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IN THE SUPREME COURT OF FLORIDA

UNIVERSITY OF MIAMI, d/b/a
THE UNIVERSITY OF MIAMI
SCHOOL OF MEDICINE, a
Florida Corporation

Appellant,

vs. CASE NO. 78,210

PATRICIA ECHARTE,
etc., et al.,

Appellees.

**BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
AS AMICUS CURIAE
IN SUPPORT OF APPELLEES**

On Appeal from the District Court of Appeal, Third District

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") respectfully submits this Brief of Amicus Curiae in support of Appellees in this case. All parties have consented to the filing of this brief.

ATLA is a voluntary bar association whose 65,000 members primarily represent injured plaintiffs in personal injury suits, including medical malpractice actions. The victims of tortious misconduct cannot be identified in advance. There is a strong temptation for legislators to grant special benefits to powerful interests at the expense of future plaintiffs who have no voice to raise in protest. ATLA has sought to serve as that voice.

Judicial deference to legislative judgments is necessarily broad. But it is not unbounded. The state and federal constitutions limit the authority of legislatures to trade away the rights of powerless minorities. When legislatures violate those boundaries, it is the responsibility of the courts to declare those acts invalid.

For these reasons, ATLA has participated as amicus curiae in cases challenging the constitutionality of legislative caps on damages in tort actions. ATLA does so again in this case.

STATEMENT OF THE CASE AND FACTS

ATLA, as amicus curiae, adopts the statement of the case and facts set forth by Appellees, the Echartes, in their brief.

LEGISLATIVE BACKGROUND AND PROCEDURAL HISTORY

In 1986 the Academic Task Force for Review of Insurance and Tort Systems was created by legislative mandate to study the nature and potential causes of the medical malpractice insurance crisis in Florida. The Task Force found that the cost of medical malpractice insurance rose substantially between 1983 and 1986 and that the increased amount of malpractice claims paid by insurers during that period contributed, in part, to the rising cost of malpractice insurance. Based on this conclusion, the legislature enacted certain reforms of the civil justice system specifically relating to medical malpractice claims. Two of these statutory provisions, Fla. Stat. (Supp. 1988) §§ 766.207 and 766.209, are the subject of this controversy.

Section 766.207 creates what is referred to by the legislature as a "voluntary binding arbitration procedure". In practical terms, there is little that is voluntary about the procedure from the perspective of a seriously injured malpractice victim. Section 766.207 gives injured claimants the option to have their noneconomic damages capped either through arbitration or if they reject arbitration, at trial.[1] Given this Hobson's choice, it is not surprising that the trial court in Echarte held

[1]Section 766.202(7), Fla. Stat. (Supp. 1988), defines noneconomic damages as "nonfinancial losses which would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses."

these statutes unconstitutional on a multitude of grounds.[2]

The District Court of Appeal, Third District, affirmed, concluding that the statutes directly abrogated the Echartes' right of access to courts for redress of tortious injury. Because the Third District found the statutes invalid under Article 1, §21 of the Florida constitution, it did not consider other constitutional infirmities. University of Miami v. Echarte, Westlaw No. 1991 WL 98016 at 1.

SUMMARY OF ARGUMENT

The Limitation on Noneconomic Damages Violates Equal Protection and Due Process Guarantees Under the Florida and U.S. Constitution.

Whether legislative limitations on damages are constitutional has become an issue of significant concern across the country. As appellant correctly framed the issue in its brief, these type of cases concern the relationship between the legislative and judicial branches of state government and the role of the court in determining whether a legislative act is constitutional. Where the legislature usurps the power of the judiciary to determine the extent of damages, as in this case, amicus contends that the Court is obligated to review the

[2]These constitutional infirmities include violations of (1) right to access to courts (Art. 1 §21 of the Florida Constitution), (2) right to jury trial (Art. 1 §22 of the Florida Constitution), (3) substantive and procedural due process rights under both state and federal constitutions, (4) state and federal equal protection guarantees, and (5) the separation of powers provision (Art. II, §3 of the Florida Constitution).

legislation under its most elevated form of scrutiny. It is the role of the courts to balance individual liberties against state-made law in order to give each citizen their "due" under the law. A majority of courts of last resort that have considered this balance test have refused to allow such intrusion on the judicial role of settling controversies. Many of these courts have found limitations on damages to be unconstitutional on the same grounds that supported the trial court and Third District's decisions here. See, Moore v. Mobile Infirmary Assoc., Westlaw No. 1991 WL 190574 (Ala. Sept. 27, 1991) (right to jury trial); Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987) (right to jury trial, right of access to courts); Wright v. Central DuPage Hosp., 347 N.E.2d 736 (Ill. 1976) (special privileges); Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988) (right to jury trial, right to remedy); Carson v. Maurer, 424 A.2d 825 (N.H. 1978) (equal protection); Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991) (equal protection); Arneson v. Olson, 270 N.W.2d 125 (N.D.) (equal protection); Morris v. Savoy, 576 N.E.2d 765 (Ohio, 1991) (due process); Reynolds v. Porter, 760 P.2d 816 (Okla. 1988) (equal protection); Lucas v. U.S., 757 S.W.2d 686 (Tex. 1988) (open courts guarantee); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) (right to jury trial).[3]

[3] By far a minority of state courts have upheld damages caps. See, Fein v. Permanent Medical Group, 695 P.2d 665 (Cal. 1985); Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980); Samsel v. Wheeler, 789 P.2d 541 (Kan. 1990), and Etheridge v. Medical Center Hosp., 376 S.E.2d 525 (Va. 1989).

Amicus argues that the statutes at issue not only infringe on fundamental rights guaranteed by the Florida Constitution, but in doing so also violate equal protection and due process requirements of the Florida and federal constitutions. Amicus will show that the legislature has enacted these statutes without a sufficient compelling state interest and that this arbitration scheme is not the least restrictive means of fostering affordable medical malpractice insurance. Although this legislation merits strict judicial scrutiny, Amicus submits that the classifications at issue are not rationally related to legitimate legislative aims and therefore do not satisfy even the most minimal equal protection and due process requirements.

ARGUMENT

I. THE NONECONOMIC DAMAGES CAPS VIOLATE EQUAL PROTECTION

While Amicus believes §§ 766.207 and 766.209 directly violate plaintiffs' rights under Art. 1 §21 (the right of access to courts) and Art. 1 §22 (the right to trial by jury) of the state constitution, amicus notes that the Florida trial court found significant equal protection problems with these statutes as well. By allowing full recovery for those less severely injured medical malpractice victims and prohibiting full recovery for those most gravely injured, §§ 766.207 and 766.209 are prima facie discriminatory.

Statutes are generally clothed in the presumption of constitutionality, and the courts accord great deference to the

factual findings that support them.[4] This presumption of constitutionality does not hold true, however, where the laws operate to the disadvantage of a suspect class or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the state or federal constitution. In this regard the U.S. Supreme Court stated in San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973), that an equal protection analysis may be used to invalidate statutes "touching upon" or which have "deprived," "infringed,", or "interfered" with a fundamental right. 411 U.S. at 38. A brief review of state law unequivocally shows that access to courts and the right to jury trial are considered fundamental in Florida. These statutes must, therefore, withstand the highest standard of judicial scrutiny in order to be constitutional.

[4]One legal scholar has argued persuasively that judicial deference to legislation is only appropriate in areas in which the legislature has expertise or can obtain expertise. However, where, as here, the challenged legislation involves an area of judicial expertise, the determination of damages, there is no reason that undue deference should be accorded. P. Zwier and D. Peirmattei, Who Knows Best About Damages: A Case For Courts' Rights, 93 Dick. L. Rev. 689 (Summ. 1989).

A. The Statutory Scheme Violates Plaintiffs' Right of Access to Courts.

Article 1, §21 of the Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay."

In Kluger v. White, 281 So. 2d 1 (Fla. 1973), the Supreme Court of Florida declared that the right of access to courts for redress of tortious injuries cannot be restricted unless one of two conditions is met: (1) providing a reasonable alternative remedy or commensurate benefit or (2) a legislative showing of overpowering public necessity for the abolishment of the right and no reasonable alternative method of meeting such public necessity. 281 So. 2d at 4. Fourteen years later the court reemphasized in Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), that the right of access to courts is "a constitutional right which may not be restricted simply because the legislature deems it rational to do so." 507 So. 2d at 1088-89. In Kluger and Smith this Court clearly announced that any legislation that touches on the right of access to courts must pass this heightened scrutiny test. Other jurisdictions have similarly recognized the need to scrutinize carefully legislation that impinges on this important substantive right. Lucas v. U.S., 757 S.W.2d. 687 (Tex. 1988); Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989).

Section 766.207 specifically provides for voluntary binding arbitration of medical negligence claims. Although the legislature states that the arbitration procedure is voluntary, the practical effect of § 766.207 is that the defendant retains the real choice in determining whether plaintiffs will in fact have access to the courts and the incentives provided to victims of medical negligence to arbitrate are empty of any tangible benefits. Additionally, under § 766.209, plaintiffs are penalized by a noneconomic damages cap of $350,000 for seeking to go to court in lieu of the "voluntary" arbitration.

The Third District Court was simply not persuaded that this so-called voluntary arbitration preserved the parties' right of access to the courts. Rather, the court found that the statute directly abrogated Art. 1 § 21 and failed to meet the strenuous Kluger/Smith test. 1991 WL 98016 at 4. Clearly on point, Smith involved a provision of the 1986 Florida Tort Reform and Insurance Act, which created an absolute cap of $450,000 on noneconomic damages. The Florida Supreme Court held in Smith that the legislature had failed to provide a reasonable alternative for redress of injuries through the courts and, therefore, the noneconomic damages cap violated claimant's rights under Art. 1 § 21.

Defendant claims the arbitration scheme with noneconomic damage caps is distinguishable from the absolute cap in Smith. Amicus flatly rejects this assertion. As the Third District Court pointed out, where, as here, a defendant decides not to contest

liability and determines that claimant's noneconomic damages will surely exceed $250,000, it is virtually certain that defendant will request arbitration to obtain the benefit of the damages cap. 1991 WL 98016 at 5 n.17. Obviously, a claimant would choose to exercise the right to full redress at trial in that circumstance. Yet, under this legislative scheme the victim is precluded from full recovery and the negligent physician is rewarded with the noneconomic damages cap![5]

And what of the innocent victim of the negligence, who still wants to exercise his or her right to go to trial? The victim may "voluntarily" subject himself or herself to the $350,000 damages cap penalty in §766.209. For a catastrophically injured victim of medical negligence the "conditional" noneconomic damages caps of §§ 766.207 and 766.209 and the absolute noneconomic damages cap found unconstitutional in Smith are essentially the same--- an arbitrary restriction on the fundamental right to redress of tortious injury through the courts. Amicus respectfully refers this Court to the excellent discussion by plaintiffs and by amicus Florida Academy of Trial Lawyers, contending that these statutes violate the Echartes' right of access to courts.

[5] It has been proposed that the medical malpractice insurance problem could be solved, not by intricate schemes that reward the tortfeasors and unfairly limit the victims, but by identifying those few unskilled doctors and rehabilitating them or eliminating them from practice. For example, statistics show that in Florida a small percentage of physicians account for most of the paid insurance claims. From 1975-1986 4 % of the doctors in Florida had two or more paid claims and were responsible for 42.2% of the total paid claims for those years. Schmidt, Heckert, Mercer, Factors Associated With Medical Malpractice: Results From A Pilot Study, 7 J. Cont. H. Law & Pol. 157, 162 (1991).

B. The Statutory Scheme Violates the Fundamental Right to Trial By Jury.

Florida's constitutional guaranty of trial by jury provision is absolute. Devotion to this principle is reflected in the language of Art. 1, §22 itself: "The right of trial by jury shall be secure to all and remain inviolate." This Court gave its unqualified support to the view that Florida's constitutional guaranty of trial by jury reflects the "most basic and fundamental of all our rights" and is "one of the bulwarks of human liberties". Broward County v. La Rosa, 484 So. 2d 1374, 1378 (Fla. 4th DCA 1986), approved, 505 So. 2d 422 (Fla. 1987). Acknowledging this constitutional imperative, the Florida Supreme Court in Smith determined that as long as a jury verdict is being capped, the plaintiff is not "receiving the constitutional benefit of a jury trial as we have heretofore understood that right . . ." 507 So. 2d at 1088-89. In spite of defendant's attempts to differentiate an absolute damages cap from a "conditional cap" triggered by the arbitration provisions, there is no evidence to support this conjecture. The Smith court's prohibition is precise--- the right to jury trial is infringed "as long as a jury verdict is being capped . . ."

To justify setting a cap on noneconomic damages the Florida legislature stated in the preamble to Chapter 88-1 (amended and reenacted Ch. 88-277, Laws of Florida):

> WHEREAS, the Legislature finds that there are certain elements of damages presently recoverable that have no monetary value, except on a purely arbitrary basis, while

> other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss...

In spite of this disparagement of noneconomic damages by the legislature, there is no indication that a cap on noneconomic damages is a benign mechanism for lowering insurance payouts. In fact, the supreme court specifically cautioned that the right to redress for noneconomic injuries was subject to the same constitutional protections as economic injuries. Smith, supra., at 1087. As one court stated, because the determination of noneconomic damages is uncertain, their assessment is "primarily and peculiarly within the province of the jury, under proper instructions . . . (citations omitted)." Sofie v. Fibreboard Corp., 771 P.2d 711, 717 (Wash. 1989).

The U.S. Supreme Court jurisprudence on the seventh amendment's scope in federal civil trials, while not binding on the states, provides some insights into the jury's critical role in awarding noneconomic damages. The U.S. Supreme Court has declared that "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

Numerous other jurisdictions have invalidated tort reform legislation that limits the jury's ability to determine damages in a given case. In Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988), the Kansas Supreme Court struck

down the state's noneconomic damages cap as violative of the Kansas constitution's right to trial by jury. After determining that the jury's role in determining damages was constitutionally protected, the court stated: "It would be illogical for this court to find that a jury, empaneled because monetary damages are sought, could not then fully determine the amount of damages suffered." 757 P.2d at 258. Similarly, the courts of Alabama, Texas, and Washington held that damages caps violated their respective constitutional provisions guaranteeing the right to trial by jury. It is highly persuasive that the operative language of the right to jury trial provisions in those states' constitutions is nearly identical to Florida's. See, Clark v. Container Corp. of America, Westlaw No. 1991 WL 189464 (Ala. Sept. 27, 1991), (Alabama: "The right of trial by jury shall remain inviolate."); Kansas Malpractice Victims Coalition v. Bell, supra. (Kansas: "The right to trial shall be inviolate"); Lucas v. United States, supra., (Texas: "The right of trial by jury shall remain inviolate"); and Sofie v. Fibreboard Corp., supra. (Washington: "The right of trial by jury shall remain inviolate").[6] These well-reasoned opinions support the trial court's conclusion in Echarte that Florida's statutory scheme infringes on plaintiffs' right to trial by jury.

While the legislature may abolish legal claims or create new or limited statutory claims, amicus argues that that power does

[6]"Inviolate" is defined in Black's Law Dictionary 826 (6th ed. 1990) as "intact; not violated; free from substantial impairment."

not include the subsidiary power to arbitrarily limit the jury's power to award damages. If a jury's determination of the facts is reasonably based on the evidence presented, the right to a jury trial has little meaning when that determination can be disregarded simply because the legislature has determined that juries tend to award arbitrary and excessive damages. The legislature's distrust for the jury system---the belief that the judicial system must be protected from the whims of juries---cannot be validated by this Court if the jury's constitutionally mandated role as a fundamental safeguard of justice is to be protected. Note, Constitutional Challenges to Caps on Tort Damages: Is Tort Reform the Dragon Slayor or is it the Dragon?, 42 Maine L. Rev. 219, 243 (1990)

C. There is No Overpowering Public Necessity or Compelling State Interest for the Noneconomic Damages Caps.

As was discussed above, the right of access to the courts and the right of jury trial are fundamental rights in Florida. Under both Florida and federal law, a statute that infringes on a fundamental right is subject to strict scrutiny and will only be upheld if it is the least restrictive means necessary to achieve a "compelling state interest." Dunn v. Blumstein, 404 U.S. 330, 343 (1972); Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 251 (Fla. 1987). Absent any presumption of constitutionality, the Florida arbitration scheme with noneconomic damages caps comes to this Court with "the very heavy

burden of justification" required of statutes that touch upon fundamental rights. Loving v. Virginia, 388 U.S. 1, 9 (1967). As amicus will show below, the arbitration scheme with noneconomic damages caps fails dismally in this regard.

1. The medical malpractice crisis does not constitute an overpowering public necessity.

Under the Florida Supreme Court's holding in Overland Construction Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979), proponents of legislation abrogating a preexisting constitutional right must show an overpowering public necessity for "this prohibitory provision, and an absence of less onerous alternatives." 369 So. 2d at 574. This requirement was reiterated by the court in Smith, when it rejected an absolute noneconomic damages cap. (". . . one can only speculate how the legislative scheme will benefit the tort victim." 507 So. 2d at 1089.) Relying on the Smith court's analysis, the Third District Court held that defendant had failed to demonstrate an overpowering public necessity for the imposition of noneconomic damages caps only on the recoveries of the most seriously injured victims of medical malpractice.

Defendant claims that the "overpowering public necessity" that supports this legislation is found in the preamble to the statutes. There, the legislature found, inter alia, that the excessive and injurious cost of medical liability insurance premiums had caused a crisis in Florida's medical liability

insurance industry endangering a potential defendant's ability to purchase malpractice insurance and a potential claimant's ability to collect damages for losses. In spite of similar legislative findings supporting the cap in Smith, the Florida Supreme Court determined that a medical malpractice crisis did not amount to a compelling public necessity. 507 So. 2d at 1089. Other courts have similarly rejected the notion that a medical malpractice crisis is sufficient public necessity to support the imposition of damages caps. The Supreme Court of Arizona's statements on this issue aptly apply in Florida:

> [T]he state has neither a compelling nor legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged of access to, and remedy by, the judicial system. If such a hypothesis were once approved, any profession, business or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting access to the courts by those whom they have damaged. Under such a system, our constitutional guarantees would be gradually eroded . . .

Kenyon v.Hammer, 688 P.2d 961 (Ariz. 1984).

Thus, Florida and other jurisdictions have concluded that the medical malpractice insurance crisis is woefully inadequate justification for the imposition of noneconomic damages caps. Moreover, under the heightened scrutiny required in Florida, the legislature must show also that there are no less onerous alternatives to limiting the damages of the most severely injured victims of medical negligence. Overland Const. Co. v. Sirmons, supra. at 574.

2. There are other less onerous alternatives to alleviate the medical malpractice crisis.

Section 766.201, Florida Statutes (Supp. 1988) provides, in part:

> (1) The Legislature makes the following findings:
>
> . . .
>
> (d) The high cost of medical malpractice claims in the state can be substantially alleviated by requiring the early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.

Clearly, then, the legislature determined that binding arbitration and lowering insurer's loss payments by capping noneconomic damages would result in lower malpractice insurance premiums. Amicus contends that there is a difference between the objectives of reducing the number of claims and lowering of medical malpractice premiums. As will be discussed in Part II, below, the link between the two objectives was not established by the Task Force and cannot be shown to be rationally related based on current documented evidence.

Assuming, arguendo, that an arbitration scheme with noneconomic damages cap will have a positive effect on reducing insurance claims, there are a number of less restrictive means to ensure that noneconomic damages awards are not excessive. The judicial system has more than adequate safeguards to protect against irrational or arbitrary damage awards including

remittitur, additur, a grant of a new trial, or appeal procedures to overturn jury verdicts. Legislatively mandated damages caps reject all of these judicial controls in favor of across-the-board solutions. The only drawback to these alternatives from the legislature's point of view is that these less burdensome alternatives, rather than resulting in wholesale reductions in damages awards, ensure that noneconomic damages awards are fair. Despite the lofty goals of the preamble to this legislation declaring the "desire to provide a rational basis for determining damages for noneconomic losses," and recognition that ". . . noneconomic losses should be fairly compensated," the caps are totally arbitrary limitations, bearing no relationship to the injuries sustained by plaintiffs. See Preamble to Chapter 88-1 (Special "E" Session)(amended and reenacted Ch. 88-277, Laws of Florida)

As the Third District Court noted, the legislature did not expressly find that no less onerous alternative method existed for meeting the purported public necessity. In fact, the Task Force considered several alternatives before concluding that the noneconomic damages cap would reduce malpractice claims. These alternatives included mandating proof of gross negligence in some situations, providing more specific jury instructions on damages, limiting or abolishing punitive damages, and changing the collateral source offset. 1991 WL 98016 at 5 n.24; Medical Malpractice Reform Alternatives, Oct. 2, 1987 at 5. The Third District was unconvinced that the legislature had met the

specific Kluger requirement: that the noneconomic damages cap be the only alternative available to remedy the overpowering public necessity. 1991 WL 98016 at 4.

Thus, given the absence of a sufficient compelling state interest or overpowering public necessity and the fact that there were other reasonable alternatives available to combat the claimed arbitrary nature of noneconomic damages, Amicus argues that this Court must find these statutes unconstitutional under the strict scrutiny and Smith/Kluger tests. However, should this Court conclude otherwise, amicus argues that these statutes do not pass constitutional muster even under the most minimal standard of scrutiny, the traditional rational basis test.

II. THESE STATUTES FAIL TO MEET THE TRADITIONAL RATIONAL BASIS TEST AS ENUNCIATED BY THE U.S. SUPREME COURT

Under the traditional rational basis test, legislation that creates classifications is unconstitutional if it creates distinctions that are "purely arbitrary and totally unrelated to any state interest." Vildibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986). See also, De Ayala v. Florida Farm Bureau Casualty Insur. Co., 543 So. 2d 204 (Fla. 1989). The Supreme Court of Florida recently stated in Palm Harbor Special Fire Control Dist. v. Kelley, supra., that:

> It is well settled under federal and Florida law that all similarly situated persons are equal before the law. (citations omitted). Moreover, without exception, all statutory classifications that treat one person or

> group differently than others must appear to be based at minimum on a rational distinction having a just and reasonable relation to a legitimate state objective.

516 So. 2d at 251.

The U.S. Supreme Court has made it very clear that in applying the rational basis test courts should determine whether the challenged legislation will advance its stated purpose under the actual circumstances in which it must operate. The Court's recent decision in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) is an excellent indication of the Court's willingness to give greater scrutiny to legislative classifications that adversely affect important rights, such as those at issue here.

In Cleburne, the legislation at issue was a special zoning requirement that effectively barred a home for the mentally handicapped from a residential location. In assessing whether the ordinance met the rational basis test, the Court reviewed the record to determine whether the legislature's policy decisions were supported by a firm factual foundation, evaluated the propriety of burdening the particular class, and considered the relationship between legislative means and objectives. Although the zoning restriction would have furthered the municipality's justification under some conceivable set of facts, the Court examined the actual circumstances in which the regulation was intended to operate and found that there was no rational basis to believe the restriction would serve its stated purpose. Id. at

449-50. Under the Supreme Court's definition in Cleburne, the term "rational" requires that an impartial lawmaker could logically believe that a classification would serve a legitimate public purpose that "transcends the harm to the members of the disadvantaged class." 473 U.S. at 451-52 (Stevens and Burger, J.J., concurring).

A. The Statutes Are Not Rationally Related To a Legitimate State Objective.

1. The statutory scheme is not rationally related to the objective of reducing insurance premiums.

The legislature's stated objective in enacting Chapter 88-1, Laws of Florida (Special "E" Session) was to ultimately lower medical malpractice premiums through encouraging arbitration with noneconomic damages caps, thereby ensuring the continued availability of malpractice insurance for physicians and protecting injured victims from potential nonrecovery of losses. According to the preamble, the legislature found that, "The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims."[7]

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[7]Significantly, the Task Force also found several other factors contributed to the high cost of insurance premiums i.e., the insurance industry practice of setting premium rates by dividing Florida physicians into "risk" classifications determined by specialty and geographic location contributed to

Primary to a traditional rational basis analysis then is whether the cap on noneconomic damages will have the intended effect of reducing medical malpractice premiums. Reviewing the statutory scheme at issue here under a Cleburne analysis, it is evident that there was no firm basis for the Florida legislature to logically believe that the arbitration procedure with noneconomic damages cap would lower medical malpractice premiums. The legislature essentially incorporated the Task Force's factual findings to support enactment of these statutes. These findings were based on the Task Force Report that stated the "high-end awards are a substantial cause of the increase in paid losses." Academic Task Force Report on Medical Malpractice Recommendations, Nov. 6, 1987 at 26. As was pointed out by the Third District Court, the Task Force never differentiated between economic and noneconomic damages awards.

Nor did the Task Force determine that the potential lowering of the frequency or amount of claims would result in lower insurance premiums. In fact, the Task Force expressed grave doubts as to the efficacy of noneconomic damages caps in reducing medical malpractice premiums. It concluded that it could not

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the affordability problem experienced by some high-risk specialties. T. Tedcastle and M. Dewar, Medical Malpractice: New Treatment for an Old Illness, 16 Fla. St. U. L. Rev. 535, 548 (Fall 1988). The Task Force also found a clustering of a large percentage of the paid claims among a relatively small group of physicians (about 4% of the physicians in Florida had two or more paid claims that accounted for over 42% of the total paid out in medical malpractice indemnity payments between 1975 and 1986). Therefore, as the Task Force suggested, one alternative that would favorably impact malpractice premiums would be to have greater professional regulation. 16 Fla. St. U. L. Rev. at 552.

predict the effect of a damages cap on the cost of medical insurance premiums. Based on hypothetical calculations, the Task Force estimated that restricting the recovery of the most seriously injured victims of medical negligence would only result in a savings of somewhere between 2.4% to 11% in loss payments. Academic Task Force Medical Malpractice Final Recommendations, Mar. 1, 1988 at 62.

Nor was there any other positive indication before the legislature that a cap on noneconomic damages would reduce premiums. To the contrary, from experience with the tort reform measures in 1986 (which included an absolute cap of $450,000 on noneconomic damages) the legislature should have been aware that this limitation on damages would have virtually no effect on the insurance industry rates. Aetna Life and Casualty Co., one of the nation's leading commercial liability insurers and a leader in the industry's nationwide "tort reform" effort, unequivocally stated in 1987 that the $450,000 noneconomic damages cap would have no effect on insurance rates in Florida. After enactment of the 1986 tort reform act, Aetna filed for a 17.2% rate increase. St. Paul Fire and Marine Insurance Company similarly concluded that a noneconomic cap of $450,000 would produce little or no savings, finding that out of 313 closed claims it analyzed four would have been affected by tort reform for a total of about 1% in savings. National Insurance Consumer Organization (NICO), "'Tort Reform' A Fraud, Insurers Admit" (Oct. 20, 1986) (a press release which includes an Addendum prepared by St. Paul Fire and

Marine Insurance Company concluding that the noneconomic damages cap of $450,000 would produce little or no savings and an analysis by Aetna Casualty and Surety Company to support their request for a premium increase, which indicated no reduction of cost due to Florida's noneconomic damages cap). See also, Young, "No Florida Savings Seen From Tort Law Reform," J. of Com., Oct. 21, 1986 at IA, col. 1 and Hunter & Angoff, "Tort-Reform Legislation . . . Ought to Reduce Premiums," Wall St. J., Feb. 11, 1987 at 26 col. 3-4 [for the convenience of the court the above-cited NICO report and newspaper articles appear in the Appendix at the back of this brief]. In fact, shortly after enactment of the 1986 act St. Paul and CIGNA, another major malpractice insurer, discontinued coverage, citing refusal of state regulatory authorities to grant sufficient increases in premium rates. Comment, Shatter Some Myths on the Insurance Liability Crisis: A Comment on the Article by Clarke, Warren-Boulton, Smith and Simon, 5 Yale J. of Reg. 417, 429 n.13 (1988). The logical conclusion from the Florida experience of 1986-87 was that insurance companies would not voluntarily curtail the cost of insurance on the basis of a noneconomic damages cap.

This experience is replicated in many jurisdictions that enacted tort reforms between 1980 and 1986.[8] A 1987 United

[8] For example, in 1986, Colorado capped noneconomic damages, limited punitive damages, eliminated joint and several liability, and eliminated the collateral source rule. Soon after, Hartford Insurance Company announced that beginning in 1987 it would no longer write medical malpractice insurance in Colorado. J. Angoff, Insurance v. Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property Casualty Insurance

States General Accounting Office study of six states with tort reform legislation concluded that physicians' malpractice insurance costs had substantially increased between 1980 and 1986. Even after the California Supreme Court in Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985), held its $250,000 noneconomic damages cap constitutional, insurance premiums continued to increase in 1985 and 1986 by 66% and 71%, respectively. P. Zwier, D. Piermattei, Who Knows Best About Damages: A Case for Courts' Rights, 93 Dick. L. Rev. 689, 708 (Summ. 1989).

After Cleburne, it is evident that a statute cannot be constitutionally upheld "simply because there is a speculative benefit to the public . . .". 473 U.S. at 451-52. Without evidence that could lead the legislature to logically conclude that the arbitration procedure with noneconomic damages caps would actually aid in the stabilization or lowering of insurance premiums, amicus argues that the legislatively assumed link between noneconomic damages caps and alleviating the health care crisis is wholly irrational. As the court in Lucus v. U.S. stated:

In the context of persons catastrophically

Industry, 5 Yale J. on Reg. 397, 399 (1988).

In West Virginia, the legislature passed a medical tort reform statute in March 1986, which capped damages. In May, St. Paul Fire and Marine notified all West Virginia physicians that their insurance would be cancelled. The company claimed that the new law's insurance provisions were too onerous and the tort reform provisions too weak. In a special session, the legislature weakened the insurance provisions and strengthened tort reform. 5 Yale J. on Reg. at 399 n.12.

> injured by medical negligence, we believe it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease.

757 S.W.2d 687, 691 (emphasis added).

Weighing the uncertain impact of noneconomic damages caps on insurance premiums against the onerous burden on a severely injured victim of malpractice there is clearly no compelling justification to support the cap. More than legislative hope and a prayer should support measures that drastically restrict the rights of injured citizens to full compensation from those that have caused their injuries.

2. There is no rational basis to believe that the statutory scheme will ensure the availability of insurance or that injured victims will recover their losses.

The preamble to Chapt. 88-1, provides, in part,

> WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their noneconomic losses . . ..

From this statement, it is obvious that the legislature intended the statutes to combat both the unavailability of medical malpractice insurance and the possibility that injured victims would be unable to recover from uninsured physicians. These, however, are illusory objectives since the problem of

unavailability was never found by the Task Force and the statute does nothing to guarantee victims of medical malpractice recovery for their injuries.

In its recommendations to the legislature, the Task Force stated that although malpractice insurance was "approaching unaffordability", it has always been available from some source. The Task Force concluded that there was no genuine availability problem. Academic Task Force's Medical Malpractice Recommendations, Nov. 6, 1987 at 39. The legislature made no independent findings of fact but constructed its premises on the Task Force findings. In this instance, the legislative objective was formed without a Task Force finding and without any reasonable support in fact.

Nor do the statutes reasonably accomplish the objective of ensuring the availability of recovery for victims of medical malpractice. The Third District Court pointed out the flaw in this argument: because insurance coverage is not mandated by the statutory scheme, defendant's immunity from liability for noneconomic damages in excess of the cap is not dependent on insurance coverage and claimant is not assured recovery of its allowable losses.

The legislature also found that the incentive for arbitration, which results in a noneconomic damages cap, serves the goal of reducing the high cost of litigation, an element in the rising cost of in insurance premiums. Once again, the Third District Court deflated this objective by observing that the high

cost of litigation, "endemic in all litigation, is not sufficiently compelling to warrant a cap on damages." 1991 WL 98016 at 5 n.23. See Overland Const. Co., Inc. v. Sirmons, 369 So. 2d 572 (Fla. 1979). The court also noted that the arbitration scheme offers no particular benefit in reducing litigation expenses since defendants have always had the option to settle meritorious claims.

Clearly, then, what Florida legislator could logically believe that the statutory scheme would serve a legitimate public purpose that transcends the harm done to the most severely injured medical malpractice victims? The Ohio Supreme Court recently agreed that: " . . .[I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." Morris v. Savoy, 576 N.E.2d at 691. All logic leads one to the inevitable conclusion: that the Florida statutes at issue here are "unreasonable" and "arbitrary" and, for this reason, must be found to violate state and federal guarantees of equal protection.

III. THE STATUTES VIOLATE PLAINTIFFS' RIGHT TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS

Under Florida law, the test to be used in determining whether an act is violative of due process is essentially the same as that for determining a violation of equal protection: whether the statute bears a reasonable relationship to a

permissible legislative objective and is not discriminatory, arbitrary, or oppressive. Lasky v. State Farm Insur. Co., 296 So. 2d 9, 15 (Fla. 1974). As amicus discussed in Part II, above, the statues as issue are not rationally related to a permissible legislative objective. Moreover, the trial court in Echarte held the statutes at issue unreasonable and oppressive and created an entirely arbitrary line between recovery and nonrecovery of noneconomic damages. Amicus fully agrees that these statutes violate due process requirements of both the state and federal constitutions.

A. The Statutes Create Arbitrary and Discriminatory Distinctions.

The Florida Supreme Court found the arbitrary nature of the noneconomic damages cap in Smith to be particularly offensive to the principles of due process. The Florida Supreme Court in Smith stated:

> if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1.

507 So.2d at 1089. The supreme court's observations on the arbitrariness of damages caps apply equally as well here where the amount of noneconomic damages received depends more on how the defendant perceives his or her degree of culpability than on the victim's actual injuries.

If the legislature targeted noneconomic damages because they are arbitrary, it stands to reason that substituting a

inflexible damages cap that bears no relationship to the facts of a case would be even more objectionable and unfair. Clearly, the jury as a reflection of community values and standards can better assess the particular facts of a case after consideration of all relevant evidence than can a legislative body setting arbitrary limits of recovery. Sofie v. Fibreboard Corp., supra., at 716-17.

The statutes make arbitrary distinctions by preserving the right to full noneconomic damages to those whose injuries at the hands of negligent health care providers are moderate and requiring those who are severely injured to give back all of the jury's award of proven damages in excess of the cap. Perversely, the more severe, painful, and permanent the injury, the greater the rebate to the tortfeasor. This discriminatory treatment of medical malpractice victims was wholly unacceptable to the Supreme Court of New Hampshire and motivated that court's rejection of the New Hampshire statutory damages cap. The court there stated that it was

> . . . simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.

Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980).[9]

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[9]A multitude of factors have been shown to have some effect on insurance premium rates. In fact, a recently conducted study showed an unexpectedly strong positive correlation between the percentage of elderly (over 65 years) in a given state and the cost of medical malpractice insurance premiums. That the Florida legislature chose to experiment with the rights of one group of citizens, the most seriously injured victims, is an arbitrary decision. This classification should merit no greater legitimacy than had the legislature chosen to curtain only the rights of the

B. The Statutes Provide No Quid Pro Quo.

It is unresolved whether and to what extent the federal due process clause requires a legislatively enacted compensation scheme to be a quid pro quo for the common law or state law remedy it replaces. See Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 92-94 (1978). Regardless of how this issue is ultimately resolved by the U.S. Supreme Court, the Florida Supreme Court is free to require a reasonable quid pro quo and in fact did so in Kluger and Smith. The first prong of the Kluger/Smith test requires that before the legislature may abrogate a preexisting common law right it must provide a reasonable alternative remedy or commensurate benefit. It should be emphasized that under Smith, the legislature must provide an alternative remedy or benefit to the victims affected by the caps and not to society as a whole. 507 So.2d at 1089. Moreover, this quid pro quo must be commensurate with the rights denied.

One arguable advantage of this arbitration scheme is that a plaintiff gains an admission of liability from a defendant. However, as the Third District Court pointed out, little benefit is conferred by defendant's admission of liability since the claimant must demonstrate reasonable grounds to initiate medical negligence litigation in the first instance and defendant, although admitting liability, retains causation defenses. 1991 WL

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elderly to recovery. Zuckerman, Bovbjerg, Sloan, Effects of Tort Reforms and Other Factors on Medical Malpractice Insurance Premiums, 27 Inquiry 167 (Summ. 1990).

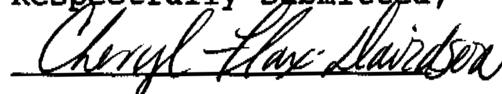
98016 at 3, §766.203(2), Fl. Stat. (Supp. 1988). The Third District Court determined and Amicus agrees that the statutes at issue here provide no reasonable trade off to a seriously injured medical malpractice victim for loss of noneconomic damages in excess of the cap. 1991 WL 98016 at 3. This court has emphasized in upholding other legislative schemes that deny pre-existing rights, such as workers' compensation and no-fault automobile insurance statutes, that the quid pro quo must be specific, substantial and must provide adequate, sufficient, even preferable benefits. See, Kluger v. White, supra.; Lasky v. State Farm Insur. Co., 296 So. 2d 9 (Fla. 1974). Here, as pointed out persuasively by plaintiffs and amicus Florida Academy of Trial Lawyers in their briefs, there are no substantial benefits provided to plaintiffs in exchange for giving up their rights to noneconomic damages in excess of the caps. One has to ask: What plaintiff would logically give up the possibility of full noneconomic damages for an admission of liability from an clearly liable defendant? What severely injured plaintiff would reasonably trade the right to full noneconomic recovery for a potential reduction in generalized health care costs? Unlike no-fault automobile and workers' compensation statutes where a similar assessment of benefits generally illicits a positive response, this legislatively compelled arbitration procedure offers no such compensating benefits to those whose rights are being compromised. In fact, as the Third District Court determined from Smith, the only real benefit of the statutes---

the damages cap---inures to the defendant. 1991 WL 98016 at 3, citing Smith, 507 So. 2d at 1088. Therefore, the statutory scheme fails to provide the quid pro quo required by the Kluger/Smith test and violates state and federal due process requirements.

CONCLUSION

Based on the foregoing, amicus respectfully submits that the Third District Court of Appeal did not err in declaring §§ 766.207 and 766.209, Fla. Stat. (1988 Supp.) unconstitutional.

Respectfully submitted,



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October 30, 1991

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APPENDIX

file

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"TORT REFORM" A FRAUD, INSURERS ADMIT

Limiting compensation to injury victims will not reduce insurance rates, according to documents filed in Florida by two of the nation's largest insurance companies.

A document prepared by Aetna Life and Casualty, one of the nation's leading commercial liability insurers and a leader in the industry's nationwide "tort reform" effort, analyzes five specific limitations on liability that Aetna is currently lobbying for. It concludes that one limitation will reduce rates by a maximum of 4/10 of 1%, while all other limitations will have no effect on insurance rates.

Enacted in Florida this spring, the five limitations are:

(1) reducing compensation to injury victims by the amount of compensation from collateral sources;

(2) restricting the doctrine of joint and several liability;

(3) limiting compensation for paralysis, disfigurement and other types of non-economic damages to $450,000;

(4) limiting punitive damages; and

(5) requiring periodic payments of future economic damages of more than $250,000.

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The Aetna document, a rate filing proposed to take effect January 1, 1987, explains why each of these provisions will have little or no effect on insurance rates. Eliminating the collateral source rule, for example, will have a negligible effect on insurance rates because "current Aetna claim settlement practices recognize, in part, the existence of collateral sources as part of the negotiating process used in arriving at a mutually satisfactory damage value with the plaintiff." Restricting joint and several liability will not reduce insurance rates "due to the interaction of economic damages sustained by the plaintiff, the percentage of liability assigned to Aetna's insured, and the policy limits purchased." And limiting compensation for "non-economic" damages will not lower insurance costs, according to Aetna, "due to the impact of degree of disability on future losses, the impact of policy limits, and the actual settlement reached with the plaintiff."

Finally, Aetna concludes, limiting punitive damages will have "no impact" on Aetna's claim values, and requiring periodic payments of future economic damages over $250,000 will yield "no net savings" because of the "interaction of policy limits, past economic losses, and future economic losses," the "settlement value of the case," and the "apparent implicit recognition of the periodic nature of future damages."

Aetna based its conclusions on an analysis of 105 claims

it had recently closed. Aetna analyzed these claims by sending out a form "designed to gather data on the impact of tort reform" to its branch managers. Interestingly, this form asks for and has yielded data, like those on the effect of joint and several liability and non-economic damages, that insurers have consistently refused to disclose to the public or legislators.

The St. Paul Fire and Marine Insurance Company, the nation's largest medical malpractice insurer, conducted an analysis similar to Aetna's and reached similar conclusions. The St. Paul found that 4 of the 313 closed claims it analyzed would have been affected by the "tort reforms" enacted in Florida, "for a total effect of about 1% savings." The St. Paul further explained that the 1% savings estimate probably overstates the savings resulting from tort reform.

The Aetna and St. Paul analyses were filed in response to legislation enacted in Florida this spring which both limited liability and required insurers to reduce their rates unless they could demonstrate that the limitations on liability would not reduce their costs.

The documents were released by the National Insurance Consumer Organization and Ralph Nader at a Washington, D.C. press conference. NICO is a non-profit, non-partisan consumer organization that monitors the insurance industry. It was founded by J. Robert Hunter, former Federal Insurance Administrator under Presidents Ford and Carter, in 1980.

The Florida Experience

During the great insurance crisis of 1986, tort "reformers" around the country urged passage of legislation limiting the right of victims of negligence to recover damages from wrongdoers. The argument was that restricting the right to recovery would result in savings in insurance costs, which would eventually be passed on to the purchasers of insurance policies. Thus, by limiting victim rights, lower insurance premiums could be had for businesses hardpressed to afford insurance. Remember, insurance premiums were escalating at astronomical rates. The argument had some appeal to legislators around the country. Depending on what is counted and who is doing the counting, from 10 to 34 states enacted assorted tort "reform" legislation in 1986.

After tort "reform" was enacted in Washington state and Maryland, we began to see glimpses of the real impact of tort "reform" on insurance rates. After a very broad tort "reform" bill was enacted in Washington state some 170 insurers filed for rate increases. The insurance commissioner politely asked all companies to re-file their requests and to specifically factor in the impact of the new law. In Maryland, where an onerous cap on damages was enacted, the doctors' insurer filed and received a 50% increase even before the Governor had signed the bill. Additional requests for rate increases are contemplated there.

But of all the evidence available to date, information filed with the Florida Insurance Department by Aetna Casualty and Surety Company and St. Paul explicitly answers the question of what effect does tort "reform" have on insurance rates. As the evidence shows, it has ZERO PERCENT (0%) impact, although in one area it does have a 0.4% (4/100) effect.

As a part of Florida's 1986 tort/insurance reform bill, the law requires insurers to disclose specific information on the effect of the tort provisions on insurance premiums. The law required a filing by October 1 for any insurer seeking rate increases effective January 1, 1987.

Prior to October 1, insurance trade associations filed a lawsuit challenging the constitutionality of the insurance portions of the Florida Act. As part of the lawsuit, the insurers sought and won a temporary restraining order relieving them of the burden of making the October 1 filings. In the lawsuit, the insurers alleged that the October 1 deadline was impossible to meet and further that beyond the time concern they did not have, nor could they ever reasonably assemble, the information needed to make the required filing.

St. Paul Fire and Marine Insurance Company
St. Paul Mercury Insurance Company
Medical Professional Liability
State of Florida

ADDENDUM

In 1986, Florida passed a number of changes to the tort system. We have reviewed the tort changes and their potential effect on our medical professional liability experience. Our review is based on a study of over 300 Florida closed claims. The total effect of the bill based on this evaluation was very small.

Evaluation:

Of the 313 closed claims that were studied, only four claims would have been effected by the law for a total effect of about 1% savings. (Exhibit A) Furthermore, all of these savings would have been eliminated if the courts had assigned only 10% more of the blame on our insureds than our claim department had estimated. It's highly likely that there would have been no savings on these claims had the bill been in effect. (Exhibit B)

Our study covered all of our Florida physicians, surgeons and hospital claims that closed in 1983 and 1984. Economic loss was determined based on the plaintiff's medical loss, weekly wage, and time lost from work. These losses were reduced for the time value of money.

We added the noneconomic loss cap to the total economic losses. The cap is $450,000 times the portion of negligence assigned to our insured. We compared this maximum award under the new law to the amount that the St. Paul actually paid on behalf of our insured.

The conclusion of the study is that the noneconomic cap of $450,000, joint and several liability on the noneconomic damages, and mandatory structured settlements on losses above $250,000 will produce little or no savings to the tort system as it pertains to medical malpractice.

Comments on other provisions of the bill:

a. Collateral source offset

The medical malpractice provisions prior to this act provided for subrogation against collateral providers. The effect of this subrogation would be similar to the effect of the collateral source rule. Therefore, the net effect of eliminating the subrogation and allowing collateral sources is negligible.

b. Itemization of Damages

Damages were itemized in our evaluation of this tort reform and no savings were shown. They are probably already implicitly itemized by either juries or our claim department when settling claims. We expect no savings from this provision.

St. Paul Fire and Marine Insurance Company
St. Paul Mercury Insurance Company
Medical Professional Liability
State of Florida

ADDENDUM
(Continued)

c. Frivolous Suit Protection

This provision can either work for or against us depending on who wins the case. No savings are expected from it.

d. Additur/Remittitur

This provision can also work for or against us. No savings are expected.

e. Punitive Damages

The legislation reduces the monetary incentive for punitive damage cases, but not total award amounts. Since these cases often have a retaliatory incentive, no savings are expected.

f. Timing of Effects

The tort changes made in Florida apply to losses occurring on or after July 1, 1986. On a claims-made policy, they will effect only the portion of our expected losses with accident date after July 1, 1986. This will impact the equivalent of our first year losses.

g. Conclusion

The tort law changes effective July 1, 1986 in Florida will, hopefully, have a positive impact on loss costs for occurrences after that date. However, to forecast the effect is highly speculative. Our evaluation of prior losses showed little or no savings under key provisions of the law and our analysis of other provisions show no expected savings. Our best estimate is no effect from the tort changes.

It can be hoped that the adoption of these tort changes will have an intangible effect on society, and further work to mitigate future loss trends. However, the trends in medical malpractice have been very high. The effect of the reform needs to be very strong to stem such trends.

Exhibit A

FLORIDA STATE TORT REFORM EVALUATION

EFFECT OF NONECONOMIC DAMAGES CAP, APPORTIONMENT OF LIABILITY, AND MANDATORY STRUCTURED SETTLEMENTS

FLORIDA PHYSICIANS' AND SURGEONS' DATA

LOSS SEVERITY	1984 INCURRED LOSS & LAE	PROJECTED PERCENTAGE SAVINGS	PROJECTED LOSS DOLLAR SAVINGS
EMOTIONAL	$759,962	0.0%	$0
TEMPORARY	$5,867,384	0.0%	$0
PERMANENT PARTIAL	$12,424,121	0.0%	$0
PERMANENT TOTAL	$8,347,000	0.0%	$0
DEATH	$9,337,688	4.5%	$420,196
TOTAL	$36,736,155	1.1%	$420,196

COUNTRYWIDE PHYSICIANS' AND SURGEONS' DATA

LOSS SEVERITY	1985 INCURRED LOSS & LAE	PROJECTED PERCENTAGE SAVINGS	PROJECTED LOSS DOLLAR SAVINGS
EMOTIONAL	$8,217,941	0.0%	$0
TEMPORARY	$81,499,529	0.0%	$0
PERMANENT PARTIAL	$110,004,377	0.0%	$0
PERMANENT TOTAL	$80,695,313	0.0%	$0
DEATH	$99,481,842	4.5%	$4,476,683
TOTAL	$379,899,002	1.2%	$4,476,683

FLORIDA CLOSED CLAIM STUDY

CLAIMS PRODUCING SAVINGS UNDER JULY 1,1986 LEGISLATION

LOSS SEVERITY	ECONOMIC LOSS	INSURED NEGLIGENCE	INDEMNITY PAYMENT	NONECONOMIC CAP	PROJECTED SAVINGS
TEMPORARY	$0	0%	$66	$0	$66
TEMPORARY	$0	0%	$194	$0	$194
DEATH	$10,000	3%	$38,975	$11,250	$17,725
DEATH	$5,000	25%	$350,000	$112,500	$232,500

CLAIMS PRODUCING SAVINGS UNDER JULY 1,1986 LEGISLATION
ASSUMING 10% GREATER LIABILITY ASSIGNED TO INSURED

LOSS SEVERITY	ECONOMIC LOSS	INSURED NEGLIGENCE	INDEMNITY PAYMENT	NONECONOMIC CAP	PROJECTED SAVINGS
TEMPORARY	$0	10%	$66	$45,000	$0
TEMPORARY	$0	10%	$194	$45,000	$0
DEATH	$10,000	13%	$38,975	$56,250	$0
DEATH	$5,000	35%	$350,000	$450,000*	$0

* INSURED LIABILITY EXCEEDS CLAIMANT LIABILITY

Commercial Insurance Division
151 Farmington Avenue
Hartford, CT 06156
(203) 273-0123

August 8, 1986

FCC-86-2172

FORMS AND CONTRACTS

Honorable Bill Gunter
INSURANCE COMMISSIONER
Florida Department of Insurance
Tallahassee, FL 32301

ATTN: Mr. Charlie Gray, Chief
Bureau of Policy and Contract Review

Dear Mr. Gray:

RATE REVISION
CONTRACTORS LIABILITY POLICY PROGRAM
THE AETNA CASUALTY AND SURETY COMPANY
THE STANDARD FIRE INSURANCE COMPANY
THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT

In accordance with your Insurance Laws, our Companies file a revised liability rate level which results in an overall selected premium increase of 17.2% with an annual premium effect of $622,250.

Our Companies' decision to revise rates results only after a thorough and comprehensive analysis. We evaluated our experience, market conditions, tort reform, and other relevant factors as they affect the establishment of adequate rate levels. The enclosed exhibits prepared by actuarial unit are submitted in support of our rate filing decision, and demonstrate that the resultant rates are neither excessive, inadequate, nor unfairly discriminatory.

We propose to implement this filing with respect to all policies written on or after January 1, 1987. So as to not delay the filing of our rate level decision, revised rate pages will be forwarded under separate cover when available.

A stamped, self-addressed envelope is enclosed for your convenience in responding.

Sincerely,

Thomas L. Rudd

Thomas L. Rudd, Superintendent
Insurance Department Affairs - Commercial Lines

BODILY INJURY CLAIM COST IMPACT OF FLORIDA TORT LAW CHANGE

Summary

The following table summarizes the expected impact of the new Florida law on bodily injury claims costs (including Allocated Loss Adjustment Expenses). The impacts shown were developed from data gathered via a special claim study conducted by the AEtna. The claim study and the analysis are detailed in the succeeding sections of this memorandum.

Impact of Tort Law Changes

Impact of Tort Law Changes

Tort Law Change	Line of Business: Products Bodily Injury	Line of Business: All Other General Liability
Collateral Source Offset	0	(0.4%)
Joint & Several	0	0
Limitation of Noneconomic Damages to $450,000	0	0
Punitive Damages	0	0
Future Economic Damages over $250,000 Paid at Present Value	0	0

All Other General Liability includes the bodily injury liability portion of package policies, SMP Section II, and monoline General Liability policies. The analysis as shown is based solely on AEtna data and, therefore, is applicable only to AEtna's book of business.

Claim Study

The attached special claim analysis form, designed to gather data on the impact of the tort reforms, was completed by experienced Branch Office claim personnel. Claims eligible for analysis were selected according to the following criteria:

1. Commercial Casualty claims (excluding National Accounts business) for policy years 1981 through 1985
   a. reported prior to January 1, 1986
   b. open as of May, 1986
   c. closed during the last six months

2. All claims in category (1) with indemnity payments or reserves over $25,000 were analyzed (total of 55 claims).

3. Fifty closed claims with indemnity of less that $25,000 were randomly selected.

The completed forms were reviewed for internal consistency prior to coding and analysis.

Collateral Source Analysis

Exhibits I and II detail the analysis of the revision in the collateral source rules. Exhibit I is for claims over $25,000 indemnity. Exhibit II is for claims under $25,000 indemnity.

Exhibit I shows that since the right of subrogation exists for many collateral sources available to the plaintiff, the economic losses incurred are not expected to be substantially reduced due to the law change. Furthermore, current AEtna claim settlement practices recognize, in part, the existence of collateral sources as part of the negotiating process used in arriving at a mutually satisfactory damage value with the plaintiff.

Exhibit II shows that for claims under $25,000, no additional savings are expected due to the change in Florida law.

Joint and Several Analysis

Exhibit III details the analysis of joint and several additional payments made by AEtna. Total joint and several payments were 4.5% of indemnity payments over $25,000. A review of each claim generating additional payments due to joint and several liability indicated no reduction in those payment due to the interaction of economic damages sustained by the plaintiff, the percentage of liability assigned to AEtna's insured, and the policy limits purchased.

Analysis of Limitation of Noneconomic Damages to $450,000

Nine claims had the potential for coming under the new limitation for noneconomic losses. The nine cases were identified on the basis of full liability value—not our insured's share of the liability. Data in the above format allowed for a review of whether total claim value could be reduced and whether such a reduction would impact on AEtna's incurred claim cost.

The review of the actual data submitted on these cases indicated no reduction of cost. This result is due to the impact of degree of disability on future losses, the impact of policy limits, and the actual settlement reached with the plaintiff; all seemed to reduce the expected noneconomic component of damages to less than $450,000.

Analysis of Punitive Damages

Only two cases were found where punitive damages had an impact on the claim settlement value. The total impact was estimated at less than $15,000 or less than 0.1% of total indemnity payments. Consequently, it appears that there will be no impact on AEtna's claim values due to changes in the allocation of the punitive damages awarded.

Analysis of Installment Payment of Future Economic Damages Over $250,000

Ten claims had the potential for coming under this section of the law. The review of individual cases indicated no net savings to AEtna for the following reasons:

1. interaction of policy limits, past economic losses, and future economic losses

2. settlement value of the case

3. apparent implicit recognition of the periodic nature of future damages

Overall Summary

The expected net reduction in claim costs is based on an analysis of AEtna claims. As such, the analysis is applicable only to AEtna's book of business.

Due to the level of detail of the historical claim data, informed claim judgement was required in some instances to ascertain some of the detail required for the analysis. The judgement, if any, was exercised by experienced claim adjustors and is implicit in the analysis.

The analysis shown represents the best estimate of future cost reductions if the law as currently structured remains in effect. However, the sunset provision of the law takes effect in four years. Furthermore, the law applies only to cases filed under the law, and the Florida statute of limitations is four years. Consequently, it is possible that any plaintiff who might be severely impacted by the provisions of the law would delay filing until after the law expires. If this situation arises, then the expected reductions will be lower than those indicated in this memorandum.

Tort-Reform Legislation . . .

. . . Ought to Reduce Premiums

By J. Robert Hunter Jr.
And Jay Angoff

Will "tort reform"—limiting the amount injured people can recover in court—reduce insurance rates? Some legislators may believe that it is good public policy to reduce such rates by limiting compensation to injured people. But surely no one believes that we should limit compensation to injury victims and get nothing in return. Yet that's exactly what two of the nation's largest insurance companies seem to be saying—just as the reforms they had lobbied for in Florida go into effect.

Aetna Casualty & Surety Co. and St. Paul Fire & Marine Insurance Co. recently told the Florida Insurance Department that their insurance rates won't be affected by the following limitations on compensation, which were recently enacted in that state:

- Limiting compensation for paralysis, disfigurement and other types of pain and suffering to $450,000.
- Limiting punitive damages — damages assessed when a defendant has acted recklessly or maliciously.
- Restricting the doctrine of joint and several liability, which allows an injured person to recover from one of several negligent defendants, with the defendants then working out among themselves who ultimately must pay how much.

In a request for a 17% rate increase on Aug. 8, Aetna argued that based on its detailed analysis of 105 claims it had recently closed, limiting punitive damages will have "no impact" on its rates, since punitive damages accounted for only 0.1% of Aetna's payouts. It further argued that limiting damages for pain and suffering to $450,000 will not reduce rates because, among other things, most policyholders purchase limits of less than $450,000.

And it claimed that restricting joint and several liability will not reduce insurance rates "due to the interaction of economic damages sustained by the plaintiff, the percentage of liability assigned to Aetna's insured, and the policy limits purchased." For example, if the plaintiff's damages are $1 million, and Aetna's policyholder is 20% liable and has policy limits of $200,000, whether joint and several liability applies is irrelevant to Aetna, since under the policy the maximum it must pay is $200,000.

Striking, Ironic Conclusions

Ironically, Aetna lobbied aggressively throughout the country for the tort reforms it now says are worthless. Doubly ironically, it has held up the specific reforms enacted in Florida as a model for other states to enact. Florida is one of only seven states to have enacted "full-fledged tort reform," Aetna general counsel Stephen Middlebrook told the American Bar Association's annual meeting last summer. Perhaps most ironic of all, what Aetna has told the Florida Insurance Department in its recent rate filing flatly contradicts what the insurance industry's public-relations arm, the Insurance Information Institute, has been consistently telling the public and legislators for more than a year.

St. Paul conducted an analysis similar to Aetna's and reached similar conclusions. It found that only four of the 313 closed claims it analyzed would have been affected by the Florida "tort reforms," and concluded that they "will produce little or no savings to the tort system as it pertains to medical malpractice."

St. Paul's conclusion is striking in view of its threat this spring to withdraw from the West Virginia medical-malpractice market, in part because the legislature there had failed to significantly limit compensation for pain and suffering or restrict joint and several liability. Even more striking, after the West Virginia legislature went into special session and, among other things, limited joint and several liability so that St. Paul would not withdraw from the state, the company sought a 136% rate increase—on top of the 190% increase it had received the year before.

Perhaps most significant, the Aetna request for a rate increase includes a form that asks for, and has yielded, very specific data on the effect on Aetna's payouts of noneconomic damages, punitive damages, joint and several liability, and other legal doctrines. Up to now Aetna has consistently refused to disclose such data to the public or to legislators and, in fact, has maintained that such data are impossible to obtain.

> *What Aetna has told the Florida Insurance Department flatly contradicts what the insurance industry's public-relations arm has been consistently telling the public and legislators for more than a year.*

It is not just Aetna and St. Paul that are telling us this. In a letter to the Kansas Insurance Department, State Farm said that tort reform would have a negligible effect on rates; the Insurance Services Offices—the national industry organization that issues rate information—has announced that its new rates will show no savings from tort reform; and Great American West Insurance Co. has told the insurance commissioner of Washington, which enacted the most comprehensive tort-reform legislation in the nation last year, that tort reform would actually increase its insurance rates. No wonder the insurance industry earned a record $11.5 billion in 1986, 605% more than in 1985.

Last year, several state legislatures enacted legislation that would limit the amount severely injured people could recover in court—in the good-faith belief that such limitations would reduce insurance rates. Aetna (one of the nation's largest insurance and financial-services companies) and St. Paul (the nation's largest medical-malpractice insurer), among other insurers, have now stated that limiting compensation to the severely injured will not reduce rates. So don't be surprised if, just as last year was the year of "tort reform," this year turns out to be the year of insurance reform.

Mr. Hunter is president and Mr. Angoff is counsel of the National Insurance Consumer Organization, in Alexandria, Va.

Axilrod, vice chairman of Nikko Securities Co. International. Mr. Axilrod, who works in the New York office of the Tokyo-based firm, said his forecast assumes that inflation will remain low and that long-term interest rates will remain at their current levels.

In an interview before addressing the Japan Society, he said there is a 50% chance that by the end of the year the United States, Japan or Germany would cut its discount rate.

Mr. Axilrod was the Federal Reserve Board's top ranking staff official for the last 10 years before he joined Nikko in July.

Machel Dies in Crash

KOMATIPOORT, South Africa — President Samora Machel of Mozambique and 26 other people were killed when their twin-engine plane crashed in bad weather just inside South Africa, foreign minister R.F. Botha said.

Mr. Botha, who flew to the crash site by helicopter and saw Mr Machel's body, told reporters at Komatipoort, near the scene, that there were 10 survivors of Sunday night's crash, including the Soviet pilot of the Tupolev 134-A jet. Mr Machel's personal plane.

He said the 27 dead included Mozambique's transport minister, Luis Alcantara Santos, a deputy foreign minister and Mr. Machel's secretary.

Mr. Machel had been president of Mozambique, a nation of 3.4 million people, since its independence from Portugal in 1975. Before taking up arms against colonial forces in 1964, he had been a nurse at a hospital in the capital.

From Wire and Staff Reports

road business when it passed legislation permitting establishment of the mechanism for transferring Conrail to the public sector.

But the final bill that calls for a public offering of the government's interest in the railroad — created in 1976 out of the wreckage of the Penn Central and six other Northeast carriers — is totally different from Reagan administration plans in this area.

The Department of Transportation originally wanted to sell the carrier to Norfolk Southern Corp.

That approach cleared the Senate...

SEE CONGRESS, PAGE 6A

while also purchasing advanced Western passenger planes, Soviet and Chinese aviation specialists here say.

Western sources say the drive by each country to build up and modernize its economy is taking place against the background of a trend toward normalization of Sino-Soviet relations, including economic relations.

Some Western sources say China will require perhaps as many as 300 passenger aircraft over the next 10 to 15 years. Such a deal, if it had been negotiated with a U.S. aircraft manufacturer, would have carried a price tag of at least $1 billion.

The Western sources say China represents one of the world's fastest growing aircraft markets. Boosting growth is the reported desire to push regionally based air carriers in China. Sources add that China need increased air transportation to promote greater access to world markets.

Trade between China and the Soviet Union also is soaring. In its first nine months of this year, China's imports from the U.S.S.R. were reported to have climbed 57.6%

> manufacturer, would have carried a price tag of at least $1 billion.

APC Net Falls, But Optimism Abounds

By JOHN DAVIES

Journal of Commerce Staff

OAKLAND — Higher taxes drove third quarter profit at American President Cos. down 34% to $9.3 million from $14.2 million a year ago.

But analysts said the fact that the transportation company's pretax earnings rose 9%, to $19.5 million from $17.9 million, suggests a continuation of the turnaround that occurred in the second quarter. Third quarter revenue was $334.2 million, up from $301.6 million.

Sally Smith, transportation analyst for Alex. Brown and Sons Inc. in Baltimore, called the financial results "very positive." Higher pretax profit, coupled with record growth in volume, continue to look good, she said.

American President Lines ships carried 30% more cargo in July, August and September of 1986 than they had during the same months a year earlier. In an even more dramatic development, APL, a subsidiary of APC, steadily expanded the number of double-stack trains it operates, boosting its domestic cargo volume by 70%.

W. Bruce Seaton, chairman of American President Cos., said third quarter profit was higher even though ocean shipping rates are much lower than they were a year ago. Mr. Seaton said the company had moved into rail operations to help offset downturns in the profitability of ocean shipping.

Mark Thompson, APC vice president of investor relations, said the third quarter results confirm the effectiveness of that strategy.

"We were pleased with the results," he said. "The overall demand for premium transportation has increased, despite the fact that rates were lower than last year. The significant items were the combined strength in ocean and domestic volumes."

Mr. Thompson said American President Cos. sees "a continuing improvement in our overall business."

He would not specifically forecast

SEE APC PAGE 18A

No Florida Savings Seen From Tort Law Reform

By LEAH R. YOUNG

Journal of Commerce Staff

WASHINGTON — There will be no insurance savings due to tort law reform in Florida, according to documents filed by Aetna Casualty and Surety Co. and St. Paul Fire and Marine Insurance Co.

The documents, filed with the Florida insurance commissioner, were revealed here by J. Robert Hunter, president of the National Insurance Consumer Organization, a Ralph Nader-affiliated consumer group fighting tort reform.

"Aetna sold the state of Florida a false bill of goods," Mr. Nader told reporters Monday.

The company lobbied for tort law changes saying limitations on the right to sue would affect liability insurance rates, but then "it broke its promise and reported that these changes will not affect insurance rates," Mr. Nader said.

"They have to be lying one way or another," Mr. Hunter told a press conference. Either tort law reform will not save insurance dollars, he said, or it will. But Aetna is now arguing it both ways, he added.

Mr. Hunter suggested that the restrictions in the Florida law would, under his analysis, save about 7%.

Aetna told the Florida commission that limitation of non-economic damages to $450,000 would result in "no reduction of cost. This result is due to the impact of degree of disability on future losses, the impact of policy limits, and the actual settlement reached with the plaintiff.

"All seemed to reduce the expected non-economic component of damages to less than $450,000," Aetna added.

Peter Lefkin, counsel to the American Insurance Association, said in an interview that there are problems with the Florida example.

For starters, he said, the law has been challenged by both the trial bar and the insurance industry and is on appeal before the Florida Supreme Court.

SEE NO, PAGE 16A

Japan Eyes Crude Steel Output Slide

By A.E. CULLISON

Journal of Commerce Staff

TOKYO — Japan's crude steel production will drop under 100 million metric tons in 1986 for the first time in three years, according to the Ministry of International Trade and Industry.

Ministry officials report this year's crude steel output will dip by 7% from production in 1985 to only 97.9 million metric tons. This is the lowest point since the 97.98 million metric tons recorded in 1983. (A metric ton equals 2,200 pounds.)

At the same time, steel industry sources disclosed that up-to-date estimates show the industry's experts this year will reach no more than 30.5 million metric tons. This would be a 3,000,000-metric-ton decline from the previous year.

Should this gloomy forecast prove accurate, it would be the first year-to-year fall since 1981. That was the

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SUMMARY OF EVERY MAJOR STORY, 2A

hearings were held last week.

Testimony showed that the surcharge for doctors being sued for malpractice has, in effect, boosted St. Paul's premium income for the state by 8.5% above the 18%.

The company said the surcharge ... reasonableness of the proposed rate increase."

The company said that both the higher rates and the investment income on the reserves would not result in a profit in the state on medical malpractice insurance.

concrete barrier at 35 miles an hour with dummies strapped inside to determine if occupants would suffer fatal head injuries. Cars in which the dummies would "die" are rated worst, those in which the dummies, and therefore presumably people, would live are rated "Best." So you end up with multiple winners or losers.

In August tests, the government said the Subaru GL was the worst since a dummy scored a 1,728 head injury, whatever that means. However, the government performed the same test in April and concluded that the Isuzu I-Mark was the worst with a 2,172 score. What about the person who saw the April results on the Isuzu and rushed out and bought a Subaru GL?

In the latest test, the government concluded that Ford Taurus and Mercury Sable failed to meet unoffi-

Consider a test in which 1,000 or higher rank means the dummy at the wheel would have been taken to the mortuary, and below 1,000, the dummy would have survived. The subcompact Nova scored very well at 552, slightly better than a full size Olds 88 at 668 but far better than a full size Buick LeSabre at 908. But if you were about to run into another car, would you rather be behind the wheel of a tiny Nova or, as the slogan goes, wouldn't you really rather have a Buick?

And how could the Olds 88 score so much better than a LeSabre when the two are GM H-body cars — the same vehicles except for grilles, trim and price? Same with Taurus and Sable, built in the same factory, yet they scored differently.

In addition to crash tests, best/worst lists filter in from the insurance industry. These studies are

Smoking Population Declines

NEW YORK — The proportion of Americans who smoke has declined markedly over the last decade, but those who smoke are smoking more heavily, according to the American Cancer Society.

The percentage of adult males who smoke dropped from 42% to 33% from 1976 to 1985, while the percentage of adult female smokers dropped from 32% to 28%, the society said.

However, the society said the proportion of male smokers 20 years of age and older consuming 25 or more cigarettes a day increased from 31% to 34.1% between 1976 and 1980, then dropped back to 31% in 1985. Among females, this proportion increased from 19.6% in 1976 to 23.7% in 1980, then declined to 23% in 1985. (AP)

No Florida Savings Seen From Tort Law Reform

CONTINUED FROM PAGE 1A

If companies reduce rates for 1987 and the law is overturned, Mr. Lefkin said, "we have to eat up that loss."

There also is fear among companies doing business in Florida that the four year time limit in the law combined with Florida's four year statute of limitations might result in attorneys delaying the filing of suits until the law expires.

But Aetna alluded to this problem in its presentation to the department, saying that if this law is allowed to expire, "the expected reductions will be lower than those indicated in this memorandum."

Aetna told the department that its estimates are based on "future cost reductions if the law as currently structured remains in effect."

Elizabeth Krupnick, a public relations spokesman for Aetna, said many of the tort law changes in Florida were "diluted."

For instance, she said, the collateral source law allows for subrogation, so pay-outs by health insurers and others may be recouped from the liability insurer.

Dale Hazlett, director of the Florida department's Division of Insurance Rating, said his office is reviewing filings received from "many, many" companies, and the task is not completed.

"There are areas where the department will have questions and will require further clarification," he said, adding that the effects of tort reform would be one area. The department, he added, can turn down the requests for increases if the justifications filed by the companies are found to be inadequate.

He also noted that other companies have filed for increases that did include a reductive effect from the tort reform elements of the law.

"The savings from tort reform are only as good as the law that is passed," she said.

Ms. Krupnick contrasted the Florida situation with Aetna's actions after tort law changes in New York and Connecticut.

In New York, she said, Aetna decreased liability rates by 7% while in Connecticut it pulled back expected increases in personal and commercial automobile lines.

She added, too, that another goal of tort reform is increasing availability of insurance, and availability problems are easing where tort reform has been enacted.

A chart produced by Aetna showed that collateral source offset in which other sources of compensation are taken into consideration would have zero effect in products liability bodily injury claims and 0.4% in all other general liability.

Limitations on joint and several liability in which one defendant can be saddled with total pay-out would gain 0% in either category, the chart showed.

Limitations on punitive damages and requiring periodic payment of future economic damage above $250,000 also have no monetary effect on the costs of either products bodily injury or all other general liability.

A similar chart showed no effect on automobile bodily injury claim costs from tort law changes in Florida, either.

In a similar analysis, St. Paul Fire and Marine Insurance Co. concluded that "the non-economic cap of $450,000, joint and several liability on the non-economic damages, and the mandatory structured settlements on losses above $250,000 will produce little or no savings to the tort system as it pertains to medical malpractice."

St. Paul went on to say that it is hopeful that the tort law changes which went into effect July 1 in Florida might have an impact on losses that occur after that date.

But, the company insisted, "to forecast the effect is highly speculative. Our evaluation of prior [illegible] showed little or no savings under key provisions of the law and our analysis of other provisions show no expected savings. Our best estimate is no effect from the tort changes."

In its letter to the Florida Insurance Department, Aetna asked for selected premium increases of 17.2% with annual premium effect of $422,250 on policies written on or after Jan. 1, 1987.

In its presentation to the state insurance department, St. Paul suggested that it might have limited savings in malpractice claims resulting in death.

A 4.5% savings in this one category could result in dollar savings in the state of $420,196 on coverage of physicians and surgeons.

Mr. Hunter surmised that the insurance industry must believe that tort law changes will affect insurance costs since it is lobbying every state legislature and the federal government for changes.

"I think they want to pocket the money," he said of the Florida filings.

He noted, too, that to compile the data, Aetna analyzed claims information and projected the effects of specific tort law changes such as the effect of joint and several liability

Deals Set Records

83% of the 1985 annual record of $150 billion.

Foreign net purchases of U.S. corporate bonds rose 11% in the second quarter to $12.6 billion from $11.4 billion in the first quarter, the SIA said. Corporate bond yields peaked in May, coinciding with exceptionally large monthly net purchases of $6.2 billion.

Although there were dramatic shifts in investment patterns, U.S. investor interest in foreign stocks was maintained at the first quarter record level of $2.1 billion in the second quarter.

INGS

FOREIGN EXCHANGE

[illegible]

Dollar Mov On Number

[illegible]

NEW YORK — The U.S. dollar moved higher Monday on a combination of factors, including a statement by Karl Otto Poehl, president of the West German Bundesbank, that the dollar has fallen far enough.

Further depreciation would be in nobody's best interest, he told a meeting in London of the West German Chamber of Industry and Commerce, because the dollar has reached a level against European currencies that conforms much bet-