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Introduction to Minnesota's Tort Reform Act

E. Curtis Roeder

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NOTE

INTRODUCTION TO MINNESOTA'S TORT REFORM ACT

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I. BACKGROUND TO THE TORT AND INSURANCE PROBLEM

Spiraling insurance costs and the accompanying unavailability of liability insurance have become an increasing nation-wide problem in the 1980's.¹ While the scope of the problem is severe, its contributing factors are not easily traced.² Most authorities agree that there

1. B. Trolin, *Controlling Liability Insurance Costs: State Actions and Future Initiatives in the Area of Civil Justice Reform*, 11 STATE LEGISLATIVE REPORT OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, No. 1 at 1 (Jan. 1986) (copy on file in the William Mitchell Law Review Office).

2. *Insuring Our Future*, 1 REPORT OF THE ADVISORY COMMISSION ON LIABILITY INSURANCE TO THE GOVERNOR OF NEW YORK, pp. 2-3 (April 7, 1986) [hereinafter *Insuring Our Future*] (copy on file in the William Mitchell Law Review Office). The Advisory Commission Report offers an excellent analysis of the tort reform-insurance problems. A second volume, released in July of 1986, explores additional solutions to the insurance "crisis." See *Insuring Our Future*, 2 REPORT OF THE ADVISORY COMMISSION ON LIABILITY INSURANCE TO THE GOVERNOR OF NEW YORK (July 1, 1986) [hereinafter *Insuring Our Future*, vol. 2] (copy on file in the William Mitchell Law Review Office).

are difficulties working together from two areas: the civil tort system and the nature of the insurance industry itself.³ This Note compares these areas in Minnesota by looking at the before and after statutory scheme as determined by the recent Minnesota Tort Reform Act. Specific attention is addressed to viewpoints emanating from the insurance business, trial practitioners, and customer-claimants.

Insurance is unique in that it combines two distinct businesses: risk underwriting and investment.⁴ Investment income is earned through investment of all available cash flow, including reserves, stockholder equity, and premiums.⁵ Commercial property and casualty insurers must maintain large portions of these investments in very liquid forms in order to be ready for claims arising from natural disasters, accidents, or product malfunction.⁶ The resulting concen-

3. *Id.* For a more detailed discussion of the specific causes *see infra* notes 15-22 and accompanying text.

4. *Insuring Our Future*, *supra* note 2, at 49-50. The authors note that *net earnings* through the combined activities of the two businesses is the primary goal of insurance companies generally. This maximization for shareholders' benefit can sometimes act against the individual interest of the underwriting sector. *Id.* at 49.

Investment income should not be confused with underwriting income, however. Underwriting income is the difference between premium revenues and the losses and expenses incurred. It is from this total that investment income is generated. Estimates from A.M. Best indicate that the industry as a whole grossed \$142.3 billion from its property/casualty lines. Of this total, \$15.3 billion was estimated as the total flow of the investment portion. *Id.* at 50-51 (citing Bests Insurance Management Reports, *Insurance Premium Distribution-1985*, Release No. 22 (July 22, 1986)).

Critics argue that the figures released by insurers are inconclusive and the industry covers up actual details of the flow between underwriting and investment. Hunter, *How to Tame the Insurance Industry Cycle and Make the Legal System More Efficient: A Suggested Legislative Agenda for 1987*, REPORT OF THE NATIONAL INSURANCE CONSUMER ORGANIZATION (NICO) BEFORE THE ANNUAL MEETING OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL), at 4-5 (August 8, 1986) (copy on file in the William Mitchell Law Review Office). *See also infra* note 59 and accompanying text.

5. *Insuring Our Future*, *supra* note 2, at 52. Investment activity tends to overshadow underwriting practices from a pure investment standpoint. *Id.*

6. *See id.* at 50-51. Beyond the difficulties of tracing income is the problem of properly calculating premiums. Many property/casualty insurers wrote policies known as "occurrence" policies. These policies insure against all covered occurrences that take place within the time period of the policy, regardless of when the claim is made. As a result, claims made on a liability policy can continue 10 years or more after the date of the policy. This phenomenon makes premium calculations, with respect to claim totals, difficult to ascertain. The uncertainty contributes to poor underwriting practices that may already be influenced by a scramble for capital. *Id.* at 53.

"Claims made" policies, which are more frequently used today, cover only claims made within the policy. Limiting the time period in which claims can be made cuts off the long insurance "tails" which thwart actuarial computations. *Id.* at 53-54. With "occurrence" policies, uncertainty as to the existence of claims compares unfavorably to auto liability insurance, where claims can be used to calculate future rates within one year or so of the policy period. *Id.* at 55. However, the use of

tration in stocks, bonds, and other liquid financial instruments means that investment income is very sensitive to changes in interest rates.⁷

The underwriting sector of the industry, meanwhile, is responsive to an entirely different set of economic and social indices including medical costs, claim litigation and resulting legal costs, jury behavior, and liability law.⁸ These needs are not adequately met when interest rates and investment income are low and the subsidy to underwriting operations is limited or removed altogether.⁹ Conversely, when interest rates and corresponding income are high, the price of insurance policies does not properly reflect the full cost of underwriting.¹⁰ In addition, during periods of high interest rates, the competition for capital is fierce and insurers often accept questionable risks in order to increase operating capital.¹¹

The resulting fluctuations in the availability and affordability of liability policies is called the "insurance cycle."¹² The current cycle,

"claims made" policies across the board for all liability insurance is likened to a "blunderbuss when a rifleshot will do". *Insuring Our Future*, vol. 2, *supra* note 2, at 42.

7. *Insuring Our Future*, *supra* note 2, at 50.

8. *Id.* at 50-51.

9. *Id.* at 57-59. As a result, estimated reserves for compensating claims are significantly understated. *Id.*

10. *Id.* at 49. The price of the premiums actually reflects the subsidizing by the investment income of the operating costs of underwriting.

This appears to be a major reason for today's problems. In order to make up for undercharged premiums, insurers are adding these costs to premium rates already overburdened by unanticipated payments due to large jury awards. This "teeter-totter" effect strongly indicates that insurer-investment practices and public policy needs are conflicting. *Id.* at 64.

11. *Id.* at 23-24. The commission report points to five major causative factors of the deep financial hole dug by the industry:

(1) *Industry reaction to interest rates*: During 1983-84 the high interest rates spawned a spectacular price war within the industry in a competition for capital. Even when rates returned to normal, low prices were easily justified by the belief they would rise again.

(2) *Disincentives to stop the price war*: Since competition was so fierce, no company wished to be the first to raise prices to a sensible level. The resulting delay caused a catastrophic jump in underwriting premium charges in 1984-85.

(3) *Disbelief in the cost-surge of liability expenses*: When evidence first became known to insurers that liability expenses were rising, they did not change actuarial models used to calculate premiums. The Commission theorized that cost increases were so great that many insurers viewed them as an aberration.

(4) *Desperate measures by imprudent underwriters to stay afloat*: Companies who bet on long-term persistence of very high interest rates, particularly small companies, refused to raise prices. In a very short-sighted manner, they believed that the continuing price war was the only way to generate cash to pay for premiums already rolling in. The Commission notes that the insolvencies present in New York are replete with this phenomenon.

(5) *Regulatory impotence*: Regulators did not wish to tell insurers that they should raise prices for consumers already strapped by high interest rates. *Id.* at 68-69.

12. *Id.* at 70-72. As previously indicated, the very nature of property-casualty

which appears to be in its trough,¹³ is much more severe than those of preceding years.¹⁴ This is generally attributed to unusually high interest rates in the early 1980's, poor judgment in risk assessment and premium rate calculations, high awards to claimants in civil litigation,¹⁵ and a loss of capital from reinsurance sources.¹⁶

From the insurance industry's perspective, civil litigation costs are

insurance business, by relying so heavily on interest rates, causes greater fluctuations in availability and costs of insurance. *Id.* See also Sherman, *Debate Begins in New Jersey on Capping Liability Awards*, 117 N.J.L.J. 471, 477 (Apr. 17, 1986).

13. *Insuring Our Future*, *supra* note 2, at 71. The "trough," described by the Commission as Stage 1, was initially entered in 1976-77. At that time, the insured experienced scarcity, higher prices, and unavailability of certain lines. The insurer saw rising revenues, higher combined ratios, and lower average risks. See Hunter, *supra* note 4, at 4. Citing NICO statistics, the author indicates 1200% profits for the industry in 1986, which probably do not reflect operating expenses. *Id.* The second stage, most recently experienced in 1978-79, typifies a consolidation process. During this time, new prices reached a plateau matching the actual costs of insurance protection. At the same time, the insurance industry felt its peak, and gained the highest overall profit.

Phase three showed an upturn for consumers with an easing of prices, greater availability, and easier coverage bargaining. This was represented by the insurance industry's glut of new capital spurred by high profits, lower overall earnings, and price cutting. This phase was last turned over in 1979-80. *Insuring Our Future*, *supra* note 2, at 71.

Phase four indicates rampant price cutting and full availability. At the same time, insurers suffered massive underwriting losses, fierce competition for capital and a major risk of insolvencies. This last phase continued into 1981 through 1984. *Id.*

14. *Id.* at 61. See also Hunter, *supra* note 4, at 3. The cycle has been turning over since the 1930's, but nothing this severe has ever before occurred, mostly because of volatile interest rates. *Id.* at 72.

A major indicator of financial performance is the return of shareholder equity (ROE). Recent underwriting losses have overwhelmed premiums taken in, which has forced insurers to erode their capital base to pay claims. The result, of course, is a loss of shareholder equity. *Id.* at 61-64. Additional data released by the Insurance Services Office, Inc. (ISO) indicates that reserves in the property-casualty lines are under-reserved in an amount equal to 30-40% of the industry base. Further indications are that many groups are dipping deep into investment reserves to meet claims. *Id.* at 58-59. Data from the reinsurance market indicates the deep-felt extent of the problem. See *infra* note 16 (discussing lack of reinsurance).

15. See *The Need for Legislative Reform of the Tort System, REPORT ON THE LIABILITY CRISIS FROM AFFECTED ORGANIZATIONS*, at 15-25 (May, 1986) (copy on file in the William Mitchell Law Review Office)[hereinafter *The Need for Reform*]. The report identifies three major flaws in the tort system. First, courts have expanded strict liability beyond the traditional fault basis of tort liability. Second, there has been a significant increase in damage awards, largely through pain and suffering and punitive damage awards. Third, money suits are brought that have no basis in the courts. *Id.* at 15-42. See also *Insuring Our Future*, *supra* note 2, at 84-88; T. Marvell, *There Is a Litigation Explosion*, 8 NAT'L L. J., no. 36, 19 (May 19, 1986) (tremendous caseload increases in appellate courts accompanied by population growth). *Contra* Hunter, *supra* note 4, at 2-4 (citing *The Shockwaves Begin*, NATIONAL UNDERWRITER 14 (May 30, 1986) (editorial in which Washington State Insurance Commissioner Dick Marquardt is characterized as saying to insurance lobbyists "You people have said that civil jus-

at the root of the problem.¹⁷ Increases in defense costs and jury awards are only part of the difficulty.¹⁸ It is the unpredictability of an ultimate award that vexes insurers. Since non-economic damage totals cannot be ascertained, normal actuarial principles used to calculate premium rates are hindered.¹⁹ The unpredictability of awards only increases the assessed premium, particularly when the industry is financially strapped, as in the current cycle.²⁰ General public knowledge of the presence of insurance in most commercial activities and increasing perceptions of what an injury is worth only exacer-

tice abuses have caused rates to soar. We believe you, and so we've acted to curb these abuses. Now it's your turn to put up or shut up.'").

The report also cites other states' experiences indicating that state imposed tort reforms have little effect on industry rate hikes. Hunter, *supra* note 4, at 2-4.

16. *Insuring Our Future*, *supra* note 2, at 72-74. Reinsurance is the sale of liability insurance contracts by the primary insurer to another insurance company, who assumes the risks for a price. *Id.* This may occur with respect to a specific insured ("facultative reinsurance") or with regard to an entire line of underwriting ("treaty insurance"). Often, the insured is unaware of the transaction, because reinsurance is a private, contractual matter.

Reinsurance is important for several reasons. First, it frees up insurer liability reserves for investment in a variety of ventures that do not require as much liquidity. Second, it is a major source of offshore capital flow into the American insurance market. Third, it is relatively inexpensive in comparison to direct lines, and is a good vehicle to carry-off excess risk. *Id.* at 74-75. The ROE for reinsurers in the United States was 20% per year until 1981, and by 1984 had turned negative. *Id.*

However, most of the reinsurance market is dominated by the British, notably Lloyds of London and Weavers of London. In addition to the liability problem, these reinsurers suffered a drastic drop in the value of the pound (\$2.80 in 1965 to \$1.05 in early 1985), which made payments in dollars to United States companies much more costly. Furthermore, Lloyds was rocked by an embezzlement scandal in 1985. During troughs of the insurance cycle, reinsurance is hard to find. Hunter, *supra* note 4, at 13 (citing *Business Insurance* at 2 (July 21, 1986); *Business Week* at 57 (August 5, 1985), and *Journal of Commerce* (July 26-27, 1985)).

Current indications are that a severe lack of reinsurance will continue, slowing the recovery of the industry. *Insuring Our Future*, *supra* note 2, at 77-78.

17. See *The Need for Reform*, *supra* note 15, at 2-4.

18. Report of Insurance Services Office, Inc., *The Rising Costs of General Liability Legal Defense*, at 3 (May, 1986). Estimates from the ISO indicate that for each dollar insurers pay to injured claimants, \$0.46 is dolled out to defense lawyers, double the amount paid ten years ago. See also Report of ISO and National Association of Independent Insurers, 1985: *A Critical Year* (May, 1985); *The Need for Reform*, *supra* note 15, at 15-24 (pointing out the problems caused by a system that apportions damage beyond the parameters of actual fault).

19. Reinsurance Association of America, *U.S. Reinsurance Market Reaction to the U.S. Civil Justice System*, at 8-10, 38 (March, 1985). This is due to the so-called "landmark" tort decisions, which place insurers in a different economic environment than the premiums were calculated for. *Id.* See also *Insuring Our Future*, *supra* note 2, at 78, 81-84.

20. *Insuring Our Future*, *supra* note 2, at 63-68. The increased pressure being felt today from incoming claims might indeed forecast a more volatile cycle next time. *Id.*

bates the problem.²¹ Accordingly, the insurance lobby has worked overtime to persuade state legislatures of the need for tort reform.²²

II. LEGISLATIVE PROPOSALS FROM THE FEDERAL GOVERNMENT, OTHER STATES, AND MINNESOTA: ATTEMPTS TO TACKLE THE PROBLEM

Responding to the national scope of the problem, Congress has recently entertained federal bills pertaining to tort reform,²³ risk retention,²⁴ insurance pooling,²⁵ litigation abuse,²⁶ and products liability.²⁷ Insurance regulation, however, has traditionally been left to

21. *See id.* at 83-84. Society in general recognizes that insurance will spread the costs of an award. As jury awards increase with the publicity that follows them, the system comes under growing strain. The problem is particularly vivid when the defendant is a large institution, either private or public. *Id.*

22. Hunter, *supra* note 4, at 24 (citing figures of a 6.5 million dollar lobbying campaign by the insurance industry, reported in the JOURNAL OF COMMERCE, 1, 20 (March 19, 1986)).

23. *See* H.R. 4460, 99th Cong., 2d Sess., 132 CONG. REC. H1549 (1986); H.R. 4920, 99th Cong., 2d Sess., 132 CONG. REC. H3297 (1986). H.R. 4460 establishes caps and damage ceilings as well as pleading and procedural alterations in certain areas of tort practice.

H.R. 4920 is a proposal to establish arbitration panels in federal district courts for use in medical malpractice, products liability, tort actions against governmental bodies, and other personal injury suits. The bill also proposes a plan to establish similar panels in state courts. Both bills are currently in the Senate Judiciary Committee.

24. *See* H.R. 5225, 99th Cong., 2d Sess., 132 CONG. REC. H4825 (1986). In an effort to salvage the anticipated dilution of IRA's after the enactment of the new tax code, this proposal would amend the tax code to allow tax free transfers of IRA's to long term insurance coverage in the form of risk retention groups.

The original Product Liability Risk Retention Act, 15 U.S.C. § 3901-04, (1982 & Supp. II 1985), provides federal incentives and exemptions from state interference to groups who wish to spread the risks of product liability among its members. Normally the members are involved in a same or similar business. Federal product liability law pre-empts that of the states. 15 U.S.C. § 3902(a)(1982).

25. H.R. 1770, 99th Cong. 1st Sess., 132 CONG. REC. H933 (1986) is another proposed amendment to the Internal Revenue Code. This measure would establish statewide incentives to insurance pools for high risk individuals.

26. *See* S. 2046, 99th Cong., 2d Sess. 132 CONG. REC. S1058 (1986) (authored by Senator McConnell in an effort to control litigation abuse in the federal courts. The bill was sent to the Senate Judiciary Committee on February 5, 1986.)

27. *See* S. 100, 99th Cong., 1st Sess., 131 CONG. REC. S71 (1985), authored by Senator Robert Kasten. *See also* Legis. Hearings Before the Subcomm. on the Consumer, of the Senate Comm. on Commerce, Science and Transportation, 99th Cong. 1st Sess. (1985) (hearings on S. 100 which offers amendments to the original bill, S. 44, 98th Cong. 2d Sess., 130 CONG. REC. S6360 (1984)).

The combined bill is now before the Senate as S. 2760, 99th Cong., 2d Sess., 132 CONG. REC. S11,745 (1986). This bill would establish a uniform products liability law, addressing issues of damages, statutes of limitations and joint liability. This bill is seen generally as a reflection of the national trend to lower the numbers of claims

state action.²⁸ As a result, forty-one states have enacted some type of tort reform legislation in 1986.²⁹

Minnesota, in step with the national trend, passed its own tort reform bill with the governor's signature on March 25, 1986.³⁰ A

and amounts of speculative damages nationwide. See 132 CONG. REC. S12,751-754 (daily ed. Sept. 17, 1986) (comments by Sen. Kasten).

28. In 1944, the United States Supreme Court decided that the insurance industry was subject to federal regulation. *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). Congress, however, specifically returned regulatory authority back to the states that same year with the McCarren-Ferguson Act, 15 U.S.C. §§ 1011-15 (1944), which specifically exempts the insurance industry from anti-trust suits. *Id.*

Some advocate repealing this Act due to: (1) the fact that the industry's continued growth has overwhelmed any single state's ability to regulate it; (2) evidence of collusion by the industry to boycott certain lines and drive up prices; (3) the violent swings in the market indicating a need for federal regulation. See *Insuring Our Future*, *supra* note 2, at 35, 37. See also Hunter, *supra* note 4, at 20; J. Olender, *The Great Insurance Fraud of the '80's*, 8 Nat'l L.J., July 21, 1986, at 15, col. 1.

The Cuomo Commission concludes, however, that the current arrangements between insurance companies and the state for sharing information have been in place for decades, and form an intricate structure for assuring that reserves are in reasonable balance with risks. Furthermore, the report implies that state regulatory measures may be strong enough, and that federal regulation may only hurt smaller, weaker insurance companies. The result may actually give the larger companies a bigger hold on the market place. See *Insuring Our Future*, *supra* note 2, at 36-37.

Nowhere has the confrontation between state legislatures and the insurance industry been more animated than in West Virginia. In March, 1986, the West Virginia legislature passed a bill, to take effect in June, that would have capped damage totals. The bill also required disclosure of data and precluded policy cancellations without "cause." The five major medical malpractice insurers in the state responded by informing the state's doctors that their premiums would be cancelled on May 31 unless the legislature repealed the anticancellation and disclosure provisions. The doctors then went on strike for a day, prompting an injunctive action against the insurers by the state attorney general. See Strasser, *Tort Crisis Focus Shifts to Insurers; Relief for Lawyers?*, 8 Nat'l L.J. June 9, 1986, at 1, col. 1 (citing *West Virginia v. St. Paul Fire and Marine*, No. 86-1400 (Kanawha Cty. Cir. Ct. 1986)).

Finally, the West Virginia legislature reconvened in special session, and repealed the controversial measures. See *id.* at 8, col. 1. The article cites a lobbyist for the St. Paul Companies who stated that the non-renewal measure prevented insurance companies from making business decisions. In addition, the requirement of reserve disclosure might impair an insurer's ability to negotiate with plaintiffs. *Id.* at 9, col. 1. Insurance policies are contracts, and their renewal is optional for either party. See *supra* note 16.

29. Trolin, *supra* note 1, at App. 1-12a. A survey by the NCSL indicated the following topics as the most popular among the state legislatures: municipal immunity, limitations on pain and suffering, limitations on attorney's fees, dram shop regulation, adoption of comparative negligence law in favor of joint and several liability, reduction of statutes of limitations, limiting governmental exposure for damages due to recreational activities, and limits on liability for medical care rendered by physician-trained mobile paramedics. *Id.* at 10. Minnesota's Tort Reform Act is substantially similar to this pattern. See generally *infra*, notes 72-193 and accompanying text.

30. Tort Reform Act of March 25, 1986, ch. 455, 1986 Minn. Laws 840.

product of compromise, the Minnesota act contains elements of bills addressing both tort reform and increased insurance regulation.³¹ The differing approaches of the House and Senate reflect opposing philosophies of how to address the insurance "crisis."

The House passed two bills that proposed specific changes in tort liability, reflecting the insurance industry's position that premium rate increases are caused by large jury verdicts and growing litigation costs.³² House File 1764³³ sought immediate relief for the medical industry, which has been particularly hard hit by increasing premium costs.³⁴ Much of the bill focused on limiting damage awards at the trial court level.³⁵ House File 1776³⁶ made more sweeping tort reform proposals to current Minnesota law. Drastic overtures sought to abolish the collateral source rule³⁷ and reduce punitive damages.³⁸ In addition, the bill attempted to cap non-economic damages³⁹ and control abuses of the jury system.⁴⁰ Repeated amendments in committee, however, watered down the impact of the

31. See *infra* notes 33-46 and accompanying text.

32. See *supra* notes 17-20 and accompanying text.

33. H.R. 1764, 74th Legis., 1st Sess. (March 3, 1986) (authored by Rep. Kathleen Blatz).

34. See *AMA Special Task Force on Professional Liability in the '80's*, Report No. 1, at 7-21 (medical malpractice premiums exceeded one billion dollars in 1975; in 1983, they rose to \$1.53 billion) [hereinafter *Professional Liability*]. See generally Church, *Your Policy is Cancelled*, TIME 20 (March 24, 1986) (average medical malpractice award was \$338,463 in 1983-84, compared to an average of \$94,947 in 1975).

35. H.R. 1764 applies many of the tort reform proposals eventually adopted and passed in S.F. 2078, Tort Reform Act of March 25, 1986, ch. 455, 1986 Minn. Laws 840. Some of these include expert certification, collateral source offsets, discount of future damages, provisions for paying periodic awards, and attorney's fees alterations. *Id.*

36. H.F. 1776, 74th Legis., 2d Sess. (March 3, 1986) (authored by Rep. Kathy Olsen).

37. See *id.* § 13. The collateral source rule is a common law doctrine which precludes certain offsets against plaintiff's tort recovery by amounts received from other sources. See RESTATEMENT (SECOND) OF TORTS § 920A (1977).

The rule operates mostly as an evidentiary device to prevent juries from being influenced by knowledge of other benefits the plaintiff may receive. The rule has its origins in British common law. See Comment, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 742 (1964) (citing *Bradburn v. Great W. Ry. L.R.*, 10 Ex. 1 (1874)). The author points out that the rule results from two aims of basic tort law, that the injured party must be made whole, and that the tortfeasor must pay the loss. *Id.* See also *infra* notes 73-85 and accompanying text.

38. H.F. 1776 § 18, 74th Legis., 2d Sess. (March 3, 1986) (proposing new statute applying comparative fault as the measure of damages).

39. See *id.* §§ 19, 34.

40. See *id.* § 33. An amendment to Minnesota Statutes section 549.22 would schedule attorney's contingent fees according to the following schedule:

- 1) 33 percent of the first \$200,000 recovered;
- 2) 25 percent of the next \$200,000 recovered;
- 3) 10 percent of any amount exceeding \$400,000.

bill.⁴¹ By a resounding vote, the House subsequently returned both bills to their original format.⁴²

Meanwhile, Senate activities paralleled those of the House. Senator William Luther's bill contained some tort reform proposals in the medical malpractice and municipal liability areas, but of a less sweeping nature than the House measures.⁴³

A compromise bill, Senate File 2078, was the center of heated debate on the Senate floor.⁴⁴ Numerous amendments, similar to those contained in the House bills, were narrowly defeated.⁴⁵ The final

The limitations would apply to all civil actions, judgments, arbitrations and include all plaintiffs. *Id.*

Another proposed addition to Minnesota Statutes section 548.44 would require that contingency fees be allocated between lump sum awards representing future damages and present awards to be paid periodically. *See id.* § 18.

These amendments are reflected in similar measures adopted as law under the new Act. *See infra* notes 73-128 and accompanying text.

41. The Judiciary Committee, dominated by attorneys, gutted the bills. The ceilings on contingency fees, guidelines for periodic payments and future damages, the banishment of punitive damages and the limitations on non-economic damages were lifted.

42. The bills were re-referred to the Judiciary Committee on Feb. 24, 1986. *See Floor Debate on H.F. 1764 and H.F. 1776 in the Minnesota House of Representatives, 74th Minn. Legis., 1st Sess., March 24, 1968* (audio tape).

43. S.F. 1950, 74th Legis., 1st Sess. (1986), incorporated three previous bills sponsored by Senator Luther. S.F. 1593, 74th Minn. Legis., 1st Sess. (1986) proposed increased disclosure requirements of insurance companies and offered to extend the JUA. S.F. 2031, 74th Minn. Legis., 1st Sess. (1986) proposed to remove punitive damages from pleadings. Eventually, this proposal was enacted into law in the Tort Reform Act, under S.F. 2078. An opposition bill, S.F. 1687, proposed by Senator Kamrath, reflected sentiments raised in the House. *See supra* notes 36-40 and accompanying text. Senator Kamrath's bill would also have abolished the collateral source rule, punitive damages, and joint and several liability, as well as cap intangible damages. At the trial level, the bill proposed to place a sliding scale on contingent legal fees. *See* S.F. 1687, 74th Minn. Legis., 1st Sess. (1986). A lesser bill, S.F. 1727, 74th Minn. Legis., 1st Sess. (1986) proposed limits on liability claims against the Hennepin County Park District.

44. *See Floor Debate on S.F. 2078 in the Minnesota Senate, 74th Minn. Legis., 1st Sess., March 11, 1986* (audio tape). The debate over the bill lasted five hours. *Id.*

45. The first major amendment, A-40, proposed by Senator Sieloff, would have reduced the statute of repose on construction contract actions to seven years. Senator Sieloff commented that 97.9 percent of all lawsuits against the construction industry were brought within seven years, and yet, the industry had to maintain liability insurance for 20 years after completion of a project.

However, Senator Luther suggested that major claims for defective construction are brought after seven years, and the useful life of a building should extend well beyond that time. *See Floor Debate on S.F. 1950 in the Minnesota Senate, A-40, (defeated), 74th Minn. Legis., 1st Sess.* (audio tape). *See infra* notes 129-33 and accompanying discussion.

A-14, sponsored by Senator Chmielewski, contemplated a \$400,000 cap for pain and suffering, noting that a \$30,000 cap on intangible damages existed for dram shop actions. He also pointed out that California limited intangible losses to

product, essentially the same as the original Senate bill, now stands as the Minnesota Tort Reform Act.⁴⁶ Though the Act encompasses a total of ninety-four separate statutory amendments, it operates in three major theatres: "hands-on" public involvement in the insurance industry,⁴⁷ general tort reform applicable to all liability scenarios,⁴⁸ and specific tort reform for particular areas of exposure.⁴⁹

III. "HANDS-ON" STATE ADMINISTRATION OF INSURANCE PRACTICES

A. Joint Underwriting Association

The Minnesota Joint Underwriting Association (JUA) is a state-run insurance plan designed to provide liability insurance for those persons or entities unable to procure insurance from private sources.⁵⁰

\$250,000. Senator Kamrath concurred, adding that all intangible losses should be capped, because insurers could not properly calculate their exposure. *See Floor Debate on S.F. 1950 in the Minnesota Senate, 74th Minn. Legis., 1st Sess., March 11, 1986* (audio tape).

Senator Luther opposed the motion, commenting that he could not personally obtain a promise that premium rates would go down if awards were capped. The strength of tort reform is weeding out frivolous claims without limiting damages to those most seriously injured. The amendment, A-14, failed by a 32-32 vote. *Id.* (comment by Senators Kamrath, Chmielewski and Luther).

An interesting side-show occurred when a voice vote abolishing joint and several liability mistakenly carried. After some anxious moments, Senator Peterson moved for a vote on the amendment, which subsequently failed. *Id.* The vote followed an intense discussion on the merits of joint and several liability versus strict comparative fault. Proponents of comparative fault appealed to the simplicity of a system in which each party is responsible for its own fault. *Id.* (comments by Senator Peterson, Senator Sieloff).

Concern was also raised about the JUA. Senator Wegscheid opposed its implementation since it was not tailored to specific problems, and would become too costly. *Id.* (comment by Senator Wegscheid without amendment). Senator Luther suggested that insurance companies could control that factor by continuing to provide insurance in "specialty" lines and avoid the problem of unavailability in the first place. *Id.* (comment by Senator Luther).

An additional amendment, A-18 sponsored by Senator Dahl, disallowed discriminatory practices in auto insurance policies that increased premium rates for divorced spouses. The practice based the rates on data obtained prior to the marriage. *Id.* (comments by Senator Dahl, Senator Luther).

46. Tort Reform Act of March 25, 1986, ch. 455, 1986 Minn. Laws 840.

47. *Id.* §§ 3-41, 1986 Minn. Laws 840, 842-63. *See infra* notes 50-71 and accompanying text.

48. *Id.* §§ 80-88, 1986 Minn. Laws 840, 878-84. *See infra* notes 72-128 and accompanying text.

49. *Id.* §§ 60-79, 92-93. *See infra* notes 129-86 and accompanying text.

50. Tort Reform Act of 1986, ch. 455, §§ 20-41, 1986 Minn. Laws 840, 850-63 (codified at MINN. STAT. § 62I.01-.22 (1986)). The JUA's purpose is to provide liability insurance for "specialty" line entities, i.e., those groups who are too few in number to substantiate an insurer's continued presence in their business. *See id.* § 21, subd. 1, 1986 Minn. Laws 840, 851. Minnesota Statutes section 62I.02, subdivision 1 provides as follows:

The new bill extends the former temporary form of the JUA.⁵¹ The JUA is specifically authorized to cover non-profit organizations and charities, such as group homes and foster care facilities.⁵² However, any entity or business that is refused coverage elsewhere may apply.⁵³

CREATION. The Minnesota joint underwriting association is created to provide insurance coverage to any person or entity unable to obtain insurance through ordinary methods if the insurance is required by statute, ordinance or otherwise required by law, or is necessary to earn a livelihood or conduct a business and serves a public purpose. Prudent business practice or mere desire to have insurance coverage is not a sufficient standard for the association to offer insurance coverage to a person or entity. The association shall be specifically authorized to provide insurance coverage to day care providers, foster parents, foster homes, developmental achievement centers, group homes, and sheltered workshops for mentally, emotionally, or physically handicapped persons, and citizen participation groups established pursuant to the housing and community redevelopment act of 1974, Public Law Number 93-383. Because the activities of certain persons or entities present a risk that is so great, the association shall not offer insurance coverage to any person or entity the board of directors of the association determines is outside the intended scope and purpose of the association because of the gravity of the risk of offering insurance coverage. The association shall not offer environmental impairment liability or product liability insurance, or coverage for activities that are conducted substantially outside the state of Minnesota unless the insurance is required by statute, ordinance, or otherwise required by law. Every insurer authorized to write property and casualty insurance in this state shall be a member of the association as a condition to obtaining and retaining a license to write insurance in this state.

Id.

51. Tort Reform Act of 1986, ch. 455, §§ 15-19, 1986 Minn. Laws 840, 850 (amending MINN. STAT. § 62F.01-.04 & 62G.16, subd. 9).

52. *See id.* § 21, 1986 Minn. Laws 840, 851.

53. *Id.* § 32, 1986 Minn. Laws 840, 859 (codified at MINN. STAT. § 62I.13 (1986)).

Subdivisions 2 and 3 outline the general eligibility requirements:

Subd. 2. **MINIMUM OF QUALIFICATIONS.** Anyone who is unable to obtain insurance in the private market and who so certifies to the association in the application is eligible to make written application to the association for coverage. Payment of the applicable premium or required portion of it must be paid prior to coverage by the association. An offer of coverage at a rate in excess of the rate that would be charged by the association for similar coverage and risk shall be deemed to be a refusal of coverage for purposes of eligibility for participation in the association. It shall not be deemed to be a written notice of refusal if the rate for coverage offered is less than five percent in excess of the joint underwriting association rates for similar coverage and risk. However, the offered rate must also be the rate that the insurer has filed with the department of commerce if the insurer is required to file its rates with the department. If the insurer is not required to file its rates with the department, the offered rate must be the rate generally charged by the insurer for similar coverage and risk.

Subd. 3. **DISQUALIFYING FACTORS.** For good cause, coverage may be denied or terminated by the association. Good cause may exist if the applicant or insured: (1) has an outstanding debt due or owing to the association at the time of application or renewal arising from a prior policy; (2) refuses to permit completion of an audit requested by the commissioner or administrator; (3) submits misleading or erroneous information to the commissioner or administrator; (4) disregards safety standards, laws, rules or

The JUA is funded by two procedures. Each member insurer is responsible for losses and expenses in proportion to the written premiums that member purchases to the premiums written for all members.⁵⁴ In addition, a "Stabilization Reserve Fund" is created by a surcharge on each premium paid to the association.⁵⁵ The Reserve Fund was proposed to protect the JUA from insolvency due to large or unanticipated claims.⁵⁶ However, if a deficit does occur, member insurers may be assessed additional amounts, again relative to their share of the market.⁵⁷

While the application procedure is easily complied with, the coverage it provides is limited. The JUA is specifically precluded from providing product liability insurance, environmental coverage or insuring any other activities whose risk the Association Board determines is "outside the intended scope and purpose of the association."⁵⁸ Joint Underwriting Associations are increasing in

ordinance pertaining to the risk being insured; (5) fails to supply information requested by the commissioner or administrator; (6) fails to comply with the terms of the policies or contracts for coverage issued by the association; and (7) has not satisfied the requirements of the market assistance program as set forth in section 28.

Id. The Market Assistance Plan establishes a committee to review applications and establish guidelines to link member insurers with applicants. *See id.* §§ 28-29, 1986 Minn. Laws 840, 856-58 (codified at MINN. STAT. §§ 62I.09 -10 (1986)).

54. *See id.* § 26, 1986 Minn. Laws 840, 855 (codified at MINN. STAT. § 62I.07 (1986)), which provides as follows:

Each member of the association shall participate in its losses and expenses in the proportion that the direct written premiums of the member bears to the total aggregate direct written premiums written in this state by all members. The members' participation in the association shall be determined annually on the direct written premiums written during the preceding calendar year as reported on the annual statements and other reports filed by the member with the commissioner.

Id. Every insurer who writes insurance, in Minnesota, including surplus insurance, must participate. *See id.* § 29, subd. 2, 1986 Minn. Laws 840, 857 (codified at MINN. STAT. § 62I.10, subd. 2. (1986)).

55. The creation of the Reserve Fund is described at *id.* § 35, 1986 Minn. Laws 840, 860-61 (codified at MINN. STAT. § 62I.16, subd. 1 (1986)):

CREATION. There is created a stabilization reserve fund. Each policyholder shall pay to the association a stabilization reserve fund charge of 33 percent of each premium payment due for insurance through the association. This charge shall be separately stated in the policy. The association shall cancel the policy of any policy holder who fails to pay the stabilization reserve fund charge.

Id. The funds are held in trust, whose proceeds are invested by the corporate trustee. All proceeds left over at the policy year's end are returned to the policyholders after expenses are met. *Id.* § 35, subd. 3, 1986 Minn. Laws 840, 860-61.

56. *See id.*

57. *See id.* § 25, subd. 6, 1986 Minn. Laws 840, 854 (codified at MINN. STAT. § 62I.06, subd. 6.)

58. *See id.* § 21, subd. 1, 1986 Minn. Laws 840, 851 (codified at MINN. STAT. § 62I.02, subd. 1).

popularity as an alternative to tort reform.⁵⁹

B. Increased Public Involvement in Other Areas

The JUA and its companions, the Risk Management Fund,⁶⁰ the Non-Profit Risk Indemnification Trust Act,⁶¹ and the Fair Plan Act⁶² substantially increase the active powers already conferred on the Commissioner of Commerce to regulate the insurance industry.⁶³ The growing participation of government in insurance regulation re-

59. Hunter, *supra* note 4, at 11-12. JUAs were initially established during the last trough of the liability cycle in 1975-76 for medical malpractice insurance. *Id.*

60. See Tort Reform Act, ch. 455, § 3, 1986 Minn. Laws 840, 842 (codified at MINN. STAT. § 16B.85). The Risk Management Fund is a state-created fund operating as an alternative to conventional insurance. *Id.* § 3, subd. 1, 1986 Minn. Laws 840, 842. The fund's operation, under the direction of the commissioner, is outlined in subdivision 2, as follows:

RISK MANAGEMENT FUND. A state risk management fund is created. All state agencies which have had or may have casualty claims against them with respect to the risks for which the commissioner has implemented conventional insurance alternatives shall contribute to the fund a portion of the money appropriated to them. The commissioner shall determine the proportionate share of each agency on the basis of the agency's casualty claim experience as compared to other affected agencies. The money in the fund to pay casualty claims arising from state activities and for administrative costs, including costs for the adjustment and defense of the claims, is appropriated to the commissioner. Interest earned from the investment of money in the fund shall be credited to the fund and be available to the commissioner for the expenditures authorized in this subdivision. The fund is exempt from the provisions of section 16A.15, subdivision 1. In the event that proceeds in the fund are insufficient to pay outstanding claims and associated administrative costs, the commissioner, in consultation with the commissioner of finance, may assess state agencies participating in the fund amounts sufficient to pay the costs. The commissioner shall determine the proportionate share of the assessment of each agency on the basis of the agency's casualty claim experience as compared to other affected agencies.

Id. § 3, subd. 2, 1986 Minn. Laws 840, 842.

61. *Id.* § 8, 1986 Minn. Laws 840, 845-47 (codified at MINN. STAT. § 60A.29). The Act allows non-profit organizations to establish trusts to indemnify themselves and their employees from tort liability. *Id.* § 8, subs. 2 & 3, 1986 Minn. Laws 840, 845.

62. Minnesota Statutes sections 65A.31-.43 (1986) was created to help place residential and property owners with private insurers. The plan prevented denials of property insurance without a physical inspection of the property. MINN. STAT. § 65A.35, subd. 2.

As amended, the Fair Plan also encompasses liability and casualty insurance. Tort Reform Act, ch. 455, §§ 42-47, 1986 Minn. Laws 840, 863-66. The Plan's operation can be altered at the commissioner's direction. MINN. STAT. § 65A.35, subd. 4 (1986).

63. See, e.g., Minnesota Insurance Guaranty Association Act, MINN. STAT. § 60C.01-.20 (1986). The statute requires state management of those insurance companies who become insolvent. *Id.* § 60C.02, subs. 1 & 2. The Act makes the state an insurer of the insolvent company's claims. See MINN. STAT. § 65C.05, subd. 1(a); see also MINN. STAT. § 61B.01-.16 (1986).

fects concerns of liability insurance availability.⁶⁴ Required by law in almost every field of private industry, liability insurance underwriting has become almost quasi-public in its operations.⁶⁵

In order to facilitate the Commissioner's increased duties, insurers licensed in Minnesota must supply annual informational reports on their writings in certain lines of insurance coverage.⁶⁶ The requirements are very specific, and include details on such matters as premiums written, investment income, incurred claims, and reserves for

64. See generally R. Brunelli, *Time for Action to Ease Liability Rates*, Conf. of Mid-America Institute for Public Policy Research (March 18-19, 1986) (cited in 132 Chicago Daily L.B., at 1, col. 2 (March 20, 1986)).

65. *Insuring Our Future*, *supra* note 2, at 21; *The Need for Reform*, *supra* note 15, at 1-6, 44-45. The report notes that the risk-spreading tendencies of today's large damage awards make all products, services, and professions more expensive; the costs are simply passed on to consumers. *Id.*

66. Tort Reform Act, ch. 455, § 6, 1986 Minn. Laws 840, 843-44 (amending MINN. STAT. § 60A.13 (1984) by adding subd. 8)). All insurers must make annual reports, pursuant to the following guidelines:

ANNUAL REPORTS. Each insurer licensed to write property and casualty insurance in this state, as a supplement to the annual statement required by this section, shall submit a report on a form furnished by the commissioner separately showing its direct writings in Minnesota and in the United States on: liquor liability, product liability, medical malpractice, and any other line so designated by the commissioner on January 1 of each year.

The supplemental reports must include the following data for the previous year ending on the 31st day of December:

- (1) direct premiums written;
- (2) direct premiums earned;
- (3) net investment income, including net realized capital gains and losses, using appropriate estimates where necessary;
- (4) incurred claims, developed as the sum, and with figures provided for, of the following:
 - (a) dollar amount of claims closed with payment, plus
 - (b) reserves for reported claims at the end of the current year, minus
 - (c) reserves for reported claims at the end of the previous year, plus
 - (d) reserves for incurred but not reported claims at the end of the current year, minus
 - (e) reserves for incurred but not reported claims at the end of the previous year, plus
 - (f) reserves for loss adjustment expense at the end of the current year, minus
 - (g) reserves for loss adjustment expense at the end of the previous year;
- (5) actual incurred expenses allocated separately to loss adjustment, commissions, other acquisition costs, general office expenses, taxes, licenses and fees, and all other expenses;
- (6) net underwriting gain or loss; and
- (7) net operation gain or loss, including net investment income.

This report is due by the first of May of each year and the report due May 1, 1987 must cover the last six months of 1986. The commissioner shall annually compile and review all reports submitted by insurers pursuant to this section. These filings must be published and made available to any interested insured or citizen.

Id.

claims and expenses.⁶⁷ Additional rules regulating insurer practices require that the insured be informed of premium rate increases at least thirty days before the policy expiration date.⁶⁸

The increased information requirements and the permanent entrenchment of the JUA are considered victories by those interest groups who feel the current crisis has been caused by insurance industry practices.⁶⁹ On the other hand, insurers have raised concerns that increased premium rate expenses will result from the additional administrative costs. They also argue that heavy-handed tactics will cause underwriters to reconsider offering liability insurance to certain Minnesota residents and businesses.⁷⁰ The insurance industry has consistently maintained that premium rates would deflate if legislatures would focus on controlling huge jury awards, which drain reserves.⁷¹ These opposing public policy arguments are at the very heart of the insurance and tort liability crisis, a tension visible throughout this discussion. Undoubtedly, both factions will be closely monitoring the effects of the Tort Reform Act in contemplation of future changes.

IV. GENERAL TORT REFORM PROVISIONS

A. Collateral Source Rule Changes

In order to prevent double recovery of damages by plaintiffs in liability lawsuits, the legislature has limited the scope of the "collat-

67. *Id.*

68. *Id.* § 58, 1986 Minn. Laws 840, 870 (codified at MINN. STAT. § 60A.30 (1986)). The new subdivision provides as follows:

If an insurance company licensed to do business in this state offers or purports to offer to renew any commercial liability and/or property insurance policy at less favorable terms as to the dollar amount of coverage or deductibles, higher rates and/or higher rating plan, the new terms, the new rates and/or rating plan may take effect on the renewal date of the policy if the insurer has sent to the policyholder notice of the new terms, new rates and/or rating plan at least 30 days prior to the expiration date. If the insurer has not so notified the policyholder, the policyholder may elect to cancel the renewal policy within the 30-day period after receipt of the notice. Earned premiums for the period of coverage, if any, shall be calculated pro rata upon the prior rate. This subdivision does not apply to ocean marine insurance, accident and health insurance, and reinsurance.

Id.

69. See Cole, *Tort Reform: Scratching the Surface as a Start*, MINN. DEFENSE 8-9 (Sept. 1986). The author specifically points to the commissioner's office as the victor in the last legislative session. *Id.* at 9. See *supra* notes 4-16 and accompanying text.

70. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, REPORT OF THE ADVISORY COMMISSION ON LIABILITY INSURANCE (vol. II 1986) (cited in 72 A.B.A.J. 26 (Sept. 1, 1986)) (implying that states who do not have JUAs, at least initially, may provide better markets for the industry). *Id.*

71. See *supra* notes 17-22 (discussing effect of jury awards on insurance premiums).

eral source rule."⁷² A creature of substantive and evidentiary background, the common law rule precludes an offset of benefits conferred upon the plaintiff by third party sources as a result of the plaintiff's injuries.⁷³ The new Act relaxes the rule and increases the number of situations where payments received by the plaintiff from other sources must be deducted from the total award.⁷⁴ These now include government-sponsored disability and workers' compensation benefits, health, accident or automobile insurance, and wage continuation or compensation plans provided by employers.⁷⁵ The Act specifically excludes life insurance benefits, social security benefits, pension plans, or private disability insurance policies for which the plaintiff paid a valuable consideration.⁷⁶

The new statute requires a party to file a motion requesting collateral source determinations within ten days of the verdict's entry.⁷⁷ Upon filing the motion, both parties must submit evidence of collat-

72. See *supra* note 37 for definitions.

73. See *id.* One reason for the rule is well stated in *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958):

No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damages caused by his wrongful act. If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.

Id.

74. Tort Reform Act, ch. 455, § 80, 1986 Minn. Laws 840, 878-79 (codified at MINN. STAT. § 548.36 (1986)). Subdivision one defines collateral sources as follows:

For purposes of this section, "collateral sources" means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:

- (1) a federal, state, or local income disability or workers' compensation act; or other public program providing medical expenses, disability payments, or similar benefits;
- (2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;
- (3) a contract or agreement of a group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services; or
- (4) a contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability, except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiff.

Id. § 80, subd. 1, 1986 Minn. Laws at 878.

75. See *id.*

76. *Id.*

77. *Id.* § 80, subd. 2, 1986 Minn. Laws 840, 878. Subdivision two provides: In a civil action, whether based on contract or tort, when liability is admitted or is determined by the trier of fact, and when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion within ten days of the date of entry of the verdict requesting determination of collateral sources. If the

eral sources, both collected upon and available to the plaintiff.⁷⁸ Afterwards, the court determines the amount of collateral sources to be offset from the total damage award.⁷⁹ Significantly, attorneys' fees based on the award are limited to the amount remaining after the offset.⁸⁰

Some potential shortcomings of the rule may exist, however. The statute does not clarify the term "collateral sources . . . otherwise available to the plaintiff."⁸¹ Conceivably, sources whose potential liability to the plaintiff have not been determined at the time of a verdict will be included or excluded to the disadvantage of one of the litigants. Resulting inequities may encourage plaintiffs to ignore, or even worse, conceal an "available" collateral source.⁸² What were formerly fact issues surrounding the various amounts due from collateral sources might now be determined by a court as a matter of

motion is filed, the parties shall submit written evidence of, and the court shall determine:

- (1) amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted; and
- (2) amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff or members of the plaintiff's immediate family for the two-year period immediately before the accrual of the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses.

Id.

78. *See id.*

79. *Id.* § 80, subd. 3, 1986 Minn. Laws 840, 878-79. Subdivision 3 defines the duties of the court:

- (a) The court shall reduce the award by the amounts determined under subdivision 2, clause (1), and offset any reduction in the award by the amounts determined under subdivision 2, clause (2).
- (b) If the court cannot determine the amounts specified in paragraph (a) from the written evidence submitted, the court may within ten days request additional written evidence or schedule a conference with the parties to obtain further evidence.

Id.

80. *Id.* § 80, subd. 4, 1986 Minn. Laws 840, 879. Subdivision 4 provides:

If the fees for legal services provided to the plaintiff are based on a percentage of the amount of money awarded to the plaintiff, the percentage must be based on the amount of the award as adjusted under subdivision 3. Any subrogated provider of a collateral source not separately represented by counsel shall pay the same percentage of attorneys' fees as paid by the plaintiff and shall pay its proportionate share of the costs.

Id.

81. *See id.* § 80, subd. 2, 1986 Minn. Laws 840, 878.

82. The availability of collateral sources may be in doubt at the time of the verdict. A court may improperly assess the existence of a collateral source or miscalculate it. Affidavits may be difficult to obtain from a source not yet willing to concede liability.

Since the scope of the amendment is limited to payments for economic damages, the calculations should be easier to ascertain. *Id.*

law.⁸³ Under the new Act, if the court cannot immediately ascertain the collateral sources to be deducted, it may request additional evidence or schedule a conference, but must do so within ten days.⁸⁴ Abolition or alteration of the collateral source rule has been popular with many legislatures, particularly in the medical malpractice area.⁸⁵

B. Punitive Damages and Frivolous Claims

Punitive damages, under past practice, were alleged in numerous lawsuits, whether appropriate or not.⁸⁶ In order to limit them to the appropriate situations, the new Act only allows punitive damages to be asserted in a motion to amend the initial complaint.⁸⁷ The motion must allege a "legal basis" for punitive damages, accompanied with an affidavit "showing the factual basis of the claim."⁸⁸ Before allowing the amended pleading, the court must find "prima facie" evidence that supports the motion.⁸⁹ The court must still adhere to the "willful indifference" standard of the former statute.⁹⁰

83. *Id.* See TASK FORCE ON LITIGATION ISSUES, REPORT TO THE BOARD OF REGENTS 4 (1986).

84. Tort Reform Act, ch. 455, § 80, 1986 Minn. Laws 840, 878 (to be codified at MINN. STAT. § 548.36, subd. 3(b)).

85. ALASKA STAT. § 09.35.548 (1986) (medical malpractice only); ARIZ. REV. STAT. ANN. § 12-565 (1986 Supp.) (medical malpractice only); CONN. ACTS 85-574 (1986); FLA. STAT. ANN. § 768.51 (West 1986) (medical malpractice only); NEV. REV. STAT. § 42.020 (1985) (medical malpractice only); N.J. REV. STAT. ANN. § 59:9-2 (1986) (claims against public entities); N.Y. CIV. PRAC. L. § 4545 (Supp. 1986); OHIO REV. CODE ANN. § 2744.05; § 2305.27 (Anderson 1981 & Supp. 1985) (medical malpractice); 42 PA. CONS. STAT. ANN. § 8553(d)(Purdon 1982 Supp.) (insurance benefits from other sources offset); R.I. GEN. LAWS § 9-19-34, 9-19-34.1 (1985 Supp. & 1986) (medical malpractice).

86. The practice was particularly prevalent in professional malpractice actions. *Testimony Before the Senate Judiciary Committee on S.F. 1670*, 74th Minn. Legis., 2d Sess., February 19, 26, 1986 (audio tape).

87. Tort Reform Act of 1986, ch. 455, § 82, 1986 Minn. Laws 840, 880 (codified at MINN. STAT. § 549.191 (1986)). The new statute provides:

Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

Id.

88. *Id.*

89. *Id.*

90. See *id.* (incorporating MINN. STAT. § 549.20 (1986)). See also *McGuire v. C & L Restaurant, Inc.*, 346 N.W.2d 605, 615 (Minn. 1984) (reiterating statute's requirement that punitive damages be based upon conduct that is willfully indifferent to the

The legislature places a great deal of hope in the new punitive damages statute.⁹¹ The concept of punitive damages in civil actions has long been a source of controversy.⁹² Defense lobbyists maintain that punitive damages have no place in the current system, particularly at a jury's disposal.⁹³ The uncertainty of whether such damages will be awarded frustrates insurers attempting to settle claims. While they cannot insure against punitive acts, they must often pay for the defense of claims that allege such damages, and include other torts.⁹⁴

Plaintiffs' advocates quickly point out that punitive damages have a long history as a deterrent to the type of activities that cause the injury.⁹⁵ Removal of punitive damages would certainly aid predictability of litigation results, but might also create a predictability that would allow unscrupulous industries to incorporate the economic

rights of others). There must be clear and convincing evidence that the conduct of the defendant warrants the award. *See also* Alsop & Herr, *Punitive Damages in Minnesota Products Liability Cases: A Judicial Perspective*, 11 WM. MITCHELL L. REV. 319, 323, 346 (1985).

91. *Floor Debate on H.F. 1950 in the Minnesota House of Representatives*, 74th Minn. Legis., 2d Sess., March 12, 1986 (audio tape) (statements of Senator Luther that new measure would reduce punitive claims by 90%).

92. Punitive damages evolved from criminal concepts of punishment and deterrence. However, a jury's attention is often directed towards the severe nature of the plaintiff's injuries. *See* Haugen & Tarkow, *Punitive Damages in Minnesota: The Common Law and Developments Under Section 549.20 of the Minnesota Statutes*, 11 WM. MITCHELL L. REV. 353, 363-65 (1985) (discussing *Eisert v. Greenberg Roofing and Sheet Metal Co.*, 314 N.W.2d 226 (Minn. 1982)).

93. This point was raised before the Senate Committees. The problem in medical malpractice actions is that the conduct is not really that of "willful indifference," and the nature of the complaint does not reflect the standard. Rhetorically speaking, why should the award also reflect that standard? *See Testimony on S.F. 1670 Before the Senate Judiciary Committee*, 74th Minn. Legis., 1st Sess., Feb. 19, 26, 1986 (audio tape). It was suggested that punitive damages should be remedial in nature and linked to the economic nature of the damages, similar to anti-trust treble damages. *Id.* (comments by Philip Cole, President of Minnesota Defense Lawyers Assoc.). *See also* Hammitt, Carroll and Nelles, *Tort Standards and Jury Decisions*, 14 J. LEGAL STAND. 751 (1985).

94. *See, e.g., Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 390 (Minn. 1979). An insurer is required to defend a suit brought against its insured even if it is unsure of the coverage offered under the policy. *Id.* at 391. While an insurer cannot insure against punitive damages, the possibility that another claim of questionable coverage could result in punitive damages, undoubtedly increases defense costs. *See Caspersen v. Webber*, 298 Minn. 93, 100, 213 N.W.2d 327, 331 (1973) (dicta implying that punitive damages are not payable by insurer).

95. *See* Haugen and Tarkow, *supra* note 92, at 356-63. The purpose of punitive damages is to prohibit unlawful purposes or lawful purposes achieved by unlawful means, expressing society's indignation at such activity. *Id.* (citing *Anderson v. Int'l Harvester Co. of America*, 104 Minn. 49, 53, 116 N.W. 101, 103 (1908)). *See also Testimony on S.F. 1687 Before the Senate Judiciary Committee*, 74th Minn. Legis., 2d Sess., Feb. 26, 1986 (audio tape).

losses resulting from injury into the marketing of a product.⁹⁶ Such practices, these allies argue, go beyond the "willfull indifference" standard to one of "intentional disregard."⁹⁷

Punitive damages have been a popular target of tort reform nationwide.⁹⁸ Currently, efforts are concentrated on capping "intangible" damage totals, rather than abolishing the remedy altogether.⁹⁹

Another legislative effort toward a more exacting litigation process was directed at frivolous claims.¹⁰⁰ Upon its own motion, a court may award costs, disbursements, attorneys' fees or witness fees for

96. See Hunter, *supra* note 4, at 39. Hunter argues that the punitive tort system is the only valid way to force corporate defendants into disclosure of possible dangerous activities. *Id.*

97. Haugen & Tarkow, *supra* note 92, at 379-80. The standard of care has been described in many ways. The authors note that malice is the standard often applied, and the Minnesota Supreme Court has defined malice in a variety of different ways. *Id.* See *Meetings on H.F. 1776 Before the House Financial Institution and Insurance Committee*, 74th Minn. Legis., 1986 Sess., Feb. 19, 1986 (audio tape). The concern over the ability of certain industries to economically incorporate human losses remains as a strong argument, although an "intentional" standard is viewed as a compromise. *Id.* (comments by Rep. Skoglund).

98. See Trolin, *supra* note 1, at 10-11. The major efforts, however, are directed towards non-economic damages such as pain and suffering. *Id.* See *Hearings on H.F. 1776 Before the House Financial Institution and Insurance Committee* 74th Minn. Legis., 2d Sess., Feb. 19, 1986 (audio tape) (argument by Tom Pearson, Minnesota Defense Lawyer's Assoc., that the civil damages system is for compensatory not punitive actions). *Accord*, *Meetings on S.F. 1670 Before the Senate Judiciary Committee*, 74th Minn. Legis., 1986 Sess., Feb. 26, 1986 (audio tape) (Phillip Cole, Minn. Defense Lawyers Assoc., emphasizing that juries are behaving inconsistently with *ad hoc* results).

99. Trolin, *supra* note 1, at 10-11.

100. Tort Reform Act, ch. 455, Sec. 83, 1986 Minn. Laws 840, 881 (amending MINN. STAT. § 549.21 (1984)). The amended statute now reads:

REIMBURSEMENT FOR CERTAIN COSTS IN CIVIL ACTIONS. Subdivision 1. **ACKNOWLEDGEMENT IN PLEADINGS.** The parties by their attorneys in any civil action shall attach to and make a part of the pleading served on the opposite party or parties a signed acknowledgement stating that the parties acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties pursuant to subdivision 2.

Subdivision 2. **AWARD OF COSTS.** Upon motion of a party, or upon the court's own motion, the court in its discretion may award to that party costs, disbursements, reasonable attorney fees and witness fees if the party or attorney against whom costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith asserted a claim or defense that is frivolous and that is costly to the other party; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon the court. An award under this section shall be without prejudice and as an alternative to any claim for sanctions that may be asserted under the rules of civil procedure. Nothing herein shall authorize the award of costs, disbursements or fees against a party or attorney advancing a claim or defense unwarranted under existing law, if it is supported by a good faith argument for an extension, modification, or reversal of the existing law.

Id.

frivolous claims or defenses.¹⁰¹ This section gives a trial court the ability to immediately castigate poor attorney practices.¹⁰² In addition, it also requires all parties to submit an acknowledgement recognizing the potential award of costs for frivolous claims.¹⁰³ The amended statute removed the requirement that a party know of the frivolity of the claim, and instead, imposes a court's opinion.¹⁰⁴

In unusual situations, a conflict may arise between the insurer and insured over a decision to assert or defend claims. An insured electing not to sign the acknowledgement may create a conflict of interest between surety and client.¹⁰⁵ This scenario would increase litigation costs, if the conflict were not quickly resolved. A more likely problem, however, occurs where a judge is reluctant to impose the sanction.¹⁰⁶ Penalties for frivolous claims are popular in many states.¹⁰⁷

C. Future Damages and Pre-Judgment Interest

Further limits on conjectural damage elements address future

101. *Id.*, subd. 2. *See, e.g.*, *Anderson v. Lindgren*, 360 N.W.2d 348, 351-53 (Minn. Ct. App. 1984) (poor behavior of appellant's attorney during trial justified award of attorney's fees).

102. *See id.*

103. *See id.*, subd. 1.

104. *Id.*, subd. 2 (law may allow a court to interrupt bad faith activities before they damage an entire proceeding).

105. Interview with attorney Steven J. Muth, partner with Lasley, Gaughan, Stich and Angell, P.A. of Minneapolis, MN (August, 1986). If the insurer loses control of the defense it may be necessary to hire another attorney to represent the client's interest in not signing the affidavit, or to bring a declaratory judgment action. *Id.* *See also* *United Fidelity & Guaranty Co. v. Louis A. Roser Co., Inc.*, 585 F.2d 932, 938 (8th Cir. 1978) (conflict of interest created when declaratory judgment action as to coverage and trial on the merits combined); *Prahm v. Rupp. Constr. Co.*, 277 N.W.2d 389, 391 (Minn. 1979) (insurer obligated to defend insured may contest coverage without creating a conflict of interest by bringing a declaratory judgment action prior to trial against insured); *Truchinski v. Cashman*, 257 N.W.2d 286, 288 (Minn. 1977) (expressing doubt that declaratory judgment action and trial on the merits could be combined without conflict of interest).

106. This may be due to a judge's actual impression that the suit began as a good claim, but failed on its own merits. Judges generally do not assess costs, under the so-called "American Rule," where each litigant is expected to bear its own costs. *Cf.* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (court reluctant to find exception to American Rule without specific legislative mandate); *Fownes v. Hubbard Broadcasting Inc.*, 310 Minn. 540, 542, 246 N.W.2d 700, 702 (1976) (court may award attorney fees without statutory mandate where one party has acted in bad faith). Further discussion of judicial "impressions" is contained in *Alsop & Herr*, *supra* note 90, at 324-25 (discussion of judicial impressions) (citing *Hutcheson, The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *CORNELL L. Q.* 274 (1929)).

107. *See* ALASKA STAT. § 9.55.536(g) (1983) (medical malpractice actions only); COLO. REV. STAT. §§ 13-17-101 to 106 (1986) (applicable to any civil action commenced or appealed); TENN. CODE ANN. § 27-1-122 (1980) (frivolous appeals only).

damages and pre-judgment interest calculations.¹⁰⁸ Expert testimony contemplating "projected inflationary or noninflationary changes" in future damages is no longer permitted.¹⁰⁹ Similarly, increases in earnings based upon general economic statistics are not admissible.¹¹⁰ Instead, trial courts are restricted to a review of noninflationary changes in earnings that are "reasonably certain to

108. Tort Reform Act, ch. 455, § 86, 1986 Minn. Laws, 840, 882-83. (to be codified at MINN. STAT. § 604.07 (1986)). The statute reads as follows:

Subdivision 1. DEFINITIONS.

- (a) For purposes of this section, the following terms have the meanings given them.
- (b) "Economic loss" means all pecuniary harm for which damages are recoverable, including, but not limited to, medical expenses, loss of earnings, and loss of earning capacity.
- (c) "Future damages" means all damages which the trier of fact finds will accrue after the damage findings are made.
- (d) "Intangible loss" means embarrassment, emotional distress, and loss of consortium.
- (e) "Noneconomic loss" means pain, disability, and disfigurement.
- (f) "Past damages" means all damages that have accrued when the damage findings are made.

Subd. 2. DISCOUNT REQUIRED. In all actions seeking damages for personal injury, wrongful death, or loss of means of support, awards of all future damages, including economic, noneconomic and intangible loss, reasonably certain to occur must be discounted to present value as provided in this section.

Subd. 3. FUTURE DAMAGES; EVIDENCE. The amount of all future damages, including economic, noneconomic and intangible loss reasonably certain to occur, must be ascertained at the time of trial without reference to projected inflationary or noninflationary changes. Evidence of noninflationary changes in earnings or earning capacity that are reasonably certain to occur is admissible, but this evidence is limited to the present value of the future changes without regard to inflationary changes. Projected increases in earnings or earning capacity dependent upon general economic statistics are not admissible.

Subd. 4. DISCOUNT RATE. The award calculated under subdivision 3 must be reduced to present value at the time of trial by application of a discount rate equal to:

- (1) The average rate of interest on judgments under section 549.09 for the five calendar years immediately preceding the commencement of trial, rounded to the nearest one-tenth, less
- (2) the average increase in the Consumer Price Index for all Urban Consumers, all items, as published by the U.S. Department of Labor, Bureau of Labor Statistics, rounded to the nearest one-tenth, for the same five-year period. If the Labor Department statistics are not published by the time of trial, the court shall employ the average increase over the most recent five-year period available in the published statistics.

In no instance may the discount rate fall below two percent or rise above six percent.

Subdivision 2 of this new section requires the statute's application to all tort actions involving personal injury. *Id.*, subd. 2. The cap on intangible losses, discussed *infra* at notes 113-21 and accompanying text, also requires a specific jury award of the amounts directed by this statute. *See id.* § 89, 1986 Minn. Laws 840, 884 (to be codified at MINN. STAT. § 549.24).

109. *Id.* § 86, subd. 3., 1986 Minn. Laws 840, 882.

110. *Id.*

occur."¹¹¹ In any case, the ultimate award is limited to the present value of the future changes.¹¹²

The present value calculation is based upon a complex formula that utilizes average interest rates on civil judgments from the previous five years and the Consumer Price Index.¹¹³ However, under no circumstances is the rate to fall below two percent or rise above six percent.¹¹⁴

The prejudgment statute itself was amended to more closely link the effect of offers and counteroffers upon the calculation of prejudgment interest.¹¹⁵ Subsequent offers and counteroffers now

111. *Id.*

112. *Id.*, subd. 4. The present value requirement is new to Minnesota law. The new statute could make arguments of pain and suffering on a per diem basis improper. It has been suggested that the best way to resolve the problem of calculating future intangible losses under the statute is to assume a cash flow equal to the gross intangible damage award. *See* Cole, *supra* note 69, at 11.

For example, the author assumes that a \$250,000 award to a plaintiff with a 25 year life expectancy should result in a \$10,000 annual cash flow. The present value of the award is \$143,809. *Id.* The new statute, effective Aug. 1, 1986, applies to all actions pending and commenced after that date. *Id.*

113. Tort Reform Act, ch. 455, § 86, 1986 Minn. Laws 840, 883 (to be codified at MINN. STAT. § 604.07, subd. 4).

114. *Id.*

115. *Id.* § 81, 1986 Minn. Laws 840, 879-80 (amending MINN. STAT. § 549.09, subd. 1 (1984)). As amended, subdivision 1 provides, in part:

(b) Except as otherwise provided by contract or allowed by law, pre-verdict or pre-report interest on pecuniary damages shall be computed as provided in clause (c) from the time of the commencement of the action, or the time of a written settlement demand, whichever occurs first, except as provided herein. The action must be commenced within 60 days of a written settlement demand for interest to begin to accrue from the time of the demand. If either party serves a written offer of settlement, the other party may serve a written acceptance or a written counter-offer within 60 days. After that time interest on the judgment shall be calculated by the judge in the following manner. The prevailing party shall receive interest on any judgment from the time the action was commenced or a written settlement demand was made, or as to special damages from the time when special damages were incurred, if later, until the time of verdict or report only if the amount of its offer is closer to the judgment than the amount of the opposing party's offer. If the amount of the losing party's offer was closer to the judgment than the prevailing party's offer, the prevailing party shall receive interest only on the amount of the settlement offer or the judgment, whichever is less, and only from the time the action was commenced or a written settlement demand was made, or as to special damages from when the special damages were incurred, if later, until the time the settlement offer was made. Subsequent offers and counteroffers supersede the legal effect of earlier offers and counteroffers. For the purposes of clause (3), the amount of settlement offer must be allocated between past and future damages in the same proportion as determined by the trier of fact. Except as otherwise provided by contract or allowed by law, pre-verdict or pre-report interest shall not be awarded on the following:

(1) judgments, awards, or benefits in workers' compensation cases, but not including third-party actions;

eradicate the legal effect of earlier offers.¹¹⁶ Previously, the statute required a written response within sixty days of a previous written offer.¹¹⁷ However, subsequent counteroffers or demands in ongoing negotiations created controversy as to which offer controlled.¹¹⁸ In all cases, the controlling offer must occur within sixty days of the lawsuit's initiation (or August 1, 1984, if initiated prior to that time) to trigger the pre-judgment interest statute.¹¹⁹

An additional amendment also removed interest calculations on any award of future damages.¹²⁰ This preclusion operates against interest calculations that are based upon the verdict or a written settlement offer lower than the verdict.

D. Cap on Damages Resulting from Intangible Loss

One of the more tentative measures adopted by the legislature is the new ceiling on claims for intangible losses.¹²¹ Intangible losses are defined as damage resulting from embarrassment, emotional distress, or loss of consortium.¹²² The total amount of damages may

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- (2) judgments, decrees, or orders in dissolution, annulment, or legal separation actions;
 - (3) judgments for future damages;
 - (4) punitive damages, fines, or other damages that are noncompensatory in nature;
 - (5) judgments not in excess of the amount specified in section 487.30; and
 - (6) that portion of any verdict or report which is founded upon interest, or costs, disbursements, attorney fees, or other similar items added by the court.
- (c) The interest shall be computed as simple interest per annum. The rate of interest shall be based on the secondary market yield of one year United States treasury bills, calculated on a bank discount basis as provided in this section.

116. *Id.*, subd. 1, 1986 Minn. Laws 840, 879. The new section requires that the action be commenced within 60 days of the demand in order to be effective. *Id.*

117. 1984 Minn. Laws ch. 549.09, subd. 1 (codified as MINN. STAT. § 549.09, subd. 1 (1984)).

118. Interview with attorney Steven J. Muth, *supra* note 105.

119. Tort Reform Act, ch. 455, § 81, 1986 Minn. Laws 840, 879-80 (amending MINN. STAT. § 549.09 (1984)).

120. *Id.*, subd. 1(3), 1986 Minn. Laws 840, 880.

121. *Id.* § 88, 1986 Minn. Laws 840, 883-84 (to be codified as MINN. STAT. § 549.23 (1986)). This section provides as follows:

Subdivision 1. DEFINITION. For purposes of this section, "intangible loss" means embarrassment, emotional distress, and loss of consortium. Intangible loss does not include pain, disability or disfigurement.

Subd. 2. LIMITATION. In civil actions, whether based on contract or tort, the amount of damages per person for intangible losses may not exceed \$400,000.

Subd. 3. JURY NOT INFORMED OF LIMITATION. The court may not inform the jury of the existence of the limitation in subdivision 2.

Subd. 4. NOT NEW ACTION. This section does not create a new cause of action for intangible loss.

Id.

122. *Id.*, subd. 2.

not exceed \$400,000.¹²³ The cap, however, does not include the equally intangible losses resulting from pain and suffering, disability, or disfigurement.¹²⁴ It appears that the legislature simply capped those damage elements with which it least sympathized. More recognizable economic losses, such as wage loss and medical expenses, are not capped in any way.¹²⁵

While the statute requires that a jury may not be informed of the cap on intangible losses,¹²⁶ their separation from other elements may be felt elsewhere. The separation of intangible losses from pain and suffering, disfigurement, and disability, now requires the jury to make additional damage calculations.¹²⁷ The possibility exists, in some cases, that total awards will actually increase as a result.¹²⁸

V. CHANGES IN SPECIFIC AREAS OF TORT LAW

A. *Limitations on Actions for Damages Based on Improvements to Real Property*

In response to complaints by the construction industry that it suffered from high insurance premiums, the statute of repose governing claims against the industry was lowered from fifteen years to ten.¹²⁹ Construction lobbyists maintained that "tail" insurance must be re-

123. *Id.*, subd. 1.

124. See *Floor Debate on H.F. 1950 in the Minnesota Senate*, 74th Minn. Legis., 1986 Sess., March 11, 1986 (audio tape) (amendment seeking to include pain and suffering within the \$400,000 cap failed). See *Hearings on S.F. 1593 Before the Senate Judiciary Committee*, 74th Minn. Legis., 1986 Sess., Feb. 26, 1986 (audio tape) (originally, a \$250,000 cap was recommended for all intangible losses, including disfigurement, pain and suffering).

125. Tort Reform Act, ch. 455, § 88, 1986 Minn. Laws, 840, 883-84.

126. *Id.*

127. It has been suggested that increasing the number of jury instructions on damages increases the overall total, since a jury that returns a verdict for the plaintiff may feel obligated to make an award for each separate category of intangible, or non-economic losses. See Interview with attorney Steven J. Muth, *supra* note 105.

128. *Id.*

129. See Tort Reform Act, ch. 455, § 92, 1986 Minn. Laws, 840, 885-86 (amending MINN. STAT. § 541.051 (1984)). The former statute allowed fifteen years after construction for a discoverable defect to arise as an actionable claim. MINN. STAT. § 541.051, subd. 1 (1984 & Supp. 1985). A plaintiff whose cause of action arose during the fourteenth or fifteenth year enjoyed the normal two year statute of limitations from the date of discovery. MINN. STAT. § 541.051, subd. 2.

In its amended form, the statute changes only the amount of time in which an action may be brought. Tort Reform Act, ch. 455, § 92, 1986 Minn. Laws 840, 885-86 (to be codified as MINN. STAT. § 541.051 (1986)). An action today must arise within two years after construction is completed. *Id.* The statute of repose was reduced from fifteen to ten years, and the suit must be brought within two years of discovery in the ninth or tenth years, extending the period ultimately to twelve years. *Id.* The same time limitations operate for land surveyors under the new statute. See *infra* note 132 and accompanying text.

tained long after the completion of a structure, and had pushed for an amendment lowering the statute of repose to seven years.¹³⁰ Industry critics successfully argued that the useful life of a building is much longer, however, and the construction industry should be required to indemnify construction defects for a representative time period.¹³¹

The Tort Reform Act also removed a somewhat arbitrary exception to the statute of limitations governing construction litigation.¹³² A new provision now requires actions based upon errors in land surveys to be brought within two years after discovery of the error, and, in any event, within ten years of the survey.¹³³

130. *Hearings on S.F. 1593 before the Senate Economic Development and Commerce Committee*, 74th Minn. Legis., 1986 Sess., Feb. 19, 1986 (audio tape). Industry practice requires contractors to retain liability insurance in order to obtain bids. Many contracts are standard in form, and require both contractors and subcontractors to carry liability insurance. The requirements were strict enough to be likened to those of licensing procedures. *Id.* See *Senate Floor Debate on H.F. 1950*, 74th Minn. Legis., 1986 Sess., March 11, 1986 (audio tape). Because liability under the previous statutes of repose could theoretically exist for fifteen years, construction companies are required to carry "tail" insurance for that period, at the same rates as conventional liability insurance. *Id.* (comments by Sen. Sieloff). Senator Sieloff also argued that 97.9 percent of all lawsuits against the construction industry occur within seven years, and that 99.6 percent occur within 10 years. Since the statute goes so far beyond the time an action would be brought, the industry is maintaining insurance for claims that probably will not be made. *Id.* See *supra* note 6 and accompanying text (analysis of "occurrence" versus "claims made" policies). See also *Hearings on H.F. 1776 Before the House Financial and Insurance Committee*, 74th Minn. Legis., 1986 Sess., Feb. 19, 1986 (audio tape) (comments by Rep. Voss, citing statistics indicating that the number of lawsuits dwindles after seven years).

131. *Senate Floor Debate on H.F. 1950*, 74th Minn. Legis., 1986 Sess., March 11, 1986 (audio tape) (comments by Senator Luther). The lowering of the statute of repose might not actually lead to a corresponding drop in industry standards, but warranties and liability coverage would certainly not be offered beyond the confines of the new statute. *Id.*

132. Tort Reform Act, ch. 455, § 93, 1986 Minn. Laws 840, 886 (to be codified at MINN. STAT. § 541.052). The new statute's provisions parallel the amended version of the two-year statute applying to the rest of the construction industry. *Id.*

Subdivision 1. Except where fraud is involved, no action to recover damages for an error in the survey of land, nor any action for contribution or indemnity for damages sustained on account of an error, may be brought against any person performing the survey more than two years after the discovery of the error, nor in any event more than ten years after the date of the survey.

Subdivision 2. Notwithstanding the provisions of subdivision 1, in the case of an action which occurs during the ninth or tenth year after the date of the survey, an action to recover damages may be brought within two years after the date on which the action occurred, but in no event may an action be brought more than twelve years after the date of the survey.

Id.

133. See *id.*, subd. 2.

B. Medical Malpractice

The Act creates some procedural changes in medical malpractice actions. In all lawsuits against health care providers¹³⁴ requiring expert testimony to prove a *prima facie* case, the plaintiff must submit two affidavits verifying expert review.¹³⁵ The first affidavit, to be served with the summons and complaint, must indicate that the plaintiff's attorney has reviewed the case with a qualified expert.¹³⁶ This affidavit requires the attorney to submit a "reasonable expectation" that the expert's opinions will be admissible at trial.¹³⁷ The affidavit must also state the expert's opinion that one or more of the defendants deviated from an applicable standard of care, causing the plaintiff's injuries.¹³⁸

The second affidavit requires the plaintiff's attorney to submit the names of experts who will testify at trial on issues of malpractice or causation.¹³⁹ The affidavit must contain the substance of the facts or opinions anticipated as testimony, with a summary of the grounds of

134. Tort Reform Act, ch. 455, § 60, 1986 Minn. Laws 840, 871-72 (to be codified as MINN. STAT. § 145.682 (1986)). Subdivision 1 of the new statute defines "health care provider" as a "physician, surgeon, dentist or other health care professional or hospital, including all persons or entities . . . as defined in [MINN. STAT.] § 145.61, subdivisions 2 and 4, or a certified health care professional . . . providing services as an independent contractor in a hospital." *Id.*

135. *Id.* Subdivision 2 requires a plaintiff to proceed as follows:

In an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a *prima facie* case, the plaintiff must: 1) unless otherwise provided in subdivision 3, paragraph (B), serve upon defendant with the summons and complaint an affidavit as provided in subdivision 3; and 2) serve upon defendant within 180 days after commencement of the suit an affidavit as provided by subdivision 4.

Id.

136. *See id.* Subdivision 3 outlines the requirements of the first affidavit:

The affidavit required by subdivision 2, clause (1), must be by the plaintiff's attorney and state that:

(a) the facts of the case have been reviewed by the plaintiff's attorney with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff; or

(b) the expert review required by paragraph (a) could not reasonably be obtained before the action was commenced because of the applicable statute of limitations. If an affidavit is executed pursuant to this paragraph, the affidavit in paragraph (a) must be served on defendant or the defendant's counsel within 90 days after service of the summons and complaint.

Id.

137. *See id.*

138. *See id.* Presumably, the standard is that of a reasonable practitioner under the circumstances.

139. *Id.*, subd. 4.

each opinion.¹⁴⁰ Answers to interrogatories can satisfy the requirements of this new statute,¹⁴¹ but a failure to file the affidavits may result in a dismissal with prejudice.¹⁴²

A new waiver of the doctor-patient privilege endorses informal discussions involving all parties "if the health care provider consents."¹⁴³ It is hoped that the waiver will alleviate frustrations incurred by defense lawyers attempting to contact the plaintiff's

140. *Id.* Subdivision 4 provides as follows:

The affidavit required by subdivision 2, clause (2), must be by the plaintiff's attorney and state the identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Answers to interrogatories that state the information required by this subdivision satisfy the requirements of this subdivision if they are signed by the plaintiff's attorney and served upon the defendant within 180 days after commencement or the suit against the defendant.

The parties or the court for good cause shown, may by agreement, provide for extensions of the time limits specified in subdivision 2, 3, or this subdivision. Nothing in this subdivision may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses.

Id.

141. *See id.* The interrogatories must be signed by the plaintiff's attorney and returned to the defendant within 180 days of the commencement of the suit against the defendant. *Id.*

142. *Id.*, subd. 6.

143. *Id.* § 84, 1986 Minn. Laws 840, 881-82 (amending MINN. STAT. § 595.02 (1984)). The new subdivision provides:

Subdivision 5. WAIVER OF PRIVILEGE FOR HEALTH CARE PROVIDERS. A party who commences an action for malpractice, error, mistake or failure to cure, whether based on contract or tort, against a health care provider on the person's own behalf or in a representative capacity, waives in that action any privilege existing under subdivision 1, paragraphs (d) and (g), as to any information or opinion in the possession of a health care provider who has examined or cared for the party or other person whose health or medical condition has been placed in controversy in the action. This waiver must permit all parties to the action, and their attorneys or authorized representatives, to informally discuss the information or opinion with the health care provider if the provider consents. Prior to an informal discussion with a health care provider, the defendant must mail written notice to the other party at least 15 days before the discussion. The plaintiff's attorney or authorized representative must have the opportunity to be present at any informal discussion. Appropriate medical authorizations permitting discussion must be provided by the party commencing the action upon request from any other party.

A health care provider may refuse to consent to the discussion but, in that event, the party seeking the information or opinion may take the deposition of the health care provider with respect to that information and opinion, without obtaining a prior court order.

For purposes of this subdivision, "health care provider" means a physician, surgeon, dentist, or other health care professional or hospital, including all persons or entities providing health care as defined in section 145.61, subdivisions 2 and 4, or a certified health care professional employed by or providing services as an independent contractor in a hospital.

Id.

treating physician.¹⁴⁴ The physician often maintains a witness relationship to material events contributing to a claim, but access is blocked by the doctor-patient privilege.¹⁴⁵

Another procedural amendment to malpractice actions alters the tolling effect a minor's age has upon the statute of limitations.¹⁴⁶ Previously, the statute was completely tolled until the minor attained maturity.¹⁴⁷ This created difficulties in proving or defending suits brought ten years or more after an alleged mishap, which put a particularly high burden on practitioners involved with young children, such as obstetricians or pediatricians.¹⁴⁸ Under the new Act, the

144. See Note, *Evidence: Waiver of Physician-Patient Privilege*, 51 MINN. L. REV. 575, 582 (1967). The author points out that the privilege fosters good communication between an ill client and the treating physician, a situation generally desirable for the practice and society. *Id.* However, it also limits discovery of information by the party most likely to shed light on the true nature of a plaintiff's injury. Cole, *supra* note 69, at 10.

145. Cole, *supra* note 69, at 10.

146. Tort Reform Act, ch. 455, § 79, 1986 Minn. Laws 840, 877-78 (amending MINN. STAT. § 541.15 (1984)). The amended statute retains those disabilities that toll the statute of limitations: insanity, imprisonment, alien nationality, injunction or statutory prohibition. *Id.*, subd.(1). The exception created by the new addition reads as follows:

(b) In actions alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider, the ground of disability specified in paragraph (a), clause (1), suspends the period of limitation until the disability is removed. The suspension may not be extended for more than seven years, or for more than one year after the disability ceases.

For purposes of this paragraph, health care provider means a physician, surgeon, dentist, or other health care professional or hospital, including all persons or entities providing health care as defined in section 145.61, subdivisions 2 and 4, or a certified health care professional employed by or providing services as an independent contractor in a hospital.

Id., subd. (b). For the definition of "health care provider," see *supra* note 134.

147. See MINN. STAT. § 541.15 (1984).

148. See Tort Reform Act, ch. 455, § 95, 1986 Minn. Laws 840, 886. Formerly, a child could wait until the age of 18, plus a year, to bring suit. As a result, claims were brought years after the alleged malpractice. See *Hearings on S.F. 1593 Before the Senate Judiciary Committee*, 74th Minn. Legis., 1986 Sess., Feb. 26, 1986 (audio tape) (comments while summarizing the bill by Senator Luther). The problem was particularly prevalent in "bad baby" cases. Obstetricians faced lawsuits nineteen years after assisting in the plaintiff's birth. *Id.* From 1975 to 1984, the average jury award in medical malpractice actions rose from \$95,000 to \$338,000. The number of claims filed against physicians doubled from 1981 to 1986. See *Hearings on S.F. 1670 Before the Senate Judiciary Committee*, 74th Minn. Legis., 1986 Sess., Feb. 26, 1986 (audio tape) (comments by the author, Senator Petty, citing statistics from the Minnesota Medical Insurance Exchange (MMIE)). The pressure on obstetricians resulted in 65 family practitioners statewide withdrawing from that particular practice, often in rural areas. *Id.*

A 1985 survey of obstetricians and gynecologists revealed that 90% of those surveyed suffered a premium increase the previous year. American College of Obste-

statute is now tolled for a maximum of seven years.¹⁴⁹ Once the minor reaches adulthood, the suit must be brought within one year. A minor relying upon the old statute of limitations is given until January 1, 1987 to bring an action.¹⁵⁰

C. Government Immunity

Municipalities should benefit from the special attention devoted to governmental immunity by the legislature.¹⁵¹ As owners of large tracts of land and providers of public services and licenses, municipalities have become primary targets of the "deep pocket" theory.¹⁵² As a result, litigation costs and increasing premium expenses have had a dramatic impact on local budgets.¹⁵³

Municipalities are granted immediate relief in the form of direct immunity in several areas. An amendment to the State Tort Claims statute now provides municipalities the same exemptions enjoyed by the state.¹⁵⁴ In addition, the Act precludes claims based on losses

tricians and Gynecologists, *Professional Liability Insurance and Its Effect: Report of a Survey of ACOG's Membership* (Nov. 1985) (cited in *AMA News*, Dec. 6, 1985)).

149. Tort Reform Act, ch. 455, § 75, 1986 Minn. Laws 840, 877-78 (amending MINN. STAT. § 541.15 (1984)).

150. *Id.* § 95, 1986 Minn. Laws 840, 886.

151. *Floor Debate on S.F. 1950 in the Minnesota Senate*, 74th Minn. Legis., 1986 Sess., March 11, 1986 (audio tape) (comments by Senator Sieloff). The problem of increasing insurance rates owed by municipalities results from the large number of suits against them. Though joint and several liability appeals intellectually, it was suggested that the effect was to bring landowners, small businesses, and communities into lawsuits for which they had little fault to contribute, but a lot of money. Road construction and recreational lands were singled out in this discussion as major sources of "deep pocket" practices. *Id.* See also *Floor Debate on S.F. 1950 in the Minnesota House of Representatives*, 74th Minn. Legis., 1986 Sess., March 10, 1986 (audio tape) (comments by Rep. Halberg).

152. Public entities provide many services that are required. Hence, they are unable to drop high risk activities like a private corporation can. *Insuring Our Future*, *supra* note 2, at 144-46. The increased exposure is having calamitous effects. Beyond sky-rocketing premiums, some cities operate without liability insurance; others seek relief from state or federal government; others are in the bankruptcy courts. Fosule, *Cities Besieged*, 71 A.B.A.J. 19, 21 (Dec. 1985).

153. Officials in California predict that two-thirds of the communities in that state will be operating without liability insurance next year. Church, *supra* note 34, at 19.

154. Tort Reform Act, ch. 455, § 73, 1986 Minn. Laws 840, 875 (amending MINN. STAT. § 466.03 (1984) by adding a new subdivision). The new subdivision 15 provides that "[a]ny claim against a municipality, if the same claim would be excluded under 3.736, if brought against the state [shall likewise be excluded]." Minnesota Statutes section 466.02 is the general provision for liability claims against the state. Section 466.03 outlines the exceptions to the general rule. The new protection provision cited above incorporates municipalities in its scope, and includes additional amendments to Section 466.03, discussed *infra* at notes 156-67. See Tort Reform Act, ch. 455, §§ 65-73, 1986 Minn. Laws 840, 874-75.

The subdivision's inclusion of Minnesota Statute section 3.736 also allows municipalities the exemption from financial liability for torts committed in certain activi-

caused by snow or icy conditions on public sidewalks that do not abut publicly owned buildings and parking lots.¹⁵⁵

The state exemption applying to recreational properties was substantially broadened under the new bill.¹⁵⁶ Currently, claims based on the construction, operation or maintenance of almost any conceivable recreational property are abolished.¹⁵⁷ A separate section also makes a particular exemption for railroads who lease land to state or municipal railroad authorities.¹⁵⁸ Conspicuously missing

ties. *Id.* This statute was also expanded in scope. *See infra* notes 155, 157, 162, 174 and accompanying text.

155. Tort Reform Act, ch. 455, § 2, 1986 Minn. Laws 840 (amending MINN. STAT. § 3.736 (1984 & Supp. 1985)). Subdivision 3 now provides:

EXCLUSIONS. Without intent to preclude the courts from finding additional cases where the state and its employees should not, in equity and good conscience, pay compensation for personal injuries or property losses, the legislature declares that the state and its employees are not liable for the following losses:

. . .

(d) Any loss caused by snow or ice conditions on any highway or public sidewalk that does not abut a publicly-owned building or a publicly-owned parking lot, except when the condition is affirmatively caused by the negligent acts of a state employee; . . .

The state will not pay punitive damages. *Id.* The exception does not apply to sidewalks that "abut" public buildings and parking lots, however. This provision was amended in committee, *see Hearings on H.F. 1776 Before the House Financial Institution and Insurance Committee*, 74th Minn. Legis., 1986 Sess., Feb. 19, 1986 (audio tape); the amendment to the bill came after the need for maintenance of public sidewalks, in areas of the heaviest use, was reconized. *Id.*, Feb. 12, 1986 (comments by C. Hvass, Minnesota Trial Lawyer's Association).

Correspondingly, the exception was also added to amend Minnesota Statute section 466.03, subd. 4 (1984 & Supp. 1985). *See* Tort Reform Act, ch. 455, § 65, 1986 Minn. Laws 840, 874.

156. Tort Reform Act, ch. 455, § 66, 1986 Minn. Laws 840, 874 (amending MINN. STAT. § 466.03 (1984) by adding subd. 6(e)). The new section is self-explanatory:

PARKS AND RECREATION AREAS. Any claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services, or from any claim based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user or park and recreation property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

Id.

157. *See id.* This section specifically exempts municipal recreational premises liability tort claims. *Id.* It parallels that of the state exemption, Minnesota Statute § 3.736, subdivision 3(h) (1984 & Supp. 1985), and legislatively overrules *Hovet v. City of Bagley*, 325 N.W.2d 813 (Minn. 1982) (municipalities not protected landowners within meaning of reactionary use statute).

Immunity from claims against all property owners, private and public, is complete in Minnesota for property that is used by persons for recreational purposes. *See* MINN. STAT. § 87.023 (1984 & Supp. 1985).

158. The legislature extended the municipality immunity provisions to railroads

under this section, however, is an exception from claims based on a duty to warn.¹⁵⁹ The omission is highlighted by the provision which retains liability for "conduct that would entitle a trespasser to damages against a private person."¹⁶⁰ At the very least, the statute's construction creates a possible toe-hold for an action against municipal property owners.¹⁶¹

Subdivision eight of the same statute limits all damage claims against municipalities to losses of property, personal injury, or death.¹⁶² Uncertainty may arise as to whether this exclusion was intended to apply to business torts, emotional distress, or defamation suits.¹⁶³

All tort claims based upon the loss of benefits or compensation due under public assistance programs, except those required by federal law, are abolished under Minnesota Statute section 466.03, subdivision 9.¹⁶⁴ Similarly, the act abolishes claims against the state that may result from lack of funding to municipal hospitals or corrections facilities.¹⁶⁵ The lack-of-funding exclusion coincides with the following section of the Act, which averts lawsuits arising out of property

leasing tracks to the Regional Railroad Authority. MINN. STAT. § 398A.01-.09 (1984). The Authority seeks to preserve existing railways in the state that private railroads have abandoned. *Id.* § 398A.02.

To facilitate the Authority, Minnesota Statute § 398A.04 (1984) was amended by adding a subparagraph:

(b) A railroad leasing its tracks and right-of-way to a railroad authority that is created under this chapter and affiliated with a railroad museum is subject to tort liability only to the extent provided for municipalities in chapter 466 as to any claims arising out of fare-paying passenger operations carried on by the railroad authority primarily for the purpose of promoting tourism on tracks and right-of-way leased from the railroad. *Id.*

159. *See* Tort Reform Act, § 65-74, 1986 Minn. Laws 840, 874-75 (amending MINN. STAT. § 466.03 (1984 & Supp. 1985)).

160. *Id.*

161. *See id.*

162. *Id.* The additional exception to the general provision allowing suits against the state (and now municipalities) includes: "Subd. 8 Any claim for a loss other than injury to or loss of property or personal injury or death." *Id.*

163. Cole, *supra* note 69, at 10.

164. Tort Reform Act, ch. 455, § 68, 1986 Minn. Laws 840, 875 (amending MINN. STAT. § 466.03 (1984 & Supp. 1985) by adding subdivision 9). The new subdivision provides as follows, an exception to the general rule: "Any claim for a loss of benefits of compensation due under a program of public assistance or public welfare, except where municipal compensation for loss is expressly required by federal law in order for the municipality to receive federal grants-in-aid."

165. *See id.* MINN. STAT. § 466.03 (1984 & Supp. 1985) was amended by adding subd. 11: [No one shall be permitted] . . .

Any claim for a loss based on the usual care and treatment, or lack of care and treatment, of any person at a municipal hospital or corrections facility where reasonable use of available funds have been made to provide care.

Id.

losses suffered by patients and inmates of municipal institutions.¹⁶⁶

An additional amendment to Minnesota Statute section 466.03, subdivision 10,¹⁶⁷ was intended to ban claims arising out of failure to issue licenses or permits.¹⁶⁸ On its face, the statute legislatively reverses *Andrade v. Ellefson*,¹⁶⁹ a recent decision allowing a claim against a county for negligently issuing a license to proceed.¹⁷⁰

Interestingly, the statute only bars claims "based on the failure to meet standards . . . for a license . . ." ¹⁷¹ From its plain meaning, the statute may not apply to situations which arise out of a failure to actually issue a permit.¹⁷² Coincidentally, municipalities undertaking inspections prior to issuing state licenses are considered employees of the state¹⁷³ for indemnification purposes.¹⁷⁴ If the municipality is clearly negligent in its supervision of the employee,

166. *See id.* The Tort Reform Act further amends Minnesota Statute § 466.03 by adding subdivision 12, which precludes "[a]ny claim for a loss, damage, or destruction of property of a patient or inmate of a municipal institution." *Id.* § 71, 1986 Minn. Laws 840, 875.

167. *Id.* § 69, 1986 Minn. Laws 840, 875 (amending MINN. STAT. § 466.093 (1984) by adding subdivision 10).

168. *Id.* The statute also prohibits "[a]ny claim for a loss based on the failure of any person to meet the standards needed for a license, permit or other authorization issued by the municipality or its agents." *Id.*

169. 391 N.W.2d 836 (Minn. 1986) *aff'g in part, rev'g in part* 375 N.W.2d 828 (Minn. Ct. App. 1985). The amendment was passed after the appellate court's decision, but before the supreme court's decision.

170. 391 N.W.2d at 843. The county's actual knowledge of overcrowding at a day care center, along with its failure to protect a class identified by statute, constituted a breach of duty to the children and their parents. A "special duty" is created when it is owed to an individual, as opposed to the public at large. *Id.* at 842-43 (citing *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 804-07 (Minn. 1979) and *Lorshbough v. Township of Buzzle*, 258 N.W.2d 96, 102 (Minn. 1977)).

In addition, the court imposed liability because section 466.06 of Minnesota Statutes creates a waiver of governmental immunity where the governmental entity procures insurance. *Andrade*, 391 N.W.2d at 840.

171. MINN. STAT. § 466.03 (1986).

172. *Id.*

173. Tort Reform Act, ch. 455, § 90, 1986 Minn. Laws 840, 884 (to be codified at MINN. STAT. § 466.132 (1986)). The new statute provides:

INDEMNIFICATION BY STATE. Municipalities, when performing, as required or mandated by state law, inspections or investigations of persons prior to the issuance of state licenses, are employees of the state for purposes of the indemnification provisions of section 3.736, subdivision 9. A municipality is not, however, an employee of the state for purposes of this section if in hiring, supervising, or continuing to employ the person performing an inspection or investigation for the municipality, the municipality was clearly negligent.

Id.

174. Minnesota Statute § 3.736, subd. 9 (1986) states that, absent a certification issued by the employer and approved by the attorney general, it is a question of fact whether or not an employee was acting within the scope of his employment. *Id.*

then the employee remains the sole agent of the municipality.¹⁷⁵ A new statute exempts directors or officers of non-profit organizations or trusts from liabilities associated with their post.¹⁷⁶

Another "stay home" provision requires municipalities to pay damages caused when its own police officers make an arrest.¹⁷⁷ A municipality may not indemnify an employee for punitive damages levied against the employee.¹⁷⁸

These amendments serve to narrow both the foreseeability and the scope of liability that municipalities face.¹⁷⁹ Arguably, insurers of municipalities should be able to calculate premiums with more precision.¹⁸⁰

Possibly the most significant piece of legislation is the partial relaxation of joint and several liability for the state and municipalities.¹⁸¹

175. Tort Reform Act, ch. 455, § 90, 1986 Minn. Laws 840, 884 (to be codified at MINN. STAT. § 466.132 (1986)). The state will be able to absolve itself from indemnifying the municipality, by showing that the municipal employee was "clearly negligent." Since this remains a fact issue for the jury, a distinct possibility exists that litigation costs will, in some situations, increase as a result of this statute. The state will implead the municipality and the resulting lawsuit will have one, and possibly two, additional litigants. The municipality's insurer will still be required to defend the municipality, an increase in costs that the statute presumably seeks to end.

176. Tort Reform Act, ch. 455, § 90, 1986 Minn. Laws 840, 884; (to be codified at MINN. STAT. § 466.132 (1986)).

177. Tort Reform Act, ch. 455, § 77, 1986 Minn. Laws 840, 877 (to be codified at MINN. STAT. § 466.101 (1986)). The additional statute provides as follows:

LAW ENFORCEMENT COSTS. When costs are assessed against a municipality for injuries incurred or other medical expenses connected with the arrest of individuals violating Minnesota Statutes, the municipality responsible for the hiring, firing, training, and control of the law enforcement and other employees involved in the arrest is responsible for those costs.

Id.

178. *Id.* § 76, 1986 Minn. Laws 840, 876 (amending MINN. STAT. § 466.07 (1984) by adding a new subdivision)).

Subdivision 4 specifically provides: "A municipality may not save harmless, indemnify or insure an officer or employee for punitive damages levied against the officer or employer. The municipality may provide a defense against a claim for punitive damages as a necessary incident to other elements of a defense." *Id.*

179. The Tort Reform Act reduces exposure in numerous areas: recreational property, *see supra* notes 156-60 and accompanying text; officers, employees, and agents, *see supra* notes 173-78 and accompanying text; parallel exemptions for municipalities and the state, *see supra* note 154 and accompanying text; licensing exemptions, *see supra* notes 168-72 and text.

180. The insurance industry has previously had doubts about insuring municipalities. The large number of public services, many of which are essential licensing, recreational and public works projects, all create scenarios of potential liability.

The exemptions extended under the new Act serve to lower the number of these situations. The damage caps, in conjunction with limitations on agency principles, narrow the level of uncertainty in damage awards. As a result, insurers should be able to anticipate lower total awards and greater predictability when calculating premiums.

181. The concept of joint and several liability is beset with increasing criticism.

If a government entity is jointly liable and its fault is less than thirty-five percent, it is jointly and severally liable for no more than twice the amount of its fault.¹⁸²

Exclusive governmental enjoyment of the new joint liability statute may create equal protection problems.¹⁸³ Under the guidelines of *Kossack v. Stalling*,¹⁸⁴ the enactment must reflect a "rationally related governmental purpose."¹⁸⁵ The clear intent of the legislature, however, is to limit governmental exposure in lawsuits where its fault is less than thirty-five percent.¹⁸⁶ The purpose of the limitation is un-

See, e.g., Graneli, *The Attack on Joint and Several Liability*, 71 A.B.A.J. 61 (July, 1985). As originally adopted, the rule was only applied against defendants in concert. Recent expansions of the doctrine, however, allow recovery against defendants who were only slightly at fault for all of the damages. *See Insuring Our Future, supra* note 2, at 129-33.

The legislature contemplated similar arguments. *See, e.g., Hearings on S.F. 1687 Before the Senate Judiciary Committee*, 74th Minn. Legis., 2d Sess., Feb. 26, 1986 (audio tape) (comments by P. Cole likening the large awards due to joint and several liability to a "notion of reward, rather than compensation"); *Floor Debate on H.F. 1950 in the Minnesota Senate*, 74th Minn. Legis., 2d Sess., March 11, 1986 (comments by Senator Kamrath; Sen. Seiloff opined that "every negligence suit is a winner."). *Contra id.* (comments by Senator Luther that pure comparative fault system goes too far, and leaves too many injured parties without a remedy). *See also Hearings on H.F. 1776 Before The House Financial Institution and Insurance Committee*, 74th Minn. Legis., 2d Sess., Feb. 12, 1986 (audio tape). Joint and several liability does not always work since many large companies put up a hard-nosed, expensive defense in order to earn a reputation and avoid future suits. *Id.* (comments by John Stanock, Minnesota Trial Lawyers Association).

182. Tort Reform Act, ch. 455, § 85, 1986 Minn. Laws 840, 882 (amending MINN. STAT. § 604.02, subd. 1 (1984)). As amended, the statute now provides:

When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. If the state or a municipality as defined in section 466.01 is jointly liable, and its fault is less than 35 percent, it is jointly and severally liable for an amount no greater than twice the amount of fault.

Id.

183. MINN. STAT. § 604.02, subd. 1 (1984 & Supp. 1985). The statute formerly required that: "[W]hen two or more persons are jointly liable, contributions to awards shall be in proportions to the fault attributable to each, except that each is jointly and severally liable for the whole award." *Id.* *See also* Note, *Tort Loss Allocation Concepts*, 5 WM. MITCHELL L. REV. 109 (1979).

184. 277 N.W.2d 30 (Minn. 1979).

185. *Kossack v. Stalling*, 277 N.W.2d 30, 34 n.4 (Minn. 1979) (citing *Davis v. Davis*, 297 Minn. 187, 210 N.W.2d 221 (1973)). The *Kossack* case overruled a former state statute that required lawsuits against municipalities to be commenced within one year of notice to the municipality. *Id.* at 32 (citing MINN. STAT. § 466.05, subd. 1 (1971)).

Noting that the general statute of limitations in such cases (here, an automobile accident), was normally six years, the court held that the statute was "not rationally related to a legitimate government purpose." *Id.* at 34.

186. *See Floor Debate on H.F. 1950 in the Minnesota Senate*, 74th Minn. Legis., 1986 Sess., March 11, 1986 (audio tape). A proposed amendment by Senator Peterson would have shifted Minnesota to a strict comparative fault system of compensation.

doubtedly to facilitate the lowering of premiums and to increase the availability of insurance to governmental units.¹⁸⁷ In view of the recognized "insurance crisis," this new purpose arguably supercedes the original intent of providing full recovery to injured plaintiffs, to the extent that municipalities can no longer bear the impact of rising insurance costs.¹⁸⁸

Joint and several liability was the focus of heated legislative debate.¹⁸⁹ There was some support for complete banishment of the rule in Minnesota, reflecting a growing sentiment that small businesses and other "specialty lines" are less able to absorb increasing costs for insurance.¹⁹⁰ However, the availability of an adequate remedy to injured parties is still a paramount concern of the legislature.¹⁹¹ Joint and several liability remains a mainstay in Minnesota's comparative fault tort scheme, but the insurance crisis will place more scrutiny on the sources of income necessary to maintain it. Faced with the same crisis, other jurisdictions have limited or abolished joint and several liability.¹⁹²

The amendment actually carried on an erroneous voice vote, which was renounced. *Id.* See also *supra* note 46 and accompanying text.

During the same debate, it was suggested that municipalities are often stuck with the entire damage award, even if their liability was only five percent. *Id.* (comments by Sen. Sieloff).

187. Indeed, the purpose is readily seen from the title pages of the Act. See Tort Reform Act of March 25, 1986, ch. 455, 1986 Minn. Laws 840. "An Act relating to insurance . . ."

188. The theme of the entire Act is to lower the exposure.

189. The movement to abolish joint and several liability was particularly strong in the House. See *Hearings on H.F. 1776 Before the House Financial Institutions and Insurance Committee*, 74th Minn. Legis. 1st Sess., Feb. 12-26, 1986 (audio tape) (detailing problems with "deep pocket" suits against doctors, the construction industry, small businesses, municipalities and the state). See *supra* notes 33-42, discussing the House bills. See also *supra* note 181 (detailing the Senate debate).

190. See also, *Hearings On S. F. 1593 Before the Senate Economic Development and Finance Committee*, 74th Minn. Legis., 2d Sess. Feb. 18, 1986 (audio tape). Commissioner of Commerce Hatch commented that "specialty lines," which have been particularly hurt by a lack of availability of insurance, include not only charitable organizations and small businesses, but product liability suits. *Id.* The implication appears to point to the general trend of the insurance cycle, and the lack of availability and increased expenses it causes. See generally the legislative debates cited *supra*.

191. See *supra* note 45 (comments by Senator Luther that the strength of tort reform is weeding out frivolous claims while retaining an adequate remedy for those most seriously injured).

192. ALASKA STAT. § 9.16 (1983) (allowing contribution after judgment and adopting Uniform Contribution Among Tortfeasors Act, 12 U.L.A. (1975 & Supp. 1986)); COLO. REV. STAT. § 13-50.5-101 (1986) (also adopting uniform contribution act); ILL. ANN. STAT. ch 70, § 301 (Smith-Hurd 1979 & Supp. 1986) (allowing contribution among tortfeasors); KAN. STAT. ANN. § 60-258 (1974) (comparative negligence only); VT. STAT. ANN. tit. 12, § 1036 (1979 & Supp. 1986) (comparative negligence only).

CONCLUSION

The Minnesota Tort Reform Act is, in many respects, typical of the responses developed by various states to the liability insurance problem.¹⁹³ The Act reflects the differing philosophies of the interests affected by high premium costs and a lack of available insurance.

In order to aid insurance actuaries in properly calculating premium rates, particularly in "specialty" commercial lines, the Minnesota legislature instituted various tort changes.¹⁹⁴ Hopefully, the specific reforms in medical malpractice,¹⁹⁵ litigation,¹⁹⁶ and governmental immunity¹⁹⁷ will provide immediate relief to those individuals who purchase liability insurance. The complexity of the financial, underwriting, and market relationships, however, has limited both the scope of the tort changes and the ability to measure the effect of the changes on premium prices and availability of insurance.¹⁹⁸ The increased disclosure requirements,¹⁹⁹ solidification of the JUA,²⁰⁰ and the controversies in the legislature itself all provide insufficient factual data upon which to base a stronger tort-insurance reform theme.

Accordingly, many questions must be answered by the private insurance industry. Current debates cover not only how much further regulation is necessary, but how much disclosure of investment cash flows and underwriting practices will be necessary to understand the problem.²⁰¹ Some critics feel that insurers have collaborated and are using the "crisis" to pressure legislatures into lowering their risk exposure at the expense of injured plaintiffs.²⁰² Other parties, concerned about the delicate relationship between the public sector and the insurance industry, argue that stronger tort reform measures should be taken and studied further before increasing regulatory remedies.²⁰³ It appears certain, however, that liability insurers can

193. Telephone interview with Brenda Trolin, Research Coordinator for the National Conference of State Legislators, (September 1986). See generally Trolin, *supra* note 29, describing the major areas of tort reform addressed by other states.

194. See *supra* notes 72-129 and accompanying text.

195. See *supra* notes 134-48 and accompanying text.

196. Included are changes in the collateral source rule, *supra* notes 72-86 and accompanying text; pleading and assessment of punitive damages and frivolous claims, *supra* notes 87-107 and accompanying text; calculation of future damages and pre-judgment interest, *supra* notes 108-20 and accompanying text; as well as a cap on some intangible damages totals, *supra* notes 121-26 and accompanying text.

197. See *supra* notes 151-80 and accompanying text.

198. See *Insuring Our Future*, Vol. II, *supra* note 2, at 10-15.

199. See *supra* note 66-68 and accompanying text.

200. See *supra* notes 50-59 and accompanying text.

201. Interview with B. Trolin, *supra* note 196. See also *Insuring Our Future*, *supra* note 2.

202. See Hunter, *supra* note 4, at 4-8.

203. *Insuring Our Future*, *supra* note 2, at 58-59.

no longer base underwriting policies on investment principles that result in bulging rates and coverage gaps. The availability of insurance, both in terms of full coverage and affordable prices, serves too great a public need.

Whether the JUA and its supporting measures can provide a satisfactory alternative to private insurance or become a quick bail-out for undesirable high risks is not clear. The JUA offers insurance to "anyone refused," but is both costly and unwieldy.²⁰⁴ One of the greatest attributes of the current tort system is the flexible array of remedies it provides an injured party. Greater public involvement could, in time, tradeoff this availability in favor of a system that provides an exclusive remedy, such as the No-Fault Act and the Workers' Compensation Statute.

Many proposed solutions have emanated from sources working to solve the problem. In order to increase competition and possible anti-trust action against insurers, some argue for a repeal of the McCarren-Ferguson Act.²⁰⁵ Similar proposals suggest more federal involvement and allowing banks to compete directly with insurance companies.²⁰⁶

Other suggested solutions would keep control of insurance in the hands of private companies, but limit their ability to abandon certain lines of insurance. These include "flex-rating" systems, which would limit the percentage of increase or decrease in premium rates that an insurer may charge in a given year.²⁰⁷ Similar proposals would require stable insurer reserves at levels necessary to meet claims.²⁰⁸ Others argue a need for standardized insurance policies to achieve more uniform judicial interpretations.²⁰⁹

Further tort reform is also being encouraged. Some suggestions include fixed rates of tort compensation and legal fees,²¹⁰ further penalties for frivolous claims,²¹¹ and encouragement of offensive collateral estoppel.²¹² Other advocates would return the tort system

204. See *supra* notes 54-59 and accompanying text.

205. 15 U.S.C. §§ 1011-1015 (1945). The pros and cons of removing the law from the federal statutes are discussed in *Insuring Our Future*, *supra* note 2, at 35-37.

206. Hunter, *supra* note 4, at 10-11.

207. *Id.* at 20. See also *Insuring Our Future*, *supra* note 2, at 93-98. A "flex-rating" system allows insurance companies to adjust actual rates of premium costs to reflect the insurance business cycle. It sets the limits on the upward and downward variations in the rates charged, however, so consumers are not priced out of the market when the cycle reaches its trough. *Id.* See also *supra* notes 4-16 and accompanying text.

208. See generally Hunter, *supra* note 4, at 3-4 (discussing need for effective, efficient regulation of industry).

209. *Insuring Our Future*, *supra* note 2, at 39-45.

210. Hunter, *supra* note 4, at 31-33.

211. *Id.* at 33-35.

212. See *id.* at 36-37.

to a complete reliance on fault as the sole basis of recovery, as opposed to risk-spreading.²¹³

It is doubtful that the tort and insurance reform measures enacted are complete. As the "crisis" continues through the current cycle, the opportunity to explore the scope and gravity of the problem will lead to more definite remedies. The short-term outlook, however, indicates a rough ride for those entities who rely on insurance availability.

E. Curtis Roeder

213. See generally *The Need for Reform*, *supra* note 15. The report contains a good discussion of the evolution of tort law and the gradual erosion of fault as the remedial guide, in favor of risk spreading.

