Minutes of the Judiciary Committee
February 2, 1983

The meeting of the House Judiciary Committee was called to order by Chariman Dave Brown. All members were present except REPRESENTATIVE FARRIS who was excused. Brenda Desmond, Legislative Council, was present.

HOUSE BILL 417

This bill updates the list of controlled substances contained in the state law to conform with the list of controlled substances under federal law, explained the sponsor, REPRESENTATIVE METCALF. The Board of Pharmacists has requested the bill. The federal list is published yearly, but it is felt the law should also be updated.

WARREN AMOLE, Board of Pharmacists supported the bill with EXHIBIT A. AMOLE recommended the committee adopt the amendments as proposed in his testimony to change the clerical typing errors of two of the drugs .

There were no further proponents.

There were no opponents.

REPRESENTATIVE METCALF, in closing, recommended the amendments be adopted.

REPRESENTATIVE ADDY asked how the list is developed. AMOLE replied it is taken from the Code of Federal Regulations. The Federal Food and Drug Administration sets up the schedule on the basis of the potential for abuse of the drug.

The hearing on the bill closed.

HOUSE BILL 357

REPRESENTATIVE DONALDSON, sponsor, stated House Bill 357 would revise the laws relating to immunization and indemnification of governmental employees. There is an ever increasing number of civil rights actions brought under federal law against employees of the state and local governments.

REPRESENTATIVE DONALDSON read EXHIBIT B, a letter from Mike Young Administrator of the Insurance and Legal Division of the Department of Administration.

SENATOR JOE MAZUREK, Senate District 16, was in favor of the proposed legislation. SENATOR MAZUREK stated he worked on the bill with the sponsor and the Department of Administration. He felt there are some mechanical problems with the bill; however, with the amendments that will be proposed, particularly those to be proposed by the City of Missoula and the Department of Administrtion, some of these problems will be worked out.

MIKE YOUNG, Department of Administration, stated his division's purpose is to defend all state officers and employees. The bill is a combined effort of the state and other agencies and local governments.

In the post civil war years after the 14th amendment was amended to the constitution the United States, Congress enacted a number of civil rights statutes and then enacted nine in the 1960's. 28 U.S.C. 1983 was originally designed by Congress to be used to go after the typical southern sheriff who used his office to deny people their civil rights. The federal civil rights statutes were rarely used for many years. But then a number of claims were filed in the 1960's.

YOUNG stated his office must go through all the complaints. All officers and employees are provided to defense for the civil rights actions because the department does not know where the litigation will end up. Today almost half of the claims filed against government employees contain some sort of civil rights claim.

As a consequence, a number of people have received warning letters at the outset of litigation that state if the defendant is found guilty of the civil rights violation, the state will not be liable and the guilty party will have to assume the responsibility.

There was a survey taken in the summer of 1982. The state agencies were asked to submit a summary of civil rights claims for the past five years. Approximately 142 claims have been filed during that time. Since then, a number of others have been filed. The Department of Institutions was recently sued in Missoula concerning the group home there. YOUNG stated he has also been sued.

This type of action is a harrassment to the state employees. The basic idea of the bill is to require government entities to provide a defense for employees except when the employees' actions fall within the exclusions of subsection (6). The bill also requires the government entity to indemnify the employee. Subsection (6) attempts to take away the indeminity right. There were a number of problems with this. This would exclude any defense for conduct that is also a criminal offense. YOUNG stated he was not entirely satisfied with that approach because it requires trying to prove a criminal burden in a civil case.

YOUNG offered EXHIBIT C, amendments to the bill. Line 2 of the bill on page 2 should be struck because a state is not a person. If this were kept in the bill it would be a violation to the 11th amendment of the U.S. Constitution.

YOUNG stated there is a morale problem with state employees because of the lengthy litigation process. This bill would give

the state more control of the conduct and settlement of the litigation. The bill would be financed through the state fund.

YOUNG stated in attempting to balance the act between the rights of the employee and the rights of the employer sometimes intended actions have unintended results.

CHUCK O'REILLY, Montana Sheriffs & Peace Officers, was in favor of the bill. He has been involved in jail liability suits a number of times. He has been sued for from $20,000 up to 1 1/2 million dollars. His jailors, who earn $850 a month gross, have also been sued. They could not afford payment if a judgement were entered against them.

BILL WARE, Montana Chiefs of Police Association, supported the bill. Many civil suits have been filed against him and the police officers. Some officers that have been sued have had to hire an attorney because the alleged act was within the scope of their employment.

NICK ROTERING, Department of Institutions, stated he has tried over 100 of this type of lawsuit. Prior to June 20, 1982, he had not lost such a case. However, that situation has changed since then. Attorneys are now getting involved for the inmates because if the attorneys can obtain any relief for the inmates they are entitled to attorneys fees. It is up to the Department whether to defend the state in these amtters.

JIM GLOSSER, Administrator of the Animal Health Division of the Department of Livestock, showed support of the bill by reading testimony from EXHIBIT D.

GLENN DRAKE, representing the Montana Public Employees Association and the American Insurance Association, was in favor of the bill. Since insurance companies often insure counties, this bill will make it clarify issues should the counties get sued.

MARY FAY, Montana Correctional Association, was in favor of the bill. The Association includes all correctional employees, juvenile and adult probation officers, the Board of Pardons, Board of Crime Control among others.

The Association supports the proposal because people in the correctional field are vulnerable to these types of lawsuits.

JEREMIAH JOHNSON, Montana Probation Officers Association, supported the bill. JOHNSON read a letter from the Missoula City Attorney, Jim Nugent supporting the bill. Amendments were also included as part of EXHIBIT E.

MARC RACICOT supported the bill.

EXHIBIT F, a letter from Robert L. Deschamps, III, was submitted in favor of the bill.

There were no further proponents.

There were no opponents.

In closing, REPRESENTATIVE DONALDSON stated that the Department of Administrations is threatened by lawsuits almost on a weekly basis. He stated he was in favor of the amendments proposed.

REPRESENTATIVE KEYSER noted $215,000 would come out of the state's insurance fund. What year will the different agencies be billed for this and when will the fund no longer cover this? YOUNG stated the actuary feels the fund is solid for the next five years.

REPRESENTATIVE JENSEN asked GLOSSER if a judgement was ruled against him. GLOSSER replied yes, a judgement of $275,000 was ruled in favor of the other party. That case is currently being appealed. The flurry of threats of lawsuits has increased since that time.

REPRESENTATIVE ADDY was concerned with the wording "for damages". SENATOR MAZUREK replied damages include civil actions for personal injury and for property damage.

ROTERING noted a decision from the United States Supreme Court states that under present federal law a person cannot file property damage claims against state officials. Instead, an action under the state tort claims act must be filed.

REPRESENTATIVE ADDY thought the bill as amended would shift the burden from the employer to the plaintiff. JOHNSON responded that if an action is filed because an employee has disobeyed a definite departmental policy, the amendments would make sure that type of person would be excluded from coverage. It would only take one bad employee to put the government office into a position that they would have to defend his actions when in reality they were opposed to his actions.

The hearing on the bill closed.

HOUSE BILL 415

REPRESENTATIVE DAILY, sponsor, stated this bill will allow a municipal court judge and his law partners to practice law before any court of this state except the court of that municipal judge.

REPRESENTATIVE DAILY noted the bill is being sponsored at the request of one of his constituents.

Current statutes do not allow a district court or municipal court judge to practice law in any court. This amendment would simply allow a municipal court judge to practice in other courts. This would comply with justice courts' current procedures.

WILLIAM GEAGAN, Attorney and Police Judge in Butte, stated he requested REPRESENTATIVE DAILY to sponsor the legislation. It would allow a judge of the municipal court, a court of record, to practice law in all other courts except his own. It would also allow his law partners to practice in any other courts.

GEAGAN noted the municipal judge's salary is not a generous one so, this bill will permit those judges to add to their income. There is only one municipal judge in the state, Judge Wallace Hart in Missoula. The judge cannot practice law because he is currently prohibited by statute. In speaking with JUDGE HART, GEAGAN noted he was in favor of the legislation.

There were no further proponents.

There were no opponents.

In closing, REPRESENTATIVE DAILY stated a municipal court judge receives the same type of training and must have the same qualifications as a district court judge. The only difference is the municipal judge must be a practicing attorney for two years and the district judge must be a practicing attorney for five years.

REPRESENTATIVE ADDY asked if there would be an adverse effect if an attorney faced a municipal court judge acting as a attorney, and was later to face the judge in his court in another matter. GEAGAN replied he did not think so. He felt both parties would act as professionals.

There were no further questions.

The hearing on House Bill 415 closed.

HOUSE BILL 429

REPRESENTATIVE HANNAH, sponsor, stated this bill will increase the penalties for discharging firearms within the limits of a city or town.

The fine is increased from $25 to $500 or imprisonment in the county jail not exceeding six months or both fine and imprisonment.

REPRESENTATIVE HANNAH felt that the present fine of $25 is not a deterrent for this type of action. There have been various problems concerning damaged property and injured people.

MARCEL TURCOTT, Montana Magistrates Association, stated the present fine is not high enough. A $25 fine is not adequate for a code violation that could cause widespread damages to an individual or property. The present fine does not give judges the ability to work with second, third, or fourth offenders. Most of the misdemeanors have an automatic $500 fine or 6 months inprisonment if a penalty is not stated. There are abuses with some of the laws. There are over 600 judges and they are all individuals, TURCOTT stated. There is a very simple appeal process with city court judgements. Within ten days of the judgement the person can appeal to district court, however, there is language in the code that would prevent this from becoming abusive.

BILL WARE, Montana Chiefs of Police Association, supported the proposed legislation.

RALPH KNAUSS, Montana Rifle & Pistol Association, also supported the bill.

REPRESENTATIVE KELLY ADDY, District 62, supported the bill. He stated if is a serious crime and warrents more than a $25 fine. He noted there is no mandatory minimum.

There were no further proponents.

There were no opponents.

REPRESENTATIVE HANNAH closed his remarks on the bill.

CHAIRMAN BROWN noted that REPRESENTATIVE SAUNDERS has a bill that would amend the definition of firearms to include BB guns and pellets.

REPRESENTATIVE HANNAH noted REPRESENTATIVE SAUNDERS did discuss this with him. He would not object to the bill being amended as such if it would not result in a negative action by the committee.

TURCOTT added pellet guns have quite a bit of velocity behind them. The argument against including them in the definition of firearms is that juveniles use pellet guns. However, they often use them destructively, for example, shooting out street lights. Juveniles charges with this would go to youth court and be fined up to $50.

The hearing on the bill closed.

HOUSE BILL 355

REPRESENTATIVE SANDS, sponsor, stated the bill would generally revise the laws relating to evidence. The bill was requested by the Supreme Court. The sponsor noted that 80% of the bill is stylistic and grammer changes. The existing evidence law was

originally written in 1895 and is now out-of-date in parts. For example, the law makes references to positions that no longer exist, such as the Secretary of War. The Montana Rules of Evidence were adopted in 1977.

SAM HAMMOND, representative of the Supreme Court Commission on the Rules of Evidence, was in favor of the bill. A joint resolution last session mandated the Supreme Court to study the evidence statutes. The purpose of the resolution was to give some consideration to the statutes that were left over after the adoption of the Rules of Evidence in 1977. The commission did three things: (1) considered whether there were any conflicts between the statutes and the Rules of Evidence, (2) considered whether each statute was really needed, (3) examined the specific language of each statute to make appropriate changes.

The Commission met in December and reviewed the statutes and the Rules of Evidence to comply with the three objectives listed above. The proposed bill is the result of the meeting.

MARC RACICOT was in favor of the bill. RACICOT noted on page 7, lines 6 through 10 and on page 10, lines 9 through 12 states "if weaker and less satisfactory evidence is offered and it is within the power of the party to offer more satisfactory evidence." Typically in criminal cases, someone would try to offer that instruction. When that instruction is used and the person does not testify, his 5th amendment right would be violated. RACICOT, therefore, stated that the bill should be amended in those areas to say "except in criminal cases".

J.C. WEINGARTNER, State Bar of Montana, was in favor of the bill.

MICHAEL ABLEY of the Supreme Court, supported the proposed legislation.

There were no further proponents.

There were no opponents.

REPRESENTATIVE SANDS closed the bill.

REPRESENTATIVE EUDAILY asked if the Commission agreed with RACICOT's amendments.

HAMMOND replied there was some discussion to see if this would be a conflict. There was some uncertainty as to whether it was limited to civil cases. Rather than create confusion the Commission suggested the language as proposed in the bill. HAMMOND stated he would not object if it was limited to civil cases.

REPRESENTATIVE ADDY asked why the age of the document was eliminated. It was replied that section is currently in the Rules of Evidence.

The hearing on the bill closed.

HOUSE BILL 389

REPRESENTATIVE MENAHAN, sponsor, stated House Bill 389 will provide for motor vehicle liability coverage of persons without regard to the motor vehicles owned or operated by the insured.

The sponsor stated the laws concerning buying insurance are written in favor of the insurance industry rather than the consumer. REPRESENTATIVE MENAHAN stated he recently tried to buy insurance on himself as a driver. Instead the insurance companies insisted he could only buy insurance on his car. What if a person doesn't own a car? The sponsor believes insurance should follow the person to whatever vehicle he drives, whether it is his or not.

There is a discrepancy in rates depending upon where an individual lives. The premium for nonoperator insurance would cost $124 because the person does not own a car. If the person owned a car the same type of coverage would only cost $60. "What if a person drives a company car and only wants to insure himself and not his family?" the sponsor questioned. He was informed that if he does not insure his family and they drive someone else's car, that person could sue him.

The sponsor was also told by the insurance companies that if a motorist only has liability insurance, coverage occurs only when another car runs into your car. Liability would not cover the passengers or the driver of the car. The sponsor stated, however, that is why most people have health insurance.

REPRESENTATIVE MENAHAN stated he has written to the NCSL asking about insurance laws in Montana and other states. The reply was that no state has a drivers insurance because this would reduce premiums.

A driver can only drive one car at a time, yet he must pay insurance on all his vehicles. The insurance follows the car, yet it should follow the driver.

MORRIS GULLICKSON, United Transportation Union, was in support of the bill. He submitted EXHIBIT G as his testimony.

DOUG OLSON was also in favor of the bill. OLSON stated he has a hobby of fixing up cars. In order to comply with the law he must carry liability insurance on every vehicle. Since he is the only

one who drives the cars he should be able to have insurance on only himself.

OLSON felt the bill would apply to farmers who drive grain trucks also.

REPRESENTATIVE JENSEN was also in favor of the bill. He stated he has an antique car collection. As a result, he has had to buy policies on a number of cars. It does not make sense to insure the cars and not the driver. Some of the cars he only drives once a month.

There were no further proponents.

GLENN L. DRAKE, representing the American Insurance Association, was opposed to the bill. DRAKE submitted EXHIBIT G as his testimony.

ROGER McGLENN, Independent Insurance Agents' Association of Montana, was against the bill. McGLENN submitted EXHIBIT I as his testimony. The testimony also includes "Insure the Driver - A Study" by the Research Board, Society of C.P.C.U..

ROBERT LADLOW, Northwest National Insurance Company opposed the bill. The insurance company is a complex industry. LADLOW stated the cost to implement this bill would be passed on to the insurance consumer.

NORMA SEIFFERT, representing the Insurance Department, was opposed to the bill. All insurance forms must be filed with the state. SEIFFERT did not know how much the bill would cost if implemented. It would also take time to implement the procedure.

SEIFFERT felt the bill could "dry-up the market in Montana and be an actuarial nightmare."

There were no further opponents.

In closing, the sponsor noted that the whole concept of insurance is complicated because the insurance industry wants to make it that way. Instead of hassling with insurance companies, why can't the consumer tell the insurance company how much his car is worth? Instead the consumer has to take the price that the blue book quotes.

REPRESENTATIVE MENAHAN also noted that if a policy is dropped for a few months and then picked up again the consumer pays more.

During the question period, REPRESENTATIVE SPAETH asked why the consumer is charged additional costs if he has failed to insure his car for 3 to 4 months. SEIFERT responded that insurance companies are not allowed to do that. Insurance companies have a theory that a person is not a good risk if he has dropped his insurance. However, her office realizes that the consumer often has a valid reason for dropping insurance for a short period of time.

REPRESENTATIVE CURTISS stated that some federal employees are not covered when they drive federal cars. Is there any way they can be covered? SEIFERT responded they can be covered by a business rate. Various insurance companies do have that type of coverage available.

REPRESENTATIVE MENAHAN stated that the law does not have driver's policies. SEIFERT responded that some companies have rates for employees under the business rates. Two statutes address the replacement costs - Title 33 and Title 27. Title 27 refers to Civil Liability, Remedies and Limitations. Title 33 refers to Insurance and Insurance Companies.

REPRESENTATIVE DAILY asked if the insurance companies could challenge a person if they did not inform the company of their change in status (i.e. where they lived, or who drove their car, etc.) McGLENN stated no. The insurance company cannot deny consideration

The hearing on the bill closed.

EXECUTIVE SESSION

HOUSE BILL 398

REPRESENTATIVE CURTISS moved DO PASS, seconded by REPRESENTATIVE IVERSON.

REPRESENTATIVE JENSEN stated the amendment proposed in testimony is required to make the bill constitutional. It eliminates the distinction between voluntary and involuntary intoxication. REPRESENTATIVE JENSEN moved the committee adopt the amendment. (see EXHIBIT K).

REPRESENTATIVE KEYSER did not agree feeling the current language in the bill is better. REPRESENTATIVE KEYSER agreed with the new language of "such condition deprives the person of the ability to have a particular state of mind that is an element of the offense charged." He thought that leaving lines 17 and 18 "conduct unless condition is involuntarily produced" would perhaps contradict with the new language.

REPRESENTATIVE JENSEN stated there is not a conflict with the added

language. In a trial the jury is instructed to raise questions of voluntary or involuntary behavior. A juror might feel that no one voluntarily ingests alcohol. The consideration should be whether or not the person on trial actually committed the crime. Whether he can remember it or not is not the issue.

BRENDA DESMOND stated this statute would be in line with the insanity defense. Leaving the proposed bill without amendments might shift to the defense the burden of proving lack of the required mental state. Further, the trial might be bogged down as to whether the incident was voluntary or involuntary.

REPRESENTATIVE RAMIREZ felt the committee was getting confused on what is a criminal defense.

REPRESENTATIVE SPAETH noted that testimony showed that "our hands are somewhat tied under present case law." He asked if the present bill creates a problem or if the amendments to the bill create a problem. REPRESENTATIVE RAMIREZ replied the problem with the present statute is the language they are trying to strike. They want to make the law in compliance with the abolition of the insanity defense. The problem with the bill as proposed is on line 24, "a voluntarily induced intoxicated or drugged condition is not a defense to any offense..." It is felt that cannot be done. It must be stated that even with a voluntarily induced intoxicated condition it can be a defense if that condition deprives the person of the ability to have a particular state of mind that is an element of the defense charged.

The new amendment will eliminate the problem on line 24. The language that is being stricken to make the present law consistent with the insanity defense confused REPRESENTATIVE RAMIREZ. He asked why should it be consistent? He had not been in favor of elimination of the insanity defense. With the insanity defense the language in this bill should be stricken. If a person was convicted of a crime it would be determined if he would go to prison or a mental hospital, and other factors would be taken into account. A person who was intoxicated during a crime was only in that state of mind during the crime. When the person is tried he is no longer in that same state of mind. A person cannot be sent to a mental institution in that situation. Involuntary intoxication on one occasion is totally different from mental disease.

BRENDA DESMOND stated in 1981 the Supreme Court ruled that the language being stricken was essentially using a defense of mental desease or defect which was the insanity defense before it was changed.

REPRESENTATIVE HANNAH asked if a person got drunk and shot another person, could he plead that he was drunk and would not do

that under normal circumstances. It was replied that the courts decide whether a person was voluntarily or involuntarily intoxicated. Voluntary intoxication is not a defense to criminal charges except a specific intent crime committed like conspriacy to commit murder. Involuntary intoxication can be a defense to just about any crime.

REPRESENTATIVE RAMIREZ asked if involuntary intoxication was treated differently than voluntary intoxication. Yes, because voluntary intoxication is the defense to a specific intent crime; involuntary intoxication is a defense that no crime was committed. The bill would eliminate the distiction between voluntary and involuntary intoxication. BRENDA DESMOND stated the statute as presently written states that under certain circumstances that is, involuntary intoxication, the person was not criminally responsible for the action, in other words there was no crime.

REPRESENTATIVE JENSEN noted the Attorney General's office worked out the language for the amendment. They consider it to be concise. The only proponent that supported the bill as originally drafted was JOHN MATSKO.

REPRESENTATIVE JENSEN withdrew his motions in order for the committee to research the bill further.

HOUSE BILL 362

The motion of DO PASS was made by REPRESENTATIVE IVERSON. REPRESENTATIVE ADDY seconded it.

REPRESENTATIVE RAMIREZ was opposed to the bill. He stated he introduced the first mandatory sentencing bill in the 1977 session. He felt there are still problems with that law. It is an injustice to young people who might get drunk and commit a crime for the first time.

REPRESENTATIVE SPAETH made a substitute motion of DO NOT PASS. REPRESENTATIVE SEIFERT seconded the motion.

REPRESENTATIVE JENSEN was opposed to the motion. Intoxication should not be an excuse for criminal behavior. The court needs direction.

REPRESENTATIVE SPAETH disagreed. A judge may take other factors into consideration. He would still have flexibility.

REPRESENTATIVE ADDY stated he was opposed to mandatory minimum sentencing but not as addressed by this bill.

A roll call vote was taken on the motion DO NOT PASS. Those voting yes were: D. BROWN, EUDAILY, KENNERLY, RAMIREZ, SCHYE, SEIFERT, SPAETH, and VELEBER. Those voting no were: ADDY, BERGENE, J. BROWN, CURTISS, DAILY, DARKO, HANNAH, IVERSON, JENSEN, and KEYSER. The motion failed 10 to 8. The vote was then reversed to a motion of DO PASS. The motion carried with a vote of 10 to 8. Those voting no above voted yes on this motion; those voting yes on the motion above voted no on this motion. House Bill 362 left the committee on a DO PASS motion.

HOUSE BILL 415

REPRESENTATIVE SEIFERT moved DO PASS, seconded by REPRESENTATIVE J. BROWN.

REPRESENTATIVE HANNAH asked if judges would go from district to district if the workload was too high. It was replied WALLACE CLARK is the only municipal judge in the state.

REPRESENTATIVE JENSEN stated that municipal courts are not set up in small rural areas. He felt that a judge should focus on being just a judge and not an attorney.

The motion of DO PASS carried with REPRESENTATIVE ADDY and JENSEN voting against the motion.

HOUSE BILL 417

REPRESENTATIVE J. BROWN moved DO PASS, seconded by REPRESENTATIVE EUDAILY.

REPRESENTATIVE CURTISS moved the committee change the mispelled words of "clonazepan" to "clonazepam" and "flurazepan" to "flurazepam". All were in favor of the motion.

REPRESENTATIVE J. BROWN moved DO PASS AS AMENDED, seconded by REPRESENTATIVE EUDAILY.

All were in favor of the motion. House Bill 417 left the committee on a DO PASS AS AMENDED recommendation.

OTHER MATTERS

BRENDA DESMOND presented the committee with EXHIBIT J, a proposed draft of a bill that would define the term "general election" for the purpose of submission to the people of laws or constitutional amendments by the legislature.

The draft was requested by the Committee Chairman because of uncertainty concerning the effect of 1979 changes in the election law on the law governing the submission of ballot issues by the

legislature to the people. Article III, Section 6 of the Montana Constitution requires that referenda submitted to the people by the legislature be submitted at the "general election." Article XIV, Section 8 requires that constitutional amendments submitted to the people by the legislature be submitted at the "next general election."

From 1889 until 1979 "general election" was defined to mean elections held in even numbered years. Therefore, constitutional amendments and referendums have traditionally been brought to the people in even numbered election years.

In 1979 the election law was amended slightly. Section 13-1-104 is entitled "Time for Holding General Elections". Under that section, there is now a "general election" in even numbered years for the election of federal officers and statewide officers and there is a "general election" in odd-numbered years for the election of "municipal officers and officers of political subdivisions." The question was raised that if the constitution requires an amendment be submitted to the people during a "general election", what exactly is meant by "general election". It was felt that "general election" means elections in both even and odd-numbered years but that it should still mean an election that takes place in even numbered years because that is when the most voters turn out because that is when most state and federal offices are filled.

REPRESENTATIVE CURTISS asked if a person does not vote during one of the elections between presidential elections, will his name be eliminated from the list of registered voters. BRENDA DESMOND did not think do. Cancellation of registered voters occurs every four years after the presidential election.

If a person did not vote during the presidential election, his name is eliminated from the list of registered voters.

REPRESENTATIVE KEYSER moved the committee adopt the draft as a committee bill.

REPRESENTATIVE BERGENE seconded the motion. All were in favor of the motion except REPRESENTATIVE HANNAH.

HOUSE BILL 471

REPRESENTATIVE ADDY moved DO PASS, seconded by REPRESENTATIVE JENSEN. REPRESENTATIVE ADDY felt the bill would be cost saving.

REPRESENTATIVE RAMIREZ stated if members of the committee feel we need additional court judges, this bill is a cheaper way to go. He was in favor of the bill. Yellowstone County definitely needs more help.

There is no possible way the district judges can handle their workload. The county, if this bill passes, would not have to hire additional staff as the current staff would be available for the referee's use. This would also help avoid electing a new judge in the 6th judicial district; which the people there do not want in the first place.

REPRESENTATIVE CURTISS moved the amendment, as proposed in the hearing, that the position need not be full time.

The motion was seconded by REPRESENTATIVE KEYSER.

REPRESENTATIVE SPAETH felt the amendment would open it up to more than one referee. The idea of the bill is to not pay for more than one.

REPRESENTATIVE ADDY stated one or more people could serve as referee with a total time equivalent to one full time position.

REPRESENTATIVE CURTISS withdrew the amendment until further investigation could be made. REPRESENTATIVE ADDY withdrew his motion on the bill.

The committee adjourned at 12:10.

Dave Brown
DAVE BROWN, Chairman

Maureen Richardson
Maureen Richardson, Secretary

STANDING COMMITTEE REPORT

February 2, 19 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 362

First reading copy (white)
color

A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING SECTION 46-18-222, MCA, TO PROVIDE THAT A VOLUNTARILY INDUCED INTOXICATED OR DRUGGED CONDITION MAY NOT BE CONSIDERED AN IMPAIRMENT TO A DEFENDANT'S MENTAL CAPACITY FOR THE PURPOSE OF PROVIDING AN EXCEPTION TO MANDATORY SENTENCES OR RESTRICTIONS ON DEFERRED IMPOSITION AND SUSPENDED EXECUTION OF SENTENCES."

Respectfully report as follows: That HOUSE Bill No. 362

DO PASS

DAVE BROWN,
Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

February 2, 83
19

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 415

First reading copy (white color)

A BILL FOR AN ACT ENTITLED: "AN ACT TO ALLOW A MUNICIPAL COURT JUDGE AND HIS LAW PARTNERS TO PRACTICE LAW BEFORE ANY COURT OF THIS STATE EXCEPT THE MUNICIPAL COURT OF THAT JUDGE; AMENDING SECTIONS 3-1-601, 3-1-603, AND 3-1-604, MCA."

Respectfully report as follows: That HOUSE Bill No. 415

DO PASS.

DAVE BROWN
Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

February 2, 19 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 417

First reading copy (White color)

A BILL FOR AN ACT ENTITLED: "AN ACT UPDATING THE LIST OF CONTROLLED SUBSTANCES CONTAINED IN STATE LAW TO CONFORM WITH CONTROLLED SUBSTANCES LISTED IN THE CODE OF FEDERAL REGULATION, 1308.11-15; AMENDING SECTIONS 50-32-222, 50-32-224, 50-32-226, 50-32-229, AND 50-32-232, MCA."

Respectfully report as follows: That HOUSE Bill No. 417

BE AMENDED AS FOLLOWS:

1. Page 16, line 24.
Strike: "clonazepan"
Insert: "clonazepam"

2. Page 17, line 4.
Strike: "flurazepan"
Insert: "flurazepam"

AND AS AMENDED

DO PASS

DAVE BROWN, Chairman.

COMMITTEE SECRETARY

STATE PUB. CO.
Helena, Mont.

ROLL CALL VOTE ------ JUDICIARY COMMITTEE

	Date: 2/2 No: HB 362 Do Not Pass	Date: No:	Date: No:	Date: No:	Date No:	Date No:	Date: No:
BROWN, Dave	Yes						
ADDY, Kelly	No						
BERGENE, Toni	No						
BROWN, Jan	No						
CURTISS, Aubyn	No						
DAILY, Fritz	No						
DARKO, Paula	No						
EUDAILY, Ralph	Yes						
FARRIS, Carol	-						
HANNAH, Tom	No						
IVERSON, Dennis	No						
JENSEN, James	No						
KENNERLY, Roland	Yes						
KEYSER, Kerry	No						
RAMIREZ, Jack	Yes						
SCHYE, Ted	Yes						
SEIFERT, Carl	Yes						
SPAETH, Gary	Yes						
VELEBER, Dennis	Yes						

HB 417
Exhibit A
2/2/83

BOARD OF PHARMACISTS

1424 9TH AVENUE
HELENA, MONTANA 59620
(406)449-3737

TED SCHWINDEN, GOVERNOR

STATE OF MONTANA

WARREN AMOLE, EXECUTIVE SECRETARY 510 1ST AVE. NO., SUITE 100 GREAT FALLS, MT 59401 (406)761-5131

Date: February 2, 1983

To: Representative Dave Brown, Chairman, Judiciary Committee, and Members

From: Warren R. Amole, jr., R.Ph., Executive Secretary

Re: House Bill 417

This bill is an act updating the list of controlled substances. There are two main reasons why the Board of Pharmacists is requesting the passage of this bill.

Number one is to have the drugs listed in the various schedules to conform with the listing in the Code of Federal Regulations. In the present statutues (referred to on page 1 of the Bill) most drugs are listed consecutively in paragraphs. This makes it difficult to locate a specific drug. You will notice that the format in this Bill names the drugs in list form. This will be helpful to anyone who has need to use the list. It will also make it easier to add, delete, or change drugs in the future.

Number two is that although the Board is given the authority to schedule, reschedule or delete a "controlled substance" (50-32-203 MCA), it has been recommended by the Attorney General's office and others that the Board support a bill in each session of the Legislature that reflects any revisions that may have occurred in the two year interval between legislative sessions. This Bill will help to eliminate any discrepancy between the statutory schedules of controlled substances and administrative rules.

In addition, whenever a drug possession case goes to court that involves a drug that has been scheduled by the Board but not by the Legislature, the

defendant uses the defense that the Board has delegated its authority to schedule drugs to the Federal Government. So far the judges have not allowed this defense ploy but this Bill would eliminate this possibility.

I have included an amendment to this Bill that corrects two misspelled words.

The Board of Pharmacists recommends the passage of this bill.

AMENDMENT TO HOUSE BILL 417

Page 16, line 24, change "~~(f)-clonazepam~~" to "(f) clonazepam"

Page 17, line 4, change "~~(k)-flurazepam~~" to "(k) flurazepam"

STATE OF MONTANA

DEPARTMENT OF ADMINISTRATION

Memorandum

TED SCHWINDEN
GOVERNOR

HB 357
Exhibit B
2/2/83

TO: REPRESENTATIVE GENE DONALDSON, DISTRICT 29

FROM: MIKE YOUNG, ADMINISTRATOR
INSURANCE AND LEGAL DIVISION

DATE: JANUARY 28, 1983

SUBJECT: H.B. 357 - LIABILITY OF GOVERNMENT EMPLOYEES

THE FOLLOWING IS A SUMMARY OF H.B. 357 INCLUDING BOTH PRO'S AND CON'S:

THE PRIMARY IMPETUS FOR THIS BILL IS THE EVER INCREASING NUMBER OF CIVIL RIGHTS ACTIONS BROUGHT UNDER FEDERAL LAW AGAINST EMPLOYEES OF STATE AND LOCAL GOVERNMENTS. ALTHOUGH MANY OF THESE ACTIONS COULD BE PRESENTED AS NEGLIGENT OR WRONGFUL CONDUCT UNDER THE STATE TORT CLAIMS ACT, SUCH CLAIMS ARE FILED UNDER FEDERAL LAW TO IMPOSE PERSONAL LIABILITY UPON OFFICERS AND EMPLOYEES. INDEED, MANY CLAIMS ALLEGE BOTH TORTIOUS AND CIVIL RIGHTS VIOLATIONS IN ORDER TO IMPOSE LIABILITY UPON BOTH THE GOVERNMENT AND THE INDIVIDUAL.

UNDER CURRENT STATE LAW, SECTION 2-9-305, MCA, EMPLOYEES ARE IMMUNIZED AND INDEMNIFIED FOR ACTIONS THAT ARE NOT INTENTIONAL OR FELONIOUS, AND TAKEN WITHIN THE COURSE AND SCOPE OF EMPLOYMENT. THIS INDEMNITY PROVISION DOES NOT APPLY TO FEDERAL CIVIL RIGHTS LAWS. IN ADDITION, VIOLATIONS OF SUCH LAWS ARE DEEMED INTENTIONAL OR WILLFUL AND IN CERTAIN INSTANCES CAN BE CRIMINALLY PROSECUTED BY THE U.S. JUSTICE DEPARTMENT AND WOULD THEREFORE BE EXCLUDED FROM INDEMNITY UNDER STATE LAW.

AGAINST THIS BACKGROUND, YOU SHOULD NOTE THAT CIVIL RIGHTS ACTIONS UNDER FEDERAL LAW WERE RELATIVELY RARE UNTIL RECENT TIMES. HOWEVER, A SURVEY OF STATE AGENCIES IN JUNE OF LAST YEAR REQUESTING CLAIM AND SETTLEMENT DATES ON ALL CASES BROUGHT UNDER 42 USC 1983 DURING THE PAST FIVE YEARS INDICATED AN ALARMING TREND. OVER 142 CIVIL RIGHTS CLAIMS HAVE BEEN FILED AGAINST STATE OFFICERS AND EMPLOYEES IN THIS PERIOD WITH TOTAL SETTLEMENTS AND JUDGMENTS IN THE AMOUNT OF $328,641. THIS AMOUNT DOES NOT INCLUDE ANCILLARY ITEMS SUCH AS DEFENSE COSTS AND ATTORNEYS FEES TO CLAIMANTS WHICH MAY BE AWARDED UNDER FEDERAL LAW. MOREOVER, SINCE THE RESULTS OF THE SURVEY WERE COMPILED, I AM AWARE OF TWO RECENT CIVIL RIGHTS CASES FILED AGAINST STATE OFFICIALS:

(1) L.R. BREIZ V. DEPARTMENTS OF JUSTICE, INSTITUTIONS AND ADMINISTRATION, THIRTEENTH JUDICIAL DISTRICT (AMOUNT UNKNOWN);

(2) ROE AND DOE V. KEITH COLBO, JOHN LAFAVER, CARROLL SOUTH, ET AL., NO. 56421, FOURTH JUDICIAL DISTRICT (SEEKING 1.5 MILLION).

SINCE ONLY FOUR OF THE 142 CLAIMS HAVE RESULTED IN PAYMENTS OF ANY KIND, IT CAN BE ASSUMED THAT THE BALANCE OF THESE CLAIMS ARE LARGELY UNFOUNDED.

H.B. 357 ATTEMPTS TO AMELIORATE BOTH EMPLOYEE AND AGENCY CONCERNS OVER THESE ISSUES IN TWO WAYS:

(1) THE STANDARD OF INTENTIONAL BEHAVIOR QUALIFYING FOR INDEMNIFICATION HAS BEEN BROADENED FROM INTENTIONAL AND FELONIOUS CONDUCT TO ACTIONS CONSTITUTING AN OFFENSE UNDER THE CRIMINAL CODE; AND

(2) THE STATE MUST PROVIDE A DEFENSE FOR ALL CLAIMS INCLUDING CIVIL RIGHTS CLAIMS AGAINST EMPLOYEES UNLESS THE ACT CONSTITUTES AN OFFENSE UNDER THE CRIMINAL CODE.

UNDER BOTH CIRCUMSTANCES OUTLINED ABOVE, NOTHING IN THE BILL CHANGES THE BASIC REQUIREMENT IN EXISTING LAW THAT THE EMPLOYEE MUST BE ACTING IN THE COURSE AND SCOPE OF EMPLOYMENT TO BE DEFENDED OR INDEMNIFIED.

THE ANTICIPATED BENEFITS OF THIS LEGISLATION ARE AS FOLLOWS:

(1) EMPLOYEE - EMPLOYER CONFLICTS PENDING LITIGATION WOULD BE MINIMIZED, THUS ALLEVIATING MORALE PROBLEMS IN THE WORKPLACE.

(2) INDEMNITY BY THE STATE FOR DOUBLE DEFENSE COSTS AND ATTORNEYS FEES WOULD BE ELIMINATED IN MOST CASES EXCEPT FOR CLEAR CONFLICTS OF INTEREST BETWEEN THE AGENCIES AND THE EMPLOYEES.

(3) BY PROVIDING A JOINT DEFENSE IN ALL CASES FOR THE AGENCY AND THE EMPLOYEE, THE STATE CAN MAINTAIN BETTER CONTROL OVER THE LITIGATION AND SETTLEMENT OF CLAIMS WHICH SHOULD REDUCE DEFENSE COSTS.

(4) ALL INDEMNITY CLAIMS BY EMPLOYEES WILL BECOME COVERED BY THE DEPARTMENT OF ADMINISTRATION'S SELF-INSURANCE PLAN WHICH WILL DEFEND AND PAY ALL SUCH CLAIMS FROM THE SELF-INSURANCE FUND. THIS WILL AVOID SUPPLEMENTAL APPROPRIATION REQUESTS TO THE LEGISLATURE BY AGENCIES TO PAY JUDGMENTS ON BEHALF OF EMPLOYEES FOR CIVIL RIGHTS CLAIMS.

(5) OFFICERS, DIRECTORS AND EMPLOYEES OF STATE AND LOCAL GOVERNMENT WILL BE ABLE TO MAKE DECISIONS ON CONTROVERSIAL ISSUES WITHOUT FEAR OF PERSONAL REPRISAL IN THE CIVIL COURTS. THIS RATIONALE IS USED EXTENSIVELY BY THE COURTS TO JUSTIFY BOTH JUDICIAL IMMUNITY AND PROSECUTORIAL IMMUNITY FROM CIVIL LIABILITY.

(6) NO EMPLOYEE WILL BE INDEMNIFIED FOR ACTS OUTSIDE THE COURSE AND SCOPE OF THEIR EMPLOYMENT OR FOR ANY ACTION THAT CONSTITUTES AN OFFENSE UNDER THE MONTANA CRIMINAL CODE.

THE ARGUMENTS AGAINST H.B. 357 WILL BE AS FOLLOWS:

(1) CONGRESS AND THE FEDERAL COURTS HAVE IMPOSED PERSONAL LIABILITY ON PERSONS ACTING UNDER "COLOR OF LAW" IN THE VIOLATION OF CIVIL RIGHTS AS A MATTER OF PUBLIC POLICY WHICH SHOULD NOT BE DISTURBED BY THE STATE.

(2) CERTAIN PERSONS COMMITTING VIOLATIONS OF PERSONNEL REGULATIONS OR INSTRUCTIONS OF AN EMPLOYER IN CARRYING OUT THE DUTIES OF EMPLOYMENT MUST BE INDEMNIFIED BY THE STATE OR POLITICAL SUB-DIVISION BECAUSE SUCH AN ACT DOES NOT CONSTITUTE A VIOLATION OF THE CRIMINAL CODE.

IN SUMMARY, THE POLICY QUESTION TO BE ANSWERED IS WHETHER THE RISK OF INDEMNIFYING A FEW EMPLOYEES ENGAGED IN NONCRIMINAL, WRONGFUL CONDUCT IS OUTWEIGHED BY THE BENEFIT OF DEFENDING NUMEROUS OFFICERS AND EMPLOYEES INDIVIDUALLY NAMED IN LITIGATION THAT IS

WITHOUT MERIT, AND WHICH INHIBITS THE ABILITY OF SUCH PERSONS TO EFFECTIVELY PERFORM THEIR DUTIES. THE LATTER APPEARS TO BE A MORE PRUDENT CHOICE.

IF YOU HAVE ANY QUESTIONS, PLEASE CALL.

JMY/CF

CC: SENATOR JOE MAZUREK, DISTRICT NO. 16

Young Adults

DOA

HB 357
Exhibit C
2/2/83

Amendments to H.B. 357 (introduced).

1. Page 2, line 1.
   Strike: ":"

2. Page 2, line 2.
   Strike: line 2 in its entirety

3. Page 2, line 3.
   Strike: "(b)"

4. Page 2, line 4.
   Following: "employee"
   Insert: "as provided in subsection (4)"

HB 351
Exhibit D
2/2/83

TESTIMONY - James W. GLOSSER, D.V.M.
H. B. 357
SUPPORT OF BILL

1. My name is Jim Glosser. I am the Administrator of the Animal Health Division, Department of Livestock.

2. My testimony is based on experience as I am an administrator of the Department of Livestock and the State Veterinarian. It is a position of responsibility unlike some other administrator positions, as the Board of Livestock is unavailable to make decisions on a day-to-day basis. I am hired specifically to make decisions and am responsible for supervising licensed professionals. I also have full responsibility for some shared federal programs which deal daily with the granting of licenses and permits and the revocation of them. My decisions are many times of an emergency nature and of such importance that a firm decision must be made quickly in order to maintain position of control over program or people involved.

3. At present, I am a defendant in a case under appeal to the Federal Circuit Court. I was sued in Federal District Court for action taken in revocation of a permit and found liable in District Court for those actions and I am individually liable under Civil Rights law, subject to judgment in the sum of over $275,000. The jury found that I acted beyond my scope of authority. Whether that is true or not, I acted in a manner compatible with predecessors in the same position, which I learned, in working for predecessors. I was taught to act in this manner, under similar circumstances and situations. Moreover I received no objections from counsel and ratifications of acts by superiors.

Point of Testimony

1. State employees are hired to make decisions and in some cases must make them in order to control a program or people under supervision or people under licensing program. This is especially true in administrative positions.

2. Sometimes these decisions must be made either immediately or in a short time frame to protect the public.

3. If employees must worry constantly of being individually liable for actions, taken within the scope of their authority, the time will come when few people will be willing to make a decision. These are not criminal actions, they are simply decisions which must be made quickly. If the problem is not taken care of, soon all decisions will be made either at a hearing or by the director of each department, if he is willing.

I urge the committee to render a do pass on HB 357.

HB 357
Exhibit E
2/2/83

TO: HOUSE JUDICIARY COMMITTEE
MONTANA STATE HOUSE OF REPPRESENTATIVES
MONTANA STATE CAPITOL
HELENA, MONTANA 59620

FROM: JIM NUGENT, MISSOULA CITY ATTORNEY

RE: HOUSE BILL 357 - TO REVISE THE LAWS RELATING TO IMMUNIZATION AND INDEMNIFICATION OF GOVERNMENT EMPLOYEES

DATE: FEBRUARY 1, 1983

Dear House Judiciary Members:

I am writing to you to express my support for House Bill 357 and the amendments proposed for House Bill 357 by Jerry Johnson, Chief Probation Officer with the Fourth Judicial District, Missoula County Courthouse, Missoula, Montana. House Bill 357 is an Act to revise the laws relating to immunization and indemnification of governmental employees. The objectives of this bill are commendable as they will help give governmental employees in Montana some peace of mind with respect to threats of lawsuit and actual lawsuits filed against them as governmental employees.

Some justifications for the enactment of a bill such as HB 357 are as follows:

1) It would be an injustice to the governmental officer or employee, particularly in the absense of bad faith, to be subjected to personal liability as a result of the exercise of his/her discretion in performing the legal obligations of his/her position.

2) The bill helps eliminate the danger that the threat of personal liability would deter the governmental officer or employee in his/her willingness to execute his/her office with the decisiveness and the judgment required for the public good.

3) The bill helps eliminate the fear that the threat of personal liability might deter citizens from holding public office or being employed as a governmental employee.

Mr. Johnson's proposed amendments are to (1) section 3, page 3, lines 3 and 4, elimination of the words "or is unable" (defendant employees would still be provided legal counsel); (2) adding two subsections to subsection (6) to identify two additional areas of employee conduct that should be identified as inappropriate conduct by the employee or officer; and (3) to add a new section that would allow the court to award attorney's fees to defendant governments and/or employees if a court finds that the plaintiff brought a frivolous suit or brought the suit with a malicious purpose or in bad faith.

I would urge your support for HB 357 and further urge your support for the amendments proposed by Mr. Johnson. Thank you for considering my comments.

Yours truly,

Jim Nugent

Jim Nugent, City Attorney

JN/jd
cc: Senator Joe Mazurek; Representative Gene Donaldson; Representative Jerry Metcalf; Representative Gene Ernst; Alec Hansen, Executive Director of the Montana League of Cities and Towns.

RECOMMENDED CHANGES TO H.B. 357

Page 3, Lines 3 and 4, Delete or is unable

Page 4, Line 19, Change (b) to (c) and insert a new (b) the conduct upon which the claim is based does arise out of the course and scope of the employees' employment, but fails to conform with established written rules, policies, or standards of conduct of the employer; or

Page 4, Line 21, Change (c) to (d)

Page 4, Line 23, Insert (e) the employee compromised or settled the claim without the consent of the government entity employer.

Page 5, Line 7, Insert (8) If the plaintiff fails to prove actionable conduct by the employer or employee and the Court determines the allegations are frivolous, malicious or made in bad faith, the Court may award attorney fees against the plaintiff and in favor of the defendant

MISSOULA COUNTY
OFFICE OF THE ATTORNEY
MISSOULA COUNTY COURTHOUSE
MISSOULA, MONTANA 59802
TELEPHONE: (406) 721-5700
ROBERT L. DESCHAMPS III
COUNTY ATTORNEY

HB 357
Exhibit F
2/2/83

February 1, 1983

Dave Brown
Chairman
House Judiciary Committee
State Capitol Bldg.
Helena, MT 59601

Re: House Bill 357

Dear Representative Brown and members of the Committee:

I offer this letter in support of HB 357 which revises the present statutes regarding the indemnification of governmental employees sued for acts arising from the performance of their duties.

The existing law appears to allow for employees to be indemnified for misdemeanors they commit while acting within the scope of their employment. This has caused some considerable difficulty in Missoula County. HB 357 removes this problem and makes it clear that employees are only to be indemnified when they are civilly sued, and that government employers are not required to defend or pay fines in criminal charges brought against their employees.

In addition, the bill clarifies that employees are protected when civil rights suits are filed against them in Federal Court. There is some question whether the existing law adequately does this, and again, in Missoula County, this has been a problem as we have been getting civil rights actions filed against employees at a rate of one every other week. To date, not a single case has been successful, but the costs of defending them are substantial and could easily

bankrupt individual employees if they had to pay for these defenses out of their own pocket.

Finally, the bill would change existing law by indemnifing employees for intentional torts. Some objections have been raised to this, and these objections are legitimate to the extent that a governmental employer should not be reponsible for the ultra vires intentional torts of its employees, any more than it should be responsible for an employee's criminal acts. On the other hand, many lawsuits falsely allege intentional torts, and employees deserve protection against false claims of intentional torts every bit as much as against unfounded claims of negligence. The costs of defense will be the same, and it will be a hollow victory for any employee who goes broke successfully defending himself against an intentional tort claim for acts arising out of his employment.

I think that subsection (6) (a) (Page 4, lines 16-18), may cover the objections raised, in that unauthorized acts may not arise out of the course and scope of the employee's employment. However, some more positive language might be appropriate. I hope that an acceptable solution can be accomplished, as it is a badly needed and worthwhile piece of legislation.

Sincerely,

Robert L. Deschamps III
Missoula County Attorney

RLD:hr

HB 389
Exhibit 6
2/2/83

WITNESS STATEMENT

Name MORRIS W. GULLICKSON Committee On JUDICIARY

Address LIVINGSTON, MT. Date 2/2

Representing RAIL BROTHERHOODS Support ✓

Bill No. HB 389 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. I MORRIS GULLICKSON, REPRESENTING THE UNITED TRANSPORTATION UNION, THE BROTHERHOOD MAINTANCE WAY EMPLOYEES, AND THE BROTHERHOOD OF RAILROAD & AIRLINE CLERKS, SUPPORT THIS BILL.

2. THIS IS A NEW CONCEPT IN INSURANCE, WE FEEL THAT MOST FAMILIES HAVE MULTIPLE CARS, AND THIS SHOULD SAVE SOME MONEY.

3. THIS WOULD INSURE A PERSON IF HE WOULD RENT A CAR AT ANY LOCATION AND ON THE SPUR OF THE MOMENT.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

HB 389
Exhibit H
2/2/83

HB-389
STATEMENT OF GLEN L. DRAKE ON BEHALF OF THE
AMERICAN INSURANCE ASSOCIATION

The American Insurance Association is a trade group of approximately 150 casualty insurers.

HB 389 purports to change the method of insuring for auto liability insurance from a method of insuring both the named insured and other persons, such as the named insured and members of his family and spouse while driving owned vehicles, to a method based solely upon insuring the "named insured persons."

The bill's problems are many. First, it fails, as written to achieve its objective.

1. Page 2, line 1, refers to "owner's or operator's policy."

2. Line 8 through 15, page 2, provides that the "owner's" policy shall insure the person named and any other person using any vehicle with the permission of the "owner."

3. Page 5, lines 3 and 4, refers again to "or operator."

4. Page 7, line 2, again refers to "owners."

Thus, the bill as written gives coverage for anyone using a vehicle with the owner's permission - contrary to the stated purpose of the bill.

However, assuming that the bill could be cleaned up to achieve its stated purpose, the question arises, "Is such underwriting change desirable?" I believe that a minimal review will show that it is not.

Section 1, page 1, lines 11 through 16, requires that liability insurer shall issue policy "without regard to the motor vehicles owned or operated by the insured." Thus, the person with ten vehicles pays the same rate as a person with one.

I have no particular problem with writing insurance for a "named insured" and excluding all others. It would be a very simple underwriting procedure. That would mean, however, that a family with four drivers in it would all have to be named

insureds in order to have coverage. If no consideration can be given to the motor vehicles owned, then a family of four drivers that owns only one vehicle would have to pay the same rate as a family of four drivers that owns four autos. That does not seem desirable.

The problems get worse though as you analyze them.

Under present underwriting procedures, a policy normally insures a named insured - his or her spouse and members of the family - and anyone driving the owned vehicle with the permission of the insured. Under the proposed bill, that would not be true. If you loaned one of your vehicles to a friend and the friend had no insurance of his own, the friend would not be covered when driving your vehicle.

Another example of problems comes in the Uninsured Motorist area.

Under present law, if an insured automobile is struck by an uninsured motorist and injury occurs to the occupants of the insured auto, all of the injured occupants of the insured auto will have coverage and be able to collect from the uninsured motorist coverage.

Under this bill, if Daddy is the only named insured (the only driver), and he, his wife and four kids are all injured by an uninsured motorist, only Daddy would be able to recover from the uninsured motorist coverage.

Think also of the business that owns many vehicles with many employees driving. A separate policy would have to be written on each driver - a very cumbersome procedure.

Although the problems created by this type of underwriting are many, I won't go further into them other than to say that if this bill becomes law, that it will, I believe, be unique in the 50 states. To my knowledge, no other state has such a law. That alone will cause many problems to the people of this state including extra costs caused by necessary special handling.

I recommend that you give HB 389 a do not pass recommendation.

HB 389
Exhibit I
2/2/83

REGARDING HOUSE BILL NO. 389

To: The House Judiciary Committee

From: Independent Insurance Agents' Association of Montana

Date: February 2, 1983

Re: Opposition to House Bill No. 389

We understand the intent of this bill as being one of the insuring public's objectives, to obtain the greatest possible protection at the lowest possible cost. However, we are concerned that this bill may cause problems for the insuring public in both the areas of cost and protection.

Attached to this statement is a copy of a study performed by the Research board of the Society of Chartered Property and Casualty Underwriters on insuring the driver. This report shows that the concept of insuring the driver is not a new idea in the insurance industry. The history of insuring the driver coverage is reported on page 121 of this report. The report also points out many of the questions that effect coverage and cost when this method is employed.

Today's insurance contracts have not been written solely by the insurance companies. Many of today's insurance coverages have been dictated by court decisions. With this proposed legislation, several questions are raised as to the insuring publics protection. Many of these questions are asked in this report.

Because a certain dollar amount of loses can be predicted, a certain amount of premium dollars must be generated. Currently a charge per vehicle is the method used. Under this bill it would appear that charges would be assesed on persons who operate motor vehicles. If there are more drivers in a family than vehicles, is

this system of rating motor vehicle liability more equitable?

After reviewing this report and considering the questions raised, the Independent Insurance Agents' Association of Montana can not support this bill.

We urge the House Judiciary Committee to consider these questions raised and the effect on the Montana insuring public before taking action on this bill.

Respectfully submitted by:
Roger McGlenn
Independent Insurance Agents' Association of Montana

INSURE THE DRIVER–A STUDY

RESEARCH BOARD, SOCIETY OF C.P.C.U.

INTRODUCTION

Statement of Problem

The securing of adequate automobile liability insurance protection at a reasonable price is becoming increasingly difficult for the insuring public, as evidenced by concern over mounting loss ratios and continuous agitation for rate relief reported in insurance trade journals for the past several years.[1] While there are various problems involved, two subjects continually recur. These are:

(1) Restrictions of coverage.

(2) Individual rating of risks.

This paper was presented at the 1966 Annual Seminars in St. Louis, Missouri, by the Society's Research Board. Assisting the editors were Donald L. Anderson, C.P.C.U.; James W. Hamilton, C.P.C.U.; Ronald H. Randall, C.P.C.U.; and Dr. Robert W. Strain, C.P.C.U., C.L.U.

Biographical Data of Editors

Charles R. Buchheit–Secretary, Home Insurance Company and Home Indemnity Company, New York, in charge of Casualty Claim Division; B.A. degree, 1950, magna cum laude, Duquesne University; C.P.C.U. 1961.

J. Wesley Ooms–Manager, Commercial Lines Division, Multi-Line Insurance Rating Bureau, New York; B.S. degree in Fire Protection and Safety Engineering, 1951, Illinois Institute of Technology; C.P.C.U. 1959.

Arthur E. Parry–Secretary, Home Insurance Company, New York, in charge of Sales, Research and Advertising; A.B. degree, 1953, Boston University; C.P.C.U. 1957.

Anthony P. Sinisgalli–Senior Underwriter, Mutual Insurance Rating Bureau, New York; B.S. degree in Education, 1948, Fordham University; C.P.C.U. 1964.

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[1] While the list of specific articles would be endless, representative reports and articles spanning this area include the following:

Force, Kenneth O., "Balance Sheet Shows Realities Are Grim but Not Unendurable," *The National Underwriter*, May 29, 1959.

"Stock Companies Have $217 Million Premium Gain; Loss Ratio Improves," *The National Underwriter*, May 29, 1959.

Force, Kenneth O., "Auto Is More Complex, Competitive," *The National Underwriter*, June 4, 1960.

Nelson, Robert A., "Safe Driver Insurance Plan: The Case For," and

Kelley, Robb B., "Safe Driver Insurance Plan: The Case Against," *The Annals of the Society of Chartered Property and Casualty Underwriters*, Volume 13, No. 3, pp. 207-220 (Winter, 1960).

Force, Kenneth O., "Business Deals More Energetically with Auto Insurance Situation," *The National Underwriter*, May 26, 1961.

(*Continued on next page*)

Most problems can be included within one of these categories. For example, the problem of market attrition would be eliminated by individual risk rating which produced adequate rates, and the problems of insuring younger and elderly drivers could be handled positively by a proper rating of each individual risk or negatively by imposition of a coverage restriction.

One often-repeated suggestion to solve the automobile liability insurance rating and coverage problems has been the recommendation to substitute a so-called "Insure-the-Driver" policy for the present automobile liability policy (which primarily insures the owner of an automobile, and by means of some "omnibus" language extends such protection to other drivers).

Although this suggestion has been offered many times in the past, this has become more frequently proposed in recent years. Subsequently in this paper, the history of this proposal will be detailed.

With respect to this suggestion, the two subjects cited above (Restrictions of Coverage and Individual Rating) may be rephrased to read:

(1) Which method of affording coverage, Owner or Driver, is more restrictive in defining who is the insured?[2]

Galloway, Ray M., "The Uninsured Motorist Problem—Four Legislative Solutions," *The Annals of the Society of Chartered Property and Casualty Underwriters,* Volume 14, No. 4, pages 353-363 (Winter, 1961).

"Senior Drivers—A Burgeoning Problem," *The Annals of the Society of Chartered Property and Casualty Underwriters,* Volume 15, No. 2, pages 159-169 (Summer, 1962).

Kobler, Jay, "Compacts Overturning Hopes, Discount Debated; Older Drivers Puzzle Insurers," *The National Underwriter,* July 6, 1962.

Force, Kenneth O., "Auto Insurance Becomes More Peaceful, Loss Ratios Still High," *The National Underwriter,* July 6, 1962.

Force, Kenneth O., "Auto Experience Worsens in 1962; Developments of Year Reviewed," *The National Underwriter,* June, 1963.

Fougner, Arne, "Automobile Insurance in Search of a Code of Ethics," *The Annals of the Society of Chartered Property and Casualty Underwriters,* Volume 17, No. 1, pages 51-59 (Spring, 1964).

Force, Kenneth O., "1963 Automobile Experience Shown," *The National Underwriter,* May 15, 1964.

"Agents Give Views on Auto Problems," *The National Underwriter,* May 15, 1964.

Rotgin, Philip Norman, "Problems with Compulsory Automobile Insurance in New York," *The Annals of the Society of Chartered Property and Casualty Underwriters,* Volume 17, No. 3, pages 245-266 (Fall, 1964).

Force, Kenneth O., "Automobile Badly Needs Round of Rate Increases," *The National Underwriter,* January 29, 1965.

"Mayerson of Michigan Gives Findings of Department on Automobile Hearing," *The National Underwriter,* April 2, 1965.

"Executives Eye Auto Situation—Present, Future," *The National Underwriter,* July 30, 1965.

McWilliams, James R., "The New Private Passenger Automobile Classification System: Its History and Development," *The Annals of the Society of Chartered Property and Casualty Underwriters,* Volume 18, No. 4, pages 293-315 (Winter, 1965).

Force, Kenneth O., "Saftey Drive Is Feature of 1966 Automobile Year," *The National Underwriter,* May 13, 1966.

[2] Elsewhere in this paper the omnibus definitions presently available are discussed.

(2) Which method of affording coverage is more discriminatory in its rating of individual risks?[3]

This study will be limited to the first subject.

Before an answer of substituting an Insure-the-Driver Policy for an Owner's Policy can be considered further, the possibility of such a substitution should be stated in question form:[4]

> "Should an Insure-the-Driver Policy be made available in place of the present Owner's Policy, which extends coverage to various drivers through its 'omnibus' definition of Insured?"

It should be noted that this question does not require a statistically verifiable answer but rather calls for a decision between two alternative solutions.

Definitions

The definition of important words in the question must be given to define the boundaries of the universe within which the question is to be considered.

The following terms apply as defined herein:

Insure-the-Driver Policy: A policy providing automobile liability coverage (with attendant provisions for Medical Payments Coverage, Death and Disability, Uninsured Motorists and others, if desired) for an individual with respect to his *operation* of an automobile. In addition,

[3] The rating of individual risks is most clearly shown in the Safe Driver Insurance Plan which is based on the premise that drivers who operate automobiles in a lawful manner which safeguards lives and property deserve recognition in terms of reduced automobile insurance costs. Thus, the non-occurrence of accidents or convictions was introduced as a basis of classification. In order to provide a reduced premium for those drivers, a point system was established under which those eligible drivers that have no points receive the lowest allowable premium. Higher premiums are provided under the plan for other drivers based upon the number of points that they have accumulated.

Past accidents are an index of the probability of future accidents. However, many motorists are involved in accidents for which they are not responsible. The plan, therefore, allows the risk to demonstrate, in several ways, that such was the case. In such instances points will not be assigned.

Past convictions for serious moving traffic violations are also an index of the probability of future accidents. Convictions for certain serious violations indicate a much greater accident probability than conviction for certain others. The plan, which is in use in most of the states, requires assignment of a greater number of points for such convictions.

In order to utilize past accidents and convictions in the determination of premium, it was necessary to establish a series of sub-classifications. The differentials established for the sub-classifications were based on studies which indicated that there is a direct relationship between the number of accidents and/or convictions a person has had in the past and the probability of his having an accident in the future. These differentials provide an objective means of producing automobile insurance premiums commensurate with the accident probability of the risk.

[4] Long, John D., "Problem Defining—A Prelude to Problem Solving," *The Annals of the Society of Chartered Property and Casualty Underwriters,* Volume 13, No. 2, page 100 (Fall, 1960).

certain "fringe" liability exposures, such as ownership liability, may be present and require coverage.

Owner's (Vehicle) Policy: The Family Automobile Form, "Standard Provisions for Automobile Combination Policies," original September 1, 1956, as revised May 1, 1958, and January 1, 1963.

Automobile: A private passenger vehicle.

Public: Both an insured individual and a potential accident victim.

Omnibus Definition of Insured: Unlike some insurance contracts, which provide the "Insured" is the individual named in the Declarations, the automobile policy also provides for others to be covered.* This broader coverage reflects the need of the public to be protected against the consequences of automobile accidents *whether or not* the individual named in the policy is actually operating the automobile.

Thus, the person named in the policy is the "named insured" and others are defined as "insureds" by an "omnibus" definition of insured.[5]

METHODOLOGY

The subject of Insure-the-Driver has been so presented as to permit a comparison between an accepted automobile policy and the one under question.

In developing the definitions, certain methodology was employed to limit and focus the approach on specific areas. These definitions were themselves the product of some research.

In this study the history and development of the present policy with respect to omnibus coverage and protection resulting from such omnibus coverage has been included. Subsequently, the legal environment in which the policy operates or is interpreted will be examined.

With the present accepted system analyzed, it will then be possible to study the history and development of Insure-the-Driver coverage.

A comparative evaluation of the two coverage methods can then be made by considering several fundamental insurance fact situations and general questions, and judging which method is better.

[5] Under the Family Automobile Form of the National Bureau of Casualty Underwriters, revised January 1, 1963, the persons insured with respect to the owned automobile include (a) the named insured and any resident of the same household, and (b) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission.

Under the "Special Package Automobile Form" of the National Bureau of Casualty Underwriters, revised January 1, 1963, the persons insured under the liability and medical expense coverage include, with respect to an owned automobile, (a) the named insured, and (b) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission.

* So do all liability policies the Ed. has heard of.—Ed.

From the comparison it should then be possible to summarize and conclude with an answer to the question.

OBJECTIVES FROM STANDPOINT OF PUBLIC

The authors of this paper believe that the objectives of the public with respect to automobile liability insurance are of paramount importance in evaluating the two approaches. What does the public expect automobile liability insurance to do?

The primary objective of the public must be to obtain as complete protection from financial loss as possible. This objective coincides with that of the state as evidenced by the prevalence of financial responsibility and other legislation affecting automobile insurance.

Within the framework of the problem considered here, this objective requires an analysis of, and a choice between, owner (vehicle) coverage and driver coverage. Under which form of policy will more protection be available to the injured public, and more adequate coverage to the owner, driver, or other persons or organizations legally responsible for the use of the vehicle?

Another objective of the insuring public would be to obtain the greatest possible protection at the lowest possible cost. This paradox is perhaps of greater significance today than ever before. The insuring public has the same reaction whenever rates are increased: "Is there any way coverage can be obtained at a lower rate?"

While this reaction is not limited to automobile liability insurance, as contrasted to other forms of insurance, it takes on added meaning there because of the tremendous social and economic impact the automobile has made upon this society.*

Although automobile insurance is being marketed competitively and this question can be answered in part in the marketplace, nonetheless, alternative solutions to the problem of rising rates are being sought constantly. In this connection, an Insure-the-Driver Policy is being explored as a possible alternative solution.

Since this study deals only with coverage under the Family Automobile Policy and the Insure-the-Driver Policy, and will review only the private passenger automobile problems, no attempt will be made to discuss commercial vehicles, trucks, public liveries or buses. Not only do the insurance provisions differ, but federal and state regulations regarding such vehicles would complicate the question.

* And because the insured considers coverage essential and the premium like a tax.—Ed.

USE OF PRESENT OMNIBUS CLAUSE IN FAMILY AUTOMOBILE POLICY

Nature and Historical Development

Throughout the years, the actual meaning and intent of the word "insured" has been subjected to careful scrutiny and revision, reflecting the underwriters' original intent, that intent as reviewed by the courts, and subsequently the changing or clarification of that intent by revision or by introduction of new or special policies. In 1935, the basic liability form used the following definition:

> The unqualified word "insured" . . . includes not only the named insured, but also any person while using the automobile . . . , provided that the declared and actual use of the automobile is "pleasure and business" or "commercial," . . . and provided further that the actual use is with the permission of the named insured . . .[6]

Thus, the individual named in the policy Declarations was covered for his liability arising out of his use of the automobile. Other users were also covered, provided these other users were any persons who qualified within the definition as shown. Although the first stipulation as to use was withdrawn from the definition in 1941, it required that, before coverage applied, it must be determined that

(1) the use stated in the policy is pleasure and business, or commercial;

(2) the actual use be pleasure or business, or commercial.

The first determination required the driver to read the policy. The second was more onerous as it necessitated a knowledge of the words "pleasure," "business," and "commercial," and also a knowledge of whether the contemplated use would fit within such intended meanings. Many court cases demonstrate that these requirements form much more than an academic exercise.

The second stipulation provided that the driver of the car must have "the permission of the named insured." Three questions immediately arise:

(1) What is actual use?
(2) What constitutes permission?
(3) Who is the named insured?

Again, these questions are not mere excuses for mental gymnastics. In situations involving loss of life, pain, suffering and loss of property as a result of an accident, there will be a real need for clarification of these three pertinent questions.

[6] National Bureau of Casualty Underwriters, Basic Liability Form—May 15, 1935 Edition.

In the 1941 revision, the clause was changed materially to delete reference to "declared use" and no longer to require that the use of the automobile be for pleasure or business or for commercial purposes:

> The unqualified word "insured" . . . includes the named insured and, . . . also includes any person while using the automobile . . . provided the actual use of the automobile is with the permission of the named insured . . .[7]

Six years later, the clause was again changed to clarify that the actual use of the automobile must be by the named insured or with his permission:

> . . . the unqualified word "insured" includes the named insured and also includes any person while using the automobile and . . . provided the actual use of the automobile is by the named insured or with his permission . . .[8]

This clause was further revised in 1955 to include the named insured's spouse as a named insured, and to extend permission to use the car if either the named insured or spouse so grants it.

> . . . the unqualified word "insured" includes any person while using the automobile . . . provided the actual use of the automobile is by the named insured or such spouse or with the permission of either . . .[9]

The initial edition (September 1, 1956) of the Family Automobile Policy contained the following partial description of Persons Insured:

> The following are insureds under Part I:
> (a) with respect to the owned automobile,
> "(1) the named insured and any resident of the same household,
> "(2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured; . . .[10]*

The term "named insured" was defined elsewhere in the policy to include his spouse if a resident of the same household. The term "resident of the same household" was not defined but could include relatives, employees, or boarders. As such, any resident could drive the car without permission of the named insured.

From the above evolution of the clause it is easily observed that permissive use acts as the fundamental in extending coverage under the policy beyond the person named.

[7] National Bureau of Casualty Underwriters, Basic Liability Form—October 20, 1941, Third Revision.

[8] National Bureau of Casualty Underwriters, Basic Automobile Liability Form—December 1, 1947, Fourth Revision.

[9] National Bureau of Casualty Underwriters, Basic Automobile Liability Form—April 1, 1955, Fifth Revision.

[10] National Bureau of Casualty Underwriters, Standard Provisions for Automobile Combination Policies, Family Automobile Form—September 1, 1956.

* For the 1963 wording, see p. 117 below.—Ed.

The late inclusion of "any resident of the same household" does not limit coverage to a relative, or even to a licensed driver. Thus, any person who met this requirement would be afforded the same coverage as the named insured regardless of whether the person were a qualified driver, were underage or elderly, or had ever had a driver's license revoked.

The effect of these changes in the Family Automobile Policy has been to give the injured public the broadest protection believed possible in an Owners' Policy.

Therefore, when coverage is afforded under a Family Automobile Policy, the injured public can reasonably expect coverage to apply, except in those rare cases where the driver of the car would not be an "insured." A driver of a stolen car could represent the latter situation.*

Case Law Background Underlying Bureau Changes

The first Standard Provisions Automobile Liability Policy in 1935 provided in its "Definition of Insured" for covering any person using or legally responsible for the use of the automobile "provided the actual use of the automobile" was by or with the permission of the named insured. The meaning and intent of this language has been explained in an authoritative work of E. W. Sawyer,[11] who participated in the drafting and designing of the Standard Provisions Program. His discussion of "actual use with the permission of the named insured" follows:

> Another important change in this provision is that not only must use of the automobile be with the permission of the named insured, but the actual use to which the automobile is being put at the time of the injury or damage must be a use *within the scope of the permission* of the named insured.[12]

The question is always: "What was the scope of permission?"[13] It revolves of necessity around the question of fact[14] but the question always remains: "Did it (the policy which spoke of operation with the permission of the named insured) cover the operation of the car by Mr. Green *at the time of and under the circumstances surrounding this particular accident?* If so, the plaintiffs can recover; otherwise, the complaints must be dismissed."[15]

[11] E. W. Sawyer, *Automobile Liability Insurance.* New York: McGraw-Hill Publishing Co., 935.

[12] Sawyer, *op. cit.*, p. 88.

[13] *Harper* v. *Hartford Acc. & Ind. Co.*, 111 N.W.2d. 480, 485 (1961).

[14] *Woodland* v. *Cote*, 252 App. Div. 254; 299 N.Y.S. 742 (1937).

[15] *Fox* v. *Employers' Liab. Assur. Corp.*, 243 App. Div. 325, 327; 276 N.Y.S. 917, 919; firmed 267 N.Y.S. 609 (1935).

* At least one case held a thief covered by his own policy where the stolen car was held a temporary substitute automobile" which is included in the term "owned automobile."—Ed.

In the matter of the change involving "scope of permission," companies previously had been of the same impression as the court in *Gulla* v. *Reynolds:*[16]

> It seems logical to this court that the term "actual use" be construed as referable to the use being made of the car *at the time and place of the accident* and if that be outside the reasonable *scope of the permission* granted to hold that coverage is not extended to the driver.

Although the question of scope of permission has therefore been considered since 1935, it has been observed, as indicated by Appleman, that "the courts are constantly liberalizing the policy coverage, as to persons and their uses covered."[17]

Recent examples of Appleman's point are found in Connecticut and New Jersey cases. In the New Jersey case,[18] the Supreme Court of New Jersey had before it the question of whether under the policies the omnibus coverage extends to a person who was expressly prohibited by the named insured from operating her car but who nevertheless operated the car contrary to such instructions. The named insured was a New Jersey wholesale beer distributor. She authorized her salesman to drive her customers in her car to a Philadelphia brewery as part of a sales promotion program. She had told her salesman that only he was to operate the car. In the course of the trip and many drinks enroute, one of the customers drove the car and had an accident. Despite the express prohibition of the named insured, the court found coverage for the customer under the named insured's policy, holding that "use" was to be distinguished from "operation"; that the policy spoke of "use with permission"; that the car was being used for the purpose intended by the named insured, *i.e.*, to go to the brewery; that therefore it was immaterial that the named insured had expressly prohibited the customer from operating the car. As the dissenting judge pointed out in this case, the "actual use" at the time of the accident for which permission must exist to find coverage logically should include not only the time, place and purpose of the trip, but also the identity of the operator where that factor has a legitimate bearing on the risk of accident in the owner's mind. The dissenting judge noted that the named insured might be entirely willing to allow use of her car to take customers on a good will excursion so long as the salesman was driving but might refuse permission if one of the customers were to drive. He added that she could well have confidence in the salesman to remain in fit condition, but not in a

[16] 81 N.E.2d. 406, 408 (1948).

[17] *Appleman Insurance Law and Practice*, Sec. 4367, pp. 320-21.

[18] *Indemnity Ins. Co.* v. *Metropolitan Cas. Ins. Co. of N.Y.*, 1966 A.2d. 355 (1960).

guest, and therefore impose a restriction as to the driver to seek to prevent exactly what happened here.

The Connecticut case[19] was in a similar vein. There, the president of the named insured corporation instructed an employee to drive the president's wife to her daughter's home. The wife was not a licensed operator and did not drive a car. The president instructed the employee not to let the wife drive; he also told his wife not to drive. While both were under the influence of alcohol and with the wife driving, an accident occurred resulting in the employee's death. In holding coverage for the wife under this language, the court found that "actual use" of the automobile at the time of the accident was the particular use at the time, *i.e.*, the transportation of the wife on the return trip from her daughter's home; that the wife's operation was incidental to that use; that since the wife was "using" the car in terms of the permitted transportation, she came within the policy terms. The court added that had it been the intention of the company when it wrote the policy to limit the omnibus clause to situations in which the "operation" of the automobile rather than the "use" for which it was being put was determinative, the Company could have done so by including the word "operation" in the policy.

It is believed that both decisions go beyond the original intent of coverage. In such instances, and when the matter is serious enough, companies take remedial steps*—sometimes even at the invitation of the court itself (perhaps to relieve its embarrassment).[20]

The court said in the Sperling case in terms of "permission" as respects a thief, under the non-owned coverage:

> What the insurer is really arguing here is that the policy was never "intended" to cover a relative who negligently caused injury with a "stolen" car, and had it been aware that the terms of the policy literally covered such a situation, it would have provided against it, as it has in the new, revised Family Automobile Policy. As Special Term correctly held, however, "the Company is bound by the plain terms of its policy rather than by what it may have intended," since, in construing a "plain contract, clear and explicit in his terms," a court is not at liberty, because of equitable consideration, "to obviate objections which might have been foreseen and guarded against. . . . We concern ourselves with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote." . . . The above rule is particularly applicable to a contract of insurance, since it "was written by the insurer and ambiguity is to be resolved against it." . . . If the intent was to "exclude" coverage where the vehicle was appropriated without the permission of the owner, "it would have been easy to say so."

[19] *Freeman* v. *Nationwide Mutual Ins. Co.*, 1966 A.2d. 455 (1960).

[20] *Sperling* v. *Great American Indemnity Co.*, 7 N.Y.2d. 442 (1960).

* For this particular remedial step, see the 1963 revision, p. 117 below.

Needless to say, companies promptly made policy changes in the countrywide form to "evidence what they intended by what they wrote" in terms of what was bothering the court in the above cited cases.

THE LEGAL ENVIRONMENT

The manner in which coverage has been granted owners and operators under the omnibus clause of the Family Automobile Policy has been treated historically, with cases cited to show why changes were made in the clause. It has been seen that automobile insurance as written today, with minor exceptions, effects coverage on a given vehicle. The owner (or owners) of that vehicle has placed upon him certain responsibilities and liabilities—under many and varied statutes of the fifty states, by operation of the common law, and by at least one common law "doctrine" with significant application.

The driver of a motor vehicle, whether or not the owner, likewise has both statutory and common law responsibilities and liabilities. Particularly, he is liable for injury or damage caused by his own negligence, unless relieved by superseding or contributing negligence. If the driver is other than the owner, his (driver's) negligence may in many instances be imputed to the owner, and to others.

Contemplation of a change from owner (vehicle) insurance to driver insurance requires examination of the present legal framework within which such a change would have to be effected, before any conclusions can be drawn as to the merits of change. This legal framework is not subordinate to the type of policy under which coverage is afforded, but rather provides the environment within which an interpretation of coverage under any policy must be made. There is no reason to believe that the statutes and legal doctrines of the various states would be altered to accommodate any change of coverage.

Further, this legal framework provides the basis for the only real comparison that can be drawn between an actual (owner's policy) set of circumstances and a hypothetical (driver's policy) set of circumstances.

Of equal significance to this study is an examination of the law relating to the flow of coverage under an owner (vehicle) policy to other than the named insured. This should disclose how efficient the *present* form of policy is in extending coverage to "omnibus" drivers under various situations.

Finally, special attention must be paid to the unique position of the owner out of immediate possession and control of his vehicle, and what his position would be if dependent solely on the existence of a "driver policy" on the actual operator of the motor vehicle.

These examinations, then, constitute the burden of the following sections.

Non-Statutory Liability of Vehicle Owners

1. General

Non-statutory liability is in effect "common law" liability. The owner of a motor vehicle is liable for his own negligent operation thereof. Apart from statute, mere ownership does not impose liability on him for its negligent operation by another, and under most authorities, he may be held liable only on principles rendering a principal or master liable for the acts of his agents or servants,* nor is he liable where the vehicle is being operated without his knowledge or consent or not on his business or for his purposes.[21]

If, however, the owner is present in (but not driving) a vehicle, and is controlling its operation or has the right and authority to control and tacitly consents to the manner of its operation, the driver's negligence may be imputed to him.[22]

An owner of a motor vehicle who knows, or by the exercise of reasonable care could have known, of its defective and unsafe condition, but permits another to operate it, without warning him of the defect, is liable for injuries resulting from the defective condition; but, he is not liable if the vehicle was operated without his knowledge or consent.[23]

Similarly, an owner of a motor vehicle who entrusts it to one whom he knows, or in the exercise of reasonable care should have known, to be an incompetent, careless, reckless, or inexperienced driver is liable for a resulting injury.[24]

2. Family Purpose Doctrine

Following the general rule, the owner of a motor vehicle is not liable for the negligence or misconduct of a member of his family in the operation of the vehicle, unless such person was acting as the owner's agent or servant.[25]

However, under the "family purpose doctrine" applied in some

[21] 60 *Corpus Juris Secundum*, Motor Vehicles, sec. 428.
[22] *Ibid.*
[23] *Ibid.*, sec. 430.
[24] *Ibid.*, sec. 431.
[25] *Ibid.*, sec. 432.
* Or children.—Ed.

jurisdictions the head of a family who maintains a motor vehicle for the general use, pleasure, and convenience of the family, is liable for the negligence of a member of the family having general authority to drive it while the vehicle is so used. Obviously an "extension" of the common law, this doctrine has been said to be based on public policy and on principles of justice and necessity, in order to afford the injured person a remedy in view of the usual financial irresponsibility of the owner's wife or child, and on the fact that the head of the family has control of the use of the vehicle.[26] The rule is a development of the doctrine of *respondeat superior*.* The doctrine has been the subject of much conflict and contrariness of judicial opinion.[27]

Where the head of the family does not own the vehicle, but does control and maintain it, he may be held liable in some jurisdictions. A married woman, not the head of the family, owning a vehicle and furnishing it for the use of the family, has been held in several cases to be liable for its use. In determining application of the family purpose doctrine, several states have gone beyond the immediate family or household where the vehicle was being used for a family purpose, and one (Connecticut) has extended the "family group" to include the owner's housekeeper.[28]

As a general rule, the family purpose doctrine is applicable only where the vehicle is being used for a family purpose. However, some states have extended the doctrine to impose liability on the head of the family where he has supplied a vehicle that is being used by a family member exclusively for the member's own purpose or pleasure.[29]

Statutory Responsibility and Liability of Vehicle Owners and Drivers

Superimposed on the common law and its judicial extensions, all jurisdictions have enacted statutes governing either the requirements for insurance of motor vehicles, proof of financial responsibility, posting of security to pay for injury or damage caused by accident, or a combination of these. In addition, thirty-seven states have some form of "vicarious

[26] *Ibid.*, sec. 433.
[27] *Ibid.* (It is not possible within the scope of this study to detail the law of the various jurisdictions regarding the "family purpose doctrine," particularly since its application has in many cases changed over the years. It appears that the doctrine has been fairly consistently applied (sometimes with qualifications) in at least eighteen states—rejected (again with qualifications) in twenty-four states, with the remaining jurisdictions without apparent intent. The extent of application, however, is sufficiently common to warrant recognition of this additional problem of owner-liability.)
[28] *Smart* v. *Bissonette*, 106 Conn. 447, 138 A. 365.
[29] 60 *C.J.S.*, sec. 433.
* *I.e.*, a fictitious agency is presumed.—Ed.

liability statutes," which amount to legislative extensions of the common law.

1. *Compulsory Insurance Laws*

In some states, by statute, the owner of a motor vehicle must, as a condition to registering such vehicle, take out a policy of liability insurance, deposit a bond, or post other security for the discharge of his liability in damages for injuries to person or property, caused by the faulty operation of his motor vehicle. These statutes are commonly referred to as "compulsory motor vehicle insurance laws."[30]

States having compulsory automobile insurance are Massachusetts, New York and North Carolina. In two other states, vehicles owned by minors cannot be registered without proof of liability insurance (Connecticut and Rhode Island) and in one state (Maryland) proof is required before a driver's license may be issued to a minor. In the three compulsory states, owners of vehicles registered in the state are required to carry liability insurance or furnish other security. In addition, New York requires insurance for owners *and* operators of vehicles used in the state. Massachusetts requires that insurance be carried by the owner of any vehicle operated within the state for more than thirty days in any year.[31]

2. *Financial Responsibility Laws*

In other states, a motorist, only *after* he has been in a motor vehicle accident or been convicted of one of certain moving traffic offenses, is required to give security to respond in damages for injuries caused by such accident, and/or to furnish proof of his financial responsibility for damages that may be caused in the future. Statutes of this nature are known as "financial responsibility laws." The security to be furnished may be in the form of a policy of liability insurance, a motor vehicle liability bond, cash, stocks, bonds or other evidences of indebtedness as approved by the commissions or courts of the various jurisdictions.[32]

Of the forty-seven states not having compulsory insurance laws, most require that security be deposited by both the owner and driver following an accident resulting in bodily injury, or property damage of a stated amount (usually $100); another large group requires *both* security *and* proof of financial responsibility for future accidents from owners

[30] 60 *C.J.S.*, sec. 110.

[31] *Automobile Financial Responsibility & Related Laws*, American Insurance Association, Chart 1 and Digests (December, 1965).

[32] 60 *C.J.S.*, sec. 110.

and drivers; a few require security from the driver only; and two require security *and* proof from the driver only. In most cases, the security and/or proof is required regardless of fault, except for several exempt categories of accidents and convictions.[33]

3. *Vicarious Liability Statutes*

So-called vicarious liability statutes are of three general types: motor vehicle, watercraft and parental.[34] Of concern here are only motor vehicle statutes,* which impose liability on the owner of the vehicle for the negligence of another operating it with the owner's express or implied consent. While not abrogating existing common law liability, these statutes in effect create a liability in cases where the common law would have imposed none.[35]

Vicarious automobile liability statutes fall into several general categories, with variations within the categories. Thirteen states have no such statute.[36]

The New York law provides an example of one of the broader statutes:

> Every motor vehicle owner shall be liable and responsible for death or injuries to person or property resulting from negligence in its operation, in business of such owner or otherwise, by any person legally using or operating same with permission, express or implied, of such owner. Whenever any vehicles are used in combination, by attachment or tow, the person using or operating any one vehicle shall, for these purposes, be deemed to be using or operating each vehicle in the combination, and the owners thereof shall be jointly and severally liable. "Vehicle" includes "motor vehicle," "motorcycle," "semi-trailer," and "trailer."[37]

Litigation interpreting the New York statute has held the owner liable for the negligence of a *third person* driving the vehicle, with the permittee's consent;[38] and where the permittee allowed a third person to use the vehicle in direct disobedience of the owner's instructions.[39]

Other states, such as Connecticut, establish a presumption (rebut-

[33] *Automobile Financial Responsibility & Related Laws*, Chart 1 and Digests.

[34] Parental liability, where fixed by statute, deals with responsibility for the intentional, willful or malicious acts of minors. It is not to be confused with motor vehicle statutes affecting the parent-minor relationship.*

[35] 60 *C.J.S.*, sec. 442.

[36] *Statutes Affecting Liability Insurance*, American Insurance Association, Digests (December, 1965). No statutes are found in Ala., Ill., La., Mo., Neb., N.H., N.J., Ore., S.D., Vt., Wash., W. Va., Wyo.

[37] *Ibid.*, p. 106.

[38] *Clarke* v. *Mason Au & Magenheimer Confectionery Mfg. Co.*, 268 N.Y.S. 290, 240 App. Div. 1001, affirmed 264 N.Y. 661, 191 N.E. 614.

[39] *Arcara* v. *Morcese*, 258 N.Y. 211, 179 N.E. 389.

* However parental liability includes automobiles along with everything else.—Ed.

table) that the operator was the agent or servant of the owner, and operating the vehicle in the course of his employment.[40]

Some statutes deal with the liability of owners or other persons permitting minors to drive. Delaware's is an example:

> Every owner of a motor vehicle causing or knowingly permitting a minor under 18 to drive such vehicle upon a highway, and any person who gives or furnishes a motor vehicle to such a minor shall be jointly and severally liable with minor for any damages caused by his negligence in driving, and the negligence of such minor shall be imputed to such owner or person for all purposes of civil damages.[41]

A type of statute frequently found is based on the responsibility for licensing minor drivers. Wisconsin has such a statute:

> Application of minor under 18 for license shall be signed by his father or, in certain cases, by his mother, guardian, or employer. Any negligence or willful misconduct of such minor in driving a motor vehicle shall be imputed to the signer, who shall be jointly and severally liable for such minor for any damages caused by such negligent or willful misconduct.
>
> If person who signed application requests that license be cancelled, he is relieved from liability for negligence or willful misconduct of minor subsequent to cancellation.[42]

The liability of the signer of the application may be unlimited (as in Wisconsin), limited (California: $15,000/$30,000 and $5,000), or removed if proof of responsibility is deposited and maintained by minor or on his behalf (Maryland).

A number of states, including some of those cited, combine two or more of the described provisions in their statutes, and there are numerous additions and exceptions in the more complex statutes.[43]

Case Law Relating to Omnibus Coverage

1. General

It is appropriate to review the practical application of the omnibus clause by noting some of the more common rulings of the courts regarding extension of coverage to the actual driver. In general, the policy language under construction is that of the current Family Automobile Policy. However, since considerable litigation has developed from other automobile policies with similar language, some of these decisions have been included to broaden the scope of the study. Further, this study is concerned primarily with the flow of coverage to other than the named insured on *owned* automobiles.

[40] *Statutes Affecting Liability Insurance*, op. cit., p. 27.

[41] *Ibid.*, p. 29-30.

[42] *Ibid.*, p. 166.

[43] No attempt has been made to do more than identify the more common provisions of vicarious automobile liability statutes.

The pertinent insuring agreement is as follows:

> Persons Insured: The following are insureds under Part I:
>
> (a) With respect to the owned automobile, . . . ,
>
> (2) any other person using such automobile *with the permission of the named insured*, provided his actual operation or (if he is not operating) his other actual use thereof is *within the scope of such permission*,[44] . . .
>
> (Underlining added for emphasis)

2. Permission

The general rule of construction is that where words are so used in a contract that their meaning is ambiguous or susceptible of two interpretations, that interpretation will be adopted which will favor the insured. This rule has been applied to the construction of the word "permission" as used in an omnibus clause.[45] The courts in general have been liberal in interpreting the word "permission" and such phrases as "implied permission."[46] Particularly when a statutory omnibus clause is involved, a liberal interpretation has been given, the view being taken that "permission" should not be limited in meaning to merely legal permission, but should be construed for the benefit of persons injured.[47]

Courts have held that under a Family Automobile Policy an insured may use the insured automobile with the permission of the named insured and thus act as an agent through whom the permission of the latter might flow, but hold that permission cannot be delegated or transmitted by an original permittee to a second permittee where the use granted to the first permittee was restricted or conditional.[48] Where the named insured expressly authorizes the original permittee to delegate permission to others to use the vehicle, the courts generally hold that the omnibus clause protects both the first permittee and his subpermittee.[49] However, courts have consistently held that the named insured's mere permission to another to use the automobile does not of itself authorize the permittee to delegate his right of user to a third person so as to bring the latter within the coverage of omnibus clause.[50] The necessary permission may be in the form of express or implied affirmative consent, or it may result by implication from the relationship of the parties or from a course of conduct in which the parties have mutually acquiesced.[51]

[44] National Bureau of Casualty Underwriters. *Standard Provisions for Automobile Combination Policies, Family Automobile Form, Amendatory Endorsement*—January 1, 1963.

[45] *Dickinson* v. *Maryland Cas. Co.*, 101 Conn. 369, 125 A. 866.
Stovall v. *New York Ind. Co.*, 157 Tenn. 301, 8 S.W.2d 473.

[46] *Fidelity & Casualty Co.* v. *Harlow*, 191 Va. 64, 59 S.E.2d 872.

[47] *Pavelski* v. *Roginski*, 1 Wis.2d 345, 84 N.W.2d. 84.

[48] *Anderson* v. *Adams*, 244 La. 120, 150 So.2d 585.

[49] *Travelers Ins. Co.* v. *Kipp*, 105 N.H. 200, 196 A.2d 48.

[50] *Hays* v. *Country Mutual Ins. Co.*, 28 Ill. 2d 601, 192 N.E.2d 855.
Horn v. *Allied Mutual Cas. Co.* (1959 CA 10 Kan.) 272 F.2d 76.

[51] *Snyder* v. *Carlson*, 135 Pa. 390, 5 A.2d 588.

Fraud on the part of the operator of the vehicle may negate the existence of consent or permission of the insured;[52] when the permission to use the vehicle is procured by fraud, there is no consent and the omnibus clause is not operative.[53] However, even though permittee may not legally drive a car, permission granted him under the omnibus clause is valid.[54]

The court found implied permission in a case where the owner had stated previously that the driver could take the car any time he wanted without asking for it and on numerous occasions the driver had used the car.[55] Where a salesman was using a company car, and was permitted to retain possession of it, keep it at his house, and use it for personal reasons, and he took several people in the company car to a ball game on a Sunday, allowed a passenger to drive and then fell asleep, the court held that the omnibus coverage applied to liability arising out of a subsequent accident.[56] And where the named insured gave permission to his minor son to use the car to take his girl to a movie, and instead, the son took several boys to a tavern 60 miles away, where they all drank, and the son was unable to drive as he became ill and asked a companion to drive, the court held that the omnibus clause applied, since the son, an insured because he was a member of the household, was present in the car. The son's liability was based on his continuing use and control of the vehicle.[57]

Generally, where the borrower has not permission, either express or implied, to permit a third party to use the vehicle, the omnibus coverage does not apply. Thus, in one case where the insured loaned his car to a neighbor, who permitted another person to drive it without the knowledge or consent of the owner, and an accident occurred, the court held that the omnibus coverage did not extend to such non-permissive user.[58] And where the vehicle was being driven by a third person after the death of the insured, the court held that the omnibus coverage did not apply, since operation could not have been with the assured's permission, and he then had no household.[59]

3. *Scope of Permission*

Where there is a particular use by or conduct of the permittee which goes beyond the scope of permission granted to him, the courts

[52] *Rondina* v. *Employers' Liab. Assur. Corp.*, 286 Mass. 209, 190 N.E. 35.
[53] *Hodge* v. *Lumberman's Mutual Cas. Co.*, 203 Va. 275, 123 S.E.2d 372.
[54] *Pawelski* v. *Roginski*, fn. 47 above.
[55] *Snyder* v. *Carlson*, fn. 51 above.
[56] *American Cas. Co.* v. *Windham* (1939 CGA 5th), 107 F.2d 88.
[57] *Travelers Ins. Co.* v. *Kipp*, fn. 49 above.
[58] *Woznicki* v. *Travelers Ins. Co.*, 12 Mass. N.E.2d 876.
[59] *Antone* v. *New Amsterdam Cas. Co.*, 355 Pa. 134, 6 A.2d 566.

have adopted three different rules to determine what effect this deviation from the purpose and use for which permission is granted will have on coverage under the omnibus clause. The three rules are: (1) the strict conversion or specific purpose rule, (2) the liberal or transfer-of-possession rule, and (3) the moderate or "minor deviation" rule.

Under rule (1), the courts hold that any deviation, no matter how slight, will defeat liability under the omnibus clause—followed by the courts in Maine, Massachusetts, Michigan, New Hampshire, Pennsylvania, Georgia, Ohio and Virginia.[60]

Under rule (2), the courts hold that once permission is given, it will extend to any and all uses of the vehicle—followed by the courts in Louisiana, New Jersey, Tennessee, Connecticut, Minnesota, North Dakota, Oregon and Wisconsin.[61]

Under rule (3), the courts hold that a slight or non-material deviation does not preclude coverage under the omnibus clause—followed by the courts in Oklahoma, West Virginia, Texas and Washington.[62]

Other Extensions and Limitations of Coverage

In addition to permissive use of owned automobiles by other than named insureds, the Family Automobile Policy extends coverage for a named insured's using non-owned automobiles as defined, as well as coverage to relatives of the named insured who are residents of the same household and are using a non-owned private passenger automobile with permission of its owner. These extensions are significant in assessing the number of automobiles in operation which are afforded coverage by the present form of "vehicle" insurance.

In litigation arising out of this insuring agreement, courts have generally required relationship by consanguinity, and reasonable evidence

[60] *Johnson* v. *American Auto Ins. Co.*, 131 Me. 288, 161 A. 496.
Blair v. *Travelers Ins. Co.*, 291 Mass. 432, 197 N.E. 60.
Gray v. *Sowatzki*, 291 Mich. 491, 289 N.W. 227.
Travelers Ins. Co. v. *Marcoux*, 91 N.H. 450, 21 A.2d 161.
Truex v. *Pennsylvania M.A.C. Ins. Co.*, 116 Pa. 551, 176 A. 756.
Hodges v. *Ocean Accident & Guaranty Corp.*, 66 Ga. 431, 18 S.E.2d 28.
Gulla v. *Buckeye Union Cas. Co.*, 82 Ohio App. 243, 81 N.E.2d 406.
Aetna Casualty & Surety Co. v. *Anderson*, 200 Va. 385, 105 S.E.2d 869.

[61] *Parks* v. *Hall*, 189 La. 849, 181 So. 191.
Rikowski v. *Fidelity & Casualty Ins. Co.*, 116 N.J. 503, 185 A. 473.
Cord v. *Commercial Casualty Ins. Co.*, 20 Tenn. App. 132, 95 S.W.2d 1281.
Dickinson v. *Maryland Cas. Co.*, 101 Conn. 369, 125 A. 866.
Peterson v. *Maloney*, 181 Minn. 437, 232 N.W. 790.
Persellin v. *State Auto Ins. Assn.*, 75 N.D. 716, 32 N.W.2d 644.
Denley v. *Oregon Auto Ins. Co.*, 151 Ore. 42, 47 P.2d 245.
Drewek v. *Milwaukee Ins. Co.*, 207 Wis. 445, 240 N.W. 881.

[62] *Lloyds America* v. *Tinkelpaugh*, 184 Okla. 413, 88 P.2d 356.
Collins v. *New York Cas. Co.*, 140 W. Va. 1, 82 S.E.2d 288.
Salitrero v. *Maryland Cas. Co.*, 109 S.W.2d 260.
Odden v. *Union Ind. Co.*, 156 Wash. 10, 286 P. 59.

of express or implied permission. The courts have denied coverage where the non-owned automobile was furnished for the regular (in the common meaning of the term) use of the named insured or relative.

The definition of owned automobile also includes a "temporary substitute automobile" and where evidence was present to conclude that the owned automobile was withdrawn from normal use for repair, etc., the courts have afforded coverage. They have denied coverage where it appeared that the temporary substitute automobile was in fact a second owned vehicle, or where the described automobile was junked or otherwise permanently abandoned.

The Family Automobile Policy has few basic limitations on the extensions of coverage granted to other than named insureds. The most commonly encountered limitation is to coverage for certain individuals employed or engaged in the automobile business as defined. It is worth noting also that some Family Automobile Policies may contain restrictive endorsements eliminating coverage for specific individuals, or classes or groups of persons such as minors, students and members of the Armed Forces. These restrictions are a result of individual risk underwriting, and not the basic policy form.

Summary of Legal Environment

It is evident from a review of cases relating to the "omnibus clause" of the Family Automobile Policy that most courts have given as liberal an interpretation as possible to this extension of coverage. The cases in which coverage was denied were clearly intended to be excluded by the underwriters. The criteria established by the underwriters for "permissive use" appear reasonable in that the only further step available would be a blanket grant of coverage to any driver under any circumstance. This could seemingly result in chaos by denying the vehicle owner any control over the application of his insurance to the use of this vehicle by others, encouraging not only unauthorized but illegal use. In the extensions of coverage to non-owned and temporary substitute automobiles, the Family Automobile Policy affords protection to the named insured and certain residents of his household for the use of vehicles that might otherwise be uninsured. The exclusion of coverage to individuals engaged in the automobile business reasonably presumes the availability of commercial coverage for this more hazardous use.

The individual who accepts the responsibility of insuring his vehicle therefore appears to be affording for himself and those around him as broad protection on the use of that vehicle as society can expect within the framework of private property rights and law enforcement. Viewed

in light of a choice between "vehicle insurance" and "driver insurance," almost all deficiencies stem from financially and/or morally irresponsible owners or drivers, a condition likely to persist regardless of the selected unit of exposure.

Of paramount concern in a consideration of driver insurance is the legal position of the owner. The foregoing discussion reveals the principal extent of statutory and non-statutory liability placed on the vehicle owner for the negligence of one driving his vehicle. It is clear that in most jurisdictions an owner cannot limit either his liability or his insurance application to his own operation. Further, the public policy which has demanded the present standard of owner responsibility is still evolving. It is predicated on possible or probable *driver irresponsibility*.

The policy covering the vehicle owner, whether a vehicle or driver type of policy, must necessarily protect the *owner* for the authorized use of the vehicle by anyone. That being the case, there is no possible way to shield the owner's policy from "other driver" experience in some degree, the extent depending on the incidence of primary driver coverage. Thus, it appears that further discussion of driver coverage must concede these two conditions:

(1) An owner policy will continue to cover the *owner's liability* for use by others.

(2) This "vicarious liability" type of protection will continue to subject such a policy to loss where operation of the law permits and the driver is not financially responsible or has inadequate limits.

It is significant to note that the above two concessions were not required at the beginning of this study. At that time a broad definition of an Insure-the-Driver Policy was given because no standard policy had been drafted, and the drafting of such a policy did not appear to be a prerequisite.

As the history and development of an Insure-the-Driver Policy is detailed and the comparative situations and questions are raised, the concessions cited above will, in effect, introduce an "impure" Insure-the-Driver Policy to be related to a "pure" policy under which only the named driver is insured.

INSURE-THE-DRIVER COVERAGE

History of the Concept of a Driver's Policy

The idea of affording automobile liability insurance on an operator or driver basis is not new and has been thoroughly investigated on several occasions in the past. As early as 1915, in the infant days of automobile

liability insurance, coverage was afforded on an operator basis for the owner of the automobile with separate additional premium charges for each and every additional operator. Within a few years, however, the plan was found to be unworkable due not only to the complication of policies, endorsements and premium charges, but because of the much more important reason of the development of the law of agency, making the principal or car owner responsible for acts of others operating his automobile with his permission as his agents. Inevitably, the operator basis was replaced about 1920 by the specified car basis.

The idea of operator coverage had been considered by the National Bureau of Casualty Underwriters prior to 1952 and was rejected for the following reasons:

(1) In case of accidents, the question of agency would arise and although the operator would be covered, the owner would still be liable for the acts of the operator. The occurrence of such a situation would require double insurance with an added inducement to ingenious claim makers, resulting in the detriment to all.

(2) No statistical experience is available on which to base rates on a named operator basis.

(3) In order to avoid discrimination, all individual operators' rates might have to be classified in accordance with the type of operation which the operator performs. The possibility of a sound individual car rating plan would then be even less likely than presently because of the wide range of exposure and use.

(4) Under the present administrative procedure involving annual policies, individual risk records, and other items, there would be a substantial increase in expense, both to the company and the producer.

At the same time, the possible advantages of the plan were shown to be as follows:

(1) It would enable the companies to work in cooperation with the Driver's License Bureaus of the various states concerning the accident record of individuals.

(2) It would directly place the responsibility for careful driving upon the individual operators.

(3) It would presumably result in a more proper measurement of hazard among families with one car but varying number of operators.

(4) It would eliminate, in a large part, the objections to the discontinuance of annual policies since it would reduce the number of endorsements and changes required by changing cars, etc.

Joint Industry Committee Report

In 1953 a report on the subject of operator coverage was submitted to the Deputy Insurance Commissioner of New Hampshire at his request by a Joint Industry Committee composed of representatives of leading stock and mutual automobile insurance companies.

In its report of May 7, the Joint Industry Committee discussed the operator basis of providing automobile insurance from the standpoint of the additional expense attendant upon the issuance of separate policies to operators, the increase in accounting functions of the insurance companies and agents, and the additional paperwork involved in maintaining appropriate records. The Joint Industry Committee stated that the broad grant of coverage under the existing automobile liability policy contract with its automatic coverage features eliminates the need for the issuance of a separate policy for each insured. The Committee went on to state that this is particularly beneficial with respect to the average family car and that this degree of simplicity could not be surpassed under an operators' coverage program which would require each member of the family to have a policy.

The Committee observed that, from a legislative standpoint, certain aspects must be of primary concern and must be attainable in order for an Insure-the-Driver Program to become a reality.

(1) It must be uniformly applicable and in effect in all states.

(2) Legislative action would be necessary to amend the Financial Responsibility Laws and Motor Carrier Laws, considering the following.

(a) Distinguish clearly between private passenger automobile and commercial automobiles.

(b) Determine continuation of existing separate requirements for owners and non-owners.

(c) Study reorganization of present State and Federal motor vehicle administrative procedures which have been established at considerable expense.

(d) Revise present policing and endorsement provisions and procedures.

(3) Since the vicarious liability laws in effect in most states impute liability to the owner of the vehicle, regardless of operator, either such laws should be amended or an equitable rating system should be developed to recognize the important distinction between a Driver's Policy issued to the owner and one issued to a non-owner.

(4) Finally, the law of agency under which the concept of Principal/Agent or Master/Servant is recognized poses questions as to whether the state laws even could be changed to make the distinction between liability arising out of the use of the automobile and liability otherwise imposed; and whether such amended laws could properly differentiate between types of car (private passenger or commercial).

The Committee was strongly of the opinion that the above legislative problems required solution as a prerequisite to the furtherance of a movement to abandon the present Owner's Policy and to substitute a Driver's Policy; in effect, substituting machinery to implement the philosophy that coverage should be based upon various degrees of operator hazards. This would appear to require ramifications involving acceptance of substantive changes by both State and Federal authorities with simultaneous timing of these changes being most critical. Any lack of such instant reform among the states could easily create issues between states on fundamental principles and could possibly lead to undesirable retaliatory measures.

Also submitted by the Joint Industry Committee was the evidence of general acceptance of the existing basis of affording automobile liability insurance by the extent to which such insurance had been recognized by the motor vehicle authorities of the several states as a means of complying with financial responsibility requirements. It should be emphasized that such laws differentiate between owners and non-owners.

The Committee concluded that operator coverage did not offer any advantages over the present basis of affording automobile liability insurance.

Special Commission of the Commonwealth of Massachusetts

In Massachusetts, where automobile liability insurance is compulsory, a Special Commission was appointed to study compulsory motor vehicle liability insurance in all its aspects. This Special Commission, which submitted its report[63] in 1957, gave consideration to the question of affording automobile liability insurance on the operator basis in an effort to develop the best method of protecting the public against the financially irresponsible operator. In its report, the Commission reached the following conclusions as to operator coverage:

1. The rates on the operator basis would have to be fixed in an arbitrary manner which would be largely guesswork and some form of

[63] *Report of the Special Commission of the Commonwealth of Massachusetts*, Senate No. 466.

individual merit rating would, of necessity, have to be adopted. They found that there was no insurance experience to be used as a guide.

2. Since the exposure would be very small, all individual operators' rates might have to be classified in accordance with the type of operation which the operator performs. The report points out that at the time there was but one rate class on the specified car basis but, in order to establish a non-discriminatory premium charge under the operator basis and lacking sufficient exposure on which to base such a charge, several new classes of operators might have to be created, possibly recognizing mileage or extent of operation and nature of operation. In addition, there would be the complication of the bus driver, taxi driver, truck driver and possibly others, all of whom might require separate classifications. The report indicates also that it would be difficult to require operators of cars to confine their driving activities wholly within the class for which they were licensed and insured.

3. Consideration was also given to the most usual type of private passenger car risk: namely, the family with only one automobile but with several members of the household operating it. The additional cost to the family of insuring each member who operated the car would, without question, exceed the cost of insurance written on the specified car basis. The Commission was of the definite opinion that this question of cost would displease the motoring public.

4. In case of accidents, the question of agency would arise; although the operator of the car would be covered, the principal or master would still be liable for the acts of his servant or agent. Such a situation would bring about double insurance with added complications arising out of the settlement of claims.

At a public hearing held on December 10, 1957, it was contended that the principal obstacles to insuring the driver instead of the car would be of a legal rather than an actuarial nature. A serious policing problem also would present itself because it could be expected that uninsured motorists in large numbers would be on the highways illegally.

It was stated that the presence of Massachusetts registration plates on a car provided *prima facie* evidence that the owner of the vehicle carries compulsory insurance. But, under an Insure-the-Driver Policy, it would be impossible for a policeman from normal observation to detect whether an operator was insured.

As the result of their investigation, the Special Commission reached the final conclusion that nothing would be gained by experimenting with the complicated plan of operator insurance.

Actual Introduction of Driver's Policy

In 1959, a company introduced a form of this coverage in a New England state "to present a more realistic approach to improving the problem of the automobile insuring business." While a rate reduction of 30 percent for one driver and 15 percent for two drivers was anticipated for the first year, and higher reductions for the second year, the interest of the program was directed at the preferred risk having one or two drivers per family. The coverage protected the insured (who may be one or more named persons) against liability for bodily injury or property damage arising either while he is operating a car, or while another licensed driver is operating the insured's car and the insured is a passenger at the time. The legal liability of the insured for injury or damage resulting from his having left the car unattended was also covered.

If, however, someone else operates the insured's automobile with or without permission, and the insured is not a passenger, no coverage is afforded. This particular limitation in coverage precluded the new policy from meeting the legal requirements for filing of financial responsibility for future accidents in certain states. From an underwriting standpoint, the company was not disposed to issue financial responsibility certificates to cover future accidents under this policy in those states.

It therefore became necessary for the insured who is required to make such filings for future driving privileges to purchase a standard owner's policy.

Although this policy could not be considered to be a "pure" Driver's Policy from the standpoint of this study since it contained a portion of owner's liability coverage as well as a medical payments coverage provision at variance with the norm, it is the only known policy of this type developed by an American insurance company available for review and is therefore mentioned in passing.

Again, in the detailing of the history and development of an "Insure-the-Driver" Policy, the necessary concessions highlighted in the legal environment section were not included because these concessions became apparent only after the legal aspects were studied. Thus, these concessions were not a natural step either in the historical approach or in a straightforward comparison of the present method versus a proposed method of affording coverage under an Insure-the-Driver Program.

COMPARISON BETWEEN AN OWNER'S POLICY AND A DRIVER'S POLICY

The study thus far has examined the two coverage approaches with an analysis of the changes which have occurred under the "permissive use" feature of the omnibus clause of a Family Automobile Policy. It has also outlined the legal background against which the two coverage approaches must be measured.

The actual measurement will now be considered to permit a final conclusion as to the relative merits of the Family Automobile Policy (Owner's Policy) and an Insure-the-Driver Policy.

A number of fact situations and general questions have been raised and will be examined in depth in the light of the present method of insuring the automobile and the proposed method of insuring the driver.

This comparison also will refer to the following with respect to a driver's policy system:

(1) Coverage for the person legally responsible for use by the driver;

(2) Coverage under an owner's driver's policy for his "owner's" liability as well as his liability as a driver;

(3) Coverage for "maintenance" liability under an owner's type of driver's policy. These additional areas highlight the differences between a driver's policy and an owner's policy.

Fact Situations

Situation #1: Pedestrian struck by automobile—driver does not own the automobile.

The present owner's policy provides coverage for both owner and operator so that the limits selected by the owner are available to others operating with permission. A driver's policy would provide coverage for the driver but not necessarily for those legally responsible for his use and probably not for the owner.

Some states have imposed financial responsibility burdens on the owner of the automobile so that if the injured pedestrian maintained the owner was responsible, such owner would need under *his own* driver's policy residual ownership protection. Immediately, this would create two types of driver policies: one for the car owner, and another for the non-car owner.

Is the injured pedestrian in a better position today by pursuing a driver (and owner) than he would be in a system which had owner's policies affording little protection to drivers; or in a system where the driver was expected to secure his own insurance in a driver's policy and the owner secure his insurance in another type of driver's policy?

A minor driver presents the most impressive case of non-responsibility in most jurisdictions with possibility of recovery dependent heavily on *existence* of coverage. Assuming coverage was required for the minor

driver, it is easy to picture lower Financial Responsibility limits being written for such drivers in place of the present existing policy limits of owner's policies available. In other words, in a driver's policy situation, assuming compulsory driver coverage, the financial responsibility of the minor driver to respond to the injured party would in many cases be less than today.

The above situation does not contemplate any statute changes or the difficulty of such changes being effected. From the facts presented above, it is seen that a driver's policy approach would not be as acceptable as the present system because:

(1) at least two types of policy would be needed immediately in place of one;

(2) compulsory insurance probably would be required;

(3) there is no assurance that existing common law doctrines would be abrogated;

(4) the injured public in many instances would be seeking recovery where financial responsibility was reduced (lower limits for minor driver's policies).

Situation #2: An accident is caused by an improperly maintained vehicle.

Under present law, if an automobile is improperly maintained so as to contribute to the happening of an accident, the owner can be held liable and such owner is afforded coverage under his owner's policy. Under the proposed driver's policy, where will coverage rest for the residual maintenance liability (usually of the owner)? Will the coverage be another fringe area in the owner's driver policy? For those rare, but possible, occasions in which a person *other than the owner or operator* is responsible for maintenance, where will such coverage be found?

These questions illustrate that certain liabilities exist irrespective of the type of policy used. Therefore, a change in the policy must accommodate the same liabilities, as otherwise a coverage deficiency will be created.

Situation #3: Due to defective equipment a driverless vehicle causes an accident.

An operator of a borrowed automobile parks the automobile at a curb or a hill. The emergency brakes fail to hold and the vehicle rolls down the hill causing injury.

Under the family policy, as long as permission for use was given, the operator last using the vehicle is covered. If action should be brought against the owner, he is also covered. This situation is an extension of

Situation #2 in that defective equipment is involved but no operator is in the vehicle at the time of this accident.

The question as to responsibility of owner or driver (or both) becomes, to an extent, academic to the injured party under the family policy because both owner and operator last using the automobile are covered. In a driver's policy system, a different problem arises. For every such accident involving an operator other than the owner, two policies are immediately susceptible to liability and claim.*

The question as to defective maintenance or failure to set the brakes properly determines against whom the action is to be brought and, therefore, under which policy action will be brought. The liability limits carried by such an operator as opposed to an owner could become a social factor if the injured member of the public were, by virtue of a driver's policy system, denied relief equivalent to that available in an owner's policy system.

Without examining other factors, it should be concluded that in the situation described a driver's policy system would be inferior to an owner's policy system because:

(1) two policies would almost always be involved;

(2) not only would litigation result from the above but lower limits could be in effect in those instances in which a minor driver would be held responsible (negligent operation) in place of an owner (negligent maintenance).

Situation #4: A driver does not carry insurance.

This is a most serious situation and perhaps the crux of the entire problem from the protection-to-the-public standpoint. Financial responsibility laws (or in certain states compulsory insurance) primarily affecting car owners have resulted in the existence of automobile insurance for most automobile accidents. Severe penalties to the automobile owner for failure to carry insurance have helped establish this condition. Under a family policy operators using the owner's vehicle with permission are covered so that an injured member of the public would be protected.

In a driver's policy system, how would the non-car-owning driver be induced or compelled to secure automobile insurance? If insurance became compulsory, the following questions must be considered:

(1) Would all drivers be required to purchase insurance?

(2) How would the older driver who presently maintains his license, but has no car, react to a compulsory premium to maintain his license?

* This is true today, *if* the driver has insurance coverage. (Driver's policy is excess over owner's and does not cover *owner's* liability.)—Ed.

(3) How would the head of the household with *one* automobile react to the requirement of purchasing separate policies for each household driver?

(4) Would such compulsory coverage be for all types of vehicle or just private passenger automobiles?

(5) Would the mandatory requirement be related to the licensing procedure as is done with vehicle registrations in compulsory insurance states today?

(6) Would not lower limits be given to minors than are available today? (See Situation #1.)

(7) If insurance were not compulsory, would not the elimination of protection presently afforded the public (by means of coverage offered drivers under a family policy) be against the public interest?

These questions highlight the problems of both a compulsory and optional coverage requirement in a driver's policy system. They also serve to illustrate the drastic changes which would be forced on the insuring public under compulsory insurance or the potential loss of protection to the injured public under an optional approach to insure the driver.

Another circumstance may be treated as a part of this general situation to again illustrate the *creation* of new problems under a driver's policy system: *A non-insured driver is involved in an accident.*

If the policy of a vehicle owner provided coverage for his (owner's) operation only, operation of the vehicle by an uninsured driver could result in denying the use of the vehicle to the owner following an accident. Some jurisdictions have statutes or ordinances which require impoundment of a vehicle for failure otherwise to satisfy financial responsibility laws. A problem could still exist even if the owner's interests *were* covered under his policy. Lacking agency or a vicarious liability law making the owner liable for the injury or damage, his car could still be impounded as security for the *driver's* obligation out of the accident.

In conclusion, it may be submitted that a driver's policy system, then, is inferior to an owner's policy system.

Situation #5: Operation of a vehicle by an unlicensed driver.

This situation is similar to Situation #4 which described an uninsured driver. There the only satisfactory way to protect the public was to make insurance compulsory. That procedure would work penalties on segments of the insuring (or licensed) public even though it would offer

protection to the injured public (perhaps offering only financial responsibility limits in most minor driver situations).

Under the family policy, coverage is provided for a resident of the insured's household when operating the insured automobile without express or even implied permission of the named insured. This is true whether or not the driver holds a license.

An unlicensed driver would not (except in a rare instance) be covered by a driver's policy. If the owner's policy covered only his (owner's) operation, no protection would be afforded the public for such an accident. Assuming that the owner's policy incorporated *owner's* protection for permissive use by others, the public would have protection where vicarious liability type laws established the owner's responsibility, or agency was present. Failing a legal responsibility on the part of the owner under the latter type of coverage, however, protection for the public still would be lacking.

It is obvious that between the present family policy and an Insure-the-Driver Program, a serious responsibility gap would arise from the unlicensed (and presumably, therefore, uninsured) driver problem alone.

General Questions

Question #1: What effect would vicarious liability statutes and doctrines have on a driver's policy approach?

In the "Legal Environment" section of this paper, numerous vicarious liability statutes and doctrines were discussed, together with the principles of agency or master/servant responsibility on the owner of a vehicle. The primary purpose of the vicarious liability statutes and doctrines has been to establish liability on the vehicle owner (in some cases, on a parent) as the most financially responsible individual in the owner-driving relationship. These laws have served to effect coverage where it would otherwise have been unavailable, and to establish liability under the coverage.

The laws of agency, etc., would, of course, not be changed by any change in automobile insurance practices. Furthermore, it is difficult to assume that states would modify their vicarious liability statutes, or courts alter their companion doctrines, simply to accommodate a change in insurance practices.

A change to a driver's policy approach rather than an owner's policy approach must seemingly embrace the principle of providing owner's liability coverage within his driver's policy. Nothing short of this could be acceptable to an owner. If such coverage is contemplated, one of the fundamental and fatal shortcomings of pure driver coverage is therefore

recognized and, in fact, a return halfway to the present owner's policy is accomplished.

Subordinate to, but within the framework of, this general question is the problem of the vehicle owner who, because of physical impairment, age, non-license status, and so forth does not operate his automobile. Some form of an owner's policy would have to be made available to such person to protect against the liability attaching under the various laws and doctrines mentioned earlier, for those situations in which the vehicle is driven by others.

Question #2: How would medical payments coverage be handled?

Although this question appears to be one of the mechanics of policy writing and issuance, it is not since the only driver's policy actually filed and a part of the study did not adequately provide for medical payments coverage.

Today, the owner's medical payments coverage covers occupants of his automobile plus resident relatives occupying, or being struck by, an automobile (*e.g.*, as a pedestrian).

Would the owner's policy under a driver's policy system provide coverage for occupants while someone other than the owner was driving? Would the owner's policy continue to cover the other householders as pedestrians? Would the driver's policy extend to cover the driver as a passenger? Would the non-driver be unable to get medical protection unless he purchased a driver's policy?

It must be remembered that a conversion to a driver's policy system could not sacrifice any protection available today (to the occupant or householder). Yet the providing for equivalent coverage creates cumbersome methods of affording protection.

Question #3: How would physical damage coverage be handled?

Coverage on a liability basis flowing from a driver would seem to part company with both present and possible physical damage coverage approaches because protection is sought for a specific vehicle. The owner of a vehicle would want protection and the rate to be charged would reflect in part the value of the automobile. In addition, the mortgagee would require clear protection for his interest in an instrument which insured a specific automobile.

Consequently, no advantage and some procedural disadvantages can be seen in attempting to reconcile driver liability and owner physical damage coverages within a driver's policy system.

Question #4: If the advantages of a driver's policy system were significant, would it not be acceptable even with a minor coverage or protection gap?

The difficulty is not in the size of any coverage gap which might exist in the transfer to another system but in the gap itself.

No legislature, politician, insurance department official, or representative of a private interest would want to claim responsibility in a specific case of death or permanent total injury to have cancelled coverage for the accident by "changing" to a driver's policy system.* The previous questions and situations have indicated a number of coverage gaps which might occur. There are probably more which have not been discussed. A satisfactory answer to the question is not available.

SUMMARY AND CONCLUSIONS

In retrospect, the question forming the basis for this study seemed to be a simple one involving merely the substituting of an Insure-the-Driver Policy for an Owner's Policy. This is, in fact, the very manner in which the question has been rhetorically presented over the years. However, this is not a simple question since it presents many complex facets to be considered carefully and independently before a conclusion can be reached.

Initially, the inquiry clearly stated: Which method of affording coverage is more restrictive in defining who is the insured?

This question was then restated: Should an "Insure-the-Driver Policy" be made available in place of the present "Owner's Policy," which extends coverage to various drivers through its "omnibus" definition of insured?

This, then, was the inquiry, one requiring an answer of relative, not absolute determinations. While the methodology properly limited itself to the Standard Provisions program as prepared by the bureau, it also limited discussion to the question as framed and ignored the many subsidiary questions which though interesting could not assist in directly reaching a conclusion.

Of prime guidance throughout this study are the objectives of the public: What does the public expect automobile liability insurance to do? Does the driver receive more protection under the family policy than under an Insure-the-Driver Policy? Under which policy would the

* This comment could have been made, with equal validity, about the coverage cutbacks in the Special-Package policy.—Ed.

potential injured public have fewer situations where coverage did not exist? Is there any way coverage can be obtained at a lower rate?

Inasmuch as the present owner's policy is widely marketed, innovations are constantly being made so that the alternative solution of an Insure-the-Driver Policy was presented for careful consideration. Even with an Insure-the-Driver Policy two approaches can be used: the "pure" driver's policy, or the "impure" driver's policy.

The "pure" approach is a straight substitution of the driver's policy for the owner's policy. However, the following conclusions can quickly be drawn to emphasize the shortcomings of this answer:

(1) Coverage for the injured party is reduced.

(2) Gaps of coverage for the driver are created.

(3) Retention of vicarious liability laws in many states will raise a question as to the adequacy of the owner's coverage.

(4) Drivers who do not own cars will be penalized.

(5) A substantial legislative change would be necessary before coverage could be effected.

(6) Other problems would be created which do not presently exist, including rating and classification.

In addition, case law is constantly determining the extent of present coverage. Legislation cannot be expected to change this overnight, especially as it may involve a limitation of liability which may appear to be contrary to public policy.

The alternate solution may then be the "impure" driver's policy which includes coverage presently in an owner's policy such as:

(1) Residual ownership coverage.

(2) "Legally responsible for use" coverage.*

Drawbacks to this second approach are as follows:

(1) Two types of policy with inherent drafting problems are involved.

(2) Rating problems would immediately arise since present classifications would not be of value for every driver.

(3) Certain added problems would arise with respect to number of drivers in family and classifications therefor.

While neither approach is suitable from the above lists of shortcomings, more important and substantive problems seal the case against the

* And physical damage, medical payments, uninsured motorists, etc.—Ed.

driver's policy. Throughout the study, the legislative aspects have been emphasized, including both the case law leading up to the change in the omnibus definition as well as case law reflecting the court's interpretations of the definition. As has been stated, it appears primarily necessary to revise the state law simultaneously in order properly to implement this change in concept.

Practically speaking, it would have to be shown that the public would benefit from either a resultant savings or an added protection. Otherwise, why go through the bother and work in getting the laws changed? Such a policy, one that is totally satisfactory, does not exist today.

In this paper, no review has been made of rates, rating plans, ratemaking methods, or rating laws as these topics should form the basis for a separate, definitive study. It should be recognized that nearly all inquiries into the automobile insurance problem (including cancellation inquiries), whether by federal or state authorities, or by private interests, have begun because of rate agitation. Only one recent study (which attempts to change the system) was initiated because of dissatisfaction with the claims payments.

Whether a change in the type of policy to be used will effect a change in the price (or rate) to be charged will depend on either expenses changing or loss dollars changing, other things being equal. The introduction of two types of driver's policies will certainly *not* reduce expenses.

A change could not be introduced if it were publicized as being established to pay *fewer claims* or *return less* from the premium dollar to those injured in accidents. It may therefore be assumed that loss dollars also will *not* be reduced by the introduction of a different type of policy.

Politically speaking, no premium savings or added coverage can be passed on to the taxpaying public. In other words, why change the law if no benefits would accrue to the voters? However, supposing that the laws could be changed, what changes would be necessary?

A careful review of the above material points up the impossibility of divorcing the automobile from the coverage presently associated with it unless all states pass minimum legislation of the following types:

(1) Abandonment of vicarious "liability type" of laws and doctrines.

(2) Adoption of enforceable mandatory driver's insurance laws.

The first type of legislation would probably not take place because the injured public would be acutely limited in attempting a recovery. The second type also would probably not take place because it would

be so difficult to administer and, further, because of certain discriminations to many who are occasional drivers today.

That the present system appears to have shortcomings with respect to reimbursement for the injured public is both readily evident and carefully documented. In one of the most publicized treatises[64] on the subject, certain such shortcomings of the present system are spelled out:

1. Some injured persons receive no compensation and others receive far less than their economic losses. This is due partly to the role of fault in the system: the injured party must show both that another was at fault and that he himself was blameless. Even though such may be proved conclusively, the person legally responsible may be financially irresponsible, either through lack of insurance (for any reason) or lack of sufficient financial assets to satisfy the claim.

2. The system rarely provides prompt compensation for personal injuries, and usually final payment is several years after the incident. In part, this is due to the increasing backlog of cases but the result is sometimes a settlement for less to obtain some much-needed remuneration.

3. Conversely to 1 above, some claimants obtain an excessive award or settlement, especially with regard to minor injuries. Companies, to avoid the expenses and risks of litigations, will offer a generous amount for a small, though proper, claim. It is quite true that the higher the claim, the more apt the company is to resist the requested settlement.

4. Costs of the present system are reflective of both losses and administration operation. Because of the role of fault in the system, intricate details of accidents are routinely contested after elaborate preparations. In some cases, the expense of the contest may exceed the amount claimed.

5. The system suffers not only from the toll of physical injury but also the toll of psychological and moral injury which results from pressures for exaggeration to improve the case of the defense. This strikes at the integrity of both the insured and the injured parties, and such temptation may prove to be too great in many cases.

In retrospect, the substitution of a driver's policy for the owner's policy would not be designed or expected to alleviate any of these shortcomings. It is submitted that such a substitution is neither feasible nor warranted because of the overwhelming difficulties presented, and because such a substitution would not improve the lot of the injured public, even if all the required legislation were passed and the expensive administrative procedures were changed.

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[64] Keeton, Robert E. and O'Connell, Jeffrey O. *Basic Protection for the Traffic Victim.* Boston, Massachusetts: Little, Brown and Company, 1965.

Exhibit J
2/2/83

L.C._____

_____ BILL NO. _____

INTRODUCED BY_____

A BILL FOR AN ACT ENTITLED: " AN ACT TO DEFINE THE TERM "GENERAL ELECTION" FOR THE PURPOSE OF SUBMISSION TO THE PEOPLE OF LAWS OR CONSTITUTIONAL AMENDMENTS BY THE LEGISLATURE; AMENDING SECTIONS 13-1-101 AND 13-1-104, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 13-1-101, MCA, is amended to read:

"13-1-101. Definitions. As used in this title, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Anything of value" means any goods that have a certain utility to the recipient that is real and that is ordinarily not given away free but is purchased.

(2) "Candidate" means:

(a) an individual who has filed a declaration or petition for nomination, acceptance of nomination or appointment as a candidate for public office as required by law;

(b) for the purposes of chapters 35, 36, or 37, an individual who has publicly announced his intention to seek nomination or election to public office by write-in vote and who has received a contribution or made an expenditure or has given an authorization to another person to receive a contribution

or make an expenditure for the purpose of supporting his nomination or election.

(3) (a) "Contribution" means:

(i) an advance, gift, loan, conveyance, deposit, payment, or distribution of money or anything of value to influence an election;

(ii) a transfer of funds between political committees;

(iii) the payment by a person other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate or political committee.

(b) "Contribution" does not mean:

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee or meals and lodging provided by individuals in their private residence for a candidate or other individual;

(ii) the cost of any bona fide news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation;

(iii) the cost of any communication by any membership organization or corporation to its members or stockholders or employees, so long as such organization is not a primary political committee; or

(iv) filing fees paid by the candidate.

(4) "Election" means a general, special, or primary election held pursuant to the requirements of state law, regardless of the time and/or purpose.

(5) "Election administrator" means the county clerk and recorder or the individual designated by a county governing body to be responsible for all election administration duties, except that with regard to school elections, the term means the school district clerk.

(6) "Elector" means an individual qualified and registered to vote under state law.

(7) (a) "Expenditure" means a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made for the purpose of influencing the results of an election.

(b) "Expenditure" does not mean:

(i) services, food, or lodging provided in a manner that they are not contributions under subsection (3);

(ii) payments by a candidate for his filing fee or for personal travel expenses, food, clothing, lodging, or personal necessities for himself and his family;

(iii) the cost of any bona fide news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation; or

(iv) the cost of any communication by any membership organization or corporation to its members or stockholders or

employees, so long as such organization is not supporting a primary or political committee.

(8) "General election" means an election held for the election of public officers throughout the state, at times specified by law, including elections for officers of political subdivisions when the time of the election is set on the same date for all similar political subdivisions in the state. For ballot issues required by Article III, Section 6, or Article XIV, Section 8 of the Montana constitution to be submitted by the legislature to the electors at a general election, "general election" means an election held at the time provided in 13-1-104(1).

(9) "Individual" means a human being.

(10) "Issue" or "ballot issue" means a proposal submitted to the people at an election for their approval or rejection, including but not limited to initiatives, referenda, proposed constitutional amendments, recall questions, school levy questions, bond issue questions, or a ballot question. For the purposes of chapters 35, 36, and 37, an issue becomes a "ballot issue" upon certification by the proper official that the legal procedure necessary for its qualification and placement upon a ballot has been completed, except that a statewide issue becomes an "issue" upon approval by the secretary of state of the form of the petition or referral.

(11) "Person" means an individual, corporation, association, firm, partnership, cooperative, committee,

club, union, or other organization or group of individuals or a candidate as defined in subsection (2) of this section.

(12) "Political committee" means a combination of two or more individuals or a person other than an individual who makes a contribution or expenditure:

(a) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination; or

(b) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or

(c) as an earmarked contribution.

(13) "Political subdivision" means a county, consolidated municipal-county government, municipality, special district, or any other unit of government, except school districts, having authority to hold an election for officers or on a ballot issue.

(14) "Primary" or "primary election" means an election held throughout the state to nominate candidates for public office at times specified by law, including nominations of candidates for offices of political subdivisions when the time for such nominations is set on the same date for all similar subdivisions in the state.

(15) "Public office" means a state, county, municipal, school, or other district office that is filled by the people at an election.

(16) "Registrar" means the county election administrator and any regularly appointed deputy or assistant election administrator.

(17) "Special election" means an election other than a statutorily scheduled primary or general election held at any time for any purpose provided by law. It may be held in conjunction with a statutorily scheduled election.

(18) "Voting machine or device" means any equipment used to record, tabulate, or in any manner process the vote of an elector."

Section 2. Section 13-1-104, MCA, is amended to read:

"13-1-104. Times for holding general elections. (1) A general election shall be held throughout the state in every even-numbered year on the first Tuesday after the first Monday of November <u>to vote on ballot issues required by Article III, Section 6, or Article XIV, Section 8 of the Montana constitution to be submitted by the legislature to the electors at a general election unless an earlier date is provided in the law authorizing the ballot issue,</u> to elect federal officers, state or multicounty district officers, members of the legislature, judges of the district court, and county officers when the terms of such offices will expire before the next scheduled election for the offices or when one of the offices must be filled for an unexpired term as provided by law.

(2) A general election shall be held throughout the state in every odd-numbered year on the first Tuesday after the first Monday in November to elect municipal officers, officers

of political subdivisions wholly within one county and not required to hold annual elections, and any other officers specified by law for election in odd-numbered years when the term for the offices will expire before the next scheduled election for the offices or when one of the offices must be filled for an unexpired term as provided by law.

(3) The general election for any political subdivision required to hold elections annually shall be held on school election day, the first Tuesday of April of each year, and is subject to the election procedures provided for in 13-1-401."

-End-

House BILL NO. 398

INTRODUCED BY J. Jensen Hannah J. Brown Moore Nolan Eck Dan Brown Brand Menahan Dimock BY REQUEST OF THE TASK FORCE ON CORRECTIONS

A BILL FOR AN ACT ENTITLED: "AN ACT TO ~~PROVIDE THAT VOLUNTARY INTOXICATION OR DRUGGED CONDITION IS NOT A DEFENSE TO ANY CRIMINAL OFFENSE AND CANNOT NEGATE A MENTAL STATE WHICH IS AN ELEMENT OF A CRIMINAL OFFENSE AND~~ TO CLARIFY THE TEST FOR RESPONSIBILITY FOR CONDUCT ENGAGED IN WHILE ~~INVOLUNTARILY~~ INTOXICATED OR DRUGGED; AMENDING SECTION 45-2-203, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 45-2-203, MCA, is amended to read:

"45-2-203. Responsibility — intoxicated or drugged condition. A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless ~~such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.~~ An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state ~~which~~ that is an element of the offense only when the condition is involuntarily produced. A voluntarily induced intoxicated or drugged condition is not a defense to any

such condition deprives the person of the ability to have a particular state of mind that is an element of the offense charged.

LC 0094/01

offense and may not be considered in determining the existence of a mental state that is an element of an offense."

-End-

HB 398 Executive Session Exhibit K 2/2/83

Exhibit G 1/31/83

-2-

INTRODUCED BILL

HB 398 Sub TAM YES

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL House Bill 355 DATE 2/2/83

SPONSOR Rep. Sands

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
J.C. Weaver	Helena	Ex Comm. State Bank	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL House Bill 357 DATE 2/2/83

SPONSOR Rep. Donaldson

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
N. Rottering	Helena	Dept. of Institutions	✓	
[illegible]	Helena	Dept. of Admin	✓	
Chuck O'Reilly	Helena	Mt. Sheriffs & Peace Officers	✓	
Mary Fay	Great Falls	MT Correctional Assn	✓	
Jeremiah Johnson	Missoula	Mt. Probation Officers Assn	✓	
Larry Weinberg	Helena	Mt. Univ. Sys.	✓	
William Blake	Helena	Mt. Chiefs of Police Assn	✓	
Glen Dick	Helena	Montana Public Employees Assn	✓	
		Am. Ins. Assn	✓	
Joe Mazurek	Helena	Sen Dist 16	✓	
Jim [illegible]	Helena	Dept of Health	✓	
Darryl Meyer	Gt Falls	Cascade County	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL House Bill 417 DATE 2/2/83

SPONSOR Rep. Metcalf

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Bertie Smith P	Helena	Montana Hospital Assn	X	
Warren Arnold	G Falls	Bd of Pharmacists	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL House Bill 415 DATE 2/2/83

SPONSOR Rep. Daily

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
William Keagan	1121 W Baton Rouge		X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL House Bill 429 DATE 2/2/83

SPONSOR Hannah

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Ralph A. Krauss	Clancy, Mt	Mont Ret & Pst Assn	X	
William [illegible]	Helena	Mt. Chiefs of Police Assn	✓	
Marcel [illegible]	Townsend	MMA	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL House Bill 389 DATE 2/2/83

SPONSOR Rep. Menahan

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Donna Seifert	Helena	Ins. Dept.		✓
Robert Minto	Missoula	Indep. Dealers Ins.		—
Roger McGlenn	Helena	Independent Ins. Agents		✓
M. L. Sullivan	LIVINGSTON	UNITED TRANSPORTATION UNION	X	
Doug Olson	Helena	Self	X	
Glen Drake	Helena	Am Ins Assn		✓
Robert Sabo	Helena	Northwestern Nat'l Ins Co		✓
K C Keeping CPCU	Clancy	Self		✓
Rep. Jim Jensen	Billings	Virtue	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33