CTLA Leader Lauds Closed-Door Deal

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SACRAMENTO — The controversial closed-door process used to enact sweeping changes in California tort law on the final day of the 1987 legislative session was defended Thursday by the president-elect of the California Trial Lawyers Association.

"The process is important, but it's not the most important aspect . . . ," Gary Gwilliam said in an interview. "The element of glue or cohesiveness that kept these negotiations going was the idea that we did have a process — an ongoing process that we will have in the future — and a moratorium on pushing legislation through as special interest groups."

Gwilliam added that there is a "lobby lock" in Sacramento, referring to the enormous political clout of special-interest groups in the capital. "We can block legislation, and others can block ours."

It was a unified desire to avoid "lobby lock," as well as an expensive 1988 initiative fight, Gwilliam contended, that kept trial lawyers and their traditional antagonists — business, medical and insurance interests — at the negotiating table.

A partner in the Oakland law firm of Gwilliam & Ivary, one of the largest personal injury-malpractice firms in the East Bay, Gwilliam participated in the months-long private sessions which led to historic legislation — Senate Bill 241. Sen. Bill Lockyer, D-Hayward, and Assembly Speaker Willie Brown, D-San Francisco, sponsored the bill which was introduced, passed and sent to Gov. George Deukmejian in the final hours of the 1987 session.

Consumer groups, locked out of the negotiations, immediately cried foul, saying the deal smacked of smoke-filled rooms and special interests.

Certainly the special interests were represented in the closed-door meetings. In addition to the CTLA, the sessions variously included a virtual Who's Who of business, law, medicine and industry in California: the California Chamber of Commerce, the California Medical Association, the Association of California Insurance Companies and the California Manufacturers Association (represented by former Deukmejian chief of staff, Steven Merksamer, a Sacramento attorney in private practice who heads a political committee for the governor, and by former Republican Assemblyman Robert Naylor).

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Gwilliam said the mere fact that the CTLA and the Association for California Tort Reform — an umbrella group including medical, business and insurance interests — were present in the same room, seriously negotiating, was historic.

The two groups were on opposite sides of the bruising battle over the so-called "deep pockets" initiative, Proposition 51, which passed last year. And it was their mutual fear of precisely another such battle which brought them to the bargaining table — and, perhaps more important, kept them talking, even when negotiations broke down.

Although Gwilliam insists the negotiations "were not motivated by a lot of self-interest," the trial lawyers and the insurance-medical-business interests clearly had a lot to lose — or win, as the case may be.

The so-called Fair Liability Act — a proposed tort reform initiative already filed by ACTR with the attorney general's office in preparation for the 1988 elections — and a companion proposal to limit attorney contingency fees were certain to provoke a bitter confrontation if placed on the November 1988 ballot.

The tort reform association experienced a major setback when the state's cities and counties — important backers of Proposition 51 that have since become disenchanted with the initiative's unrealized promises of lower insurance rates — declined to support the 1988 initiative, and sat down with the CTLA to come up with a public-sector tort reform package introduced in August and passed by the Legislature.

ACTR insisted the loss of organized local government support was not crippling, since the new initiative drive still had the backing of individual local government officials. Gwilliam said flatly that the CTLA "would have defeated it, with about $6 million."

The trial lawyers spent an estimated $5 million in 1986 in an unsuccessful effort to defeat Proposition 51, and the tort reform group spent an additional $6 million to pass it. The 1988 initiative fight was expected to be even more expensive. The various parties to the tort-insurance wars estimate that the costs for doing battle could range from $18 million to $30 million, depending on the number and nature of tort and insurance reform initiatives which might eventually made their way onto the 1988 ballot.

Consumer groups say they still plan to place an insurance reform initiative on the 1988 ballot, but clearly without CTLA funding. A key element of the tort reform agreement is that the various war-

SEE GWILLIAM, PAGE 17

Gwilliam: 'Lobby Lock' Sparked Deal

CONTINUED FROM PAGE 16

ring factions will not file or fund initiatives against each other in the next five years.

Gwilliam said the importance of the initiative cease-fire agreement — as well as the resolve to continue to negotiate for substantive insurance reform, which the Legislature failed to address before it adjourned last week — far outweighs the "down side," the secretive process by which the agreement was reached.

But he remains concerned about how it all looked, especially to consumer groups. Those groups, he said, saw the secret "fat cat" negotiations as "business as usual" in Sacramento, where lobbyists for special interest groups wield great power over the legislative process.

"I don't like that process," Gwilliam said of the negotiations, which he said began initially between representatives of the California Medical Association and the CTLA last spring and broke down during the summer. The negotiations intensified when the Legislature returned from its summer recess in August, he said.

"I wish [the process] could have been changed, but that's the way it came down," Gwilliam said. "We should not lose sight of the fact that we really changed the way these confrontations occur between these very diverse interests. We compromised. We had give and take. It's a much more sensible way of approaching laws than doing it by initiative. And that's what's really important in the long run."

Gwilliam insists that the CTLA represented the interests of consumer groups during the negotiations. The consumer groups counter that their interests and those of trial lawyers — though similar in many ways — are quite different in significant aspects.

"My clients are the victims and the consumers," Gwilliam said. "I'm not out to feather the nest of lawyers."

"Trial lawyers' interests with respect to consumers are different than those of consumer groups," said Consumers Union lawyer Gail Hillebrand. "Auto insurance is the most obvious example. There is an issue for consumers of access and affordability. From the lawyer's point of view, the lawyer is interested in seeing that there is more coverage, higher limits and so forth. There may be a conflict between coverage and affordability."

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And, Hillebrand noted, "some victims weren't there" in the secret negotiations. "Those who are going to be injured by alcohol or tobacco would not have made the compromise that the CTLA did [on product liability,]" she said, or on the malpractice contingency fee increase without any concurrent increase in the ceiling on damages.

"We're not saying the attorneys fee change wasn't needed, but there did not seem to be a full representation of the victim's interest," she added.

Gwilliam said the last-minute intensity of the secret negotiations was the result of the Sept. 11 legislative adjournment deadline, because legislative reform to avert an initiative battle would be too late if it came when the Legislature resumes Jan. 1, 1988.

"We all learned how expensive the initiative process is and how it is not the best way to pass laws," Gwilliam said. "If we didn't do something by Sept. 11, it would have become a real war — a public relations war, with a lot of lawyer-bashing and court-bashing. You end up [in an initiative battle] with a lot of television spots. That's fine for soap and automobiles, but it's not a good way to discuss the civil justice system."

He said the negotiations picked up steam after the public-sector tort reform measures were successfully worked out among representatives of the cities and counties, the CTLA and the attorney general's office.

Accomplished in the form of a nine-bill package and a duplicate omnibus bill now on the governor's desk, Gwilliam said "the deal with the cities and counties" on public-sector tort reform occurred earlier under more optimum open conditions.

"Ultimately, [legislation] should be done in public," Gwilliam said, "although I'm not sure you want the press sitting in on all our negotiations. The problem [with the private sector negotiations] was that damn Sept. 11 deadline."

In addition to the initiative "cease-fire agreement," the negotiators pledged to continue talks on insurance rate regulation and agreed to legislative provisions that would:

- Alter the sliding-scale contingency fee limitation of the Medical Injury Compensation and Reform Act to 25 percent for awards of $100,000-600,000 and 15 percent of awards over $600,000. Currently, judgments of $200,000 or more carry a 10 percent contingency fee — which Gwilliam said was a major barrier to malpractice lawyers taking on large cases.

Other provisions of MICRA (40 percent contingency fees for $50,000 awards, one-third for the next $50,000 and 25 percent for the next $100,000) remain unchanged.

- Change the definition of malice and oppression to include proof that the defendant's conduct was "despicable."
- Increase the plaintiff's burden of proof from "preponderance of evidence" to "clear and convincing evidence."
- Immunize sellers of products that are known to consumers to be "inherently unsafe," such as alcohol, cigarettes and foods high in cholesterol. This provision has raised the most concern among consumer groups, who say it will jeopardize legal efforts on behalf of victims of fetal alcohol syndrome and cigarette smoke.
- Clarify the circumstances in which an insurance company must provide separate independent counsel to an insured and defines criteria for selection and payment of independent counsel.