

PUBLIC HEARING

before

SENATE JUDICIARY COMMITTEE

AND

SENATE LABOR, INDUSTRY AND PROFESSIONS COMMITTEE

(Liability Insurance Issue)

July 28, 1986
Gilligan Student Union Building
Jersey City State College
Jersey City, New Jersey

MEMBERS OF COMMITTEE PRESENT:

SENATE JUDICIARY COMMITTEE:

Senator Edward T. O'Connor, Jr., Chairman
Senator John F. Russo
Senator Carmen A. Orechio
Senator John H. Dorsey
Senator William L. Gormley

SENATE LABOR, INDUSTRY AND PROFESSIONS COMMITTEE:

Senator Raymond Lesniak, Chairman
Senator Christopher J. Jackman, Vice Chairman
Senator Gerald Cardinale

ALSO PRESENT:

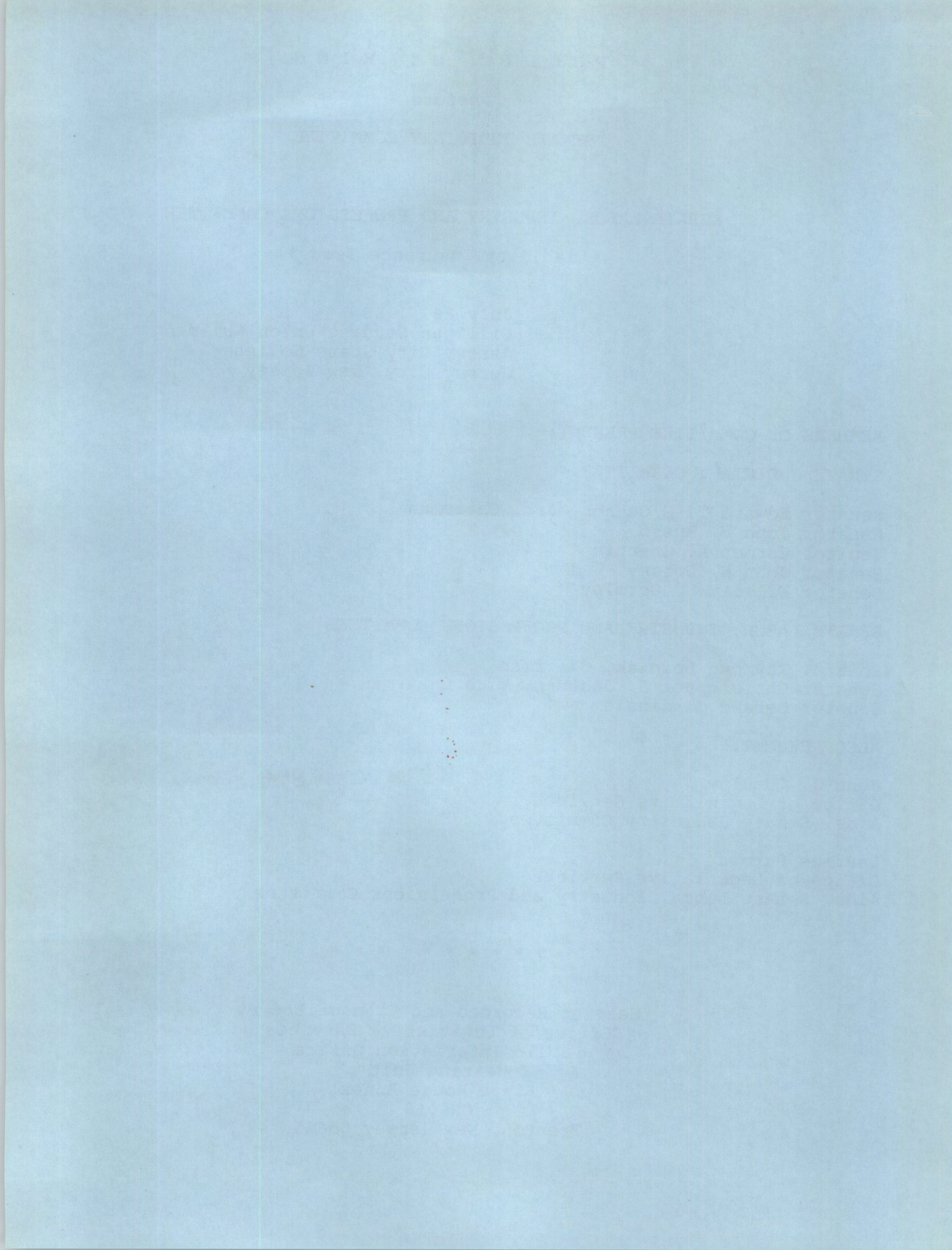
John J. Tumulty
Office of Legislative Services
Aide, Senate Judiciary Committee

New Jersey State Library

Laurine Purola
Office of Legislative Services
Aide, Senate Labor, Industry and Professions Committee

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ANNOUNCEMENT

SENATOR EDWARD T. O'CONNOR, CHAIRMAN OF THE SENATE JUDICIARY COMMITTEE AND SENATOR RAYMOND LESNIAK, CHAIRMAN OF THE LABOR, INDUSTRY AND PROFESSIONS COMMITTEE ANNOUNCE THAT THE COMMITTEES WILL HOLD JOINT HEARINGS ON THE LIABILITY INSURANCE ISSUE ON JULY 28 AND JULY 30.

THE JULY 28 HEARING WILL BE HELD IN MULTIPURPOSE ROOM 4, GILLIGAN STUDENT UNION BUILDING, JERSEY CITY STATE COLLEGE, CULVER AVENUE, JERSEY CITY. THE JULY 30 HEARING WILL BE HELD IN CITY COUNCIL CHAMBERS, CITY HALL, 60 WINFIELD SCOTT PLAZA, ELIZABETH. BOTH HEARINGS WILL BEGIN AT 10:30 A.M. TESTIMONY WILL BE BY INVITATION ONLY.

ANYONE WITH QUESTIONS CONCERNING THESE HEARINGS SHOULD CONTACT EITHER JOHN TUMULTY, AIDE TO THE JUDICIARY COMMITTEE AT (609) 292-5526 OR DALE DAVIS, AIDE TO THE LABOR, INDUSTRY AND PROFESSIONS COMMITTEE AT (609) 984-0445.

TABLE OF CONTENTS

	<u>Page</u>
Robert V. Van Fossan Federation of Advocates for Insurance Reform	3
Gloria Jackson Wright Legislative Liaison Department of the Public Advocate	31
John P. Thurber Department of the Public Advocate	39
John Atlas New Jersey Citizen Action Committee	41
Laura Rein Project Director Citizen Action Insurance Campaign	48
APPENDIX:	
Statement and attachments submitted by Robert V. Van Fossan	1x
"A Summary of Research Results: Trends and Patterns in Civil Jury Verdicts" submitted by Mark A. Peterson	i4x

* * * * *

mjz: 1-60

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TABLE OF CONTENTS

3	Robert A. Johnson Assistant Attorney General for the State of New Jersey
31	Glenn E. Johnson Assistant Attorney General Department of the Public Advocate
39	John V. Johnson Department of the Public Advocate
41	John A. Johnson New Jersey Citizens Action Council
48	Laura Kohn Project Director Citizen Action Resource Center
	APPENDIX
ix	Statement and attachments submitted by Robert V. Van Dyke, Jr., Researcher, Peace Research Center in Civil Disobedience, New Jersey Citizens Action Council

SENATOR EDWARD T. O'CONNOR, JR. (Chairman, Senate Judiciary Committee): Good morning, ladies and gentlemen. I would like to thank you all for coming today to Jersey City, my hometown. On behalf of Senator Chris Jackman, my fellow Hudson County Senator, we take special pride in having all of you here in attendance.

This, of course, is a public discussion on the origins and scope of the commercial, property, and casualty liability crisis currently facing the people of this State. As you know, the nature of the issue under discussion is unique, in that it affects both our 200-year-old system of jurisprudence and the business of the insurance industry itself. It was this dual effect which necessitated the Senate Judiciary Committee and the Senate Labor, Industry and Professions Committee to attempt to meet as one Committee.

During these hearings we will attempt to gather information that will sharpen our focus, so that each Committee can then separately, but with full knowledge of the other's actions, craft an appropriate response to this insurance liability crisis in an expeditious manner.

Today's discussion will focus on the plight of the consumer. Mr. Robert Van Fossan, representing the Federation of Advocates for Insurance Reform -- the group called FAIR -- will detail the problems now facing those consumers requiring commercial, property, and casualty insurance. We had invited a Mr. Mark Peterson of the Rand Corporation to discuss current litigation trends, but we were advised this morning that he will be unable to attend. The Public Advocate and the New Jersey Citizen Action Committee will detail the problems this crisis has caused for the non-commercial individual insurance consumer, as well as the victim.

The primary purpose of this hearing is to clarify the parameters of the current crisis. On Wednesday, these Committees, under Senator Raymond Lesniak's able direction,

will explore the positions of the Department of Insurance, as well as the solutions to the problem advanced by the States of Florida, New York, and West Virginia.

In exploring the origins of the crisis and how other states have attempted to resolve the crisis, the members of this Committee are attempting to settle on the most appropriate of 33 specific legislative proposals for insurance and tort reform. This task, although difficult, will be greatly aided by full and thorough discussion.

Today's hearing will continue what we feel is the Senate's course of deliberative and responsible legislative action, which began with our passage of the comprehensive solution to the municipal insurance crisis. I am referring to S-1718, under the sponsorship of Senator Lesniak.

So, once again, I thank all of you for coming today, and we will get under way directly. Senator Lesniak?

SENATOR RAYMOND LESNIAK (Chairman, Senate Labor, Industry and Professions Committee): I would like to take this opportunity to thank Senator O'Connor for hosting this Committee hearing in Jersey City, and for paying for our lunch after the hearing.

SENATOR O'CONNOR: You are in for a surprise.

SENATOR LESNIAK: I would like to introduce the members of the Senate Labor, Industry and Professions Committee. On my left the Vice Chairman, Senator Chris Jackman, from Jersey City. I am Senator Raymond Lesniak. I would concur with the opening statement of Senator O'Connor. We have already passed legislation which deals with municipal liability, counties -- actually, all public entities, with the thought that where insurance is currently unavailable, we will find a way to make it available. That pooling concept, when it passes the Assembly, will do just that.

The purpose of these hearings, as Senator O'Connor stated, is to look for other solutions to the problems as they deal with the private sector.

SENATOR O'CONNOR: Thank you, Senator. I would also like to introduce the other members of the Joint Committee. To my immediate right is Senator Carmen Orechio, Senate President pro tem, from Essex County. To his right -- and I think he gets the award for traveling the farthest distance today -- is Senator Bill Gormley, all the way up from Atlantic County. We are very ably assisted, on the left, by Paul Anzano, of the Senate Majority Staff. To his right is Laurine Purola of the Office of Legislative Services, and on the far right, the Staff Aide to the Senate Judiciary Committee, John Tumulty. To John's right is Diane Legreide, Assistant Executive Director of the Senate Majority Staff.

So, we will begin then. The first witness on today's list is Mr. Robert Van Fossan, representing the Federation of Advocates for Insurance Reform.

R O B E R T V. V A N F O S S A N: Thank you, Senator, and good morning to each of you. I have prepared some comments, but I am not going to go through all of those verbatim. You will be receiving copies of them for your own information.

What I would like to do is perhaps highlight some of what I deem to be salient areas, and then stand ready, obviously, to answer any questions that you or any members of the Joint Committee might have. Needless to say, I thank you for the opportunity to appear before you this morning. I happen to believe, as I have indicated to a couple of you, that this issue is one of the more important issues facing the bulk of the people in this State, with far-reaching permeations on all counts.

As indicated by the Senator, I am here on behalf of FAIR -- the Federation of Advocates for Insurance Reform -- a large body now representing some 50 organizations, either commercial enterprises or, in many cases, associations of employed people here in the State. We think it is one of the larger and more diverse coalitions of business, trade, and

nonprofit organizations ever to assemble in this State on a public issue. It is the largest I am aware of since the transportation bond issue back in 1978.

As you know, the Chairman up there, William E. Simon, former Secretary of the Treasury who had achieved distinction, is out of the country and, as a result, I am filling in for him -- pitch-hitting for him here today.

A brief personal note to clarify any of my comments. I do serve, as some of you know, as Chairman and Chief Executive Officer of Mutual Benefit Life Insurance Company in Newark. Mutual Benefit does not write any form of liability or property coverages. We are strictly a life insurance company, writing group life insurance and health insurance on individuals. I am a member of FAIR because I, like thousands of others in business, nonprofit, and government, have to buy liability insurance and also pay the premiums, if I am able to get it.

As you also know, the membership of FAIR does include insurance companies which do write liability coverage. We felt, from the outset, that their participation in working toward solutions to this crisis would be most meaningful. Indeed, they must play an important role if the reforms we hope to achieve -- and you hope to achieve -- are to be accomplished with dispatch.

But, by and large, FAIR -- the organization -- is composed of consumers of insurance who find that this liability crisis has made it even more difficult to provide goods and services. The unavailability of the liability coverage and the fear of protracted expensive litigation handicap nonprofit institutions, as well. As many of you know, we are active -- in my own company -- in a number of organizations -- hospital boards, social agencies -- as many of you are. The impact of this crisis all the way from soup kitchens to nature preserves, I think, speaks loudly and clearly as to the magnitude of the problem.

The professionals -- doctors, lawyers, accountants, architects, and engineers -- face higher costs and less security in the performance of their specialties, and they, too, as a result, are obviously involved. As you well know because of your own affiliation with them, local governments, no longer shielded by the doctrine of sovereign immunity, face a soaring number of suits, and are called upon to pay ever-increasing awards and ever-increasing premiums, if they can get the coverage.

When this system -- this tort liability system -- this insurance system fails, as I suggest to you it is failing now, the economy suffers, society suffers, and the individual rank and file suffer. Some of that suffering, however, is not quantifiable, and I would like to touch on a couple of those points. How do we place a value on the new medicine which is not brought to market despite the lives that could be saved, because the exposure to suit is too great? And I know; I sit on the board of a pharmaceutical company which turned down -- decided not to bring out; stopped all research on -- a particular item, because they felt the potential liability was too large on that product.

New Jersey needs to resolve this crisis quickly. How do you put a cost on a legal system that tears apart a neighborhood because of the issue of fighting back and forth as to who is going to have the payoff? The issue must be solved. We think -- and I think you feel -- that now is the time to pull together. The tort liability crisis is the product of several changes in insurance company practices, as well as changes in the way our system, as a whole, works.

Insurance industry practices have played a part, in my judgment, in driving up premiums and drying up coverage. The high interest rates of the late 1970s perhaps did create investment opportunities so attractive that many insurance companies lowered the premiums in order to attract capital.

That, in my opinion, is a fact. Interest rates have still fallen and premiums have risen, but never before in the familiar insurance premium interest rate cycle have they risen so high so fast. I liken it to: If you've got a wet basement that was caused by a leak in the roof, and all of a sudden you have a flood in the basement, and you say, "The damned roof really went to pot," it may not be. It may be that you've got a broken water main in the basement. I think that is what we've seen here.

The age-old issue of the interest rates was putting pressure on the system, but, at the same time, when you had another factor occur, then you put undue stress, that the system simply cannot tolerate.

Greater disclosure, in my judgment, of relevant data by insurance companies could help to prevent what some would fear to be future cash flow underwriting. But regulation of the insurance industry would not affect the fundamental cause of our current difficulties. The rapid unforeseen change in our legal system -- not the trial lawyers necessarily, not the judges, but the system as a whole -- the system as we describe it; what used to be a fault-based system -- now compensates for any and every injury, no matter what the degree of fault of the entity called upon to make the compensating payment. A lot of the goal of helping the injured has resulted, I suggest to you, in a hidden tax on every consumer in this State in the form of higher goods and service prices, and that is a tax bill that is simply getting too high.

We recognize that the courts broadened the area of liability to provide for the injured and the aggrieved. But another important need went unrepresented -- the need of an economic society for predictability. I suggest to you that the one area where the casualty business is no different than my business, is in the availability of predictable numbers. The actuary in the insurance business only works off of one item,

and that is data that he or she can use to predict the probability of something else occurring. When they can't get predictability, one of two things occurs: Either they set the price so high to be ultraconservative that they can't possibly be wrong, or they say, "There is no way we can write the business at all." I am afraid that is the dilemma we put them in when we force up the unpredictability aspects of our system.

You recognize, I'm sure, that once a door is cracked open to admit a severe and legitimate claim, it can be pushed wide open by frivolous claimants in search of a share of the lottery. I happened to notice a bumper sticker this past week, which I think is a sign of the times. I was reminded in my mind's eye that I happened to be in Texas back in '73 when the first oil crisis hit. The hot bumper sticker down there was: "Drive 90 and Starve a Yankee." The bumper stickers I am seeing crop up in New Jersey now say: "Hit me, I Need the Money." I think that is a sign of the times; that is a sign of the times.

If today's problems, however, were solely the result of mismanagement -- which some have alleged -- solely the result of company mismanagement, or of greed -- as some have alleged -- by the insurance industry, the crisis, I would suggest to you, logic would say, would hit all lines of insurance. But, it does not. If you were to look at the report of the Attorney General that came out earlier this year -- which is public information -- it states: "The two property/causalty lines that have been the primary source of availability and affordability problems -- general commercial liability and medical malpractice -- amounted to only 7% of all the property/casualty lines in terms of total 1984 premiums."

So what you have, I suggest to you, is a small piece of the total liability line that is this massive problem today. I would suggest to you that if the objective of the industry were to engage in greed to rip off the policyholders,

hell, they would go after a broader based coverage than directors' and officers' liability. They would go after one of the biggest single pieces of the line, and that is the homeowners' line.

The fact of the matter is, there is no affordability crisis in homeowners' insurance. There is no price problem in homeowners' insurance. The problem is peculiar to two pieces where you get into the public liability aspect of the line.

Between 1980 and 1984, losses paid on general liability policies in New Jersey doubled, while the premiums written barely kept pace with inflation. The tort liability problems of municipal government -- I don't need to tell you -- are particularly acute. The number of claims filed against insured municipalities nationwide rose 199% from 1980 through 1984, and settlements increased 121% in the same period. The average claim paid in tort judgments and settlements by New York City -- in a recent study put out by Governor Cuomo's office -- increased 400% in the last seven years. Last year, it paid out in New York State, \$118 million in 7650 claims, also according to Governor Cuomo's Study Commission.

The situation, I say to you, is as bad, if not worse, right here in New Jersey, where both the number of suits and the amount of awards against public entities are increasing sharply and daily. In the last nine years following the modification of the doctrine of sovereign immunity, the number of claims against municipalities in our State has increased 658%, and the amount paid in awards has increased 7000% from \$4000 to \$23,000.

Take the issue of directors' and officers' liability insurance, for instance. In the past decade, the number of companies reporting claims against directors and officers has increased by 162%. The percent of claims, however, with payment over \$1 million, has increased 73%. The average

defense cost per claim has increased 154% to \$461,000. That is just to defend the claim, not to pay it. This predicament, I say to you, extends to all corporate liability coverage, and is particularly acute in this State.

A major pharmaceutical company headquartered here found most insurers would not quote on its catastrophic liability policy. One London insurer would participate, but only if the pharmaceutical company would permit itself to be listed at an address other than the State of New Jersey.

The system, I say to you, cries out for reform, when substantial, honorable business leaders resign from hospital boards and the boards of charities because of their exposure to loss and their inability to get insurance to cover it. The system cries out for reform when New Jersey mayors become three times more likely to be sued than their colleagues in any other state. The system cries out for reform when one of the nation's leading drug companies is asked to pretend that it is located in some other state, so that it can get better liability coverage.

FAIR recognizes that the effort to restore predictability to the tort liability system must, however, be tempered by the sensitive appreciation for the needs and rights of the injured. Victims of a tortuous act must be able to get full compensation for all economic damages. Two reforms, in our judgment, would do much to restore the equity and predictability we seek -- and which we think you seek -- even allowing for full recovery of actual damages. Modifying the doctrine of joint and several liability, and capping the award of noneconomic damages would make the working of the system both fair and more predictable.

Some cap on noneconomic damages is needed, not necessarily the cap that has been discussed by any of the varying proponents, but some cap is needed. An insurer can simply calculate exposure for lost wages, medical costs, rehabilitation, and support at least with a fair degree of

certainty. Unlimited awards -- totally unlimited awards -- left, as we used to say, after the grace of God and a fast outfield, simply cannot be calculated and, if they cannot be calculated, they will either be overpriced when they come out, or they will not be offered at all.

So long as the doctrine of joint and several liability continues to be applied as it has been applied in recent years, the tort liability system, in my judgment, will be grossly unfair. Under that doctrine, it does not matter how responsible for damages a defendant may be; all that matters is how much money -- oftentimes how much insurance -- that defendant has. No one should be liable to pay a greater portion of damages than his share of the risk.

So, while I would stress those two reforms, you will notice in our submitted data the recommendations regarding the other seven or eight.

In closing, before taking any questions you have, I would like to make a couple of points, with a personal request of the Committee. I would urge you to take the time needed to do a complete job on the tort reform liability issue, not just a patchwork. I gather from talking to several of you that you are of a mind to do that. You have the time, in my mind, to do it right. We stand ready to do anything we can at FAIR to provide data, or to get data for you in any of the areas you need.

I would hope -- and I think you would hope -- that the New Jersey Legislature could put a package together, hopefully that could be signed by the Governor, which would be a prototype package that could be used by other states.

One last word, if I may, on a point triggered by something I read in the press this week. There have been several comments made about the increased profits. There was a big story on Aetna's operating profit. It is up 58.5%. I take you back to my comment about only 7% of the premiums covering

the areas we are talking about. Their profits don't all come from that. The profits come from other parts of the business. The problem, however, as you address the issue, is a significantly key one. If you try to get too doctrinaire with what you do with the carriers, you will force the carriers out of the State.

I am not saying -- as I said earlier -- that there has to be some side to this legislation put in to be certain that the resolution is in the best interest of the public. But, there are two other articles. Here is a story following the reaction in Florida: "Two Major Insurers Pull Out of the State." One of them, in my judgment, is one of the finest property and casualty companies in this country -- USF&G down in Baltimore, Maryland. Hell, they have been in business for 150 years down there, a quality company. They pulled out of the State of Florida. When you force the good guys out, as you well know, unfortunately in our society, the bad guys come in. The bad guys are typified in a story in The Star-Ledger yesterday about the 12 or 13 companies which went defunct, and left the State policyholders holding \$56 million of unpaid claims.

So, all I say to you is, be certain that you don't force the good guys out and end up with nothing but these kinds of carriers sitting around writing insurance in the State.

Thank you very much for the opportunity to appear. I would be happy to answer any questions, Senator, that you or your associates might have.

SENATOR O'CONNOR: Thank you, Mr. Van Fossan. Before we get to the questions, I would just like to acknowledge the presence now on the panel of Senator John Russo, the Senate President. Good morning, Senator.

SENATOR RUSSO: Good morning.

SENATOR O'CONNOR: Questions from the panel?

SENATOR LESNIAK: Yeah, I would like to ask a few questions, if I may.

Mr. Van Fossan, if what we are going to do is tort reform, and if the problem, as you state, only involves 7% of the lines of insurance -- I presume that is 7% by volume--

MR. VAN FOSSAN: Premium.

SENATOR LESNIAK: --of premium, yet our reforms that are proposed affect 100% of that business. Aren't we going to see, therefore, then, a windfall to the insurance industry with regard to the 93% of that premium?

MR. VAN FOSSAN: I don't think so, Senator, and I don't think so for two reasons: One is the competitive pressures on the industry. To maintain some competitive position, they are subject to antitrust, notwithstanding what some people think. There can still be collusion on price setting, and if there is, they would be in severe straits. The fact of the matter is, you can't regulate-- I don't think anyone wants to regulate the rate to be certain that there are no undue profits made. I suggest to you that rate disclosure -- adequate information going into the Department of Insurance -- is the best way you can measure that.

SENATOR LESNIAK: Well, when we talk about competition, the Public Advocate and some of the Attorneys General have stated that there is a conspiracy in the industry with regard to setting rates. Have you examined that? Do you have a position on that?

MR. VAN FOSSAN: Well, it is totally unfounded. I am not in that side of the business. I am in the other side, and I assure you there is no collusion in rate setting. We don't even want to talk rates with another company.

SENATOR LESNIAK: Isn't the insurance industry exempt from the antitrust laws?

MR. VAN FOSSAN: It is exempt some aspects of the antitrust, but the fact of the matter is-- If there were price fixing, the Department of Justice would invoke some jurisdiction, I'm sure, on price fixing, per se.

SENATOR LESNIAK: The Department of Justice isn't doing a very good job even enforcing the current antitrust laws.

MR. VAN FOSSAN: That's right. But, in my opinion, there is simply no basis for allegations of price fixing.

SENATOR LESNIAK: Is there an avenue for action on this crisis in Washington, and is FAIR taking any position with regard to national legislation?

MR. VAN FOSSAN: The avenue that is under the most discussion down there, as you well know, is that pertaining to product liability. While FAIR would encourage the Legislature here to be all-encompassing on the total issue and not leave it up to Washington to take their piece of it, we think that ultimately there will be some action come out of Washington.

SENATOR LESNIAK: How do you feel about allowing individual industries, or compatible industries unfettered ability to form captive -- to self-insure when insurance, in effect, isn't available, or only available at a very high cost?

MR. VAN FOSSAN: Well, I think it is the inevitable result. If the individual purchaser, be it a company or an individual, feels that the price they pay is too high, they will seek some other remedy to the solution. So, just as a citizen, I would say, well, that is part of the way the system of this country was built. I've got some questions about the economics of it, but that is a separate issue.

SENATOR LESNIAK: Okay, but you would be in favor of allowing that to occur if private industry felt that was the best way to handle it.

MR. VAN FOSSAN: If they feel they can cover the risk and operate the system that way at less cost than they could the other way, I would assume that that is what they would do.

SENATOR LESNIAK: And you don't-- Well, I mean, if the State regulates against that, or if there are State laws or regulations, or Federal laws or regulations prohibiting that, you would be favor then of changing those laws to allow--

MR. VAN FOSSAN: That's right. I think the only concern I have is that if somebody tells me five people are going to set up a pool to reinsure themselves, I would say, "You've got to have some money, because if you get a claim, who is going to pay the claim?" That is why I say the economic aspect is the only concern I've got.

SENATOR LESNIAK: Just one other question on fairness. Do you believe it is fair for--

Let me make an opening statement first. As I see it, the excess of awards and the need for a cap on damages-- If there were, for instance, a \$500,000 cap on pain and suffering, and someone had a sprained ankle, and that sprained ankle resulted in an excessive award for pain and suffering of \$550,000, the person with the sprained ankle's award would be cut by only \$50,000. Another person, who is a quadriplegic confined to a wheelchair for his entire life -- say he is an 18-year-old, or a 16-year-old -- who got an award for pain and suffering -- now, this is the quadriplegic versus the sprained ankle person -- got an award of \$4 million for pain and suffering, that award for that quadriplegic would be reduced by three and a half million dollars. Is it fair to have that cap hurt, in effect, the person most seriously injured, but not affect, or affect insubstantially, the person who is less injured, or very slightly injured?

MR. VAN FOSSAN: Well, let me suggest to you, Senator, that the problem with that illustration is, the bulk of the payment to the quadriplegic would be treated under economic damages. The young person who is permanently disabled and can never work-- That is an economic loss. There is nothing pain and suffering or intangible about that at all. That is a loss of income. That would be covered under the economic loss.

SENATOR LESNIAK: I don't believe you answered the question. By the way, I didn't pull these two examples out of a hat. They are real examples, although it wasn't a sprained ankle; it was a broken ankle.

In terms of fairness, equity, and justice -- which is really what public policy ought to be--

MR. VAN FOSSAN: Right.

SENATOR LESNIAK: --involved in, is it fair, equitable, and just to reduce the quadriplegic's award by three and a half million dollars by an arbitrary cap, and not affect, or very insubstantially affect the person with the broken ankle? I just don't see that as a fair situation.

MR. VAN FOSSAN: But, you would put in the fact, Senator, that the quadriplegic had considerably higher -- by multiple times -- economic damages.

SENATOR LESNIAK: That is a separate issue. I am talking about pain and suffering.

MR. VAN FOSSAN: No, it's the same issue; it's the same person.

SENATOR LESNIAK: Yeah, but I am talking about the pain and suffering part of the award -- if there were an interrogatory given to the jury, and they came back with specific awards for pain and suffering. Basically, that is what would be required under the capping proposals. The jury would have to give a specific award for economic damages and a specific award for pain and suffering.

MR. VAN FOSSAN: Or, a percentage award.

SENATOR LESNIAK: Or a percent-- Well, I don't know. If there is a proposal like that, I haven't seen it. But, in any event, the cap -- that cap would dramatically affect the person who is the most seriously injured, and would have an insubstantial effect--

MR. VAN FOSSAN: No question. No question. In that illustration, that is true.

SENATOR LESNIAK: That is a very unfair situation.

MR. VAN FOSSAN: But, the total dollars payable to the two parties would be drastically different.

SENATOR LESNIAK: But we're talking about pain and suffering.

MR. VAN FOSSAN: Yes, but I don't think you can separate it -- that is my point, Senator -- from the basic claim.

SENATOR LESNIAK: Okay. Do you feel that pain and suffering is not a valid measurement of damages at all?

MR. VAN FOSSAN: In very rare cases. I think the issue of the noneconomic damages is the heart of the problem we are tackling. It is as if we have let that run wild. That is where the system is struggling.

SENATOR LESNIAK: We're on the right track. The issue of noneconomic damages, you say has gone wild. Do we address that issue by most dramatically affecting those people who are most seriously injured, while having insubstantial, or no impact on the person who may have gotten a substantial award, or an excessive award? You know, the cap does nothing for that.

MR. VAN FOSSAN: Unless we can find a way to set that capping to take into consideration that type of circumstance. It may be possible.

SENATOR LESNIAK: Okay. Thank you.

SENATOR O'CONNOR: Senator Jackman?

SENATOR JACKMAN: Along the same line, I read a paper the other day where an award was granted to a young woman who was in her '40s, who had a malpractice suit. They had to take out about 10 feet of her intestines. Now, the pain and suffering amounted to \$64 million. It is the same analogy I am putting together. In connection with John Mansville, a young man died of asbestosis, and I think he wound up with about \$150,000. Sixty-four million dollars to take your intestines out, because you're alive, and \$150,000 because you died of asbestosis. How do you justify the values? I don't get it.

MR. VAN FOSSAN: I don't think you do. I saw the same story, Senator, in The New York Times, and I shook my head, too. How does a woman get \$64 million on that issue?

SENATOR JACKMAN: How do you pay \$64 million for somebody-- There is no question about the pain and suffering. The thing that worries me right now-- You see, and I am not saying this in a derogatory sense; most of the people I deal with on my Committees are lawyers-- They work very hard and very diligently trying to put together legislation that is going to be beneficial to everyone concerned.

But, when I pick up a newspaper in the morning -- and I represent 56,000 members of a union in New York and New Jersey -- and I see an ad in that paper that says, "Did you fall down? Did you get a bloody nose? Call Jacoby and Meyers. We're going to get you all the money in the world--" I get frightened, because then the employer says to me, "You know, Jackman, what you're doing-- You're just going to tap us right out. We're not going to have enough money to pay for the premiums that your people are now asking for." A guy skins his knee. Heretofore, he would just get up and wipe himself off. Now, he finds a piece in the paper, he walks with a limp for the next four days, and that's worth, maybe, two or three thousand dollars, or a down payment on a car. What's the answer?

MR. VAN FOSSAN: I don't know, but I wish I had said that.

SENATOR JACKMAN: Huh?

MR. VAN FOSSAN: I wish I had said that.

SENATOR JACKMAN: Okay. I can say it because I'm a layman.

SENATOR O'CONNOR: Senator Russo?

SENATOR RUSSO: Well, Bob, if you had said it, it would have been really irrelevant to this hearing, because nothing that is being even discussed here would go to that particular problem -- the skinned knees, the falling down, and the minor injuries. You've got another problem there, and that is the lawyers -- well, the ambulance-chasing bunch, the

doctors who work with them, the insurance investigators, and so forth. But, that has nothing to do with this issue at all. Nothing we are even talking about would stop that. That is an ethical matter -- this business about lawyers advertising -- which, frankly, I always found to be totally offensive. I see those ads, too, and they disgust me as well. But, that is another issue. It has nothing to do with this one.

But, on this issue, let me see if I can ask a few things, staying, for a moment, with the question of capping. Senator Lesniak raises a point that, you know, troubles a lot of us. We have a problem here that we have to try to resolve, and anyone who is on these committees who is a lawyer and tries to just protect the profession by no reforms, may be actually hurting himself, if that is his goal. But, on the other hand, we can't simply knuckle under to intimidation by an industry such as the insurance industry.

When we talk about capping -- arbitrary capping -- and there is no other way you can define it -- arbitrary capping, you pick a number, and that's it.

MR. VAN FOSSAN: Or, a formula.

SENATOR RUSSO: Pardon me?

MR. VAN FOSSAN: Or a formula.

SENATOR RUSSO: Well, I don't know how you would do it on a formula. You pick a number, and you say, "You cannot receive any more than 'X' dollars." It doesn't matter if two years from now we are all sitting in this same room and we have a litigant who we know about, who we all now agree is worth much more than that, but we set an arbitrary limit. You have a couple of questions there that concern me. They tie into the Florida situation.

I don't know how you-- Perhaps I should just ask you and see how you would answer the question. What assurances do we have if we do put that cap on -- among other things -- that we, in fact, will have lower insurance rates, or more

availability of insurance? Do you know of any? Before you answer, let me point out that Ontario did this a few years ago -- the insurance industry asked them to do it -- and their problem is the same as ours here today. Is there any assurance that if we take away anyone's rights that we, in fact, will solve the problem, or alleviate the problem, or might we not just increase the profits of the industry?

MR. VAN FOSSAN: Well, as no one knows better than all of the Senators, there are some things for which there is absolutely no sure-fire answer. But I think there are some things -- and this is one -- where good judgment, as well as public opinion would indicate some strong pressure. One thing is, the Legislature has the right to amend if they find out something was not right.

I honestly don't think, however, that it could do other than force some reductions. I think that part of that -- as I said -- is asking for, and being certain that the Insurance Department is looking at, and spending the time necessary to monitor the claims results of those lines of the business.

SENATOR RUSSO: Well, you see, for example, in Florida, that is exactly what they were concerned about, and they may have taken too arbitrary a figure. But the argument there was, "Hey, if we do this, we are still going to end up with, 'So they mandated a reduction.'" And what happened, as you said, was that one of the major carriers -- several perhaps -- pulled out. So, you wonder, do they want this? Is the pressure being put on because they want to make insurance more available, or because they want to increase profits? I don't know the answer, but that is one of the concerns we have.

It is actually supported by -- if I might refer to this just for a moment -- the Consumer Reports in August of this year, where they talked about John Byrne in June of '85,

the Chairman of GEICO, who said, "It is right for the industry to withdraw, and let pressure for tort reform build in the courts and in the state Legislatures." Then, as pointed out, this March, the Insurance Information Institute announced a \$6.5 million advertising campaign to sell "the lawsuit crisis" -- I'm quoting. It was aimed at the general public.

So, you know, one wonders whether or not we are being intimidated by the absence of any McCarren Act protection to force people, like, you know, Chris, who says, "Hey, I've got a concern for all of my people," to make changes, in the hope -- no more than that -- the hope that it will reduce premiums or solve the crisis. The fact is, I think -- and you and I talked about this the other day -- the problem deals with the fluctuation in interest rates. If you do everything the carriers ask you to do and the interest rates don't go up or go down further, you are still going to pay more. If you do nothing -- if you do nothing and interest rates go up, you are going to pay less. That doesn't mean there isn't some need for tort reform, but I think we've got to be very, very careful, Bob, about doing things under pressure -- under the gun -- that aren't going to solve the problem.

For example, on the capping, you talked about the noneconomic damages in the case of the illustration of Senator Lesniak, which would be very high. That is not at all necessarily true. Take the non-working housewife; the children are grown. She has no economic loss, as such.

MR. VAN FOSSAN: Oh, yes she does.

SENATOR RUSSO: Other than medical, and other than the loss of services to her husband. They are limited now. You know, you can only build them up so much. But, suppose that person has been put in a situation of pain -- I mean, I'm talking about real, real pain, not some lawyer-manufactured pain -- and will suffer the rest of her life, and can't do things that she had a right to expect, but for the negligence

of someone -- maybe gross it might have been, too. She would be limited to this arbitrary ceiling, whereas, as Ray pointed out, the sprained-ankle person wouldn't be.

Wouldn't it be better to change the definition of the powers of the court -- the judge -- to set aside an excessive verdict, so that he can now treat the case based on its merits, and not just an arbitrary figure? Wouldn't that make more sense, to give the judges more power to set aside excessive and arbitrary verdicts?

MR. VAN FOSSAN: Let me see, Senator, if I can take two or three of the points you raised or questioned on. Let me go to your point on the ads of the insurance industry and the "peer campaign." I don't happen to be overly impressed with either the insurance industry's ad program or the trial lawyers' radio program. I think both, perhaps, are muddying up the issue for the average person by just casting some things out there that perhaps would be better left unsaid and would allow cooler heads to prevail.

I do believe that the system would respond if, in fact, claims came down. I think premiums would come down. I don't happen to think the issue is whether or not interest goes up. I think you start at any given point in time. The rates have now been set for a level of interest earnings about where they are today. That is the way premiums are coming up. So, the major impact we are going to see would be any drop or increase in the claims. I happen to be enough of a believer in the system being "a legitimate system," that it would work, and if there is any doubt in the minds of the State and the political people, then they should set up, via inspection, the kinds of data that would make it clear as to what happened, so that if it were abused, it would be clear who abused it.

Again, the Legislature always has the right to go in and amend the action -- I don't believe you would -- but if you found that it was wrong, you would have the right to go back in and change it.

So, I do tend, I think -- going back to the conversation that you and I had the other day-- I think the issue is much more malleable and doable than we might think, if we could get at it on that basis.

The issue of the capping, I know, is the most sensitive issue of all, but I am convinced, as I sit here -- as I said to the three of you I have talked to in the last 10 days -- that if we don't come up with some answer -- I'm not saying what the answer is -- if we don't come up with some answer to the capping, we're wasting our time, and we're kidding ourselves on the solution.

SENATOR RUSSO: Okay. I gather, then, that you are looking for alleviation of the problem. Capping is the thought you have, but there may be others. Because, you see, I didn't read about the \$64 million verdict, but I'll tell you now, I'll bet you a good steak dinner that the litigant will never see that \$64 million.

SENATOR JACKMAN: I think you're right.

SENATOR RUSSO: It won't get past the trial judge. If it does, it won't get past the Appellate Courts, because, you see, the thing we have to remember, Bob, is, we read about these big verdicts. Now, we don't read about them because they happen every day. We read about them because they are very unusual. I would venture to say that nine out of 10 of them are reduced far below that grotesque amount -- what I would say is grotesque -- far below that amount, and it never ends up coming out of the coffers of the insurance treasury, because they are, in fact, reduced.

MR. VAN FOSSAN: May I make a comment on that -- while you are on that -- before you go on? I agree with you. I don't think that \$64 million claim will stand up. But, I'm reasonably confident of one thing: The ultimate award will be higher now than it would have been had that award come out at \$32 million. That I am reasonably sure of.

Secondly, I am not so sure that it is always workable to rely on the judge to set aside the award. There are some states where they have attempted to do that without too good a result. It's a psychology that takes hold. I believe -- and I think most of you believe -- that the juror sitting there, who, if he feels the person has been wronged, says, "Well, let's set the award a little higher. Why not?" And that's the psychology that concerns me about where we go. That is where I agree with Senator Jackman. If we build up in the minds of the people, "Hell, go ahead and hit for big bucks" -- adopt the lottery concept -- our system cannot survive that, John.

SENATOR RUSSO: I think you're right, except for one thing. You are making an assumption that jurors are sitting there saying, "Hey, let's build this thing up," for whatever psychological reason there is. And I raise the question to you about whether or not that is so. I raise the question to you, if that were true, you wouldn't be reading about these verdicts. The same thing with airplane crashes. If they happened every day, you wouldn't read about them -- like car accidents happen. They are unusual.

I am not sure that the psychology of a juror is as you say. When I used to practice this kind of law, I didn't get too many of them who had that kind of psychology. It seemed as though they were always rather, you know-- Well, they always understood that they were the premium payers. They were the premium payers.

MR. VAN FOSSAN: Where are all the big awards coming from?

SENATOR RUSSO: Where are all the big awards coming from?

MR. VAN FOSSAN: Where are the increase and the--

SENATOR RUSSO: I was told by Commissioner Gluck, Bob, that -- and this applies to automobile, for the moment -- the increase in awards in the years 1980 to 1984 went up by 4%.

MR. VAN FOSSAN: On automobiles, I am not in a position to--

SENATOR RUSSO: Okay. Now, even on the liability, you have some areas of the law that never existed before -- the asbestos, for example; that is pointed out in one of these articles, but I won't bother to dig it out -- that caused-- The percentages increased because you had an area you never had before. But, the typical verdict -- let's use that word -- the typical verdict for the typical type of case, has not risen that dramatically, at least to my knowledge. When it does-- When you have that aberration, it makes a newspaper headline. Why? Because it is an aberration.

MR. VAN FOSSAN: John, Governor Cuomo's study, which came out within the last month, stated that in the State of New York, the claims have gone up 400% in the last seven years.

SENATOR RUSSO: Claims, or awards? What are you referring to?

MR. VAN FOSSAN: Judgments and settlements.

SENATOR RUSSO: Went up 400%?

MR. VAN FOSSAN: Four hundred percent in seven years.

SENATOR RUSSO: In what category? In what area?

MR. VAN FOSSAN: Huh?

SENATOR RUSSO: In what category -- automobile, liability?

MR. VAN FOSSAN: No. Claims in the tort judgments and settlements by New York City; that is, the claims paid by New York City. So that would be potholes and roads and--

SENATOR RUSSO: Oh, against the City?

MR. VAN FOSSAN: Against the City -- 400%.

SENATOR RUSSO: Do you have any information as to New Jersey -- as to the amounts, the awards?

MR. VAN FOSSAN: I don't have that.

SENATOR RUSSO: I would suggest that the rise has not been anywhere near as dramatic, even a fraction of that, at least not in any information I have seen thus far.

MR. VAN FOSSAN: We do have some data that I will ask staff to get out for me, which I would like to share with the Committee and your staff.

SENATOR O'CONNOR: Before we get on to some more questions, I would just like to acknowledge the presence of Senator Dorsey from Morris County, who has just arrived.

Senator Gormley?

SENATOR GORMLEY: I would like to look at this in terms of, let's call it a mutuality of capping. If you have a proposal, or if you have capping on one end-- Suppose we had a cap on profits; made it 30%? That would be relatively very high, or a very high percentage, so there would be plenty of range for profit by the insurance carriers. But if there be excess profits, or whatever, that money would go into a fund to pay those individuals who had been limited by this other cap. Shouldn't there be a balance? It's similar to a circumstance with a utility. We do have control -- we think we have control -- over the utilities, to a great degree, and we have limited the ability of people to buy those services to those particular utilities. Now we are limiting rights on what-- We are going against the open market. When you go against the open market on one end, shouldn't you balance it on the other end with a limitation -- some limitation on profit, not unreasonable, or whatever, because couldn't the circumstance arise that there would be no judgments, that in a year-- Let's give an extreme hypothetical the other way, and then there would be extreme profits the other way. Do you see any potential for that, that there be a link between the two, because that is the full scale?

MR. VAN FOSSAN: Let me see if I can respond to you, Senator, on that. I have done a considerable amount of

thinking on that very subject. I don't think it is probably the best answer. You saw it in the oil industry -- the excess profit stacks. You could liken it to the same situation. But, let me take your analogy with a utility. There is one fundamental difference between the insurance and the utility. The utility is a total monopoly. You see, both the phone company and the electric utility are monopolies. You can't get the service from anybody else, by and large. Now with some of the phone company moves, you can. By if you happen to be in PSE&G territory, either you are going to use their electricity and/or their gas, or you ain't going to have electricity.

That is not true on the insurance side. So, there is that difference.

SENATOR GORMLEY: I am not saying it is that extreme, but what we have done is, we have limited the rights of the individual under your proposal.

MR. VAN FOSSAN: Yes?

SENATOR GORMLEY: Consequently, we are limiting the rights in order that that insurance company can write insurance and stay open in the State. There has to be some balance. Once you ask for regulation on one end, there has to be a balance on the other end. That's equity.

MR. VAN FOSSAN: I agree with your premise that there have to be practices set up that would stop the insurance company from reaping an undue profit. I agree, philosophically, with that statement. Now, how you do that is a different issue.

I contend that if you gain adequate disclosure, so that you would be sure you knew whether or not they were reaping excess profits, then you wouldn't need to regulate prices in order to get at that issue.

SENATOR GORMLEY: One thing you are saying is that before you would set a cap, you would have full disclosure before the cap would take place.

MR. VAN FOSSAN: I think they run hand in hand. They both should come as a piece of the same legislation.

SENATOR GORMLEY: If you take a simplistic approach-- I understand what you're saying. You've thought this out on the insurance end. You said, "Oh, you can cap it, but that is so simplistic that people won't want to do business." Of course, you have to understand--

MR. VAN FOSSAN: And may not respond fast enough, is the other negative.

SENATOR GORMLEY: Well, you have to understand the problem. That same simplistic approach on the other end is unfair to the individual or person on the street, who does not have the wherewithal to make the more complex argument.

When you have a situation where the actuary is going over what the costs will be, and whatever, obviously he also does runs on potential profits. I would assume he would.

MR. VAN FOSSAN: That's right.

SENATOR GORMLEY: Don't you think, as to individual category of insurance-- He must also do the profits on the individual categories of insurance.

MR. VAN FOSSAN: That he does.

SENATOR GORMLEY: Wouldn't it seem, consequently, that that information could be given, not just in terms of overall profits of the company, but as to the individual lines of insurance -- the 7% that is the problem? Do you feel that can be done?

MR. VAN FOSSAN: That was implicit in my statement, Senator, that adequate information be provided to the Department so that you would be aware, and the Department would be aware, of any abuses in excess profits.

SENATOR GORMLEY: You see, I think one of the approaches you have to take-- You have to have a certain line or rule. I think if we had a rule that it was capped and there could be exceptions, that that might be an approach. But I

really have a problem with taking a simplistic approach on one side, and saying it's laissez-faire on the other side -- that it is wide open.

MR. VAN FOSSAN: No, I can--

SENATOR GORMLEY: There is an experiment -- not an experiment-- Maybe you are familiar with this. We touched briefly on pooling. Are you familiar with what is being done in Bermuda -- the pooling by companies such as Eli Lilly and Company?

MR. VAN FOSSAN: The pharmaceutical company, yes.

SENATOR GORMLEY: Have you been able to review the pooling program that has taken place? It totally circumvents all regulations in this country. Are you familiar with that program at all?

MR. VAN FOSSAN: Only to the extent that it is cropping up now in all facets. The pharmaceuticals have their own; the oil companies have their own; the chemical companies have their own; the municipalities have their own. The public utilities are now talking about a separate one for the atomic energy plants.

SENATOR GORMLEY: Well, the peculiarity about this pooling is that they have left the country. I was just curious if that particular--

MR. VAN FOSSAN: I would expect we would see more of that, unless some individual state took actions to make it as attractive for those companies to operate in New Jersey as they find it to operate in Bermuda. Some states are talking about it. I would expect Delaware -- which, obviously, is always out pounding on doors for business -- could very easily come back and try to make it attractive to set up pooled operations in the State of Delaware.

SENATOR GORMLEY: Thank you.

SENATOR O'CONNOR: Senator Orechio?

SENATOR ORECHIO: Mr. Van Fossan, you alluded earlier to a report regarding USF&G pulling out of the market in Florida. I imagine one of the reasons for that was the Florida law that caps awards. It is pegged to a mandatory rollback on insurance premium. I am wondering, if you do capping on one side, would it follow that reducing the premium on a mandatory basis as a provision of that change would be balance, and would be something that might be worthwhile to pursue?

MR. VAN FOSSAN: That doesn't appear to be the case, Senator. If you will, let me read-- This is a very brief story out of "The Journal of Commerce": "Two Major Insurers Pull Out of Florida: Two major commercial insurance underwriters have stopped writing new business in Florida. They said they are retaliating against rate rollbacks demanded by both houses of the Legislature and recommended by the Administration down there. The USF&G" -- the Baltimore-based underwriter I referred to earlier -- "told its Florida offices, 'Because when we look to the future, especially in light of the proposals, we do not think there is a possibility to write business at a profit.'" So, they reached a conclusion. Now, whether they were rushed in reaching the conclusion is an individual situation. But, their judgment was that they could not make a profit, so they did, I think, what obviously is the right of business, they said, "Well, if we can't make a profit, let's pull out of the state."

SENATOR ORECHIO: But, I mean with respect to adding that to a change in the law if we cap awards. If we, at the same time, provide for a mandatory reduction in liability insurance premium -- the percentage rate, as they do in Florida--

MR. VAN FOSSAN: That, of course, is what triggered that.

SENATOR ORECHIO: Yeah. That seems to me to be a component--

MR. VAN FOSSAN: Again, as in my response to Senator Russo -- and I recognize that it is on this point that reasonable men will differ-- I suggest to you that the right of disclosure, and the right to mandate the kinds of data that the Legislature and the Department would need to be certain that there were not excessive profits to be made-- I share your concern, but I think you can do that, and be certain then that you have the wherewithal to make whatever changes you need without mandating the regulation.

SENATOR O'CONNOR: Senator Russo?

SENATOR RUSSO: The only thing is, what good is it if you find out they are making excessive profits, if you can't do anything about it? I mean, under your proposal -- if I understand it correctly -- you want to put in a tool so that we can get disclosure. Now, we get it. We find out we have capped awards; we've done away with joint and several, etc., but still the rates are high and they have made large profits. How do we then mandate--

MR. VAN FOSSAN: I would assume then you would come in -- the Legislature would be convening to talk about mandatory rate reductions.

SENATOR RUSSO: Isn't that putting something before the something -- the cart before the horse?

MR. VAN FOSSAN: I don't think so; I don't think so. It's certainly not without precedent in our whole approach.

SENATOR RUSSO: No, but we lose, maybe, two years' worth of a lot of money if we do it that way.

MR. VAN FOSSAN: But, I don't think you lose it, John. That's the difference. See, I really don't think you lose it.

SENATOR RUSSO: Why not do it-- If you tie it in, for example, to a formula, which says, "If they make" -- you know -- "profits of" -- however the formula would read -- "then the rates must be reduced by so much." Why not do it that way? Why do you have to wait--

MR. VAN FOSSAN: If there is enough latitude in there so that you are not really nailing down rate regulation, then that is a separate issue. But, by and large, my caution to you is-- Florida was very close until they hit that issue. Now, I know why they hit it; I understand the political action that went into it, and you do, too. But that is a backlash that you don't want in this State. We went through one case of companies pulling out here, and we don't want that. You don't want that -- companies pulling out of here.

SENATOR O'CONNOR: Senator Dorsey, do you have any questions?

SENATOR DORSEY: No, not right now.

SENATOR O'CONNOR: Thank you, Mr. Van Fossan.

MR. VAN FOSSAN: Thank you, Senator. Thank you all.

SENATOR O'CONNOR: Next we have -- representing the Public Advocate, Alfred Slocum -- Ms. Gloria Wright.

G L O R I A J A C K S O N W R I G H T: Chairman O'Connor and members of the Joint Committee: On behalf of Commissioner Slocum, who, regretfully, could not be here today, I am Gloria Jackson Wright, representing the Public Advocate. Thank you very much for the opportunity to appear.

I have presented you with written copies of our statement. This statement was previously given to the Senate Task Force on Liability Insurance, and others who requested this same statement. Instead of going by the statement verbatim, I will attempt to summarize what our statement says.

The problem of the affordability and availability of liability insurance in this State has, indeed, reached a state of crisis. The difficulties facing New Jersey residents, municipalities, businesses, and other entities in obtaining insurance are serious and well-documented. We have received numerous inquiries from day care centers forced to close their doors because their insurance policies were cancelled and they were unable to obtain the necessary insurance protection.

Distraught parents have contacted us because they had nowhere to take their children. Midwives, skilled at delivering babies, cannot obtain this vital coverage.

At a time when the reduction and elimination of Federal programs have cultivated a need for greater volunteer involvement in helping the needy and disadvantaged, volunteers and nonprofit groups are being prevented from providing their important services because of lack of insurance. New Jersey's efforts to clean up hazardous waste sites and to address other public health and safety concerns have been seriously impaired by the activities of the insurance industry. Furthermore, as has been widely reported, these problems have crippled municipalities, businesses, and other groups throughout the State.

In response to these requests for assistance and because of the substantial public interest in the reasonable availability and affordability of commercial insurance coverage, the Department of the Public Advocate became involved in this issue and has reached several general conclusions:

First, we are very concerned that the insurance industry's calls for a radical alteration of our system of tort law have not been supported by hard statistical or actuarial data. Certainly those who seek to fundamentally change our legal system bear a heavy burden of establishing -- with facts and figures -- both the need for those changes and their benefits.

Central to the insurance industry's arguments for radical changes in our system of tort law is the contention that there is a "lawsuit crisis." Only the insurance industry has access to the facts that would establish whether such a crisis is, indeed, occurring, and the industry has not made this information available. The limited information that is available on this issue tends to support the arguments against these major changes in our system. For example, a recent study

conducted by the National Center for State Courts concluded that the number of tort filings increased only 9% between 1978 and 1984, a rate which was only slightly higher than the 8% increase in populations in the State study.

Mr. Edwin Kennedy, Director of Statistical Services for the New Jersey Administrative Office of the Courts has stated that New Jersey figures support the conclusions of the NCSC report.

The size of jury verdicts has also not risen at the rate claimed by the insurance industry. Much has been made of the figures supplied by Jury Verdict Research, Inc., which suggest that the average medical malpractice verdict in the United States rose 363% between 1975 and 1985, and that damage awards and tort actions in New Jersey were 21% above the national average in 1983, and 15% above the national average in 1984.

These statistics are very limited and may be misleading, according to a firm which compiles these statistics. Many of the no-cause verdicts, or verdicts in favor of the defendant never get reported, nor do many small verdicts. The service also does not include any information regarding the results of post-trial motions or appeals, which may reduce or reverse the verdicts.

Given the sweeping nature of the tort law changes sought by the insurance industry, the industry should be held to the highest standards of proof to establish both the need for the changes and the benefits that it claims will result. It is unclear whether a financial crisis presently exists for the insurance industry, as claimed by the industry. The National Insurance Consumer Organization asserts that the insurance industry still makes quite a profit; that the losses they claim are based only on the operating revenues. The investment income never comes into the picture.

It also claims that the insurance industry's financial condition has substantially benefited by its virtual exemption from Federal taxation. According to the General Accounting Office, the property/casualty insurance industry earned a profit of \$75.2 billion during the period between 1975 and 1984, yet as a whole paid no Federal income taxes.

Moreover, Best's Property/Casualty Stock Index indicates that the insurance stocks have continuously out-performed the Dow-Jones Industrial Average over the last five years. In 1985 alone, the property/casualty stocks rose by 50%, which was almost double that of the stock market as a whole.

For these reasons, the insurance industry's claim of financial disaster may represent a serious distortion of the real picture.

Many of the current problems relating to the costs and availability of commercial liability insurance coverage appear to have roots in the economic cycles of the insurance industry, as much as anything else. In the mid-1970s, the country was subjected to a similar crisis of lack of insurance for medical malpractice and product liability, as well as skyrocketing premiums.

At that time, regulators across the nation responded to the industry's appeals by granting insurers hefty rate increases, and state Legislatures in over half of the states acted to reduce victims' rights. A Federal study concluded that the 1970s' crisis was no justification for these actions, finding, instead, that the industry had just panicked for lack of data. The parallels between the previous crisis and the present one are all too clear. After an extensive review of the problems facing the insurance industry, the editors of "Business Week" recently concluded that the current crisis was self-inflicted, caused by imprudent underwriting practices.

Also, there is evidence which suggests that the current crisis is beginning to resolve itself. As recently as July 17, 1986, The Wall Street Journal issued an article which documented some of the changes that are currently being experienced in the market. Also, there is an article from the "Journal of Commerce," reported on April 22, 1986, that the commercial rates should stabilize this year, even though capacity for traditional markets shows little sign of easing at least through 1987.

Furthermore, many former policyholders have taken steps to solve this crisis by themselves; for example, by opting for self-insurance, by creating captive insurance companies to supply insurance coverage, or by adopting other nontraditional insurance programs. This business may be lost to the insurance industry forever; for example, there has been a move by Merrill Lynch and Company, Smith Barney, Citicorp, and other Wall Street firms to form new insurance facilities such as Enhance Reinsurance and U.S. Capital Reinsurance.

Finally, our research into this issue suggests that the property/casualty insurance companies operating in New Jersey, together with the industry associations to which they belong, may be violating Federal and State antitrust laws or engaging in an unlawful boycott or conspiracy, either criminal or civil. We have, therefore, requested Attorney General Cary Edwards to conduct an investigation into this matter to determine whether any such violations have, indeed, occurred.

In conclusion, in our view, the insurance industry has failed to meet its burden to provide clear evidence supporting its proposals to radically change our system of tort law. The available evidence is, indeed, to the contrary: There is no litigation explosion; the industry is not in the midst of a financial disaster; and, many of the problems experienced by those attempting to secure coverage are beginning to be resolved as the insurance cycle progresses.

Recent studies have also revealed similar conclusions. There is a 1986 article in "Consumer Reports" -- which Senator Russo cited previously -- which concludes that perhaps this is a manufactured crisis. There is also an article-- Well, there is a study which was prepared for the National Association of Attorneys General which advised that this crisis may not be all that it is cracked up to be.

We are concerned, however, that appropriate steps be taken to ameliorate the continuing problems in the affordability and availability of commercial liability insurance through effective regulatory controls over the industry and the encouragement of alternative forms of insurance coverage, such as pooling. We have also requested that Attorney General Cary Edwards investigate whether the industry is engaging in antitrust or other violations of our laws by deliberately withholding insurance coverage in an attempt to force changes in New Jersey's civil justice system that would increase their profitability.

Thank you very much for considering the views of the Public Advocate.

SENATOR O'CONNOR: Thank you, Ms. Wright. Can you tell us what the response of the Attorney General's office has been to the inquiry you suggested?

MS. WRIGHT: Yes. We received a letter from Attorney General Cary Edwards, dated May 28 -- we received it on June 1 -- which, in essence, stated that he had received our request, and that he was advising his staff at that time to carefully evaluate the allegations that we had brought before him, and to study the possibility of whether or not further exploration into the matter was warranted. He advised that he would be in contact with us, but we have not heard from him since that time.

SENATOR O'CONNOR: That's two months ago, to the day.

MS. WRIGHT: Yes.

SENATOR O'CONNOR: There has been no further contact?

MS. WRIGHT: No. We assume he is taking the time to investigate as to whether or not an investigation is needed.

SENATOR O'CONNOR: Questions from the Committee?

SENATOR RUSSO: Yes. I wrote the same type of letter to him when you did, when I saw that Attorneys General report. It was put out by five Attorneys General, I think -- as I remember, led by the Attorney General of West Virginia, who, incidentally, someone had suggested to me, "Oh, well, he is a trial lawyer." I found out that he never was one in his life. He was an antitrust lawyer with the Federal government.

But, in any event, I received the same response, namely that he was going to investigate whether an investigation should take place. I was going to ask you if you had heard any more, because I haven't. I just wrote another letter the other day. Apparently he has not finished investigating whether to investigate.

MS. WRIGHT: We assume that is correct. There is a lot of material. Maybe he is taking the time to carefully analyze it.

SENATOR RUSSO: Okay. Also, I think I should point out, in all fairness, that he may actually have an investigation under way. I don't know that he doesn't. I gather that you don't either.

MS. WRIGHT: No, we have no other information.

SENATOR RUSSO: I just recently followed up, so we could be totally fair to the Attorney General, namely by asking him, "Are you investigating, or have you determined whether or not to investigate?" I would hope that your Department-- Maybe when you are in one of those Cabinet meetings, you could have the Public Advocate lean across the table and ask the Attorney General whether or not he is going to investigate, because I think the things you raise here at least warrant an inquiry. Maybe you're all wet. You know, you might be. We leave that possibility open. But the Attorney General, I would

think, ought to look into that. I think maybe he is just doing it quietly without fanfare, and that is why we haven't heard.

MS. WRIGHT: Let's give him the benefit of the doubt.

SENATOR RUSSO: Okay, we will.

MS. WRIGHT: Perhaps that is what he is doing, but I will bring it to the Commissioner's attention that you think perhaps another follow-up from us would be helpful.

SENATOR RUSSO: Oh, I think so. And, as I say, besides the follow-up, at the next Cabinet meeting, when they are all sitting around-- I've got to believe that the Governor, too, would share our concern that if there is such a conspiracy going on, we want to know, because if so, the people are being duped, and so is the Governor, because he has basically accepted many of the things that the insurance industry has proposed. I am sure he would want to know as much as we do, so I think the Public Advocate could be doing him a great service by insisting that we find out. One way or the other, let's find out.

SENATOR O'CONNOR: Senator Gormley?

SENATOR GORMLEY: Maybe we could do it this way: The next time the Governor is out of the State, the Acting Governor could then tell the Attorney General what to do. (laughter) Let's not be subtle about this.

I would be curious as to your conclusions and the reviews that have been done leading to the conclusions. Has there been made available to your office, or has there been a review for your office by someone such as an actuary -- somebody actually reviewing the money going in -- of the profit ratios? I mean, there is a lot of broad speculation, but in terms of reaching the conclusions that you have reached -- even though they are preliminary -- was there any access to actual numbers and data, and did somebody go over those numbers and data who could really give a legitimate bottom line as to profit and loss -- someone with real expertise, who could really sift this out? Was that done?

MS. WRIGHT: We could not get that information, Senator. We wanted that information, but we were unable to get it from the insurance industry. That is the exact same information that we are asking the Attorney General to examine. We have not had--

SENATOR GORMLEY: In other words, you didn't even have any-- You had no numbers upon which even to base the conclusion, or the tentative conclusion.

MS. WRIGHT: I have with me an in-house expert who can perhaps better address that point. John, do we have any actual figures?

J O H N P. T H U R B E R (speaking from audience): You're talking about the conclusion as to the possibilities of a boycott of New Jersey?

MS. WRIGHT: Figures of--

SENATOR GORMLEY: Through this whole issue, it's money. Okay? What access have you had to draw the preliminary conclusions that you have drawn with regard to the conspiracy? Obviously, to a great degree, it is based on cash flow, based upon profit, based upon the premiums, etc. What numbers, if any, were available, and what review was done of those numbers?

MR. THURBER: Actually, the primary basis for our concerns leading to the letter to Attorney General Cary Edwards was statements made by industry representatives and members of industry groups which were, in fact, the theme of the letter the Commissioner sent to Attorney General Edwards.

SENATOR GORMLEY: Okay.

MR. THURBER: We do, however -- as part of the work of our Division of Rate Counsel -- get involved in the rate-setting process, as much of the rate-setting process as occurs now under the deregulation of rates. We have some expertise in that area; however, there is a great deal of concern because data has not been made available to us.

SENATOR GORMLEY: Let me ask you a question: What specific information -- and, excuse me if this was mentioned-- What specific information do you want that you are not getting, just the books in general?

MR. THURBER: A great deal of information that relates to the claims history, the profitability, the rates in the various lines mentioned earlier -- the 7%, or whatever the figure is, that is at the heart of this crisis.

SENATOR O'CONNOR: Excuse me for one second. I have just been advised that you are not being picked up by the microphone. Would you please try to speak over toward the microphones?

SENATOR GORMLEY: So, the predicament is that the conclusions drawn by the Public Advocate were not based on specific data; they were only conclusions that could be drawn from general comments that had been made by the industry, and the fact that there is resistance by the industry to providing the data on profit.

MR. THURBER: That and the pattern of unavailability of insurance, which leads to the suspicion that there may be a boycott.

SENATOR GORMLEY: Okay, fine.

MS. WRIGHT: Our conclusions are very general. That is why we think a further investigation is warranted. We cannot get the information. We would like to see what kinds of losses and what kinds of profits the insurance industry is experiencing.

SENATOR GORMLEY: I assume you could potentially be encouraging the Senate to use its power of subpoena to look at those.

MS. WRIGHT: Yes, that would be-- We don't have it; that is why we turned to the Attorney General.

SENATOR O'CONNOR: Senator Orechio?

SENATOR ORECHIO: You made reference to the suggestion of a boycott taking place among the insurance companies. Do you have anything concrete to confirm that that is taking place? I mean, if somebody doesn't want to sell insurance and moves out of a state-- Of course, that is not a boycott at that point. They just project that economically they can't survive in that particular state.

MR. THURBER: Right. It only becomes a boycott if there is a group that is involved, several insurers who are acting in concert. The concern we have is--

MS. WRIGHT: Our concern is that no one is writing, say, insurance for midwives or for day care centers. So, the evidence may be there. We have not had any concrete evidence as to whether or not they have agreed to boycott a particular area.

SENATOR ORECHIO: So, that is another one of the probes you are suggesting the Attorney General maybe could pursue--

MS. WRIGHT: Yes.

SENATOR ORECHIO: --to flush out that information.

MS. WRIGHT: That is correct.

SENATOR O'CONNOR: Thank you very much. We have one more witness on today's agenda, Mr. John Atlas, who will be speaking for the New Jersey Citizen Action Committee. Mr. Atlas?

J O H N A T L A S: Good morning. Let me introduce myself. My name is John Atlas. I am an officer with New Jersey Citizen Action. New Jersey Citizen Action is a coalition of over 100 groups -- labor, nonprofit corporations, environmental groups, minorities, seniors, and tenants. By the way, I am also Vice President--

SENATOR JACKMAN: You don't have a written statement, do you? You are just speaking--

MR. ATLAS: I don't, but we can submit one for you.

SENATOR JACKMAN: Okay, that is all I wanted to know.

MR. ATLAS: I am also Vice President of the New Jersey Tenants Organization, which is an 80,000-member consumer organization.

Citizen Action has been in the State for four years. We are involved in a number of issues ranging from fair taxes to toxic waste to jobs. We go door to door talking to over 50,000 people a year -- 50,000 households -- talking to families and educating people on our issues. We have a staff of over 45 people, staffing offices in Hackensack, New Brunswick, and Woodbury Heights.

With me is one of those excellent staff people, the Project Director of the Citizen Action Insurance Campaign, Laura Rein.

I would like to start with a story, the story of a fellow named Jack, who was an experienced volunteer paramedic. He was called to a factory fire -- I believe about three years ago -- to rescue two trapped employees. Suddenly, in the midst of this heroic rescue attempt, an explosion occurred, killing the two employees and blowing away Jack's legs and arms. Sixty percent of the rest of his body suffered severe burns.

At the Burn Center, he was called the "miracle man." He survived the constant pain, he said, because his wife and three children gave him the will to live, although he has undergone more than a dozen operations and will never look normal enough to go to the movies or out to dinner with his fine family. He will never see his daughter's high school graduation or go camping with his sons' Cub Scout Troop. His favorite Saturday morning activity -- browsing in hardware stores -- is impossible. Even his church is too public a place for his deformity.

What caused this explosion that ruined Jack's life? Well, the factory where the accident occurred had numerous safety problems. The factory's own safety manager formally

reported these safety problems to the boss, but his reports were ignored. You see, business was a little off, so the company executive decided to delay the needed changes.

I ask: Is \$100,000 or \$200,000 or some other cap adequate compensation for this suffering man who, by any measure, is a hero? There are other anecdotes, but that is what is at stake here.

Yes, there is an insurance crisis. National studies point out that insurance premiums eat up 11% of our disposable income. I won't list all the other victims of the skyrocketing premiums and those denied insurance. You know them -- municipal corporations, health care facilities, social service agencies, day care centers, and recreation centers; small businesses which are going bare; community organizations no longer meeting in church basements because they can't afford liability insurance. All this at a time when Federal funds to support these programs are being slashed to the bone.

By the way, I coach my son's soccer team. I used to worry about the opposition; now I have begun to worry about lawsuits. So, a lot of people are affected.

But the question is: What is the cause of this crisis? We at Citizen Action believe the answer is the cyclical nature of the industry. Senator Russo isn't here right now -- I don't believe -- but he is doing his homework. We, too, read the insurance industry's literature. In the spring of 1986, the Insurance Information Institute -- the PR organization for the insurance company -- was quoted in the "Journal of Commerce," saying that they will begin a \$6.5 million campaign to "change the widely held perception that there is an insurance crisis to a perception of a lawsuit crisis."

The industry has blamed juries, lawyers, and victims for their own refusal to renew insurance premiums and for skyrocketing premiums. However, to quote the August edition of

"Consumer Reports" -- of which we have copies if you haven't read it -- "A more objective analysis suggests that the crisis is of the insurance industry's own making."

I guess most importantly what we are suggesting, is that before we remedy the high cost and unavailability of insurance problem, let's understand what has actually caused the problem. The answer, as I said, we believe, is caused by the cyclical nature of the insurance industry itself. The insurance companies' two major sources of income are premiums collected and interest earned on the invested premiums. When interest rates are high, companies try to gain as many customers as possible to bring in premium dollars to obtain a high rate of return on their investment. That makes sense.

In the early 1980s and late '70s, companies slashed premiums to capitalize on high interest rates and, additionally, they practiced poor underwriting procedures. To quote Dennis Jay of the Professional Insurance Agency Trade Association: "The insurance companies did anything they could to get money put into the money markets." It is very tempting to get the money in today to earn 21% interest, and worry about the losses later.

If insurance rates drop, so does the return on investments. The bad underwriting procedures also came home to roost. So, in 1984, the industry, according to the GAO -- the Government Accounting Office -- earned less than expected; still making a profit, however, when taking into account Federal tax rebates. The industry has used the cycle to push for limitations on victims' compensation. The industry would cap awards to victims of drunken drivers, toxical chemical companies, and corporate negligence.

In simple words, they want to limit the rights of the injured people, and fix the problem by blaming the victim. In reality, it is the cyclical nature of the industry that is at the root of the insurance crisis. An analysis of the cause of

the current crisis of unavailability and unaffordability of liability insurance prepared by the National Association of Attorneys General has said exactly that.

We sense a conspiracy. The industry's argument for limiting victims' rights is based on a false assumption. The litigation explosion, we are told. How do we know there is a litigation explosion? The industry argues, by anecdote. Let's look at the facts with the data available. The litigation explosion -- is there one? Well, we don't think it is supported by the data. "Consumer Reports" calls it a "phantom explosion." An analysis of data on tort litigation in 20 states was done by the National Center for State Courts. It concluded, upon examination of the data, that it provides no evidence to support the existence of a litigation explosion in state trial courts. What the data does show is this: Tort files claimed in the last six years rose 9%, while population rose 8%.

Product liability cases in Federal courts did rise significantly. However, a single type of lawsuit accounts for a 31% increase -- damage claims related to asbestos. By the way, here I have a personal note, because my brother happened to die of lung cancer, apparently from asbestos.

A medical malpractice publication -- a study of hospital records -- published by Hartford University Press in 1985, showed that only 10% of malpractice instances led to a claim, and of that 10%, only 40% resulted in payment.

The increase in State litigation is much less than that implied by the insurance industry. There is an additional implication that the dollar value of awards is skyrocketing. Stories told to support this are part of the growing body of folklore -- myths -- again, exaggerated by anecdote. Let's look at the available data from the Attorneys General study. Only a small portion of tort cases filed resulted in jury verdicts. The majority of claims are settled out of court,

which results in smaller awards than jury verdicts. The amount awarded by a jury verdict is usually reduced substantially by judges in appeals courts, as Senator Russo has stated. The median jury award -- the midpoint figure for all awards -- has not increased in the last 20 years when adjusted for inflation. The number of million dollar verdicts, the stuff we read in the paper -- again, as Senator Russo made clear earlier -- is news only because it happens so rarely -- only about 1% of the claims.

In New Jersey last year, with a population of seven and a half million, there were only six claims over a million dollars. And, what were they for? Quadriplegics, brain damaged people, and dead people.

Is there a litigation explosion? We at Citizen Action challenge the industry to provide us with facts, and not anecdotes -- not with, as "Business Week" stated, "Twisted tales repeated so often that they are seldom questioned." Of course, in a system that deals with hundreds of thousands of cases every year, you can find an anecdote to support any argument.

Let's look at the industry's second argument related to this; that is, because of these claims, the industry is no longer profitable. It takes a major conspiracy, much more than the insurance industry is able to involve itself in, to cover up the extreme profitability of the insurance industry. All you have to do is look at the industry's Bible -- "The National Underwriter." Here is an excerpt from a recent publication. I have it right here. "1985 -- a year of glittering glory. It was a ball, a celebration we will savor and not forget any time soon, unless, of course, 1986 turns out to be just as good or even better than last year."

This from an industry that cannot afford to insure day care centers, skating rinks, and pony rides. To exaggerate their underwriting loss, the industry deliberately excludes

their investment income and Federal tax rebates from the profit reports. Additionally, they include estimated claims as losses, though these may not be paid for years, and are frequently substantially reduced.

Let's take a look at some of the statistics that include investment income and tax rebate, as well as the industry's estimated losses and claims. According to Best, the property/casualty industry had investment income of \$19.7 billion in 1985. They realized a capital gain of \$5.3 billion in '85. A \$46 billion underwriting loss between 1975 and 1984 was offset by a \$121 billion investment gain in the same period. The GAO estimates that in the next four years -- 1986 to 1990 -- the industry will realize a net gain, before taxes, of over \$90 billion.

From 1975 to 1984, their stocks rose 500% -- five times the average market increase -- and the question is, will 1986 be as glittering for the industry? Well, it may be even more so, because first-quarter profits are up 1227% (sic). Stocks are up 26%. Come on, folks.

By the way, since we like anecdotes, did you know that the industry's CEOs -- the chief executive officers -- earn about \$100,000 every eight days, and that this \$100,000 that the insurance industry CEO makes is the same amount -- the \$100,000 -- that the industry would cap compensation for quadriplegics and that person, Jack, who I mentioned earlier.

The insurance crisis--

SENATOR JACKMAN: Excuse me. Would you go back again?

SENATOR LESNIAK: Yeah, \$100,000 every eight days? We want to put our applications in.

SENATOR JACKMAN: Yeah, go slow on that one.

SENATOR RUSSO: You can't spend it all, Chris.

SENATOR JACKMAN: He gets \$100,000 every what -- every eight days? For what?

SENATOR LESNIAK: That's \$5.2 million a year.

SENATOR JACKMAN: That's what he gets for his salary?

MR. ATLAS: That is his total compensation.

SENATOR JACKMAN: That's his salary?

SENATOR RUSSO: What's the difference?

MR. ATLAS: Average total compensation.

SENATOR LESNIAK: Five point two million dollars?

MR. ATLAS: In conclusion, the insurance crisis has a far-reaching effect on every aspect of our society.

SENATOR JACKMAN: You went into your conclusion, and you didn't give me the answer.

MR. ATLAS: Oh, I'm sorry. What was your question?

SENATOR JACKMAN: Go back again. I'm very slow. You're telling me--

MR. ATLAS: I have no job applications.

SENATOR JACKMAN: What chief executive officer gets that kind of money -- \$100,000 every eight days? To me, that quickly runs--

SENATOR LESNIAK: It's about \$5 million.

SENATOR JACKMAN: About \$5 million. Now, every single insurance company chief executive officer earns that kind of money?

L A U R A R E I N: It's an average.

MR. ATLAS: It's an average.

SENATOR JACKMAN: That's an average?

SENATOR RUSSO: Some get more.

MR. ATLAS: Some get more; some get less.

SENATOR JACKMAN: Including the guys who went into bankruptcy?

SENATOR GORMLEY: They got more. (laughter)

SENATOR JACKMAN: They got more?

SENATOR GORMLEY: They got a lot more.

SENATOR JACKMAN: I gotcha, okay.

MR. ATLAS: I don't have any job applications with me.

SENATOR JACKMAN: Yeah. I want to bring the guy back from the insurance company afterwards and find out how he's doing.

MR. ATLAS: The insurance crisis has a far-reaching effect on every aspect of our society. It eats up disposable income; it hinders toxic cleanup; it puts nonprofits out of business; it is limiting municipal government. But, the insurance crisis is the result of the industry's own profit cycle. This cycle is being used as a springboard for an opportunity -- perhaps a conspiracy -- that would have us limit the accountability and liability of the industry. This opportunity or conspiracy is aided by the fact that the industry is regulated in name only, and is not required to provide any actuarial or statistical data to consumers or the Insurance Commissioner.

The insurance crisis will occur again and again, unless measures are taken to examine the industry's accounting procedure -- line-by-line information on the premiums collected and claims paid -- and the claims history of all line items.

We at Citizen Action challenge the New Jersey Legislature to support full financial disclosure of the industry. Let's get the facts, and not legislate in the dark.

SENATOR JACKMAN: I would like to ask one question.

SENATOR O'CONNOR: Go right ahead, Senator Jackman.

SENATOR JACKMAN: I am amazed that we can't get some of the data that you've got. What is the source of the data you received? Did you get that from the insurance companies?

MR. ATLAS: Which data?

SENATOR LESNIAK: He's talking about the \$5 million.

SENATOR RUSSO: He's hung up on the \$5 million.

SENATOR JACKMAN: No, I would like to know. Did they tell you they were making \$5 million, or did you--

MS. REIN: It's from the insurance industry itself.

SENATOR JACKMAN: What was that?

MR. ATLAS: All this stuff is from insurance industry documentation, either publications or other kinds of things. This is all public information.

SENATOR JACKMAN: It is public information?

MR. ATLAS: Yes.

MS. REIN: Yes, it is.

SENATOR JACKMAN: I've got a cramp in my leg now. (Senator Jackman gets up and walks around.) I couldn't take that \$5 million. I've got a cramp.

SENATOR RUSSO: You want to get some of those names for your next fund raiser, Chris. Send them a ticket. (laughter)

SENATOR LESNIAK: I just have one question. You painted a picture of profitability for the insurance industry; as a matter of fact, profitability that is -- as you said -- five times what the Dow-Jones-- Not profitability, I'm sorry, but the stock market increase, which is five times the Dow-Jones average over what -- a six-year period of time?

MR. ATLAS: Over a 10-year period.

SENATOR LESNIAK: A 10-year period of time. We heard that the crisis -- what we are referring to in terms of unaffordability and unavailability -- really only affects 7% of the total premium market. If that profitability applied to those lines -- day care centers, pollution protection, public entities, professionals, products liability-- If that profitability applied to those lines, why haven't we seen insurance companies starting to write those lines? I don't understand-- There are no restrictions on that.

MR. ATLAS: We're not sure that those are as profitable as other things they invest money in. In other words, it may be that those aren't as profitable. We're giving you overall numbers. We don't have any data on those. We do have data on the fact that a lot of these centers -- day care centers and others -- had no claims. But, we don't know the answer to that. That's why we think-- Well--

SENATOR LESNIAK: Well, I thought that was going to be the answer, because I don't know that we have the answer to that either. That is one of the answers we are going to have to have before we can arrive at any solution to the problem.

SENATOR RUSSO: Ed?

SENATOR O'CONNOR: Senator Russo, before you ask your question, I just want to acknowledge Senator Cardinale's presence. Senator Cardinale is a member of the Senate Labor, Industry and Professions Committee. Senator?

SENATOR CARDINALE: Just in time for lunch.

SENATOR RUSSO: Just to follow-up on something Senator Lesniak said-- You know, you have reeled off a bunch of facts and figures, and you have basically painted the industry as the bad guy. I'm wondering whether you think there is any merit at all to anything they have said. Have you looked at the package of bills we have here? Is there nothing here that you think is necessary?

MR. ATLAS: Well, we think something should be done, and we have had discussions about capping liability -- or, not capping liability, but doing something about that. But, we don't think that an arbitrary cap of a dollar amount makes any sense.

SENATOR RUSSO: What would you do?

MR. ATLAS: Well, we don't have a specific proposal. You know, some people have suggested things like maybe permitting defendants to pay pain and suffering awards over time through the purchase of an annuity reduced to the present value -- things like that. There are probably things-- We have spent more time trying to get the facts, than we have trying to come up with the solutions.

Our main point is simply, if you are going to fix something, make sure you are fixing the things that are broken.

SENATOR RUSSO: Tell me, in your research and study, did you ever come across the article entitled, "The Crisis in

Commercial Liability Insurance," by Melvin Howard, which was printed in the "New Jersey Bell Journal" this summer?

MR. ATLAS: No.

SENATOR RUSSO: No? Let me suggest that you take a look at that because, you know, we have referred to, for example, the manufactured crisis, "Consumer Reports," and so forth. There is very little out there -- maybe because there are very few people who feel they can defend it -- but there is very little out there in defense of the industry and what they are trying to do. The nearest thing to it -- I emphasize that -- is this particular article. For example, a couple of the points they raise concern me, and I would just quickly like to get your response to them.

They point out: "In 1984, the industry did suffer a \$3 billion pre-tax operating loss." The reason pre-tax is important is because-- The fact is, the industry, in general, has paid no taxes and, in fact, has gotten some \$125 million back over the last few years.

But, that is beside the point. They have had that operating loss in general. I wonder whether you have any comment on that -- whether that indicates some need for some reform, or something?

MR. ATLAS: Well, I am not too sure whether that is an accounting loss or a real loss.

SENATOR RUSSO: Well, okay. How about the reinsurance market? Lloyd's, for example, has pulled out of reinsurance because of the uncertainty of coverage in claims. Any justification to that concern?

MR. ATLAS: We have no data on that. We don't understand why--

SENATOR RUSSO: Yeah, but you should have, shouldn't you?

MR. ATLAS: The problem is, you have to rely on the insurance industry to get it.

SENATOR RUSSO: Well, yeah, but--

MR. ATLAS: They have a monopoly, oftentimes, on the information -- the exact kind of information you are trying to get. That is why we are suggesting we need more information from the insurance industry. That is why we don't have a specific proposal. We have a specific challenge; that is, more disclosure of the industry's facts.

SENATOR RUSSO: You see, I think the thing is, your credibility isn't-- Much of what you have said, I agree with. I have said that before. That is why I have asked--

MR. ATLAS: I quoted you at the outset.

SENATOR RUSSO: Okay. But, it seems to me as though your credibility would be enhanced by looking at both sides of it. For example, I suspect that there are some tort reforms needed, even though I have no doubt that we are victims of an insurance industry plot. You might call it intimidation. There is no question about that. But that doesn't make it all wrong. There may be some justifiable changes that are needed, regardless of the fact that the SOBs are trying to put it to us in that manner. I didn't say that publicly; I said that privately.

MR. ATLAS: Some of our best friends are in New Jersey.

SENATOR RUSSO: But, in any event, what about the question of the fact that the industry claims they have no way to anticipate, you know, extensions in liability by the courts -- if they write a contract, and then the courts are amplifying it to cover things they never anticipated? Do you have any comment on that?

MR. ATLAS: Well, they have past history to go on.

SENATOR RUSSO: Well, past history doesn't help when the court creates a new theory of liability.

MS. REIN: Additionally, isn't that the industry's job, to anticipate losses?

SENATOR RUSSO: I don't know.

MS. REIN: And, isn't that how they set their premiums?

SENATOR LESNIAK: That is exactly what they are doing now.

MS. REIN: Well, that actually isn't substantiated, because we don't have the facts to support \$1000 premium increases, without claims histories backing them up.

SENATOR LESNIAK: But that is basically what they would have answered: "Yeah, that is what we are doing now."

MS. REIN: Well, they look into their crystal ball when they want to, and they don't when they don't want to.

SENATOR RUSSO: Okay.

SENATOR O'CONNOR: Senator Cardinale?

SENATOR CARDINALE: Yes. To pick up on that last point, you say, "They look into their crystal ball when they want to, and they don't when they don't want to." When they rate the past, we all accept the fact that they have data that they can use even if we don't see it. But, I believe Senator Russo's point, and I believe Senator Lesniak also pointed out to you, that there are changes taking place. One of the things they have said at other hearings -- and perhaps some people have even said it here today -- is that they are not playing on a level ball field; that the law is changing. And, insurance people have said to me that they don't know what the law is going to be three years from now when a claim for today is being litigated, or six years from now when a claim for today is being litigated, and that they are projecting the best way they can.

You say it is their job, and that is what they are doing. They don't base these rates of today on the settlements of today necessarily, but rather on the trend. And the trend is that they don't know what liability is going to be assessed for the policy that they have today. They may be able to predict what incidents are going to occur, but they can't predict how the responsibility for those incidents is going to fall.

Do you have a comment on that scenario, because that would be very helpful to me?

MR. ATLAS: I think we would agree that there is what I would call "an unacceptable randomness and uncertainty" connected to pain and suffering awards. We are not happy with that; we might not even be happy with the amount of -- or the percentage that attorneys take on those. But, we think that to correct that, we would look to things like a little closer judicial oversight, perhaps, and some other kinds of fine-tuning. A cap, to us, is not fine-tuning.

So, we say that that is not good. Let's look at something else on that issue.

SENATOR CARDINALE: What kind of oversight would you suggest?

MR. ATLAS: Well, I'm not sure.

SENATOR LESNIAK: How about the Lesniak bill? Have you looked at that?

MS. REIN: The pooling and the cap bill?

SENATOR LESNIAK: No, no, the one that-- Nobody even heard of it. (laughter)

SENATOR RUSSO: They will; they will.

SENATOR LESNIAK: No, the bill that changes the standard review of awards from one that shocks the conscience to one that is patently unreasonable, and I'm really paraphrasing the standard. But, basically, what it does is broaden the discretion of either the trial judge or the appellate judge to review excessive awards.

MR. ATLAS: That sounds like something we should look into seriously. That seems a little bit-- That seems a lot better than saying, "Sorry, it's \$100,000," no matter what.

SENATOR CARDINALE: How about changing the standards of proof to prove negligence, so that we return to what some people used to think we had, and some people would probably maintain we have today -- which I think is in error -- that we

have a fault-based system, instead of a compensation-based system? Do you think that would be a useful thing for us to do?

SENATOR LESNIAK: Senator Cardinale, are you referring to things like environmental damage -- that you would change strict liability for the disposal of hazardous waste to a negligence standard to lessen the--

SENATOR CARDINALE: Yes, Senator, to the people who are at fault for having done it. I would take the personal liability of people, and make it based on fault -- things that they have done.

SENATOR LESNIAK: Are you talking about hazardous waste disposal, as well?

SENATOR CARDINALE: I'm talking about every aspect of liability. I don't think hazardous waste should be treated any less seriously than other problems.

SENATOR LESNIAK: More seriously. You don't think it should be treated more seriously.

SENATOR CARDINALE: I don't think it should be treated any less seriously than other problems, Senator.

SENATOR LESNIAK: How about more seriously?

SENATOR CARDINALE: I think as an issue we need to deal with, more seriously; but as a fact of assessing liability against people, you create an abominable situation when you say, because hazardous waste is involved, someone who is not at fault is going to be held responsible. Because then you make it impossible -- as we have seen -- to get insurance, or to cover people who are doing legitimate things. Sometimes people who are even trying to resolve the problem become held into the problem by these ludicrous -- ludicrous provisions that have been added by people, with good intention, but without sufficient perception of the outcome of their well-intended follies.

SENATOR LESNIAK: I won't respond to that.

SENATOR CARDINALE: Thank you, Senator.

MS. REIN: I will.

MR. ATLAS: Maybe we both should. But, go ahead.

MS. REIN: I don't have the quote in front of me, but I would like to bring to mind Lee Thomas' statement as Director of the Environmental Protection Agency of this country: "Joint and several liability is what enabled us to do the job that we have done so far in cleaning up in toxic litigation." Of course, this job hasn't gone far enough, but joint and several liability was set out to deal with cases when the fault is indivisible. If you expect a mother of a daughter who has leukemia to determine which company of the 50 companies that dumped in the toxic waste site -- or which chemicals actually reached her daughter and caused leukemia, you are putting the burden of proof on the victim, and you are victimizing her again.

SENATOR CARDINALE: Well, you see, that is a real issue -- the changing of the victim. Making new people who have done almost nothing to contribute to the problem -- and perhaps nothing to contribute to the problem -- making them responsible is creating, in fact, another set of victims. Whatever legislation we come up with, I certainly hope we don't create new victims. I hope we stop creating new victims in the sense that it has.

Just bear with me for a second. Joint and several liability, combined with our fault -- our no-fault, essentially, based system, takes, in fact, and makes it almost impossible-- It is open-ended insurance that you are asking people to grant. So, if someone is going to grant insurance to a good company -- a company that would never do anything wrong -- that may happen to get caught up among another group because it does a lot of business-- Now, you make it impossible even for that good company to get insurance, because of the fact that they are going to get caught in the web of joint and several.

MS. REIN: How would you provide compensation? (All members of Joint Committee speaking at once.) Oh, is that a bad question?

SENATOR GORMLEY: You can't ask the Senator questions. There are rules here. Only Senator Lynch and Senator Russo can ask Senator Cardinale questions. (laughter)

MS. REIN: Oh, sorry.

SENATOR O'CONNOR: Senator Orechio, do you have a question?

SENATOR ORECHIO: Yes. You indicated earlier that you are adverse to capping. Would you see any merit to capping if you had pegged to that threshold a mandatory percentage reduction of the liability premiums?

MR. ATLAS: Well, then we would be getting a little closer to some form of equity in terms of who is to blame -- who is causing the problem. I think what we are concerned about is reducing insurance rates. Is that what you're saying?

SENATOR ORECHIO: Yes. So, you see some merit then?

MR. ATLAS: Yes, if it would reduce insurance rates. That is something we can talk about and consider.

SENATOR O'CONNOR: Any last questions?

SENATOR DORSEY: Yes, just one question. You haven't asked this question already. Assume that through some method -- notwithstanding your best efforts -- the system of capping of judgments enters into our legal system. Have you all given any thought to Senator Gormley's thought of, in some way, capping, limiting, or formulizing insurance company profits?

MS. REIN: I think we would consider that as a last resort. Are you talking about what they did in Florida? They passed tort reform and mandated a reduction to '84 rates.

SENATOR RUSSO: He's talking-- Unless I misunderstand, Senator Dorsey is talking about capping the profits an insurance company can make. What you are talking about is mandating a rate reduction plan.

MR. ATLAS: I think what we are more interested in is lowering insurance costs.

SENATOR RUSSO: See, if you just cap the profits they can make, then Chrisy's buddy is going to be making \$8 million a year, instead of \$5.2 million. They will just spend it on salaries instead of premium reduction.

SENATOR DORSEY: So, in other words, you are suggesting straight rate reduction?

SENATOR RUSSO: No, I am not suggesting that. I am just saying that when you limit their profits, it doesn't necessarily benefit the consumer, you know.

SENATOR DORSEY: Not necessarily, but it could.

SENATOR RUSSO: Yeah, it could. It's worth looking at.

SENATOR JACKMAN: I am interested that you made reference to the fact that in your studies you visited about 50,000 families around the State -- or your volunteers did. Is that true?

MR. ATLAS: Yes, on the issues that were involved.

SENATOR JACKMAN: On the issues?

MR. ATLAS: Yes.

SENATOR JACKMAN: Of the 50,000, did you get any inkling of how many did not have any insurance?

MR. ATLAS: We didn't get that kind of information. Generally, we--

SENATOR JACKMAN: The only reason I ask that-- Wouldn't that have been of interest, the fact that they weren't covered? If you are going around and making inquiries about insurance, the costs, etc., wouldn't knowledge about whether some of these people were not insured because they couldn't afford it be of interest?

MR. ATLAS: It would be of interest. What we do, when we go door to door, is tell them about the problems we are involved in. If we got a chance to get into that detail, we

would, but oftentimes you just don't have enough time to get into that information and other things.

SENATOR JACKMAN: All right. Thank you.

SENATOR O'CONNOR: Thank you very much.

MR. ATLAS: Thank you for inviting us here.

SENATOR JACKMAN: You're welcome.

SENATOR O'CONNOR: The Committee is now going to adjourn. We will resume this public hearing on Wednesday--

SENATOR LESNIAK: In the great City of Elizabeth.

SENATOR O'CONNOR: --in the City Hall, at 10:30 a.m.

(HEARING CONCLUDED)

APPENDIX

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DRAFT REMARKS

(7/25/86)

Statement by Robert V. Van Fossan
Representing FAIR
(Federation of Advocates for Insurance Reform)

Public Hearing
Senate Judiciary Committee
Senate Labor, Industry and Professions Committee

Monday, July 28, 1986
Jersey City State College

Thank you for this opportunity to appear before this joint committee as you undertake your public review of what I believe is the most important question now facing New Jersey: finding remedies for the liability crisis, a crisis that affects every New Jerseyan.

Your commendable concern for the issue is demonstrated by this unusual cooperation between your two committees. The grassroots nature of the problem is emphasized by your decision to hold these hearings not sequestered in a meeting room in Trenton but out in public in two of the state's major cities.

I am here on behalf of FAIR: the Federation of Advocates for Insurance Reform. FAIR, through its 50 member groups, corporations and associations, represents tens of thousands of New Jersey citizens. It is perhaps the most diverse coalition of business, trade, professional and non-profit organizations ever to assemble in this State on a public issue.

Our chairman, William E. Simon, who has achieved distinction in the governmental and business life of our Nation is out of the country. I am filling in for him.

A brief personal note. I serve as Chairman and Chief Executive Officer of Mutual Benefit Life, which is headquartered in Newark. Mutual Benefit does not write liability coverage. I am a member of FAIR because I, like thousands in business, in non profits, in government, have to buy liability insurance.

The membership of FAIR does include insurance companies which do write liability coverage. Their participation involves the insurance industry in working towards solutions to this crisis. Indeed, the industry must play an important role in any reforms which we do achieve. But by and large FAIR is composed of consumers of insurance who find that the liability crisis has made it ever more difficult to provide their goods and services and transact business.

INSERT (A)

No burden on business in New Jersey today is greater than the crisis in the tort-liability system. As you know, it is not just the business sector which is suffering.

the unavailability of liability coverage and the fear of
non-profit

Insert A

Let me put this question in its proper context. The two property-casualty lines that are the primary source of this crisis -- general commercial liability and medical malpractice -- amount to only 7% of all the property-casualty insurance written in this country. SEVEN PER CENT! These figures are drawn from the February 1986 report developed for the Attorney General of the United States.

perform its function truly is a crisis.

Tort law and liability insurance together should perform two key functions.

Tort law should encourage safe practices by holding those responsible for injuries responsible for the damages they cause.

Liability insurance should encourage the delivery of useful but risky goods and services by spreading liability among all engaged in the activity through the mechanism of insurance.

When this system fails, as it is failing now, the economy suffers, society suffers, people suffer. Some of the suffering is quantifiable; much is not.

How do we place a value on the new medicine which is not brought to market despite the lives that could be saved, because the exposure to suit is so great?

How do we calculate the cost of a legal system that does not draw neighbors together for comfort and support when someone is injured, but pulls them apart in a courtroom battle for a big payoff?

New Jersey needs to resolve this crisis quickly and responsibly. That task falls on the Legislature, and you are responding with encouraging dispatch.

Now is a time to pull together to solve a problem, not to pull apart to place the blame. There is an unfortunate tendency to portray the public debate over the causes of the tort-liability crisis as a spitting contest between giant insurance companies and greedy lawyers. In fact, this crisis

affects every sector of society, and touches every person.

The tort-liability crisis is the product of changes in insurance company practices and of a sudden change in the way the legal system arranges to compensate the injured.

Insurance industry practices have played a part in driving up premiums and drying up coverage. The high interest rates of the late 70's created investment opportunities so attractive that many insurance companies lowered premiums to attract capital.

Interest rates have since fallen, and premiums have risen. But never before in the familiar insurance premium - interest rate cycle have they risen so high so fast.

Greater disclosure of relevant data by insurance companies could help prevent future cash-flow underwriting. But regulation of the insurance industry will not affect the fundamental cause of our current difficulties.

Let's be absolutely clear on that fundamental cause. It was a rapid, unforeseen change in the legal system over the last decade. What used to be a fault-based system now compensates for any and every injury no matter what the degree of fault of the entity called upon to make the compensating payment.

The laudable goal of helping the injured has resulted in a hidden tax on every consumer of goods and services, a tax bill that is getting too high to pay.

The natural impulse to compensate for loss or suffering has destroyed the very basis of insurance: predictability. Claims and decisions reach far beyond the anticipated coverage on which past premiums were based.

We recognize that the courts broadened the area of liability to provide for the injured and aggrieved. But other important needs went unrepresented in those courtrooms: The need in economic society for predictability; the need of the tort system to instill responsibility; the need to provide equitable treatment by maintaining a reasonable correspondence between fault and liability.

You recognize, I am sure, that once a door is cracked open to admit a severe and legitimate claim, it can be pushed wide open by frivolous claimants in search of a share of the lottery.

That door was swinging wide open at the same time that the insurance industry was suffering the results of having written coverage at low premiums. Thus the industry faced expanded liability for awards it was unable to predict at a

time of particular financial difficulty. The result was the current crisis.

If today's problems were solely the result of mismanagement or greed by the insurance industry, the crisis would affect all lines of insurance. It does not. Premiums for life insurance have not soared. Homeowners insurance is still readily available and affordable. The risks in those lines are still predictable.

They are not predictable for liability risks. Losses are soaring; the future that the actuaries must account for is more uncertain than ever.

Comprehensive, analytic studies of the costs of the system are scarce. And while we should be wary of anecdotal evidence, there are facts to base policy on.

The tort-liability system has grown unwieldy, inefficient, and ineffective. A recent study of the asbestos litigation found that, excluding court costs, plaintiffs received only 38 cents for every dollar spent on the litigation.

Between 1980 and 1984 losses paid on general liability policies in New Jersey doubled, while the premiums written barely kept pace with inflation.

The tort-liability problems of municipal government are particularly acute.

The number of claims filed against insured municipalities nationwide rose 199 percent from 1980 through 1984. The average payment for verdicts and settlements increased 121 percent in the same period.

The average claim paid in tort judgements and settlements by New York City increased 400 percent in the last seven years. Last year it paid out \$118 million in 7,650 claims, according to Governor Cuomo's study commission.

The situation is worst right here in New Jersey, where both the number of suits and the amount of awards against public entities are increasing sharply.

In the last 9 years, following the modification of the doctrine of sovereign immunity, the number of claims against municipalities has increased 658 percent. The amount paid in awards has increased 7,052 percent. The average award in this period more than quadrupled from \$4,722 to \$22,784.

According to a recent legislative study, a New Jerseyan is twice as likely to sue his local government as a citizen of another state. Local governments in New Jersey are three

times as likely to be sued as local governments nationwide.

That data squares with studies which show a relationship between urbanization and the number of suits filed. The closer we live to other people, the more likely we are to bump into them. The more urban the place, the less likely we are to feel neighborly about them.

The professions, too, face major problems from the system. Again, predictability is a large part of the problem.

A recent study shows that for medical malpractice awards below \$200,000, non-economic damages account for 27 percent of the total award, while for awards above \$600,000, the non-economic share increases to 54 percent. That is, for large awards, more than half the total comes in intangible damages, for which there is no objective, predictable standard.

A striking example of problems of predictability is a recent Kansas polio vaccine case. In that case, a jury decided that the approved package insert for physicians for the FDA-approved oral polio vaccine was inadequate because it did not advise that the Salk vaccine, which hasn't been used to any extent in this country for over 20 years, had less risk of causing polio than the oral vaccine. The jury went on to award \$2 million in economic damages and \$8 million in punitive damages even though this vaccine has almost eliminated polio and was in compliance with rigid government standards.

Cases like this are, unfortunately, becoming commonplace, and are the prime reasons why the insurance companies will no longer insure pharmaceutical and vaccine product liability cases. They can no longer evaluate the risk.

You don't have to go to Kansas to find horrible examples of the malfunctioning of the system.

Take Officers and Directors liability coverage, for instance. In the past decade, the number of companies reporting claims against directors and officers has increased by 162 percent. The percent of claims with payment over \$1 million has increased 73 percent. The average defense cost per claim has increased 154 percent to \$461,000 -- that's just to defend the claim, not to pay it. [Source: Surveys by the Wyatt Company, quoted in Dan A. Bailey, "The Crisis in Insuring Directors," The Corporate Board, July/August 1986.]

The natural reaction of insurers has been to restrict such coverage or charge much, much more for the increased and hard to predict risk.

So we see community leaders with the judgement and

experience necessary to guide hospitals resigning from boards in Newark.

We see increasing difficulty in attracting capable directors to the emerging growth companies who need their guidance. These are the companies, by the way, which provide the bulk of new jobs and on whom the future economic health of the state depends.

This predicament extends to all corporate liability coverage and is particularly acute in New Jersey. A major pharmaceutical company headquartered here found most insurers would not quote on its catastrophic liability policy. One London insurer would participate, but only if the pharmaceutical company would permit itself to be listed at an address outside New Jersey. The company is still considering that request.

The system cries out for reform when substantial, honorable business leaders resign from the boards of charities because of their exposure to loss and inability to be covered by insurance.

The system cries out for reform when New Jersey mayors become three times more likely to be sued than their colleagues in other states.

The system cries out for reform when one of the nation's leading drug companies is asked to pretend it is located in another state in order to get liability coverage.

FAIR recognizes that the effort to restore predictability to the tort liability system must be tempered by a sensitive appreciation for the needs and rights of the injured. Victims of a tortious act should get full compensation for all economic damages.

Two reforms would do much to restore the equity and predictability we seek, even allowing for full recovery of actual damages.

Modifying the doctrine of joint-and-several liability and capping the award of non-economic damages would make the workings of the system both fairer and more predictable.

Some cap on non-economic damages is needed, in the interest of restoring predictability. An insurer can calculate exposure for lost wages, medical costs, rehabilitation and support, at least with a fair degree of certainty. Unlimited awards for "pain and suffering" cannot be calculated.

So long as the doctrine of joint and several liability continues to be applied as it has in recent years, the tort-

liability system will be unfair. Under this doctrine, it does not matter how responsible for damages a defendant may be. All that matters is how much money --often, how much insurance-- that defendant has. No one should be liable to pay a greater portion of damages than that person's degree of responsibility for an injury.

While I stress these two reforms, please remember that New Jersey's real need is for comprehensive reform of the tort-liability system as a whole.

The moment for that thorough-going reform is now. Concern for the issue is high on the public agenda. Every sector of the state sees the need for reform now. Your approach should not be piecemeal. I urge you to take up the entire package of reforms at once. Then, and only then, will the relationships among those reforms be clear. Then, and only then, will these measures enjoy the attention and support needed to make this the first state to pass a comprehensive, responsible package. New Jersey needs nothing less.

FAIR proposes reforms which will restore predictability, return the tort- liability system to its original purpose, and help make insurance available once again. FAIR is committed to a system which will:

1. Compensate any victim of a tortious act for all economic loss, but taking collateral sources into account.
2. Allocate awards based on the degree of fault.
3. Cap non-economic damages at a reasonable level.
4. Limit the liability of government entities, with reinsurance pools or government subsidy for further compensation if required.
5. Provide similar caps and assistance for non-profit entities.
6. Discourage frivolous suits, and encourage arbitration rather than adjudication.
7. Protect high tech and existing manufacturing industries with state of the art defense for product liability cases.
8. Establish reasonable time limits on the filing of suits.
9. Require that insurance rates be set on the basis of New Jersey experience so the state gets directly the benefits of tort reform.

10. Require strict disclosure or relevant financial data by insurance companies doing business in New Jersey.

FAIR agrees that insurance companies should be held to account. They should be required to disclose the financial data relevant to understanding their economic condition.

To use such information on behalf of the public, we recommend that the Department of Insurance be beefed up. The Department needs a competent professional staff and equipment to review the data submitted to it. But even the wisest and most powerful insurance regulation will not solve today's crisis. Insurance will only be available and affordable when we have recreated an environment in which the insurer can predict the extent of his exposure and the outer limit of his liability.

The recognition by both houses of this need for comprehensive reform is encouraging. You understand, I am sure, that even the most thorough reform will not work miracles. This crisis took several years to develop, and it will take time to dissipate.

You cannot expect instant results from your work. Not only will the courts have to interpret the new legislation you enact, the large backlog of current cases will be decided under existing law. These decisions will take time, but only those decisions will provide the predictability that we all seek.

We understand that the Assembly and Senate have competing approaches to the problem of reform. The political debate giving rise to these competing approaches is constructive. Out of that debate a creative and responsible solution can emerge.

It is not enough for each house to put forth and enact its own package, and then to wash its hands of the problem. The Senate and the Assembly must each advance a responsible and effective program that can cope with the problems we have outlined. Then it is incumbent on both houses to agree on legislation that can be placed before the Governor.

I am convinced that both political parties and both houses are determined to keep New Jersey moving forward. FAIR hopes that your two key committees will lead the way in achieving solutions in the Senate that can be conformed with ideas already approved in the Assembly. With this kind of action, you will make New Jersey a leader in this vital area of governmental reform.

ROBERT V. VAN FOSSAN
Chairman of the Board & Chief Executive Officer
The Mutual Benefit Life Insurance Company

Business Career:

Elected Chairman of the Board and Chief Executive Officer of Mutual Benefit Life on January 16, 1978.
Elected President and Chief Executive Officer, Mutual Benefit Life, January 17, 1971, after 24-year career with Northwestern National Life Insurance Company in Minneapolis.
Began insurance career as agency cashier for NWNL in Great Falls, Montana in 1947; became agent two years later.
1949 to 1972 held various positions in sales management, becoming vice president and chief agency officer in 1956.

Business Activities:

Amerada Hess Corporation, Director.
MBL Life Assurance Corporation, Chairman and Chief Executive Officer, Director.
Mutual Benefit Life, Director.
Nova Pharmaceutical Corporation, Director.
Public Service Electric & Gas Company, Director.
Squibb Corporation, Director.

Other Activities:

Community Foundation of New Jersey, Advisory Board.
Greater Newark Industry Capital Fund Campaign Committee, Chairman.
National Conference of Christians & Jews, Executive Committee.
New Jersey Historical Society, Trustee.
New Jersey State Chamber of Commerce, Director; Executive Committee; Vice Chairman.
Newark Museum, Trustee.
The Partnership for New Jersey, Chairman.
The Port Authority of NY & NJ, Commissioner.
Princeton University Council on New Jersey Affairs.
Regional Plan Association, Director.
Renaissance Newark, Inc., Chairman.
United Way of Essex and West Hudson, Trustee.

Personal:

Born in Breckenridge, Minnesota, September 24, 1926.
He and his wife, Mary Jane, reside in Mendham, New Jersey, and are the parents of three children and have one grandson.
Served in Marine Corps in the South Pacific 1943 to 1946.

June, 1985

FAIR MEMBERS

- * New Jersey Policemen's Benevolent Association (PBA)
- * New Jersey Alliance for Action
- * New Jersey Hospital Association
- * New Jersey State Chamber of Commerce
- * The New Jersey Business & Industry Association
- * Prudential Insurance Company
- * Medical Society of New Jersey
- * The New Jersey State Nurses Association
- * Thomas & Betts Corporation
- * Raritan River Steel
- * South Jersey Industries
- * New Jersey Dental Association
- * New Jersey Medical Inter-Insurance Exchange
- * The Associated General Contractors of New Jersey
- * New Jersey Asphalt Pavement Association
- * The Utility & Transportation Contractors' Assn. of New Jersey
- * Professional Insurance Agents of New Jersey
- * New Jersey Society of Certified Public Accountants
- * Pharmaceutical Manufacturers Association
- * The School Boards Association of New Jersey
- * New Jersey State Interscholastic Athletic Association
- * American Home Products Corporation
- * Squibb Corporation
- * Johnson & Johnson
- * Schering-Plough Corporation
- * The Chubb Corporation
- * New Jersey Association of Osteopathic Physicians & Surgeons
- * New Jersey Restaurant Association
- * New Jersey Podiatric Medical Society
- * New Jersey Association of Realtors
- * Consulting Engineers Council of New Jersey
- * Home Care Council of New Jersey

- * New Jersey Non-Profit Nursing Homes
- * New Jersey Association of Health Care Facilities
- * National Federation of Independent Business/New Jersey
- * New Jersey Food Council
- * National Solid Wastes Management Association/NJ Chapter
- * Ohaus Scale Corporation
- * Spa 23 & Racquet Club
- * New Jersey Motor Truck Association
- * a-C.A.U.S.E.
- * New Jersey Association of School Business Officials
- * Independent Insurance Agents of New Jersey
- * New Jersey Liquor Stores Association
- * Merck & Company, Inc.
- * RJR Nabisco, Inc.
- * American Cyanamid Company
- * Ciba-Geigy Corporation
- * Crestmont Cleaning Service & Supply Co., Inc.
- * New Jersey Society of Architects

July 24, 1986

W H A T ' S F A I R

FAIR, The Federation of Advocates for Insurance Reform, has one overriding goal --- to make liability insurance protection available to New Jersey consumers at rates they can afford.

The formation of FAIR was inspired by a liability insurance crisis in New Jersey and nationally that diminishes the quality of life for every family and resident of our state.

FAIR is a non-partisan organization that already has become the most diverse coalition ever to join on a single issue in New Jersey. And its membership keeps growing steadily.

The unity of purpose that brings so many different groups together under FAIR's banner is a common commitment to support meaningful liability insurance and tort reform by our elected representatives in Trenton.

The impact of the crisis is felt everywhere. Businesses have to cut back or cannot even get started; jobs are lost; municipalities have to curtail essential services such as police protection; non-profit organizations and volunteers are afraid to serve the public; recreational opportunities for young people have to be limited ... the problems go on and on.

FAIR's membership reflects the truth that this crisis touches everyone's life. The coalition includes police, nurses, school boards, small and big businesses, hospitals, doctors, dentists, accountants, engineers, nursing homes, restaurants, insurance companies, realtors, contractors, high school sports administrators.

FAIR is not interested in partisan politics. Its priority is not to place the blame on any particular group because there are a lot of reasons for this crisis in the lawsuit-happy society in which we live.

FAIR's priority is to press the Legislature and State Government in Trenton to take action NOW on fair, effective solutions to the crisis.

These are the FAIR principles needed to solve this crisis:

Full compensation of any victim of a tortious act for all economic loss, such as medical expenses and loss of earnings. Compensation must take into account payments from collateral sources so injuries do not become a vehicle for individual gain.

Allocation of awards based on degree of fault, a foundation of the New Jersey tort system that has been rendered meaningless by the doctrine of joint and several liability.

Reasonable limitations of non-economic damages, while preserving fair compensation for victims of injuries.

Setting of insurance rates on the basis of New Jersey experience.

Support for "caps" on the liability of government entities and immunity for certain employees -- teachers, coaches and others engaged in the normal pursuit of their duties -- with liability passed on to the employing agency. When the award of damages exceeds the agency's cap and further compensation is clearly required, the public must assist through self insurance pools and government subsidy.

Similar assistance to non-profit organizations engaged in charitable and related activities.

State encouragement of cooperative insurance undertakings in the private sector.

Easing burdens on the court system through required arbitration of liability suits involving lesser damages and through discouragement of frivolous or nuisance lawsuits.

Protection of rapidly growing high-tech and existing manufacturing industries by establishing defenses reflecting a reasonable application of current scientific and technical knowledge. Such "state-of-the-art" defenses are crucial to maintaining New Jersey's economic leadership and jobs.

Reasonable time limits on the filing of suits in cases of medical and professional malpractice. If insurance costs are to be stabilized, it is important that carriers are not threatened by suits that may be initiated decades later.

Strict disclosure of relevant financial data by insurance companies seeking to do business in New Jersey.

Support for increased funding for data processing equipment and staff to enable the Department of Insurance to review filing requests and actuarial data in an expedient manner.

Strict investigations and enforcement of fraudulent insurance claims.

A SUMMARY OF RESEARCH RESULTS:
TRENDS AND PATTERNS IN CIVIL JURY VERDICTS

Testimony by Mark A. Peterson

Presented to the Subcommittee on Oversight, Committee on Ways and Means
United States House of Representatives

March 13, 1986

Mr. Chairman and members of the Ways and Means Committee, my name is Mark Peterson. I am a lawyer and senior psychologist on the staff of The Institute for Civil Justice at The Rand Corporation. Rand is a private, nonprofit corporation that conducts public policy research. The Institute for Civil Justice was established in 1979 within Rand and is supported primarily by corporate and foundation grants.

My testimony deals only with one issue involved in the current concern about availability and cost of liability insurance: How have lawsuits and civil jury verdicts changed in recent years? Most lawsuits and civil claims settle without reaching trial, but those settlements are presumably influenced by the outcomes of lawsuits that are tried to juries. Consequently, as jury verdicts change, outcomes are likely to change not only for cases that go to trial but also for cases that settle.

My testimony will draw primarily on the Institute's research on civil jury verdicts. The Institute has assembled a data base on the results of all civil jury trials in cases for money damages held in Federal and superior state courts in Cook County, Illinois, and San Francisco, California, between 1959 and 1984.¹ The Institute has published five reports describing trends in civil jury trials between 1960 and 1979² and will shortly publish two more. Most of my testimony will draw upon these seven reports to describe trends and patterns in

¹ The data were obtained from jury verdict reporting services that are published in both jurisdictions. The Institute has also expanded the data base to include all verdicts in the State of California from 1980 through 1984.

² Peterson and Priest, 1982; Shanley and Peterson, 1983; Peterson, 1984; Chin and Peterson, 1985; Peterson, 1985.

jury awards through 1979.³ I will note when my testimony is based on other data.

Our research shows two very different trends in the size of verdicts awarded by juries. For the bulk of lawsuits tried to juries, verdicts did not increase during the 1960s and 1970s. After adjusting for inflation, the median (or 50th percentile) jury award remained almost constant in both Cook County and San Francisco -- less than \$20,000 during both decades.⁴ Most jury trials involved slight or moderate injuries (e.g., strains, sprains, bruises) suffered in vehicle accidents or slips and falls. Jury awards in these cases were virtually the same in the late 1970s as they had been in the early 1960s.

In contrast to this stability for most cases, large jury awards increased greatly, more than doubling during the 1970s. The average jury award and the total amount of money awarded by juries also doubled in the 1970s, but these increased only because large awards increased in size.

These differing trends seem to occur, in part, because jurors react differently to different types of suits. Plaintiffs in product liability, malpractice, street hazard, and workplace accidents -- types of lawsuits that we describe as "high stakes" cases -- received larger awards for the same type of injury. In Cook County in the 1970s, a plaintiff who was injured by medical malpractice received 3-1/2 times as much as a plaintiff with similar injuries from a slip and fall; in San Francisco, a product liability plaintiff received twice as much as a plaintiff with similar injuries from a slip and fall. Differences in compensation between high stakes and routine lawsuits have increased in recent years.

These differences also arose in part because juries made bigger awards against "deep pocket" defendants -- businesses, professionals, and government agencies -- who were usually the defendants in product liability, malpractice, street hazard, or workplace injury lawsuits. Government or business defendants were assessed 30 to 50 percent more than individual defendants when plaintiffs had similar injuries and

³ Data for the 1980s were added recently and only preliminary analyses of these data are now available.

⁴ All amounts are in 1979 dollars unless otherwise noted.

brought the same type of lawsuit. This "deep pocket" effect was even greater if plaintiffs were seriously injured: Businesses then paid 2-1/2 times as much as individual defendants did in similar cases.

Observers who view the civil justice system from different perspectives might reach different conclusions about what is happening because they focus on these differing trends. Those who participate in the system on a day-to-day basis, such as trial judges and lawyers, may see little change in jury verdicts, because awards in most cases have not in fact changed. But insurance companies or self-insured companies that are frequently involved in litigation see great increases. They have to pay jury awards and the total (and average) of these awards has increased, driven by the increasing size of very large awards.

Million dollar verdicts provide a dramatic example of these trends. In San Francisco during the 1960s, only five cases had a value of \$1 million (in 1979 dollars) -- 0.3 percent of all cases in which plaintiffs received an award. The total amount of money awarded in these million dollar verdicts represented eight percent of all money awarded to plaintiffs. During the 1970s, 26 cases (2.3 percent of all cases in which plaintiffs received an award) produced awards exceeding \$1 million. These cases accounted for 30 percent of all money awarded in the first half of the decade and nearly half of all money awarded in the second half of the 1970s. Million dollar verdicts were less frequent in Cook County, but the trends were similar. While we have not yet completed our analysis of the data for 1980-1985, our preliminary results indicate that these trends are continuing: Although million dollar awards occurred in less than four percent of all cases won by plaintiffs during this period, they now account for roughly two-thirds of all money awarded to plaintiffs.

Our statistical analyses show that large jury awards increased at least in part because juries now award more money for certain cases. Jury awards to seriously injured plaintiffs -- those who lost a limb, were paralyzed, or suffered burns or serious eye or ear injuries -- doubled or tripled during the 1970s in both San Francisco and Cook Counties. The average (mean) award to plaintiffs who lost a limb increased three-fold in San Francisco (from \$321,000 in the 1960s to \$1.2 million in the 1970s). In Cook County, the average wrongful death award increased from \$125,000 in the 1960s to \$385,000 in the 1970s.

Furthermore, juries in both jurisdictions increased awards for high stakes types of lawsuits -- medical malpractice, product liability, street hazard, and work injury cases -- regardless of the seriousness of the plaintiffs' injuries in those cases. In both jurisdictions, malpractice plaintiffs in the 1970s received awards that were twice as large as malpractice plaintiffs received for similar injuries in the 1960s. Product liability and street hazard awards in San Francisco during the 1970s more than doubled awards for similar injuries in the 1960s. Cook County juries showed the same general pattern of change, but the rate of change was somewhat less.

Finally, large jury awards seem to be less predictable. Fewer large awards in the 1970s could be explained by our measures of the number, type, severity, or disability from injuries or the amount of medical expenses or lost income.

Our preliminary analyses of jury awards in the 1980s indicate that the two separate trends in jury awards are continuing. Most jury awards still remained modest. The median or typical jury award apparently increased in San Francisco in the 1980s, but the median award actually decreased in Cook County after adjusting for inflation. In contrast, the largest awards continued to increase in both jurisdictions in the 1980s, growing even faster than they had during the previous decade. Average awards and the total amount of money awarded by juries increased by 50 percent in San Francisco and almost doubled in Cook County in the early 1980s, again because the largest awards continued to increase greatly.

Increasingly, the civil justice system seems to be two different systems. One is a stable system that provides modest compensation for plaintiffs who claimed slight or moderate injuries in automobile and other accidents that have been the major source of litigation for 50 years.⁵ The second is an unstable system that provides continually increasing awards for claims of serious injuries in any type of lawsuit, and for all injuries, serious or not, in product liability, malpractice, street hazard, and workplace accidents.

⁵ See Selvin and Ebener, 1984, an Institute study of 100 years of litigation in Los Angeles County.

The number and size of punitive damage awards also increased substantially in both jurisdictions during the past 25 years. In Cook County, the rate of increase rose sharply during the 1980s: The number of punitive damage awards doubled and the total amount of money awarded increased by 700 percent during this period.

Although punitive damage awards were volatile, the typical award remained small throughout most of the period and the total number of such awards in both jurisdictions was less than 200. Most punitive damage awards were made in cases involving intentional torts or business disputes rather than ordinary personal injury cases. Punitive damages were awarded in only eight product liability suits in both jurisdictions during the entire 25-year period. But in the past few years, there has been a rapid growth in the number and size of punitive awards in personal injury cases in Cook County.

Punitive damage awards against businesses increased both in number and amount in both jurisdictions, and the rate of increase was particularly great in recent years. Both compensatory and punitive damage awards against business defendants were larger than awards against individual defendants. During the 1980s, juries increased the amount of punitive damage awards against business defendants relative to plaintiffs' losses.

A substantial number of punitive damage awards were reduced after trial as a result of settlement or judicial action. For 1980 trials resulting in punitive damage awards across all closed cases (including those in which the original judgment was satisfied and those in which it was reduced), plaintiffs received 50 percent of the original verdict.

The Institute's data describe trends in two major urban jurisdictions; we cannot be certain that these trends apply throughout the nation. Nevertheless, the findings do suggest that these trends might apply more broadly. Trends in Cook and San Francisco Counties were strikingly similar and our most recent data collection shows similarities in awards during the 1980s in other jurisdictions in California.

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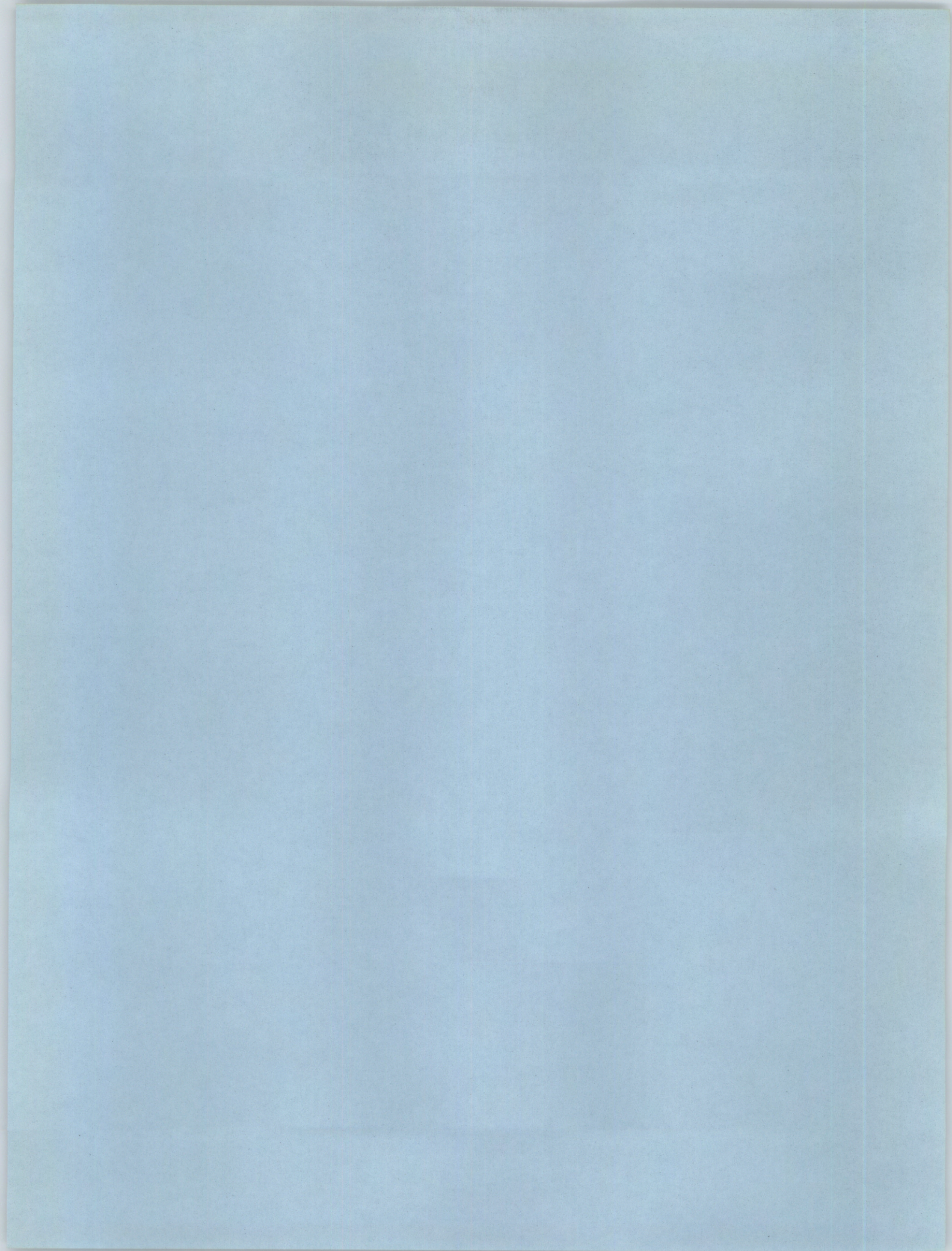
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