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THE ILLINOIS LEGISLATURE'S ATTEMPT TO RESOLVE THE INSURANCE CRISIS: TOO MUCH TORT REFORM AND TOO LITTLE INSURANCE REGULATION

On September 26, 1986, Governor Thompson signed into law Senate Bill 1200, entitled "An Act in Relation to the Insurance Crisis" (Act).¹ The purpose of the Act was to increase the availability of insurance at reasonable rates for local governments, businesses and citizens of Illinois.² The Act was also supposed to alleviate the "hardships" that insurance companies face and to permit them to remain in the industry.³ The Act sought to achieve its purposes through a combination of tort reform and insurance regulation.⁴

The Act contains several articles that are necessary to reform the tort system and to regulate the insurance industry, but does not contain the essential reforms that would quell the insurance crisis.⁵ Those who expect an increase in the availability of insurance and a decrease in insurance rates will be severely disappointed. Conversely, the insurance industry will benefit because its currently excessive profits will continue to grow.⁶

This comment first defines the insurance crisis⁷ and presents

1. An Act in relation to the insurance crisis, Pub. L. No. 84-1431 (1986) (CCH). The various articles in the Act are now codified in the Local Government, Civil Procedures and Insurance Chapters of the Illinois Revised Statutes.

2. 84th Gen. Assembly, Illinois, House of Representatives Transcript Debates, June 30, 1986 at 5 (statement of Rep. Grieman).

3. The insurance industry feared that it had lost 5.5 billion dollars nationwide in 1985. See Effron, *Insurers Defend Figures of 1985 Losses*, L.A.D.J., p.5 col. 1, Jan. 14, 1986. This figure is disputed, and other statistics establish that the industry is more profitable than ever. See *infra* note 37 and accompanying text for a discussion of these statistics. The insurance industry also claims that there has been a 47 billion dollar increase in claims over the past five years. See *Insurance Wars Vexing the States*, Chi. D. L. Bull., Aug. 4, 1986, at 1, col. 2 [hereinafter *Insurance Wars*]. The reason industry figures are disputed is due to the fact that much of its information is not made available to the public. See Simon, *Keynote Address: Allerton House Conference on Tort Damages*, 75 ILL. B.J. 132-33 (1986).

4. See *infra* notes 89-107 and accompanying text for the specific civil procedure and insurance statutes enacted by the legislature.

5. See *infra* notes 145-155 and accompanying text for a discussion of the insurance regulations enacted by this Act.

6. See *infra* note 37 and accompanying text for a discussion of the insurance companies' profits.

7. See *infra* notes 12-24 and accompanying text for the symptoms and effects of the insurance crisis.

several different theories posited for its cause.⁸ Next, this comment sets forth and explains the eight major articles of the Act.⁹ This comment then demonstrates that tort reform will not resolve the insurance crisis. It critiques the articles of this Act and suggests modifications.¹⁰ Finally, this comment presents proposals which would effectively quell the insurance crisis.¹¹

I. BACKGROUND

The Insurance Crisis

The entire country is experiencing an insurance crisis.¹² The symptoms giving rise to this crisis include exorbitant insurance rates, shortages in liability coverage and arbitrary cancellation of policies.¹³ The crisis affects every sector of society: businesses, local governments and individuals. When rates increase, many small businesses, educational facilities and municipalities are especially unable to obtain liability coverage.¹⁴ The crisis does not end here. Instead, this lack of attainable coverage triggers a "domino" effect. For example, educational facilities have been forced to discontinue extra-curricular activities, and municipalities have had to close public parks and eliminate citizen services.¹⁵ Consequently, children, senior

8. See *infra* notes 27-59 and accompanying text for the divergent theories on the causation of the insurance crisis.

9. See *infra* notes 60-78 and accompanying text for an explanation of the reforms in this act.

10. See *infra* notes 80-115 and accompanying text for critique of the tort and insurance reforms in this act.

11. See *infra* notes 127-150 and accompanying text for proposals that would quell the insurance crisis.

12. For example, as of October 1985, Sacramento could only find one policy to cover its liability insurance at a cost of 640 thousand dollars. This cost was four times more than the year before and twelve times more than the year before that. *Too Much for Too Little*, L.A.D.J., Aug. 5, 1986, at 3, col. 1 [hereinafter *Too Much for Too Little*]. The Sacramento school district's insurance cost two and a half times more in 1985 than it did in 1984 for less than half of its coverage. *Id.* Thousands of professionals, including attorneys in West Virginia, received policy cancellations right before a new law went into effect that would place restrictions on such cancellations. *Insurance Wars*, *supra* note 3, at 1. Florida had to cut back insurance rates by 40%. *Id.* at 10. Washington rejected 160 rate increase requests. *Id.* North Carolina, New York and Hawaii all enacted insurance regulation to fight the crisis. *Id.* Thirty-three states enacted some sort of tort reform and 14 states instituted insurance regulations. *Id.* In August 1986, the President and Congress sponsored a conference for small businesses to discuss solutions to alleviate the crisis. See *Insurance Dominates Business Session*, Chi. D. L. Bull., Aug. 21, 1986, at 3, col. 2 [hereinafter *Insurance Dominates Business Session*].

13. See Marovitz, *Insurance Crisis Could Be Solved By Industry Reform*, Chi. D. L. Bull., May 14, 1986, at 2, col. 1. See also Quinn, *Does Illinois Need a Consumer Insurance Board?*, Chi. D. L. Bull., Nov. 22, 1985, at 3, col. 1.

14. *Id.*

15. *Id.*

citizens and others who depend on local government suffer.¹⁶ When businesses have to close their doors, the whole economy suffers.

Recent statistics establish that insurance costs are harshly impacting consumers.¹⁷ Many public transportation systems are experiencing rate increases from 500% to 1000%.¹⁸ Most architectural and engineering firms' rates have compounded by 200% and 300%.¹⁹ Indeed, the smaller architectural and engineering firms cannot obtain insurance coverage.²⁰ Municipalities are also operating without coverage.²¹ For example, one small Illinois town, which receives six thousand dollars in revenue, has a liability premium of fifty-six hundred dollars.²² A hospital in Illinois went without coverage when it discovered its liability premium cost eight-hundred thousand dollars for one million dollars in coverage.²³ Moreover, a major corporation's premium jumped in one year from five-hundred thousand dollars to thirty million dollars.²⁴

The insurance industry, trial lawyers, businesses and politicians have all advanced theories about what caused this insurance crisis. One theory is that the insurance industry manufactured the crisis through its investment practices and manipulation of consumers.²⁵ The contraposition is that the crisis emanated from the tort system; namely, that the liability standards and doctrines have eroded the tort system, thus causing a large increase in lawsuits and damage awards.²⁶ The last theory speculates that the crisis is a result of a combination of factors stemming from both of the foregoing theories.

16. *E.g.*, Transcript Debates, 84th Gen. Ass., 23-24, June 30, 1986 (statement of Rep. Tate) [hereinafter Tate]. Tate observed that the crisis has cost Illinois consumers their jobs and livelihoods and has deprived them of their right to put food on their tables. *Id.* at 23. He stated that citizens have been deprived of their right to enjoy public parks and deprived of local government services. *Id.* at 23-24.

17. In late 1985, a Chamber of Commerce study showed that the cost of property and casualty insurance increased an average of 97%. *See* Quinn, *supra* note 13, at 3. A California company, Lahr Electric Motors, had their insurance cost increase by 450%. *See Insurance Dominates Business Session*, *supra* note 12, at 3. The company's liability insurance premiums for 1986 equaled its profits in 1985. *Id.*

18. *Task Force Findings*, 75 ILL. B.J. 155 (1986).

19. *Id.*

20. *Id.*

21. *Id.*

22. Simon, *supra* note 3, at 132.

23. *Id.*

24. *Id.*

25. *See infra* notes 27-45 and accompanying text for a discussion of the business reasons attributed to the insurance crisis.

26. *See infra* notes 46-59 and accompanying text for a discussion of the tort system factors as it relates to the insurance crisis.

1. Insurance Industry Factors

Two main reasons underlying the insurance crisis have been attributed to the insurance industry: price wars, and the absence of government regulation. First, during the late 1970's and early 1980's, insurance companies engaged in price wars.²⁷ Many insurance companies cut premium rates in efforts to attract new business.²⁸ The insurers, however, did not base coverage and premium rates on consumer risk.²⁹ Rates, therefore, were severely discounted and coverage became easily attainable.³⁰ Insurers took advantage of inflated interest rates by investing this additional money received as premiums.³¹ The investments produced a high enough rate of return to cover claims and still make a greater profit than if they had adhered to the normal practice.³²

Inevitably, interest rates fell and claims increased.³³ As a result, the high rate of returns dropped.³⁴ As a consequence of this poor business judgment, premiums skyrocketed, and insurers arbitrarily cancelled various insurance lines and marginal customers, and did not issue many new policies.³⁵ The insurance industry claimed that

27. *Insurance Wars*, *supra* note 3, at 10. It is undisputed that the price wars are part of the cause of the crisis. The dispute arises over how predominant a role the price wars have played. Doug Hallet, a specialist in insurance regulation, stated that the insurance industry is cyclical, therefore, price wars will result every few years. See Chiang, *Law in Business*, L.A.D.J., Aug. 5, 1985 at 3, col. 1. State Senator William Marovitz found that "the current crisis is due to the boom and bust nature of the industry itself." Marovitz, *supra* note 13, at 2. An insurance spokesman, however, stated that even though price was a cause of the crisis, lawsuits increased during the same time period. Keading, *Insurance Regulation Proposal Criticized*, Chi. D. L. Bull., June 6, 1986, at 2, col. 3.

28. Marovitz, *supra* note 13, at 2.

29. *Id.*

30. *Id.*

31. *Id.* See also *Insurance Wars*, *supra* note 3, at 10. But see Beyler and Kelley, *Large Damage Awards and the Insurance Crisis: Causes, Effects and Cures*, 75 ILL. B.J. 140, 144 (1986) (the authors view this event from a different perspective).

32. Marovitz, *supra* note 13, at 2.

33. *Id.* This started in 1979 and peaked in 1983 when interest rates dropped. *Id.* The average return on net worth was 8.3% in 1983. *Id.* The return dropped to 1.7% in 1984. *Id.*

34. *Id.*

35. *Id.* See also *Insurance Wars*, *supra* note 3, at 10. Contra Beyler and Kelley, *supra* note 31, at 144. The authors state that there is a temptation to overprice, but that the temptation is limited by the competitive market and state regulation. *Id.* They claim that "[u]nless insurers are running a cartel that is operating as successfully as OPEC's [cartel] once did, the temptation to overprice during [low cash flow] market cannot possibly explain the high premium increases we are seeing." *Id.*

This Comment suggests that the insurance industry may have a cartel similar to OPEC's. First, the industry is exempt from anti-trust laws. See *infra* notes 38-39 and accompanying text. Thus, monopolies and price agreements are possible. *Id.* Second, many states, including Illinois, do not have any rate regulations. Third, insurance coverage is needed as much as oil is needed in order to function in the modern world. See *infra* notes 115, 127-130 and accompanying text.

its lost profits justified its response to rapidly declining interest rates.³⁶ Statistics reveal, however, that the insurance industry was never in any threat of financial danger.³⁷

Second, the government does not heavily regulate the insurance industry. Nationally, because insurance companies are exempt from anti-trust laws, they are free to fix rates at any level.³⁸ Although this practice might not be widespread, the continuation of exorbitant premiums suggests that insurers are not competing with each other.³⁹ The federal government allows the states to control the insurance companies.⁴⁰ States, however, do not exhibit much control. Indeed, Illinois insurers are the least regulated in the country.⁴¹

Not only are Illinois insurance companies able to set their own rates, they may also arbitrarily raise rates and cancel policies.⁴² Furthermore, insurance companies can withhold a substantial amount of financial information from both consumers and the government.⁴³

36. The insurance industry claims that it lost 5.5 billion dollars in 1985. See Keading, *supra* note 27, at 14.

37. The Illinois Public Action Council ("IPAC") found that the industry had a 6.6 billion dollar net profit in 1985. See Lewis, *The Case Against Caps*, 75 ILL. B.J. 164-65 (1986). IPAC also contends that in 1984, Illinois insurers received almost one billion dollars more in premiums than losses. See *id.* In 1985, insurance stocks outperformed the Dow average by 80%. See Marovitz, *supra* note 13, at 2. The Government Accounting Office explained that the property/casualty lines of the insurance industry tripled its assets to 250 billion dollars from 1974-1984. *Id.* Twelve billion dollars in profits were earned during that time. *Id.* Aetna's stock jumped from 38 dollars per share to 86 dollars per share in the course of one year. *Id.* Aetna's first quarter profit in 1986 increased 348%; Kempers' increased 210%. See Transcript Debates, 84th Gen. Ass., at 51, June 30, 1986 (statement of Rep. Levin) [hereinafter Levin].

38. See Simon, *supra* note 3, at 132. See also *infra* note 40.

39. *Id.*

40. The McCarran-Ferguson Act, 20 U.S.C. §§ 1011-15 (1984), exempts insurance companies from anti-trust laws. Because it also exempts insurance companies from federal regulation, the states can regulate the industry. 20 U.S.C. § 1011, 1012. The United States Supreme Court has construed section 1012(b) as preempting federal regulation of "insurance business," not as preempting the "business of insurance." See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979).

41. Transcript Debates, 84th Gen. Ass., at 104, June 30, 1986 (statement of Sen. Marovitz) [hereinafter Marovitz]. Former Illinois Supreme Court Justice Walter Shaefer stated that "the regulation of insurance companies is one of the weakest spots in [Illinois] government." See Quinn, *supra* note 13, at 3. For example, two proposals that have been consistently rejected are the proposed requirements that insurance policies be written in plain language and that disclosures of rates of returns on the savings components of whole life insurance policies be required. *Id.*

42. See Lewis, *supra* note 37, at 165. See also Transcript Debates, Ill. Senate, at 90, June 30, 1986 (statement of Senator Newhouse) [hereinafter Newhouse].

43. See Transcript Debates, 84th Gen. Ass., at 108, June 30, 1986 (statement of Sen. Rock) [hereinafter Rock]. One example, Rock noted, was that dividends paid to shareholders are written as underwriting losses. *Id.* Normally, dividends are treated as profits.

When the insurance industry representatives met with the Illinois legislature to discuss solutions to the crisis, the legislators requested documentation substantiating the industry's needs. Marovitz, *supra* note 13, at 14. They asked for closed claim files,

One analyst of the crisis asserted that there is not even enough industry information available to determine the exact cause of the crisis.⁴⁴ The industry's failure to produce information that would justify its practices has lead many analysts to believe that the insurance industry manufactured the crisis.⁴⁵

2. Tort System Factors

Another theory advanced to explain the insurance crisis is that the ever-changing tort system has caused an increasing amount of tort litigation and excessive jury awards.⁴⁶ Consequently, insurance companies claim that they can no longer accurately predict the risks involved in extending coverage to consumers.⁴⁷ As a result, insurers contend that they must raise rates and cancel coverage.

The first component of this theory is that the extraordinary increase in the amount of tort litigation results from court-created torts, and the erosion of well-established standards of negligence.⁴⁸ In support of this allegation, insurers assert that there has been a forty-seven billion dollar increase in the number of reported claims over the past five years.⁴⁹ Since 1950, the tort system's total cost has

which the insurance industry's financial outlook is based upon, and for other books and records to decipher the crisis. *Id.* Every time the legislators requested, the industry refused. *Id.* The industry claimed that the documentation was unavailable and would be difficult to prepare. *Id.*

44. See Brunelli, *New Head of ABA Panel Looks to Illuminate Insurance Problems*, Chi. D. L. Bull., Aug. 8, 1986, at 1, 14.

45. See, e.g., Rock, *supra* note 43, at 94.

46. See, e.g., Willard, *Does the Tort System Need an Overhaul?*, A.B.A. J. July 1986, at 36. The insurance industry's argument is that tort law was previously composed of a predictable set of rules, in which negligent defendants would compensate clearly identified plaintiffs. *Id.* Recently, however, negligence laws have eroded, and standards such as "assumption of risk" and "contributory negligence" have disappeared. *Id.* Courts are creating new standards and presumptions, which are overcoming causation requirements. *Id.* Consequently, the industry claims that the size of jury awards have ballooned enormously and the frequency of lawsuits has increased tremendously. *Id.*

47. *Id.* at 37. See also Pike, *Panel Discussion on the Insurance Crisis*, 75 ILL. B.J. 160, 161 (1986). Pike stated that the ability to predict exposure to risk and to charge a rate commensurate with that exposure is the "bedrock of insurance pricing." *Id.* Stated simply, the risk is the chance the insurer takes that the insured will not be sued. The industry claims that years ago it could accurately predict this risk because negligence laws were definite and the standards for causation were narrowly construed. *Id.* Because negligence laws have changed and causation has broadened, the insurers cannot accurately predict their exposure to risk, i.e., the chance of the insured being sued. *Id.* As a result, it becomes difficult to set rates for the insured, and more difficult to judge whether to insure someone. *Id.* This problem is especially evident in product liability, medical malpractice, and governmental liability situations. *Id.*

48. See *supra* note 46 for a general discussion of the standards that were eroded.

49. *Insurance Wars*, *supra* note 3, at 1.

grown three times faster than the Gross National Product.⁵⁰ Medical malpractice and product liability are the two main areas of tort law where the increase in litigation is most striking.⁵¹ Several reasons advanced for the increase in these areas of litigation, as well as other tort law areas, are the adoption of strict liability and comparative negligence, the existence of joint and several liability, the erosion of sovereign immunity, and the relaxed standards of causation.⁵² Additionally, judicial recognition of new torts such as negligent infliction of emotional distress, retaliatory discharge and bad faith refusal to settle claims has contributed to the increased number of lawsuits.⁵³

The second component of this crisis theory is that extraordinary jury awards have caused financial hardships on insurance companies. In Cook County, for example, the average jury award doubled between 1960 and 1979.⁵⁴ This jump, however, is due to a increase in only the top ten percent of awards; the lower ninety percent has remained constant.⁵⁵ Much of this increase has been attributed to the availability of punitive damages. Punitive damage awards alone have increased 700% since 1980.⁵⁶

Another factor attributed to excessive jury awards is the "deep pocket" theory of tort recovery.⁵⁷ Rather than suing the actual tortfeasor, plaintiffs seek out large businesses and municipalities which have only a minor connection in the accident and join them as defendants. The joint and several liability rule requires these defendants, if found to be remotely at fault, to pay the entire judgment.⁵⁸ Studies indicate that plaintiffs can recover three times as much from a governmental defendant and four times as much from a corporate defendant than from an individual defendant.⁵⁹

50. Beyler and Kelley, *supra* note 31, at 140-41 (citing Sturges, *THE COST OF THE U.S. TORT SYSTEM* 23 (1983)). See also PETERSON AND PRIEST, *THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS*, Cook County, Illinois, 1960-1979, VII, VIII, IX (Rand Corp., Inst. for Civil Justice, 1982).

51. Simon, *supra* note 3, at 132. Medical malpractice suits in New York increased 10.9% between 1983 and 1985. *Id.* Product liability cases litigated in federal courts increased 75% in the last decade. *Id.*

52. Beyler and Kelley, *supra* note 31, at 150.

53. *Id.*

54. Peterson and Priest, *supra* note 50, at 21. Although inflation is factored out, this statistic is still very misleading because only the top 10% of jury awards doubled, thus raising the overall averages. *Id.* at 20-23. All other sizes of jury awards have remained constant in the 20-year period. *Id.* The overall median of jury awards, including the top 10%, has also remained constant. Beyler and Kelley, *supra* note 31, at 148.

55. See *supra* note 54 for a short overview of these statistics.

56. Keading, *supra* note 27, at 2. See Frank, *Trends in Million-Dollar Verdicts*, A.B.A. J. Sept. 1984, at 52.

57. *Too Much for Too Little*, *supra* note 12, at 3.

58. *Id.*

59. See Beyler and Kelley, *supra* note 31, at 153, (citing CHIN AND PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* 43 (Rand

II. THE ACT

Governor Thompson signed Senate Bill 1200 into law on September 26, 1986.⁶⁰ It was then titled "an Act in relation to the insurance crisis."⁶¹ Governor Thompson's statement that the Act would not lower insurance rates or significantly affect the availability of insurance was consistent with the view of many legislators.⁶² Nevertheless, when Thompson signed the Act, he stated that "[to] veto the bill would be like asking soldiers who suffered casualties in a pitched battle to retreat from minimal gains without reason before the next battle starts."⁶³ The Act consists of twenty-seven articles. This Comment, however, will discuss only eight of the major articles.⁶⁴ Four articles represent tort reform measures which apply to negligence actions resulting from bodily injury or physical property damage, and product liability cases based on strict tort liability;⁶⁵ the other four constitute insurance regulations.⁶⁶

First, under this Act, punitive damages can only be added to a plaintiff's complaint after a hearing.⁶⁷ The trial judge has discretion to allocate punitive damages, if awarded, among the plaintiff, his attorney and the Department of Rehabilitation.⁶⁸ Second, the Act has put a restriction on joint and several liability, thereby mitigating the "deep pocket" theory.⁶⁹ Under this Article, a defendant who is found less than twenty-five percent at fault will be liable only for his share of the awarded non-medical damages.⁷⁰ Third, the Act effectuates the collateral source rule.⁷¹ The plaintiff's damages will be reduced by the amount of medical benefits he receives in excess of twenty-five thousand dollars. Fourth, the Act modifies the comparative negligence rule, so that a plaintiff who is greater than fifty per-

Corp. Inst. for Civil Justice 1985)).

60. Pub. L. No. 84-1431 (1986) (CCH).

61. *Id.*

62. Letter from Governor James Thompson to the 84th General Assembly (September 26, 1986) (signing into law Senate Bill 1200).

63. *Id.*

64. A major article in the Act that will not be discussed in this Comment is article one, which gives various immunities to local government.

65. See *infra* notes 67-72 and accompanying text for an explanation of the enacted tort reforms.

66. See *infra* notes 73-78 and accompanying text for an explanation of the enacted insurance regulations.

67. ILL. REV. STAT. ch. 110, § 2-604.1. The complaint may be amended if the plaintiff establishes at the pre-trial hearing that there is a "reasonable likelihood" of proving sufficient facts at trial to support the award of punitive damages. *Id.*

68. ILL. REV. STAT. ch. 110, § 2-1207. The judge may also use his discretion to determine if a jury award for punitive damages is exclusive, and enter remittitur if so. *Id.*

69. ILL. REV. STAT. ch. 110, § 2-1117.

70. *Id.* The exception to this new rule applies to defendants who discharge pollutants into the environment. See ILL. REV. STAT. ch. 10, § 2-1118.

71. ILL. REV. STAT. ch. 110, § 2-1205.1.

cent at fault will be prohibited from recovering any damages at all.⁷²

Four articles of the Act constitute the major portion of the insurance regulatory provisions. First, insurers must provide customers with a complete record of their claim history upon the insured's request, the cancellation of the insured's policy, or the non-renewal of such a policy.⁷³ Second, the Act provides that insurers give the Department of Insurance ninety days notice of, as well as reasons for, terminating a substantial portion of certain lines of insurance.⁷⁴ Third, the Act requires insurers to give sixty days notice of cancellation or failure to renew a particular policy.⁷⁵ It also requires sixty days notice where the insurer intends to increase a premium by more than thirty percent.⁷⁶ Finally, the Act requires insurance companies to provide the Department of Insurance with more information so that the government can study the relationship between insurance premiums and the insurer's profits and expenses.⁷⁷ This portion of the Act was intended to encourage competition between insurance companies and to establish a "mechanism to ensure the provision of adequate insurance at reasonable rates."⁷⁸

III. ANALYSIS

The alleged compromise between the insurance industry and the legal community greatly benefits the insurance industry. As a result, the Act reflects the legal community's concession to a powerful insurance lobby.⁷⁹ Apparently, the citizens and businesses of Illi-

72. ILL. REV. STAT. ch. 110, § 2-1116. Where a plaintiff is not greater than 50% at fault, damages will be reduced in the proportion to the amount of his fault. *Id.* The court will instruct the jury that a plaintiff cannot recover damages if he is greater than 50% at fault. ILL. REV. STAT. ch. 110, § 2-1107.1

73. ILL. REV. STAT. ch. 73, § 755.10a. The loss information from the three previous policy years must be provided within thirty days of the insured's request. *Id.* The insurer must provide the dates and descriptions of occurrences, and total amounts of payments and reserves. *Id.* § 755.10a(1)(a),(b),(c). The Director of Insurance has the power to exclude the automatic providing of loss information for any line of insurance where it can be shown that the information would not be needed. *Id.* § 755.10a(3). The loss information provided is not subject to discovery. *Id.* § 755.10a(5).

74. ILL. REV. STAT. ch. 73, § 755.11a. The statute does not apply to life, accident and health, fidelity and surety, and ocean marine policies. *Id.* The notice must include all data relied upon by the insurer for terminating the line and disclose whether the insurer offers, and will continue to offer, the line in other states. *Id.*

75. ILL. REV. STAT. ch. 73, § 755.17a.

76. ILL. REV. STAT. ch. 73, § 755.17a(b).

77. The Insurance Cost Containment Act is codified at ILL. REV. STAT. ch. 73, §§ 1065.901-906. Paragraphs 1065.902 and 1065.903 promulgate the Director of Insurance's duties. Among his duties is to report to the General Assembly. *Id.* These reports must include his findings and recommendations for cost containment. *Id.* §§ 1065.902,3. The data collected may include: number of policies; premiums collected; losses paid; number of claims; net underwriting losses; net investment income; and any other information collected by the Director. *Id.* § 1065.904.

78. *Id.* § 1065.904.

79. As of 1985, the insurance industry had 61 highly trained experts lobbying in

nois have taken a back seat on this issue.

As it stands, the Act will not relieve Illinois' insurance crisis. Reduction in rates and increased coverage, either through the industry's own initiative or through regulation, is what is needed. Even though Illinois needs tort reform, such reform will not solve the crisis because the tort system is not the source of the problem. The Act, in the end, will only serve to increase the already excessive profits of the insurance industry.

A. The Act and Tort Reform

The tort system has very little relationship, if any, to the insurance crisis. Advocates of tort reform complain that tort doctrines, supposedly reformed under this Act, serve as a catalyst to the insurance crisis, alleging that tort doctrines increase both the number of lawsuits filed, and the amount of damages awarded.⁸⁰ There is no proof, however, that these doctrines, or the tort system in general, directly caused the insurance crisis. In Cook County, for example, not only has the number of lawsuits filed per capita remained constant,⁸¹ but after taking inflationary factors into consideration, the average jury award for seventy-five percent of the cases has remained constant.⁸² Only the top ten percent of the highest jury awards have caused the average jury award to increase.⁸³ Otherwise, the median jury award has remained constant.⁸⁴

In many states that have implemented a tort reform system in response to the insurance crisis, insurance rates continue to soar, and insurance policies remain unavailable.⁸⁵ For example, Pennsylvania's legislature enacted various local governmental immunities, but insurance companies still continue to cancel policies.⁸⁶ The Iowa legislature modified its joint and several liability doctrine only after

the Illinois General Assembly. See Quinn, *supra* note 13, at 3. The industry spends millions of dollars each year on lobbying. *Id.* Consumers, on the other hand, do not have any special interest groups protecting their interests. *Id.* See also Transcript Debates, 84th Gen. Ass., at 99-100, (June 30, 1986) (statement of Sen. Barkhausen). Senator Barkhausen did not vote for the bill because it was a result of the insurance industry's influence. *Id.*

80. See *supra* notes 46-59 and accompanying text for a discussion on the tort reformers theory of the insurance crisis.

81. Marovitz, *supra* note 13, at 2.

82. See Peterson and Priest, *supra* note 50, at 20-23.

83. *Id.*

84. Beyler and Kelley, *supra* note 31, at 148.

85. *Insurance Wars*, *supra* note 3, at 101. As of August 1986, eighteen states had put caps on damages and nine states had limited punitive damages awards. *Id.* Additionally, nine states now have structured payments for awards and collateral source payments. See *id.* Some states that enacted tort reform have produced limited relief. In most states, however, insurance rates are still rising. See *id.*

86. Marovitz, *supra* note 13, at 14.

the insurance industry gave assurances that the county governments would be able to obtain insurance coverage.⁸⁷ Just one year later, however, forty-one Iowa counties had their insurance cancelled.⁸⁸ Unsuccessful tort reform is also evident in Canada. Canada has revised its entire tort system.⁸⁹ Nevertheless, premiums have risen 400% and some forms of coverage cannot be attained at any price.⁹⁰

Although tort reform will not halt the crisis, the Act does contain several provisions which are necessary to reform the tort system and which may have a positive impact on the crisis. Conversely, there are several unfair provisions that will neither reform the tort system nor have a positive impact on the insurance crisis. The best reform in the Act is Article Three, which regulates punitive damage awards.⁹¹

1. *Punitive Damages*

Article Three, which attempts to reform punitive damage awards will decrease the burden placed on the courts by frivolous lawsuits, and will more accurately distribute damages. The Article requires plaintiffs to amend their complaints to include punitive damages only after a pre-trial hearing has demonstrated that there is a reasonable likelihood that they can be proved up at trial.⁹² It also grants the trial court discretion to apportion the punitive damage award among the plaintiff, his attorney, and the Department of Rehabilitation.⁹³

The concerns regarding frivolous lawsuits, excessive awards, and windfalls to plaintiffs have led reformers to assert that punitive damages should be abolished.⁹⁴ Punitive damages, however, are essential to our system of justice. Punitive damages are assessed for wilful and wanton misconduct and are necessary to punish and deter such conduct.⁹⁵ If punitive damages were precluded, defendants, after weighing the cost of harm to plaintiffs against the benefit of engaging in the misconduct, would be more likely to engage in the mis-

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. See *supra* notes 92-102 and accompanying text for a discussion of Article Three.

92. ILL. REV. STAT. ch. 110 ¶ 2-6041.

93. ILL. REV. STAT. ch. 110 ¶ 2-1207.

94. See, e.g., Potter, *Are Punitive Damages Getting Out of Control?*, A.B.A. J. Dec. 1984, at 16. (concerns involved with awarding punitive damages).

95. See Drummond, *Punitive Damages*, 75 ILL. B.J., 172, 173-75 (1986). For cases in Illinois explaining this rule, see *Fopay v. Noveroske*, 31 Ill. App. 3d 182, 334 N.E.2d 79, 94 (1975), and *Skelley Oil Co. v. Universal Oil Prod. Co.*, 338 Ill. App. 79, 86 N.E.2d 875, 881 (1949).

conduct. Consequently, punitive damages are necessary to punish and deter others from engaging in wilful and wanton misconduct.

Punitive damages, are not intended to compensate the plaintiff.⁹⁶ A plaintiff, therefore, cannot complain about not receiving punitive damages where he has already "been made whole." If all punitive damage awards were to escheat to the State, plaintiffs would have no additional incentive to seek punitive damages. Such a result would permit the defendant to escape liability for wilful and wanton misconduct. The Illinois legislature has codified an effective solution to the "windfall" problem by granting courts the power to apportion the damages among the plaintiff, his attorney, and the Department of Rehabilitation.⁹⁷ This new rule serves the dual function of solving the windfall problem and deterring defendants from misconduct.

There are several other proposals which would more effectively reform tort law. First, implementation of structured awards would prevent the hardship of a defendant paying a large punitive damage award all at once, possibly threatening solvency.⁹⁸ Second, in vicarious liability situations, punitive damages should not be assessed against the principal-defendant unless he is found culpable for his own wilful and wanton misconduct.⁹⁹

None of these tort reform measures significantly affect the insurance crisis. In Illinois, punitive damages can only be insured against in vicarious liability situations, thus, the assessment of punitive damages does not impact heavily upon insurance rates and coverage.¹⁰⁰ The new Act will, however, cause insurers to spend less time and money litigating frivolous lawsuits. First, the punitive damage pre-trial hearing requirement places a heavier burden on

96. Drummond, *supra* note 95, at 173 (citing *Hawk v. Ridgeway*, 33 Ill. 472 (1864)).

97. ILL. REV. STAT. ch. 110, ¶ 2-1207.

98. A structured punitive damage award would allow a judge to divide the award and would permit the defendant to make payments over a period of time. See Drummond, *supra* note 95, at 175. The judge would consider factors such as the defendant's ability to pay the award, attorneys fees, how much of award is going to the Department of Rehabilitation, and the need to deter and punish. *Id.* An argument against structured awards is that the plaintiff or receivers of the award are not actually getting the amount awarded because they are losing interest on the money as a result of being paid over a period of time.

99. This requirement, entitled the complicity rule, is followed by Illinois. *Tolle v. Interstate Sys. Truck Lines, Inc.*, 42 Ill. App. 3d 473, 356 N.E.2d 625 (1976). Drummond would strike the complicity rule, thus not holding the principal liable for any punitive damages. See Drummond, *supra* note 95, at 174-75.

100. Shumaier and McKinsey, *The Insurability of Punitive Damages*, A.B.A. J. Mar. 1986, at 69. Insurers in Illinois can not claim that punitive damages are causing hardships on them because they do not have to pay any claims for punitive damages unless vicarious liability is at issue.

the plaintiff to prove wilful and wanton misconduct.¹⁰¹ Second, because of these additional burdens placed upon the plaintiff, cases may not even be filed and many controversies will be settled out of court. Finally, because insuring punitive damages prevents the deterrence effect on wilful and wanton misconduct, punitive damages should either be insured at very high rates, or not at all.¹⁰²

2. Joint and Several Liability

The joint and several liability doctrine has evoked much debate, primarily because of the "deep pocket" theory.¹⁰³ On the one hand, the law mandates that a plaintiff be made whole. On the other hand, assessing the entire award against a defendant who is only partially at fault creates an inequitable result. The new Act considers both of these factors. The relevant provision allows total recovery for medical damages,¹⁰⁴ while not unjustly punishing the defendant. As long as the plaintiff is relieved from paying incurred medical expenses, it is not unreasonable to impose a higher threshold, such as fifty percent, for non-medical damages upon defendants in a joint and several liability setting.

Although it has been questioned in other jurisdictions, this reform may have an effect on the insurance crisis. In 1984, members of the insurance industry told Iowa legislators that if it abolished the joint and several liability doctrine as it applied to municipalities, insurance coverage would be made available.¹⁰⁵ In 1985, insurance companies cancelled the insurance policies of forty-one Iowa counties.¹⁰⁶ The joint and several liability reform, however, may have an indirect effect on the insurance crisis. The reform might play a role in the negotiating processes between plaintiffs and defendants.¹⁰⁷ First, more lawsuits may be settled out of court, thus lowering the litigation costs. Second, more lawsuits may be settled for the true value of the defendant's fault. If a defendant's liability is close to the twenty-five percent threshold, a plaintiff will settle out of court and not risk losing non-economic damages.

101. The judge at a separate pre-trial hearing may ensure that the "wilful and wanton conduct" requirement be ascertained. If there were no such requirement, the standard for wilfulness and wantonness might not be met at trial.

102. If punitive damages were insured, a person or business would not be deterred from wilful or wanton conduct because he would have nothing to lose.

103. *Insurance Wars*, *supra* note 3, at 1. See also Transcript Debate, 84th Gen. Ass., at 59 (June 30, 1986) (statement of Rep. Hosser).

104. ILL. REV. STAT. ch. 110, § 2-1117.

105. See *supra* notes 87-88 and accompanying text.

106. *Id.*

107. See Transcript Debate, Ill. Senate, at 87, June 30, 1987 (statement of Senator Berman) [hereinafter Berman].

3. Collateral Source Rule

The Act has also modified the collateral source rule. Under the Act, a plaintiff's judgment will be reduced by the amount of medical benefits he receives in excess of twenty-five thousand dollars.¹⁰⁸ The new collateral source rule was enacted to prevent a windfall to the plaintiff. The rule not only produces inequitable results, but will not have any effect on the insurance crisis.¹⁰⁹ By reducing the plaintiffs' awards, the rule punishes the plaintiff for being injured. The defendant, who caused the injury, escapes liability by not having to pay damages. In order to rectify this harsh result, defendants should indemnify the plaintiff's insurance company for all medical bills.¹¹⁰ Consequently, the plaintiff is made whole, his insurance company is reimbursed, and the defendant pays for his liability.

The new collateral source rule will not reduce rates or increase coverage. Essentially, the rule shifts the burden of paying for liability from the defendant to the plaintiff's insurance company. Thus, the insurer is punished because it has to pay for the defendant's negligence. This can only have an adverse impact upon the plaintiff's insurance rates and coverage.

4. Modified Comparative Fault

The Act creates a modified comparative fault rule. This rule bars the plaintiff from recovery if he is more than fifty percent at fault.¹¹¹ The rule is unconscionable. Justice demands that a defendant must compensate an injured plaintiff for his share of fault. Further, a plaintiff should be compensated for whatever degree he is not at fault. Advocates of the abolition of the joint and several liability doctrine cannot support a modified comparative fault rule because the same principle supports both arguments. If it is unfair to make a defendant pay more than his share of fault, then it is unfair to bar a plaintiff from recovering damages that are not the result of his own fault.

Most likely, the new rule will not save defendants money from judgment because the judge will instruct the jury the plaintiff is barred from recovery if he is more than fifty percent at fault. The jury, however, may find for the plaintiff where his degree of fault is slightly over the fifty percent threshold. For example, under the jury

108. ILL. REV. STAT. ch. 110, ¶ 2-1205.1.

109. This collateral source rule applies to past medical bills only, and not for future medical bills that an insurer or an employer would cover. See Transcript Debate, 84th Gen. Ass., at 56 (June 30, 1986) (statement of Rep. Pederson). Twenty-five thousand dollars is also a high threshold for most accidents. *Id.*

110. See ILL. REV. STAT. ch. 110, ¶ 2-1205.1(w).

111. *Id.* ¶ 2-1116.

nullification principle, if a plaintiff is found to be between fifty and sixty percent at fault, the jury may decide to only find him forty-nine percent at fault. If the previous pure comparative fault rule applied, the defendant would only have to pay forty percent; whereas, now, he would have to pay fifty percent. Like efforts to reform joint and several liability, however, this rule could prove to be an effective negotiating tool.

The tort system, specifically under the reforms of this Act, will not solve the insurance crisis. The collateral source rule and the modified comparative fault rule will not positively impact the crisis. The punitive damage and joint and several liability reforms may have only an indirect impact. A large insurance company declared that if the Illinois legislature were to adopt the industry's tort reform package, insurance rates would decline eleven percent.¹¹² Considering the fact that Illinois businesses are experiencing rate increases of 250% and are declaring bankruptcy because they cannot afford coverage,¹¹³ such tort reform will not resolve the insurance crisis. This becomes more evident after considering the fact that several insurance companies experienced anywhere from a 210% to a 348% increase in profits in the first quarter of 1986.¹¹⁴

The solution to the insurance crisis lies in governmental regulation of the insurance industry. Ordinarily, governments should not regulate business. With certain industries, however, such regulation is essential. Insurance coverage has become a necessity in order to live and function in this country today.¹¹⁵ For example, construction

112. See *supra* notes 17-24 and accompanying text for additional statistics.

113. See *supra* notes 17-24 and accompanying text for additional statistics.

114. See *supra* note 37.

115. See, e.g., N.Y. INS. LAW § 2344 (McKinney 1985). In enacting further legislation, the legislature enunciated the effects of this crisis:

The legislature hereby finds and declares that the state is in the midst of an insurance crisis which affects all aspects of the public and private sectors. Day care centers, not-for-profit organizations, volunteer groups, businesses, governmental entities, housing and transit authorities, professionals and others have experienced sudden and inexplicable cancellations and nonrenewals of their liability insurance policies with little, if any, notice. In other cases, policyholders and the public have been confronted by skyrocketing premiums or reductions in coverage. These events have disastrous effects on a multitude of public entities, groups and individuals, and threaten to undermine economic development and the delivery of essential and necessary services to residences, consumers and businesses throughout New York state. Because critical coverages have become unavailable or unaffordable, a comprehensive, balanced approach is imperative to provide stability and safeguard the public interest.

The legislature further finds and declares that, by the enactment of the provisions of this act [L.1986, c.220], it is the intent of the legislature to fulfill its constitutional obligation to provide for the health, safety and welfare of the people of this state. It is imperative that this state provide stability, security and certainty for commercial risk, public entity and professional liability insurance policyholders and the public at large by the enactment of this act.

Id.

companies cannot bid for governmental projects unless they have insurance. Business owners that do not have insurance risk losing all their personal belongings. It is only natural for insurers to take advantage of this situation and to try to make as much profit as they can. Consequently, the insurers need to be regulated.

B. Insurance Regulation

The insurance regulatory provisions of the Act lay a foundation for insurance industry reform. These regulations, however, are only nominal. They will prevent neither arbitrary policy cancellations nor exorbitant rate increases. A system that will directly curb the insurance crisis, while preserving a stable market, must include provisions for rate regulation, hearing boards, and guidelines prescribing these procedures.

The regulations enacted are only nominal and represent a "smoke screen" for necessary regulation. During the Senate debates, Senator Rock stated that the Act contained a "whole host of measures aimed at the insurance industry," created to afford the Department of Insurance the necessary information to suggest to members of the insurance industry "that they watch their practices."¹¹⁶ He professed that the insurance industry has freely agreed to this measure.¹¹⁷ Considering the fact that the industry has prevented disclosure of its policies for so long, to suddenly profess a willingness to freely relinquish information and control suggests that these provisions are not regulatory at all.¹¹⁸ As further support for this proposition, the insurance lobby is probably one of the most powerful in the state.¹¹⁹

First, the Act mandates that insurers provide customers with a complete record of their claim history either upon cancellation, non-renewal or their request.¹²⁰ This regulation was enacted so that the customer could present his record to another insurer after he has been cancelled.¹²¹ The regulation neither prevents arbitrary cancellations nor prohibits nonrenewals. Because Illinois does not have established criteria for cancellations based upon claim history, an insurer can cancel policies for any reason. This regulation also gives the insurance director the power "to exclude the automatic providing of [claim history] at the time of cancellation . . . where it can be

116. Rock, *supra* note 43, at 79.

117. *Id.*

118. See, e.g., Marovitz, *supra* note 41, at 104-05. The legislature could not obtain information from the insurance industry during the medical malpractice crisis in the 1970's. *Id.*

119. See *supra* note 89.

120. ILL. REV. STAT. ch. 73, § 755.10a(1).

121. Transcript Debates, 84th Gen. Ass., at 6, June 30, 1986.

shown that the information is not needed."¹²² Thus, the consumer is given a limited right which can easily and arbitrarily be taken away.

Second, the Act requires insurance companies to give ninety days notice of, and reasons for, terminating a line of insurance or a substantial portion thereof.¹²³ This regulation is of little significance mainly because it is unlikely that an insurance company will terminate an entire line or substantial portion of either property or casualty insurance. Insurance companies can continue to arbitrarily cancel, without notice, any portion of an insurance line considered to be less than substantial. Twenty percent can be considered less than substantial, but considering the number of citizens and businesses in Illinois, twenty percent will have a great effect.

Third, the Act requires insurers to give sixty days notice for cancellation or nonrenewal of policies, as well as for an increase of thirty percent in premium rates.¹²⁴ The insurer, however, does not have to give reasons for the cancellation. This regulation only benefits the consumer by providing time to acquire another policy.

Fourth, the Act confers power upon the Director of Insurance to obtain what previously was inaccessible insurance industry information.¹²⁵ This may be the only regulatory provision which does have an impact on the crisis. This section of the Act also requires the Director to report his findings to the legislature. This requirement should provide a further check on the industry.¹²⁶ Hopefully, this information will lay a foundation for further reform.

Further industry reform must be implemented because insurance coverage has become a necessity in modern society.¹²⁷ Illinois' citizens, for example, spend ten cents out of every dollar for insurance.¹²⁸ After food, housing and taxes, it is the largest household expenditure.¹²⁹ For many businesses, insurance has become their largest expenditure.¹³⁰ In reality, insurance has become a public utility.

Thus, the Department of Insurance should regulate the insurance industry for the same reasons that the Illinois Commerce Commission ("ICC") regulates motor carriers and electric companies. Insurance companies are similar to motor carriers in two ways: first, in

122. ILL. REV. STAT. ch. 73, § 755.10a(3).

123. ILL. REV. STAT., ch. 73, § 755.11a.

124. *Id.* § 755.17a, b.

125. *See Id.* §§ 1065.900.1-6. *See also supra* note 77.

126. *See Id.* §§ 1065.902, 1065.903.

127. *See supra* note 115.

128. Quinn, *supra* note 13, at 3.

129. *Id.* Illinois consumers spend five billion dollars every year on insurance.

130. *See supra* notes 17-24, 113 and accompanying text for statistics on the expense of insurance to businesses.

their numerosity, and second, in their practices prior to the regulation of the motor carrier industry. Motor carriers were regulated because of their mistreatment of the consumer, their change within the industry, and because of the changing economic conditions.¹³¹ Moreover, insurance companies are similar to electric companies because both insurance and electricity are necessary.¹³² Consequently, without regulation, these industries can easily exploit the consumer.

States such as New York and Florida have already recognized these similarities and have established a regulatory system.¹³³ In order for Illinois to set up regulations similar to those of the ICC, New York and Florida, it must provide for three essential elements: rate regulation; hearing boards; and rules that will guide these procedures. These elements, along with the requirements enacted, will prevent unreasonable rate increases and arbitrary cancellation of policies, thus terminating the insurance crisis.

The first essential element is rate regulation. Rate standards should not be unfairly discriminatory, unreasonable, unjust, excessive or inadequate.¹³⁴ In order to achieve these standards, anti-competitive behavior must be prohibited and insurers should not be allowed to monopolize or conspire in any way that would prevent competition.¹³⁵ The Department of Insurance ("Department") must have the authority to approve or modify rates prior to the imposition of a thirty percent increase or decrease,¹³⁶ and must be notified of all changes for data collection. In approving, rejecting, or modifying rates, the Department must analyze the insurer's financial position, past and prospective claims record, and existing market circumstances.¹³⁷

To avert unreasonable and unjust premiums and rate increases,

131. See ILL. REV. STAT. ch. 95-½, ¶ 18c-1101 (1986) (motor carriers).

132. See *supra* note 115.

133. The purpose of establishing rate regulation was to promote the public welfare; to prevent excessive rates, discriminatory practices, promote competition, and to improve the availability and reliability of insurance. N.Y. INS. LAW § 2301 (McKinney 1985); FLA. STAT. ANN. § 627.031 (West 1984).

134. See ILL. REV. STAT. ch. 111-¾, ¶ 9-101 (1985) (public utilities); ILL. ANN. STAT. ch. 95-½, ¶ 18c-3205 (motor carriers); N.Y. INS. LAW, § 2303, FLA. STAT. ANN. § 627.031(2).

135. See, e.g., N.Y. INS. LAW § 2316.

136. See, e.g., ILL. REV. STAT. ch. 111-¾, ¶ 9-102.

137. The factors considered for the insurer's financial position should include: profits, reasonable margins for underwriting profits, dividends, savings, investment income, loss reserves, and past and prospective expenses. See FLA. STAT. ANN. § 627.072.

The factors that should be considered include: catastrophic hazards, total losses and factors reasonably attributable to certain risks. *Id.*; N.Y. INS. LAW § 2304.

Other factors to consider should be the extent and nature of competition, sizes of coverage, level range of rates and rate change among insurers, extent of consumer complaints, volume of cancellations and nonrenewals, and changing conditions in the economic, judicial and social environment. N.Y. INS. LAW § 2304.

rates should be based on a graduated scale in conjunction with consumer classes.¹³⁸ Insureds should be classified into groups according to their risk and claim history. For example, an insured with twenty years of experience, who manufactures aspirin and has only one minor claim against him should not receive the same rate increase as an insured with five years of experience who manufactures a new drug and has two claims against him. Where an insured has been exploited or where the Department plans to approve or set rates, a hearing should be held in order to further the ends of justice.

For example, where the industry requests thirty percent increases, a general hearing must be held.¹³⁹ The Department's commissioners should conduct the hearing. Any interested party may participate in the hearing for the purpose of determining, on the basis of findings of fact and conclusions, whether rates should be approved or modified.¹⁴⁰ The Department, on its own, may also hold a hearing to determine whether the rates are excessive or inadequate, and to determine whether and how consumer classes should be reclassified.¹⁴¹ As a result, the Department would have the power to reduce rates that would yield unreasonable profits and to revise inequitable classifications.

The Department must also establish boards to review individual complaints.¹⁴² The boards would consist of a three-member panel, and would be deployed throughout the state.¹⁴³ These boards would hear complaints on unjust rate increases and arbitrary nonrenewals, as well as policy cancellations. The only parties that would participate in such a hearing would be the aggrieved party and the insurer. The complainant, however, must have exhausted his remedies with the insurer,¹⁴⁴ and must meet certain requirements to have standing for a board hearing. For example, an aggrieved consumer may only bring an action for rate increases, cancellations or nonrenewals if the insurer has provided him with coverage for three years or more, or his rate is being increased by more than ten percent, and his claim total has been less than a certain percentage of his total premiums paid. On petition, these standing requirements may be waived by the board. If the board holds for the complainant, it may issue a cease and desist order for rate increases, cancellations and

138. N.Y. INS. LAW § 2304(c),(d); FLA. STAT. ANN. § 627.072(2),(3).

139. *See, e.g.*, N.Y. INS. LAWS § 2344.

140. *Id.*

141. *See, e.g., id.* § 2308.

142. *See, e.g.*, ILL. ADMIN. CODE, ch. 1, § 200 (hearing procedure of the Illinois Commerce Commission).

143. The board need not consist of three members. The Department of Insurance should decide if one administrative law judge (hearing examiner) is appropriate.

144. *See, e.g.*, N.Y. INS. LAW § 2319(b) (every insurer must provide a hearing for an aggrieved customer).

nonrenewals.¹⁴⁵ If it finds that the insurer has charged excessive or otherwise unjust rates, it may order the insurer to make due reparation to the complainant and order that a just rate be charged.¹⁴⁶

The insurance consumers, however, should not and cannot rely solely on the government for protection. When the Department of Insurance proposes regulations and holds hearings, the insurance industry is always represented. As of 1985, the industry fielded sixty-one lobbyists in the Illinois General Assembly, where the consumers had none.¹⁴⁷ Consumers, then, should establish a "Consumer Insurance Board" ("CIB"). The CIB would be a statewide not-for-profit corporation, representing the interests of families, businesses and local governments.¹⁴⁸ The CIB would hire full-time attorneys, actuaries and accountants who would monitor insurance companies, represent consumer interests to the Department of Insurance, and lobby the General Assembly.¹⁴⁹ CIB experts would also propose standards for the insurance industry, counter their arguments and unravel many of the industry's mysteries.¹⁵⁰

In order to reverse the current state of the insurance crisis, Illinois' citizens cannot wait for the new Act to take full effect. As previously discussed, the full effect of the Act would only indirectly affect the crisis. Consequently, the suggested governmental regulations must be implemented without further delay.

IV. CONCLUSION

The Act will not relieve Illinois of its insurance crisis. Tort reform is not the answer for alleviating exorbitant rates and halting arbitrary policy cancellations. The Act, however, does contain several provisions necessary for tort reform and to provide a foundation for insurance regulation. Because insurance has become a necessity in our society, the Illinois legislative committee should regulate the insurance industry to halt the insurance crisis and to stabilize the market. The Department of Insurance must be given the power to control rates and provide hearings to protect the consumer. Consumers must also unite to have an effective voice in our state and to

145. See, e.g., ILL. REV. STAT. ch. 111- $\frac{3}{4}$, §9-250 (1985).

146. *Id.* § 9-252.

147. See *supra* note 79.

148. Letters from members to form Consumer Insurance Board of Illinois to prospective members (Jan. 2, 1987) (explaining Consumer Insurance Board organization and practices). The Consumer Insurance Board (CIB) would be the first and only organization representing insurance consumers.

Any Illinois resident would be able to become a full-voting member upon paying an annual fee of five dollars. *Id.* No public funds would be used and citizens contributions would entirely fund CIB.

149. *Id.*

150. *Id.*

prevent the insurance industry's domination of the Department of Insurance and General Assembly. Until these events occur, Illinois' attempt to resolve to insurance crisis will consist of too much tort reform and too little insurance regulation.

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