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Ralph Nader Gives Recommendations on Insurance Reform Post Proposition 103

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CALIFORNIA LEGISLATURE

SENATE COMMITTEE ON
INSURANCE, CLAIMS AND CORPORATIONS

SENATOR ALAN ROBBINS, CHAIR

RALPH NADER GIVES RECOMMENDATIONS ON INSURANCE REFORM POST PROPOSITION 103

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SENATE COMMITTEE ON INSURANCE, CLAIMS AND CORPORATIONS

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March 9, 1989
Sacramento

CHAIRMAN ALAN ROBBINS: I'd ask everyone to take a seat. This is the latest that the Senate Insurance Committee has ever started a hearing. But because of the importance of our guests today, we'll live with that one blemish on our punctuality record.

This is a joint hearing of the Senate Insurance, Claims and Corporations Committee, the Senate Transportation Committee, and the Senate Judiciary Committee. There are a number of Members who are coming who unfortunately have been delayed by the visit in town and the luncheon that's taking place with a group of professional football players from San Francisco. Pardon? The people who are standing in front of them need insurance. But they will be -- a number of our other legislators will be joining us in addition to Senator Kopp at my right who's Chair of the Senate Transportation Committee; to my left is Senator Davis who sits as a Member of the Senate Insurance Committee; Assemblyman Lloyd Connelly who's joined us at our request; Assemblyman Tom Hayden who's joined us at our request, and Senator Cecil Green who sits on the Senate Insurance Committee.

Let me say just very briefly that our Committee has taken very seriously its task of working on the implementation of Proposition 103. It has certainly dramatically changed, not only insurance law in California but indeed I think the entire political picture surrounding insurance in California. And as a result of its passage, I think more and more Members of the Legislature are interested in the subject of insurance. Many Members who, a year ago, rarely had any understanding of what the word meant except that it's name was usually in the name of some insurance company that was on their contributor list. Today, more legislators are interested and I think it has given a renewed spirit to those of us who have been interested in the issue in the past but who are now, have a stirred electorate to assist in the area of insurance reform.

With us today for the Committee are two gentlemen who really need no introduction but you'll get a brief one anyhow. Harvey Rosenfield and Ralph Nader were the cosponsors of Proposition 103 in our state. It was approved by the electorate.

Mr. Nader, of course, has been a consumer spokesperson for years on the national level, has been known to voters in the State of California. And if I may give my own surmise, the fact that two of the propositions that were sponsored on the ballot were sponsored by the insurance companies and two were sponsored by the trial lawyers and one was sponsored by Ralph Nader. I don't know if this is a great compliment, but you're more popular than the insurance companies or the trial lawyers in the State of California. I take that back. Three were sponsored by the insurance companies; one was sponsored by the trial lawyers and one was sponsored by Mr. Nader. And Mr. Nader, you're definitely more popular than those two entities. But even more so than that, despite the fact that tens of millions of dollars was spent on the campaign against Proposition 103, the voters chose to take a chance on the brand that you had endorsed.

Harvey Rosenfield is, of course, a very familiar part of our Committee and has been gracious

enough to participate in all of our hearings on the implementation of Proposition 103, has not hesitated when necessary to prod the Members of this Committee or the Chair of this Committee and has become a genuine local folk hero here in California, somewhat akin to Howard Jarvis and what he did with Proposition 13, that has literally changed the concept of how much taxing government can get away with over the last ten years.

Having said all of those nice things, I'd like to turn the mike over to you and perhaps to have you give us maybe about a 15-minute summary of your perspective, or longer, if you wish, and then the Members of the Committee and the -- I mean the legislators that we've asked to sit in with us -- will be given the opportunity to ask you whatever questions they have. So through an exchange, we will seek the truth and hear the information and hear what you have to say.

Mr. Nader, the mike is yours.

MR. RALPH NADER: Thank you, Senator Robbins and Members of the Committee on Insurance Claims and Corporations. I have -- sorry. The Committee on Transportation and Judiciary, and the two Assemblymen. Have I covered everybody?

CHAIRMAN ROBBINS: You could just say "and Senator Kopp".

MR. NADER: I'd like to submit for the record my complete testimony which covers both the reasons why conditions led to 103 and how 103 was enacted, what 103 means, not only here in California but around the country, as well as the characterization of the insurance industry's response, both pre- and post-103. There's also an attached letter that I've written to Chairman James Lynn of Aetna Insurance Company focusing on loss prevention and a copy of an article I wrote in Suffolk Law Review on the issue of the insurance industry's obligation to become the sentinels for health and safety as part of their loss prevention responsibilities.

I'd like to submit all that for the record, with your permission, Mr. Chairman, and then summarize some of the points that I wish to make today.

I want to thank you for the invitation to discuss Proposition 103 and the impact that it had, not only on California consumers, businesses, nonprofits, municipalities, but also throughout the nation, its energizing repercussions as citizens mobilized in state after state and to follow the leadership of the voters of California in bringing the insurance industry to greater levels of disclosure, greater levels of accountability, and higher levels of loss prevention standards.

It does seem, however, that the insurance companies are behaving as if the Supreme Court of California has stayed the entire Proposition 103 instead of two provisions. They're behaving almost as if the voters of California hadn't approved 103. We're seeing here, in almost uniformally institutional defiance of Proposition 103 by insurance companies, not only in not taking advantage of certain marketing opportunities, such as moving to sell group auto and group homeowner insurance policies throughout the state, which Prop. 103 now permits, having repealed the past restrictions in California's law against those kinds of group purchasing practices, but they also seem to be engaged in a process of huffing and puffing and intimidation and threatening to pull out of the state or canceling policies, not renewing policies, and recently, actually increasing insurance premium rates in some instances.

They are being aided and abetted in this institutional defiance of Prop. 103 by probably one of the most lackidaisical insurance commissioners that I've ever had the displeasure to observe throughout these United States, Roxani Gillespie, who, of course, made no secret of her antipathy and antagonism for Prop. 103 before election day in November. And, of course, her supervisor, Governor Deukmejian who, again, made no secret of his opposition to Prop. 103 before the voters rendered their verdict and since then they've certainly been lukewarm in instructing the Insurance Commissioner to begin enforcing all those provisions of 103 which have not been stayed by the Supreme Court of California.

Now this, of course, is leading to an attitude among many people in the state that can be characterized at in some segments of the population as anger, indignation, and the demand that this proposition be enforced. Other segments of the population have become more fatalistic, more resigned, saying, "What good is our vote? We voted Prop. 103 in and we haven't seen its provisions implemented." Other people have an even more withdrawl characteristic in this repect of what kind of resignation as to whether it makes any difference to vote at all. These kinds of feedbacks have been coming into the canvassers who are going door to door for Voter Revolt. And I think that they tell us that there's an added dimension here that should not be ignored, and that is, when people vote into law, they expect their elected representatives to move, to all dispatch in support of this law, having the kind of public hearings that you've been having, and they expect the executive branch to do likewise, as the Attorney General has been doing, John Van de Kamp. And if they don't see this, they can go one of both ways, one of two ways: One, they can become very resigned and turn off, which is not good for democracy; or they can become tremendously aggressive in moving for a major follow-up drive, which may not be good for many elected representatives.

So I think it is important that you recognize that there's a tremendous reliance on that vote in November on behalf of Prop. 103, its 20 percent cut, reduction, in insurance rates as of November of 1987. It's exposing the antitrust law enforcement against these companies who've been engaged in a great deal of ratemaking collusion, and having an elected Insurance Commissioner in requiring prior approval of any auto insurance and other liability commercial insurance rate increases before the selected insurance commissioner, and encouragement of group buying of auto and homeowner insurance, in addition to requiring disclosure by the insurance companies of information so that never again these companies can go trying to whipsaw the public into submission underneath their arbitrary classifications, their discrimination, their massive reliance on territorial rating, and their under-reliance on good-driver record.

So we now, of course, have to await the Supreme Court of California's decision, knowing full well that it's a much more business-oriented court than it was two years ago. We also have to look forward to the utilization of the provisions of Prop. 103, as we did yesterday with a Senior Center in Southern California where hundreds of senior citizens demonstrated their determination to start banding together and demanding that they be sold group auto insurance policies which will lead to significant cutbacks in insurance rates because the economies of scale and the absence of promotional and advertising expenses to land such customers and the ability of group auto insurers

to -- insureds, rather, to -- bargain with the various insurance companies bidding for their business -- all of these factors certainly foresee a significant reduction in auto insurance rates and, I might add, the same pattern with obtaining homeowner insurance rates.

Now I'd like to point out that the insurance companies have continually postured after any defeat in any state. They did this in Florida when they were forced to roll back their rates. They threatened to pull out of Florida. They threatened to cancel. They huffed and they puffed and the state government stood firm, and the insurance companies got over their withdrawal pains and they resumed their normal pattern of business.

I was just speaking with an insurance agent/broker in a Washington, D.C., suburbs and he said, "You know, it really is amazing the way these insurance companies postured right after Prop. 103 won." He said, "But now they're doing business, and they know that they're going to still make money in California." He said, "Even we, we opened an office last year in California. We thought, gee, Prop. 103, maybe we shouldn't have opened the office." He said, "We're doing very well." I think he might have even been more candid because a few minutes later, when I was discussing the reinsurance companies, he launched into this tirade against Lloyd's of London and other reinsurers and they say, "We're still not moderating their rates and are still whipsawing the primary insurers with repercussions to customers all over the country," to which I said, "Well, don't you think the reinsurers ought to be under similar disclosure and regulation as the primary insurers, especially the offshore insurers like Lloyd's of London?" He said, "Absolutely."

And that's one of my first recommendations to you, Mr. Chairman, is that you initiate what no other state has yet initiated, and that is, an investigation to Lloyd's of London as the lead and dominant reinsurer whose practices and policies are followed by reinsurers as far away as Munich Re and Swiss Re, in Western Europe, to domestically based reinsurers in the United States. The reinsurance factor is very key to launching these gyrations in the insurance cycle, destablizing the primary insurers, who then transfer the destablization onto the day care centers, the trucking firms, the doctors, the hospitals, as well as auto owners and other consumers throughout the state. The Congress certainly should do this as well. But if the Congress is going to drag its feet, the way it has been on reinsurance over the last several years, why not start with the next best thing in terms of size, which is the State of California?

CHAIRMAN ROBBINS: Let me ask you briefly on the subject of reinsurance. We had started to tackle it, and this Committee has taken an interest sometime in reinsurance, two years ago, of proposed legislation that was defeated, like many bills are by the insurance companies, to limit reinsurance and to require that at least 10 percent of any policy be retained by the company writing the policy rather than to reinsure 100 percent of the policy in order to get some degree of responsibility with the company issuing the policy.

Other than that type of legislation, what else can specifically be done at the state level to deal with the reinsurance companies, most of whom are international in scope?

MR. NADER: Well, first of all, I understand the trend is in the reverse, that is, the primary insurers are having to swallow a larger portion of the risks.

Now let me answer your question with one prefatory remark. Lloyd's of London does not release its annual profits, except three years later. In other words, they just released their 1985 profits. In 1985, Lloyd's of London was screaming poverty, near bankruptcy, inability to underwrite risks because of runaway juries, judges, and lawyers in the United States of America. Just a few days ago, they released their 1985 profits, record profits. And one can only imagine what their 1986 and '87 profits are going to be because that's been a curve in the primary markets have been, record profits.

Secondly, here's what California can do: They can require Lloyd's of London to justify their reinsurance criteria so that when Lloyd's of London says, "Sorry, we're going to have to sock it to a nonprofit group of board of directors, and we're going to have to sock it to day care center reinsurance," you can say to Lloyd's of London, under a new California law, "Prove it. How much have you taken in from day care center reinsurance? How much have you paid out? How much have you reserved? And where's the rest of the money?" So disclosure, a whole series of disclosure requirements, is important there as well.

I think also you can press them to release their financial data more currently. You know, they have tremendous leverage over regulators, when they can say they're losing money and they don't have to show it until three years later. And they got away with a lot of arm twisting in this country because I'm afraid too many state legislators believed them. Of course, Lloyd's did suffer losses in that year in hurricanes and other things not related to liability. But that's not the liability part that's part of the problem. And I might add, that even though they suffered these hurricane losses, they've always made money. Lloyd's, by the way, is not a corporation. It's a collection of partnerships where wealthy people invest $150,000 and up. They become members and it's a tremendous tax advantage. You get these wealthy people from all over the world to join, and they've been expanding their capacity rapidly in the last year.

We have finished a report on Lloyd's of London about eight months ago. I also want to make sure that the Committee ...

CHAIRMAN ROBBINS: I would like to have Lloyd's of London referred to California, actually, to the liability system of California, as the Black Hole of California at one point, a few years ago. I think it would be entirely appropriate for this Committee to invite Lloyd's of London to have the opportunity to come forward and provide the answers to all of the questions that you're asking and to provide the documented information on their losses and profits.

MR. NADER: Can you require them to come forward?

CHAIRMAN ROBBINS: Well ...

MR. NADER: You're on the verge of a historic pronouncement, Senator.

CHAIRMAN ROBBINS: We take a very aggressive approach in this Committee. But to the best of my knowledge, since Lloyd's of London does maintain an office in California, we can require their California representative to come forward and to obtain for us the information from what I suspect they would refer to as "home office".

MR. NADER: I think that California is such a large market and over the years has been a

golden hole, not a black hole, for Lloyd's of London that you should invite the Chief Executive Officer of Lloyd's of London to come and testify as the most responsible and presumably knowledgeable person in the organization. That's important. Otherwise, what they'll do is they'll send, they'll send their lawyer from Le Boeuf and Lamb, a law firm in New York.

CHAIRMAN ROBBINS: I agree with you and this Committee shall do exactly, exactly that. And Senator Davis, who is about to say something, will have the opportunity to assist them in explaining the losses that they've suffered.

SENATOR ED DAVIS: Well, let me say, you know, we're talking nonsense -- Lloyd's of London doesn't write insurance. They properly talked about their being a group of partners who come under one roof now. They're all individual little combines and are gamblers .. to go back there and say, "We want to lay off some facts to you." And I don't think there's any way in the world that the State of California can regulate a lot of individual partners in London. You don't have a Lloyd's of London Insurance Company.

CHAIRMAN ROBBINS: Yes, but you have a Lloyd's of London Reinsurance Company that says to a particular segment of the California insurance industry, the child care segment, we're going to increase what we charge you for reinsurance so you're going to have to increase what you charge for your insurance. And while certainly we have no ability to regulate them, we have the ability to ask them to appear and to give them the opportunity to put their financial information out in the spotlight of public attention.

SENATOR DAVIS: Before you just (inaudible), don't forget that an awful lot of this reinvestment is done -- reinsurance is done -- in Berlin now and Frankfurt and other German cities. I guess, if we're going to expand now, we're going to take over the world.

CHAIRMAN ROBBINS: No.

SENATOR DAVIS: You better straighten the mess out here before ...

CHAIRMAN ROBBINS: We're going to assist in any way that we can in getting as much information and disclosure to the public out there of what's going on so that if Lloyd's of London is being treated unfairly and losing all these bets, then they'll have an opportunity to explain that. If they're winning large bets at the expense of the California insurance consumer, then they should not be unwilling to explain what it is they bet and how much they've won.

SENATOR QUENTIN KOPP: Mr. Chairman.

CHAIRMAN ROBBINS: Senator Kopp.

SENATOR KOPP: Well, I know we're using some colorful metaphors here. But I want to ask ...

CHAIRMAN ROBBINS: That's just because the 49ers are in town and delayed the start of my hearing.

SENATOR KOPP: I wanted to ask Mr. Nader -- this is a situation and this is the problem which is presented. I guess your argument is that reinsurers have a direct effect upon the price of insurance to the consumers of California. And at the same time, Senator Robbins referred to perhaps adopting a rule which would require primary insurers to retain at least 10 percent of coverage. And you suggested in one of your first remarks that indeed that is happening to a larger extent. I am

interested in what your recommendation would be, irrespective of whether we have long-arm jurisdiction over Lloyd's of London or some West Germany company.

MR. NADER: You mean on this legislation?

SENATOR KOPP: Well, yeah, yeah, on the whole ...

MR. NADER: (Inaudible), you mean?

SENATOR KOPP: Yeah, on the whole element of reducing the amount and extent of reinsurance because that would seem to me to be another way of reaching an answer to the problem.

MR. NADER: Yes, but that can have effects in terms of reducing the willingness of certain companies to take on certain risks. See, the key thing is to make sure they're both solid. I think the key thing is to make sure that the primary insurers and the reinsurers are solvent, do not engage in arbitrary, discriminatory practice, do not engage in collusive pricing practices. Those are the questions you want. But once you start getting an arbitrary percentage, you might affect the willingness, indeed, the capacity, of the primary insurer to take on the risks and then lay them off on the reinsurer. There are much better ways to make sure they're both operating in a healthy, undiscriminatory and actuarially sound manner and the way they assess the risks and underwriting prices.

SENATOR KOPP: Without any overriding rule by statute or otherwise that would require primary insured to retain so much coverage?

MR. NADER: Not unless you see a real clear abuse, not unless you see a real withdrawal from the reinsurance market in order to bring the primary companies to their knees or their customers' (inaudible).

CHAIRMAN ROBBINS: A brief question or comment and then he's going to resume.

SENATOR DAVIS: A very, very brief comment. I endorse trying to get somebody who can represent the reinsurers (inaudible) Lloyd's to come here to tell us why (inaudible) what you'd hear is a terribly distorted California court system that makes this an impossible place to reinsure at the same rate you can reinsure in many other states and in many other countries. And so I'm all for getting the representatives here from the reinsurers, from Lloyd's, and we'd even pay their expenses. I think it would be worth it. We can learn something about the real problems of insurance. The underlying problems are the terribly distorted court system in California.

MR. NADER: Let me just (inaudible) Senator Davis. First of all, Lloyd's itself will admit that by far the most lucrative market in the world for Lloyd's, year after year, has been the United States.

Secondly, I think we have to remember that Lloyd's would prefer that our legal system goes to the lowest British common denominator, where the juries have very little role, if any, in determining damages where punitive damages are unknown, where there's no contingent fee opening the courtroom door to lower economic classes, where the difficulty of getting evidence into the trial is insuperably higher in England. They would like that. They would like a legal system where victims of the drug Oraflex, produced by Eli Lilly in England, were just paid, after five years of litigation, in settlement, $3,100 each, which, I might add, was less than what the Chairman of Eli Lilly makes in

one day. And these are horribly damaged -- their skin is falling off, elderly people, liver damage -- horrible damage widely publicized in England. Or in this country, the same victims of Oraflex received verdicts of $250,000 to $400,000 settlements, in that area, if not more. I'm sure Lloyd's would love to bring our country's legal system down to their ways like medieval status in England at the same time. And so that shouldn't be a surprise to any of us.

CHAIRMAN ROBBINS: Lloyd's will be invited to appear, be asked to expose the financial information, and be given an opportunity to state their views. Mr. Nader.

ASSEMBLYMAN LLOYD CONNELLY: Mr. Chairman, would you just be sure not to refer to them as Lloyd's. Say Lloyd's of London every time. (Laughter)

MR. NADER: Well taken. I can understand your sensitivity.

CHAIRMAN ROBBINS: Please continue.

MR. NADER: All right. Now I'd like to focus on the issue of loss prevention. If the insurance companies are going to behave as if they're just a pass-through mechanism, what do we need insurance companies for? The best pass-through mechanism of insurance is Medi-Care and Social Security. It takes about 3 cents on a dollar to deliver Medi-Care. The justification for a private insurance industry is not to behave like a pass-through mechanism. It's to first and foremost be active in loss prevention, in analyzing work place hazards and unsafe automobiles and traffic congestion and speed limits and bumper standards and become an advocate for the kind of measures, both in the marketplace through differential rating of differential car repair and experience, as car safety experience, and by having public and enforceable safety standards to keep its claims down. The best way to keep claims down and to keep the cost of the insurance companies down is to make sure that safety and health advance in such concrete, pragmatic ways that fewer people get killed, fewer people are injured, fewer people come down with diseases, fewer dollars are devoted to damage.

Now look at the record. When Mr. Reagan pushed, at the request of General Motors, to be sure, in the early 80s, to reduce the bumper standards from 5 miles per hour protective level to 2½, the insurance companies issued a statement saying it's going to cost hundreds of millions of dollars more a year in these fender-bender collision expenses. Yet, did they put the muscle on in those critical few weeks when we were trying to save that standard, the awesome muscle of insurance agents around the country, their executives? No. The standard went down to 2½; GM went down to 2½. That's less than walking speed -- a bumper standard.

One or two of the companies did file a lawsuit; they didn't win but this was a lobbying effort through Congress which they could have. Basically, they didn't do much at all. They then recognized that going from 55 to 65 was not only going to be more fuel inefficient, but it was going to kill X numbers of people and generate more injury. They didn't lift a finger on that except that they said that the rates were going to go up if the standard was allowed to go to 65 miles. They had predicted that the rates would go up.

Thirdly, let's take the pompous Fireman's Fund Company, one of my favorite examples of insurance pompousity. Look at this: Fireman's Fund. Remember the name. Remember the name.

In 1982, Andy McGuire of the Trauma Foundation from San Francisco, probably known to you, he became very interested in trying to get support for the development of a fire-safe cigarette. He learned from the various national data-gathering safety institutes that between 1,500 and 2,000 deaths from fire were due to fire -- were due to cigarettes -- that the cigarette was the leading cause of fire in this country, bar none; and that of the 5,500 deaths a year, almost 2,000 were from cigarette-caused fires in the homes elsewhere. He was concerned because our country has the highest fire death fatality rate per capita of any western country, three times that of Japan.

He also was concerned because the insurance companies had displayed a remarkable indifference toward trying to reduce fire. A scholar at Harvard accused him a number of years ago of wanting to preserve their market -- we've got to have fires. And you sell more fire insurance and you charge more. Well, Mr. McGuire was not that jaded. He went to the Chairman of Fireman's Fund, Myron Dubane, who referred him to John Kennedy, who was then ahead of Legislative Affairs for the Fireman Fund. And he went to John Kennedy and asked him to support Senator Cranston's bill in Congress to push, to regulate the cigarette so it is more fire resistant. This is technically feasible. Two tobacco companies have developed a fire-safe cigarette. 900 of these cigarettes are in cold storage, as we speak, in the National Bureau of Standards so they don't deteriorate. And John Kennedy told Mr. McGuire, he said, quote, "This is of real interest to us but this is a federal issue and we don't get involved in federal issues," end quote, a very rough but very rather accurate paraphrase.

Now the insurance companies always are sensitive to this because they want continued state, quote, "regulation", a euphemism, and they don't want to push for any federal standards of safety because they think other people would say, "Oh, good enough to regulate X industry federally. Why not you?" But then Mr. McGuire said, "Well, we just happen to have a California bill in Sacramento to achieve the same goal." And Mr. Kennedy said, "Well, we still didn't think the company would support it because it deals with the tobacco industry and the tobacco industry can only be dealt with on a national scale." Nice Catch-22.

Here's the Fireman's Fund, huh? Now my letter to the head of Aetna goes into some detail in terms of the early history of loss prevention when Lloyd's of London did a very good thing in the 17th and 18th Century, required that the ships going to the Orient to be equipped with lifeboats; they built lighthouses. That's loss prevention. In the 19th Century, they did good work, the insurance companies, on boiler safety, the rise of the Industrial Revolution, where boilers would explode and kill workers.

But in recent decades, the insurance companies have become not engineering underwriting institutions as much as financial institutions. They would much rather get $1,000 of premium from you and pay you just $500 back than get $500 in premium and pay you $250 back because in the first case, they've got $500 left over to put in investment and get investment income from, which is a big factor for them. And in the second case, all they have is $250. So they have become a cost-plus type of operation, a pass-through mechanism, involving tens of billions of dollars a year. And instead of having this colossal vested interest supporting cancer prevention, fire prevention, worker safety, auto safety, in a powerful, not a rhetorical way -- they'll give you the rhetoric; they'll show you the

resolutions; they'll show you institutions like Underwriting Lab, which are very, very timid. I'm talking about using their muscle the way Clay Jackson uses his muscle on some of your colleagues.

Imagine Clay Jackson fighting for a fire-safe cigarette, fighting for stronger bumpers on cars to reduce those hundreds of millions of dollars for expenses to consumers in California, pushing for faster adoption of air bags to prevent the injuries and the deaths and therefore the claims on his client's treasury chest. Imagine Clay Jackson, this man who towers above the Legislature in Sacramento, who can simply come to a legislative committee and say, "Ladies and gentlemen, you know our opposition to this legislation. Thank you." And the message is conveyed.

CHAIRMAN ROBBINS: Should Mr. Jackson then consider this an endorsement of his product?

MR. NADER: Excuse me?

CHAIRMAN ROBBINS: Should Mr. Jackson consider your statement an endorsement of his product, his lobbying services?

MR. NADER: It's his endorsement of his unfulfilled power to do good. Now ...

SENATOR BILL LOCKYER: Actually, he has a new brochure that points out that the people have the right to petition their government and that's what he does.

MR. NADER: Oh, yeah. I recognize that right which he exercises day by day and night by night. But I'm just trying to give it a qualitative redirection.

CHAIRMAN ROBBINS: I don't think Mr. Jackson, having arm wrestled with Mr. Jackson on various tobacco legislation, I doubt that he will be pushing for development of a safe cigarette since one of his clients happens to be the American Tobacco Institute.

MR. NADER: Well, may the cries of anguish of burned children's bodies and homes destroyed by cigarettes ring in his nightmares. He should be ashamed of himself, but then he has other priorities.

Now I think that, I think that the insurance industry basically is taking the world as it is. That phrase was given to me by a vice president of an insurance company in New England. He said, you know -- when I talked to him about loss prevention -- he said, "You know, I guess the insurance company just takes the world as it is and then write the risks and then get the money and the pay out." And loss prevention means you don't take the world as it is. You elbow that critical insurance function in the direction of private and public safety and health standard. But not only do the insurance companies take the world as it is but they tend to blame everybody but themselves. You would think the juries in California go berserk. You'd think the judges are reading Karl Marx on their lunch break. You would think that the Rand Corporation, hardly a radical organization out of Santa Monica, which has issued study after study debunking the myth of the litigation explosion, the runaway, crazy juries, the expansion of unreasonable imposition of punitive damages, again and again, the Rand Corporation studies which, I might add, are partially funded by an increasingly disgruntled insurance industry, are coming out reflecting the true data that the stability of the tort system is remarkable in accordance with inflation and population growth. You can always point to a crazy verdict; you can almost always point to a judge setting it aside or throwing it out or in an appeal court reverse it. Very few people point to the legitimate claims that go through trial and don't get a cent because juries are pretty tough, oftentimes too tough minded or judges likewise. Those don't

lead to any headlines in the Los Angeles Times or San Francisco Chronicle, like the brain-damaged infant, tremendous evidence of malpractice in a Virginia hospital, three days of trial by a prominent trial lawyer of great integrity who never takes a phony case or who would consider a phony case, he got zero for that infant and in Jerry Falwell's hometown, Virginia.

So we should remember that not one out of ten of malpractice cases ever gets a dollar in verdict or settlement. The total number of malpractice victims getting any money in 1986 was about 18,000 in the United States. There are easily over 400,000 serious malpractice cases a year in our country. And the total transfer in malpractice verdicts or settlements is less than $2 billion a year which is less than what we spend on cat food. Business Week had it right, right from the beginning, article editorial after article editorial, exposing the myth of the runaway verdicts in the litigation explosion. And they said that the cause of medical malpractice crisis is malpractice.

So I would like to emphasize, Mr. Chairman, that the Committee might do well having an information hearing of loss prevention. Let the insurance companies have their say, how they support the National Underwriters Lab, $7 million ___(inaudible)___ due for highway safety when they can use $30 million. But let other groups have their say and let's develop a public expectation level that begins to look at their insurance companies with the following muses. I wonder what my insurance company has done to get a car built in this country that's less repair prone or with bumpers that adequately protect against property damage, or with crash protection that will make my family secure and crashes that now take lives and limbs. That kind of expectation level will be the most fundamental restructuring reform of the insurance industry, in addition with the more day-to-day provisions implicit in Proposition 103. A lot of other points that I made ...

CHAIRMAN ROBBINS: I don't want you to think that this Committee is quick to respond to suggestions but I just had the sergeant give you a piece of legislation that's scheduled for introduction tomorrow that would require any insurance company that makes an application for a rate increase under Prop. 103 to include within it its Risk Reduction Program and to -- it also requires the information on the Risk Reduction Program be contained with each insurance policy issue. So either we were thinking along the same line or else my staff has acted remarkably fast in taking --

MR. NADER: I wasn't aware of ...

CHAIRMAN ROBBINS: -- taking your suggestion and getting it ready for legislative introduction tomorrow which is the bill introduction deadline here in the Senate.

MR. NADER: I'm very pleased by that. But I do want -- without seeming ingracious, I do want to end by noting page 9 and 10 of my testimony which lists some of the bills which have gotten through in this Legislature with very little publicity, chipping away the personal injury rights of victims. And I think that when you see this occurring, you see that this ship of state that we call the safety rights of injured and sick people to have their day in court is being perforated with holes in the hull in one way after another with bills that don't command great public attention and are propelled through the Legislature and signed by Governor Deukmejian.

For example, what possible justification could there be for a bill that immunizes municipalities for injuries to third parties caused by police pursuits? That's when the police take off on very little

pretext. A Syracuse police chief once told me, he said, "Some of our boys are like teenagers two years removed." You know, they're not seeing a felony, someone coming out with smoking guns from a bank. They just suspect something; they take off; the chase car becomes a missle, crashes into another car at a red light. That car, which may have a family of four -- an actual case in California -- Washington suburb -- under this law, could not have sued the municipality that the police worked for. The same is -- things like eliminating both strict liabilities for injuries caused by prescription drugs meeting FDA approval. The FDA is notoriously weak and behind the times in terms of their drug standard. And this one was particularly interesting to me on a police dog. Let me see if I can find it. A police dog, a bite by a police dog.

CHAIRMAN ROBBINS: Be very careful about what you say about the police with Chief Davis seated to ...

MR. NADER: I know.

CHAIRMAN ROBBINS: To my left.

MR. NADER: I know. What he knows, he knows as a police chief, that some of the officers behind the wheel sometimes get carried away with themselves. And there are always police department guidelines on hot pursuits.

Look at this one, "immunizes municipalities from liability for acts of police dogs." That's what I mean by chipping away. "... immunity for negligence of volunteer directors of nonprofit corporations and medical trade associations", "limit punitive damage claims against religious corporations." Well, what if they have a truck that's driven by a guy under the influence and kills someone? Do you say to the mother of the dead child, "Sorry, it was a religious institution that owned that truck"?

SENATOR LOCKYER: If I may, Mr. Chairman, one of the problems with the way that the list has been summarized, Mr. Nader and others, is that it tends to miss some of the subtleties. For example, just to give you one example, the most, the last bill you mentioned was that by Senator Doolittle on religious organizations. The debate, which was a rather serious one, involved an assertion of First Amendment Constitutional claims that were being burdened by tort system factors. Now that's -- people might decide those in different ways but at least it was a serious discussion about important matters. The result was to require a pleading hurdle. It doesn't grant an immunity. It simply says before you can bring a punitive damage claim against the religious organization, you should show the court that there is some reasonable basis for punitive damages, not as we have often been told, sort of legal harassment which terrorizes people because they can't insure against punitives. So the bill in fact is much more, much less, restrictive of a right to recover than perhaps the brief description or summary of it in the list. So, you know, I could do that with each one of the -- I wouldn't to take a lot of time to do it.

MR. NADER: I know.

SENATOR LOCKYER: To make that general point.

MR. NADER: You see, it's all in the direction of making it more difficult.

SENATOR LOCKYER: Of course.

MR. NADER: Like let me give you an example, which you could make a case.

SENATOR LOCKYER: Yes.

MR. NADER: It provides immunity to restaurants donating food to a nonprofit food bank. The argument is, hey, you know, they're not making any money on this. They're giving their food to a nonprofit food bank. But we all know that the prospect of liability tends to make people more careful. If they are donating the food to a nonprofit food bank, they're getting the P.R., you know, P.R. pluses for it. It's good for business indirectly. And what if they become negligent in this area? They say, you know, there's immunity here if we donate the food. Don't worry about the fact that it might be spoiled. That cream in the bakery product might be a little spoiled. So it's chipping, chipping, chipping, chipping. And while individually it may not seem much per bill.

SENATOR LOCKYER: I understand.

MR. NADER: Together, it becomes more and more. Am I correct ...

SENATOR LOCKYER: That's why I published the list, frankly, was to address this current discussion which is, well, now the insurance industries have suffered. They have Prop. 103. But the other side, which, you know, some think of it as the lawyers versus, and that's all that's at stake, the other side hasn't made any concessions or changes in the way they do business and so I came forward with a, I think, extensive list and not one which I produced, you know, proudly, but saying here are the frequent cases in which we have balanced individual recovery against some general social purpose. And at least in these cases, a much longer list would be that which we voted down. But at least in these instances, we have provided some protections, immunities, constraints -- and thinking it's a balancing matter -- but partly addressing this, and I'd ask you to comment if you would. As I recall these numbers, the average payout in California in a personal injury action is about $9,200, at least the last time these figures were obtained. The typical public costs associated with those disputed resolutions is almost to $9,000. It seems that's a transactional cost that's pretty hard to defend. So we're looking all the time for ways to squeeze and economize with judicial resources, understanding that that may entail some squeezing of what would be viewed as a right to bring a cause of action but trying to do more dispute resolution with less and less resources as every public institution feels the pinch of fewer and fewer resources. And most of these really were subjected to those kinds of tests. I don't know what other ways there are. We've tried to talk about arbitration or a neighborhood dispute, resolution centers, or alternatives that would perhaps be less expensive. But when the public costs are the equivalent of that which the victim gets in these lawsuits, it just seems to be a disproportionate public burden.

MR. NADER: But my experience in the way these little bills get through around the country at the state legislative level is that they usually get through because they're extremely narrow. They don't arouse a large constituency. And they have one little anecdote behind it, two little anecdotes. Some states now have been passing a bill which makes it very difficult to sue a physician for malpractice if the physician is treating an indigent patient without the prospect of payment directly. That's a terrible ...

SENATOR LOCKYER: We're having the same dispute in this ...

MR. NADER: That's a terrible discrimination against the poor. Just because you're poor, you have less rights against a malpracticing physician. Well, they say, well, you know, so-and-so hospital in Eureka -- and this occurred -- there's no consistent pattern of evidence that has to be maintained to chip away like this. There's no quantitative significance to it. I mean on that basis, I could triple the stringency of tort laws in California by showing you how many people get nothing. I can give you a lot of anecdotes and say, hey, you know, really sock it to these companies and municipalities.

I also see an increasing trend of immunizing public officials. Now we all know, that if public officials are excessively at risk, they're not going to stick their neck out to do anything. That's one extreme. On the other hand, if they're excessively secure -- good heavens, they're probably bureaucrats -- most of the states and federal agencies I know is that they're excessively secure on that kind of accountability -- then they're not going to be as careful. They're not going to be as prudent. And that's why I'm concerned about some of these bills are basically further immunizing public officials. I mean the books are not full. The law books are not full of many cases suing public officials. They're very tough. There always has to be that prospect there in order to make these public officials feel sufficiently insecure, to be more accountable and more responsible. If they're too secure, they're going to be too efficient.

CHAIRMAN ROBBINS: Senator Davis, I know you have to leave so a brief statement or question before you do.

SENATOR DAVIS: You exploited Clay Jackson as some kind of a titan who always won. Let me tell you who wins around here all the time -- you trial lawyers. And all of our California trial lawyers are trying to emulate all your great successes and they stopped to realize injustice around here. They kill anything they want to kill. So when you're going to exploit Clay Jackson and the insurance industry, you ought to improve your own brothers as trial lawyers.

Now let me say one more thing. You know, you came in and took on the industry for not having money for prevention. You wrote the new law in California. You didn't put in any requirement that there would be any percentage of a premium dollar that goes into prevention. And so how can you criticize others when you, the great creator of this bill, you know, didn't do that yourself? I'm sorry I have to leave but ...

MR. NADER: Let me have the author of the bill respond. (Laughter)

SENATOR DAVIS: I listened to television. You're the author.

CHAIRMAN ROBBINS: And you didn't think he was an adroit politician.

SENATOR DAVIS: Why are you out of uniform today?

MR. HARVEY ROSENFIELD: You mean I have my coat on?

SENATOR DAVIS: You have your jacket on.

MR. ROSENFIELD: Climate.

SENATOR DAVIS: And your tie and everything.

MR. ROSENFIELD: Out of respect for the dignity of this group.

Senator, we wrote Proposition 103 specifically to encourage interveners, citizen groups, and the Insurance Commissioner to set up normative standards to address loss prevention. Proposition 103

permits us to intervene and we have, in fact, already begun to do so to ask the Commissioner to set forth standards which base the insurance industry's ability to raise rates on their activities and actions to ensure a greater loss prevention. It's the structure which makes that possible that's built in within Proposition 103.

CHAIRMAN ROBBINS: Okay. Senator Davis would love to retort again but he has his wife waiting in the basement. Let me use that -- she's waiting for him (chuckle) in the basement. Let me use that to move into ...

MR. NADER: Let me just answer his other point very quickly for the record.

CHAIRMAN ROBBINS: Sure.

MR. NADER: That is, I was talking about Clay Jackson as being the titan on insurance industry matters. The trial lawyers do have influence on personal injury law matters but I don't think their power over the Legislature is expressed in SB 241. They did with tobacco.

CHAIRMAN ROBBINS: No question, the trial lawyers are powerful; the insurance companies are powerful. In between, some of us in the Legislature try to get something done occasionally.

Let me specifically ask you with respect to the implementation of Proposition 103 and where we go from here. We have tried, we are trying various things legislatively. The Senate has passed SB 103 that will provide for penalties that, if Senator Davis were here, he'd refer to as "Draconian" on insurance companies that violate the requirement of Proposition 103, that it renew the policies of of auto insurance. It provides for penalties of up to 50 percent of premium amount for refusal to renew. That bill will be considered Thursday, a week from today, in the State Assembly, on the floor. What are your thoughts of where we are now with respect to that legislation, with respect to other proposed legislation, or with respect to additional legislation that hasn't been proposed yet that may be needed?

SENATOR KOPP: Can I supplement that?

CHAIRMAN ROBBINS: No.

SENATOR KOPP: No? Okay. I'll supplement that when questions are answered.

MR. ROSENFIELD: Senator, as you know, Voter Revolt has concentrated most of its resources, which have been on the defense of Proposition 103 before the Court, that have taken no formal position on any legislation here in Sacramento. Our number one priority and the thing that we think must be done is the full implementation of Proposition 103, the permission of the Court for the remaining provisions to go into effect and then the commitment of the Insurance Commissioner and the Deukmejian administration to enforcing those provisions which are now in effect.

So while we have no formal position on any legislation up here, I do want to say that the voters might have anticipated, as we did, the reaction of the insurance industry in the months since Proposition 103 has passed. We don't think, that when it comes right down to it, any more insurance companies are going to leave California than they have been, in Florida or other states where consumers have risen to demand reform and received it. However, should any insurance company be foolish enough to do so, sacrifice its market share here to competitors and go against their principles that I think their shareholders would probably want to enforce, we're supportive of any legislation

that protects the consumers of California and I think punishes the companies that don't understand their civic duty as corporate citizens of this state.

CHAIRMAN ROBBINS: Mr. Nader, anything you want to add? Then Senator Kopp will supplement.

MR. NADER: No, I agree with Harvey.

CHAIRMAN ROBBINS: Senator Kopp.

SENATOR KOPP: Since we were using "gambling" as a metaphor, I'll bet you a buck, even up, that the 20 percent rollback provisions are held unconstitutional. So my question is: What are you going to do in the aftermath of what I expected or predicted with the decision of the California Supreme Court?

MR. NADER: Well, I never engage in predicting how a group of judges or justices are going to ...

SENATOR KOPP: Well, let's ask it as a hypothetical.

MR. NADER: Same thing.

SENATOR KOPP: If, if --

MR. NADER: Same thing.

SENATOR KOPP: -- the provision is invalid, what then?

MR. NADER: The "if" adds nothing to it, Senator.

SENATOR KOPP: You don't want to answer.

MR. NADER: Because, first of all, anytime you try to say in advance what the court's going to do, it's going to upset someone in court. You're basically saying, "You know, I think I know the prejudices of these justices. I can total up the pros and the cons and it doesn't matter what the arguments and the briefs say; this is the way I think they're going to come out." Obviously, it's a more business-oriented court than it was in the days of Rose Bird and her colleagues. But I have often been pleasantly surprised about the objectivity of courts and places around the country and I hope to be in this court.

SENATOR KOPP: Let me ask you one other question.

CHAIRMAN ROBBINS: Before you do that, though, I want to take you up on your bet. I'll take your bet. Senator Lockyer, you want to hold the one-dollar bill?

SENATOR LOCKYER: I'm the stake holder? Oh-oh. (Chuckle)

SENATOR KOPP: It's a good thing Chief Davis is gone. (Laughter)

CHAIRMAN ROBBINS: He may not bet on this but I'm betting they uphold.

SENATOR LOCKYER: Both of these Senators can afford the stakes too.

SENATOR KOPP: Let me ask you, let me ask you this. I was going to to ask you privately, Mr. Nader, but I might as well ask you publicly. You're familiar with Jeff O'Connell's voluntary no-fault law review article. Do you have any opinion formulated yet on the desirability of a choice plan on no-fault?

MR. NADER: Well, I'm against the no-fault law because, for a number of reasons. One is, is that it doesn't allow recovery for pain and suffering and it turns human beings into chattels like so

many damaged fenders or cars. Now comes a choice which really will not turn out to be a choice because the no-fault segment will be a suction process to bring people into that area by differential pricing. Whichever segment the insurance companies prefer, no-fault or fault, they're going to price it in order to get the most people into the segment that they, that they want in.

SENATOR KOPP: Suppose you have regulation pricing by government?

MR. NADER: Well, then, I'll go back to my general opposition.

SENATOR LOCKYER: (Inaudible) similar, that only 2 percent of the votes opted for the tort system so, as a practical matter, no-fault was the only real system in effect.

MR. NADER: Because they never think they're going to be in an accident.

SENATOR KOPP: Well, of course, I've always opposed no-fault as mandatory, and still do. But others would argue but that proves the case. People evidently want no-fault.

CHAIRMAN ROBBINS: People want no-fault for the people who they hit in accidents.

MR. ROSENFIELD: Senator, I want to respond to that point. You know, our position is, quite aside from the merits that Mr. Nader has pointed to of social justice or injustice in restricting victims' rights, it's astonishing to us that anybody at this point in the process of Proposition 103 would be seriously proposing no-fault. I understand why people want to talk about it. I think the industry, both in California and throughout the country, has a vested interest in figuring out some last-minute bail out so that they can maintain what they've put together in the way of waste and inefficiency for their operations, if they're forced to accept our rollback, by cutting it down on how much you have to pay on the other end.

But until Proposition 103 is in effect and until the disclosure requirements are obeyed by the insurance companies, we actually see what's going on. Until we have some empirical data that shows how many people are suffering from years of delay, how much of it goes to defense lawyers' fees, until we have some information, why should we address or discuss no-fault? Proposition 103 guarantees that you folks here in the capitol will have that information in a few years and then I think we can have a better debate about it. If you look at the long list of tort proposals and restrictions that have occurred in the last few years, beginning with, say, Proposition 51, propaganda and television commercials but never any data. So Prop. 103 will give us something to work on. Then we can discuss the subject under a better atmosphere.

MR. NADER: You know, Prop. 104 was just defeated, with a lot of money, to get the message to ...

SENATOR KOPP: This isn't Prop. 104. Let's not confuse it.

MR. NADER: Well, I mean Prop. 104 was across the board ...

SENATOR KOPP: Mandatory, no choice.

CHAIRMAN ROBBINS: Senator Kopp, you asked, you asked the question after you got him all irritated by betting a dollar against the 20 percent provision. Senator Deddeh.

SENATOR WADIE DEDDEH: To both Mr. Nader and Mr. Rosenfield, in 103, either deliberately or inadvertently, you have effected a special company known as USAA that only writes insurance for military, retired or active, their families, members of the F.B.I., and employees of this particular

company. And this particular company, Mr. Rosenfield, does not fall within Farmers and others and so on. And my understanding is that neither you nor Mr. Nader would have any objection -- if you do, I want to hear it -- that they be exempt because they write only for these people, be exempt from the impact of 103. Is my information correct or my information is wrong?

MR. ROSENFIELD: You don't mean exempt from the rate control provisions of 103?

SENATOR DEDDEH: No, not rate control, but to do whatever they were doing prior to 103 because they don't write insurance to you and to me. They only write to military people, retired or active, members of the F.B.I., and employees of the company.

MR. ROSENFIELD: I think I understand what your question is, Senator. Nothing in Proposition 103 requires a company to write insurance --

SENATOR DEDDEH: To everybody.

MR. ROSENFIELD: -- to everybody. Because of the nature of the litigation and obviously the attention that this issue has been paid, if you want to discuss this with us, we'd be glad to clarify it.

SENATOR DEDDEH: I would like to do that because I do have plans to introduce a bill, not to exempt them from the impact of 103, for their rates and so, but to have them, that exclusive jurisdiction right, whatever they had, to write only, and only to these people.

MR. ROSENFIELD: Well, I'd be glad to discuss with you our intention.

CHAIRMAN ROBBINS: By the way, you can solve the USAA problem, not by, without amending Prop. 103. What creates their problem is the cross effect of the Rosenthal-Robbins Auto Insurance Nondiscrimination Act that says you can't discriminate on occupation when that's interfaced with Prop. 103. You can do it by amending the Rosenthal-Robbins Act to deal with your definition of occupation to allow a military company, to ...

SENATOR DEDDEH: Mr. Chairman, is that your SB 103?

CHAIRMAN ROBBINS: No, that is not SB 103. That's a bill that we passed several years ago, that when it's put together with Prop. 103, creates the problem but you can solve their problem by making an amendment to that act rather than making an amendment to Prop. 103.

SENATOR DEDDEH: If an amendment to that particular act, again, they will be back in business the way they were prior to 103?

CHAIRMAN ROBBINS: Without touching 103. 103 doesn't create their problem. It's the combination of the two that does.

SENATOR DEDDEH: I'd like to help resolve that problem but I do not know how to do it.

CHAIRMAN ROBBINS: I'll get you ...

SENATOR DEDDEH: I don't want to offend anybody's, any of the witnesses any more than I would offend the Chair. So I would like to work with the Chair and Mr. Rosenfield.

CHAIRMAN ROBBINS: They're not offended; I'm not offended. We'll get the language.

SENATOR DEDDEH: All right. Great, great.

CHAIRMAN ROBBINS: Senator Lockyer, and then ...

SENATOR LOCKYER: I guess a similar inquiry as to a related form of insurance that was excluded from 103 but many of us are concerned about is worker compensation. Now, obviously,

there's a different bundle of issues and I could understand why you drew the line you did. But here we have a form of insurance that is highly profitable, from all we could tell, and in California, not totally noncompetitive, that is, the State sets the price and that's what you have to pay. And then theoretically, you may get a rebate. It seems like a circumstance very right for insurance reform that would benefit workers and business people. I don't know if you're contemplating any additional efforts in that area or if you have thoughts about it. If there are ones, I'd appreciate your sharing them.

MR. ROSENFIELD: Senator, my understanding is that there are others who are working on such an initiative.

SENATOR LOCKYER: Okay.

MR. ROSENFIELD: Right now, most of our -- all of our resources ...

CHAIRMAN ROBBINS: He just wants to make sure you don't have idle time on your hands that results in your being forced to ...

SENATOR LOCKYER: Mr. Chairman, if I may, one other observation, and I guess we can just sort of share prospectives on this and perhaps that's the most I can do. For those of us who feel that part of our job is to act as a social glue in a very plural and diverse society, things like the proposals Mr. Nader mentioned, specifically, SB 241, with that whole list of bills that we have discussed in terms of chipping away at the tort system, that was supported by trial lawyers, though reluctantly. And it was premised on the belief that the business and medical community was about to aggressively initiate in ways that would result in very, very extreme rollbacks, cuts in tort recovery potential. And so it was kind of a tactful choice and it's a difficult one and it's one I, you know, raise for any comments you may make, of whether it is better to just maintain the pure position, and I could understand private advocates setting those kind of standards. But for those in government who have this sort of mediative responsibility, whether we should stay pure and fight, at least at the time the belief that we were outgunned so much, we would lose; or whether we should make some modest accommodation where they seem reasonable in order to postpone that fight.

Now, obviously, the same issues in the 103, 104 context, they had a lot of fire power and you won. I'm not sure that same thing would have happened with respect to victims' rights rather than the more direct, economic benefit that a consumer would feel with their personal auto insurance. If you could comment on that.

MR. NADER: I have two comments. I always thought that they would never have had to reach the napkin in the restaurant stage, had in the spring. They had put forth a credible initiative of promise. The insurance industry put forth a credible initiative threat. The trial lawyers did not put forth the prospect of the credible initiative. Therefore, they got themselves cornered by the time of fall.

SENATOR LOCKYER: In terms of the tactical situation.

MR. NADER: Yeah.

SENATOR LOCKYER: Yeah.

MR. NADER: Secondly -- yeah, that's what I wanted to say about that. What was the other

point?

SENATOR LOCKYER: Well, just generally, how those assessments in what worker comp. -- assessments.

MR. NADER: I was going to say, that in Florida, there was an initiative last November to restrict pain and suffering for a lifetime to $100,000. And the doctors and the corporate lobbyists spent $12 (million) or $15 million and they lost, quite decisive. So there was ...

SENATOR LOCKYER: How much was spent on the other side?

MR. NADER: About $10 (million). So there was a tort reform issue.

SENATOR LOCKYER: True citizens' campaign. (Chuckle)

MR. NADER: Yeah. There was a tort reform ...

SENATOR LOCKYER: Sounds like a lot of money on both sides.

MR. NADER: Oh, yeah, there was.

SENATOR LOCKYER: But at least that side ...

MR. NADER: I mean it was basically ...

SENATOR LOCKYER: So arguably ...

MR. NADER: The trial lawyers up against the entire Florida (inaudible) establishment.

SENATOR LOCKYER: Right.

MR. NADER: And the medical association. And all the newspapers came in on the side of the victims, almost all the major newspapers -- Orlando Sentinel, Miami Herald. It was very Draconian, as I debated a doctor on a radio talk show. And I said, "Doctor, you want to limit a person to $100,000 for a lifetime of pain and suffering and many doctors in Florida make that much in three months without any pain and suffering." I mean it's really an incredible -- it's amazing how people who should know better, people who deal with pain every day, doctors, can put something like that on the ballot.

SENATOR LOCKYER: Thank you.

CHAIRMAN ROBBINS: As we approach the end of our hearing, what I'd like to do is to -- Assemblyman Hayden hasn't asked any questions. I'll give, if he wishes the opportunity to ask one ...

ASSEMBLYMAN TOM HAYDEN: Just a very brief one.

CHAIRMAN ROBBINS: And then I'll have a brief comment.

ASSEMBLYMAN HAYDEN: I agree with you that we should be working on 103 and not on alternatives. But what's being floated here by many is the New York version of no-fault. I'd just like to give you an opportunity to discuss the New York pricing.

MR. NADER: I might just say that the New York version passed about 50 years ago. And it deals with no-fault for very small cases, so it isn't the kind of verbal threshold that some no-fault proponents want, like initiative versions. I don't think New York teaches this very much about no-fault.

CHAIRMAN ROBBINS: Senator Kopp has a 15-second question to ask.

MR. NADER: Sure.

SENATOR KOPP: Did you get an answer to this letter to Jim Lynn?

MR. NADER: Yes. As a matter of fact -- I didn't get it from Jim Lynn. I got it from Steve Middlebrook (?) who's general counsel. I did want to bring it today but I'll send you a copy.

SENATOR KOPP: I'd like to see it.

MR. NADER: And if I may characterize it, basically, they say the real problems are auto theft, traffic congestion, runaway juries. We've always been in favor of safe ...

CHAIRMAN ROBBINS: Let me, on that note, let me say that it has been very helpful that you have taken the time to appear at the Committee today. You've answered all of the questions fully. Some of them were questions that warmed the seat a little bit that you were sitting on. Let me thank you for that.

Let me say that the Senate, I believe, takes very, very seriously the duty to implement Proposition 103. It is the will of the people and it gives the Legislature a challenge, and it is my hope and my prayer that the Legislature will rise to the challenge. There is precious little excuse not to do so except for those who may wish to curry favor with the special interests.

Let me make one last comment, which is, you commented we have a business-oriented court in California and we do. I sat in on the hearing before the Court, as Harvey did. Every small businessman in California buys insurance. The guy who operates a shoe repair store has to carry insurance. The guy who has a pizza business has to carry insurance in his truck. The department store has to carry insurance on its fleet of vehicles. Every businessman in California carries insurance and indeed the business community of California has as big a stake in the insurance reform issue in bringing down the costs of insurance in California as the individual who will never buy any policy, except a car policy, because he doesn't even have enough money to buy a house and he lives in an apartment. And it's my opinion that that business-oriented court will uphold Proposition 103 because it's good for business in California, with the possible exception of one list of 600 companies that are in a unique business, dominated by out-of-state interest, and obviously have a very vested stake in their legal challenge to overrule Proposition 103. Thank you for being with us today.

MR. NADER: Thank you for the invitation.

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TESTIMONY SUBMITTED

STATEMENT OF RALPH NADER
before the
Senate Insurance, Claims and Corporations Committee
Senate Judiciary Committee
Senate Transportation Committee
of the
California State Legislature
March 9, 1989

Mr. Chairman, thank you for your invitation to discuss Proposition 103, and the impact this remarkable citizen victory will have upon California consumers, businesses, non-profit organizations, municipalities and the economy of California.

Throughout the nation, as citizens mobilize in state after state to follow the leadership of the voters of California, the insurance industry is engaged in yet another public relations offensive, bellowing about its exaggerated plight under Proposition 103 and once again attempting to deny responsibility for its inefficiency, unjust rates and abusive practices.

Just two days ago, some of the largest and wealthiest insurance firms in the nation asked the California Supreme Court for a reprieve from the rate reductions and other reforms contained in Proposition 103, pleading poverty and unfair treatment.

From the courts of California to the public airwaves, this industry has sought to convey the impression that it loses money in almost every state year after year, while nationally its assets, surplus, profits, executives salaries, stock prices and number of Persian office rugs reached record levels again and again.

But close scrutiny of the insurance industry -- scrutiny that will be greatly enhanced by Proposition 103 -- demonstrates the fallacy of the industry's claim that it cannot afford the reductions required by Proposition 103, and exposes the deception inherent in the industry's self-serving promotion of restrictions in the tort system that has characterized the industry's response to the national uproar over higher rates.

The Fiscal Health of the Insurance Industry

In reviewing the industry's professed inability to meet Proposition 103's rate reductions, consider the facts about the insurance industry's financial health and its recent rate increases:

- Since 1986, auto insurance rate increases in California have exceeded general inflation and inflation in relevant sectors -- such as car repair and health care costs -- by well over the 20% reduction required by Proposition 103.

- During the November 1987 -- November 1988 pre-election period, many of the largest insurance companies operating in California increased rates significantly, including State Farm (7.9%), Farmers (5.4%), 20th Century (14.5%), and the Southern California Auto Club (12%).

• According to the General Accounting Office, the industry nationally made $81 billion in profits between 1976 and 1985 without paying any federal income tax as a group and indeed, received a $1.6 billion tax credit during that period.

• According to the National Insurance Consumers Organization (NICO), the property-casualty insurance companies reaped profits of approximately $20 billion nationally in 1988.

• Dividends paid back to consumers by mutual insurance companies in recent years are substantial and demonstrate that rates have been set at excessive levels. For example, the California State Auto Association returned 10.1% of its earned premium for 1987 in the form of dividends; USAA, 12.9%.

• Waste and inefficiency account for an unacceptably large percentage of every dollar of premium California motorists pay to auto insurance companies. Overhead, salaries, commissions, defense lawyer fees and profits averaged 35 cents of every premium dollar the insurers wrote between 1982 and 1986 -- two to seven times higher than the expenses per dollar paid by group health plans or utilities, respectively.

• Insurers routinely overestimate the amount of funds they must hold in reserve to cover claims that have not yet been reported or paid, according to a 1986 study by A.M. Best. Because such reserves are counted against income in calculating profits, insurers have a strong incentive to overstate reserves by hypothesizing huge losses -- which _never_ materialize.

These phantom loss projections -- until 103, unverifiable by any independent source -- are the source of the industry's claim that it pays out more than a dollar for every dollar it receives from the public. But a review of payouts by California auto insurers between 1982 and 1986 shows that insurers have _never_ paid out more than they have taken in in premiums.

Moreover, insurers fail to discount loss reserves to reflect the time value of money. Best's Insurance Management Reports (April 7, 1986) concluded that reserves were overstated by 21% solely as a result of failure to discount.

• Many companies are over-capitalized. Surplus, or the difference between assets and liabilities, consists essentially of start-up capital or retained earnings. It is the amount of money insurers hold in addition to loss reserves as a cushion against unexpected liabilities or insufficient loss reserves.

While the National Association of Insurance Commissioners conservatively sets the desirable ratio of premium to surplus between 3:1 and 2:1, many companies selling insurance in California are hoarding unjustified levels of surplus through excessive rates. For example, in 1987, both State Farm and USAA had a premium to surplus ratio of 1:1.

Prior to Proposition 103, the insurance companies did not have to answer these charges. Exempted from the antitrust laws that promote

competition and efficiency, protected by their Sacramento lobbyists from any form of government oversight, free of significant requirements of financial disclosure, the insurance companies ran riot in California as they have nationally, their basic secret intact: under their "cost plus percentage of costs" approach to their business, insurance companies make more money from higher claims -- as long as they can command with impunity higher premiums. Proposition 103 marks the end of business as usual for the insurance companies.

History of Proposition 103

Today, as the insurance industry fights Proposition 103 and its progeny throughout the nation, the insurance companies want us to forget the vast auto premium increases which forced California motorists to choose between not driving a car or breaking the law by driving without insurance.

They want the public to forget the destabilization of the economy, especially small businesses, municipal and state entities, voluntary organizations and professions, by sudden rate hikes, reduced coverage, and cancellations, absent any explanation or good cause, due to the self-inflicted cyclical history of this industry.

And the insurance companies want the public to forget about the past four years of their rapacious assault on the legal rights of the most vulnerable people -- the injured, sick and next of kin -- to have their day in court against wrongdoers, using the common law rights carefully built over a century of judicial decisions.

For years, we had heard complaints from consumers and businesspeople around the nation, about the damaging effects of excessive insurance rates. In California, the situation was among the worst. Consumers and businesses were angry about years of price-gouging, coverage reductions and arbitrary cancellations by the unregulated California insurance industry. Auto insurance rates in California had risen 76 percent on average over the last five years, according to A.M. Best & Co. Many motorists could no longer afford insurance and drove without it.

Despite years of frustration, it was not until September 1987 that the campaign for insurance reform began to have significant momentum. That month, the legislature enacted, with virtually no legislative debate, a "compromise" bill supported by the states' insurance companies, doctors, tobacco companies, the state trial lawyer leadership, and the Chamber of Commerce. The legislation was part of a deal, including a five-year "non-aggression pact" in which the parties promised to refrain from legislative or initiative campaigns for five years, and what has now been held by at least one court to be a grant of virtual immunity to tobacco companies in cigarette litigation cases.

Consumer and victims' groups, who were not in the room when the deal was cut and were not party to the "non-aggression" pact, were furious, and rightly so. With the insurance situation so out of hand in California, the Voter Revolt campaign was born, led by Harvey Rosenfield, Carmen Gonzalez, Angelo Paparella, Bill Zimmerman, and hundreds of other committed individuals, and supported by a statewide network of volunteers.

In a profound display of the power of grassroots democracy, Voter Revolt obtained 577,000 signatures to place Proposition 103 on the ballot, thanks to the assistance of 165,000 volunteers. Voter Revolt's troops visited over 1.1 million homes in 1988, carrying a simple message about true insurance reform that dwarfed the $70 million campaign against it.

This word-of-mouth triumph, the victory of citizens everywhere who donated an average of $19 to keep Voter Revolt alive, overcame the largest television advertising campaign (most of it false and misleading) in the history of issue-based elections. Proposition 103 prevailed despite millions of dollars worth of "voter guides" disguised as party slate card mailers, written to mislead voters into believing the Democratic party had opposed Proposition 103. A similar "voter guide," directed toward Republican voters, pictured Governor George Deukmejian alongside anti-103 statements. (The Governor's press secretary announced this was an unauthorized mailing).

Voter Revolt also overcame the in-house lobbying effort of the insurance companies, which sought to turn their employees and agents against Proposition 103. One company, the Farmers Group, even mailed out letters to policyholders under the names of their insurance agents who expressly denied them the right to do so.

The Key Elements of Proposition 103

Proposition 103 contains four essential components, now emulated in similar proposals throughout the country.

1. Immediate Rate Relief

The absence of both competition and regulation permitted insurers to raise their rates to unreasonable and unjustified levels in preceding years. Moreover, as noted above, many insurance companies took dramatic rate hikes during the year prior to the November election, in anticipation of the passage of one of three other insurance-related initiatives on the same ballot (Propositions 100, 101 and 104), which would have left such increases intact prior to implementing some form of temporary rate reduction.

Under Proposition 103, all auto, homeowner, business, hospital, school district and municipal insurance premiums are reduced to the rate in effect November 1987, and reduced a further 20%. This immediate premium relief is necessary to reduce the current, unjust rates and establish a proper base from which future rate increases may be judged under the new standards of Proposition 103.

Premiums are then frozen at the reduced level for one year, to permit the Insurance Commissioner ample time for the implementation of 103's long term reforms.

Insurers may obtain relief from the rollback only if they can show that they would be "substantially threatened with insolvency" if required to honor it. This test is similar to the standards in place in many states to protect both consumers and insurers. Proposition 103 provides the Insurance Commissioner with full leeway to devise

procedures that will guarantee prompt review and resolution of exemption applications.

2. Government Oversight

After the one year rollback, Prop. 103 establishes a prudent system, in effect in nineteen other states, under which insurance companies must open their books and justify any future rate increases. The Insurance Commissioner must approve such applications before they go into effect.

Under Prop. 103, no longer will insurers be able to arbitrarily cancel auto policies, reduce coverages or heavily base rates on classifications -- like place of residence -- that have nothing or very little to do with a motorist's driving record. Driver safety record is first under 103, though insurance companies will be permitted to take into account legitimate, justifiable geographic factors, upon approval by the Commissioner.

No longer will insurers be permitted to conceal their investment income: Proposition 103 requires the insurance companies to provide this information and the Insurance Commissioner to consider it in determining whether to grant rate increases.

Proposition 103 tears away the veil of secrecy that has enshrouded the insurance industry, reducing rates from their unjustified levels and forcing the industry to disgorge the facts of its finances before further increases are permitted.

3. Competition

Proposition 103 also repeals the insurance industry's antitrust exemption. The antitrust exemption, in effect in most states and at the federal level under the McCarran-Ferguson Act, permits insurance companies to fix prices and engage in other anti-competitive behavior that would be unlawful violations of the antitrust laws in other areas of commerce or industry.

In addition, Prop. 103 repeals the anti-rebate laws, permits consumers expanded rights to band together to negotiate group insurance policies, and provides for a computerized consumer information system to facilitate comparison shopping.

It is important to emphasize these provisions of Proposition 103, because forcing insurance companies to compete in a broader manner will compel them to reduce their waste, pay more attention to safety and loss prevention and thereby maintain lower rates.

4. Accountability

As double protection against insurance companies' efforts to evade these reforms, 103 requires that an insurance commissioner elected by the people approve the insurance industry's rates and practices, commencing November 1990. An open electoral system will ensure that a commissioner more accountable to consumers will implement Prop. 103, and that insurance issues receive regular widespread public debate.

And Prop. 103 requires insurers to cooperate with a permanent, independent voluntarily-supported public benefit consumer watchdog organization to protect consumers' insurance rights and monitor both the commissioner and the industry.

No longer will the insurance industry be permitted the sloth and inefficiency that characterized pre-103 California, where the insurance companies were absolved from competition in the marketplace through their exemption from the antitrust laws, and absolved from accountability to responsible state officials. Proposition 103's rate reductions will wring the inefficiency and waste from the insurance companies; competition and regulation, mandated by 103, will keep the insurers trim and their rates lower.

The Insurance Industry's Post-Election Behavior

Within hours of the passage of Proposition 103, insurers began a massive campaign of economic turmoil within California. Many companies ceased writing al forms of property-casualty insurance; consumers were cancelled unlawfully; agents' agreements were suspended or terminated; dozens of insurers threatened to withdraw. As revealed by legal papers filed by insurers with the California Supreme Court, these events had been choreographed weeks in advance of the election.

On November 9, insurers filed a number of lawsuits asking various courts to block Proposition 103. The Supreme Court responded with a stay of the initiative. The stay was partially lifted in December. With the exception of the rollback and the watchdog organization, which remain in abeyance pending the court's decision, all other provisions of Proposition 103 are now in effect.

Unfortunately for California consumers, insurers have arrogantly taken advantage of the court's temporary stay of the rate reduction and freeze to implement further rate increases. State Farm policyholders which buy the required minimum insurance package have been hit with a 17% increase; GEICO has instituted a 9% increase; and based on copies of premium notices we have received from members of the public, many companies have taken even greater increases. Some motorists have seen their auto insurance climb by as much as 40%.

Indeed, many companies appear to be ignoring the requirements of the provisions of Proposition 103 which are now in effect. Arbitrary discrimination, cancellations and non-renewals are frequently reported, and often go unchallenged or uncorrected by the Insurance Commissioner. Meanwhile, companies such as 20th Century are reporting record profit surges.

Moreover, the Commissioner has stated conflicting and erroneous positions on the portions of Proposition 103 which are legally in effect. The Commissioner has taken little action to enforce the operational protections of 103 and has yet to begin the complicated and critical process of developing regulations for those reforms which are scheduled to take effect in November. In some cases, the Commissioner appears intent upon enforcing provisions of the Insurance Code which no longer exist, since Proposition 103 repealed them.

There is no excuse for this dereliction of duty, particularly during a time in which consumers must rely on the vigilance of the Deukmejian Administration to protect them against anarchy in the insurance marketplace. Our worst fears about Commissioner Gillespie have only been slightly assuaged by her recent requests to the legislature -- long overdue -- for immediate funding for personnel and equipment needed to implement 103.

The commitment of the legislature, the Governor and the Insurance Commissioner to the defense of the public will be put to an even greater test by the industry in the coming months. There is evidence that once the Supreme Court agrees to permit 103 to have full effect, insurers will renew their threats of economic intimidation. As the insurance industry's political consultant, Clinton Reilly, pointed out in a secret post-election memo, "[t]he ramifications of Prop 103 may ultimately force ... voters to re-examine Prop 103, but only if events create an unstable environment where the Auto Insurance System is in continuing turmoil."

Of course, if companies threaten together to withdraw, they will subject themselves to criminal prosecution by the state attorney general for concerted boycott. California is the largest and most lucrative insurance market in the nation. If any insurance company dares leaves it, others will move in to take its business.

Moreover, declarations of boycotts and other intimidation toward the large California market by some insurance companies will only stiffen the resolve of consumers everywhere to hold the property/casualty insurance industry accountable for its volcanic rating practices, its unsubstantiated assertions of unprofitability. Few in California can doubt that the industry's post-election abuses have furthered outraged the public; a recent poll showed Proposition 103's support at at even greater level than the Election Day returns indicated.

Californians are not the only citizens to experience the wrath of the insurance industry when insurers are confronted with lawfully enacted consumer reforms. In 1986, the Florida legislature enacted a 40% rollback of specified commercial liability insurance lines. Insurance companies issued exactly the same threats, cancellation notices, and dire predictions as they did in California on November 9, 1988. A lawsuit was brought. However, the Florida Supreme Court ignored the machinations of the industry, upheld the rollback, and insurers continue to prosper in Florida today.

Assault on the System of Justice

Withdrawal from the lucrative California marketplace is a self-defeating economic decision for insurance companies. But the industry has often exercised its economic clout, and its ability to destabilize the consumer marketplace in the short term, in order to bully elected officials into enacting restrictions on victims' rights that would permit insurance companies to maintain their wasteful and inefficient

operations.[1] In recent years, insurers have used their control of the liability insurance marketplace as a weapon of involuntary servitude, enlisting businesses, medical professionals and manufacturers in an alliance to undermine the integrity of the courts and the rights of consumers.

We now know, of course, that restrictions on the legal rights of consumers and victims to full compensation by wrongdoers, have virtually no impact upon insurance rates. Dozens of tort law restrictions since 1986 in California have had no impact on rates -- yet today the insurance companies, anxious to avoid the impact of Proposition 103's rate cuts, demand that consumers surrender even more of their basic civil law rights!

Consider some examples of the wholesale legislative retreat from California's once nationally-respected panoply of victims' civil law rights and remedies, drawn from a summary prepared by Senate Judiciary Committee Chair Bill Lockyer:

- Proposition 51 -- This June 1986 ballot measure promoted by the insurance industry, the medical and manufacturers lobbies promised an immediate 15% savings in insurance by restricting non-economic damages in joint and several liability cases.

1988 Statutes

- SB 1 (Doolittle) -- limits punitive damage claims against religious corporations.

- SB 1978 (Lockyer) -- permits post-litigation inquiry into veracity of certificate of merit of architects and engineers.

- SB 1755 (Lockyer) -- provides immunity for negligence of volunteer directors and officers of non-profit corporations and medical trade associations if sufficient insurance coverage is in effect.

- SB 2333 (Kopp) -- provides immunity for schools from strict liability for asbestos exposure.

- SB 2427 (Rogers) -- provides immunity to restaurants donating food to non-profit food banks.

- SB 2789 (Maddy) -- limits liability of lending institutions for large loans.

- AB 2973 (O'Connell) -- immunizes public entities from liability for acts of police dogs.

- AB 3224 (N. Waters) -- immunizes farmers from liability for

[1] One powerful sector of the insurance industry which has received little attention is the reinsurance system. The legislature should conduct an investigation of Lloyds and other reinsurers in order to bring them under proper regulatory and disclosure requirements. This will prevent actions by reinsurers which contribute to the destabilization of the insurance marketplace in California.

injuries caused by dangerous conditions to persons invited on the farm to pick produce for charitable purposes.

• AB 3473 (Filante) -- immunizes a physician from liability for obstetrical negligence when "on call."

• AB 3694 (Harris) -- expands public entity immunity for land failures.

• AB 3992 (Frazee) -- expands immunity of local elected officials.

<u>1987 Statutes</u>

• SB 23 (Bergeson) -- overturns state supreme court case which permitted liability of public entities which provided safety services on public property.

• SB 241 (Lockyer) -- the statutory embodiment of the infamous "nonaggression pact" between various trade associations, this law establishes tougher procedural hurdles for punitive damages awards, restricts product liability actions against tobacco, alcohol and butter and other products, and limits the obligation of insurance companies to provide independent counsel to insureds.

• SB 1526 (Lockyer) -- qualified immunity provided to volunteer directors and some officers of non-profits if insurance secured or effort made to secure insurance.

• SB 1598 (Presley) -- provides that a violation of governmental manual or rule book does not create presumption of negligence unless the rule was formally adopted as a regulation or statute.

• AB 1530 (W. Brown) -- permits corporations to immunize directors and officers from liability to the corporation for their negligence.

• AB 1912 (Stirling) -- immunizes public entities for injuries to third parties caused by police pursuits.

In addition to these legislative infringements upon tort laws, a number of recent court decisions have further limited tort laws:

<u>Foley v. Interactive Data Corp.</u> (1988) -- eliminated tort remedies for wrongful termination.

<u>Moradi - Shalal v. Fireman's Fund</u> (1988) -- abolished bad faith thirty party actions against insurers.

<u>Brown v. Superior Court</u> (1988) -- eliminated most strict liability for injuries caused by prescription drugs.

<u>Jolly v. Eli Lilly</u> (1988) -- restricted statute of limitations to bar DES suits.

This immodest list of legislative and judicial restrictions upon common law tort rights and remedies -- some centuries old -- has deprived consumers and victims of important legal protections. Insurance

companies demanded many of these changes; yet this patchwork of statutory restrictions on elemental human rights has yet to result in any significant reduction in insurance rates.

That is not surprising, since these changes were made without the benefit of any empirical evidence to support the industry's claims that such restrictions were either necessary or justified.

Indeed, even the insurance industry-funded Rand Corporation's Institute for Civil Justice says that there is no basis for the industry's allegation that automobile lawsuits are soaring, necessitating premium increases. In its 1987 report "Trends in Tort Litigation," Rand said the following:

o In California between 1975 - 1985, "The data for auto cases show a slight increase, which roughly mirrors population growth during this period; in other words, litigation in this area remained basically stable."

o Auto cases are a declining percentage of case filings.

o In San Francisco, one area studied by Rand, "auto accident cases constitute a steadily declining slice of the caseload pie, falling from 48 percent to 35 percent."

o "Plaintiffs in auto cases involving modest injuries and expenses continue to obtain modest awards and, at least in recent years, these awards generally hold after trial."

o Between 1980 and 1985, the average growth rate in insured defendants' average legal fees and expenses paid per claim was about 6 percent for auto (i.e., less than the rate of inflation).

o "Routine personal injury torts such as auto cases are growing slowly in frequency and costs, and their outcomes --inflation adjusted -- have not changed much over the last 25 years."

When properly implemented, Proposition 103 will provide public officials charged with the responsibility to make policy decisions and legislative choices with the information on payouts, losses, income and reserves necessary to determine the true condition of the insurance industry and how victims are faring under the present system.

Questions such as how much insurers pay out for different types of damages, i.e., economic damages, non-economic damages and punitive damages; or how victims actually fare -- in other words, how much insurers actually pay in settlements, or verdicts that are reduced post-trial, compared to victims' injuries and losses; remain unanswered until Proposition 103's disclosure provisions are fully utilized by the Insurance Commissioner and obeyed by the companies.

Of course, most insurance companies continue to see no reason to wait for the facts. Faced with the rate reductions mandated by Proposition 103, insurers in California are once again demanding a "no fault" bailout in order to preserve their squeezed profits and privileges by limiting their responsibility to fully pay legitimate claims.

However, legislators should follow the lead of the public, reflected in the election results last November, and refuse to surrender to the economic pressure and propaganda of the industry. The array of restrictions on victims' rights recently approved by the legislature should be repealed; an appropriate place to begin is SB 241, a measure whose mission had failed before the ink on the Governor's signature was barely dry.

Another appropriate candidate for immediate repeal is MICRA, which in the fourteen years since its passage has deprived many victims of medical malpractice of legal representation and full compensation for their injuries.

And the legislature should consider whether Prop 103's application of the Unfair Business Practices Act and other consumer protection laws offers sufficient remedies to those victimized by the bad faith of insurance companies, or whether other legislation is necessary in light of the Royal Globe decision.

Finally, proposals which call for further sacrifices of the legal rights of California citizens should be rejected; there are many legitimate measures which the industry can adopt -- without legislation -- which will cut costs, improve safety and reduce insurance rates.

Loss Prevention

Insurance companies are usually indifferent to safety and loss prevention because they have become predominantly cash flow financial institutions. Their profit is based on a percentage of their projected costs, so the higher the cost, the greater the absolute dollar profit. More and more attention is paid to increasing investment income through premium volume. Less attention is paid to safety and engineering contributions that could reduce premiums but retain prudent underwriting profits. Insurance companies would much rather charge a premium of $1000 and then pay out $500 in claims, then charge $500 and pay $250, because they would prefer having more money to put in investments and to pursue their financial objectives.

Under this system, insurance companies lack incentive to reduce claims and costs through better health and safety conditions. As a result, even repeated litigation arising from well-known and identical hazardous products or services has not prompted the insurance industry to insist that hazards be eliminated. And with very few exceptions, they have failed to exert their legendary political muscle in state legislatures and in Congress, or advocate before regulatory agencies, to enact or maintain proven life-saving programs like the 55 mph speed limit, airbags, and the 5 mph bumper protection standard (the latter having been reduced to an absurd 2 1/2 mph collision protection level costing billions of dollars). Our 1987 survey of eleven major U.S. property/casualty company foundations showed that casualty prevention is not accorded much of a priority for grants and other contributions. Only Travelers contributed $10,000 to safety programs. Aetna, American Financial Corporation, Chubb, Continental, and Farmers Insurance Group contributed $5,000 or less.

We have challenged the insurance industry to disavow the assault on the civil justice system, and instead join with us in fighting for tougher loss prevention practices that would cut claims costs by reducing the source of claims -- preventable deaths and injuries. Attached you will find a letter to the Chairman of Aetna Life and Casualty, suggesting in detail a program of loss prevention that would dramatically reduce payouts and protect workers and consumers. To date, no insurer has made the necessary commitment to loss prevention.

Conclusion

The Prop. 103 victory is reverberating throughout the nation with the message that insurance consumers will be standing up for their rights against unreasonable insurance rates, arbitrary practices and lobbying pressure by insurance companies and their corporate allies to take away victims' rights. Californians can be proud that their pioneering vote last November has given strength and direction to millions of consumers across the country.

January 26, 1989

James P. Lynn, Chairman
Aetna Life and Casualty Company
151 Farmington Avenue
Hartford, CT 06156

Dear Mr. Lynn:

I am writing to you about how Aetna can reduce costs -- especially through loss prevention -- instead of continuing its three decade drive to take away injured peoples' legal rights in courts of law.

Insurance companies say that Californians should be denied their right to receive Proposition 103's rate relief and insurance industry reform because, they say, Prop. 103 will cost them money. They say that the one-year 20 percent rate reduction ordered by Prop. 103 is unfair and unreasonable since auto insurance rates are already too low, and because "costs," i.e. legal fees, medical bills and car-repair expenses, are rising. "The cost increases have outpaced our ability to manage efficiently, so we have to charge more," Safeco's president told the Wall Street Journal.

Rather than looking at their own waste, inefficiency, mismanagement and inattention to loss prevention for the solution to controlling costs, insurers have spent many millions of dollars campaigning not only to defeat proposed reforms of the insurance industry, but to restrict the rights of victims to sue the perpetrators of their harm and obtain fair compensation for injuries.

Proposition 103's enactment, notwithstanding the industry's multi-million dollar campaign to defeat it, has mobilized citizens nationwide to fight for strengthened regulation and increased competition for the insurance industry. Therefore, companies will have to look for ways to reduce their costs, specifically through more efficient operation, and more effective advocacy for health and safety to prevent injuries and property damage from occurring.

1. Efficiency

The insurance industry represents one of the greatest bundles of capital ever brought together in world history. Property/casualty companies in the United States have assets totalling over $300 billion; and over 2,000 life insurance companies have assets totalling over $900 billion. This huge industry, however, is an inefficient and wasteful bureaucracy. If insurance companies operated more efficiently, they could easily reduce rates.

For example, in the private passenger automobile liability line, the industry overall pays 35.3 percent of what it writes in

loss adjustment and underwriting expenses, including claims processing, defense fees, commissions and brokers. Yet USAA, one of the best service companies in the market, operates at only a 20 percent expense level. According to the National Insurance Consumer Organization, auto liability insurance rates would drop by an average of 19 percent nationally if the industry on average were as efficient as USAA.

Insurance companies have operated so inefficiently in California and elsewhere because the insurance market is, in important ways, not competitive. Insurers engage in price-fixing because such practices are not subject to antitrust laws. In addition, states have anti-rebate laws which prohibit insurance agents from offering discounts to policyholders. As a result, the most efficient agent can not compete for market share by offering a discount. Also, many state laws prohibit group auto and homeowner insurance sales which could enhance buyer bargaining power. And consumers do not have access to good, comparative information about prices and services.

Proposition 103 repeals the antitrust exemption, the rebate and the group sales prohibition in California and allows banks to sell liability insurance. Prop. 103 also provides for a computerized consumer information system to facilitate comparison shopping. These measures should provide much needed incentive to insurers to reduce costs caused by waste and inefficiency.

In addition, insurers could be doing much more than simply complaining about legal, medical and auto repair expenses which they say are driving up their costs. For example, insurance companies often insist that information they provide plaintiffs during the discovery process in product liability cases be kept completely confidential. This not only keeps important safety information that can lead to hazard alerts and policies, from consumers and public agencies, but also it forces plaintiffs to start from scratch the discovery process in each similar case, driving up both plaintiff and defense legal fees.

As for medical costs, health insurers like Aetna could be aggressively pushing for strict guidelines to reduce physician's misuse of unnecessary medical tests, like chest X-rays and electrocardiograms, as well as unnecessary surgery, which add billions to health care costs in this country. Former HEW Secretary Joe Califano recently observed in the New York Times Magazine that Americans are four times more likely to have coronary bypass surgery than Western Europeans with the same symptoms, and that at least half of the 900,000 Caesarean sections performed in 1986 were unnecessary.

Insurance rates have risen out of all proportion to auto repair costs, according to the National Insurance Consumer Organization. Even so, however, insurers could be doing much more to encourage automobile design changes which would reduce repair costs without sacrificing safety, and reduce auto theft, which is responsible for the largest component of comprehensive insurance costs. I recently received a letter from a Houston inventor who has developed a patentable computer key system which

would make cars virtually impossible to "hot-wire" and steal. He contacted a number of insurance companies, as well as his local chapter of the industry-backed National Auto Theft Bureau, with his idea. Not a single insurer responded, and the NATB chapter provided him no encouragement or support.

2. Loss Prevention

Former Pennsylvania insurance commissioner Herbert Denenberg wrote in 1970,

> It would be an act of gross social irresponsibility to permit insurance companies to acquire this expertise in saving life and limb and then permit them to utilize this information only for the purpose of estimating the cost of deaths and injury and not for the purpose of eliminating death and injury.

The insurance industry should be the safety sentinel for the nation's economy. The industry should put into practice its theoretical vested interest in increasing profits by reducing claims and should be making great strides in areas of hazard control and loss prevention. Unfortunately, and contrary to their historic mission, however, insurers are barely lifting a finger to eliminate or reduce hazards that cost insurers billions yearly.

Three centuries ago, Lloyd's of London wrote insurance for ships travelling to the Orient on the condition that the insurer adopt certain safety precautions, such as equipping ships with lifeboats. That was an early display of the insurance industry's early commitment to loss prevention, and it had some notable successes in succeeding centuries, such as in the areas of industrial boiler and elevator safety.

But today, insurance companies are usually indifferent to loss prevention because they have become predominantly cash-flow financial institutions. More and more attention is paid to increasing investment income through premium volume. They pay very inadequate attention to safety and engineering contributions that could reduce premiums but retain prudent underwriting profits. Insurance companies would much rather charge a premium of $1,000 and pay out $500 in claims, then charge $500 and pay $250 in claims, because they would prefer having more money to put in investments that pursue their financial objectives.

As a result, even repeated litigation arising from well-known and identical hazardous products or services has not prompted the insurance industry to insist that hazards be eliminated. In the area of auto safety, the Insurance Institute for Highway Safety (IIHS), once an important voice in efforts to ensure crashworthiness and permanent design safety improvements to motor vehicles, has shifted focus in recent years from the automobile product to the automobile victim. While supporting seat-belt and drunk driving laws -- as do many other consumer and victim groups -- the IIHS recently has shown less public interest in crashworthiness issues. For example, although side impact

crashes result annually in nearly 8,000 deaths and 25,000 serious injuries, IIHS offered no position during NHTSA's 1986 hearings on side crashworthiness protection.

Unfortunately, IIHS has aligned itself with the automobile industry in other areas detrimental to the public health and safety. For example, IIHS supported Ford's petition to extend to 1994 full implementation of DOT's passive restraint rule, giving companies four more years to satisfy the requirement with driverside only air bags, instead of full front air bags or automatic belts. The Center for Auto Safety called Ford's petition an attempt to hold "the safety of the American driving public for ransom."

Insurance companies point to the IIHS and other safety and anti-crime organizations such as the Insurance Crime Prevention Institute and the National Auto Theft Bureau, as evidence of their financial commitment to safety organizations and loss prevention. Notice, however, the insurance industry's inattention in pressing automobile companies to design more theft-resistant locks, especially GM whose locks car thieves have long known are easier to defeat. And compare, for example, the $7.6 million annual budget of the IIHS with the far greater resources needed to advocate, test and lobby for loss prevention in auto safety.

In addition, our 1987 survey of 11 major U.S. property/casualty company foundations showed that casualty prevention is not accorded much of a priority in making foundation grants and other contributions. Only Travelers contributed as much as $10,000 to safety (meaning loss prevention) programs. Aetna, American Financial Corporation, Chubb, Continental and Farmers Insurance Group contributed $5,000 or less. See "Loss Prevention and the Insurance Function," published in the Fall, 1987 Suffolk University Law Review.

Moreover, if insurance companies were sufficiently determined to minimize hazards causing injury and death, they could easily use their rate and coverage control to accomplish their goal. For example, companies could use their own rating function to penalize through increased rates insureds who do not improve safety, or require implementation of hazard prevention measures as part of the insurance contract. They could establish structured programs to disclose information about product hazards, which their investigators have documented for their insurance company files, to those authorities responsible for ensuring safety. (The media has learned to look infrequently to insurance companies for such information or comment.) And they could set more quickly and amply loss prevention examples in their own shop, such as by requiring their entire fleet of cars to be air bag equipped. Only a very few casualty companies have done the latter. The major life companies have not.

Moreover, insurers have innumerable opportunities to exercise their full muscle before government bodies, whether lobbying Congress, formally petitioning regulatory safety agencies, or seeking enforcement of health and safety standards

in judicial proceedings. Instead, the contact insurance companies have with the court system is in fighting claims and essentially defending hazards. A few luminous exceptions have occurred, such as when State Farm successfully petitioned the U.S. Court of Appeals to reverse NHTSA's 1981 rescission of the automatic restraint standards, or when State Farm and Allstate challenged the 2 1/2 mph bumper protection standard. But even the IIHS has only occasionally petitioned for auto recalls and even more rarely for new or stronger motor vehicle safety standards.

To demonstrate how little attention insurance companies pay to safety and loss prevention, consider the nationwide trend in motorcycle helmet use laws. Between 1966 and 1973, almost every state had passed a motorcycle helmet use law. But by 1980, 29 states had repealed or weakened their law and insurance companies did virtually nothing to stop them. More than 500 excess deaths and many more serious injuries occur yearly in those states with no, or weak helmet laws, compared to states with strong laws. A few other examples serve to demonstrate what opportunities insurance companies have to reduce claims and therefore costs by insisting on the reduction or elimination of hazards.

a. Vehicle Safety:

55 mph speed limit: In 1987, a closely divided U.S. Congress revoked the federal 55 mph speed limit on federal interstate highways, leaving to the states authority to raise the limit to 65 mph. According to NHTSA, in the 38 states that have upped the limit on rural roads in the past year, deaths on these highways have increased 19 percent -- an increase nearly three times as high as in states that kept the 55 mph limit.

The insurance industry must share the blame for the increasing costs resulting from this predictable increase in deaths and injuries. Although the IIHS and some companies devoted some support efforts to try to preserve the 55 mph speed limit, had the industry devoted its full political muscle to this issue, there is little doubt the industry could have prevailed on Congress to preserve this proven highway safety measure. And now that the grim facts about increased deaths and injuries are in, why are insurance companies not fighting to lower highway speeds at the state level, or to ensure the 55 mph speed limit is maintained in states which have not raised it?

Air bags: The air bag can save at least 12,000 lives and hundreds of thousands of serious injuries a year in this country. Some major auto insurers are providing some financial incentives to encourage purchases of cars equipped with air bags (although the IIHS says the major AAA and other motor club insurers provide no incentive unless required to do so by law as in New York state). The IIHS says USAA's incentive program is exceptional for providing unusually large discounts for medical and personal injury protection for cars equipped with air bags (60 percent,

where as most companies' discounts range from 20-30 percent for medical and personal injury protection). During 1988, USAA also provided $300 to any policyholder who bought or leased a car equipped with an optional air bag (although for the bonus to apply, the air bag must have been optional, and even this bonus was discontinued in 1989).

But if all insurers put their muscle behind air bags by encouraging air bag retro-fitting, equipping their own entire company fleets with air bags as has Travelers Insurance Co., pushing for mandatory regulations for air bags or their equivalents, many more lives could be saved and billions of dollars more could be saved annually in health costs, wage loss and disability payments.

Seatbelts: The National Highway Transportation Safety Administration (NHTSA) conservatively estimated that in 1987, "the 25 percentage point rise in national belt use over 1984 levels saved about 1,300 lives and prevented about 16,000 moderate-to-serious injuries. The resultant reduction in automobile insurance claims was roughly $1 billion to $2.5 billion. Other public and private insurers probably saved another $0.5 billion to $1.25 billion."

But while seatbelt use in automobiles has reduced deaths, serious injuries and insurance costs, it is not used to reduce premiums. Also, these benefits have not been extended to workers who must drive dangerous vehicles on the job. For example, according to a 1987 Trial magazine article, at least 100 forklift operators are killed or seriously injured each year as they are thrown out, or jump out of forklifts that accidentally tip over. Many tests have demonstrated the effectiveness of seat belt use in preventing these injuries, and although a few companies like Clark Equipment Co. and U.S. Steel require that seat belts be installed on forklifts, most insurance companies have not insisted on this condition.

James W. Smirles, national broker liaison with the Long Grove, Ill.-based Kemper Group, told a risk managers' conference this year that in the worker compensation area, the difference between a very good and a very bad safety record can cause them to raise premiums as much as 400 percent. Wouldn't workers be better off if insurers simply insisted that for continued coverage, employers provide safety protections so that their workers are protected from such accidents so that injuries and insurance claims can be reduced?

5 mph bumper standard: Between 1978 and 1982, the government required a 5 mph bumper protection standard, which the Carter administration's Department of Transportation estimated would save consumers over $400 million a year. Despite overwhelming consumer support for this standard, the Reagan administration, after heavy lobbying by General Motors, rolled the bumper protection standard back to 2 1/2 mph.

While fender-bender accidents represent a large segment of insurance company costs, insurance companies, with a few exceptions like Allstate and State Farm, paid very little attention to this development. In addition to applying its lobbying muscle in Congress, if not before the DOT to have prevented the rollback of bumper protection standards, insurers could have petitioned the government to reinstate the standard once data on the 2 1/2 mph standard's impact came in. They did not. Moreover, insurers have not insisted on bumper standards for light trucks and vans, which now comprise about 1/3 of all new vehicles sales.

b. Fire and Electrical Safety.

Deaths and injuries due to fire are largely preventable. In Japan, for example, the rate of fire deaths is half that of the United States -- 25.7 per million in the United States; 12.5 per million in Japan.

The insurance industry frequently points to its past help in originating the national electrical code and establishing Underwriters' Laboratories and the National Fire Protection Association as examples of its past commitment to loss prevention and fire safety. Yet these efforts are small compared to what the industry should be doing now to make these institutions real change-agents rather than indentured servants.

First, the industry-backed Underwriters' Laboratories' seal of approval on electrical devices does not always ensure the product's design safety. For example, after an alarming increase in residential fires due to kerosene heater use, UL recently upgraded its kerosene heater standard, UL 647, to help reduce some of the fire deaths and injuries. However, the compromise standard failed to address some problems, such as flare-ups and afterburn. See, for example, the analysis in the 1988 report by the Federal Emergency Management Agency/U.S. Fire Administration, "Alternative Heater Fires: A Critical Review of Safety Issues." Moreover, after UL 647 was upgraded, retailers were still permitted to sell out existing stocks of substandard heaters.

Similarly, in a November, 1987, New York Times column, the president of a mailorder home appliance company expressed outrage that UL's new standard to prevent electrocution from accidental immersion of hair dryers in water, applied only to hair dryers manufactured after October 1, 1987. Retailers were permitted to sell out their stock of substandard hair dryers. As a result, during the 1987 Christmas buying season, new and old dryers were on the shelves, both with UL labels, and consumers could not tell which were substandard.

Moreover, insurance companies have not actively promoted the fire-safe cigarette, nor advocated strongly for residential sprinklers. They recently have pushed for tougher criminal laws for arsonists, and have assisted efforts to help catch arsonists with the Insurance Committee for Arson Control and the Insurance Crime Prevention Institute. But David Hemenway, an economist at

the Harvard School of Public Health and a Pew Fellow in Injury Control who has studied insurance industry efforts to promote residential fire safety, has written that the size of these efforts is minuscule compared to the size of the insurance industry and the magnitude of the fire problem. This is an important observation. The insurance industry, when it goes beyond mere rhetoric, rarely puts more than a tiny fraction of its resources and power beyond public and private safety, health and property damage prevention efforts. But Aetna and other companies are known to lobby very vigorously against victims' rights or repeal of the McCarran-Ferguson Act.

Insurers have released very little useful statistical fire data to those responsible for ensuring safety, or to policyholders. Nor do insurers operationally cooperate with ongoing community efforts at fire prevention. For example, one well-known anti-arson group undertook a program to prevent many of the most notorious properties in New York City from getting fire insurance. According to a 1985 article in Citizen Participation magazine, the group wrote to every insurance company known to provide fire insurance in its area, offering to share with those companies some of its own credible "early-warning" data as an aid in evaluating insurance risks. With the notable exception of the Liberty Mutual insurance company, the group's letters and phone calls drew what it termed an "unenthusiastic response." According to the article, other groups which also offered to work with insurers reported similarly disappointing results, "raising suspicions that some insurance companies don't much care about inner-city arson, so long as the premiums keep rolling in to cover it."

In addition to exchanging information and more strongly advocating fire safety measures, Hemenway suggests that insurers should offer policyholder discounts to encourage fire prevention. For example, only in the past few years have residential insurers included discounts for smoke detectors and for not smoking, and these discounts have neither been large nor well-publicized. Such discounts should be expanded to include use of less dangerous wiring and heating systems and for non-flammable furnishings.

c. Products:

It is estimated that nearly 100,000 deaths and millions of injuries each year are product-related, and are occurring at increasing rates. There are many ways insurance companies can function to control and minimize these hazards which cause death and injury.

For example, by implementing a structured disclosure program, insurance companies can do a great deal to assist those responsible for making products or services safer. According to safety research consultant David V. MacCollum, former president of the American Society of Safety Engineers, insurance companies should be collecting data on equipment, identifying injuries by

particular hazards, and maintaining a central data bank on hazard information, narratives of occurrences and available safeguards. For each claim or disputed injury, insurance companies should be routinely identifying the product hazard or unsafe condition which resulted in the claim, including the make and model of any product that served as the host for the hazard, or any chemical that could cause toxic injury. Companies should publish annual summaries of all death or injury-related occurrences, assuring public access to this information. These data are crucial for regulatory agencies, for those injured by such products, and for the populace so they may be alerted to unsafe products and conditions.

Internally, insurance companies with multiple lines, like workers' compensation and product liability, should forward information regarding hazards and equipment from one line to another. In addition, information about hazardous conditions and products and those which repeatedly cause serious harm should be communicated to law enforcement officials, as well as advertised to the public.

Insurance companies should also require implementation of hazard prevention measures as part of the insurance contract, particularly after a claim is submitted and specific hazard prevention measures identified. After a legitimate claim is paid, the insurer should routinely conduct a hazard analysis of the product or unsafe circumstance.

The insurance industry's lack of concern in controlling even the most serious hazards that the industry insures, was clearly evident during the House Subcommittee on Surface Transportation of the Committee on Public Works and Transportation hearings, May 19, 1988, on the transportation of hazardous materials. There are 500,000 shipments of hazardous and toxic materials moved each day through, what Rep. Douglas Applegate called "an archaic hazardous materials transportation system." DOT reported incidents of hazardous spills in 1986 were 5,700, and the Office of Technology Assessment says that as many as 50 percent of incidents are not reported.

Twenty-five witnesses testified at this hearing, including generators of hazardous wastes (e.g., the chemical manufacturers and corporations like DuPont); transporters of hazardous wastes (e.g., truckers, shippers); emergency management specialists (e.g., the Federal Emergency Management Agency,); and state and local government associations (e.g., National Governors Association). Not one insurance company nor insurance industry representative testified or even filed materials for the record.

d. Smoking

According to findings reported by PrideMark Young & Simon, smokers cost insurance companies 54% more for health care than do non-smokers. It is a mass tragedy that the life and health insurance industries did not crusade against cigarette smoking promotions and establish anti-smoking clinics years ago. Over

the years, Reader's Digest did far more in this area than did insurers such as Metropolitan, Prudential, the Equitable and John Hancock.

According to safety research consultant MacCollum, "If the existence of an effective hazard prevention program within an institution were used as the foremost criteria for providing underwriting coverage for workers' compensation, product liability, public liability, and other such insurance, we would not, today, need to be addressing the problem of exorbitant insurance rates." With their tremendous assets and soaring profits, insurance companies have a great opportunity to contribute to the advancement of health and safety by working to eliminate or reduce hazardous products, services and conditions. And they will reduce their claims costs in the process.

Instead of a major commitment by Aetna in these directions, your company is spending large sums to prejudice public opinion against the rights of injured persons to plead before juries for justice. Presently, in at least four states -- Colorado, Louisiana, St. Louis and upstate New York -- you are spending many policyholders' dollars in full page newspaper ads and electronic media spots. The content of these ads are replete with wild misrepresentations that do not reflect the regular disposition of cases in the courts. These ads are far, far less fair than would be an ad depicting Aetna's lengthy coverup of its knowledge about the Dalkon Shield mutilations as being explicitly representative of the entire insurance industry's practices.

Is this the way Aetna wants to spend money -- caricaturing the American legal system better than any Kremlin propagandist could do? Does Aetna want to provoke an aroused public against its outrageous distortions or would it rather enlist an aroused public into loss prevention project after project -- ranging from motor cycle helmet use to safer motor vehicles, medical devices and pharmaceuticals? Let's hear from you, Mr. Lynn. Which specific projects do you wish to have your company work on, that are mentioned in this letter, for results, not rhetoric?

Sincerely,

/s/

Ralph Nader

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Case Comments

LOSS PREVENTION AND THE INSURANCE FUNCTION

Ralph Nader*†

Loss prevention and advocacy for health and safety have been important historical objectives of the insurance function. Nearly three centuries ago, Lloyd's of London wrote insurance for ships travelling to the Orient on the condition that the insurer adopted certain safety precautions, such as lifeboats. In 1894, the insurance industry established Underwriters Laboratories for issuing seals of approval for fire-prone electrical devices and connectors. During the nascent development of elevators and boilers, insurers led the way in insisting on safety standards and equipment improvements, such as with elevator cables and boiler monitoring.

Accompanying the technological strides of the past century has been a rapid expansion in the technology of safety. We know a great deal today about machine and product safety, controlling environmental hazards, and preventing industrial accidents. Yet statistics show that the casualty count in the workplace and marketplace continues to run into the millions yearly. Researchers at the National Academy of Sciences say that nonintentional injuries are the number one cause of death for Americans under forty-four years of age, costing an estimated 4 million years in future worklife.[1] In 1984, the latest year surveyed, such mishaps caused more than 140,000 deaths and 70 million nonfatal injuries, including 80,000 permanent disabilities.[2]

Today, the insurance industry has vast opportunities to advance significantly society's health and safety through loss prevention programs. The industry itself has enormous resources to devote to safety improvements. The 3,000-plus property/casualty companies in the United States have assets totalling over $300 billion,[3] and over 2,000 life insurance companies have assets totalling over $800 billion.[4]

Yet despite its growth in size and influence, the insurance industry is nowhere near the factor in loss prevention it achieved in the past.[5] Even

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† Attorney Joanne Doroshow provided research assistance for this article.

1. NATIONAL ACADEMY PRESS, INJURY IN AMERICA: A CONTINUING PUBLIC HEALTH PROBLEM 1, 5 (1985).

2. *Id.* at 1, 4.

3. INSURANCE INFORMATION INSTITUTE, 1986-87 PROPERTY/CASUALTY FACT BOOK 5 (1986).

4. AMERICAN COUNCIL OF LIFE INSURANCE, 1986 LIFE INSURANCE FACT BOOK 6 (1986).

5. *See* Hemenway, *Private Insurance as an Alternative to Protective Regulation: The Mar-*

repeated litigation arising from well known and identical hazardous product models or services has not prompted the insurance industry to insist on elimination of avoidable dangers. Insurance companies are letting hazards continue to cause accidents at increasing rates, forcing workers and consumers to assume the risk of death or serious injury.

There are many ways insurance companies can function to control and minimize hazards which cause injury or death.

1. Disclosure of Information

Insurance companies are in a unique position to disclose information about hazards to those responsible for ensuring safety, and to the public. Insurance companies, however, have typically resisted information sharing outside the industry. The experience of some community anti-arson groups in New York City, in their attempts to obtain basic information and cooperation from insurance companies in their anti-arson efforts, typifies this attitude. One group undertook a program to prevent many of the most notorious properties in New York from getting fire insurance. According to a 1985 article in *Citizen Participation* magazine, the group wrote to every insurance company known to provide fire insurance in its area, offering to share with those companies some of its own credible "early-warning" data as an aid in evaluating insurance risks.[6] With the notable exception of the Liberty Mutual Insurance Company, the group's letters and phone calls drew what they termed an "unenthusiastic response."[7] Other groups which also offered to work with insurers reported similarly disappointing results, "raising suspicions that some insurance companies don't much care about inner-city arson, so long as the premiums keep rolling in to cover it."[8] Similarly, in a letter published in the *New York Times*, Stanley Bulbach, Director of Communities United for Research and Education for AIDS, discussed the importance of AIDS education in controlling the disease, but noted resistance by insurers to scale down escalating insurance claims by promoting education on AIDS through billing newsletters.[9]

By implementing a structured disclosure program, insurance companies can do a great deal to assist those responsible for making products or services safer. For example, according to safety research consultant David V. MacCollum, former president of the American Society of Safety Engineers, insurance companies should be collecting data on

ket for Residential Fire Insurance, 15 POL'Y STUD. J. 415, 416 (1987) (understanding factors affecting incentives of insurers necessary to elicit support in hazard reduction).

6. Delibert, *The Burning Question*, CITIZEN PARTICIPATION, Summer 1985 at 10, 11.

7. *Id.*

8. *Id.*

9. N.Y. Times, Mar. 22, 1987, § 3, at 20, col. 2.

equipment, identifying injuries by particular hazards, and maintaining a central data bank on hazard information, narratives of occurrences and available safeguards.[10] For each claim or disputed injury, insurance companies should be routinely identifying the hazard or unsafe condition which resulted in the claim, including the make and model of any product that served as the host for the hazard, or any chemical that could cause toxic injury.[11] Companies should publish annual summaries of all death or injury-related occurrences, assuring public access to this information.[12] Information about ultrahazardous conditions and those which repeatedly cause serious harm should be communicated to law enforcement officials, as well as advertised to the public. Internally, insurance companies with multiple lines, like workers' compensation and product liability, should forward information regarding hazards and equipment from one line to another.[13]

2. Rating and Coverage

Companies should use their own rating function to penalize insureds who do not improve safety. Insurance companies should also require implementation of hazard prevention measures as part of the insurance contract, particularly after a claim is submitted and specific hazard prevention measures identified.[14] After a legitimate claim is paid, the insurer should routinely conduct a hazard analysis of the product or unsafe circumstance and refuse to continue coverage until all the hazards uncovered by the analysis are removed and the risk of injury reduced.[15] How often do insurers with their engineers accomplish these missions?

3. Petitioning Regulatory Agencies

Insurance companies can also be effective advocates for safety improvements through needed regulation. Virtually all regulatory agencies which set health and safety standards provide opportunities for outside input through the adjudicatory or rulemaking process. For years, citizens have taken advantage of these rights by petitioning agencies such as the Consumer Product Safety Commission for product standards, or the Nuclear Regulatory Commission for nuclear safety standards, or asking for the removal of toxic, chemical, or pharmaceutical hazards. Yet insurance companies, with many more financial resources than the average

10. D. MacCollum, There is No Such Thing As A Liability Crisis—It's The Absence of Hazard Prevention That's Hurting Us! 4-5 (unpublished manuscript).

11. *Id.* at 26.

12. *Id.*

13. *Id.* at 28.

14. *Id.* at 27.

15. *Id.*

citizen, have largely stayed clear of regulatory agencies. Even in the auto safety area, only the Insurance Institute for Highway Safety, which does not consider itself an insurance industry trade association, has petitioned occasionally for auto safety recalls and even more rarely for new or stronger motor vehicle safety standards.

Without question, improved safety regulations could have a direct impact on insurance claims. In the fire prevention area, regulations requiring more fire resistant mattresses and furniture, which went into effect in the 1970s, have had some effect in reducing household fires. According to figures compiled by the Consumer Product Safety Commission, 4,240 Americans died in 623,000 residential fires in 1984, down from 757,500 home fires and 5,500 deaths reported in 1980.[16] But this figure still remains higher per capita than many other nations, according to James F. Hoebel, manager of the commission's Fire and Thermal Burn Hazards Office.[17]

4. *Litigation*

Related to their regulatory responsibilities, insurance companies can seek enforcement of health and safety standards through judicial proceedings. Unfortunately, most contact which insurance companies have with the court system is in fighting claims and essentially defending hazards. A luminous exception occurred when State Farm Mutual Automobile Insurance Company, the nation's largest insurance company, petitioned the United States Court of Appeals to review the National Highway Traffic Safety Administration's (NHTSA) 1981-rescission of the automatic restraint standard.[18] In June, 1983, the United States Supreme Court unanimously upheld the State Farm position and found the NHTSA decision illegal.[19]

5. *Research and Development*

Insurance companies devote minimal effort and resources towards research and development in the area of hazard or disease prevention. According to David M. Pharis, president of the Philadelphia-based S.T. Hudson International which specializes in loss control, quoted in the May 21, 1986 *Journal of Commerce*,

> [T]he quality of [risk] managers has improved considerably over the

16. *Tougher Standards Help Reduce Fire Toll*, J. COM., Aug. 20, 1986, at 12a, col. 4.
17. *Id.*
18. State Farm Mut. Auto. Ins. Co. v. Department of Transp., 680 F.2d 206, 213 (D.C. Cir. 1982).
19. Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 56-57 (1983). The court concluded the agency failed to supply the requisite "reasoned analysis" as to its change of course. *Id.* at 57.

> years, but we are still talking about people who are used to dealing with the financial elements of risk control. The engineering aspect is something for which corporations have not yet seen the benefit of allocating funds. Even insurers, in their loss-control departments, have not by and large allocated significant funds for engineering.[20]

In addition, even where engineers are on staff in insurance company loss control departments, they may be without relevant experience or training in the field of safety. According to safety research consultant MacCollum,

> Generally the engineer with training in a conventional discipline has little practical knowledge in the field of hazard prevention. Currently only a few schools teach hazard prevention principles to undergraduate engineers. Such courses are elective and are not a requirement to obtain a degree, and, therefore, a very small percentage of engineers have been exposed to any instruction on the methodology necessary to identify and control hazards.[21]

6. *Setting Standards in Their Own Shop*

Insurance companies should set their own loss prevention and hazard control examples. For example, by the end of 1986, the Travelers Insurance Company should have completed conversion of its entire fleet to driver-side air bag cars. According to Travelers' Senior Vice-President Peter Libassi, "Looked at from a purely economic point of view, our investment has already paid for itself. The hospitalization and rehabilitation costs, lost work time, or possible death benefits would have exceeded the actual cost of equipping our cars with air bags."[22] Allstate and Aetna insurance companies have also purchased air bag cars for their fleets. Others, such as Prudential, have not.

As another example, according to findings reported by PrideMark Young & Simon, smokers cost insurance companies 54% more for health care than do nonsmokers.[23] In a recent letter to the *New York Times*, Stanley G. Karson, Director of the Center for Corporate Public Involvement, noted that some insurance companies have taken the positive step of banning smoking in their corporate offices or have restricted smoking to certain designated areas.[24] It is a mass tragedy that the life and health insurance industries did not crusade against cigarette smoking promotions and establish antismoking clinics years ago. The ***Reader's Digest***

20. Zinkewicz, *Risk Managers' Role Expands*, J. COM., May 21, 1986, at 14a, col. 3.
21. D. MacCollum, *supra* note 10, at 24.
22. "Insurers Bag It", TECH. REV. 12, 13 (Aug./Sept. 1986).
23. 14 PRIDEMARK YOUNG & SIMON, INSURANCE AND RISK MANAGEMENT No. 1, at 1
24. N.Y. Times, *supra* note 9.

did far more in this area than insurers such as Metropolitan, Prudential, the Equitable, and John Hancock.

The insurance industry's overall indifference to loss prevention—their failure to apply these functions to major environmental, product and professional hazards—has been a significant contributor to the "insurance crisis" of the mid-1980s. Consumers and businesses have been hit with skyrocketing insurance premiums, reduced coverage, and arbitrary cancellations. According to safety research consultant MacCollum, "[i]f the existence of an effective hazard prevention program within an institution were used as the foremost criteria for providing underwriting coverage for worker's compensation, product liability, public liability, and other such insurance, we would not, today, need to be addressing the problem of exorbitant insurance rates."[25]

In October, 1986, Richard Wade, International Technology Corporation's Director of Environmental Risk Management Services, said in a panel discussion on pollution liability, that pollution liability risks would be more insurable if there were more attention paid to risk assessment and risk control. In particular, he said most pollution risk assessments fail to evaluate accident probability and emergency response plans so that accidental chemical spills can be cleaned up before contaminating the ground water. He also described most problems as the result of inadequate maintenance, improper training of workers, or too little capital paying for safeguards.[26] Another panelist, Michael Baram of the Boston University School of Medicine, criticized the insurance industry's failure to use environmental specialists or epidemiologists who can assess the relationship between substances and illness in risk assessments.[27]

The insurance industry, in some cases, has even provoked those responsible for safety protection into ignoring loss prevention. In a recent phone conversation, Tim Holt, Executive Vice President of the National School Supply and Equipment Association, stated that the group has not had much time "to devote to safety" due to the "distraction" of trying to find and maintain adequate insurance coverage during the insurance crisis. "Liability has distracted us from the task of creating safer products," said Holt. "Consumers are the ones who suffer."

According to loss control specialist Pharis,

> Insurers spend approximately 70% of their money on losses. Some 20% is spent on commissions and operating expenses. Perhaps 6% shows up in expenses for salaries and expenses for claims people and underwriters. Nevertheless, when the [people] at the top begin worrying

25. MacCollum, *supra* note 10, at 1.
26. Young, *Group To Take On Environmental Risks*, J. COM., Oct. 29, 1986, at 1, col. 2.
27. *Id.*

> about poor loss ratios, everybody starts attacking the 6%. They begin cutting back on staff and salaries and talk about bad pricing. But what's really killing them is that 70% in losses.[28]

One reason insurance companies have become uninterested in doing something about loss prevention is that they have become predominantly cash flow financial institutions, and have moved away from their risk management functions. More and more attention is being paid to increasing investment income through premium volume. They pay less attention to safety and engineering contributions that could reduce premiums but retain prudent underwriting profits. For example, in the early 1980s when interest rates were high, the industry cut prices in order to obtain premium dollars to invest at high interest rates. The companies wanted premiums so quickly for high interest bearing investments that they even sold a $75 million retroactive insurance policy for the 1981 MGM Grand Hotel fire in Nevada—after the fire.[29]

These days, because of the investment income generated, an insurance industry executive would rather charge a $200 premium and risk paying out $100 in claims, than charge a $100 premium and risk paying out $50 in claims.

On January 20, 1987, we launched a survey of eleven major United States property/casualty company foundations to determine whether loss prevention, hazard prevention, or system safety programs are accorded high priorities for grants or other contributions. Our preliminary responses are not particularly encouraging for prevention of casualties.

1. Of $6,796,018 total grants in 1985 by the Aetna Life and Casualty Company Foundation, the only safety contribution was $5,000 to an Indianapolis, Indiana, Volunteer Fire Department.[30] Approximately $195,000 went to health care programs and institutional charities for the handicapped. According to The Foundation Center Source Book Profile, the foundation does not support medical research. Interestingly, however, the Aetna Foundation recently gave a grant to the National Center for Small Communities to study ways to prevent municipal insurance-related loss in small communities. The results are still pending, but according to the National Association of Towns and Townships, in-depth interviews with sixteen insurance and risk management experts revealed that officials "generally felt [that] towns and townships ought to appeal to insurers themselves for expertise in de-

28. Zinkewicz, *supra* note 20.
29. *Availability and Affordability Problems in Liability Insurance: Hearings Before the Subcomm. on Business, Trade, and Tourism of the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 1st Sess. 44 (1985) (Report of J. Robert Hunter, President Nat'l Ins. Consumer Org.).
30. 1985 REPORT OF AETNA LIFE AND CASUALTY COMPANY AND AETNA LIFE & CASUALTY FOUNDATION, INC., TAKING PART 8-14 (1985).

signing and operating risk reduction activities."[31]

2. In 1985, American Financial Corporation Foundation of Cincinnati, Ohio, gave no safety grants.[32] The foundation gave approximately $20,000 to health related charities and around $2 million to hospitals.

3. As a policy, The Chubb Foundation of Warren, New Jersey, awards no grants for loss prevention programs.[33] Their grants consist only of scholarships to dependents and relatives of employees for college or junior college degrees.[34] Chubb does publish a brochure describing its loss control services.[35]

4. In 1985, The Continental Corporation Foundation of New York, New York, gave a number of small matching grants, most under $100, and some larger grants totalling less than $10,000, to various health care programs and charities. No contributions were made to safety programs.[36]

5. Farmers Insurance Group Safety Foundation of Los Angeles, California, would not respond to our survey, but 1985 public records show $3,000 in contributions to safety-oriented groups, and $1,000 to health care programs.[37]

6. In 1985, The Travelers Companies Foundation, Inc. of Hartford, Connecticut, gave $10,000 to safety programs,[38] and several hundred thousand dollars to geriatric care and research, infant care, and health care. Travelers also noted "a long history of supporting safety measures that reduce automobile accident deaths," including support of mandatory seat belt laws and federal legislation to mandate air bags or some other nonbelt automatic protection for the front seat.[39]

7. The USF&G Foundation of Baltimore, Maryland, did not respond to our survey with a list of contributions, although they noted that some health care and safety programs received grants in 1985.[40] The foundation did outline safety surveys conducted by the company

31. NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS, MANAGING RISK IN SMALL TOWN AMERICA, PRELIMINARY REPORT 3 (1987).

32. Income Tax Return for 1985, Form 990, American Financial Corporation Foundation. The foundation gave approximately $20,000 to health related charities and around $1 million to hospitals. *Id.*

33. Telephone interview conducted by Ruth Ann Paulson with Henry Harder, Chubb Foundation (Mar. 12, 1987).

34. *Id.; see* THE CHUBB FOUNDATION, A CALL FOR APPLICATIONS FOR SCHOLARSHIPS TO BE AWARDED IN RECOGNITION OF ACHIEVEMENT (1986).

35. CHUBB GROUP OF INSURANCE COMPANIES, LOSS CONTROL, THE VITAL LINK (1986).

36. Income Tax Return for 1985, Form 990, The Continental Corporation Foundation.

37. Income Tax Return for 1985, Form 990, Farmers Insurance Group Safety Foundation.

38. Letter from Ernest L. Osborne, President, The Travelers Companies Foundation, Inc., to Ralph Nader (Feb. 16, 1987).

39. *Id.*

40. Letter from E. Donald Bangs, Executive Vice President, USF&G Foundation, to Ralph Nader (Feb. 4, 1987).

and stated support for seat belts for its fleet and for air bags "when made available."

8. Cigna Foundation of Philadelphia, Pennsylvania, has not responded to our survey.

9. American International Group Foundation of New York, New York, has issued no response to date.

10. CNA Insurance Company Foundation of Chicago, Illinois refused to respond.[41]

11. St. Paul Companies of St. Paul, Minnesota, has issued no response to date.

Another informal survey of this country's major auto insurance carriers reveals that some insurance companies are providing financial incentives to encourage purchases of cars equipped with air bags.

Travelers offers medical premium discounts—15% to policyholders with a driver-side air bag or 30% for those with a full front seat air bag. The savings for an average policyholder with a 1987 Volvo containing a driver-side air bag would be around $30 per year. With a full front seat bag, the savings would double to $60 per year. To qualify for this deduction, the purchaser must have a signed paper verifying the air bag's installation at the time of purchase.[42]

Allstate offers discounts on total medical and comprehensive premiums—20% to policyholders with a driver-side air bag and 30% to those with a full front seat air bag. This discount does not apply to collision insurance.[43]

Nationwide offers discounts on total medical and comprehensive premiums—25% to policyholders with a driver-side air bag and 40% to those with a full front seat air bag. This amounts to almost $80 per year for average policyholders with a fully-equipped full front seat air bag.[44]

Starting on March 23, 1987, Prudential is offering a 30% medical premium discount for policyholders with full front seat air bags, provided the consumer verifies the air bag purchase.[45]

The Hartford Insurance Group, St. Paul Fire and Marine Insurance Company, Aetna Life and Casualty, and Safeco have adopted an advi-

41. Letter from Suzanne J. Reade, Public Affairs Consultant, CNA Insurance Company Foundation, to Ralph Nader (Mar. 18, 1987).

42. Telephone interview conducted by Jim Mussleman with Peter Libassi, The Travelers Companies (Mar. 5, 1987).

43. Telephone interview conducted by Jim Mussleman with Bob Montgomery, Allstate Insurance Company (Mar. 23, 1987).

44. Telephone interview conducted by Jim Mussleman with Becky Wasenjo, Nationwide Insurance Company (Mar. 23, 1987).

45. Telephone interview conducted by Jim Mussleman with Ivatt Lugo, Prudential Insurance Company (May 7, 1987).

sory rule of the Insurance Services Organization[46] which recommends a 30% medical premium discount for a full front seat air bag and a 20% medical premium discount for a driver's side air bag.[47]

State Farm offers no discount for air bag equipped cars, claiming a lack of available actuarial data that air bags cut down insurance costs.[48]

Besides offering discounts, insurance companies should encourage air bag retrofitting. Companies should increase donations to pro-air bag public safety organizations.

In the medical malpractice area, insurance companies should be seeking to decrease the large number of unnecessary operations, X-rays, and drug prescriptions, improve the handling of X-ray equipment, improve the quality of emergency and intensive care, reduce hospital infections, and increase peer review.

Much improvement can be made in the area of emergency care. A recent study of claims files managed by the Risk Management Foundation of the Harvard Medical Institutions, relating to clinical fellows moonlighting outside of institutions where they were employed between April, 1976, to October, 1986, found that physicians with fellowships in internal medicine and its subspecialties were at greatest risk of emergency room related moonlighting claims.[49] In a recent article, the foundation encouraged risk managers and insurance programs to strengthen loss prevention programs in the emergency room setting; to enforce a stringent credentialling process to all physician applicants including those for moonlighting positions; to monitor and evaluate care regularly as part of the hospital-wide risk management and quality assurance programs; and to support strong loss prevention programs through additions or modifications to insurance underwriting criteria such as by requiring additional evidence of pertinent training for fellows who desire to moonlight in emergency rooms.[50] Very few malpractice insurance companies do anything regarding loss prevention or provide the state medical licensing review board with evidence of serious physician malpractice.

In areas of school sports safety, the Seattle schools have an athletic safety program which has been a model for safety programs throughout

46. Telephone interview conducted by Jim Mussleman with Rea Tyler, Insurance Institute for Highway Safety (Apr. 16, 1987).

47. Telephone interview conducted by Jim Mussleman with June Bruce, Insurance Services Organization (Apr. 16, 1987); *see Passive Restraint Discount*, G-5 INSURANCE SERVICES OFFICE, PRIVATE PASSENGER AUTOMOBILE MANUAL (1983).

48. Telephone interview conducted by Jim Mussleman with Laura Sullivan, State Farm Insurance Company (Mar. 23, 1987).

49. RISK MANAGEMENT FOUNDATION, *Clinical Fellows with Limited Emergency Care Experience Targets of "Moonlighting" Claims*, 8 FORUM 6-7, 14 (Jan.-Apr. 1987).

50. *Id.* at 7, 14.

the country and should be promoted by insurance companies.[51] The components of the safety program include:

—Development of forms which tell parents and participants of the risks and potential dangers in graphic, comprehensive detail.

—Formation of safety guidelines for each sport to give to coaches.

—Training of coaches in the area of sports medicine (31 hours).

—A record-keeping mechanism which details training done and injuries received every day. The record-keeping helps discover patterns in injuries which may be cues that something is wrong.

—Requirement of a physician's authorization before an athlete may return after a malady or injury. There is also coach involvement in the rehabilitation program.

The Texas School Services Foundation has another model program to which insurance companies should pay close attention.[52] Included are:

—Pre-employment screening to determine what physical labor an employee can sustain.

—Investigations after every accident, once to recommend ways to make the workplace safer, and again to ensure that the recommendations are acted upon.

—A risk control manual for distribution to the school.

Loss prevention provides the insurance industry with great opportunity to combine its vested interest in profits with social contributions to health and safety. By insisting on the elimination or reduction of hazardous products, services, and conditions, insurance companies can become the sentinels for health and safety. They will not perform those missions as long as they spend millions of dollars in advertised demands to restrict victims' rights, diminish deterrents, and inflate a phony lawsuit crisis into a corporate strategy for callous abdication of loss prevention responsibilities.

51. Telephone interview conducted by Ruth Ann Paulson with Gwen Gregory, General Counsel, National School Boards Association (Mar. 20, 1987).

52. *Id.*