P U B L I C H E A R I N G

before

COMMISSION ON ALCOHOLIC BEVERAGE LIABILITY

on

Social Host Liability

ASSEMBLY BILL 43
(Exempts social hosts from civil liability for injuries caused by adult consumers of alcoholic beverages served by them)

ASSEMBLY BILL 347
(Limits the amount of liability damages for sellers of alcoholic beverages)

SENATE BILL 2122
(Limits the scope of host liability for drunk driving by guests)

Held:
May 9, 1985
Bergen County Courthouse
Hackensack, New Jersey

MEMBERS OF COMMISSION PRESENT:

Senator Raymond Lesniak, Chairman
Senator Gerald Cardinale, D.D.S.
Assemblyman Newton E. Miller
Murray A. Laiks, Esq.
Elmer J. Herrmann, Jr., Esq.
Lawrence Toborowsky
Richard Levinson, Esq.

ALSO PRESENT:

Geraldine Weltman
Office of Legislative Services
Aide, Commission on Alcoholic Beverage Liability

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ASSEMBLY, No. 43

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1984 SESSION

By Assemblymen HOLLENBECK and SCHWARTZ

AN ACT concerning the service of alcoholic beverages and supplementing Title 33 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. No person, other than a person licensed according to the provisions of Title 33 of the Revised Statutes to sell alcoholic beverages, who furnishes any alcoholic beverage to a person at or over the age at which a person is authorized to purchase and consume alcoholic beverages shall be civilly liable to any person or the estate of any person for personal injuries or property damage inflicted as a result of intoxication by the consumer of the alcoholic beverages.

2. This act shall take effect immediately.

STATEMENT

The purpose of this bill is to exempt social hosts from civil liability for injuries caused by adult consumers of alcoholic beverages served by them.

This bill, if enacted, would distinguish between the responsibilities of an alcoholic beverage licensee and those of a social host. According to the New Jersey Administrative Code 13:2–23.1, which carries the full force of law, the holder of a liquor license shall not serve a person who is actually or apparently intoxicated. The courts have held that a licensee may be civilly liable for injuries caused by an intoxicated person whom he has served. Licensees hold their alcoholic beverages licenses not as a right but as a privilege. Their strict obligation not to serve intoxicated persons

stems from the responsibility to the public assumed when they take on such a license.

But to hold a social host liable for the actions of a drunken guest denies that the adult consumer of alcoholic beverages is primarily responsible for his actions. This bill is not intended to encourage hosts to serve liquor to intoxicated guests or allow intoxicated guests to drive. Rather, it is the purpose of this bill to recognize that an adult who becomes intoxicated is more responsible for his condition than the host who serves him at a party.

ASSEMBLY, No. 347

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1984 SESSION

By Assemblyman RILEY

AN ACT concerning civil actions against persons who sell or furnish alcoholic beverages, amending N. J. S. 2A:14–1 and N. J. S. 2A:31–5 and supplementing Title 2A of the New Jersey Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) The Legislature finds and declares that:

a. As a direct consequence of the judicial imposition of civil liability upon persons who sell or furnish alcoholic beverages in a negligent manner, a person faces great difficulty in obtaining insurance against the imposition of civil liability for negligently selling or furnishing alcoholic beverages;

b. Where insurance coverage is available, exorbitant increases in its costs have occurred and many persons who sell or furnish alcoholic beverages do not, therefore, obtain this coverage;

c. This lack of insurance adversely affects those persons and potential claimants;

d. In order to make it economically feasible for insurance companies to provide coverage, the incidence of liability should be more predictable; and

e. To encourage the development of risk reduction techniques, the limits of the civil liability of those persons must be defined in the law.

2. N. J. S. 2A:14–1 is amended to read as follows:

2A:14–1. Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.
Matter printed in italics *thus* is new matter.

chattels, for any tortious injury to the rights of another not stated in [sections] *N. J. S.* 2A:14–2 and *N. J. S.* 2A:14–3 [of this Title], or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within six years next after the cause of any such action shall have accrued.

This section shall not apply to any action for breach of any contract for sale governed by [section] *N. J. S.* 12A:2–725 [of the New Jersey Statutes] *or to any action for tortious injury to real or personal property governed by section 3 of P. L. . . . . , c. . . . (C. . . . .) (now pending before the Legislature as Assembly Bill No. 347 of 1984).*

3. (New section) A civil action which alleges tortious injury to real or personal property caused by a defendant who sold or furnished alcoholic beverages in a negligent manner shall be commenced within two years after the cause of action accrued.

4. N. J. S. 2A:31–5 is amended to read as follows:

2A:31–5. [In] *Except as otherwise provided in section 5 of P. L. . . . . , c. . . . (C. . . . .) (now pending before the Legislature as Assembly Bill No. 347 of 1984), in* every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased, to the persons entitled to any intestate personal property of the decedent.

5. (New section) Damages assessed against a defendant for negligently selling or furnishing alcoholic beverages are limited to the following amounts:

a. $75,000.00 per person for death or personal injury;

b. $150,000.00 for all deaths or personal injuries, regardless of the number of persons; and

c. $10,000.00 for injury to real or personal property.

6. This act shall take effect immediately.

STATEMENT

The purpose of this bill is to limit the amount of damages which may be assessed against a person for negligently selling or furnishing alcoholic beverages. The maximum amount recoverable for personal injury or death is $75,000.00 per person to a total of $150,000.00 for all deaths or personal injuries regardless of the

number of persons. The maximum amount recoverable for property damage is $10,000.00.

The bill also establishes a statute of limitations of two years on civil actions for tortious injury to real or personal property in civil actions alleging the negligent sale or furnishing of alcoholic beverages. The existing statute of limitations on civil actions for tortious injury to real or personal property is six years.

SENATE, No. 2122

STATE OF NEW JERSEY

INTRODUCED SEPTEMBER 13, 1984

By Senators CARDINALE, FELDMAN, CONNORS, LASKIN, HAGEDORN, FORAN, CONTILLO, HURLEY, McMANIMON, DiFRANCESCO, DORSEY, EWING, DUMONT, BASSANO, GORMLEY, SAXTON, HIRKALA, BUBBA and GARIBALDI

Referred to Committee on Law, Public Safety and Defense

AN ACT concerning limitations on actions against persons providing alcoholic beverages to others and supplementing Title 2A of the New Jersey Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. As used in this act:

"Visibly intoxicated" means a degree of intoxication, accompanied by an act or series of actions or some other clearly unmistakable sign of intoxication. Evidence of failure to pass a test to determine the presence of alcohol in the blood or urine shall be insufficient, in the absence of corroborating evidence, of visible intoxication within the meaning of this act.

2. No action at law, either for injury to the person or for injury to real or personal property, arising out of a motor vehicle accident caused by the negligent or otherwise illegal operation of a vehicle resulting from the excessive consumption of alcoholic beverages, shall lie against any person, or the estate of any person, for having provided alcoholic beverages to any driver at or over the authorized age for the purchase and consumption of alcoholic beverages, except where:

a. The person furnished the alcoholic beverages as a licensee or as the employee of a licensee under Title 33 of the Revised Statutes, and knew or had reasonable cause to know that the pur-

chaser was visibly intoxicated and knew or should have known that the person would operate a motor vehicle reasonably soon thereafter; or

b. Where the person is not a licensee or employee of a licensee under Title 33 of the Revised Statutes, the person willfully and knowingly, manifesting extreme indifference to the rights of others, served the alcoholic beverages to a person who was visibly intoxicated in his presence, and who he knew or should have known would operate a motor vehicle reasonably soon thereafter.

3. This act shall take effect immediately.

STATEMENT

This bill would substantially limit the scope of host liability recently created by the New Jersey Supreme Court in *Kelly* v. *Gwinnel*, A-96/97 (1984), in which the court extended liability for injuries arising out of a motor vehicle accident caused by an intoxicated driver to a social host who served drinks to the driver prior to the accident. That case was and is without precedent anywhere in the country.

In opening the door to social host liability the court utilized ordinary standards of negligence and placed no limitations on the amount of a potential recovery. Thus, the way is clear for the court to easily extend this liability far beyond the particular circumstances of this case. The consequences of such a decision require immediate legislative action.

First, the decision will create an immediate climate of fear and uncertainty with the general public. Homeowners' and apartment-dwellers' insurance rates will inevitably rise. And they will rise for those who do not serve alcoholic beverages and those who serve alcoholic beverages responsibly, as well as for those who serve alcoholic beverages in an irresponsible manner. Many apartment dwellers do not carry insurance and thus would be subject to unlimited individual liability. And if they cannot afford it, they surely would be financially ruined by an unlimited liability lawsuit.

Secondly, the decision will subject individuals to unlimited liability situations where they may bear only marginal, or at best partial responsibility, but because of limitations of proof of independent or intervening factors they will be forced to shoulder the burden. For instance, a social host has no effective way of proving that a guest did not drink immediately before leaving his home. Nor could he prove if the guest ingested any form of drugs in addition to the alcohol he had served. Social guests do not ordinarily announce how many drinks they have had on arrival, and

many problem drinkers are quite effective at masking their level of consumption, thus further complicating the situations of proof in these cases.

While this decision only speaks in terms of "visible intoxication," the only proof is a level of intoxication measured by a test taken sometime subsequent to the serving of the drinks, a test which ordinarily would only be one given to determine the blood-alcohol level, not the presence of drugs.

Because a social host is not the party at fault for the accident, and because there are other, much more direct avenues of redress for injured parties, it seems grossly unfair to hold hosts responsible except in extreme circumstances where their behavior is egregious and their culpability is manifest.

This bill, therefore, would require, in order to establish liability on the part of a social host, that he willfully and knowingly, manifesting extreme indifference to the rights of others, serve a visibly intoxicated person, knowing in all likelihood that the guest would be driving a car within a reasonable period of time.

The standard for an alcoholic beverage license holder, however, would be substantially less, and it would require license holders to refuse to provide alcoholic beverages to visibly intoxicated persons.

SENATOR RAYMOND LESNIAK (Chairman): This is the second meeting of the Commission of Alcoholic Beverage Liability. I am Senator Lesniak. I am the Chairman of the Commission.

To my left is Senator Cardinale, who you know very well, and who we want to thank for making the arrangements for today's meeting. To his left is Assemblyman Newton Miller from the 34th District; next to him is Lawrence Toborowsky; next in order is Murray Laiks. These gentlemen are all Commissioners. On the far right is Richard Levinson and Elmer Herrmann. So I guess we are all here; absent Assemblyman Bocchini, who has been very active this week.

We are going to try to move along the testimony of today. I don't want to cut anyone short, but I want to advise the Commission members, in addition to myself, that we have a heavy schedule today and we want to develop as much information as possible so that we can conduct our deliberations with a broad-based factual background to deal with this subject.

From the Department of Insurance, Jasper Jackson is here. Would you like to comment? You are number one on the list. You are not ready to say anything? You were asked to be first, I presume.

JASPER JACKSON: Really? I didn't know that.

SENATOR LESNIAK: You didn't know that?

MR. JACKSON: I did not. I was not aware of that. I am appearing because the Department was requested to have a representative, and I am here to answer any questions or concerns that members of the Committee may have.

SENATOR LESNIAK: Okay. I think, then, what we ought to do is hear from the insurance companies' representatives first. Maybe after their testimony, we will have more questions to ask. I think it would be better to do it that way.

MR. JACKSON: Okay.

SENATOR LESNIAK: You can stay around for awhile, and we'll call on you then. Thank you, Jasper.

Dorothy Light from Prupac. Dorothy, do you have written testimony for the Commission, or are you just going to make a statement?

DOROTHY LIGHT: I have a statement that I will read. I can provide copies of it at a later time, if you would like to have it for the record.

SENATOR LESNIAK: Well, I guess that is not necessary because it will be transcribed.

MS. LIGHT: Okay. Fine.

I want to thank the Commission for the opportunity to address you to talk about the question of social host liability. I am Dorothy Light, and I am a Vice President of Government Affairs for Prudential Property and Casualty Insurance Company. That is a wholly owned subsidiary of Prudential. We are the eleventh largest writer of homeowner insurance. We have nearly 195,000 policies. We do not write commercial insurance, so I will confine my remarks to the social host issue.

We have been carefully tracking the legislative and judicial environment across the country. We are watching with intense interest the impact of the California law which provides no social host may be held legally accountable for damages. We have been looking at the decision just rendered this week in Minnesota which upheld the exemption of a social host. There is a case in Indiana in which a co-patron -- I repeat, a co-patron -- was held civilly liable. And we look to the Pennsylvania case which held that in the case of an ordinary able-bodied man, it is the consumption of alcohol rather than the furnishing of alcohol that is the proximate cause of any subsequent consequences.

Now, as a result of all this activity throughout the country, we set in motion, in our company, a tracking system which identifies all claims arising from our policyholders which could extend to this liability coverage situation, similar to the Gwinnell case. Our homeowner liability policy will cover that circumstance. And, in fact, when the Kelly v. Gwinnell case was rendered we began an educational program for our policyholders. We told them about the recent case, and we urged them to consider the limits of their coverage, as well as asking them to explore the possibility of purchasing personal catastrophe coverage. In the last three months we have seen a 15%

increase in the number of personal catastrophe policies we have in force. If you look at our year-end figures from 1983 to 1984, there has been a 43% increase in that coverage.

On the claims side, however, to date we have not seen any significant increase in the number of social host claims that have been filed. In fact, there really has only been one case which has come in New Jersey since last July, and that relates to the minor guest. And speaking of someone who has some experience in this matter, I submit to you that anyone who serves alcohol to a minor is asking for trouble.

I think I do have to point out to you, however, that whenever the homeowner liability coverage is extended, costs are incurred, either through defense costs or through claim costs. That always translates into increased premiums for the policyholders. I think that is something that all of us want to avoid.

As we review our homeowners experience, we see an alarming trend. We see an increasing erosion of exclusion of our liability policy and we see an ever-expanding concept of liability coverage. The notable trend involves the disregard of the "intentional act exclusion," which we interpreted as limiting our exposure when a homeowner had committed a crime, such as child abuse or a stabbing. We are now covering cases that we never contemplated, and I submit that the social host case is one of such cases we never contemplated.

As we look at our trends in New Jersey over the last few years, we find that the numbers of cases -- what we call our frequency -- has increased only minor, and that is a 4% increase. We had roughly 1539 cases in 1983, almost 1600 in 1984. But we see that the severity, the average amount that we pay on each claim has increased a dramatic 88%, the average in 1983 being $2100, the average in 1984 being over $4100. That increase in the average amount is due primarily to the increase in the number of major losses, those claims over $25,000. We see that between 1983 and 1984, we moved from 19 of those major claims to 51. So, there is a marked change in what is happening in the homeowner coverage.

Now if you look at what the Legislature should do in this regard, there are a lot of alternatives. You can start with limiting social liability completely, like California. You can eliminate the liability in the absence of, perhaps, reckless and wanton behavior. You can establish a "cap." You could create a legislative standard, such as Senator Cardinale has suggested. And, you can also impose a comparative negligence concept to liquor liability cases.

I know you have considered all of these. And while we think they would be improvements to the current situation, we do fear that the political process may encumber, rather than elucidate, the standard that we already have. We feel that the merit of the Supreme Court decision is not that it challenged the Legislature to act, but that it has brought an awareness to the citizens of New Jersey regarding their responsibilities as social hosts. It surfaced the issue of irresponsible drinking, and that is a topic that we as corporate citizens have been interested in for a long time.

We have worked with groups like the National Council on Alcoholism. We were instrumental in forming employee assistance programs. A dear colleague of mine, the late Jamie Deans, played a key role in developing employee assistance programs for the New Jersey State employees. We have assisted in the formation of the Monmouth County Task Force on Drunken Driving. We have worked with the State Symposium. We are intimately aware of the ravages that alcoholism can cause: damage to families, adverse impact in jobs. We are particularly alert to the damage that has been done through drinking and driving.

We know that the solution is in changed behavior, and we know that legislation has never been very successful in dramatically altering social behavior. Rather than introduce legislation which will again subject us to more interpretation than the Supreme Court decision already rendered, we would prefer that the Legislature continue to devote time to solving the root problem, which gives rise to social host liability. That root problem is irresponsible alcohol and drug use. Educational problems have to be continued. Strong criminal sanctions must be created, and the legislative oversight must see that

there is enforcement. Finally, the citizens must be aware of the dangers of drinking, especially when combined with the privilege of driving.

As the Pennsylvania Court noted, "Consumption is the proximate cause of any subsequent occurrence." We feel the focus should not be so much as how to compensate the victim, but rather how to avoid having victims.

Thank you for your attention.

SENATOR LESNIAK: You're welcome, Dorothy. Any questions from the Committee members? (no questions) No questions? They listened well.

MS. LIGHT: Good.

SENATOR LESNIAK: Thank you, Dorothy. It was very good testimony.

MS. LIGHT: Thank you.

SENATOR LESNIAK: Mike Velotta from Allstate Insurance Company.

MICHAEL J. VELOTTA: Mr. Chairman, members of the Commission, my name is Mike Velotta. I am counsel with Allstate Insurance Company from its home offices in Northbrook, Illinois. I appreciate this opportunity to come here this evening to give you our thoughts on this public policy issue that you all have to address in the Legislature this year.

We are here, really, to offer information. We haven't taken a position on any of the pending bills that are before the Legislature, such as A-347, which would limit the amount of damage awards, or A-43 and S-2122, which would eliminate the social host liability. Again, we are here just to help focus on those public policy issues that were made in light of the Kelly v. Gwinnell decision.

SENATOR LESNIAK: You didn't forget Senator Cardinale's bill, did you?

MR. VELOTTA: I sure hope I didn't, Senator. Which one?

SENATOR CARDINALE: In your description, you threw Senator Lesniak for a loop. In your description, you described it similarly to Assemblyman Hollenbeck's bill, whereas we think of it very differently.

MR. VELOTTA: I apologize, Senator, for putting that in.

SENATOR LESNIAK: We never try to confuse Senate bills with Assembly bills. Go ahead, Mike.

MR. VELOTTA: My apologies, Senator.

Again, Allstate has been very active on the issue of drunk driving and trying to get drunk drivers off the road. We feel that that is one way to help hold down the costs of insurance, both in New Jersey and in other states, because of the costs of deaths and injuries that occur as a result of drunk driving.

We have made a corporate commitment to that issue. In fact, one of our Corporate Vice Presidents for Corporate Relations is on the Executive Committee for the National Commission Against Drunk Driving, which is the successor organization to the President's Commission on that same topic. We are also a member of the Board of Mothers Against Drunk Driving Organization and have supported both of those organizations with our membership, with staff time, with cash grants, as well as free printing for a number of the publications which those organizations put out.

We have been very active, also, in our trade association in the area of education about the problems of drunk driving, especially aimed at teenagers. They produced a couple of films on those subjects and made those films available to high schools and other places around the country.

In New Jersey, we have also been very active in the support of the local MADD chapters, as well as the SADD organization. We participated, along with the New Jersey Insurance News Service, on the statewide symposiums on drunk driving over the last two years.

The point of this -- if there is one -- is that we are very committed, both from a social standpoint and from a company cost reduction standpoint, to helping get drunk drivers off the road. We are very much concerned with that issue.

On the other hand, at the same time, we think that there are significant policy issues to be decided and looked at in light of the Kelly V. Gwinnell decision. We think that those issues ought to be balanced against the issues of getting the drunk drivers off the road.

The key decision that I think you all need to address is: Should there be a change in the public policy made by the Supreme Court in the Kelly v. Gwinnell decision? The Supreme Court said that the social host-- Or, in fact, it changed the rules of law and imposed a duty on the social host to protect third persons against the dangers created by a guest who consumes alcohol and then later drives a car. In creating this duty, there is a new rule of liability, in effect, established by the Supreme Court that goes against the host, where they said effectively that serving alcohol is a legal cause of the injury to the third persons.

So, we are simply concerned about this liability and the costs that may come out of it. This is a new liability. It is probably, in practice, covered by homeowners and PUP policies that Allstate issues in the State of New Jersey.

SENATOR LESNIAK: Excuse me, what policies?

MR. VELOTTA: It's personal umbrella policies, referred to as PUP. So, they really are two different policies, in addition to the homeowners that would provide some coverage for the hosts in that situation.

So, we are concerned that a new liability has been created. There will be costs associated with that liability. That is one of the public policy issues that we would like for you all to address and look at. When insurance provides for that coverage, there are going to be costs associated with that. Those are going to be ultimately reflected in the premiums for homeowners and the personal umbrella policies that all policyholders here in New Jersey pay for.

At the present time, we have about 14 cases arising out of the Kelly v. Gwinnell decision.

SENATOR LESNIAK: How many homeowners policies do you have in the State? Do you know?

MR. VELOTTA: Senator, I'm sorry, I don't know.

SENATOR LESNIAK: More than Prupac?

MR. VELOTTA: Yes. I think we are about the second or third largest. I am sorry that I don't have that number.

We are in the process of defending those 14 cases. They run in the fact situation exactly like the Kelly case, where you have a one-on-one situation. They also fall into the party situation where you have a sort of unsupervised situation. This is one area that we are concerned about: that ruling, ultimately, will, or may be expanded, for courts to cover the party situation as opposed to the one-on-one situation. We will have lower court decisions that will probably be all over the lot and appellate decisions over the years. Who knows which way those are going to come out? Ultimately, the issue may be addressed by the Supreme Court if the Legislature doesn't. So, it seems to me that an area that we are concerned about is the expansion of the original holding because we have already seen it; we have cases that we are defending, and we don't know which way they are going to turn out. Again, we have the 14 cases since June or July of last year, when the decision came down.

Allstate's currently filed and approved rates for both homeowner's coverage and our personal umbrella policy do not have included in the costs a factor for the Kelly v. Gwinnell type of liability.

As to any future rate activities, it depends really upon the costs that are incurred and if they are of a significant enough nature to warrant and to provide a basis for prediction of future costs that would allow us to say that is what we are going to be paying and, therefore, increase our rates to reflect that cost. At this point, we simply don't have a way of making any projection. It is our estimation that these will be what we call "low frequency," that is, that they don't occur very often, but are of a fairly high severity. They are costly when they do happen. That is our judgment at this point. But other than that, there is no way that we could tell you how much it is going to cost in the future because we simply don't know.

Another factor that we would like you to consider in your review of the Kelly decision is to take a look at the real effect of this rule of liability, the liability to the third party injured as a result of the guest -- leaving the host -- in an intoxicated condition. The guest is obviously driving a car -- because obviously

that is the situation we are in; that is the reason the liability has arisen -- and that car is within the definition of an automobile under the no-fault law, so the injured party -- that is the other third party -- is either driving another vehicle or is a pedestrian. If the injured person is driving, presumably he or she has the mandatory no-fault PIP coverages.

One of the coverages under that no-fault law is the personal injury protection or PIP coverage. That is mandated by Section 39:6A-4. That includes, as a minimum unlimited benefit, for "all reasonable medical expenses incurred as a result of personal injury sustained in an automobile accident." The insured -- the injured person -- also has the option of having coverage for varying levels of wage loss, replacement services, death benefits, and funeral expenses. So, the injured person in a Kelly situation has all the medical expenses covered in an unlimited amount and has had the option to purchase coverage for wage loss, replacement services, and others of a significant amount. If the injured party is a pedestrian or is uninsured, he still has those same coverages available under the guest's automobile policy because he would technically be a pedestrian. And, assuming even if the guest-driver is uninsured, the unsatisfied claim of judgment funds still provides another avenue of recovery for that injured third party.

The result of this statutory scheme for the injured third party basically provides that the economic losses are covered under the no-fault scheme, irrespective of the Kelly v. Gwinnell liability decision. One of the main effects that we see of Kelly is to provide that the hosts, as well as guests, are going to be responsible for the noneconomic loss, that is, pain, suffering, and inconvenience, as well as uncompensated economic injuries, that is, the things that are not covered under the no-fault provisions.

The key question, as we see it, to be addressed, and one that needs to be wrestled with, is in the social host liability area, whether this liability is desirable, and, if so, whether the monetary and social costs of imposing this liability justifies the practical benefits that are to be provided by the rule of law. Are there other

means available to achieve this desired goal of getting drunk drivers off the road that are as, or more, effective and cost beneficial? Is imposing a financial liability on a social host for the actions of his or her adult guests a reasonable means of getting at the drunk driving problem? If the objective is deterring the behavior of driving while intoxicated, what are the effective alternatives currently in place or reasonably available? What would be the effect, say, of other approaches, such as a law that would provide that any damages arising out of the operation of driving while intoxicated, are not covered by insurance? That is, making the driver aware that there is no deep pocket insurance coverage available to pay for the pain, suffering, inconvenience, or other losses caused when he injures the third party.

An analogous situation exists in most states regarding punitive damages. That is, punitive damages are not covered by normal automobile coverages. In fact, many states specifically provide that you may not insure punitive damages. That is simply an area that might be interesting to explore from a truly deterrent standpoint.

As a last item of information, I call your attention, just a little bit more, to what Dorothy has already talked about, which is the California experience. In April of 1978, the California Supreme Court rendered a decision very, very similar to the Kelly v. Gwinnell decision. In September of that same year, the Legislature overturned that rule. It affected both social hosts and liquor licensees. The law that they enacted in California provided that there would be no liability for selling, furnishing, or giving alcoholic beverages. It provided specifically that the proximate cause for injuries from driving while intoxicated is the consumption of alcohol and not the serving of alcoholic beverages.

In conclusion, we recognize that this is tough social problem. We have interests, both economic and social, on both sides of the issue. We want to get drunk drivers off the road, but we also, at the same time, want to make sure that the rule of liability does not increase other costs, if there are more and just as beneficial ways of addressing that problem.

Mr. Chairman, let me address one other point. I know Gerry had asked specifically, when I talked to her before, about the Oregon experience. There was an Oregon decision -- I forget what the date was -- and then the Legislature came back and said that the liability that was to be existent for the social host was limited. I forget exactly how the statutory language goes, but it is a more limited liability. I think it is those who specifically know that the person is intoxicated at the time when they serve him alcoholic beverages. That is the statute that allows the liability. What has been our experience in Oregon? Frankly, we talked to our claims people out there and they are aware of relatively no cases that we have experienced under that liability statute. So, as far as claims or anything else, we simply haven't seen it. We don't know that we have enough claims that it is even worth tracking.

SENATOR LESNIAK: Have any of the claims that you now have been filed by the guests themselves?

MR. VELOTTA: I am not sure, Senator. I asked the question and I received a general response about the types of cases that we have, as far as those filed by the guests.

MR. HERRMANN: By the first party, the person who was actually doing the drinking?

MR. VELOTTA: Not that I know of. I guess I did ask that one. These are all third-party claims.

SENATOR LESNIAK: Senator?

SENATOR CARDINALE: If you know, what are the lead times, generally, for a company like yours between the event, the filing of the suit, and the ultimate effect of the results of these suits, whether they be settlement or other results, on the rate applications that you make?

MR. VELOTTA: Senator, my informed estimate is probably about two years or so.

SENATOR CARDINALE: Three years?

MR. VELOTTA: It takes a couple of years for them to get--

SENATOR CARDINALE: (interrupting) From the event to the first--

MR. VELOTTA: (interrupting) Until we get enough experience, where we would have a judgment as to whether there is going to be any impact on rates. We would incur the defense costs, and those costs are associated right away and go out over the length of time period. At the end you have some resolution, some claims payment, enough to get enough experience. It is usually about two to three years on these type of cases.

SENATOR CARDINALE: How long after an incident -- probably there are four people, at least, at this table who can answer this question, but I can't -- would the victim, any kind of victim, be able to file a claim?

MR. VELOTTA: It would defer to the Chairman. I would assume it is two years?

SENATOR LESNIAK: Two years.

Assemblyman?

ASSEMBLYMAN MILLER: I'm fine, thank you.

MR. LEVINSON: I take it, Mr. Velotta, that you are concerned about the victims?

MR. VELOTTA: Yes.

MR. LEVINSON: You really can't compare punitive damages and drunk driving in the manner in which you did, can you?

MR. VELOTTA: Well, I think you could if-- It depends on what the objective is in your rule of law. As I was trying to indicate, I think the no-fault scheme, the way it is drawn up, attempts to address most of the economic losses that a person sustains.

MR. LEVINSON: It doesn't go to pain and suffering; it doesn't go to--

MR. VELOTTA: (interrupting) Exactly. That was a point that I was trying to raise: the pain and suffering element. If you are looking at it from a compensation viewpoint or a deterrent viewpoint, from a compensation viewpoint, no, they are not equivalent. If you are looking at them as a rule of law to deter this kind of behavior, then I think, yes, they are analogous. I think you can make that analogy. It depends on whose side you are looking at it from.

MR. LEVINSON: Then if you are going to do that, though, the victim, who was the victim of someone who wasn't drunk, would get compensated, and if someone was unfortunate enough to be struck by a drunk, he wouldn't be compensated.

MR. VELOTTA: No, that is not what I am suggesting.

MR. LEVINSON: That is what you are suggesting if you are making drunk driving the equivalent of punitive damages. Punitive damages are something that are in excess of losses for pain and suffering, in excess of economic losses. It is a punishment factor, quasi-criminal, correct? So you can't really make them the same, can you?

MR. VELOTTA: No, I did not mean to imply that. What I was trying to indicate was that if you are trying to deter the behavior of the driver, if he realizes that he doesn't have insurance-- It seems to me that this is another factor, when he realizes that whatever his actions are, in regard to drunk driving, he is not going to be able to turn around and rely on Allstate or somebody else to pay a judgment that would come forward for that action. It comes out of his own assets; it comes out of his own pocket, rather than the insurance company's pocket. That was the deterrent aspect that I was trying to focus on. If I didn't make myself clear, I apologize.

SENATOR LESNIAK: I think you made yourself very clear.

MR. LEVINSON: I understood that, but it would be a deterrent at the expense of a victim.

MR. VELOTTA: Only if that person doesn't have the assets to be able to respond. You are making the judgment that everybody would not be able to respond, that the only assets available are insurance.

MR. LEVINSON: Well, we know in most situations that is true, and certainly, in the State of New Jersey.

MR. VELOTTA: I can't make that statement; if you can, you have.

MR. LEVINSON: I think that is why most people are insured, isn't it? They can't respond.

MR. VELOTTA: I think the reason most people are insured is because they are required by statute.

SENATOR LESNIAK: If I have anything to say about it, they will be.

MR. LEVINSON: I have another question for you. What have you done to determine what the effect of the deterrents are in the Kelly case? I take it that if Kelly is a good deterrent, you would be for it.

MR. VELOTTA: Again, that is what I tried to indicate, that we do feel that it does have a deterrent effect from the standpoint that people-- It doesn't deter the driver because the driver's liability remains unchanged before and after Kelly. The deterrence is on the social host situation. All you have said is that the social host said, "Okay, you're responsible now for the alcohol that you serve to a guy who is going to drive." From the standpoint that if imposing that liability has some deterrence, we are not sure. I guess what we are saying is we don't know if it does or doesn't; we have no way to make a judgment on that.

MR. LEVINSON: So, you have no statistics on that. And if it is, in fact, a deterrent then it would actually save money under your PUP policy, which covers also automobile as well as homeowners; is that correct?

MR. VELOTTA: I tried to say, at the outset, that any action that will keep drunk drivers off the road is not only to our social benefit, as a company, but it is also an economic benefit because it will mean less claims, less cost. That is what I said at the outset. That is why we have been involved and why we do support efforts to get drunk drivers off the road. We are not sure if imposing liability on the host is an effective way of getting at that question. I'm not sure.

MR. LEVINSON: You don't know one way or the other?

MR. VELOTTA: We don't know.

MR. LEVINSON: Thank you.

SENATOR LESNIAK: Are there any other questions?

SENATOR CARDINALE: I have one question that I would like to follow up on because the question provoked a question. I guess I missed it when you testified initially. You said, now, that before and

after Kelly, there is no change in the liability of the driver. In fact, isn't there really a diminishing of the liability of the driver post-Kelly because there is another person? It didn't affect Gwinnell; he didn't know that this was ever going to happen. But, in effect, a portion of the moneys which were determined to be due and owed to that victim were paid by another party. In subsequent cases, does that not diminish the liability of the driver?

MR. VELOTTA: I don't see that it does, Senator. Again, that is an area that is probably going to be explored because, then, we are in the situation of the host and the guest-driver, in separate actions, determining who is responsible for contribution among joint tort-feasors. Under Kelly, they are both joint-- It is probably joint and several liability; I don't know that that has been determined yet. That is probably another issue. But if it is joint and several, then the full judgment could be collected from the host. The host, then in turn, in his carrier for the different companies, may turn around and sue the driver's insurance company, or the driver, for the contribution for the sum or all of the amount, depending on-- Again, that gets complicated because of comparative negligence and everything else. Those are issues that are yet to be decided. Those simply make the issue more difficult from the host/guest situation.

SENATOR CARDINALE: In other areas of insurance--

MR. VELOTTA: (interrupting) In answering your question, I don't see that it reduces the liability of the drunk driver under Kelly because he can still have that entire judgment collected against him if he has coverage assets or whatever. His liability is not diminished under Kelly. All Kelly does is say you have two targets now. You have both the host and the driver to go after, as an injured third party, and you can get however much money you can out of either or both parties. That is my view of what happens with the situation after Kelly. You have simply added another target to recover from.

SENATOR CARDINALE: Okay. In other situations where insurance coverage has been extended in this fashion, have you noticed -- perhaps, product liability would be a good example -- that there was, in fact, an increase as more parties were made targets?

MR. VELOTTA: Senator, I simply don't have any experience to be able to answer the question.

SENATOR LESNIAK: Thank you, Mike.

MR. VELOTTA: Thank you.

SENATOR LESNIAK: Jeff Klein, American Insurance Association.

Incidentally, we have received correspondence dated May 3, 1985, from the New Jersey Licensed Beverage Association, supplementing testimony they gave at our last hearing, which we will submit for today's record.

Jeff?

JEFFREY M. KLEIN: Good evening. Sitting here before this panel, I have an almost irresistible urge to run down the hall and see if the Assembly or Senate is meeting in Chambers, until I realize that I am in Hackensack tonight.

I'm Jeff Klein. I am an Associate Counsel for Government Affairs in the New York/New Jersey Region of the American Insurance Association. I have a printed statement for the record. I will read portions of it, but I will try to just summarize it for you.

AIA is a national trade association representing 174 property and casualty companies that do business around the country, including here in the State of New Jersey, where we account for about 37% of the total homeowners' premiums in the State. I represent such domestic companies as Crum and Forster, Selected Risks, and a Chubb & Son, here in the Garden State.

As with the other two insurance representatives here tonight, we have a significant interest in this issue, both from a social perspective and from an insurance perspective. We appreciate the invitation extended to us to appear here tonight.

Just for the record, a lot of this has been done on the national level. I lobby, also, in New York; our members have been very involved in drunk driving issues, especially in the 1980s when this has become a major social concern. We have been involved in the Presidential Commission on Drunk Driving, the Institute for Highway Safety in Washington and the programs they administer, and the National

Highway Traffic Safety Administration. Back in 1982, with the Insurance Information Institute, which is the entire industry's public relations arm, we cosponsored an International Symposium on Alcohol and Drunk Driving. This received a great amount of attention and was praised widely in legislative and regulatory circles for bringing many groups together under one roof to discuss this issue. In New York State, I have gotten involved with several groups -- including the County Stop DWY coordinators, the Governor's Traffic Safety Committee -- by going around speaking, helping establish speakers bureaus, and the like.

One particular item that I want to mention, which appears on page two of my statement, is a project I got involved in with some people from Syracuse, New York. There is a firm up there known as Eastern Ambulance. A man by the name of Marty Yenawine, who is a very persistent individual, called virtually the entire industry. By working with him, we got the insurance department to recognize an alternative driving program known as "I'm Smart," which operates out of Syracuse and is extending to other areas of the state, like Rochester and Albany. If someone knows, in advance, that they are going to go out, essentially, to a tavern -- not someone's home -- for a little too much, for a fee, a van will take the driver and his car home. There is a subscription service. It is about $20 or so for a ride. That has received a lot of attention. That is the type of thing that we think the insurance industry can help get involved in. It is good public policy, and it serves all concerned.

We continue to be strong supporters of efforts, in general, to reduce deaths and injuries on the nation's highways. We are pleased that this issue has received the attention that it has in New Jersey, where you, the Legislature, have taken such an advanced and strong role in curbing drunk driving.

But it is clear to us, and I am sure to all of you here tonight, that in passing down the decision of Kelly v. Gwinnell, the New Jersey Supreme Court has, in effect, broken legal ground and established an unusual precedent when it held social hosts liable for any injuries inflicted on third parties, as a result of negligent operation of motor vehicles on the State's highways.

As to the insurance implications of the Kelly decision, I can only reiterate what has been said here before. The short answer to that question is we do not yet know. I have checked with the Insurance Services Office, which is headquartered in Lower Manhattan. It is a rating and statistical organization that serves much of the property and casualty industry. I have also checked with our members. The consensus is that up to the present time, the Kelly decision, which was only handed down last June, has not had any appreciable impact on homeowners' claims.

However, I was told by ISO -- I spoke to them just the other day -- that, probably, relevant claims information for calendar year 1984, which includes the year in which Kelly was handed down, will not be available until, at the very earliest, the end of calendar year 1985, or early 1986. That is about the time frame we are working under.

We do know that in New Jersey and around the country -- just for your information -- the standard homeowner's policy limits, right now, contain limits for liability coverage of $100,000 per person and $300,000 per incident. Standard renter's policy contains limits of $25,000 per person and $50,000 per incident.

It is clear to me, and I am sure to you, that awards for economic loss or noneconomic loss, which we commonly refer to as pain and suffering from Kelly-type suits will eventually be borne by policyholders somewhere down the road if the number of cases is substantial.

And although drunk driving remains a scourge on the nation's highways, we think a delicate balance has to be struck somewhere along the line. That is the judgment, as Mike Velotta said, that you have to make. We have to make the choice whether potentially huge judgments against social hosts -- and the impact that that will have on insurance rates for everybody, in general -- will serve as an effective deterrent against drunk driving, or whether the Kelly case constitutes an unwarranted intrusion into private and personal relationships and decision-making on behalf of both hosts and guests.

But it is clear to us at AIA, and growing up as a middle-of-the-road or liberal Democrat myself, it hard for me to say this, but I think society has become excessively litigious -- and in New Jersey, as well -- and that resort to the courts has become rather commonplace. With that in mind, we just suggest to you that some of the bills that are before the Legislature, including Senator Cardinale's bill, may serve one function: that is, they may place standards and limitations on liability in place in the law before the court's doors are flung wide open. To the extent that that has been a problem in other areas of liability, like product liability, we think it makes sense for the Legislature to consider bills that will create some standards.

I am prepared to say here that we support Senator Cardinale's bill wholeheartedly. It includes in the law a logical, common-sense approach that a host will be judged by definitive negligence standards. We also support Assemblyman Riley's bill, Assembly Bill 347, which would place some limitations on the amount of damages awarded. We leave it to you to determine where to draw the line, but we think, at least, these bills warrant some consideration.

I want to caution tonight that we have tried our best, and I am at a little disadvantage, being in a trade association as opposed to a company, to get hard facts and statistics, but we have just not seen a flood of claims yet. If any are coming, we will not know, at least, until the end of this year.

SENATOR LESNIAK: Thank you. I can state quite clearly my position is to draw the line right through my friend Assemblyman Riley's bill. Do any of the members have a question?

SENATOR CARDINALE: Yes. I could probably ask this question of any of the insurance speakers, but it just occurred to me because you mentioned the limits of the policies which are generally in effect. First of all, are limits higher than $100,000 available? Aren't they available?

MR. KLEIN: I believe they are for an extra premium.

SENATOR CARDINALE: What you are talking about is a kind of standard policy that most people would carry, a $100,000 liability?

MR. KLEIN: That is correct.

SENATOR CARDINALE: It has been my experience -- and I will just offer this gratuitously -- that the average person's home is their principal financial asset; in many, many cases, at least, it is. What would happen if you had a case where there was a minimum automobile policy, and a judgment was rendered in a case for some figure, let's say $1 million, which is not terribly uncommon, and there was $100,000 worth of liability on the part of the homeowner, in terms of the homeowner's coverage? Could their home end up being used to satisfy that judgment?

MR. KLEIN: It has been years since I have attended my tort class, Senator, but my general knowledge of tort law would be that the home could probably be attached unless there is a specific exemption in the law or a specific court rule to the contrary.

SENATOR LESNIAK: It depends on how ownership is held.

MR. KLEIN: It's a question of title and the husband and wife, whether it is jointly owned or whether it is owned by the defendant himself.

SENATOR CARDINALE: The point was made in the decision by Justice Garibaldi and responded to by the Chief Justice, I presume, who wrote the majority opinion, that such a scenario could happen, that even the joint owner -- if the wife was a joint owner with the husband on title -- might suffer the loss of the home. And it just seemed to me that ought to be on the record here somewhere, that awards for damage tend to be fairly high -- much higher than the general limits that most people carry, with respect to homeowner's insurance.

MR. KLEIN: That is the type of thing I personally feel -- and I can speak for my association, as well -- that has to be figured into the policy mix. It is hard, on the one hand, to value a lost life or injury as opposed to a home; on the other hand, I think, we all should maintain some degree of responsibility for our own actions. Some have raised the question as to whether the person who is imbibing too much should not have some responsibility for his own activity in that. Hanging over all of that is the possible consequence of a loss of a home, which has been an accumulation of a lifetime in savings. It is a difficult question of where to draw the line.

MR. LEVINSON: For the obvious reason that there can be more than one cause of an accident. Correct?

MR. KLEIN: Yes, sure. Multiple.

MR. LEVINSON: Just by closing the tap, you can stop an accident as well as you can stop it by not drinking. So there are two ways and two proximate causes; or there can be, as there were in Kelly.

MR. KLEIN: I just question whether the attempts to expand liability in these areas are essentially attempts to find as deep a pocket as possible, above and beyond what might normally be compensable. I hate to use common cliches, but I have learned that there is really no such thing as a free lunch, and someone -- the policyholders, the citizens of the State of New Jersey -- will end up paying for these suits across the board. Of course, it may be a little additional piece per homeowner, but if these cases do become prevalent and if they are severe enough, it is not the question of the victim being recompensed and the money falling from the sky. It is going to be borne by the people and I am just suggesting that that has to be weighed. There has to be some rational judgment made, some limitation.

MR. LEVINSON: Well, of course the more we cut back causes of action, and, in fact, if we cut them back to nothing, then there will be no insurance premiums. Correct?

SENATOR CARDINALE: Wouldn't that be wonderful?

MR. LEVINSON: Right?

MR. KLEIN: I would not be in Hackensack on Thursday night. I love your fair town, but I wouldn't have a job.

SENATOR LESNIAK: And I would be in another line of business.

SENATOR CARDINALE: You could be a full-time legislator. (laughter) You do that so well.

MR. TOBOROWSKY: Can you foresee in the future where the homeowner would have to carry a separate liability insurance policy, such as the licensees do, in the State?

MR. KLEIN: I have been in the industry three years, and my response to that is that would only happen if the frequency in severity of cases became so severe that it was found necessary to segregate that portion of the coverage into a separate endorsement or separate--

MR. TOBOROWSKY: (interrupting) But there is a possibility of that?

MR. KLEIN: I would say remote, from what I have been told about this area. We just don't foresee, as Mr. Velotta of Allstate and Dorothy of Prudential said, a floodgate of cases in this aree.

SENATOR LESNIAK: Would that be subject to regulation? Could you change your coverage without approval by the Department?

MR. KLEIN: Personal lines coverage, especially, are supervised quite rigidly by the Department, and filings would be approved and policies would have to be approved.

MR. TOBOROWSKY: There would have to be legislation.

MR. KLEIN: The Insurance Services Office does a lot of the policy forms for the industry around the country, but they have to be approved on an individual basis by each insurance department.

SENATOR LESNIAK: Okay.

MR. KLEIN: Okay. Thank you.

SENATOR LESNIAK: Thank you, Jeff.

Peter Strauss, Alliance of American Insurers.

PETER STRAUSS: Good evening. I am Peter Strauss. I represent the Alliance of American Insurers.

SENATOR LESNIAK: You used to be Chairman of the National Democratic Party?

MR. STRAUSS: No, that was my dad. (laughter) No, unfortunately, there is no relation to any Strausses with any money.

I represent the Alliance of American Insurers, which is a national property casualty trade association, with over 175 members. I thank you for the opportunity to comment on the issue of social host liability tonight.

Along with the three other insurance representatives you have heard from tonight, our association and our member companies individually have been very active in trying to get drunks off the road

and to educate people about the dangers of drunk driving and what can happen to them as a result. I am not going to go into more detail about that.

SENATOR LESNIAK: We'll accept that.

MR. STRAUSS: You have heard plenty enough.

Let me say, right off the bat, in answer to your question to Jeff -- perhaps I can expand on that -- rates or forms for homeowner's insurance could not change without the approval of the Insurance Department. I have also checked with the ISO and with my member companies and they told me that there are, at present, no plans to change the rates or forms for the homeowner's policy. They don't expect any until there is a beating towards the courthouse steps. Should that rush to the courthouse steps occur and should the courts continue to expand the social hosts liability, it would be likely that the policies and rates would change accordingly.

SENATOR LESNIAK: We don't know; it is too early to determine that?

MR. STRAUSS: Yes, that is absolutely true. Homeowners' policies were never intended to cover anything other than injuries occurring to guests while on the property. Generally, these are the kinds of injuries sustained when the mail carrier slips and falls on the walk or the neighborhood kid falls off the fence.

Courts have now decided that the social hosts have a liability not only to their guests, but to any unknown people that their guests may injure, as a result of their activities as guests. To expand on the court's ruling, who would have the responsibility for a guest who arrives at a party, has a drink and then leaves without appearing to be intoxicated, to go to another party where he has another drink, and then leaves again without appearing to be intoxicated, to go, yet, to another party where he has another drink, and then leaves to go home, still without appearing to be intoxicated? Who would have responsibility if this person got into an accident on the way home?

SENATOR LESNIAK: Do you want an answer to that question? Because based on that fact pattern, none of the hosts would be responsible in that case.

MR. STRAUSS: Well, it is our fear that the courts could expand on their decision in Kelly v. Gwinnell, and perhaps--

SENATOR LESNIAK: (interrupting) Even if the host were a licensee, he wouldn't be liable. You still have to prove negligence. Isn't that true?

MR. STRAUSS: You have to prove that you knew the person was drunk. But what if you didn't know the person? What if this was a friend of a guest of yours who you did not know? How would you be able to tell when that person is intoxicated not knowing the person, not knowing how he reacted? It would be difficult.

SENATOR LESNIAK: Again, the burden of proof is on the plaintiff in those cases.

MR. STRAUSS: We asked--

SENATOR LESNIAK: (interrupting) I'm sorry.

MR. STRAUSS: That is quite all right. You are getting to my point. We ask that you set, statutorily, a standard of negligence, such as suggested in Senator Cardinale's bill. While the court did set a standard of negligence in Kelly v. Gwinnell, we would prefer to see that set in statute rather than have the case loss subject to review every time there is an action.

We agree with groups like RID, MADD, and SADD that the drunk drivers should not be on the road. However, we should not turn insurance, which was meant to protect against losses based on the insured's actions, not the actions of others, into a punishment device for serving drinks to adults.

Let me stop at this point and make it clear that we have absolutely no desire to see the standards for serving drinks to minors relaxed. We need to keep our objectives clear. It is the drunk driver who causes injury and who should be held liable unless there is negligence present. We would like to see you set in statute a standard of negligence.

SENATOR LESNIAK: Any questions?

MR. LEVINSON: I just have one question. You said that homeowners' policies traditionally were for injuries on the premises? That isn't true, is it?

MR. STRAUSS: As far as I know, it is.

MR. LEVINSON: How about the golfer? Situations like that? Didn't they always cover the person who committed a negligent act off premises -- from the time they were first drawn? Their personal liability policy?

MR. STRAUSS: Yes, the personal liability aspect of the homeowners' policy would cover that.

MR. LEVINSON: And it is off premises.

MR. STRAUSS: Yes, that's true, but it is the insured who is covered.

MR. LEVINSON: Yes, but we never intended homeowners' policies to solely apply on premises.

MR. STRAUSS: You are correct, sir.

SENATOR LESNIAK: Okay, thank you.

MR. STRAUSS: Thank you.

SENATOR LESNIAK: Is Judge Kirsch here? Nathan Kirsch? (not present)

By the way, now that we have gone through the insurance representatives, I want to thank each and every one of you; your testimony was very good and very informative.

Are there any questions for Jasper Jackson from the Department?

SENATOR CARDINALE: I am going to ask Jasper the same question I asked of the insurance company about lead time. It has occurred to me, as we have dealt with automobile insurance, for instance, that one of the reasons we have not seen a fall in rates -- despite the fact that we get all kinds of reports with the various things we have done and there have been fewer accidents -- is that there must be a lead time factor--

MR. JACKSON: (interrupting) Yes.

SENATOR CARDINALE: (continuing) --in the experience of the Department, between the incident and the time at which there is an impact felt on rates. What do you see as the lead time?

MR. JACKSON: For automobile insurance, I would say, approximately three years to have really credible statistics. In homeowners' insurance, I believe, it is going to take at least the same

amount of time. The problem is that, assuming that claims begin to arise, even within the first year, there is no way you can look at that first year's body of experience to determine whether or not it is going to be normal, aberrant, or whether or not you believe any trends and the data. And also the first year's volume or the first two years' volume may not be sufficient enough to be considered to be credible statistically. So, in any event, it will take at least three years' time.

SENATOR CARDINALE: Were you with the Department when no-fault first became part of our insurance?

MR. JACKSON: No, I wasn't.

SENATOR LESNIAK: He was in high school. (laughter)

SENATOR CARDINALE: Then it wouldn't be fair to ask you the question.

MR. JACKSON: No, I was not.

SENATOR LESNIAK: Are there any other questions? (no questions)

I presume that the Department doesn't have a position at this time on this whole issue, or do they?

MR. JACKSON: No, I believe that the question of host liability -- whether the social host should be responsible -- is really a legislative problem.

SENATOR LESNIAK: I kind of thought you were going to say that.

MR. JACKSON: We have gone from a scenario, where the traditional view was that the consumer of the alcohol had a standard of care and was held to be totally liable for any actions that resulted from that consumption, to the view that the provider of the alcohol should also be judged with respect to some standard of care in terms of providing alcohol to an individual, whom they could observe may be intoxicated. And, to the point, where we now have the New Jersey Supreme Court saying that, in the sense of a social host, who knowingly serves an individual who appears to be intoxicated, and who knows that individual is going to drive away, that that social host should be held liable. But I think that all of those issues -- the pros and cons -- are really questions for the Legislature to wrestle with.

SENATOR LESNIAK: Thank you, Jasper. Are there any other questions? (no questions) Thank you.

MR. JACKSON: There was one question that the Committee had asked us to address. There were three, actually.

SENATOR LESNIAK: I proposed them, and I forgot them.

MR. JACKSON: One was whether homeowners' insurance covers social host liability; you have the answer to that. Two, whether there has been any increase in rates due to Kelly v. Gwinnell, and you have the answer to that. And three would be what process the DOI would undertake if an increase in rates occurs.

First, there could be no increase in rates due to this phenomenon, unless the insurers were successful in putting statistical and financial data before the Department that convinced us that the rates should be increased due to this phenomenon. What we do intend to do, until we know which route the Legislature is going to go on this, is set up a separate statistical category for this area, so as the claims arise, we will be able to segregate it from other areas of liability and, hopefully, capture the statistics that will demonstrate to us whether or not the rates should be increased or decreased when a company makes a request to do.

SENATOR LESNIAK: Thank you, Jasper.

Is William Schkeeper here? (affirmative response)

WILLIAM E. SCHKEEPER: Good evening, Mr. Chairman and members of the Commission. My name is Bill Schkeeper. I am a trial lawyer. I practice in the private area, representing injured plaintiffs. My practice is exclusively devoted to the representation of victims of injuries, technologies of the professions.

I am here representing the Association of Trial Lawyers of America, the New Jersey affiliate, a group of approximately 2,000 trial lawyers in the State of New Jersey, who practice primarily as I do. It is our belief that the policy of this State, which has been strongly pronounced in order to discourage drinking and driving, is one that should not be diluted by any legislation which has as its effort to limit or restrict the liability of tavern owners for serving intoxicated adults or for serving minors. We also urge you not to

change the existing law as pronounced by Kelly in regards to social hosts.

I asked: What is the problem? The insurance companies have already testified that there essentially is no significant change in the claims that are being made following Kelly. There is, I suggest, no real problem aside from the fear of some problem in the future. It is perhaps premature to entertain legislation which would change the system until adequate data has been generated by the Department of Insurance. I understand that Commissioner Gluck has already testified before that they will be investigating the rates and availability of coverage as to tavern owners. There already has been testimony that there is no anticipated change with regard to homeowners which would affect the social host problem.

With regard to tavern owners, I suggest that if there is any problem in terms of availability, this coverage should be made mandatory for all taverns, thus spreading the risk among the whole population of tavern owners, reducing the individual premiums and providing adequate coverage with adequate limits for the entire population.

The Department of Health, I understand, in prior testimony has indicated that they are prepared to entertain educational programs for tavern owners, bartenders, and waitresses to educate, to certify, and to prepare these people so that--

SENATOR LESNIAK: (interrupting) You are getting a little bit away from the scope.

MR. SCHKEEPER: Okay, I'm sorry. Do you want me to focus strictly on social hosts?

SENATOR LESNIAK: Yes, we would prefer it.

MR. SCHKEEPER: Fine. It has been indicated that there is available insurance, adequate insurance, which can protect homeowners and tenants. There are wide ranges of the limits that are available to these people. The Kelly case does not diminish in any regard the liability of the drunken driver. Unfortunately, you must recognize that the drunken driver most often is in the assigned risk plan with the lowest limits, totally inadequate limits, to cover an event where he runs a child over or maims other people or kills people.

The problem of Kelly is-- Kelly is a symptom; it is not a cause. It is a symptom of the problem of hundreds of thousands uninsured drivers in the State of New Jersey, many of whom how have bad records, who have histories of drunken driving, or who are on the assigned risk plan with inadequate insurance.

As an attorney, it is my obligation to try to get adequate compensation for an injured victim. I do not want to sue a social host if I can avoid it. Jurors, I predict, will not want to give awards against social hosts. They will see themselves in that position. The preferred defendant is the driver himself, but, unfortunately, he generally lacks insurance or lacks adequate insurance.

One solution to that problem would be for the Legislature to tackle the problem of the hundreds of thousands of uninsured drivers. Make sure that there is insurance available to the victim; then we wouldn't have to go looking for a social host. Make sure that the insurance limits are adequate, and $15-25,000 is not adequate these days. There should be, I believe, a minimum of $100,000, or perhaps $500,000, of liability made mandatory for all.

The incremental premium increase for every driver will not be substantial if it is spread throughout the entire population. You can develop a level of coverage with a fair premium that protects all concerned. Make underinsured motorists' coverage, with the same limits as the liability coverage, mandatory for all policies. That way, if I am in a automobile accident with a drunken driver, regardless of where he got drunk -- at home, in a tavern, or at his friend's barbeque party -- if that man or woman does not have adequate insurance I can collect against my own policy through the underinsured motorists' coverage. But to the extent that I have those limits, that should be made mandatory.

It is important for you to realize that to the extent that I am testifying here as a lawyer, as a plaintiff's trial lawyer, personally, perhaps professionally -- economically, at least; not personally, not professionally -- it probably would be better for more and more drunken drivers to be on the road. Let them all loose. There

would be more accidents, more injuries, more claims, more lawsuits. I don't propose that. Get them off the road. Provide adequate insurance for them. That is, perhaps, against my purely selfish economic position, but I don't want this position where there are these people out causing havoc, harm to children, to adults.

I am going to court tomorrow on a case where a four-year-old boy was terribly mutilated in an accident where he was in the back seat of his father's car two blocks from a tavern. A man came out of a tavern; he had been there four hours, drinking gallons of beer and who knows how many ounces of hard whiskey. Two blocks out of the tavern, he crossed the center line and nailed this innocent man's car where a four-year-old son was in the back seat. The boy looks worse than Frankenstein ever did in any movie. His face is torn almost from ear to ear. He has already had numerous plastic surgery operations and he will be operated on probably five to six times before he is 18; he will never be normal. That driver had a $15,000 policy. He had two prior drunk driving arrests and convictions in the course of five years. $15,000 of insurance is totally inadequate. We had to then find out where the man got drunk. Our investigation showed it was a tavern. He had been there with a buddy and they were celebrating somebody's birthday. Both of them were drinking like it would never stop.

One of the basic problems is the inadequacy of insurance for the driver himself. It forces the injured victim beyond that when there is inadequate compensation.

You raised the question of whether homes would be taken away. I know of no case -- certainly none in my office; my office's career goes back some 30 years, although I certainly don't -- in the 10 or 12 years I have practicing and in the 30 years my partner has, and with my knowledge of the practice throughout the State of New Jersey, where, because a defendant had inadequate insurance, his home was taken away. Lawyers don't take away homes. They will look for available insurance policies and they will do their best to get compensation out of those. But we don't take away homes. I don't know of it ever being done.

If you wanted to solve that problem, and if that is the real fear, perhaps some exception could be made so that a primary domicile, primary house of a judgment creditor might be exempt without touching the victim's right to recover from other resources, without eliminating liability. You can protect that if that is the real fear -- saving the man's house. I don't think it is going to happen. I can't guarantee it, but you could, if you wanted to, carve out some exception on that line.

The present system works. There have been so few of these cases. I wonder why the scare. If it is projection of fear over what is going to happen in the next few years, well, let's wait and see. Rather than changing the course and the status of the law now, wait until that data -- hard, firm data -- is available, then reevaluate the situation. Perhaps there will be some need if that data develops as you fear. I don't think it will. I would suggest that you hold back until there is a real justification. There is no present compelling need, socially, legally, morally, or economically to change the system.

SENATOR LESNIAK: I believe Senator Cardinale has some questions.

SENATOR CARDINALE: Why do you say that?

SENATOR LESNIAK: I just have a sneaking suspicion.

SENATOR CARDINALE: Is your organization the same organization that used to have Alan Medvin at its head?

MR. SCHKEEPER: Alan Medvin is the current president of our association.

SENATOR CARDINALE: He is the current president? Okay.

MR. SCHKEEPER: His term expires in June.

SENATOR CARDINALE: He made a statement similar to the statement that you made in the course of a program that we both appeared on. I want to explore that for just a moment. As far as I know, a judgment against a person, which is rendered by a court, becomes a lien on any real problem which they own.

MR. SCHKEEPER: That is true.

SENATOR CARDINALE: And are you somehow indicating to me that trial lawyers do not exercise any kinds of foreclosures on these kinds of liens, whereby those properties could be lost?

MR. SCHKEEPER: I know of not one such occurrence.

SENATOR CARDINALE: That would be very interesting. I know we are in the courthouse here, and I'll bet that if we went outside to the sheriff's door, we would find that they have a sheriff's sale here about every two weeks where liens of one or another type, in fact, are executed against real property on a day-by-day basis. I think some of them, at least, must come out of judgments which are rendered in courts. I think that is the only way that they end up on that docket. I don't understand how you can make that statement.

MR. SCHKEEPER: I make it on the basis of my experience, of my knowledge in this profession, of my association with the predominant number of plaintiff's attorneys throughout this State. I know of no single home taken away from a judgment debtor where the judgment was based on a personal injury action. Those lien sales, the execution sales, are for commercial types of debts, foreclosures on mortgages, and other business-related judgments, but I know of not one that is based on a judgment for personal injuries.

SENATOR LESNIAK: If I may, Senator, I would concur. I am sure there are some, by the way.

MR. SCHKEEPER: I say I know of not one.

SENATOR LESNIAK: I am sure there are some. I know of none either. That is generally not the practice, but I am sure there are some as well.

SENATOR CARDINALE: Your association, I think you said, is predominantly plaintiffs' lawyers, and you indicated that you really are not defending your own financial interests, you are defending the interests of prevention of drunken driving.

MR. SCHKEEPER: And to ensure that the victim of this horrible situation is properly compensated and not left with the door closed in his or her face because the public wants to, somehow, disown the drunken driver.

SENATOR CARDINALE: And as a remedy you suggest that we raise the amounts of automobile insurance to $100,000 or maybe $500,000?

MR. SCHKEEPER: That is a remedy.

SENATOR CARDINALE: As a remedy. As you were saying that, it occurred to me that the irresponsible person who today either does not carry insurance or carries the minimum insurance that the law allows that person to carry, in many instances -- and maybe not all, but in some instances, at least -- carries that amount of insurance because he is irresponsible by nature. He doesn't feel that he needs to protect other people who he might injure. Were we to raise that limit to $100,000, would they not have, in effect, passed off their responsibility, and thereby, be uninhibited in any way from any kind of personal involvement? It seems to me that if you really wanted to get drunks off the road, you would outlaw insurance and say everyone must be responsible for their own actions if they cause an injury and do not have any insurance. Insurance is an act of passing off your responsibility to someone else.

MR. SCHKEEPER: If I may, Senator, I disagree.

SENATOR CARDINALE: Sure. I want your comments on it. That is why I am asking.

MR. SCHKEEPER: I disagree. To remove insurance and to leave the drunken driver and say, "If you are involved in an accident, you are going to pay out of your own pocket; we are not going to permit you to be insured," he is going to respond, "Who cares? I don't own a house. I am judgment-proof. So what?" Just as he is going to go out and with the recidivism of drunken drivers they don't care about the surcharges. They may now since they have gone up. It didn't matter in the past the fact that they could go to jail, lose their licenses, or lose their livelihoods. They did it again, and again, and again. To remove insurance doesn't penalize the drunken driver. It penalizes the victim who is left with nothing. Then he becomes or she becomes a ward of the State. You force them to go on welfare, to be on Medicaid, with no available insurance. Who is going to pay for that? The State, the taxpayers. Isn't it not better to spread that cost among the whole driving population or among the whole drinking population through the tavern owners' insurance? I suggest the latter course as the most sound one economically and it provides the best remedy for all concerned.

SENATOR CARDINALE: Would you also, as an association or as an individual, favor a program -- you want to share this cost by all people -- which does something like we have done with workmen's compensation for all these injuries? Let's take them all out of court. Let's say that all injuries are going to be compensated at certain dollar amounts, as we do in compensation; wouldn't that really be better for the victim?

MR. SCHKEEPER: Senator, not at all.

SENATOR LESNIAK: Let me just interject. You know, Senator, that workmen's compensation is liability without fault. You would certainly be expanding the amount of liability and exposure, if that is what you want to do. I just warn you about that before you get the answer.

SENATOR CARDINALE: If you check the Legislative Index, you will find that I have introduced legislation which would be a preliminary to doing exactly that. That is why I asked this question. I asked the question because of the obvious, and you pointed it out yourself. I am not be overly critical of you as an individual. I hope you don't take offense at what I am going to say, but it would seem to me that there is a great self-interest, particularly for plaintiffs' attorneys, in increasing the limits of insurance and in making insurance mandatory because it does give you a pocket in which you can, yes, have your clients who are victims of accidents compensated, but, yes, it is how you make your living too. I think we both recognize that, and you put it on the record. And I want you to know that I recognize that too.

MR. SCHKEEPER: If I may comment on your other question: Would I, by picking higher limits, feel no responsibility for my actions? I am sure that most of you, and perhaps most of the people in the audience today, have rather high liability limits. I doubt that you go casually driving down the road without any caution about what may happen to you, to your families, or to just your own ego, if you are involved in a serious accident.

SENATOR CARDINALE: That is why I think you missed my point. My point was that those who are already irresponsible individuals-- I

think you used the word judgment-proof. There are many people who are not judgment-proof, but who are less and less judgment-proof as they go up the ladder. Some of those, somewhere in the middle of the ladder -- if you picked $100,000 limit -- if they were forced to pay a premium for $100,000 limit in order to drive a car, I think that some of those would allow that irresponsibility to carry on.

As I think about the Kelly v. Gwinnell case, for instance, I think it is a beautiful illustration of this point. The financial interest -- and I realize it was never finally adjudicated -- of Gwinnell was to place as much of the burden of that liability unto Zak as they possibly could because it appears from a casual reading of the papers that Gwinnell was not, in fact, judgment-proof. Gwinnell had $100,000 coverage and he also had a business. If a judgment were rendered against Gwinnell for greater than the amount of his insurance, it would have gone onto his business, perhaps his home, perhaps any other assets that he might have had. I don't know what all of those are. But it was obviously in his interest to implicate this additional party. That is very frequently the case in any kind of third-party suit. Bring in the other party, you reduce the exposure as a practical matter, if not in technical, legal terms, of the other party. That is a reduction in the responsibility.

Every survey I have read about drunken driving has indicated to me that certain people do it time and time again. They are repeat offenders. Yes, there are some marginal people, and they will only do it once, particularly if they suffer severe penalities and we have certainly put that on them. But these people who are borderline or actually alcoholics, they don't care. If we take away their licenses, they drive without it. If we take away their insurance, they drive without it. Alcohol has become to them an end-all of existence. It is a real problem and we have to cope with it.

But do we cope with that, when we put these kinds of financial burderns on all of the citizenry, including -- if these rates go up -- those people who never have a party, those people who never serve alcohol in their own homes? They too are going to pay that.

MR. SCHKEEPER: Well, if they don't pay it by a small incremental increase, they will pay it by taxes and other societal costs when the State has to pick up the burden for the driver who has no insurance.

SENATOR CARDINALE: All right. Thank you.

SENATOR LESNIAK: Are there any other questions? Assemblyman Miller?

ASSEMBLYMAN MILLER: Just a couple of observations. You made the comment: Why the rush if we don't know about these limits right now? There is no experience factor. I found, through my experience in Trenton, that there are really three bodies to the Legislative Branch: the Assembly, the Senate, and the Supreme Court. I object strenuously to the Supreme Court making rules and regulations. I think it is in our jurisdiction to do so and is our responsibility. So, in other words, we have laws being made by them. I think the Kelly case, in this instance, may be the only case on record in the State, thus the foot in the door. And Lord knows if you get another Kelly case and then another Kelly case, then the next thing you know the criteria is set. Then what happens, you lawyers get together and settle out of court. That is what happens with cases in court. These settlements out of court then reflect back into the insurance policies. But nobody really wants to fight it because if the insurance companies fight it, they are apt to lose three times as much versus what they can settle for. This "wait and see" I don't agree with.

I'll give you other examples: the Mount Laurel I decision -- wait and see; Mount Laurel II -- the judges ruled exactly what we had to do and created all sort of havoc throughout the entire State.

I sort of smiled when you mentioned your approach to this thing. It takes me back again to the insurance problems: Should we have the $200, $1,200 threshold? There was a big argument over that. The lawyers, the legal group, the whole bunch were down on everybody's back because we were trying to do something here that was a little different and all you got was: "You got to stay with the $200." So they went with the $1,200, and I, for one, felt it was pretty good. When I found I was going to save $16, I stayed with the $200. So, we

really didn't do much good at all, but we listened to all this legalese, if you will, about what it was about.

I think the problem here is the effect on the innocent. I, for one, am not a heavy drinker. If I have one Manhattan when I'm out, fine. I may have two. But I will have a glass of wine instead, because I know if I get out on the road and if something happens -- especially since I voted on this no drunk routine -- it might make pretty good headlines for my opposition. So, I watch what I do. I think the average person is doing that. The innocent person, the person who will never, perhaps, get into that kind of trouble, is the one who is being affected by this. And, of course, that effect is having an effect upon the industry itself. I am talking about the beverage industry. It is feeding its way down.

I am listening to this testimony -- and we had a meeting already -- and from what I am observing and hearing, I think the efforts have to be towards getting that guy off the road. As the Senator pointed out, he is the habitual; he is the one who is out there two or three times; he will drive without the insurance; he'll drive without the license. How do you get him off the road?

MR. SCHKEEPER: You don't get him off the road by depriving his victim of compensation. You don't get him off the road by creating caps on recovery. You don't get him off the road by granting immunities. You get him off the road with stricter enforcement.

ASSEMBLYMAN MILLER: I don't argue that point. All I am saying to you is that to make that person whole, the one who has been hurt, somebody else other than the man who caused it is going to suffer for it. And, I think that is the part that we have to watch in our deliberations.

SENATOR LESNIAK: Thank you, Assemblyman. Are there any other questions?

MR. HERRMANN: I just wanted to ask you if you are in a position to suggest what you think the standards should be before imposing the liability on the social hosts?

MR. SCHKEEPER: I think the stated standard is an adequate one: When a social host gives an alcoholic beverage to a visibly

intoxicated person, there should be liability. And a visibly intoxicated person standard is something that has been around for many, many years, and almost everyone in the lay public is capable of making that determination, in my opinion.

SENATOR LESNIAK: Okay. Are there any other questions?

SENATOR CARDINALE: Yes. He has opened up a whole area that we went into at our last hearing.

SENATOR LESNIAK: Here goes dinner. (laughter)

SENATOR CARDINALE: There goes dinner. You think that the lay person is capable of making a determination? I think we are really at the heart of what we have to decide as a Commission. Not to be any other way-- Within the Kelly v. Gwinnell decision, there was a standard laid down, and you enunciated part of that standard. But in the dissenting opinion, Marie Garibaldi says that the court arrived at that by working backwards, by saying he had a 2.8 or .28, or something like that, blood level, therefore, he must have been visibly intoxicated. There was no testimony, as I see it, from anybody but Gwinnell. I believe that Zak made the representation that there were only two or three drinks.

How are we to know whether someone is visibly intoxicated? We have had testimony before this Committee, and I would just like to give you a very brief summary from people who are experts, law enforcement people, who deal with drunk drivers on a daily basis. They have indicated that they take readings and they cannot tell by looking at people what kind of reading they are going to come up with. We have loads of testimony from experts who have been trained, who deal with it on a day-to-day basis, who calibrate the machines, who operate the machines. They can't tell. They have run experiments in their own group and they can't tell when someone is intoxicated on any kind of reliable basis.

How would you set up those standards so that a host, who is not a trained person, is going to be able to tell whether someone who is about to leave his home, or to whom he is about to give another drink to, is really drunk?

MR. LEVINSON: Senator, can't we add that we also had testimony that you can tell?

SENATOR CARDINALE: Yes.

MR. LEVINSON: We had two witnesses who said that you can definitely tell when someone is .15 or more.

SENATOR CARDINALE: Counselor, I would tell you this--

MR. LEVINSON: (interrupting) So, you could add that.

SENATOR CARDINALE: (continuing) If you read again, you will find-- I haven't read what is printed here, but I recall asking the question of the college professor: Was he testifying, based on any kind of controlled studies that had been done anywhere? And he said that none have ever been done. That was his answer. So, I would have to say that people who have told us they are operating daily with a routine and they cannot tell, that testimony is far more credible to me than a college professor who comes in and spouts his expertise in one area, which is not the area we are dealing in, and says there have never been studies.

MR. LEVINSON: Except that is his whole career.

SENATOR CARDINALE: It is his personal opinion.

MR. LEVINSON: And he gave you a great deal more than that, Senator.

SENATOR CARDINALE: It is his personal opinion.

MR. LEVINSON: Plus the fact, Senator, we had another law enforcement person who said you could tell a .15. If we are going to give a hypothetical question to this gentleman, I think we should give him all the information that was presented.

SENATOR LESNIAK: The transcripts of our last hearing are available. You can read it yourselves. Is there a question?

SENATOR CARDINALE: Yes. The question is, what kind of a standard would he apply? For the visibly intoxicated what would you use?

MR. SCHKEEPER: You can use your two eyeballs and your nose and your senses. That is all it takes. The courts for many, many years have said that a lay person is qualified to give an opinion on intoxication among other things. A person will know if another person is drunk.

SENATOR LESNIAK: Let me ask you this: Would the court accept an expert's opinion in a case?

MR. SCHKEEPER: They certainly would, and it is invited. There are experts who do testify is these cases.

SENATOR LESNIAK: In terms of whether a person--

MR. SCHKEEPER: (interrupting) Would or would not be visibly intoxicated? Yes.

SENATOR LESNIAK: Right.

SENATOR CARDINALE: Would or would not, but not whether they were.

MR. SCHKEEPER: Would or would not, yes.

SENATOR CARDINALE: Based on a subsequent reading on a Breathalyzer?

MR. SCHKEEPER: Yes, and based on factual observations by the arresting police officers, by other witnesses who were at the scene. This is a factual question that can't be resolved in one sentence, or two, for every case. Every case will have to be judged on its own merits, based on the witnesses' observations and other factors. Juries are going to be very loathe to apply the visibly intoxicated standard to a social host, as a matter of a visceral reaction.

SENATOR CARDINALE: Have you read the standards as they have been set forth in the proposed Senate Bill 2122?

MR. SCHKEEPER: Yes, I believe I have.

SENATOR CARDINALE: Do you find those standards acceptable or unacceptable?

MR. SCHKEEPER: I think they are too narrow.

SENATOR CARDINALE: Why? What do you find too narrow about them? I would like to know.

MR. SCHKEEPER: I don't have the bill in front of me. I'm sorry. (copy of bill is handed to the witness) Well, I would take issue, Senator, with the-- You say visibly intoxicated means a degree of intoxication accompanied by an act or series of actions or some other clearly unmistakable sign of intoxication. That is overly restrictive and unnecessary.

SENATOR CARDINALE: Now, let's discuss that because we had some discussion from another party, at our last meeting, who had a similar comment. What do you find objectionable in that language?

MR. SCHKEEPER: Everything beyond the visibly intoxicated.

SENATOR LESNIAK: Let's talk about unmistakable.

MR. SCHKEEPER: Clearly unmistakable.

SENATOR CARDINALE: Clearly unmistakable? Is that the language that you find--

MR. SCHKEEPER: (interrupting) That is the most obnoxious of it, if I may use that term.

SENATOR CARDINALE: Well, visibly intoxicated means a degree of intoxication; so far, you're okay?

MR. SCHKEEPER: Well, just visibly intoxicated.

SENATOR CARDINALE: Accompanied by an act or series of actions? Is that all right with you?

SENATOR LESNIAK: It's all right with me. Go ahead. (laughter)

MR. SCHKEEPER: Well, it's vague and not specific, so--

SENATOR LESNIAK: (interrupting) It's okay with me. Go ahead.

MR. LEVINSON: It's redundant.

SENATOR CARDINALE: How do you tell that he is intoxicated if there is something visually there that tells you he is intoxicated?

MR. SCHKEEPER: Well, it can be a number of things. You can smell a person's breathe. You can look in his eyeballs. You can see how he sits or how he talks.

SENATOR CARDINALE: Isn't that what we are saying?

MR. SCHKEEPER: Well, act or series of actions. That could be anything.

SENATOR CARDINALE: Or some other clearly unmistakable sign of intoxication. You know--

MR. SCHKEEPER: (interrupting) Why does it have to be unmistakable? Why does it have to be clear?

SENATOR CARDINALE: Well, if something is not clear to the party who is subsequently going to be held liable, how do you want to hold them liable?

MR. SCHKEEPER: Based on reasonableness.

SENATOR CARDINALE: Based on what? Voodoo?

MR. SCHKEEPER: Based on reasonableness, under those circumstances.

SENATOR CARDINALE: You see the problem I have with that, counselor, is that attorneys take reasonableness to mean all kinds of things, all kinds of shades of meaning, not the meaning that lay people take.

SENATOR LESNIAK: Let's set the record straight. It is the jury that makes the decision, not the attorney.

MR. SCHKEEPER: That's correct. We have to prove this to a jury, not to a bunch of lawyers.

SENATOR CARDINALE: Okay. You really don't like this because you think it should not be quite as strict a standard as it is?

MR. SCHKEEPER: I think the present stated standard, as applied, is more than adequate and provides enough room for defense attorneys to get social hosts off the hook. More than enough room.

SENATOR CARDINALE: With all due respect, I disagree with you.

MR. SCHKEEPER: I respect your opinion.

SENATOR LESNIAK: Okay, thank you, Senator. Thank you.

Florence Nass from the Mothers Against Drunk Driving, Bergen County Chapter?

FLORENCE NASS: Mr. Chairman, members of the Commission, I am Florence Nass, and I am president of the Bergen County Mothers Against Drunk Driving. MADD welcomes the 1984 decision of the New Jersey Supreme Court in the Kelly case, and we also support the previous decisions holding commercial sellers of alcoholic beverages liable for crashes by drunk drivers.

The Kelly case hold social hosts liable only when they serve obviously intoxicated guests. We feel that friends have a responsibility to each other because they care about each other and do not want them to be injured or to cause injuries to others.

Similarly, although our homeowners' insurance covers insurance caused by icy sidewalks, we do not want a neighbor to sustain a fall and a possible broken back, so we are out early on a frosty morning shoveling snow because we care.

The Kelly case, coupled with our farsighted drunk driving laws, has made New Jersey a recognized leader throughout the nation in

the fight against death and injury due to drunk drivers. According to the Insurance Information Institute, the Supreme Court of Iowa has subsequently also held social hosts liable and, in their decision, cited the New Jersey case.

MADD feels that the host decision helps protect the victims of drunk driving crashes, at least financially. Injuries caused by drunk drivers are usually very serious. Medical expenses may be enormous, and the driver's insurance and other resources may be inadequate. The victim has traditionally been the forgotten person in the criminal justice system. Only recently has the New Jersey Legislature, along with the courts, begun to formulate some victim's rights. The right to seek compensation from a social host or commercial seller of alcohol is one of these rights, which should be preserved and protected.

New Jersey policy is trending toward more protection of victims, or even potential victims. The recently enacted law requiring the use of seat belts is an example of this trend. The Legislature is aware that the seat belt use saves a great many lives and prevents some serious injuries.

We believe that third-party responsibility will also save lives, in addition to compensating victims. As Justice Wilentz wrote in the Kelly case, social customs are already changing, and hosts are becoming more aware of the inebriation of their guests. This decision will cause more people to change their party-giving practices, and keeping drivers sober will become the expected norm.

The naming of a designated driver for every group, whether at home or at restaurant gatherings, is a practice MADD is happy to see growing. The designated driver drinks no alcohol at all on that occasion, leaving all guests and social and commercial hosts free of any worries about drunk driving.

Taverns have been operating well and profitably for many years under a decision holding them liable for damages by their intoxicated patrons. Currently, alcoholic beverage servers are being trained to recognize intoxication and how to handle it. Along with the general public's education and awareness, these developments should reduce crashes and lawsuits against bars.

Therefore, MADD opposes any watering down of liability of licensees by the Legislature or an attempt to place a dollar limit on damages. In your recommendations and report, I ask you to think primarily of the victim because one family, in every two, will at some time be affected by a drunk driving crash. All New Jerseyans are potential victims. Protecting the victim is protecting the people. Thank you.

SENATOR LESNIAK: Florence, you wouldn't consider a change in the law that would limit the drunk driver's ability to sue, watering down the responsibility of licensees, would you?

MS. NASS: As I understand it, the drunk driver is the person who is sued first, and then after--

SENATOR LESNIAK: (interrupting) Well, there are some cases where the drunk could sue, would sue, and does sue the licensee, and the licensee can't even impose the defense of comparative negligence on the drunk himself.

MS. NASS: There are things that-- We have thought about that. However, we consider that the person, who has served that drunk driver, is, indeed, responsible.

SENATOR LESNIAK: More so than the drunk driver himself?

MS. NASS: Not more so, but equally.

SENATOR LESNIAK: But the current law makes the licensee more so than the drunk driver. So you wouldn't consider a change in that law as watering it down -- the liability of the licensee?

MS. NASS: The--

MR. LEVINSON: (interrupting) Respectfully, I don't think the current law makes the drunk driver more liable than the licensee. I think that is up to--

SENATOR LESNIAK: (interrupting) I didn't say that. I said it appears-- Isn't it a fact that the licensee can impose a defense of comparative negligence?

MR. LEVINSON: Oh, to that extent, you mean when the drunk driver is suing directly?

SENATOR LESNIAK: Yes.

MR. LEVINSON: Yes, that is true.

SENATOR LESNIAK: You're excused for coming in late.

MR. LEVINSON: I'm sorry.

SENATOR LESNIAK: So, in that instance, what I am trying-- MADD testified at our last hearing. I'm sorry, I really don't know who from the organization testified, but she said, "Our concern is for the victim and not the drunk driver."

MS. NASS: Yes.

SENATOR LESNIAK: There are instances, in New Jersey, where the drunk driver, himself, has more protections than the licensee. Since you addressed that issue, in terms that you would oppose any watering down of the licensees' liability, I just want to make it clear that you wouldn't consider that watering it down because that really goes to the drunk driver. Is that correct?

MS. NASS: In that case, there are probably some qualifications that could be done. But, as I really said, equally, the drunk driver and the licensee are responsible.

I must make some comment about the homes, the concern about the person who might lose his home or her lien on her home. What about the victim: the widow whose husband was killed, who is forced to lose her home because she has no means of support? This is where we need to address it again. It is the victim we are talking about. I think that New Jersey has cared about that, and we should continue to.

SENATOR LESNIAK: Are there any questions?

SENATOR CARDINALE: I have discussed this issue at great lengths with Florence; I have been before her group. I wonder if you could comment on some specific language. If we were to establish a standard, whereby liability would follow, if the host observes the guest exhibiting obvious, visible signs of intoxication--

SENATOR LESNIAK: (interrupting) Are you amending your law?

SENATOR CARDINALE: (continuing) If that were the standard, would you accept that standard?

MS. NASS: I think that is kind of a moot standard. In my opinion, whether, in fact, that person is extremely intoxicated or intoxicated in any way, if I were a host, and if I even imagined that one of my guests was slightly intoxicated or showed any little sign, I certainly would not serve him again. And I think that that person

should be responsible because he can go out and kill someone. So, you--

SENATOR LESNIAK: (interrupting) Would you go further?

SENATOR CARDINALE: I think your behavior--

SENATOR LESNIAK: (interrupting) Would you go further than not serving them again?

MS. NASS: Yes, I would make sure that they got a ride home, or that someone else took them home, or that they slept over at my house.

I brought with me an article from The New York Times, "Let's Not Water Alcohol Laws," which gives many suggestions on how we can protect ourselves. I also brought two articles from The Record, which would support that law. I have them with me if you would like to take them.

SENATOR CARDINALE: He may want them. The articles in The Record I have read.

MS. NASS: How about The New York Times? That is the one I have.

SENATOR LESNIAK: If you want to submit them for the record, we certainly will make them part of the record.

SENATOR CARDINALE: But I would like to get back to your answer to the question because I am not clear on how you feel about the language. You answered by telling us how you would behave at a party. I consider that exemplary. It's what I would expect, knowing you. It is what I would expect you would do. But what we are talking about is establishing a standard of liability. Do you feel that people should be held to a stricter standard than observing a guest who is exhibiting obvious, visible signs of intoxication?

MS. NASS: Yes.

SENATOR CARDINALE: Okay. What is the standard then that you would want if you want it stricter than this? This is the standard that was testified to by another chapter of MADD which testified at the last hearing. What is the standard that you would like to see?

MS. NASS: As I have said, I think any hint of intoxication is something that should be addressed. What we have heard here, from

the testimony, is there are very few cases that have come up, and, therefore, it is, obviously, a good deterrent and that people are careful now when they serve someone. I consider, and I believe that MADD considers, this a real deterrent, more than a means to get money or to protect anyone else. I think that just knowing that there is the possibility, people will be careful. They won't worry whether that persons are very, very intoxicated or slightly intoxicated. They will see to it that they don't get out there and drive. I believe part of the Wilentz decision was that besides being physically intoxicated, you have to have the knowledge that they are going to drive. That, too, would be another deterrent.

SENATOR CARDINALE: You see, the problem that I see with the decision is not that portion of it. I think you are aware of that. The problem is the jumping in the logic from a subsequent reading to saying that, therefore, the person must have been visibly intoxicated.

Again, I would say -- I know you were in the room -- that experts, who do this on a day-by-day basis, have testified before this Committee that they can take a reading and find people who are intoxicated that they never dreamed, even as trained professionals, were intoxicated. Now, in light of that, if you could accept that for the moment as being a fact, would you feel that we should not impose, or we should impose, liability on persons who have no way of clearly knowing that the person before them, the one they are going to give another drink to, is intoxicated?

MS. NASS: Again, I think, as the counselor said, if you smell alcohol on someone's breathe, if their eyes are bleary, if their speech is slurred, or if they walk with an unsteady step, you have a suspicion right then and there that that person--

SENATOR CARDINALE: (interrupting) Isn't that what we are talking about? Isn't that visibly intoxicated?

MS. NASS: But the point is if they are, to your knowledge, visibly intoxicated and you allow them to go out and they, indeed, do kill or injure someone, then you know that obviously they were intoxicated. Whether it comes out to .28 or .13, they have killed or injured someone. I think that is answer enough. You, as a host, in

that case, did have that obligation, just by seeing those few signs, to stop them.

SENATOR CARDINALE: Florence, maybe we have been misunderstanding one another. What you have now enunciated is that signs of visible intoxication-- You have named some of those signs of visible intoxication, and I believe what you have said is that then the responsibility ensues. Would you feel that if you gave me a drink right now, and if I walked out, got into my car, and got into an accident that you should be held liable?

MS. NASS: Not if I gave it to you--

SENATOR CARDINALE: (interrupting) I mean right now in this circumstance that we are together with one another?

MS. NASS: Yes. I looked at you and I didn't see anything. You have not had a drink in my home. You can go out and have a drink. If you have had one drink--

SENATOR LESNIAK: (interrupting) I wouldn't serve him orange juice. (laughter)

Let me make something a little clear for the Senator. The Supreme Court didn't make a determination in this case. This was a motion for a summary judgment, so they have to view the facts as most favorable to the plaintiff. They didn't really reach that issue.

Thank you, Florence.

MS. NASS: Thank you.

SENATOR LESNIAK: Are there any other questions?

SENATOR CARDINALE: They reached that issue. It was a point of debate between the assenting and the dissenting opinion. I understand it, but they treat it and that is guidance.

SENATOR LESNIAK: That is what you have to do on a summary judgment.

SENATOR CARDINALE: But it is guidance. They are establishing standards there.

SENATOR LESNIAK: Not really. We'll talk about it some other time.

Lorraine Roy, from Remove Intoxicated Drivers, RID.

SENATOR CARDINALE: How have you been, Lorraine?

LORRAINE ROY: Fine.

SENATOR CARDINALE: Lorraine was on the same program with Alan.

MS. ROY: I was the other one, opposing some of the things that you were saying.

ASSEMBLYMAN MILLER: Before you start, Senator, I must say that Lorraine contacted me; she is in my district. She wanted to get on this Committee, but I'm sorry, Lorraine, they put me on instead.

MS. ROY: They put you on? (laughter) I know you too well, very well, in this and many other jobs in the future.

My name is Lorraine Roy, and I am State Coordinator for Remove Intoxicated Drivers. I am here to take from this board as well as to, hopefully, answer any questions you may have. The issue of social host liability is an important issue with the RID organization.

Following the Supreme Court Decision, we obviously came in contact with members of the public, and very early on learned that the public had an unrealistic-- Perhaps they did not know the Supreme Court decision. In our contacts with the public, we met people who would say, "Does this mean if I serve somebody a drink and they have an accident then I am subject to liability?" Of course, we were particularly concerned because we find that it is impossible to get to every individual in the State of New Jersey to say: " No, that is not what the Supreme Court said." But we felt that we had a duty to the public to let them know what, in fact, the Supreme Court ruling was, so they would know not only what their responsibilites should be but also how far their liabilities go.

In my humble opinion, it would appear to me that, perhaps, the Legislature is attempting to clarify, but I hope not to further abridge, the ability of victims to obtain judgments about the social hosts.

I might call to your attention that as early as September of last year, we had requested from the State of New Jersey, or had made notice to the Division of Motor Vehicles, that, perhaps, this was a keen issue and we had, in fact, applied for a grant. That grant was

just awarded to us within the past week or two. I understand it was during the last week in April. It will now be our duty -- thanks to a $10,500 grant -- to advise the general public of what their liabilities are. In other words, as of today, we are telling people that their liability, as defined by the Supreme Court, is: If a social host continues to serve someone who is visibly intoxicated and he or she knows that person will be driving home, in that case they are, in fact, liable. We will all be saying this in our sleep tonight.

If there are any reasons that you feel you might be further defining that, then I would ask that you please let us know this and, ultimately, give us the recommendations that this Commission will give to the Governor.

I would like to make a comment--

SENATOR LESNIAK: (interrupting) I believe that the recommendations will be given to the Legislature, by the way.

MS. ROY: Not to the Governor?

SENATOR LESNIAK: He can see them too.

MS. ROY: Will you let him see them? (laughter) Okay, fine.

SENATOR LESNIAK: They will be released to the public.

MS. ROY: Whatever you do, can we please have a copy?

SENATOR LESNIAK: Absolutely.

MS. ROY: There were comments made earlier in regard to the social hosts, comments about whether or not the home will be lost if there are no upper limits, if there is a judgment above $100,000. To go a little further, yes, in fact, there are liens put on property and, of course, there are foreclosures. We all know that. I believe there is a possibility that we hold off on execution of such liens until such time as the property is normally sold. It doesn't mean they don't get their money.

But going beyond that, it distresses me when I hear any of us pleading the case of the poor person who, by definition, would have continued to serve an intoxicated guest. I don't feel sorry if that person is liable. And I would hope that you don't feel sorry. I would pray that you do not limit the liability on that individual when

someone has a valid claim for, certainly, pain, suffering, and beyond that. I plead with you to think about that. Let us remember that we must think about the plaintiff who is suing that individual; he should certainly have a just cause. The jury will decide upon the verdict. Let us not let the Legislature decide what that judgment figure is going to be. I ask you to please don't do it. Let the jury hear the matter. Let the jury decide the judgment. And let us stop talking about the poor helpless host. That is not what the Supreme Court said. The Supreme Court did not say that if someone served one drink, he is going to be liable. They are talking about someone who blatantly ignores any consequence of serving someone who is intoxicated.

SENATOR LESNIAK: You shouldn't use that language. He is going to put it into his bill.

SENATOR CARDINALE: It's there already.

MS. ROY: Well, the Senator and I had a debate about the bill before, and I don't want to go into it, because he knows my comments. But if anyone would like to ask me any more questions, I would be happy to put it on the record. As you say, you want to make the laws; you don't want case law, in fact, to be the matter. This has come to pass. It is a positive thing. It is a deterrent. It is an important deterrent. But we must eliminate this fear due to lack of knowledge. RID will hopefully get out into the public and let them know when they are not liable.

SENATOR LESNIAK: Senator, do you have any questions at this time?

SENATOR CARDINALE: Yes. What are the standards which you are going to use in informing them?

MS. ROY: Insofar as standards, we will be using the rule of the Supreme Court. Okay?

SENATOR CARDINALE: Visibly intoxicated? Suppose someone says to you: What does that mean, visibly intoxicated? Does it mean slurred speech? Does it mean not being able to stand up correctly? Does it mean not being able to walk a straight line? What does visibly intoxicated mean to you?

MS. ROY: Do you want to know what it means to me?

SENATOR CARDINALE: Well, you are going to advise the public. I'm interested--

MS. ROY: (interrupting) Senator Cardinale, I assumed that you would be asking me that question in a forum. I would say the normal standards: if you see someone who has slurred speech, or who is spilling a drinking, or who has stumbled on the way to get an hors d'oeuvre, et cetera. It is the normal standards that people mostly have.

I think one of the questions in part of your bill is that one cannot use the standards solely of a Breathalyzer. They must have corroborating evidence. That would, of course, be corroborating evidence.

SENATOR CARDINALE: But I don't understand--

MS. ROY: (interrupting) But you are excluding the Breathalyzer in your bill, I might add. You are excluding that if there is no corroborating evidence.

SENATOR CARDINALE: Yes.

MS. ROY: I question why you are doing that.

SENATOR CARDINALE: Because we have testimony that says that the Breathalyzer reading can be above the .1 in many cases where there is no visible sign.

MS. ROY: Well, I assume that a jury, again, would have an opportunity to know that the reading was .10, .11, and that there were no other signs of intoxication that guests might corroborate. So, therefore, the plaintiff would not have, in fact, proven to the jury that this guest was visibly intoxicated. The plaintiff has to prove that.

SENATOR CARDINALE: I understand that. But what I don't understand, if you are willing to allow--

MS. ROY: (interrupting) I am not an attorney, I might add. (laughter)

SENATOR CARDINALE: If you are willing to allow a jury to make that determination, and a different jury in each and every case, why is it that you object to writing that standard -- the same standard you are talking about -- into the law on a legislative basis?

MS. ROY: I don't know that I said that I object to writing that standard. What I do object to in your bill, and it isn't much, Senator, I might add-- I am happy that you decided to initiate this bill.

SENATOR LESNIAK: The Senator just raised a point that I find very objectionable. What if I had a .50 reading on my test and no other corroborating evidence -- there were no other guests there; I couldn't get anyone else to testify because there wasn't anyone else there -- would you also say that the third party wouldn't be able to--

SENATOR CARDINALE: (interrupting) There is the problem. And it is a problem that you are always going to have. You would handle it one way as an attorney. As a layman, I would tell you this. I'll put myself in a position of a social host, who, now, is seeing someone who is acting as sober as you are acting. I have seen you in other conditions, (laughter) but I believe you haven't had a drink. I really believe that. If I gave you two drinks here and now and you walked out and a half-hour later were involved in an automobile accident, and maybe three-quarters of an hour after that, you were given a Breathalyzer examination and you came out way up on the scale -- whatever; .5; I think you would really have to be dead; you couldn't be alive--

SENATOR LESNIAK: (interrupting) 2.5.

SENATOR CARDINALE: 2.5. Very high, 2.8, Kelly v. Gwinnell. It would seem to me that, absent anything that I had any control over, I should not be held liable because a number of other circumstances could have led to that level. That level should not be evidence that I gave you the drink. You could have had a bottle sitting underneath the front seat of your car, if you are one of these drunks we are talking about. You could have swigged a half of bottle of Scotch in a couple of seconds, thrown the bottle out because it was empty, and went down your merry way on the highway. That could have occurred.

SENATOR LESNIAK: And you would eloquently argue that to a jury?

SENATOR CARDINALE: No.

SENATOR LESNIAK: And those are the facts you would want.

SENATOR CARDINALE: The fact that would have to be argued to the jury, under the standards of this bill, is that there is no evidence that you were served while you were visibly intoxicated. I think that is what we ought to be holding people to. If there was no one to witness a murder and there was no evidence of a murder, but a murder did occur, we don't automatically say that the last person you were with must have killed you.

SENATOR LESNIAK: But we don't--

SENATOR CARDINALE: (interrupting) The last person someone else saw you with.

SENATOR LESNIAK: But we don't exclude evidence. We don't exclude circumstantial evidence.

SENATOR CARDINALE: I am not suggesting that we should.

SENATOR LESNIAK: Your bill does.

SENATOR CARDINALE: No, no. I am not saying that is not evidence which proves that I gave you the drink.

SENATOR LESNIAK: I think the terminology of the bill needs some work.

MS. ROY: May I say something? That is a particular problem that I see with the bill. It is saying that if there is no corroboration, we must throw that evidence out. I don't think that is the correct way to address it, if you will forgive me. I do not agree with that.

SENATOR CARDINALE: I'll forgive you.

MS. ROY: Okay. I cannot believe that-- If there is no other evidence, then the plaintiff would not be able to prove his case. And you can have someone with a .28 who has been served by the social host. I think that juries will adequately decide. I don't think that-- Well, I don't know that there is any evidence that there are a lot of suits. There is one important point that I don't agree with, and that is, the elimination of the use of the Breathalyzer, as stated in your bill, if there is no other corroborating evidence. I strongly object to that because you would eliminate some very valid claims.

ASSEMBLYMAN MILLER: If I may point out, Lorraine, I think that would be a field day for lawyers, without that kind of a statement. They could turn right around and twist around--

SENATOR LESNIAK: (interrupting) There is a lawyer on the other side too.

ASSEMBLYMAN MILLER: I understand that, but you are talking about a jury. You are talking about the poor kid, the four-year-old who we just heard about before. It is a case of lawyers with the bleeding heart approach, and the next thing you know everybody is accountable. I'm not for getting away with it; don't get me wrong.

SENATOR LESNIAK: I wouldn't call protecting the rights of a four-year-old who is seriously injured in an accident a bleeding heart case.

ASSEMBLYMAN MILLER: (interrupting) No, I'm saying to take any case you want. Some of you lawyers are pretty good actors. You do a good job on the jury. I have been with you -- on the opposite side, I might add.

SENATOR LESNIAK: Sounds like he has lost a few cases. (laughter)

ASSEMBLYMAN MILLER: What I am saying is that what bothers me is to find that point at which you can honestly hold the host liable. As was explained by one of the witnesses at the last session, you can come in and have one drink and be perfectly okay. Then you have two for the road on the way out the door; you were sober when you left, but the two for the road were enough to put you over the top. Ten minutes later, going down the road you had an accident. I didn't see. You were perfectly okay when you left. How do you hold that person liable?

MS. ROY: (interrupting) Oh, I understand. I think-- Excuse me.

MR. LEVINSON: You don't. You don't hold the person liable.

ASSEMBLYMAN MILLER: But if you take this out of the bill that the Senator has, then it is a case of one lawyer's word against another lawyer's word, and the host is out in the wind.

MS. ROY: As I read it, what I was reading is that you cannot use the Breathalyzer in the absence of corroborating evidence. All right? The jury will have to weigh, if-- I don't want to get into individual cases. Lawyers, back there, are going to hit me over the head because they are better at this.

SENATOR LESNIAK: No, you're doing very well.

MS. ROY: They are better at this.

SENATOR LESNIAK: You're pretty good.

MS. ROY: If there were a hypothetical case where someone had a .15, from the evidence from the Breathalyzer, or if a blood test -- because the defendant had been injured -- said a .15, and there were witnesses from a party who said that this individual did not display visible signs, it would seem to me--

SENATOR LESNIAK: (interrupting) Plus, I'm sure the defense attorney would bring in an expert, like we have heard from the testimony, and say, "I have seen a thousand of these cases; I can't tell one from the other."

MS. ROY: That's right. I believe that the jury would certainly weigh the opinions of the defense witnesses who say, "This person was never visibly intoxicated." Maybe they had a flask; maybe they went to someone's house en route. The jury will weigh this. But as I read this law, it throws out the Breathalyzer. I think that--

SENATOR CARDINALE: (interrupting) There is a reason for that, Lorraine. Let me explain it to you. I want to explain the reason why that is there.

MS. ROY: Okay.

SENATOR CARDINALE: I don't think you really understand. Most of these of cases will never get to a jury.

MS. ROY: Most cases don't.

SENATOR CARDINALE: The greatest percentage of the cases that will be brought -- including Kelly v. Gwinnell -- never go to a jury. Those issues are never going to be tried. What is going to happen is the social host is going to be held liable because, in effect, they are going to settle, not wanting to be exposed to the trial for a number of reasons.

One is because of the expense of going to trial; that in itself is a major expense. The practice in almost all auto cases is that they are settled. It is the rare exceptional case that goes to trial.

Second, the tendency of juries in New Jersey has been to make outstanding awards. Now, whatever factual basis they make them on--

SENATOR LESNIAK: (interrupting) We don't have any factual basis for the Committee on that.

MR. LEVINSON: I really would like to see the proof for that, Senator. I am sure you can't make that stand up.

MS. ROY: Please continue, Senator.

SENATOR LESNIAK: Wait a second. Who is the Chairman? (laughter)

MS. ROY: I want to hear what he has to say because I don't believe it either. (laughter)

SENATOR CARDINALE: Let me back up a hair. I have asked insurance companies-- There is a fellow here who is going to testify on a case that he had; I see him sitting in the audience. I just whispered to him asking if he wanted to testify. I presume he is going to testify about a case. I asked his insurance company why they settled because the fact pattern in that case -- as his insurance company described that fact pattern to me -- was nowhere near Kelly v. Gwinnell. He will tell you the fact pattern himself. They said, "We will not expose ourselves to what might occur in a courtroom. We would far prefer to settle." They didn't settle for $25,000; they settled for many dollars. I'll let him tell you about that, as much of the case as he wants to tell you.

The problem is that then that is going to impact on all of the population. In automobile cases, it is not the settlements that are arrived at by a jury that create the rates that we are all paying; it is the settlements that create the rates that we are all paying. So, to say that we are going to have standards that a jury can evaluate on a very loose basis, leaves us open to a number of problems.

One of those problems is that one jury may give an amazing award and another jury may give nothing on the same facts. That is

possible. That is why it is better to have our laws written down somewhere, not just in terms of previous decisions.

I like to give an example when I talk about previous decisions. Please pardon me for one more minute; I don't often get the opportunity to put things like this on the record. If you ever watch a carpenter building what is called a stick-built house, you will see that when the lumber comes to the job -- if it has eight-foot walls, for example -- he cuts all his studs to a given length. He takes the first one and he cuts it to that length; he measures it with a ruler. He uses that stud as the pattern for the next one. Now a good carpenter builds a house where the walls are level. What he does is, he uses stud one as the pattern for two, stud one for the pattern for three, and four, and so on. One is always the model.

But what we do in the kind of law that you are suggesting is we use stud one for two, stud two for three, and stud three for four. I would suggest to you that many times the walls would come out like this. That is the way some of our laws are. They are uneven. We should have an even application of law. The only way we can arrive at that, to my knowledge, is by writing it down and saying to the court and to the jury: These are the standards. We can discuss what those standards ought to be. I think that is very productive. But I find it very difficult to accept that we shouldn't have standards, that we should leave all of these determinations open only to a court to decide at some time, whatever mood happens to strike them. Why is it to be different?

Is there any difference for the victim who is being judged by the New Jersey courts as opposed to somebody who was over in Rockland County at a party? There are certain general standards of decency that we should be observing. Because we happen to have a court that is noted -- I'm not giving you any information -- as being one of the most activist courts, if not the most activist court in the entire country, should there be different standards then imposed on the people of New Jersey, who haven't selected that court?

MR. LEVINSON: How about legislatures that all have different laws, Senator? Should we have the same laws that they have in Kansas?

SENATOR LESNIAK: Okay. First of all, I'll take the laws of the State of New Jersey over any other state. I'm not going to venture my opinion based on what other states do. Thank you very much for your testimony.

MS. ROY: Thank you.

SENATOR LESNIAK: Captain Bob Herb of the Bergen County Police Department. Captain Herb, thank you for staying around to testify.

BOB HERB: Thank you, Senator. Mr. Chairman and members of the panel, I am here tonight not in my capacity as a Captain of the Bergen County Police and Coordinator of Bergen County DWI Strike Force, but I am here as a homeowner and as a resident of this State. Perhaps I may add something to this panel in assessing the feedback that I get in my daily contact with members of the public as to their interpretation of this host liability law, their fears and doubts, and where it leaves them as far as, perhaps, increasing the homeowner's liability to some enormous amount.

The public is confused. The public is frightened. I am not going to discuss tonight the merits of the Kelly-Zak case, whether a .28 is visibly intoxicated. It is subject to interpretation, at least from the panel or members of the audience. What I am going to talk about tonight is a certain danger that the Kelly-Zak case has opened up, a certain Pandora's box. When a Judiciary had decided on this case, and used the convenient term of visibly intoxicated, they thought that was the end of the problem.

If this decision is enlarged down the road to include not visibly intoxicated, but legally intoxicated, where is the fine line between visibly intoxicated and legally intoxicated? It's intoxication.

SENATOR LESNIAK: Do you want a answer to that?

MR. HERB: I'll answer my own question, Senator. (laughter)

SENATOR LESNIAK: No, you won't, not as long as I am Chairman of this Commission. (laughter) If I may? It is my understanding that the visibly intoxicated standard has been in our law for a long time. But what we are talking about is the expansion of the duty concept, not

an expansion of the negligence concept. I think that is what the Kelly case is all about.

MR. HERB: That's true. But should the next situation arrive, where a legally intoxicated driver is involved in an accident and injures someone, and the case comes up where a third party, a host, had served this person to legal intoxication -- let's say to a .11 or .12; let's say the police tested the person after the accident and that person was .11 or .12, perhaps not visibly intoxicated-- I am in charge of this DWI Strike Force checkpoints. I can concur in a manner with Senator Cardinale that very often until we get a person out of the vehicle and put him through a series of physically coordinated tests, we cannot make a determination to arrest him for drunken driving unless that person fails these coordinative tests. Up until that point, when that person fails the coordinative test, there is a fine line as to whether or not the person is intoxicated enough to arrest.

I have heard testimony here tonight about the poor homeowner: Don't worry about the homeowner, worry about the person who gets injured. Sure, that's right. Worry about the person who gets injured. That's true. I have heard testimony here tonight that no jury is going to convict when you have right on your side and it will be blown out of court. Damn it to hell, what is to determine what the jury will do? Like Senator Cardinale mentioned, maybe they will go for it this time or against it the next time. It is a variable.

Why should the New Jersey homeowner spend many a sleepless night until his case gets on the calendar -- a year's time, or whatever it takes to get on the calendar -- tossing and turning in his bed at night because he has $200,000 homeowner's liability on his home and he is being sued for $300,000? Where does it come from?

I think what we are starting to see in New Jersey is a series of frivolous suits that will arise with each succeeding Judiciary decision, unless you develop parameters in the Legislature as a check and balance system. Interpretation of a three-panel court, or three-member panel Judiciary, could just about go for anything. Going for legally intoxicated could be the next decision.

I am not particularly directing this against the Judiciary. But it has to have what you are doing now: study, feedback from the public, and a lot of thought. The residents of New Jersey depend as much on the Judiciary as they do on the legislative process. That is important too -- whether it can be defined legislatively. I think this is where it has to lay.

In concluding my statements tonight, there seems to be an atmosphere in New Jersey that is building up, that is blaming everyone except the fellow who consciously choses to go out and drink, consciously choses to get intoxicated, and then consciously choses to step into that motor vehicle and take the change and drive intoxicated.

It seems that everything is shifting over onto everyone else's responsibility for that person. Fine, we are all responsible for each other in society to a great degree. But it seems that there is more of a shift over to the side of the employer, the party, the bartender, the restaurant owner, the host, and now the police officer when he releases a fellow from custody and he gets killed -- he is still held responsible. Where are we going to end?

It is up to you to put the brakes, as a check and balance system, on the Judiciary. You are all equal: Executive, Legislative, Judiciary. There has to be a check and balance system. That is put into your hands. I commend you for making this panel to discuss this, rather than letting it stay in the hands of just the courts because it is going to be holiday out there with frivolous lawsuits. As I said before, why should a homeowner, even if he is right, have to worry? Did you ever have a suit against you? You worry about it until it is cleared. Just think of the ordinary person.

Testimony was brought forth here tonight: What about drinking before they get to your house? What about drinking after they get to your house? If I was over at Senator Cardinale's house and I drank 45 minutes later in a tavern, I would say I was over at his house for credibility. I wouldn't tell the police I was in a tavern. Is it credible? Yes, it is credible.

These are the problems that arise. A few drinks before they get to your house, then you serve them two drinks, and a few drinks after they leave your house. These are the problems. These are the gaps in it. What more have I got to say but that?

SENATOR LESNIAK: I just have one question. You heard the testimony of the representatives from Allstate and Prudential?

MR. HERB: I believe I did.

SENATOR LESNIAK: Would you say that testimony supports your concern about frivolous suits being filed as a result of the Supreme Court decision?

MR. HERB: From what I can remember-- I think I stepped out when one of the gentlemen was talking.

SENATOR LESNIAK: Let me refresh your memory.

MR. HERB: Refresh my memory.

SENATOR LESNIAK: Okay. Prupac, which writes 187,000 policies in the State of New Jersey -- somewhere around there -- has one suit on file. Allstate, which probably writes about two or three times as many, has 14 cases. Would you say that would constitute an awfully lot of frivilous suits being filed?

MR. HERB: This is a new decision, Senator. Wait till it starts to roll. That is my answer.

SENATOR LESNIAK: (conferring with aide) How old is this decision?

MR. HERB: It was last year, wasn't it?

SENATOR LESNIAK: June of 1984.

MR. HERB: June of 1984. It takes a while to sink in in New Jersey, but wait till this ball starts rolling.

SENATOR LESNIAK: Not to the trial bar it doesn't. I can assure you that. Thank you for your testimony.

MR. HERB: Thank you.

ASSEMBLYMAN MILLER: I agree totally with him. Can I just point something out? In keeping with your line of thinking, Bob, the point really is to avoid having two innocent victims with two tragedies instead of one. When a person gives a drink to a person who doesn't really look intoxicated, and then he goes out and does have an

accident, then the person who has the accident turns around and sues the host because of the liability he had not to give him that drink. That is something else that bothers me. If you are the one who caused the accident, I think the prime responsibility is right there. I recognize also that the host does have a degree of responsibility. That is part of it.

MR. HERB: Definitely. It's up to you.

SENATOR LESNIAK: Thank you, Captain.

Robert T. Baer, All Citizens Against Unjust and Severe Enforcement, A-C.A.U.S.E.

ROBERT BAER: If I may preface, gentlemen, I am most interested, of course, in the testimony from this side of the table, and, certainly, I am delighted and encouraged in hearing testimony from folks on your side of the table. It is unfortunate that the entire State of New Jersey is not cognizant of your attitudes.

SENATOR LESNIAK: We tried to get CBS TV here. (laughter)

MR. HERB: No Oscars tonight, fellows.

My name is Robert T. Baer. I am president and co-founder of a citizen's group known as A-C.A.U.S.E., the acronym for All Citizens Against Unjust and Severe -- as opposed to the other term on the speaker's list -- Enforcement.

We are entering our second year. We were founded approximately one year ago this past month and we represent some 6,000 citizens of New Jersey and/or petitioners. We are growing daily in numbers, I'm happy to say, and in credibility in our role as the "only organized opposition" to the DWI legislation as such, and in its related manner of enforcement including opposition to the social host decision. This is the reason we are here tonight.

Our objections to the social host ruling are based in part on the following:

1. We agree with Associate Justice Marie Garibaldi of our New Jersey Supreme Court that the ruling would place "an almost impossible burden on the hosts who entertain in their homes."

2. We agree with Monmouth County's prosecutor, John Kaye, when he said even "super vigilance" cannot always protect a host from

being sued. The prosecutor went on to say that the cost of a lawsuit could be devastating and "everything you own could be on the line."

3. We agree with the Legislative Study Commission who endorsed a bill that would exempt social hosts who serve alcohol from civil liability, and which committee concluded the measure "puts the onus on the person doing the drinking, not the host."

4. We agree with Assembyman Robert P. Hollenbeck of Bergen County and Assemblyman David Schwartz of Middlesex County, the bill's co-sponsors, Assemblyman Hollenbeck claiming the Supreme Court decision "unfairly forces people to act as their brother's keeper."

5. We agree with the editors and columnists of our leading newspapers throughout the State, best illustrated by The Asbury Park Press in their editorial of August 2, 1984, shortly after the ruling and the decision by the Supreme Court, wherein they stated: "There is such a thing as overkill. No one condones the carnage drunks cause every year. However, it makes little sense to makes hosts responsible. The litigation would be endless and the only ones to profit from the ruling would be lawyers. The average person does not drive drunk and can control his liquor intake."

6. Furthermore, we agree with the 418 persons of 463 responding to a press poll of its readers, wherein they expressed overwhelmingly their opposition to the court's ruling, and whose obvious opposition is echoed by the majority of New Jersey's citizens, as further borne out by an Eagleton Poll in which near 70% of those polled opposed the social host decision.

7. Finally, we agree with Governor Kean who expressed, "I think the Legislature should have done it instead of the court. The court made law."

Chairman Lesniak and members of this Committee, we respectfully submit that the social host decision is merely another extension of the fear, hysteria, and paranoia perpetrated on our society through a neo-prohibition movement spawned some four years ago.

No one wishes the drunk driver on our roadways, nor do I, nor do the thousands of supporters of our organization, A-C.A.U.S.E.;

however, in attempting to legislate morality, as proven in the past, we can only anticipate failure.

Those legislators responsible for the passage of no less than 40 alcoholic-beverage related bills in so brief a time frame have even thrown their own hands up in despair, as best summarized by Senator Caufield who recently expressed: "Let's let the dust settle and see what we have done."

Furthermore, Assemblyman Walter J. Kavanaugh's comment that "A lot of people think we are forcing things on them without getting their input," says it all.

Additionally, Senator Frank X. Graves' observation in that without such opportunity to permit telling "who is right, and who is wrong," through carefully examining the issue, could make a "sham" out of the Commission, seems quite correct.

SENATOR LESNIAK: Are you suggesting that we follow that same course?

MR. BAER: The same course as what, sir?

SENATOR LESNIAK: As waiting until the dust settles.

MR. BAER: I believe that what you are doing is correct in having the hearings, certainly, and in taking the entire input of those who are submitting their feelings, opinions, and statistics. Yes, naturally, action must be taken. We want action, of course, but what I am suggesting is that a lot of the impulsive action taken so far has caused a lot of what we are facing in this State today. There has been a tremendous amount of impulsive action. When you pass 40 alcohol-related bills, I say, "Let's wait a minute."

SENATOR LESNIAK: I appreciate that, but that is not the subject of this Commission. We are restricted to the host liability concept.

MR. BAER: Well, as expressed, I believe that this is merely an extension of DWI. I think, in all candor, undoubtedly it is. I think you would all have to admit that as well. It is just another area of DWI legislation. This would never had come up had we not had the impetus of the Presidential Commission and everything that has evolved since then. Are people no more cognizant--

SENATOR LESNIAK: (interrupting) I don't know what goes on in the minds of Chief Justice Wilentz and the rest of the members of the Supreme Court.

Are there any questions?

MR. BAER: If I may go on, sir? Please. I mean I have sat here for two hours.

SENATOR LESNIAK: I appreciate that, but only if you are going to talk about host liability.

MR. BAER: Yes, yes, definitely, definitely.

I think this relates very much, if you will, and it is tied into, obviously, the social host decision. Just-released figures from our New Jersey Office of Highway Safety indicate 932 fatalities occurred on our roadways in 1983. In 1984 it appears that at least 929 person shall have died on these same roads, in spite of, of course, the millions of taxpayers' dollars spent, roadblocks, and the like.

The pride of people who are saying how successful this DWI entire format and policy is, and the various modes and methods which have been devised to, of course, reduce the carnage, which everybody wishes for-- Unfortunately, and even ironically, there has been a 42% increase in deaths since the inception of the seat belt in the month of March alone. A lot of people may not realize that.

SENATOR LESNIAK: Are you saying that makes any statistical sense whatsoever? Is that your testimony that we should draw conclusions based on one month of statistical data?

MR. BAER: No, no because--

SENATOR LESNIAK: Then what are you saying?

MR. BAER: Because in the first quarter of this year, the New Jersey Department of Transportation stated 81 people were killed in traffic accidents in March, compared to 57 last year. There is a 15% increase in the deaths; that is what I am saying, in spite of roadblocks, spot checks, and all the hysteria and paranoia that has been perpetrated in our State. Actually, in the process, and using a term that has been used a lot, there has been a high watering-down of our civil liberties on the roadways. People can be stopped. And now going into the home--

SENATOR LESNIAK: (interrupting) I'm sorry. Please--

MR. BAER: (interrupting) Okay, okay, right. We will stay with that.

It is our opinion that the issue here is not whether to limit liability for homeowners or licensees, but rather that all citizens of New Jersey be exempt from any social liability and the obvious burden which it carries. Surely people must be responsible for their own actions, as has been brought out by members of your panel tonight.

There is no way in this world where we can legislate morality, including the social host decision, which, in fact, it is. The 6,000 petitioners of A-C.A.U.S.E. wish to go on record as being vehemently opposed to any form of social host law, nor do they wish to see the citizens of our State continue to be buried under an avalanche of DWI legislation. Rather, we seek the review, reform, and repeal of much of it. We feel that, certainly, such practices do not make our nation as proud as it has been. Through any lead on the part of New Jersey, the boundaries would stand alone in our nation in being the only State in the Union to enjoy "the social host decision," in that it was brought up in California and Oregon by the Supreme Court and handed down and overturned by the legislative bodies.

We thank you for offering us the opportunity--

SENATOR LESNIAK: (interrupting) Just for the record, I think states have reacted differently. It is my understanding that some have put some limits on -- and not all of them have excluded -- social host liability.

MR. BAER: Well, the two, to my understanding, so far that stand out were California and Oregon. They have abolished any type of social host decision, as I understand it.

SENATOR LESNIAK: That's not correct.

MR. BAER: It isn't? What are the limitations then?

SENATOR LESNIAK: If you look at the record, we'll have all the statutes.

MR. BAER: Will you? Fine.

SENATOR LESNIAK: Are there any questions?

ASSEMBLYMAN MILLER: Just one point regarding the 15% increase. Maybe there are more cars on the road; maybe there are more

car miles. Maybe it should have been 20% if we hadn't had these kinds of things. These are the kinds of things we don't know.

MR. BAER: I agree so much with what Senator Cardinale has said and what you have said yourself, very frankly. The answer here is, number one, to rehabilitate the alcoholics, who are three out of four, responsible for the fatalities on the roads. Whether they come out of a home from a social party, from a tailgate party, from a licensee or package store with goods that they purchased, three out of four-- In addition to the recidivism rate, there are people -- it was borne out at this hearing -- who are driving without a license. They don't care if you say 30 years in jail; they are out there. No licenses, again, borne out by this panel. No insurance. A recidivism rate.

Very candidly, the pendulum has swung so far because of this neo-prohibition climate. It was wrong, certainly, to adjudicate and slap an offender on the wrist after killing a child or anyone, and say, "The man was drunk; what could he do? He wasn't responsible." Of course, he wasn't responsible. It is these same irresponsible people. And all the punitive threats, fines, and everything that is going down will not correct the attitudes of these people. You need education in the school system from grade school up to correct this. You won't have to worry about social hosts laws or any of it. You do need to educate our children as they do in some countries in Europe where they learn the use and abuse of alcohol and the elimination of the use of drugs. When they get to be older and good citizens, they will not even be concerned about getting behind the wheel of a car while they are under the influence. Being drunk of itself will be socially unacceptable.

But we have a recidivism rate and a tremendous amount of alcoholism. You can't attack it with the social hosts law. You can't do it with a task force; that is to say roadblocks and spot checks. Howell Township, in Monmouth County, where I live, has been bragging -- Chief Morrell there -- about how many arrests they make. They just called in the State Police to help them because this thing is still generating.

In answer to your question, Assemblyman Miller, do I think because there are more cars-- DOT, the Office of Highway Safety, and the State Police are very quick to say how wonderful the percentages are that dropped down, when there are, in fact, reductions in fatalities on our highways. Why should the shoe, as soon as it drops on the other foot say, "Maybe there are more people on the road"? Maybe there were less people the last time. It is obvious that you cannot legislate it through political expediency. You cannot correct a social ill. And I say, here and now, this is a social ill. We have to educate our young. We have to rehabilitate our sick. And we do have to adjudicate properly. Those people who have a recidivism rate are on the roads of this State.

The guy who is leaving a bar or a home where he has been entertained gets stopped because he has a .10 BAC. They are ready to take his license away for six months because there is no adjudication. This man is being deprived of his livelihood. His family is also. He is an offender for the first time. He has not killed anyone. He has not caused any damage.

SENATOR LESNIAK: It is not relevant.

MR. BAER: But it is very-- Well, this man could be leaving a party, a social host party. Why isn't it relevant? All your major corporations have killed any Christmas parties or annual picnics and so forth as social hosts.

SENATOR LESNIAK: Thank you, Mr. Baer.

MR. BAER: This is a very, very critical area. And just as there is dirt and you try to put pine-sol on it to clean it up, that is not the answer. You better get rid of the dirt, with all due respect. Social hosts and roadblocks and spot checks will not cure the social ills which we have. We have to look to rehabilitation, to adjudication.

SENATOR LESNIAK: Thank you, Mr. Baer.

Louis Dughi, Garden State Restaurant Association? (not present)

Diane Legreide, are you testing for LEGAL?

DIANE LEGREIDE: Thank you, Mr. Chairman and Commission members, for the opportunity to testify before the Commission on behalf of LEGAL. The members of this Commission should be commended for devoting their time to such an important topic, one which should be the focus, I think, of anyone serving alcohol to persons who will drive on our highways.

A great deal of concern has been expressed by various persons, both before this Commission and the Assembly Law, Public Safety Committee with reference to the affordability and availability of insurance coverage as a result of recent court decisions. While it is important that this Commission consider the effect of insurance availability and cost, it is even more important to consider the citizens of our State who may be maimed or killed by drunk drivers.

The frequency of alcohol-related accidents and fatalities has been receiving widespread attention, not only in New Jersey but nationwide. The Presidential Commission on Drunk Driving, a group formed in response to public and official pressure to, and demand for action, has written that one-half of all highway-related fatalities have been alcoholic related. This certainly has been a source of great concern to the public. Pressure has been applied to public officials to find ways to combat the problem. New Jersey has been in the forefront in this area. I have to disagree with Mr. Baer, respectfully, that I think it has done a terrific job in addressing the problem and has taken a lead in the nation in trying to reduce highway fatalities.

The Presidential Commission on Drunk Driving recommended that one possible means of deterring drunk driving is to impose penalties on the person who sells or provides alcoholic beverages to a driver who later causes a crash. In calling for the enactment of dram shop and social host laws, the Presidential Report states: "These laws implicitly establish the necessity of placing responsibility on the part of the seller or server, whether they be commercial or individual hosts. These laws also reinforce the principle that others have a responsibility to prevent intoxicated individuals from driving."

Twenty-three states have laws that make those who sell and serve liquor responsible if their drunk drivers have accidents. Most states are increasing penalties for those who are driving while drunk. And, of course, we know New Jersey has some of the toughest laws in the nation. As a result, bartenders have become more vigilant about cutting off their customers before they have had too much to drink. I think we have testimony from Colonel Pagano which says that New Jersey's tough stance on driving is paying dividends. There has been a 30% decrease in accidents over the past two years -- in fatalities, I should say.

Likewise, the social host liability ruling could also serve to further reduce alcohol-related fatalities. I think a responsible host will take reasonable measures to make sure that the people he is entertaining will not drive while they are drunk. This ruling establishes a responsibility on the part of a host which will not only protect the potential drunk driver but the victim that he may encounter.

While this Commission may feel it is necessary to recommend a definitive description of social host liability, the issue of a licensee is different. The retail licensee, by its very nature a profit-making enterprise, has more of an impetus not to restrict the sale of drinks and should therefore come more explicitly under the jurisdiction of the law.

Former ABC Director, Joseph Lerner, in 1980, remarked, "In return for the granting of an ABC license, each of the retail licensees has a legal and moral obligation to consider the well-being of the patrons he serves. They should be held to that obligation."

I am going to limit my testimony. I am not going to go on because a lot of this has been covered. But I would like to make a comment on one thing that Mr. Baer said. He indicated that Governor Kean had made a statement that the Legislature should enact this, and not the Supreme Court. And yes, that's true. But the Governor, in the news release, also commended the court for their decision, feeling it was a proper decision and it would also further help curb driving on our highways. I just think the rest--

SENATOR LESNIAK: (interrupting) The Governor played both sides of the issue.

MS. LEGREIDE: I'm saying the Governor, while he feels that the Legislature should have done it, also felt that the decision was the right one. I thought that ought to be added to the issue.

SENATOR LESNIAK: Are there any questions?

SENATOR CARDINALE: Just one. I promise not to grill you. It is getting too late.

MS. LEGREIDE: That's okay. I anticipated this.

SENATOR CARDINALE: No, Diane, I'm not going to do that. In terms of the specifics, I don't think there is much disagreement that there ought to be some kind of law covering this topic. I haven't heard disagreement on that. In terms of establishing those standards legislatively, have you reviewed 2122?

MS. LEGREIDE: Yes. Surprisingly, to you, I'm sure, LEGAL has not taken your position against the bill. We have not taken a firm position in favor of it either. We are still looking at it. Obviously, tonight I have listened to the discussion involving lines two through seven. My problem is not with the description as much as it is -- and I have to go along with Lorraine Roy -- with the elimination of tests in determining this, along with other corroborating evidence.

I just want to bring out the fact that a test which might be admitted could also work the other way: Somebody who may show a sign of intoxication, who is on antibiotics or something, could go in under .08, and I think that test should be allowed for that person. It would get him off. Obviously he was not intoxicated, even though he may have shown some visible signs. I think it can work both ways. I think the admission of the tests are very important along with other corroborating evidence.

SENATOR CARDINALE: The point in the bill, though, is that the tests by themselves are not evidence. I don't think that the bill would preclude a test from being used as evidence that someone was not drunk.

SENATOR LESNIAK: I think as drafted it would.

MS. LEGREIDE: I believe that it would. There also is-- If there are no witnesses, I have the problem with the fact that you are going to go in and someone has a high-- I think each case has to be looked at differently. Of course, we can all come up with horror stories. We can all come with a case that, maybe, isn't applicable, but there are going to be just as many that are. I think each one has to be based on its merit. I don't think you can close out the whole system on one or two examples of what shouldn't be in the system. That goes for any area of law. You are going to find the one or two very small exclusions.

SENATOR LESNIAK: Okay. Thank you, Diane.

MS. LEGREIDE: Thank you.

SENATOR LESNIAK: Nancy Kelly from the New Jersey Restaurant Association.

NANCY KELLY: Thank you, Senator Lesniak for allowing me to speak. I hadn't registered to address this group tonight because I represent an organization, the New Jersey Restaurant Association. This is an organization of commercial hosts. I knew the objective of this committee was to look at social hosts.

Eighty-five percent of my members have liquor licenses. Fifteen percent of my membership are unlicensed restaurants. During the course of the last six months, since liability insurance has been such an issue to commercial hosts, I have spent a major portion of my time looking at what is happening in different states, what is working, what is not working. In hearing some of the comments that were made tonight, I felt that perhaps some of the information which I have obtained from looking at what is happening in other states might be helpful in relationship to the social hosts.

I took some notes so I will try to work from that. I think we will all be relieved that I will be finished very quickly. As I came in this evening there was a question: What if there is more than one host, and the social host or commercial host, and the guest or customer has gone from one bar to another bar to another bar, or from one home to another home to another home? The question was who pays in that instance? The response was that logically it was assumed that no

one pays unless it could be proven that the host was negligent. And when we know that the definition of negligence is -- did the host serve somebody who was visibly or apparently intoxicated -- we get into that legal interpretation that was talked about so much tonight.

I think most attorneys would agree with that, that no one pays unless negligence could be proved, unless the attorney specialized in liquor liability cases. In working with an attorney, who is not affiliated with my association, but who I have come in contact with, who does 80% of his work with surplus line companies in the liquor liability field, you find out that what is logically is not necessarily what is actually happening out there.

So while it would seem fair that an operator should not be held legally or financially liable, except in instances where he was actually determined negligent-- Let me share with you an example of what I have been told actually happens.

The reality is that the operator cannot prove 100% that he didn't serve someone who is visibly intoxicated. Now why can't he prove it? In case of commercial hosts, we don't find out that we are being sued until one or two years after the accident has taken place. Our best defense is a witness, and I would assume the best defense for a social host would be a witness.

SENATOR LESNIAK: Is that the same circumstance in the host case?

MS. KELLY: I would think so because in Kelly v. Gwinnell, we had--

SENATOR LESNIAK: (interrupting) Because I don't know how many hosts have served drinks to as many people as bartenders do.

MS. KELLY: No, you're right.

SENATOR LESNIAK: Normally if you have somebody who was in an accident, who was at your house and who you were serving drinks to, you would know in just about all instances right afterwards. Isn't that a fact?

MS. KELLY: Definitely. You wouldn't be notified, but here again, you would go to court and the same thing that happened in Kelly vs. Gwinnell, you would have the host saying, "He wasn't visibly

intoxicated. I didn't see him stumbling or anything like that." The plaintiff is going to say, "He must have been intoxicated; he had a blood level content of .20." I would have to say that in the case of Kelly vs. Gwinnell, logically it would seem that they should have known that that person was intoxicated. Somebody with a blood level content of .20, there is no question that that person is showing visible signs of intoxication.

But I would say again, here we get down to the fact that the best defense is a witness. All right? And again, if you can't produce that witness, for whatever reason, one, a social host where there simply wasn't anyone other than yourself there, or if--

SENATOR LESNIAK: (interrupting) You're a witness.

MS. KELLY: Well, you yourself, but you have a self interest in making sure that you are not found guilty. I would think, although I know there are laws against perjury, that some people might be tempted to bend the truth if they thought it was going to be beneficial to do that. In fact, that is one of the--

SENATOR LESNIAK: (interrupting) As some hosts could bend the truth.

MS. KELLY: Oh, definitely. In fact, in that particular instance which I just mentioned, Senator Lesniak, I was talking about the host. In other words, I think if I were on a jury--

SENATOR LESNIAK: I'm trying to get to the point. What point are you trying to make?

MS. KELLY: The point here is that your best defense is a witness. If you can't produce that witness, then what actually happens in court is the fact that you are only found-- The jury, if they have a doubt in their mind, they might say, all right, if there are several hosts, and will find one 10% negligent and one 90% negligent.

SENATOR LESNIAK: I don't want to be rude. It is getting late and I have a tendency to be rude when it gets late. But I am not sure what your expertise is in this area to give this testimony. You are talking about how juries behave.

MS. KELLY: I have heard an awful lot of people testify tonight and I'm not sure of their expertise, so I can move onto another area here, but--

SENATOR LESNIAK: We can assess their expertise. We heard them as well.

MS. KELLY: I wished I had talked before Mr. Baer. With all due respect to Mr. Baer, I find that sometimes when I follow him, everybody--

SENATOR LESNIAK: (interrupting) Everybody gets annoyed. (laughter)

MS. KELLY: (continuing) --seems very defensive. So perhaps I should have started out by saying that my organization feels -- and we have made a decision as an organization -- that, definitely, an operator who is found guilty of negligently serving someone, and if that person goes out and hits an innocent third party, that we have an obligation to that innocent third party which can't be ignored. I think that is the problem here. We have a moral dilemma. We see this poor innocent person who had nothing to do with anything, and somebody should pay for him. When the drunk driver doesn't have any insurance, then it falls on the shoulders of the person who does have the insurance. We don't argue with that, up to this point.

I'll skip over the fact of not having a witness, other than just saying that in the case of commercial hosts, if the jury finds you 10% negligent and another commercial host who does not have insurance 90% negligent, the one who is 10% negligent is going to pay the entire bill. So, it is a rather hollow victory when you have to pay everything even if you have legally, technically won the case.

MR. LEVINSON: That isn't exactly so, either, but that is okay. They can go back and proceed against the other insured if they want and take their house just as you are suggesting they might do to the social host.

MS. KELLY: That's true.

MR. LEVINSON: They can take their bar. They can close them up.

MS. KELLY: And again, we have talked about a lot of times these cases don't go to court; they settle out of court because insurance companies don't want to take that chance. So oftentimes, it is still the less negligent host's insurance company who maybe footing a large part of the settlement just to get out of it.

ASSEMBLYMAN MILLER: Can I get this right? Are you saying that if the drunken driver has no insurance of any kind, he has nothing to fall back on, and he is held 90% liable and the host is held 10% liable, because he doesn't have the 90%, the host can pick up the balance of it? Is that what you are saying?

MS. KELLY: I am saying that often happens. It is very true. That is what I wanted to bring out tonight. I don't know if that is true in terms of social hosts. I know it has something to do with a legal term called joint tort-feasor which I just learned about three weeks ago. All I know about joint tort-feasor, as far as restaurants are concerned, is just exactly what you said is the case. One of the things our association would like to see brought about is an amendment to the joint tort-feasor act so that your financial settlement could be no larger than to the degree to which you were found guilty.

SENATOR LESNIAK: I suggest that after the meeting you contact Senator Cardinale, who is going to sponsor the bill. Okay?

MS. KELLY: Okay. I think somebody brought up the fact--

SENATOR LESNIAK: I just gave you a bill. Are you going to still testify?

MS. KELLY: Somebody brought up the fact-- I have another point here. I think some of the comments which we have heard tonight from attorneys and from some of the people who perhaps haven't looked at this thing as closely as others of us have, is the concept, which comes up, regarding mandatory insurance. If the problem is insurance, why don't we just make it mandatory that everybody has to have insurance? This could be on the social host level, to a certain degree, mandatory insurance, just as much as for a commercial host.

From a commercial host standpoint, in New Jersey the Insurance Department does not regulate commercial host insurance rates.

SENATOR LESNIAK: That was our decision as a Legislature.

MS. KELLY: Exactly. But if you have mandatory insurance, and insurance companies are free to charge whatever they want in rates, then you are forcing a situation where you saying to me that I have to have insurance, but if I can't afford it, I am out of business.

SENATOR LESNIAK: That is a very good point. If we were ever to do that, we would have to start regulating them again, in terms of price.

MS. KELLY: Exactly. That was the other thing. In terms of mandatory insurance, it has to be with some kind of regulation on the price. Because right now, this afternoon, one of my operators -- two catering places -- without mandatory insurance, his insurance was $12,000 last year; this year it is $75,000. Now you have to raise your menu prices a lot to make up that.

I would also say that out in California-- We have all heard about California. In California all the operators apparently don't have any liability. That came about because California, I believe, was the first state to enact a social host ruling. In fact, when they overturned liability for commercial hosts, they did the same, I believe, for social hosts.

SENATOR LESNIAK: That's correct.

MS. KELLY: If you looked at what happened out in California, one of the things that began happening was that as time went on the insurance rates for social hosts did begin to increase. Or you find the situation where rather than increasing the rates, they began excluding that portion or that kind of liability and began selling it as rider-type situations, where you would have to buy it as a rider or additional coverage. I am told that may be a possibility. I am just bringing these things up because I think it is important.

SENATOR LESNIAK: That is extremely unlikely in the State of New Jersey as long as Hazel Gluck is Commissioner. I'm sure of that.

MS. KELLY: Well, we have had three insurance commissioners in the last two years, so I hope Commissioner Gluck has more luck than the others.

The other thing we have heard about is caps on settlements. We did a survey of 215 insurance companies and we asked: Would a cap on settlements bring you back into the market?

MR. LEVINSON: In the commercial area? Correct?

MS. KELLY: In the commercial area. Okay, so you want me to go on talking about that?

ASSEMBLYMAN MILLER: I would be interested because it does relate to what we are talking about.

SENATOR LESNIAK: Go ahead.

MS. KELLY: Very quickly. The insurance said that caps would not bring them back into the market because there are too many people suing today, too many lawsuits, and the settlements are coming in so high, that they felt that any kind of cap we could get through the Legislature -- $100,000 or $300,00 cap -- would be so high, multiplied by the increase in suits -- 300% in the last six months -- that it would destroy the concept of caps. So we asked: What would bring you back in the market? They said -- Senator Lesniak you would be interested in this -- that we all have a moral dilemma, I feel, on the innocent third party.

My organization feels that we do have a responsibility towards those people. But there are two types of people who sue in liquor liability cases. One is the innocent third party, but the other is the drunk driver himself.

SENATOR LESNIAK: I agree.

MS. KELLY: My organization feels it is very difficult to feel sympathy for the drunk driver who sues for injury to himself.

SENATOR LESNIAK: If I agree with you, will you stop? (laughter)

MS. KELLY: Yes.

SENATOR LESNIAK: Because I do agree with you. Thank you.

MS. KELLY: I could tell you that insurance companies have said they would come back in the market if we could revise the laws so that we could get rid of the drunk driver. In other words, eliminating the first party's right to sue which would get rid of one-third of the law cases in New Jersey, which would certainly have to have an impact on the market.

SENATOR LESNIAK: Okay. Thank you very much, Nancy.

We still have one more witness: Ed Orr.

ED ORR: My name is Ed Orr. I am a homeowner in Dumont. I was sued as a host, but I would call myself an absentee host. I wasn't even in the country when the incident happened. The insurance company awarded, out of court, $136,000.

MR. LEVINSON: May I ask if they were members of your family who were present at the time?

MR. ORR: Yes, one of my sons.

MR. LEVINSON: How old is your son?

MR. ORR: At that time he was 21.

COMMISSION MEMBER: Did he live in the home?

MR. ORR: Yes, he lived in the home. What happened there is on July 4th, a bunch of them -- my son included -- decided to have a July 4th get-together. They weren't even in the house. They were just on the property of the house. Some bought beer. Some bought other stuff. Mostly it was beer. But it wasn't all bought by one person. There was not one person you could say was the host.

The reason they chose my house is because my property runs right into a park. It is a nice area. This one fellow had too much to drink. And they realized it. They served themselves. They did get they keys away from him. What happened after that I don't know. They don't know either. He somehow or other got the keys back. They weren't given back to him. He took off in his car and had a bad accident.

SENATOR LESNIAK: Can I ask you what the injuries were for the person?

MR. ORR: I don't know what the injuries were. From what I understand there were two persons hurt, and they were quite serious.

MR. LEVINSON: I wonder who the claims manager was.

ASSEMBLYMAN MILLER: How much did they pay, did you say?

MR. ORR: $136,000.

ASSEMBLYMAN MILLER: How much did the driver pay -- his insurance company?

MR. ORR: I believe it was $50,000. That was his limit.

ASSEMBLYMAN MILLER: Why were you held accountable or liable for it when you weren't around and your son was 21? Why wasn't he held liable for it?

SENATOR LESNIAK: He was. That was what the coverage was for the homeowners.

MR. ORR: They didn't sue my son; they sued me.

SENATOR CARDINALE: Someone -- I think it was Captain Herb -- testified that we should take into consideration what happens to a person who is sued. Were you subjected to any kind of anxiety?

MR. ORR: Yes, it was quite a traumatic experience. They didn't know exactly what-- They said to wait for this particular case -- and I believe you have been talking about it all night -- to see how that was settled, then they would decide how they would move. Lawyers for the insurance company and some other lawyers who I spoke to advised me that if in ample time it looked real bad for me to move my property out of my name into somebody else's name, or whatever else I owned.

SENATOR LESNIAK: You say you got some advise from lawyers?

MR. ORR: Lawyers, yes. More than one.

MR. TOBOROWSKY: When they settled for $136,000--

MR. ORR: (interrupting) Their liability was $200,000.

MR. TOBOROWSKY: No, no. How much were you getting sued for to begin with?

MR. ORR: They weren't really sure.

SENATOR LESNIAK: You don't know how serious the injuries were, but you know they were very serious.

MR. ORR: From what they explained to me, they were quite serious.

SENATOR CARDINALE: Did anybody compensate you for the anxiety that you went through or any suffering or time that you went through as an individual?

MR. ORR: No, no. They told me that if I wanted to I could reverse suit of the young boy who was driving the car, and stuff like that.

MR. LEVINSON: Did anybody tell you what your son did wrong and why this suit took place against him? Can you tell us that? What the allegations were? You don't know that, do you?

MR. ORR: No. They were claiming that he was the host serving, but he wasn't.

SENATOR LESNIAK: But they were claiming more than that, weren't they?

MR. ORR: I don't know.

SENATOR LESNIAK: You don't know?

SENATOR CARDINALE: Did they tell you why they settled it rather than letting it go to court?

MR. ORR: No, I tried to get that information. They did not tell me.

SENATOR CARDINALE: For the information of the Committee, I spoke to the insurance company when Ed told me about this case. They told me that despite the fact that this case predated the court decision by more than a year-- What was the year of that?

MR. ORR: 1982.

SENATOR CARDINALE: 1982. It was approximately two years ago.

MR. ORR: That is when the incident happened.

SENATOR CARDINALE: The incident happened two years before the case was decided by the Supreme Court. I thought that should have been dismissed on a summary motion. I asked the company the question that I believed that you just asked, Counselor. Why did they settle it? They said they were afraid that with the circumstances of this case, if it went into court, it would form a new pattern, another pattern, and they would be held for the full amount of the liability. And secondly, they did not want to expose the law to the additional chances that the circumstances of this case might lend. Therefore, they chose to pay $136,000.

SENATOR LESNIAK: Can I ask one other question? How old was the driver?

MR. ORR: Eighteen.

SENATOR LESNIAK: Under 21. Not allowed to drink legally in the State of New Jersey.

MR. ORR: I don't know. I think at that time it might have been legal.

MR. LAIKS: I think at that time it was 19.

MR. LEVINSON: I don't think so. I don't think he was allowed.

SENATOR LESNIAK: Okay. We don't know all the facts of the case. Thank you, gentlemen. We'll decide whether we will have another another hearing.

MR. ORR: If I may make one more statement? I did increase my insurance which cost me quite a bit. I wanted to get an umbrella policy.

SENATOR LESNIAK: That is a good idea for everybody.

MR. ORR: In order to get the umbrella policy, you have to increase your car insurance from, let's say it's $100,000 for the first incident, to $300,000 for the first incident. Then you can get the other. I would rather have put that money towards a disability for me in case I get hit by somebody, like that fellow who didn't have the coverage.

SENATOR LESNIAK: Thank you.

(Hearing Concluded)

APPENDIX

STATEMENT

OF

AMERICAN INSURANCE ASSOCIATION

ON

SOCIAL HOST LIABILITY ISSUES

BEFORE

ALCOHOLIC BEVERAGE LIABILITY COMMISSION

Hackensack, New Jersey
Bergen County Courthouse
May 9, 1985

Good evening. I'm Jeffrey M. Klein, Associate Counsel for Government Affairs in the New York/New Jersey Region of the American Insurance Association. AIA is a national trade association representing 174 property and casualty insurers that account for approximately 37% of the total homeowners' premiums written in New Jersey. As such, our members have a significant interest in issues concerning social host liability and we appreciate the invitation extended to us by this Commission to testify here tonight.

We wish to state first that our Association and its member companies have taken an active interest in these issues, which are of critical importance to Americans in all fifty states. We have been active or assisted in the work of numerous study commissions and governmental agencies, including the Presidential Commission on Drunk Driving, the Insurance Institute for Highway Safety and the United States Department of Transportation and its National Highway Traffic Safety Administration. We have co-sponsored, with the Insurance Information Institute, the International Symposium on Alcohol and Driving in November 1982 in Washington, D.C., which provided a broad-based forum for discussion of drunk driving counter measures. We have also lent our support to efforts to increase the quality and quantity of alcohol education in the schools for children who are subject to heavy peer pressure at an impressionable age.

Such education programs should go hand-in-hand with general efforts to increase the public's awareness of the consequences of drunk driving. The Insurance Information Institute, a nonprofit organization which receives its funding from the industry, has conducted an extensive "public issues" campaign, concentrated in major national publications in 1983. The III has also developed booklets, news releases and public service announcements on the hazards of drunk driving and possible remedial measures. AIA's own Public Affairs Department has run similar public service announcements, in cooperation with the Independent Insurance Agents Association of America and the International Association of Chiefs of Police, in an effort to attract attention to the problem. Plainly, the problem of educating the public is an important one and a continuing responsibility of all of us. Finally, in New York, another state in which I represent AIA, we have worked with the firm of Eastern Ambulance in Syracuse, New York, to help gain recognition of its "I'm Smart" alternative driver program. The "I'm Smart" program, pioneered by Mr. Martin Yenawine, provides a van service for a fee through which tavern patrons (and their vehicles) can be safely transported home after having "had too much". We continue to be strong supporters of efforts to reduce the number of deaths, injuries and other losses on our highways resulting from driving while under the influence of drugs or alcohol. We are heartened that this issue has aroused such concern throughout the nation and in

New Jersey in particular. The work of this Commission is vitally important and we congratulate you for your efforts to study and respond to the problem.

However, it is clear to all of us present here tonight that the New Jersey Supreme Court broke legal precedent last June in Kelly v. Gwinell when it held social hosts liable for injuries inflicted on third parties as a result of the negligent operation of motor vehicles by intoxicated guests. This, where the host knew the guest to be intoxicated and knew that he would thereafter be operating a motor vehicle.

What are the insurance implications of the Kelly decision? The short answer is we do not yet know. We have checked with the Insurance Services Office, a rating and statistical organization that serves much of the property and casualty industry and our members and there does not appear up to the present time to have been any appreciable increase in liability claims as a result of Kelly. In fact, relevant claims information for 1984 will not be available until the end of 1985 or early 1986. Consequently, there appears to be no immediate impact on homeowners' rates. We do know that the standard homeowners' policy currently contains limits for liability coverage of $100,000 per person, $300,000 per incident ("100/300") and that standard renters' policies contain limits of $25,000/$50,000. It is also clear that any awards for economic loss or noneconomic loss ("pain and suffering") emanating from Kelly-type suits will eventually

be borne by policyholders. Although drunk driving remains a scourge on our nation's highways, a delicate balance must be struck. We must all make the choice whether potentially huge judgments against social hosts, with the impact on affordability of rates, will serve as an effective deterrent against drunk driving or whether the Kelly rule constitutes an unwarranted intrusion into private, personal judgment and decision-making on behalf of both hosts and guests. Again one thing is clear to us: our society has become excessively litigious and resort to the courts for recompense has become commonplace. With that in mind, we wish to express some comments concerning several bills before the Legislature which would place some limitation on the liability of hosts.

Senate 2122, sponsored by Senator Cardinale, would prohibit liability for provision of alcoholic beverages to drivers at or above the drinking age except where the server "willfully and knowingly, manifesting extreme indifference to the rights of others," served beverages to persons intoxicated in his presence and knew or should have known that the person being served would operate a motor vehicle "reasonably soon thereafter". Senator Cardinale's bill would place a logical, common-sense standard in the law. It recognizes the fact that, to some extent, a larger share of the responsibility for our actions should rest on us and not be imposed on others. We support Senate 2122.

Assembly Bill 43, sponsored by Assemblymen Hollenbeck and Schwartz would fully immunize a social host from any liability for injuries suffered. We support the effort to curb the Kelly case but perhaps, this bill goes a bit too far, in that it fails to provide any negligent standard whatever and creates a blanket immunity. Finally, Assembly Bill 347, by Assemblyman Riley, would place some limitation on damages against those who negligently "sell" or "furnish" alcoholic beverages. Damages would be limited to $75,000 for death or personal injury, $150,000 for all such deaths or injuries in any given incident and $10,000 for damage to real or personal property. We believe that this is a sound approach. Our position with these bills must be understood in terms of the possible impact that Kelly may yet have on the court system and insurance rates. We stress once again that no appreciable impact has yet been felt. However, to prevent excessive and burgeoning liability awards which have been seen in other areas of the law, we believe it would be best to have some sound standards and limitations in place before the court doors are swumg wide open and before any "crisis" in rates is permitted to develop.

We thank you for the opportunity to be present here tonight and will try to provide you with any information or answer any questions you may have.

Respectfully submitted,

AMERICAN INSURANCE ASSOCIATION

Jeffrey M. Klein
Associate Counsel
Government Affairs
New York/New Jersey Region

ATLA NEW JERSEY

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Legislative Committee

Statement by the Association of Trial Lawyers of America -- New Jersey

On Behalf of the Public on Assembly Bills #43 and #347 and Senate Bill #2122

ATLA-NJ is a non-profit organization of trial lawyers who primarily represent injured members of the public in personal injury litigation. It is on behalf of that constituency, our clients - the public - that we submit this position paper.

ATLA-NJ is strongly opposed to the three bills which seek to (a) grant immunity from liability to a social host, (b) restrict the liability of an alcoholic beverage license holder and (c) establish maximum amounts recoverable (caps) for the injury or death of a victim of an alcohol-related injury. These bills are not in the public interest. The State of New Jersey has been committed to reducing the incidence and severity of alcohol-related automobile accidents. The proposed legislation would seriously undermine existing law of the State of New Jersey and would run counter to

everything the legislature has been trying to do to discourage and penalize drunk driving and the carnage that results from it.

Governor Kean in his annual message to the New Jersey State Legislature on January 8, 1985, stated (p.38) that:

...

> Continued vigilance is also needed in our battle against drunken driving.
>
> New Jersey's efforts to stop drinking and driving have attracted national attention...
>
> ...for the first time in 20 years, highway fatalities fell under 1,000 in 1983. Drunk driving deaths are down by almost 30%...
>
> ...New Jersey now ranks third in the nation in the ratio of deaths to highway miles travelled. But that is not enough. Our goal is nothing short of ranking number one...
>
> And that is why I am committed to doing more to fight drunk driving...
>
> ...when lives are at stake, we must be harsh. And lives <u>are</u> at stake.

The proposed legislation would certainly thwart the effort by Governor Kean and the New Jersey Legislature to reduce the number of victims of alcohol-related accidents and fatalities.

The development of the law regarding liability of tavern keepers is principally set forth in the two cases of <u>Rappaport v. Nichols</u>, 31 N.J. 188 (1959) and <u>Soronen v. Olde Milford Inn</u>, 84 N.J. Super. 372 (App.Div. 1964). In <u>Rappaport</u>, our Supreme Court identified the strong public interest in discouraging minors or intoxicated persons from being served and noted:

> When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent....

The Court also held:

> ...We are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regularlity precautions against such sales and their frightening consequences and will not place any unjustifiable burden on defendants who can at least discharge their civil responsibilities by the exercise of due care...
>
> Liquor licensees, who operate their businesses by way of privilege rather than as of right, have long been under strict obligation not to serve minors and intoxicated persons and if, as is likely, the result we have reached in the conscientious exercise of our traditional judicial function substantially increases their diligence in honoring that obligation then the public interest will indeed be very well served.

In Soronen v. Olde Milford Inn, the Court addressed the liquor industry's argument that it is the person's own fault if he drank too much and accordingly there should be no liability on the part of the tavern keeper. This same argument is presently being raised in an effort to justify restricted liability on the part of tavern owners. In Soronen, the Court stated that:

> As heretofore noted, a duty is imposed on a tavern keeper by common law and by statute not to serve liquor to an intoxicated person. This duty arises not only in the public interest but for the protection of the intoxicated person himself. The duty would be rendered meaningless to a large extent if a tavern keeper could avoid responsibility by claiming that it was the person's own fault if he drank too much. It is obvious that in the ordinary sense it is one's own fault if he gets drunk, but the postulation of the tavern owner's duty in such a situation assumes implicitly that there has been such fault on the part of the drinker and nevertheless imposes the protective duty.

It is unwise as a matter of public policy to encourage drinking and driving or driving after drinking. With so much recent progress having been made in New Jersey in the effort to remove drunken drivers from the road and provide alternatives to their transportation needs, it would be seriously counterproductive to grant immunity to tavern keepers who serve minors or intoxicated persons.

It is similarly unwise, to relieve social hosts from liability for injury sustained by third persons following negligence by the host in serving an already intoxicated person. Most social hosts serve alcoholic beverages primarily to their relatives and friends. Would they not be as concerned, if not more concerned, about the relative or friend who has had too much to drink, than would the tavern keeper who has a less personal relationship with his patron.

To grant immunity or limited liability as against a tavern owner or social host will only encourage drivers who have had too

much to drink to get behind the wheel and cause injury to innocent victims. It is on the victim's behalf that ATLA-NJ strongly recommends against any modification of the existing law.

If the liquor industry is concerned about the availability and cost of proper insurance then appropriate action must be taken to provide insurance. If it is true that many taverns are operating without the protection of insurance then ATLA-NJ suggests that the State make liquor liability insurance mandatory with adequate limits. If necessary, the State Department of Insurance should be properly funded and staffed so as to be able to establish an assigned risk plan for tavern liability insurance similar to that established for automobile insurance.

ATLA-NJ endorses the position of the New Jersey Department of Health which spoke in favor of imposing liability on both social hosts and alcohol beverage licensees. Mr. Evans of the Dept. of Health, when testifying before the Assembly Law, Public Safety and Defense Committee on April 4, 1985, confirmed that the Dept. of Health is prepared to assist in the training of bar owners and managers in risk managment techniques. Instructional programs can be given to bartenders and waitresses and a certification program can be established statewide to insure that those who serve alcoholic beverages will be properly advised how to take steps to refuse service to already intoxicated customers. Some bars do this already. A "designated driver" program can be established whereby the person designated by a group as the driver is served free non-alcoholic beverages. Taverns can arrange transportation

for intoxicated patrons, remind patrons of the surcharges and other penalties under the law and even install breathalizer machines.

The social host can be adequately protected by existing homeowners and tenants liability insurance. There is no data which suggests any justification for any significant change in homeowners and tenants liability insurance in terms of coverage or premiums by reason of the Supreme Court decision in Kelly v. Gwinnel.

As a matter of fundamental principle, ATLA-NJ is steadfastly opposed to any legislation which seeks to (a) grant immunity to any special interest or (b) establish a cap or maximum recovery which arbitrarily limits the victims' right to full compensation for his/her injury.

It is unsound morally and legally to grant immunity to any activity where innocent third parties are killed or injured as a result of negligence of the original participants. Immunity breeds irresponsibility. Immunity is unfair, inequitable and disfavored under the law. The only present immunity in New Jersey applies to charitable institutions. There is no compelling social, legal or economic need to grant tavern keepers immunity from their negligence.

Equally unfair and inequitable is the notion of a cap on any recovery. Consider the situation where two passengers in the same car are injured in an accident with a drunken driver who just left

a tavern. One passenger suffers a broken arm while the other is paralyzed. Why should the barely injured or modestly injured person be given full compensation for their injuries while the catastrophically injured victim's recovery is limited by an arbitrary amount? This constitutes a denial of equal protection under the law. The very concept of a cap is abhorrent to justice. Further, establishing a cap on any recovery will only serve to force the severely injured victim to depend on the State for the means to live and support any dependents.

The present system works. It is fair because it serves to spread the risk among all who participate in the activity. Tavern owners and social hosts have insurance available to protect them. The tavern owner ultimately passes this cost to his customer. Although the New Jersey Department of Insurance has acknowledged that it has no present data regarding the affordability of liquor liability insurance since the area is not regulated, it has indicated that it will be collecting information in the future. ATLA-NJ welcomes such an investigation.

In the face of declining drinking, drunken driving and injuries/fatalities, one wonders why tavern owners are complaining of increased premiums. Perhaps the insurance carriers are manipulating the premiums in order to create an artificial "crisis" in order to pressure the legislature to change the current system which provides justice for all concerned.

ATLA-NJ emphasizes that eliminating the rights of the victims is not the solution to alcohol-related injuries. The State of New

Jersey must respond to the enormous problem created by automobile owners and drivers who do not carry insurance despite the requirements of the law. The estimates of the number of uninsured drivers in the State of New Jersey are staggering. Rather than eliminating the rights of victims, the New Jersey legislature should devote the requisite energy and resources needed to reduce the number of uninsured drivers and substantially increase the minimum limits of automobile insurance while making underinsured motorist coverage (equal to the liability limits) mandatory.

WILLIAM E. SCHKEEPER

WES:eca

MADD

Mothers Against Drunk Drivers

TESTIMONY OF Bergen County Mothers Against Drunk Driving before the New Jersey Commission on Alcoholic Beverage Liability. Hackensack, N.J. May 9, 1985

MADD welcomes the 1984 decision of the N.J. Supreme Court in the Kelly case and we also support the previous decisions holding commercial sellers of alcoholic beverages liable for crashes by drunk drivers.

The Kelly case holds social hosts liable only when they serve obviously intoxicated guests. We feel that friends have a responsibility to each other because they care about each other and do not want them to be injured or cause injury to others.

Similarly, although our homeowners insurance covers injuries caused by icy sidewalks, we do not want a neighbor to sustain a fall and a possible broken back--so we are out early on a frosty morning shoveling snow, because we care.

The Kelly case, coupled with our farsighted drunk driving laws has made New Jersey a recognized leader, throughout the nation, in the fight against death and injury due to drunk drivers. According to the Insurance Information Institute, the Supreme Court of Iowa has subsequently also held social hosts liable, and in their decision cited the New Jersey case.

MADD feels that the host decision helps protect the victims of drunk driving crashes at--least financially. Injuries caused by drunk drivers are usually very serious, medical expenses may be enormous and the driver's insurance and other resources may be inadequate.

The victim has traditionally been the forgotten person in the criminal

justice system. Only recently has the New Jersey Legislature (along with the courts) begun to formulate some "victims' rights." The right to seek compensation from a social host or commercial seller of alcohol is one of these rights which should be preserved and protected.

New Jersey policy is trending toward more protection of victims-- or even potential victims. The recently-enacted law requiring the use of seat belts is an example of this trend. The Legislature is aware that seat-belt use saves a great many lives and prevents some serious injuries.

We believe that third-party responsibility will also save lives--in addition to compensating victims. As Justice Wilentz wrote in the Kelly case, social customs are already changing, and hosts are becoming more aware of the inebriation of their guests. This decision will cause more people to change their party-giving practices, and keeping drivers sober will become the expected norm.

The naming of a "designated driver" for every group, whether at home or at restuarant gatherings, is a practice MADD is happy to see growing. The "designated driver" drinks no alcohol at all on that occasion, leaving all other guests and social and commercial hosts free of any worries about drunk driving.

Taverns have been operating well and profitably for many years under a decision holding them liable for damages by their intoxicated patrons. Currently, alcoholic beverage servers are being trained to recognize intoxication and how to handle it. Along with the general public's education and awareness, these developments should reduce crashes and lawsuits against bars.

Therefore, MADD opposes any watering down of liability of licensees by the Legislature or any attempt to place a dollar limit on damages.

In your recommendations and report, I ask you to think primarily of the victim. Because one family in every two will at some time be affected by a drunk driving crash, all New Jerseyans are potential victims. Protecting the victim is protecting the people.

Thank You

Attached to my testimony is a newspaper editorial which gives many helpful suggestions for social hosts:

"Lets Not Water Alcohol Laws" (New York Times September 2, 1984)

Also enclosed:

"Be a good host: it's the law" (The Record, June 28, 1984)

"This ruling should stand" (The Record, August 3, 1984)

Presenter: Florence Nass, President Bergen County Chapter
Mothers Against Drunk Driving (MADD)

STATEMENT BY

ROBERT T. BAER

PRESIDENT

A-C.A.U.S.E.

AT

PUBLIC HEARING ON ALCOHOLIC BEVERAGE LIABILITY

MAY 9, 1985

BERGEN COUNTY COURTHOUSE, HACKENSACK, NEW JERSEY

MR. CHAIRMAN AND DISTINGUISHED COMMITTEE MEMBERS, MY NAME IS ROBERT T. BAER, I AM PRESIDENT AND CO-FOUNDER OF A CITIZEN'S GROUP KNOWN AS A-C.A.U.S.E. (ALL CITIZENS AGAINST UNJUST & SEVERE ENFORCEMENT).

A-C.A.U.S.E., AS IT ENTERS THE SECOND YEAR SINCE IT'S FOUNDING, REPRESENTS SOME 6,000 MEMBERS AND/OR PETITIONERS, AND GROWS DAILY IN NUMBER AND CREDIBILITY IN IT'S ROLE OF "ONLY ORGANIZED OPPOSITION" TO TODAY'S DWI LEGISLATION AND IT'S RELATED MANNER OF ENFORCEMENT, INCLUDING OPPOSITION TO THE SOCIAL HOST DECISION.

OUR OBJECTIONS TO THE SOCIAL HOST RULING ARE BASED IN PART ON THE FOLLOWING:

1. WE AGREE WITH ASSOCIATE JUSTICE MARIE GARIBALDI OF OUR NEW JERSEY SUPREME COURT IN THAT THE RULING WOULD PLACE "AN ALMOST <u>IMPOSSIBLE</u> BURDEN ON THE HOSTS WHO ENTERTAIN IN THEIR HOMES".
2. WE AGREE WITH MONMOUTH COUNTY'S PROSECUTOR, JOHN KAYE, WHEN HE SAID EVEN "SUPER VIGILANCE" CANNOT ALWAYS PROTECT A HOST FROM BEING SUED. THE PROSECUTOR WENT ON TO SAY THE COST OF A LAWSUIT COULD BE DEVESTATING AND "EVERYTHING YOU OWN COULD BE ON THE LINE".
3. WE AGREE WITH THE LEGISLATIVE STUDY COMMISSION WHO ENDORSED A BILL THAT WOULD EXEMPT SOCIAL HOSTS WHO SERVE ALCOHOL FROM CIVIL LIABILITY AND WHICH COMMITTEE CONCLUDED THE MEASURE "PUTS THE ONUS ON THE PERSON DOING THE DRINKING, NOT THE HOST."
4. WE AGREE WITH ASSEMBLYMEN ROBERT P. HOLLENBECK OF BERGEN COUNTY AND DAVID SCHWARTZ OF MIDDLESEX, THE BILL'S CO-SPONSORS; ASSEMBLYMAN HOLLENBECK CLAIMING THE SUPREME COURT DECISION "UNFAIRLY FORCES PEOPLE TO ACT AS THEIR BROTHER'S KEEPER".

5. WE AGREE WITH THE EDITORS AND COLUMINSTS OF OUR LEADING NEWSPAPERS, AND WHICH IS BEST ILLUSTRATED BY THE ASBURY PARK PRESS IN THEIR EDITORIAL OF AUGUST 2, 1984, WHEREIN THEY STATED: "...THERE IS SUCH A THING AS OVERKILL. NO ONE CONDONES THE CARNAGE DRUNKS CAUSE EVERY YEAR. HOWEVER, IT MAKES LITTLE SENSE TO MAKE HOSTS RESPONSIBLE. THE LITIGATION WOULD BE ENDLESS AND THE ONLY ONES TO PROFIT FROM THE RULING WOULD BE LAWYERS. THE AVERAGE PERSON DOES NOT DRIVE DRUNK AND CAN CONTROL HIS LIQUOR INTAKE."
6. FURTHERMORE, WE AGREE WITH THE 418 PERSONS OF 463 RESPONDING TO A PRESS POLL OF IT'S READERS, WHEREIN THEY EXPRESSED OVER-WHELMINGLY THEIR OPPOSITION TO THE COURT'S RULING AND WHO'S OBVIOUS OPPOSITION IS ECHOED BY THE MAJORITY OF NEW JERSEYS' CITIZENS, AS FURTHER BORNE OUT BY AN EAGELTON POLL IN WHICH NEAR 70% OF THOSE POLLED OPPOSED THE SOCIAL HOST DECISION.
7. FINALLY, WE AGREE WITH GOVERNOR KEAN WHO EXPRESSED "I THINK THE LEGISLATURE SHOULD HAVE DONE IT INSTEAD OF THE COURT. THE COURT MADE LAW".

CHAIRMAN LESNIAK, AND MEMBERS OF THIS COMMITTEE, WE RESPECTFULLY SUBMIT, THAT THE SOCIAL HOST DECISION IS MERELY ANOTHER EXTENSION OF THE FEAR, HYSTERIA, AND PARANOIA PERPETRATED ON OUR SOCIETY THROUGH A NEO-PROHIBITION MOVEMENT SPAWNED SOME FOUR YEARS AGO.

NO ONE WISHES THE DRUNKEN DRIVER ON OUR ROADWAYS, NOR DO I, NOR DO THE THOUSANDS OF SUPPORTERS OF A-C.A.U.S.E.; HOWEVER, IN ATTEMPTING TO LEGISLATE "MORALITY", AS PROVEN IN THE PAST, WE CAN ANTICIPATE ONLY FAILURE.

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THOSE LEGISLATORS RESPONSIBLE FOR THE PASSAGE OF NO LESS THAN 40 ALCOHOLIC-BEVERAGE RELATED BILLS IN SO BRIEF A TIME FRAME, HAVE EVEN THROWN THEIR HANDS UP IN DESPAIR, AS BEST SUMMARIZED BY SENATOR CAUFIELD WHO RECENTLY EXPRESSED "LET'S LET THE DUST SETTLE, AND SEE WHAT WE'VE DONE...".

FURTHERMORE, ASSEMBLYMAN WALTER J. KAVANAUGH'S COMMENT THAT "A LOT OF PEOPLE THINK WE'RE FORCING THINGS ON THEM WITHOUT GETTING THEIR INPUT", SAYS IT ALL.

ADDITIONALLY, SENATOR FRANK X. GRAVES' OBSERVATION IN THAT WITHOUT SUCH OPPORTUNITY TO PERMIT TELLING "WHO IS RIGHT, AND WHO IS WRONG" THROUGH CAREFULLY EXAMINING THE ISSUE, COULD MAKE A "SHAM" OUT OF THE COMMISSION, SEEMS QUITE CORRECT.

FURTHER EVIDENCE OF THE NECESSITY IN DETERMINING WHAT, IF ANY, BENEFICIAL RESULTS HAVE BEEN REALIZED THROUGH SUCH A PLETHORA OF LEGISLATION, HAS PROMPTED OTHER COMMITTEES TO STUDY THE ISSUE; COMMITTEES SIMILAR TO THE ONE WHICH WE ARE NOW PRIVILEGED TO APPEAR BEFORE, AND WE COMMEND ALL THOSE RESPONSIBLE FOR TAKING SUCH REQUIRED ACTION.

IT IS SAD TO NOTE, IN SPITE OF THE SEVERE AND UNJUST DWI LAWS, AND THEIR RELATED MANNER OF ENFORCEMENT, AND IN SPITE OF THE HUNDREDS OF THOUSANDS, IF NOT MILLIONS OF TAXPAYERS' DOLLARS SPENT IN THIS FUTILE ATTEMPT TO CORRECT A SOCIAL ILL THROUGH POLITICAL EXPEDIENCY, RESULTS REMAIN FOR THE MOST PART UNCHANGED, OR IN FACT, HAVE WORSENED.

FIGURES FROM OUR OWN NEW JERSEY OFFICE OF HIGHWAY SAFETY INDICATE 932 FATALATIES OCCURRED ON OUR ROADWAYS IN 1983; IN 1984 IT APPEARS AT LEAST 929 PERSONS SHALL HAVE DIED ON THESE SAME ROADS, IN SPITE OF THE HERETOFORE MENTIONED MILLIONS OF TAXPAYERS DOLLARS SPENT; AND AS IMPORTANTLY, DESPITE THE "HYPE" PROMPTING OUR NEW JERSEY CITIZENS, ON BOTH SIDES, TO BECOME PARANOID OVER THIS CRITICAL ISSUE.

THE PRIDE CURRENTLY BEING DISPLAYED BY SOME IN TOP-LEVEL OFFICES OF OUR STATE, AS THEY ESPOUSE THE MERITS AND "SUCCESS" RESULTING FROM WHAT THEY PROUDLY REFER TO AS THE "TOUGHEST DRUNK DRIVING LAWS IN THE COUNTRY", IS NOT ONLY MISLEADING AND SHAMEFUL, BUT ALSO ERRONEOUS; FOR AS RECENT AS APRIL 2, 1985, WE READ OF SPOKESMAN H. ARTHUR SMITH III OF THE NEW JERSEY MOTOR VEHICLES DEPARTMENT, DECLARING THE HIGHWAY FATALITY RATE INCREASED 42% IN THE FIRST MONTH SINCE MOTORISTS HAVE BEEN REQUIRED TO WEAR SEAT BELTS.

FURTHERMORE, JOHN DEMPSTER, OF THE NEW JERSEY DEPARTMENT OF TRANSPORTATION STATED 81 PEOPLE WERE KILLED IN TRAFFIC ACCIDENTS IN OUR STATE IN MARCH COMPARED TO 57 DURING MARCH OF LAST YEAR. NEW JERSEY STATE POLICE INDICATE A 15.0% RISE IN HIGHWAY DEATHS FOR THE FIRST THREE MONTHS OF THIS YEAR COMPARED TO THE SAME PERIOD IN 1984!

BETWEEN JANUARY 1, AND APRIL 3RD OF THIS YEAR, THERE HAVE BEEN 29 MORE DEATHS ON OUR ROADWAYS REPORTED THAN FOR THE SAME PERIOD ONE YEAR AGO.

IN VIEW OF THE ABOVE REVELATION, WE RESPECTFULLY SUBMIT, THOSE OFFICES RESPONSIBLE FOR PROPOGANDIZING THE EFFICACY OF OUR "TOUGH DRUNKEN AND/OR DRIVING LAWS" REFRAIN FROM SO DOING, AND AS OUR LEGISLATORS HAVE SO WISELY DECIDED, TO STUDY THIS MOST COMPLEX ISSUE, AND WHO HAVE THEMSELVES SELF-IMPOSED A MORATORIUM ON ANY FUTURE RELATED LEGISLATION; SO SHOULD THOSE REFERRED-TO OFFICES ADOPT SUCH PROCEDURE, AND SHOULD THE EVIDENCE OF THIS AND OTHER HEARINGS REVEAL AND SUBSTANTIA THAT WHICH A-C.A.U.S.E. HAS PROJECTED HERE TODAY, THEN LET THIS GREAT STATE OF OURS, IT'S GOVERNOR, AND IT'S REPRESENTATIVES, TAKE THE LEAD IN DECLARING TO THE REST OF OUR NATION, THAT THIS INDEED IS NOT THE WAY TO GO; BUT RATHER LET US ADOPT MEASURES MORE LIKELY OFFERING THE DESIRED RESULT; THAT OF REDUCING SENSELESS LOSS OF LIFE ON OUR NEW JERSE STREETS AND HIGHWAYS, IN THE ABSENCE OF ANY WATERING DOWN OF OUR CITIZEN BLANKET CIVIL LIBERTIES.

RATHER THAN CONTINUE IN ATTEMPTING TO CURE THIS SOCIAL ILL THROUGH LEGISLATIVE EXPEDIENCY - OBVIOUSLY, AN IMPOSSIBLE METHOD, LET US INSTEAD EARMARK DWI ENFORCEMENT DOLLARS, AS WELL AS A PART OF OUR STATES' SURPLUS IN EDUCATING ALL OF NEW JERSEY'S CHILDREN IN AN ONGOING PROGRAM AS TO THE USE AND ABUSE OF ALCOHOL, AND IN THE ELIMINATION OF DRUG USE; LET US UPGRADE OUR REHABILITATION CENTERS AND ATTRACT QUALIFIED AND TALENTED PERSONNEL TO THIS WORTHY SERVICE; AND LET US INSIST OUR COURTS PENALIZE THOSE DESERVING PUNISHMENT - THE RECIDIVIST, WHO IS THE REPEAT OFFENDER ON OUR ROADWAYS, AND WHO IN MANY CASES IS DRIVING ON A REVOKED OR SUSPENDED LICENSE, AND WHO IS MOST RESPONSIBLE FOR THE HIGHWAY CARNAGE - IN SPITE OF HIS FACING STRINGENT PENALTIES INCLUDING HEAVY FINES, LICENSE SUSPENSION, AND INCARCARATION, WHILE THE SOCIAL DRINKER - WHO IS A LAW-ABIDING CITIZEN PAYS THE PRICE.

THERE ARE SOME WHO WOULD SAY "IF WE SAVE ONE LIFE - IT'S WORTH IT". BUT IS IT? IS THIS WHAT OUR FOREFATHERS WISHED FOR US? IS THIS WHAT MEN WHO HAVE FOUGHT BATTLES IN THE PRESERVATION OF THAT WHICH IS NOW BEING THREATENED, AND WHO HAVE SPILLED THEIR BLOOD AND LOST THEIR VERY OWN LIVES, WISHED FOR US? THERE IS AN ELEMENT OF RISK FROM THE VERY MOMENT WE ARE BORN. IN ALL CANDOR AND RESPECT, IT IS OUR CONCLUSION AND THAT OF THOUSANDS OF OTHERS, IN AND OUT OF OUR ORGANIZATION, THAT IT IS ABOUT TIME THE STATE STOPPED SAYING "WE KNOW WHAT IS BEST FOR YOU, LET US SAVE YOUR LIFE." ARE THE CITIZENS OF NEW JERSEY INTELLIGENT ENOUGH TO LOOK OUT FOR THEIR OWN SAFETY, OR DO THEY NEED COERCION FROM THE STATE? OUR COURTS AND OUR LEGISLATORS SEEM TO BELIEVE THE LATTER!

25x

PRECIOUS CIVIL LIBERTIES ARE AT THE VERY LEAST, BEING DILUTED THROUGH LEGISLATION PROMPTED BY A HANDFUL OF "DO-GOODERS", WHILE AN ENTIRE INDUSTRY; IT'S WORK FORCE, ALONG WITH TENS OF THOUSANDS OF EMPLOYEES IN RELATED INDUSTRY; IT'S REVENUE - MUCH OF IT USED IN BENEFITTING OUR STATES' CITIZENRY, IS LITERALLY "GOING DOWN THE DRAIN", AS A NEO-PROHIBITION CLIMATE PERMEATES OUR ENTIRE SOCIETY!

IT IS OUR OPINION...THE ISSUE HERE IS NOT WHETHER TO LIMIT LIABILITY, FOR HOMEOWNERS OR LICENSEES - BUT RATHER THAT ALL CITIZENS OF NEW JERSEY BE EXEMPT FROM ANY SOCIAL LIABILITY AND THE OBVIOUS BURDEN WHICH IT CARRIES; SURELY PEOPLE MUST BE RESPONSIBLE FOR THEIR OWN ACTIONS, AND THERE IS NO WAY IN THIS WORLD WHEREIN WE CAN LEGISLATE MORALITY, THE 6,000 PETITIONERS OF A-C.A.U.S.E. WISH TO GO ON RECORD AS BEING VEHEMENTLY OPPOSED TO ANY FORM OF SOCIAL HOST LAW, NOR DO THEY WISH TO SEE THE CITIZENS OF OUR STATE CONTINUE TO BE BURIED UNDER AN AVALANCHE OF DWI LEGISLATION, AS EXISTS IN NEW JERSEY TODAY; BUT RATHER SEEKS THE REVIEW, REFORM AND REPEAL OF MUCH OF SUCH LEGISLATION, INCLUDING THE PRESENT UNCONSTITUTIONAL UTILIZATION OF ROAD BLOCKS ON OUR STREETS AND HIGHWAYS, AND DESIRES THE REPEAL OF PENALIZING OUR CITIZENS TWICE FOR THE SAME OFFENSE THROUGH THE PRACTICE OF IMPOSING RETROACTIVE SURCHARGES.

LET SUCH PRACTICES REMAIN COMMON IN FACIST AND COMMUNISTIC COUNTRIES, BUT NOT IN OUR PROUD NATION, AND CERTAINLY NOT THORUGH ANY LEAD ON THE PART OF OUR OWN GARDEN STATE, WHO'S BOUNDARIES WOULD STAND ALONE IN OUR NATION IN IT'S VIOLATION OF IT'S CITIZENS' RIGHTS TO BE RESPONSIBLE FOR THEIR OWN ACTIONS, SHOULD THIS LUDICROUS SOCIAL HOST COURT DECISION STAND.

WE THANK YOU FOR OFFERING A-C.A.U.S.E. THE OPPORTUNITY TO ADDRESS THE ISSUE, AND WE WISH YOU THE VERY BEST IN YOUR DELIBERATION, AND ULTIMATE DECISION, WHICH HOPEFULLY SHALL RESULT IN THE REPEAL IN IT'S ENTIRETY OF THE SOCIAL HOST RULING AND THE ELIMINATION OF ANY THIRD PARTY LIABILITY.

EXECUTIVE DIRECTOR

Diane Legreide
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Lawyers Enc[illegible] Government and Law

preserving th[illegible]e of law for the public interest

POSITION STATEMENT ON SOCIAL HOST LIABILITY

Before the Commission on Alcoholic Beverage Liability

May 9, 1985

Appearing for LEGAL
Diane Legreide
Executive Director

TESTIMONY RE: SOCIAL HOST LIABILITY May 9, 1985

Thank you, Mr. Chairman and commission members for the opportunity to testify before this commission on behalf of LEGAL.

The members of this commission should be commended for devoting their time to such an important topic, one which should be the focus of anyone serving alcohol to persons who will drive on our highways.

A great deal of concern has been expressed by various persons, before both this commission and the Assembly Law, Public Safety Committee with reference to the affordability and availability of insurance coverage as a result of recent court decisions. While it is important that this commission considers the effect of insurance costs to homeowners and licensees; it is even more important to consider those citizens of our state that at some future time may be maimed or killed by drunken drivers.

The frequency of alcohol related accidents and fatalities has been receiving widespread public attention, not only in New Jersey, but nationwide. The Presidential Commission on Drunk Driving, a group formed in response to public and official demand for action, has written that one-half of all highway deaths are alcohol related. As this problem has become more and more a source of concern to the public, pressure on public officials to find ways to combat the problem has brought forth a variety of proposals to reduce the number of intoxicated drivers on streets and highways. New Jersey has been in the forefront in this area, and in fact has been successful in reducing the incidence of highway accidents related to alcohol.

The Presidential Commission on Drunk Driving recommended that one possible means of detering drunk driving is to impose penalties on the person who sells or provides alcoholic beverages to a driver who later causes a crash. In calling for the enactment of Dram Shop and Social Host laws, the Presidential report states that, "these laws implicitly establish the necessity of placing responsibility on the part of the seller or server, whether they be commercial or individual hosts. These laws also reinforce the principle that others have a responsibility to prevent intoxicated individuals from driving."

Twenty-three states have laws that make those who sell and serve liquor responsible if their drunk customers have accidents. Most states are increasing penalties for those who are driving while drunk and of course, we know New Jersey has some of the toughest laws in the nation. As a result, bartenders are more vigilant than ever about cutting off their customers before they have had too much to drink. Col. Pagano, superintendent of the New Jersey State Police, has said that New Jersey's tough stance against drinking and driving is paying dividends already. There has been approximately a 30% reduction in alcohol related fatalities in the past two years.

Likewise, the Social Host liability ruling will serve to further reduce alcohol related fatalities. A responsible social host will take reasonable measures to ensure that the people he is entertaining will not drive drunk. This ruling establishes a responsibility on the part of the host which will not only protect the potential drunk driver, but also his victims.

While this commission may feel it is necessary to recommend a definitive description of the social host liability, the issue of a licensee is different. The retail licensee, by its very nature a profit making enterprise, has more of an impetus not to restrict the sale of drinks and should therefore come more explicitly under the jurisdiction of the law.

Former director of the ABC, Joseph Lerner, in 1980 remarked that, "in return for the granting of an ABC license, each of the retail licensees has a legal and moral obligation to consider the well-being of the patrons he serves. They should be held to that obligation."

New Jersey Licensed Beverage Association, Inc.

1880 WOODBRIDGE AVENUE, EDISON, N.J. 08817

Phone 985-6670

MARY E. RAHMIG, EXECUTIVE DIRECTOR

May 3, 1985

Senator Raymond Lesniak
Chairman
Commission on Alcoholic
Beverage Liability
651 Westfield Avenue
Elizabeth, New Jersey 07208

Dear Senator Lesniak:

We wish to take this opportunity to thank you for the time afforded us on April 25th to testify before the Commission on Alcoholic Beverage Liability relative to licensees and the present liquor law liability problem. The sample premium sheet which was distributed to you and your committee testifies to our exorbitant premium increases and clearly demonstrates our liability dilemma, with little hope of a solution in the very near future.

In view of the fact that our testimony time was limited because of a time factor, I wish to submit additional information for you and your committee's review and consideration. The licensees in the State of New Jersey certainly need some relief from the liability problem. It is a must that licensees be able to purchase this type of insurance at affordable rates. It is unjust and unfair to ever place a business person in a position of possibly losing his entire livelihood because he cannot afford the exorbitant premiums being foisted upon him. Only eight or nine years ago we could purchase sufficient coverage for $100 per year; in today's market, because of the ever-increasing jury awards and the proliferation of suits, the limited coverage now available costs the average licensee seven to ten times that figure.

It is our belief that the consumer should be responsible for his/her own actions. In light of this, we are preparing legislation wherein the person who drinks and causes an accident cannot claim liability against the licensee or server. A request of modification in third party liability, to comparative negligence is also to be considered. This legislation will include the social host situation as well.

There is no doubt in our minds that homeowners will also see dramatic increases in their homeowner policies because cases will continue to escalate over the months and years to come. Perhaps we will see the day when insurance companies will exclude this particular coverage altogether from the homeowners policy.

We reiterate our opinion that the very low minimum limit of $15/30,000 on automobile insurance has a direct reflection on legal action against a licensee or social host. This problem of very low insurance then brings forth the deep-pockets theory; go where the highest coverage is.

I am enclosing a reprint from the AMERICAN PSYCHOLGIST entitled, "Psychology, Public Policy, and the Evidence for Alcohol Intoxication." This article may shed some additional light on the question that was brought up several times at the hearing regarding one's ability to identify if a person is intoxicated. The reprint thoroughly examines three experiments testing the ability of social drinkers, bartenders and police officers to estimate the sobriety of target persons.

Also find enclosed some pertinent articles relative to our testimony.

Thanking you again for the opportunity to express our views on this very serious and timely situation, I remain.

Sincerely,

Carmen Giletto

Carmen Giletto
President

/j

ENCLOSURES

cc: Members of the Commission
on Alcoholic Beverage Liability

(SCHEDULE B)

New Jersey Licensed Beverage Association, Inc.

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MARY E. RAHMIG, EXECUTIVE DIRECTOR

REPRESENTATIVE SAMPLING OF LIQUOR LAW LIABILITY PREMIUMS

ACCOUNT NUMBER		LIMIT	PREMIUM 1984	PREMIUM 1985
BRV 555 E. Brunswick		$500,000	$ 1,217	$11,050
DAN 215 Boonton	1984	$500,000		
	1985	$100,000	$ 700	$ 7,500
CHE 800 Bloomingdale	1984	$300,000		
	1985	$100,000	$ 613	$ 7,500
KRO 300 Sparta		$500,000	$ 815	$ 3,450
PER 343 Manville		$500,000	$ 800	$ 8,050
PEL 490 So. Plainfield		$500,000	$ 1,055	$ 9,159
WAR 855 Somerville		$500,000	$ 906	$ 6,550
NER 516 Closter		$500,000	$ 800	$ 8,370
OLD 230 New Brunswick		$500,000	$ 715	$ 8,050
HAN 300 Manville		$500,000	$ 1,265	$ 8,090
FAN 045 Pemberton	1984	$300,000	$ 1,800	$25,000
	1985	$100,000		
TIL 085 Egg Harbor Twp.		$300,000	$ 1,200	$18,000