

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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The Adequacy of Current Judicial and
Commercial Loss Compensation Systems

House Bills 280, 1405, 1773, 1774, 1828, 1829
1830, 1831, 1832, 1833 and 1834

* * * * *

Room 60 East Wing, Capitol Complex
Harrisburg, Pennsylvania

Thursday, February 25, 1988 - 10:05 a.m.

BEFORE:

- Representative H. William DeWeese, Chairman
- Representative Michael E. Bortner
- Representative Gerard A. Kosinski
- Representative Kevin Blaum
- Representative Richard Hayden
- Representative Babette Josephs
- Representative Paul McHale
- Representative Michael C. Gruitza
- Representative Nicholas B. Moehlmann
- Representative Jeffrey E. Piccola
- Representative Lois Sherman Hagarty
- Representative Robert D. Reber, Jr.
- Representative Joseph A. Lashinger, Jr.
- Representative Christopher R. Wogan
- Representative David Heckler

1988-103

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ALSO PRESENT:

Michael P. Edmiston, Esquire
Chief Counsel for Judiciary Committee

John J. Connelly, Jr., Esquire
Special Counsel

Mary Woolley, Esquire
Minority Counsel

Amy Nelson
Research Analyst

Susan Germanic
Research Analyst

C O N T E N T S

<u>WITNESSES</u>	<u>PAGE</u>
Julius Uehelin, President of AFL-CIO	6
William Graham, Esquire Asst. General Counsel of PA Chamber	28
Dick Reinhardt President of NFIB/PA	32
Donald H. Weir, Chairman of Coalition of PA Manufacturers	36
James F. Mundy President/PA Trial Lawyers Ass'n	52
Charles Evans, President PA Trial Lawyers Association	52
Donald Harrop, M.D. President/PA Medical Society	76
William Groves, Chairman of Executive Broad, PA Ass'n of Township Supervisors	105
William J. Schofield, III 2nd Vice Pres. of PA School Bd Ass'n	121
Richard Lee, PA League of Cities	126
Monica O'Reilly, Eastern Director Insurance Information Institute	130
Michael Rooney, Director of Projects People's Medical Society	134
Patrick J. Callan Victim of malpractice	153
Representative Robert Flick	159
Robert Griffith PA Recreation & Park Society	161
Norman Walters Executive Director, York YMCA	165

WITNESSES (CONT'D)

PAGE

Sanford Lewis Nat. Campaign Against Toxic Hazards	176
Jeff Schmidt Sierra Club	195
Victor Schwartz, Esquire Crowell & Moring	197
Jay Angoff Nat. Insurance Consumer Organization	213
James J. Morley, CPA PA Institute of Certified Public Accounts	234

Written testimony submitted by

Professor Aaron Twerski

H. Robert Davis, M.D.

Christine Garvey DeLuce
PA Newspaper Publishers' Association

Pennsylvania Farmers' Association

Stephanie G. Wychock, Director
Luzerne County Young Democrats

Michele L. Kessler
UFCW Local No. 72

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1 CHAIRMAN DeWEESE: I would like to
2 welcome you to our February 25th Judiciary
3 Committee meeting.

4 I'd like to indicate to the audience
5 and the membership, obviously, we have a full
6 schedule this morning. I would like all of us
7 to do our best to keep things moving from both
8 sides of the table. I'd ask our Committee
9 members to forward only the most crucial and
10 compelling questions. I have chatted with some
11 of the witnesses. I'm hopeful that all of the
12 witnesses will be forthcoming with answers to a
13 series of potential questions that could be
14 written and forwarded in the very near future.

15 If we do have some gray areas, and I'm
16 sure there will be, I'm hopeful our Committee
17 members will be able to forward specific
18 questions to the members of the audience that
19 will be testifying today. Of course, having no
20 proclivity toward being an autocrat, I will
21 naturally allow some questions. I want them to
22 be short and to the point.

23 Initially, on our agenda this morning,
24 it's the privilege of the Chair to welcome
25 Julius Uehlein of the Pennsylvania AFL-CIO.

1 About six minutes late, we are going to start
2 this proceeding.

3 Welcome and good morning, Mr. Uehlein.

4 MR. UEHLEIN: Thank you, Bill. Before
5 I begin my testimony, I'd like to enter a United
6 Labor Lobbyist statement opposing House Bills
7 1828 through 1834, the so-called Tort Reform
8 Bills, and supporting House Bills 1773 and 1774
9 the Work Play Safety Act. We have signatures
10 from most all of the labor unions in the state.

11 Would you give the Chairman those
12 petitions.

13 CHAIRMAN DeWEESE: Julius, I'd like to
14 interrupt you for 30 seconds. State Repre-
15 sentative Scott Chadwick has a prepared
16 statement he's going to offer to the staff and
17 will be distributed later. I want to recognize
18 the fact that Mr. Chadwick, Minority member of
19 our Committee, is welcome this morning and does
20 have information to pass out. I wanted to state
21 that for the record before commencement of the
22 proceeding.

23 MR. UEHLEIN: Chairman DeWeese, members
24 of the Committee and Committee staff, my name is
25 Julius Uehlein and I'm President of the

1 Pennsylvania AFL-CIO. It is a pleasure for me
2 to appear before you on behalf of our 1.2
3 million Pennsylvania members to discuss the
4 adequacy of current judicial and commercial loss
5 compensation systems.

6 This is a big subject and of enormous
7 significance to our membership. I will try to
8 focus my comments on areas of particular concern
9 with the hope that I can continue this dialogue
10 in the months ahead.

11 I would first like to suggest a
12 framework for analyzing this broad area. For
13 the past six years, business groups have been
14 proposing various restrictions on individual
15 rights. Often promoted under the name "Tort
16 Reform", these restrictions, in one way or
17 another, would limit the rights to individuals
18 to sue.

19 More recently, Pennsylvania AFL-CIO and
20 other groups have supported legislative efforts
21 aimed at more adequately addressing the rights
22 of victims. These proposals addressed most
23 explicitly in House Bill 1773 and House Bill
24 1774 are aimed at remedying the injustice of
25 current law.

1 It seems to me incumbent upon the
 2 members of this Committee to examine the factual
 3 basis for the claims of the various proponents.
 4 I urge you to resist being stampeđ into
 5 unsupported positions.

6 Further, I implore you to resist the
 7 convenience of political expediency which calls
 8 for developing compromise solutions satisfactory
 9 to none and unjustifiable in fact or principle.
 10 The presumption must rest on the side of
 11 individual rights and the burden of justifi-
 12 cation must rest with those who seek to restrict
 13 tort law remedies.

14 At stake in this cloud of laws
 15 governing our basic relationships are the
 16 fundamental issues of safety and the related
 17 standard of care which governs our daily life
 18 and the quality of life for injured and disabled
 19 victims. Retreat from safety, that is from the
 20 standard of care or from the quality of life for
 21 injured victims, is only justified to satisfy
 22 other even more compelling interests. As I will
 23 discuss, insurance and business industry greed
 24 fails to meet this test.

25 In plain words, Mr. Chairman, you and

1 the members of this Committee are our Marines
2 and fellow warriors charged to keep the flag
3 raised. Our history is a never-ending fight to
4 expand the rights of individuals. I strongly
5 urge you not to cede hard won ground to slick
6 public relation words where blood was let to
7 achieve rights of basic fairness.

8 Perhaps, you feel that I am being
9 overly dramatic, but let me put these comments
10 in some perspective for you. For a moment, I
11 would like to focus on product liability.

12 In our view, the subject of product
13 liability in the workplace can only be sensibly
14 considered as part of the broader subject of
15 safety in the workplace. Product liability
16 rules, after all, are at bottom a means of
17 promoting safety and compensating the victims of
18 unsafe products. And our views on the product
19 liability system, as it applies to the
20 workplace, are largely shaped by the failure of
21 other parts of the legal system to deal
22 adequately with the problem of workplace safety.

23 Nationally, each year over 5,500,000
24 workers are injured or killed while at work. In
25 Pennsylvania, over 300,000 workers are injured

1 or killed while at work. In addition, it is
2 estimated that each year, at least 100,000
3 workers, nationally, die as a result of diseases
4 contracted through occupational exposure to
5 toxic substances such as asbestos.

6 In Pennsylvania, close to 5,000 workers
7 die from exposure to toxic substances, and
8 hundreds of thousands, if not millions, of
9 additional workers are at serious risk by reason
10 of the exposure to such substances each year in
11 the course of their employment.

12 In 1970, Congress enacted the
13 Occupational Safety and Health Act to deal with
14 this situation. The theory of that act is that,
15 through regulations promulgated and enforced by
16 the Secretary of Labor, employers would be
17 required to eliminate unsafe conditions and
18 practices, and employees would thereby be
19 assured, so as far as possible, safety and
20 healthy working conditions.

21 The theory has never been put into
22 practice. Especially during the past seven
23 years, the Department of Labor has done
24 preciously little to require employers to meet
25 the goals of the Occupational Safety and Health

1 Act, and the Department has done even less to
2 enforce those rules that have been promulgated.
3 The drastic cuts that have been made in the
4 budget for the Occupational Safety and Health
5 Administration make it difficult to foresee the
6 day in which the Department will have the
7 capacity to adequately enforce the law.

8 Enforcement of the Occupational Safety
9 and Health Act has been scaled back to the
10 point of almost complete agency paralysis.
11 With 850 inspectors nationwide for four million
12 worksites, OSHA has become more of a roadblock
13 than a gateway to protection for the nation's
14 working men and women.

15 In addition, Pennsylvania is one of the
16 25 states which does not yet provide health and
17 safety protection for our public workers.

18 The short of it is, that Congress's
19 attempt to prevent occupational injuries,
20 diseases and deaths through a regulatory system
21 which would outlay unsafe practices has
22 essentially failed.

23 Just as a regulatory scheme to monitor
24 safety has failed, the very nature of our
25 standard of care is impacted by proposed

1 restrictions on product liability law. Without a
2 regulatory scheme in a free enterprise economy,
3 the duty of care is established by the potential
4 for being sued. The calculation of risk
5 prescribes the nature of care. Narrowly
6 restricted rights by nature lessen the standard
7 of care.

8 Unfortunately, corporate managers
9 regularly complete cost benefit analysis on
10 various production and product improvements
11 designed for safety. In fact, this form of
12 cost/safety analysis was institutionalized
13 during the past seven years in Washington by
14 Judge Ginsburg of the Court of Appeals, who was
15 nominated to the Supreme Court and urged against
16 asbestos controls because of the cost and the
17 long gestation period.

18 Either in making the cost of unsafe
19 conditions more easily calculable or by reducing
20 the cost, you alter the standard of care. In
21 essence, you legalize the Pinto design, the
22 daldon shield; Drano cleaner and similar
23 management decisions. These landmark cases
24 serve as deterrants to unsafe management
25 decisions. They serve as a tool for responsible

1 managers to urge in the board room to test,
2 protect and warn; lessening the chance of being
3 sued; making it more easy to calculate the cost
4 or insulating the product from liability
5 undermines the ability of responsible corporate
6 leadership to advocate for safety.

7 Barring other mechanisms to insure
8 safety, such as regulation or criminal
9 prosecution, the threat of being sued is the
10 single most important contributor to safety in
11 our society. Actions which alter the
12 calculation of cost can be directly translated
13 into harm for users and innocent victims.

14 The legal system, putting tort law to
15 one side for the moment, has been no more
16 successful in its attempt to provide
17 compensation for workers who are the victims of
18 occupational injuries or diseases. In theory,
19 Workers' Compensation laws were enacted to
20 assure that injured workers (and the survivors
21 of deceased workers) would receive adequate
22 recompense.

23 But, the reality is that the benefit
24 levels under these laws have failed to keep pace
25 with the cost of living. Those benefit levels

1 are today grossly inadequate to support an
2 injured worker and his or her family.
3 Similarly, the coverage provisions of many
4 Workers' Compensation laws have not been updated
5 in light of current knowledge about the
6 relationship between occupational exposures to
7 toxic substances and diseases with long latency
8 periods.

3
9 For example, the Workers' Compensation
10 law requires occupational disease victims to not
11 only establish their own illness, but the
12 special prevalence of this occupational disease
13 within the industry. This industry test is
14 impossible to establish given the limited amount
15 of testing and knowledge. As a result, many
16 workers suffering from occupational diseases are
17 not even eligible for any Workers' Compensation
18 benefits at all.

19 It is against this background that we
20 approach the subject of product liability and
21 the workplace. Because, as just explained, the
22 legal system has failed to assure workplace
23 safety or to provide adequate compensation to
24 injured workers, it has become necessary for
25 employees to turn to the product liability

1 system as a means of promoting safety and
2 securing adequate compensation for workplace
3 injuries.

4 Through so-called third-party suits,
5 many workers have sued the manufacturers of
6 machines, toxic chemicals, or other products
7 that cause occupational injuries and diseases.
8 Indeed, according to a study by the Insurance
9 Services Office, 50 percent of the compensation
10 paid in product liability actions goes to
11 workers who have brought such third-party
12 actions. Through these suits, workers have
13 found a means of securing a fairer measure of
14 compensation for their injuries and of providing
15 a financial incentive to encourage the
16 manufacture of safer products.

17 This increased reliance--or more
18 precisely dependence--of workers on the product
19 liability system is eloquent testimony to the
20 failure of the regulatory, Workers' Compensation
21 and criminal law systems. Workers have turned
22 to tort law as a means of protection in spite of
23 the fact that tort litigation is slow, costly
24 and unpredictable in terms of results. The fact
25 of the matter is, however, that there is not

1 presently any workable alternative to the tort
2 system for assuring workplace safety and for
3 providing adequate compensation to injured
4 workers.

5 So long as that is true, any
6 legislation that would restrict the ability of
7 injured persons to recover damages for injuries
8 caused by unsafe products is indefensible.

9 For these reasons, the Pennsylvania
10 AFL-CIO vigorously opposes House Bill 1833 and
11 any similar restrictions on victim rights.

12 All of the so-called tort reform
13 measures fail for essentially the same reasons;
14 safety, standard of care, and adequacy of
15 compensation.

16 Throughout my tenure as President of
17 the Pennsylvania AFL-CIO, I have demonstrated a
18 flexibility where compelling interests dictated.
19 This flexibility is perhaps best demonstrated in
20 the 1983 unemployment compensation compromise
21 with business. I feel that I have tried to
22 approach each challenge with an overriding
23 commitment to make change where the facts
24 justified action, even if that has meant
25 compromise on important issues.

1 Working men and women are keenly aware
2 that the workplace of the '80's and into the
3 '90's and 21st Century is a constantly changing
4 and increasingly competitive world economy.
5 After all, we have more at stake than anyone and
6 our responsiveness through our union is a direct
7 reflection of this awareness.

8 Despite the fact that today's dis-
9 cussion directly impacts safety and the standard
10 of care, as well as the adequate provision to
11 injured people, we would be willing to consider
12 retreat from individual rights if the facts so
13 warrant.

14 I have carefully studied the claims
15 over the past six years. I have researched the
16 matter and discussed the issue with state and
17 national experts. Frankly, this is one of the
18 most unusual situations I have ever encountered
19 in the legislative process.

20 The supposed justification for retreat
21 is the high cost and limited availability of
22 liability insurance resulting from the
23 proliferation of lawsuits and the increase in
24 jury verdicts.

25 From everything I can learn, from

1 Business Week to the National Association of
2 Attorney Generals, to the Corporate Conference
3 Board and the Wall Street Journal; from
4 insurance industry executives to high government
5 officials, from court administrators to
6 university professors, there are two common
7 messages:

8 The first message is that the so-called
9 cost and availability issues are (a) a phenom-
10 enon of the mid 1980's; and (b) correlated with
11 the insurance industry investment cycle and are
12 most directly related to interest rates and
13 investment earnings.

14 The second message is that the number
15 of lawsuits has not increased significantly and
16 nor have the amounts of injury awards. Even
17 more to the point, limitations on individual
18 rights is not significantly correlated with
19 lower cost or increased availability.

20 To put it a little more plainly, claims
21 for tort reform are completely uncalled for.
22 This program was devised by industry and
23 insurance leaders who seek to cover up bad
24 insurance practices and market phenomena by
25 blaming the victim.

1 Insurance companies who collaborate to
2 exploit, legislate exemption from anti-trust,
3 pay no taxes, operate without surveillance, and
4 reap untold billions in annual profits, have
5 amassed unparalleled and political capital to
6 carry on this fight. We struggle tirelessly to
7 deal with the phantom of tort reform, even the
8 economic rationale has evaporated with passage
9 of the insurance industry cycle.

10 I started by saying the presumption
11 must be in favor of retaining individual rights
12 and the burden for justifying limits rests with
13 those seeking limits.

4
14 This is the easy case. Today, I make a
15 motion to dismiss on the Pleadings.

16 They have no case. Stop wasting our
17 time. The people of Pennsylvania are tired of
18 this abuse. We can tell a phony claim. It is
19 time that we focused our collective attention to
20 some of the real issues of direct threats to
21 Pennsylvania citizens.

22 I would like to spend several minutes
23 on House Bills 1773 and 1774.

24 Workplace injuries that are inten-
25 tionally caused by an employer are particularly

1 noxious and cannot be tolerated as a matter of
2 public policy in any civilized society. No
3 employer can plead a valid justification for
4 intentionally dismembering, poisoning, or for
5 that matter, killing a worker.

6 This past spring our Supreme Court in
7 the case of Poyser vs Newman Company created a
8 complete employer civil immunity for intentional
9 harm to workers. It is incumbent upon the
10 General Assembly to reverse this travesty of
11 justice and policy.

12 Let me briefly review for you the fact
13 as reported by the Court in the Newman case.
14 The worker said, which for the purposes of the
15 case was accepted by the Court, that he was
16 operating a "notching" machine manufactured by
17 the employer. Part of the machine consisted of
18 6 sharp saw blades, which would spin when the
19 machine was turned on. The worker lost part of
20 his fingers when it came in contact with the
21 spinning blades.

22 The worker sued his employer because
23 there was no cover or guard over the saw blades
24 to protect the operator's hands. In fact,
25 despite the employer's awareness of the danger

1 posed by the saw blades, the employer
2 deliberately forbade the workers from using a
3 certain "feeding" device which would have
4 greatly reduced the risk of hand injury. The
5 employer knew that the "notching" machine did
6 not comply with Federal and state safety rules
7 and had directed the workers to hide the machine
8 on eve of an OSHA inspection and only 11 days
9 later the injury occurred.

10 The worker's suit claimed that the
11 employer's wanton disregard for the safety of
12 his workers amounted to intentionally causing
13 the injury. This traditional concept of
14 "constructive" intent--that is, being held
15 liable for the natural consequences of your
16 actions, regardless of your state of mind--is
17 broadly accepted in both civil and criminal law.

18 This legal action for intentional harm
19 to a worker was challenged by the employer as
20 precluded under the State's Workers' Compens-
21 sation law. Although Worker's Compensation
22 establishes a no-fault exclusive remedy for
23 workplace injuries, the question of intentional
24 employer harm presented a new question for the
25 Court.

1 In summary, the Court had to decide
2 whether or not workers, in foregoing the right
3 to sue their employers at the time that Workers'
4 Compensation was adopted, also gave up the right
5 to protection from intentional wrongdoing by
6 their employer.

7 Chief Justice Nix, writing for the
8 majority, characterized the worker's argument as
9 follows: "...if an employer is to be allowed to
10 escape common law liability for intentional
11 misconduct causing harm to a worker, govern-
12 mental policies aimed at promoting job safety
13 will be undermined.

14 Although Chief Justice Nix seemed to be
15 intrigued by the worker's argument, he denied
16 him the right to sue saying: "The appellant's
17 argument is an interesting one that must be
18 resolved by the General Assembly; not this
19 Court."

20 It is undeniable that one of the
21 principal justifications for open-ended tort
22 liability is safety. Clearly, those in
23 positions to produce products safely, operate
24 services in a safe manner and protect the public
25 are strongly motivated to do so because of the

1 potential for litigation. Barring a massive
2 regulatory scheme, open-ended civil liability is
3 the safety equalizer.

4 Short-term managerial wisdom dictates
5 policies based on cost competitiveness, which is
6 negatively correlated with safe production
7 practices. Prior to the Poyser case, cost of
8 production versus safety was vague at best.
9 Employers faced the possibility of open-ended
10 liability to their own workers for intentionally
11 disregarding safety warnings, or standard safe
12 operating procedures.

13 In the coldest terms you could not
14 accurately price out a worker's life versus
15 making a known life-saving safety improvement
16 prior to the Poyser decision. The threat of
17 litigation served to protect workers from the
18 knowing disregard of safety practices. Poyser
19 changed that.

20 This change must be corrected as Chief
21 Justice Nix challenged the General Assembly to
22 do. It is simply unacceptable public policy
23 that employers may intentionally harm their
24 employees with immunity.

25 House Bill 1773 and House Bill 1774

1 address this crying injustice by establishing
2 clearly ascertainable standards of care.

3 It has always seemed like the twilight
4 zone to me that a manufacturer can produce a
5 product with a safety device, and once sold, a
6 manufacturer (sic) could remove the safety
7 guard; and when you were injured, you could sue
8 the manufacturer but not the employer who caused
9 the injury. This state of the law is confusing,
10 cumbersome and unduly penalizes the victim and
11 the manufacturer.

12 The principal goal is safety. House
13 Bills 1773 and 1774 are the most direct and cost
14 efficient way of improving workplace safety.

15 At the same time, we are in the process
16 of proposing criminal penalties to correct the
17 intolerable policy of the Poyser decision.

18 We urge the Committee to carefully
19 consider these bills and to act on them as soon
20 as possible.

21 I appreciate the fact that the
22 Committee has spent the time to hold hearings on
23 these important issues. The tough job is to
24 separate the wheat from the chaff and then
25 making the bread.

1 I have tried diligently to tell you how
2 I see it and I appreciate your listening.

3 CHAIRMAN DEWEESE: Mr. President, thank
4 you very much. The next witness will be Bill
5 Graham, Dick Reinhardt and Don Weir. Are there
6 questions?

7 (No audible response)

8 CHAIRMAN DEWEESE: Gentlemen, thank you
9 very much.

10 For the record, Mr. Graham has
11 testified for our Committee before. Bill Graham
12 is from Bethlehem Steel and is the Assistant
13 General Counsel for Pennsylvania Chamber. Don
14 Weir of Wexco Corporation is the Chairman of the
15 Coalition of Pennsylvania Manufacturers.
16 Richard Reinhardt is President of the National
17 Federation of Independent Businessmen.

18 Before we go any further, now that we
19 have a good many of our members present, I'd
20 like to introduce them. To my far right is Bob
21 Reber of Montgomery County; Lois Hagarty, Mont-
22 gomery County; Gerry Kosinski of Philadelphia;
23 Rick Hayden, Philadelphia; Mike Bortner, York
24 County; Jeff Piccola, Dauphin; Public Chairman,
25 Nick Moehlmann of Lebanon; Mike Gruitza of the

1 Shenango Valley; Paul McHale of Lehigh Valley;
2 Kevin Blaum of Wilkes-Barre; Babette Josephs of
3 Philadelphia; and Dave Heckler of Bucks County.

4 REPRESENTATIVE KOSINSKI: Mr. Chairman,
5 I'd also introduce Debbie Piltch, University of
6 Pennsylvania Law School, did all my research on
7 the (inaudible word) safety act.

8 CHAIRMAN DeWEESE: Frank LaGrotta of
9 Beaver County is in the audience, and I also
10 recognize Sam Morris of Chester County as
11 members of the Assembly who are attending our
12 hearing.

13 At this point the Chair will allow
14 Mr. Bortner to make a one-minute comment and
15 then we'll go forward with our next witnesses.
16 We're running in pretty good order.

17 REPRESENTATIVE BORTNER: Thank you,
18 Mr. Chairman. I appreciate that.

19 At the beginning I had asked to make
20 one short comment, which I think for me brings
21 things into perspective and maybe some other
22 members as well. One of the unfortunate
23 consequences of this debate is that the legal
24 system has been given a black eye. As
25 Mr. Uehlein said, I don't want to sound overly

1 dramatic.

2 I think on the 200th anniversary of our
3 Constitution, it's important to recognize what
4 our legal system has done. I think simply it's
5 brought us here today. It's kept us together as
6 a country and as a society. I think it's done
7 that in a large measure because people have felt
8 that they have had a forum in which to dissolve
9 their differences; that they have had an
10 opportunity to dissolve their differences within
11 the law.

12 I would be first to point out it's not
13 a perfect system. It's a system that hasn't
14 remained static. It's a system that has
15 changed. Maybe we need to make some adjustments
16 to that system right now. That's why I'm here
17 today.

18 I'd like to state for everybody that as
19 I approach these hearings and consider these
20 bills, my goal is a fair system; not a system
21 that provides an advantage for Plaintiffs; not a
22 system that provides an advantage to the
23 Defendants, but one that keeps the system of
24 justice in balance. It's within that framework
25 that I'm very anxious to hear from the witnesses

1 today to consider these bills and to discuss it
2 with the other members of my Committee.

3 Thank you, Mr. Chairman.

4 CHAIRMAN DeWEESE: Thank you.

5 Gentlemen, if you will proceed.

6 MR. GRAHAM: Thank you and good
7 morning. My name is Bill Graham. I am an
8 Assistant General Counsel of the Bethlehem Steel
9 Corporation and the immediate past Chairman of
10 the Risk Management Committee of the Penn-
11 sylvania Chamber of Business and Industry. I'm
12 here today on behalf of the Pennsylvania Chamber
13 to present our position in favor of tort reform
14 generally, and specifically in favor of House
15 Bills 1828 through 1834.

16 Because of the time limitations today,
17 I can only very briefly discuss some of our
18 concerns. I have, however, submitted a more
19 comprehensive written statement for the record
20 and I urge your careful consideration of it.

21 Initially, I want to reemphasize what
22 we've stated before, and that is, that whether
23 you choose to describe it as a "problem" or as a
24 "crisis", it remains beyond a question that the
25 cost of liability insurance has increased

1 dramatically over the past few years for most
2 business, governmental and nonprofit activities
3 and, in some instances, remains either
4 unaffordable or unavailable, at any cost.

5 It is a problem which has affected
6 everyone from the largest industrial companies
7 to the smallest local businesses--from day care
8 centers to the largest urban medical centers--
9 from huge municipal authorities such as SEPTA to
10 the smallest rural townships.

11 And, ultimately, it is a problem that
12 is borne by the consumers and taxpayers,
13 generally; whether it is the form of higher
14 costs and higher taxes, on the one hand, or in
15 the loss of jobs, services or goods available,
16 on the other. Whether it's a municipality
17 forced to close a recreational facility, a drug
18 company no longer willing to manufacture infant
19 vaccines or an obstetrician's decision to stop
20 delivering babies, it is the taxpayers and
21 consumers who are the ultimate losers.

22 Nor, can the problem be characterized,
23 as opponents of tort reform consistently attempt
24 to, as exclusively an insurance problem, created
25 solely by the insurance industry. While the way

1 insurance companies do business and the way we
2 regulate them are clearly appropriate subjects
3 for consideration, some changes have already
4 been made in those areas.

5 More importantly, as the experience of
6 the Medical Society, which has its own insurance
7 company, and the experience of self-insured
8 companies like my own confirm, the primary
9 problem is with the tort liability system,
10 itself.

6
11 In short, it has become a system where
12 liability standards have rapidly departed from
13 all traditional concepts of fault and caution
14 and where damages can exceed any reasonable
15 measure of compensation for the actual injury
16 suffered, a system where the ever increasing
17 costs of defense, the growing reluctance of
18 courts to dismiss frivolous claims and the
19 unrelenting increase in jury verdict exposure,
20 often combine to compel the so-called nuisance
21 value settlements of even clearly groundless
22 actions. At bottom, it is a system which has
23 become unbalanced, unpredictable and unfair.

24 As both state and national polls
25 demonstrate, this imbalance has been recognized

1 by the public generally as a problem in need of
2 remedy. Indeed, some 35 other states have
3 already responded to this problem through the
4 enactment of the reform legislation, leaving
5 Pennsylvania at the far end of the tort law
6 spectrum and at a disadvantage in terms of
7 economic development.

8 On behalf of the Pennsylvania Chamber
9 specifically, and the business community
10 generally, I wish to express support for House
11 Bill 1828, which addresses the problem of
12 frivolous lawsuits; House Bill 1829, which
13 modifies the collateral source rule; House Bill
14 1830, which modifies joint and several
15 liability; House Bill 1831, dealing with
16 punitive damages; House Bill 1832, which is the
17 reduction of future losses to their present
18 worth; House Bill 1833, which modified products
19 liability law; and House Bill 1834, which
20 reforms medical malpractice law.

21 Time precludes me from discussing these
22 Bills in detail. I want to emphasize, however,
23 that they do not constitute a dramatic departure
24 from the current tort law. Under no circum-
25 stances do any of these provisions, either

1 standing alone or taken together, deny anybody
2 from the right to bring an action or to have it
3 determined by a jury ultimately. They are
4 modest, compromise proposals. The risk, if any,
5 is that they do not go far enough in restoring
6 predictability, balance and fairness to the
7 system.

8 We respectfully urge this Committee to
9 give these Bills your speedy consideration and
10 to send them to the Floor at your earliest
11 opportunity. We thank you for the opportunity
12 to appear before you today, and I will be happy
13 to answer any questions which you may have.

14 CHAIRMAN DeWEESE: Mr. Reinhardt.

15 MR. REINHARDT: Good morning. My name
16 is Dick Reinhardt. I'm President of PII
17 Affiliates LTD in Manchester. We have 75
18 employees and five separate small businesses,
19 one of which, is a distributorship of material
20 handling equipment, i.e., forklift trucks. I am
21 the immediate past Chairman of the NFIB/
22 Pennsylvania State Guardian Advisory Council.

23 I also was an elected delegate to the
24 1986 White House Conference on Small Business.
25 I spent most of my time working with hundreds of

1 other delegates developing the number one
2 recommendation of that conference, liability
3 insurance and civil justice reform.

4 As you know, NFIB/PA is the largest
5 single membership business organization in the
6 Commonwealth. It serves 20,841 independently
7 owned and operated small businesses in
8 Pennsylvania.

9 Last year on our survey, out of 16
10 possible problems affecting small business in
11 the Commonwealth the liability issue ranked
12 No. 1.

13 More recently, on our annual state
14 ballot to all NFIB members in Pennsylvania, 63
15 percent indicated between a 10 and 49 percent
16 increase, 13 percent indicated they have
17 experienced between 50 to 99 percent increase,
18 and 13 percent indicated over a hundred percent
19 increase in their general liability insurance
20 premium over the last three years.

21 In my testimony we have listed four
22 specific examples of those increases.

23 While some portion of these increases
24 may be justifiable and beneficial to some, there
25 are also negative effects to both our economy

1 and job development. As a result, I strongly
2 support House Bill 1828 through 1934.

3 There are a number of reasons to
4 support comprehensive changes to the present
5 law. First, many legal experts believe there
6 have been several changes in the liability
7 groundrules from a traditional fault based
8 system to a no-fault liability where Defendants
9 are considered to be better able to bear the
10 cost burden.

11 Second, there's some question that the
12 operability of our civil justice system is being
13 adversely adjusted by excesses.

14 Third, these changes translate into
15 costs and uncertainty for insurers. We should
16 join the majority of other states to establish
17 more fair, more certain liability rules.

18 Although Mr. Graham, as a practicing
19 attorney is more qualified to comment on
20 specific provisions of these Bills, I believe
21 examples of a more fault-based system can be
22 seen with the proposed changes to joint and
23 several liability and in the product liability
24 bill changes in certain defenses.

25 In terms of fairness, it has always

1 puzzled me why a jury should not hear all of the
2 relevant information, i.e., public collateral
3 source or why frivolous lawsuits should not be
4 discouraged.

5 One of the major issues in the debate
6 over liability laws is whether such changes will
7 stabilize and reduce insurance premiums.

8 Supporters of tort changes argue that successful
9 reform will reduce uncertainty of future costs
10 and, hopefully, overall litigation cost. We
11 believe this to be theoretically true, but we do
12 not want to be naive about the relationship
13 between liability changes and insurance rates.

14 Opponents of liability change believe
15 there is no relationship between increased
16 litigation or changes in the law and insurance
17 costs

18 As consumers of insurance, we believe
19 that changes to the insurance arena should be
20 reviewed. We recommend the report proposed and
21 approved by the Pennsylvania Civil Justice
22 Coalition on June 10, 1986, concerning the
23 insurance aspects of liability insurance crisis
24 for your review. It should be noted that some
25 insurance changes are already or are about to go

1 into effect in Pennsylvania. Needed legislation
2 has already become law regarding adequate notice
3 of significant premium increases, cancellations
4 and nonrenewals. That's Act 86 of 1986.

5 Also, what's clear is that since 1975
6 when I moved to Pennsylvania to start my first
7 business, I understand a few significant changes
8 have been made by the General Assembly to
9 provide fair, reasonable changes to the
10 liability laws.

11 We appreciate consideration of our
12 views. Thank you.

13 MR. WEIR: Good morning, Mr. Chairman,
14 members of the Committee. My name is Don Weir.
15 I'm Chairman of Wexco, Incorporated and past
16 President of Manufacturers' Association of York,
17 Pennsylvania. I too was a delegate for
18 Pennsylvania at the White House Small Business
19 Conference. I'm presenting this testimony on
20 behalf of the Coalition of Pennsylvania
21 Manufacturers.

22 The Coalition of Pennsylvania Manu-
23 facturers consists of five regional Manufac-
24 turers' Associations across Pennsylvania repre-
25 senting over 2,000 employers and approximately

1 150,000 employees. In a survey of our members
2 we found that liability coverage has become an
3 increasingly significant operating expense,
4 which, in most instances, is passed on to the
5 consumer.

6 From 1985 to 1986, 32 percent of our
7 members experienced premium increases of 50 to
8 100 percent; 34 percent of our members had
9 premium increases of 200 to 600 percent; and
10 seven percent of our members had over 1,000
11 percent increases in their insurance premium.
12 These significant premium increases were
13 accompanied by a decrease in coverage for
14 43 percent of our members and an increased
15 deductible for 38 percent of our members.

16 I'd like to share with you the results
17 of a recent study undertaken by the Rand
18 Corporation. This study was conducted in
19 response to the lack of information, and much
20 misinformation, available regarding the civil
21 justice system. The study found that an
22 astounding thirteen to \$15 billion in net
23 compensation went to injured parties in 1985,
24 and more astounding was the fact that the total
25 transactions cost of the tort litigation system

1 was fifteen to \$19 billion. Of all the money
2 paid in compensation and legal fees and expenses
3 of tort litigation, the injured plaintiff
4 receives approximately 45 percent in net compen-
5 sation, with the legal system consuming the
6 rest.

7 Manufacturers are also being subjected
8 to an increased number of product liability
9 filings. 1980 to 1985 the number of product
10 liability filings in federal district courts
11 increased from 7,755 to 13,000, an increase of
12 over 60 percent.

13 We have reached a point where our civil
14 justice system is way out of balance. We have a
15 system where it costs as much to run the system
16 as it does to compensate an injured plaintiff.
17 We have a system, whereby, our doctrine of joint
18 and several liability dock allows the Defendant,
19 who may only be one percent at fault, pay 100
20 percent of the award. We have a system where an
21 injured party may receive compensation twice.
22 We have a system where a manufacturer can be
23 sued for a product manufactured at the turn of
24 the century. We also have a system where
25 products that have been altered, modified and

1 misused are still the responsibility of the
2 manufacturer.

3 Manufacturers in this state could give
4 you specific examples of these inequities for
5 the next several days, if this Committee had the
6 time.

7 May we also state here that we fully
8 support awarding consumers who have been
9 justifiably abused if a manufacturer has not
10 extended every reasonable effort to make the
11 product safe, conform to government and industry
12 standards, he should expect to be penalized;
13 however, the pendulum has swung well beyond
14 reason.

15 We need legislative action to clear-cut
16 standards of liability to guide judicial
17 decisions. We need to better define who can be
18 sued and on what grounds. House Bill 1833 now
19 before this Committee for review would codify
20 Pennsylvania's product liability law to provide
21 such guidance.

22 The Coalition of Pennsylvania
23 Manufacturers also supports the full package of
24 Bills introduced on behalf of the Civil Justice
25 Coalition, House Bills 1828 through 1834.

1 We are all paying this multi-billion
2 dollar tort system that has evolved. We are
3 paying through higher priced goods, higher
4 taxes, dropped product lines, decreased services
5 and diminishing market shares.

6 In addition, we are continuing to fall
7 behind the rest of the country, as well as the
8 rest of the world, in product leadership. Many
9 claim laziness, unions, and corporate leaders
10 are the cause. I maintain that due to the
11 excessive litigious climate we have today, Chief
12 Executives must devote a preponderance of their
13 time in legal matters instead of concentrating
14 on product development, innovative sales and
15 promotion strategies and production
16 efficiencies.

17 The risks are so high that most CEO's
18 cannot afford to delegate this area. Find me
19 one CEO that does not find at least half of his
20 daily action basket filled with legal problems,
21 no matter how carefully he has followed the laws
22 and safety standards existing today.

23 The manufacturing community supplies 26
24 percent of the jobs in Pennsylvania. A lot of
25 states have already recognized the importance of

1 this, based on a recent article in the National
2 Insitute of Business Management, and I quote:
3 "Liability laws hurt economic development.
4 State legislators are responding to this point
5 by easing the law's bite. Alabama, for
6 instance, passed a major package of tort reforms
7 and discovered it was a good talking point in
8 government efforts to attract new industry.
9 Nearby Mississippi is likely to react by putting
10 a cap on some damage awards. Other states
11 hungry for new industry including South
12 Carolina, Indiana, Louisiana, Illinois or New
13 Hampshire are expected to pass similar reforms
14 very soon."

15 We must act now to maintain the
16 economic vitality of the manufacturing
17 communities in this state. We cannot sit back
18 and wait for federal action on this issue.
19 Don't cause your manufacturing residents to
20 continue to ask the question, "Pennsylvania,
21 where are you?" Let's change it to "Penn-
22 sylvania recognizes the imbalance of the current
23 tort system and is doing something about it."

24 CHAIRMAN DeWEESE: Thank you, sir.

25 REPRESENTATIVE PICCOLA: One of the

1 targets of the liability insurance crisis that
2 people often point to are the insurance
3 companies placing fault with them for the
4 increased premiums.

5 I was interested to hear in your
6 comments that you might have some evidence that
7 would dispute that based upon your experience as
8 a self-insurer and, perhaps, other companies who
9 are also self-insured in Pennsylvania would have
10 that same experience which would indicate that
11 your costs for self-insurance is going up just
12 as much as insurance company premiums are going
13 up.

14 Could you elaborate on that and,
15 perhaps, if you can't provide us with specifics
16 relevant to your company or other companies that
17 are self-insured, provide us with data on that
18 comparing self-insureds to those who cover
19 themselves with insurance coverage?

20 MR. WEIR: Let me summarize our
21 experience as briefly as I can. Everybody knows
22 the steel industry has gone through a difficult
23 five or six years. Our experience has been the
24 same as the other companies in the industry.
25 That has drastically cut our capacity along with

1 the number of jobs that we provide. As a result
2 of that, our sales have dropped. The ton shift
3 has dropped. Our revenues have dropped and our
4 lawsuits have gone up.

5 I can answer that by also saying, I
6 spend my full time working with the system. I
7 don't think anybody who works with the system
8 can objectively say that there hasn't been a
9 dramatic change in the law--product liability,
10 in particular--general liability in the State of
11 Pennsylvania in the last 15 years. It's not
12 evolved. It's been a revolutionary change.

13 As part of my written statement there's
14 a paper by Professor Twerski which compared
15 Pennsylvania's law, particularly some of the
16 most troublesome areas, with other states. I
17 think any objective comparison shows the law in
18 Pennsylvania is on the far end of the spectrum.

19 It's a two-fold problem. It's both the
20 extent to which it's gone and the unpredict-
21 ability that we see in that law. I recommend
22 that you all take a look at that paper. Also
23 this afternoon, Professor Swartz will be talking
24 directly about product liability as well.

25 REPRESENTATIVE PICCOLA: Maybe you

1 didn't understand my question. My question was,
2 some people say that the problem is insurance
3 companies are just gouging people. You said as
4 a self-insured your costs are going up just as
5 much as anyone who would buy insurance to cover
6 their liability.

7 What I'm asking you is, do you have
8 data that supports that, showing your costs as a
9 self-insured have gone up and can you provide
10 that information to our Committee? Do you have
11 any statistics to compare those costs to the
12 costs of companies that aren't self-insured that
13 purchase policies of insurance to cover the
14 liability?

15 MR. WEIR: We can try to provide you
16 with the statistics and we will do so to provide
17 you with the type of statistics that you're
18 looking for and to break it out, if we can break
19 it out. I think the simple fact is, our sales,
20 the number of products that have gone out
21 through our doors in the last five or six years
22 has dropped dramatically. The number of law-
23 suits coming in has not.

24 CHAIRMAN DEWEESE: I'd like you to try
25 to finalize this, Jeff.

1 REPRESENTATIVE PICCOLA: My point is
2 this, many people point to insurance companies
3 as the problem. I would like to try to get that
4 out of the way and identify that as a red
5 herring that there is competitiveness in the
6 insurance industry and we don't have
7 unreasonable premiums given the problems that
8 exist.

9 If you can demonstrate that self-
10 insured's are experiencing the same costs in
11 black and white that people who have to buy
12 insurance are experiencing, I think that would
13 help to eliminate insurance companies as the
14 target of our main effort. If you can provide
15 that information I would be most grateful.

16 MR. WEIR: We will work with you to do
17 that. Also, as I pointed out, Dr. Harrop will
18 be testifying as to the Medical Society's
19 experience where they have their own insurance
20 company.

21 REPRESENTATIVE PICCOLA: That would
22 be helpful also. Thank you, Mr. Chairman.

23 CHAIRMAN DeWEESE: A quick comment from
24 Mike Bortner. A quick question from Paul McHale
25 and a quick overview from Jim Mundy.

1 REPRESENTATIVE BORTNER: I'd just like
2 to point out to my colleagues on the Committee
3 that Mr. Reinhardt, Mr. Weir have their
4 businesses in my legislative district. I have
5 visited their businesses. They are both very
6 successful and they have discussed these issues
7 with me before.

8 As is obvious today, they are very
9 articulate spokesmen on behalf of their cause.
10 I know they are very busy and I wanted to
11 personally thank both of them for taking the
12 time to come up and share with us your thoughts
13 on this issue. Thank you Dick, and thanks Don.

14 REPRESENTATIVE McHALE: I think you
15 were present in the hearing room when
16 Mr. Uehlein made reference to the decision
17 Poyser vs Newman Company. I happen to be very
18 familiar with that decision. It was rendered by
19 our Supreme Court last March 17th.

20 Mr. Uehlein, I think, paraphrased
21 accurately what that case said, a thumbnail
22 scale. Supreme Court Poyser vs Newman Company
23 said difinitively for the first time, if an
24 employer in Pennsylvania intentionally--we are
25 not talking about negligently--but intentionally

1 harms one of his employees through the knowing
2 violation of a safety standard, and as a result
3 of that intentional misconduct the employee is
4 injured, the employee, as a result of Poyser,
5 may no longer sue in tort, but is limited to the
6 exclusive remedy of a Workmen's Compensation
7 claim.

8 Does your organization defend the
9 rationale of that decision?

10 MR. WEIR: I don't know that I have
11 studied the decision that carefully. It doesn't
12 relate directly to the Bills that we have
13 introduced or are sponsoring, but I think I can
14 address the general policy issue that's there.
15 I think, and also it's my understanding of
16 Pennsylvania law in that area that you can still
17 bring an action for an intentional act, if it's,
18 indeed, the intent to injure the employee.

19 REPRESENTATIVE McHALE: That's not
20 correct. That's what was reversed by that
21 decision based on an interpretation of statutory
22 law. The Supreme Court said, even if it's
23 intentional injury through the knowing violation
24 of the safety standards you may not sue in tort.
25 You can only file a Workmen's Comp.

1 MR. WEIR: Accepting that as the law
2 then, the basic compromise that underlies the
3 Workers' Compensation is a tradeoff right to
4 assure recovery. And the nature of the act, of
5 course, doesn't change the nature of the injury.
6 So, the level of compensation should not change
7 in that regard either.

8 On the one side of the tradeoff the
9 nature of the act really makes no difference
10 insofar as that tradeoff is concerned. On the
11 other side of the coin is the obvious public
12 policy of wanting to deter intentional acts.
13 There are, of course, other deterrents to
14 intentional acts on the criminal side, but how
15 you draw the balance in terms of the two
16 competing public policy considerations can be
17 debated either way. If you are asking if my
18 company, my organization, subscribes to this
19 system which encourages or doesn't discourage
20 intentional infliction, the answer, of course,
21 is no.

22 REPRESENTATIVE McHALE: Chairman is
23 anxious to move on. I will say briefly, you're
24 correct. There's a tradeoff. There's a quick
25 pro quo. When you're talking about a negligent

1 injury inflicted by an employer upon an
2 employee, that's why we created the Workmen's
3 Compensation system. The employee gives up the
4 right to sue, but is guaranteed a payment
5 through the Workmen's Comp insurance system.

6 On the Poyser decision when the Supreme
7 Court extended that rationality with intentional
8 injuries where the employer intentionally harms
9 the employee, but we at the Civil Justice System
10 say to the employee you may not sue in tort.
11 You can only file workmen's comp. I think
12 that's ethically indefensive.

13 CHAIRMAN DeWEESE: Mr. Blaum.

14 REPRESENTATIVE BLAUM: Thank you,
15 Mr. Chairman. Like some of the members had said
16 earlier, I hope that from these hearings today
17 that we all learn something from them; that they
18 are just not restating the positions that we are
19 all familiar with from both sides of the issue.

20 What I want to know, when you talk
21 about the increase in lawsuits, if they are all
22 legitimate lawsuits, then we don't have a
23 problem with our tort system. I'm not saying
24 they are. You suggest that they are definitely
25 not. Rather than say our lawsuits, number of

1 suits that you are experiencing and this
2 Chamber's membership is experiencing is on the
3 increase, do you have any statistics or
4 information that tells me how many of them have
5 been found to be frivolous, or if not thrown out
6 by the judge, are decided very quickly by the
7 jury and thereby can probably be considered
8 frivolous? Do you have that kind of
9 information?

10 I don't think just telling this
11 Committee that our lawsuits are going up --
12 They may very well be all legitimate. If they
13 are, I don't think anybody here wants to limit a
14 person who has been truly injured from being
15 truly and adequately compensated; at least I
16 don't, but I do want to try and eliminate and
17 cut out the frivolous actions which are causing
18 everybody a problem.

19 Do you have that kind of information
20 that can tell us not only your lawsuits are
21 going up, but how many of them, to a reasonable
22 person, are ridiculous?

23 MR. WEIR: I don't know of anywhere you
24 can get a direct indication of that. If you
25 will look at the percentage of cases being won

1 and lost, you're looking at just five percent of
2 all of the cases brought.

3 Part of the problem is that, approxi-
4 mately 95 percent of the cases are settled, and
5 many of those are often settled based on the
6 pure economics of it costing more to defend than
7 it does to settle out cheaply. That's what this
8 package of proposals are designed to do.

9 As I stated before, none of them bar
10 anybody from bringing an action under any
11 circumstances. The thrust of these proposals
12 are modest compared to the reforms enacted in
13 other states. It's simply to try to put some
14 disincentives for frivolous action and try to
15 put some additional information and to put some
16 additional defenses that make the cases fair.

17 But, ultimately, there is no bar in any
18 of these provisions either working singly or
19 together and nothing that prevents any of these
20 claims from being determined by a jury
21 ultimately. We are not trying the change the --
22 none of these Bills would change the basic
23 system.

24 As far as numbers, I don't know of any
25 statistics kept anywhere. Of course, it can be

1 argued what is frivolous and what isn't. It's
2 one of the reasons we stayed away from an
3 anecdotal response. We can mark out cases
4 that fit in that category, but I don't think
5 that serves our purpose.

6 CHAIRMAN DeWEESE: Well, gentlemen,
7 thank you.

8 Good morning, Mr. Mundy. Introduce
9 your cohorts and then begin your testimony.

10 MR. MUNDY: Seated with me on my left
11 is Charles Evans of Pittsburgh who is President
12 of the Pennsylvania Trial Lawyers Association.
13 On my right, Mark Phenicie, Legislative Counsel
14 for the Pennsylvania Trial Lawyers Association.

15 Before we begin, Mr. Evans has a brief
16 statement that he will read into the record.

17 MR. EVANS: There has been some
18 statements already submitted to your Committee
19 for the record. I'd like to make mention the
20 groups involved, these are various groups across
21 the state who could not appear here today to
22 testify, and again, who have given your
23 Committee written statements in opposition to
24 the tort reform Bills that are under discussion
25 today. Those groups include the following:

1 American Association of Retired
2 Persons; Pennsylvania State Council of Senior
3 Citizens; Sierra Club; Pennsylvanians United to
4 Rescue the Environment; Three-Mile Island Alert;
5 The Society for Patient Awareness; Philadelphia
6 Area Project on Occupational Safety and Health;
7 Injured Workers of Pennsylvania; Asbestos
8 Victims Education and Information; Dalkon Shield
9 Information Network, Incorporated; Greene County
10 Medical Malpractice Victims; Head Injury
11 Foundation; DES Action; Leigh Valley Petitions;
12 and Luzerne County Young Democrats. Thank you.

13 MR. MUNDY: Mr. Chairman, as this
14 Committee contemplates the enactment of
15 legislation which would bring about sweeping
16 changes in our system of legal justice, we, of
17 the Trial Bar, ask only that you first consider
18 three threshold questions:

19 One, does the civil justice system
20 serve a valuable and legitimate social purpose
21 to protect the innocent from potential harm and
22 to bring just compensation to victims of care-
23 less and irresponsible behavior?

24 Two, have the advocates of restricting
25 consumer rights met their burden of proving that

1 changes are necessary?

2 Three, would enactment of House Bills
3 1828 through 1834 and other similar legislation
4 actually produce the substantial savings in
5 insurance premiums predicted by tort reform
6 enthusiasts?

7 The purpose of the civil justice
8 system. In America there are two ways by which
9 to deter unsafe or irresponsible behavior:
10 governmental regulation and the threat of
11 litigation. The civil justice system offers the
12 advantages of thoroughness and flexibility.

13 No number of federal or state
14 inspectors, no number of special governmental
15 investigative agencies or other bureaucracy can
16 hope to provide the same level of deterrence as
17 does our civil justice system. Nor would the
18 business community or society as a whole
19 tolerate the level of bureaucratic intrusion
20 that would be necessary to approach the
21 efficiency of the legal system in feretting out
22 unsafe conduct.

23 In addition, the judicial system has
24 the flexibility necessary in an age of constant
25 development of new products, new medical

1 techniques and the like, to confront the new
2 hazards to the consumer and the environment
3 often disguised as progress. The compendium of
4 our civil law developed over two centuries is
5 not only flexible enough to meet these
6 challenges, but also has proven to be more
7 deliberative and cautious in its adaptation of
8 law to changing concepts of justice and social
9 responsibility. Too often we tend to overlook
10 the benefits to society derived as a consequence
11 to a lawyer's effort to serve a client.

12 It was in a courtroom that we first
13 heard of the Ford Motor Company's conscious
14 decision to allow people to burn in their Pinto
15 automobiles because their own cost/benefit
16 analysis determined the cost of repositioning
17 the gas tank would be three dollars more per car
18 than it would cost to compensate the families of
19 those who would perish in flames if they did
20 not.

21 It was in a courtroom that we learned
22 of the deception of John Manville and others,
23 who, for 50 years, knowingly disseminated the
24 horrors of asbestos fibers oblivious of the
25 consequence to generations.

1 It was in a courtroom that we found out
2 about the import for profit of highly flammable
3 fabric for us in the manufacture of children's
4 pajamas. It was in a courtroom that we learned
5 that a diving board mounted over a backyard
6 inground, hopper-bottom pool was a prescription
7 for paralysis.

8 Thalidomide, Mer-29, DES, the dunebuggy
9 and too many other products had their Madison
10 Avenue gloss stripped away and their true ultra-
11 hazardous character revealed not through govern-
12 mental intervention, or by routine scientific
13 research, but by exposure to a courtroom.

14 I wonder if it were possible to measure
15 the savings in terms of medical expense and
16 economic loss brought about because of the know-
17 ledge and forewarning gleaned from adversarial
18 encounter whether our civil justice system would
19 still appear to be extravagant.

20 And what of the deterrent effect such
21 cases as these may well have had upon those who
22 might otherwise have succumbed to the temptation
23 to risk injury to others for the opportunity to
24 earn a fast buck. Another savings that defies
25 quantification.

1 We do know, however, that the concepts
2 of safety engineering and risk management had
3 their genesis as a response to litigation.
4 Where would we be today without the safeguards
5 these disciplines have provided? Would any of
6 us wish upon our children a world where such
7 injury-preventive specialization no longer
8 exists?

9 Even the Rand Corporation, sometimes
10 referred to as the conservative think tank, has
11 conceded that it is the threat of a product
12 liability lawsuit which constitutes our
13 singular, most effective deterrent against the
14 manufacture, distribution and sale of unsafe
15 products.

16 There is substantial evidence that
17 legislation aimed at eroding the principle of
18 man's responsibility for his actions does have
19 an impact upon the social behavior of those
20 accorded legislative privilege and immunity.

21 This past summer in Philadelphia a
22 two-year-old boy walking with his mother in a
23 public park was lost forever when he fell
24 through an open water drain. The absence of a
25 manhole cover is a defect readily discoverable

1 by routine inspection. But it is less likely
2 that money will be spent on inspection when the
3 law eliminates any need to be concerned about
4 liability. The Recreational Land Use and
5 Control Act confers complete immunity for such
6 conduct.

7 In Nay Aug Park located in Scranton,
8 Pennsylvania, there is an abandoned quarry basin
9 filed with water which is used extensively as a
10 swimming hole despite the existence of numerous
11 large and jagged rock formations just below the
12 surface. According to the local newspapers, 27
13 people at last count, most of them teenagers,
14 have lost their lives or suffered brain damage
15 or paralysis because no one will spend the money
16 necessary to eliminate this hazard. The
17 Recreational Land Use and Control Act says they
18 don't have to.

19 In three cases in which I have been
20 involved, a suicidal individual was inexplicably
21 released from a psychiatric hospital despite
22 clear and unmistakable signs that each was
23 actively planning a repeat attempt at suicide.
24 Two of them, fathers of young children,
25 including one who was an Assistant United States

1 Attorney, were dead within 24 hours of their
2 premature release. The other, an 18-year-old
3 girl who was the recipient of an academic and
4 athletic scholarship to one of our most presti-
5 gious universities, remains paralyzed from her
6 attempt to end her life on the day following her
7 release.

8 In each of these cases, the institu-
9 tions involved sought to hide behind the blanket
10 immunity afforded by the General Assembly in the
11 Mental Health Acts of 1968 and 1976. With this
12 shield on the books, those who were aware of the
13 dangerous propensities of Sylvia Seegrism felt
14 no compulsion to sound so much as a warning
15 before she brought death and mayhem into
16 Delaware County's Springfield Mall.

17 Then there is the tragic death of one
18 of the nation's most prominent newscasters,
19 Jessica Savitch, who drowned when a car in which
20 she was a passenger overturned into a water-
21 filled canal which was located adjacent to the
22 parking lot of the Bucks County restaurant
23 where she had dined. The vehicle went over that
24 embankment within one foot of the spot where
25 another man lost his life in the same way five

1 years before.

2 In the five years which intervened,
3 letter after letter written by the owners of the
4 restaurant, Chez Odette, requesting permission
5 to erect, at their own expense, barriers to
6 prevent a reoccurrence were ignored. The owner
7 of the canal was the Commonwealth of Penn-
8 sylvania which had the protection of a \$250,000
9 cap as well as immunity from punitive damages
10 under the Sovereign Immunity Act.

11 Is change necessary? That's another
12 way of asking, is there a lawsuit crisis?
13 According to Robert Roper, Executive Director of
14 the National Center for State Courts, the growth
15 in the number of lawsuits filed in the United
16 States over the last five years, and indeed, for
17 the 25 years in which that organization has kept
18 records, has done nothing more than track the
19 growth in population. The average verdict has
20 increased at approximately the same rate as the
21 medical cost index.

22 Since reimbursement for medical bills
23 is the graverman of a personal injury suit, this
24 is exactly the growth that would be expected.
25 The median verdict in this country over the last

1 25 years is \$8,000 1959 dollars. Those are the
2 statistics of the lawsuit crisis.

3 Has the insurance industry been able to
4 keep up with this rate of growth? According to
5 the General Accounting Office, the official
6 watchdog of the Federal Government, in the
7 10-year period between 1975 and 1984, the
8 casualty insurance industry earned \$75 billion.
9 They paid no federal income tax at all, and
10 instead, received a \$125 million rebate from the
11 IRS.

12 In the so-called year of crisis, 1985,
13 they initially claimed \$24 billion in losses,
14 which they later revised to \$5.5 billion in
15 loses. According to the GAO, the industry
16 actually earned a \$5 billion profit that year
17 followed by a whopping \$19 billion in 1986. We
18 don't know what the GAO will say about 1987 yet,
19 but the industry itself admits that --

20 CHAIRMAN DeWEESE: Repeat that last
21 sentence.

22 MR. MUNDY: So-called year crisis 1985,
23 they initially claimed a \$24 billion loss which
24 they later revised to a \$5.5 billion loss.

25 According to the GAO, the industry

12
1 actually earned \$5 billion that year which was
2 followed in 1986 by a \$19 billion profit. We
3 don't know what GAO will say about 1987, but the
4 industry admits to a \$13.7 billion profit in
5 1987 and they still haven't paid any income tax.

6 In the 20-year period between 1966 and
7 1986, the assets of the casualty insurance
8 industry rose from \$42 billion to \$370 billion,
9 a growth of 780 percent, which is even more
10 remarkable when you consider that the industry
11 claimed cumulative losses of \$104 billion for
12 that 20-year period. Statistics such as these
13 prompted the conservative GAO to predict in 1986
14 that casualty insurance profits will grow at a
15 rate of not less than 25 percent per year for
16 each of the next five years.

17 It was information such as this which
18 caused Consumer Reports to feature the lawsuit
19 crisis as an insurance industry spawned myth in
20 its 50-year commemorative edition published in
21 August of 1986, and Ralph Nader to describe the
22 insurance crisis as:

23 "The greatest commercial hoax I have
24 ever observed in the United States, both in
25 terms of its size, tens of billions of dollars,

1 and in terms of its manufactured figures and
2 phony anecdotes."

3 The issue was also examined by the
4 National Association of Attorneys General, whose
5 report released in May of 1986 contained the
6 following conclusions:

7 "Conclusion No. 1, the property/
8 casualty industry is in adequate and indeed
9 improving financial condition.

10 "Conclusion No. 2: There have not been
11 vast or explosive increases in claims and
12 payments to victims.

13 "Conclusion No. 3: The cyclical nature
14 of the industry itself, and not any change in
15 tort claims, is largely responsible for the
16 current 'crisis'.

17 "Conclusion No. 4: Changes in the
18 civil justice system are not likely to solve the
19 current or future problems in availability or
20 affordability of liability insurance."

21 These are substantially the same con-
22 clusions as those reached by Pennsylvania House
23 of Representatives Committee on Insurance in its
24 report released in September of 1986 which was
25 based upon evidence gathered from hearings held

1 across the Commonwealth.

2 Will costs be reduced? The third
3 threshold question is whether enactment of tort
4 reform would indeed bring about the promised
5 savings in insurance premiums.

6 On this subject, let me say from the
7 outset that to a large extent the campaign for
8 change has already succeeded. Tort reform in
9 the form of judicial fiat has already occurred
10 in the Commonwealth of Pennsylvania. This fact
11 was acknowledged by an earlier speaker today,
12 William Graham, Esquire, Chairman of the Chamber
13 of Commerce Risk Management Committee, in an
14 interview published this past summer in
15 The Business Report in which he stated:

16 "Most importantly, the Chamber has
17 initiated an ongoing dialogue with representa-
18 tives of the Pennsylvania court system con-
19 cerning the problem, and in the past year, there
20 have been some favorable decisions from the
21 Pennsylvania Supreme Court which suggest that a
22 positive change in the direction of the case law
23 may at last be taking place."

24 My reading of recent case law causes me
25 to wholeheartedly agree with Mr. Graham's obser-

1 vation. I have attached to this testimony a
2 synopsised list of recent decisions which, by no
3 means, complete but which illustrates the point.

4 But, will such restrictive changes in
5 the law bring about reduced insurance costs? On
6 this point the experience of the Province of
7 Ontario, Canada, is most revealing because,
8 unlike most of the United States, it enacted
9 sweeping tort reform prior to 1980, and these
10 restrictions were solidly in place when the
11 insurance crisis exploded upon the scene in
12 1985.

13 In Ontario, prior to 1980, they had
14 capped pain and suffering awards to \$100,000,
15 eliminated punitive damages except for inten-
16 tional conduct, eliminated the so-called "poor-
17 man's key to courthouse", eliminated the right
18 to have a jury hear civil cases and enacted a
19 rule requiring the losing party to pay the
20 winner's court costs and counsel fees.

21 Do you know what happened in Ontario in
22 1985? The casualty insurance carriers, the same
23 ones who insure us, canceled the insurance for
24 day care centers in Ontario. Only one of
25 Ontario's 121 school boards could get insurance.

1 Many of Ontario's major cities,
2 including the City of Toronto, could not get
3 insurance. The Canadian National Ski Team,
4 which had never had a claim against it, could
5 not get insurance. The intercity bus industry
6 saw its premiums go up 1000 percent. Schoolbus
7 operators saw their insurance go up 400 percent,
8 and on and on after more than five years of a
9 magnitude of tort reform beyond anything being
10 contemplated here.

11 But, we need not look so far away to
12 prove the point. This Commonwealth enacted in
13 1978 what was, up until then, considered to be
14 the most tort restrictive legislation in the
15 history of the United States, the Political
16 Subdivision Tort Claims Act. The collateral
17 source rule was eliminated. You must overcome
18 both a monetary (\$1,500) and a verbal (permanent
19 injury) threshold to be eligible to bring an
20 action for general damages.

21 There are only eight causes of action
22 and you must fit your case within one of those
23 tightly defined eight subdivisions, or you're
24 out of court. If you get through all of that
25 and win, you must contend with a \$500,000

1 aggregate cap. If 50 people go over an
2 embankment in a schoolbus, that's \$10,000 per
3 victim. Did it work? Were Pennsylvania cities
4 and municipalities saved the scourge of ram-
5 paging insurance company anymore than Ontario
6 was?

7 We are not advocating rigidity. We
8 accept the premium that change is the waystation
9 of progress. It's simply that we believe reform
10 is not synonomous with regression; and that
11 truly progressive legislation does not come at
12 the expense of individual rights and freedoms.
13 Rather than seek cost savings at the expense of
14 the victims, why not strive to achieve cost
15 elimination by protecting victims?

16 We, of the Pennsylvania Trial Bar,
17 support the efforts of organized labor to
18 achieve improve safety conditions for the
19 working man through the introduction of the
20 Workplace Safety Acts of 1987.

21 One of those Act, the Hazard Free
22 Workplace Act, would remove an employer's
23 immunity from being sued by an employee where
24 the employee becomes injured as the result of
25 the removal of a guard, safety device or warning

1 from a machine at the workplace.

2 The other, the Toxic Free Workplace
3 Bill, would confer the same right upon an
4 employee injured because of an unreasonable
5 exposure to a toxic substance in the workplace.

6 We support this legislation primarily
7 because we believe the working man needs, and is
8 entitled to, the protections and remedies these
9 Bills would create. The object is to make it
10 financially unfeasible for an employer to remove
11 safety devices or to be careless with toxics.

12 Obviously, however, if the legislation
13 succeeds, a by-product will be reduced costs;
14 fewer injuries means fewer Workers' Compensation
15 claims, and if the guard stays on the machine,
16 there will no longer be a basis for a product
17 liability claim against the manufacturer on the
18 theory that the guard should have been designed
19 to be tamper proof. That is 50 percent of our
20 lawsuits according to Rand.

21 It will not be easy to convince our
22 critics that the improved cost efficiency they
23 seek might more readily be achieved through
24 injury prevention than by erecting road blocks
25 to a victim's recovery. Yet, where there is no

1 vision, the people perish. Perhaps,
2 Maeterlinck said it best:

3 "At every crossway on the road that
4 leads to the future, each progressive spirit is
5 opposed by a thousand men appointed to guard the
6 past."

7 To pass tort reform based upon this
8 evidence would be to reward the insurance
9 industry for the imprudent investment policies
10 that were the root cause of the so-called
11 "crisis" and raise false hopes of cost relief in
12 overburdening consumers. We urge this Committee
13 to reject these concepts in favor of injury
14 preventive legislation.

15 Thank you, Mr. Chairman.

16 CHAIRMAN DeWEESE: Mr. Mundy,
17 Mr. Evans, thank you on behalf of the Committee.
18 Any quick questions that need to be addressed?

19 REPRESENTATIVE HECKLER: Mr. Mundy, I
20 can't resist the observation that when -- I sat
21 and ride through many closing arguments in
22 defense counsel and criminal cases that I have
23 prosecuted and it seems to me, at least to some
24 extent, you have done what I have heard before
25 assembled a strong man and very eloquently and

1 thoroughly demolished that strong man.

2 As a sponsor of some of these simple
3 Bills which are the subject of this hearing, let
4 me say first, I'm interested in those Bills in
5 refining our system and not in locking people
6 out of court who have been injured and who are
7 entitled to a fair recovery from those who
8 caused their injuries.

9 I would be interested in hearing your
10 specific reactions to some of that legislation.
11 For instance, House Bill 1828 which would extend
12 the availability of sanctions to the court
13 against frivolous litigation which are presently
14 contained in Federal Rule 11 to Pennsylvania
15 State Courts. Don't you think this would lead
16 to improvement in our civil justice system in
17 Pennsylvania?

18 MR. MUNDY: If it's established that
19 there are frivolous lawyers, lawyers who would
20 bring a lawsuit in which he would have to expend
21 his own money and time that would bring him no
22 return on that investment; and if that is a
23 problem that there are too many lawyers out
24 there doing that, then certainly that legis-
25 lative remedy would be called for.

1 My problem is and the threshold
2 questions that I have tried to address in my
3 testimony is, until someone establishes that the
4 problems exist, until they have met that burden,
5 then to enact change for change sake could well
6 end up causing some of the other problems that I
7 have alluded to that no one intended when the
8 Recreational Lands Use and Control Act was
9 passed or some of those other acts.

10 REPRESENTATIVE HECKLER: You would
11 suggest that the extension of Federal Civil
12 Rule 11 of possible sanctions at the discretion
13 of the Court to the Pennsylvania justice system
14 could lead to the kinds of unaddressed injuries
15 that you cited in your testimony?

16 MR. MUNDY: No, I don't mean to suggest
17 that. What I mean to suggest is, a threshold
18 must be met to show there is reason for change.
19 I have heard nothing to suggest that the
20 threshold has been met, and in fact, every
21 critical analysis of this problem done by some
22 of our most reliable authorities show that the
23 problem never existed except in the insurance
24 information institutes and campaigns.

25 REPRESENTATIVE HECKLER: If I can say

1 my perception is that we do a great deal in the
2 General Assembly because of one constituent's
3 rights and one legislator. I have difficulty
4 believing in order to adopt something that is
5 already a Federal rule we would have to find
6 some additional justification.

7 Let me ask one other question.
8 Presently, Pennsylvania is one of the few states
9 which has not adopted the state of the art
10 defense in product liability areas, the subject
11 which you addressed the middle part of your
12 testimony. A manufacturer in Pennsylvania can
13 be liable even if his product conforms to the
14 best technical and scientific knowledge existing
15 at the time he produced that product. Could you
16 explain the justification for that, our
17 standard?

18 MR. MUNDY: I have tried a few product
19 liability cases in my time. I found that jurors
20 are very fair in their treatment of manufac-
21 turers as well as claimants. The statistics are
22 today without that defense that only one out of
23 four claimants recover in a product liability
24 action.

25 To say that the playing field isn't

1 level or that the manufacturers need more
2 protection, to me, based on my experience of
3 trying those cases and on the numbers and the
4 defense verdicts that are rendered, just doesn't
5 seem to make any sense.

6 REPRESENTATIVE HECKLER: That's
7 interesting. It strikes me if only one out of
8 four result in recovery, maybe there are too
9 many of those lawsuits.

10 We did something yesterday --

11 CHAIRMAN DeWEESE: We are going to try
12 to hold this to one question per person.

13 REPRESENTATIVE HECKLER: If I may, I
14 think we may find something Mr. Mundy and I can
15 agree about. Yesterday this legislature, the
16 House, enacted a Bill which would, as I read it,
17 extend blanket protection to doctors, who,
18 because of their personal philosophical and
19 religious beliefs declined to advise their preg-
20 nant patients of the availability of the
21 diagnostic tests.

22 Therefore, we supposedly eliminated
23 wrongful birth lawsuits. Do you have any
24 comment upon the advisability of that or the
25 position of your association on that

1 legislation?

2 MR. MUNDY: I'm sorry. I haven't read
3 that legislation.

4 REPRESENTATIVE KOSINSKI: Clarifi-
5 cation, Mr. Chairman. In Mr. Mundy's testimony,
6 if you notice, to get Representative Heckler's
7 point, that was one of the judicial tort reforms
8 of Ellis B. Sherman wrongful life/wrongful death
9 action.

10 REPRESENTATIVE SHERMAN-HAGARTY: We are
11 talking about wrongful life/wrongful birth.

12 REPRESENTATIVE GRUITZA: House Bill
13 1828 was brought up here. I read this and I
14 find very little difference from this Bill from
15 what I understand the Rules of Court to be as
16 they presently exist, it seems to be a codifi-
17 cation of rulings that I always understood.

18 I always thought it was improper and
19 unethical in subject of court sanction to file
20 notorious motions or frivolous motions of this
21 nature. I look at the Bill and I see -- It
22 almost seems to me to be illusory in a sense.
23 I'm wondering if you can --

24 For example, it says here, you're
25 certifying the claims or defenses are warranted

1 by existing law or by good faith argument for
2 the extension, modification, or reversal of
3 existing law. That seems to be a pretty broad
4 thing. You can be filing a suit hoping from day
5 one in signing your name to it that the law is
6 going to be reversed in your case.

7 Could you you make a comment on that as
8 to how this Bill really is different from what
9 the courts might require today and how, by an
10 attorney signing his name on a document, and the
11 only thing he's attesting to is that he may be
12 seeking a reversal of a law, would this in any
13 way cut back on the filing of frivolous suits?

14 MR. MUNDY: Mr. Evans reminds me of
15 something that as a member of disciplinary board
16 I should have thought of myself. The new
17 Pennsylvania canons of ethics adopted by the
18 Supreme Court on April 1st 1988 -- will be
19 effective April 1, 1988, does embody Federal
20 Rule 11. Federal Rule 11 is already being given
21 that status by the Supreme Court and exists, of
22 course, in Federal rules.

23 In effect, we are already operating
24 under Federal Rule 11, and I don't mean to say
25 that lawyers should not. All I meant to say is,

1 on any change we ought to have evidence first
2 before we react.

3 CHAIRMAN DeWEESE: Thank you,
4 gentlemen. Thank you very much for your
5 testimony.

6 I'm going to bypass the video
7 presentation from 60 Minutes for the time being.
8 We have some plane schedules I'm going to try to
9 accommodate. At this time I like to call Donald
10 Harrop, M.D., from the Pennsylvania Medical
11 Society and H. Robert Davis, M.D, who I believe
12 is going to accompany Dr. Harrop. Good morning
13 gentlemen, welcome to our hearing.

14 DR. HARROP: Along with me is Dr. Davis
15 who is going to give written testimony.

16 I'm Dr. Donald Harrop a family practi-
17 tioner for the last 31 years from Phoenixville.
18 I appreciate having the opportunity to speak to
19 you briefly this morning about, what we believe
20 is a very important subject.

21 By profession I'm a physician, and I
22 also wear several other elected hats. One of
23 those is as the Coroner of Chester County and
24 have been for the last 22 years.

25 I also want to thank you members of the

1 House for a couple days ago unanimously passing
2 the Coroner's Education Bill. I think that's a
3 Bill we worked on for a long time. We finally
4 got that to conclusion. We've been working on
5 this for a long time too, and I hope we see it
6 to come to a rapid conclusion also.

7 CHAIRMAN DeWEESE: Coroner's Bill came
8 out of this Committee?

9 DR. HARROP: Yes, sir, and we
10 appreciate it.

11 The other jobs that I hold are really
12 in the State Medical Society. I am Vice-
13 Chairman of the Board of the Society's owned
14 insurance company, the Pennsylvania Medical
15 Society Liability Insurance Company, or PMSLIC.

16 I'm also President of the Society's
17 wholly-owned subsidiary, the Keystone Peer
18 Review Organization, and this is the corporation
19 which has twice successfully bid and received
20 the Medicare Review contract in Pennsylvania.

21 And while these activities are related
22 to the subject under discussion today, my
23 principal function is to speak to you as
24 President of the Pennsylvania Medical Society
25 and bring you the concerns of its 19,000 members

1 regarding the problem of medical liability and
2 the need for meaningful tort reform.

3 I feel very comfortable in speaking to
4 you as the representative of the physicians in
5 Pennsylvania for several reasons. With better
6 than 19,000 members, the Pennsylvania Medical
7 Society represents the vast majority of prac-
8 ticing physicians in the Commonwealth. Also
9 from extensive travels across the state in the
10 last three years, I know there's no other
11 subject of greater concern to our members and to
12 your personal physician than the liability
13 crisis.

14 As you know, this is not the first
15 occasion on which we have come to you to seek
16 reform of the civil justice system. Two years
17 ago the recommendations we sought were contained
18 in House Bill 2230. You had problems with that
19 Bill and told us that some of its provisions
20 were unacceptable. We heard you loud and clear.
21 We have reexamined our positions and do not seek
22 action on the most controversial proposals on
23 which consensus is not really possible.

24 It also became clear to us that many of
25 our liability concerns are shared with other

1 professions and industries. We, therefore, felt
2 it made sense to become a team player and join
3 our friends in the Civil Justice Coalition.
4 That brings us to the package of seven Bills
5 before you, 1828 through 1834.

6 I will not go into detail on provisions
7 in the six non-medical Bills since others have
8 or will be doing this for you. However, it is
9 important to note that the same language found
10 in House Bills 1828 through 1833 also appears in
11 House Bill 1834. Those provisions include:
12 frivolous lawsuits, collateral source rule,
13 comparative negligence, i.e., joint and several
14 liability; punitive damages; and reduction of
15 awards to present worth.

16 This has been done to expedite amending
17 Act 111 of 1975, the state's medical liability
18 law. Before we look at the medical bill more
19 specifically, let me make four overall
20 observations about these bills:

21 One, these proposals, including the
22 medical bill, do not seek a cap on pain and
23 suffering or a cap on anything else.

24 Secondly, they do not limit attorneys'
25 fees in any way.

1 Third, nor do they substitute any other
2 dispute resolution system for the present court
3 system with its traditional day in court and
4 trial by jury.

5 Finally, all these proposals are middle
6 of the road and eminently reasonable and fair.

7 Having said that, let me discuss a few
8 of the key provisions in House Bill 1834 which
9 are unique to medicine, and as such, they really
10 appear as amendments to Act 111 of 1975.

11 House Bill 1834 proposes a two-year
12 Statute of Limitations from the date of
13 discovery up to a maximum of three years. Of
14 course, it has the usual exceptions for foreign
15 objects left in a body and actions relating to
16 minors.

17 Experience shows us, on average, claims
18 are being filed within two years.

19 The proposed amendment would produce
20 savings if enforced by the courts, because
21 leaving the door open indefinitely causes
22 actuaries to increase the amount of money they
23 recommend reserving. If there is no limit, some
24 cases will come in after three years.

25 In medical liability cases it is

1 crucial the jury hear from a truly qualified
2 expert witness. Today, because some medical
3 expert witnesses can and do testify in areas
4 outside of their own specialty it is possible
5 for a jury to be misled.

6 We believe that in a matter as
7 technical as a medical liability case, the
8 expert witness should indeed be a practicing
9 physician providing patient care in that
10 specialty.

11 Therefore, House Bill 1834 would
12 require that expert witnesses have current
13 personal experience and practical familiarity
14 with the medical subject at hand, and be
15 actively engaged in direct patient care in that
16 subject. This formalizes what is just plain
17 common sense and I think that's eminently fair
18 also.

19 The Bill recognizes signed consent and
20 informed consent and mandates informed consent
21 for major invasive procedures.

22 Finally, House Bill 1834 proposes
23 mandatory reporting of awards by Catastrophic
24 Loss Fund to the Medical Licensing Board.

25 At the same time we do not believe that

1 the filing of a successful claim against a
2 doctor necessarily means that doctor is a bad
3 doctor. Indeed, in the present climate,
4 particularly in some high-risk specialties, most
5 doctors do have at least one claim against them.
6 Nevertheless, we believe it's fair to make this
7 data available to the Medical Board.

8 Mandatory reporting leads us into the
9 whole area of medical discipline and the bad
10 apple argument. I think it's extremely
11 important that we take a few minutes and go into
12 this in detail.

13 In my judgment, physicians in Penn-
14 sylvania, through their state medical society,
15 has devoted a tremendous amount of time and
16 money in an effort to secure meaningful
17 discipline of doctors and reduce the risk of
18 incompetency to public.

19 Let me talk about several key issues
20 the Pennsylvania Medical Society has endorsed
21 and discuss where we go from there.

22 When the current medical liability law,
23 Act 111, was passed in 1975, we demanded that it
24 strengthen the Medical Board. You agreed with
25 us and provided the following: One, authority

1 for the Board and to keep the money it raises
2 from licensing doctors, so it never lack the
3 funds to police the profession. Two, the
4 authority to set its own fees; and three, the
5 authority to hire investigators, prosecuting
6 attorneys and hearing officers.

7 Since we took pride in recommending
8 those steps to strengthen the State Licensing
9 Board, you can imagine how frustrated we were
10 three years later when, despite a growing bank
11 account, the State Medical Board failed to act.

12 In an unprecedented move, the
13 Pennsylvania Medical Society sued the Medical
14 Board and the Governor on January 11, 1978, to
15 get them to release their hoard of \$2 million
16 and to start policing the profession.

17 Newspapers loved the story. It fell
18 under the category of man bites dog. To settle
19 the suit, the Board agreed to begin spending
20 money, and to hire more investigators,
21 prosecutors and hearing examiners to break up
22 the backlog of consumer complaints.

23 Two years later we had to sue them
24 again because they were still sitting on a pile
25 of money and weren't doing their job.

1 As recently as 1985, we supported a
2 number of proposals, enacted into law, which
3 further strengthen the Medical Board.

4 One, Act 6, which allows the Medical
5 Board to immediately temporarily suspend a
6 physician who poses an immediate and clear
7 threat.

8 Two, Act 7, which provides for
9 automatic suspension for conviction of a drug
10 related felony.

11 Three, Act 48, which requires hospitals
12 and other health care facilities to report to
13 the Medical Board physicians who have been fired
14 or have privileges revoked for misconduct or
15 malpractice.

16 Four, a revised medical practice act
17 which gave the Board subpoena authority and
18 mandated hospitals and other physicians to
19 report evidence of a physician with an active
20 addictive disease who is not under treatment.

21 At the same time as we were lobbying
22 for approval of these Bills in legislature, we
23 were acting on our own to safeguard the public.

24 We hired a full-time physician/director
25 for our Impaired Physician Program. Within 24

1 months, Dr. Robert McDermott has brought such
2 high credibility to this program, that we have
3 added a full-time administrative assistant for
4 him and a part-time nurse assistant. The
5 program is rapidly being recognized as a
6 national leader and our own Medical Board is
7 beginning to refer cases to it.

8 But discipline and rehabilitation must
9 also be accompanied by education. And for that
10 reason with the founding of the Society's
11 insurance company in 1978, risk management was
12 included from day one. Today, with five full-
13 time professionals, our Risk Management
14 Department serves, virtually free of charge, not
15 only our insureds, but all PMS members.

16 A third and logical step for PMS was to
17 lead in peer review, the process of independent,
18 impartial physicians reviewing the work of other
19 physicians. That tradition in Pennsylvania
20 began back in the early 1960's when the Society,
21 and Blue Cross of Western Pennsylvania,
22 pioneered the concept in Pittsburgh area
23 hospitals.

24 In 1985, to preserve input into the
25 Medicare system, the State Medical Society

1 formed the Keystone Peer Review Organization,
2 KePRO, and won Pennsylvania contract peer review
3 work for the Federal Health Care Financing
4 Administration.

5 Today, that organization, in its second
6 two-year contract, not only reviews all Medicare
7 in-patient admissions and ambulatory care
8 procedures for appropriateness and necessity,
9 but under a federal mandate, checks to be sure
10 the services provided met recognized standards
11 of quality.

12 I'm proud of this record. There's no
13 doubt in my mind when I tell you that the
14 physicians of Pennsylvania recognize their
15 responsibility to practice quality medicine and
16 have taken every reasonable step to assure the
17 public's safety.

18 Nor can the problem be reduced to the
19 assertion that the liability crisis is all the
20 fault of a few bad doctors. The most recent
21 survey by the AMA found that by 1986, 36.7
22 percent of all physicians had been sued at least
23 once in their career.

24 In the surgical specialties more than
25 half of all surgeons had been sued at least

1 once. The American College of OBGYN reports
2 that 75 percent of its doctors have been sued at
3 least once. In the case of our own insurance
4 company, we have found that 42 percent of our
5 better than 70,000 insureds have been sued at
6 least once, and this number includes doctors who
7 have just started practice.

8 Because the liability problem is
9 associated with insurance, there's always the
10 question of whether or not we are really dealing
11 with an insurance question; not a breakdown in
12 tort law system.

13 I completely understand that concern,
14 so I'd like to take a few minutes to take you
15 back to 1975, at which time almost 5,000 members
16 of the Pennsylvania Medical Society were insured
17 by the Argonaut Insurance Company. During the
18 36-month period from 1975 through 1978, we went
19 through what's going on in Florida.

20 Every few months it seemed Argonaut
21 sought unbelievable rate increases; one for over
22 200 percent. Finally, it announced that they
23 were pulling out of the state, stranding nearly
24 5,000 doctors. The rapport between physicians
25 and insurance companies were severed and the

1 term "ripoff" became the battle cry.

2 The response of the Pennsylvania
3 Medical Society was to start its own captive
4 insurance company. Obviously, a principal
5 reason for doing this was to open the books of
6 the company to all physicians so that the role
7 in insurance companies play in the problem could
8 be determined once and for all.

9 Ten years later that company is the
10 largest insurer of doctors in the Commonwealth
11 and it has never turned a profit. Its books
12 have been examined and reexamined by everyone,
13 including Professors Hofflander and Nye. The
14 conclusion? The medical liability insurers in
15 Pennsylvania are not making excess profits.

16 I sit on the Board of PMSLIC, and one
17 of the things of which I'm most proud is its
18 commitment to data. Its records are compu-
19 terized in such a way to make it possible to do
20 an incredible number of studies on the dynamics
21 of medical liability insurance in Pennsylvania.
22 And all of these studies show that the problem
23 lies outside of the insurance company. For the
24 first time we are able to deal with facts
25 instead of emotions.

1 Today, half of the physicians in the
2 nation are insured by captive insurance
3 companies owned by medical societies, and none
4 of these companies are making any profits on
5 their liability insurance. Indeed, a few of
6 them are in serious trouble.

7 Another way to examine the "it's the
8 insurance companies" argument is to look at a
9 self-insured entity. And since we're meeting in
10 a state building, I can't think of a better
11 example than the Commonwealth itself.

12 If we look at the budget which the
13 Governor just submitted, we find that, in a
14 state with a declining population, the number of
15 suits against the Commonwealth continues to
16 increase as does the amount of money required to
17 pay these suits.

18 In the past 24 months the total number
19 of claims pending against the Commonwealth has
20 grown from 7,139 to 11,000, or an increase of
21 3,861 or 54 percent. In the same 24 months, the
22 cost to the taxpayers has gone from \$264 million
23 to \$414 million, or an increase of \$150 million
24 or 57 percent.

25 Our experience has been that the

1 medical liability problem has been growing in
2 Pennsylvania at the rate of about 21 percent a
3 year. It would seem then that the Common-
4 wealth's self-insured experience, which you
5 people are into, may even be worse than our own.

6 Finally, the reason why the liability
7 problems are so urgent are two-fold:
8 availability and cost.

9 The availability of care is gradually
10 being restricted. According to the survey of
11 Pennsylvania Academy of Family Physicians, the
12 number of family practitioners who do obstetrics
13 has dropped to 50 percent a few years ago to
14 about 20 percent today, one of the lowest rates
15 in the nation.

16 Pregnant women in rural and small
17 communities have to travel further and further
18 to find obstetricians who will deliver their
19 babies.

20 As I mentioned earlier, during the
21 past five years, the cost of the medical
22 liability system in Pennsylvania has increased
23 21 percent each year.

24 These expenses ultimately are passed on
25 to patients, labor unions and employers who

1 purchase health insurance for their members and
2 employees.

3 The AMA estimates that 15 percent of
4 the expenditures for physicians services goes to
5 pay liability costs. And the same AMA
6 researchers have found that 63 percent of recent
7 physician fee hikes can be attributed to the
8 medical liability problem.

9 The American College of OBGYN says that
10 eight out of ten obstetricians have increased
11 their fees because of higher liability premiums.

12 And then there are the costs to
13 patients and insurers generated by defensive
14 medicine, i.e., those extra tests and studies
15 ordered to establish a solid defense for the
16 physician in the event of a suit. These have
17 been set at \$10 billion per year nationally, and
18 more than \$35 million per year in Pennsylvania.

19 In Pennsylvania, the cost problem is
20 exemplified by the performance of the state's
21 two CAT Funds. Since the early 1980's, the
22 medical CAT Fund has shown a yearly increase in
23 the amount of money it has paid out. It reached
24 its highest peak last year, paying out over
25 \$136.1 million.

1 At the same time, the much newer
2 automobile CAT Fund has developed similar
3 problems and already is causing great concern
4 among both the public and the legislature.

5 Both of these CAT Funds are incurring
6 liabilities which must be paid at some future
7 time. In the case of the medical CAT Fund, it
8 was \$1.1 billion in 1987 and is estimated to
9 reach \$1.3 billion by the end of this year.

10 Perhaps the system wouldn't be so
11 expensive if more of the money went to the
12 injured person. Presently, less than half of
13 the money paid into the system ever goes to an
14 insured person. Most of it stays in the legal
15 system, and a lot of it is consumed in defending
16 non-meritorious cases.

17 The recent experience in Florida is an
18 example of what can happen, if we fail to act
19 responsibly. But, even if we act responsibly,
20 we must not expect an instant cure.

21 The liability problem has been growing
22 for the past 13 years. This legislation, as
23 essential as it is, will not bring immediate
24 rate reductions. But, it will begin the process
25 of reversing trends and of bringing order out of

1 chaos. It should put the brakes on rate hikes
2 so that they are not as high and as frequent as
3 in the past.

4 In summary, the problem is not that of
5 a few bad doctors. More than one-third of the
6 nation's doctors have now been sued. Discipline
7 plays a role, but the principal actor is the
8 state itself, through its Medical Board, which,
9 to date, has chosen a low profile.

10 Is it an insurance company ripoff?
11 Independent researchers have examined the books
12 of companies writing medical liability insurance
13 in Pennsylvania and have found that they are not
14 making excessive profits. Even the self-insured
15 are experiencing the same problems.

16 The medical liability system is out of
17 balance. Less than half the money ever reaches
18 the injured person.

19 Frivolous suits waste millions of
20 dollars. It is decreasing the availability of
21 care to some and driving up the cost for all of
22 us.

23 The reforms proposed are moderate, yet
24 meaningful. They will restore balance and order
25 out of chaos and reverse the present rising

1 trends.

2 I urge you to report these Bills out of
3 Committee now and give your colleagues an
4 opportunity to vote on them. Thank you, and I
5 certainly will answer any questions that you
6 might have.

7 CHAIRMAN DeWEESE: Doctor, thank you
8 very much. Representative Bortner from York
9 County.

10 REPRESENTATIVE BORTNER: One very
11 quick question; two actually. You're speaking
12 for Pennsylvania Medical Society. Does the
13 osteopathic medical profession support the Bill,
14 if you are in a position to answer that
15 question?

16 DR. HARROP: I'm not in a position to
17 answer that. I think you're aware they are into
18 some other medical liability problems insurance-
19 wise, and I just don't know.

20 REPRESENTATIVE BORTNER: They are not
21 part of the coalition or in the coalition with
22 you on this Bill?

23 DR. HARROP: They are members of the
24 civil justice coalitions.

25 REPRESENTATIVE BORTNER: To that extent

1 they would be supportive of this?

2 DR. HARROP: I really hope so.

3 REPRESENTATIVE BORTNER: Time precludes
4 a lot of questions, which is unfortunate. I'll
5 focus on one you touched on earlier. That one
6 deals with the Bill of expert witnesses. I
7 think you referred to that Bill as making common
8 sense. I would agree with you.

9 Let me ask you this question. How do
10 you respond to the suggestion that that problem
11 exists due to the so-called conspiracy of
12 silence within the medical profession?

13 DR. HARROP: I think maybe 10 years
14 ago, 15 years ago there was a conspiracy of
15 silence. I would not deny that. I think,
16 however, today that's just not there. I think
17 if you look at the Medical Society's record, we
18 really do believe in openness. We are quite
19 willing to head these problems straight on. I
20 don't think it exists today. I think it did in
21 the past.

22 REPRESENTATIVE BORTNER: In the
23 interest of keeping to our schedule, I'll
24 conclude my questions, Mr. Chairman.

25 CHAIRMAN DeWEESE: Mr. Gruitza and then

1 Mr. Reber.

2 REPRESENTATIVE GRUITZA: Doctor, you
3 made a reference to the Pennsylvania's CAT Fund.
4 Were you referring to the CAT Fund that we
5 have --

6 DR. HARROP: I was referring to the
7 Medical Catastrophy Loss Fund.

8 CHAIRMAN DeWEESE: The Chairman would
9 like to take this opportunity to welcome
10 Mr. Colafella from Beaver County. He's their
11 representative, and also State Representative
12 Pete Daly from Washington County. Thank you
13 gentlemen for attending our hearing.

14 REPRESENTATIVE REBER: Good morning,
15 Doctor. I'm going to hand you a copy of House
16 Bill 1834 and open to page 10. I call your
17 attention to Section 206A of that Bill. It's
18 the joint and several liability section.
19 Specifically, my concern lies on lines 19
20 through 21. The language I have some question
21 over is as follows:

22 "However, if a Defendant's responsi-
23 bility is 10 percent or less of the total
24 responsibility..." I think I understand what
25 that means. My question goes to the following

1 phrase, "...or if a Defendant's responsibility
2 is less than the Plaintiff's responsibility,
3 that Defendant shall be liable only for that
4 proportion of the total dollar amount awarded as
5 non-economic damages."

6 Obviously, I think what the Bill trying
7 to get at is, it's ten percent or less there's
8 only going to be an award for the non-economic
9 damages incurred. My question is, what is that
10 phrase "or the Defendant's responsibility is
11 less than Plaintiff's" and what impact, the
12 practical impact, of how far that might go in
13 percentage fashion, as you understand it?

14 DR. HARROP: You have to understand I'm
15 not an attorney. But, I would read that to mean
16 that if the Plaintiff was more responsible for
17 his injury than the Defendant was responsible
18 for it, that the only thing the Defendant would
19 have to pay is that part for which he was
20 responsible.

21 REPRESENTATIVE REBER: I assume, theo-
22 retically, that could go as high as 49 percent,
23 which he may not be responsible for 48 percent,
24 somewhere in that neighborhood. There's a
25 possibility of that happening.

1 At first blush when you read this
2 section, you get the impression it's 10 percent
3 or less, only of payment of non-economic. It
4 doesn't trouble some people, but I think further
5 analysis of that additional section conceivably
6 could take that particular type of capping, if
7 you will, to a limitation on damages of no more
8 than non-economic up to conceivably 48 percent.
9 Do you understand what I'm saying?

10 DR. HARROP: I understand what you're
11 saying.

12 REPRESENTATIVE REBER: One other thing.
13 I'm kind of glad you referenced the medical CAT
14 Fund as well as the automobile CAT Fund. We all
15 seem to be getting a little bit of contact on
16 that recently. I would just make this
17 observation for the benefit of subsequent
18 lecturers today; that it might be interesting to
19 hear some comparisons of this scenario.

20 The thing we always hear so much as far
21 as one of the reasons, major reason, for the
22 rising cost of premiums, is the attorney fees,
23 and contingency arrangements, that particular
24 aspect.

25 It's my understanding that the CAT Fund

1 increase that was supposedly justifiable by the
2 Board that made that increase was based upon the
3 traditional actuarial studies, ratings, what
4 have you, done traditionally by the insurance
5 companies when they're factoring their own
6 results.

7 The interesting thing as I see it is,
8 there's no attack to that fund for attorney
9 fees. There's no way that attorney fees can be
10 responsible for being the basis of driving up
11 that premium. That's the CAT Fund premium. I
12 think that's something we ought to take a look
13 at when we're analyzing what's going on here.

14 If we are using a system to analyze
15 something like the CAT Fund is driving up fees
16 and there's no way that the attorney fee aspect
17 is plugged into that, I think we also ought to
18 consider that same analogy when we are looking
19 at what the cost factor in driving up premiums
20 in traditional areas where they may be.

21 We have a three-times increase here,
22 and many times two, three-times increases in
23 premiums for car insurance and other types of
24 insurance. I'm not so sure, necessarily, that
25 with this dead example in mind where attorney

1 fees cannot at all be held accountable or
2 responsible, there may be other factors.

3 It may be costs that are escalating
4 that are being paid from that CAT Fund. Maybe
5 it's the manner in which the actuarial studies
6 were being done, which, from my information,
7 were many of the same methods employed as is
8 done with other ratings.

9 I thank you for bringing that up
10 because it gave me an opportunity to publicly
11 make that observation. It's something we do
12 want to take a look at.

13 CHAIRMAN DeWEESE: The Chair would like
14 to recognize two or three minutes after we got
15 started today another member came in. Chris
16 Wogan of Philadelphia came in. I'm sorry I
17 didn't introduce you earlier.

18 Paul McHale for a quick question, then
19 Mr. Heckler.

20 REPRESENTATIVE McHALE: Thank you,
21 Mr. Chairman.

22 I'd like to raise one issue that's been
23 a concern to me that I think directly relates to
24 the cost of malpractice insurance. That concern
25 is medical discipline. Let me preface my

1 question by saying, I have the highest regard
2 for your profession, and fortunately, there are
3 very few members who are incompetent; a very
4 very small percentage in a very large field of
5 competent practitioners. The concern I have is
6 this.

7 If a doctor is truly incompetent and
8 through his negligence severely injures or kills
9 somebody, how long does it take for his license
10 to come under review and be effectively revoked?

11 DR. HARROP: Mr. McHale, I do not sit
12 here to defend the Medical Board. As I
13 explained in my testimony, we have had to sue
14 them a couple times to try to get them to act
15 stronger than they do. We have also supported
16 and now is law they can remove this license
17 immediately even before a hearing.

18 REPRESENTATIVE McHALE: They can, but I
19 think that's only under extraordinary
20 circumstances.

21 DR. HARROP: I hope if they kill
22 somebody that would be extraordinary circum-
23 stances.

24 (Laughter of audience)

25 REPRESENTATIVE McHALE: I don't allow

1 laughter on this point. I'm very familiar with
2 a case where a physician did kill someone, and
3 because it was shown in the emergency
4 investigation that this was aberrational conduct
5 on his part. He didn't kill people all the
6 time. His license was not lifted. He's still
7 practicing medicine under review years after the
8 occurrence took place. Forgive me for being so
9 serious on that point, but I think you
10 understand what my prospective is.

11 DR. HARROP: I think we are serious
12 too. I'm not sitting here defending the Medical
13 Board. The Medical Society has no direct
14 appointments on the Board. As you know, we have
15 sued that Board to try to get them to do the
16 job, which legislatively, they have the power to
17 do.

18 REPRESENTATIVE McHALE: I commend you
19 for that.

20 DR. HARROP: I believe we are working
21 and we believe most strongly on proper medical
22 discipline.

23 REPRESENTATIVE McHALE: And I commend
24 you for that. The point I would emphasis is, I
25 think for most physicians the vast majority of

1 them are compete and are paying very high
2 malpractice premiums. It would be extremely
3 helpful in attempting to stabilize or decrease
4 those premiums that we have in effect in the
5 disciplinary process, to remove the few
6 incompetent physicians from practice. From my
7 own experience I can tell you, it's our fault of
8 the General Assembly that we have not
9 established a process for doing so, physicians
10 that are truly incompetent, because in the
11 current system are able to practice for years
12 after that incompetence is revealed.

13 I think for the sake of the public, as
14 well as the vast majority of your profession, we
15 ought to do something about that. Once we do, I
16 think we will see an impact on the insurance
17 premiums.

18 DR. HARROP: I'd like to see something
19 done too.

20 CHAIRMAN DeWEESE: Dave Heckler from
21 Bucks County.

22 REPRESENTATIVE HECKLER: Thank you,
23 Mr. Chairman.

24 Really just an observation in response
25 to Mr. Reber's question. I believe the joint

1 and several provisions to which Mr. Reber refer,
2 first of all, I'm not aware that the
3 contributory negligence would arise as a defense
4 in a medical malpractice situation, so the
5 doctor may have been ill-prepared to deal with
6 that particular issue.

7 I call Mr. Reber's attention, I think
8 the intention of the language which you cited
9 was to deal with this multiple Defendants
10 situations where a given Defendant might be well
11 found to have 10 or 15 or 20 percent of the
12 liability and a Plaintiff would have
13 contributory rule as in an automobile accident
14 situation.

15 Thank you, Mr. Chairman.

16 CHAIRMAN DeWEESE: Thank you gentlemen
17 very much for your testimony.

18 I'd also like to recognize Bob Flick,
19 Chester and Delaware.

20 Is Mr. Groves still in the audience?
21 At the conclusion of Mr. Groves' testimony, we
22 are going to take a 10-minute break. Members
23 are going to be asked to get a sandwich or a
24 salad. At the conclusion of the 10-minute
25 break, at that time we are going to watch the

1 video presentation from the 60 Minutes excerpt.

2 The Insurance Information Institute has
3 asked for a two or three-minute rebuttal of the
4 film. I think that would be provocative and
5 useful. I'm looking forward to that testimony,
6 10-minute break. We will have a lunch while we
7 here in the committee room watching the video.
8 Then Monica O'Reilly, Eastern Regional Director
9 of the Insurance Information Institute, will
10 give a two or three-minute rebuttal. I welcome
11 you back at that time.

12 Mr. Groves, if you will continue, and
13 we welcome you and we are grateful you're here
14 for our hearing.

15 MR. GROVES: Mr. Chairman, and members
16 of the House Judiciary Committee, I am William
17 Groves, Chairman of the Executive Board of the
18 Pennsylvania Association of Township Supervisors
19 and an elected township supervisor from
20 Cumberland Township, Greene County. Joining me
21 today are Councilman Harry Schrum, from the
22 Borough of Spring Grove, York County, and a
23 member of the Board of Directors of the
24 Pennsylvania Association of Boroughs; Richard
25 Lee of the Pennsylvania League of Cities; and,

1 William J. Schofield, III, from the Shaler
2 School District, Allegheny County, and Second
3 Vice President of the Pennsylvania School Board
4 Association.

5 We are representing the members of the
6 Pennsylvania Local Government Conference which
7 also includes the Pennsylvania State Association
8 of County Commissioners, the Pennsylvania
9 Municipal Authorities Association, and the
10 Pennsylvania State Association of Township
11 Commissioners.

12 We appear before you today on behalf of
13 the Commonwealth's municipalities and school
14 districts to speak out on an issue that has
15 caused great concern and significant financial
16 burden for all Pennsylvanians in recent years.
17 I am, of course, referring to the tort liability
18 crisis.

19 We commend the Chairman and the members
20 of this committee for taking up this complex and
21 politically difficult subject. It is only
22 through efforts such as this that a rational,
23 comprehensive and equitable system of reform can
24 be developed for the benefit of all parties
25 interested in and affected by the current

1 liability crisis.

2 The tort liability problem touches
3 almost every segment of today's society.
4 Certainly, it involves higher prices for
5 consumers or increased taxes for the taxpayer.
6 Consequently, every Pennsylvanian has a stake in
7 the search for a solution to lessen the impact
8 of these harmful effects.

9 There are many factors which weigh
10 heavily in the liability problem. There are
11 those who will argue that the problem has as its
12 roots an insurance industry which is attempting
13 to recover from declining interest rates and
14 record losses.

15 On the other side are those who believe
16 the problem is the result of a permissive court
17 system that has given rise to a litigation
18 explosion in this country. Others will argue
19 that the problem lies at the feet of Plaintiff's
20 trial lawyers, while still others will blame a
21 greedy and unprincipled citizenry.

22 Actually, all sides are right. I, for
23 one, readily acknowledge that a degree of
24 responsibility for both the cause and cure of
25 this problem lies with the insurance industry.

1 In the late 70's, when interest rates
2 were reaching record levels, insurance companies
3 were simply eager to sell their insurance and
4 invest the premiums at rates as high as 20
5 percent. To sell more insurance, companies
6 reduced their premiums and sold coverage that
7 today would be considered too risky. Actuarial
8 data from the Foundation for Determining the
9 Cost of Insurance was ignored in the competition
10 to generate more premium dollars.

11 Insurance companies today are no longer
12 enjoying high interest returns on their premium
13 dollars, but the claims continue on those
14 policies that the companies discounted years
15 earlier in their attempts to generate more cash
16 flow.

17 We must remember that insurance
18 companies are in the business of providing
19 others with protection or indemnification
20 against a specific peril or exposure. But, in
21 order for their business to be successful and
22 meet the needs of their consumers, the industry
23 must be able to reasonably predict the cost of
24 providing the protection of insurance. It is
25 here, we believe, that the system has broken

1 down and we are now faced with the dilemma known
2 as the "liability crisis."

3 Trial attorneys are zealous in repre-
4 senting their clients. They are supposed to be.
5 No doubt there are instances where that zeal
6 brought to bear in individual cases has worked
7 to the detriment of the court system as a whole.

8 Our courts and jury system are designed
9 to be accesible to litigants, and well they
10 should be. It is not surprising, however, that
11 under the constant pressure of claimants, the
12 court system gradually bends to accommodate this
13 pressure.

14 It matters little who is to blame for
15 the problem. Local government and all those who
16 bear the risk of excessive liability and the
17 high cost of insuring against that liability
18 remain hostage as the dabate continues in the
19 liability crisis.

20 As local officials, we face tremendous
21 adversity in our efforts to purchase adequate
22 insurance protection to ensure the future of a
23 goverment of and for the people. And while we
24 do not wish to understate the impact this
25 adversity has had on our municipalities, there

1 remains a far more serious crisis.

2 Government, despite the partial shield
3 that is provided by statutory immunity, remains
4 a prime target for litigants who would exploit
5 the advantages that currently exist for
6 claimants in the judicial system. People
7 believe that when we sue government, there is an
8 unlimited pot of money waiting at the end of the
9 litigation rainbow and no person will suffer
10 financial loss on account of any award they
11 receive--regardless of the amount.

12 Our tort system exists to compensate
13 persons wrongfully injured by others. I am
14 confident that local officials across the
15 Commonwealth embrace and support the right of
16 any individual to be compensated for injuries
17 incurred on account of the negligence of others.

18 However, our society and judicial
19 system have expanded this concept so that too
20 many times injured parties are compensated or
21 excessively compensated, regardless of whether
22 or not, or to the degree which another person is
23 at fault. The merchant of this proposition is
24 our tort system.

25 These constant changes to the tort

1 system and the expansion of the legal doctrine
2 of "liability" and the growth of punitive damage
3 awards have made it difficult, if not impos-
4 sible, to predict what government may be held
5 liable for in the future.

6 This uncertainty has been damaging to
7 all those who serve or are served by government.
8 It is a particularly dangerous hazard for
9 insurance companies, as they have no way of
10 knowing or projecting what the liability
11 exposure for government might be a year or ten
12 years from now. They understandably try to
13 protect themselves from this hazard by building
14 in an adequate cushion in the rates they charge
15 or by leaving the market altogether.

16 It is an impossible situation.
17 Insurance companies try to set rates and conduct
18 a business under certain rules of law, and then
19 the rules change, and change, and change. The
20 end result is a costly, ineffective and unjust
21 system that will ultimately must be absorbed by
22 every citizen of this Commonwealth in the form
23 of higher taxes.

24 We recognize that local government, in
25 several respects, is in a better position than

1 other Defendants or victims of the current
2 system because local government has the benefit
3 of a statutory provision that limits both the
4 areas of liability and the amount of liability.

5 Nevertheless, because of the prejudices
6 in the system against "faceless Defendants",
7 financially responsible Defendants and
8 Defendants in general, local government is
9 affected by the inequities of the current tort
10 system. Therefore, and despite the aid of the
11 immunity statute, it is important to local
12 government that reform provisions be imposed on
13 the current system to reduce these inequities
14 and to relieve the unfair financial burden that
15 falls upon local governments and other
16 Defendants.

17 To restore the balance in our tort
18 system and, at the same time, preserve one's
19 right to fair compensation for injuries sustained
20 by the wrongful acts of another, we believe the
21 most effective and meaningful improvement, if
22 not solution, to the liability insurance problem
23 can begin with several proposals currently under
24 consideration in the General Assembly. These
25 measures are not panaceas but they do provide a

1 much needed adjustment to the current system to
2 move it towards a better point of balance.

3 These include House Bill 1830, which
4 would redefine the doctrine of joint and several
5 liability to establish that multiple Defendants
6 remain jointly and severally liable for economic
7 damages; however, a co-defendant would be liable
8 only for the proportionate share allotted to him
9 of noneconomic damages where the Defendant's
10 responsibility is 10 percent or less of the
11 total responsibility, or less than the
12 responsibility of the Plaintiff.

13 Under our current judicial system, a
14 Defendant can be found to be only five percent
15 at fault among all Defendants but may be
16 required to pay 100 percent of the award if the
17 other co-defendants cannot afford to pay. House
18 Bill 1830 would eliminate this in the circum-
19 stances described above, and Defendants would be
20 accountable only for that portion of the
21 wrongdoing that is determined to be their
22 responsibility.

23 House Bill 1829 would alter the
24 "collateral source rule" and allow evidence to
25 be introduced in the court proceedings showing

1 benefits already received by the Plaintiff as a
2 result of the accident or injury.

3 Currently, the jury cannot be made
4 aware of any hospitalization, workers' compen-
5 sation, or similar benefits received by the
6 Plaintiff as a result of his injuries. Thus, by
7 this enforced omission, the jury is purposely
8 misled as to the compensation actually received
9 by the Plaintiff. This has served only to place
10 the jury in a vacuum and make awards that in the
11 aggregate far exceed its own determination of
12 just compensation. In effect, an injured party
13 may be compensated twice.

14 House Bill 1828 would place into state
15 statute an existing federal rule sanctioning
16 attorneys and parties who bring frivolous
17 actions or motions against someone.

18 We live in a sue-happy society. Subse-
19 quently, there are many many cases brought to
20 the courts that are lacking any reasonability of
21 cause. The consequences of these actions, even
22 if the court dismisses the case or finds in
23 favor of the Defendant, are the expenses of a
24 legal defense. According to the respected Rand
25 Corporation, the cost of the judicial system may

1 exceed the cost of compensating an injured
2 party.

3 House Bill 1832 would establish the
4 rule of present worth in our judicial process by
5 requiring that an award that reflects the future
6 loss of earning capacity be determined on
7 present worth by the application of a simple
8 interest discount factor equal to the "average
9 yearly index" of five-year U.S. Government note
10 interest rates. The legislation would also
11 establish a formula for computing the average
12 yearly index.

13 We firmly believe these changes to our
14 legal system will influence significantly the
15 future fiscal stability of Pennsylvania's
16 municipalities. Indeed, their adoption would
17 serve to substantially stabilize an otherwise
18 unpredictable judicial system.

19 On behalf of my colleagues here today
20 and local officials across this Commonwealth, we
21 pledge to you our support and assistance in
22 bringing about a swift and meaningful conclusion
23 to the liability insurance crisis.

24 We thank you for this opportunity and
25 will now attempt to answer any questions you

1 have.

2 CHAIRMAN DeWEESE: Mike Gruitza.

3 REPRESENTATIVE GRUITZA: Thank you,
4 Mr. Chairman.

5 Mr. Groves, one of the things that
6 impressed me particularly with the doctors' case
7 they bring to the legislature for reform is the
8 fact they have a captive insurance situation.
9 They were pretty able to show us the kind of
10 premiums that are being elected and the kind of
11 premiums going out there.

12 Do you, as a representative of local
13 government, have any statistics along those
14 lines which would show the premiums that are
15 being paid by the local governments across
16 Pennsylvania for liability insurance along with
17 their experience and claims paid over the last
18 four or five years?

19 MR. GROVES: I don't know if I can
20 specifically answer your question. I can tell
21 you my own township's history. Eight years ago
22 our total insurance package was approximately
23 \$12,000 and now it's slightly over \$40,000. I
24 have been informed to expect at least a 11
25 percent increase this year which would be

1 approximately \$4,400, which is one-third of what
2 we were actually paying in 1980.

3 All of the things that I have mentioned
4 are affecting that, but we simply can't afford
5 to have those kind of increases continuing. I
6 think what we have said here today, let's get a
7 handle on this thing.

8 I don't know what you can specifically
9 do to reduce premium prices, but if everybody
10 could get a fair shake of where we are and where
11 we are going, we might be able to at least quit
12 the escalation at this point. Our local
13 governments can't afford these kind of insurance
14 policies.

15 REPRESENTATIVE GRUITZA: I think we are
16 sensitive to that problem. Along that same
17 period of time, had your county had any extra-
18 ordinary claims presented?

19 MR. GROVES: We had one claim. We were
20 found to be five percent guilty because a state
21 road was located in our township. The
22 individual that was involved in the accident was
23 inebriated; hit a medial in the middle of the
24 state highway stacking lane, killed himself and
25 we were five percent guilty because the road was

1 in our township.

2 REPRESENTATIVE GRUITZA: Would it be
3 possible -- I have been trying to obtain this
4 type of information. Would it be possible for
5 local governments in Pennsylvania or the town-
6 ship supervisors, in the counties to somehow
7 access some of this information that would give
8 us some black and white figures what these local
9 governments are paying out for liability claims
10 and what -- I'm interested in seeing what they
11 are paying in premiums and what they are paying
12 in claims.

13 MR. GROVES: I believe we can get you
14 some information along those lines.

15 REPRESENTATIVE GRUITZA: I think that
16 would be helpful to me in looking at the crisis
17 as it affects our local governments. Thank you.

18 CHAIRMAN DeWEESE: Mr. Reber from
19 Montgomery County.

20 REPRESENTATIVE REBER: The case that
21 you just referenced with that particular
22 municipality, was there a verdict entered by the
23 court or by a jury, or was that a settlement?

24 MR. GROVES: That's a good question,
25 sir. I can't answer that. It's my township,

1 but naturally, we turned it over to our
2 insurance carrier and our solicitor. Whether or
3 not they reached a decision prior to it going to
4 court--I know it was scheduled to go to court--I
5 don't know.

6 REPRESENTATIVE REBER: Could you
7 provide us with notification of the verdict if
8 it was entered by a court or jury?

9 House Bill 1828, which is the so-called
10 placing of the Federal Rule 11 relative to
11 conduct sanctioning attorneys and parties
12 bringing frivolous actions, we keep hearing a
13 lot about it.

14 My experience, and I want to ask
15 Mr. Mundy this because he does a substantial
16 amount of practice in Federal Court, I would be
17 interested in developing some testimony or
18 information as to, in fact, how many sanctions
19 per case brought in Federal Court are entered
20 under Federal Rule 11.

21 More importantly, it's my under-
22 standing, because we looked into this a number
23 of years, that under current Pennsylvania law,
24 Title 42, Section 2503, you're permitted in
25 Pennsylvania right now for participants "to

1 receive counsel fees for any party that
2 commences an action which is arbitrary,
3 vexatious, brought in bad faith, seem to be
4 dilatory or obdurate", whatever that means. In
5 any event, I tend to think we go out of our way
6 to hype scenarios.

7 Under Federal Rule 11, proposed House
8 Bill 1828, it still is going to take a party to
9 move for the sanction if necessary. Under the
10 section of Pennsylvania code which has been in
11 effect since I don't know when, with that
12 particular language I think if, in fact, a case
13 exists for such punitive sanctioning actions to
14 be taken, there's current precedent and
15 procedure to accomplish that under Pennsylvania
16 law right now.

17 I think the fact that it is not being
18 done of and in itself recognizes, exemplifies,
19 to me that instances are so insignificant they
20 are not worth hyping the issue all the time as
21 if this is going to drive down insurance costs,
22 insurance premiums and what have you. I make
23 that observation and I wonder if you have any
24 comments on that?

25 MR. GROVES: Not really. As I said

1 earlier, we are not here to say something is
2 going to take down these premiums costs. We'd
3 like to get a handle on where they are so they
4 don't keep going at the rate they have been
5 going.

6 REPRESENTATIVE REBER: I guess my
7 observation is, I want to grab the right handle
8 and not grab a doorknob that's going to come off
9 in my hands.

10 CHAIRMAN DeWEESE: Mr. Groves, will you
11 please introduce these gentlemen at the table.
12 The gentleman to your far left would like to
13 make a comment.

14 MR. GROVES: Mr. Schofield, Mr. Lee and
15 Mr. Schrum.

16 CHAIRMAN DeWEESE: Mr. Schofield,
17 you're recognized.

18 MR. SCHOFIELD: Thank you, Mr. Chaiman.

19 Earlier in the hearing this morning one
20 individual characterized these proceedings as a
21 debate on the subject. I don't choose to put it
22 in that category, but it's an inviting prospect.
23 I sat here and I listened to the representation
24 from the trial lawyers. I'd like to qualify
25 that I'm 39 years an independent insurance agent

1 and broker, self-employed, never having gained a
2 dollar of direct employment from any insurance
3 company. I own my own agency.

4 I'm also an eight and a half year
5 public school board member and have been
6 involved close to 20 years in that process.

7 Further, I do not write public business
8 as a matter of principle since I have chosen to
9 be involved in the public process. I'd like to
10 make three quick points, if I may.

11 CHAIRMAN DeWEESE: Congratulations to
12 Mr. Groves, you still have three or four minutes
13 left in your 20-minute allotment.

14 MR. SCHOFIELD: The statement was made
15 by the representative from the trial bar I'd
16 like to qualify as a matter of fact on the
17 public record is that, the auto No-Fault law
18 during a 10- to 11-year period that existed
19 produced a delivery of claims dollars to the
20 claimants numbered in the 80 to 85 percent rank
21 of delivery, which leaves anywhere from 15 to 20
22 percent for cost of the delivery of that
23 service.

24 I invite your attention to the numbers
25 that were placed on the record earlier this

3

1 morning where, currently, in general terms,
2 litigation has produced approximately 45 percent
3 of delivery of dollars to the Plaintiffs, the
4 claimants, as it were, and 55 percent to the
5 process which clearly includes huge numbers of
6 dollars to the legal profession.

7 The question of the insurance industry
8 should be qualified as the insurance companies
9 and not those among us who work directly with
10 the consuming public. We represent the client
11 to the company and the company to the client. I
12 will not beg the insurance company's performance
13 in recent years in particular on the investment
14 low pricing. That's a matter of public record
15 and I subscribe to that.

16 The fact is, however, that the
17 insurance premiums paid for losses after the
18 losses are adjudicated. One of the big problems
19 is the protracted period for the reserving of
20 losses and the interminable litigation process
21 that obviously drags on and on raising the cost
22 to all concerned and delivering a lesser dollar
23 to the consumer.

24 Final comment. I do believe it is
25 within the power of the legislature, and I look

1 at the youth at these tables, and I suspect some
2 of you are younger than my 39 years in this
3 business. I respectfully offer that the process
4 of legislative oversight which includes the full
5 recognition and funding of effective enforcement
6 of existing legislation will contribute a great
7 deal towards the long-term solution. The
8 necessary changes that have been proposed in
9 these pieces of legislation for public bodies is
10 vital.

11 I urge you to look at the facts on the
12 record, not my belief or any other, but look at
13 the facts that are documented and recognize
14 where the need is.

15 Please address the law as now in effect
16 using the case in point, the Pennsylvania
17 automobile situation which is illustrative of
18 the entire field of casualty insurance and the
19 public need for proper recourse. You gentlemen
20 and ladies have it in your power to correct a
21 sad history of a failure of legislative over-
22 sight to follow-up after you have done a
23 splendid job of writing law. Make certain it's
24 implemented and enforced.

25 Thank you very much.

1 CHAIRMAN DeWEESE: Mr. Groves and
2 Mr. Kosinski.

3 MR. SCHOFIELD: Mr. Lee would like to
4 make a statement.

5 CHAIRMAN DeWEESE: Mr. Kosinski from
6 Philadelphia is recognized.

7 REPRESENTATIVE KOSINSKI: The testimony
8 this morning, and we have no way to back this
9 up, said the injured Plaintiff receives 55
10 percent of net compensation, not 45 percent,
11 with the legal system consuming the rest.

12 The legal system is not defined. That
13 doesn't mean the other 45 percent, if that is in
14 fact a true number, goes to attorneys. The
15 legal system can mean a number of different
16 things; for example, the court reporter, the
17 binding of a deposition, video tape depositions,
18 court costs, other fees, clerical fees,
19 preparation. Don't say it's coming into the
20 attorneys.

21 MR. SCHOFIELD: I did not, sir. I
22 said 55 percent to process, which is the word I
23 have written here, and 45 percent to victim,
24 which is what --

25 REPRESENTATIVE KOSINSKI: You're wrong

1 on that too. Testimony this morning states
2 injured Plaintiff receives 55 percent in net
3 compensation with the legal system consuming the
4 rest. That is from Mr. Weir's testimony this
5 morning that I'm reading from.

6 MR. SCHOFIELD: It was spoken as I have
7 written it. I'm obviously incorrect according
8 to what you have read.

9 CHAIRMAN DeWEESE: I don't think it's
10 any catastrophic problem. Any other questions
11 or comments on behalf of the Committee members?

12 I recognize Mr. Bortner from York
13 County.

14 REPRESENTATIVE BORTNER: I'll allow
15 Mr. Lee to speak.

16 MR. LEE: It's not a prepared
17 statement. It's just to highlight the fact that
18 municipalities, since the elimination of
19 sovereign immunity, have been doing their fair
20 share of work in the risk management field.
21 They have been analyzing claims. Many of them
22 have moved into a much more aggressive loss
23 control posture than we ever have in our
24 history.

25 In my past employment as an

1 Administrator for the City of York, I also
2 served in several management positions with the
3 City of Allentown. One of them was Risk
4 Manager. One of the roles I had was to move the
5 city into a self-insurance program back in the
6 late 70's.

7 When we did that, we did that with our
8 eyes open. We knew what we were getting into.
9 We felt we could regress loss control, manage
10 our risks in a much more comprehensive and
11 efficient fashion than we were on relying, to a
12 total degree, on transfer of risk to an
13 insurance company.

14 I suppose it was an education when you
15 realize that so much of that work is based on
16 knowing what you do and doing it well. It's
17 especially disconcerting to find out that you
18 could be on the periphery of the result of a
19 loss or an injury, only to find out that the
20 responsible party that did cause injury or
21 damage was uninsured and to find out the
22 municipality is likely to be on the hook for the
23 total award.

24 You quickly come to the conclusion, do
25 we know what we are doing? Is it possible to

1 project what this is going to impact on the
2 taxpayers? The results are just a little
3 clearer because we are self-insured. Transfer
4 of risk on insurance companies are going to have
5 the exact same impact. The insurance company is
6 not going to lose money. Those types of awards
7 come down against municipalities for cases like
8 that. Municipalities across the country and
9 across the state are going to pay for it.

10 We have had to sit in fear in court-
11 rooms realizing that the Plaintiff has had
12 substantial economic awards, again from other
13 parties that more directly caused the injuries
14 and to find out that it was impossible to
15 introduce that piece of evidence, key type of
16 information, in for the jury's benefit before
17 they determined exactly how negligent the City
18 was. Again, we felt we were not negligent at
19 all; and also, how much that was going to cost
20 us.

21 Third, we have had our fair share of
22 frivolous lawsuits, relating the fact that we
23 were sued once in federal court because we paid
24 a vendor by check instead of in gold and silver
25 as required by the Constitution. I'll leave it

1 at that.

2 REPRESENTATIVE KOSINSKI: What happened
3 to that case?

4 MR. LEE: It was thrown out of court.
5 Litigation of that type is how we are solving
6 disagreements, where 10 years ago that was not
7 the case.

8 CHAIRMAN DeWEESE: Mr. Bortner for a
9 closing comment.

10 REPRESENTATIVE KOSINSKI: Was that
11 particular case that you mentioned, did an
12 attorney file that or was it filed by --

13 MR. LEE: An attorney filed that.

14 REPRESENTATIVE BORTNER: Just a quick
15 comment. Rick Lee and I served as fellow Board
16 members in the York County Transportation
17 Authority. I'd like to point out to the members
18 of the Committee, that my uncle, Harry B.
19 Schrum, who is also seated before you, and in
20 the interest of time I won't ask you any
21 questions though it's a hard opportunity to pass
22 up.

23 I'm also the Solicitor for the borough
24 of which he's the borough council member. I
25 think I have a very good understanding of the

1 way that some of these problems impact on local
2 government, particularly smaller boroughs,
3 transit authorities, and so forth.

4 CHAIRMAN DeWEESE: Thank you,
5 gentlemen, for being here with us this morning.
6 I thought your comments, Mr. Schofield, were
7 especially balanced and effective and I'm glad
8 to have all of you here today, thank you again.

9 We will take a 10-minute break.

10 (A short recess was taken)

11 CHAIRMAN DeWEESE: Our hearing will
12 reconvene at this time. We have a 13-minute
13 presentation on video. It's a 60 Minutes
14 excerpt.

15 As I indicated earlier, Monica O'Reilly
16 from the Insurance Information Institute has
17 asked for a 30-second rebuttal. I'll give her
18 two or three minutes but we are going to do our
19 best to keep on schedule.

20 (Videotape presentation)

21 CHAIRMAN DeWEESE: Monica O'Reilly,
22 since you're not a scheduled witness, confine
23 your remarks to three or four minutes.

24 MS. O'REILLY: Thank you very much to
25 allow me a few moments. I didn't know the 60

1 Minutes program was going to be on when I came
2 to the hearings so I have no formal comments;
3 just a few notes I'd made while listening to
4 that.

5 The Triple I's--that is, the Insurance
6 Information Institute--informational program,
7 which consisted of magazine ads, did not include
8 any anecdotes we'd like to put out, so neither
9 the motorcycle nor the horse coming through the
10 roof or the psychic or any of those had anything
11 to with our ad. It's unfortunate that that
12 point is kind of fuzzed over by mentioning our
13 ads and then not bringing in these other
14 stories.

15 Our ads did simply call attention to
16 activities that were threatened at that time--
17 this was 1986--because of the specter of
18 lawsuits hanging over them. The ads pointing to
19 curtailment of high school sports and other
20 recreational activities--this is a well-known
21 fact--municipal services and delivering babies
22 by obstetricians.

23 As to the ad about the clergy being
24 threatened with suits, if there was one such
25 suit that became known to the members of the

1 clergy, this would have a chilling effect on
2 their counseling activities and other
3 activities.

4 The increase in claims costs can be
5 seen in the experience of cities who self-insure
6 such as New York, Los Angeles and Dallas. Each
7 has seen its claims costs quadrupal over a
8 period of less than 10 years. There's no
9 insurance company to blame in these cases. The
10 cities are running nonprofit, self-insurance
11 programs and are seeing their costs go up like
12 everyone elses. This, more than anything else,
13 it seems to me, proves that the civil justice
14 system does need some remedial work.

15 The validity of the concerns expressed
16 in our informational ads is also shown by the
17 fact that legislators in 38 states enacted some
18 type of civil justice reform in 1986 and other
19 states enacted such legislature last year.

20 One final note. Earlier today I heard
21 history of someone citing the GAO report on
22 industry profitability. I would mention first
23 of all --

24 CHAIRMAN DeWEESE: We'd prefer if you
25 confine your remarks to the tape. I wanted to

5

1 have some give and take on the tape. We have a
2 wide body of testimony yet to come that are
3 going to parallel some of the things you're
4 sharing.

5 MS. O'REILLY: Mr. Wallace also did
6 refer to industry profitability. I was just
7 going say that some 3600 companies over 10
8 years' time, so, of course, it's going to be a
9 large number.

10 I will personally deliver each of your
11 offices later, by the way, the report of the
12 Anti-Trust Division of the U.S. Justice
13 Department that looked at industry profitability
14 to see whether there was collusion, price-fixing
15 and so on, and which concluded that more than
16 any other factors, the growth of the lawsuits
17 and size of awards has caused property casualty
18 insurance to be expensive and sometimes hard to
19 buy.

20 I thank you again for allowing me to
21 make these comments.

22 CHAIRMAN DeWEESE: The first individual
23 to testify after our lunch break, Michael Rooney
24 from the People's Medical Society. I have no
25 idea what the People's Medical Society is.

1 Please make your remarks by sharing that to me.
2 I'm anxious to know.

3 MR. ROONEY: The People's Medical
4 Society is a national consumer health
5 organization which was founded in 1982 by Robert
6 Rodale, who is Chairman of the Board of Rodale
7 Press, publishers of magazines that are in
8 health and fitness areas such as Prevention,
9 Organic Gardening, Bicycling, Runners World,
10 Cross Country Skier, et cetera.

11 Mr. Rodale has been quite an observant
12 observer of the health care delivery system and
13 the need for individuals to be more responsible
14 in taking better care of themselves, and also in
15 dealing with the system that has been growing by
16 leaps and bounds. I'm talking about the medical
17 care delivery system.

18 In that concept he began writing
19 editorials in Prevention concerning the role of
20 the consumer. Out of that came the formation of
21 the People's Medical Society. Our headquarters
22 is in Emmaus, Pennsylvania, which is right near
23 Allentown, Pennsylvania. We have been in
24 existence since 1983.

25 REPRESENTATIVE McHALE: That's in

1 suburban Bethlehem.

2 MR. ROONEY: Right, suburban Bethlehem.
3 I recognize Representative McHale. I've seen
4 him a few times. I also share something in
5 common with Representative Bortner, being from
6 York originally.

7 I'd like to get into some of the points
8 that I would like to touch upon, and hopefully
9 bring to your attention some consumer
10 viewpoints.

11 As I mentioned we are a national
12 organization. We represent about 5,000 people
13 in Pennsylvania and tens of thousands more
14 nationwide. We believe in the concept of
15 consumerism in medical care and the need for
16 consumers to become empowered advocates
17 concerning the issues which directly affect them
18 and their dealings with the medical care deliver
19 system.

20 I want to thank you for giving us the
21 opportunity to present the consumers viewpoint
22 on the important issues of medical malpractice
23 and tort reform.

24 Tort reform as a remedy for medical
25 malpractice is an issue which we have brought to

1 the attention of our members and other
2 interested consumers. The People's Medical
3 Society has been actively involved in this issue
4 since 1984 and we have joined forces, when
5 appropriate, with other consumer organizations
6 to present the consumer viewpoint on this
7 important, and potentially devastating, matter.

8 Today, we join with other consumer
9 organizations such as the Pennsylvania Chapter
10 of the American Association of Retired Persons,
11 Pennsylvania AFL-CIO, Injured Workers, United
12 Mine Workers, Pennsylvania State Council of
13 Senior Citizens, Pennsylvania Public Interest
14 Coalition, Dalkon Shield Information Network and
15 the Pennsylvania Conference of Teamsters. The
16 sum of these organizations and ours represents
17 millions of Pennsylvania's citizens.

18 We hope to show that you restrict a
19 citizen's right to redress by limiting access
20 and narrowing who is responsible for harm is not
21 reform in its truest sense. It is disenfran-
22 chisement of the highest order. It is nothing
23 more than an assault on the constitutional
24 guarantee made to every citizen to have his/her
25 case heard by a jury of his or her peers. This

1 is fundamental to the American ideal of fairness
2 and playing by the same rules.

3 The "so-called" reforms, such as those
4 proposed in House Bill 1834, seek to punish the
5 victim of an incompetent or impaired practi-
6 tioner by making the victim pay for becoming a
7 victim. If you want to address the issue of
8 medical malpractice which this legislature must,
9 you and your esteemed colleagues need to first
10 recognize that medical malpractice is not the
11 same as general product liability, nor is it
12 remedied by blaming the victim.

13 The People's Medical Society believes
14 the only fair and equitable way to address this
15 issue is to examine it in terms of three related
16 components: medical malpractice, physician
17 discipline and liability insurance reform.

18 The medical literature serves as strong
19 evidence that the reason there are many mal-
20 practice suits filed each year is because there
21 is a significant level of unaddressed mal-
22 practice. We maintain that the public is
23 subject to a dangerous number of incompetent and
24 impaired providers.

25 To add insult to such injury, the very

1 mechanism that was designed to protect the
2 public from such providers, the Medical
3 Licensing Boards has been unable or, worse yet,
4 unwilling to perform its function. The reasons
5 for this are many. However, two of the most
6 prominent reasons are lack of adequate funding
7 to hire investigators, and the reluctance of the
8 Boards to take even a modicum of action against
9 a fellow physician, let alone revoke a medical
10 license.

11 Only last year Governor Casey referred
12 to the licensing Boards as being in "a
13 shambles", in the Philadelphia Inquirer,
14 June 23, 1987. This is not isolated to just
15 Pennsylvania, but rather a symptom of a cancer
16 which threatens to tear at the very fabric of a
17 system that was designed to protect the public.

18 There is in each state, a medical
19 licensing board empowered with the awesome
20 responsibility to not only license medical
21 practitioners, but also discipline them. While
22 it has performed adequately in the former, it
23 has failed miserably in the latter; so much so,
24 that the United States Secretary of the Depart-
25 ment of Health and Human Services, Otis R.

1 Bowen, himself an M.D., has called for stricter
2 action from these Boards.

3 It has also been reported that much of
4 what eventually becomes known as malpractice is
5 caused by a small percentage of physicians. In
6 Pennsylvania alone it has been estimated that
7 one percent of the physicians are responsible
8 for 25 percent of malpractice claims. That's
9 the Hofflander and Nye study. We have also read
10 respected studies that indicate three to four
11 percent of all physicians are responsible for
12 the majority of malpractice claims and actions.

13 We do not understand why the vast
14 majority of physicians, those who are not
15 malpracticing, permit a minority of their
16 members to besmirch their reputation. We would
17 think that 96 percent of physicians who are
18 competent would do all that was necessary to rid
19 their profession of these errant practitioners,
20 but, they do not. Instead, they go after the
21 victim with legislation such as House Bill 1834.

22 Consumers have also been told that the
23 medical profession polices its own. However,
24 there is a paper trail of evidence that demon-
25 strates otherwise. When left to their own

1 devices, the medical profession is not only
2 slow, but actually loathe, to turn-in one of its
3 own. This has been called a "conspiracy of
4 silence" and this conspiracy of silence is not a
5 consumer contrived conspiracy theory, despite
6 most consumers feeling such a situation exists.
7 No. The "conspiracy of silence" was revealed by
8 Otis R. Bowen, M.D., the Secretary of Health and
9 Human Services.

10 As we mentioned, the primary reason
11 there are malpractice suits is because there is
12 malpractice being committed against citizens
13 like you and me; and we, as consumers, have been
14 systematically denied the information we need to
15 avoid these criminals.

16 While consumers were left guessing as
17 to whether or not a particular physician was to
18 be avoided, there is a body of evidence to
19 suggest that the medical profession is fully
20 aware of the number, extent and seriousness of
21 impaired and incompetent physicians. In fact,
22 this information has been known for a long time
23 and reported in the professional medical press.
24 Unfortunately, it has been deliberately kept
25 from the public. Consider the following:

1 Between 22,600 and 36,600 physicians
2 are alcoholics, recovering alcoholics or soon to
3 be alcoholics (T. Watkins, "Physicians A Higher
4 Risk Group", Medical Tribune, June 19, 1985."

5 Since 1975 it has been reported that
6 about one out of every six known drug addicts in
7 the United States, England, Holland, France, and
8 Germany is a doctor. (A.S. Freeze, Managing
9 Your Doctor, Stein and Day, 1975).

10 Prescription drug abuse by doctors is
11 four times the national average, and their
12 cocaine use has increased ten-fold since 1980.
13 That was by David Smith, M.D. "Drug Addiction
14 Casts A Growing Shadow over M.D.'s", Medical
15 Economics, November 1985.)

16 A Harvard University study discovered
17 the following about 500 practicing physicians
18 and 500 medical students: 59 percent of the
19 physicians and 78 percent of the medical
20 students reported they had used psychoactive
21 drugs at some time;

22 Recreational use of marijuana and
23 cocaine was reported by physicians and medical
24 students;

25 Self-administered drugs consisted of

1 tranquilizers and opiates;

2 Ten percent of the sample indicated
3 current regular drug use occurring once a month
4 or more often;

5 Three percent of the physicians and
6 five percent of the medical students indicated
7 that they were drug addicts at sometime.

8 ("Psychoactive Drug Use Among Practicing
9 Physicians and Medical Students", New England
10 Journal of Medicine, September 25, 1986, pages
11 805-810)

12 We present this information not to
13 shock, but to illustrate that there are mal-
14 practice suits because of incompetent and
15 impaired practitioners. They are significant in
16 number. They will not be stopped by limiting a
17 citizen's ability to redress their wrongs.
18 Rather, they will be encouraged, knowing that
19 little will be happen to stop them.

20 The second point to be addressed is
21 physician discipline by the licensing Boards.
22 Disciplinary actions by State Medical Boards, as
23 reported by the Federation of State Medical
24 Boards, Fort Worth, Texas, shows that Penn-
25 sylvania ranks 26th in actions taken against

1 errant physicians. These data are for 1986, the
2 latest year for which statistics are available.
3 There are some 28,000 physicians in Pennsylvania
4 and only 27 licenses were revoked in 1986, in
5 addition to limited actions being taken against
6 103 other physicians. This translates into only
7 3.7 actions taken per 1,000 physicians.

8 If we recall the Hofflander and Nye
9 study, which indicated that one percent of all
10 of the physicians in the state cause 25 percent
11 of the malpractice, we would expect to see
12 additional actions against approximately 280
13 physicians. However, this was not the case.

14 Clearly, these Boards are not carrying
15 out their mandates, and perhaps with good
16 reason. They lack the proper resources in terms
17 of dollars and staffing. Perhaps the legis-
18 lature needs to examine the licensing fee
19 structure and implement some changes that will
20 provide adequate funding for the licensing
21 Board.

22 We propose that the fee charged
23 physicians should be raised at least \$100. This
24 alone will raise \$2.8 million which should
25 certainly contribute to the hiring of additional

1 investigators.

2 But, that is only part of the problem.
3 If this crisis is to be resolved, the consumer
4 must be represented on the licensing board.
5 Thus far, Virginia is the only state that
6 statutorily provides consumers with a voice on
7 the licensing boards. There also needs to be a
8 system for tracking physicians who lose a
9 license in any state and then set up a practice
10 in an adjoining state or halfway across the
11 country.

12 The evidence to support the call for
13 stricter enforcement of the existing licensing
14 laws is not too difficult to find. The
15 Inspector General of the Department of Health
16 and Human Services reports that 20,000 to 45,000
17 patient care doctors are likely candidates for
18 some form of disciplinary action ("Medical
19 Discipline, Peer Review Weak, HHS Study Finds."
20 Medical Liability Advisory Service, February
21 1986). Yet, only 2,108 physicians had any type
22 of action taken against them in 1986. That's
23 from the Federation of State Medical Boards,
24 Fort Worth, Texas.

25 Also, Arnold S. Relman, M.D., Editor of

1 the internationally respected New England
2 Journal of Medicine, "All the evidence suggests
3 that most, if not all, the states have been too
4 lax, not too strict, in their enforcement of
5 medical professional standards."

6 However, we need not look out of state
7 to find such slipshod enforcement. The Penn-
8 sylvania Board of Medical Examiners, even when
9 presented with evidence of fraudulent action by
10 physicians such as cheating on Medicare/Medicaid
11 billing, failed to take action against
12 34 doctors who were convicted of a felony.

13 In light of this evidence, one would
14 expect the medical profession to respond with a
15 call to rid itself of these errant providers.
16 But how has it responded? Their responses have
17 been a "tales of woe" about the poor, put-upon
18 and downtrodden physician forced to abandon
19 practice because of greedy and over-expectant
20 patients who will sue at the drop of a hypo-
21 dermic needle. Physicians respond by seeking
22 special legislation that will put them above the
23 law and grant them a form of immunity, immunity
24 from the very people they may harm.

25 Is this justice? Do we grant this

1 immunity to architects, plumbers, building
2 contractors? No. Yet, the physician community,
3 prompted by increased liability insurance rates,
4 campaigns to take away the citizen's fundamental
5 rights.

6 After examining House Bill 1834, we
7 cannot find one fair or equitable provision to
8 this legislation. Instead, it is a pseudo-
9 solution which blames the victims and exonerates
10 the perpetrators. It says the victim should
11 collect damages from other sources of
12 compensation and not look to the party which
13 caused the problem for any just compensation.

14 There is no relief from the seemingly
15 high liability insurance premiums found in any
16 of these bills. There is no mandated roll-back
17 of insurance premiums which would address the
18 main concern of the physician community. We
19 cannot believe that physicians would back
20 legislation which does not address their para-
21 mount concern of high insurance premiums. It
22 appears that what they really want is to limit
23 the rights of 11,000,000 people to satisfy the
24 perceived needs of a 28,000 member profession.

25 Another issue which must be addressed

1 is the cyclic nature of the liability insurance
2 premium. It has been demonstrated in various
3 studies that the liability companies appear to
4 operate on ten-year cycles, wherein, during the
5 early years there is intense competition for the
6 premium dollar. In essence, these companies
7 underprice coverage, and then when losses appear
8 to be growing, suddenly boost the rates to the
9 insured.

10 According to a story which appeared in
11 the Allentown Morning Call, on Sunday,
12 February 21, 1988, liability insurance rates are
13 forecast to drop 15 to 25 percent this year.
14 This drop in rates can be tied directly to the
15 cyclic nature of the liability insurance
16 business. In a related article, published by
17 the insurance industry, it was reported that
18 Pennsylvania physicians will pay about 14
19 percent less for their liability insurance in
20 1988 than they paid in 1987.

21 There has also been a reduction in the
22 amount of the 1988 contribution required to the
23 Pennsylvania Catastrophic Liability Fund, or CAT
24 Fund, from 87 percent of liability premiums to
25 61 percent of premiums.

1 There is also the question of whether
2 or not all physicians are facing a sudden
3 increase in their liability insurance premiums,
4 or is it just a few high risk specialties?
5 According to a survey in Medical Economics,
6 November 1987, the cost to obtain liability
7 insurance contributes only four percent of the
8 cost of doing business. In the Mid-Eastern
9 states, which includes Pennsylvania, that cost
10 averages 5.4 percent or about \$9,500 per doctor.

11 According to the same medical economics
12 survey, the specialty with the lowest percentage
13 of operating expenses for malpractice insurance
14 premiums is ophthalmology, at 2.2 percent. The
15 largest percentage is neurosurgery, at 9.8
16 percent.

17 One final point. We ask you to look at
18 who supports this legislation. We can only see
19 professional groups who have a vested economic
20 interest backing this bill. Yet, those who
21 oppose it are, for the most part, citizen
22 groups, the people who elect you and your
23 colleagues. Weigh that heavily in your
24 deliberations.

25 The People's Medical Society asks you

1 to remember the true victims of medical
2 malpractice--the citizens--and not deprive the
3 injured party of his/her right to recover
4 damages. We are not asking for special
5 treatment; just fair treatment. Thank you.

6 CHAIRMAN DeWEESE: Before we commence
7 with questions, would the other gentleman please
8 introduce himself for the record.

9 MR. CALLEN: My name is Patrick Joseph
10 Callen from Roxborough.

11 CHAIRMAN DeWEESE: You're with the
12 People's Medical Society?

13 MR. ROONEY: No, he's not a member of
14 our association. He's here representing a
15 victim of medical malpractice.

16 CHAIRMAN DeWEESE: Do the members have
17 questions? Mr. McHale.

18 REPRESENTATIVE McHALE: If I can
19 follow-up on a line of questioning that I
20 explored briefly this morning, when a complaint
21 is made concerning medical malpractice in the
22 Bureau of Professional and Occupational Affairs,
23 at that point commences an investigation into
24 the alleged impropriety.

25 Do you have any figures as to how long,

1 on the average, it takes that investigation to
2 be resolved as far as disciplinary action
3 appropriately taken?

4 MR. ROONEY: From information we've
5 obtained, by consumer contacts of the Licensing
6 Board that registers the complaint, there was
7 approximately a 60-day cycle in which the
8 Plaintiff -- The information is collected. The
9 party about whom the complaint was filed is
10 notified and they are asked to respond. We were
11 told this should occur within 60 days.

12 At that point a decision is made
13 whether or not there's enough information to
14 present it to the entire Board. From that point
15 on I cannot tell you what the time frame is
16 because it's going to vary with the number of
17 investigators available and how much time it
18 takes to collect additional information.

8
19 REPRESENTATIVE McHALE: I would simply
20 close with comment that from my own experience I
21 can tell you about a case where that 60-day
22 cycle was completed. The decision was made that
23 there was sufficient information to be presented
24 to the Board and an ongoing investigation still
25 occurs two to three years later. In the

1 interim, the physician continues to practice.
2 This is a death case.

3 I think we of the legislature must do
4 something for the sake of the profession, as
5 well as the sake of the public, to provide for a
6 more thorough and prompt investigatory
7 procedure. It seems to me in a proven case of
8 gross negligence resulting in a death we ought
9 to be able to fairly and firmly resolve that
10 investigation with appropriate disciplinary
11 action in less than two or three years.

12 MR. ROONEY: I think we agree. I think
13 our organization on a national basis, as well as
14 there have been different states in which this
15 issue has been debated quite promptly have been
16 calling for immediate summary action where the
17 Board may take action to restrict that
18 physician's activities.

19 There was one case in Pittsburgh where
20 a physician had been suspended for ordering
21 tests that were not necessary; also misinter-
22 preting tests. However, as I understand it, the
23 physician's license was restored in full within
24 60 days.

25 REPRESENTATIVE McHALE: I will close

1 with this issue also. There is an expedited
2 procedure where determinations are made when
3 there's immediate threat to public health and
4 safety by allowing the physician to continue his
5 practice. If it can be shown during the course
6 of that investigation that the tragic death
7 resulting in all probability due to that
8 doctor's negligence was not typical of his
9 course of conduct in practicing medicine, then
10 the expedited procedure is not implemented.

11 Unless he kills people on a regular
12 basis, if he kills someone aberrationally, once
13 during the course of his career, that isolated
14 death, as tragic as it is, goes through the
15 normal process which may take two or three or
16 even longer years in order to have the matter
17 resolved. I think in a death case that's
18 outrageous.

19 MR. ROONEY: I think we agree with you.
20 We think consumers need to know this
21 information. We also have been calling for more
22 full disclosure legislation which will put the
23 information before the public. They may decide
24 for themselves about the medical providers as
25 well as hospitals.

1 REPRESENTATIVE McHALE: Thank you,
2 Mr. Chairman.

3 MR. CALLAN: I would like at this time
4 to explain what has happened to me as a patient
5 as I listen to the gentleman in the back there.

6 CHAIRMAN DeWEESE: Just one second.

7 (Chairman DeWeese and Mr. Edmiston
8 confer privately)

9 CHAIRMAN DeWEESE: Counsel advises that
10 the request had been made prior to the hearing.
11 I was not aware of it. Limit your remarks to
12 three minutes.

13 MR. CALLAN: On the 11th of April,
14 1985, I was admitted to a hospital for a
15 myelogram. That afternoon I had the myelogram.
16 I thought I would go home the next day. I was
17 told I would be there one day.

18 The following morning the doctor came
19 to the bed and said what it had shown. We would
20 not operate, but we would do an epidural at noon
21 today. I was sent up to an anesthesiologist,
22 which he did. At 12 noon I was taken down to
23 surgery and they started to do the epidural.
24 When he finished the bottom of the spine, I was
25 taken back into the recovery room, nothing

1 happened. It didn't work. I laid there for 45
2 minutes. He came over and I asked him what went
3 wrong. He said, "I don't know."

4 He came back and says, "I will take you
5 back in again in a little while. I'm going to
6 go in four or five inches further up your back,"
7 and he did. He proceeded again and the same
8 amount of time, roughly, and it didn't work. He
9 took me back out again.

10 Then all of a sudden, like a flash of
11 lightning, something happened in my groin and it
12 seemingly started to work. Then it went towards
13 my chest. My two arms were leaned across my
14 chest and both of them fell off. I didn't know
15 what happened or what was happening until it
16 went to my neck and I couldn't breathe at this
17 time. The nurses started running.

18 He came back at this time and I had a
19 problem then with my blood pressure. They said
20 "Patrick don't sleep on us; Patrick don't sleep
21 on us." I kept fading away. All I saw in front
22 of me was like bodies, dead bodies piled up in
23 front of me face.

24 I felt I was floating over the bed. I
25 could see myself lying there. I had a problem

1 breathing. The nurses were taking my blood
2 pressure that they had said later went down to
3 90 over 60.

4 But, today, I went in for one day. I
5 spent 111 days in the hospital. I lost the
6 power of my arms all the way right down.
7 Nothing was moving but my head. I had to be
8 fed.

9 Then I was transferred to another
10 institution for 96 days. When they had me in
11 there for about two months, then they trans-
12 ferred me up to a psychiatric ward making it out
13 it was in my head or whatever. I don't know. I
14 didn't fit in there anyway. I knew that much.

15 Since then my bladder is gone. I have
16 to catheter myself nine times per day. I'm on a
17 bowel program. I have no sensation from the
18 hips down. My erection, no erection. My
19 complete life is in ruin.

20 I'm seeing several specialists, and
21 some of them have felt they are to the end with
22 me. There's not much more they can do, but I'm
23 on a lot of medication. If I make mistakes now
24 it's through the medication I'm on. I'm on pain
25 killers. I have chronic pain all the time.

1 This is what has happened to me at that
2 particular place with that doctor.

3 CHAIRMAN DeWEESE: Thank you, sir, for
4 your testimony.

5 Mr. Rooney, I have a question. You
6 said in your testimony there wasn't any
7 provision in this Bill that you were pleased
8 with. Do you have a copy of the Bill in front
9 of you? If you don't --

10 What about the expert witness section
11 of the testimony? That seems to me a crucial
12 element from the point of view of many of the
13 people on the Committee. That doesn't seem to
14 be that antagonistic or aggressive. It seems
15 like apparently benign language. What does your
16 organization find to be disconcerting about that
17 particular section of the Bill?

18 MR. ROONEY: I think on that particular
19 section it seems to be an attempt to intimidate
20 the person before they even begin to investigate
21 their case by trying to restrict the area of
22 expert testimony.

23 I heard the comments this morning on
24 that entire issue of who could be an expert
25 witness. There happens to be some physicians

1 who are in practice who may only be in a certain
2 practice 25 percent of the time in teaching to
3 research the other, who would be expert
4 witnesses. It sounds to us what this is
5 intending to do is limit an expert witness to a
6 specific area.

7 CHAIRMAN DeWEESE: For my own purposes
8 and purposes of the Committee and audience, I
9 want to read three or four sentences into the
10 record.

11 Section 402A, Qualifications of Expert
12 Witnesses. "No person shall be permitted to
13 testify as an expert witness regarding the
14 standard of care unless a person has education
15 and professional knowledge as a general
16 foundation for testimony; is duly licensed in
17 any state of the United States; has current
18 personal experience and practical familiarity
19 with the medical subject that is being
20 considered; and is actively engaged in direct
21 patient care in the practice of the medical
22 subject of the testimony.

23 "No person shall be permitted to
24 testify as a medical expert against a Defendant
25 Board-certified specialist unless that person is

1 Board certified."

2 Sir, to me that is not aggressive
3 language. I don't think that -- Your word was
4 intimidating. I want to share with you my own
5 personal bafflement at your comment that that
6 language upsets you or disturbs your
7 organization. I'm sorry.

8 This is a hearing for give and take.
9 You have offered us some of your opinions and
10 I'm offering you mine. I just wanted to share
11 that for the record.

12 Do other members of the Committee have
13 some comments or questions for this gentleman?
14 If not, thank you very much.

15 REPRESENTATIVE BORTNER: I have a quick
16 one. I'm confused about who is on the Medical
17 Board. If you know the answer, what's the
18 makeup of the Medical Board?

19 MR. ROONEY: Right now I think there's
20 a non-physician, who is Chair, and there are
21 other physicians on the Committee. I can't
22 offhand give you the names. I think there are
23 seven people on the entire Committee.

24 REPRESENTATIVE BORTNER: Are they all
25 doctors?

1 MR. ROONEY: To my knowledge they are,
2 except for the Chair of this particular year.

3 CHAIRMAN DeWEESE: Thank you very much,
4 sir.

5 The next individual scheduled to
6 testify is Mr. Robert Griffith of the
7 Pennsylvania Recreation and Park Society. Is
8 there a Norman Walters of the YMCA?

9 Mr. Griffith, I'm going to display my
10 usual flexibility. My colleague, Mr. Flick, has
11 introduced legislation applicable to your
12 testimony. With your indulgence, I'd like for
13 him to take two minutes, and two minutes only,
14 to give a brief overview. He has waited a long
15 time. He's a colleague of mine in the General
16 Assembly. If you don't mind, sir, I'm going to
17 ask him to take a few minutes.

18 Mr. Flick, would you share with us,
19 momentarily, your perspective on the --

20 MR. FLICK: Thank you, Mr. Chairman.

21 I am here on behalf of Pennsylvania's
22 volunteers. Two years ago under the direction
23 of Chairman DeWeese, Pennsylvania Trial Lawyers
24 and various officials from Youth Sports
25 Organization hammered out specific wording

10

1 regarding the negligence standard for those
2 volunteers and organizations involved in youth
3 sports activities.

4 Later that same standard was expanded
5 to Board members and trustees of nonprofit
6 organizations, and then later that same year to
7 Board members and trustees of for-profit
8 organizations.

9 I believe, Mr. Chairman, is now to
10 expand that to all volunteers in public service.
11 I would urge the Committee to take this Bill,
12 House Bill 1405 or the Bill in the Senate, which
13 is Senate Bill 844, which is now in your
14 Committee having passed unanimously in the
15 Senate, and put it on your agenda for a vote in
16 the next regularly scheduled meeting.

17 I appreciate your courtesy for allowing
18 my to share these thoughts with you. I urge my
19 colleagues on the Judiciary Committee to move in
20 the same manner in which they moved two years
21 ago in 66 to provide the additional protection
22 to youth sports volunteers. Thank you.

23 CHAIRMAN DeWEESE: You're very welcome.
24 Thank you for capsulating it.

25 Bob Griffith, Pennsylvania Recreation

1 and Parks Society, and Norman Walters, YMCA.
2 Welcome, gentlemen.

3 MR. GRIFFITH: Thank you, Mr. DeWeese.
4 I'm joined this afternoon by members of our
5 Pennsylvania Recreation and Parks Society Board
6 of Directors and Governmental Affairs Committee
7 who represent the communities and citizens
8 around the Commonwealth. I plan to hit the
9 highlights of our prepared statement.

10 For 53 years our Society has been a
11 private, nonprofit association engaged in the
12 education, training and a variety of activities
13 intended to improve the delivery of quality
14 recreation and park services in the Common-
15 wealth. We have over 1300 members including
16 civic leaders, interested citizens, profes-
17 sionals and university students. We work with
18 over 200 full-time municipal recreation and park
19 departments. There's approximately 900 citizen
20 recreation and Park Advisory Boards that serve
21 the communities around the Commonwealth.

22 We work with hundreds of hospitals,
23 long-term care facilities, and private
24 recreation facilities around the state.

25 1985 Gallup survey estimated that

1 89 million volunteers provide more than
2 \$110 billion worth of free services to our
3 economy each year.

4 Many of the recreation and park
5 programs in Pennsylvania rely heavily on the
6 generosity of our volunteers. For instance, the
7 Fairmont Park Commission estimates that
8 volunteers contribute 100,000 hours each year to
9 offer public programs which could not otherwise
10 be provided.

11 Unfortunately, all is not well with the
12 volunteer efforts in our community recreation
13 and park programs. In 1987 a survey of our
14 membership in recreation agency indicated 55
15 percent of agencies responding felt that they
16 were having difficulty obtaining volunteers due
17 to the threat of litigation.

18 On a national scope, a Volunteer
19 Protection Act of 1987 states that the willing-
20 ness of volunteers to offer there services has
21 been increasingly deterred by perception that
22 they, thereby, put personal assets at risk in
23 the event of liability actions against the
24 organization they serve.

25 We feel that Pennsylvania's House Bill

1 1405 will address these problems by providing an
2 improved negligence standard for volunteers in
3 public service and nonprofit associations. Its
4 passage will be an important step in reducing
5 the threat of lawsuits for those citizens
6 willing to contribute their time and efforts to
7 support public service programs and projects.

8 On a national level we have seen
9 bi-partisan support from the majority of Penn-
10 sylvania congressional delegations. Fourteen
11 Pennsylvania Congressmen are co-sponsors of that
12 legislation.

13 The Federal Volunteer Protection Act is
14 intended to persuade states to pass statutes to
15 grant immunity to volunteers serving as
16 directors, officers, trustees, or direct service
17 volunteers to nonprofit associations.

18 Pennsylvania General Assembly has
19 already partially addressed these concerns with
20 Act 57 of 1986. They provide us with protection
21 for the officers and trustees and directors of
22 501 (c) nonprofit organizations and for
23 managers, coaches, umpires and referees and
24 nonprofit organizations involved in certain
25 sports programs.

1 Unfortunately, Act 57 of 1986 failed to
 2 extend the same coverage to volunteers involved
 3 in youth sports programs conducted by munici-
 4 palities, even though many municipalities do
 5 conduct the same types of programs as the
 6 nonprofit associations.

7 Proposed Pennsylvania legislation would
 8 extend the above precedents to other public
 9 service volunteers. We ask, why should a
 10 volunteer in a municipal sports program in
 11 Waynesburg, Greensburg or Philadelphia have less
 12 protection, a different standard of negligence,
 13 than a volunteer working for a Little League
 14 baseball program? Obviously, they should not.

15 House Bill 1405 has 50 bi-partisan
 16 co-sponsors and is identical to Senate Bill
 17 No. 844, Printer's No. 1015, which passed the
 18 Senate with bi-partisan support by a vote of
 19 49-0.

20 We don't come to you asking for
 21 legislation to solve the problem. We are taking
 22 action ourselves.

23 I'd like to urge the prompt consider-
 24 ation and passage of House Bill 1405, a modest
 25 proposal, which we'd like to see passed prior to

11

1 start of the summer programs and special events.

2 Thank you. I'll be happy to answer any
3 questions after the gentleman from the YMCA has
4 testified.

5 CHAIRMAN DeWEESE: Mr. Walters.

6 MR. WALTERS: Good afternoon,
7 Mr. Chairman, members of the Judiciary
8 Committee. My name is Norman Walters. I'm
9 Executive Director of the YMCA in York and York
10 County.

11 I am here today on behalf of the 80
12 corporate and 55 branch YMCA Organizations in
13 Pennsylvania. These YMCAs service a
14 constituency of over 1,000,000 people. We
15 appreciate having this opportunity to speak to
16 this Committee on a matter of great importance
17 to YMCA's and all non-profit service
18 organizations, as well as the communities they
19 serve here in the Commonwealth.

20 We are pleased that this Committee has
21 seen fit to take up this very important subject
22 for tort reform affects every organization and
23 individual in our society.

24 Because many people in our society have
25 come to believe that our court system is the

1 road to instant wealth, YMCAs and similar non-
2 profit organizations have, in recent years, been
3 forced to reexamine the programs they offer to
4 their members and public. In many instances,
5 programs that have been the bullwork of our
6 service to Pennsylvania communities for the past
7 100 years.

8 For example, YMCA's have had to
9 discontinue or modify some youth sports programs
10 or pay extremely high premiums for liability
11 insurance to protect their organization from
12 financial disaster.

13 At the York YMCA, we saw our insurance
14 premiums increase from \$10,500 in 1985, to
15 \$41,000 in 1987. This represents an increase of
16 290 percent.

17 In addition, we are operating under
18 very strict guidelines from our insurance
19 carrier and have no coverage for child
20 molestations or abuse. We are fearful of losing
21 our coverage entirely if the overall experience
22 of the carrier deteriorates and they choose to
23 discontinue insuring non-profit organizations.

24 The problem of YMCA's obtaining
25 insurance became so acute throughout the country

1 that our national organization formed their own
2 captive insurance company in 1986. Of the 950
3 corporate YMCA's in the United States, 193 are
4 now insured through our YMCA owned captive.
5 That is a non-profit captive. Ten of the
6 Pennsylvania YMCAs have joined the captive and
7 nine others have applied, but lack the required
8 up-front capitalization dollars amounting to 60
9 percent of the first year's premium.

10 Many more would like to be insured in
11 the captive because it is a very comprehensive
12 program and does not exclude child molestation
13 or abuse. Unfortunately, many YMCAs cannot
14 afford the cost.

15 The York YMCA made application to the
16 captive in 1987 and was quoted an annual premium
17 of \$69,400, plus a one-time capital investment
18 of \$41,600 for a total of \$111,000. There was
19 no way for us to handle this in our budget
20 without seriously curtailing our services.

21 The Harrisburg YMCA could not find a
22 commercial carrier to write their coverage in
23 August of 1987, and are presently insured
24 through the captive at an annual premium which
25 is \$43,000 over their 1987 premiums.

1 Two YMCAs in Pennsylvania were known to
2 be operating without liability coverage because
3 they could not find a commercial carrier to
4 write their liability coverage, and they could
5 not afford to participate in the captive
6 program. They have since acquired coverage.

7 It has been difficult enough in recent
8 years to provide services to our communities and
9 still balance the budget. These tremendous
10 increases in the cost of insurance to protect
11 our assets makes it almost impossible to do so.
12 Our support from United Way has leveled off, and
13 if we are to remain accessible to all segments
14 of our community, we must hold the line on our
15 fees.

16 We are in a Catch-22 position, for we
17 cannot do without insurance protection, and in
18 order to pay the bill we must either raise our
19 fee substantially or reduce services.

20 We think it is wrong for the vast
21 majority of our society to be asked to sacrifice
22 in order for a few to profit.

23 We are not opposed, and in fact, fully
24 support the right of an injured party to recover
25 if he or she has suffered an injury caused by

1 the acts of others. However, we do believe that
 2 we must return to a fault system where people
 3 must be responsible for their own acts and where
 4 they recover fair and just amounts based upon
 5 the fault of others. Any other approach is
 6 purely and simply a social program, whereby,
 7 anyone injured will be taken care of by the
 8 rests of our society. We do not believe that
 9 society, as a whole, would support such a
 10 system.

11 Our purpose in being here today is to
 12 ask you to examine our tort system for fairness
 13 and the consequences to society if we allow the
 14 system to continue to go unchecked.

15 A poll of the non-profit community
 16 service organizations throughout Pennsylvania
 17 will, I believe, clearly indicate their support
 18 for the legislation now before your Committee;
 19 namely, the ones under discussion here today.

20 Others, much more qualified than I, who
 21 have or will testify before you today, will
 22 discuss these Bills in more detail, but on
 23 behalf of YMCAs and all other non-profit
 24 community service organizations throughout
 25 Pennsylvania, we urge this Committee to give

12

1 these Bills prompt consideration and report them
2 to the Floor of the House and give your
3 colleagues an opportunity to vote on them.

4 Thank you.

5 CHAIRMAN DeWEESE: Mr. Walters, thank
6 you very much. Do members of the Committee have
7 questions for our witnesses?

8 (No audible response)

9 CHAIRMAN DeWEESE: Chair would like to
10 welcome Joe Lashinger. He joined us much much
11 earlier in our program. I neglected to welcome
12 you. Joe Lashinger from Montgomery County.

13 REPRESENTATIVE LASHINGER: Real
14 quickly, do you have statistics on litigation in
15 this area? Do you have volunteers that are
16 being sued in the Commonwealth?

17 MR. WALTERS: I can tell you about the
18 York Y. I don't have it throughout the
19 Commonwealth.

20 MR. LASHINGER: What is it in York?

21 MR. WALTERS: Our record has been
22 extremely good. In the past five years we have
23 had about three or four cases that threatened
24 suit and all were settled before they got to
25 litigation. They were all rather minor, in my

1 estimation, in terms of dollars.

2 I think the problem is the fear, the
3 risk. YMCAs are high risk. We have swimming
4 pools, gymnastics, children, nursery schools,
5 things like this. Our rates skyrocket regard-
6 less of what our record is. I think proof of
7 that is, when our national YMCA U.S.A. started
8 captive rate, their rates were so much higher
9 than what we are paying now and our record is
10 good.

11 MR. LASHINGER: My concern is -- I
12 think we are all sympathetic. It's an apple pie
13 and mom issue, who's opposed to volunteers. I
14 don't think you will find a member of the
15 Committee who wants to cast a vote against
16 volunteers. The problem is, we hear about your
17 premiums, but might we be going about it the
18 wrong way? Might we not be addressing it better
19 from the insurance end.

20 There have been proposals before this
21 Body before to provide for insurance pools for
22 non-profits. We were going to do it for
23 licensees, liquor licensees, day care centers,
24 which is nonprofit. Might that not be a better
25 approach from the insurance end than take away

1 rights that might still be needed on the part of
2 victims in this part of Commonwealth?

3 MR. WALTERS: I can't respond to that.
4 Let me say one thing. I'm not so much here
5 concerned about our volunteers. I'm more
6 concerned about the institution and the fact
7 that our participants --

8 As a matter of fact, our volunteers,
9 people who use the YMCA that will come around
10 and threaten suit against YMCA for an injury
11 that we had really nothing to do with.

12 CHAIRMAN DeWEESE: We have six minutes
13 left. Feel free to continue.

14 MR. GRIFFITH: I can answer the
15 question on volunteers. Concerning volunteers
16 our concern is not to provide any type of
17 blanket immunity, but make it a little bit more
18 difficult to allow a suit to be considered and
19 filed. I think the cost of litigation and the
20 stress that a volunteer goes through, even
21 during the time that it's being deliberated,
22 whether they're found negligent or not, some of
23 the costs we'd like to avoid and things seem to
24 be turning people against participating.

25 That's really what we are looking for;

1 not a blanket immunity. We would also like to
2 look at things like risk management in
3 combination with that measure to try to improve
4 the overall situation.

5 CHAIRMAN DeWEESE: Can everybody in the
6 back hear? Thank you.

7 MR. LASHINGER: Why all 501Cs? Why not
8 just 501C3s? Why cover all nonprofits?

9 MR. GRIFFITH: I think you find a lot
10 of the nonprofits that do a lot of volunteer
11 work will probably not be 501C3s. They are
12 generally educational groups. They are much
13 more difficult nonprofit status to obtain.

14 I think you'd find a lot of the
15 association groups are 501C6, 501C4. There are
16 a varieties that do these particular functions
17 that are all nonprofit. It just depends on the
18 types of activities they're involved in as to
19 how the IRS might rule on their particular tax
20 status.

21 MR. LASHINGER: This has been a pet
22 peeve of mine for a few years. Bob, I don't
23 have a problem with Park and Recreation Society,
24 or Little League. We just went through that in
25 the Committee two years ago.

1 The problem comes when you immunize
2 people who work with hazardous waste as
3 volunteers. We then went to the Little League
4 coaches. We expanded that to physical
5 therapist, the trainers who work with those
6 people. Now we're expanding it to all
7 volunteers. I don't know where this ends. How
8 much immunity are we going to offer people. Are
9 we going to make anyone responsible for their
10 actions?

11 MR. GRIFFITH: It's not a blanket
12 immunity. We are looking to extend the
13 precedence we set by the General Assembly for
14 the similar types of activities offered by Youth
15 Sports Non-Profit Association to the same
16 activity might be offered by a volunteer working
17 for a municipality. It's not a change in the
18 precedent. It's an extension of a very similar
19 type of activity.

20 MR. LASHINGER: Gross negligence, is
21 that the same?

22 MR. GRIFFITH: Gross negligence we
23 expect somebody to be sued for.

24 CHAIRMAN DeWEESE: Mr. Griffith, you
25 mention in your testimony The Pennsylvania

1 Federation of Sportsman's Clubs, The Garden Club
2 Federation of Pennsylvania, Pennsylvania
3 Environmentalists Council, Chesapeake Bay
4 Foundation, had a parallel point of view with
5 your organization. In earlier testimony this
6 morning, if my recollection is accurate, the
7 Sierra Club was mentioned as a group on the
8 other side of the issue.

9 One, am I correct in remembering that
10 they are on the other side of the issue, and if
11 I am correct, why is the Sierra Club and the
12 Chesapeake Bay Foundation at odds on this and
13 the Environmental Council and the Sierra Club?

14 MR. GRIFFITH: I wasn't here this
15 morning to hear testimony on the Sierra Club.

16 CHAIRMAN DeWEESE: They didn't testify.
17 Their name was mentioned as being a group that
18 supported a contrary position.

19 MR. GRIFFITH: I think we have to
20 address that to the Sierra Club. This issue was
21 brought before a group called Pennsylvania
22 Conservation Network.

23 CHAIRMAN DeWEESE: Why weren't they on
24 here? Why isn't their name on here? They are a
25 respected group. They have an --

1 MR. GRIFFITH: I think we have to
2 address that question to the Sierra Club.

3 CHAIRMAN DeWEESE: I thought you might
4 have asked them.

5 MR. GRIFFITH: At that particular time
6 they didn't have opportunity to sign on because
7 of need for certain Board approval.

8 CHAIRMAN DeWEESE: Thank you very much.
9 Any other comments, questions?

10 (No audible response)

11 CHAIRMAN DeWEESE: Thank you,
12 gentlemen, for your testimony this afternoon.

13 We are right on schedule, ladies and
14 gentlemen. Our next witness will be Sanford
15 Lewis of National Campaign Against Toxic
16 Hazards.

17 MR. LEWIS: I'm Sanford Lewis. I'm
18 Counsel to the National Campaign Against Toxic
19 Hazards. National Campaign was formed in 1984
20 and provides organizational and technical
21 assistance to community and environmental
22 groups. In Pennsylvania we are working with the
23 Pennsylvania Public Interest Coalition, the
24 Delaware Valley Toxics Coalition, Philadelphia
25 Clean Water Action Project, and many other local

1 groups.

2 As you know, the toxic crisis has
3 staggering human and economic costs. Millions
4 of American workers and citizens are dying and
5 suffering diseases caused by exposure to toxic
6 chemicals. Despite medical advances, cancer
7 rates continue to increase. At the same time,
8 toxic chemicals are damaging reproductive
9 systems and neurological systems, harming and
10 killing unborn and young children. At the same
11 time they are damaging our global life support
12 systems.

13 The National Campaign is working to end
14 this crisis. In the past we have worked
15 actively with groups trying to clean up dump
16 sites, and now we are working to prevent these
17 problems. We are working with grassroots groups
18 and technical experts across the country and
19 have prepared a platform of 10 points on how to
20 solve this toxic crisis.

21 One of the ten points relates to
22 liability for toxic releases and exposures.
23 Obviously, the liability systems can provide a
24 powerful engine to force companies to improve
25 product formulas, clean up hazardous waste sites

1 and stop making hazardous products.

2 However, it is by no means easy to
3 bring suits against the firms that cause toxic
4 injuries. For instance, the practical limits on
5 victims' abilities to bring suits regarding
6 hazardous waste sites are probably among the
7 most severe. You can imagine a child living
8 near a toxic site that suffers respiratory
9 disease. The child's parents and their lawyers
10 have to go through a lot of hoops that are
11 extremely difficult.

12 For example, they have to show the
13 Defendant dumped in the site; the Defendant's
14 waste caused the exposure despite the fact that
15 there may not have been air monitoring in the
16 area. They may have to say what and how much
17 toxic substance was in the air. They have to
18 prove an unreasonable lack of care by the person
19 who dumped the waste there, and at the same time
20 they have to prove one of the hardest things of
21 all--that the sickness actually was caused by
22 the exposure.

23 Of course, the Defendants are going to
24 mount and always do multi-layer counter-
25 offenses. They are going to say that the kid's

1 father's smoking caused the sickness. They're
2 going to say that there's a genetic predis-
3 position for the respiratory sickness. Because
4 of these kinds of problems, many attorneys will
5 not take the risk of investing in these
6 hazardous waste cases.

7 Because success in these cases is
8 essential to encouraging preventive action and
9 clean up, we support the strengthening rather
10 than the weakening of the tort system.

11 These so-called reform proposals, such
12 as before you today, could make it harder still
13 for victims up against the likes of Dow Chemical
14 and W. R. Grace to recover their damages. We
15 see four key issues in concern to victims in
16 these reform proposals.

17 The first is that they often threaten
18 to bury victims alive, a new factual dispute on
19 top of the ones I already mentioned. They
20 attempt to blame the victim rather than the
21 person who caused the problems. They tend to
22 carve away at the victim's right for full
23 compensation by eliminating or capping pain and
24 suffering and punitive damages, and they create
25 other liability loop holes, opportunities for

14

1 defense counsel to raise new arguments and try
2 to get new interpretations into the law.

3 I want to testify specifically in
4 opposition to three Bills before the Committee
5 today. These relate to joint and several
6 liabilities, House Bill 1830; punitive damages,
7 House Bill 1831; and products liability, House
8 Bill 1833. I will testify briefly in support of
9 affirmative preventive legislation.

10 Joint and several liability, House Bill
11 1830. House Bill 1830 would modify existing
12 Pennsylvania principles of joint and several
13 liability. Under current law where more than
14 one wrongdoer is involved in causing an
15 indivisible injury, the victim is able to
16 recover for the full damages by seeking a
17 recovery against any one or more of the
18 wrongdoers by applying this joint and several
19 principle.

20 House Bill 1830 would modify this
21 principle by barring full recovery of non-
22 economic damages against certain parties, and
23 the proposal seems simple and fair enough on its
24 face. It says if a Defendant was less than 10
25 percent causally negligent compared with other

1 Defendants, then it would only be required to
2 pay the victim a portion of the noneconomic
3 damages corresponding to this so-called causal
4 share.

5 Unfortunately, in reality, the effect
6 of this provision would obstruct the pursuit of
7 damages in toxics cases and other complex wrongs
8 in our technological society. It would be a
9 severe impediment where many firms have been
10 involved dumping into a site or where many firms
11 have been involved in marketing similar
12 poisonous products that a victim used.

13 The proposal could block the filing of
14 many lawsuits that, in fairness, ought to be
15 brought. It would certainly increase the number
16 of lawyers involved in these cases, resulting in
17 fewer cases being processed at greater costs.
18 Where these cases are brought, victims would
19 often bear major parts or even most of their
20 losses instead of the wrongdoers. Let me
21 explain that.

22 First thing, I think, at the outset, we
23 need to figure what is noneconomic damages.
24 Labeling certain kinds of compensation non-
25 economic may make these damages seem less real

1 or less important than so-called economic
2 damages. In reality, for many toxic victims--for
3 example, victims with cancer--fair compensation
4 does not mean merely paying doctor bills and
5 lost wages. Victims, obviously, lose more than
6 that. They suffer extensive pain and they lose
7 out on other what we think of as noneconomic
8 activities, like leading a normal family life.
9 In short, quality of their life is harmed.

10 The availability of these damages in
11 toxic tort cases are especially important since
12 these cases are among the most costly to
13 develop. In an environmental tort case, for
14 instance, the Plaintiff may need to finance
15 field studies costing hundreds of thousands of
16 dollars and hire experts in ten or more
17 disciplines. Reducing the ability to recover
18 noneconomic damages could tip the economic scale
19 in many of these cases and block the victim's
20 ability to even begin to commence a suit for the
21 wrongs.

22 Let's turn to the operation of the rule
23 itself. The whole notion of 10 percent causal
24 negligence in these cases is really a fallacy.
25 You need to understand that. The proposed rule

1 would divide up liability by dividing up
2 so-called causal negligence among the parties to
3 an action. We can begin understanding this by
4 considering actual hazardous waste sites in
5 Pennsylvania. There are a number of sites in
6 your state in which many parties have dumped.

7 In my written testimony I have written
8 a dozen Pennsylvania sites which involved more
9 than 10 parties, and which sites are so
10 dangerous they are on a national priority list.
11 There are approximately 2,000 dump sites in
12 Pennsylvania in need of attention because they
13 may threaten health or the environment. A great
14 many of those sites are also likely to involve
15 multi-party situations.

16 Under the joint and several liability
17 Bill that's before the Committee today, a jury
18 might find that a very thinly capitalized land
19 owner who operated a dump that contaminated a
20 well who was, say, 50 percent responsible,
21 causally negligent, and that Dow Chemical sent
22 maybe a few hundred barrels to the site
23 contributed less than 10 percent of the total
24 waste at the site, and therefore, less than 10
25 percent causally negligent. So, Dow will pay

1 less than 10 percent of noneconomic damages
2 under that proposal, and the landowner, who
3 doesn't have the money or doesn't have the
4 insurance, ends up paying little or nothing.

5 Unfortunately, this reflects a
6 distorted understanding of reality and would
7 result in a great deal of injustice. The
8 assumption that Dow Chemical is only
9 fractionally responsible for contamination of
10 that well is really a fallacy. Most of the time
11 any one of ten or a hundred dumpers could have
12 sufficed to contaminate a well; and yet, under
13 the proposal Dow Chemical would be liable for
14 but a small fraction of the damages.

15 Now, the mere fact that all of these
16 companies dumped into the site under the
17 proposed Bill would apparently be enough to
18 excuse them from full liability. This is really
19 odd, if you think about it. It creates kind of
20 a perverse incentive. It's cheaper to dump
21 together than alone under the Bill. For that
22 matter, it's cheaper to undertake any other kind
23 of technologically based wrong as a group rather
24 than individually because you only end up paying
25 a share of the liability.

1 This is not a hypothetical possibility.
2 There are many cases in other places that I
3 believe than here -- There are some cases that
4 are pending now or that have been settled where
5 I think this rule would have really worked an
6 injustice.

7 For example, the Times Beach case is a
8 case that's already been settled in Missouri.
9 In that case waste oil containing dioxane, which
10 is possibly the most toxic chemical in the
11 world, was spread on roads. Cases of cancer
12 resulted and that was about 10, 11 years after
13 the dumping occurred and a suit was brought
14 against a number of parties, including the
15 individual who spread the waste oil around. He
16 had no insurance or assets. The manufacturer
17 whose waste was disposed there, the manufacturer
18 went out of business in 1972 and was also
19 grossly underinsured; the middle man who hired
20 the hauler for the manufacturer, and the firm
21 that leased the property on which the waste
22 itself had been produced.

23 The result was that 150 victims in that
24 situation recovered a \$19 million settlement,
25 but the settlement -- \$17 million of that came

1 from the latter two, the middle man and the firm
2 that had actually owned the property on which
3 the materials were produced. Under the proposed
4 Pennsylvania law, I believe it's highly possible
5 that most of those damages would have been
6 impossible to recover.

7 Another example of importance in Penn-
8 sylvania is asbestos. John Manville, producer
9 of asbestos, has caused as much 50 percent of
10 all the exposures and now they have gone bank-
11 rupt. The other firms who produce asbestos
12 would be the ones that the victims in Penn-
13 sylvania will need to go against. They too may
14 face a situation under this legislation where
15 they would not be able to recover.

16 I said that among the problems caused
17 here would be burying victims beneath, really,
18 a heap of lawyers and evidence. Let me talk
19 about that for a minute.

20 In the existing system a victim can sue
21 any one of the dumpers in this dump site
22 scenario, if he or she can show that the dumper
23 was a substantial contributor to the damages.
24 As Defendants, they are free to turn around and
25 recover against the other Defendants. They can

1 seek a portionment of contribution against the
2 Defendants.

3 In contrast, a victim under the
4 proposed system could be forced to sue all the
5 potential Defendants himself. One may not know
6 who the biggest contributors were when you file
7 a suit originally, and, in fact, it could be
8 malpractice on the part of the victim's lawyer
9 to not sue all possible Defendants. Needless to
10 say, when you pack dozens or even hundreds of
11 lawyers into the courtroom, it makes these cases
12 much more difficult to manage.

13 Even if a victim only sues one party
14 initially, it would be in the interest of that
15 Defendant to turn around and bring in all the
16 other possible Defendants, so you still have a
17 courtroom packed with lawyers as an automatic
18 result facing each Defendant in a multiple party
19 situation.

20 Then what would happen is that these
21 lawyers, once you get them into the courtroom,
22 of course, they are going to engage in most
23 creative argumentation they can to show they are
24 less than 10 percent responsible -- for example,
25 in the dump site scenario. Some Defendants

1 would claim that they were less than 10 percent
2 responsible because they didn't operate the dump
3 themselves. Some would say they are less than
4 10 percent responsible because the volume of
5 their waste that went to the site was maybe less
6 than 10 percent, but then others would say even
7 though it may be more than 10 percent of the
8 waste on the site were theirs, their waste was
9 less toxic than others or their waste were in a
10 different part of the site that didn't quite
11 contaminate the well as much as the others.

12 You can imagine how complicated this
13 kind of chemical soup situation that happens in
14 this kind of waste site can be if this rule were
15 to operate. The arguments, the lawyers facing
16 the victim would be enough to make anyone cry
17 uncle and settle for whatever small amount of
18 money they can get out of the case, if they even
19 decided they wanted to go forward and file a
20 suit.

21 Last thing I want to say about joint
22 and several liability is that it plays a very
23 important role in encouraging cleanup and
24 prevention. Ironically, at the same time you
25 have this Bill before you here, I understand

1 another Committee of the legislature is
2 considering establishing strict joint and
3 several liability for hazardous waste cleanup by
4 the Department of Environmental Resources.

16
5 Joint and several liability is a very
6 important ingredient in government hazardous
7 waste cleanup, and in fact, National Campaign
8 supports -- We fought hard for national
9 legislation and to maintain national legislation
10 along these lines. We also support the same
11 strict joint and several principles being
12 available to victims.

13 The EPA, which already has this
14 principle in place, responded in the last round
15 of super fund reauthorization to attempts to
16 weaken strict joint and several. They said this
17 joint and several principle is the foundation of
18 an effective environmental enforcement program.
19 That's a quote.

20 The industry's arguments against joints
21 and several were resoundingly rejected by
22 Congress. We hope they will be in Pennsylvania
23 as well.

24 Let me turn to punitive damages,
25 House Bill 1831. Punitive damages are damages

1 awarded beyond economic and compensatory damages
2 in cases in order to insure that for the worst
3 wrongdoing corporations, they'll think twice
4 before neglecting health and safety. The
5 reforms proposed before you today threaten to
6 limit those damages and undermine those incen-
7 tives. It's already difficult under existing
8 laws to prove gross negligence of corporations.
9 The proposed legislation would make it more
10 difficult still to win punitive damages.

11 It rules out gross negligence as a
12 basis, and instead, requires that you either
13 prove an evil motive on the part of the corpor-
14 ation doing the toxic harm or that they create a
15 high degree of risk or physical harm to another
16 person and acted or failed to act in conscious
17 disregard or indifference to a risk.

18 We can probably discount evil motives
19 on the part of most corporations except in cases
20 where, maybe, they dumped something straight
21 into somebody's backyard for the purpose of
22 poisoning them.

23 The other standard is also going to be
24 very very difficult to meet. For example, take
25 the Bhopal incident where the issue of punitive

1 damages is currently being litigated in India
2 and 2800 people were killed by a very serious
3 chemical accident, the most serious ever.

4 While recent news accounts indicate
5 that the major failing in safety there may have
6 been the failure of the company to put contain-
7 ment systems in place to contain a release of
8 methyl isocyanate, however unlikely that would
9 be. It was considered very very unlikely.
10 Let's say it ws one in a thousand possibility
11 there would be a release.

12 Your proposed legislation before you
13 says it would require a show that they took a
14 high risk of physical harm, of causing physical
15 harm to another person. In fact, if it was only
16 one in a thousand chance that there was going to
17 a be release anyway, I'm not sure that that
18 standard would even apply in that situation.

19 Let me very briefly turn to products
20 liability and say that, proposals to eliminate
21 strict liability and require a showing of
22 negligence for design and formula, defects and
23 labeling situations are very very difficult and
24 troubling.

25 Amazingly, I think the incentive that

1 would be provided in that legislation would be
2 to actually discourage companies from doing
3 adequate testing, from aggressively researching
4 less toxic substances. There's a clause in that
5 Bill that actually says that not only do they
6 have to show -- does the victim have to show
7 negligence, they have to show that there was an
8 alternative design or formula available which
9 would have resulted in less severe injury, which
10 was known and readily available to the manufac-
11 turer at the time the product was designed to
12 formulate it. If I was the manufacturer, I
13 would stop my R&D program so nobody could ever
14 say that such a thing was available under this.
15 It has exactly the opposite effect that we are
16 trying to prevent.

17 Let me mention just three points. I
18 think my time is up. Three things we recommend
19 as affirmative things that need to be done. One
20 is toxic-free workplace act, HR 1774, allowing
21 workers to return to the tort system for these
22 expensive and difficult toxic exposure cases.

23 Second is expanding community toxic
24 victims' rights to sue the Government and
25 responsible parties for injunctive relief to

1 clean up pollution; and finally, I think there's
2 a need for regulatory measures to encourage
3 toxic chemicals usage reduction.

4 For now, liability incentives are the
5 main thing we have available to encourage
6 corporate soulsearching which asks the funda-
7 mental question, do we really need to use the
8 most severely toxic chemicals that we have in
9 the first place?

10 It certainly makes no sense to
11 undermine these incentives and create a field
12 day for toxic dumping and the marketing of
13 dangerous products by tort reform legislation
14 along the lines proposed today.

15 Thank you for this opportunity to
16 testify. I will be glad to answer any
17 questions.

18 CHAIRMAN DeWEESE: Thank you, sir.
19 Mr. Hayden from Philadelphia.

20 REPRESENTATIVE HAYDEN: Mr. Lewis, New
21 Jersey passed some so-called tort reform
22 legislation. I believe they accepted from that
23 reform package toxic tool or at least hazardous
24 waste site cleanup. Did they exempt both
25 hazardous waste cleanup from joint and several

1 strict liability alterations they made in their
2 law only, or did they also include personal
3 injury hazards as a result of potential
4 pollution cases?

5 MR. LEWIS: Well actually, the products
6 liability was for the Bill and they did exempt,
7 I think, toxic pollution cases. But let me
8 caution you about that kind of approach.

9 Although I'm talking about the toxic
10 example, I can think of examples involving
11 computers, things that people can do with
12 computers, where they can act in concert in the
13 same way and they're every bit as complicated as
14 the toxic situation. I caution against any kind
15 of exemption that's limited to toxic pollution.
16 Pharmaceuticals are, obviously, one I touched on
17 briefly. It really applies to a whole range of
18 ways that people can act in concert.

19 REPRESENTATIVE HAYDEN: You're saying
20 from your concern the campaign against toxic
21 hazards, you think any adjustment to joint and
22 several liability, even if we went ahead and
23 protected the hazardous waste situation, that
24 that's not enough?

25 MR. LEWIS: For example, I can think of

1 one of the kinds of things you'd likely to leave
2 out, but that the National Campaign is concerned
3 about, and that is biotechnology--environmental
4 releases of genetically engineered organisms.

5 The problem is, you can't really
6 predict what you're doing. These principles
7 have evolved to encompass all of the possible
8 situations involving many different types of
9 wrongdoers converging. I think you're really
10 prone to -- someplace along the line you will be
11 encouraging this in-concert type of action.

12 REPRESENTATIVE HAYDEN: Thank you,
13 Mr. Chairman.

14 CHAIRMAN DeWEESE: Thank you very much
15 for your testimony.

16 We're a few minutes ahead of time and
17 since I did mention the Sierra Club, Jeff, would
18 you give us two minutes -- Jeff Schmidt from
19 the Sierra Club. This is not a scheduled
20 witness.

21 MR. SCHMIDT: Thank you, Mr. Chairman.
22 I apologize to the witnesses that are to follow.

23 It's clear because of the earlier
24 exchange that the Chairman had with a represen-
25 tative from York Recreational Park Society,

1 liability issues until we get the national
2 organization a solid position on that. While
3 many of our members are interested in that Bill,
4 there's no position on it.

5 We are strictly opposed to 1830 because
6 of the doctrine of joint and several liability.
7 We support that doctrine. We don't want to see
8 that altered. We also do support the joint and
9 several liability provision as embodied by the
10 proposed state Super Fund Bill which is the
11 subject of another Committee.

12 That's all I have to say.

13 CHAIRMAN DeWEESE: Thank you for your
14 quick response and keeping things on time.

15 Next gentleman who is going to testify,
16 is Mr. Victor Schwartz, Law Professor at the
17 University of Virginia, commonly known among his
18 votaries as the Schwartz on torts.

19 MR. SCHWARTZ: I just wanted to make a
20 correction. I'm not at UVA. I don't know where
21 that came from. I'm a partner with the law firm
22 of Crowell & Moring in Washington D.C. I had
23 been a Professor of Law at Georgetown University
24 and I also taught at UVA a number of years ago.
25 Maybe it appeared in a flier of one of my books

1 Mr. Griffith, there needs to be some
2 clarification about the Sierra Club's position
3 regarding the Bills you're considering today.

4 We are an environmental organization.
5 We currently have a position on only one of the
6 Bills that you are considering today, that is
7 House Bill 1830 which was the prime subject of
8 the previous testifier. We oppose House Bill
9 1830. I did not, however, come here today
10 prepared to testify or answer questions about
11 our position on that.

12 My understanding is that earlier today
13 Mr. Chuck Evans from the Trial Lawyers read a
14 list of organizations and a number of Bills that
15 these organizations are in opposition to. We
16 are opposed to 1830. We are not opposed to any
17 of the other Bills in the package of House Bill
18 1828 through 34. We also don't support them.
19 We just don't have a position on those Bills.

20 In addition, House Bill 1405, I don't
21 believe that Mr. Evans discussed that Bill. That
22 is a Bill that our members are interested in.
23 Currently, the National Sierra Club has advised
24 all state chapters, of which Pennsylvania is
25 one, not to take positions on volunteer

1 or somebody may have copied it down
2 inadvertently.

3 I appreciate the opportunity to talk
4 with you today. I really looked at this area of
5 law from three perspectives. For many years I
6 was a full-time law professor. I am author of
7 the case book, the leading case book of the
8 United States, Treatise on Product Liability,
9 Treatise on Multistate Litigation, Treatise on
10 Comparative Negligence, and I've written a lot
11 of law articles, sometimes the Supreme Court of
12 Pennsylvania.

13 Second, I served in the Government of
14 the United States. I ran the Federal Inter-
15 agency Task Force on Products Liability and
16 coordinated all insurance issues in the Federal
17 Government on a council set up by President
18 Carter.

19 Currently, I'm in private practice and
20 head our torts and insurance practice section.
21 The primary work that we do is defense but we do
22 represent Plaintiffs, and I have, fortunately,
23 successfully.

24 I think we ought to begin with some
25 basics. There's been a lot of talk today about

1 detail and that's whether any legislative action
2 should be had in a field of products liability.
3 For over 200 years in this country, courts have
4 decided product liability cases and tort cases.
5 Why is it that now we should have something
6 different? Why should you, as legislators,
7 enter into an area that's been covered by
8 courts?

9 First I'd say, that in the past there
10 was a very coherent philosophy among the courts;
11 that is, fault or individual responsibility was
12 the keystone of imposing liability. That has
13 changed.

14 The second is that the decisional law
15 that we have moved very slowly. In our case
16 book we can show one change that took over a
17 hundred years, and that was from contributory
18 negligence to comparative negligence.

19 Today, in one day, the Supreme Court of
20 Pennsylvania can change the entire basis of
21 liability in our law. When that decision is
22 made it's retroactive. A couple years ago the
23 Supreme Court of Michigan decided it didn't like
24 strict liability anymore and in a case called
25 (inaudible word) they went the other way.

1 So, courts make giant leaps now where
2 they used to move incrementally. So the system,
3 as many of us learned in law school, what I
4 learned in law school, and that is that common
5 law moves in small steps is gone and we have
6 papers to submit to you. There's a very nice
7 paper by Professor Twerski that makes this
8 crystal clear, irrefutable about the types of
9 changes that are made.

10 What consequences flow from this?
11 First, it's hard to make any reasonable assess-
12 ment of risk. Whether you're a commercial
13 insurer or self-insurer, it's difficult. A lot
14 of blame can be put on the insurance industry
15 with all of this. They have their financial
16 ways of working. Interest rates go up. They
17 might like to have a lot of premium and hold it
18 for awhile. Interest rates go down, they look
19 more at the bottom line, but the fact is, both
20 commercial insurers and self-insurers alike face
21 this uncertainty. We put together 25 self-
22 insurance group in our firm. All of them worry
23 about what's coming next. They don't know
24 what's coming next.

25 Second adverse consequence of this

1 uncertainty comes to accident prevention. The
2 gentleman from AFL-CIO spoke very eloquently
3 this morning about tort law as an engine for
4 safety. I believe in that. But if you don't
5 know what the rules are going to be, it's very
6 difficult to plan your conduct to be safe. That
7 is the situation in this state today.

8 A third adverse consequence of
9 uncertainty is legal cost. I'm a practicing
10 lawyer. First thing I need to know in any case
11 is what the rules are, but I can tell you that
12 we do not know what the rules are until the
13 final court, especially in a state like
14 Pennsylvania where there's so much momentum, in
15 one case, which I will go to a bit later, in
16 Pennsylvania that I had dealt with warnings.

17 I discovered in this state you couldn't
18 tell what the law was on obligation to warn. We
19 had people, the Gremlins and Associates -- and I
20 even went in a library, which is unusual for a
21 partner, to try to find out what the law was in
22 that case and I couldn't find it either.

23 Flexibility in the law has its
24 benefits. Judges can fit cases on a case by
25 case basis to what is needed in that particular

1 case. You can help render independent justice.
2 It can reach a point where the uncertainty pro-
3 vided outweighs the benefits. This legislature
4 can create reasonable predictability of risk and
5 help stabilize the insurance system both for
6 self-insureds and insurers alike.

7 This legislature can properly formulate
8 a product liability law placing incentive for
9 risk prevention, accident prevention on the
10 people that can do the most good, whether it's a
11 wholesaler or manufacturer or employer or
12 individual who is using a product. This legis-
13 lature can reduce unnecessary legal costs which
14 are in our system with a well-drafted product
15 liability law that's clean and addresses some
16 issues.

17 Key issues. I'm going to talk about a
18 few of them. I don't mean by these issues that
19 this is an exclusive list, but these are ones
20 that seem to me to be very important issues to
21 be addressed in a product liability Bill at a
22 state level. Let me discuss design liability
23 first.

24 Design liability is when a manufacturer
25 is held liable for what his product looks like,

1 all the cars, not a defect in just one of them,
2 all of the airplanes, all the trucks, the basic
3 design of his product. Liability in design is
4 very uncertain in a number of states, but in
5 this state the Supreme Court of Pennsylvania has
6 said, judges first decide whether the risks
7 outweigh utility and then we tell the jury that
8 the manufacturer is a guarantor of its product.

9 Think about those words if you were on
10 a jury. The manufacturer is a guarantor of its
11 product, what does that say to you? Does that
12 say who to find for? There is no state in the
13 Union that uses those words other than the
14 Keystone State. There are a lot of things to be
15 proud of in this state, but ladies and
16 gentlemen, that's not one of them.

17 There needs to be some outer perimeter
18 on design liability. One that has been
19 suggested followed in Ohio, followed in New
20 Jersey, followed in the overwhelming majority of
21 states by case law is that if you follow a
22 reasonable, practical, feasible design, the best
23 practical, feasible design that is obtainable at
24 the time you make your product, that's enough.
25 You cannot and should not be asked to go beyond

1 what is humanly possible to do.

2 I'm all for deterrents. I said, tort
3 law is the greatest engine for safety that we
4 have, but you should not ask the manufacturer to
5 go beyond what is possible.

6 I heard a lawyer this morning ask some
7 questions. In his practice how does he want to
8 be judged? Does he want to be judged beyond
9 what's humanly possible? Does he want absolute
10 liability every time he loses a case? Standard
11 of practical, technical feasibility pushes that
12 manufacturer to the border line in which he can
13 go and not beyond.

14 This approach has been agreed to by
15 leading scholars. This approach curiously is in
16 the restatement of torts, and I put an appendix
17 on my testimony so people can see it in black
18 and white, a statement and part of the restate-
19 ment that has been ignored, unfortunately, by
20 the courts of this state.

21 Let me mention another doctrine very
22 briefly that provides some perimeter on
23 liability. There are certain products whose
24 inherent characteristics can't be removed.
25 Otherwise, you don't enjoy the product anymore.

1 I think the hot dogs in the ballpark,
2 they have a lot of cholesterol in them. I've
3 seen an ad on TV for a Big Mac attack that pulls
4 you out of your home at night for hamburgers;
5 butter, whisky, there are certain products our
6 society wants and desires. They opt risks that
7 everybody knows about and they really should not
8 be subject to liability.

9 Current law in Pennsylvania, as far as
10 I can determine, follows this doctrine, but it
11 is one of the border lines of law that provides
12 some predictability to people about what our law
13 is going to be all about.

14 A similar doctrine that is important
15 focuses on ethical drugs, prescription drugs,
16 and prescriptions today, medical devices.
17 That's unavoidably unsafe products.

18 Suppose someday we have a breakthrough
19 and there is a vaccine that will prevent AIDS.
20 It's very possible that vaccine will produce
21 some very serious side effects. If you impose
22 liability on an manufacturer for an unavoidably
23 unsafe aspect of his product after it has been
24 approved by F.D.A., what you are doing is
25 deterring the manufacturer of that product and

1 pushing product liability beyond that perimeter
2 to impose liability for unavoidably unsafe
3 products is a wrong to every person in this
4 state. A manufacturer is going to be less
5 likely to come into this state to sell his
6 products here if he's going to be subject to
7 liability for a product that's unavoidably
8 unsafe.

9 It really struck me as curious,
10 Pennsylvania law, where I could find nothing but
11 mush when I tried to find out what duty to warn
12 was all about. It might be absolute liability.
13 It might be negligence. It might be something
14 with a state of the art perimeter. It might be
15 anything.

16 If you made a product, you're a
17 manufacturer, if you want to do a good job, you
18 want to do the best job, wouldn't you want to
19 know what your obligations are with respect to
20 warnings? Should you warn about an obvious
21 danger or not?

22 Better thought says you should not have
23 to warn obvious danger because it detracts from
24 warnings that are really important; that are
25 really significant that they want people to pay

1 attention to.

2 Go to a hardware store this weekend and
3 look at a ladder in Pennsylvania. Do it,
4 please. Go in a hardware store and look at a
5 ladder. You will see that the warnings start at
6 the top go all the way down. If you have a
7 pocket version of warranties in the ladder, you
8 might fit into the pocket warranties first
9 before the ladder because the manufacturers
10 don't know what to do here, so they throw
11 everything on and pray, well, maybe we will get
12 by.

13 Outlining what the obligations are for
14 duty to warn, you're performing a public service
15 for both the people that buy products and those
16 who sell products in this state. If you shy
17 away from it and don't do it, you're performing
18 a public service to nobody. I have outlined
19 some ideas and statutory language throughout the
20 testimony, but if I were sitting where you are
21 and somebody said read a statute to me, I'd
22 leave.

23 Let me address a final point, and
24 that's product sellers: wholesalers,
25 distributors, retailers. Most liability, about

1 95, 96 percent are imposed on manufacturers in
2 this country and in this state. Yet,
3 wholesalers, retailers are dragged into almost
4 every product liability action. Ultimately,
5 they leave that imposition of liability on the
6 manufacturer, but they have to pay the lawyers.
7 They have to pay me and what you see in front of
8 you is an unusual thing, one defense lawyer.
9 Meaning, they're not all -- None travels in
10 pairs, but defense lawyers is a whole group,
11 where all the little clocks like the New York
12 taxi cabs where meters go faster when they are
13 standing still.

14 While the wholesaler is in there, he is
15 paying money even though, ultimately, he is
16 found not liable. A solution that has been
17 brought to aid this problem was the Uniform
18 Products Liability Act which I worked on when I
19 was in the Congress Department, adopted in about
20 18 states. This is what it says.

21 It says, Mr. Wholesaler, Ms. Whole-
22 saler, if you are negligent, if you are
23 responsible, you pay. If you mistorted your
24 goods; if you have not conveyed instructions; if
25 you have failed to give information that the

1 manufacturer gave to you on to your buyer, you
2 pay. If you have done anything wrong, you pay.

3 But, you don't pay for something you
4 cannot prevent, for something that isn't in a
5 product that you cannot discover. That's not
6 your responsibility, unless, unless, a situation
7 is one where the manufacturer cannot be found or
8 he's judgment proof in that state.

9 So, if you have a situation where the
10 wholesaler has dealt with a judgment proof
11 manufacturer, somebody who can't be found in the
12 jurisdiction, that wholesaler or distributor
13 must bear strict or absolute liability if the
14 product is defective.

15 Now, that makes sense especially today.
16 We don't want our distributors and wholesalers
17 dealing with foreign manufacturers that have no
18 place where you can sue them in this country.
19 If you pass that kind of legislation you are
20 engaging in sound social politics because you
21 are encouraging that wholesaler and that
22 distributor and that retailer to deal with a
23 responsible person. Because if he doesn't, he's
24 going to get dinged, or subject to suit, with a
25 manufacturer liability and he does not want

1 that.

2 In conclusion, there are many treatises
3 on product liability. They are long and
4 prolifics. We have one with a publishing
5 company that's two (sic) pages and looks like
6 the Brooklyn phone book. It's thick and long.
7 And product liability statutes can go on and on.

8 You need to zero in, as you appear to
9 be doing in your statutes, on a few key issues
10 and address them and address them now. If this
11 state does it and it does it in a good way, a
12 way that's convincing, a way where everybody's
13 interest is taken into effect, it will have an
14 effect on other states.

15 This is a very important state, a bell
16 ringer on product liability, chiefly because of
17 the abberant decisions you have from your
18 Supreme Court. I encourage you to do this. I
19 will be pleased in any way possible to help you
20 if you think that help is necessary.

21 Thank you for your attention.

22 CHAIRMAN DeWEESE: Thank you, sir.
23 Questions. Mr. Heckler.

24 REPRESENTATIVE HECKLER: Thank you,
25 Mr. Chairman.

1 Observation first. For the first time
2 since 1972, I wish I were back at U.V.A. law
3 school. I'm sorry, Mr. Schwartz, I didn't have
4 one of your courses.

5 Second observation, it is delightful to
6 hear someone who claims he knows what he's
7 talking about, taking our appellant courts in
8 this state to task, and in my opinion it
9 deserves to be taken.

10 Now the question. Mr. Schwartz, one of
11 the more persuasive arguments that I hear in
12 connection with the issue of product liability
13 is that this is an issue that should be dealt
14 with on a federal level; that if we deal with it
15 here, we are penalizing Pennsylvania Plaintiffs
16 without really -- and protecting manufacturers
17 from other states. Do you have any comments to
18 make?

19 MR. SCHWARTZ: In 1950 that would be
20 the 64th dollar figure -- correction, in 1970
21 the 64th thousand, and with the new imbalanced
22 budget that is now the million dollar question.

23 The Federal Government is in the best
24 position, without a doubt, to have uniform
25 federal product liability law, but I have

1 discovered something in working to enact federal
2 product liability law. That is, it's much more
3 likely to come about if the states act when we
4 are dealing with representatives of state "X" or
5 "Y" that has passed a product liability law is
6 ever so much easier to persuade them that this
7 is a national problem. When the state has
8 refused to deal with it, then we have much less
9 luck, so to speak, on that issue.

10 Also by dealing with it, you help
11 create and shape that federal law because the
12 federal legislators, without doubt I know it,
13 look to what the states have done in their
14 statutory law as they shape their own law. So,
15 it's interesting to me that when some members of
16 the National Trial Bar come down to the Federal
17 Government they tell us, they talk a lot about
18 state rights.

19 Once in a while in some of the states I
20 have been in, Ohio is one, they say it will have
21 to be the Federal Government because they don't
22 want anything anyway. I do and I think the law
23 should be statutory, and I think we can begin
24 clearly politically by having major states like
25 New Jersey, which has done it, like Ohio which

1 has done it, like California which has passed
2 some provisions, and like Pennsylvania to move
3 ahead that will help bring about a federal
4 solution.

5 REPRESENTATIVE HECKLER: Thank you,
6 Mr. Chairman.

7 CHAIRMAN DeWEESE: No other questions,
8 thank you very much, sir.

9 Next individual to testify Jay Angoff,
10 National Insurance Consumer Organization.

11 MR. ANGOFF: Thank you Mr. Chairman.

12 I'm Jay Angoff. I'm counsel to the
13 National Insurance Consumer Organization. We
14 were founded in 1980 by two state insurance
15 commissioners and one federal insurance
16 administrator. Since 1981 I have been involved
17 in both insurance and liability issues both in
18 Washington and on the state level.

19 I was very surprised to see my good
20 friend Victor Schwartz, very surprised to see
21 him here in Pennsylvania arguing in favor of a
22 state law that limits liability, because in
23 Washington, Victor has said for seven years, and
24 very eloquently, has said we have got to have
25 federal legislation. We can't have state

1 legislation because look what happens if you
2 just have state legislation.

3 One the one hand, you limit the ability
4 of people who are injured in the state to
5 recover damages, so you injure people in your
6 own state but you do nothing to bring down
7 insurance rates because product liability
8 insurance rates are made nationwide. So both
9 Victor and the senior author on the case book--
10 Victor is the junior author--Prosser, Wade and
11 Schwartz on torts.

12 Dean Wade was my teacher in law school
13 was particularly off on about this, and said the
14 worst thing a state could do is to enact a bill
15 that limits recovery of injured people in
16 product liability cases. Victor said the same
17 thing on the federal level, and I'm shocked to
18 see him saying something different here.

19 In any event, our perspective is some-
20 what different than others who oppose tort
21 reform bills. We believe that the legislature
22 does have the legislative decision to decide to
23 limit recovery for injured people if you get
24 something for it. It's a very important right
25 for people to be able to go into court, but we

1 are not a hundred percent opposed to any
2 limitations on that right if the legislature
3 gets something for it.

4 What we found out, and we have had two
5 insurance crisis in the last 13 years, is that,
6 when the legislators around the country pass
7 limits on the ability of severely injured people
8 to recover damages in court, it has no effect on
9 insurance rates. Let me give you a few examples
10 contained in the handout you got earlier.

11 After the insurance crisis of '74-75,
12 there were quite a few states, 15 states enacted
13 certain limits on medical malpractice
14 recoveries. There was a study done by a Frank
15 Sloan, Professor at Vanderbilt University of all
16 of those statutes. It's published in Volume 9
17 of the Journal of Health Politics, he found that
18 they had no effect one way or the other on
19 insurance rates.

20 After the insurance crisis of '74-75,
21 a number of states enacted other limitations
22 besides those on medical malpractice. Right
23 here in Pennsylvania, as I'm sure you know,
24 there's a cap on municipal liability. You would
25 think that during the insurance crisis of

1 1985-86, whatever was the case in Pennsylvania
2 for day care centers, for liquor liability, for
3 product liability, other types of liability, the
4 one type of insurance that people would have no
5 trouble getting at all would be municipal
6 liability insurance because, after all, there is
7 no strict cap in Pennsylvania on municipal
8 liability.

9 My understanding is that that was not
10 the case in Pennsylvania. Despite the cap in
11 Pennsylvania, municipalities still had trouble
12 getting insurance during 1985-86, the first half
13 of '87.

14 We made that argument to -- Some
15 people believe very strongly in tort reform.
16 They said you need more than a cap on municipal
17 liability. What you need is to eliminate joint
18 and several liability because that's the real
19 problem.

20 Well, that's what they did in Iowa in
21 1983. Soon after the bill was passed, 41 Iowa
22 counties had their insurance canceled despite
23 the fact that the legislature had just
24 eliminated joint and several liability. The
25 legislature elected charge for the elimination

1 of joint and several liability. Lowell Junkens,
2 since that time, has been going around the
3 country with mixed success, I guess, trying to
4 persuade legislators not to make the same
5 mistake that he did, because they eliminated
6 joint and several liability in Iowa and that had
7 no effect on the insurance rates.

8 Then you have the answer, well, what
9 you have to do is, you've got to do both. It's
10 not enough to just eliminate joint and several
11 liability.

12 (Short recess occurred)

13 CHAIRMAN DeWEESE: We will convene the
14 hearing. I'm very sorry for the interruption
15 but thank you for being understanding. Jay, I
16 don't want you to be lethargic but slow down a
17 little bit.

18 MR. ANGOFF: Mr. Chairman, and
19 particularly Madam Stenographer, I apologize for
20 getting a little excited, but I'm sure you can
21 understand how people do get excited about
22 things like joint and several liability and the
23 amount of damages.

24 In any event, I was about to get to New
25 Mexico where legislature did both things. They

1 put a cap on municipal liability even more
2 stringent than Pennsylvania. I guess it was
3 \$200,000 or \$300,000, and they totally
4 eliminated joint and several liability. They
5 did both of those by 1979.

6 I was in New Mexico not too long ago
7 during the insurance crisis and, believe it or
8 not, even in New Mexico where they did both of
9 those there was every bit as big an insurance
10 crisis as there was in other places in the
11 country.

12 Finally, the most rapt tort audience I
13 have ever spoken to, the Chamber of Commerce of
14 Wichita, Kansas, last year was very strongly in
15 favor of joint and several liability. They
16 eliminated joint and several liability but what
17 they didn't realize was, Kansas was the first
18 state in 1974 which totally repealed by statute
19 joint and several liability. It seems clear to
20 us, I think the evidence is fairly clear that
21 there just is not a connection between those
22 legal doctrines and the level of insurance
23 rates.

24 Let's go for awhile to what happened
25 more recently in the last two years during the

1 insurance crisis. The neighboring state of West
2 Virginia in March of 1986, the legislature
3 passed a Bill that was a compromise between the
4 insurance industry on one side and the trial
5 lawyers on the other side. They agreed to do
6 some tort reform and some insurance reform.
7 Specifically, they agreed to restrict the
8 insurance industry's ability to cancel policies
9 and they were required the disclosure of certain
10 financial information from insurance companies.

11 The Bill was passed in March but was
12 not scheduled to take effect until June. What
13 happened was, the beginning of May, the three
14 major medical malpractice companies in the state
15 sent notices to all their policies saying that
16 you were canceled effective May 31 unless the
17 legislature repeals the anti-cancellation and
18 disclosure provisions of the Bill which they
19 passed that was not to take effect until June
20 because we can't afford to do business in the
21 state unless those provisions are repealed.

22 What happened was, the legislature came
23 in a special session. Reluctantly, they tried
24 to set up some kind of state fund but they just
25 didn't have the time or the expertise to do it.

1 They came back in a special session and they did
2 exactly what the malpractice insurers wanted.
3 They got rid of the provisions the malpractice
4 insurers found objectionable. They threw in
5 some good tort reform for good measure and the
6 insurance did not cancel all of the doctors in
7 the state.

8 The postscript or punchline of that
9 story is that, after the Bill was repealed and
10 more tort reform was thrown in for good measure,
11 the major malpractice insurance company in the
12 state from St. Paul came in and asked for a 190
13 percent rate increase. That's again some
14 evidence.

15 I guess one of my favorite stories is
16 the law in Canada which has, again, been in the
17 law for quite awhile, where in Canada they have
18 pretty much the tort reform program that
19 business groups are pushing for around this
20 country. There's a cap on pain and suffering of
21 \$180,000 in Canadian dollars. That's about
22 \$130,000 in American dollars.

23 There's no punitive damages in a
24 practical matter. There's no ad damnum clause.
25 You can't specify the amount you're seeking in

1 the complaints. There's no contingency fee. In
2 Canada, win or lose, the Plaintiff has got to
3 pay his lawyer by the hour. There's no consti-
4 tutional right to a jury trial in Canada so most
5 trials are judge trials.

6 There are penalties for frivolous
7 suits. The penalty is a fairly strong one. If
8 you lose, not only do you pay your own lawyer,
9 but you have to pay the other guy's lawyer too.
10 Obviously, this is a very restricted system
11 actually more restrictive than most business
12 groups ask for around this country. You would
13 think with a system like this there couldn't
14 possibly be any insurance crisis in Canada.

15 But, if you go up to Canada and look in
16 the papers during 1985 and '86 the same time
17 there was an insurance crisis here, you'd see
18 exactly the same headlines in the Toronto papers
19 as you do in the Harrisburg, Washington or New
20 York papers.

21 The Canadian ski team couldn't get
22 insurance, day care centers, school bus
23 operators. The same risks that couldn't get
24 insurance in this country couldn't get insurance
25 in Canada at that time despite much more

1 restrictive Canadian law.

2 Now, obviously, there's no problem
3 getting insurance, for the most part in either
4 country, because the insurance industry last
5 year had its best year in history after having
6 its second best year in history in 1986.

7 What I found most impressive though is,
8 what insurance companies say themselves about
9 what will happen to rates in states that already
10 have an active tort reform. For example, in
11 1986 Florida enacted the Big 5 tort reform as
12 follows: Get rid of collateral source rule,
13 putting a cap on non-economic damages,
14 restricting punitive damages, eliminating joint
15 and several liability for non-economic damages
16 and requiring periodic payments of future
17 damages. Florida also became the first state to
18 do what I think makes sense; which is, if you're
19 going to pass tort reform then also require
20 insurance companies to reduce their rates in
21 response to tort reform.

22 After this law was passed, Aetna, one
23 of the major insurance companies in the country,
24 did a study in which they went and looked at a
25 hundred cases that had recently closed and asked

1 the question, how would our payouts be affected
2 in these cases if the tort reform that just
3 passed were the law during the pendency of these
4 cases? Here's what they came up with.

5 They found that the collateral source
6 rule had zero effect, four-tenths of one percent
7 for other general liability, zero effect on
8 products cases. Modifying joint and several had
9 zero effect. Capping non-economic damages had
10 zero effect. Restricting punitive damages had
11 zero effect, and requiring periodic payments of
12 future damages had zero effect.

13 Now, Aetna was not the only company to
14 do this. St. Paul did a very similar study,
15 only they looked at a little over 300 cases;
16 came to the same conclusion that the effect in
17 Florida of tort reform would have no effect on
18 insurance rates.

19 It wasn't just in Florida, though. The
20 head of the State Farm Insurance Company wrote a
21 letter to the Insurance Commissioner of Kansas
22 in which he said the same five tort reforms
23 would have virtually no effect on State Farm
24 rates.

25 The Great American West Company went

1 even further in response to tort reform enacted
2 in Washington which was one of the two or three
3 most comprehensive tort reform programs enacted
4 in the country. The Great American West Company
5 wrote to the Insurance Commissioner, David
6 Marquar (phonetic) in Washington, said, not only
7 will this tort reform not reduce our rates, but
8 actually may raise our rates. You have that
9 letter in front of you too.

10 This evidence caused a problem for the
11 insurance industry. So, in response to this
12 evidence the Insurance Services Office, which is
13 the insurance industry organization which
14 collects data and issues advisory rates did a
15 study intending to show that tort reform really
16 would have some effect on rates.

17 What they did was, they asked 1200
18 claims adjustors, insurance claims adjustors
19 around the country, what they thought the effect
20 on insurance payouts would be in six hypothe-
21 tical cases. The intent was to use those
22 responses to show that tort reform would really
23 have a substantial effect.

24 When they announced the study and
25 methodology we were very critical of it. We

1 argued, I think sensibly, that asking claims
2 adjustors is not going to get you an objective
3 answer. After all, claims adjustors are in the
4 insurance industry.

5 They have heard for two years how
6 effective tort reform is on reducing rates. So,
7 we thought they would come out with a study
8 showing that there would be a very very
9 substantial effect because of these tort reforms
10 that were enacted in different states. Here's
11 what the ISO came up with.

12 They looked at seven different states
13 that had active caps on non-economic damages:
14 Colorado, Florida, Maryland, New Hampshire,
15 Washington, Alaska, Minnesota. They asked the
16 question how much would this cap reduce our
17 payouts, and therefore, eventually our insurance
18 rates, in the six hypothetical cases, four of
19 which involved serious accidents, two not so
20 serious. As you can see, they came up -- with
21 two exceptions, they came up with essentially
22 zero.

23 The non-economic damage cap, though, is
24 not an exception. They also looked at the two
25 cases where punitive damages might be applicable

1 and again, they looked at six states that had an
2 active restriction, abberation or restriction of
3 punitive damages. They found the same thing;
4 that restriction of punitive damages would have
5 zero effect on their payouts, and therefore, on
6 their rates.

7 Finally, they looked at the dreaded
8 contingency fee. They looked at three states
9 that had restricted contingency fees for
10 Plaintiff's lawyers, hadn't done anything to
11 restrict fees for defense lawyers; and again,
12 they found that in Connecticut, New Hampshire,
13 Washington, all had restricted contingency fees
14 had zero effect on their payout, and therefore,
15 zero effect on insurance rates.

16 In conclusion, Mr. Chairman, you heard
17 a lot of arguments today about tort reform being
18 unfair. I'm sure you will hear a lot more of
19 those. Again, I think it's a legitimate
20 judgment for legislators to make to restrict the
21 rights of injured people in exchange for sub-
22 stantial insurance rate reductions.

23 To the extent that you're seriously
24 considering tort reform, I ask the insurance
25 industry to come in and say how much will you

1 reduce your insurance rates if we restrict joint
2 and several liability, or if we cap non-economic
3 damages. And then, if and when they gave you a
4 number, then you can make a decision, well, if
5 the tradeoff is worth it -- If they refuse to
6 give you a number it seems to me to make
7 absolutely no sense to enact any tort reform,
8 not only is it unfair, but the empirical
9 evidence shows it doesn't do anything to rates.

10 That's the end of my testimony. I'd be
11 glad to answer any questions.

12 CHAIRMAN DeWEESE: Did you read our
13 proposals, or Bills?

14 MR. ANGOFF: Yes; not in detail.

15 CHAIRMAN DeWEESE: You say it makes no
16 sense to make any changes.

17 MR. ANGOFF: No.

18 CHAIRMAN DeWEESE: Is that correct?

19 MR. ANGOFF: I said it makes no sense
20 to enact tort reform. It's my fault. Let me
21 distinguish between tort reform and what I call
22 true legal reform.

23 Tort reform is limits on the abilities
24 of injured people to recover damages. I say it
25 makes no sense to do any of that because what

1 you get there is just limiting the liability of
2 injured people recovering damages and keeping
3 all of the costs, keeping all the inefficiencies
4 of the existing system exactly the same.

5 On the other hand, I think it does make
6 sense to enact changes on the system which do
7 make the system more efficient without injuring
8 either side, for example, limitation on
9 frivolous suits and frivolous defenses.

10 CHAIRMAN DeWEESE: We can't get Jim
11 Mundy to say that.

12 MR. ANGOFF: I have a great deal of
13 respect for Jim Mundy, but in this case I
14 certainly disagree with him. I think that as
15 long as you do it on either side, if it makes
16 perfect sense. The unfortunate thing is, tort
17 reform is not true legal form. It's limiting
18 the ability of one side.

19 CHAIRMAN DeWEESE: Do members of the
20 Committee have questions? David Heckler.

21 REPRESENTATIVE HECKLER: Thank you,
22 Mr. Chairman.

23 First, a postscript since
24 Mr. Schwartz is no longer here. He shared with
25 me during the break -- I would assume that when

1 you testify on the national level you oppose a
2 national approach to product liability reform,
3 for instance?

4 MR. ANGOFF: We oppose codifying
5 product liability law on either the state or
6 federal level. I guess for the same reason my
7 teacher and Victor's senior author, Dean Wade
8 said, which is, the courts are less subject to
9 political pressures.

10 It's not perfectly efficient. Courts
11 do make some mistakes along the way, but that
12 we'd rather trust the courts from the
13 Plaintiff's prospective has got a better shot in
14 court than in the legislature. I'm more
15 familiar with federal legislature, but it's an
16 approach which is more in favor of common law
17 than statutory law.

18 REPRESENTATIVE HECKLER: I assume you
19 were here during his testimony?

20 MR. ANGOFF: Yes.

21 REPRESENTATIVE HECKLER: It seemed to
22 me that he made a rather cogent point that in
23 Pennsylvania, in particular, the courts have
24 thrown the balance out of kilter, if you will.
25 Their approach is not incremental, and some

1 cases are more like incomprehensible. Are you
2 able to comment on the state of the law in some
3 of these areas?

4 MR. ANGOFF: Certainly.

5 REPRESENTATIVE HECKLER: In
6 Pennsylvania?

7 MR. ANGOFF: Not in Pennsylvania, and
8 not that specific case he said. On the issue of
9 incremental change versus marginal change I
10 think the evidence is pretty clear the
11 substantial changes -- incremental changes
12 versus much bigger changes --

13 The real big changes happened in the
14 '60's. The '60's is when we went from negli-
15 gence to strict liability. The '60's is when we
16 got rid of the pain and danger rule. The '60's
17 and early '70's is when we went from contri-
18 butory negligence to comparative negligence.
19 The famous case of Greeman against UGI Power or
20 the case in New York which finally overruled the
21 pain and danger rule was very influential.

22 The second collision doctrine was the
23 Larson case which was in late '60's. All these
24 were major, major changes. I think since the
25 '60's and the early '70's the changes have been

1 not only much more incremental, but actually go
2 back the other way. I think the tort reform
3 movement, the real effect of the tort reform
4 movement isn't in the legislature but in the
5 courts; with juries in the courts because we are
6 beginning to see judges move away and restrict
7 liability rather than expand it.

8 Maybe that's not such a bad
9 development. I don't know. I think it's pretty
10 clear the evidence does not support what Victor
11 was saying. It did change in the '60's; not in
12 the '80's.

13 REPRESENTATIVE HECKLER: Thank you.

14 CHAIRMAN DeWEESE: Any further
15 questions?

16 (No audible response)

17 CHAIRMAN DeWEESE: One more time for my
18 own recollection. It does not discompose you a
19 great deal to think we might have some penalty
20 for frivolous suits along the federal lines in
21 Pennsylvania? That doesn't -- We are talking
22 in general, because that's something a lot of us
23 are discussing.

24 MR. ANGOFF: As long as it's a two-way
25 street. I would hate to see a Bill that would

1 just penalize frivolous suits and did not
2 penalize frivolous defenses, motions,
3 objections, collateral attacks, interlocutory
4 appeals. In my experience there's more abuse --
5 People can argue about that, but certainly abuse
6 on both sides. As long as you do it for defense
7 lawyers as well as plaintiffs' lawyers, I see no
8 problem with that.

5
9 CHAIRMAN DeWEESE: My final question
10 has to do with another subject I'm curious
11 about. That's the expert witness language that
12 the medical people are desirous of. That seems
13 absolutely reasonable to me, but yet, some of
14 the stalwarts on the other side are apoplectic
15 that we consider that.

16 What's your reaction to the expert
17 witness language? Do you have to have Board
18 certification in that area; that you have to be
19 schooled and practiced in that area? The lay
20 person out there thinks that makes absolutely
21 good sense. Forget the insurance modulations
22 just that that makes good sense as far as our
23 system of jurisprudence is concerned. Does it
24 or does it not?

25 MR. ANGOFF: I'm not your best witness

1 on that. I did try some of these cases for a
2 short time. I don't know the specific language
3 in your Bill. I do know we have the problem in
4 Tennessee, where I went to law school, of having
5 to get a doctor in the same specialty from
6 Tennessee. You couldn't get him from Kentucky.
7 You couldn't get them from North Carolina. You
8 couldn't get from a neighboring state. They had
9 to be from Tennessee. I don't know if your Bill
10 goes like that.

11 I know it was difficult, more difficult
12 in Tennessee than other states qualifying your
13 doctor as a competent expert witness. I'm
14 sorry. I don't know what the specific language
15 of your statute is.

16 CHAIRMAN DeWEESE: I would like you to
17 get back with us on that one question because
18 those are two salient elements of the proposals
19 from my own perspective. I heard you testify in
20 the past. I would be personally interested in
21 to know your reaction to that subsection of the
22 Bill in the next several weeks, if you don't
23 mind.

24 MR. ANGOFF: I would be glad to.

25 CHAIRMAN DeWEESE: Thank, Mr. Angoff,

1 for testifying before our House Judiciary
2 Committee this afternoon.

3 Final witness, James J. Morley, CPA,
4 who will represent the Pennsylvani Insitute of
5 Certified Public Accountants.

6 MR. MORLEY: I'd like to say they saved
7 the best for last, but after hearing all these
8 attorneys--I came in this afternoon--I'm quite
9 impressed with the speaking knowledge, story
10 lines and the presenting of their positions.

11 CHAIRMAN DeWEESE: We have had some
12 fine lay people also during the day.

13 MR. MORLEY: I guess I qualify as a lay
14 person. I'm not an attorney. I'm a Certified
15 Public Accountant, sometimes referred to as a
16 bead counter. I'm a partner in Arthur Andersen,
17 one of the large public accountant firms, in the
18 Philadelphia office. I handle clients, small
19 and large clients in a variety of industries. I
20 have been 32 years in the profession.

21 Today, I speak on behalf of 15,000
22 certified public accountants who are members of
23 the Pennsylvania Institute of Certified Public
24 Accountants.

25 I'm looking at this, if you will, from

1 a special interest point of view, how tort
2 reform could impact us. I have heard talk of
3 joint and several liability which is a very
4 important issue to us. I heard talk of
5 insurance and costs which is a very important
6 issue to us. We do appreciate the opportunity
7 to talk to this Committee today and welcome that
8 opportunity.

9 As I said, we get hit both on the
10 liability, in that we get sued, and the issue
11 that is a major concern to us is joint and
12 several liability. We, as accountants, get
13 sued. Our insurance goes up. Some accountants
14 cease carrying insurance go bare, which is a
15 serious situation, in that the great majority of
16 CPA's practice as individual practitioners or
17 partnerships; not in corporate form.

18 Therefore, if they carry no insurance,
19 their personal assets are literally at stake in
20 litigation. We have a situation of difficulty
21 in getting insurance and the cost of it being so
22 great or greater self-insurance; plus, the joint
23 and several liability which we are particularly
24 subject to, I would say, because of the
25 so-called deep pocket syndrome.

1 We examine the financial statements of
2 a publicly-held company, or a privately held,
3 large or small company. That company goes belly
4 up, goes bankrupt. A lot of people think that
5 the auditor is at fault there. As a fact, that
6 is not necessarily true, but we will typically
7 be brought into the litigation on that. With
8 the deep pocket syndrome where we may even be
9 judged to be 5, 10, 20 percent liable, we may be
10 the only one that has the funds, and therefore,
11 we do really get socked in the area.

12 Of the problem with getting insurance
13 the Pennsylvania State Board of Accountancy has
14 recognized this. We do have a number of CPA
15 firms, like law firms that practice as
16 professional corporations. Their required
17 insurance has been dropped from \$2 million to
18 \$500,000. A recent survey indicates that was
19 made in the Midwest, not in Pennsylvania. About
20 a year and half ago that one in five small CPA
21 firms were without insurance.

22 What has caused this situation? I sit
23 here as a layman and I'm ready to say a pox on
24 everybody's house. I can look at tort reform
25 and I can say joint and several liability,

1 despite what I have heard, which to me is unfair
2 to say that if you have the money you pay, not
3 because you're at fault, but because you can
4 afford to is the perception that we would like
5 to see the elimination of joint, or curtailment
6 of joint and several liability.

7 I think the courts in some of the cases
8 we get involved in -- Of course, they are not
9 pain and suffering; they are economic damage.
10 The courts have come up, I think, moved away
11 from the rigorous concept of fault, which we had
12 maybe in times past, toward the idea that all
13 loss should be compensated by someone.

14 Injured parties look to everyone
15 associated with the loss, regardless of degree
16 or proportion of fault. We think the situation
17 is genuinely damaging for both the accounting
18 profession and for society. Businesses, in
19 general, we think, are becoming more and more
20 aware of this. For example, two-thirds, in this
21 book Megatrends, John Naisbett has said that
22 two-thirds of all new jobs are created by small
23 business.

24 The CPA typically is very involved with
25 the early stages, the critical stages of a

1 entrepreneur starting up the small business,
2 whether Pennsylvania or any other state. It's
3 during this critical era of make or break period
4 of this enterprise's life that the innovative
5 and creative work of the CPA is needed.

6 The question comes, though, if he or
7 she, the CPA perceives there is something unfair
8 to them of greater liability with joint and
9 several concept, they are going to be wary of
10 handling this business at this critical time
11 that these entrepreneurs need that.

12 This idea of tort law in particular
13 states is obviously been debatable on the
14 national scene. It is being considered by
15 businesses in determining whether to locate to
16 or relocate from a specific area. This is in
17 addition to the traditional factor such as tax
18 incentives, availability of natural
19 resources, availability of qualified personnel
20 and a good transportation network.

21 I think as more states create a more
22 attractive tort environment through tort reform,
23 they are creating a competitive advantage for
24 themselves vis-a-vis the states that are not
25 addressing the issue of tort reform.

1 For example, one of the southern
2 states, Alabama, tauts their tort reform change
3 in a full page ad in the Wall Street Journal,
4 headed "Alabama is Open For Business", signed by
5 the Governor and saying, write to our bureau and
6 why it makes sense to come to our state and open
7 your business.

8 I do want to assure you, as
9 accountants, CPA's, I think we are responsible
10 citizens and aware of our responsibilities. We
11 are not trying to eliminate accountants
12 liability. The traditional accountants
13 liability for negligence is clearly necessary
14 and just. I think changing tort reform,
15 restricting joint and several liability and
16 hoping that enacting several liability would not
17 disturb these basic legal remedies.

18 We, in Pennsylvania, need an economic
19 environment that encourages growth and
20 innovation. I think the state, the northeast as
21 I observed the business scene, has come back
22 very much from 10 or 15 years ago when my
23 partners in Houston and Dallas, the sunbelt
24 would kid about "you're up there in the stagnant
25 northeast; whereas, we can lay on the beach at

1 Galveston Bay and just sign clients up on the
2 beach."

3 That situation has change very much in
4 my judgment in the last 10 years. We are in the
5 cycle now where it's the sunbelt that's the
6 depressed area. I think anything that we can do
7 to keep that going, to give the entrepreneurs a
8 fighting chance, is important for the legis-
9 lature to consider.

10 From that point, from an accountant I
11 think being able to provide services for these
12 fledgling entrepreneurs that are starting up
13 these businesses, that are going to be 40 years
14 from now the AMPs. I remember when AMP was a
15 small company, one of my clients, twelve,
16 fifteen million dollars in sales. It's 2.3
17 billion now.

18 I think being able to provide these
19 services to these clients at a reasonable cost
20 and any cost that we incur, obviously, as any
21 business incurs, are ultimately passed along, is
22 a factor to consider. We certainly hope your
23 Committee will make several liability a priority
24 for your actions.

25 You face a difficult challenge. I

1 recognize that. I'm not a lawyer and not the
2 political type, but I certainly recognize the
3 difficulty of the challenge in this area, a
4 challenge to make changes to assure fairness in
5 the Pennsylvania tort system. We welcome your
6 thoughts to the approach of hearings like this.

7 Thank you for this opportunity to
8 present our concern.

9 CHAIRMAN DeWEESE: You're welcome,
10 Mr. Morley. Questions from members of our
11 Committee.

12 (No audible response)

13 CHAIRMAN DeWEESE: It's late in the
14 day. Thank you for sticking around. Thank you
15 to the stenographer and compete staff and
16 members on both sides of the aisle.

17 Once again to my staff, I'm grateful
18 for the witnesses that came here today. We had
19 expert people on both sides of the issues. I
20 think we were all beneficiaries today.

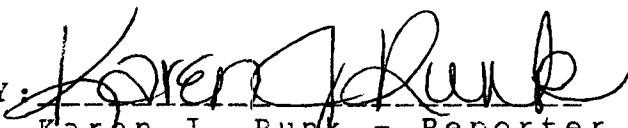
21 (At or about 3:35 p.m., the hearing
22 concluded)

C E R T I F I C A T E

I, Karen J. Runk, Reporter, Notary Public, duly commissioned and qualified in and for the County of York, Commonwealth of Pennsylvania, hereby certify that the foregoing is a true and accurate transcript of my stenotype notes taken by me and subsequently reduced to computer printout under my supervision, and that this copy is a correct record of the same.

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Dated this 15th day of March, 1988.

BY: 
Karen J. Runk - Reporter
Notary Public