MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 15, 1987

The seventh meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on January 15, 1987 by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members present.

CONSIDERATION OF SB 51: Senator Bob Brown of Whitefish, Senate District #2, introduced SB 51. He said the bill amends the statute on comparative negligence by substituting the doctrine of "comparative fault" for the doctrine of "comparative negligence". He said presently in Montana law, the plaintiff does not have to claim negligence on the part of a defective product. He commented he needs to only prove that a defect caused an injury and then the manufacturer is strictly liable for any injury or damage caused. He said under existing law it is possible for a plaintiff's negligence or negligent misuse of a product to constitute 90 percent of the cause of his injury, where as the defective product might be only 10 percent of the cause. He stated the negligence of the plaintiff is not considered and he can recover fully from the product's manufacture. He explained under SB 51 the fault of the plaintiff would be compared to the fault of the seller or the manufacture of the product and his recovery would than be reduced or dropped, depending upon the percentage of his fault. Senator Brown read the types of action that produce one's own fault ((a) through (d) on page 2 of the bill). He explained Section 2 eliminates the concept of joint and several liability, except where defendants have acted in concert in contributing to a claimant's damage or if one defendant acts as an agent of another. He explained under existing law there could be three defendants who cause injury to a plaintiff and they are all liable for the full amount of the plaintiff's damages, regardless of their own percentage of liability. He explained if a plaintiff sues for $100,000 and is 10 percent at fault and each defendant is 30 percent at fault, the plaintiff can collect the entire amount from one of the defendants or any combination of them. He said that if the plaintiff collects from one defendant, that defendant has to attempt to collect the balance of the settlement from the other defendants. He said under SB 51 a jury must determine percentage of fault of each person whose action contributed to the plaintiff's damages, including the plaintiff himself. He said the plaintiff is not entitled to be compensated for the percentage of the damages that resulted from his own fault and each defendant is only liable for damages attributable to him. He stated the bill eliminates the need for the present practice of the paying defendant of having to take action to recover from other defendants, since each defendant is only liable for his own degree of fault. He

felt it made major changes in the law: comparative fault instead of comparative negligence; the plaintiff becomes responsible for his own actions; it also does away with joint and several liability.

PROPONENTS: Jim Robischon, Montana Liability Coalition, gave a list of members of the Coalition to the committee (see Exhibit 1). He felt the bill matches liability for damages to fault. He said the author of the bill, John Stephenson, of Great Falls, could not come, so he would answer any questions about the bill. He said the bill has been patterned after a Washington state bill and the Coalition feels there should be an amendment because the bill does not make it clear whether an employer's or co-employer's fault would be included in the "comparative fault pie" and the amendment would exclude employer's or co-employee's fault, so when the consideration of the fault of all the parties involved in the issue would be assigned, the employer's and co-employee's, which is under the Workmens' Comp. Act, would be excluded. He presented amendment:

> Page 3, line 22.
> Following: "Claimant."
> Insert: "Provided, however, that in attributing fault among persons, the finder of fact shall not consider or determine any amount of fault on the part of any injured person's employer or co-employee to the extent that such employer or co employee has tort immunity under the Workers' Compensation or Occupational Disease Acts of this state, or any other state, or of the federal government."

He said the question always is what is going to be the impact on availability and cost of liability insurance. He said there is no proven link between general tort reform, such as in SB 51, and availability or cost of liability insurance. He handed out a publication by Orin S. Kramer, a November 4, 1986 issue out of the The Journal Of Commerce (see Exhibit 2). He said this article deals with the issue. He stated the individuals of the Coalition could be insured in a combination of ways:

1. They could be fully insured.
2. They could be partially insured.
3. They could be under insured and only be able to afford inadequate limits.
4. They could be self insured, like the Montana Medical Association and the Montana Cites and Towns, and maybe, the Montana Bar Association.
5. They could be uninsured.

He felt SB 51 would operate for the benefit of four of these situations. He felt the bill would provide a greater opportunity of security in the modern court environment. He commented that an additional security would be in the actions taken in the investments made by a person or

organization in self-insurance programs. He believed there would be security in the knowledge that any improvement that a business organization or person made in the reduction of risks to others would probably be rewarding to the organization or person in that the fault would be reduced.

Gerald J. Neely, Montana Medical Assoication, testified in support of SB 51 (see Exhibit 3, written testimony).

Kay Foster, representing the Governor's Council on Economic Development and the Billings Chamber of Commerce supported SB 51 (see Exhibit 4, written testimony).

Alex Hanson, League of Cities and Towns testified that municipal governments provide services to the people of the state of Montana. He said they have 1,000 miles of streets and sidewalks and he said they operate utilites in most of the cities in Montana and conduct fire and building inspections; operate public buildings. He said a year ago a program began to provide insurance for the cities and towns of Montana that were not available in the commercial market. He stated the Montana Municipal Insurance authority has been set up, which provides liability coverage up to a limit of 1.5 million dollars to more than 75 cities and towns in the state. He stated we are trying to provide fair priced insurance because it is the tax payers who pay the premiums for the cities and towns. He felt SB 51 will help their effort to provide fair insurance to the state.

Kathy Irigoin, State Auditor's Office, testified for the bill with amendments attached (see amendment sheet (Exhibit 4A)). The State Auditor's office suggested that a provision be added to the bill that states joint and several liability applies if the claimant's apportioned percentage of negligence is zero, she said. She stated the reason for this is that if a claimant is not responsible for his injuries, he would be able to recover in the easiest way possible, which means going after the "deep pocket". She felt because of this reason joint and several liability should be permitted. She said the State Auditor also believes there are not many cases in which a claimant is not found to be at all responsible for his injury. The Auditor felt that the word "fault" in section 1 of this bill should be replaced with the word "negligence". She thought the bill extended too far because of the conflicting studies conducted as far as the effects of tort liablity and the cost of insurance.

Dan Hoven, Montana Municipality Insurance Authority, testifed in support of SB 51 and he said their position is to eliminate joint and several liability. He hoped joint and several will stay the way it is now in the bill. He stated this is important to the insurance authority because

of the broad responsibilities the cities and towns have in this state. He gave an example of a simple traffic accident that caused a town to be one of the defendants in a liability case because a pothole was in the area, and if the pothole had minimal involvement in the accident, the city or town, presently, can be exposed to the full recovery or has the option to settle the suit way over the amount of their true fault. He said it is only a matter of fairness that the responsibility for damages equals fault.

Lorna Frank, Montana Farm Bureau and Mountain West Farm Bureau Mutual Insurance Company, stated support for the bill (see Exhibit 5, written testimony).

Bruce Moerer, Montana School Boards Association, testified in support of the SB 51, especially in the joint and several liability section. He felt schools are willing to pay their fair share, but should not be exposed to more than that. He felt the tax payers should not have to pay for the wrong doings of others.

H.S. Hanson, Montana Technical Council, supported the bill.

OPPONENTS: John Hoyt of Great Falls, representing himself, testifed that he was not against a good business climate in Montana, but wanted to point out that elimination of joint and several liability is a popular theme today and the special session about joint and several showed the hysteria over this subject. He said a workable system of civil justice is needed. He said no one person has talked about the people that will need your help when they become injured. He presented an amendment and the reasons for it:

1. It is important that law suits are settled and litigation be brought to the lowest level possible.
2. It is important that one percent liable people are not stuck for a big payment.

He explained his amendment gives those people or entities found to be 10 percent or less negligent severally liable and not jointly. He explained they would pay in a verdict if it was 10 percent or less. If it is more than 10 percent, they are substantially negligent. He said we don't know who is going to win or lose with this bill. He stated the proponents of this bill don't know if they may be the ones who are going to suffer because there might be fights among the defenants themselves over how much and who did what. He felt this will not happen if the committee entered this 10 percent into the bill. He said it will help Mr. Neely with this. As far as changing "negligence" to "fault", it opens up a "Pandora's Box", he said. He commented that he has tried to meet with fair and knowledgeable lawyers who represent people in the coalition and insurance areas about this problem. He mentioned a meeting on December 23, 1986 in Helena and the majority of them felt joint and several

should be left in the bill with the 10 percent amendment. He stated the eliminating of joint and several all together will make the settlement of cases more difficult and the 10 percent will make it easier for settlement. He commented the bill requested by the Montana Defense Council and the Montana Trial Lawyers' bill should both be abandoned and there should not be a substitute of "comparative fault" for "comparative negligence".

Tom Lewis, President to the Montana Trial Lawyers Association, opposed SB 51 because mixing concepts of negligence with strict liability, and concepts of warranty are mixing "apples and oranges" and creating havoc to the legal system. He gave the example of a simple negligence action about a farmer who goes 7 miles to feed his cattle, but the road is icy. He said the farmer has to feed the cattle, so he assumes the risk and gets on the road and gets hit by a truck. He said his assumption of the risk becomes a defense despite the fact his conduct was reasonable. He stated the same type of analysis can apply when you talk about the simple negligence as a defense in a strict liability case. Strict liability involves a policy decision by the courts and legislators and it is well accepted in this county, he explained. It is based on the premise that the manufacturer that places the product in the stream of commerce is going to be liable for defects in that product which creates an unreasonable risk of harm to the consuming public, he said. He commented that negligence should not be a defense to that because the plaintiff doesn't have any control over that. He stated on the issue of joint and several he agreed with Mr. Hoyt and he felt the committee should compare the individual fault of the plaintiffs and defendants for the purposes of establishing whether joint and several should be applied. He said if the plaintiff is more negligent than the defendant, he can't recover anything or the defendent may be severally liable, if the plaintiff is more negligent than the individual defendant. He said if we get rid of joint and several liability, we get rid of something we have had for many years; so there are three choices: 1) Let the victim carry the burden of his harm. 2) Let the public carry the burden of harm. 3) Let the persons at fault carry the burden of harm. He felt the innocent victim is left to his own resources with this bill and the public pays for it. He felt our system of tort does justice because it states who the person is at fault; who creates the unreasonable risk; and who is negligent, bares the risk of harm; that is where it is and that is where it should remain.

Karl Englund, Montana Trial Lawyers Association, stated this is asking the jury to not only tell what each defendant did wrong, but apportion the fault to people who are not even represented in the case. He said it prevents the settling of any case in which you have multiple defendants because if you settle with one defendant, the rest of the defendants will blame the one that settled out of court. He said this bill will have to have a trial procedure against every defendant and make every case more complex and more difficult.

Zander Blewett, a lawyer from Great Falls, opposed the bill because it is a full scale change in the law and it will give the system more problems. He supported the 10 percent threshold in joint and several because it gets rid of the municipality problems, the school board problems, or any of those people that are slightly involved. He felt with this bill the whole tort system is changed. He stated that the bill actually says if you are not wearing a seat belt that that issue ought to be litigated in every automobile case. He said we are talking about having experts from both sides coming in and saying, "Well, I know he was rear ended but our expert says he wouldn't have a head injury if he had a seat belt on."

DISCUSSION ON SB 51: Senator Crippen asked Mr. Robischon to comment on Mr. Hoyt's 10 percent proposal to the joint and several part of the bill. Mr. Robischon replied that the American Bar Association Tort Reform Committee that studied the joint and several liability and the "comparative fault pie" has come up with a recommendation of 25 percent. He commented that arbitrary percentages are being debated here, whether or not the doctrine applies. Senator Crippen commented that what he gathered from Mr. Robischon's statement is he was not opposed to the concept of Mr. Hoyt's proposal, but the percentage of it. Mr. Robischon replied that the concept in SB 51 is a wide open doctrine and different percentages will effect it differently. Senator Crippen asked Mr. Hoyt where they got the idea of above 10 percent would be substantially negligent. Mr. Hoyt responded that studies in California showed that less than one percent of those persons that are defendants and multiple defendants in cases have been found to have liability less than 10 percent. He said it eliminates those who have a minimal amount of fault and it is a fictitious number, but not an arbitrary one. He echoed it was one that was arrived at after studying liability cases from all over. He said it is very important to settle cases and some attorneys are great for drawing liability cases out. Senator Crippen inquired if section 1 wasn't changed, with a plaintiff of 25 percent negligence and several defendants that were 10 to 15 percent negligence, would it still not allow the plaintiff to recover anything. Mr. Hoyt responded that under the joint and several, presently, the plaintiff would recover, but that is a gray area. Senator Crippen gave an example of 10 percent situation, which fit the Hoyt amendment. He said under the bill if the plaintiff is over 10 percent negligent, the fact is he would have to give up that 10 percent, or would he be entitled to it, or is he liable, or is there anyway to recover at all. Mr. Hoyt replied this a gray area again.

Senator Mazurek stated that would be good for the committee to run through different percentages to see how this would work.

Senator Halligan commented that he felt that mixing all of the concepts of warranty, strict liability, and product liability was a bit much. He

asked Mr. Robischon if they had discussed the confusion that may result from combining these issues. Mr. Robischon answered that expanding existing definitions to one definition of fault, and the way it effects the concept of joint and several liability, is expanding the concept of negligence to fault, and the things identified in subsection 2 are expanding the consideration of the plaintiff's involvement in the over all "fault pie". He stated if the plaintiff is going to have fault attributed to him or if his share of the "fault pie" is going to increase because of non-use of safety devises, that has to have a secondary effect upon the 10 percent tortfeasor in the case, because of the increasing claimant's share of that pie. He said the change from "negligence" to "fault" causes changes in the plaintiff's share when it comes down to what the severally liable defendants really have to account for in dollars. Senator Halligan asked what sort of social policy or judicial policy comes along with this. Mr. Robischon replied it will increase the plaintiff's fault where it has never been increased before to reduce the size of the dollar pie.

Senator Mazurek explained there will be a subcommittee appointed to this bill.

Senator Beck commented that we are trying to limit the exposure of each person to a certain amount and when we get in executive session the attorneys on both sides should remember that.

Senator Brown closed on SB 51 by stating the bill is modeled after the tort law in Washington state and it is by the recommendation of the joint committee on liability issues, which was made up of equal party members. He said the committee was in favor of this bill. He said it is critical to self insurers and their solvency and if the availability of affordable insurance is going to be a repetitious problem for Montanans in the future, then self-insurance might be the answer. He commented on Mr. Hoyt's amendment and the 25 percent threshold recommendation by saying they are arbitrary with whatever percentage one looks at and he felt that it should be discussed in trusting the jury on 10 or 25 percent or beyond that. He commented that the League of Cities and Towns, the Farm Bureau, the Govenor's Economic Council and the voters that passed Initiative 30 seem to think there should be tort reform in Montana and their wishes should be considered too. He pointed out Mr. Lewis's comment on the term "fault" being too broad, and the issue of product liability with allowing the jury to look at the misuse of a product by a plaintiff to arrive at their decision. He believed that if you have to broaden "negligence" to "fault", to do that. He pointed out Mr. Englund's point that people are at fault, but are not even defendants in the case. He quoted the language on page 3, line 17 of the bill. He said this is not necessarily anything that is going to happen, because the term "may" prevents it. He concluded by saying 25 states have already passed legislation addressing joint and several liability.

CONSIDERATION OF SB 48: Senator Bob Brown, Senate District #2, introduced SB 48, which was at the request of the joint interim subcommittee on liability issues. He stated the bill will provide for periodic payment of future damages in actions for personal injury, property damage, or wrongful death if the amount of future damages awarded equals or exceeds $50,000. He explained each section of the bill, and the bill would allow the judge to make mandatory the periodic payment concept if requested by either party and it would extend the application beyond settlements to include judgements. He closed by saying "lump sum" settlements can be costly to the plaintiff in terms of taxes; periodic payments provide the plaintiff with a guaranteed method of payment for future damages and they can be extended. He stated "lump sum" payments can be devastating to insurers.

Gary Neely, representing the Montana Medical Association, testified in favor of SB 48 (see Exhibit 6, written testimony). Mr. Neely also handed out the "Actuarial Analysis of American Medical Association; Tort Reform Proposals", by Milliman and Robertson Inc. (See Exhibit 7). He said this study sets forth the kind of savings that is attributal to this legislation. He said that from this study there would 6 percent equivalent premium dollar saving from it. He said the concept of it has been indorsed by a special committee by the American Bar Association.

Kay Foster, Deputy Mayor of Billings and Chairman of the Insurance Subcommittee of the Governor's Council on Economic Development, supported SB 48 (see Exhibit 8, written testimony).

Kathy Irigoin, State Auditor's Office, testified in support of the SB 48 because it will make insurance more availible and affordable in Montana.

Dan Hoven, Montana Municipality Insurance Authority, supported the bill because cities and towns sought insurance and could not find it and made an effort to create their self-insurance pool. He felt if cities and towns were hit with a series of major damage awards, the "insurance pool" would feel a strain on its reserves. He felt this would allow the insurance pool to enhance its economic availability. He stated with catastrophic damages most would be paid up front with this bill because it is a special damages case. He believes the judge has the discretion to shorten the periodic payments in catastrophic cases.

Jim Robischon, Montana Liability Coalition, testified in favor of the bill because it provides an alternative in tort action judgments. He felt it would work well with the comparative fault doctrine discussed in SB 51 and it would help self-insured groups get "off the ground".

Lorna Frank, Montana Farm Bureau and Moutain West Farm Bureau Mutual Insurance Company, supported SB 48 (see Exhibit 9, written testimony).

Bonnie Tippy, Alliance of American Insurers, supported SB 48 because many who get a lump sum settlement spend it quickly and do not plan for the future.

OPPONENTS: John Hoyt, representing himself, opposed the bill because it does not benefit injured people. He stated that he represented a young man who was brain damaged by an injury through no fault of his own. He said a $500,000 payment would purchase for this young man, over his lifetime, five $100,000 payments, but it is reduced to present worth which is only $50,000. He stated a voluntary settlement, which embraces a structured settlement, is done now only after a tremendous amount of research on the part of any competent plaintiff's attorney. He felt no small company should be allowed to structure a catastrophic award. He believed no one knows what companies will be around in the next ten years, so we find the best that we can find now when we get a structured settlement and then we don't let the defendant "off the hook". He commented that this is the only way to be assured that a periodic payment is going to be made and with an annual increase for the cost of living. He said this doesn't say that. He stated his lawyer friends in Florida that have this legislation found that the attorneys for the defendants and plaintiffs stipulate to the court that they not be paid in periodic payments because it is catastrophic to everyone.

Tom Lewis, Montana Trial Lawyers Association, believed that the basic flaw in this legislation is it goes against the finality of judgments because it takes so long to get full pay. He said it has constitutional problems because it only applies to future damages and personal injury cases and he doesn't see how people who have damage actions arising out of personal injury be treated any different than people who have damage actions arising out of improper business actions or anything else. He felt there were not tax advantages in the bill, but insurance companies get advantages because of the premiums. He felt they don't have to pay it out so soon. He believes competent plaintiff's and defendant's counsel get those cases that need structuring, structured. He did not agree with the judge being required to structure the payments because it is only beneficial to the side that requested it before the trial. He said it won't increase availability of insurance and it is not a "Savior" for self-insurers because they might have to purchases an annuity; and how does that help a self-insurer. He commented if the district judges knew about this bill they would be here in full force because it means every personal judgment for $50,000 has to be in existence for many years.

Zander Blewett, representing himself from Great Falls, opposed the bill because it deals with insurance limits and individuals and they can't reapply for more money from anyone. He said there are few incidence of people quickly spending lump sums, but competent counsel and courts should take care of that.

Pat Melby, State Bar of Montana, spoke against the bill, but spoke of how most of the time the State Bar is neutral in legislative "hot issues", but he felt there were major problems with this bill. He believed the Bar had no problem with the concept of a district court or jury to have the authority of periodic payments. He said this would allow a policy in every personal injury case, where there are future damages over $50,000 where the requirement of periodic payments is made by one person. He commented not every case can use this idea, because of this and the "mandatory" concept of the bill he opposed it.

DISCUSSION ON SB 48: Senator Crippen asked if a plaintiff receives period payments, can the plaintiff at sometime assign the payments to a bank or creditor. Mr Robischon replied the funds are placed outside the plaintiff's hands with a third party, so they don't become taxable. The plaintiff doesn't receive those funds till the day of dispersement, he said. Senator Crippen questioned where in the bill can the plaintiff go back and ask for an increase in payments because of an increase in medical payments. Mr. Neely answered that section 3 on page 3 of the bill has that answer. He explained that if a judge sets five periodic payments of $100,000 per year and if the plaintiff is still alive, he can come to the court and apply to the court for additional payments limited to economic damages. Senator Crippen asked if the regular payments did not take care of the medical bills, then what happens. Mr. Neely said this situation is not in this bill, but it would be simple to put in the bill. Senator Crippen asked that in a trust fund is there a cost of living factor built in. Mr. Neely answered yes. Senator Crippen questioned how does one protect a plaintiff in that situation. Mr. Neely responded that the court could order an inflation index annuity. Senator Crippen commented that if they had a trust fund, and they got into it and the insurance company sets up a reserve, which goes into that trust fund to make these periodic payments. He said you take the principal and assume a rate of return on the principal and that is your periodic payment or you can have the trust fund to have a diminishing amount of principal. Senator Crippen asked how is one going to protect a plaintiff more with this method if he has the funds available and they were able to determine what type of periodic plan they could enter into. Mr. Neely answered if the individual receives a lump sum, there is no limitations. He said when dealing with annuities, the court has the power to form a security to require the form of the annuity in other matters and the individual is protected because of the solvency of the insurance carrier. He felt the person is protected more under this than a voluntary settlement agreement.

Senator Blaylock questioned could this be guaranteed to make insurance rates go down. Mr. Neely answered no. He said if one is insured by their own carrier and if he receives a savings, it has to pass on to the insured. He stated rates are made up of frequency and severity of claims, so if your claims double and the amounts paid out doubled, that can wipe out its savings. He felt there will still be a downward increase on rates.

Senator Mazurek asked about the impact of the judgment on the individual tortfeasor. Mr. Neely answered that the court can take that into account for certain cases, such as when it involves borrowing. He said it is not required unless one asks for it. Senator Mazurek asked what Mr. Neely thought of Mr. Melby's thought on "mandatory" statement in the bill. Mr. Neely answered that the mandatory feature is important to implementing this legislation because if it is not in there, it is like the law now.

Senator Brown closed by saying a proposal of a $100,000 threshold for periodic payments was recommended by the Govenor's Economic Council, so they do endorse the concept and there was broad base support here today. He stated that as far as being unconstitutional, other states who have this have not found it unconsitutional. He urged the committee's support.

The committee was adjourned at 12:15 p.m.

Chairman

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date Jan. 15th, 198

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

VISITORS' REGISTER

(SENATE) AND HOUSE COMMITTEE Jud.

BILL SB 51 DATE Jan. 15th

SPONSOR

NAME	REPRESENTING	RESIDENCE	SUPPORT	OPPOSE
Kathy Irigoin	State Auditor	Helena	X	
Jim Robischon	Mont. Link Coalition	Helena	X	
Kay Foster	Govevnor's Council Billings Chamber	Billings	X	
Roger Tippy	Montana Dental Association	Helena	X	
ROGER McGLENN	INDEPENDENT INSURANCE AGENTS ASSOC. OF MT	Helena	X	
Bob CORREA	Bozg. Chamber	Bozg	X	
Lorna Frank	Mont Farm Bureau	Boz	X	
Bonnie Tippy	Alliance of Am. Insurers	Helena	X	
Gerry J. Neely	Mont. Med. Assoc.	Billings	X	
CHIP ERDMANN	MT League of Savings Inst	Helena	X	
BRIAN ELLIS	MT. Med. Assn.	Helena	X	
Bruce W. Moerer	MSBA	Helena	X	
H.S. Hanson	MT. Tech. Council	Helena	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

SENATE AND HOUSE COMMITTEE JUDICIARY

BILL SB48

DATE 1-15-87

SPONSOR

NAME	REPRESENTING	RESIDENCE	SUPPORT	OPP
Tom Lewis	Montana Trial Lawyers	G.F.		
Roger McGlenn	Independent Ins Agents Assoc. of MT.	Helena	X	
Kathy Irigoin	State Auditor	Helena	X	
Jim Robischon	Mont Liab Coalition	Helena	X	
Kay Foster	Gov. Council on Economic Development	Billings	X	
Bob Correa	Boz Chamber	Boz	X	
Lorna Frank	Mont Farm Bureau	Boz	X	
Bonnie Tippy	Alliance of Am Insurance	Helena	X	
Gerald J. Neely	Montana Med. Assoc.	Billings	X	
Chip Erdmann	Mt League of Savings Inst	Helena	X	
Dan Hoven	Mont. Munic. Ins. Auth	"	X	
Pat Melby	State Bar	Helena	amend	
John Maynard	Tort Claims / Admin.	Helena		
Bryan Enderle	Missoula Chamber of Com	Helena	X	
Bruce W. Moerer	MSBA	Helena	X	
Brian Zins	MT. Med. Assn	Helena	X	
Chuck Mundeman	State Farm Ins Co	Bozeman	X	
Alec Hansen	MT League of Cities		X	
Dan Thomas	Sen Bob Williams	Helena	X	
HS Hanson	MT. Tech. Council	Billings	X	
Zander Blewett	Self	GF		
Annie Bartos	MMIA	Helena	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

SENATE JUDICIARY
EXHIBIT NO. 1
DATE Jan. 15, 1987
BILL NO. SB 51

MONTANA LIABILITY COALITION

MEMBERSHIP

Montana Home Builders Association
Professional Insurance Agents of Montana
Lewis and Clark County Medical Society
Montana Taxpayers Association
Montana Retail Association
Montana Outfitters and Guides
Montana Forward Coalition
Glendive Chamber of Commerce
Montana Chamber of Commerce
Montana Society of CPAs
Montana Bankers Association
Montana Loggers Association
Montana Building Material Dealers Association
Montana Academy of Family Physicians
Montana Innkeepers Association
Wolf Point Chamber of Commerce
Billings Chamber of Commerce
Mountain Bell
Blue Cross and Blue Shield of Montana
Montana Hospital Association
Montana Dental Association
Montana Auto Dealers Association
Ennis Chamber of Commerce
Montana Chiropractic Association
Montana Contractors Association
Montana Independent Bankers
Anaconda Chamber of Commerce
Montana Farm Bureau Federation
Montana Medical Association
Montana Motor Carriers Association
Butte Chamber of Commerce
Montana Tavern Owners Association
Miles City Area Chamber of Commerce
Missoula Chamber of Commerce
Bozeman Chamber of Commerce
Havre Chamber of Commerce
Montana Chapter, National Electrical Contractors Association
Montana Association of Defense Counsel
Montana Restaurant Association
Montana Health Care Association
Helena Area Chamber of Commerce
Montana Solid Waste Contractors, Inc.
Kalispell Chamber of Commerce
Montana Hardware & Implement Association
Montana Tire Dealers Association
Montana Office Machine Dealers Association
Independent Insurance Agents Association of Montana
Montana Petroleum Association
National Federation of Independent Business
Montana Association of Realtors

1/14/87

THE JOURNAL OF COMMERCE, Tuesday, November 4, 1986

The Issues Behind Tort Reform

The reality is that the recovery won't cure the crisis: There's a capacity shortage at least through 1988, and the predicate to the recovery is that companies are repricing or avoiding the problem lines.

By ORIN S. KRAMER

(First of a Two Articles)

In drafting the New York Advisory Commission report on liability insurance, a central objective was to separate out the broad, philosophical questions about the purpose of the civil justice system — questions to which there are no definitive answers — from the issues for which a reasonably verifiable answer exists. Nothing would advance the public dialogue more than excising this latter category of false issues from the current debate. Let me suggest three persistent issues where the facts should be stipulated.

First, the industry's earnings recovery. The issue is whether the recovery will cure the crisis and obviate the need for tort reform.

The reality is that the recovery won't cure the crisis: There's a capacity shortage at least through 1988, and the predicate to the recovery that companies are repricing or avoiding the problem lines. Full availability of coverage for insurable risks should return by early 1987. But significant price reductions are not foreseeable over the intermediate term.

Even if we were about to witness a surge of new capacity sufficient to reduce rates, it would still be irrelevant to the merits of tort reform. The essential argument for tort reform is that as a nation we are making an excessive investment in satisfying liability obligations, and that that investment undermines our international competitiveness, inhibits productive activity, imposes hardship and threatens the health of the insurance mechanism. Whether we as a society are putting too many dollars in the compensation basket is a legitimate point of contention, but that is the question around which the debate should revolve. The issue is not whether on the day we enact long-term changes in our civil justice system, an industry that is incontrovertibly cyclical happens to be in its recovery phase, at its peak, or at its nadir.

Second, what do we know bout the behavior of liability costs?

We know there have been misstatements. Our so-called litigation explosion is no more severe than Western Europe's. Most of the increase in civil cases has been in family law, personnel and entitlement actions, not torts. The median settlement hasn't risen dramatically.

What should be indisputable is that beginning around 1980, aggregate civil liability costs accelerated rapidly, driven not by an increase in the median claim, but by the exponential growth of the small minority of claims above $100,000. There is ample documentation of that proposition in our report. The experience of self-insureds corroborates that the cost explosion is not an artifact of the insurance market.

What's driving these larger cases? It's not an explosion of hazard and risk. With the exception of the inhalation of toxics, all death rates for accidents, including medical procedures, are down. It's not wage inflation or health-care costs — the cost surge exceeds any inflation index. The cost surge reflects three forces:

- An upward revaluation of social concepts of the dollar value of intangible injury;
- The evolution from a body of law aimed at deterring unreasonably risky activity to legal doctrines with a primary concern for full compensation of injuries; and
- A dramatic rise in transaction costs exceeding even the rate of increase in payments to claimants.

In effect, judges and juries — operating without budgetary constraints — have levied what amounts to a massive tax on society, a tax which at its heart reflects increasing social intolerance of unbuffered risk. If we view that cost increase as a problem, it is not an insurance mechanism problem but a liability problem.

The final issue: Is there a demonstrated, quantifiable linkage between tort reform and premium rates? If not, should we defer tort reform until that linkage is empirically established?

There is no reliable research establishing a quantitative linkage between tort law change and insurance prices. There is some data on the cost savings produced by specific tort reforms, but not on the translation of those savings into prices. There are three reasons why: There are few dispassionate professionals in this field; the research is difficult and complex; and, prior to this year, there wasn't much general tort reform, as opposed to specialized tort reform involving health-care providers. Moreover, because insurance pricing reflects so many variables beyond tort costs, there will probably never be a model that can predict the effect of tort law changes on insurance rates.

But quantitative evidence on the linkage should not govern the debate. We do have empirical evidence that tort reform reduces liability costs. We do know that in competitive markets with low entry barriers, cost changes will exert pricing pressure in the same direction. There may not be a 1:1 relationship between tort law change and insurance pricing at any one point in time. But over the long haul, the liability cost structure will determine how much insurance is written and at what price.

Orin S. Kramer, an attorney and consultant who served in the Carter administration, was vice chairman and executive director of the State of New York Advisory Commission on Liability Insurance.

JOURNAL OF COMMERCE, Wednesday, November 5, 1986

Redefining Tort Reform Debat

Tort law is, quite properly, blind to the very existence of insurance; taking into account the economic status of the parties would repudiate the principle of equal protection.

By ORIN S. KRAMER

(Second of Two Articles)

The central question facing those studying tort reform and the insurance industry is how we move to redefine the public debate in 1987 and beyond.

My own thought is that those who care about the health of the insurance mechanism and how we handle risk would want to convert what has historically been a cyclical "crisis" issue, where the debate operated within fairly narrow intellectual parameters, into a much more fundamental discussion.

This discussion would focus on the very purposes of the civil justice system, and where the objective is to institutionalize that discussion as part of the ongoing public agenda. That discussion would revolve around five fundamental questions:

- How much risk do we want to tolerate in society — to what extent is it desirable or economically feasible in a competitive world economy to seek a zero risk environment?
- How much to pay people with injuries?
- Who should pay?
- Who should be paid?
- What mechanism should we use to deliver that money?

Those issues have two characteristics. The first is that they are primary issues that should be explicitly addressed, but they're so far-reaching that they tend to get avoided. So we end up proceeding as if there were a consensus on basic principles when few people have examined these principles. Then we're surprised when the failure to articulate the goals produces a stalemate on policy.

The second characteristic of these first-order issues is that they are issues on which there is no single, "right" answer, and they are issues on which nobody's going to get a resolution in 1987 or 1988. They are fundamental questions, the answers to which revolve around subjective judgments on the nature of justice and how much society elects to invest in liability protection.

Proponents of the status quo argue we should permit those answers to evolve through the courts. I would argue that case law is unsuited to take into account the systemic effects of legal principles, and the effects on insurance are a case in point.

Tort law is, quite properly, blind to the very existence of insurance; taking into account the economic status of the parties would repudiate the principle of equal protection. But that blindfold numbs the sensitivity of the judicial system to the health of the risk-spreading mechanism that ultimately determines whether a paper verdict produces a real recovery.

If the long-term dialogue centered around the basic issues outlined above, we could begin to ask the real questions:

- What's the problem? Is it predictability, or predictability and cost, or the absence of deterrence?
- Is it the arbitrariness of the system — and if so, is the problem that some get too much, or some get too little, or that it takes too long to get it?
- How much risky conduct do we want to deter?
- To what extent should the tort system, as opposed to government regulation, be our vehicle for deterring unreasonably risky conduct?
- Do we really want to compensate most forms of injury absent a finding of fault? If we do want broad compensation, is no-fault an answer?

If we want to deter negligent conduct through the tort system, then we should predicate recovery on a finding of negligence. If society insists on compensating certain classes of injury irrespective of negligence, then there are cheaper, faster and fairer ways to do so than through the tort system.

You can make a philosophical case for either approach. You can achieve deterrence through a fault-based tort system. Or you can achieve broader compensation through no-fault and broader safety nets, and rely on government regulation and the criminal law for deterrence. But you can't achieve both objectives through the same tort system without putting intolerable strain on that system.

The reluctance to discuss those first-order issues is understandable because they're so far-reaching, and because the implication is either (a) that you revert to a pure fault system and leave injured parties without compensation, or (b) that you move to a no-fault approach that involves broader government safety nets and perhaps a greater cost than this country would find acceptable. That's not an easy choice, but I'd submit that if you don't find vehicles to introduce these issues as part of the public dialogue we're inevitably left with what we have today:

- A system that's eroding the international competitiveness of our economy.
- A system with minimal deterrence.
- A system with uneven levels of compensation.
- A system that's high on cost.
- A system that lacks the requisite predictability to make the risk-sharing insurance mechanism work.

Orin S. Kramer, an attorney and consultant, was vice chairman and executive director of the New York State Advisory Commission on Liability Insurance.

1. JOINT & SEVERAL LIABILITY

A. SUMMARY OF LEGISLATIVE PROPOSAL

▪ Proportionate liability of persons being sued -- the defendant in a court case -- based on the degree of their fault.

B. INTRODUCTION

WHAT IS "JOINT AND SEVERAL LIABILITY"?

Under "joint and several" liability, a plaintiff - negligent himself - who sues more than one defendant can collect the entire judgment from a defendant who was less negligent than all other defendants, and even less negligent than the plaintiff himself. And to the extent the other defendants are insolvent, the less-negligent defendant has to foot the entire bill.

The law allows a division of fault between a negligent plaintiff and the defendants (through comparative negligence) and allows division of fault among the defendants (through contribution), but will not allow a division of damages based on fault among all the negligent parties, including the plaintiff.

A negligent plaintiff is made "whole", while making a solvent defendant incur liability in excess of his proportionate fault and bear the entire burden of an insolvent co-defendant. The courts inflict an injury on the solvent defendant in excess of his proportionate fault, even when the plaintiff's negligent conduct was also a factor in inflicting the injury on himself.

The "joint and several liability" concept is at the root of escalating settlements and verdicts facing cities, school districts, parks and other government entities. The public, through increased taxes, pays directly for any disproportionate liability imposed by the joint liability rule.

For physicians and their patients, it is a vital topic because many physicians are members of single-line physician-owned carriers selling medical liability insurance and highly dependent on a volatile reinsurance market adversely affected by the presence of the joint and several concept.

WILL PROPER LEGISLATION HAVE A DOWNWARD IMPACT ON PREMIUMS OR IMPROVE THE AVAILABILITY OF INSURANCE?

Responsible authorities believe changes in the "joint and several" liability concept will help to bolster the reinsurance market, a market which is so important to single line policyholder-owned insurance companies.

Independent actuaries have estimated in California that the passage of the California initiative could favorably affect professional liability premiums by as much as 5%.

The fiscal impact report by the Legislative Analyst and State Finance Director of California, in the official title and summary of the Californi initiative, estimated the savings to state and local governments "could be several millions of dollars annually, but may fluctuate significantly annually, depending on size of claims paid." The California initiative was limited to non-economic damages, and a measure not so limited could be expected to have a greater impact.

C. POLICY REASONS FOR LEGISLATIVE PROPOSALS

The proposed legislation will:

- Cause a reduction of the infliction of injury by the courts on defendants in excess of their proportionate fault

- Cause a reduction in cases involving contribution from joint tortfeasors

- There are objective, scientific reasons to believe that passage the legislation will have a demonstrable downward impact on premiums and further insure the availability of insurance.

D. FURTHER BACKGROUND ON TOPIC

HAVE OTHER STATES ACTED IN THE AREA OF JOINT AND SEVERAL LIABILITY?

Twenty-five states have eliminated or in some way restricted application of the joint and several rule. 1

Those states have acted with legislation which provides for:

- Proportionate share of fault as to all defendants for all damages. 2

- Proportionate share of fault as to all defendants for all damages where a plaintiff is at all negligent. 3

- Proportionate share of fault as to all defendants for non-economic damages. 4

---

1 California, Colorado, Indiana, Iowa, Louisiana, Kansas, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Texas, and Vermont are discussed in the following materals. Alaska, Connecticut, Florida, Michigan, West Virginia, Colorado, Missouri, Utah, Washington, Wyoming made modifications in 1986, and the comments herein do not include 1986 bills.

2 Indiana, Kansas, New Hampshire, New Mexico, and Vermont.

3 Oklahoma

4 California

SENATE JUDICIARY
EXHIBIT NO. 3
DATE 1-15-87
BILL NO. S.B. 513

- Proportionate share of fault as to any defendant whose negligence is less than that of a plaintiff's. 5

- Proportionate share of fault as to any defendant who is bears less than 50% of the total fault, including the plaintiff's. 6

- Defendants jointly liable only with other defendants who are proportionately less negligent. 7

- Retention of joint and several liability, but reallocation of insolvent defendant's liability among all negligent parties, including the plaintiff's. 8

Prepared by the Montana Medical Association, 2021-11th Ave., Helena, Montana 59601, G. Brian Zins, Executive Director, 406-443-4000. 1/87	LEGISLATIVE PROPOSALS - JOINT & SEVERAL LIABILITY

5 Colorado, Louisiana, Nevada, and Texas

6 Iowa

7 Missouri. Thus, if the jury deems defendant "A" 20% negligent, defendant "B" 30% negligent, and defendant "C" 50% negligent, the result is that:

C: jointly liable for 100% of damages
B: liable for 50% of damages (B plus A's negligence)
A: liable for 20% of damages

8 Minnesota. The end result of this approach is that defendants generally remain jointly and severally liable, but a plaintiff's recovery will be reduced by: (1) his own negligence; (2) his proportionate share of a defendant's insolvency.

SB 51

The Council urges approval of the elimination of joint and several liability as presented in Section 2 of SB 51.

Although we made no recommendation regarding comparative fault as outlined in Section 1 of this bill, the Council specifically recommended that the legislature change Montana's doctrine of join and several liability so that defendants will be responsible only to the degree that they are found to be negligent.

The specific task of the Insurance Subcommittee of the Governor's Council on Economic Development was to study the liability insurance crisis in Montana and present recommendations to the Governor and Legislature which would increase the affordability of liability insurance. In almost all circumstances the recommendations do not just offer the insurance industry but involves basic changes in Montana's system of civil justice.

Our conclusion was that the elimination of joint and several liability and return to a fault based system of damage assessment would make Montana more attractive to insurors and, consequently, add some stability to Montana business and governmental units.

SENATE JUDICIARY
EXHIBIT NO. 4
DATE Jan. 15, 1987
BILL NO. SB 51

SENATE JUDICIARY
EXHIBIT NO. 4A
DATE Jan. 15, 1987
BILL NO. SB 51

Proposed Amendment to SB 51

1. Title, lines 7 through 9.
Strike: "SUBSTITUTING THE DOCTRINE OF COMPARATIVE FAULT FOR THE DOCTRINE OF COMPARATIVE NEGLIGENCE;"

2. Title, line 9.
Strike: "ELIMINATING"
insert: "REVISING"

3. Page 1, line 14.
Strike: section 1 in its entirety
Renumber: subsequent sections

4. Page 2, line 11 through line 13, page 3.
Strike: line 11, page 2 through line 13, page 3

5. Page 3, line 14.
Before: "(1)"
Insert: "NEW SECTION. Section 1. Multiple defendants--apportionment of negligence."

6. Page 3, line 14.
Strike: "fault"
Insert: "negligence"

7. Page 3, line 16.
Strike: "fault"
Insert: "negligence"

8. Page 3, line 23.
Strike: "Judgment"
Insert: "Except as provided in subsection (3) and [section 2], judgment"

9. Page 4, line 6.
Strike: "fault"
Insert: "negligence"

10. Page 4.
Following: line 9
Insert: "Section 2. Section 27-1-703, MCA, is amended to read:
"27-1-703. Multiple defendants jointly and severally liable--right of contribution. (1) Whenever the negligence of any party in any action is an issue and the claimant's apportioned percentage of negligence is zero, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.
(2) [illegible]
(3) [illegible]"

BILLS REFERRED/SCHEDULED FOR HEARING

CHAIRMAN--SEN. JOE MAZUREK

SECRETARY--MARY MORRIS

COMMITTEE--(S) JUDICIARY

NORMAL SCHEDULE--- SITE: ROOM 325 DAYS: MON THRU FRI TIME: 10:00 A.M.

REFER DT--HEAR DT--BILL NO--SHORT TITLE--- PRIMARY SPONSOR
ROOM 402 -- 10:00 A.M.

02/14	DATE 02/17	SB 330	REGULATE TESTS OF BLOOD AND URINE OF EMPLOYEES AND PROSPECTIV...	...EES	BOYLAN, PA...
02/17	DATE-___/___ TIME-___:___	SB 356	ESTABLISH MINIMUM OFFICEHOLDING AND TRAINING REQUIREMENTS FOR...	...ERS	HOLSTAD, ...
01/23	DATE-02/05	HB 13	EXEMPT IN BANKRUPTCY ACTION ALL PROPERTY OF INDIVIDUAL EXEMPT...	MCA	MERCER, JOHN
01/24	DATE-02/05	HB 19	GENERAL REVISION OF LAWS RELATING TO PROPERTY EXEMPT FROM EX...		MERCER, ...
01/21	DATE-02/05	* HB 21	RAISE LEGAL DRINKING AGE FROM 19 TO 21; PROVIDE EFFECTIVE DATE		FRITZ, HARRY
...	DATE-02/10	HB 37	DEFENDANT'S RECORD EXPUNGED UPON DISMISSAL OF CHARGES		BRADLEY, ...
01/27	DATE-___/___ TIME	HB 42	CLARIFY LEGAL STANDARD GOVERNING LANDOWNER LIABILITY		...ODD, JOHN
...	DATE-___/___ TIME-___:___	HB 53	GENERALLY REVISE MCA		...
...	DATE-___/___ TIME-___:___	HB 58	LET PSYCHOLOGISTS EXAMINE PERSONS WHEN MENTAL DEFECT IS A CRI...	ISSUE	KEENAN, NAN...
02/21	DATE-___/___ TIME-___:___	HB 65	SERVING OUT TRAFFIC FINES AT $10 PER DAY		PECK, RAY
02/21	DATE-02/12	HB 77	ALLOWS PATERNITY ACTION BY STATE AGENCY UNTIL CHILD BECOMES ...	...S OF AGE	BROWN, JAN
02/20	DATE-02/12	HB 78	ALLOW DSS TO REQUIRE HEALTH COVERAGE WHEN CHILD SUPPORT IS BEI...	...FORCED	BROWN, JAN

SENATE JUDICIARY
EXHIBIT NO. 7
DATE Jan. 15, 1987
BILL NO. SB 48

AMERICAN MEDICAL ASSOCIATION

Analysis of Tort Reform Proposals

Appendix C - Description of Models

MONTANA
FARM BUREAU
FEDERATION

P.O. Box 6400
~~502 South 19th~~
Bozeman, Montana 59715
Phone (406) 587-3153

TESTIMONY BY: Lorna Frank

BILL # S.B. - 51 DATE 1/15/87

SUPPORT XXX OPPOSE _____

Mr. Chairman, members of the committee, for the record, my name is Lorna Frank, representing Montana Farm Bureau and Mountain West Farm Bureau Mutual Ins. Co. with some 3500 members in Montana.

Farm Bureau members support S.B. - 51 since it determines the liability of each of several defendants by comparing their fault with each defendant paying his proportionate share.

I urge this committee to give S.B. 51 a do pass recommendation. Thank you.

SENATE JUDICIARY
EXHIBIT NO. 5
DATE Jan. 15, 1987
BILL NO. SB 51

SIGNED: Lorna Frank

PERIODIC PAYMENT OF FUTURE DAMAGES

A. SUMMARY - PERIODIC PAYMENTS LEGISLATION

▪ PERIODIC PAYMENT OF FUTURE DAMAGES PAID BY ANNUITY. After a jury or judge verdict awarding in excess of $50,000 in future damages (such as medical treatment, loss of earnings, pain and suffering, etc.), the judge shall order that an inflation-indexed annuity be purchased by the insured or insurer for payment of the future damages in installments. Depending upon circumstances, the court can authorize the use of a trust fund and an appropriate bond.

▪ PAYABLE UNTIL DEATH OR TERMINATION OF DISABILITY UNLESS EXTENDED BY COURT. The periodic payments would be payable until the patient's death, even if beyond the anticipated life expectancy, if an annuity be used, or upon termination of the disability involved if that be part of the court's order, whichever first occurs. If an annuity is not involved, the patient, upon expiration of the normal life expectancy, may apply to the court for additional payments of economic damages arising out of the injury. The court can authorize that payments continue if persons are dependent upon the support of a deceased.

B. INTRODUCTION

WHAT ARE "STRUCTURED PAYMENTS" OR "PERIODIC PAYMENTS"?

In states without "periodic payment" or "structured settlement" of damage legislation, unless otherwise agreed upon by the parties or ordered by the court, judgments can only be rendered as a lump-sum award.

There are advantages to periodic payments for both the claimant and the insurance carrier:

Advantages To Claimant:

1. Lifetime Payment. A basic advantage of periodic payments for claimants is the lifetime payment feature. A claimant who receives a lump sum award and proceeds to live longer than expected will not be compensated for losses that continue beyond the projected lifetime.

2. Tax-Free Receipt Of Income. Periodic payments provide a plaintiff with the opportunity for federal income tax savings that do not exist with a lump sum payment, by avoiding taxation of what would otherwise be investment income to the plaintiff.

3. Increasing Benefits. Periodic payments can provide a claimant with increasing benefits over the years, including a series of deferred lump sums and including tying payments to an index in the marketplace, such as the discount on US Treasury Bills, thus accounting for the ravages of actual inflation.

Carrier Benefits:

1. Cost Savings. The reasons for cost savings with periodic payments is in the opportunity to use alternative methods of loss financing to make periodic payments. That can provide tax advantages to a casualty insurer not available from a lump sum settlement. Because a carrier can almost always obtain better investment rates than an individual, the same sum of money can be made available to the claimant, but with cost savings to the carrier.

2. Reduction of Solvency Problems. Periodic payments can also be used by an insurer to avoid insolvency.

Lump sum awards are ill-suited to many liability cases, because awards in such cases often include payment for anticipated future medical care, lost earnings, and pain and suffering. The assumptions made may not correspond to the actual needs of the injured party.

Juries are now presented with long and highly technical arguments with respect to average life expectancy and the range of possible interest rates by which a lump sum award should be discounted in order to determine how much money need be paid now in order to provide a given amount over future years.

These interest rates must be balanced against another dizzying range of possible guesses about what the purchasing power of the dollar will be in the interim.

Future damages usually cover the cost of medical care and rehabilitation, loss of income or the obligation of support, and general damages for pain and suffering. Any determination by the jury has no necessary relationship to what actually will occur, and experience indicates that that is one of the major factors in large verdicts, which in turn are often routinely approved by appellate courts.

And this business of inflation adjustment, discounting the present value, and life expectancies are major components -- not only in the large awards -- but the significant dollars which must be spent on expert witnesses and lawyers in preparing the case.

Periodic payments allow damages to be paid in installment amounts, the size of which can be specified by statute, negotiated by the parties, or determined by the trial judge, depending upon the type of statute.

Periodic payments may be limited to the disability period or lifetime of the patient only or they may be limited to the patient's lifetime plus the support of persons whom the patient was legally obliged to support.

Periodic payments are less expensive to finance for the insurer than the equivalent lump-sum payment. Periodic payments allow savings to be passed on to the insured in at least a reduced rate of increase in premiums and they assure that financial resources will be available to an injured person over time as needed.

The use of periodic payments allows the insurer to not have to maintain large reserves to pay lump sum awards and reduces the cost of reinsurance or at least spreads it out over a longer period of time.

The installment approach leaves the cash involved in the judgment in a position to earn interest for the insurer during the period between the date of the judgment and the date of payment.

To the degree that this interest rate is higher than that which would have been assumed by the jury in discounting the award to its present value, the interest income offsets the effect of the judgment on the companies' assets.

Interest rate differentials can add up fast. A series of payments which would cost $4 million in present value if discounted at 8% would cost only $2.7 million if discounted at 5%. This is roughly a one-third reduction in the amount that would have to be paid out, but under both circumstances, the patient still receives his due.

Also, if the jury has based its judgment on a longer life expectancy than actually occurs, there is at least the freeing of the portion of assets encumbered by the defendant's need to prove responsibility. And predicting life-expectancy by a jury is error-prone.

The patient can fall far short of living out his normal life expectancy, either because of an inaccurate estimate of his natural life or as a result of unexpected accidents or illness unassociated with the claim the patient has made. The consequence is an inequitable cost to those paying for malpractice premiums -- the public -- and an unjustified windfall to the patient's heirs if they are not dependent upon the patient for their support.

Under the annuity approach, the insurance carrier buys an annuity; if the patient outlives his normal life expectancy, he would receive payments for his entire life. If all patients were covered by such annuities, any such imbalances would work themselves out over a period of time, since some patients would die before and some after their life expectancy.

Use of the annuity makes it immaterial in severe cases whether at trial or in settlement the claimant's contentions about life expectancy are exaggerated. And convoluted jury instructions on reduction to present value would no longer be necessary, as the insurer would invest the funds as it saw fit, and pay the patient what the patient is entitled to.

If the award is specified as an annuity, to be indexed to a publicly available price index such as the consumer price index, the issue of inflation and discounting is removed from the jury. Under this approach, the patient is assured the intended real future purchasing power with no windfall losses or gains.

The existence of periodic payments by statute as to all awards will induce such periodic payments in settlements.

One argument in favor of periodic payments is that plaintiffs spend lump sum awards friviously and then become wards of the state. This position implies a degree of paternalism and restriction of freedom of choice of the tort victim that is hard to defend, although that may be the motive of many states in their lotteries in requiring payments to be made over a period of time.

A better argument for periodic payments is that the approach resembles the form of disability plus life insurance policy that people choose to buy when insurance is voluntary, and thus it reduces the cost of providing malpractice insurance. This ultimately reduces the cost to the public, who pays for the malpractice premiums.

The use of periodic payments of future damages greatly facilitates the integration with other sources of compensation to prevent double recovery. For example, it becomes a simple matter to reduce collateral source payments by the amount of payments from the annuity.

WILL PROPER LEGISLATION HAVE A DOWNWARD IMPACT ON PREMIUMS OR IMPROVE THE AVAILABILITY OF INSURANCE?

An actuarial survey undertaken by an independent actuarial firm at the request of the American Medical Association indicated a total savings in premiums of 6% of the premium dollar from legislation implementing a periodic payments for future damages in excess of $100,000. 1

A Pennsylvania study has recently estimated potential saving from periodic payments legislation to be between 7% and 14% of the premium dollar, while a New York study suggests that potential savings might be approximately 5%. 2

Without quantifying the amount, the American Bar Association concluded that there would be a noticeable impact on premiums from periodic payment legislation:

> "*** Finally, one other tort law change which could have noticeable impact on premiums, if used frequently in cases involving large future damages, is the periodic payment settlement or judgment." 3

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1 November 22/29, 1985. American Medical News, p. 19. AMA General Counsel's Office commission of actuarial survey by Milliman & Robertson Inc, New York. Survey: Actuarial Analysis of American Medical Association Tort Reform Proposals, September, 1985.

2 p. 15, AMA Professional Liability Report 2.

3 1977 Report Of the Commission On Medical Professional Liability. 1977, American Bar Association, pp. 55 - 58.

Danzon and Lillard tested, among other matters, the effect of periodic payments. Their findings were as follows: States which instituted periodic payments did lower awards by 30% on average. 4

WHAT IS THE POSITION OF COMPETENT AUTHORITIES ON THIS LEGISLATION?

In addition to the American Medical Association support of the use of periodic payments, the American Bar Association Commission on Medical Professional Liability recommended that legislation should be enacted in all states to permit the payment of future damages in periodic installments. 5 They concluded that periodic payment judgments constitute a generally sensible and flexible way of compensating those whose disabilities are long-term and substantial.

C. POLICY REASONS FOR LEGISLATIVE PROPOSALS

The general objectives of legislation concerning periodic payments to patients are:

- provide mutual tax benefits to both claimant and carrier
- provide a guaranteed method of payment of future damages that is reflective of what will actually occur in the patient's life, rather than on a speculative basis at an earlier time, on a basis that resembles disability plus life insurance
- allow the carrier to not have to maintain as much reserves and to reduce the amount necessary for reinsurance, thus further assuring the affordability and availability of medical malpractice insurance
- eliminate, by use of the inflation-indexed annuity, numerous complex matters that are typically presented to a jury, which then makes a speculative decision as to interest rates and life expectancy, and in the process reducing significantly the cost of attorney fees and expert witness fees at the trial stage

---

4 Danzon, Patricia M. and Lee A. Lillard, "Settlement Out of Court: The Disposition of Medical Malpractice Claims," Journal of Legal Studies, Vol. XII, No. 2, June, 1983, pp. 345-77. According to the Florida Medical Association "Medical Malpractice Policy Guidebook", 1985, FMA, the study's "empirical results on tort reform effects should be viewed by policy analysts with caution. First, the time span was too short for assessing more than a very short-term effect. Second the authors considered only a limited number of reforms, and certain reforms were entered in some equations and excluded from others for reasons that are unclear." p. 95.

5 American Bar Association. 1977 Report of the Commission On Medical Professional Liability, Appendix F. See the Appendix to this Report for a full report of the reasons advanced by the Commission.

SENATE JUDICIARY
EXHIBIT NO. 6
DATE Jan. 15, 1987
BILL NO. SB 48

D. FURTHER BACKGROUND ON TOPIC

HAVE OTHER STATES ACTED IN THE AREA OF PERIODIC PAYMENTS?

Twenty-four states have passed statutes permitting or requiring periodic payments of damages over the lifetime of the plaintiff. The statutes have been upheld in two states and overturned in two states.

Prepared by the Montana Medical Association, 2021-11th Ave., Helena, Montana 59601, G. Brian Zins, Executive Director, 406-443-4000. 1/87	LEGISLATIVE PROPOSALS - PERIODIC PAYMENTS

Actuarial Analysis of American Medical Association Tort Reform Proposals

September, 1985

SENATE JUDICIARY
EXHIBIT NO. 7
DATE Jan. 15, 1987
BILL NO. SB 48

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September 11, 1985

Mr. Kirk Johnson
General Counsel
American Medical Association
535 North Dearborn
Chicago, Illinois

Dear Mr. Johnson:

We have completed our review of the potential medical professional liability cost savings related to the American Medical Association (AMA) proposed National Professional Liability Reform Act of 1985 (the Bill). This report describes our approach, our conclusions and a number of important limitations related to this type of analysis.

APPROACH

The objectives of this project were as follows:

1. To identify the potential one-time savings in medical professional liability cost attributable to the four tort reforms in the Bill. (We did not attempt to assign a value to the peer review, discipline and risk management aspects of the Bill.)

2. To identify the potential reductions in medical professional liability claim severity trend rates attributable to the Bill.

Our approach to achieving this objective included the following steps:

1. Estimate the medical professional liability premium (including self-insured costs) in the United States in 1984.

2. Estimate a range of potential savings for each of the four tort reforms in the Bill separately and combined. The bill language we evaluated is included in Appendix A.

3. Estimate the potential impact on claim severity trend rates of the reforms in the Bill.

SUMMARY OF CONCLUSIONS

The next three sections describe the results from each of the three areas.

Estimated Premium

Table 1 below summarizes the result of our review of medical professional liability costs in the United States in 1984. Appendix B describes the sources of these estimates.

Table 1

Estimated Medical Professional Liability
Premium Costs in the United States

Item		Amount in Millions
1.	U.S. Direct Written Premium 1984	$2,258
2.	Joint Underwriting Associations (JUA) not included in 1	120
3.	Patient compensation funds (PCF), Catastrophe funds (Cat Fund) and other "pay-as-you-go" financial mechanisms	166
4.	Hospital self-insurance programs and hospital programs insured outside the United States	200
5.	Total	$2,744

The $2.7 billion total somewhat underestimates the 1984 cost since we could not identify a source which would permit us to estimate the cost of all governmental self-insurance programs nor the amount of premiums paid directly to non-United States insurers.

Our experience with medical professional liability insurers, JUA's and PCF's indicates that costs have been increasing at more than 15% per year since 1984. By 1986, medical professional liability costs are therefore likely to exceed $3.6 billion.

Potential Initial Savings

Table 2 below summarizes our estimates of the potential savings for each of the four tort reform components for a typical state.

Table 2

Potential Initial Savings from Reform Bill

Item	Potential Savings ("Typical" State)
Periodic Payments	6%
Collateral Source Offset	8%
Limitation on Non-Economic Damages	12%
Contingency Fee Limitation	9%
Total	28%

Applied to the 1984 medical professional liability costs of $2.7 billion, the potential initial savings is approximately $800 million. Applied to the estimated 1986 medical professional liability costs of $3.6 billion, the potential initial savings is approximately $1.0 billion.

Appendix C describes the models used to develop these estimates. In addition to the cautions in the LIMITATION section below, the following should be considered:

1. To realize the potential savings it is necessary that law impact claim settlements to the same extent as court awarded claims, even though the statutory language only applies specifically to court awards. In the extreme case, if the law had no effect on settlements the value of the savings when applied only to court awards would be approximately 5%.

2. The savings will vary from state to state based on considerations which are discussed in Appendix C. Application of models to a range of state situations implies that the range of savings within which the experience of most states is likely to fall would be 23% to 33%.

3. The potential initial savings might not be fully reflected in cost reductions immediately after passage of a state law. Insurers and JUA's might be reluctant to decrease rates by the full amount of potential savings until the effectiveness of the law could be tested. PCF's generally charge premiums based on expected claim payments. For several years after passage of state law claim payments will reflect the prior law, and PCF charges will not be immediately affected. Self-insurance costs may be subject to considerations like those of insurers if the self-insurance program is fully funded or like those of PCF if the self-insurance program is not fully funded.

If the laws were applicable to claims reported on or after the effective date then it could take three to five years to realize the full initial cost savings. If laws were applicable to claim occurrences on or after the effective date then it would take two to three years longer (five to eight years) to realize the full initial cost savings.

Impact on Trends

The element of the Bill which we anticipate will have a significant effect on claim severity trends is the limitation on non-economic damages. Appendix C describes the manner in which the impact of the law on cost trends has been estimated.

We believe the reduction in trend over the 1986-1989 period for a typical state will approximate 4% per year, with most states realizing a trend savings ranging from 3% to 6%. The trend reduction in the typical state is equivalent to $80 million per year at 1984 cost levels and $100 million at 1986 cost levels. The annual savings will continue to increase since rising cost levels will increase the $2.7 billion base ($2.0 billion after the law change) and inflation will increase the potential for non-economic loss in excess of $250,000 per claimant.

LIMITATIONS ON RESULTS

The following limitations should be considered in utilizing these results:

1. The projected potential savings rely on models which depend critically on the judgments which are applied. We believe the judgments are reasonable. Other reasonable judgments could result in significantly different results.

2. The actual savings which might result from passage of these tort reforms will depend on factors such as plaintiff behavior, attorney behavior and court interpretations which cannot be predicted in advance. Actual results may therefore differ significantly on these projections.

3. There are a number of studies underway (the GAO study for example) which are gathering statistical and non-statistical information. If such information were currently available it could significantly affect our judgments and conclusions. As part of this project we are not responsible for updating this report to reflect information which becomes available after the report is issued.

SENATE JUDICIARY
EXHIBIT NO. 7
DATE Jan. 15, 1987
BILL NO. SB 48

4. The Bill is currently in outline form. Actual bill language could produce results which differ from the intended results. We have relied on interpretations from AMA Counsel regarding the intentions of the bill language.

   We assume that the agency responsible for administering the Bill would prepare minimum criteria which any state law would need to meet in order to become eligible for the benefits under the Bill. Appendix A comments on some elements which must be included in the actual operation of a state law in order to realize the potential savings.

We appreciate this opportunity to assist the American Medical Association on this important and challenging project.

Sincerely,

Allan Kaufman

Allan Kaufman, F.C.A.S.

AK/dmk

Appendix A - Tort Reform Proposals

(1) Periodic Payments - Such state liability reform shall include provisions:

(A) that periodic payments shall be made for all future damages when such damages exceed $100,000;

(B) for mandatory periodic payments of such future damages over the lifetime of the beneficiary or until the damages are fully paid, whichever comes first; and

(C) that if a plaintiff dies prior to full payment of damages, the party obligated to make such payment shall retain any sums not yet paid out in accordance with the payment schedule, provided, however, that the court shall have the discretion to order continued payments necessary for the support of the plaintiff's spouse or children.

(2) Collateral Source Rule - Such state liability reform shall provide:

(A) that in an action for damages for medical injury, the damages awarded shall be reduced by amounts paid or to be paid from all collateral sources including:

(i) government disability or sickness programs;

(ii) government or private health insurance;

(iii) employer wage continuation program; and

(iv) other sources intended to compensate the plaintiff for such medical injury.

(B) that the amount that the judgment is reduced shall equal the difference between the total amounts received from collateral sources and the amount directly paid by the plaintiff to secure such amounts.

(3) Noneconomic Damages - Such state liability reform shall provide that in a judgment for medical injury not more than $250,000 may be awarded as damages for noneconomic losses.

(4) Contingency Fees - Such state liability reform shall provide that the attorney representing a medical injury claimant may not receive as a fee more than 33 1/3% of the first $150,000 of damages, 25% of the next $150,000 of damages, and 10% of the balance of any damages awarded to such claimant. The Court awarding a judgment shall be authorized to increase the permissible fee upon a petition containing evidence which in the opinion of the Court justifies additional compensation.

Appendix A -- Comments on Interpretation of Reform Bill for Valuation Purposes

To realize the potential savings the Bill must be interpreted to accomplish the following:

(1) Periodic Payments:

a. Claimant's attorney fee should be paid periodically in the same fashion as the award or settlement amount.

b. The period of payment of future damages is estimated when the award (or settlement) is made. Amounts paid for medical costs and non-economic damages terminate at the earliest of the following two dates: (1) when the claimant dies; or (2) when the originally estimated period of payment for future damages expires.

(2) Collateral Source

a. Government programs to which an offset applies include the following: medicare, medicaid and public assistance (with respect to services rendered prior to the award or settlement date) social security retirement and disability income, veterans benefits, workers' compensation benefits and benefits to military personnel and their dependents.

b. Where public or private sources of medical benefits or income replacement coverage now permit the public or private source to place a lien on a professional liability award or permit subrogation against the professional liability tort feasor, the lien and subrogation rights must be superceded by the revised collateral source rule.

c. A mechanism must be established to permit the professional liability insurer to offset the claimants future collateral source benefits under programs such as employer sponsored health insurance against amounts of damages awarded for future medical expenses without penalizing the claimant if those benefits are not available at all times in the future. One method to accomplish this objective is to permit the professional liability insurer to issue a health insurance policy which would provide coverage for gaps in benefits awarded by a court or agreed to in a settlement if collateral sources of those benefits are not available in the future.

Appendix A -- Comments on Interpretation of Reform Bill for Valuation Purposes

(3) Non-economic Damages

The $250,000 limit is to apply to each injured patient, no matter how many health care providers are held to be negligent.

(4) Contingency Fees

a. The contingency fee schedule applies to the amount awarded to the claimant no matter how many health care providers are held to be negligent.

b. The contingency fee applies to the award or settlement amount after reduction for collateral source offsets.

AMERICAN MEDICAL ASSOCIATION

Analysis of Tort Reform Proposals

Appendix B - Sources for Table 1

1. A.M. Best Company. Covers insurers reporting to A.M. Best. These amounts are gross of reductions for reinsurance which the insurers might purchase.

2. From JUA financial statements as follows

State	Written Premium (Millions)
Florida	4.2
Massachusetts	65.6
New Hampshire	8.0
New York	6.8
Pennsylvania	4.7
Rhode Island	11.5
South Carolina	5.2
Texas	4.0
Wisconsin	10.4
Total	120.4

3. From PCF and CAT Fund financial reports

State	Assessments (Millions)
Florida	55.0
Indiana	9.5
Kansas	15.0
Louisiana	1.0
Nebraska	0.1
New Mexico	0.9
Pennsylvania	66.2
South Carolina	1.0
Wisconsin	17.3
Total	166.0

4. Hospital self-insurance programs:

   a. Hospital professional liability costs constitute approximately 25% of total medical professional liability costs (NAIC Study).

   b. We estimate that 20% to 40% (use 30%) of hospital professional liability costs are self-insured or insured directly through non-United States insurers and thus those costs are not included in items 1 - 3 above.

   c. The total of items 1 - 3 therefore constitutes all but 7.5% of total costs (7.5% is 30% of 25%). The self-insured segment is calculated to increase the total of items 1 - 3 from 92.5% (100% - 7.5%) to 100%.

AMERICAN MEDICAL ASSOCIATION

Analysis of Tort Reform Proposals

Appendix C - Description of Models

A. Limitations on Non-Economic Damages to $250,000 per Award

1. The distribution of claim size amounts is assumed to follow a log-normal distribution.

   a. The coefficient of variation of the distribution is assumed to equal 2.5 in all states.

   b. A variety of average claim size amounts assuming no policy limit were tested.

   c. For multiple defendant claims the award amounts are assumed to be distributed as the sum of highly correlated log normal distributions, each with the mean and coefficient of variations described in (a) above. (The distribution of the number of defendants is based on the 1974 - 1978 NAIC Study).

2. The non-economic damage component of the award amount is assumed to closely relate to the total award as follows:

   a. The non-economic damage amount of the unlimited awards is closely correlated to the total award, e.g., a fixed percentage.

   b. Award amounts for non-economic damages are assumed to equal 54% of the limited award amount at 1974-1978 closed claim cost levels. This percentage varies over time depending on the relationship between award size and typical policy limit.

   c. Non-economic damage award amounts are assumed to be log normally distributed with a coefficient of variations of 2.5 and a mean equal to a percentage of the total award which depends on the factors described in 2.b.

3. Legal defense costs are assumed to be equal to 25% of indemnity amounts before the limitation. Legal defense costs are assumed to be unchanged by the limitations (the defense costs become a higher percentage of the reduced indemnity costs).

4. The effect of the policy limit on reducing awards and settlements is assumed to reduce non-economic damage amounts to zero before recoveries for economic loss are affected.

5. Since there is significant uncertainty in the actual distribution of non-economic damages by size of claim, and there is some evidence that non-economic damage compensation is a larger portion of the total cost on small claims than large claims, the savings indicated by the model described above are reduced by safety factors of 40% to produce the value shown in Table 2.

6. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

B. Limitation on Contingency Fees

1. The claim size distribution model is the same as that described in A.1 above.

2. Claims are assumed to settle such that the plaintiff receives the same unlimited award amount with the revised contingency fee schedule as the plaintiff would have received under the old contingency fee schedule. Specifically this means the following:

   a. For unlimited claim amounts below the policy limit, the amount paid by the insurer or self-insurer is reduced by an amount equal to the reduction in the contingency fee.

   b. For unlimited claim amounts exceeding the policy limit by large amounts the plaintiff receives a greater net award (net of contingency fee) but the insurer pays the same amount.

   c. For unlimited claim amounts between the levels described in 3.a and 3.b above, the insurer pays somewhat less and the plaintiff receives a somewhat greater award net of contingency fee.

3. Legal defense costs are assumed to follow the pattern described in A.3 above.

4. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

C. Periodic Payments

1. Jury instructions commonly require the jury to consider future interest income (the time value of money), and inflation and mortality in establishing awards. If juries on the average reached conclusions which correctly considered these factors then passage of a periodic payment law might have no impact indemnity payments.

   The Bill provides that periodic payments for medical and non-economic damages will be made for the shorter of the following two time periods: (1) life expectancy as determined by the jury; (2) actual time until the claimant dies. This element of the bill produces a savings (referred to below as mortality savings) compared to the present system even if juries properly considered interest, inflation, and mortality.

2. If juries do not properly consider interest, inflation and mortality then it is hypothesized that the jury errs in favor of a larger award to the plaintiff.

   In at least one jurisdiction (Pennsylvania) juries are instructed to assume interest and inflation are equal and offsetting factors. This instruction biases awards upward because in the long run interest rates exceeds inflation rates.

3. Low, medium and high estimates of savings result from assuming the following:

   a. Low savings result from assuming that juries are instructed to consider interest, inflation and mortality and that on the average the jury awards correctly reflect these variables.

   b. High savings result from assuming that juries treat interest and inflation as offsetting factors.

   c. Medium savings result from assuming jury results between (a) and (b).

4. The savings resulting from the assumption in 4a-c are calculated considering the following:

   a. A distribution of claimants by age and degree of injury (source: NAIC 1974 - 1978 study).

   b. The claim size model described in A.1a - A.1c.

   c. Average limited and unlimited claim size amounts as described in A.1.

   d. Assumptions regarding the portion of future and past damages by claimant age and degree of injury (Actual data on this subject is not available).

5. Legal defense costs are assumed to follow the pattern described in A.3.

6. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

D. Collateral Source Offset

1. The coverage provided by health, and long-term disability insurance to the U.S. population through employer sponsored, privately purchased and public insurance is estimated from public information sources. (Primarily the Statistical Abstract of the United States - 1985).

2. The portion of awards related to medical care and wage loss is estimated from the NAIC 1974-1978 Closed Claim study.

3. In some awards, the award amount does not fully cover the medical costs and wage loss. In these cases the collateral source offset merely recognizes the situation that already exists, and no savings is projected.

4. Legal defense costs are assumed to follow the pattern described in A.3.

5. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

E. Comments on Terminology

UNLIMITED CLAIM SIZE AMOUNT/UNLIMITED AVERAGE CLAIM SIZE

The use of claim size distributions to approximate the actual claim amounts results in predictions of claim amounts greater than those observed in practice. Reasons for the difference between theoretical distributions and actual observations include the following: (1) the amount of insurance coverage available may limit the amounts paid; (2) primary and excess insurance coverage data often cannot be combined to produce total limit data; (3) courts, particularly in the appeal process, may limit the maximum award amounts.

The theoretical claim sizes which should be observed if none of these forces operated are referred to as unlimited claim size amounts. The average size of the unlimited claim size amounts is referred to as the unlimited average claim size. The unlimited average claim size is generally larger than claim sizes observed actual experience.

LIMITED CLAIM SIZE AMOUNTS/LIMITED AVERAGE CLAIM SIZE

The observed claim size amounts and the average of limited claim size amounts are modeled using the unlimited distribution and then capping all claims at an amount referred to as the policy limit. This limitation may be the actual policy limit, if the policy limit is the major limiting force on claim amounts. The policy limit may also be interpreted as the maximum award amount sustainable in an appeal court.

F. Combined Effect of all Reforms

1. If the effects of the various reforms were independent, the combined savings could be calculated by multiplying the complements of the individual savings.

2. For this analysis we assume that savings through the elements of the law interact and reduce the opportunity for savings in other areas. For example, reduced economic damage recoveries through application of the collateral source offset and the limit on non-economic damages reduces the percentage savings resulting from the revised contingency fee schedule (since the amount of savings depend on the size of the award). The adjustment for this interaction is a 10% reduction in the savings calculated on a multiplicative basis.

3. It is possible that the reforms will operate synergistically on the system and produce greater savings than we have projected by reducing legal defense costs, reducing the number of claims filed, etc. On the other hand, it is possible that the savings will be less than we have projected as court decisions operate in ways which we cannot forecast.

Appendix C - Description of Models

G. Impact on Trend Rates

1. The limitation on non-economic damages is the element of the law which would have the largest effect on future trend rates. The revised contingency fee schedule has a small effect on trend rates.

2. We used the models described in this Appendix, Section A (for the limitation on non-economic damages) and in Section B (for the limitation on contingency fees), to calculate differences between trend before the law and trend after the law over the 1985 - 1988 period for a variety of initial unlimited claim sizes and policy limits and a variety of trends in unlimited claim sizes and policy limits.

SENATE JUDICIARY
EXHIBIT NO. 8
DATE Jan. 15, 1987
BILL NO. SB 48

I am Kay Foster, Deputy Mayor of Billings and chairman of the Insurance Subcommittee of the Governor's Council on Economic Development.

On behalf of the Governor's Council I urge your support of SB48. Following nine months of study, including several day-long public hearings in Helena and Billings, the Council unanimously recommended that Montana courts be granted the authority to mandate structured damage awards. The recommendation of the Council is substantially the same as SB48. The one small difference is that our Council suggested the advisability of periodic payments in instances where damages exceed $100,00.00 rather than the $50,000.00 suggested by the Interim Subcommittee.

The Council feels that this allowance of periodic payment of future damages is beneficial both to plaintiffs and defendants and is one important step this legislature can make toward achieving one of the major goals of the Council...making insurance more available and affordable for Montana business and governmental entities.

MONTANA
FARM BUREAU
FEDERATION

P.O. Box 6400
~~502 South 19th~~
Bozeman, Montana 59715
Phone (406) 587-3153

TESTIMONY BY: Lorna Frank

BILL # S.B. - 48 DATE 1/15/87

SUPPORT XXX OPPOSE _____

Mr. Chairman, members of the committee, for the record, my name is Lorna Frank, representing Montana Farm Bureau. and Mountain West Farm Bureau Mutual Ins. Co

Farm Bureau members believe Montana needs legislation that encourages structured settlements that disburse payments over time. Therefore we support S.B. - 48, it will set into place the option of making periodic payments rather than one lump sum.

I urge this committee to give a do pass recommendation to S.B. 48. Thank you.

SENATE JUDICIARY
EXHIBIT NO. 9
DATE Jan. 15, 1987
BILL NO. SB 48

SIGNED: Lorna Frank

NAME: Tim Robischon DATE: 1/15/87

ADDRESS: Helena, Montana

PHONE:

REPRESENTING WHOM? Mont. Liability Coalition

APPEARING ON WHICH PROPOSAL: SB 48, SB 51

DO YOU: SUPPORT? ✓ AMEND? ✓ OPPOSE?

COMMENTS: will present testimony on both Bills. will offer amendment TO SB 51.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

WITNESS STATEMENT

NAME Gerald J. Neely BILL NO. SB 51

ADDRESS Billings, Montana DATE 1/15/87

WHOM DO YOU REPRESENT? Montana Medical Association

SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

NAME: Kay Foster DATE: 1-15-97

ADDRESS: 1832 Wicks Lane, Billings

PHONE: 245-5801

REPRESENTING WHOM? Gov. Council on Economic Development
Billings Chamber of Commerce

APPEARING ON WHICH PROPOSAL: 45 + 51

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Dan Hoven DATE: 1/15/86

ADDRESS: 28 W. Church Helena

PHONE: 449-6220

REPRESENTING WHOM? Mont. Municip. Fin. Auth.

APPEARING ON WHICH PROPOSAL: SB 48 51

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENTS: Support concepts of eliminating joint SAO
Audits.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Clip Erdmann DATE: 1/15/85

ADDRESS: Helena

PHONE: 442-8813

REPRESENTING WHOM? MT League of Financial Institutions

APPEARING ON WHICH PROPOSAL: SB 51

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: The Legislative Committee of the Savings and Loan League met and discussed the various tort reform bills. They voted to strongly support SB 51 and the concept it contains to eliminate joint & several liability.

- J & Several liability is an inequitable concept - damages should be equal to fault
- this is an overdue revision and will be a big step in making Montana a better place to do business

I urge your favorable consideration of SB 51

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: John C Hoyt DATE: 1-15-87

ADDRESS: Great Falls

PHONE: 761-1960

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: 51

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Tom L Lewis DATE: 1-15-91

ADDRESS: P.O. Box 2325 Great Falls MT 59403

PHONE: 761-5595

REPRESENTING WHOM? Montana Trial Lawyers

APPEARING ON WHICH PROPOSAL: S.B. 51

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Zander Blewett DATE: 1-15-87

ADDRESS: PO Box 2807 GF MT 59403

PHONE: 761-1960

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: SB 51

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: John C Hoyt DATE: 1-15-87

ADDRESS: Box 2807 Great Falls

PHONE: 761-1960

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: 48

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Tim Lewis DATE: 1-15-87

ADDRESS: P.O. Box 2325 Great Falls MT 59403

PHONE: 761-5595

REPRESENTING WHOM? Montana Trial Lawyers

APPEARING ON WHICH PROPOSAL: S.B. 48

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Pat Melby DATE: 1-15-81

ADDRESS: 723 Gilbert

PHONE: 442-7450

REPRESENTING WHOM? State Bar of Montana

APPEARING ON WHICH PROPOSAL: SB48

DO YOU: SUPPORT? _____ AMEND? ✓ OPPOSE? _____

COMMENTS: Periodic payments should be discretionary in the Ct after hearing and after finding that it is in the best interests of the parties.

Mandatory periodic payments raises serious Constitutional questions which can't be adequately answered

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.