MINUTES OF THE MEETING
JUDICIARY COMMITTEE
REPORT TO THE 50TH LEGISLATIVE SESSION

January 27, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on January 27, 1987, at 8:00 a.m. in Room 312-D of the State Capitol.

ROLL CALL: All members were present.

HB # 291 - was transferred from Judiciary Committee to Highways Committee.

HB # 240 - Rep. Fred Thomas, District # 62, sponsor, stated this bill revises the law on insurance bad faith claims. These are claims against insurers arising out of unfair claims settlement practices, which is essentially an administrative remedy that has been on the books for many years. The Supreme Court has expanded the administrative remedy into a court created right of action called the Tort of Insurance Bad Faith. Based on a 1983 case, the court not only allows insurers to sue their own insurer for the Tort of Insurance Bad Faith but also allows an injured third party to sue the wrong doer's insurance company. Montana is one of a handful of liberal right of action states. The right of action has also substantially increased premiums to businesses and individuals across the state. Availability, affordability and fairness are the issues of this bill. Our court has swung the pendulum so far in favor of the trial lawyers that it has stacked the deck against insurers, as a result, all of us pay. This bill swings the pendulum back towards the middle. It limits the action where an insurer should be held accountable for an injury it causes to a person through highly improper conduct. This bill also encourages alternative dispute resolution; this should cut down on court congestion and unnecessary litigation processes. HB #240 moves us toward the original intent of the Unfair Claims Settlement Practices Act but courts will still be able to hear those insurance bad faith actions that in the past have given insurance companies such a black eye.

SUPPORTERS:

JAMES JONES, Attorney, Billings, Representing Montana Association of Defense Counsel stated that in 1983 the traditional system that had existed in Montana for over 100 years and 200 years in the United States was dramatically changed by a controversial and split decision of the Montana Supreme Court, titled Klout vs. Klink. In that case, the court majority said when someone claims to have been injured

in an accident, he gets two suits. One against the other party and a second suit against the other side's insurance company. The result was to set Montana apart from the rest of the nation and identify it as one of the most anti-insured states in the country. We believe it is time to apply some restraint to this new tort created in 1983. HB #240 attempts to do this while keeping the basic claim or suit for deserving cases of misconduct. This bill does this in several steps; 1.) It increases the penalty the insurance company can levy for any violation of any of the 14 provisions of the Unfair Trade Practices Act. 2.) The private cause of action is recognized in the new section four of the bill but it is limited to only four sections. 3.) The bill adopts the Supreme Court 1986 ruling requiring separate trials in the underlining case and then a second trial for violation of the Unfair Trade Practices Act. 4.) Restores some balance, it allows recovery but it limits it.

RANDY GRAY, Attorney, Great Falls, and a lobbyist representing State Farm Insurance Company and National Association of Insurers submitted amendments (Exhibit A) and stated the insurance bad faith climate in Montana, more than any other single cause, has discouraged insurance companies from doing business here for the past four years. Court created action has reduced the predictability in the insurance business in the state. The legislature not the court should decide if this is the recovery system we want for this state. Legislatures should be aware that there is a cost to this system. The cost is paid in terms of higher insurance premiums by everyone and in problems of insurance availability. To open a company up everytime a bad faith claim is made is a bad remedy. The insurance industry believes the Tort Insurance Bad Faith claims should be abolished both on first and third party claims. The industry realizes that the Bad Faith Tort may have become a fixture in our system of laws in Montana. For this reason the insurance industry supports and can live with HB #240 with amendments. This will reduce the shadow affect of bad faith claims and reduces insurance company's losses and thereby hold down the cost of insurance in Montana. It also makes insurance more available. A $25,000 fine by the commissioner is designed to catch an offending company's attention.

DAVID BRUCK, Helena, former owner of Montana International Insurance, now Vice President and Agency Manager of F.B.S. Insurance International, Helena shows concern with his customers in Montana. He supports Mr. Gray's amendments.

JIM ROBISCHON, Montana Liability Coalition, Helena states the interest of the members of the Liability Coalition and the amendments to the legislation are strictly as a consumer. Members support HB #240 because it preserves a cause of

action in an insurer under the Unfair Claims Settlement Practices Act as pointed out by attorneys here earlier. Members wish to see the cause of action that has been provided to the insured retained in the Montana law and HB #240 does that. This bill also provides a more effective regulatory support in its disposition. This enactment also provides for a clear and well established standard upon which the behavior of the insurance company could be judged or determined, in the event, civil action is prosecuted in lieu of or along with the administrative process before the State Insurance Commissioner.

RALPH YAGGEN, Governor's Council on Economic Development, spoke on behalf of Kay Foster who is Chairwoman of the Insurance Subcommittee of the Governor's Council and stated the council believes the adoption of HB #240 will help to alleviate many of the problem's associated with Insurance Bad Faith in Montana.

ROGER McGLENN, Executive Director of the Independent Insurance Agents Association of Montana stated that the Association, in talking to the companies providing a market for agents to serve their clientele, have told us this is the number one bill effecting availability of insurance in the state of Montana. The Association also favors the amendments presented by Mr. Gray.

KATHY IRIGAN, State Auditor's office and Commissioner of Insurance submitted amendments (Exhibit B) and stated that the first amendment is intended to clarify that subsection (2) of Section 2, Pg. 4, line 5-8 applies only to subsections 1(f) and 1(m) of Section 2. The second amendment is meant to eliminate the increase in the plaintiff's burden of proof reflected in subsection 5 of Section 4 which is on Pg. 5, lines 23-2 on Pg. 6. HB #240 has fiscal impact on the State Auditor's office. This bill encourages insurers third party claimants to bring alleged violations of the Unfair Trade Settlement Practices Statute before the State Auditor rather than before the District Court. The State Auditor generally opposes the amendments proposed by Mr. Gray.

OPPONENTS:

KARL ENGLAND, Montana Trial Lawyers Association explained that the term "Bad Faith" is used loosely to describe a number of different kinds of conduct which our law holds to be wrong or wrong enough to give rise to a law suit. Looking at Pages 2, 3 and 4 of the bill you will see that Montana law currently has a series of prohibitions against an insurance company having a general business practice which includes the things listed on these pages. The key section of the bill is on Page 4, beginning on line 5. This

provides that liability is reasonably clear when there is no genuine issue as to any material fact regarding liability and the claiming party is entitled to judgement as a matter of law. As a matter of law, I am not entitled to a judgement until I have a judgement! He stated that it is clear that this bill eliminates Insurance Bad Faith. It eliminates the one truly proven effective means that all Montanan's have to insure that they are treated fairly and honestly by the insurance industry.

MR. HOYT, Attorney, Great Falls, stated that he was going to do his best to attempt to influence the committee because it was time to look at where we are, and where we are going and why we should be going there. The genesis of the purpose of the Unfair Trade Settlement Act started in 1947 in Washington D.C. There was a annual meeting of the National Association of Insurance Commissioners and they recognized the insurance industry had to be regulated in their claim settlement practices. The act was devised by N.A.I. Commissioners. He stated that this act is embodied in the settlement claims manual of every major insurance company that does business in the United States. The insurance companies asked that one thing be put into this act, that being, if they violate the act one time, nothing happens to them. Now, the insurance companies say they do not want that in the act. Mr. Hoyt explained the reason being, it is too easy to prove that certain companies that do in fact violate the act, do it over and over again. A handful of insurance companies try to get away with misuse of the act. Mr. Hoyt said this is not the number one bill, so rather than pass a bill that is this bad, leave it alone or repeal the whole act. We are better off with it repealed than with a bad law. No law is always better than a bad law. He feels this is a bad law.

REPRESENTATIVE WHALEN, District #78, spoke in opposition of HB #240 and submitted an article from In the Nation (Exhibit C). He stated that he feels it is misleading to label all of this legislation that this bill is a part of, as Tort Reform. This is an insurance company bill because it deals with the Unfair Trade Practices Act of the insurance code and it does not report to do anything with claims in any other area except the insurance industry. He feels it is important to understand two points before action is taken on this bill. The first point being, what is the purpose of bad faith causes of action which allow for the imposition of a punitive damage award and the nature of the insurance industry itself. Rep. Whalen stated that there is virtually no regulations of the insurance industry. HB #240 appears to be reasonable on the surface but, if it is passed it will do away with punitive damage claims or bad faith claims against insurance companies. Because the standard of proof

is so unreasonable that it would be virtually impossible for any plaintiff to prove what is required by the bill. The plaintiff has the burden of proving his claim. The direction Montana needs to take is not to further deregulate the insurance industry but to make them comply with notions of fairness and justice.

NO MORE OPPONENTS

QUESTIONS:

REP. RAPP-SVRCEK asked Rep. Thomas how this bill would increase insurance availability to Montana consumers. Rep. Thomas answered that a wrong way of doing business will have been eliminated. Therefore, with more availability we are going to bring into the situation more competition.

REP. MERCER asked Mr. Jones why there are distinctions made between various elements that are in the Unfair Claims Settlement Practices Act. Mr. Jones stated that the bill was passed as a regulatory scheme and it was attempting to regulate general business practices. We chose four elements that go to the heart of either the first party or third party bad faith claims.

REP. MERCER asked Mr. Hoyt if this bill would be a better state of the law for a person as a broadening of the law. Mr. Hoyt answered that personally he feels that the general business practices work against the insurance industry because it is so easy to prove.

REP. THOMAS closed the hearing by stating that Montana is one of the few states that allows this unjustified right of action. The losers of this bill are insurance agents, defense attorneys, and trial lawyers. He sees as the winners of this bill the Montana insurance consumer. There should be more availability, better pricing, better market in which to buy insurance in Montana, and a continued protection against the unfair claims practice.

HOUSE BILL NO. 322, Rep. Eudaily, District #16, sponsor stated that this bill is by request of the Department of Fish, Wildlife and Parks. This is being put forward so there will be an effective statute to act under when the occasional boater and drinking problem arises. The bill established the blood alcohol standards for persons who operate or are in motor boats, vessels or are manipulating water skiis or surf boards while under the influence of alcohol or drugs. Courts and prosecutors are familiar with the term under the influence while the term intoxicated is not presently defined in the criminal law context. This is one example of the confusion which is created by the

language in existing statutes that this bill will address. A statement of intent is with this bill.

SUPPORTERS:

JIM FLYNN - on behalf of the Department of Fish, Wildlife and Parks explained that the intent of this legislation is to amend the existing statute which makes unlawful the operation of boats while under the influence of alcohol or drugs. The bill is a response to comments from local County Attorneys, many of whom feel the existing statute is poorly worded and lacking the standards necessary for effective prosecution. (Exhibit D).

NO OPPONENTS

REP. DARKO was concerned about who would be enforcing the law. Mr. Flynn answered that the wardens would be enforcing the law.

REP. GIACOMETTO questioned Rep. Eudaily regarding water skiers or surfers being intoxicated and if that was unlawful. Rep. Eudaily stated that it is present law.

REP. BULGER wondered if under the influence of means effects your ability to the slightest degree versus ability to do it safely. He asked Rep. Eudaily where this leaves us in terms of other changes we are attempting to make in the law. Rep. Eudaily referred this question to John MacMaster. He stated that it is the same standard.

REP. MERCER asked Mr. Flynn about line 21 of the bill in regard to a person knowingly operating a motor boat and wonders how a person would unknowingly operate a motor boat. Mr. Flynn referred the question to the department's staff attorney. Peter Funk responded that the insertion of that phrase before the word operate is an attempt to put forward an explicit mental state. He said there is a risk that the statute might be construed as what is known as an absolute liability offense. The intent was to eliminate any doubt as to whether or not this was a liability offense.

REP. ADDY asked Mr. Funk about Pg. 4, line 3 that says if you refuse the blood test, you will not get one, but it would be shown in court that you refused and the jury can consider that as circumstantial evidence of guilt. This was put in to make the standards of admissibility consistent with the DUI code.

REP. EUDAILY closes by stating that this bill is an attempt to improve an existing statute rather than to infer new or extensive authority on the department although it is against

Montana law to boat or water ski while intoxicated, the law lacks teeth.

HOUSE BILL NO. 326, Rep. Addy, District #94, sponsor, at request of the Department of Institutions. It clarifies a post sentencing procedure. The change in the law occurs on Pg. 3, line 10. It deals with if somebody has violated the terms of their probation or parole or suspended sentence and the court calls them back in to impose a sentence. This bill deals with credit they deserve to receive.

SUPPORTERS:

KURT CHISHOLM, Department of Institutions, supports this bill because the department has to face 25 to 30 cases a year where it is not clear whether the sentencing court intended the inmate or defendant to be credited with time served on the street while serving out the conditions of the deferred imposition of sentence or the suspended sentence. This causes much time and paperwork to get this matter clarified.

NO OPPONENTS

REP. ADDY closed the hearing.

EXECUTIVE ACTION

Action on HB #141.

REP MERCER moves DO PASS AS AMENDED. Rep. Gould moves Mr. Tippy's amendment DO PASS. Rep. Addy comments on the amendment stating it raises a question about the bill itself. If the bill is voted on, the amendment should be put on. Rep. Mercer favors the amendment. Rep. Addy stated he just really does not like the bill. Question was called by Rep. Giacometto and a voice vote was taken on the amendment. All members voted IN FAVOR of the amendment with the exception of Rep. Addy. Rep. Rapp-Svrcek moved to amend HB #141 further by deleting new subsection 5, on Pg. 6 in its entirety and delete the language on Pg. 5, lines 11 and 12 and the fees would distribute 32% into the General Fund to county and the remaining to the State Fund. Rep. Gaicometto asked Rep. Addy who pays for the substitution fee; the county or does it come out of the State Fund. Rep. Addy stated that with an administrative fee agency, it would come out of the agency's budget. The state pays the salary and the 5. ct. pays for the judges travel fund. Question was called on the amendment, that should we delete subsection 5. Voice vote was taken with seven members voting IN FAVOR and nine members voting AGAINST. The motion FAILED. Question was called on the original motion. Voice vote was

taken and all members voted IN FAVOR with the exception of Rep. Addy, Rep. Eudaily, Rep. Daily and Rep. Brown voting in opposition. HB #141 DO PASS AS AMENDED.

ADJOURNMENT: There being no further business to come before this committee, the hearing was adjourned at 11:15 a.m.

Earl Lory

REP. EARL LORY, Chairman

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Jan. 27, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

STANDING COMMITTEE REPORT

JANUARY 27, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report HOUSE BILL NO. 141

☒ do pass ☐ be concurred in ☒ as amended
☐ do not pass ☐ be not concurred in ☐ statement of intent attached

Chairman

1. Title, line 7.
Strike: "AND"
Insert: ","

2. Title, line 8.
Following: "25-1-201,"
Insert: "AND 25-10-405,"

3. Page 6.
Following: line 17
Insert: "Section 3. Section 25-10-405, MCA, is amended to read:

"25-10-405. Governmental entities not required to prepay fees. The state, a county, a municipality, or any subdivision thereof or any officer when prosecuting or defending an action on behalf of the state, a county, a municipality, or a subdivision thereof is not required to pay or deposit any fee or amount to or with any officer during the prosecution or defense of an action, except the fee under 25-1-201(1)(c for filing a motion for substitution of a judge." "

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EXHIBIT A
DATE 1-27-87
HB # 240

HB240

AMENDMENT NO. 1

Proposed by Randy Gray, Lobbyist for State Farm Insurance Company and National Association of Independent Insurers.

Section 1:

p. 1, line 13 - after commissioner, insert "(1)"
p. 1, line 15 - reinsert $5,000.00
p. 1, line 16 - strike $25,000.00
p. 1, line 17 - after 33-30-1012, insert: "and 33-18-201,"

At the end of section 1(1), insert a new subsection (2) as follows:

> "The Commissioner may, after having conducted a hearing pursuant to 33-1-701, impose a fine not to exceed the sum of $25,000.00 upon a person found to have violated the provisions of 33-18-201. The Commissioner is authorized to award up to one-half of any fine levied under this subsection (2) to the complaining party."

Section 4(1):

p. 5, line 8, after 33-18-201, strike "." and insert: ", provided such insured or third-party claimant has not accepted any award of any fine from the Commissioner pursuant to Section 1(2)."

Section 4(2): delete

RSTA19.1 #2 CT

EXHIBIT

EXHIBIT B
DATE 1-27-87
HB # 240

STATE AUDITOR'S PROPOSED AMENDMENT TO HB 240

1. Page 4, line 5.
Strike: "this section"
Insert: "subsection (1)(f) and (1)(m)"

2. Page 5, line 23 through line 2, page 6.
Strike: subsection (5) in its entirety

EXHIBIT 6
DATE 1-27-87
HB #240

WRITTEN TESTIMONY OF STATE AUDITOR"
HB 240

The State Auditor and Commissioner of Insurance supports House Bill 240 with the attached amendments. The State Auditor supports House Bill 240 because its passage should improve the business climate in this state. The amendments proposed by the State Auditor are intended to (1) clarify that subsection (2) of section 2 (page 4, lines 5 through 8) applies only to subsections (1)(f) and (1)(m) of section 2; and (2) eliminate the increase in the plaintiff's burden of proof reflected in subsection (5) of section 4 (page 5, line 23 through line 2, page 6).

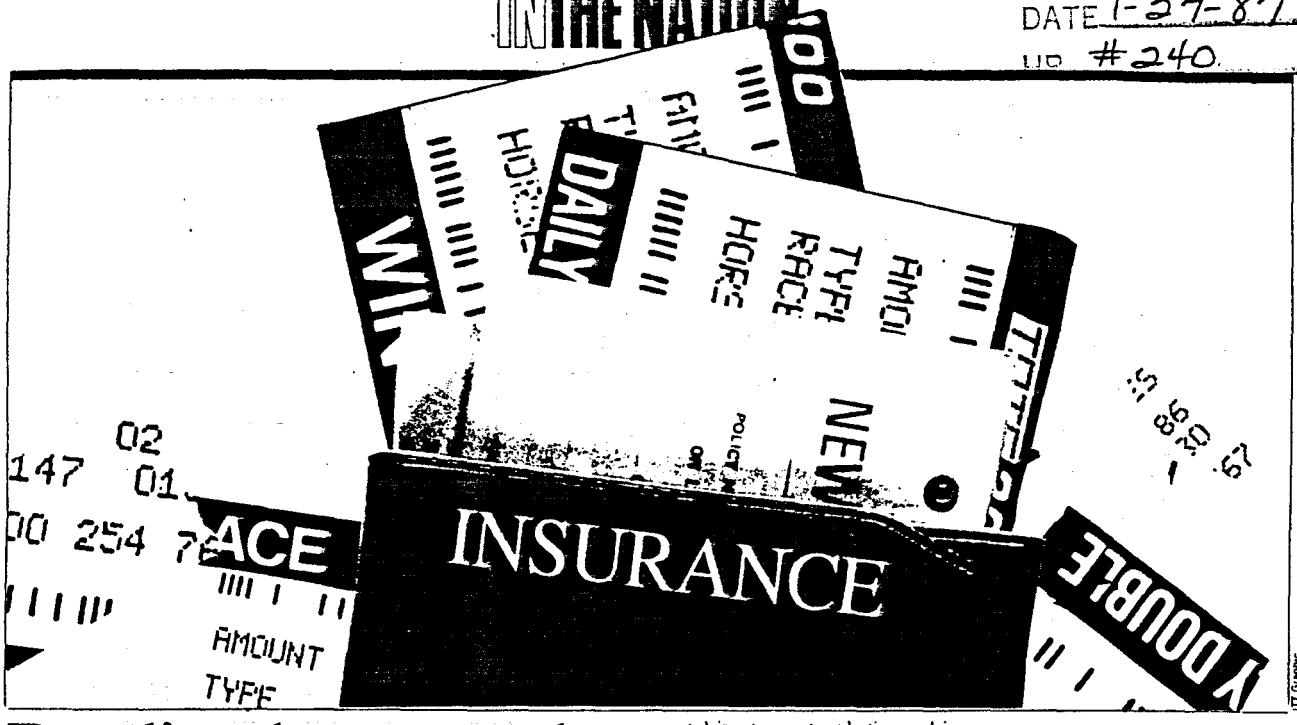
House Bill 240 has fiscal impact on the State Auditor's office and a fiscal note should be requested because House Bill 240 encourages insureds and third-party claimants to bring alleged violations of the unfair claim settlement practices statute before the State Auditor rather than before a district court. To enforce House Bill 240, should it pass, the State Auditor will need one attorney to handle administrative hearings, two compliance specialist to investigate and process consumer complaints, one paralegal to assist in preparing for administrative hearings, clerical personnel, and data processing personnel.

The State Auditor supports increasing the amount of the fine that she may impose upon an insurer for violations of the Montana Insurance Code. The current $5,000 limit is relatively low when compared to the amounts that other states are authorized to levy against insurers for violations of insurance laws and is often lower than the violation warrants.

The first amendment proposed by the State Auditor simply clarifies that subsection (2) of section 2 (page 4, lines 5 through 8) applies only to subsections (1)(f) and (1)(m) of section 2. The State Auditor's second amendment is to delete subsection (5) of section 4 (page 5, line 23 through line 2, page 6) because it is vague and therefore likely to result in increased litigation and because it increases the plaintiff's burden of proof beyond the limit necessary.

The State Auditor requests this committee to consider her proposed amendments. She strongly urges this committee to give House Bill 240 a do pass recommendation.

Exhibit C
DATE 1-27-87
HB #240



ITT Graphic

Reading between the lines of profit policy

By Rebecca Lightsey and Margarita Fournier

DURING THE FIVE YEARS ELAINE Brightwater was a midwife, not a single malpractice claim was filed against her. Yet her liability insurance was cancelled recently. The only policy she can now obtain will cost her $3,500 a year, a 9,0000 percent increase from five years ago, when her annual premium was $38.

Brightwater's experience exemplifies recent actions by the insurance industry. Mass cancellations of policies and rate hikes are reaching critical proportions. This crisis of availability and affordability of insurance directly affects many Americans.

To solve this crisis, the insurance industry advocates tort reform (see story below), a proposal that puzzles Brightwater: "We have never been sued. Only 6 percent of midwives have ever been brought to court nationwide. I see no relationship between lawsuits and insurance premiums—at least not for midwives."

New worlds to conquer

In the fall of 1985 the national campaign for tort reform started with a bang, fueled by a $6.5 million budget raised by the property and casualty insurance industry. Insurance companies coalesced various business interests in the effort to alleviate "the grave crisis" in liability insurance that they insisted was caused by an excessive American penchant for lawsuits.

Initially the strategy succeeded. Several states amended their tort laws to suit the industry's proposals. But the changes expected in return—rate reductions and increased availability of insurance—have not materialized. Policy makers and insurance consumers have begun looking beyond the aggressive but poorly documented tort reform campaign and are seeking changes in the insurance industry as well as legal restraints (see story on right).

The insurance industry has tracked a path between boom and bust for the past 50 years. In "crisis" periods, when profitability is relatively low, the industry has challenged and even modified the law. For instance, the last bust cycle in the mid-'70s brought attention to medical malpractice insurance costs; the industry achieved success in many states, making claims against doctors procedurally more difficult to pursue and in some cases capping recovery of damages. But even in the "bust" year of 1984, when the insurance industry registered its lowest profits in 10 years, combined industry profits amounted to $2 billion, according to the Insurance Information Institute.

This paved the way for an all-out assault on the civil justice system. As Mechlin D. Moore, president of the Insurance Information Institute, a large public relations firm, wrote in the *National Underwriter*: "An effort to market the idea that there is something wrong with the civil justice system...is, in effect, the national pilot effort.... We believe there is a very real opportunity now—probably for the first time—to gain significant legislative change."

Media accounts of outrageously excessive awards in ridiculously frivolous suits have created the impression that filing suit is *the* response to any wrongdoing. Citing these factors, insurers cease writing types of insurance or virtually price consumers out of the markets. Hidden behind the veil of the legal process, one senses that the insurers are threatened most by profit concerns. Therefore, if they reduce liability, their payouts will decrease.

In calling for "tort reform," insurance companies propose to shrink their liability, restricting the recovery of damages for injury, by limiting awards for pain and suffering; abolishing joint and several liability, which forces solvent defendants to pick up the tabs for insolvent defendants out of line with their shares of responsibility; and total abrogation of punitive damages, commonly cited as a corporate deterrent.

The root of the crisis

Insurers make money in two ways: first, through the difference between the price of

Continued on following page

Tort reform: what is it?

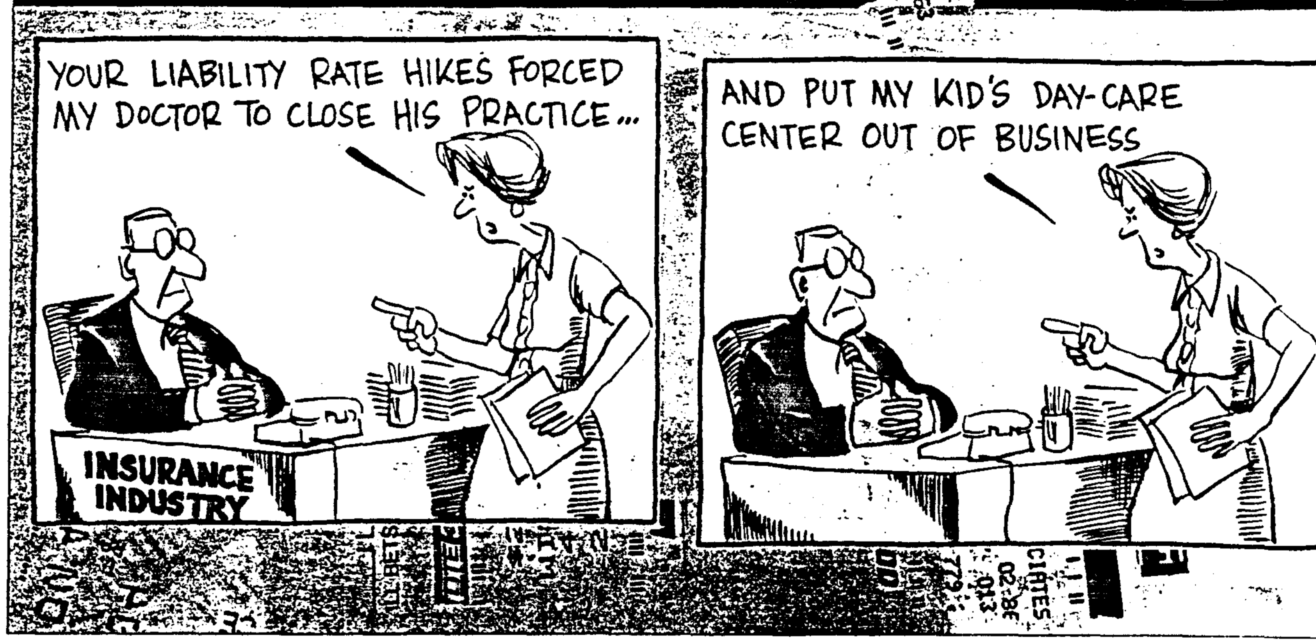
Technical phrases that mean little to those outside the legal profession are an integral part of the current tort reform debate. These terms represent legal doctrines that play a critical role in the U.S. civil justice system. Below are brief descriptions of those legal theories and their practical applications, which the insurance industry is attempting to change or abolish:

- **Abolish the doctrine of joint and several liability.** This doctrine holds that when more than one defendant is responsible for an injury, any one of those defendants has a responsibility to compensate the innocent party. Without this doctrine, for example, the victims of a toxic waste dump would not be able to recover fully for the harm. The victim would have the burden of proving what share of their injuries was caused by each dump user.
- **Caps on pain and suffering.** Juries award money to injured individuals for both economic damages, such as medical bills, and non-economic damages, such as the pain some victims suffer after a tragedy. The industry proposes a limit on how much juries in any state can award for pain and suffering, so that, for instance, the daily anguish and aggravation a paraplegic endures would be "worth" only $100,000. Caps enacted during the malpractice crisis of the '70s were held by some state courts to be unconstitutional.
- **Abolish punitive damages.** Punitive or exemplary damages are the "punishment fines" levied against wrongdoers, usually corporations, for *intentional* wrongs. As admitted by many companies, punitive damages is the one social pressure that has most influenced companies' willingness to redesign products according to higher safety standards.
- **Limits on contingency fees.** Most injured people cannot afford the attorneys' hourly rates, so to obtain legal representation they hire lawyers on contingency fee arrangements. The lawyer gets a percentage of an award, sometimes 33 1/3 or 40 percent, but receives no payment if the suit is lost. The system assures that everyone, regardless of their financial resources, has access to the courts. Restricting contingent arrangements would make it more difficult for those without money to hire lawyers. ■

Reform proposals

The complexity of insurance business requires permanent solutions aimed at its fundamental structure. Thus consumer organizations in several states have proposed various insurance reforms designed to make the industry more accountable and equitable, and thus less likely to engage in irresponsible behavior. These proposals include the following:

- **Sunshine laws.** Companies must provide detailed financial data to the state insurance commissions; and data that would also be accessible to the public. Today only industry insiders know the actual losses and reserves, and their actuaries massage the numbers. What else could explain the 10-year combined profits of $75 billion without any federal tax payments? The rates should be reviewed periodically by commissions to determine their validity.
- **Public counsel offices.** In New Jersey, an active Office of Public Counsel guarantees that insurance buyers are represented at the rate hearings. Regardless of states' different rate-approval mechanisms, establishment of such an office would bring more balance into the rate regulation system.
- **A limit on mid-term cancellation.** Consumers should also demand readable and, if possible, standardized policy forms. Information, such as claims procedures, and a company's record of claim settlements should be readily available.
- **Experience rating.** As illustrated by Florida's malpractice figures, often only a small number of offenders are responsible for most claims there. In a more egalitarian system of rate classification, premiums would be based on the individual's experience. An experience rating system would provide an additional incentive for the policyholders to maintain their good records.
- **Risk management.** Considering that the best cure is prevention, companies would be required to develop and maintain strict "risk management" programs that concentrate on safety.
- **Flex-rating.** Flex-rating, introduced in New York, would limit rate increases and decreases to a plus-or-minus 3 percent range. ■



Continued from previous page
the product (premiums charged) and the cost of the product (underwriting), the way most businesses earn profits; and second, "investment income," the interest earned by investing the unearned (or unspent) premium dollars, which accounts for the largest part of the profits.

Beyond the primary level of insurance, which provides insurance for the buying public, there are reinsurers, who insure the insurance companies, thereby permitting primary insurers to spread their underwriting risk. Lloyd's of London presides over the reinsurers, most of which are located in foreign countries.

Reinsurers sell shares of policies, a practice called retroceding. Reinsurance, and to a larger degree, retroceding markets attract investors with large capital. When interest rates begin to drop, opportunities to make a quick profit decrease. Many reinsurers opt for a hasty withdrawal, limiting the ability of the primary insurers to reinsure.

"The property/casualty insurance industry will always by cyclical," said U.S. Fidelity and Guaranty President Paul J. Scheel. The last cycle was an extreme one, with investment returns reaching 25 percent in the late '70s and early '80s, when interest rates were high, and then dropping precipitously to 3-4 percent by 1984.

As investment income peaked, large policy holders saw premiums fall to unprecedented lows as insurers cut rates substantially in a wild clamor to attract more dollars. Some companies went beyond premium cutting and insured risks after the loss had occurred. For example, the MGM Grand Hotel, devastated by fire in 1980, was able to buy insurance in 1981 to cover the damage. While suits over the fire dragged out in court, insurers gambled on investment of premium dollars. But the hotel settled instead, and then had to sue the underwriters, who resisted paying settlements.

The "brutal price war," as it was characterized in a report published by the National Association of Independent Insurers, ended on a sour note when interest rates started to drop rapidly in the '80s. Claims came due for collection and the insurance companies found themselves with severely diminished cash reserves.

In September of 1984, people attending the National Convention of the Independent Insurance Agents of America were warned "to brace themselves for sharp premium hikes." Suddenly premiums shot up 100, 200, even 1,000 percent. Many policies were cancelled in mid-term, and several lines of liability coverage were no longer available.

The industry searched for a culprit to blame for what Thomas Kellogg, senior vice president of General Re, one of the larger reinsurers, called "corrections necessary for a return to underwriting profit."

The mantle of guilt was conveniently draped on a "permissive" court system and "greedy" trial lawyers. A litigation explosion manifested by excessive awards in frivolous suits—decided by sentimental juries and presided over by irresponsible judges—gave the industry pause to tell the public that the nature of the system forced them to increase rates and, in many cases, withdraw from particular lines of coverage.

Clearly, the industry's reluctance to cover certain risks such as toxic waste dumps, likely to generate increasing numbers of claims in coming years, were not unfounded. But the denial of coverage to day-care centers, midwives and cities, however, appeared unwarranted.

It turned out that the mass cancellations was in large part a publicity stunt. The Insurance Service Organization, another insurance trade association, could find no justification for denying liability to day-care centers, for example. Nevertheless, the publicity served to portray a worsening crisis and thus forced lawmakers to respond.

John J. MacKowski, chairman of the board of the Atlantic Companies, in a *Business Insurance* article, expressed the hope that the capacity shortage would never end, or at least the perception that there is one.

It would seem that this capacity shortage would end with the industry's recent performance. After all, the leap in premiums in recent years has led to high profits currently. "It was acres and acres of diamonds for owners of insurance and financial services issues as our favorites sparkled in 1985 as they seldom have before, if ever," wrote Thomas Meakin in *The National Underwriter*.

For the first quarter of 1986, "the rebound in profits is astonishing," wrote the National Underwriter, with company income up as high as the 814 percent registered by St. Paul Insurance Company. Because of the insurance industry's normal profitability cycle, it is pulling out of its slump, although the tort law changes that were enacted have not yet had an effect.

While tort laws have not affected the insurance cycle, the cycle has affected tort law. The insurance industry's aggressive tactics took most legislatures by surprise. In 1985 and early 1986, the states of Washington, Utah, South Dakota and Wyoming passed tort law restraints, with little or no

Big firms buy way out

By Allen Hornblum

CAUGHT IN THE LIABILITY INSURANCE squeeze, many of the nation's railroads and mass transit companies have turned to what has become a growing favorite of private industries—the captive insurance company.

Captives are insurance companies, usually headquartered in Bermuda or another Caribbean country for tax advantages and regulatory permissiveness, that insure only member corporations who form it to provide their own insurance.

Railroad Association Insurance, Ltd., or RAIL, is the latest of 1,200 captives established in Bermuda, 75 percent of which are U.S.-owned. Some of the largest U.S. industrial companies, such as IBM, Ford and SmithKline Beckman, have joined captives.

Railroads and transit authorities have been squeezed by declining federal support combined with a terribly unstable property and casualty insurance market. Managers have tried escape routes such as fare hikes, service cutbacks, self-insurance pools, bonding and group purchase of excess coverage. RAIL, formed by 11 private and public rail firms, will provide its members with $50 million of liability coverage on any catastrophe with claims of more than $50 million.

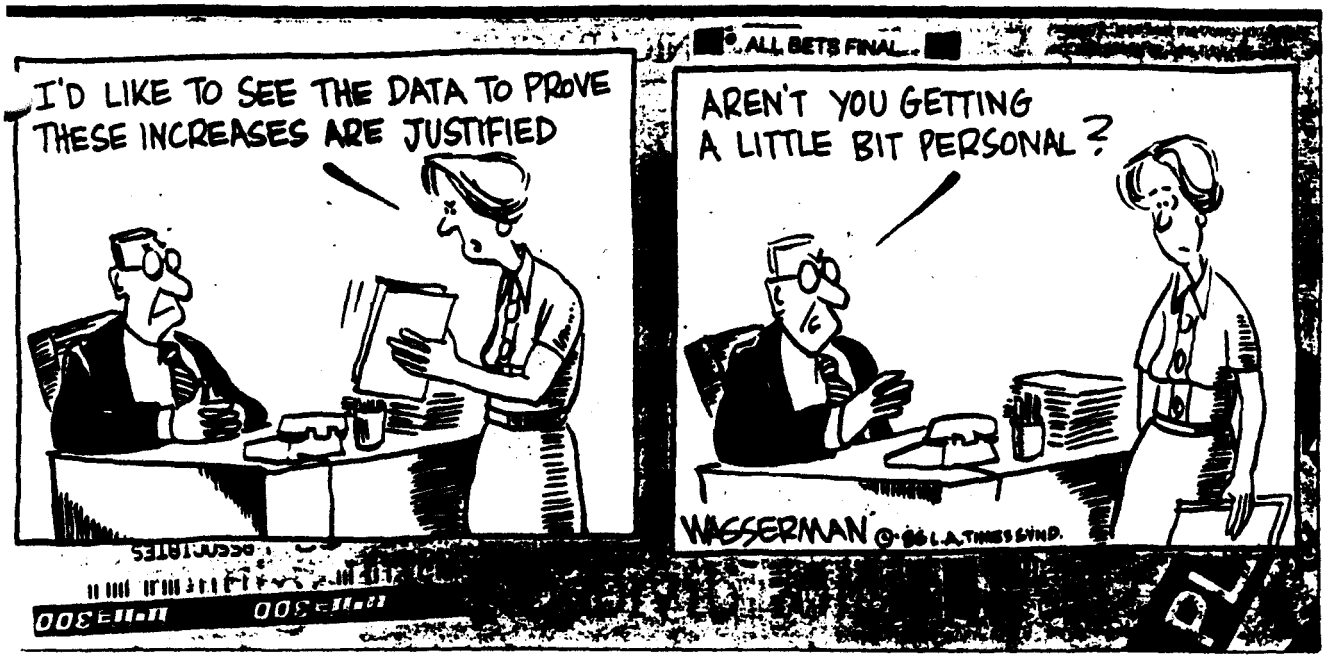
"The big problem for all of us is that the marketplace lacks reinsurance for the higher excess liability layers," says Bill Boone, director of risk management for the [illegible] Authority [illegible] SEPTA [illegible] coverage has plummeted from [illegible] to less than a tenth of that for triple [illegible] prices. [illegible]

Many railroad managers were tempted but considered the venture risky and fraught with problems. "Few companies wanted to share losses with other railroads," observed Oend Gibson, director of casualty insurance for CSX Transportation, the parent company of the Chessie system. Each believed that their own operation was far better run and safer than that of others. There was also a debate over who was at greater risk, freight carriers that hauled explosives and toxic chemicals or commuter lines that had trains filled with people.

Since its founding by Union Pacific, Amtrak, CSX, Chicago and Northwestern, Kansas City Southern, Conrail, Illinois Central Gulf, Norfolk Southern, Santa Fe and Southern Pacific, the Soo Lines and SEPTA, RAIL has voted to accept two new members, Canadian Pacific and Chicago's METRA system. RAIL also voted to open board membership to transit authorities, some of whom have been contemplating their own captive.

Standard risk management strategies are proving useless for rail and transit systems in the current insurance crunch. Within the next year and a half it should be clear whether a captive insurance company is a workable answer. ■

Allen Hornblum is chief government information officer for SEPTA.



study of the necessity or their consequences, as a response to industry pressure.

As part of its public-relations campaign, the insurance industry publicized awards that it considered excessive, often using numbers that had been reduced by further court action. It counted on public opinion to promote their legislative agenda for tort reform. For a while, this PR campaign overshadowed any legislative need for hard facts.

Not until April of this year did a definitive study of the actual numbers of lawsuits filed and the average size of awards become available. And when the National Center for State Courts published its survey of the court filings, its statistics conflicted so sharply with general assumptions that they went unrecognized.

The Center, funded in part by state governments, found no lawsuit explosion. The total number of court filings for personal injury claims rose only slightly during the past four years; from 1978 through 1984, tort filings increased 9 percent, while the

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Urban poor 'redlined' out

By Gregory D. Squires & William Velez

THE INSURANCE CRISIS FACING many cities, professionals and businesses with the cancellation of their liability insurance has recently grabbed the headlines. But for at least 20 years black residents in central cities have confronted a similar crisis in availability and affordability of homeowners insurance. That crisis will only worsen as the current liability crunch squeezes consumers and companies tighten underwriting practices, exacerbating the redlining and concomitant disinvestment of urban neighborhoods.

Our recent study of Milwaukee is not untypical. Voluntary market homeowners policies sold by the traditional, well-known insurance companies are concentrated in predominantly white and suburban neighborhoods. The FAIR Plan also known as the Wisconsin Insurance Plan, or WIP), a publicly administered but privately financed "insurer of last resort" that provides an inferior quality product for those unable to obtain coverage through the voluntary market, is for the black community.

From data on 18 of the state's largest insurers, we found that in 1985 the number of homeowners policies in force for every 100 owner-occupied dwellings ranged from seven in a nearly all-black inner-city neighborhood to 48 in a nearly all-white suburban community. WIP was concentrated in virtually all-black communities and often did not even exist in white neighborhoods.

Does that pattern simply reflect greater risk in older, poorer, less stable parts of town? Excluding age of housing, income and residential turnover—factors that the industry claims are associated with risk—there was still a statistically significant relationship between race and the absence of voluntary market policies or presence of WIP policies.

Even profitability cannot explain the pattern. We found no relationship between insurer profitability and market penetration of minority communities. That is, the companies that redlined most did not make more money. Clearly, racial discrimination is an important factor, in violation of state laws.

Besides passing new legislation such as state variants on the federal Community Reinvestment Act that would require insurers to be sensitive to the insurance needs of particular areas, states and cities could develop alternatives. Several cities are now considering municipal insurance programs. Funds that traditional insurers pay out as dividends to stockholders would be reinvested into the community to finance programs to reduce losses, such as smoke alarms, block-watch programs or better building inspection and fire-fighting services. Loss reserves could be deposited in local financial institutions that are committed to neighborhood investment.

Private insurance cooperatives could be established along the same principles. All these institutions could emphasize employment of local residents, purchases from local businesses and use of local offices to become a vehicle for reinvestment. Although greatly restricted in its operations by the insurance lobby, the long-profitable Wisconsin state life insurance fund has proven what a publicly-owned insurance plan can do. It offers a model that might be followed to combat the long-term but worsening problem of homeowner insurance redlining. ■

Gregory D. Squires and William Velez teach sociology at the University of Wisconsin-Milwaukee.

Individualized law fails in our 'risk-infested' world

By Stephanie Wildman

THE PICTURE MOST OF US HAVE OF the law focuses on individuals —individuals clashing in court, individuals paying other individuals for harming them, individuals charged with violating a law.

That is particularly true regarding accidents, even though, as California Justice Mathew Tobriner said of today's "risk-infested society," "our current crowded and computerized society compels the interdependence of its members."

Underlying modern personal injury law are 19th-century principles that continue to emphasize individual responsibility, using notions such as fault and causation. But in the 20th century, technology has magnified the kind of harm victims may suffer, and the use of insurance and other devices to spread losses have implicitly collectivized responsibility for accidents. Thus legal principles and social reality have diverged.

In the 19th century a growing body of negligence cases firmly established the principle that an injured person must prove that someone responsible for an accident was at fault in order to recover damages. But "fault" is now so ingrained in our thinking it is hard to imagine theoretical alternatives. Yet the law could instead require someone to prove that he or she was not at fault or could require someone involved in an accident to pay regardless of right or wrong. These alternatives penalize activity broadly and seem particularly inappropriate when two individuals are involved.

When two contesting corporations or an individual and a corporation are involved, however, there may be preferable alternatives. Already we have seen how workers' compensation laws and doctrines of strict liability concerning defective products have reduced the emphasis on fault. But "fault" remains central in personal injury law.

With regard to "causation," there is also a conflict of individual and collective responsibility. Nineteenth-century legal writers tried to maintain a doctrine of objective causation to ensure that liability would not be automatically assigned to a rich capitalist defendant with "deep pockets," according to Harvard Law School professor Morton Horwitz. He argues that the doctrine on causation limits legal liability and denies the interdependence of people by focusing on individual responsibility for injuries. Some courts have modified the harshest application of causation doctrine by looking, for example, at a company's market share of a defective drug to assess the likelihood that the company caused an injury.

While some legal doctrines of personal injury law rest on notions of individualism, others spread responsibility more broadly, much as financial responsibility is collectivized by insurance or losses are spread by tax and price policies. The battle over personal injury law reform, like Proposition 51 in California, occurs in this gray area of conflict between older legal doctrines of individual responsibility and a sense of social responsibility for compensation of accident victims.

Proposition 51, approved in a June 3 referendum, eroded the notion of joint and several liability. This doctrine, which had early roots in common law, evolved from cases where wrongdoers acted in concert to harm the victim. Joint and several liability evolved from these cases to be applied in instances where wrongdoers had not acted in concert and might have been held liable independently. Under this interpretation, independent actors could be joined in one legal action for the sake of efficiency; one harm from multiple causes could be settled in one lawsuit.

Thus a victim could bring one suit against a wrongdoer who drove negligently and broke his or her leg and the doctor who mended it negligently. If one defendant was insolvent, then the victim could still be compensated in full by the other. Joint and several liability shared responsibility and thus conflicted with much of the philosophical basis of personal injury law.

If individual responsibility is stressed, victims may never recover enough to pay for their medical care or rehabilitation. In some instances we already socially share responsibility for risks, such as sharing nuclear power risks through pricing and insurance. More generally, we should acknowledge directly that society will take care of accident victims and not leave them victims of the law as well as their accident. ■

Stephanie Wildman is a law professor at the University of San Francisco.

Insurance

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population increased 8 percent. The oft-cited litigation explosion thus appears to have been exaggerated.

During the period 1981-84, wrote the Center's Robert Roper, "the source of the perception that there is a litigation explosion may be based on a changing mix of civil cases, increased complexity of cases being filed and widespread media reports of enormous awards in relatively few cases."

A study by the Rand Corporation, partially funded by the insurance industry, also concluded that "the per capita filings have remained stable in the past several years."

Some areas do, in fact, experience high concentrations of suits, specifically medical malpractice and products liability. But these are areas where public confidence is low, in many cases deservedly so. In Florida and Texas, some malpracticing doctors continue to treat patients without reprisals. Three percent of Florida's doctors accounted for 48 percent of the money paid to malpractice victims from 1975 through 1984; one Miami dermatologist settled 34 claims totaling $1.5 million. And in Texas in 1985, out of 669 complaints filed against doctors that year with the state medical board, only 32 led to serious disciplinary measures.

Product liability cases, in which manufacturers are sued for defective products, often grab headlines. The infamous Ford Pinto with its exploding gas tank, the Dalkon Shield that caused 60,000 women to miscarry, and asbestos manufacturing, predicted to cause 20,000 deaths annually until the year 2012, have eroded public confidence in corporate concern for health and safety. The Rand Corporation found that "of all the various external social pressures, product liability has the greatest influence on product design decisions." Thus it appears that it is the constant threat of lawsuits that holds manufacturers accountable.

The absence of an actual lawsuit explosion explains why tort reform has not measurably affected insurance rates. In the state of Washington, for example, strict tort laws were enacted this past spring, only to be followed by additional industry requests for rate hikes. One company's representative informed the Washington insurance commissioner that the 50 percent increase requested would have been 80 percent were it not for the new tort changes.

Iowa abolished joint and several liability during 1983, but today the state faces the same problems of availability found in other states.

In Florida, the state legislature enacted most of the tort restrictions the insurance industry demanded, but coupled them with a rollback in premiums. Several of the largest carriers responded by withdrawing their coverage from the market. Although the tort legislation satisfied them, they did not lower insurance rates.

The predictability of losses that some tort alterations may bring to the insurance industry will likely have only a fleeting impact on the built-in cycle of the insurance industry, which is largely tied to larger economic trends. It will, however, have long-term implications for society. Although tort law changes may affect how many people go to court, they do not address the real issues, mainly those of preventing injuries and fair compensation for injuries incurred. On the contrary, restricting tort law will preclude victims of others' negligence from obtaining adequate compensation, leaving open the question of who is responsible for their care.

Recent insurance industry reports indicate that it is recovering from its latest profit slump, with or without tort reform. Although the liability crisis has abated—at least until the next profit slump—questions remain about the role of the American tort system. In a less hysterical atmosphere, fundamental questions about societal responsibility for injured persons need to be addressed.

Originally, insurance was a way to help diffuse risk by spreading cost among a large number of people. Implicit in this role was a sense of responsibility toward society. But now, in the age of complex technological advances—which can cause unexpected, adverse consequences—spreading risk is increasingly complicated. Recent disasters such as the Bhopal chemical explosion led to large numbers of injuries or deaths. But if insurance companies refuse to underwrite, for example, chemical operations, who will assume the responsibility for potential damage?

It's difficult to imagine any resolution of this question without government intervention. Unfortunately, to date government involvement has focused more on protecting the insurance industry than the public. ■

***Rebecca Lightsey** is a representative of a coalition of public-interest groups in Texas working on the insurance and tort issues. **Margarita Fournier** works with her and is a graduate student at the Lyndon B. Johnson School of Public Affairs in Austin, Texas.*

Mao

Continued from page 13

began his cruel "purges" 10 years before his death, whereas Stalin's "Great Terror" started more than 15 years before he died. Therefore many of the Chinese party workers incarcerated and imprisoned during the years of the "Cultural Revolution" were not only rehabilitated but returned to responsible posts in the '70s.

I don't mean to downplay the contribution of Deng Xiaoping in the renewal of the Chinese economy, society and party. Deng clearly achieved better results in overcoming the Chinese "cult of personality" than Khrushchev was able to achieve with the 20th Party Congress and after it. But who could Khrushchev rely on? The doors of the prisons and camps were open, but most of the people returning home were broken physically, if not in spirit. Among them was not one former member of the Central Committee; they were shot immediately after their arrest or only a little bit later. The only ones still left to the leadership of the country and the party were Molotov, Voroshilov and Kaganovich—and Khrushchev found them much harder to remove from power than the Chinese Gang of Four was for Deng Xiaoping.

History is not a realization of something predestined on high. It is held in the hands of human beings. The responsibility of those who lead great powers is especially heavy. China has not achieved the level of economic and cultural development it might have attained without the "Great Leap Forward" and the "Cultural Revolution," which blocked the development of China and pushed it back into its past. But after Mao's death, China achieved much more than it would have been possible to predict 10 years ago. Changes in the USSR and the People's Republic of China are aiding improvement of relations between them.

It's possible to say with certainty that the memorial to Chairman Mao in Tiananmen Square in Peking will be just as enduring as the mausoleum to V. I. Lenin in Moscow's Red Square. It would be a mistake to enshrine the past or to create new myths around the name of Mao, but it would also be a mistake for us to talk only about the shortcomings and crimes of this person.

I hope that the new Soviet leaders can meet with the new Chinese leaders more than once before this century is over, both in Moscow and Peking. The Chinese leaders will truly consider it an honor to visit the Lenin mausoleum. But likewise a visit to the memorial to Chairman Mao Tse-tung should not be seen as a humiliating procedure to the Soviet leaders. ■

***Roy Medvedev**, author of Let History Judge and On Socialist Democracy among other works, is the leading public democratic socialist dissident living in the Soviet Union.*

Translated by Alexander Amerisov and Anne Schmitt.

EXHIBIT D
DATE 1-27-87
HB 322

HB 322
January 27, 1987

Testimony presented by Jim Flynn, Department of Fish, Wildlife and Parks

The intent of this legislation is to amend our existing statute which makes unlawful the operation of boats while under the influence of alcohol or drugs. The bill is a response to comments from local county attorneys, many of whom feel the existing statute is poorly worded and lacking the standards necessary for effective prosecution.

The legislation first changes the wording of the existing statute so that it more closely resembles the language used in the DUI statute.

The bill then adds a new section of law which will accomplish several things. It will provide for the use of the same standards regarding the phrase "under the influence" as are used in the DUI context. It also allows for the introduction into evidence of any BAC test results, as well as any other competent evidence bearing on the "under the influence" question. It further provides that if a person charged with violating this section of the law were asked to take a BAC test and refused, such refusal would be admissible evidence in any future prosecution.

Finally, the new section incorporates some provisions from the motor vehicle code which specify how, procedurally, BAC testing is to be done, adopts the motor vehicle code definition of "blood alcohol concentration" and authorizes the Department to adopt rules implementing these sections of the law.

The Department supports these changes and believes their adoption will eliminate the problems inherent in the language of the existing statute.

WITNESS STATEMENT

NAME Tim Robischon BILL NO. 240

ADDRESS Helena, MT DATE 1/27/87

WHOM DO YOU REPRESENT? Mont. Liability Coalition

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. HB 291 DATE JANUARY 27, 1987

SPONSOR PECK

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Stanley BALL	Nashua MT		L

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. HB 376 DATE JANUARY 27, 1987

SPONSOR LEDBY

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
CJET CHISHOLM	DEPT INSTITUTIONS	X	

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CS-33

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. HB 240 DATE JANUARY 27, 1987

SPONSOR

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
John C HOYT	GRT FALLS-BELT		X
Tim Robischon	Helena	X	
David Brunch	HELENA	X	
Roger McGlenn	INDEPENDENT INS AGENTS Helena ASSOC. OF M	X	
James L Jones	Billings Mont Assn of Defense Counsel	X	
Dee Henigan	MT Assn of Defense Counsel Helena	X	
Randy Gray	GF. State Farm, NAII	X	
Wendy Cundon	State Auditor's Office		
Kathy Irigan	" " Office	X	
Bob Correa	Bozy Chamber of Com	X	
Karl Englund	MTLA		X
Joseph Mazz	M.P.A		✓
Timothy J. Whalen	Billings Montana		X
Ralph Maggar	Gov's Council on Economic Dev	X	
Ralph Marta	Troy Mont.		

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CS-33