

Atlantic Provinces Trial Lawyers Association (APTLA)
Insurance Wars: Litigate to Win
November 13, 2009

PRESERVING ACCESS TO JUSTICE: RESISTING THE PUSH TO RESTRICT TORT RIGHTS

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Barristers and Solicitors

CURRENT CHALLENGES TO TORT RIGHTS

- JOINT AND SEVERAL LIABILITY
 - PROPORTIONATE LIABILITY
 - CAPS ON LIABILITY
- AUTO INSURANCE
 - THRESHOLDS
 - DEDUCTIBLES
 - CAPS
 - VICARIOUS LIABILITY IN LEASING

FIGHTING FOR TORT RIGHTS IN ONTARIO

THE BATTLES

- 1990
- 1994
- 1996
- 2003
- 2009

2009 RESULTS ANNOUNCED NOVEMBER 2, 2009

- SLIGHT INCREASE IN TORT
- STILL TOO MANY TORT RESTRICTIONS
- DILUTED PRODUCT
- DIMINISHED COVERAGE

WHY?

- PREMIUMS AND POLITICS

WHY CONTINUE THE FIGHT

- SINGLE-MINDED FOCUS OF IBC = PROFIT
- CONSUMERS UNREPRESENTED
- PROTECTION FOR CONSUMERS WILL DETERIORATE
- OTHER AREAS ARE VULNERABLE
 - MEDICAL MALPRACTICE
 - JOINT AND SEVERAL
 - OTHER AREAS OF AUTO

APPROACH TO AUTO INSURANCE REFORM

THREE KEY OBJECTIVES:

1. CONSUMERS MUST HAVE AFFORDABLE PREMIUMS
 - some paternalism
 - inflationary changes
2. PRESERVE REASONABLE ACCESS TO JUSTICE AND ACCESSIBLE BENEFIT
 - don't lightly interfere with tort
 - strike right balance
 - efficient and understandable
3. MAINTAIN A VIABLE AND HEALTHY INSURANCE INDUSTRY
 - reasonable ROE

PRESERVING ACCESS TO JUSTICE

OBSTACLES TO OVERCOME

- INSURANCE INDUSTRY POWER & MONEY
- LIMITED ACCESS TO INFORMATION (GISA)
- PUBLIC INTEREST & COMPLEXITY
- ALLEGATIONS OF SELF-INTEREST

INSURANCE INDUSTRY SPIN

- INSTABILITY CAUSED BY UNCONTROLLED CLAIM COSTS
→ **NOT TRUE**
- INSTABILITY CAUSED BY COURTS AND ARBITRATORS
→ **NOT TRUE**
- CONSUMERS ARE WINNERS WHEN COVERAGE REDUCED TO CONTROL PREMIUMS
→ **NOT TRUE**

THE STRATEGY

- UNDERSTAND THE BUSINESS OF INSURANCE
- LOOK TO FUNDAMENTAL ISSUES AND EXPLAIN
- LEARN FROM HISTORY
- BRING FOCUS TO RELEVANT ISSUES
- DO NOT BE DEFENSIVE
- SOLID BASIS FOR POSITION

AUTO INSURANCE – TORT AND FIRST PARTY BENEFITS

ONTARIO

- VERBAL THRESHOLD
- DEDUCTIBLES
- MED/REHAB → \$1,000,000.00/\$100,000.00
→ \$1,000,000.00/\$50,000.00 (proposed)

NOVA SCOTIA

- CAP → \$2,500.00 for “minor injury”
- MED/REHAB → \$25,000.00

NEW BRUNSWICK

- CAP → \$2,500.00 for “minor injury”
- MED/REHAB → \$50,000.00

P.E.I.

- CAP → \$2,500.00 for “minor personal injury”
- MED/REHAB → \$25,000.00

WHAT MOTIVATES LIMITS ON TORT RIGHTS

- INSURANCE COMPANIES
 - taking away tort rights
 - reduces costs
 - increases profit
 - allows recovery from poor fiscal results without large premium increases

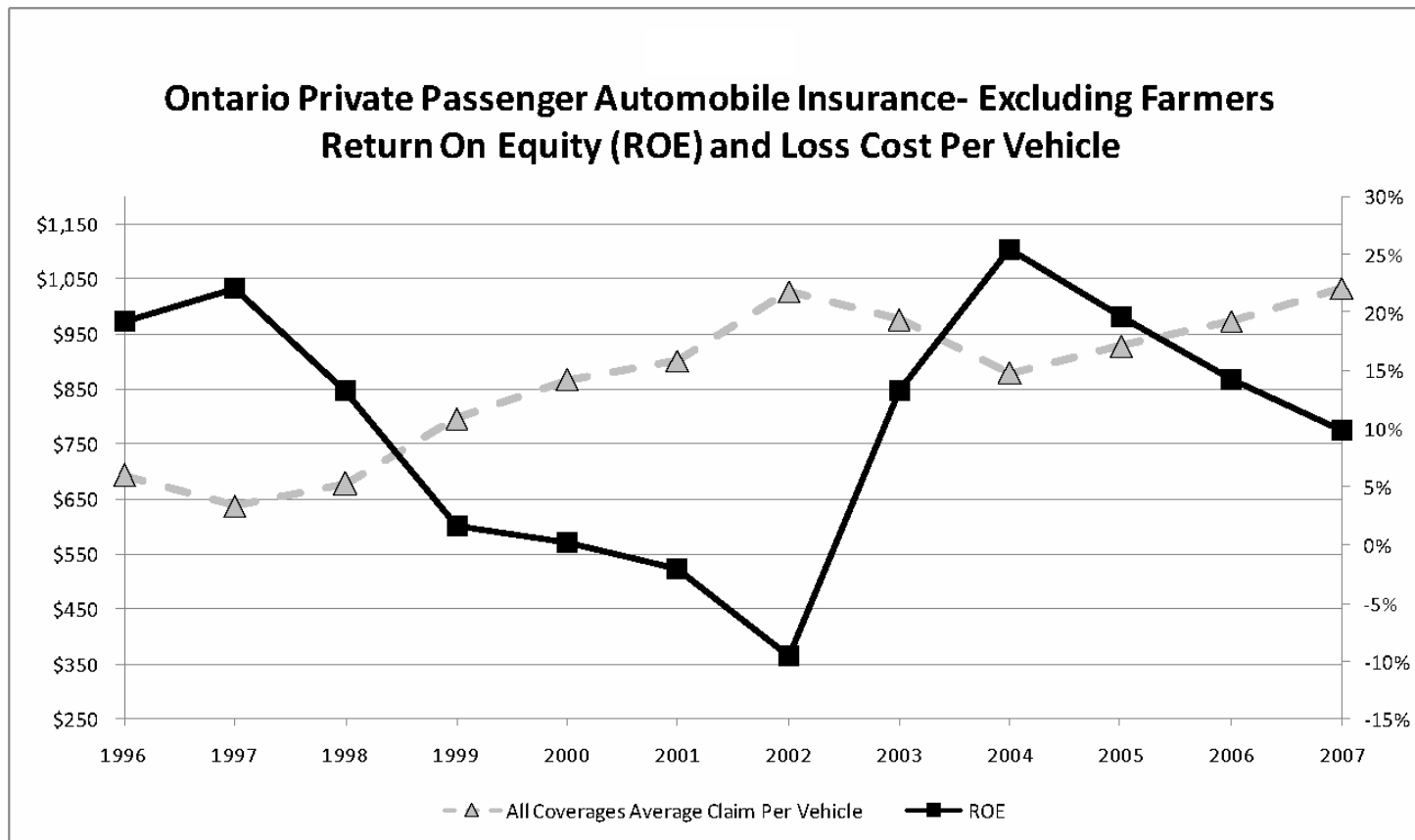
UNDERLYING ECONOMIC ISSUES AFFECTING INSURANCE

- CLAIMS COSTS GENERALLY
 - BODILY INJURY
 - FIRST PARTY
- ACCIDENT FREQUENCY
- ACCIDENT SEVERITY
- RESERVES
 - LIABILITY FOR CURRENT AND FUTURE CLAIMS
- RETURN ON INVESTMENTS
- CAPITAL
- UNDERWRITING

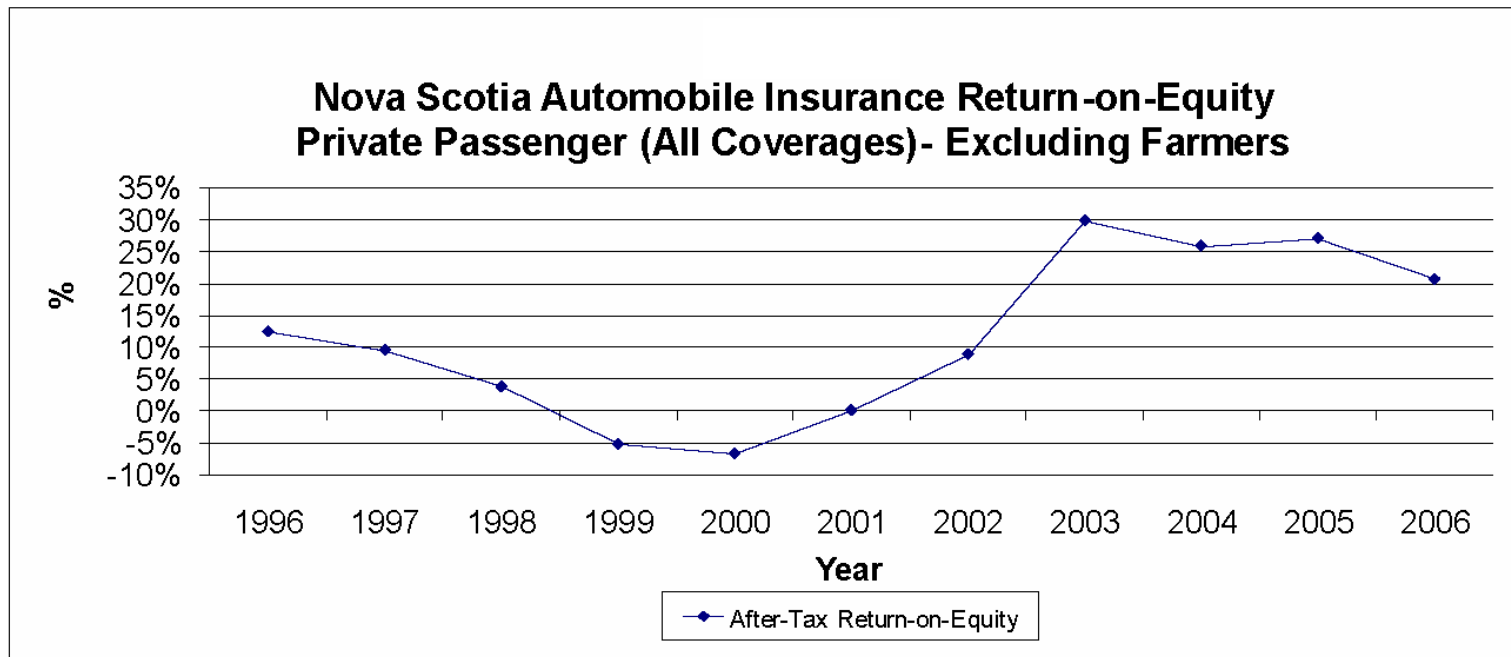
ULTIMATE ISSUE IS RETURN ON EQUITY (ROE)

- AFTER TAX PROFIT DIVIDED BY INVESTMENTS MADE IN THE INDUSTRY
 - THE MEASURE OF RETURN FOR RISK
 - INSURERS NEED PROFIT TO DO BUSINESS
- TENDS TO FOLLOW CYCLICAL PATTERN
 - THE CYCLES EXPLAIN THE PERIODIC CALL FOR TORT RESTRICTIONS
 - UNDERSTANDING CAUSE FOR CYCLES NEEDED TO PROPERLY RESPOND TO CALL FOR REFORM

ROE CYCLES (ONTARIO)



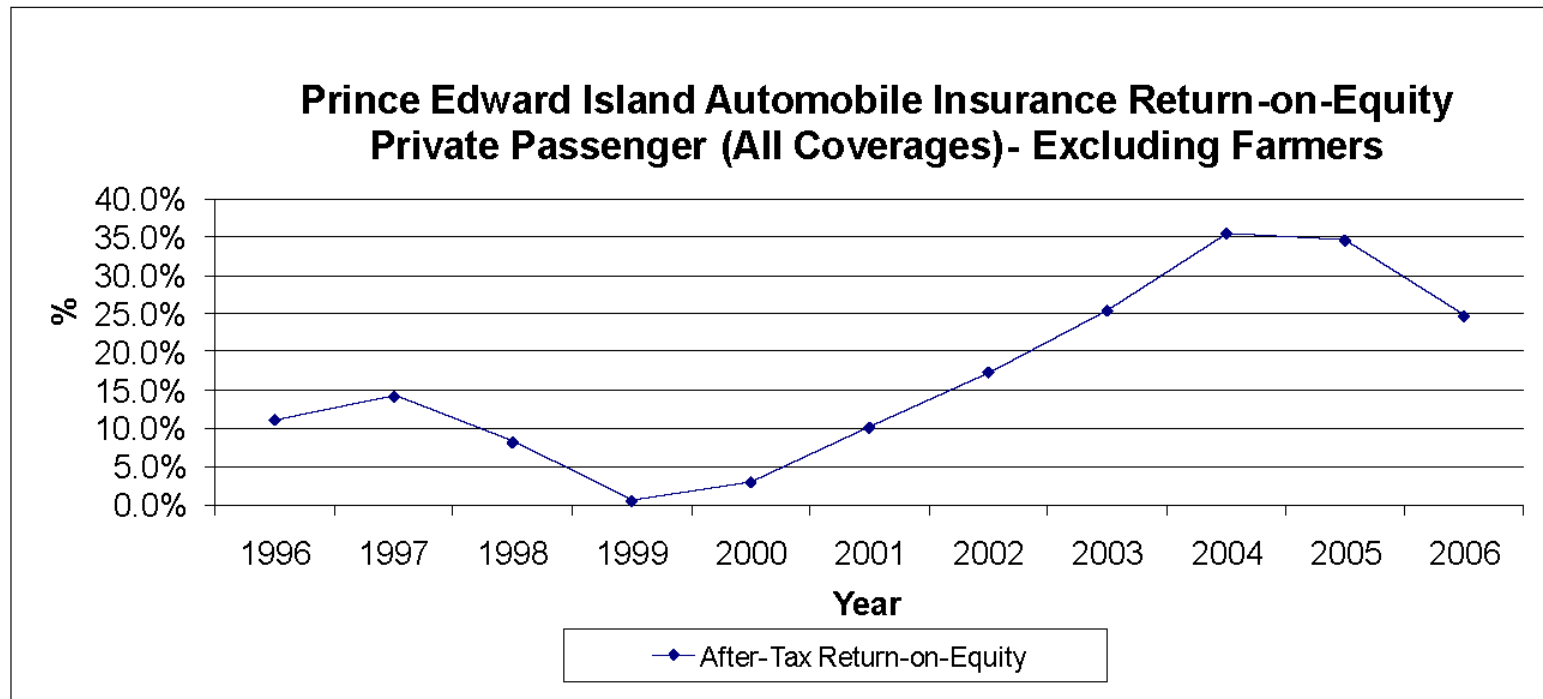
ROE CYCLES (NOVA SCOTIA)



ROE CYCLES (NOVA SCOTIA)

Nova Scotia Automobile Insurance Profitability Private Passenger (All Coverages) Excluding Farmers		
Year	Total Profit	After-Tax Return-on-Equity
	(millions) After-Tax Profit	
1996	26	12.4%
1997	21	9.5%
1998	9	3.7%
1999	(13)	-5.3%
2000	(17)	-6.8%
2001	0	0.1%
2002	24	8.8%
2003	85	29.9%
2004	80	25.9%
2005	92	27.0%
2006	76	20.7%

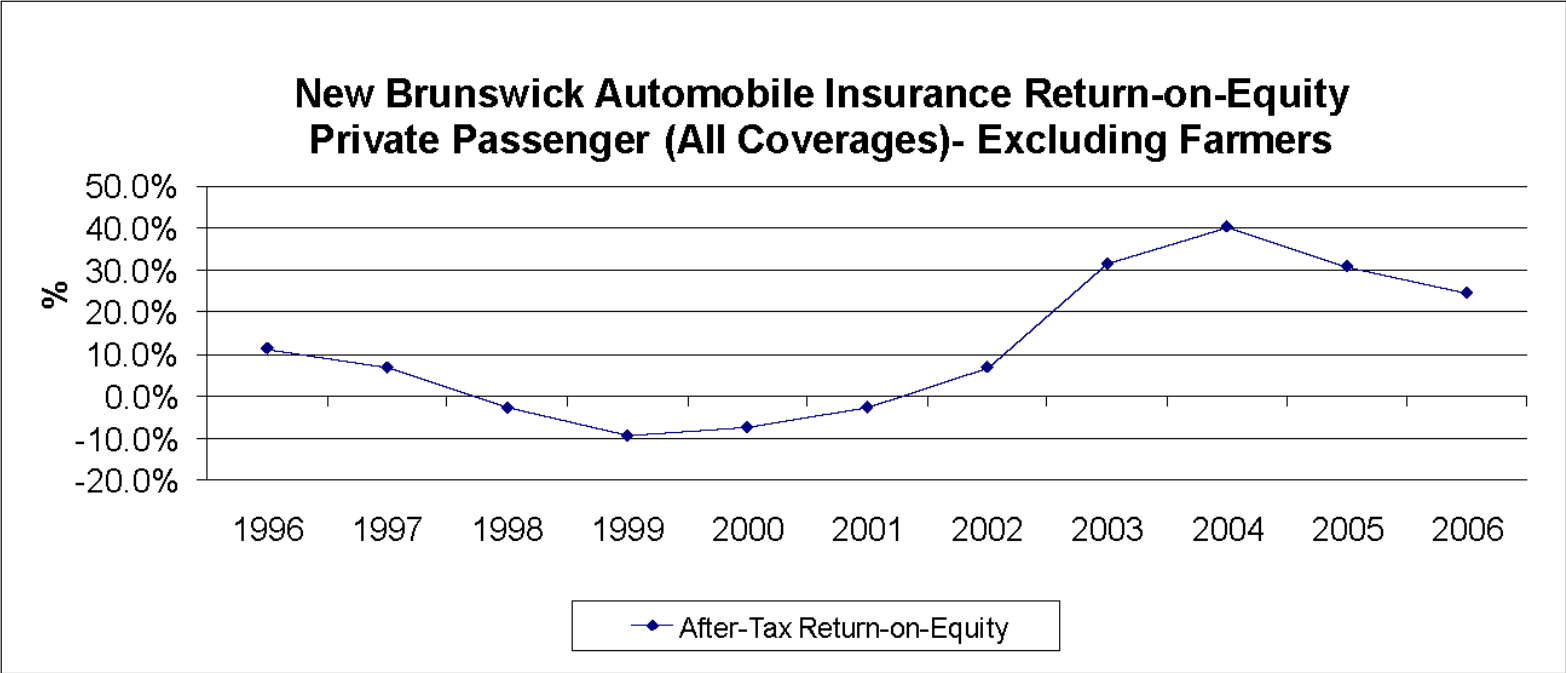
ROE CYCLES (P.E.I.)



ROE CYCLES (P.E.I.)

Pince Edward Island Automobile Insurance Profitability Private Passenger (All Coverages) Excluding Farmers		
Year	Total Profit	After-Tax Return-on-Equity
	(millions) After-Tax Profit	
1996	3.5	11.1%
1997	4.5	14.2%
1998	2.7	8.1%
1999	0.2	0.5%
2000	1.1	2.9%
2001	4.0	10.1%
2002	6.6	17.3%
2003	10.0	25.4%
2004	15.7	35.5%
2005	17.4	34.6%
2006	13.5	24.7%

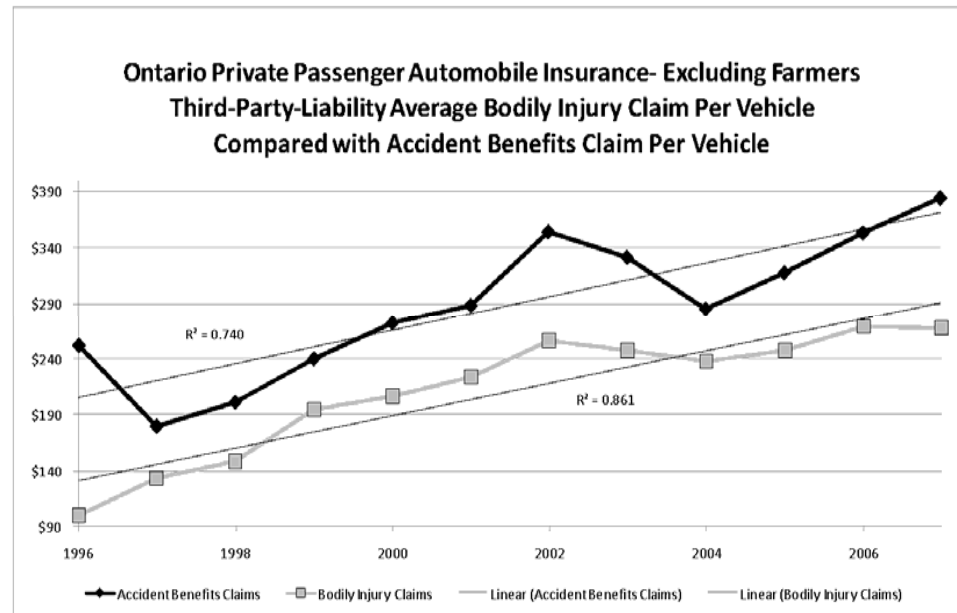
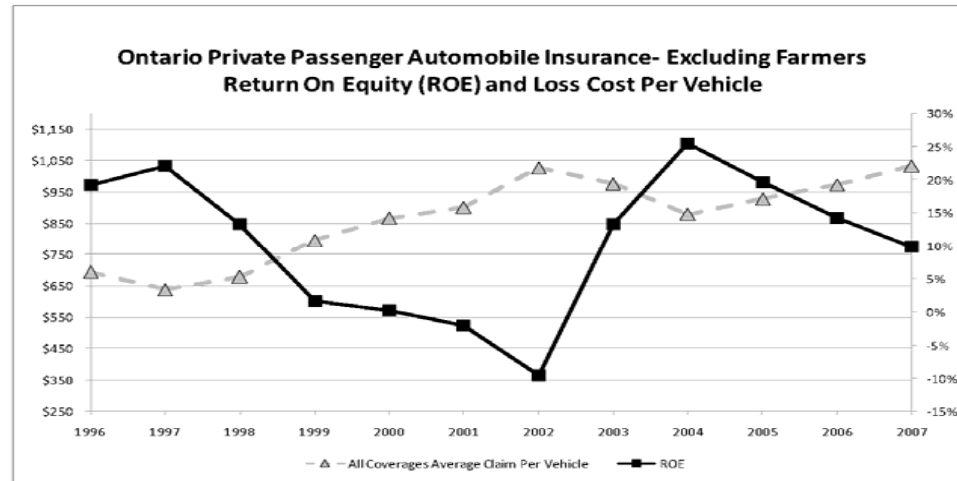
ROE CYCLES (NEW BRUNSWICK)



ROE CYCLES (NEW BRUNSWICK)

New Brunswick Automobile Insurance Profitability Private Passenger (All Coverages) Excluding Farmers		
Year	Total Profit (millions) After-Tax Profit	After-Tax Return-on- Equity
1996	25	11.3%
1997	15	6.7%
1998	(7)	-2.8%
1999	(23)	-9.4%
2000	(19)	-7.4%
2001	(7)	-2.7%
2002	18	6.8%
2003	86	31.4%
2004	124	40.3%
2005	106	30.7%
2006	87	24.5%

EXPLAINING ROE CYCLES



WHAT CAUSES AMPLITUDE OF ROE CYCLES

- NOT CLAIMS COSTS PATTERNS
 - a contributor to cost
 - not a contributor to instability
 - cannot explain a “crisis”
- NOT CHANGES IN INVESTMENT RETURNS
- PRICES NOT TRACKING COSTS

WHAT CAUSES AMPLITUDE OF ROE CYCLES

Prince Edward Island Automobile Insurance Private Passenger-Excluding Farmers All Coverages				
Year	Average Premium	Average Claim per Vehicle	Claim Costs Relative to Premiums	
1996	\$ 580	\$ 490	85%	
1997	\$ 580	\$ 467	80%	
1998	\$ 582	\$ 494	85%	
1999	\$ 593	\$ 561	95%	
2000	\$ 601	\$ 574	95%	
2001	\$ 648	\$ 520	80%	
2002	\$ 732	\$ 477	65%	
2003	\$ 832	\$ 509	61%	
2004	\$ 847	\$ 392	46%	
2005	\$ 825	\$ 375	45%	
2006	\$ 787	\$ 438	56%	

Source: GISA/IBC AU90-P.1987-2006

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- AVAILABILITY OF CAPITAL AND UNDERWRITING PRACTICES
 - soft markets
 - relaxed underwriting
 - reliance on government bail out through reform

 - STABILITY
 - for insurers, predictable costs
 - setting price for future liability
 - need to have proper reserves

 - for insured, household budget
 - inflation okay
 - spikes in cost not okay

IMPACT OF ROE CYCLES

- PROLONGED SOFT MARKETS AND POOR PRICING ALLOWS PROFITS TO DISAPPEAR
 - insurers respond late
 - rate review process has delays
 - price does not reflect market
 - requires precipitous premium increases
- LATE REACTION TO LOW PROFITS CALLS FOR BIG PREMIUM HIKE
 - insurers need to restore profit
 - options are:
 1. raise premium, or
 2. reduce cost
- PUBLIC REACTION TO THREAT OF HIKE
 - political fall-out
 - rate hikes will be approved
 - governments not in enviable spot
- ONLY SHORT TERM SOLUTION IS DILUTE COVERAGE

MITIGATING ROE CYCLES

- INSURERS MUST ADOPT UNDERWRITING DISCIPLINE
- RATE ADJUSTMENT TO MARKET FORCES MUST BE QUICKER
- SOFT MARKETS MUST END BEFORE PROFIT DISAPPEARS, NO MATTER WHAT AVAILABLE CAPITAL
- INSURERS MUST BE WARNED THAT THERE ARE NO BAIL OUTS TO AVOID REINFORCING UNDERSIRABLE PRACTICES

PROOF THAT LIMITING TORT DOES NOT WORK

ONTARIO

- 2003 REFORMS
- INDUSTRY ON WAY TO RECORD PROFITS
- REFORMS NOT NEEDED TO RESTORE PROFIT

NOVA SCOTIA

- CAP NOV. 1, 2003
- 2003 RECORD HIGH PROFIT

PROOF THAT LIMITING TORT DOES NOT WORK

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P.E.I.

- CAP APRIL 1, 2004
- RECOVERY EVIDENCE BY 2002
- PROFIT EXCEEDS REASONABLE LEVELS
- NO OFFER TO REVOKE RESTRICTIONS IN GOOD TIMES

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NEW BRUNSWICK

- CAP JULY 1, 2003
- 1998 TO 2001 – BAD YEARS
- 2002 START OF RECOVERY
- 2003 OUT OF TROUGH
- 2004 RECORD PROFITS

New Brunswick Automobile Insurance Profitability Private Passenger (All Coverages) Excluding Farmers		
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CONCLUSIONS

- AUTO INSURANCE REFORMS OF 2003 AND 2004 NOT NEEDED TO RESTORE PROFITABILITY
- INSTABILITY OF AUTO INSURANCE NOT CAUSED BY CLAIMS COSTS
- ROE CYCLES DUE TO INDUSTRY CONDUCT, CAPITALIZATION, PRICING AND RATE REVIEW PROCESS
- MITIGATING ROE CYCLES WILL RESULT IN LESS TINKERING WITH AUTO INSURANCE
- LIMITING TORT RIGHTS DOES NOT FOLLOW FROM DECREASED PROFITS
- IF THERE IS ANY JUSTIFICATION FOR LOWERING CLAIMS COSTS IT IS NOT DUE TO INSTABILITY OR UNPREDICTABLE COST PATTERNS