invited to speak to Commission

Everard Stevens, Deputy Superintendent, Bureau of Insurance

Joseph Edwards, Superintendent, Bureau of Insurance

Theodore Briggs, Former Superintendent, Bureau of Insurance

David Gregory, Professor of Law, University of Maine School of Law

Gerald Petruccelli, Esq., Petruccelli, Cohen, Erler & Cox

Hebert Moulton, President, Fort Hill Agency

William Ferranti, Vice President, Republic Hogg Robinson of New England, Inc.

Richard Johnson, Actuary, Bureau of Insurance

Brenda Trolin, National Conference of State Legislatures

Michael Bird, National Conference of State Legislatures

George Z. Singal, Esq.: Chairman, Civil Rules Committee of the Courts; Maine Trial Lawyers Association

David Hale, Director, Property Casualty Division, Bureau of Insurance

L. Kinvin Wroth, Dean, University of Maine School of Law

Debra Olken, Policy Analysis Officer, Administrative Office of the Courts

Gordon Smith, Maine Medical Association

David Clough, National Federation of Independent Businesses

Robert Miller, Superior Court Administrator, Penobscot County

Robert Howe, Maine Hospital Association

Bill Julewitz, Maine Liability Crisis Alliance

Barry Mills, President, Maine State Bar Association

APPENDIX B

Testimony at Public Hearings

Adams & Fogg Oil Equipment Company

American Academy of Family Physicians

American Consulting Engineers Council

Aroostook Mental Health Center

Family Day Care Association

Harriman Associates

Head Start

Hospitality House

Independent Insurance Agents Association of Maine

Kennebec Valley Community Action Program

Maine Coast Memorial Hospital

Maine Dental Association

Maine Psychological Association

Mid-Coast Human Resources Council

Moir Company

Motivational Services, Inc.

Northeast Cardiology Associates

Oxford County Community Services

Paper Industry Information Office

Penquis Head Start

Portland, City of

Rural Health Centers of Maine, Inc.

T.Y. Lin International

Wright-Pierce Architects and Engineers

APPENDIX C

List of Reports, Articles, Speeches that analyze causes of liability insurance crises

Tort Policy Working Group, An Update on the Liability Crisis, March 1987.

"The Liability Crisis: Who's to Blame," State Government News, The Council of State Governments, March/April 1986.

Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, February 1986.

Andrew Schotter and Janusz Ordover, "The Cost of the Tort System," C.V. Starr Center for Applied Economics, March 1986.

Alliance of American Insurers, American Insurance Association, National Association of Independent Insurers, Civil Justice Reform Data: Property and Casualty Insurance Industry Data and the Case for Tort Reform -- Documenting the Cost of Expanding Tort Liability Doctrines Beyond Traditional Common Law Boundaries, June 1986.

George Clemon Freeman, Jr., "Tort Law Reform: Superfund/RCRA Liability As a Major Cause of the Insurance Crisis," Tort and Insurance Law Journal, Vol. XXI, No. 4, Summer 1986.

"The Cost of the U. S. Tort System," an address to the American Insurance Association by Robert W. Sturgis, Tillinghast, Nelson & Warren, Inc., Nov. 14, 1985.

National Association of Independent Insurers, "Punitive Damages and the Civil Justice System. The Case for Reform and a Plan of Action." (no date specified).

National Association of Independent Insurers, "Medical Malpractice: A Second Opinion," May 1986.

National Association of Independent Insurers, "Joint and Several Liability: Closing the Deep Pocket," May 1986.

Mark A. Peterson, "Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois," The Institute for Civil Justice, 1987.

"Insurance: After the Storm," The Economist, June 6, 1987.

"Property-Casuaty Insurers Profits Soar," Wall Street Journal, Nov. 4, 1986.

"The Manufactured Crisis: Liability -- insurance companies have created a crisis and dumped it on you," Consumer Reports, August 1986.

Samuel Greengard "Is the Tort System Heading for a Crash?" Barrister, Winter 1987.

"Liability insurance hassles ease but reforms still seen as needed," Christian Science Monitor, Sept. 10, 1986.

"Fact Sheet on 'Litigation Explosion,'" Coalition for Consumer Justice, Draft, March 14, 1986.

"NFIB's View of the Liability Insurance Crisis," statement by Wayne L. Campbell, National Federation of Independent Business, presented to NCSL Conference on Controlling Liability Insurance Costs: State Strategies, Jan. 4, 1986.

Prepared for the National Association of Attorneys General, An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance, May 1986.

National Center for State Courts, Court Statistics and

Information Management Project, "A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 1978, 1981, and 1984," April 1986.

National Center for State Courts, Court Statistics and Information Management Project, State court caseload statistics: Annual Report 1984, June 1986.

"Insurance Reform and Civil Justice: Where Lies the Consumer Interest?" Coalition for Consumer Justice, 1986.

American Bar Association, Report of the Action Commission to Improve the Tort Liability System, February 1987.

"Product Liability Jury Awards Reflect Common Sense of American People," Consumer Federation of America, May 30, 1986.

"Insurance Industry Profits Rose More than 1200% in 1st Quarter, Study Finds," National Insurance Consumer Organization, June 2, 1986.

"The Explosion in Liability Lawsuits is Nothing But a Myth," Business Week, April 21, 1986.

"Both Sides Brace for Tort Battle," National Law Journal, Feb. 16, 1987.

APPENDIX D

Medical and Legal Malpractice
PL 1985, c. 804

subjects	new law
statutes of limitations (Secs. 1, 2, 13) (eff. Aug. 1, 1988)	medical: action brought within 3 years of when cause of action accrued
	cause of action accrues on date of act causing injury, except accrues when injury discovered in foreign object surgery cases
	minor must commence action within 6 years after cause of action accrues or 3 years of attainment of majority, whichever first
	legal: action brought within 6 years of when cause of action accrues
	cause of action accrues on date of act causing injury, except accrues when injury discovered in real estate title opinion cases and will drafting cases
regulation (Secs. 8, 9, 10, 17, 18, 19, 20) (eff. July 16, 1986)	insurers: failure to report claims and dispositions against health care practioner or provider to Super. of Ins. permits up to $1,000 civil fine
	boards of reg. in medicine & of osteopathic exam. and reg.: must treat 3 claims resulting in $ judgment or settlement over 10-year period as complaint against licensee or practioner
	coordination between boards in staff use, increased staff, increased fees for licenses to $250 or $125

prelitigation screening
(Secs. 12, 14)
(eff. Jan. 1, 1987)

medical malpractice:
1. prior to filing court complaint, notice of claim served on accused and clerk of Superior Ct. with $200 fee

stat. of lmts. tolled for 175 days, at most

accused files appearance with $200 fee

2. Chief Justice, Superior Ct. chooses person with judicial experience to chair screening panel

chair chooses other panel mems.: 1 attorney, 1 health care practitioner in accused's specialty, possibly 1 more practitioner or provider if multiple accuseds (challenges for cause permitted)

combined hearing if more than 1 accused, unless all parties, or chair, choose separate hearings

all parties may agree to by-pass panel and resolve by lawsuit or submit claim to binding determination of panel or request litigation of preliminary issues before panel hears case

3. parties agree on timetable for reasonable discovery

4. if 1/2 panel requests, chair shall choose expert witnesses

costs of experts apportioned among parties by chair (appeal to Chief Justice)

5. informal hearing, chair's rulings on procedure final, tape recorded for panel's use only, hearing matters generally confidential

chair attempt to mediate before panel reaches findings

failure of party to comply leads to finding against

6. panel's findings:

whether acts complained of are deviation from applicable standard of care, and

whether there is a reasonable medical or professional probability that acts complained of caused the injury

7. if panel's findings are unanimous against claimant, claimant must release claim - if claimant goes to court, panel's findings are admissible

if panel's findings are unanimous against accused, accused must seek settlement - if accused won't settle, panel's findings are admissible in court

(panel may be asked to set damage amount)

expert witness list
(Sec. 15)
(eff. July 16, 1986)

medical malpractice: parties to court action must file expert witness lists with other party within 90 days of filing for plaintiff, within 60 days of receipt of plaintiff's list for defendant (extension possible)

childbirth
(Sec. 16)
(eff. July 16, 1986)

healthy child: may claim damages for sterilization and pregnancy costs, pregnancy pain and suffering, lost earnings during pregnancy

no damages for rearing costs

	unhealthy child: limited to damages associated with child's disease, defect, handicap
structured awards (Sec. 16) (eff. July 16, 1986)	medical malpractice: awards equal to or greater than $250,000 in future damages shall be paid periodically upon party's request
	jury determines what damages are past, what future
	court sets amount of periodic payments (court may deny structuring if financial resources unsuitable or may require security)
	failure to pay requires payment of all damages, plus court costs and attorneys' fees
	judgment creditor death requires payments continue to estate
contingent fees (Sec. 16) (eff. Aug. 1, 1988)	attorneys' fees in medical malpractice:
	33 1/3% of first $100,000
	25% of next $100,000
	20% of amount over $200,000
	court may approve additional compensation in special circumstances
reports (Sec. 21)	commission to examine tort/ins.: shall examine medical and legal malpractice, including:
	stats. of lmts.
	accrual of causes of action from date of discovery
	contingent fees
	damages caps

Super of Ins.: report to 114th Leg. impact of PL 1985, c. 804

MF/lk/6961

APPENDIX E

A portion of the July 16, 1987, Medical Mutual rate filing with the Bureau of Insurance

MEDICAL MUTUAL INSURANCE COMPANY OF MAINE

Physicians and Surgeons
Professional Liability

Statute of Limitations

The new law (24 M.R.S.A. - 2902) increases the statute of limitations for professional negligence from two to three years after the cause of action accrues. For minor children, the law revises the statute of limitations so that actions for professional negligence by a minor shall be commenced within six years after the cause of action or within three years after the minor reaches the age of majority, whichever first occurs.

A recent study by Patricia Danzon, "The Frequency & Severity of Medical Malpractice Claims: New Evidence" found that a reduction of one year in the statute of limitations reduced total claims frequency by 8%. One may infer that an increase of one year in the statute as in 24 M.R.S.A. will result in an increase of 8% in total claims frequency.

It is also generally recognized that the amount of settlements/ awards for malpractice increase as the time between the alleged malpractice and the date of claim filing increases.

It is therefore the opinion of Medical Mutual that the increase in the statute of limitations from two to three years will have an adverse impact on both the frequency and severity of claims experienced by Medical Mutual. The adverse impact is not expected to be offset by the potentially minimal positive effects of the reduction in the statute as it applies to minor children.

Contingent Fees

The new law (24 M.R.S.A. - 2902) limits the total contingent fee for plaintiff's attorney as follows:

(a) 33 1/3% of the first $100,000 recovered
(b) 25% of the next $100,000 recovered
(c) 20% of any amount over $200,000 recovered

In a 1985 study prepared by Milliman & Robertson for the American Medical Association, it was estimated that limiting contingency fees could produce potential cost savings of 9% in a "typical state". The study used a theoretical model and assumed the following limitations:

(a) 33 1/3% of the first $150,000 recovered
(b) 25% of the next $150,000 recovered
(c) 10% of any amount over $300,000 recovered.

These assumed limitations will produce a more significant reduction in contingent fees for large awards than will the Maine Act. It is not likely that savings as high as 9% will be realized in Maine.

In the previously mentioned study by Patricia Danzon, nation wide claims experience for 1975-1984 was analyzed. It was concluded that limiting contingency fees appeared to have no systematic effect on the number of malpractice claims filed or the size of awards.

It is the opinion of Medical Mutual that the limitation on contingency fees enacted in Maine will have no significant effect on the frequency or severity of malpractice claims experienced by Medical Mutual.

Mandatory pre-litigation screening and mediation panels:

It is the considered opinion of the Company that these pre-suit procedures result in no net savings for malpractice insurance carriers.

At least one Maine Superior Court Justice has characterized the conflicts and vagaries of the pre-litigation screening panel law as "an abomination". Some of the problems in the new law include 1) the nature and scope of discovery allowed before suit and its impact on the discovery rules applicable to suits, 2) the standard of proof utilized by the panel, 3) the use of the panel's findings without explanation at trial, 4) the conflict in interpretation between individual panel chairmen as well as other problems, both substantive and procedural.

While it is true that the pre-litigation panels may weed out frivolous suits that are legally and medically simple by pointing out to the plantiff's counsel, working for a contingent fee, the difficulties in the case; in complicated matters it is our understanding that plaintiff's counsel will continue to present their cases to a jury in any event.

Additionally, in complicated matters the defendant cannot put together an adequate defense within 120 days of the notice of the claim, and the attendant increases in attorney's fees and costs for "another layer" of litiation will be enormous. It is the belief of the Company that the increases in attorney's fees and costs to routinely go through formal pre-suit procedures will far outweigh any savings from plantiff's abandonment of their suit after a panel finds against them.

MEDICAL MUTUAL INSURANCE COMPANY OF MAINE

Physicians and Surgeons
Professional Liability

Notice of expert witnesses:

The new law provides the counsel for that defendant doctor has only 60 days after receipt of the plantiff's expert's medical theories of the case to marshall evidence in opposition to them. As a practical proprosition, under normal pre-trial discovery, the defense has a much longer period than 60 days within which to elicit the plaintiff's expert's theories and take appropriate depositions and interrogratories prior to trial. In essence, this section simply restricts the defendant's response time to 60 days whereas in actual practice it is generally much longer. The Company's experience is that it is physically impossible to fully analyze the plaintiff's medical theory, consult with the insured physician, search the medical literature, locate out of state specialists willing to testify, submit all relevent information to them, meet with them to determine whether their testimony should be presented, and provide a summary of their opinions within 60 days. It is our opinion that this provision may in fact hamper the presentation of a full defense and evaluation of the case and will probably result in increased indemnity payments to plaintiffs.

Prohibition of claims based upon wrongful birth of a healthy child:

This section does nothing more than recognize the existing case law in both Maine and the majority of American jurisdictions. While it is true that the damages are limited to special expenses and pain and suffering connected with pregnancy and the sterilization procedure; this has previously been the prevailing holding of the courts of Maine. See Macomber V. Dillman, 505 A.2d 810 (Me. 1986). Therefore the codification of this holding will have no impact upon the Company's rates.

Structured awards:

This provision of the law does not elminate or reduce the amount of indemnity payments which must be made by the insurance company as a result of a jury verdict or settlement with payments to be made in the future which recognize the present value of money and the interest to be added on account of the delay in payments. While this statute may have salutory effects upon the welfare costs of the State

in preventing imprudent exhaustion of judgments or settlements by improvident plaintiffs, it produces no savings to the indemnity carrier. Some counsel have suggested that the manner in which that breakdown of damages by categories given to the jury may in fact be a tactical windfall for the plaintiff's bar so that the Company's indemnity payout may very well increase under this new law.

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.

APPENDIX F

List of titles of all State Study Reports gathered by Commission

Liability Insurance and the Law of Torts in Colorado: Problems and Remedies. Report of the Special Task Force on Tort Liability and Insurance, January 1986.

Report of the Governor's Oversight Committee on Liability Insurance. Task Force on Liability Insurance (Maryland), Lt. Governor J. Joseph Curran, Jr., Chairman, December 1986.

Liability Insurance: A Background Report. Nebraska Legislative Council, Legislative Research Division, January 1987.

Insuring our Future: Report of the Governor's Advisory Commission on Liability Insurance. State of New York, April 1986.

Liability Insurance Crisis in Pennsylvania: Report of the Insurance Committee. Pennsylvania House of Representatives, William C. Rybak, Chairman, September 1986.

Study of Insurance Against Medical Malpractice. Legislative Commission, Legislative Counsel Bureau, State of Nevada, September 1986.

Report to Nevada's Legislative Commission on The Liability Insurance Issue. Research Division, Legislative Counsel Bureau, Nevada Legislature, October 1986.

Final Report of the Missouri Task Force on Liability Insurance. January 1987.

The Joint Committee Report to the 70th Legislature of the State of Texas. House/Senate Joint Committee on Liability Insurance and Tort Law and Procedure, January 1987.

Liability Insurance. Policy Development and Research Office, State of Pennsylvania, April 1986.

APPENDIX G

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

APPENDIX H

Excerpts from October 14, 1987, letter to Commissin from Shirley Brantingham,Senior Government Affairs Manager, The St. Paul Companies

Tort Reform. When scrutinizing the constitutionality, effectiveness, or desirability of changes in the tort system, legislatures and courts have historically focused on two key issues:

First, will the proposal save money?

Second, will it be equitable to all elements of society?

In balancing those two concerns, which are not always compatible, the key test has been whether those injured, and society as a whole, have been provided with a quid pro quo. It is the position of The St. Paul that only society as a whole, through its elected representatives, can make that determination.

There is no way to lower the cost of the civil justice system without reducing some benefits to all -- or denying all benefits to some. Thus, there is only one universally accepted, objective standard for defining a fair and affordable system -- it is one which meets most people's needs, most of the time, under most conditions, and at a cost that most believe is affordable.

As a result, The St. Paul believes that only two groups of people are entitled to promote change in the system or object to change -- those who may need to use the system and those who ultimately pay the cost. Of course, all Americans are both, whether they use the liability insurance system to cover their costs or choose to pay directly.

Because of the above, long-held beliefs, The St. Paul has not joined other insurance companies or insurance trade associations in their promotion of changes in the civil justice system. In fact, we have urged fellow insurers, and trial bar leadership, to re-examine whether their roles in the current debate are truly appropriate.

Although we cannot speak for those insurance companies which have lobbied for tort reforms, The St. Paul has always made it clear that it is impossible to conclusively price any given reform. While passage of proposed reforms may ultimately have an impact on loss costs, it simply is not possible to predict -- with any reasonable degree of accuracy -- the extent of dollar savings which might result from any given change in the tort system - or when that savings might be realized.

To the extent that any changes made actually reduce loss costs, buyers of insurance and self-insureds will see a future reduction in the upward trend in their costs. Whether or not any resulting reduction in recoveries will be sufficient to produce an actual rate reduction, over time, is uncertain.

APPENDIX I

Insurance and Tort Bills Carried Over

Banking and Insurance Committee

LD 208 -- AN ACT to Amend the Maine Business Corporation Act and the Maine Nonprofit Corporation Act to Enable Maine Stock and Nonstock Corporations to Adopt Limits on Director Liability and to Modernize Indemnification Provisions.

LD 208 deals with nonprofit corporations and for-profit corporations. All Commission members recommend the deletion of the provisions concerning nonprofits from this bill. Chapter 12, Commission Recommendation #6 deals with nonprofit directors' immunity in another way.

The majority of the Commission is not inclined to support the for-profit provisions of LD 208. However, all Commission members believe that the Banking and Insurance Committee should continue gathering information and working on the for-profit provisions of LD 208 before a final decision is made.

LD 380 -- AN ACT Pertaining to the Establishment of Mandatory Risk-sharing Plans.

All Commission members recommend that LD 380 could be used as a vehicle to implement Chapter 11, Commission Recommendation #8. LD 380 will need to be redrafted to accomplish this.

LD 621 -- AN ACT to Provide Flexible Rating for Property and Casualty Insurance.

All Commission members recommend the use of LD 621 as a vehicle to implement Chapter 11, Commission Recommendation #4. LD 621 will need to be redrafted to accomplish this.

LD 810 -- AN ACT to Create the Maine Property and Casualty Joint Underwriting Association.

All Commission members recommend that LD 810, like LD 380, could be used as a vehicle to implement Chapter 11, Commission Recommendation #8. LD 810 will need to be redrafted to accomplish this.

LD 2 -- AN ACT Establishing an Immunity from Civil Liability for Certain Shelters for the Homeless.

All Commission members recommend that LD 2 not be enacted. Chapter 12, Commission Recommendation #6 presents the extent to which the Commission believes new immunity should be provided to nonprofits.

LD 250 -- AN ACT Affecting Joint and Several Liability.

The majority of the Commission recommends that LD 250 not be enacted. See Chapter 12, Commission Recommendation #7. A minority of the Commission recommends that LD 250 could be used as a vehicle to implement Chapter 12, Minority Recommendation #7.

LD 256 -- AN ACT to Amend the Maine Tort Claims Act Regarding Punitive Damages.

All Commission members recommend that LD 256 not be enacted. See Chapter 12, Commission Recommendation #9.

LD 268 -- AN ACT to Create the Litigation Accountability Act.

All Commission members recommend that LD 286 not be enacted. The Commission found that frivolous suit concerns are adequately addressed by Maine Rule of Civil Procedure 11.

LD 269 -- AN ACT to Create a Noneconomic Damages Award Act.

The majority of the Commission recommends that LD 269 not be enacted. See Chapter 12, Commission Recommendation #5. A minority of the Commission recommends that LD 269 could be used as a vehicle to implement Chapter 12, Minority Recommendation #5.

LD 294 -- AN ACT to Broaden Peer Review Immunity.

All Commission members recommend that the Judiciary Committee gather information and work on LD 294. The bill may concern policies beyond the scope of the Commission's work.

LD 338 -- AN ACT to Exempt Directors of Credit Unions' from Liability on Certain Matters.

All Commission members recommend that LD 338 not be enacted. Chapter 12, Commission Recommendation #6 presents the extent to which the Commission believes new immunity should be provided to nonprofits.

LD 358 -- AN ACT to Amend the Maine Tort Claims Act to Remove Joint and Several Liability for Government Entities.

All Commission members recommend that LD 358 not be enacted. The majority of the Commission bases this on Chapter 12, Commission Recommendation #7. A minority of the Commission finds that LD 358, while in line with Chapter 12, Minority Recommendation #7, is not an appropriate vehicle for implementing that recommendation.

LD 526 -- AN ACT to Abolish Joint and Several Liability.

The majority of the Commission recommends that LD 526 not be enacted. See Chapter 12, Commission Recommendation #7. A minority of the Commission recommends that LD 526 could be used as a vehicle to implement Chapter 12, Minority Recommendation #7.

LD 539 -- AN ACT to Reform Provisions of the Civil Justice System.

§§263, 264: The majority of the Commission recommends that these sections not be enacted. See Chapter 12, Commission Recommendation #5. A minority of the Commission recommends that these sections could be used as a vehicle to implement Chapter 12, Minority Recommendation #5.

§265: The majority of the Commission recommends that this section not be enacted. See Chapter 12, Commission Recommendation #2. A minority of the Commission recommends that this section could be used as a vehicle to implement Chapter 12, Minority Recommendation #2.

§266: The majority of the Commission recommends that this section not be enacted. See Chapter 12, Commission Recommendation #7. A minority of the Commission recommends that this section could be used as a vehicle to implement Chapter 12, Minority Recommendation #7.

§267: All Commission members recommend that this section could be used as a vehicle to implement Chapter 12, Commission Recommendation #6. This section will need to be redrafted to accomplish this.

§268: The majority of the Commission recommends that this section not be enacted. See Chapter 12, Commission Recommendation #10. A minority of the Commission recommends that this section could be used as a vehicle to implement either of the Chapter 12, Minority Recommendations #10.

§269: All Commission members recommend that this section not be enacted. The Commission found that altering the current content of ad damnum clauses will not affect liability insurance availability or affordability.

§§1602, 1602-A: All Commission members recommend the use of these sections as a vehicle to implement Chapter 12, Commission Recommendation #8. These sections will need to be redrafted to accomplish this.

LD 584 -- AN ACT Establishing Peer Review Immunity for Licensed Psychologists.

All Commission members recommend that the Judiciary Committee gather information and work on LD 584. The bill may concern policies beyond the scope of the Commission's work.

LD 634 -- AN ACT Limiting the Liability of Directors and Officers of Charitable Organizations.

All Commission members recommend that LD 634, like LD 539, §267, could be used as a vehicle to implement Chapter 12, Commission Recommendation #6. This bill will need to be redrafted to accomplish this.

LD 657 -- AN ACT Amending the Workers' Compensation Laws Exempting Design Professionals from General Civil Liability for Injuries on Construction Projects.

Two Commission members recommend that LD 657 not be enacted because it is beyond the extent of Chapter 12, Commission Recommendation #6. Other Commission members recommend that the Judiciary Committee gather information and work on LD 657; the bill may concern policies beyond the scope of the Commission's work.

LD 797 -- AN ACT to Establish Policies Governing Medical Malpractice Claims.

§8302: The majority of the Commission recommends that this section not be enacted. See Chapter 12, Commission Recommendation #5. A minority of the Commission finds that this section, while in line with Chapter 12, Minority Recommendation #5, is not an appropriate vehicle for implementing that recommendation.

§8303: The majority of the Commission recommends the use of this section as a vehicle to implement Chapter 12, Commission Recommendation #3. This section will need to be redrafted to accomplish this. This section could also be used to implement Chapter 12, Minority Recommendation #3 pertaining to abolition of the medical malpractice contingent fee schedule.

LD 820 -- AN ACT to Eliminate Ad Damnun Clause in Cases Involving Unliquidated Damages.

All Commission members recommend that LD 820 not be enacted. The Commission found that altering the current content of ad damnun clauses will not affect liability insurance availability and affordability.

LD 832 -- AN ACT Pertaining to Civil Liability for Volunteers.

All Commission members recommend that LD 832, like LD 539, §267, could be used as a vehicle to implement Chapter 12, Commission Recommendation #6. This bill will need to be redrafted to accomplish this.

LD 1221 -- AN ACT to Apportion Fault under the Comparative Negligence Law.

All Commission members recommend that LD 1221 not be enacted. The Commission believes that Maine's comparative negligence law should not be altered. See Chapter 12, Commission Recommendation #7 and Minority Recommendation #7 for related concerns.

LD 1453 -- AN ACT to Provide Immunity from Civil Liability for Certain Emergency Medical Service System Participants.

All Commission members recommend that the Judiciary Committee gather information and work on LD 1453. The bill may concern policies beyond the scope of the Commission's work.