

COMMONWEALTH OF PENNSYLVANIA

HOUSE OF REPRESENTATIVES

----- -X  
 :  
 Judiciary Committee of the House :  
 of Representatives :  
 :  
 Re: Legislative Responses to :  
 Insurance Crises :  
 (Governmental Immunity, Act 57, :  
 Senate Bills 1427, 1428 and 1395) :  
 :  
 Public Hearing :  
 :  
 ----- -X

Pages 1 through 219

Majority Caucus Room 140  
Main Capital Building  
Harrisburg, Pennsylvania

Thursday, September 4, 1986

Met, pursuant to notice, at 10:07 a.m.

JUDICIARY COMMITTEE MEMBERS:

H. WILLIAM DeWEESE, Chairman	PAUL McHALE
GERARD KOSINSKI	JOHN F. PRESSMAN
DAVID J. MAYERNIK	NICHOLAS B. MOEHLMANN
ALLEN KUKOVICH	JEFFREY E. PICCOLA
WILLIAM E. BALDWIN	LOIS SHERMAN HAGARTY
MICHAEL DAWIDA	ROBERT D. REBER, JR.
KEVIN BLAUM	CHRISTOPHER WOGAN
MICHAEL BORTNER	JOHN CORDISCO

**Commonwealth Reporting Company, Inc.**

700 Lisburn Road  
Camp Hill, Pennsylvania 17011

Camp Hill  
(717) 761-7150

Philadelphia  
(215) 732-1687

C O N T E N T S

<u>Witness</u>	<u>Page</u>
Jay Angoff, Counsel National Insurance Consumer Organization	3
Andrew Sislo, Counsel Virgil F. Puskarich, Executive Director Local Government Commisison	24
Mark Peterson, Vice President Pennsylvania Public Interest Coalition	50
Lois Backus People's Medical Society	57
Judy Maietta Carlisle Day Care Center	63
Barbara Woods Director of PennPIC	68
Paul Laskow, General Counsel Insurance Federation of Pennsylvania	78
Michael Lovendusky, Assistant Counsel American Insurance Federation	85
Honorable Robert J. Flick, Sponsor Act 57 of 1986	132
Harold Goldner, Liason Compulsory Arbitration Committee Philadelphia Bar Association	160
William A. K. Titelman, Legislative Counsel Pennsylvania Trial Lawyers Association	168
William Graham, Assistant General Counsel and Chairman, Risk Management Committee Pennsylvania Chamber of Commerce Fred Fox, Staff Member, Chamber of Commerce	203

P R O C E E D I N G S

1  
2 CHAIRMAN DEWEESE: Good morning, everyone, and welcome  
3 to the House Judiciary Committee Hearing. I am Bill DeWeese,  
4 from Greene County. To my left is Nick Moehlmann, Republican  
5 Chairman of the Committee.

6 We are happy to welcome you here this morning as we  
7 take a look at some legislative responses to the insurance  
8 crisis that confronts the state.

9 We have received an abundance of mail regarding a  
10 variety of bills and specific legislative initiatives that  
11 have been proposed by members on both sides of the aisle.

12 Today is a chance for us to commence our own formal  
13 hearings on some of these bills. I would like to at this time  
14 welcome Mr. Jay Angoff, counsel of the National Insurance  
15 Consumer Organization, for his testimony.

16 I apologize, we are about eight minutes late. We are  
17 going to try desperately to keep on schedule. Thank you  
18 very much for joining us here today, Mr. Angoff.

19 MR. ANGOFF: Mr. Chairman, Members of the Committee,  
20 I am very glad to be here. My name is Jay Angoff. I am  
21 counsel to the National Insurance Consumer Organization, which  
22 is a non-partisan, non-profit consumer group located in  
23 Alexandria, Virginia outside of Washington, D.C. which  
24 monitors the insurance industry.

25 It was founded by Bob Hunter in 1980. He was the

1 federal insurance administrator under both President Ford and  
2 President Carter.

3 Refusals to deal and large rate increases by insurance  
4 companies are old news. The issue has been around for quite a  
5 while, and I think people on both sides now are more sophisti-  
6 cated than they had been when insurance rates first started  
7 skyrocketing.

8 I think there are certain things that people both  
9 within the insurance industry and outside the insurance indus-  
10 try agree on.

11 The first is the cyclicity of the insurance industry.  
12 I think there is no disagreement that the insurance industry is  
13 cyclical, that the profitability of the industry more or less  
14 tracks interest rates.

15 When interest rates are high, insurance industry  
16 profits are high. When interest rates are low, insurance  
17 industry profits are low. That is not exact, but it does track  
18 interest rates.

19 Another thing that there is agreement on -- there may be  
20 some disagreement as to how exactly it affects the cycle --  
21 but there is agreement on the proposition that the insurance  
22 industry is a uniquely privileged industry.

23 It has got four unique privileges on the federal level:  
24 first, the exemption from the anti-trust laws. Insurance  
25 companies, as you probably know, are permitted to fix prices.

1           They can't boycott, that is they can't totally with-  
2 draw from a market legally, but they can legally agree to  
3 all charge the same price. So, they are exempt from the  
4 antitrust laws.

5           They are exempt from federal rate regulation. They  
6 are exempt from federal consumer protection regulation, and  
7 they are exempt from federal income taxation.

8           That will change when the new tax reform law is enacted  
9 this year, but the last ten years, anyway, they earned a net  
10 profit of \$75 billion, yet paid not a penny of federal income  
11 tax, in fact got \$125 million back from the government as a  
12 tax refund.

13           So, those are the four special privileges on the  
14 federal level. On the state level, there are two unique  
15 protections from competition.

16           The first is, as a general matter, it is very difficult  
17 in most states for commercial risks to get together and  
18 either join together to self-insure, that is put a pool of  
19 money aside from which claims are paid, or to become a  
20 purchasing group, that is join together to buy insurance and  
21 thereby exercise their leverage in buying insurance. There are  
22 antigroup laws in most states which make this very difficult,  
23 as a practical matter impossible.

24           And the second protection from competition is again a  
25 practical prohibition on banks selling insurance. There are

1 legitimate policy reasons underlying that prohibition, but  
2 the fact is that banks, the most likely potential entrant, the  
3 most viable potential entrant, is, by both federal and state  
4 law and regulation, as practical matter, prohibited from  
5 getting into the insurance industry.

6 So, as a practical matter, this is an industry which is  
7 insulated from competition, and which is really accountable  
8 only to itself and the state insurance commissioner.

9 What is there disagreement about? There is agreement  
10 about the fact that the industry itself, to a certain degree,  
11 is responsible for its own problems.

12 There is a disagreement about the extent if any to which  
13 the legal system is responsible for what we see in the  
14 insurance industry in the last 18 months.

15 And I am particularly glad to be here in Pennsylvania,  
16 because the answer can be found here in Pennsylvania. There  
17 are many people in this room who are more expert on this  
18 provision of the law than I am, but my understanding is that  
19 in 1978, Pennsylvania enacted a cap on municipal liability of  
20 \$500,000 per occurrence.

21 That cap allows you to discover, by analyzing what  
22 happened in Pennsylvania before 1978 and what happened after  
23 1978, as far as municipal liability is concerned and what is  
24 happening in Pennsylvania now versus what is happening in the  
25 other states that don't have caps on municipal liability, by

1 analyzing that data, you will be able to tell what if any  
2 effect the limitation on municipal liability had on  
3 insurance rates.

4 We get calls all the time from small business people  
5 and from mayors of small towns, and the statement is always  
6 the same thing. It's always along the same line.

7 It is this: "I paid my premiums on time for 17 years.  
8 I have never had a claim against me. And all of a sudden, I  
9 get a letter in the mail canceling my insurance or raising my  
10 rates 1000 percent."

11 And we and others have asked the insurance industry  
12 how this happens, and the answer always is that despite the  
13 insured's past record, there is always a possibility under the  
14 law that that insured, there could be a huge claim against that  
15 insured, and therefore the rates must go up.

16 In Pennsylvania, the insurance companies, as far as  
17 municipal liability is concerned anyway, do have certainty.  
18 My understanding is that the cap is \$500,000, not just on  
19 pain and suffering but on all damages.

20 And it is not just per individual, but it is per  
21 occurrence, so that for example in a bus accident, if 50 people  
22 become quadriplegics, the municipality is absolutely  
23 guaranteed paying no more than \$500,000 in total or \$10,000  
24 for each person.

25 That gives certainty, and we would expect, therefore,

1 to find in Pennsylvania, unlike the other states, we would  
2 expect to find whatever is the case in Pennsylvania as far  
3 as day care centers and nurse midwives and doctors and other  
4 insureds, we would expect to find, if there is any connection  
5 between legal doctrine and insurance rates, we would expect  
6 to find that municipalities in Pennsylvania have no problem  
7 because of this cap.

8 And I would think that before going ahead with any  
9 kind of legislation, you would try to find the answer to that  
10 question.

11 Where do you get the data The data today is unavailable.  
12 The insurance companies file with the Pennsylvania Insurance  
13 Commission data on how much they pay out for a large general  
14 category called "Other Liability." Other liability includes  
15 product liability, day care center liability, liquor liability,  
16 nurses, midwives, product, premises, municipal.

17 It includes many difference categories, but it is not  
18 disaggregated today. In order to find out what if any effect  
19 the cap on municipalities has had on Pennsylvania, it is  
20 essential that you get from the insurance industry how much  
21 they actually take in, that is how much they collect in pre-  
22 miums, and how much they actual pay out in claims in each year.

23 And that data can be gotten, and I think you can do a  
24 very good study on the basis of that data. I should mention,  
25 Congressman Peter Rodino, the Chairman of the U.S. Congress



1 House Judiciary Committee, has gotten some of that data on a  
2 nationwide basis, and he has found that the insurance companies  
3 take in between two and three times more than they pay out in  
4 claims on municipal liability countrywide.

5 It would be interesting to see what the case is in  
6 Pennsylvania. I think something else that is very important  
7 to do before enacting any changes in the legal system is to  
8 look around at your neighbors and see what happened to them  
9 when they enacted changes in their legal system.

10 For example, let's take two states that border on  
11 Pennsylvania; Maryland and West Virginia. In Maryland, a  
12 cap on damages for paralysis and disfigurement and other kinds  
13 of pain and suffering of \$350,000 was enacted a few months ago.

14 As soon as the bill was enacted, the major medical  
15 malpractice insurer in Maryland came in and asked for a 50  
16 percent rate increase.

17 And the response of some people in Maryland was, "We  
18 enacted this cap. The reason for the cap was, we thought rates  
19 would go down."

20 And the response of the medical malpractice insurer  
21 was, "Well, if it weren't for the cap, we would have asked for  
22 an 80 percent increase. This time we only asked for a 50  
23 percent increase."

24 Probably the most famous case in the entire country is  
25 what happened in West Virginia, and I think that is very

1 instructive for our legislators particularly.

2 In March, the legislature there passed a law. It was  
3 scheduled to go into effect in June, which would limit  
4 liability to a certain extent, but it would also require  
5 certain financial disclosure by companies, and it would  
6 prohibit arbitrary cancellation.

7 It was scheduled to go into effect June 6, I think. In  
8 the middle of May, all malpractice insurers in West Virginia  
9 sent notices to all the doctors in West Virginia, saying,  
10 "Your insurance is cancelled effective May 31 unless the  
11 Legislature repeals this law which we just find that we can't  
12 do business in West Virginia if it goes into effect."

13 The Legislature then came into special session,  
14 repealed the provisions the insurance industry found  
15 objectionable, that is the disclosure -- or substantially  
16 modified them, the disclosure and anticancellation provisions.

17 And it added some more tort reform on join and several  
18 liability, specifically, in addition. After that happened,  
19 just last week, in fact, the St. Paul, the major malpractice  
20 insurer, asked for a 136 percent rate increase.

21 I know Charlie Brown, the attorney general in West  
22 Virginia, just had a press conference saying he was going to  
23 try to put a freeze on rates and maybe even ask for rate  
24 rollbacks.

25 But I know that controversy is brewing in West Virginia,

1 and I think that is instructive for legislators here.

2 If we are skeptical of changes in the legal system  
3 down insurance rates, what can be done to bring down insurance  
4 rates? A number of things in the area of creating more  
5 competition: there are three different ways to go.

6 The first is to make it easier for people to self-  
7 insure, make it easier for them, and I mean businesses,  
8 municipalities, others to get together and put aside money in  
9 a pool and in effect become their own insurance company, make  
10 it easier for them to form a purchasing group and thereby have  
11 some leverage when they form insurance.

12 The second thing is, with adequate consumer protections,  
13 allow banks to a certain extent, anyway, to get into the  
14 insurance industry.

15 Banks would love to write insurance. They have got the  
16 money, they have got the wherewithal, and they are more effici-  
17 ent than insurance companies.

18 They would love to get into the industry. I think  
19 there is a problem with potential tying arrangements, but that  
20 can be taken care of by legislation.

21 Banks would inject a tremendous amount of competition  
22 into the insurance industry.

23 A third way to get more competition into the industry --  
24 and now again, some people have ideological problems with  
25 this -- but it is to have the state itself write insurance.

1           There are many states that write workers' comp  
2 insurance. There is no conceptual reason why the state could  
3 not set up its own insurance company.

4           That was something that was talked about in West  
5 Virginia. I know some people there are still interested in it.  
6 It hasn't happened yet.

7           CHAIRMAN DeWEESE: Excuse me. If you had item one and  
8 item two, would you need item three?

9           MR. ANGOFF: Item one --

10          CHAIRMAN DeWEESE: If you are either self-insured or  
11 you had banks involved, would you need number three?

12          MR. ANGOFF: No, probably not.

13          The point is, that is one way to go to inject more  
14 competition into the industry, and those are three ways to do  
15 it.

16          Another approach would be to have more effective  
17 regulation, and I think there are five ways that we think are  
18 the most -- five different types of making regulation more  
19 effective and would have the greatest effect.

20          The first is to do what New York has already done and a  
21 number of other states are already considering, which is to  
22 establish a system of flex rating.

23          All that means is, you let the insurance industry raise  
24 or lower its rates without having to get any kind of approval  
25 from the insurance commissioner within a narrow band, say 10

1 or 20 percent above and below the existing rate. But above  
2 that 20 percent, you have got to get approval from the  
3 insurance commission.

4 A second way would be to require that all risks are  
5 experience rated. What many people don't understand is that  
6 doctors, for example, are not rated like drivers.

7 Good drivers pay less than bad drivers, but good  
8 doctors don't pay less than bad doctors, because doctors are  
9 not experience rated.

10 That is, if you have been sued successfully 10 times,  
11 you pay the same rate as somebody who has never been sued, all  
12 other things being equal, same specialty, same practice, same  
13 area.

14 And what that creates is a system in which the good  
15 doctors, who are the huge majority of doctors, subsidize the  
16 few doctors that are responsible for a large percentage of the  
17 malpractice.

18 A third approach is to have an insurance consumer  
19 advocate, that is when an insurance company files for a rate  
20 increase, generally there is -- not generally -- exclusively,  
21 there is the insurance commissioner hearing the rate increase  
22 and the insurance company asking for the rate increase, but  
23 there is nobody opposing the rate increase.

24 And if some arm of the government were empowered to  
25 intervene when it in its independent judgment thought a rate

1 increase was excessive, I think that would have an effect on  
2 holding down rates.

3 Another thing obviously is to beef up the resources,  
4 the manpower and the money of insurance commissions. In Iowa,  
5 for example, there are 7,000 rate increases a year.

6 There is a person and a half that is in charge of  
7 analyzing those 7,000 rate increases a year. I don't know what  
8 the statistics are in Pennsylvania.

9 They are probably a little better, but maybe not  
10 substantially so. I think it is important that the insurance  
11 commissioner does have sufficient actuaries and accountants  
12 so that he can do independent analysis of these rate filings.

13 Finally, the fifth regulatory approach is, require that  
14 insurance companies break down their expenses, break out their  
15 expenses when they are seeking rate increases.

16 There was just a decision in Oklahoma a few weeks ago  
17 making Oklahoma the first state to require this breakdown.  
18 What happens today is, they don't break down their expenses  
19 by type or by state. They just pass them on pro rata to the  
20 rateholder, and some people, including us, don't think this is  
21 just.

22 For example, the type of expenses they pass on are  
23 their lobbying expenses and their public relations expenses.  
24 Obviously, these are things that an insurance company has a  
25 right to do, but we think it is fairer that the stockholders

1 of the company pay for those rather than the ratepayers.

2 In conclusion, I haven't talked at all this morning,  
3 and I won't, about the fairness of limiting compensation to  
4 severely injured people.

5 That is a question that legislators have to decide for  
6 themselves, whether, assuming that limiting liability, limiting  
7 compensation to severely injured people will bring insurance  
8 rates down, is that a fair thing to do.

9 I think there is room for disagreement on that  
10 question. But I do think that before even getting to that  
11 question, it is essential that you get the data from the  
12 insurance industry which will enable you to tell, if you do  
13 limit compensation to quadraplegics and brain-damaged people  
14 and amputees and so forth, will that bring insurance rates down.

15 And then only after you get that data and get the  
16 answer to that question, I think, should you consider  
17 whether or not these suggested changes are fair.

18 That concludes my prepared statement, Mr. Chairman.  
19 I would be glad to answer any questions the committee may have.

20 CHAIRMAN DeWEESE: Ladies and gentlemen, questions?  
21 Allen Kukovich?

22 REPRESENTATIVE KUKOVICH: Mr. Angoff, first of all, I  
23 would like to thank you for your testimony. I think it was an  
24 excellent job. There is only one point that needs to be  
25 clarified.

1           In your three key areas of reform to try to promote  
2 competition, you talked about allowing banks to become  
3 involved in the insurance industry.

4           And earlier in your testimony, you alluded to some  
5 rationale for preventing that. I didn't understand what the  
6 problem was. Can you elaborate, number one, on what the  
7 problem is and number two, how we can pass state laws to  
8 correct that problem?

9           MR. ANGOFF: Yes. The problem is this: the fear is  
10 that if banks are allowed to get into the insurance industry,  
11 they will tie. That is, they will not, for example, give you  
12 a mortgage unless you agree to buy mortgage insurance from  
13 them, or they won't give you a loan to buy a car unless --

14           REPRESENTATIVE KUKOVICH: Unless you buy auto from them.

15           MR. ANGOFF: That's right. And I think that is a  
16 substantial concern, but I think that that can be taken care  
17 of with legislation.

18           There would just be severe penalties -- I mean, tying  
19 agreements are unlawful under most circumstances anyway, but  
20 the law could be tightened and there could be severe state  
21 penalties established for such practices.

22           And I think on balance, although I don't dismiss the  
23 fears, on balance I think that banks should be allowed to a  
24 certain extent to get into the insurance industry.

25           In Florida, for example, they have just allowed banks to



1 get into reinsurance, to invest in reinsurance companies.

2 Those are companies that sell insurance to insurance  
3 companies. They haven't gone so far as to let them into the  
4 insurance industry, but I think that will happen in some states.

5 REPRESENTATIVE KUKOVICH: In the rather voluminous  
6 testimony you provided us, did you provide a listing of --

7 CHAIRMAN DeWEESE: Excuse me. Could both of you  
8 gentlemen get closer to your microphones, please?

9 REPRESENTATIVE KUKOVICH: Yes. Did you provide a list  
10 of states that are writing insurance themselves or a list of  
11 states that are allowing banks to compete in insurance?

12 MR. ANGOFF: We didn't provide a list. What we did do  
13 was give sample legislation from Florida on allowing banks to  
14 get into insurance, reinsurance, and a sample of legislation  
15 from Ohio, which is the workers' compensation statute.

16 But a list is not included. I could provide such a  
17 list to the committee, though.

18 REPRESENTATIVE KUKOVICH: That would be helpful. Then  
19 we could compare what other states have done.

20 MR. ANGOFF: I will provide such a list to the committee.

21 REPRESENTATIVE KUKOVICH: Thank you very much. That's  
22 all I have.

23 CHAIRMAN DeWEESE: Lois Hagarty?

24 REPRESENTATIVE HAGARTY: Thank you, Mr. Chairman. It's  
25 my understanding that New York, on the medical malpractice

1 side, has no private insurance, that they have a state  
2 insurance for doctors, and a non-profit doctor's insurance.

3 I am told, though, that they still have the same  
4 problems that other states have in terms of the dramatically  
5 escalating medical malpractice.

6 And I wondered, in light of your comment that states  
7 should consider insuring, what you state of that New York  
8 experience, which certainly would dissuade me from thinking  
9 about the state getting involved if the result has been the  
10 same as Pennsylvania where we have only private insurance on  
11 the medical side.

12 MR. ANGOFF: My understanding is that the New York --  
13 first, let me say that New York doesn't have the same problems,  
14 it's got worse problems.

15 New York is in terrible shape. My understanding is  
16 that it is not a state-run malpractice insurance. It is a  
17 doctor-owned but insurer-run, obviously, malpractice  
18 insurer, and they are in terrible trouble because of various  
19 management decisions.

20 And I would rather not comment on that, except to say  
21 that I don't think the New York experience could be taken as a  
22 precedent either way.

23 That is unique, and they are in serious trouble for a  
24 number of different reasons.

25 REPRESENTATIVE HAGARTY: I am told that in addition to

1 the doctor non-profit, that the state also provided insurance,  
2 but you are either not sure of that, or you have different  
3 information, so you can't comment specifically on that?

4 MR. ANGOFF: I am not sure of that. My understanding  
5 is that it is not a state-run company. The major one is a  
6 doctor-run company.

7 But New York is a bad situation, and it is a unique  
8 situation. I think we will learn more about that over the  
9 next year.

10 REPRESENTATIVE HAGARTY: Thank you.

11 CHAIRMAN DEWEESE: Representative Kosinski?

12 REPRESENTATIVE KOSINSKI: This testimony is fantastic.  
13 It is very comprehensive, and I appreciate the solutions  
14 that you have offered.

15 The one thing I want to point out to you is, in Pennsyl-  
16 vania there are currently a number of proposals for an  
17 insurance consumer advocate.

18 You covered that in your paper. Could you explain why  
19 the system works so well? Are there certain things we should  
20 build into our Pennsylvania system that would make it  
21 effective?

22 MR. ANGOFF: Yes. The way to do it most cheaply and  
23 effectively I think is to do what they do in New Jersey, and  
24 that is this: you bill back to the insurance company the cost  
25 of intervention by the Consumer Advocate.

1           That creates an incentive on the insurance company not  
2 to ask for a huge rate increase, obviously to ask for the  
3 biggest rate increase it thinks it can get away with without  
4 having the consumer advocate intervene.

5           The overall incentive is for the insurance company to  
6 moderate its increase because it knows, if it asks for a rate  
7 increase, the advocate will intervene, the company won't get  
8 what it wants, and it will have to pay for the opposition in  
9 addition.

10          So, I think that is a very effective way to do it, and  
11 my understanding is that in New Jersey, it does work.

12           REPRESENTATIVE KOSINSKI: How long has that system  
13 been in effect in New Jersey?

14           MR. ANGOFF: I am not sure, I think only a few years.

15           REPRESENTATIVE KOSINSKI: Because what I am afraid of,  
16 in this current situation, and what really bothers me is that  
17 whenever we make a move that would help the situation, the  
18 insurance companies come back and say, "Well, we won't write  
19 any policies, we won't do this, we won't do that."

20          In July, I had the pleasure to be in Florida on vacation.  
21 I stopped in a local legislator's office down there, and we  
22 talked about two hours on their tort reform measure that the  
23 insurance companies are fighting in Florida, much like the  
24 West Virginia situation, where the insurance companies have  
25 told people that they will not write any policies in the state

1 of Florida.

2 For those of us who are not familiar with that, Florida  
3 put a cap on pain and suffering, but in the first year of the  
4 new bill down there, they put a 40 percent cap or 40 percent  
5 reduction on insurance rates.

6 And right away, the insurance industry said, "We are  
7 not going to write another policy in Florida," which I find  
8 hard to believe.

9 But as far as this is concerned, it has been my opinion  
10 all along, and the more I read about it, it is more of an  
11 insurance crisis and an industry than a system crisis as far  
12 as tort reform.

13 MR. ANGOFF: The data that is available shows that, as  
14 I touched on at the end. There is an issue that people can  
15 argue about, that we can argue about the legal system, whether  
16 it is too liberal, whether it is too strict.

17 But the problems -- and there certainly are problems in  
18 the legal system -- are not responsible for insurance rates,  
19 for the skyrocketing insurance rates of the last 18 months.

20 We need more data, and can only get it from the  
21 insurance industry. But to the extent data exists, I think that  
22 is what it shows pretty clearly.

23 As far as the first question, what Pennsylvania can  
24 do to prevent insurance companies from withdrawing from the  
25 market, and your allusion to what happened in West Virginia and

1 Florida, Pennsylvania -- West Virginia is in a terrible  
2 position because it is a small state. I think it has got  
3 about two million people.

4 Pennsylvania is a big state and a strong state, just as  
5 Florida is. West Virginia, they threatened the legislature,  
6 and they won, they successfully blackmailed the legislature.

7 In Florida, they have threatened to withdraw, but they  
8 haven't. Ironically, the industry that criticizes the legal  
9 system so much is arguing in court today that the law the  
10 legislature in Florida passed is unconstitutional because it  
11 requires the rate rollback.

12 But the point is, they haven't withdrawn from Florida  
13 because Florida is too big a market. It's too good a market,  
14 and so is Pennsylvania.

15 And whereas West Virginia may not be able to stand up  
16 to the industry, Pennsylvania does have that power because it  
17 is just too good a market for the industry to withdraw from.

18 CHAIRMAN DEWEESE: Chris Wogan?

19 REPRESENTATIVE WOGAN: Thank you, Mr. Chairman.

20 Mr. Angoff, I agree with you that it may prove interes-  
21 ting to look at what is happening to municipalities in  
22 Pennsylvania since the 1978-1979 limitation on liability  
23 insurance was adopted by the Legislature.

24 I feel constrained to point out that I believe your  
25 example is invalid when you mention bus companies. In the

1 Commonwealth of Pennsylvania, we have transit authorities  
2 which are actually creatures of the Commonwealth of Pennsyl-  
3 vania.

4 And they are certainly not subject to the \$500,000  
5 limitation on liability that you mentioned. I thought I would  
6 point that out to you.

7 CHAIRMAN DeWEESE: Bob Reber?

8 REPRESENTATIVE REBER: Thank you, Mr. Chairman.

9 Mr. Angoff, could you give committee the names of the  
10 insurance companies that carried out the acts that you  
11 described in the state of West Virginia?

12 MR. ANGOFF: Yes.

13 REPRESENTATIVE REBER: Just for my information, are any  
14 of those companies or all of those companies writing medical  
15 malpractice insurance in Pennsylvania?

16 MR. ANGOFF: I don't know, but I can find that out,  
17 and I will provide that to you.

18 REPRESENTATIVE REBER: If you would, thank you very much.  
19 Thank you, Mr. Chairman.

20 CHAIRMAN DeWEESE: If there are no further questions for  
21 the witness, thank you very much, Mr. Angoff.

22 MR. ANGOFF: Thank you, Mr. Chairman.

23 CHAIRMAN DeWEESE: I would also like to say this is  
24 excellent testimony. I heard Mr. Angoff speak at the  
25 National Congress of State Legislators in New Orleans, and his

1 testimony there was the impetus for him to visit with us today.

2 The next witness is Andrew Sislo and his partner,  
3 Virgil Puskarich. Virgil is the executive director of the  
4 Local Government Commission here in the Capitol Complex, and  
5 Andy is the legal counsel. Welcome to both of you gentlemen.

6 Please be aggressive with the microphone. Put it  
7 about two inches from your mouth and share with all of us what  
8 you have to say.

9 MR. SISLO: Mr. Chairman and members of the committee,  
10 again we thank you for the -- how is that, is that okay? Can  
11 you hear me?

12 CHAIRMAN DEWEESE: Can everybody hear? If I am known  
13 for anything ten years from now, I would like for people to know  
14 that when they came to our hearings, they could hear people.

15 Number one, we are going to turn this machine off,  
16 please. I think it is better sweat than to not hear. Both  
17 are unfortunate circumstances, but if I had to pick one at a  
18 committee meeting, I guess I would rather hear.

19 So, be even more aggressive, please. Get down there  
20 and testify.

21 MR. SISLO: Okay, Mr. Chairman.

22 As you indicated, my name is Andrew Sislo, and I am the  
23 legal counsel of the Local Government Commission, of which I  
24 am sure you are all very aware, as an agency of this  
25 Legislature itself.



1           With me today is Virgil Puskarich, who is the  
2 executive director of the Local Government Commission. The  
3 Commission was requested by your Committee to present  
4 testimony at this hearing which hopefully would provide the  
5 Committee with what we might call a frame of reference to  
6 help it formulate conclusions about the impact which proposed  
7 restrictions upon the civil justice system might have on both  
8 the availability and affordability crisis in the liability  
9 insurance marketplace.

10           We all know what the prolem is. Liability insurance  
11 is either unavailable or unaffordable for many businesses,  
12 local governments and individuals.

13           Certain special interest groups throughout the  
14 Commonwealth, including insurance companies, have waged a  
15 strong and persistent campaign before the Legislature and in  
16 the press, advocating tort reform as the most effective  
17 solution to the problem.

18           Others, on the other hand, have counter-argued that  
19 restricting access to the civil courts, limiting damage  
20 awards and restricting procedures for collecting damage  
21 awards cannot be justified by substantiated, empirical data  
22 and that tort reform may in fact not be the panacea for the  
23 crisis in the insurance marketplace.

24           As currently promoted, tort reform implies and assumes  
25 that lawsuits are either an exclusive or substantial cause of

1 high insurance rates. The issue, if we should be so bold to  
2 phrase it, for the Committee appears to us to be, whether the  
3 assumption has any legitimate basis to warrant further  
4 consideration of tort reform, or is the assumption mostly  
5 rhetoric.

6 Thus, with these considerations in mind, the Local  
7 Government Commission today would like to refer to the  
8 Committee, A, generally, its report of its hearing on municipal  
9 liability insurance, which is dated September 24, 1985; and  
10 the Commission would also today like to specifically refer the  
11 Committee to, B, the Political Subdivision Tort Claims Act as  
12 comparative existing law which is similar to current  
13 proposals for general tort reform both within the Commonwealth  
14 and nationally in that it imposes restrictions upon the civil  
15 justice system when a local government is the tortfeasor.

16 We would also like to specifically refer to the  
17 Committee the Act's impact upon availability and affordability  
18 of municipal liability insurance; and finally, the issue of  
19 availability of data as evidence to support allegations that  
20 municipal insurance rates have risen because claims against  
21 local governments have risen.

22 At the Local Government Commission's hearing, some  
23 witnesses most frequently cited excessive use of the judicial  
24 system and unprecedented jury verdicts as the major cause for  
25 the current insurance problem.

1 Selected cases -- none of which, we would note, were  
2 Pennsylvania cases -- were cited in an attempt to substantiate  
3 this allegation.

4 The testimony, as well as responses to some very  
5 pointed questioning from members of our Commission, very  
6 clearly established that no empirical data was available to  
7 substantiate the indictments of the Pennsylvania tort system  
8 as it impacts municipal governments of the Commonwealth.

9 Thus, due to the unsubstantiated allegations, it  
10 appeared to the Commisision that either, A, the allegations  
11 leveled against the tort recovery system are overstated or  
12 have little basis in fact, and that the system of tort  
13 recovery has adapted itself to an age of technology where harms  
14 and dangers unknown a decade ago are perhaps now commonplace.

15 The conclusions also raised the possibility, however,  
16 admittedly, that maybe the time for tort reform has in fact  
17 arrived.

18 But in any event, any reasonable doubt as to the  
19 validity of the allegations set off warning signals to avoid  
20 what might be called a quick fix which may have a substantial  
21 and far reaching effect upon the rights of every individual  
22 and upon fundamental concepts of social accountability and  
23 social justice.

24 Avoidance of these quick fix solutions for municipal  
25 insurance woes became more evident to the Commission when it

1 compared testimony about local government claims experience  
2 with the effects of the Political Subdivision Tort Claims Act.

3 Both the testimony and the acquired knowledge of the  
4 Commission led it to find that over the last ten years,  
5 tort claims against local governments have been minimal.

6 No real data exists to support any conclusions to the  
7 contrary, and minimal claims are consistent and compelling  
8 evidence that the provisions of the Political Subdivision  
9 Tort Claims Act have substantially and effectively insulated  
10 local governments from legal accountability for their  
11 tortious conduct.

12 Given these findings of fact, the only ultimate and  
13 logical conclusion is that municipal insurance rates and  
14 availability should not have reached crisis proportions in  
15 Pennsylvania.

16 As a study in comparative legislation, the Committee  
17 could reasonably characterize the Political Subdivision Tort  
18 Claims Act as municipal tort reform.

19 It is a very restrictive immunity statute. It excuses  
20 local governments from accountability for its negligent acts  
21 or conduct or the negligent acts or conduct of its employees.

22 This immunity is complete and absolute, except for  
23 eight very limited categories, which include things like  
24 operation of motor vehicles, care and custody of real personal  
25 property, street, sidewalks, traffic controls, utility services

1 and even care and custody of animals. What that anticipates  
2 are animals such as police dogs.

3           Moreover, even if authorized, a lawsuit is not allowed  
4 unless a written claim is filed within a six months statute  
5 of limitations, and if timely filed, the plaintiff still  
6 must prove negligence.

7           Other restrictions of the Act include limited damages  
8 for pain and suffering when medical expenses exceed \$1,500 --  
9 thus, there is a threshold -- and only in the following  
10 cases: death; permanent loss of bodily functions; permanent  
11 disfigurement; permanent dismemberment.

12           Another restriction as noted by earlier testimony is  
13 a \$500,000 absolute cap on damages per occurrence, and that is  
14 no matter how many plaintiffs are involved.

15           Another restriction is that the Act spells out or has  
16 specificity of recognized losses. Historically, again, if we  
17 are looking at this as comparative legislation, historically,  
18 beginning in 1973, legislators in this Commonwealth faced  
19 the difficult task of accommodating inherently mutually  
20 exclusive fundamental social and politican interests not  
21 unlike -- and perhaps even more critical than -- those which  
22 legislators face in the insurance crisis today.

23           Then, as now, accountability for tortious conduct and  
24 redress through adjudication for harm and damage to personal  
25 property competed with the more general interests of the

1 Commonwealth in protecting the collective interests of its  
2 citizens from adverse impacts upon the ability of local  
3 governments to provide both necessary services and to  
4 maintain the health, safety and welfare of all its residents.

5 In passing the Political Subdivision Tort Claims Act,  
6 the Legislature made a declaration of public policy that the  
7 rights of individuals to seek redress and damages for harm  
8 must yield to a paramount and more compelling state interest  
9 in the integrity of local government.

10 Nevertheless, the legislative proces which proceeded  
11 passage of the Act was deliberate. Perhaps this procedure is  
12 instructive in that even in the face of the Pennsylvania  
13 Supreme Court's complete abrogation of the common law doctrine  
14 of governmental immunity in 1983, serious questions still  
15 remain for the Legisture about the extent to which individual  
16 rights should defer to state interests.

17 I earlier referred to the report of the hearing of the  
18 Local Government Commission on municipal liability insurance.  
19 The Commission's recommendations as a result of that hearing  
20 can be found on pages 9 through 11 of the report, and I do  
21 believe we have provided the Committee with copies of our  
22 report.

23 Many of those recommendations have found their way  
24 into legislation. One which did not is recommendation number  
25 11 calling for recordkeeping requirements.

1           As a result, the Commission recommended and initiated  
2 introduction of an amendment to the Political Subdivision  
3 Tort Claims Act to require municipal recordkeeping of claims  
4 and lawsuits filed against local governments.

5           The Commission recognized that the virtual nonexistence  
6 of such data hindered the Commission as well as local  
7 governments and we dare say insurance companies also in  
8 assessing the probable cause of the municipal insurance  
9 crisis more definitively.

10           A copy of the amendment, defeated in the Senate, as  
11 well as pertinent debate extracted from the Senate Journal  
12 are also attached to our testimony.

13           In conclusion, the Local Government Commission in the  
14 report of its hearing acknowledges the municipal tort reform  
15 embodied in the Political Subdivision Tort Claims Act as a  
16 conscious deference of individual rights to a compelling state  
17 interest of local government immunity from liability for  
18 otherwise tortious conduct.

19           The Commission files persuasive evidence that  
20 governmental immunity has in fact protected Pennsylvania  
21 local government from suit to the degree to which it was  
22 intended to do so.

23           And finally, the Commission finds that nevertheless,  
24 municipal liability insurance rates have escalated, while  
25 availability of coverage has diminished or disappeared.

1           The Commission does express its appreciation for the  
2 invitation to come before the Committee and offer its comments  
3 to the Committee on this very important issue of tort reform.

4           Again, we would emphasize that we are not pretending to  
5 have any special expertise in either insurance matters or  
6 the civil justice system.

7           However, we do hope that our comments will cause the  
8 Committee to at least pause and reflect upon the effects and  
9 impacts existing municipal tort reform has had on insurance  
10 costs and availability as it considers general tort reform.

11           As I indicated, a copy of our report is also attached  
12 for your convenience. We thank you for the opportunity, and we  
13 would, both Mr. Puskarich and I, would certainly welcome and  
14 entertain any questions you may have.

15           CHAIRMAN DEWEESE: Thank you, counsel.

16           Virgil, do you want to say anything, or do you just  
17 want to respond to questions?

18           MR. PUSKARICH: Just respond to questions.

19           CHAIRMAN DEWEESE: Nick Moehlmann?

20           REPRESENTATIVE MOEHLMANN: In the situation of a  
21 municipally owned and operated solid refuse landfill operation,  
22 in the event that that were to widely pollute the groundwater  
23 and make the groundwater unusable for some distance around  
24 the area, for example making the groundwater unusable for a  
25 small municipality, is it your opinion that the municipal tort



1 act covers that situation and limits the municipality's  
2 liability to \$500,000?

3 MR. SISLO: I shouldn't say obviously, but obviously  
4 to me, it appears that the answer to your question is going to  
5 have to be determined by a court saying what is an occurrence.

6 The case that has been so well publicized and referred  
7 to in New Jersey, according to my understanding, turned on  
8 that exact determination.

9 If the court should determine that there was more than  
10 one occurrence, yes, very possibly more than \$500,000 could be  
11 involved in terms of liability.

12 But if the occurrence is only one occurrence, it would  
13 be my opinion that the \$500,000 cap would be sustained. I  
14 would also point out that one of our recommendations, one of  
15 the Commission's recommendations in the report was to have the  
16 Environmental Resources Committee in the Senate and its  
17 counterpart in the House of Representatives to study the  
18 possibility of developing some type or kind of superfund  
19 insurance program to take care of those contingencies.

20 The Commission did recognize that the kinds of losses  
21 that may be suffered as a result of pollution from landfills  
22 or similar kinds of waste disposal facilities may in fact be  
23 beyond the means of local governments to fund if in fact  
24 liability was found.

25 REPRESENTATIVE MOEHLMANN: Thank you, Mr. Chairman.

1 CHAIRMAN DeWEESE: Bob Reber?.

2 REPRESENTATIVE REBER: Thank you, Mr. Chairman.

3 Just following up on that, I guess it was the Jackson Township  
4 case in New Jersey you were referring to.

5 MR. SISLO: Yes.

6 REPRESENTATIVE REBER: And Representative Moehlmann  
7 was regarding the occurrence language as a possible way of  
8 being dispositive under Pennsylvania existing law.

9 I was wondering, did you analyze that case at all from  
10 the standpoint that, if it was brought against a Pennsylvania  
11 municipality, would that in fact be capped at \$500,000, or  
12 would that fall under the exemption language in the eight  
13 specific areas as a utility type use and therefore be  
14 available for an uncapped award?

15 Do you understand my question?

16 MR. SISLO: Yes, sir, I do. We would not view the  
17 operation of a landfill as what is traditionally viewed as a  
18 utility.

19 It certainly is the delivery of a municipal function  
20 or service by municipal government to its citizens and  
21 residents.

22 Care and control of real property, possibly, it may be  
23 within that exemption. I think the answer to your question  
24 would depend upon the exact factual pattern in any particular  
25 case. Did the municipality own the landfill, did it lease it,

1 was it under its case and custody; I think all those things  
2 could possibly bring it within the exemption.

3 But we must remember that the exemption still triggers  
4 all of the other restrictions and limits of liability that are  
5 set forth in the Act.

6 So, I think what your question is asking, if I can  
7 even extend it more generally, is that yes, there are exemptions  
8 in the Act that do allow individuals to sue local governments.

9 But when they do sue, the Legislature in 1978 spoke  
10 and said, we recognize the harms that were caused to you, the  
11 dangers, the damages that you suffered because of the local  
12 government doing things that it should not have done, and we  
13 feel that you should recover for that. But we also recognize  
14 that we can't let local governments go bankrupt; thus, we are  
15 limiting your recovery.

16 REPRESENTATIVE REBER: I tend to agree with what you are  
17 saying. I just wanted your comments.

18 Mr. Chairman, there is one other thing that I think this  
19 Committee should take a long, hard look at, and that is the  
20 testimony on page page 2, at the beginning of the second  
21 paragraph on page 2.

22 That is the testimony that was elicited at the Local  
23 Government Commission hearing where many witnesses cited  
24 excessive uses of the judicial system, and more importantly,  
25 I think, various unprecedented jury verdicts, and what have you

1 and the fact that each and every one of those particular cases  
2 was citing litigation, cases, verdicts if you will that had  
3 their genesis outside the Commonwealth of Pennsylvania.

4 I think a little bit later today we are going to be  
5 hearing from Representative Flick, who is the sponsor of Act 57.  
6 And I would call it to the remembrance, if you will, of this  
7 Committee that when we were having hearings on that particular  
8 piece of legislation, myself and Representative McVerry  
9 pointed out to the Committee that again, in that particular  
10 instance, we were hearing about "excessive uses of the  
11 judicial system" and excessive verdicts on those particular  
12 issues.

13 And after questioning, I believe, if my memory serves  
14 me correct, again, none of those were taking place in the  
15 Commonwealth of Pennsylvania,.

16 I think we see a pattern developing here, and I would  
17 caution the Committee throughout to not be caught up by  
18 sensationalisms that take place in some of our more radical  
19 states, if you will. Thank you, Mr. Chairman.

20 CHAIRMAN DeWEESE: You're welcome, Robert.

21 Speaking of radicals, from Pittsburgh's South Side,  
22 Mike Dawida.

23 REPRESENTATIVE DAWIDA: Following up on that, Mr. Sislo,  
24 your point is that the Pennsylvania law regarding municipali-  
25 ties and torts is a pretty good one for keeping your cases

1 down and should keep your rates lower, is that your point?

2 MR. SISLO: That's correct, sir. Not only is it a  
3 pretty good one; our correspondence and Virgil's  
4 participation in the National Conference of State Legislators  
5 indicates that it in fact be one of the most restrictive if  
6 not the most restrictive in the nation.

7 REPRESENTATIVE DAWIDA: That being so, it is your  
8 presumption that part of the problem with your rates lies in  
9 cases and places outside of Pennsylvania?

10 MR. SISLO: Yes, sir.

11 REPRESENTATIVE DAWIDA: That being so, if you were to  
12 extrapolate that logic to all other areas where there is an  
13 insurance crisis, if we were to restrict our tort responsi-  
14 bilities, it would seem that we would still have an insurance  
15 crisis because the problem in many cases lies outside  
16 Pennsylvania.

17 MR. SISLO: As I indicated earlier, we are not going to  
18 comment upon how you should interpret or draw conclusions from  
19 our testimony, but I at least would say that it would seem to  
20 me that that would be a reasonable conclusion that any  
21 reasonable person could reach.

22 REPRESENTATIVE DAWIDA: Thank you.

23 CHAIRMAN DeWEESE: Any more reasonable people want to  
24 ask questions? Mike Bortner, York County?

25 REPRESENTATIVE BORTNER: In your view, does the municipal

1 tort claims act adequately protect the individuals that  
2 serve on the boards of the municipality as well as the  
3 municipality itself?

4 In other words, passing on from the liability of the  
5 municipality, how about the individual liability of the  
6 people that serve on the recreation commission, sewer  
7 authority, council members, et cetera?

8 MR. SISLO: I think the answer to your question, sir,  
9 without being too technical, really could be found in the  
10 definition of what an employee is in terms of the coverage that  
11 is to be provided by the tort act. And that definition is  
12 extremely broad, and I will read it for you.

13 I quote, "Any person who is acting or who has acted on  
14 behalf of a local government unit, whether on a permanent or  
15 temporary basis, whether compensated or not, and whether  
16 within or without the territorial boundaries of the government  
17 unit, including any volunteer firemen and any elected or  
18 appointed officer, member of a governing body or other person  
19 designated to act for the government unit." And it goes on  
20 to talk about independent contracts.

21 REPRESENTATIVE BORTNER: It's everybody.

22 MR. SISLO: Which is basically everybody.

23 REPRESENTATIVE BORTNER: My understanding is that as  
24 long as you are acting within the scope of your authority, all  
25 these protections would apply to you, is that correct?

1 MR. SISLO: Yes, sir.

2 REPRESENTATIVE BORTNER: One of my concerns is,  
3 speaking from personal experience in York, I think some very  
4 good people have resigned from positions on the sewer  
5 authority and recreation commission, I believe because of a  
6 misunderstanding of the law.

7 When the municipality's insurance was cancelled,  
8 there was some question, and I think many of them felt that  
9 they had exposure for all their personal assets, and many  
10 people resigned.

11 I agree with you. I guess I kind of wanted to hear it  
12 from somebody else, somebody who has studied it more than  
13 I have in terms of what the municipal tort claims act does.

14 MR. SISLO: With your permission, Mr. Chairman, I  
15 would like to take a few minutes to expand on the question that  
16 was just presented by Mr. Bortner.

17 CHAIRMAN DEWEESE: I'd appreciate it.

18 MR. SISLO: It does appear to the Commission -- and  
19 again, the Commission has virtually daily contact with local  
20 elected officials in terms of inquiries and through inquiries  
21 that come through your offices, as well as the local government  
22 conference and associations.

23 It appears to us that the resignations with respect to  
24 the insurance liability crisis may in fact be knee jerk  
25 reactions because of a lack of understanding of the kind of

1 protection that they have under the Political Subdivision  
2 Tort Claims Act.

3           However, we must admit that there may be some reason  
4 for concern, and that reason for concern and also for the  
5 resignations is something beyond the control of certainly the  
6 Commission and even beyond the Commonwealth and the  
7 Legislature, and that is -- and as must of the lawyers on  
8 the Committee, I am sure, are aware -- there is always the  
9 possibility that local officials will be sued for a federal  
10 tort or civil rights action.

11           Our immunity statute will not give them protection.  
12 That is completely beyond our control and completely beyond  
13 what the Legislature can do.

14           So, thus, that is something that would have to be  
15 addressed at the national level, and has really no impact upon  
16 this, but probably is one of the concerns in terms of the  
17 resignations.

18           As a matter of fact, at some local government workshops  
19 that I have both attended and addressed, one of the major  
20 concerns has been and continues to be, what do I do if I get  
21 sued because I have allegedly violated somebody's civil rights?

22           Just as an aside, however, the courts do appear to be  
23 whittling down the use of the federal civil rights statutes,  
24 particularly 1983, as a substitute for getting around immunity  
25 statutes such as Pennsylvania has.



1           The Supreme Court of the United States just handed  
2 down a case -- unfortunately, I can't remember the name of  
3 it -- wherein they said, we are not going to allow you to  
4 try to frame your otherwise common law negligence action in  
5 terms of a federal civil rights statute.

6           REPRESENTATIVE BORTNER: So, your answer would be, if  
7 there is a problem, if there is exposure, it is to those  
8 federal suits under 1983, but there is pretty adequate  
9 protection for common law torts that would be brought in  
10 Pennsylvania?

11           MR. SISLO: To a large degree, yes, sir.

12           REPRESENTATIVE BORTNER: Thank you.

13           CHAIRMAN DEWEESE: Nick Moehlmann?

14           REPRESENTATIVE MOEHLMANN: Thank you, Mr. Chairman.

15           Just a brief comment to which I would like your comment.  
16 Your answer to Representative Dawida that a reasonable person  
17 would presume that the municipal tort claims act cured the  
18 problem of the large verdict with regard to municipal claims  
19 is perhaps an oversimplification.

20           You said in answer to my question that you didn't  
21 know whether the -- or I think this is what you said, that you  
22 didn't know whether the tort claims act would cap a claim at  
23 \$500,000 with a landfill problem because the court would have  
24 to interpret the term "occurrence."

25           And I think you said in answer to Representative Reber

1 that you didn't know or you were not sure that that situation  
2 would not fall within exceptions covering public utilities  
3 or the custody of real property.

4 And I think that points up this conclusion, that in fact  
5 the insurance companies don't know, even though we have this  
6 good law, insurance companies don't know whether they are  
7 subject to the big hit on a problem like that because it  
8 hasn't been tested, those points haven't been tested in the  
9 court.

10 And what we need in addition to a law is the testing  
11 before the Pennsylvania Supreme Court of those points. And  
12 up until now, that having not occurred, the insurance  
13 companies are not certain that they have that protection.

14 MR. SISLO: I think the issue you are raising is the  
15 question of the constitutionality of the liability damage  
16 limitation.

17 You are correct, that that has not been finally  
18 settled in the courts, although it is our understanding that  
19 there is -

20 REPRESENTATIVE MOEHLMANN: Excuse me. That may be a  
21 corollary point, but it is not the point I am raising. The  
22 point I am raising is, assuming that this act is found  
23 constitutional, how will the court interpret it. There may  
24 also be a problem with constitutionality.

25 MR. SISLO: I think the interpretation question arises

1 in those very special and dramatic cases of landfills.

2 Outside of the landfill area, the cap will be \$500,000.  
3 There is no question. It will be \$500,000 per occurrence. I  
4 think the problem we have with the landfill situation, as  
5 shown in the Jackson case, is what is an occurrence under those  
6 circumstances, only because the pollution that caused the  
7 injury to the citizens and residents was an activity that  
8 had occurred over a very long period of time.

9 I think if you are talking about a simple automobile  
10 accident involving a municipal vehicle, there is no question  
11 what the occurrence is. It is one, and there will be one  
12 damage limitation.

13 CHAIRMAN DEWEESE: Bob Reber, and then Paul McHale.

14 REPRESENTATIVE REBER: Just a quick followup that  
15 was triggered by Representative Bortner's comments on some of  
16 the problems we are facing with some of the local government  
17 resignations.

18 Has there been a determination that a municipal authority  
19 doesn't fall within the purview of the political agency  
20 definition and members there who would be employees under the  
21 act? Is there any discrepancy as to that?

22 Adn the reason for that, it has been my experience,  
23 understanding and working with some local governemnts, that  
24 they are not necessarily per se having trouble getting  
25 coverage for the governing bodies, even though the cost is

1 somewhat prohibitive.

2 But there is virtually a lack of desire to write  
3 coverage at all for municipal authorities. I was wondering  
4 if we have some case law problem that brought this about, or if  
5 there is a lack of clarity in the definition. I would ask your  
6 thoughts.

7 MR. SISLO: First with respect to the definition,  
8 there does appear to be some lack of clarity on that issue.  
9 With respect to the first question that you had asked, the  
10 cases don't seem to come down clearly in determining whether  
11 or not an authority -- and we are running a big gamut by  
12 using that term; I mean, we can run from housing authorities  
13 to municipal authorities to parking authorities, all of which  
14 have different and separate enabling legislation, all of  
15 which contain different provisions within them that run to  
16 the issue, an important issue of, are they local government,  
17 i.e. are they political subdivisions, or are they agencies of  
18 the Commonwealth.

19 But in terms of the liability question, I can say that  
20 some cases are coming down and saying they are political  
21 subdivisions and others are coming down and saying they are  
22 state agencies, in which event the effect is really the same  
23 because if they are state agencies, then they get the  
24 protection of the sovereign immunity act, which by the way is  
25 virtually identical to the Political Subdivisions Torts Claims

1 Act, except the damage limitations are in fact a lot  
2 stricter; \$250,000, I believe, \$1 million aggregate.

3 CHAIRMAN DEWEESE: Paul McHale of Lehigh Valley?

4 REPRESENTATIVE McHALE: Thank you, Mr. Chairman.

5 Mr. Sislo, did I understand you to say that in your  
6 opinion Pennsylvania has one of the most restrictive and that  
7 is most protective municipal tort claims acts in the nation?

8 MR. SISLO: Yes, sir.

9 REPRESENTATIVE McHALE: I represent a series of  
10 communities where we do not have landfills, for instance, so  
11 the question of what is an occurrence is not a relevant issue,  
12 at least with regard to possible pollution from a sanitary  
13 landfill.

14 I represent communities that do not have a track record  
15 of previous federal complaints based on Section 1983. Yet,  
16 these stable communities have experienced enormous increases  
17 in their liability insurance premiums.

18 You indicated that your agency is in touch with local  
19 officials on a daily basis. When those local officials are  
20 told that they will face an unpercedented increase in their  
21 premium and they ask why, what are they being told by the  
22 insurance industry?

23 MR. SISLO: I am not sure I can answer that question.  
24 I think you are going to have to ask the insurance industry.  
25 I am not trying to hedge, because I am not so sure.

1           Some of the things we hear is --

2           REPRESENTATIVE MCHALE: That's not what I am asking you.

3           MR. SISLO: The things that we hear really comes down  
4 to, to use a phrase, quote-unquote, "It's those damn lawyers."  
5 Bottom line, that is the most frequent response we get when  
6 we ask them as to what kind of answer did you get from your  
7 carrier or your agent?

8           REPRESENTATIVE MCHALE: I don't find that to be a very  
9 satisfactory answer. I have several communities that, to the  
10 best of my knowledge, have never been sued, at least they have  
11 never been sued successfully.

12           These are very stable communities, very little  
13 development, no history of federal civil rights actions, no  
14 unusual occurrences within their boundaries that might give  
15 rise to extraordinary liability.

16           And yet, these communities with a clean track record  
17 and very responsible local government are being told that their  
18 premiums will go up next year at an unprecedented enormous  
19 rate.

20           And I would hope that during later testimony, we can  
21 get very specific economic information as to why these kinds of  
22 communities, unlike some others that might justifiably be  
23 faced with higher premiums, why these stable communities with  
24 good track records are nonetheless being told that they either  
25 aren't to have insurance, or if they are to have it, it is at

1 an extraordinarily high rate.

2 Thank you, Mr. Chairman.

3 CHAIRMAN DEWEESE: Paul, just to clear the record, I  
4 think you meant not that the counselor's answer was not  
5 satisfactory, but what he is hearing out there from the  
6 people is not satisfactory.

7 REPRESENTATIVE MCHALE: That's exactly what I meant.  
8 I didn't mean to put Mr. Sislo in the shoes of the insurance  
9 industry when we ask the industry questions, but I was curious  
10 as to what you were hearing on a daily basis from the local  
11 communities in terms of what they are being told.

12 And I would hope that the phrase that you used would  
13 not be the bottom line answer that we will receive. I would  
14 like to know why a community of 6,000 people that has never  
15 been successfully sued either in state or federal court, that  
16 doesn't have an unusual risk within its boundaries such as a  
17 sanitary landfill, that has never been sued in federal court  
18 on a federal civil rights violation, is now being told that  
19 its annual premium must be doubled in order to have insurance  
20 available.

21 I would like to see the economic facts and figures  
22 that would justify that. So far, I am not very persuaded.

23 CHAIRMAN DEWEESE: Right. I understand that,  
24 Representative McHale, and hopefully some of our future people  
25 that are going to testify will be able to illuminate that

1 subject.

2 Virgil Puskarich, executive director of the Local  
3 Government Commission?

4 MR. PUSKARICH: I think, Mr. Chairman, in some part,  
5 Representative McHale's question can be answered by taking  
6 a look at an attempt we made at the Local Government  
7 Commission to amend a piece of legislation in the Senate to  
8 require recordkeeping, reporting by both the industry and  
9 local governments.

10 It was characterized by some in the Senate as being  
11 bureaucratic overkill, and we ought not to hamper our local  
12 governments with this kind of onerous, burdensome task.

13 As a result, the amendment was defeated by a vote of 20  
14 to 30. And we have appended to the testimony -- and I  
15 recommend that each of you have a look at it -- the copy of  
16 the Senate Journal from that day with of course the amendment  
17 printed in it.

18 We would like you to take a look at it. It's a major  
19 concern that we have at the Commission and something we feel  
20 you ought to give consideration to.

21 REPRESENTATIVE McHALE: Thank you very much.

22 Mr. Chairman, I would simply state that I strongly  
23 support that. At least in my communities, we would much rather  
24 keep a few more records documenting a clean litigation record  
25 than pay double our premium on liability insurance.



1 MR. PUSKARICH: If your premium is going to be increased,  
2 tell me why. That should be the response of the local govern-  
3 ment unit. How many claims have we had against us? We find  
4 that the insurance companies do settle claims against local  
5 governments and not even tell them.

6 The local government feels then in turn that they have  
7 had a very clean record. So, we feel that recordkeeping is  
8 most important, and perhaps you should consider it.

9 REPRESENTATIVE MCHALE: Mr. Speaker, I agree with the  
10 gentleman's comments. Thank you.

11 CHAIRMAN DEWEESE: Thank you very much. That concludes  
12 the testimony of the gentlemen from the Local Government  
13 Commission. Thank you, Virgil; thank you, Andy.

14 We are running behind, but I used to say when Max  
15 Bieski was the chairman, I was always raising hell because  
16 he wouldn't let me ask questions, so we are going to run a  
17 loose ship. Anybody who wants to ask questions, feel free.

18 We are just going to run behind, my adherence to the  
19 schedule notwithstanding.

20 Mark Peterson, vice-president of the Pennsylvania  
21 Public Interest Coalition. Mark, you have some other folks  
22 who are going to join you, so please introduce them at your  
23 convenience.

24 That makes me happy. I thought they were all going to  
25 get 20 minutes according to my paper up here. I am glad that

1 we will condense it a little bit.

2 MR. PETERSON: I think each one of us will introduce  
3 ourselves and save a little time in that way. I will start  
4 out. I handed out copies of my statement, and I think you  
5 have or will soon have copies of everyone else's.

6 I will not go over all of my statement. I will try to  
7 cut my remarks, although I would like to point out that  
8 everything in the statement we are handing out is what we  
9 want to say today.

10 My name is Mark Peterson. I am the vice-president of  
11 Pennsylvania Public Interest Coalition. The individuals  
12 with me this morning represent different points of view on  
13 the problems created by insurance companies in our state over  
14 the last two years.

15 They have experienced a crisis in the availability and  
16 price of insurance in different ways. Our purpose in asking  
17 them all to join us is to create a picture of how pervasive  
18 the crisis actually has become.

19 My role is to lead off by summarizing our recommenda-  
20 tions to restore some reason and balance to the operation of the  
21 insurance industry in the state.

22 You clearly hear about these problems in your district  
23 in a regular basis and a frequency that is getting alarming.  
24 One thing the insurance industry has accomplished by  
25 creating this crisis is clearly illustrating the central role

1 that insurance plays in our lives.

2           Your list of witnesses today shows how many insti-  
3 tutions that are vital to our day to day existence are  
4 threatened by the business practices of the insurance  
5 industry.

6           Insurance is now the fourth most expensive item in the  
7 average Pennsylvania family's budget. Analysts at the 1986  
8 meeting of the National Association of Insurance Commissioners  
9 predicted that the crisis of availability and price is about  
10 to move into the area of automobile premiums.

11           As we knock on thousands of doors, including those of  
12 our 80,000 members across the state, we find this prediction  
13 is quickly becoming a reality, as people complain more and  
14 more about their automobile premiums.

15           And they are increasingly angry about this new  
16 expense in their already broken budgets. Because insurance  
17 plays a key role in so many areas of our lives, it is vital  
18 that an inclusive and comprehensive understanding of the  
19 problems of the industry be developed.

20           We think your committee is to be commended for taking  
21 that challenge on and for taking a broad approach and a  
22 broad point of view on this question.

23           We believe that many of the problems of the industry  
24 can be solved by the active intervention of the General  
25 Assembly. The Legislature made major improvements in the

1 operation of the Public Utility Commission, and therefore  
2 the utility companies of the state this summer.

3 Our organization is confident that you will begin a  
4 similar process this year that will eventually result in  
5 improved regulation of the insurance industry in our state.

6 Your investigation is an important step in this  
7 process. We also look forward to the pending report of the  
8 House Insurance Committee and expect that to be helpful to all  
9 of us as we grapple with this problem.

10 We appreciate your interest in our organization's point  
11 of view. As an organization practiced in representing  
12 the interests of consumers on the question of utility rates  
13 and policies, the right to know about chemical dangers in our  
14 workplace and neighborhoods and the economic health of the  
15 Commonwealth, we are concerned about the operation of  
16 insurance companies in two ways.

17 We believe that consumers of insurance, whether they  
18 are institutions, individuals or small businesses, must be  
19 protected from what has been the damaging up and down cycles  
20 created by the business practices of the industry.

21 In addition, we are convinced that the crisis in tort  
22 cases is simply a public relations myth manufactured by the  
23 insurance industry to advance their own narrow objectives.

24 The ancient legal right of Pennsylvanians are too  
25 precious to quickly toss out the window because of this

1 public relations myth.

2 Extensive information I believe has already been  
3 provided to you about the financial health of the insurance  
4 industry, and the dimensions of the myth called the tort  
5 crisis, so I will skip over our information about that.

6 We are particularly impressed with the excellent work  
7 of the National Insurance Consumer Organization, and find  
8 that their work on this has been very accurate and helpful.

9 We also know that the media has unearthed a few  
10 individuals around the country who seem to be lawsuit-happy.  
11 But in all of our discussions, canvassing and public speaking  
12 around the state, we have yet to find any Pennsylvanians who  
13 have somehow gone off the deep end, become a litigious mad dog  
14 and aggressively sued everybody they could find.

15 We have not found any jury members who have gone crazy  
16 and tried to turn the civil justice system into a new form of  
17 welfare.

18 Nevertheless, the insurance industry would of course  
19 have us believe that all this has happened to the brother-in-  
20 law of each of us and if we don't clamp down on them, if we  
21 don't blindly agree to restrict our access to attorneys and  
22 the courts, then these suit-happy Americans will ruin the  
23 country.

24 The truth is that the insurance industry has gone off  
25 the deep end. They got drunk on the high interest rates of

1 the late seventies and early eighties. To raise investment  
2 capital and take advantage of these interest rates, they  
3 severely undercut prices in a premium selling frenzy. They  
4 are still drunk on their incredible profits, but we, the  
5 policyholders, already have the hangover. The insurance  
6 companies must be stopped before they ruin the country.

7 Fortunately, the General Assembly has the power to  
8 stop them in Pennsylvania. You have the authority to bury  
9 their outrageous tort reform proposals so deeply they are  
10 completely forgotten.

11 In addition, you can consider some straightforward  
12 improvements in the state's regulation of the industry. We  
13 have the following recommendations for bringing the industry  
14 back into a balanced, reasonable level of operation. Many of  
15 these ideas have been mentioned earlier. Some are already  
16 proposed in legislation, and others require further  
17 development. Our main points are:

18 Prohibitions on excessive premium price increases;

19 Creation of an insurance consumer advocate like the  
20 one for utility rate cases;

21 Disclosure of insurance company operating costs by  
22 type or line of insurance, profits by line of insurance,  
23 details about overhead expenses and investment income;

24 Prevention of the cancellation of insurance policies  
25 of consumers who have good claim records;

1           Allowing the group purchase of auto and homeowner  
2 policies to reduce premium costs;

3           Provisions for joint underwriting associations that  
4 make insurance available to good risks that cannot obtain or  
5 afford coverage;

6           And finally, improvements in the Workers Compensation  
7 law to require speedier claim processing and allow for cost  
8 of living increases.

9           Based on recent experiences we have had at the Insurance  
10 Commission, PennPIC is convinced that an urgent priority for  
11 action this year are the financial disclosure amendments  
12 attached by Representative Dawida to Senate Bill 934 which is  
13 still before the House, I believe.

14           These amendments would require the increased reporting  
15 of key information by insurance companies operating in the  
16 state. The vital information includes the operating expenses  
17 of each company by line of insurance, including overhead  
18 items like office furnishings, executive salaries, perks,  
19 travel and entertainment expenses which should be included.

20           Companies would also be required to report their net  
21 income by line of insurance in Pennsylvania and to break down  
22 their operating losses in the same manner.

23           It is impossible for the Insurance Commission to make a  
24 fair determination about the prices of premiums without this  
25 information.

1           To further illustrate how important we feel this bill  
2 is, I can tell you about our recent review of current auto  
3 insurance premiums in Pennsylvania.

4           We found that in 1985, the 14 largest auto insurers in  
5 the state wrote \$1,572,241,914 in premiums. After they  
6 covered claims against those premiums, against those policies,  
7 they had \$543,850,377 left over.

8           That amounts to about 35¢ on every premium dollar.  
9 Our question is, what was this money used for? Where is it  
10 now? Did it really cost that much to operate the auto  
11 insurance business of these 14 companies? And based on that  
12 \$543 million figure, are the prices of these premiums  
13 justifiable?

14           CHAIRMAN DeWEESE: Just out of curiosity, where did you  
15 get the information?

16           MR. PETERSON: This is from the Insurance Commission  
17 reports that the insurance companies file on a regular basis  
18 at the Commission.

19           The policyholders of these companies, the General  
20 Assembly and the people of the state have a right to answers to  
21 these questions. The Insurance Commission should be required  
22 by law to obtain this information.

23           We also like Representative Lloyd's amendment to Senate  
24 Bill 936 that will sunset the Insurance Commission on December  
25 31, 1987, which will provide another key opportunity to



1 improve the Insurance Commission, if the House version of this  
2 bill survives in conference committee.

3 I will end my remarks there and turn the microphone  
4 over to a representative of the People's Medical Society,  
5 Lois Backus.

6 CHAIRMAN DEWEESE: The mic that you have your right  
7 hand on is the one that affects those in this room. The  
8 others are for the media.

9 MS. BACKUS: I am Lois Backus, director of policy affairs  
10 of the People's Medical Society, a national organization  
11 of health-care consumers.

12 We have 85,000 members nationwide, and 5,500 members  
13 in Pennsylvania. I am also speaking on behalf of the People's  
14 Justice Alliance, a coalition of over 200 victims and  
15 consumers advocacy organizations in the United States.

16 In keeping with the goals of both our organizations,  
17 I am going to restrict my comments to the medical malpractice  
18 situation.

19 Medical malpractice and the supposed medical  
20 malpractice liability insurance crisis is a unique and  
21 separate problem from the general liability crisis.

22 Medical malpractice is unique because medical care is  
23 a necessity, and in cases of illness, an obligation for  
24 consumers. And obtaining that care requires faith and trust  
25 in the practitioner.

1           The potential for harm at the hands of medical  
2 practitioners is far greater than possible economic loss.  
3 To what extent actual incidents of medical malpractice occur  
4 is not exactly known.

5           The only study that has been done on this subject was  
6 done in 1974 by the California Medical Association and the  
7 California Hospital Association.

8           And they found in their study of acute care hospitals  
9 in California that they could expect one out of every 126  
10 hospital admissions to result in a case of medical malpractice.

11           Despite these large numbers of medical malpractice  
12 victims -- that would extrapolate to roughly 1.5 million  
13 victims per year in the United States -- it is estimated  
14 that only 6 to 10 percent result in the filing of a medical  
15 malpractice claim.

16           There are obviously many medical malpractice victims  
17 who never seek compensation through the courts. In the  
18 mid-seventies and now, 10 years later, an alleged malpractice  
19 crisis has arisen, and this crisis is the result primarily  
20 of large malpractice insurance premium rate hikes, and it is  
21 a crisis of both availability and affordability of malpractice  
22 insurance.

23           Tort reform legislation was passed in every state,  
24 including Pennsylvania, in the mid-seventies, and is being  
25 proposed again today as a solution to this crisis.

1           The reasoning behind the tort reform movement is  
2 that measures such as abolishing the collateral source rule  
3 and joint and several liability, reducing the statutes of  
4 limitations and limiting awards will make the system more  
5 predictable, thereby allowing insurers to set more actuarially  
6 sound rates and avoid the cyclical nature of the industry.

7           A study of the medical malpractice insurance crisis  
8 in Pennsylvania, however, commissioned by the Pennsylvania Bar  
9 Association, the Pennsylvania Medical Association, the  
10 Pennsylvania Hospital Association and others, disputes this  
11 claim.

12           Drs. Hofflander and Nye, authors of the study, point  
13 out that the current crisis in Pennsylvania is not based on  
14 increased malpractice claims occurrence.

15           Rather, it is based on what they describe as the  
16 effects of ineffectively regulated competition in the  
17 malpractice insurance market.

18           They say specifically that many suggested modifications  
19 to the tort law system, caps on malpractice awards, reductions  
20 in the statute of limitations applicable to malpractice  
21 claims or elimination of the collateral source rule, are  
22 merely cost shifting devices that partially shift the costs  
23 of medical malpractice from health care providers and their  
24 insurers to other forms of insurance, to state programs or  
25 the taxpayers, and to malpractice victims themselves. They

1 do not save money in the aggregate.

2           The most important point to be made here is that  
3 these same tort reform provisions were passed all over the  
4 country ten years ago, and they did not prevent the crisis  
5 today.

6           Tort reform proponents claim that greedy consumers  
7 are subjecting medical professionals to frivolous claims,  
8 thereby forcing insurers to steeply raise premium rates to  
9 the point where many medical providers complain that they are  
10 not able to afford them.

11           Fifty percent of the physicians in Pennsylvania in 1984,  
12 however, paid less than \$3,500 in premiums that year. An  
13 analysis of premium increases shows that the premiums rose at  
14 a rate exceeding the Medical Care index only for orthopedic  
15 surgery, neurosurgery, and emergency medicine.

16           Tort reform proponents also claim that the combined  
17 costs of malpractice insurance and the tort system have  
18 contributed significantly to the rise in health care costs.

19           But Hofflander and Nye's data show, however, that the  
20 costs of both of these are roughly  $\frac{1}{2}$  of 1 percent of total  
21 health care costs, hardly a significant contribution.

22           The tort system is designed to do two things: one,  
23 compensate victims of medical malpractice; and two, deter  
24 health care providers from careless or incompetent practice.

25           The solutions to the medical malpractice crisis

1 proposed by tort reformers address neither of these goals  
2 and actually compromise both of them. Victims' access to  
3 full compensation would be limited, and health care  
4 providers would have little to fear from court proceedings.

5 The only substantive solutions to these recurrent  
6 crises are changes in insurance regulation and a stronger  
7 disciplinary procedure for malpracticing health care  
8 providers.

9 A major barrier to effective rate-setting by  
10 malpractice insurers is the lack of comprehensive data on  
11 claims and incidence information.

12 Insurers collect data on those they insure for the  
13 period insured, but have little or no access to malpractice-  
14 related data on individual insureds before they set the  
15 rates for that person.

16 Therefore, insurers set rates by class of practitioner.  
17 And as Florida and Pennsylvania data show, there is good  
18 reason to be able to evaluate the risks of individuals and  
19 set premium rates accordingly.

20 In Pennsylvania, it is estimated that 1 percent of  
21 all the licensed physicians are responsible for 25 percent  
22 of all CAT fund losses since the inception of the CAT fund.  
23 And in Florida, 3 percent of Florida's physicians accounted  
24 for 48 percent of the claims paid.

25 In order to establish a useful and comprehensive

1 database of malpractice claims information, all insurers  
2 would have to be required to report such data routinely.  
3 The data could then be made available to insurers, the State  
4 Board of Medical Education and Licensure, hospitals reviewing  
5 individual practitioners for attending status, and in some  
6 form to consumers.

7 Medical providers in general and physicians in  
8 particular lay claim to a large amount of public trust, and  
9 that trust requires that they accept a large responsibility.

10 Medical professionals control vast amounts of highly  
11 specialized knowledge, knowledge which in less skilled hands  
12 could do serious harm.

13 Medical professionals have the responsibility, in the  
14 absence of of skilled and knowledgeable consumers, to insure  
15 that consumers will not be victimized by substandard care.

16 We urge this committee not to consider any solutions to  
17 the medical malpractice crisis which do not include creating  
18 a comprehensive database of malpractice claims and incidence  
19 data to enhance the abilities of state regulatory boards to  
20 perform their duties and enable and require insurers to  
21 provide insurance at demonstrably reasonable, actuarially sound  
22 rates, and we endorse all of the recommendations of PennPIC.

23 CHAIRMAN DEWEESE: Thank you. You have one more or two  
24 more people?

25 MR. PETERSON: Two more people.

1           CHAIRMAN DeWEESE: I am going to let you answer this  
2 question, but could we have a little more shooting the  
3 breeze, give-and-take? We have the statements in front of us,  
4 only in the matter of time, because we have a good amount of  
5 people.

6           Since we have the testimony of your other witnesses,  
7 could they just share with us for three, four, five minutes  
8 some of their general views on that, rather than read the  
9 entire statement?

10          MS. MAIETTA: If I may, I would rather read this. I  
11 can do it faster. It is just three pages.

12          CHAIRMAN DeWEESE: Well, I will allow that. Go ahead.

13          MS. MAIETTA: I thank you for the opportunity to allow  
14 me to read this. My name is Judy Maietta, and I am the  
15 executive director of a private, non-profit day care that has  
16 been in operation for 22 years.

17                 During this time, we have never had a liability claim,  
18 yet in the past two years, our insurance costs have increased  
19 more than 600 percent, while our coverage has been cut in half.

20                 The Carlisle Day Care Center offers center-based care  
21 to 78 preschool children, maintaining a child-staff ratio of  
22 7 to 1. The state, by the way, requires 10 to 1.

23                 We provide family day care homes for 20 infants and  
24 toddlers with a ratio of one adult for every four children.  
25 The primary concerns of our program are the safety and

1 well-being of our children and the promotion of a positive  
2 self-image with a feeling of independence.

3 To this end, the center and home staff are trained in  
4 program philosophy and objectives, child development,  
5 discipline and first aid.

6 All classroom lead teachers have a bachelor's degree  
7 in early childhood development and elementary ed. Staff  
8 members are offered numerous opportunities each year to  
9 attend or participate in conferences and workshops.

10 These rigorous requirements have enabled the Carlisle  
11 Day Care Center to provide a quality program to the children  
12 of working parents in our community for a quarter of a century.

13 However, the level of excellence the center has  
14 achieved has had little impact on the insurance industry.  
15 Fiscal year 1984-85, the center paid \$1,300 a year for  
16 liability coverage.

17 That gave us a \$1 million policy. This same coverage  
18 increased to \$2,800 in 1985-86. In August of 1985, I was  
19 told that our policy would not be renewed at the end of the  
20 contract period, so in September, 1985, I began a massive  
21 campaign to secure coverage by July 27, 1986.

22 With 10 months ahead of me, I felt reasonably sure  
23 that I would be able to find coverage. By April, 1986, my  
24 insurance broker had been unable to locate a single company  
25 willing to provide coverage to my program.



1 I became concerned and asked a second broker to assist  
2 us in our search. With two brokers now tracking every  
3 possible lead, I was hopeful that we would find coverage in  
4 time.

5 By June 27, I was very worried, and applied to the  
6 Market Assistance Program for help. After spending three hours  
7 with my broker filling out the application forms, we submitted  
8 the paperwork and a check for \$150 to MAP. Then I waited.

9 Two weeks later, I had not had a single response  
10 from anyone with the Market Assistance Program, not even an  
11 acknowledgement of my application being received.

12 By now, I was desperate. I had only two weeks to find  
13 coverage for my program, or I would be faced with closing the  
14 doors on 98 preschool children and possibly putting 150  
15 low-income parents out of work because affordable child care  
16 would not be available.

17 I could not run a day care program without liability  
18 coverage. When my broker called with an offer from a carrier,  
19 I jumped at the chance to secure coverage.

20 Now came the bad news. To receive only \$500,000 in  
21 coverage, it would cost \$6,700 for liability insurance alone.  
22 A separate property policy would be written that would cost an  
23 addition \$1,300. Property and liability insurance would now  
24 cost a total of \$8,000 a year.

25 In addition to this high price, we would no longer be

1 able to take the children on field trips, since our policy  
2 would not cover transportation of any kind.

3 I had no choice but to accept this outrageous and  
4 unreasonable offer. My alternative was to go out of business.  
5 In 1984-85, I spent \$13 per child per year for a million  
6 dollar property and liability policy.

7 Now, in 1986-87 fiscal year, I am spending \$81.63  
8 per child per year for a \$500,000 coverage. To pay these  
9 exorbitant prices, I am jeopardizing the quality of my  
10 program.

11 With the exemplary track record the Carlisle Day  
12 Care Center has, there is no logical reason for these  
13 astronomical increases.

14 CHAIRMAN DEWEESE: Just one second. In rough  
15 mathematics, you are paying five times as much for half the  
16 coverage?

17 MS. MAIETTA: Right, half the policy.

18 CHAIRMAN DEWEESE: So, ten times, in one year?

19 MS. MAIETTA: Right.

20 CHAIRMAN DEWEESE: What did your insurance guy say?

21 MS. MAIETTA: First of all, the coverage is from a  
22 brand new company we have never had coverage with. Our other  
23 carrier cancelled our policy because we had five minor  
24 violations which were corrected within 24 hours.

25 The violations were of a type -- we had an extra fire

1 extinguisher that we did not need. We had seven in  
2 serviceable condition. It was in a storage room. It had not  
3 been renewed in two years, this extinguisher which we did not  
4 need to use.

5 CHAIRMAN DEWEESE: Bottom line, 10 times what you were  
6 paying last year, with no adequate explanation?

7 MS. MAIETTA: No adequate explanation whatsoever.

8 CHAIRMAN DEWEESE: Continue.

9 MS. MAIETTA: If there are programs operating without  
10 licenses or providing poor quality or unsafe conditions for  
11 children, let them bear the brunt of the insurance industry  
12 concerns.

13 Each day care program should be evaluated on its own  
14 merits and not lumped together and viewed as a collective  
15 problem.

16 I am not alone in my plight. Many quality day care  
17 programs in Pennsylvania have been faced with cancellation or  
18 inability to find affordable coverage.

19 We are struggling to survive in an economic climate  
20 that does not recognize the importance of preschool education.  
21 Why is the insurance industry being given free rein to rob us  
22 of desperately needed dollars for child care?

23 This abuse of quality educational programs must stop.  
24 Thank you.

25 CHAIRMAN DEWEESE: I don't see Jack Mull.

1 MR. PETERSON: No, you see Barbara Woods, the  
2 director of PennPIC. Jack and his wife are working today to  
3 try to pay their auto premium and cannot be here. They  
4 submitted a statement that we would like Barbara to deliver.  
5 It is about two paragraphs.

6 MS. WOODS: I can summarize it very briefly.

7 CHAIRMAN DEWEESE: Fine.

8 After this, we will take a five-minute break, which  
9 in this setting usually means seven or eight, but I am going to  
10 try to hold it to five.

11 We are over halfway through, and we are going to have  
12 some expert testimony from a variety of folks as soon as Barb  
13 is finished. Five minute break, and then we are going to  
14 finish up. Welcome.

15 MS. WOODS: Thank you.

16 Basically what I wanted to deliver today was the fact  
17 that Pennsylvania Public Interest Coalition has a door-to-door  
18 canvas. When we meet people on a face-to-face basis, we  
19 talk about issues that we are concerned about.

20 Of course, we are talking now about insurance reform.  
21 I wanted to bring to you today the statement by Jack Mull and  
22 his family because they couldn't be here, but it is just a  
23 number. We could have just piles of these kinds of scenarios.  
24 This one is on automobile insurance. We have heard it on  
25 businesses that can't afford insurance liability coverage

1 anymore. We have heard it from church members that are  
2 worried about their congregation getting coverage.

3 The Mull family just happened to be notified in  
4 February of this year that as of November 1 of this year,  
5 they will not be covered by this company. They have a  
6 cancellation notice as of November 1, 1986.

7 Mr. Mull's problem was -- looking at this, he has  
8 dealt with this same company for 30 years. He has dealt  
9 with the same insurance agency for 40 years. He and his wife  
10 have had no problems with insurance.

11 They have a 20-year old son that over the past two years,  
12 one accident in 1984, one accident in 1985 -- both accidents  
13 were weather related.

14 On one accident, he received no citation as to cause,  
15 because it was deemed an act of God. There was ice on the  
16 road. There was nothing that anyone involved in the accident  
17 could do about it.

18 On the other one, again, it was a snow-covered road  
19 situation. He was cited as failing to yield right-of-way.  
20 The car was -- there was nothing he could do about it, but he  
21 did receive a citation on that one.

22 The family has been troubled by the fact that even with  
23 all of the money that they have paid to this insurance  
24 company over these 30 years, because their son had two  
25 accidents over which he really had no clear control over,

1 they are jeopardized with no insurability. They don't know  
2 where to go. They don't know what to do.

3 They are not known by other insurance companies. The  
4 premiums they are paying at this point, this year they paid  
5 \$1,592 for that coverage.

6 It used to be, he said, that he could remember paying  
7 \$150 for automobile insurance. Now it's \$1,592, and now they  
8 are telling him he can't even get insurance because of his  
9 son being a driver on any of their automobiles.

10 He is saying, do I have to lie to companies now, put my  
11 son on a separate policy so that I can even find a company to  
12 insure, and then we are not even guaranteed what kind of a rate  
13 we are going to get.

14 My son, he said, could actually end up paying over \$1,000  
15 himself for insurability, and my wife and I, because he is  
16 still in our household and still has access to our cars, would  
17 still be liable to very high rates and we have no protection.

18 He is saying, these kinds of things are totally beyond  
19 anyone's control, and it is a real indication to them that we  
20 have a major problem.

21 Their health insurance runs them \$2,200 a year for  
22 the three of them, another area where they are totally out of  
23 control. He said, what do we do? We can't afford to be without  
24 health insurance. We can't afford to be without automobile  
25 insurance. We can't afford to be without a homeowner's policy.

1           We have no control over what the cost of these --  
2 these current costs are costing us per year, and we have no  
3 protection that even though we have no problems, no liability  
4 suits, no other things that have happened to us as a family,  
5 we have been very responsible, we have no protection or  
6 guarantee to access to adequate coverage. That is all that I  
7 wanted to say to that.

8           CHAIRMAN DEWEESE: Thank you for your verve. Do  
9 members have questions? Gerry Kosinski from Philadelphia.

10           REPRESENTATIVE KOSINSKI: I have a few. First of all,  
11 where are the Mulls from?

12           MS. WOODS: The Mulls are from Harrisburg.

13           REPRESENTATIVE KOSINSKI: Thank God. If they were  
14 from Philadelphia, they would probably be paying double,  
15 because I alone as a single male pay more for one car for  
16 one driver than the Mulls pay.

17           So, the only consolation in this matter is, thank God  
18 they are not in Philadelphia, because we are getting killed  
19 down there.

20           One moving violation, you're an assigned risk. One  
21 accident, no matter what it is, no matter what cause, you  
22 wind up losing it.

23           And the thing that really bugs me, that really gets me  
24 upset are the drivers who are suspended administratively by  
25 PennDOT who go down to Philadelphia Traffic Court, pay the

1 citation before they're supposed to be suspended, think that  
2 Philadelphia Traffic Court is going to inform PennDOT, but  
3 they don't, and then next insurance find out they're an  
4 assigned risk.

5 So, I agree with you wholeheartedly there.

6 CHAIRMAN DEWEESE: I think we'll have Gerry as a  
7 witness at our next hearing.

8 MS. WOODS: PennPIC is a clear indicative case of that,  
9 because we have suburbans in all of our regional offices.  
10 The suburban in Philadelphia alone is over \$2,000 this year.  
11 It used to be less than \$600 for coverage in Philly.

12 REPRESENTATIVE KOSINSKI: I have a question for Lois.  
13 I agree with most of what you say, especially that physicians  
14 should be judged on an individual basis of malpractice.

15 The one thing I am going to talk about here is the  
16 licensing fee of \$500. Where did you pull out that \$500?

17 MS. BACKUS: That's a recommendation from Ralph Nader's  
18 public citizens. And we feel, although we don't know why  
19 they pulled out \$500, our recommendation in other policy  
20 papers has been 1 percent of gross income.

21 But of course, it really is quibbling about figures,  
22 because most physicians would fight it to the death.

23 REPRESENTATIVE KOSINSKI: See, here's my concern about  
24 \$500. First of all, is it reasonable? I can't see charging a  
25 resident at a hospital who is working his or her tail off and is



1 getting peanuts the same amount as a --

2 MS. BACKUS: The reason \$500 is in there is because  
3 it's the public citizen recommendation.

4 REPRESENTATIVE KOSINSKI: Because I think we may have a  
5 problem legally setting an arbitrary \$500 unless we could  
6 prove that the fee charge is related to the cost of maintaining  
7 such a staff --

8 MS. BACKUS: What is really important there is that  
9 there is no required cost to physicians right now for  
10 licensing, and that is totally unacceptable.

11 REPRESENTATIVE KOSINSKI: That's it.

12 CHAIRMAN DEWEESE: Other questions from the committee?

13 REPRESENTATIVE MOEHLMANN: Just very briefly, I hear  
14 you saying that no licensing fee for physicians is totally  
15 unacceptable, and I am not sure why.

16 What will be accomplished by imposing a \$500 licensing  
17 fee on physicians?

18 MS. BACKUS: Primarily that that money could be used  
19 to create a more effective disciplinary board. I am sure that  
20 all of you at different times have talked to members of the  
21 medical education and licensure board.

22 And every one of them complain that they are under-  
23 staffed. And that is true even in states like Connecticut  
24 which have relatively high licensure fees of \$120 or \$130.

25 CHAIRMAN DEWEESE: Jack Pressman, Lehigh County?

1           **REPRESENTATIVE PRESSMAN:** The lady from the People's  
2 Medical Society, you gave a figure, 1 percent of doctors in  
3 Pennsylvania causing how many percent of the CAT?

4           **MS. BACKUS:** 25 percent of the CAT fund losses since  
5 its inception.

6           **REPRESENTATIVE PRESSMAN:** Are you talking about number  
7 of claims or dollars?

8           **MS. BACKUS:** Dollars.

9           **REPRESENTATIVE PRESSMAN:** The same numbers for Florida  
10 were 3 percent --

11           **MS. BACKUS:** 3 percent accounted for 48 percent of all  
12 the claims from private insurers.

13           **REPRESENTATIVE PRESSMAN:** Dollars?

14           **MS. BACKUS:** Dollar losses from private insurers.

15           **REPRESENTATIVE PRESSMAN:** That's all, Mr. Chairman.

16           **CHAIRMAN DeWEESE:** Paul McHale?

17           **REPRESENTATIVE MCHALE:** This is a followup to  
18 Representative Pressman. On that variation with regard to  
19 1 percent of physicians being responsible for 25 percent of  
20 the losses to the CAT fund, are you aware that Representative  
21 Lloyd introduced an amendment four or five months ago, which  
22 would have required, whenever a major settlement is made in a  
23 medical malpractice case, that notice be given to the medical  
24 board of education and licensure so that there can be a followup  
25 investigation as to the competency of that particular doctor?

1 And if you are aware of that, how do you feel about it?

2 MS. BACKUS: I was not aware of that, but we would  
3 strongly endorse that.

4 REPRESENTATIVE McHALE: I am glad I cosponsored it.  
5 Thank you.

6 CHAIRMAN DEWEESE: Subcommittee Chairman Kosinski?

7 REPRESENTATIVE KOSINSKI: Just a little problem on that,  
8 and I think Lois brought it out in her testimony very well, is  
9 the medical board doesn't have the investigatory capacity or  
10 staffing to do it.

11 I think it would be an excellent way to help some of the  
12 malpractice problems to police the doctors like us attorneys  
13 are policed, as far as the disciplinary board, because we  
14 have a quite active disciplinary board.

15 In fact, we pay more in fees to compensate victims of  
16 crooked attorneys than we do for our administrative fee, is  
17 that correct?

18 REPRESENTATIVE McHALE: I don't know anything about  
19 crooked lawyers.

20 CHAIRMAN DEWEESE: Okay, thank you. Yes, John Cordisco  
21 from Bucks County.

22 REPRESENTATIVE CORDISCO: Thank you, Mr. Chairman.  
23 I arrived a little late. I heard most of the testimony that  
24 was given by the Medical Society. There is a reference to  
25 Hofflander and Nye?

1 MS. BACKUS: Yes.

2 REPRESENTATIVE CORDISCO: The report was done by who?

3 MS. BACKUS: It was commissioned by a group of at  
4 least ten organizations in Pennsylvania, including the  
5 Pennsylvania Bar Association, the Medical Association and the  
6 Hospital Association.

7 REPRESENTATIVE CORDISCO: These are the same people  
8 that came up with the stats that were quoted earlier?

9 MS. BACKUS: Yes. The title of the report is, Medical  
10 Malpractice Insurance in Pennsylvania, and it was published in  
11 1985. If anyone here needs a copy, we can make sure that you  
12 get one.

13 REPRESENTATIVE CORDISCO: Mr. Chairman, I would request  
14 a copy of that report.

15 CHAIRMAN DeWEESE: I was not paying attention, John,  
16 but I am sure that someone will be forthcoming and provide you  
17 with that. Is that correct, from the folks at PennPIC?

18 (No response.)

19 CHAIRMAN DeWEESE: Thank you very much, .We will take  
20 a break, and then we are going to have some very interesting  
21 testimony from the trial lawyers, the Insurance Federation,  
22 the Chamber of Commerce, our good friend Bob Flick, and Harold  
23 Goldner of the Bar Association. So, come on back in about five  
24 minutes. Thank you.

25 (Recess.)

1           CHAIRMAN DEWEESE: Ladies and gentlemen, I am going  
2 to call the hearing back into session, and if Paul Laskow, the  
3 general counsel of the Insurance Federation of Pennsylvania  
4 and Mike Lovendusky, assistant counsel of the American  
5 Insurance Association, can make their way forward to the  
6 table, we will get started here in just a matter of a minute  
7 or two or three.

8           I would like to thank both of you gentlemen for your  
9 indulgence, and if we have fallen behind schedule, I think  
10 that is intrinsic in these settings.

11           I am anxious to hear your testimony, and I welcome you  
12 to this event. Would you please tell me which one is Paul and  
13 which one is Mike?

14           MR. LASKOW: I am Paul.

15           CHAIRMAN DEWEESE: Thank you. As I said earlier, that  
16 microphone is very powerful if you will just be affectionate  
17 with it.

18           MR. LASKOW: Thank you, Mr. Chairman. I would like  
19 to give my prepared testimony and then perhaps answer a  
20 couple of the issues that were raised earlier.

21           For instance, I would like to assure Representative  
22 Kosinski that you can't be cancelled for one moving violation.  
23 You can't be cancelled for one accident. You have already --

24           REPRESENTATIVE KOSINSKI: B. S. I can prove to you  
25 different.

1 CHAIRMAN DeWEESE: We'll get into the repartee --

2 REPRESENTATIVE KOSINSKI: Don't smile and tell me  
3 different. I have one right now that was cancelled for an  
4 administrative suspension. The guy is going nuts.

5 MR. LASKOW: This Legislature acted very  
6 effectively with Act 78 to prevent cancellation for less than  
7 two accidents within a 36-month period.

8 REPRESENTATIVE KOSINSKI: It is being done. I can  
9 prove it to you. I can prove to you that there have been  
10 claims that have been put in that haven't been paid.

11 CHAIRMAN DeWEESE: I am sure you and Paul, with your  
12 keen legal backgrounds, can pursue the obscurantism of this  
13 issue at a later time.

14 Right now, I would like for Paul to commence.

15 MR. LASKOW: Thank you, Mr. Chairman.

16 Again, my name is Paul Laskow and I am general counsel  
17 of the Insurance Federation of Pennsylvania. I understood  
18 the purpose of this hearing to be an evaluation of the impact  
19 of the Political Subdivision Tort Claims Act, Act 57 in 1986,  
20 and several Senate Bills now pending before this committee.

21 It is my intention to advocate that these legislative  
22 initiatives and other pending bills such as House Bill 2426  
23 and House Bill 2230 be examined first in terms of their effect  
24 on the parties to any civil action, and second in terms of the  
25 effect on the cost of the civil action to the various parties

1 to any such civil action.

2 Before deciding we want to try to curb the cost of the  
3 civil liability system and in turn tame the cost of liability  
4 insurance, you should satisfy yourself that the change you would  
5 enact is fundamentally fair to the parties or perhaps even  
6 more fair than the system as it stands now.

7 For example, with Act 57, it lowers the standard of  
8 care for volunteer and non-profit entities who cause an injury  
9 or loss to another during the course of the voluntary activity  
10 or the non-profit activity.

11 This may result in some individuals who are injured  
12 because of the actions of a volunteer to suffer a loss not  
13 compensated for by the volunteer.

14 Indeed, I expect that was your intention. Nonetheless,  
15 it is fair that someone who gives their time as a volunteer  
16 be protected to whatever degree this statute achieves that  
17 end because of the net benefit to society from volunteerism  
18 and non-profit activity.

19 There remains, however, the question of whether Act 57  
20 will have any impact on the cost of the liability system which  
21 underlies the price of liability insurance.

22 This requires some estimation of the impact of Act 57  
23 on the frequency and severity of claims against volunteers or  
24 non-profit entities.

25 First, there is no reason to believe or to suppose that

1 Act 57 should reduce the severity or the amount that may be  
2 sought in any individual claim. The severity of the claim  
3 could be altered by imposing either a threshold or a limit  
4 on what could be claimed.

5 As to the frequency of claims, logic suggests that  
6 there should be a decrease in the number of claims, because a  
7 higher degree of negligence must be shown in order to recover.

8 But the degree of negligence is an issue of fact, and one  
9 that must be resolved by a judge or a jury. It may be that  
10 insurers will face the same number of claims with only a  
11 small change in the wording of the claims or in the complaints  
12 filed in court.

13 In order to gauge your own evaluation of the effective-  
14 ness of this new law in reducing the frequency of claims, how  
15 many among you would advise the board of a non-profit entity  
16 on which you serve to go without insurance or to reduce its  
17 limits of coverage based upon this law's enactment.

18 Legislation action that addresses the severity of  
19 claims such as the Political Subdivision Tort Claims Act with  
20 its cap on per-occurrence liability tends to have a more  
21 quantifiable impact on costs and more easily survive the  
22 question of fairness, that part of the two-pronged test that  
23 I urged you to consider in evaluating tort reform.

24 Action to curb directly the frequency of claims are  
25 harder to quantify in terms of the savings against cost of the



1 system and to justify in terms of fairness.

2 This is because legislation aimed at frequency of  
3 claims essentially involves raising a barrier to seeking  
4 redress in court.

5 For this reason, the omnibus tort reform package in  
6 House Bill 2426 focuses on the severity of claims and not the  
7 frequency of claims.

8 Only that section imposing a penalty for frivolous  
9 suits may mildly impact on the frequency of claims, but I submit  
10 to you it is not much of a barrier to going to court.

11 Similar language is found in one of the bills before  
12 this committee, Senate Bill 1427, but I question the efficacy  
13 of this bill.

14 The federal experience with Rule 11 has been not very  
15 encouraging. A recent monograph published by the American  
16 Bar Association has found that courts are unwilling to impose  
17 sanctions that are afforded them under Rule 11.

18 And the conclusion is that if the court is unwilling to  
19 dismiss frivolous suits, why would they impose sanctions after  
20 the fact?

21 In addition, you have a question as to what is a frivo-  
22 lous suit. For example, it would have been frivolous to bring  
23 an action for emotional distress, a classic non-economic loss,  
24 for merely observing an automobile accident a few years ago.

25 Now, merely observing someone else be injured is a

1 compensible injury or loss in three state.

2 CHAIRMAN DeWEESE: How about Pennsylvania?

3 MR. LASKOW: Not yet the law in Pennsylvania.

4 Whether such a development in the law is progressive  
5 or not is debatable, but that such a progression in the law or  
6 development in the law increases the frequency and severity  
7 of claims is not debatable.

8 Although there is an economic component to most of the  
9 reforms contained in House Bill 2426, some are compelled more  
10 by fairness, and some, while fair, are compelled by economics.

11 The restoration of the law on joint and several liability  
12 is plainly a fairness issue first and foremost. If someone is  
13 75 percent responsible for an injury or loss, that person  
14 should pay 75 percent of any award.

15 But if someone is only 10 percent responsible, perhaps  
16 even less responsible than the claimant, they should not be  
17 required to pay 75 percent of the award, as may now happen.

18 Another fairness issue is the scheduling of contingent  
19 fees so that the jury's award reaches the person it is  
20 intended to make whole.

21 There is no fairness in allowing a windfall fee to be  
22 taken from an injured person in order to support the bringing  
23 of an action against someone entirely different.

24 The schedule of fees set forth in House Bill 2426  
25 creates no disincentive for a lawyer taking a case of merit.

1           Indeed, under the schedule, it would provide \$115,000, a  
2 fair wage, in any million dollar case. Better still would be  
3 to adopt the provisions in House Bill 2230 that provide for a  
4 separate award of attorney's fees.

5           Establishing a limit on the amount awarded for  
6 non-economic loss is an issue driven by compelling economic  
7 impact.

8           The United States Department of Justice found that  
9 limiting these awards, which are now left completely to the  
10 unbounded discretion or speculation of a jury, limiting these  
11 awards to \$100,000 would affect less than 3 percent of all  
12 claims in the area of medical malpractice, but would reduce the  
13 total payout for such claims by an estimated 38 to 50 percent.

14           There is no reason why this reduction in costs would  
15 not be applicable to all personal injury claims. Moreover,  
16 the experience of the National Federation of State High School  
17 Associations, with its athletic injury program, shows that an  
18 injured claimant will trade an early commitment to meet the  
19 economic losses of an injury for the speculative pain and  
20 suffering award that they may win under the tort system.

21           Apart from being fundamentally fair, the tort reforms  
22 contained in House Bill 2426 and 2230 will work at ameliorating  
23 the problems of the availability and affordability of liability  
24 insurance.

25           The California experience with the Medical Injury

1 Compensation Reform Act, MICRA, has shown that the cost and  
2 price of insurance responds to tort reform.

3 For the last decade, despite court challenges and  
4 repeal efforts, MICRA has resulted in medical malpractice  
5 awards half the national average.

6 Likewise, California doctors' premiums have gone up at  
7 half the rate that premiums have risen nationally. MICRA  
8 provides for periodic payments of awards over \$50,000,  
9 disclosure to the jury of collateral sources of benefits to  
10 the plaintiff, a limitation of \$250,000 on non-economic loss,  
11 and a schedule of attorney's fees identical to that found in  
12 House Bill 2426.

13 An independent actuarial analysis estimates that the  
14 savings for each of these provisions is 6 percent, 8 percent,  
15 12 percent and 9 percent, respectively.

16 Tort reform will lead to more predictability and  
17 stability in the insurance market. Companies will tend to  
18 stay in the market and be able to price their products  
19 prudently and properly.

20 Reforms in other states, such as Connecticut, Michigan,  
21 and California, have resulted in companies shifting their  
22 capacity to offer insurance in those states.

23 Indeed, this is precisely what the chief economist at  
24 First Pennsylvania Bank predicted earlier this year. He  
25 suggested that states enacting tort reform would attract

1 business and jobs the way that certain states attract business  
2 and jobs by creating tax advantages for certain businesses.

3 I am confident that if you apply the analysis that I  
4 have outlined, you will find that House Bills 2230 and 2426  
5 are fair in their treatment of the parties, including the  
6 plaintiff's lawyer.

7 Significantly, but not more importantly, tort reform  
8 will have a direct, immediate impact on the severity of claims  
9 and perhaps a second order effect on the frequency of claims.

10 I appreciate the opportunity to contribute to this  
11 committee's consideration of the issues of tort reform.

12 CHAIRMAN DeWEESE: Thank you.

13 Michael, do you have some comments?

14 MR. LOVENDUSKY: Yes, sir. Thank you for allowing me  
15 to appear before you today. I am Michael Lovendusky,  
16 associate counsel with the American Insurance Association in  
17 Washington, D.C.

18 My name was inadvertently left off the printed  
19 witness list, so I thank the Chairman for indulging me.

20 CHAIRMAN DeWEESE: No problem.

21 MR. LOVENDUSKY: I have prepared a written statement  
22 which, if the Chairman will accept it for the record, I will  
23 simply summarize pertinent parts of it.

24 CHAIRMAN DeWEESE: I think the most vital aspect of  
25 the next 10 or 15 minutes will be the question and answer

1 session, but please, go ahead and summarize.

2 MR. LOVENDUSKY: Fine. Thank you. My written  
3 testimony does suffer something of a shortcoming in that it  
4 was tailored to address those particular issues identified as  
5 the subject matter of the hearing today.

6 Nevertheless, I will proceed and just mention a few  
7 things, that the bills that are before the committee today  
8 do not constitute civil justice reform.

9 The bills before us today tinker with the mechanics of  
10 the insurance delivery and civil just system in ways that maybe  
11 will and maybe will not save the Pennsylvania consumers some  
12 amounts of money.

13 More probably, the effect of their enactment on the  
14 overall costs of the civil justice system would be to shrink  
15 certain areas.

16 It would be the same as squeezing an inflated balloon.  
17 The costs would shrink where they are squeezed and bulge  
18 elsewhere in the system.

19 If it is this committee's intention to increase  
20 insurance availability, lessen civil justice and insurance  
21 costs, and help consumers of Pennsylvania, the committee should  
22 look at serious system reform.

23 The committee should eliminate joint and several  
24 liability -- establish several liability in all cases except  
25 in instances of concerted action by joint tortfeasors;

1 cap non-economic damages;  
2 abolish the collateral source rule;  
3 repeal Supreme Court Rule 238 regarding the application  
4 of interest on judgments;  
5 and modify the current law regarding reduction of  
6 awards to present worth.

7 These true civil justice reforms --

8 CHAIRMAN DEWEESE: Just a little bit slower, for those  
9 of us who aren't as intimately familiar with the issues, please.

10 MR. LOVENDUSKY: These true civil justice reforms can  
11 be found in detail in House Bill 2426, a bill also before this  
12 committee.

13 The improvements embodied in House Bill 2426 will  
14 benefit all Pennsylvanians and restore balance to a civil  
15 justice system which today benefits fewer and fewer people.

16 The first particular issue that the committee was  
17 going to address was governmental immunity statutes of the  
18 state.

19 The law passed by the Legislature in recent years was  
20 good law then and it is good law now, and the association has  
21 advocated the adoption of similar legislation in other states  
22 of the nation.

23 There are several reasons why the law is not providing  
24 more dramatic insurance relief for municipalities and state  
25 local government divisions.

1 First, the current law does not change the applicability  
2 of joint liability to governmental units. This is a major  
3 problem.

4 Second, excess and surplus line carriers suffered a  
5 constriction in capacity to a degree even more so than  
6 primary carriers. To a large degree, governmental insurance  
7 is written by excess and surplus carriers and not primary  
8 carriers.

9 Consequently, the markets served by the excess and  
10 surplus carriers was the hardest hit and remain the markets  
11 suffering severe availability problems today.

12 Third, insurers await the interpretation of the  
13 governmental immunity laws by Pennsylvania courts, especially  
14 the Pennsylvania Supreme Court, before they will rely upon it  
15 to improve the predictability of local government and state  
16 government risks.

17 Pennsylvania courts have been activist in expanding tort  
18 liability and insurer exposures over the past decade. Only  
19 since 1984 have Pennsylvania courts reviewed the  
20 constitutionality of sundry pieces of the governmental immunity  
21 laws. Simply put, the judicial atmosphere gives insurers  
22 pause.

23 Fourth, the problem with any state-passed sovereign  
24 immunity bill is that it suffers the inherent weakness of not  
25 being able to limit either the severity or frequency of claims



1 against a state or its local divisions under federal statutes,  
2 particularly the civil rights statute.

3 It would not be surprising to learn that the number of  
4 federal claims against state and local governments have  
5 increased at a more rapid rate than state claims against  
6 state and local governments.

7 Finally, insurers are waiting to see if the bill will  
8 succeed in actually dampening the frequency of claims filed  
9 against state and local subdivisions.

10 The bill clarifies when an individual can and cannot  
11 sue the state or local government, and it may well be that  
12 aggressive trial lawyers will be more imaginative in fitting  
13 their claims against the state and local subdivisions into  
14 those categories where suits are still permitted.

15 The cost of defending against claims, whether or not  
16 they are frivolous, is an increasing part of an insurer's cost  
17 and something that an insurer takes into consideration when  
18 calculating a premium for a particular policy.

19 Again, the single most important legislative action  
20 that could be taken to improve the governmental immunity  
21 situation is reform of joint and several liability law.

22 A party should be only liable for the amount of injury  
23 attributable to that party. The law needs an adjustment to  
24 avoid the search for the deep pocket.

25 The search for the deep pocket has often been directed

1 towards the state and local governments, with their ability  
2 to tax. The governor and the insurance department understands  
3 this, and listed the reform of joint and several liability as  
4 number one priority in its list of possible amendments to  
5 42 Pa. C.S. 85.

6 The American Insurance Association generally endorses  
7 the other amendments proposed by the governor and the commis-  
8 sioner which were communicated to you in July.

9 With regard to Act 57 of 1986, former House Bill 1625,  
10 which establishes a negligence standard for volunteer coaches  
11 and non-profit organizations, that bill is an attempt to lessen  
12 the ability exposure in order to ease availability problems  
13 in a particular class of a particular line.

14 It won't work, because its exceptions swallow the whole.  
15 That is, the unusual, fuzzy exceptional standard of conduct  
16 created in §8332.1 defies predictable interpretation.

17 Triers of fact still have free rein to find liability  
18 without restraint. An amendment striking this particular  
19 language would be the first step in making the new law  
20 effective.

21 With regard to Senate Bill 1395, authorizing  
22 establishment of local government joint insurance funds, this  
23 bill attempts to directly ease local government insurance  
24 problems by permitting them to underwrite risks from a  
25 common pool.

1           In recent years, various legislative proposals have  
2 been advanced to permit insurance pooling or group self-  
3 insurance. Generally, the impetus has come from municipalities  
4 or entities like school boards.

5           Although the details may vary, all of these proposals  
6 have certain common elements and deficiencies from a regulatory  
7 and public policy perspective.

8           Political questions, such as the propriety of  
9 assessing taxpayers of one municipality to pay for the losses  
10 of another municipality, or the problems of adverse membership  
11 selection as among rural and urban areas with distinct loss  
12 experience, are beyond the scope of my comments today.

13           That is something which should be considered by this  
14 committee before approving this particular bill. The one  
15 comment I would urge upon the committee is that what really  
16 differentiates recent group self-insurance proposals from  
17 those traditional insurance mechanisms with which we are all  
18 familiar is the way in which the group self-insurance  
19 proposals and pools would be regulated.

20           The cornerstone of most proposals is an exemption from  
21 the requirements of the insurance law that would otherwise  
22 apply.

23           Instead, the group self-insurance pools would be  
24 regulated only under whatever provisions are set forth in the  
25 particular bill.

1           The hope is that in addition to retaining the benefit  
2 of any profits, the insureds will also save themselves the  
3 significant costs of regulatory compliance, not to mention  
4 premium taxes, licensing fees and various assessments paid by  
5 all insurance companies.

6           Logically and as a matter of public policy, it makes no  
7 sense to create a favored class of insurance companies for  
8 particular interest groups.

9           The laws regulating insurance companies in Pennsyl-  
10 vania have been developed over the better part of the century.  
11 These laws reflect the public policy of the state in terms of  
12 protecting policyholders and claimants from the consequences  
13 of mistreatment or mismanagement.

14           The potential cost savings in an exemption from the  
15 insurance regulatory laws has a hidden danger: increased risk  
16 of harm to everyone who must look to the insurance mechanism  
17 for protection.

18           With respect to municipalities, for example, this means  
19 that the interests of municipal entities, local taxpayers,  
20 municipal employees, and accident victims would not be  
21 protected to the same extent as if insurance were purchased  
22 from a regulated insurer.

23           In my written testimony, I summarize ten particular  
24 areas of the law which should be made applicable to any  
25 group self-insurance pool, and I would urge the committee to

1 review those ten things and apply them to any legislation  
2 that is approved by this committee which would allow  
3 municipalities to form group self-insurance pools.

4 With regard to Senate Bill 1427, which increases the  
5 claim amounts of cases subject to compulsory arbitration,  
6 the bill is a modest, commendable gesture.

7 The association urges that consideration be given to,  
8 first, increasing the limits of the amount in controversy  
9 under which cases are compelled to arbitration, and secondly,  
10 requiring pleadings to be verified by affidavit, the violation  
11 of which is punishable pursuant to the perjury statutes. The  
12 association does recommend that this bill be reported to the  
13 full House for consideration.

14 With regard to Senate Bill 1428, regarding punitive  
15 damages, the bill could be greatly improved. The association  
16 strongly urges the committee to adopt the approach embodied in  
17 House Bill 2426

18 Senate Bill 1428's creation of a standard of "outrageous  
19 conduct" is an unusual, poorly defined concept that lowers  
20 the level of behavior punishable by punitive damages to  
21 include unintentional "reckless indifference." The entire  
22 notion will exacerbate the problems engendered by the misuse  
23 of punitive damages.

24 Further, Senate Bill 1428 could increase rather than  
25 decrease the frequency of punitive damage awards with its use

1 of the preponderance of evidence standard rather than that  
2 of clear and convincing evidence.

3 The bill does contain one commendable nugget at §8364,  
4 which would deny prejudgment interest or delay damages to be  
5 added to a punitive damage award. The association also urges  
6 the committee to approve this bill and report it also to the  
7 full House for its consideration.

8 Tahank you for your consideration of my written  
9 testimony. Together with Paul, we are available to answer any  
10 questions the committee may have.

11 CHAIRMAN DEWEESE: You said you may have a few reactions  
12 to some things that were said earlier. Before you get to that,  
13 I would like to entertain a few questions from here, and we  
14 have Representative McHale, Representative Baldwin, Represen-  
15 tative Kosinski, Dave Mayernik, Mike Bortner. So, we've got  
16 some questions.

17 Paul McHale, Lehigh County?

18 REPRESENTATIVE McHALE: Thank you, Mr. Chairman.

19 Mr. Laskow, just so we are clear as to what we mean  
20 by some of these terms that the lawyers I think are very aware  
21 of, that to laypersons are possibly obscure in the sense that  
22 these are terms that people don't run into on a daily basis,  
23 non-economic loss, that is a very sanitized term in my opinion.

24 We are really talking about what has traditionally been  
25 called pain and suffering, is that correct?

1 MR. LASKOW: That's correct.

2 REPRESENTATIVE McHALE: Why do you use the term "non-  
3 economic loss" instead of pain and suffering, which is the  
4 term which has traditionally been used under the law?

5 MR. LASKOW: Because that is what it is. It is a  
6 non-economic loss. It is not quantifiable. It is completely  
7 speculative.

8 REPRESENTATIVE McHALE: I think there is an opinion  
9 there, and obviously it's your right to express that.

10 You indicate on page 4 of your testimony, basically what  
11 you have just reiterated, that is that pain and suffering is  
12 now, and I quote, "left to the unbounded speculation of a jury."

13 I trust juries. Why don't you?

14 MR. LASKOW: I do. I was a trial attorney for the  
15 U.S. Department of Justice for eight years. I have a great deal  
16 of respect and trust in juries. It's just that --

17 REPRESENTATIVE McHALE: Why do you describe them in  
18 terms of unbounded speculation of juries?

19 MR. LASKOW: Because that is what it is. They have no  
20 guidelines.

21 REPRESENTATIVE McHALE: Why do you call it speculation?

22 MR. LASKOW: Because there is no way of quantifying a  
23 non-economic loss.

24 REPRESENTATIVE McHALE: Is it true that juries have been  
25 making these kinds of decisions for better than 300 years?

1 MR. LASKOW: I don't think they have been awarding  
2 pain and suffering for 300 years. I don't know exactly when  
3 that innovation was adopted.

4 The problem is that you are substituting some  
5 predictability for speculation. And that is a tradeoff that  
6 you I think as arbiters of society have to weigh.

7 And if you can save 38 to 50 percent of the payout for  
8 claims and roll that savings back into savings on premiums,  
9 as has happened in California, then a good argument can be  
10 made along the same lines of the argument that justified your  
11 action on Act 57, that it's fair.

12 3 percent will only get, only, \$100,000, but 38 to 50  
13 percent of the payout will be saved. And so I submit that  
14 that is a fair imposing of a standard.

15 REPRESENTATIVE McHALE: Mr. Laskow, if you are saying to  
16 this committee, we will accept these limitations on a jury  
17 award in order to keep down the costs of insurance, that is  
18 an economic argument that I think we ought to consider.

19 But when you begin to, I think, partially and unfairly  
20 criticize the system of justice that we have had for better  
21 than 200 years by indicating that juries act in an irresponsi-  
22 ble manner or with unbounded speculation, I don't think that  
23 is factually correct, and I think that does a disservice to the  
24 system of civil justice which I believe very strongly in.

25 Isn't it true, the jury is not making these decisions



1 based on unbounded speculation? Isn't it in fact true that  
2 a jury makes this type of determination after a full trial,  
3 cross-examination, presentation of evidence on both sides of  
4 the case, and then the jury decides if any compensation is  
5 appropriate in terms of the pain suffered by the victim?

6 I find that to be due process of law, not unbounded  
7 speculation. Could you comment on that?

8 MR. LASKOW: It is completely speculative. There is  
9 no other way to characterize it. We look at the same facts and  
10 we draw different inferences. I don't disagree with you.

11 REPRESENTATIVE MCHALE: For folks who are unfamiliar  
12 with the process, unbounded speculation is not the kind of  
13 decision which is made based on the evidence following a  
14 full trial.

15 I guess what I am saying is, if you are arguing we will  
16 save insurance dollars, that's an argument that I think is  
17 respectable and we ought to take a look at that.

18 But when you begin to criticize, not only in terms of  
19 your testimony but in terms of the ads that I see in the media  
20 over the last six months the very jury system itself, I find  
21 that to be unfair.

22 MR. LASKOW: You are reading more into my testimony than  
23 is there. I am not attacking the jury system. I am saying  
24 that the juries need guidance here, where they are unfettered  
25 now.

1           REPRESENTATIVE MCHALE: You're not suggesting  
2 guidance. You're suggesting a limit.

3           MR. LASKOW: Well, they can award as they see fit up to  
4 the limit.

5           REPRESENTATIVE MCHALE: I would simply suggest to you  
6 that the argument that has been presented by your industry  
7 does a disservice to the people who serve on juries and who  
8 for better than 200 years have been making these kinds of  
9 decisions.

10           Now, I agree with you on a number of major points.  
11 Please don't view me simply as an antagonist. I am on this  
12 point, but I agree with you on joint and several liability,  
13 and I agree with you in terms of limiting contingency fees.

14           Having said that, how will a limitation on contingency  
15 fees keep down the costs of insurance? I understand how it  
16 will keep more money in the pocket of the injured person,  
17 and I find that to be a worthwhile goal, and that is why I  
18 support it.

19           But I don't understand how it will keep down the cost of  
20 insurance.

21           MR. LASKOW: Because juries are made up of people who  
22 read and write English and know that there are such things as  
23 contingent fees, and they inflate awards to compensate for it.

24           REPRESENTATIVE MCHALE: Are you saying they inflate the  
25 award to take care of the attorney?

1 MR. LASKOW: Absolutely. It would be fanciful to  
2 suggest otherwise.

3 CHAIRMAN DeWEESE: I am not a lawyer, Paul, and I find  
4 that to be an outrageous observation. If I am on a jury --  
5 I just don't think that's accurate. I just had to intercede  
6 there.

7 REPRESENTATIVE McHALE: Mr. Laskow, isn't it fact true  
8 that if you limit contingent fees -- I emphasize again that I  
9 support a reasonable limit on a contingent fee -- that that  
10 will not keep more money in the pocket of the insurance  
11 industry, but it will keep more money in the pocket of future  
12 victim; but whether it's in the victim's pocket, where I  
13 think it belongs, or in the attorney's pocket, it is still  
14 going to cost the insurance companies the same amount of money?

15 MR. LASKOW: The actuarial study which I referred to  
16 earlier, which I will be happy to provide to the committee,  
17 found that there were quantifiable savings to be had from  
18 limiting contingent fees.

19 REPRESENTATIVE McHALE: I understand that conclusion.  
20 I am asking why.

21 MR. LASKOW: Because a jury wants to make a person whole,  
22 and they know that in addition to whatever their real  
23 economic losses are, there is an attorney that has spent the  
24 last week or two or three with them arguing that case who needs  
25 to be paid.

1 It's a fiction to suppose otherwise.

2 REPRESENTATIVE KOSINSKI: The last week or two or three?

3 Paul, how long does it take to bring these cases to court?

4 Years.

5 MR. LASKOW: I am saying, that's how long the person

6 is on the jury --

7 REPRESENTATIVE KOSINSKI: One or two or three weeks?

8 Paul, be real.

9 MR. LASKOW: And bear in mind that an insurance company

10 has to defend their cases as well, so there is not one lawyer

11 but two.

12 REPRESENTATIVE McHALE: Mr. Laskow, I would simply make

13 the point, as you argue -- and this is my opinion -- that

14 people of moderate financial means should be limited in terms

15 of their access to an attorney by means of a limitation on

16 contingency fees, and I support that limitation, I find it

17 ironical to hear that argument from an attorney who is being

18 paid by the insurance industry.

19 The problem has been historically, the contingency fee

20 has given access to the courtroom for people who otherwise

21 would not be able to appear there.

22 I find it ironic that an attorney who is probably being

23 paid on an hourly basis comes in and so boldly criticized

24 the sensibility of the contingency fee with regard to people

25 who can't afford to pay \$150 per hour.

1 MR. LASKOW: You assume incorrectly that I am paid  
2 on an hourly basis.

3 REPRESENTATIVE McHALE: I am certain you are being paid  
4 sir.

5 MR. LASKOW: I am. The problem is not -- in no way  
6 does this very modest limitation keep someone out of court.  
7 As I noted, on a million dollar case, the attorney gets  
8 \$115,000, a very substantial fee, I suspect you would agree.

9 REPRESENTATIVE McHALE: Yes, I would.

10 MR. LASKOW: The problem is that in medical malpractice  
11 cases, the plaintiffs lose eight out of ten cases. The  
12 doctors win eight out of ten cases. But the insurance  
13 company loses ten out of ten cases, because they have to pay to  
14 defend that case, at a substantial cost.

15 REPRESENTATIVE McHALE: Mr. Laskow, I agree with your  
16 conclusion. I emphasize again that the contingency fee ought  
17 to be limited. I agree that we ought to give the trial judge  
18 discretion to award legal fees in the event of a frivolous  
19 lawsuit.

20 Again, that is a position that I think you would  
21 advocate. What I resent is the erroneous implication that a  
22 limitation on a contingency fee will bring down the cost of  
23 insurance. I don't think that it will.

24 I think it will result in greater justice to the  
25 injured victim, and that is why I support it, but I don't think

1 it is going to lower insurance premiums at all.

2 If I may ask a final question, and this really arises  
3 out of the municipalities in my district -- you may have  
4 heard me ask this question earlier -- why would a community  
5 that has an unblemished litigation record, the community  
6 either has never been sued or has never been sued successfully,  
7 the community is a very stable community, relatively little  
8 development, the community does not have a sanitary landfill  
9 or other major risk involving potential liability, the  
10 community has never been sued in federal court for a civil  
11 rights violation; when you have in fact what appears to be a  
12 model community in terms of insurance risk, why would that  
13 community in the course of one or two years experience a  
14 300 or 400 percent increase in premium coverage for  
15 liability insurance?

16 MR. LASKOW: Because of claims in that class of  
17 business generally among municipalities similarly situated.  
18 The idea of insurance is that you spread the risk among  
19 similarly situated entities.

20 In Pennsylvania in 1980 there were 159 claims against  
21 municipalities. In 1981, it went from 159 to 268. In 1982,  
22 it went from 268 to 586. That's almost double.

23 REPRESENTATIVE MCHALE: How are you defining your  
24 classes? What I don't understand is, insurance ought to  
25 be based on risk.

1           When a community has a demonstrable record of not being  
2 a risk, why is that community classified in a manner that  
3 results in a higher premium?

4           I can give you community after community where that  
5 has happened throughout the commonwealth of Pennsylvania.

6           MR. LASKOW: Insurance is not strictly experience-based.  
7 If it were, you would have no need for insurance. If every  
8 doctor starting out had a claim in his first year of practice  
9 which resulted in a \$100,000 award, should his premium the next  
10 year be \$100,000? That would be very pure experience rating.

11           REPRESENTATIVE McHALE: You raise a good analogy. What  
12 I am saying is, in the same sense that general practitioners  
13 should not be classified with neurosurgeons and anesthesiolo-  
14 gists, why should a stable community with an unblemished track  
15 record in terms of litigation experience be classified in a  
16 manner that results in a substantially higher premium?

17           That kind of classification does not make sense to me.  
18 If that is not your method of classification, why are these  
19 stable communities experiencing horrendous increases?

20           MR. LASKOW: They are being grouped with similarly  
21 situated communities. The problem is that the claims  
22 experience has gone up dramatically. I was telling you that,  
23 from 159 to 268 to 568 to 730.

24           REPRESENTATIVE McHALE: That's for all municipalities?

25           MR. LASKOW: Correct.

1           **REPRESENTATIVE McHALE:** What I'm saying is, why isn't  
2 that broken down?

3           **MR. LASKOW:** Because any municipality or most  
4 municipalities suffer some sort of exposure due to the fact  
5 that they maintain roads and bridges.

6           **REPRESENTATIVE McHALE:** Sure.

7           **MR. LASKOW:** I think this committee had testimony from  
8 one insurance company in Pennsylvania located here in  
9 Harrisburg who said at the present time they have 89 cases  
10 open where the municipality has been joined in the suit in a  
11 traffic accident, merely as the deep pocket.

12           And if you maintain roads and bridges, you are a very  
13 attractive target in any sort of traffic accident. If you  
14 are 5 percent at fault, 10 percent at fault because the weeds  
15 have grown up or the stop sign is five feet placed in the  
16 wrong direction, then the city or municipality is going to be  
17 held liable, and perhaps liable --

18           **REPRESENTATIVE McHALE:** If you have a municipality  
19 maintaining the same roads and bridges 30 years and has never  
20 been sued, now recognizing the fact that that history is not  
21 the sole factor being considered, is it not an extremely  
22 important factor in determining future risk?

23           **MR. LASKOW:** Yes, it is an important factor, and it is  
24 taken into account.

25           **REPRESENTATIVE McHALE:** It is not being reflected in



1 insurance premiums.

2 MR. LASKOW: Not to perhaps the degree that you would  
3 like, but it is reflected to some degree.

4 REPRESENTATIVE McHALE: When I see increases of 300  
5 or 400 percent over a two-year period in a community which is  
6 6,000 people and where that community has never successfully  
7 been sued, I scratch my head as to the logic involved in those  
8 insurance increases.

9 MR. LASKOW: But you see a claims experience that is  
10 more than five times greater over four years.

11 REPRESENTATIVE McHALE: No question about it. There  
12 are communities that have sanitary landfills. There are  
13 communities that may have poor records in public service in  
14 terms of their litigation experience. They have been sued  
15 successfully.

16 REPRESENTATIVE HAGARTY: While he has the chart out,  
17 ask him how many of those suits were successful?

18 REPRESENTATIVE KUKOVICH: I would like to know, and  
19 Paul, I think this is a followup for you --

20 CHAIRMAN DeWEESE: The chair recognizes the gentleman,  
21 Mr. Kukovich.

22 REPRESENTATIVE KUKOVICH: A couple of points: whether  
23 or not you have statistics on claims pre-79, when the new law  
24 went into effect; and secondly, more importantly, we don't know  
25 how many of these -- are these incurred claims?

1 MR. LASKOW: Yes.

2 REPRESENTATIVE KUKOVICH: They are incurred claims.

3 If they are incurred claims, how many of these were actually  
4 paid and how many are known claims and maybe haven't been paid,  
5 and how many are incurred but not reported? I assume that is  
6 all rolled in.

7 MR. LASKOW: I think you can appreciate, this was  
8 beyond the scope of my testimony. I just had access to this  
9 chart, and I thought I would give it to you. I don't have --

10 REPRESENTATIVE KUKOVICH: So, if you can't answer that,  
11 this chart doesn't mean a thing, does it?

12 MR. LASKOW: No, that's not true. That's completely  
13 unfair to say such a thing. That shows you the claims that  
14 have been received by those companies, claims that have to be  
15 adjusted, claims that have to be defended.

16 REPRESENTATIVE HAGARTY: These are just filed claims,  
17 and we have no idea whether these were --

18 MR. LASKOW: That chart doesn't tell you, but certainly  
19 that information is otherwise available.

20 REPRESENTATIVE KUKOVICH: Can you provide that informa-  
21 tion? I mean, it is possible, if you don't have --

22 MR. LASKOW: No, I don't have that information. The  
23 Insurance Federation is not a statistical agent. The  
24 insurance department may have that information. I assume  
25 they have that information, but I do not.

1 REPRESENTATIVE KUKOVICH: So, it's possible that on  
2 your 1983 chart, the 730 incurred claims, maybe none of  
3 those even resulted in a payment; that's possible, isn't it?

4 MR. LASKOW: That's very unlikely, wouldn't you admit?

5 REPRESENTATIVE KUKOVICH: Yes, but it's possible, isn't  
6 it, or maybe only a few of them were actually paid.

7 MR. LASKOW: Equally unlikely, I would submit.

8 REPRESENTATIVE KUKOVICH: But possible?

9 MR. LASKOW: Anything is possible.

10 REPRESENTATIVE KUKOVICH: And you don't have any  
11 documentation to support it, either?

12 MR. LASKOW: I have no documentation with me to support  
13 that.

14 REPRESENTATIVE KUKOVICH: Okay.

15 CHAIRMAN DeWEESE: Paul, do you have any further  
16 comments?

17 REPRESENTATIVE McHALE: One final comment. I would  
18 emphasize for the gentleman that there are several fundamental  
19 points where I agree with him.

20 That may not be something that certain other groups  
21 want to hear, but I agree with you on issues such as joint  
22 and several liability, a limitation on contingency fees, a  
23 reasonable limitation.

24 Those are very controversial issues. But I really  
25 resent the whole tone of your industry over the last year,

1 in mounting what I consider to be a fundamental assault on  
2 the jury system.

3 Our juries are not foolish. The people back in my  
4 home community sit there as a group of 12 people and by and  
5 large make pretty good choices as to what is appropriate in  
6 order to compensate an injured victim.

7 And I resent the ad campaign, I resent the innuendo  
8 that is raised in your testimony with regard to the  
9 arbitrariness or the unbounded speculation of juries.

10 We have trusted juries both in the criminal system and  
11 the civil system for better than 300 years, and I think,  
12 consistent with that faith, you could make some pretty good  
13 arguments.

14 But when you begin to attack the jury system or place  
15 unreasonable limits on jury judgment, then you lose me.

16 MR. LASKOW: You find an innuendo that isn't there.  
17 I made no such attack.

18 REPRESENTATIVE McHALE: Unbounded speculation.

19 MR. LASKOW: I stand by that.

20 REPRESENTATIVE McHALE: That is not the system we have,  
21 neither in case law nor in practice. Thank you, Mr. Chairman.

22 CHAIRMAN DeWEESE: Thank you for your emphatic  
23 observations. Any questions? The Chair recognizes Bill  
24 Baldwin, then Gerry Kosinski, then Dave Mayernik, then Mike  
25 Bortner, so you'll have an idea; then Allen Kukovich will

1 follow up, then Lois Hagarty.

2 REPRESENTATIVE HAGARTY: If you're still patient enough.

3 CHAIRMAN DeWEESE: Bill Baldwin.

4 REPRESENTATIVE BALDWIN: Thank you, Mr. Chairman.

5 Mr. Laskow, getting back to a point that Paul raised  
6 about the municipalities, and Mr. Lovendusky, you mentioned a  
7 lot of municipalities are experiencing problems because of  
8 those civil rights actions.

9 If you have a municipality that has no police force,  
10 no landfill, why should they join together for insurance  
11 purposes with other municipalities who do have a police force,  
12 who do have a landfill?

13 MR. LASKOW: They are not. You're right.

14 REPRESENTATIVE BALDWIN: They are not?

15 MR. LASKOW: Correct. They are rated separately. They  
16 pay different premiums than people who have landfills.

17 REPRESENTATIVE BALDWIN: Then why would they experience  
18 such a vast increase when they don't have claims experience,  
19 and those municipalities don't have --

20 MR. LASKOW: If they maintain a stop sign, they are at  
21 risk.

22 REPRESENTATIVE BALDWIN: Not to that extent.

23 MR. LASKOW: Absolutely correct, you're right.

24 REPRESENTATIVE BALDWIN: But they're lumped altogether  
25 in that chart.

1 MR. LASKOW: No, no. You're asking two separate  
2 questions. You asked, are they lumped together for rating  
3 purposes. The answer is no.

4 Are those claims aggregated on that chart? Yes, they  
5 are.

6 REPRESENTATIVE BALDWIN: You are using those claims in  
7 that chart to justify the rates that you are charging.

8 MR. LASKOW: No, I am trying to explain to you why  
9 rates have gone up. Rates have gone up because of the  
10 frequency of claims.

11 REPRESENTATIVE BALDWIN: The only thing I don't  
12 understand, it seems to me there would be three things that an  
13 insurance company would have to look at in terms of monies  
14 paid out.

15 One is the frequency of claims, and the other is  
16 severity, and the third thing, which I don't see you addressing  
17 anywhere, is how many times you actually paid the amount of  
18 damages, so that if you have a win, if you defend something  
19 successfully, sure you're going to have defense costs, but  
20 you are not paying the claim, you're not paying the damages.

21 It would seem to me that that is a statistic that  
22 should bear on your rates, that you are not paying that money  
23 out of your pocket.

24 MR. LASKOW: As I say, the medical malpractice area,  
25 the doctors win eight cases out of ten. That is reflected in

1 the rates. They can't charge --

2 REPRESENTATIVE BALDWIN: Well, you have the Political  
3 Subdivision Tort Claims Act that has been in effect now for  
4 seven or eight years. That has a cap on the amount of damages  
5 that can be paid and limits very severely how you can sue in  
6 the first place.

7 You have to fit in to one of eight categories. And  
8 yet, I have municipalities throughout my district who can't  
9 even get insurance, and if they do get it, they are paying  
10 three or four times what they did before.

11 I think Mr. Lovendusky said, they have to wait for the  
12 courts to decide. That has been seven years. He is telling us  
13 that if we adopt this whole tort reform, which I view as a  
14 major blow to the civil justice system, then we are going to  
15 have to wait seven or eight years to see any change in insurance  
16 rates anyway.

17 MR. LOVENDUSKY: Generally speaking, there has to be  
18 some amount of time pass between the passage of a law and its  
19 interpretation by the courts in order to ascertain what the  
20 effect of the bill will be.

21 There have been insurers in particular states who, as  
22 a matter of good faith, have either restrained or even lowered  
23 their ratemaking in the particular states that have passed  
24 significant tort reform. The states of Washington state and  
25 Connecticut come to mind, where primary carriers, in response

1 to the legislatures' enactment of significant tort reform,  
2 have moderated, either by restraining or actually lowering,  
3 their rates for particular lines of insurance.

4 REPRESENTATIVE BALDWIN: The insurance industry is  
5 advocating this modification of the civil justice system. What  
6 I am asking is, are you saying to the Legislature that if we  
7 make these changes, that we are going to see a decrease in  
8 rates?

9 MR. LOVENDUSKY: I am not certain, sir, what changes  
10 we are talking about. The more changes that you make along  
11 the lines of say House Bill 2426, the more impressive the  
12 action would be upon insurers and the more able insurers would  
13 be to restrain their ratemaking.

14 But we are talking speculation here as to what you are  
15 going to do, as to what the House is going to do, as to what  
16 the Legislature --

17 REPRESENTATIVE BALDWIN: I am asking, if we adopt the  
18 whole package that you are advocating, you still can't guarantee  
19 that you are going to reduce the rates.

20 MR. LOVENDUSKY: I can't, no.

21 REPRESENTATIVE BALDWIN: Then you are not really saying  
22 anything.

23 MR. LASKOW: If I may, that's where you look to the  
24 California experience, with the Medical Injury Compensation  
25 Reform Act. There, after ten years, you can see tort reform



1 works.

2 Rates have gone up at half the national average, and  
3 the awards are half the national average. There is no question  
4 that tort reform works. All you have to do is look west.

5 REPRESENTATIVE BALDWIN: I am looking at the experience  
6 in Pennsylvania with the Political Subdivisions Tort Claims  
7 Act, that it has gone in the opposite direction and it is  
8 doing almost exactly the same thing that you are asking us to  
9 do with the whole civil justice system.

10 MR. LASKOW: No, it hasn't gone in the opposite direction.  
11 Your earlier witness from the Local Government Commission, I  
12 think it was, says that the Political Subdivision Tort Claims  
13 Act has been very effective at limiting claims and awards.

14 REPRESENTATIVE BALDWIN: It has been very effective in  
15 shielding them from liability, but it has not shielded from  
16 exorbitant insurance premiums?

17 MR. LASKOW: Right, because of the increase of the  
18 frequency of claims. And you have got to break your analysis  
19 between the frequency of claims and the severity of claims.  
20 The tort claims act, political subdivision act, addresses the  
21 severity of claims and not the frequency of claims.

22 MR. LOVENDUSKY: Sir, contrary to your interpretation of  
23 what an insurer has to look at before deciding how to rate a  
24 class of risk, one of the elements that an insurer must look at  
25 is the evolution of the law, both the case law and the

1 legislative law.

2 And the evolution of the law in certain areas, including  
3 municipality law, has been such to alarm insurers and to cause  
4 them to pause before writing those risks.

5 As I mentioned in my testimony, municipal liability,  
6 local and state governmental liability insurance is, to a  
7 large degree, written by excess and surplus lines carriers,  
8 those carriers that write the riskiest kinds of lines.

9 The primary carriers left that particular line of  
10 insurance long ago, because of the erosion in sovereign  
11 immunity both at the state and at the local subdivision level.

12 REPRESENTATIVE BALDWIN: As Paul said, I can see an  
13 argument concerning the joint and several liability issue in  
14 terms of fairness.

15 But on the contingent fee issue, I think what you are  
16 saying is, there is no question that lowering the contingent  
17 fee is going to put more money into the victim's pocket.

18 But I think what you are really looking at, from your  
19 point of view, is to reduce the frequency of the claims. And  
20 I think you can talk around that --

21 MR. LOVENDUSKY: Sir, the frequency of claims is  
22 certainly one of the most troublesome areas in --

23 REPRESENTATIVE BALDWIN: When you are going to try to  
24 make the accessibility of an attorney reduced for the person  
25 in lower income brackets, then I think you have to also couple

1 that with some kind of limitation on what the defense side  
2 can do from an attorney's point of view, so you have fairness  
3 in the system.

4 I don't think there is an attorney practicing anywhere  
5 who does any claimant's cases who can't tell you stories where  
6 the other side has tried to bury claimants in paper, so it  
7 gets so expensive to try a case that they want to run to a  
8 settlement. They can't afford to go any further.

9 There are automobile manufacturers that are self-  
10 insured. When you sue one of those, you end up getting  
11 interrogatories by UPS in cartons, and then you have to answer  
12 them.

13 If there is no limitation on what the defense can do,  
14 how is that fair in giving the plaintiff equal access to the  
15 courts? There are cases that a plaintiff could not afford to  
16 take without the contingent fee situation.

17 MR. LASKOW: We are not changing the contingent fee  
18 system, but just tinkering with the top end, the windfall fee  
19 at the top end.

20 This schedule allows the claims attorney to take 40  
21 percent of the first \$50,000, so you are talking about the  
22 vast majority of cases already, 40 percent.

23 It then sets 33-1/3 of the next \$50,00. Is that any  
24 limitation on the contingent fee system?

25 REPRESENTATIVE BALDWIN: I think 40 percent of the first

1 \$50,00, you are talking about the vast majority of cases, and  
2 most attorneys aren't even charging that now. What I am  
3 concerned about is a situation where you have the Dalkon  
4 Shield case, where the attorneys had to finance \$800,000 -- I  
5 am not sure if that is the figure -- in pretrial costs just  
6 to get that case that far.

7 You are talking about a major case with major damages,  
8 and that is where you want to limit it. How could a claimant  
9 get an attorney to take that on, with no guarantee of a win?

10 MR. LASKOW: By paying him 40 percent of the first  
11 fifty, 33-1/3 of the next 50, 20 percent of the next \$100,000,  
12 and then 10 percent of the next \$100,000, everything over  
13 \$100,000. That's a whopping fee.

14 REPRESENTATIVE BALDWIN: Shouldn't you couple that  
15 with some kind of limitation on what the defense can spend on  
16 the other side?

17 MR. LASKOW: We are not limiting what the plaintiff  
18 can spend in presenting his case. We are merely limiting  
19 how much the plaintiff's lawyer walks away from the  
20 courthouse with.

21 REPRESENTATIVE BALDWIN: You know very well that the low  
22 income plaintiff doesn't advance the cost for medical experts  
23 and engineering experts, that they don't have the money, if  
24 they have the money to go out and hire an attorney in the first  
25 place.

1           That's coming out of the contingent fee a lot of times,  
2 and that's why attorneys take them on a contingent fee basis  
3 because they have to advance all their costs to the client in  
4 order for the client to get to court.

5           If you are not going to have some kind of balance on the  
6 defense side, how will you have a fair justice system?

7           REPRESENTATIVE MCHALE: You would allow 40 percent of the  
8 first \$50,000?

9           MR. LASKOW: Correct.

10          REPRESENTATIVE MCHALE: Isn't that unethical under  
11 existing law?

12          MR. LASKOW: No. It's unbounded, again.

13          REPRESENTATIVE MCHALE: That's not true. I suggest you  
14 take a look at Pennsylvania law.

15          MR. LASKOW: Attorneys can charge 40 percent.

16          REPRESENTATIVE MCHALE: Generally it's 1/3.

17          MR. LASKOW: Generally it is 1/3, but they can charge  
18 40 percent.

19          REPRESENTATIVE MCHALE: I find 40 percent to be  
20 excessive.

21          MR. LASKOW: I think it is excessive as well.

22          REPRESENTATIVE MCHALE: Why are you advocating it?

23          MR. LASKOW: Because the idea is not to curtail access to  
24 court for the bulk of cases. If you want to amend it to 33-1/3,  
25 I would certainly be willing to have that.

1           But there are cases now where it's 40 percent. The  
2 court does have authority to regulate the fee for minors,  
3 settlements of awards for minors.

4           But otherwise, it is whatever the lawyer can get.

5           CHAIRMAN DEWEESE: Representative Kosinski?

6           REPRESENTATIVE KOSINSKI: I am going to yield  
7 temporarily to Representative Cordisco, who must get back to  
8 his district.

9           REPRESENTATIVE CORDISCO: I have listened back and  
10 forth as to the question and answers, and I think there is  
11 one question that I would like to ask before I leave here.

12           I see the testimony following that the insurance  
13 industry basically is pointing the finger to tort reform and  
14 the trial lawyers are pointing the finger to the insurance  
15 industry.

16           I think I would prefer that the individuals coming  
17 before us today say something in the way of policing their own,  
18 rather than back and forth.

19           My question to you is going to be, what effect do you  
20 think that the poor investment of the insurance industry per  
21 se had on the cost of the premiums over the last four or five  
22 years?

23           And the second part of that question would ask, what do  
24 you see as a recommendation of policing your own industry so  
25 that we see some type of guarantee that in fact, if tort reform

1 should become a reality, that in fact we are going to see a  
2 reduction in rates? And please do not refer to the comparison  
3 in California, because that is theoretical.

4 Can you give us a guarantee here today that in fact  
5 if that takes place, that you are going to guarantee a certain  
6 percentage, if certain recommendations come forth?

7 Because I'll tell you why. Basically I heard the same  
8 thing when we looked at no-fault when we recently made some  
9 corrections there, that we would see a drastic reduction.

10 And I will say for the record that I cast a vote in  
11 that fashion, and saw an increase, not a reduction, and I am  
12 really sorry that I cast a vote that way.

13 So, if you can follow what I have told you, what I am  
14 requesting is, A, what effect have your poor investments  
15 had on premiums, the increases thereof; and secondly, what  
16 police recommendations can you give or mechanisms can you give  
17 to police your own industry so that we would see a guarantee  
18 of a reduction in rates?

19 MR. LASKOW: First, you assume a fact for which there is  
20 no evidence, and that is that there were poor investments.  
21 Investment income in the industry rose dramatically throughout  
22 the last decade.

23 REPRESENTATIVE CORDISCO: Let's clarify it then. At  
24 what point would you say that it is fair to say that some of  
25 the members within your industry were accepting premiums at

1 maybe a loss to gain that money to put it out where the  
2 interest rate was somewhere between 15 and 18 percent, to  
3 gain the revenue, so they were making up for that loss --

4 MR. LASKOW: That's right, as well they should. They  
5 were accepting an underwriting loss because they knew they would  
6 make it up in investment income.

7 REPRESENTATIVE CORDISCO: That's speculative. You are  
8 putting that dollar out there --

9 MR. LASKOW: That's not speculative. They did invest  
10 and cover their underwriting losses with their investment  
11 income, as well they should.

12 To charge higher premiums because you are making more  
13 investments would be excessive. You couldn't do that. The  
14 state insurance department would not allow you to ignore your  
15 investment income.

16 So, premiums did go down because companies were making  
17 more on their investments. That is the way it should work.

18 REPRESENTATIVE CORDISCO: What was the result when the  
19 interest rates dropped?

20 MR. LASKOW: Then they couldn't cover their underwriting  
21 losses, and they had to increase the premium side to cover the  
22 losses and make sure there was money there to pay the claims  
23 when they come in.

24 REPRESENTATIVE CORDISCO: What impact did that have?  
25 Can you give me an idea as to -- you're saying, you have given



1 us at this point testimony that said, due to the amount of  
2 claims and so forth, that there was an increase in premiums.  
3 Now you are saying, if I follow you, that you also have to  
4 take into consideration what we just went through in the last  
5 few minutes, that because in fact the interest rates dropped,  
6 premiums had to be raised to cover your costs.

7 MR. LASKOW: Interest rates dropped; the investment  
8 income didn't drop, that's correct.

9 REPRESENTATIVE CORDISCO: Are you saying 50/50, 40/60?

10 MR. LASKOW: I am not an actuary. I wouldn't hazard  
11 a guess.

12 REPRESENTATIVE CORDISCO: But it did have a substantial  
13 impact --

14 MR. LASKOW: Absolutely.

15 REPRESENTATIVE CORDISCO: Now that we have --

16 MR. LASKOW: And we all benefit from that drop in  
17 insurance rates. When I bought my house, I financed it at  
18 17.25. I have now just refinanced it at 9. It stands to  
19 reason.

20 REPRESENTATIVE CORDISCO: So did I, but I don't see the  
21 relevancy of that.

22 MR. LASKOW: The point is that the insurance industry is  
23 not free to ignore the fact that interest rates are much lower,  
24 and their return on investment is much lower, so they must  
25 charge more premiums.

1           REPRESENTATIVE CORDISCO: I am concerned with the fact  
2 that you have ability to go out and take my dollars that I  
3 give you to cover those risks so that you can invest it on the  
4 open market, and hopefully maintain those interest rates at  
5 a certain rate with no protection, because once they drop,  
6 you are protected. You are basically insulated, because you  
7 can come back over to me to cover those losses.

8           MR. LASKOW: Well, if you have a loss of \$1,000, and  
9 we have taken a \$500 premium, the insurance industry eats the  
10 other \$500. We don't get to come back to you for more premium.

11           So, both sides are at risk in the system, where you  
12 take the premium in advance of knowing what the loss is.

13           REPRESENTATIVE CORDISCO: I think a lot of us would like  
14 to go to the stock market and pick stock, knowing that in case  
15 it should drop tomorrow, someone else is going to have to pick  
16 up that loss.

17           MR. LASKOW: You are not paying more premium for the  
18 past year. What you are saying is that prospectively, if  
19 they are only going to have investment income at a lower level  
20 in the next year, then your premiums have to increase.

21           There is no making up or going back. That seems to be  
22 what your question is suggesting.

23           MR. LOVENDUSKY: I might point out that despite the  
24 vagaries of the interest rates and whatnot, that nevertheless  
25 between the period of 1979 to 1985, generally earned premiums

1 were up 153 percent. But nevertheless, for that same period  
2 of time, paid losses were up 194 percent. So, despite the  
3 increase in premiums from 1979 to 1985, they were not enough  
4 to compensate for the paid losses paid out by the property  
5 and casualty insurance industry.

6 REPRESENTATIVE CORDISCO: I take it then, the next  
7 logical conclusion, are you telling me at this point in time  
8 that the drop in interest rates had no bearing, no impact on  
9 individual premiums?

10 MR. LOVENDUSKY: They certainly did. They had a good  
11 benefit for our consumers. When interest rates were high,  
12 insurance companies were able to make sufficient income from  
13 their investments to have a sale of insurance for consumers, and  
14 everyone benefited by that.

15 If there were any concerns about the actuarial soundness  
16 of the rates that were to be charged at that time, no one  
17 raised a voice about it.

18 I don't believe there were any legislators complaining  
19 about the sale of insurance. The commissioner didn't take  
20 any action to charge actuarially sound rates, and everyone  
21 benefited through the insurance mechanism of the higher  
22 interest rates.

23 When the interest rates dropped, the insurers, in order  
24 to maintain their solvency, had to have income adequate to pay  
25 their debts and to maintain their surplus, and the only way to

1 do that was to go back to the ratemaking mechanism and charge  
2 higher rates.

3 Those rates were reviewed by the commissioner, found  
4 actuarially correct, and approved.

5 CHAIRMAN DeWEESE: Okay, thank you.

6 REPRESENTATIVE CORDISCO: I don't know whether I heard  
7 them respond to whether they had any recommendations as to how  
8 they could police their own industry.

9 MR. LOVENDUSKY: I might observe that the commissioner  
10 has a considerable amount of authority existing to review rates  
11 to determine whether they are excessive or whether they are  
12 inadequate.

13 That ratemaking function and the scrutiny that the  
14 commissioner has to require both normal reported data as well  
15 as any particular data that he may require from any insurer,  
16 any particular line or class of insurance, should be enough  
17 to insure that rates are neither excessive nor inadequate.

18 The insurance industry is one of the most regulated  
19 industries of any of them, and I suggest that there is  
20 adequate insurance existing in the Pennsylvania code and  
21 regulations to supervise insurance companies.

22 REPRESENTATIVE CORDISCO: The conclusion is that there  
23 is adequate regulation, and you see no further --

24 MR. LOVENDUSKY: No, there are areas in which the  
25 insurance industry is diligent in looking for improvements or

1 coming forward with information or changes that --

2 REPRESENTATIVE CORDISCO: I think I am becoming  
3 repetitious. Do you have any --

4 MR. LOVENDUSKY: Well, no, but there are mechanisms  
5 to do it. One of the mechanisms is the National Association  
6 of Insurance Commissioners. That organization, for example,  
7 is looking at the question as to whether insurance data  
8 provided to every state insurance commissioner is sufficient.

9 The industry is expecting the NAIC in the near future to  
10 approve the requirement of supplementary data, information from  
11 insurers which will be then recommended to the states on a  
12 uniform basis, and left to the different state commissioners  
13 to adopt or not to adopt.

14 That is the appropriate way to go in considering  
15 additional regulation, is to look to the institution with the  
16 expertise and the staff and the experience to properly  
17 regulate an industry as sophisticated and complicated as the  
18 insurance industry.

19 CHAIRMAN DEWEESE: Counselor, if some of us would ask  
20 you your opinion on sunseting the insurance commission in the  
21 next couple of years, how would you react to that?

22 MR. LOVENDUSKY: Sunseting the commission?

23 CHAIRMAN DEWEESE: Right, let it go through the sunset  
24 process here in Pennsylvania.

25 MR. LOVENDUSKY: Sir, I am an advocate of free enterprise

1 and competition. There is more competition in the insurance  
2 industry than virtually any other industry.

3 In fact, it is arguable that it is because of the degree  
4 of competition in the industry that you have the sale that we  
5 experienced in those years when interest rates were high.

6 I believe that competition and the free market is the  
7 best way to regulate the insurance industry. So, I suspect  
8 that my association would not oppose a sunset of the insurance  
9 department.

10 CHAIRMAN DeWEESE: Okay. Have a good trip. Thank you  
11 very much.

12 REPRESENTATIVE KOSINSKI: John, thank you for keeping  
13 that question short.

14 CHAIRMAN DeWEESE: We are not going to cut anybody off,  
15 but one question and one followup, and then we are just going  
16 to keep on coming around to everybody so everybody gets a  
17 shot. I am personally not doing anything until the weekend,  
18 but one question and one followup.

19 REPRESENTATIVE KOSINSKI: Mr. Chairman, I have two  
20 questions that were original in nature, and I would appreciate  
21 if I could ask them.

22 CHAIRMAN DeWEESE: Mr. Blaum had one observation.

23 REPRESENTATIVE BLAUM: Thank you, Mr. Chairman.

24 A few minutes ago we were talking about fees, contingency  
25 fees and a schedule. I don't know if the schedule Paul

1 mentioned, whether he was taking it from House Bill 2230 or  
2 another bill, but the schedule in House Bill 2230 is similar,  
3 that is 40 percent of the first \$50,000, 33-1/3 of the next  
4 fifty, 25 percent of the next 100 and the next would be 10  
5 percent of the next \$100,000 and everything above.

6 The point I want to make is that that fee is separate  
7 from the award, that the 40 percent of the first \$50,000, that  
8 does not come out of that \$50,000.

9 The insurance company would write two checks, one for  
10 the plaintiff for \$50,000, and then a separate check to the  
11 attorney, so that the plaintiff would not be -- I explained  
12 that to Representative McHale on his way out, and I wanted all  
13 the other members to know that the fee does not come out of the  
14 award. Thank you, Mr. Chairman.

15 CHAIRMAN DEWEESE: All right. Mr. Kosinski?

16 REPRESENTATIVE KOSINSKI: One of the things that greatly  
17 upsets me with this whole tort reform issue is something that  
18 Representative McHale touched on.

19 There is a great amount of misinformation being spread  
20 around, and the more I read on the subject -- and I read a  
21 great amount -- the more upset I get.

22 You were talking about actions for emotional distress  
23 recognized in three states. I would imagine California is  
24 one, New York is another; what's the third state?

25 MR. LASKOW: I am not certain.

1 REPRESENTATIVE KOSINSKI: Okay. How long ago was  
2 that emotional distress tort?

3 MR. LOVENDUSKY: Within the last 15 years.

4 REPRESENTATIVE KOSINSKI: Within the last 15 years;  
5 was it about 15 years ago, Paul?

6 MR. LASKOW: I couldn't tell you.

7 REPRESENTATIVE KOSINSKI: It was about 15 years ago,  
8 because when I was in law school, we were pointed out to the  
9 California cases in about 1970 that did that.

10 Now, what gets me upset here is, in fairness, let me  
11 give you a little legal lesson, if you forget law school -- I  
12 may forget it after ten years or so -- that economic distress,  
13 I doubt if it will ever become a tort in Pennsylvania.

14 It has been brought up again and again in the courts and  
15 knocked down. It isn't strict liability, which was adopted  
16 by almost all the 50 states.

17 So, it is something that will never happen or  
18 probably won't happen -- I shouldn't say never, but probably  
19 won't happen.

20 But you throw this up as a red flag. And as the  
21 members of this committee know, I hate anything that is red.  
22 That's the first thing.

23 Second, I am upset that the insurance industry doesn't  
24 talk about economic disincentive for defense attorneys. One  
25 of the problems that attorneys have, plaintiffs' attorneys have



1 is, we know exactly how much -- and you do, too, the insurance  
2 industry knows how much a soft tissue injury is, how much a  
3 broken bone is.

4 We give the insurance companies a fair settlement,  
5 okay, and they say, no, take it to court, take it to court,  
6 take it to court, because their static costs for the defense  
7 attorneys remain the same, but the plaintiffs' attorneys are  
8 going to have to go out, get the experts, get the testimonies,  
9 get the depositions, the whole thing.

10 And it is of course going to cost more in the long run.  
11 I would like to see some type of economic disincentive for  
12 the defense part built into any tort reform cases.

13 The third comment I would like to make is, you said  
14 let's look west to California. I say let's look west, too, to  
15 Washington, where they passed massive tort reform legislation,  
16 yet the insurance rates went up 15 percent.

17 Let's look south to Florida, where they put the cap,  
18 everything the insurance industry wanted, but a 40 percent cut  
19 in the rates. The insurance industry is fighting that tooth  
20 and nail.

21 And as pointed out this morning, let's look at  
22 Maryland, where they put caps on medical malpractice, yet the  
23 rates go up 130 percent. Would you care to comment on that?

24 MR. LASKOW: I would assume that the Maryland insurance  
25 commissioner has reviewed those rates, found them not excessive

1 or inadequate, and that those rates were justified by the  
2 claims frequency, severity, and adjustment expense.

3 REPRESENTATIVE KOSINSKI: I find that most insurance  
4 commissioners should have the middle name of rubber-stamp.

5 MR. LASKOW: I think that is very unfair. I worked in  
6 the insurance department. I think George Grody is perhaps the  
7 finest example of a public servant that I have observed in  
8 14 years of public practice of law.

9 That's a glib comment, perhaps one that you didn't  
10 reflect on before making it, and I am sure that upon reflection,  
11 you would find George Grody to be equally as fine a dedicated  
12 public servant as I have.

13 REPRESENTATIVE KOSINSKI: That doesn't matter. That  
14 doesn't mean he is not a rubber stamp. If he doesn't have the  
15 staffing, if he doesn't have the wherewithal to investigate or  
16 if he doesn't have the ability to use all the enforcement  
17 mechanisms that he has, he is no good.

18 And that is part of the problem we have. We have  
19 insurance commissioners who do not use the full power of their  
20 office. I point to Herb Denenberg. There's a gentleman who  
21 used the full power of his office.

22 And I am not casting aspersions on Mr. Grody or his  
23 predecessors, but I think they are afraid to use the full powers  
24 of their office, unless the insurance industry steps on their  
25 toes like it did with the unisex. And then we saw the full

1 power of the insurance commissioner being used for a change.

2 MR. LASKOW: I would commend the record of Commissioner  
3 Grody and his predecessors on rate matters. If you have  
4 some particular rate filing in mind --

5 REPRESENTATIVE KOSINSKI: I certainly do. Right after  
6 we passed the flexible auto insurance plan. I, like  
7 Representative Cordisco, voted on only one reason.

8 This is the bottom line for any sort of reform measure:  
9 will the rates go down? At public hearings, the insurance  
10 industry said yes, they would go down. Guess what happened.

11 We were fooled. We are not going to be fooled again.  
12 We are going to take a look at this very carefully, and I will  
13 be very honest with you. The more I see, the more I read, the  
14 more I feel it is an insurance problem and we are going to have  
15 to settle it that way.

16 There are some matters that have to be taken care of  
17 tortwise with tort reforms with the civil justice system; fine.  
18 But I think there is more to be done with the insurance  
19 companies than anything else.

20 CHAIRMAN DeWEESE: The questioning I assume is over --

21 REPRESENTATIVE KOSINSKI: Yes.

22 CHAIRMAN DeWEESE: -- and gentlemen, your reaction to  
23 those questions.

24 One quick interruption: Representative Bob Flick,  
25 prime sponsor of what eventually became Act 57, 1986, Bob,

1 you stand to be recognized.

2 Representative Flick has another obligation in his  
3 home district. I apologize for the hearing going so far  
4 behind, and you are going to submit your comments for the  
5 record?

6 REPRESENTATIVE FLICK: It was submitted to the committee,  
7 yes, and it is not uncommon. You are very thorough and  
8 complete, Mr. Chairman.

9 CHAIRMAN DeWEESE: Yes, we did, went overtime for your  
10 bill, so I appreciate your flexibility. Thank you for staying.  
11 The gentlemen from the insurance industry still have some  
12 members who would like to talk to them: Dave Mayernik, and  
13 then the gentlelady from Montgomery County, Ms. Hagarty.

14 REPRESENTATIVE MAYERNIK: Mr. Laskow, since I have been  
15 up here for about three or four years, all we have talked about  
16 is tort reform. People in my district, a small district, call  
17 me up and say, we need tort reform.

18 The question I keep asking is, will the insurance rates  
19 go down if we have tort reform? That is the question I am  
20 asking you today.

21 I looked at your testimony and in Senate Bill 1427, you  
22 say it's a modest, commendable gesture; 1428 could be greatly  
23 improved.

24 If we were to pass your package, could you guarantee  
25 that insurance rates would go down? Because my consumers at

1 home, all they understand is how much they are paying. The  
2 businessman understands the insurance rates are too high.  
3 Will the rates go down?

4 MR. LASKOW: If you can tell me the number of claims will  
5 go down, and if you can tell me that the severity of those  
6 claims will go down, then I will guarantee you that insurance  
7 rates will go down.

8 But unfortunately, you can't guarantee that the number  
9 of claims are going to go down, and you can't guarantee that  
10 the severity of those claims is going to go down.

11 I attempted in my testimony to point out how, in Act  
12 57 which is already enacted, you can't even gauge it for that  
13 bill, a fairly simple, narrow, minor adjustment of the law.  
14 And it is still completely left to experience to see whether  
15 or not that reduces the frequency and severity of claims.

16 So, until we have the answers to those two questions,  
17 I can't give you an answer to your question.

18 REPRESENTATIVE MAYERNIK: Let's say the severity of  
19 claims stays the same and the number of claims stays the  
20 same. Would the insurance rates go down?

21 MR. LASKOW: No, they wouldn't go down. They would stay  
22 the same, subject to the cost of money, interest rates and --

23 REPRESENTATIVE MAYERNIK: With those minor changes in  
24 the law, though, you should see some type of profit or some  
25 type of relief, right?

1 MR. LASKOW: No. If the number of claims and the  
2 severity of claims remains constant, then the premiums  
3 remain constant. They can't go down if the number of claims  
4 and the severity of claims doesn't go down.

5 REPRESENTATIVE MAYERNIK: I don't think they are going  
6 to go down. My entire problem is that we are going to change  
7 the entire system, everybody is pushing tort reform, the  
8 insurance premiums aren't going to go down and we are going to  
9 be in the same spot.

10 We passed the auto insurance bill last session, the  
11 insurance rates went up. Once we start messing around with the  
12 insurance companies, it ends up the consumer always gets the  
13 short end of the stick, and the insurance rates go up. That  
14 is what I am afraid of in this case.

15 CHAIRMAN DEWEESE: The gentle Republican lady from  
16 Montgomery County.

17 REPRESENTATIVE HAGARTY: Thank you, Mr. Chairman.

18 Somewhere along the line in the testimony, there was  
19 indication that each additional section of the tort reform  
20 package that we pass, there would be an associated decrease  
21 in rates.

22 To give you a specific example, let's say that we pass  
23 the joint and severable liability section that has been  
24 suggested. How much would rates go down?

25 MR. LASKOW: I believe that was part of my testimony. I

1 didn't say rates would go down by that amount. I said that  
2 much was saved against the increase in awards and the increase  
3 in premiums that were experienced in California.

4 If you recall my testimony, I said that the omnibus tort  
5 reform bill only went to severity of claims. It didn't go to  
6 the frequency of claims.

7 You cannot -- it's impossible to say that the rates  
8 will go up or down unless you know what is happening to the  
9 frequency of claims.

10 REPRESENTATIVE HAGARTY: Let me ask you, on joint and  
11 severable liability, do you keep statistics as to your payouts,  
12 what portion of that payout is attributable to the law on  
13 joint and severable liability?

14 MR. LOVENDUSKY: I am not sure I understand the  
15 question, but I suspect that even if I did, the answer would be  
16 no, that statistics are not kept in such a way as to be able  
17 to ascertain how much are paid out on behalf of a claim to  
18 which a joint tortfeasor defendant was five percent negligible  
19 but levied 100 percent of the award.

20 REPRESENTATIVE HAGARTY: Do you keep any specific  
21 breakdown on claims that come in and claims that go out,  
22 other than an overall -- I see you have an overall figure of  
23 payout and premiums received. Do you keep any breakdown  
24 whatsoever?

25 MR. LOVENDUSKY: Unfortunately, I suspect you are

1 asking the question of the wrong representatives of the  
2 insurance industry. You want to speak to claims officers or  
3 perhaps a statistical reporting organization.

4 REPRESENTATIVE HAGARTY: Representing the Insurance  
5 Federation, you have no idea how they keep their information,  
6 is that the answer?

7 MR. LASKOW: I have some idea. You are asking whether  
8 or not the --

9 REPRESENTATIVE HAGARTY: My problem is that it has been  
10 suggested that we should make a number of changes in tort law.  
11 And I have yet to hear anyone tell me that there are any  
12 statistics kept which enable you to reach a conclusion that  
13 any one of those changes will affect your payout.

14 MR. LASKOW: I have asked you to look at the experience  
15 in California.

16 REPRESENTATIVE HAGARTY: I am interested in the  
17 experience in Pennsylvania.

18 MR. LASKOW: We don't have the experience yet. That  
19 was my whole point.

20 REPRESENTATIVE HAGARTY: I am asking, do you keep those  
21 statistics to make that determination.

22 MR. LASKOW: No, those statistics are not --

23 REPRESENTATIVE HAGARTY: I will make one statement,  
24 although I shouldn't, because I have listened to all the other  
25 committee members, but I said the same thing on automobile



1 insurance. I think we all feel that way from what you have  
2 heard today. We are not going to cut back, which is what this  
3 is, on individual rights to recovery without any indication  
4 by the insurance committee that we will save one dollar in  
5 premiums paid. And we have not heard it to date.

6 MR. LASKOW: Unfortunately, you are not cutting back  
7 rights, you are restoring rights. When you adopt --

8 REPRESENTATIVE HAGARTY: When I tell people that they  
9 are going to get less money if they sue or no money for pain  
10 and suffering, you term it anything you want. I have no  
11 other term, and I said the same thing on automobile insurance,  
12 other than to say that I am cutting back on rights.

13 MR. LOVENDUSKY: If I may, there is a lot of talk about  
14 tort reform, but really it is a misnomer. It I think creates  
15 misunderstanding.

16 REPRESENTATIVE HAGARTY: I agree it's a misnomer. It's  
17 tort abolition.

18 MR. LOVENDUSKY: No, it is not tort reform. As the  
19 members of this committee know, as attorneys, the concept --

20 CHAIRMAN DEWEESE: We are not all attorneys.

21 MR. LOVENDUSKY: As the members --

22 CHAIRMAN DEWEESE: I know that might come as a surprise to  
23 to you.

24 MR. LOVENDUSKY: For the benefit of those members who  
25 are not attorneys, the concept of tort law is that it holds a

1 party responsible for harm caused by the party, either through  
2 the negligence by that party or by intention by that party.

3 Inasmuch as the problem that is created in insurance is  
4 to the degree that we have moved away from tort law, that we  
5 have moved into new areas of law, concepts of liability such as  
6 strict liability or even more unusual concepts of liability such  
7 as market share liability, that is a departure from traditional  
8 tort liability concepts.

9 It is to the degree that you depart from the traditional  
10 concepts of tort liability that causes problems with the  
11 insurance mechanism, the insurance system.

12 That is why to call it tort reform is a bit of a misnomer.  
13 We are looking at civil justice reform, and we are trying to  
14 bring an imbalance that has crept into the judicial system  
15 back to a level where there is a way to predict the risks out  
16 there.

17 And the way to do that is by adherence to a traditional  
18 tort law.

19 REPRESENTATIVE BALDWIN: Excuse me.

20 CHAIRMAN DeWEESE: Bill Baldwin.

21 REPRESENTATIVE BALDWIN: I don't mean to interrupt Lois,  
22 but I think this committee is entitled -- you are representa-  
23 tives of the insurance industry testifying before this  
24 committee. For you to answer Lois' question that we have  
25 to talk to a claims adjuster to get data I think is not being

1 fair to this committee. You are the representatives. If  
2 you are telling us that we should make these changes and these  
3 changes have to be made because of the insurance crisis with  
4 the premium dollars that are being charged and the lack of  
5 insurance, I think we are entitled to know what statistics you  
6 have to justify that these changes will bring about relief  
7 of that crisis.

8 And if you don't have the statistics, how can you tell  
9 us that it is going to happen?

10 MR. LOVENDUSKY: There are studies done by actuaries and  
11 by experts of the civil justice system that come to the  
12 conclusion that the particular kinds of reforms in the  
13 civil justice system will translate over time into savings; if  
14 not reductions in actual rates, at least restraints in the  
15 rate of increase in those particular rates.

16 The reform of the civil justice system is only one part  
17 of addressing the ratemaking process. We have already had a  
18 discussion earlier about the effect of interest rates, for  
19 example, on ratemaking.

20 REPRESENTATIVE BALDWIN: But I can't believe that you  
21 don't have statistics. You are telling us that joint and  
22 several liability is one of the worst problems you have to  
23 deal with. I can't believe that you can't identify what kind  
24 of money you have had to pay out because of that provision in  
25 the law.

1           MR. LOVENDUSKY: The impact of joint and several  
2 liability is not measured so much by the amount of dollars  
3 paid out as it is in the incidence of claims coming in, the  
4 frequency of claims.

5           You can see different areas of --

6           REPRESENTATIVE BALDWIN: Do you have statistics about  
7 the frequency of claims --

8           MR. LOVENDUSKY: Yes.

9           REPRESENTATIVE BALDWIN: -- that could be attributed  
10 to joint and several liability, not overall claims?

11          MR. LOVENDUSKY: No, because joint and several  
12 liability isn't factored out of any particular -- first of all,  
13 claims are not merely litigation claims. Claims come from a  
14 variety of sources.

15          Claims include claims that are paid through settlements  
16 and are not litigated.

17          REPRESENTATIVE HAGARTY: You're saying your big costs  
18 are not in paying out verdicts?

19          MR. LOVENDUSKY: May I suggest, there is one resource  
20 available to the committee that would have a better  
21 understanding as to what amount of claims are paid through  
22 the operation of joint and several law, and that is the Trial  
23 Bar, that priesthood of lawyers who do know what kinds of  
24 claims are made, which ones are settled, which ones are paid,  
25 and that might be the more appropriate way to go to find an

1 answer to a question lke that.

2 REPRESENTATIVE HAGARTY: My problem is, all we have  
3 heard is frequency of claims is the issue, so therefore  
4 verdicts are not your big cost, it's frequency of claims.

5 MR. LOVENDUSKY: No, I'll --

6 REPRESENTATIVE HAGARTY: I suggest that what you are  
7 paying then in frequency of claims is, it's your own employees  
8 and your own defense counsel that are incurring costs. It's  
9 not verdicts, you're telling me, it's how many claims are  
10 filed. That's the only chart you've brought, and that is  
11 what you are telling me will affect future rates.

12 MR. LOVENDUSKY: With regard to the charts we've  
13 brought, we limited our testimony to the items that were before  
14 us on the agenda. The committee has expanded the scope of this  
15 hearing to include areas which we did not come to educate  
16 the committee on, unfortunately.

17 The frequency of claims is one of the aggravating  
18 factors affecting the insurance system and driving rates up,  
19 but the severity of claims is another one that is documented.

20 It has been referred to by the justice department. We  
21 know that in 1952, we had one million dollar claim, which in  
22 1984, we had 401 million dollar claims.

23 REPRESENTATIVE HAGARTY: In Pennsylvania?

24 MR. LOVENDUSKY: No, nationally.

25 REPRESENTATIVE HAGARTY: I don't know about the other

1 members of the committee, but I am interested in Pennsylvania.  
2 I am not in Congress.

3 REPRESENTATIVE BALDWIN: Are our rates in Pennsylvania  
4 written on national experience, even though we might change the  
5 law in Pennsylvania?

6 MR. LOVENDUSKY: Generally, no. Generally, lines of  
7 insurance are written on a state --

8 REPRESENTATIVE BALDWIN: Then why aren't we hearing  
9 Pennsylvania statistics? I agree with what Lois said. I am  
10 interested in Pennsylvania, too.

11 MR. LOVENDUSKY: I will give you some Pennsylvania  
12 statistics. In Pennsylvania, the commercial multiperil loss  
13 ratio is 142 percent --

14 REPRESENTATIVE BALDWIN: What?

15 MR. LOVENDUSKY: The commercial multiperil -- commercial  
16 multiperil is a particular line of property casualty insurance.  
17 That line of insurance has, in 1984, experienced a loss ratio  
18 of 142 percent.

19 That means that for every \$1.00 in premiums that was  
20 brought in by an insurer, that insurer paid \$1.42 out in  
21 claims.

22 Another Pennsylvania statistic is that municipal  
23 liability claims rose 359 percent between 1980 and 1984,  
24 despite the enactment of a very good law restoring a balance  
25 of sovereign immunity to both the state and its local

1 subdivisions.

2 I'll give you another Pennsylvania statistic.

3 REPRESENTATIVE HAGARTY: Claims, or money paid out?

4 MR. LOVENDUSKY: Claims.

5 In medical malpractice, another line of insurance, the  
6 loss ratio in 1984 in the state of Pennsylvania was 160  
7 percent. For every dollar of premium that the insurer brought  
8 in on the medical mal line, they paid out \$1.60.

9 You can't run a business that way.

10 CHAIRMAN DEWEESE: Okay, thank you. You have been  
11 pilloried and buffeted, and you have withstood the testimony  
12 very well. Excuse me, Mr. Reber, you do have a question?  
13 Because I asked you earlier and you didn't have one.

14 REPRESENTATIVE REBER: Yes. They were not touched upon  
15 by my colleagues on the committee, so I feel compelled to  
16 delve into them.

17 I will ask either of you gentlemen, and I guess since  
18 Mr. Lovendusky did not come prepared to comment, I will ask you,  
19 Mr. Laskow, because your testimony does in part fall within  
20 that area.

21 A great bit of the concern appears to be excess profits  
22 on the part of attorneys in the contingency process. I would  
23 like your comments as to excess profits and financial disclosure  
24 law to be mandated upon insurance companies in the commonwealth  
25 of Pennsylvania.

1           MR. LASKOW: If you heard me say that I thought that  
2 there was an excess profit problem for attorneys generally,  
3 that is not what I intended to say or intended for you to  
4 understand from my testimony.

5           I just think that there should be a modest capping or  
6 scheduling of attorneys' fees at the very upper level.

7           REPRESENTATIVE REBER: I understand that, and I under-  
8 stand the basis of the rationale, where you feel that it is  
9 an inflated target figure and it is inflated accordingly.

10           I am more concerned about, and I am extremely  
11 concerned and troubled as a result of the nonresponsiveness  
12 to Representative Hagarty's questions about certain what I  
13 consider to be financial and statistical database that in my  
14 mind should be readily spoutable by anyone who is advocating  
15 this position.

16           I am not being critical of you. I just think that  
17 somebody had better get that information to us. And if  
18 Mercator is out there, hear me well.

19           What bothers me though is that we don't have that  
20 information readily ascertainable. And I made the comparison --  
21 I don't know if the members of the Democratic staff have  
22 provided their members with it, but we were provided with it a  
23 month and a half, two months ago, with the statistical  
24 information as a result of our experience rating under the  
25 catastrophic loss trust fund that is being administrated



1 vis-a-vis the recent automobile legislation.

2 And I found it very interesting, for once, to finally  
3 get information as to the amount of money taken in a la  
4 premiums paid, as to the amount of money spent on  
5 administration, as to the amount of money available for  
6 claims in the future, and most importantly, as to money paid  
7 out on claims processed.

8 And I was astounded to the good side, to see that there  
9 was a sufficient amount being generated by the fund, that the  
10 amount that was being paid out was nowhere near what I had  
11 thought and what I had been told by various representatives of  
12 the insurance industry from 1981 when we were battling House  
13 Bill 1285 up through the finalization fo the enactment of the  
14 recent bill or legislation and now act that we are laboring  
15 under.

16 I find that information rather interesting, and I can't  
17 understand why the insurance companies don't provide that  
18 particular type of information on each and every particular set  
19 of experience ratings of particular types of coverage that  
20 they are presenting.

21 I wonder about your comments on that, and that goes back  
22 again to my original question on excess profits mandated  
23 legislation to insurance companies, and on financial disclosure  
24 legislation mandated to insurance companies.

25 I haven't gotten yet to the premium rollback rate

1 reduction mandated legislation. We will follow that up next.

2 MR. LASKOW: First of all, it would be redundant to  
3 have some sort of excess profit legislation. It was quite  
4 incredible that the gentleman who testified earlier from  
5 PennPIC said that, his words were, the industry --

6 CHAIRMAN DeWEESE: Credible or incredible?

7 MR. LASKOW: Incredible -- that the industry was --

8 CHAIRMAN DeWEESE: Some things that are incredible are  
9 credible.

10 MR. LASKOW: He said that the industry was still drunk  
11 on profits. The industry in 1984 had a 4 percent return on  
12 equity, maybe one-quarter of what the return on equity was  
13 for other Fortune 500 companies.

14 So, there aren't excess profits. Secondly --

15 REPRESENTATIVE REBER: What did it average between  
16 1979 and about 1982, do you have those figures?

17 MR. LASKOW: Well, never higher than the Fortune 500.  
18 I may have some additional information.

19 REPRESENTATIVE REBER: Maybe you could provide it to us  
20 later. I would rather have it statistically and empirically  
21 correct.

22 MR. LASKOW: First, there weren't excess profits.  
23 Secondly, you've got a statute in Pennsylvania that provides  
24 that rates can't be inadequate or excessive.

25 So, the rates are examined by the commissioner. And I

1 am sure you take the view that perhaps there are too many rate  
2 filings asking for increases, but they are reviewed each time  
3 to make sure that the rate is based upon the loss experience  
4 of the company, the loss adjustment experience.

5 So, it would be redundant to have an excess profits  
6 law, even if you knew how to fashion one. There was another  
7 part to your question, and I don't recall it.

8 REPRESENTATIVE REBER: Let's just shift gears for a  
9 moment. As a followup to the comments I made concerning the  
10 data that we received from the experience on the CAT fund,  
11 let me ask you this: what would be your particular reaction  
12 to this particular scenario.

13 And the scenario I am going to take, I am sure you are  
14 familiar with the movie "The Verdict." I can't imagine  
15 anybody in the insurance industry not being familiar with "The  
16 Verdict."

17 MR. LASKOW: I don't remember the plot line, but Paul  
18 Newman --

19 REPRESENTATIVE REBER: It was a medical malpractice  
20 case in Boston.

21 MR. LASKOW: I couldn't have told you that much. Go  
22 ahead.

23 REPRESENTATIVE REBER: In any event, in that particular  
24 case, there was some very, very severe problems arising out of  
25 leadups, if you will, to the administering of anaesthesia prior

1 to a particular delivery.

2 How are you, sitting as a legislator who is going to  
3 in essence cast a vote to cap the maximum that a person could  
4 recover on a particular case like that being \$250,000, going  
5 to explain to someone that has to experience for the rest of  
6 their lifetime a mother, a wife of a husband who is absolutely  
7 "vegetable-ized", for lack of better words, to that particular  
8 type of status, and to be compensated to the max being  
9 \$250,000? How do you justify that?

10 MR. LOVENDUSKY: Sir, what will compensate a person  
11 in that situation? Will a million dollars compensate the  
12 person?

13 REPRESENTATIVE REBER: A lot better than \$250,000.

14 MR. LOVENDUSKY: The fact is that nothing will compensate  
15 somebody --

16 REPRESENTATIVE REBER: And two million does an even  
17 better job. The point I'm trying to make --

18 MR. LOVENDUSKY: But those costs --

19 CHAIRMAN DEWEESE: Bob, let the guy answer the question.

20 REPRESENTATIVE REBER: First of all, I directed the  
21 question to Mr. Laskow. I wasn't completed my question. It is  
22 an emotional issue, that's the problem, and it is emotional  
23 for us because it is going to be emotional for each and every  
24 one of those particular individuals when they are faced with  
25 that situation.

1           Obviously, sitting here in a very sterile atmosphere,  
2 it is easy to talk about \$250,000 cap. But it unfortunattee,  
3 and it is difficult, and there is no way in our society we  
4 can equate that any other way than monetarily.

5           We don't allow the husband of that woman that is a  
6 vegetable to go out and tar and feather that particular doctor  
7 who is extremely negligent in the case.

8           We don't allow them to run around and chase the  
9 insurance company because they didn't insure that doctor with  
10 excess limits.

11           We are only allowed to do it, under our system of  
12 justice and compensation vis-a-vis that award in that system of  
13 justice, in dollars and cents.

14           Now, no doubt, in many instances, that causes your  
15 problems. But to place an arbitrary amount in what I consider  
16 to be a ridiculous sum, that affronts my senses, my dignity.

17           If you came in with \$2.5 million, I don't think I could  
18 be as incensed. But \$250,000, my God, the doctors charge fees  
19 these days that could eat that up in two years over and above  
20 of continuing care after the award is entered.

21           I am sorry if I have gone on, but I think I have set the  
22 tone of the concern of arbitrary caps of such ridiculous low  
23 amounts when you are placing it on every possible conceivable  
24 injury which has to be governed by the particular award  
25 entered under those caps. That's my problem.

1           MR. LASKOW: I can certainly appreciate the question  
2 and the origin of the question, and I think there are several  
3 parts to my answer.

4           First is, I think the person would be consoled by the  
5 fact that 100 percent of their economic loss would be covered.  
6 When the trial lawyers got together and cranked up a tort  
7 reform bill found in Senate Bill 1530, they concocted a cap on  
8 liability that allows the insurance company and the doctor to  
9 get out of a case without paying all of the economic loss.

10           If you offer your limits, \$200,000, the doctor and the  
11 insurance company walk away. That's the trial lawyers at  
12 work, capping economic loss.

13           So first, the person's economic losses, their medical  
14 costs, the lost wages and the rest of them, are covered.

15           REPRESENTATIVE REBER: Can I just comment on that? On  
16 the economic side, in our great society today, most people are  
17 going to have other types of medical coverage, health care  
18 coverage that is going to cover that. So, I don't think that  
19 necessarily flushes, either.

20           Go ahead. I am sorry I interrupted you, but that one  
21 bothered me a little bit because I don't think it was, on the  
22 majority side, statistically correct, again.

23           MR. LASKOW: Well, be sure to ask Bill Titelman or  
24 whoever testifies for the trial lawyers, about their --

25           REPRESENTATIVE REBER: Like Mr. DeWeese, I have nothing

1 to do until the weekend. And Mr. Titelman, if he was party to  
2 some of those things you said, he will also have to answer  
3 for it.

4 MR. LASKOW: Very well. I think that your constituents  
5 are probably not too different from the parents of people who  
6 participated in the National Association of High School  
7 Athletics. I reference the association in my testimony.

8 What they set up was a program where, for \$1.25 per  
9 annum per student athlete, they could cover the unlimited  
10 medical costs of any athlete injured in the country, plus \$300  
11 a week lost wage benefit.

12 All the injured athlete had to do was make the  
13 decision that he wanted to take 100 of his economic loss,  
14 including the lost wage benefit, or go to the tort system,  
15 where he could get pain and suffering.

16 In every single one of the cases where someone was  
17 injured covered by that program, the parent has chosen to  
18 have the certainty of the economic loss covered, and not to  
19 take the wheel of fortune, pain and suffering route.

20 Two things fall out of that experience of that national  
21 association. First, people really don't want the lottery  
22 system that you have when you go for pain and suffering.

23 Secondly, by putting a cap on the amount of pain and  
24 suffering, you eliminate one of the major elements of what  
25 drives cases to trial, why these cases can't settle.

1           There is usually no dispute in a lot of these personal  
2 injury cases that the person suffered a certain injury,  
3 that they suffered certain economic losses.

4           The economic losses are easily quantifiable. It is  
5 quantifying the unquantifiable, non-economic loss, that drives  
6 the tort system, creates the need for trials.

7           And when you look to the person who says, why should I  
8 only have \$100,000 to compensate me for my pain and suffering,  
9 you can say, we have liberated, by doing that, billions.

10           The AMA estimates that one in three tests given by  
11 doctors are unnecessary and are defensive medicine. They  
12 put a figure of \$15 billion on those unnecessary tests.

13           They put another I think \$21 billion on the costs of  
14 defensive medicine, apart from tests. Think of the poor  
15 people, the dollars that you have liberated in terms of the  
16 medical treatment available in this country to pay poor  
17 people by doing away with the need for defensive medicine,  
18 doing away with the need for useless tests.

19           That is what you would achieve by capping this  
20 non-economic loss. You could take care of hundreds of  
21 thousands of people who don't have adequate health care now  
22 by doing this. And that would be the answer that I would give.

23           REPRESENTATIVE REBER: My only thought and my only  
24 response is that if you are going to talk about capping, I  
25 tend to think that the appropriate capping is done by



1 appropriate defense counsel on behalf of the particular  
2 insurer which is in essence working for the insurance company,  
3 the expertise that goes with that.

4 There is additional aspect of the case being factually  
5 presented. We went over this with Representative McHale a  
6 little bit earlier, and his faith in that particular process,  
7 which heretofore has gone on.

8 I think that many of those particular instances far  
9 outweigh the various abuses that you have pointed out and others  
10 have pointed out in particular cases outside the commonwealth  
11 of Pennsylvania, incidentally, which I always find to be  
12 rather troublesome when we sit here and hear people testifying  
13 as we have heard over the years on these issues. I am not  
14 necessarily referring to yourself, of course.

15 MR. LASKOW: When you tell the lawyers that they can  
16 no longer cite a New Jersey case in their Pennsylvania brief,  
17 when you tell the people in Philadelphia that they can't read  
18 about jury awards in New York City or Washington State, then  
19 we can just limit ourselves to talking about Pennsylvania.

20 It's a national problem, and courts are influenced by  
21 decisions in New Jersey. The Jackson County case has been  
22 cited in any number of environmental cases in Pennsylvania.

23 You cannot just sort of blindly decide that  
24 Pennsylvania sits by itself. As I say, if you are willing to  
25 limit lawyers and what they plead in cases and ask lawyers not

1 to ask courts to extend the law from other states to Pennsyl-  
2 vania, then we could agree that we should limit our debate  
3 to only Pennsylvania law.

4 REPRESENTATIVE REBER: I guess what I am saying though,  
5 is that I have a lot of faith that even with that process being  
6 carried out, we still don't have that. Even though the juries,  
7 as you say, have been referenced to this particular precedent  
8 in this particular state, and this particular outcome and  
9 decision in this state, they still seem to not be reacting  
10 to the ridiculous that I hear is running rampant because we  
11 don't have that particular --

12 MR. LASKOW: I didn't say that it was running rampant.  
13 I said that the juries get it right 97 percent of the time.  
14 It's only 3 percent of the time that juries, I think, are  
15 unbounded in their speculation.

16 REPRESENTATIVE REBER: For that 3 percent, we are going  
17 to penalize generations to come that have extraordinary medical  
18 residual problems which far exceed necessary care in excess  
19 of \$250,000 by taking that as an artificial basis and capping  
20 it by state law and saying that you cannot be compensated any  
21 further.

22 MR. LASKOW: That is not what we are saying. We are  
23 only capping the non-economic loss. We are not capping any  
24 one of the economic losses.

25 It is merely the non-economic loss that would be modestly

1 capped in 3 percent of the cases.

2 REPRESENTATIVE REBER: Loss of consortium is a  
3 non-economic loss, correct?

4 MR. LASKOW: Correct.

5 REPRESENTATIVE REBER: The lack of motherly care to  
6 children, the attendance to those particular children and a  
7 husband, again is a non-economic loss, is that not correct?

8 (No response.)

9 REPRESENTATIVE REBER: The fact that an individual can-  
10 not pursue that for which he or she has trained for, the  
11 profession and the type of profits that might be generated  
12 from that, again, non-economic loss. I can go on and on and on  
13 with various examples of how that reflects back on the  
14 individual victim as well as the victim's immediate family.

15 MR. LASKOW: The last one on the list I think is  
16 economic.

17 REPRESENTATIVE REBER: The last one may be rather  
18 speculative --

19 MR. LASKOW: No, no, it's economic --

20 REPRESENTATIVE REBER: -- but we'll work it out in the  
21 courtroom for the judge and see if we can get the appropriate  
22 instruction.

23 I am sorry, Mr. Chairman. I do appreciate your putting  
24 up with the pursuing of this, but I think these are the hard,  
25 real facts that we have to deal with, and the type of setting

1 in which we have to place them when we are looking at them,  
2 and not just the sterile arguments of legislators and  
3 lobbyists, if you will.

4 I appreciate your indulgence, thank you.

5 CHAIRMAN DEWEESE: Any further questions? Kevin Blaum?

6 REPRESENTATIVE BLAUM: Question for Mr. Laskow. Before I  
7 ask it, on the issue of caps, I think before anyone begins to  
8 worry about caps, there is a provision in the Pennsylvania  
9 Constitution which says that we cannot cap what a person can  
10 sue for.

11 And I think anyone would have difficulties drafting any  
12 language to get around that constitutional amendment. In  
13 Pennsylvania, it may be for all time impossible to cap what a  
14 person can sue for.

15 Paul, my only question is, a lot of us think that the  
16 insurance commission should go through the sunset process,  
17 and Michael has answered the question that his organization  
18 probably would not oppose that. Would yours?

19 MR. LASKOW: I am not sure I understand completely  
20 what the sunset process is. If it is merely the examination of  
21 their functions and definition of their role in the regulatory  
22 process --

23 REPRESENTATIVE BLAUM: We would review the insurance  
24 commission, make improvements, changes, even abolition if that  
25 was desired, although that probably wouldn't be the case.

1 MR. LASKOW: I think the risk that you would  
2 actually abolish the insurance department and the chaos that  
3 would result probably outweighs the benefit of doing the  
4 analysis of their function.

5 I think that you should dedicate more state resources  
6 to the insurance department.

7 REPRESENTATIVE BLAUM: The risk the Legislature would  
8 do something that egregiously off-target and take a look at  
9 what they're doing?

10 MR. LASKOW: It would be out of character. But they  
11 did it with IRRRC. I mean, IRRRC went out of existence, and  
12 that created I think some disruption, not nearly as much as  
13 there would be with the insurance department.

14 REPRESENTATIVE BLAUM: But, would your association be  
15 opposed to the Legislature having the insurance commission go  
16 through the sunset process whereby it would be looked at under  
17 a microscope by various committees and the entire House as a  
18 whole?

19 MR. LASKOW: I think, because of the possibility for  
20 chaos that would result from actual sunseting, we would have  
21 to be against it.

22 But we would not be opposed to some specially fashioned  
23 legislation that would do everything but actually put them out  
24 of business. Unfortunately, I guess your choices are either  
25 to go through the sunset provision or fashion some special

1 legislation. Even though it may be more work for you, I think  
2 it would be probably more prudent to not run the risk of  
3 accidentally sunseting the insurance department.

4 REPRESENTATIVE BLAUM: Even though the odds of that  
5 happening are probably zero --

6 MR. LASKOW: If the odds were zero --

7 REPRESENTATIVE BLAUM: -- that the insurance commission  
8 would go out of business?

9 MR. LASKOW: If the odds were zero, then we wouldn't  
10 oppose it.

11 REPRESENTATIVE BLAUM: You would not oppose it?

12 CHAIRMAN DEWEESE: If the odds were zero. The odds  
13 are one in a hundred, but that's all right. My interpretation  
14 of his remark is that he opposes it, the sunset process.

15 MR. LASKOW: Yes.

16 CHAIRMAN DEWEESE: Because they are one in a hundred.

17 MR. LOVENDUSKY: Mr. Chairman, if I may, with regard to  
18 my testimony on whether or not the American Insurance  
19 Association would support a sunset, I really don't know.

20 That is not a subject that I came here prepared to  
21 address. But I will stand by the statement I made, that the  
22 American Insurance Association is a big believer in free  
23 enterprise and in the free market, and that excessive regulation  
24 is a cost that is passed through the insurance mechanism to the  
25 insureds, to the consumers of Pennsylvania.

1           So, I know that that statement, which is the philosophy  
2 of the American Insurance Association, would be considered in  
3 any review of any legislation or move to sunset the insurance  
4 department.

5           REPRESENTATIVE BALDWIN: It seems that the American  
6 Insurance Federation would like to see the -- or be in favor  
7 of sunset if it meant that the insurance department would go  
8 out of existence, and the Pennsylvania Federation is against  
9 it because of the possibility that it would go out of existence.

10          MR. LASKOW: Mine is a practical observation. His is  
11 a philosophical. I think that it would be chaotic to have  
12 no Pennsylvania insurance department.

13          CHAIRMAN DeWEESE: Well, this has been a rather  
14 chaotic experience for all of us, but I think it is worthwhile  
15 in our society and in the purview of the committee.

16          Thank you both very much. You might have felt at times  
17 as popular as Custer's Indian scouts did when Crazy Horse was  
18 on the horizon, but nevertheless as Chairman I would like to  
19 again, for the third time, say thanks for coming and visiting  
20 with us and sharing with us your points of view.

21          MR. LASKOW: Thank you, Mr. Chairman.

22          MR. LOVENDUSKY: Thank you, Mr. Chairman.

23          CHAIRMAN DeWEESE: We have one quick change in the  
24 agenda. Harold Goldner of the Philadelphia Bar is trying to  
25 catch a 3:00 train. I am under the impression that there are

1 two Bills, Bill Titelman and Bill Graham, who are local folks,  
2 and if they would be so kind as to let this gentleman jump  
3 ahead on the schedule, the committee would be grateful.

4 MR. GOLDNER: Thank you.

5 CHAIRMAN DEWEESE: I understand you have a very brief  
6 testimony.

7 MR. GOLDNER: Yes, that is correct.

8 I want to thank Mr. Titelman and Mr. Graham for  
9 allowing me to jump ahead here. I am primarily here as a  
10 liason from the Compulsory Arbitration Committee of the  
11 Philadelphia Bar Association.

12 I note from your agenda that I have been unilaterally  
13 and summarily promoted to chairman of that committee; I am  
14 not the chairman. I am merely a liason.

15 I have provided a brief, one-page statement. I am not  
16 going to read from that statement. You can read that  
17 yourselves.

18 I am going to basically explain to you why I am here in  
19 support of only Senate Bill 1427. I am here only in that  
20 capacity.

21 Senate Bill 1427 has been designed to do what we have  
22 been attempting to do for a substantial period of time, now,  
23 and that is to increase the limits of compulsory arbitration  
24 from the present level of \$10,000 for the smaller counties  
25 and \$20,000 for I think it is Class 1 cities, the first class



1 1-A and two, and home rule counties, to the level of \$17,500  
2 and \$35,000 for the same categorization.

3 The jurisdictional limits of compulsory arbitration  
4 started out in 1968 at only \$3,000, and one year later, the  
5 court said, "Let's try it up to \$10,000 on a voluntary basis,"  
6 and by 1971, only three years later, that \$10,000 was made  
7 mandatory.

8 Only a few years later, eight years later, it went up  
9 to the present level of \$20,000 and \$10,000. When you talk  
10 about tort reform or insurance reform, what you are really  
11 talking about is cost to the system.

12 And compulsory arbitration definitely reduces the cost  
13 to the system. Trials in Philadelphia County, a weekly jury  
14 trial where that jury can only hear one case costs in excess  
15 of \$2,000.

16 An arbitration panel, a single arbitration panel  
17 assembled in the same county costs approximately \$600, and  
18 that panel will usually hear more than one case.

19 It should be noted that the Legislature has already  
20 increased the limits of compulsory arbitration for motor  
21 vehicle cases to \$25,000. That is effective January 1, 1987,  
22 and that is part of the Motor Vehicle Financial Responsibility  
23 Law.

24 So, the concept of higher limits has already been  
25 entertained. The Eastern District of Pennsylvania has

1 compulsory arbitration of claims without any federal  
2 mandate that it do so, claims not in excess of \$75,000. That  
3 was raised from \$50,000.

4 So, the change from \$10,000/\$20,000 to \$17,500/\$35,000  
5 is not significant. I note that the insurance industry is  
6 not opposed to it. I know the trial lawyers are not opposed  
7 to it. The Bar Association is obviously in favor of this sort  
8 of thing.

9 When you file a claim now in excess of \$20,000, in  
10 most counties, you begin the arduous process of pleading and  
11 discovery, and sometime, in excess of one year to maybe four  
12 years later, you may be assigned to trial.

13 And once you are assigned to trial, you may wait another  
14 six months to a year before you actually see a courtroom. In  
15 most counties -- and I speak of the Greater Philadelphia area --  
16 in most counties, if you file an arbitration matter in  
17 Delaware County within one year, it is listed for arbitration.

18 In Bucks County, as soon as you say you are ready to  
19 go, within one month a panel is assembled. In Montgomery  
20 County, as soon as you certify you are ready to go, within three  
21 months a panel is assembled.

22 And in Philadelphia, when you file suit, you have eight  
23 months until you see an arbitration panel. So, by increasing  
24 the limits of arbitration, you suddenly take out of this  
25 immense court system those cases worth less than \$35,000 and

1 put them into a process which will essentially dispose of  
2 them usually within a year.

3 We will be proposing a technical amendment which allows  
4 for incremental increases in the arbitration limits. A Supreme  
5 Court case called In re: Smith sometime ago mandated that  
6 counties, Courts of Common Pleas of the various counties adopt  
7 the entire compulsory arbitration system or not at all.

8 By proposing this amendment, we will allow counties to  
9 say, "We don't want to go from \$10,000 to \$17,500 immediately,  
10 or we don't want to go from \$20,000 to \$35,000 immediately;  
11 we would like to go in step increments of \$5,000 or some  
12 other increments and see what it does to our trial calendar."

13 So, we are going to propose that amendment. My  
14 understanding is that a technical amendment is being prepared.  
15 I don't think it has been forwarded to you yet.

16 The second portion of Senate Bill 1427 I just want to  
17 mention briefly. It essentially codifies Federal Rule 11. It  
18 would dispose of the antiquated requirement of affidavit of  
19 verification to pleadings, and essentially say that a  
20 signature on a pleading or anything filed in court by either  
21 a party or their attorney would constitute certification that  
22 it is made in good faith after an investigation and with no  
23 intent to delay.

24 Although the insurance industry indicated that Federal  
25 Rule 11 has not worked, I think that is a bad characterization.

1           There has always been the availability of sanctions  
2 under the rules of civil procedure. In fact, the language  
3 of Federal Rule 11 echoes the Dragonetti statute, the wrongful  
4 use of civil proceedings statute which already exists.

5           And the tendency now is for courts to in fact encourage  
6 sanctions for frivolous claims. So, there is no real change in  
7 the law by the second section of Senate Bill 1427. It will  
8 just codify a federal rule of civil procedure.

9           I want to urge you, this is not a tort reform bill. I  
10 would hate to see it tied up really in the concept of tort  
11 reform and insurance reform. It is a bill that is designed to  
12 let claims see the light of a courtroom much sooner than they  
13 would otherwise by increasing the limits of compulsory  
14 arbitration.

15           I will be happy to entertain any questions you have.

16           CHAIRMAN DeWEESE: Jack Pressman?

17           REPRESENTATIVE PRESSMAN: Just a couple brief questions.

18 I am not really familiar with this arbitration system. I am  
19 more familiar with it as a result of labor relations type  
20 things. Who are the arbitrators?

21           MR. GOLDNER: There are basically three types of  
22 arbitration in this state. There is statutory arbitration,  
23 which is voluntary, and that is labor arbitration, you are  
24 referring to. That is also used for public employees,  
25 schoolteachers, policemen, firemen.

1           There's common law arbitration, which has existed in  
2 this country and in this commonwealth for hundreds of years,  
3 where parties may voluntarily submit to arbitration.

4           There is also compulsory arbitration, which is a  
5 provision of the judiciary code, which says that all cases,  
6 excluding equity matters and certain real estate matters --  
7 foreclosures and so forth -- where the amount in controversy  
8 is not in excess of \$20,000 or \$10,000, depending on the  
9 jurisdiction, will be submitted to a board of arbitrators.

10           The board of arbitrators are attorneys from that  
11 jurisdiction who usually, I think in every county they are  
12 required to have tried at least one case. So, they are  
13 experienced trial attorneys.

14           In Philadelphia County, they are required to attend a  
15 seminar which is a three-hour session where they are instructed  
16 on exactly what is appropriate and inappropriate for an  
17 arbitrator to do and what they can expect to see.

18           So, they are attorneys who are schooled in the law, and  
19 they hear these controversies.

20           REPRESENTATIVE PRESSMAN: And these decisions by  
21 arbitrators can be appealed?

22           MR. GOLDNER: Yes. You have to preserve the right of  
23 appeal de novo from arbitration, otherwise you are tampering  
24 with the constitutional right to trial by jury.

25           The Smith case also said that compulsory arbitration was

1 constitutional because you had the right to appeal de novo.

2 Now, what in fact happens is, of those cases filed in  
3 arbitration, statewide, the average is less than 5 percent  
4 ever actually see a jury.

5 And of those that are filed in arbitration, less than a  
6 third actually go to a panel of arbitrators. Most of them are  
7 settled before.

8 So, by increasing the limits of jurisdiction, what we  
9 are in fact doing is increasing the likelihood that more suits  
10 will settle long before they get caught in the court system.

11 REPRESENTATIVE PRESSMAN: So, 5 percent of the ones that  
12 are originally heard by an arbitrator end up in front of a jury?

13 MR. GOLDNER: No. Five percent of all cases filed in  
14 arbitration, that means a complaint is filed -- when you file  
15 a complaint, you have to state whether it is arbitration or  
16 excess, in every county.

17 And what is known as the ad damnum clause at the end of  
18 a complaint says, we are demanding judgment in excess of 20  
19 or in excess of 10, or not in excess.

20 And that says to the prothonotary, this is an arbi-  
21 tration matter, this is not an arbitration matter.

22 Thank you very much for your attention.

23 REPRESENTATIVE REBER: Basically I guess what you are  
24 saying is, the attorney is capping the case in part, where it  
25 is a minimal amount?

1 MR. GOLDNER: That's right. It essentially takes  
2 those cases that are not as serious out of the system and  
3 brings them up for quicker review.

4 That is why, when you get involved in concepts of  
5 caps, fee caps, this is --

6 REPRESENTATIVE REBER: Although conceivable and  
7 technically, in a negligence action, a case that is framed  
8 with that cap put on by plaintiff's counsel could in fact  
9 be framed in a pleading that could be an unlimited amount, is  
10 that correct?

11 MR. GOLDNER: Not in an arbitration matter.

12 REPRESENTATIVE REBER: I am saying, a particular  
13 claim could be framed on the facts as a cause of action and  
14 could go to whatever amount, any high level amount.

15 MR. GOLDNER: No, because usually the wherefore clause,  
16 the ad damnum clause of the complaint says, not in excess or  
17 in excess.

18 REPRESENTATIVE REBER: We're going in a different  
19 direction. I understand what you are saying. I am trying  
20 to characterize it in a different light.

21 Basically what I am saying is that by the arbitration  
22 process, the parties at the outset, even in a negligence  
23 action -- which conceivably could have unlimited award  
24 potential -- are in essence capping it by the initial  
25 proceeding.

1           MR. GOLDNER: Yes, that's correct, although it should  
2 be noted that once the case is appealed, it is conceivable  
3 that a jury verdict could be entered in excess of the arbitra-  
4 tion limits, and then you may come into contact with the cap.

5           There are stories of arbitration awards that have come  
6 in within the limits, and then have been appealed, and for  
7 some reason there has been an astronomical jury award. That  
8 has occurred.

9           Thank you all very much.

10          REPRESENTATIVE KOSINSKI: Thank you very much, Mr.  
11 Goldner. I would like to call upon William Titelman,  
12 legislative counsel, Pennsylvania Trial Lawyer's Association.

13          Mr. Titelman, thank you for your patience.

14          MR. TITELMAN: Thank you. It is a pleasure to be here.  
15 I was hoping the other -- oh, he did stay. As a member of the  
16 priesthood, I forgive you, for you have sinned.

17          It truly is a pleasure to be here today. You have, I  
18 trust, the folders that I have provided the committee. And  
19 included in the folders, first of all, is an article of mine  
20 which really grew out of the testimony I gave to both the  
21 House Insurance Committee and the Senate Banking and Insurance  
22 Committee on this issue, as well as to the Local Government  
23 Commission.

24          And I commend it to you. I am not going to review it  
25 at this time with you, but I also would suggest to you that you



1 might find it extremely useful to request from the House  
2 Insurance Committee particularly, because of their extensive  
3 hearings, some of the testimony that they received as well as  
4 material from the Local Government Commission.

5 I would like first to begin my comments by, I am going  
6 to sort of go through a few of the clips that I have provided  
7 the committee, and you will see the first one -- and I think  
8 the prior witnesses from the insurance industry sort of proved  
9 the headline which appeared the other week in the Inquirer on  
10 this Op-Ed piece: "Insurance Companies Aren't Convincing."

11 I would like to go into that. You heard some very  
12 interesting things, and I would like to talk about this chart,  
13 and perhaps use the blackboard to try to be instructive to the  
14 committee about some aspects of insurance, if that is all right.

15 REPRESENTATIVE KOSINSKI: That would be fine, Mr.  
16 Titelman.

17 MR. TITELMAN: You were told that we have all these  
18 claims here, and you were told about a loss ratio, loss ratios  
19 of 140 and 160 percent.

20 Those were with reference to something -- I don't see  
21 any chalk here --

22 REPRESENTATIVE KOSINSKI: It's a budget measure, Mr.  
23 Titelman.

24 MR. TITELMAN: It is tough to draw it on paper.

25 REPRESENTATIVE KOSINSKI: In caucus, we usually use

1 blood.

2 MR. TITELMAN: I hope not mine.

3 The industry is using incurred claims, incurred losses.  
4 Now, you must understand something about insurance industry  
5 jargon and how insurance industries work.

6 You see, under the tax law and under the way insurance  
7 companies work, they declare a loss and they take a loss and  
8 they immediately reserve some of their assets -- in a sense,  
9 they become liabilities -- to pay claims.

10 And some of those losses -- they're all incurred  
11 losses -- some of those losses are claims paid. And some of  
12 those losses are known claims.

13 And others are a category called claims incurred but  
14 not yet reported. In other words, the way normal people would  
15 think of it is, they aren't claims. They haven't become a claim.

16 It is not something that somebody has filed a suit on.  
17 They haven't even notified the insurance company about it. It  
18 is a claim that an actuary thinks might occur.

19 And so you have claims paid, and you have known claims,  
20 and IBNR, claims incurred but not reported. And that is what  
21 incurred claims are.

22 Now, these are the only ones that have been paid, and  
23 these are the only ones in addition to that that they know  
24 about, that they have a file on, that something is happening.

25 So that when they cite you a loss ratio or they talk

1 about this(indicating), they are talking about the whole  
2 shebang.

3 Now, why is that significant? It is significant  
4 because --

5 REPRESENTATIVE KOSINSKI: First of all, Mr. Titelman,  
6 let me interrupt you for one reason. How come the people from  
7 the insurance industry couldn't give us this information if  
8 you can give us this information? Where did you get your  
9 information from?

10 MR. TITELMAN: Well, I guess I have just sort of paid  
11 attention over the years and tried to learn, and I read, and I  
12 study. I don't know what else to say.

13 REPRESENTATIVE KOSINSKI: In other words, would this  
14 same information be available to the presenters in the  
15 insurance industry?

16 MR. TITELMAN: Yes.

17 The fact of the matter is that of every dollar that  
18 they take in, they may have only paid out that year 26 cents,  
19 but they get to say that they had a loss ratio because of  
20 all these incurred claims, even though they may not pay it out  
21 until next year, in which case they also will have taken in  
22 premiums that year.

23 Here, we have a very interesting thing. There are two  
24 things that are not shown here. One, again, you know about  
25 incurred claims. But also, you don't know about the occurrence

1 years of these claims.

2 Now, we know that what happened in Pennsylvania was,  
3 we went from having complete, sovereign immunity to no  
4 sovereign immunity to the partial reinstatement, substantial  
5 reinstatement of sovereign immunity.

6 When did these claims arise? I mean, they may have  
7 written them down here in 1983, we have 730 incurred claims.  
8 Only some of them are known claims. There are a whole bunch  
9 of them out there they say we think were claims, but we can't  
10 tell you which ones they are, we can't tell you who was  
11 involved, we can't tell you who the parties are because we  
12 don't know anything about them.

13 They are claims we think that are out there, we guess  
14 are out there. Now, they have motivations for changing their  
15 guesses. Let me give you one example of a motivation for chang-  
16 ing their guesses: taxes.

17 You know, you're doing real well, you need tax  
18 writeoffs; the more losses you have -- they can take the loss  
19 now. They may not pay the claim until five years or ten years  
20 down the road, but they take the loss now.

21 They have a great year, they may find it prudent to  
22 raise reserves, to increase the number of incurred claims,  
23 increase the IBNR in this example, because they don't want to  
24 pay taxes. I mean, it is just that simple.

25 It is perfectly legal. The IRS may come back at them,

1 but the business is a cyclical business, so they have reasons  
2 other times for reducing IBNRs. Why do they want to increase  
3 IBNRs and why do they want to reduce them?

4 Well, they might want to increase IBNRs, they might  
5 want to increase incurred claims during times when investment  
6 yields are declining.

7 They don't want to write more insurance when investment  
8 yields are declining, they want to write less. They've got  
9 to justify, they want to justify increased premiums, okay,  
10 because their investment yield is declining.

11 So, it is very, very convenient for them to do that.  
12 Their losses are rising during that period. But when interest  
13 rates are rising, it is prudent for them, for example, to  
14 reduce IBNRs. Why? They may want to write more insurance.

15 They write more insurance, they are allowed to write  
16 insurance based upon what their net worth is. The typical  
17 ratio is a three to one ratio. They can write in premiums  
18 three times what the net worth is, what their surplus is. That  
19 is the insurance jargon for net worth.

20 Obviously, you know the accountant's formula: assets  
21 minus liabilities equals net worth. If their assets decline,  
22 their surplus goes up; they can take on more risk, they can  
23 take in more premium dollars and earn more on the investment  
24 yield.

25 So, you have those kinds of factors in there, plus you

1 have questions about, what were the occurrence years of  
2 these claims, these 730 incurred claims, only a percentage  
3 of which are known, only a percentage of which are paid.

4 Some of them may be pre-1978. Some of them may be  
5 post-1978. We don't know that. Unless we have an analysis  
6 that shows us claims paid by occurrence year, we don't know  
7 anything. This is just a piece of paper with a chart.

8 And the kind of ratio that has been presented to you  
9 is just a number that sounds great, but its real relevance to  
10 you I question.

11 So, this is the kind of thing -- I mean, I hear very,  
12 very interesting testimony that the representatives of the  
13 insurance industry gave.

14 They say to you that it really doesn't matter what laws  
15 you pass, because we are going to find a reason to keep on doing  
16 what we have always done.

17 If you pass the law, we are going to say it might be  
18 unconstitutional, you know, so what difference does it make?  
19 Therefore, we are going to continue to do what we want to do  
20 regardless of what you do. I mean, that is really what they are  
21 saying to you.

22 If you and the people of this Commonwealth want to  
23 continue to take that, I guess that's on all of us. I too  
24 feel like I was suckered as a party to the auto insurance law.  
25 We made the mistake once of believing the figures that we were

1 presented by the insurance industry, and I can tell you,  
2 we are not going to make that mistake again, and I urge you  
3 not to make that mistake again.

4 They tell you to rely on the insurance commissioner,  
5 rely on the NAIC. There was a General Accounting Office study  
6 put out about 1979 or 1980 of the problems of insurance  
7 regulation and it detailed how our insurance regulatory  
8 mechanism was totally inadequate to the task; that there was  
9 of course no federal regulation; that the big insurance  
10 companies ran circles around the state regulators.

11 They detailed that one of the biggest problems was  
12 the revolving door between the regulators and the industry.  
13 And the classic example is the man who sat right here in this  
14 seat, general counsel of the Insurance Federation; his  
15 immediately preceding place of employment was as general  
16 counsel of the Insurance Department.

17 And he is sitting here giving you that self-serving  
18 testimony about the insurance department and this and that and  
19 the other thing.

20 Well, you know, fine, he's welcome to do it. They ask  
21 you to take away rights. You know, when you, this Legislature,  
22 and the general public dealt with the issue of no-fault  
23 insurance and no-fault schemes, what you were offered, at  
24 least there was a tradeoff. You were going to give up some  
25 rights and you were going to get something back in return.

1           Where's the tradeoff in what they're proposing? Where  
2 is the tradeoff? What are they giving back to the people?  
3 They're taking their rights away. What are they giving back  
4 to the people?

5           You know, they talk about the civil justice system in  
6 other countries and it's not like it is here. You know, in  
7 other countries, in some of the great western industrial  
8 nations, they have an enormous social welfare system, cradle  
9 to grave security for everything.

10           Here in this county, over half of the American public  
11 has no, no security whatsoever for long-term nursing care if  
12 they are ill, none.

13           Seventeen percent of the public has no health insurance.  
14 And I could go on and on and on. We have a different civil  
15 justice system in this country in part because we don't have  
16 the social welfare system that we have in the other socialist  
17 democracies of Western Europe or Japan or some of the other  
18 countries.

19           Now, if we want to have a tradeoff, fine. Where's the  
20 other half of the tradeoff? Are we prepared to have the  
21 business and personal taxes to support that? I can tell you  
22 that time and experience has proven that there is only one  
23 thing that is more expensive than the tort system, if there  
24 is one thing that happens to be more expensive than the tort  
25 system. It happens to be social welfare systems, that guarantee



1 benefits to everybody regardless of the issue of fault in  
2 all instances.

3 But if we want to go that route, fine, I am prepared  
4 to begin that exploration. I submit to you that that is a  
5 major, fundamental change in our society.

6 They are proposing one-half of it, just take the rights  
7 away. And I tell you that we really are confronted with a  
8 conspiracy.

9 We never before, ever, have had in my examination of  
10 history, had an industry and its allies come forward and say  
11 that the way to improve profitability is to remove rights.

12 I think that is unheard of. I mean, to me, the way to  
13 improve profitability is to make a better mousetrap, do a  
14 better job, reduce overhead, reduce expenses and all that  
15 kind of stuff.

16 They come here, they want to talk about contingent fees.  
17 I'll talk about attorneys' fees all day, if that's what you  
18 want to talk about.

19 Isn't it astounding that what you had in front of you  
20 was a bunch of defendants who want to regulate the agreement  
21 that the claimant can make with his attorney, how much that  
22 claimant can spend on employing his representation, but they  
23 don't want to do anything at all about what they are able to  
24 spend on their representation.

25 And the data submitted to you by the National Insurance

1 Consumer Organization shows that defense costs are at least  
2 twice, the defense bar nets at least twice what the plaintiffs'  
3 bar nets, at least.

4 CHAIRMAN DEWEESE: Why?

5 MR. TITELMAN: You have a member of your committee  
6 who wants to answer.

7 REPRESENTATIVE KOSINSKI: They bill on an hourly basis,  
8 and the hourly rate is inflated.

9 MR. TITELMAN: For a fascinating story on the subject,  
10 you ought to read Broder's book on the asbestos litigation,  
11 in which you would read a horror tale of phalanxes of defense  
12 lawyers asking the same witness and repetitive witnesses the  
13 same interrogatories time and time again, just running the  
14 meter, when they could have settled these cases for a fraction  
15 of what they ended up doing.

16 It is fascinating that they failed to mention to you  
17 that the Rand Corporation, which is financed by big business  
18 and the insurance industry, did a study for the Reagan  
19 Administration, which they haven't mentioned lately after the  
20 Willard Report, which found that the only way that contingent  
21 fee regulation could save money would be by preventing people  
22 with legitimate claims from bringing them, because of the way  
23 it changed the economics of the practice of law; or, in those  
24 cases with a sliding scale kind of concept, what it does for  
25 the first time is, for the first time, it puts the plaintiff's

1 attorney in a potential conflict of interest with his client  
2 so that he may be induced to settle the case for less than  
3 the case is worth to the client, because the economic value to  
4 him has been so diminished, he's looking at his other cases  
5 and saying, "For me to get the extra half a million dollars  
6 that my client deserves, it's not worth it to me."

7 Is that justice? Is that justice? In private, these  
8 same people who sit here and say this to you, in private they  
9 say to me, when we've sat down in meetings, "We know  
10 contingent fees is nonsense." Why don't they be honest?

11 Let's be forthcoming here. I am offended. I mean, I  
12 am truly, truly offended by the testimony that I heard before  
13 from the insurance industry.

14 Now they go on and they talk about frequency and  
15 severity and things like that, and I am glad to talk about  
16 frequency and severity all day.

17 Fortunately, the Pennsylvania General Assembly is not  
18 about to be stampeded anymore by the insurance industry, at  
19 least it seems that way to me.

20 And thank God, because we have had the time here to see  
21 studies and all these things come out, some of which are  
22 included here, the National Association of Attorney Generals'  
23 Report, the Consumer Federation of America, a synopsis of their  
24 study.

25 There is the National Center for State Court study which

1 is reported in some of these articles.

2           There is also a letter from the Administrator of the  
3 State Courts of Pennsylvania, who said, and I just want to  
4 note, that according to state court records, in 1984, there  
5 were 36,283 new civil case filings in Common Pleas Courts in  
6 Pennsylvania, compared to the 39,784 filed in 1980, a decline  
7 of 8.8 percent.

8           There's your litigation explosion for you. Now, with  
9 regard to exploding jury verdicts, isn't it fascinating that  
10 the chairman of the board of jury verdict research in front of  
11 the U.S. Congress testified that the insurance industry and  
12 the proponents of tort reform have been misusing our data,  
13 and that they do not support the allegations either of an  
14 explosion of verdict or of an explosion of claims.

15           What about the explosion of verdicts? You may hear from  
16 the Chamber of Commerce, because I have heard them say it  
17 before, that jury verdicts have risen at a rate twice the  
18 Consumer Price Index.

19           You know, you can do all kinds of things with statistics.  
20 I want to ask you what relevance the Consumer Price Index has  
21 to verdicts.

22           If you read the study from the Consumer Federation of  
23 America, they point out that it really has no relevance. They  
24 point out that first of all, personal injury claims, the value  
25 of personal injury claims is controlled by the special damages,

1 the economic loss, the total value. Most of them are settled,  
2 and that is what people look at when they go to settle cases.

3 And the fact of the matter is that the bulk of the  
4 special damages more often than not are medical expenses.  
5 And the rate of inflation of the Medical Care Index has been  
6 pretty close to twice the rate of inflation of the Consumer  
7 Price Index, and that is a far more controlling index than  
8 anything else.

9 Plus, there are other factors that are overlooked.  
10 These are some of them: the lengthening life expectancy. It  
11 costs more to maintain a person who is going to live longer.

12 The fact that we can keep people alive today who used  
13 to die, but at substantial expense, with some of the extra-  
14 ordinary advances of medical technology, and we pay for this.  
15 We can't expect not to pay for this -- and so on.

16 So, all of these kinds of factors have to be considered,  
17 and the Consumer Federation of America, when it did its study,  
18 found -- guess what -- when you consider those factors, no  
19 change in verdicts, none, when those factors are considered.

20 So, they talk about, isn't terrible that there were  
21 400 million-dollar verdicts in the United States a year or so  
22 ago, isn't that terrible.

23 This is a nation of 240 million people. I think it's  
24 terrible people get injured like that, but I think frankly,  
25 from a risk management standpoint, it isn't all that bad that

1 there are only 400 people in this county injured so grievously  
2 through the fault of someone else or a faulty product that they  
3 require a million dollars or more in compensation.

4 And how many of those actually receive the million  
5 dollars? How many of those cases are thrown out of court, as  
6 the CAT scan case was? Mr. Laskow talked about, there are 3  
7 percent aberrations, and there may be.

8 There are checks and balances in our judicial branch  
9 just as you have checks and balances in the legislative branch.  
10 That's what the appeals process is for.

11 And the system works. And for proof that the system  
12 works, we don't have to look outside of Pennsylvania. We  
13 can look at what happened with that CAT scan case. It is a  
14 classic example.

15 We can go on and on and on. The fact of the matter is,  
16 one of the other things I put in here was a recent report just  
17 a few days old out of the Wall Street Journal: "Property and  
18 Liability Insurers Report Strong Profits, Signaling Easing of  
19 Crisis."

20 Let me tell you what the conspiracy has been. The  
21 conspiracy has been to fool the public. They got themselves  
22 into this mess. They shot themselves in the book. They  
23 over-competed for dollars when interest rates were high so  
24 they could get that big, high investment income.

25 Now they don't want to compete, because they don't want

1 these premiums at these low yields. They don't want to take on  
2 risks. They want to be more investment bankers.

3 And so, what have they done? They went out to get the  
4 claims-made form, and they got it in virtually every state,  
5 over 40 states -- I tell you, a potential threat to every  
6 policyholder who buys it and every person who needs to look to  
7 that insurance coverage for payment.

8 There are real consumer problems with that. And they  
9 blackmailed the insurance regulators of this country into  
10 approving the claims-made form in over 40 states now. That's  
11 what they got out of it.

12 And that makes, virtually makes the Jackson Township  
13 case that was referred to earlier a moot point, because  
14 you no longer have occurrence policies, you are going to have  
15 claim-made policies. If you want to get into that, I will get  
16 into it.

17 What else did they conspire to do? They put on an  
18 advertising campaign intended to shift the focus of attention  
19 from their internal problems onto the legal system.

20 You have seen all these things with the lawsuit crisis.  
21 You know, they did all this fancy stuff. They got a Madison  
22 Avenue firm and they got focus groups together and they  
23 determined that they could change the public perception if  
24 they called it that, because it plays to popular images about  
25 courts and verdicts and all that kind of thing.

1           And they told you that we had a crisis in clerical  
2 malpractice, you saw that ad, and the one with the babies  
3 and the high school sports coaches.

4           Mr. Laskow mentioned the high school sports coaches,  
5 and of course in Pennsylvania, the Tort Claims Act, there is  
6 no cause of action for supervision, for lack of supervision.  
7 You can't sue your high school sports coach in Pennsylvania.

8           And they ran this advertising campaign, which I tell  
9 you is the single biggest job of jury tampering that has ever  
10 been done in this country.

11           And I think that if a real investigation were run, a  
12 really interested investigation, I think you would find that  
13 jury verdicts are way down, because they got into the minds of  
14 every single person that walks in the jury.

15           I can tell you this, we've done polling that shows it.  
16 I can tell you, in those states that allow lawyer-conducted  
17 voir dire, which Pennsylvania doesn't, they have found that.

18           That's occurring right now. And these are very shrewd  
19 people. They didn't spend \$6.5 million on this advertising  
20 campaign for tort reform laws which they knew would be spotty  
21 and different and unique and all that in every single different  
22 state, because a lot of their rating is done on a national basis  
23 and a lot of their rating is done very subjectively.

24           They didn't do it for that. They knew they were going  
25 to win when they bought the advertising, because they knew that



1 it would show up in the bottom line in reduced verdicts to  
2 deserving victims. They knew that they would get the claims-  
3 made form.

4 These are the kinds of things that they were going for.  
5 They hoped in the process they might get a few windfalls, a  
6 few windfalls in terms of gifts that the General Assemblies  
7 of the various states would give them.

8 People have asked, what about joint and several? I have  
9 heard that today. Maybe we should do joint and several, that's  
10 a good one.

11 You know, they did joint and several, and one of the  
12 clips, the last one I have, they did it in Iowa and Kansas  
13 back in 1983. Guess what?

14 When this insurance crisis hit in Iowa and Kansas, in  
15 Iowa, 41 of the 49 counties had their insurance coverage  
16 canceled.

17 They can't even give us data on joint and several  
18 liability. A principle of law which had its beginnings 400  
19 years ago, all of a sudden it's an issue now.

20 Do you think maybe the real issue is the fear that  
21 insurers may have to pay substantial claims on pollution  
22 liability, that we have a ticking time bomb here, we have 2,000  
23 identified hazardous waste sites in the Commonwealth of  
24 Pennsylvania, over 30 per county on average?

25 Do you think maybe they're worried about that? Look at

1 this: "Chemical Firms Battle Insurers on Policy." Do you  
2 think maybe this was what is underlying some of the attempts  
3 to change the tort law?

4 This is a shell game. And we can play into it or not  
5 play into it as we choose. The choice is yours, and the choice  
6 is the people's choice.

7 I suggest to you that the public of this state wants to  
8 correct abuses, but they don't want to give up their rights.  
9 I don't think a person was ever elected in this country on a  
10 platform of giving up the people's rights.

11 I don't believe that. Someone could convince me  
12 otherwise. Now, with respect to the reputed bill which is not  
13 the subject of the testimony today, House Bill 2426, it has  
14 been suggested that it is a fair bill and all that kind of  
15 stuff.

16 It wasn't a group of plaintiff's lawyers, it was the  
17 Pennsylvania Bar Association's House of Delegates at their  
18 annual meeting, a roomful of 250 lawyers, more than half of  
19 which were defense lawyers.

20 And the presentation on this bill was made by a  
21 defense lawyer. And the House of Delegates of the Pennsylvania  
22 Bar Association voted unanimously -- in fact, there was not a  
23 single voice raised in the room in support of 2426, not a  
24 single voice -- they voted unanimously to oppose House Bill  
25 2426. They described it as favoring the interests of special

1 interests, as being one-sided and unfair, as being not  
2 philosophically honest.

3 One of the things that was pointed out in the report  
4 that was written on it was that it takes away the rights of  
5 personal injury victims in tort claims but doesn't do  
6 anything in commercial tort claims where these same big  
7 corporations may be plaintiffs, you see, suing someone else.  
8 It doesn't affect them.

9 We could go, of course, on and on about that. They  
10 also pointed out that these changes in law, experience has  
11 shown us, will do absolutely nothing about the cost and  
12 availability, the affordability and availability of liability  
13 insurance.

14 It is very interesting, again, Mr. Laskow commented  
15 about some states were responding to the tort reform in other  
16 states and writing insurance for municipalities and all that  
17 kind of stuff.

18 Where is the response for the municipalities in our  
19 state in the wake of the law that municipal people consider  
20 to be one of the most restrictive in the United States?  
21 Where's the response? Do you think it may be a little bit  
22 political? Do you think there may be some other motivations  
23 behind that response?

24 Mr. Laskow pointed you to California as an example that  
25 tort reform works, because the insurance rates increased at

1 half the national rate. He failed to tell you a few things.

2 He failed to tell you that the insurance law, like the  
3 law in Pennsylvania, prohibits excessive rates. But unlike the  
4 law in Pennsylvania, the insurance law in California allows a  
5 private right of action.

6 In Pennsylvania, the only person that can bring an action  
7 against the insurance industry for excessive rates is the  
8 commissioner.

9 And so, what did the doctors do in California? They  
10 sued their insurance companies. And in just one case -- and  
11 there were several of them -- I believe it was with  
12 Traveler's, they got a \$46 million refund for excessive  
13 premiums.

14 Do you think that might have had something to do with  
15 what happened with insurance rates in California? So, we can  
16 go on through -- oh, yes, I really wanted to comment on pain  
17 and suffering.

18 We lawyers make a mistake, it's a real error that we  
19 make in allowing people to call it pain and suffering. We  
20 refer to it as that ourselves.

21 Pain and suffering, so-called pain and suffering is  
22 really general damages. If you want to call it non-economic  
23 loss -- it's general damages, is the real term of art.

24 And it is in fact the only compensation the victim  
25 receives for the injury itself, the only compensation the

1 victim receives for the injury itself and the way that injury  
2 adversely altered the victim's quality of life. It is the  
3 only compensation.

4 Mr. Blaum is a very good friend of mine and I have a  
5 high admiration for him. He sponsored a bill that the Medical  
6 Society want to put in which absolutely abolished any  
7 compensation for that.

8 And the result of that, I'll give you examples, because  
9 it also handled the collateral source rule: a woman, let's  
10 say she's a housewife. She goes in for a procedure, and they  
11 mistake her for the wrong patient and they do a radical  
12 mastectomy.

13 She has no lost wages. Her medical bills are paid.  
14 Under House Bill 2230, not a dime of compensation for the  
15 injury itself -- not one thin dime.

16 I could give you example after example of how egregious,  
17 how unfair, how outrageous that is. I don't think I have to,  
18 because frankly, I think that the witnesses that went before me  
19 concluded my case.

20 And so, I think you for your patience, and I would be  
21 glad to answer any questions.

22 CHAIRMAN DEWEESE: You don't have to call me "Your  
23 Honor," but that was -- I think one of the former witnesses  
24 said you were part of the priesthood of the Bar; regardless,  
25 that was a heck of a performance there.

1 MR. TITELMAN: And I wasn't paid on a contingent fee.

2 CHAIRMAN DEWEESE: This is no bull, committee members.

3 We are going to have one question and one followup, and that is  
4 it, and then we will come back around, rather than what we  
5 did before.

6 By the way, to the general public here, we are learning.  
7 This is a good agenda. I have learned something here, and I  
8 will take full responsibility for it. Next time, it will be  
9 an all-day event, and we will have four or five people before  
10 lunch and four or five people after lunch, and you won't have  
11 to get here early.

12 I apologize for this scheduling aspect only, the time.  
13 Everything else, I am not going to apologize for. Question?  
14 Lois Hagarty? And then Gerry Kosinski is next.

15 REPRESENTATIVE HAGARTY: Could you tell me your  
16 opinion on the constitutionality of limiting attorneys' fees?  
17 And I say that because it is my understanding that the Supreme  
18 Court has already decided that limiting attorneys' fees by  
19 the Legislature is unconstitutional.

20 MR. TITELMAN: I think that you are right about that.  
21 I think that Article V of the Constitution -- lawyers are  
22 officers of the court. I think we sometimes perhaps forget  
23 that, but shouldn't. And it gives them complete authority  
24 over the regulation of the practice of law, so that it is my  
25 personal opinion that regulation of attorneys' fees is

1 unconstitutional.

2           You know, I am very fond of telling poeple that they  
3 ought to shop around for lawyers, too. They don't. They  
4 don't shop around for insurance companies. They don't shop  
5 around for lawyers and all that kind of stuff, and consumers  
6 sometimes do themselves an injustice.

7           You work out a fee agreement with your lawyer like you  
8 work out any other contract.

9           **REPRESENTATIVE HAGARTY:** Thank you.

10           **REPRESENTATIVE REBER:** Can I just expound on that  
11 answer, because I think it is apropos to what we are hearing  
12 today.

13           **CHAIRMAN DeWEESE:** Yes, you can.

14           **REPRESENTATIVE REBER:** I also tell many of my  
15 corporate executives with insurance companies down in the  
16 big city that they also ought to shop around for defense  
17 counsel, because the hourly rate in Western Montgomery County  
18 is a lot less than it is in Center City Philadelphia, and I  
19 think the quality of representation for those insurance  
20 companies might be enhanced at a much cheaper price, which  
21 again, as we heard earlier, will ultimately be reflected in  
22 the premium paid by the consumer.

23           So, there are some lessons to be learned about shopping  
24 around by all.

25           **MR. TITELMAN:** I would like to comment, if I could, on

1 a couple other sort of constitutional issues that were  
2 raised by earlier witnesses.

3 CHAIRMAN DEWEESE: Anything to do with Ms. Hagarty's  
4 question?

5 MR. TITELMAN: Well, no, it is not.

6 CHAIRMAN DEWEESE: Then we are going to continue the  
7 question and answer. Go ahead, do you have a follow-up?

8 REPRESENTATIVE HAGARTY: I will just yield to Mr.  
9 Titelman on the constitutional issues, because I fee -- and I  
10 have begun to answer my correspondence in terms of indicating  
11 to people my concern to support bills that at least in my  
12 understanding have very unconstitutional provisions. So, I  
13 think that it is important.

14 CHAIRMAN DEWEESE: You want to enhance your earlier  
15 comments relative to --

16 MR. TITELMAN: Just that there were some other issues  
17 raised, for example relating to the Political Subdivision  
18 Tort Claims Act and things like that.

19 There are several cases that are up in the courts now with  
20 regard to whether transportation authorities come under the  
21 purview of sovereign immunity.

22 I am actually told by someone from SEPTA that they have  
23 reason to believe that they are going to be, very shortly,  
24 afforded the protection of sovereign immunity as a commonwealth  
25 agency, so all these things that do get resolved by the courts,



1 you aren't going to ever have perfect predictability in  
2 anything in this world. The insurance companies have lived  
3 with that. Change is the one constant, we all know that.

4 But there are cases in the courts now on some of  
5 these issues, and the courts have consistently to date upheld  
6 the constitutionality of the Political Subdivision Tort Claims  
7 Act and sovereign immunity, although I must tell you that I  
8 personally believe that the cap contained within that  
9 legislation is blatantly unconstitutional.

10 The other thing that was mentioned that relates to that  
11 was the liability of public officials and employees arising  
12 under federal law, and it was said that nothing could be done  
13 about that, that we have taken care of that on our  
14 Pennsylvania law as far as liability arising under  
15 Pennsylvania law.

16 And I spoke to Mr. Sislo afterwards, and he said that  
17 I could quote his agreement with this. There is one thing  
18 that could be done that would close the loop, that would solve  
19 that problem, and that is in one of the bills before you,<sup>1</sup>  
20 Senate Bill 1395.

21 While you cannot change federal law, you cannot address  
22 federal law, what you can do is provide that public officials  
23 and employees are to be defended by the municipality and  
24 indemnified by the municipality.

25 You can do that, and we feel that you should do that.

1 That way, there would be absolutely no fear of personal  
2 liability on the part of public officials or employees  
3 acting within the scope of their authority.

4 CHAIRMAN DEWEESE: Gerry Kosinski, one question and  
5 one followup.

6 REPRESENTATIVE KOSINSKI: Mr. Titelman, are we close  
7 to any sort of settlement on medical malpractice?

8 MR. TITELMAN: Certainly we are all hopeful for that,  
9 and working very, very hard. That has been a two-year process  
10 that we have dedicated the substantial resources of our  
11 association almost exclusively to.

12 And it is my understanding that there is some degree  
13 of communication through the office of the Senate President  
14 Pro Tem who has taken the lead in this. And I hope so.

15 CHAIRMAN DEWEESE: No followup?

16 REPRESENTATIVE KOSINSKI: No followup.

17 CHAIRMAN DEWEESE: Bill Baldwin.

18 REPRESENTATIVE BALDWIN: On the constitutional issue  
19 in Senate Bill 2426 and some others, talking about taking  
20 away damages, isn't that also a function of the court?

21 MR. TITELMAN: Yes, and I am glad you raised that,  
22 because again there is a case up in the Supreme Court on that  
23 issue, and rumor has it that they are going to take some action  
24 on that issue that might not exactly make members of my  
25 association happy. And I understand that that action is

1 imminent.

2 But yes, it's a rule of court. I think that the court  
3 guards their prerogatives very closely, just as the legislative  
4 branch guards its prerogatives closely.

5 I think that you might have a real conflict between  
6 two of the three branches of our government on that issue.  
7 While we are on the constitutional thing, there was one other  
8 point that was made, and that was the so-called cap on  
9 medical malpractice bill.

10 That is not an absolute cap. It could not be, to  
11 withstand constitutional muster. And if you really want to  
12 get into the details of how that works, I would be glad to do  
13 it, but somehow I don't think you do.

14 I resented the comments again which were made earlier  
15 which I think portrayed it in a rather self-serving fashion.

16 CHAIRMAN DEWEESE: Any other questions? Kevin Blaum?

17 MR. BLAUM: Thank you, Mr. Chairman.

18 In relation to the 2230 bill which you mentioned, you  
19 may have heard me say earlier that I believe -- and I think you  
20 may have just referred to it -- that any cap on what somebody  
21 can sue for probably violates the constitution of Pennsylvania  
22 because of the amendment that was put in way back in nineteen-  
23 whatever.

24 And I am happy to hear you say that you are hopeful  
25 there will be a solution to medical malpractice, an agreed-upon

1 solution, which I think 2230, 1513 will primarily be  
2 responsible for.

3 MR. TITELMAN: I think that you are probably right, and  
4 I think, Kevin, you certainly made a contribution that is an  
5 important contribution, helping bring people together and  
6 urging a constructive solution.

7 I really think that it is a highly complex issue and  
8 it requires the best minds on all sides of the issue to sit  
9 down and work it out, and I hope we do.

10 CHAIRMAN DEWEESE: Bob Reber?

11 REPRESENTATIVE REBER: Thank you, Mr. Chairman.

12 Mr. Titelman, you have been eloquent in getting to a lot  
13 of what you consider to be per se distinctions on the issues  
14 that are facing us on this.

15 But I would prefer if you would really get to the  
16 jugular and tell this committee, if you will, what, one, two,  
17 three, as you see it, might be the areas which could be  
18 addressed legislatively, stand the constitutional muster,  
19 not get into a conflict of separation of powers, and yet  
20 provide the relief that our particular constituents,  
21 municipal, governments, doctors, tavern owners, day care  
22 center operators will see in the form of reduced premiums?  
23 All the rhetoric is real good.

24 MR. TITELMAN: I would be glad to do that. I did think  
25 that I had gotten to the jugular, and if I missed, I'm sorry.

1           REPRESENTATIVE REBER: You danced around it, but you  
2 didn't give me anything that --

3           MR. TITELMAN: I sure made an effort, but I will make  
4 another leap at that jugular right now.

5           REPRESENTATIVE REBER: Concise, to the point.

6           MR. TITELMAN: First of all, I will comment with  
7 these particular bills on your agenda, and then I will move  
8 to some other things that you might want to consider.

9           CHAIRMAN DEWEESE: Concise, please.

10          MR. TITELMAN: Very quickly.

11                 1395 I think is a step in the right direction. It  
12 allows municipalities to get out of the grip of the insurance  
13 industry to a degree and not be so victimized by the insurance  
14 industry's business cycle, and it provides a very important  
15 security from personal liability to public officials and  
16 employees, fear of personal liability. I think it is a  
17 definite step in the right direction and improvement.

18                 Senate Bill 1427 codifies into state law Federal Rule  
19 11 and increases the arbitration limits, and I think that this  
20 is appropriate kind of reform in our legal system with respect  
21 to the arbitration limits in that it speeds the process of  
22 justice, reduces the cost of justice, and I think that is  
23 something that justice is all about. And I think that that is  
24 a plus.

25                 With regard to Federal Rule 11, I would be glad to

1 provide evidence to the Committee, including the ABA book that  
2 Mr. Laskow referred to, because they pointed out that it was  
3 being used with increased frequency.

4 In fact, I am aware of a very recent case in the federal  
5 court in the Western District of Pennsylvania where a very  
6 prominent member of our association was socked with over  
7 \$100,000 of defense costs, merely because he tried to pursue  
8 the enterprise liability theory in Pennsylvania.

9 So, the one fear that I do have with this piece of  
10 legislation is that it could be abused. But we are as lawyers  
11 opposed to frivolous lawsuits.

12 They don't serve any of us well, and anything we can do  
13 to cut down on frivolous lawsuits as well as frivolous  
14 defenses -- and Rule 11 in that respect is even-handed --  
15 is I think something we could live with. I am concerned about  
16 the potential for abuse.

17 With regard to punitive damages, Senate Bill 1428, it  
18 is an extremely restrictive law. The problem with punitive  
19 damages -- and this is a classic red herring, because punitive  
20 damages are not paid by insurance companies, unless the  
21 insurance company did the actual act and is being sued itself  
22 for punitive damages, because you can't insure punitive damages.  
23 They have nothing to do with insurance rates.

24 The problem with punitive damages is that sometimes they  
25 are pleaded in cases where they don't belong, and may in fact

1 incur some defense costs in that respect.

2 And this would really put a chilling effect on that  
3 without preventing punitive damages from being brought in the  
4 types of cases where they are absolutely appropriate, and by  
5 that I refer you to cases like the Dalkon Shield, the  
6 repetitive conduct.

7 It is very interesting, the Chamber's bill, 2426, says  
8 you can bring one punitive action, as best as I recollect,  
9 the first case, and then there's no more.

10 What about repetitive conduct? What about the fact  
11 that you keep putting the product in the market, in the  
12 stream of commerce, knowing full well what it is going to do,  
13 and it does it again and again and again and again.

14 Punitive damages are an important part of the law, and  
15 we should prevent them from being pleaded in cases where they  
16 are inappropriate, but not tamper with them otherwise, and  
17 1428 does that, and the people in the insurance industry have  
18 agreed with me in that respect.

19 With respect to 1625, I think it is truly, as I said  
20 once before, an acid test of tort reform just as the  
21 Political Subdivision Tort Claims Act was.

22 And once again, the insurance industry came up wanting.  
23 And that is your Act 57. There are other areas. I frankly  
24 think that the record is replete with evidence that changes in  
25 tort law are not going to do anything about affordability and

1 availability of insurance, and that is the problem, and that  
2 is the issue that ought to be focused on.

3 And if you want to do something about affordability,  
4 and if you want to do something about availability, there are  
5 things you can do.

6 What are they? First and foremost is insurance  
7 company financial disclosure, complete, thorough, line by line  
8 classification by classification, so we know the experience  
9 of our political subdivisions in Pennsylvania and we are not  
10 being hurt by something that happened over in New Jersey, so  
11 that we know what the experience of day care centers is and  
12 nurse midwives and so on.

13 Knowledge is the beginning of wisdom. Without it,  
14 how can we make fair judgments affecting people's rights? And  
15 we shouldn't.

16 Market mechanisms to assure availability of insurance;  
17 a joint underwriting association -- the Market Assistance  
18 Plan is at best a weak response and I think totally inadequate,  
19 and I think that you need a stick, and the stick with the  
20 industry to make they write insurance is a joint underwriting  
21 association, a mechanism which says to the insurance industry,  
22 if you decide because of your market conduct that you are not  
23 going to write a specific line, then by golly we are going to  
24 make the lot of you the insurer of last resort.

25 It keeps the state out of the insurance business and it



1 makes the insurance industry pay a price, which it ought to  
2 pay, for its adverse market conduct.

3 CHAIRMAN DeWEESE: How about banks?

4 MR. TITELMAN: I certainly think that is something that  
5 ought to be looked at. You know, the insurance industry,  
6 broadly speaking, appears competitive.

7 But in some lines, it is not competitive at all. When  
8 you have one or two people selling in a line, that is not  
9 competition. And we ought to be looking at that.

10 We ought to be doing something about removing their  
11 protection from antitrust liability. We ought to be --

12 CHAIRMAN DeWEESE: That is not this level, though.

13 MR. TITELMAN: We could do that on the state level, yes,  
14 we could. We could have a state antitrust law that relates  
15 to insurance companies.

16 We ought to provide a private right of action for  
17 insureds from unfair insurance practices, including excessive  
18 profits and unfairly discriminatory practices, a private right  
19 of action, so we don't have to rely on the good graces of  
20 whoever the insurance commissioner may be, without character-  
21 izing any insurance commissioner.

22 We ought to put a band around rates, that is have  
23 flexible insurance rates in this sense: you get a rate, it's  
24 an actuarially sound rate, there are limits as to how far you  
25 can deviate from that rate up or down.

1           That would protect insurance consumers from the  
2 enormous volatility of the market cycle. These are at  
3 least some of the things, and I would be glad to submit to the  
4 committee some more detail in terms of insurance regulation.

5           A consumer advocate may not be a bad idea in that area.  
6 There's an interesting bill that Senator Bell just put in  
7 that ought to be looked at, creating a real insurance commis-  
8 sion. It's called a commission, but it's not really. It's a  
9 cabinet office like any other.

10           Maybe we ought to be looking at that kind of thing. But  
11 we've got to be focusing our attention on affordability and  
12 availability of insurance and the kind of market conduct that  
13 was revealed, for example, in the medical malpractice study  
14 where you see a company like PIMSLIC being preyed upon --  
15 that's the doctor-owned insured -- being preyed upon by  
16 private insurers who know how to time their market entry,  
17 who skim the cream of the market and do things like that.

18           There are all kinds of tactics that they use in the  
19 marketplace that ultimately inure to the benefit of certain  
20 insurance companies, but are definitely to the detriment of  
21 the public.

22           REPRESENTATIVE KOSINSKI: Who is PIMSLIC's provider,  
23 private provider?

24           MR. TITELMAN: No, I am saying, they are competitors  
25 of PIMSLIC who engage in market conduct that cause them

1 CHAIRMAN DEWEESE: Any further questions?

2 (No response.)

3 CHAIRMAN DEWEESE: If there are no further questions,  
4 thank you very much, Mr. Titelman, for your testimony.

5 MR. TITELMAN: I appreciate the opportunity, thank you.

6 CHAIRMAN DEWEESE: The last gentleman to testify before  
7 our committee is Bill Graham, assistant counsel and chairman  
8 of the risk management committee of the Pennsylvania Chamber  
9 of Commerce.

10 I profusely apologize for the delay. It will not  
11 happen again, I hope, ever under my stewardship.

12 MR. GRAHAM: That's quite all right. We are happy to  
13 have the opportunity to speak at any time of the day. Good  
14 afternoon, Mr. Chairman and members of the committee.

15 I would like to take this opportunity to thank you for  
16 providing me with the opportunity to testify today concerning  
17 the vital issue of tort reform.

18 My name is Bill Graham, and I am employed as an assistant  
19 general counsel for the Bethlehem Steel Corporation. I am here  
20 today on behalf of the Pennsylvania Chamber of Commerce as  
21 the chairman of its risk management committee.

22 Also with me today is Fred Fox of the Chamber's staff.  
23 Whether you choose to characterize it as a problem or as a  
24 crisis, it is simply beyond debate at this point that the cost  
25 of liability insurance has increased dramatically for most

1 business, governmental and non-profit activities. In many  
2 instances, it has become either unaffordable or unavailable at  
3 any cost.

4 It is also clear that while the burden of this problem  
5 may initially be borne by the businesses, professionals,  
6 municipalities or non-profit organizations seeking insurance,  
7 it is ultimately borne by the taxpayers and consumers  
8 generally, whether it is in the form of higher costs and  
9 higher taxes on the one hand, or in the loss of services and  
10 goods available on the other. Whether it's a municipality  
11 forced to close a recreational program or facility, a drug  
12 company no longer willing to manufacture vaccines, or an  
13 obstetrician's decision to stop delivering babies, it is the  
14 taxpayers and consumers as a whole who are the ultimate losers.

15 And it is also they who ultimately bear the costs and  
16 burdens of an overcrowded court system where the resolution of  
17 even meritorious claims is often delayed by the glut of  
18 meritless claims, claims spawned by a tort law system where  
19 liability standards have steadily departed from traditional  
20 concepts of fault or causation and where damage awards can  
21 exceed a reasonable measure of compensation for the actual  
22 injury suffered, a system where the ever-increasing costs of  
23 defense, the growing reluctance of the courts to dismiss  
24 frivolous claims, and the unrelenting increase in jury verdict  
25 exposure often combine to compel the so-called nuisance value

1 settlements of even clearly groundless actions.

2           It is this problem with the current tort law system  
3 which we believe must be addressed in order to achieve any  
4 meaningful, lasting relief from the liability insurance  
5 problem. By specifically addressing frivolous or dilatory  
6 pleadings and the unwarranted assertion of punitive damage  
7 claims, Senate Bills 1427 and 1428 serve as laudable first steps  
8 toward that end.

9           It should be noted, however, that the bills do not  
10 fully remedy either the particular problems at which they are  
11 directed or the overall problem with the tort law system.

12           On the one hand, the effectiveness of Senate Bill 1427  
13 in eliminating frivolous claims and dilatory procedures will  
14 necessarily be determined by the actual practice of the  
15 courts in imposing sanctions under it.

16           Since it is essentially analogous to Rule 11 of the  
17 Federal Rules of Civil Procedure, the experience with the  
18 federal rule should be instructive.

19           Unfortunately, however, in spite of repeated attempts  
20 to effect more vigorous use of the federal rule, the actual  
21 imposition of sanctions under it, particularly for the  
22 bringing of frivolous actions, has remained relatively  
23 infrequent.

24           While there is little reason to believe that the  
25 experience in Pennsylvania under this bill would be

1 substantially different, the possibility of sanctions alone  
2 would nonetheless necessarily have some favorable deterrent  
3 value.

4           On the other hand, the effectiveness of Senate Bill  
5 1428 in eliminating the coercive use of unwarranted punitive  
6 damage claims may be limited by its own terms. In many of its  
7 provisions, it does not significantly depart from current law  
8 and, in some, it essentially restates it.

9           Because punitive damages have traditionally been  
10 intended to apply in only the extreme cases, involving  
11 intentionally malicious conduct, because they constitute a  
12 windfall to the claimant and their attorney, and most important-  
13 ly, because they are all too frequently used merely as a  
14 device to drive a wedge between the defendant and his  
15 insurance company and to enhance the nuisance value of a  
16 claim, we believe that the provisions contained in House Bill  
17 2425 and 2426 with regard to punitive damages would more  
18 appropriately remedy this problem.

19           Specifically, punitive damages should only be awarded  
20 where the evidence is clear and convincing that the defendant  
21 personally acted out of hatred or spite directed toward the  
22 injured party, or knowingly acted with malice in violating  
23 the injured party's legal rights, or for the similar actions of  
24 their agent where they knowingly authorized the doing and the  
25 manner of the act.

1           Any such award of punitive damages should be limited  
2 to 150 of the compensatory damages awarded, and should only  
3 be awarded once for the same act or course of conduct.

4           Finally, evidence of a defendant's wealth or financial  
5 condition should only be admissible after an actual liability  
6 determination, so as to avoid any prejudice to the defendant  
7 in that determination or any unnecessary harassment of the  
8 defendant in the interim.

9           It should be reemphasized, however, that even if enacted  
10 in the most effective forms, Senate Bills 1427 and 1428 would  
11 provide only a small measure of the tort reform necessary to  
12 bring about lasting, meaningful relief from the liability  
13 insurance problem.

14           Such relief can only be achieved through the more  
15 comprehensive approach embodied in House Bills 2425 and 2426.  
16 Specifically, any successful solution must additionally  
17 address, among other issues, the following:

18           The abrogation of joint and several liability;

19           The reduction of awards for future damages to present  
20 worth;

21           A limitation on awards for noneconomic loss;

22           The modification of the collateral source rule;

23           A contingent fee limitation;

24           Modificaiton of Rule 238 relating to delay damages;

25           The admissibility of evidence of remarriage, and that

1 awards are not subject to income tax;

2 More definite standards of proof in toxic torts;

3 The nonadmissibility of advance payments;

4 The notice of intent to sue;

5 Clear definition of "Commonwealth Party";

6 Modification of the strict liability theory in  
7 products liability cases;

8 State of the art, alteration, modification and misuse  
9 defenses and a seller's exemption in products liability cases;

10 And a limited statute of repose and the limited  
11 admissibility of post remedial improvements in products cases.

12 Time precludes me from discussing these provisions in  
13 detail. I will, however, remain to answer all questions  
14 relating to all those specific provisions.

15 As they are treated in House Bills 2425 and 2426,  
16 however, they do not constitute a dramatic departure from  
17 the current tort law system.

18 Under no circumstances do any of the provisions,  
19 either standing alone or taken together, take away anyone's  
20 right to bring an action in the first instance or to have it  
21 determined by a jury.

22 The thrust of the bills is solely to restore some  
23 measure of balance to the system and to ameliorate some of the  
24 unfair and coercive elements of the system which have  
25 encouraged the filing of meritless claims and the payment of



1 nuisance value settlements.

2 While these bills may not be a panacea, they do  
3 address a number of critical problems and will provide a  
4 large measure of predictability, fairness and relief.

5 We solicit your favorable consideration of these  
6 important bills, and I again thank you for the opportunity  
7 to be here.

8 CHAIRMAN DEWEESE: Thank you very much.

9 Chris Wogan or Lois Hagarty, any questions or  
10 observations?

11 REPRESENTATIVE HAGARTY: No.

12 REPRESENTATIVE WOGAN: Nothing, Mr. Chairman.

13 CHAIRMAN DEWEESE: Counsel has a couple questions.

14 MR. EDMISTON: Mr. Graham, do you have some commentary  
15 that you can share with us concerning the discussion that I  
16 imagine you have heard some of regarding the kind of data  
17 that is available on the insurance industry and the practices  
18 that take place?

19 MR. GRAHAM: I have been here all day, and I will try  
20 and recount as well as possible the basic line of that  
21 questioning.

22 As I understand it, there has been a request of the  
23 insurance industry to provide concrete, dollar percentage  
24 figures in terms of the effect that the enactment of these  
25 bills would have on future premiums.

1 I am not a representative of the insurance industry.  
2 In fact, my company is for most purposes self-insured. It is  
3 my feeling, though, that it would be difficult for the  
4 insurance industry to give you finite figures with regard to an  
5 event and an experience which has yet to occur.

6 I do believe that the experiences in Connecticut,  
7 California, and other states where they have enacted similar  
8 provisions are instructive.

9 At the same time, I have not heard any figures from any  
10 of the other speakers or studies for that matter that  
11 demonstrate that the enactment of these provisions would not  
12 have a substantial, positive effect on liability insurance  
13 premiums.

14 One of the problems, of course, is you are required  
15 to look into a crystal ball and determine what effect the  
16 courts will ultimately give to these provisions, and in fact  
17 what effect that will have on both the filing of the claims  
18 and the ultimate overall cost, referred to before as the  
19 severity of claims.

20 I am not sure how anybody could give you a definitive  
21 answer on that. I have heard no evidence or testimony today  
22 that it would not have a positive effect, and I believe just  
23 common logic suggests that.

24 I am not an underwriter, but the scope or parameters of  
25 liability of the insured are necessarily determined by the

1 expansiveness of the liability theories and the damage  
2 theories to which they are ultimately subjected in our court  
3 system.

4 If those are restricted, if those are limited, logic  
5 dictates that it has to have a positive effect. Given the  
6 future's economic conditions, I don't know that anyone could  
7 promise that it would in fact lower rates or lower them by a  
8 set amount or percentage.

9 But I don't believe anybody could sit here and tell you  
10 that they wouldn't have a positive effect in that regard.

11 CHAIRMAN DEWEESE: Fred Fox, I didn't recognize you  
12 with the contact lenses. I apologize for not saying hello  
13 earlier.

14 A couple of questions to both you gentlemen. Financial  
15 disclosure, line by line, for the insurance companies -- by the  
16 way, I am not an attorney, and I am not self-abnegating,  
17 either, so I am just going to admit, I don't know some of these  
18 things, and the people in Monroe or Snyder or Pike or Greene  
19 or Fayette Counties that we represent are obviously lost  
20 quickly in this kind of setting.

21 And what we hear from the insurance people as opposed  
22 to what we hear from Mr. Titelman as opposed to what we hear  
23 from doctors and Cliff Jones and everyone else is very, very  
24 confusing to some of us.

25 But if we had financial disclosure, line by line, would

1 that enhance our current system in Pennsylvania, if the  
2 insurance companies were to give us this information?

3 MR. GRAHAM: I am not sure, again, that I can give you  
4 a definitive answer. I think, in terms of additional  
5 requirements that are imposed on the insurance company or  
6 the industry, what you have got to look at is, is the cost  
7 that adheres to those additional requirements outweighed by  
8 the benefit that is conferred by having that information.

9 The problem that we are dealing with right now is one  
10 of availability and affordability of insurance. I think you  
11 have to carefully consider the cost of any measures that are  
12 considered so that ultimately the net effect is not to drive  
13 up the cost, which is one of the problems we are dealing with,  
14 or to make it more unattractive or desirable to write  
15 insurance in this commonwealth, so that we drive off the  
16 insurance companies.

17 But if, in reviewing the matter, it appears to you  
18 that the benefit conferred by having that line by line informa-  
19 tion exceeds the cost of the burden on the insurance company,  
20 then it is desirable.

21 CHAIRMAN DeWEESE: You have been here all day, sir.  
22 Paul McHale, my colleague from Lehigh Valley, was talking  
23 about a municipality that was paying exponentially more this  
24 year than it was a couple of years ago.

25 What is going to happen if the Chamber's tort reform

1 concept was realized; would Paul McHale's municipalities still  
2 be paying those high premiums, or are they going to plummet?

3 MR. GRAHAM: I think that goes back to my response to  
4 the earlier question about the inability to predict a  
5 precise amount or percent that the premiums may be affected.

6 But again, I think these bills could have nothing  
7 but a positive effect on premium levels, whether it is in  
8 terms of reducing premiums or whether it is in terms of  
9 holding back increases due to economic considerations.

10 CHAIRMAN DEWEESE: The lady that sat to your left earlier  
11 today with the red suit on and said that her day care center  
12 was paying 10 times, really five times for half the coverage,  
13 what they were a year ago, as an attorney and as a citizen of  
14 the commonwealth, do you think that is the responsibility of  
15 the civil justice system, or do you think the insurance  
16 companies are ripping us off, or is it somewhere in the  
17 middle?

18 What do you think about that? I mean, ten times in a  
19 year, this didn't exist when you and I were little boys. This  
20 didn't exist ten years ago. Is there no way that Cordisco  
21 and Blaum and some of these other men are right, that the  
22 insurance companies invested heavily and put a lot of money  
23 out there a few years ago, and all of a sudden they are trying  
24 to recoup their losses?

25 Is there no way the insurance company couldn't be 100

1 percent or 80 percent or 60 percent culpable for the confusion  
2 that allowed this lady's day care center to have the problem  
3 it did?

4 MR. GRAHAM: I don't think that there's no way that the  
5 insurance industry may not have had something to do with the  
6 dramatic rise.

7 I do think that if you look at a ten-fold rise in a  
8 year in terms of the cost of premiums, that is something that  
9 would cause you to take a second look and a very hard look at  
10 the causes of that.

11 I think, without a doubt, that a cause and a significant  
12 cause is indeed the tort law system. And when we talk about,  
13 why not 10 years ago, why not 15 years ago, the answer is  
14 because the expansion of liability theories and damage  
15 exposure in the last 10 to 15 years is virtually unprecedented.

16 We heard many comments about the fact that our common  
17 law system derives from a history of 300 to 400 years. Most  
18 of the elements of this system that are addressed in these  
19 two bills are very recent vintage.

20 Some go back a great length of time, and I am interested  
21 to hear that that argument is used both ways in opposing it;  
22 if it has been here forever, it can't be changed, which is  
23 with regard to most of the provisions that we are seeking to  
24 change.

25 And on the other hand, if it is of relatively new

1 vintage, that's okay, too. I mean, it seems to me you  
2 can't have it both ways.

3 But I want to point out, too, in that regard that  
4 putting aside all the economic arguments, the provisions of  
5 2425 and 2426, when you go and take them item by item, which  
6 really hasn't been done today -- there's been focus on a  
7 couple of them -- when you take them item by item, besides  
8 the economic considerations, what they are intended to do as  
9 well is restore a measure of balance to the system.

10 I don't think anybody who practices in the system -- and  
11 I have been trying cases within it now for 13 years -- can  
12 sit here and tell you that there hasn't been a dramatic  
13 expansion in terms of liability theories and damage theories  
14 as well.

15 But to go back to the original thrust of your question,  
16 can the insurance industry be viewed as having had something to  
17 do with it? I believe that that is something that ought to  
18 be looked at.

19 But again, I think you have to look at what you might  
20 do with respect to the insurance industry on a cost/benefit  
21 basis so you don't exacerbate the problem.

22 CHAIRMAN DEWEESE: There's some degree of objectivity.  
23 Obviously, there are certain other aspects of the day's  
24 proceedings we haven't seen or felt in that answer.

25 Fred Fox, Chamber of Commerce, what do you folks think

1 about a consumer advocate for insurance?

2 MR. FOX: Mr. Chairman, if we have a policy on that,  
3 at the moment I am unaware of it. We have not taken a position  
4 either favoring or opposing a consumer advocate in the  
5 insurance commission that I am aware of.

6 CHAIRMAN DeWEESE: What does Fred Fox think about it?

7 MR. FOX: I think that is irrelevant in this proceeding.

8 CHAIRMAN DeWEESE: Well, you are well paid and you are  
9 a man on the hill --

10 MR. FOX: I dispute that(laughter) --

11 CHAIRMAN DeWEESE: -- and let the record show that I was  
12 interested in what the lobbyist of the Chamber of Commerce  
13 thought about a consumer advocate for insurance. Insurance  
14 is big business in this state. You represent business, Fred  
15 Fox. I just asked you what you thought about that, so let  
16 the record show that.

17 Fred Fox, you were preceded by a couple very affable,  
18 knowledgeable folks from the insurance industry about an  
19 hour ago, and they are free enterprisers just like you and  
20 Cliff, Bethlehem Steel.

21 Somehow, we forget to ask them what they thought  
22 about banks getting involved in insurance. I don't know how  
23 we let that go.

24 What do you think about banks, free enterprise, getting  
25 more people involved; what do you think about banks in



1 insurance?

2 MR. FOX: Generally speaking and philosophically  
3 speaking, we do favor a competitive marketplace for insurance.  
4 I am not prepared, I did not come here today prepared to  
5 address that specific issue of banks in the insurance business  
6 or insurance companies in the banking business.

7 I really cannot answer that question. I don't have the  
8 knowledge to.

9 CHAIRMAN DEWEESE: Bill, you say Bethlehem Steel is  
10 self-insured?

11 MR. GRAHAM: It is for most purposes with regard to  
12 liability claims, but any company our size is required to  
13 retain insurance under some contractual provisions and under  
14 some financing terms.

15 But for most of the types of claims that have been the  
16 subject of discussion today, we are indeed a self-insured.

17 CHAIRMAN DEWEESE: Would you find it favorable for the  
18 Commonwealth to make it easier for people to self-insure in  
19 Pennsylvania?

20 MR. GRAHAM: I guess the answer would have to be yes.  
21 For most purposes, we already are. I can see no vice in making  
22 it easier for people to self-insure.

23 CHAIRMAN DEWEESE: Last question: as a lawyer,  
24 representing Bethlehem Steel, I don't know if it was Titelman  
25 or one of the people who testified earlier who said .

1 something about, antitrust legislation could be offered in  
2 the state, that it might have a positive impact. Do you  
3 have any observation on that, relative to the insurance  
4 companies?

5 MR. GRAHAM: It is my belief that that is an area that  
6 has been preempted by Congress. And my view, without having  
7 researched it, would be that it is not an area that can be  
8 filled by the state.

9 But I didn't come here prepared to address that  
10 question. We could certainly do so.

11 CHAIRMAN DeWEESE: That is one of my peculiar problems,  
12 that I like to ask questions on different parts of the dart  
13 board except for the bull's-eye.

14 I have nothing else. Lois Hagarty?

15 REPRESENTATIVE HAGARTY: No questions.

16 CHAIRMAN DeWEESE: I assume there is nobody else.

17 Thank you for your perdurability, and tell Cliff I  
18 said hello.

19 MR. GRAHAM: Thank you for the opportunity.

20 CHAIRMAN DeWEESE: That's the end of the meeting.

21 (Whereupon, at 3:12 p.m., the proceedings were  
22 concluded.)

23

24

25

C E R T I F I C A T E

1  
2 I hereby certify, as the stenographic reporter, that  
3 the foregoing proceedings were taken stenographically by me  
4 and thereafter reduced to typewriting by me or under my  
5 direction; and that this transcript is a true and accurate  
6 record to the best of my ability.

7 COMMONWEALTH REPORTING COMPANY, INC.

8 By: \_\_\_\_\_

*John A. Kelly*  
9 John A. Kelly

10 -0-

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25