

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

March 3, 2004

1:58 p.m.

**MEMBERS PRESENT**

Representative Lesil McGuire, Chair  
Representative Tom Anderson, Vice Chair  
Representative Jim Holm  
Representative Dan Ogg  
Representative Ralph Samuels  
Representative Les Gara  
Representative Max Gruenberg

**MEMBERS ABSENT**

All members present

**OTHER LEGISLATORS PRESENT**

Senator Donny Olson

**COMMITTEE CALENDAR**

CONFIRMATION HEARING

Violent Crimes Compensation Board

David G. Ingraham, M.D. - Anchorage

- CONFIRMATION ADVANCED

HOUSE BILL NO. 403

"An Act relating to the Alaska Insurance Guaranty Association; relating to joint insurance arrangements and assessments to the association; relating to the powers of the Alaska Industrial Development and Export Authority concerning the association; and providing for an effective date."

- MOVED CSHB 403(L&C) OUT OF COMMITTEE

HOUSE BILL NO. 472

"An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 468

"An Act relating to the amount of the bond required to stay execution of a judgment in civil litigation involving a signatory, a successor of a signatory, or an affiliate of a signatory to the tobacco product Master Settlement Agreement during an appeal; amending Rules 204 and 205, Alaska Rules of Appellate Procedure; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 424

"An Act relating to review of regulations under the Administrative Procedure Act by the Legislative Affairs Agency; and providing for an effective date."

- MOVED CSHB 424(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 334

"An Act relating to unlawful exploitation of a minor."

- SCHEDULED BUT NOT HEARD

#### PREVIOUS COMMITTEE ACTION

BILL: HB 403

SHORT TITLE: ALASKA INSURANCE GUARANTY ASSOCIATION

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

01/28/04	(H)	READ THE FIRST TIME - REFERRALS
01/28/04	(H)	L&C, JUD, FIN
02/09/04	(H)	L&C AT 3:15 PM CAPITOL 17
02/09/04	(H)	Heard & Held
02/09/04	(H)	MINUTE(L&C)
02/11/04	(H)	L&C AT 3:15 PM CAPITOL 17
02/11/04	(H)	Heard & Held
02/11/04	(H)	MINUTE(L&C)
02/16/04	(H)	L&C AT 3:15 PM CAPITOL 17
02/16/04	(H)	Moved CSHB 403(L&C) Out of Committee
02/16/04	(H)	MINUTE(L&C)
02/18/04	(H)	L&C RPT CS(L&C) NT 5NR
02/18/04	(H)	NR: LYNN, GATTO, DAHLSTROM,
02/18/04	(H)	GUTTENBERG, ANDERSON
02/26/04	(H)	FIN AT 1:30 PM HOUSE FINANCE 519
02/26/04	(H)	<Bill Hearing Postponed>
03/03/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 472

SHORT TITLE: CLAIMS AGAINST HEALTH CARE PROVIDERS

SPONSOR(S): REPRESENTATIVE(S) ANDERSON

02/16/04 (H) READ THE FIRST TIME - REFERRALS  
02/16/04 (H) JUD  
02/25/04 (H) JUD AT 1:00 PM CAPITOL 120  
02/25/04 (H) Heard & Held  
02/25/04 (H) MINUTE(JUD)  
03/03/04 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 468

SHORT TITLE: APPEAL BONDS: TOBACCO SETTLEMENT PARTIES

SPONSOR(S): LABOR & COMMERCE

02/16/04 (H) READ THE FIRST TIME - REFERRALS  
02/16/04 (H) JUD  
03/01/04 (H) JUD AT 1:00 PM CAPITOL 120  
03/01/04 (H) Heard & Held  
03/01/04 (H) MINUTE(JUD)  
03/03/04 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 424

SHORT TITLE: REGULATION REVIEW

SPONSOR(S): REPRESENTATIVE(S) HOLM

02/02/04 (H) READ THE FIRST TIME - REFERRALS  
02/02/04 (H) ARR, JUD  
02/02/04 (H) ARR REFERRAL REMOVED  
02/25/04 (H) JUD AT 1:00 PM CAPITOL 120  
02/25/04 (H) Scheduled But Not Heard  
02/27/04 (H) JUD AT 1:00 PM CAPITOL 120  
02/27/04 (H) Heard & Held  
02/27/04 (H) MINUTE(JUD)  
03/03/04 (H) JUD AT 1:00 PM CAPITOL 120

**WITNESS REGISTER**

LINDA HALL, Director  
Division of Insurance  
Department of Community & Economic Development (DCED)  
Anchorage, Alaska  
POSITION STATEMENT: Presented HB 403 on behalf of the  
administration.

ROLAND GOWER, M.D.

Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of HB 472 and responded to questions.

PHILIP R. HINDERBERGER, Senior Vice President & General Counsel  
Assistant Corporate Secretary

NORCAL Mutual Insurance Company ("NORCAL")  
San Francisco, California

POSITION STATEMENT: Provided Comments during discussion of HB 472 and responded to questions.

EMILY NENON, Alaska Advocacy Director  
American Cancer Society (ACS)

Anchorage, Alaska

POSITION STATEMENT: Provided comments and posed questions during discussion of HB 472.

CARMEN E. CLARK

Anchorage, Alaska

POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 472.

LES SYREN

Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of HB 472.

JAMES JORDAN, Executive Director

Alaska State Medical Association (ASMA)

Anchorage, Alaska

POSITION STATEMENT: Responded to questions during discussion of HB 472.

BARBARA COTTING, Staff

to Representative Jim Holm

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Answered questions on behalf of the sponsor of HB 424, Representative Holm.

DEBORAH BEHR, Assistant Attorney General

Legislation & Regulations Section

Department of Law (DOL)

Juneau, Alaska

POSITION STATEMENT: Provided a sectional analysis of CSHB 424, Version S.

KARLA SCHOFIELD, Deputy Director  
Legislative Administrative Services  
Legislative Affairs Agency  
Juneau, Alaska

POSITION STATEMENT: Explained the fiscal note on HB 424.

**ACTION NARRATIVE**

**TAPE 04-33, SIDE A**

Number 0001

**CHAIR LESIL McGUIRE** called the House Judiciary Standing Committee meeting to order at 1:58 p.m. Representatives McGuire, Anderson, Samuels, Gara, and Gruenberg were present at the call to order. Representatives Holm and Ogg arrived as the meeting was in progress.

CONFIRMATION HEARING

Violent Crimes Compensation Board

Number 0203

CHAIR McGUIRE announced that the committee would first consider the appointment of David G. Ingraham, M.D., to the Violent Crimes Compensation Board.

Number 0246

REPRESENTATIVE SAMUELS made a motion to advance from committee the nomination of David G. Ingraham, M.D., as appointee to the Violent Crimes Compensation Board. There being no objection, the confirmation was advanced from the House Judiciary Standing Committee.

HB 403 - ALASKA INSURANCE GUARANTY ASSOCIATION

[Contains mention that SB 276, the companion bill to HB 403, would be heard by the House Judiciary Standing Committee at a later date.]

Number 0265

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 403, "An Act relating to the Alaska Insurance Guaranty Association; relating to joint insurance arrangements and assessments to the association; relating to the powers of

the Alaska Industrial Development and Export Authority concerning the association; and providing for an effective date." [Before the committee was CSHB 403(L&C).]

Number 0265

LINDA HALL, Director, Division of Insurance, Department of Community & Economic Development (DCED), explained that HB 403 is intended to address a funding shortage in the Alaska Insurance Guaranty Association [Fund]. She said:

The [Alaska Insurance Guaranty Association] was formed under statute, and its members are insurance companies who write business in Alaska. The purpose of the [Alaska Insurance Guaranty Association] is to minimize financial loss to both policyholders and claimants; they provide payment of claims - step in place of an insolvent insurer. Assessments are made to provide the funds to pay those claims. In July of 2003, Fremont Indemnity Company ["Fremont"] was declared insolvent by the Los Angeles superior court, and while they had not actively written business since early in 2001, they left behind estimated claim reserves, over a period of time, of \$60 million. When they were an active insurer they wrote 27 percent of the Alaska workers' compensation market, so it was [a] very large percentage of our market.

At the time they were declared insolvent, there were two other insolvent workers' compensation insurers in the [Alaska Insurance Guaranty Association]: Reliance Insurance Company, which was domiciled in Pennsylvania, the largest insolvency of [an] insurance carrier ever to occur in this country; and Paula Insurance [Company], also domiciled, as was Fremont, in California. The magnitude, however, of the Fremont insolvency far surpassed any prior insolvency, and exceeded the resources of the [Alaska Insurance Guaranty Association]. The assessments of the [Alaska Insurance Guaranty Association] currently are capped in statute at 2 percent. That 2 percent raises \$4.2 million on an annual basis; November, December, January claim payments were ranging from \$1.7 million to \$2.1 million per month, so you can see the size of the gap.

Number 0439

We have had insolvencies in Alaska for probably 20 years. We've always been able to cover them; this safety net provided for policyholders when we have insolvencies. In this particular case, we're dealing with workers' compensation. When there are insufficient funds in the [Alaska Insurance Guaranty Association], statute allows a prorating of claim payments. In August I received, as the director of the Division of Insurance, a letter from the [Alaska Insurance Guaranty Association] indicating it was their intent to begin prorating claims because they could see they were not going to have sufficient money. This seemed to all of us to be an absolutely unacceptable solution, as it would mean injured workers would start receiving partial weekly wage benefits, and partial payments would go to medical providers. We felt the impact on claimants would be disastrous.

MS. HALL also said:

To give you an idea of the magnitude, on February 2 of this year there were 598 open claims for injured workers; that's from four insolvent carriers. On the other side of that lack of payment to claimants, we have where that obligation would go next - the next place that obligation will go will be to employers. Workers' compensation is an obligation of the employer, typically satisfied by the purchase of a workers' compensation policy. When we have the scenario that developed, ... we now have that obligation going back to an employer - an employer who, in good faith, purchased an insurance policy, who felt they had taken care of their obligation, [and] who ... [now has] an unanticipated financial obligation back.

We have 380 Alaskan employers who have injured workers whose claims are currently being funded through the [Alaska Insurance Guaranty Association]. Those claims for those 380 employers, or the 598 injured workers, can range from very minimal amounts up to ... one claim that's reserved at \$5 million. We're talking [about a] substantial financial obligation potentially faced by Alaskan employers. It's our concern, it's my concern, that this unanticipated additional cost could

truly stretch small businesses to the point where they could no longer stay in business - they could be forced to file bankruptcy or to, at minimum, ... have no assets to function their business.

Number 0607

[Chair McGuire turned the gavel over to Vice Chair Anderson.]

MS. HALL continued:

The potential for a prorating of claims was averted in the end of 2003 through a series of, first, loans from the California liquidator. The [Alaska Insurance Guaranty Association] received \$5 million from the California liquidator, [\$4.5 million] from the estate of Fremont, \$500,000 from the Paula [Insurance Company] estate, [and at] the end of December, we received \$2.6 million from the Pennsylvania department of insurance from the estate of Reliance [Insurance Company]. So sufficient funds came in, along with the assessments that were done, to allow the [Alaska Insurance Guaranty Association Fund] to pay claims through the end of the year and they have continued to pay claims.

Anticipated date, currently, that the [Alaska Insurance Guaranty Association Fund] will run out of money is probably the end of May - we will run out of money this year - there will be no money to pay claims at that rate. ... The funding proposal here is proposed to find a stream of funds without requesting what I would call a bailout of the industry by state funds. With the fiscal issues being faced by Alaska, it seemed [inappropriate] to ask for money from the state, so we chose instead to present a proposal [such] that all employees and employers across the state who are involved in the insurance world of workers' compensation would be assessed ..., as they are today, for the cost of this insolvency.

Using the basic principles of insurance, we've ... tried to spread the risk so the cost of the funding would go across the workers' compensation environment. There is little question in my mind that the proposed solutions are not popular; at first consideration I don't know anybody who's going to stand up and say,

"Oh, let me pay" - it doesn't usually work that way. The [Alaska Insurance Guaranty Association Fund] is a safety net. Not only did this legislature create that, but every other state has a similar guaranty fund. It's been a public policy adoption that we need a mechanism to provide this safety net.

Number 0719

MS. HALL added:

In the [Alaska Insurance Guaranty Association Fund] there are three types of accounts, and I do want to describe this so that some of ... the provisions of the bill will make a little more sense. There are three what I would refer to as buckets: there is a workers' compensation bucket; there is an auto bucket; and there is an "other" [bucket, which] ... includes everything except workers' compensation and auto. There are also a few coverage lines that are not covered by the [Alaska Insurance Guaranty Association Fund] such as surety coverage and fidelity coverage. But generally it will include homeowner's coverage, commercial property, commercial liability, boats, anything that's not auto and [workers' compensation].

Today, when we have an insolvency, we assess only the line of business, the account, that has the insolvency; in a particular case, we are only assessing today the workers' compensation account for the insolvent workers' compensation carriers. The bill proposes to change that to allow, instead of the current 2 percent cap, ... that assessment to be increased to 4 percent for the account in which there is an insolvency. The second step in the process would be to allow an assessment of the other two remaining buckets - the auto bucket and the "other" bucket. Doing that is not unprecedented, either around the country or in Alaska; 18 states have structured their guaranty association so that there is a single account, so any insolvency is spread across all lines of business.

In our particular situation, today in Alaska, there is [a] guaranty fund assessment in that "other" account of one half of 1 percent [.5 percent] which is now being applied, or can be applied, to (indisc. -

coughing) your homeowner's policy, commercial property policies, whatever falls in that "other" account, and it's done primarily due to the insolvency of a medical malpractice carrier. So right now, today, your homeowner's policy is likely being assessed at [.5 percent] to pay for a medical malpractice insolvency. That principle, to me, I find we should be able to [carry] that out and assess across those lines; I think we already do it with two exceptions, [so] I'm not sure why we need to make exceptions for the auto and the [workers' compensation] accounts either. So I don't think this is an unprecedented action.

Number 0914

[Vice Chair Anderson returned the gavel to Chair McGuire.]

MS. HALL went on to say:

The third step of the current bill would be to allow [the Alaska Industrial Development and Export Authority (AIDEA)] to provide guarantees for the [Alaska Insurance Guaranty Association] to obtain loans to meet their cash requirements should assessments not be enough. We're looking at plugging a current hole, but I'm also looking for a mechanism [such] that we never get here again; I would like to make sure that we're never faced with this prorating of claims. The [Alaska Insurance Guaranty Association] currently has the statutory authority to borrow money, but they are not a viable commercial loan prospect - they don't have any assets, ... they don't accumulate a bank of money.

This is called a "post loss assessment." Only when they have a need for funds do they make an assessment on an annual basis; in November of last year, they determined they needed their assessment for 2004 and they made that assessment. If they, in fact, would run out of money, we would like them to be able to borrow. They have no assets; the only asset they have is this stream of assessments that currently is being used, up until about 2010. Commercial banks aren't really likely to look at you and say, "Oh, it's okay, you don't have to pay me back for another six years." The maximum principal outstanding balance at any one time would be capped at \$30 million.

Generally I've worked with financial experts; ... the current chairman of AIDEA, Mike Barry, worked with me diligently. We looked at various bond possibilities, various types of loans, looking for the most efficient effective way to borrow money, and this seemed to be the best way. This is the best proposal we came up with; this is a backstop. Hopefully, through the process of assessments, we would never get here, but, again, it provides a final safety net.

Number 0986

MS. HALL concluded:

I would close by saying [that HB 403] provides some what I would consider to be painful, somewhat expensive, very unpopular provisions. I do, however, believe that the provisions are not nearly as painful as the consequences of no action. I would urge you to think about ..., at a minimum, temporary interruption of benefits for 598 injured Alaskan workers [and] financial obligation going back to 380 employers. ... This is safety net, it's been a public policy for a number of years in most all states, and ... I would urge [your] support for the bill.

CHAIR McGUIRE mentioned that the Senate companion bill [SB 276] would be heard by the committee at a later date, and suggested that members limit debate on HB 403 and save the bulk of their questions for the hearing on the Senate bill.

REPRESENTATIVE GARA asked how much money is needed this year to make the [Alaska Insurance Guaranty Association] whole.

MS. HALL said it would take approximately \$5.8 million, since there is a balance left over from last year and the \$4.2 million assessment has already been made for 2004.

REPRESENTATIVE GARA asked why, under current law, the assessments can't be made large enough to raise the money that's needed.

MS. HALL replied:

The current statute has a 2 percent cap. That 2 percent cap, in the workers' compensation line, only

raises \$4.2 million. And that has already been assessed for 2004. There was approximately [a] \$6 million balance brought forward from last year through the loans and the early distribution from Pennsylvania, and we have done the \$4.2 million assessment already.

REPRESENTATIVE GARA asked who can currently be assessed up to that 2 percent cap.

Number 1141

MS. HALL said that currently, only the workers' compensation line can be assessed that 2 percent. She went on to say, "Some carriers - Reliance [Insurance Company], for example - wrote all three lines; they wrote workers' compensation, they wrote auto, they wrote liability, and so all three lines are being assessed based on the premium volumes in their particular lines of business." In response to a further question, she reiterated that if nothing is done, the projection is that the [Alaska Insurance Guaranty Association] would run out of money at the end of May, and this means that there would be no claims paid for the rest of the year - June through December. The next assessment that would be available would be in January of 2005. She said that according to her understanding of interpretations of statute, that January '05 assessment would go towards paying what wasn't paid in '04; in other words, there would be no money with which to pay claims in '05.

REPRESENTATIVE GARA asked whom would the [Alaska Insurance Guaranty Association] be able to assess if this legislation passes and what would the percentage of that assessment be.

MS. HALL said that the workers' compensation assessment would go up to 4 percent for this year, and that although the [Alaska Insurance Guaranty Association] has asked for the ability to assess auto and "other" lines up to 2 percent, the latter actual calculated assessment today is .19 percent for '04 and then there would be an additional 2 percent. She went on to say, "In 2005, just to give you an example of where that goes, we would again assess 4 percent in the workers' compensation line, and [.47 percent] in the other two lines, so we're talking about [.5 percent] on auto [and .5 percent] on the policies that are in the 'other' bucket." She reiterated that the policies in the "other" bucket include "homeowner's, commercial property, commercial liability, boats" - everything except auto and workers' compensation.

REPRESENTATIVE GARA asked what would the percentage have to be raised to if they only wanted to assess workers compensation lines.

MS. HALL said she had not yet calculated what that percentage would have to be, but noted that the workers' compensation line is the smallest with regard to premium volume. The workers' compensation line raises roughly \$4 million, whereas the other two lines raise roughly \$15 million. This means that if the other two lines were assessed an additional .5 percent, it would amount to an additional "2 percent minimally, so somewhere [in the range of] 6 to 7 percent."

Number 1304

REPRESENTATIVE SAMUELS asked if the percentages will drop as the money isn't needed any more.

MS. HALL said yes, but noted that if the legislation is passed, the ability to assess up to the aforementioned percentages will still be there should a similar situation arise again. She went on to say:

Frankly, today, we only have three companies who have a market share that could even potentially put us in this crises situation. ... I have no indication that we have any possibility of that, but I would never say never anymore. ... To carry out my ... rough calculations that I presented a minute ago, the assessments for the "other" and the auto accounts would totally go away in 2006, and the [workers' compensation] assessment would then drop to 3.37 [percent] in that year and subsequently it would continue to drop. So they would not stay at these levels for an extended period of time. ...

I would say there have been insolvencies; ... we had a fifth insolvency in the workers' compensation arena on February 12. ... Protective National [Insurance Company of Omaha] has not had a certificate of authority to operate here since 1991, so we're talking 13 years ago since this company wrote business, and as of their 2002 yearend financial statement they had \$1.6 million in outstanding Alaska claims. And that gives you an idea of the long "tail" on those claims. So ... I think we need to have a structure that

anticipates insolvencies. We also, in ... [another] bill, have tried to do some other things to bring about some changes.

REPRESENTATIVE SAMUELS asked whether money recovered from insolvent companies would automatically flow into the [Alaska Insurance Guaranty Association] Fund.

MS. HALL said yes, but noted that it generally takes a couple of years before money recovered from insolvent companies is distributed. In response to a question, she said that "self insureds" are not covered by the [Alaska Insurance Guaranty Association] Fund, nor are they assessed by the [Alaska Insurance Guaranty Association].

Number 1500

REPRESENTATIVE SAMUELS moved to report CSHB 403(L&C) out of committee with individual recommendations and the accompanying fiscal notes.

CHAIR McGUIRE, after noting that there were still questions for Ms. Hall, asked that the motion be voided.

REPRESENTATIVE GRUENBERG asked how AIDEA came to be selected.

MS. HALL explained that AIDEA was selected because it was willing and would be acceptable to commercial lenders. In response to a further question, she said that the cumulative maximum deficit is now estimated at \$20 million.

Number 1559

REPRESENTATIVE SAMUELS again moved to report CSHB 403(L&C) out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 403(L&C) was reported from the House Judiciary Standing Committee.

REPRESENTATIVE GARA noted that he did not want to slow the bill down and doesn't have a problem with moving it from committee. However, he does have a concern, he said, about passing the additional costs onto consumers of unrelated lines of insurance. He added:

My preference would be to fund that extra amount, which would probably be ... in the [\$1 million to \$2

million] range. We're \$5 million short right now, but they're raising the assessment on workers' [compensation] ratepayers from 2 percent to 5 percent, so that \$5 million may ... [still be \$2 million] short. I'd be much more in favor of just paying that through the general fund [GF]. ... It does sort of stick me wrong as charging just a certain class of consumers to pay for an unrelated class of problems. ... I mean, if it's something that society should pay for, society pay for it, and that's the general fund. ...

CHAIR McGUIRE said that is a fair argument, and offered her understanding that at least as of today, the Senate version of the bill does contain a provision whereby funds would come from the general fund.

REPRESENTATIVE GARA suggested that if other members share his view, an option would be to hold HB 403 in committee and wait for the Senate version to come before the committee.

CHAIR McGUIRE suggested instead that they report HB 403 from committee and debate the Senate version when it comes before them, adding that the Speaker has indicated that the Senate version will be the vehicle that moves through the process. Therefore, when SB 276 comes before the committee, members can review whether it still contains the general-fund language and debate the issue at that time.

[HB 403(L&C) was reported from committee.]

#### HB 472 - CLAIMS AGAINST HEALTH CARE PROVIDERS

Number 1670

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 472, "An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

Number 1720

ROLAND GOWER, M.D., said that issues surrounding medical liability reform are very important issues for the state of Alaska and consumers of health care. He went on to say:

My history in Alaska goes back to 1975, when I came here in the military, and that was about the time of the last liability medical insurance crises when the state formed MICA [Medical Indemnity Corporation of Alaska]. I never purchased insurance from MICA; at that time I was moonlighting in the emergency room as a contract physician and my malpractice was furnished by a group out of California. But I did go into private practice in Anchorage in the fall of 1977, at which time there was insurance available through MICA. ... [But] I elected not to purchase malpractice insurance ... and essentially went without medical liability insurance for four or five years until after incorporating my practice and being advised over and over again by my attorney ... that this was something that I needed to do.

And when I married and started a family and had children and [had] assets to lose, it became obvious that I needed to purchase insurance. I have only been with one insurance company ... since 1982 ... and that's with MIEC [Medical Insurance Exchange of California] .... My initial policy, [which] was for relatively low limits, was markedly inexpensive in view of today's cost - somewhere in the range of [\$3,000 or \$4,000] - but slowly, over a period of five to six years to the late '80s, my premiums rose to nearly \$100,000 .... Those were grim days in Alaska as far as medical liability insurance was concerned. And then, whatever drives forces like this, things have changed over the last number of years to where, up to three years ago, my premiums had dropped for a policy that was double what it was in the late '80s in coverage, to in the range of \$20,000.

Number 1861

Over the last three years my rates have gone up 108 percent, and there's every indication that they're going to continue to go up - they had doubled in that period of time - and this can be looked at as a cost of doing business. ... Any physician practicing ... could absorb this cost, but ... what frequently happens ... is [that] it can be passed on to the consumer, which sets up a new set of problems of increasing the cost of medical care. I'm not saying that that's what will happen in this instance, but it

certainly is a solution for the physicians. But what also is going to happen, as I see, if we follow what's going on in the rest of the United States and the crises that are developing in other [states], is the availability of the insurance.

DR. GOWER continued:

And once it becomes not available, it becomes a personal problem for me, especially at [this] stage of my career; there was a point in time where I was willing to go bare, [I] didn't have much to lose, I was in my early 30s and could recover if I did lose, but nowadays - with the situation of medical liability and personal assets on the line, a family that I need to think about, kids that expect me to send them to college - I probably would quit practicing medicine or at least modify what I do. There are certain areas of practice of general surgery that are extremely high exposure in liability, and one is treatment of breast cancer.

And I'm one the physicians in the state who treats breast cancer - anywhere from 40 to 60 cases a year, probably in the range of a quarter of the ones that [are] treated in ... Alaska - and it would be a real risk for me to do that without liability insurance because the statistically most likely area that I would get sued in would be treating breast cancer patients and failure to diagnose. So, the non-availability issue is a very personal issue for me, and it would make ... me face a decision whether I could continue to practice medicine or not. I think that there are a lot of physicians in ... Alaska right now - where we already have, in some areas, ... availability problems of specialists or whatever - ... who would make similar decisions; I cannot speak for them, but I think that there's a lot of people in that boat.

Number 1959

Statistics say that over half of the physicians in ... Alaska are over 50, and ... there would be, I think, a certain amount of manpower ... that's providing care now ... [that] would probably not be willing to risk our life's work and our personal assets without the

availability of malpractice insurance. The doctor:patient ratio in Alaska ... [is] in the lower quarter of the United States as far as the number of doctors who practice here; at one time we had a very young population [and so] that didn't seem to matter so much, but our population is aging, which means more health problems and actually a greater need for more physicians.

With the unavailability of insurance in Alaska and the malpractice climate that is not favorable, it is hard to recruit and attract people here. And I would maintain that if this legislative body could find some solutions to the medical liability crisis in Alaska, then we might be able to solve some of our problems with recruiting young physicians; if it was attractive to come here and practice in a place that looked like it was going to be stable in this area, I think it would be easier for us to bring young doctors to Alaska that are specialty trained and also who provide primary care.

DR. GOWER added:

... As a general surgeon I started off doing lots of things including vascular surgery, which is a very high liability area. It was an area that I didn't have as much interest in as say breast cancer, and a lot of us in general surgery - and this [is] true in cardiology and whatever - have not only been able to specialize but to ultra-specialize. And so somebody who treats 50 to 100 cases of breast cancer a year is going to be a lot better than the general practitioner who has the opportunity to treat only five or ten, and that is something that might change in the demographics of the physicians in Alaska if ... there's not a solution reached to this problem.

Number 2068

Doctors are consumers of medical care also. One of the things that will happen to you and your constituents, and to physicians in this state, is the availability of certain specialty care and high-risk care if something is not resolved or done about the availability of malpractice insurance and the affordability. I am very acquainted with a surgeon

who recently has been unable to get a procedure that is a high-risk procedure involving injection of steroids around the spinal column because of a "nerve-root disk" problem that he has. He'd had four previous injections over the last eight years without having surgery to his back; they work if they're done and put in the proper space by skilled people.

The skilled physicians who ... do this have just recently lost their medical liability coverage to perform this procedure because of its high risk and because of the experience with this procedure in Alaska over the last 10 years: there have been at least five [cases] that have settled for \$1 million-plus for mal-occurrences or injuries or whatever that occur [with] this procedure. It's probably still safer than surgery, it works, but in order to get that treatment now there is maybe one other doctor left doing it in Anchorage who has been there a very short period of time. This physician would have to travel out of state, to Seattle, to get it. So not only is it affecting your constituents, our fellow Alaskans, and perhaps some of you eventually, it affects the medical community too.

DR. GOWER concluded:

So I think that there is a crisis looming in Alaska. As you are aware, all but two companies that are writing medical malpractice insurance have left the state; both of these are mutual doctor-owned companies ... [and], at the present time, they are limiting in some areas the specialties that they are writing insurance for and also the limits of the policies of which they are writing. So I don't think that we have a full-blown crisis today, but every indication is that Alaska is heading in the direction of states like New York, Ohio, Florida, et cetera.

So I would appeal to you that this is a problem that faces all Alaskans, not only ... raising the cost of medical care the consumer will have to pay, but ... the availability of medical care. And I think there are some things that we have been used to, of getting quality care in Alaska, that are ... going to go away; there are just not going to be specialists here who are willing to give it.

Number 2197

REPRESENTATIVE GARA said that he recognizes that malpractice insurance is high, that there are only two carriers in Alaska, and that Alaska only trains about eight new doctors a year through the Washington, Wyoming, Alaska, Montana, Idaho Medical Education (WWAMI) Program. He asked Dr. Gower whether he could think of any other options that could be used to bring new physicians to Alaska besides cutting the amount of damages people can receive if they are harmed.

DR. GOWER replied:

I think to expect Alaska ... [to] train more doctors ... is not realistic. ... We are a small community when you look at places like Seattle and Portland ... where there are large medical schools. ... There are never going to be a lot of physicians trained in Alaska, ... there is just not the ... population base here to do that - we don't have a medical school and we never will have one - it's just not an economically feasible thing. So I think ... the more realistic thing is to attract people to come here and practice, ... but the solution is not to train more people here in Alaska, because you'll never train specialists here; even if you train primary-care doctors, you're not going to train cardiologists and you're not going to train surgeons and you're not going to train neurosurgeons. It's never going to happen.

So something needs to be done to stabilize the climate that makes it attractive for somebody to come here and practice. Alaska has been one of the most attractive places for the last eight [to] ten years, I think, as far as medical liability goes and also as far as a place to practice without interference from [health maintenance organizations (HMOs)] et cetera. But the medical liability issue ..., I'm predicting it's going to get a lot worse, and what we have we're going to lose plus not have the ability to attract anybody new.

Number 2297

The other part of your question that maybe you're referring to ..., there are other ways to approach medical liability insurance and stabilize the cost.

... I don't have the wherewithal to say whether it's exactly the right thing to limit noneconomic damages or not, it appears to be something that works in other states in stabilizing the availability and the cost of medical liability insurance, but I can tell you, some of the other solutions are going to be very expensive. It is my understanding that Ohio, in the last week, has just established a state-run insurance company because they have the concern that the underwriters of ... medical malpractice insurance are going to withdraw. ...

DR. GOWER concluded:

It hasn't happened, nor has it happened in Alaska, but there are some indications that that could happen, and that is going to be [an] immediate crisis. So, ... if we can't stabilize the insurance - [if it is] not the wisdom of this body to help with this problem, either with noneconomic damages or many other things that could be done - then maybe there should be some consideration to set up a failsafe program, that if medical malpractice insurance goes away, that the state's going to have to go back into the insurance business, because there are going to be a lot of us that will not risk our life's work and our personal assets to practice bare.

REPRESENTATIVE GARA said:

One of the reasons I'm skeptical is, we already limited noneconomic damages in 1997. We limited them to \$400,000 - except if it's a very serious injury, \$1 million. And those numbers can go up ... for people with very long life expectancies, and [in] those cases they can go up ... to \$2 million, but the general cap is \$400,000 and \$1 million. But you testified that in the last few years your insurance rates skyrocketed  
....

DR. GOWER interjected to say: "I testified that my insurance [rates were the lowest that they have been] in '97 and '98 and '99." [The previously bracketed portion was taken from the Gavel to Gavel recording on the Internet.]

**TAPE 04-33, SIDE B**  
Number 2393

DR. GOWER went on to say: "It's '99 that they have started going back up, and ... it's the last three years that they have been stable up through I guess 2000. ... [So] the lowest I ever paid was in 1999."

REPRESENTATIVE GARA remarked: "But even with these damage caps, you said they've skyrocketed in the last couple of years, though, right?"

DR. GOWER replied:

Well, you know, \$1 million is a significant amount of money, and there are multiple claims that have been in multimillion-dollar settlements, I think, over the last several years. These probably are questions better for the insurance company than for me, but I do know that the overall number of claims have more or less stabilized if not [gone] down, but the awards have gone significantly higher. That is my understanding from my insurance company that they're paying much larger awards in the last four or five years, and that's what drives the claims experience. I think there's a lot of difference between \$250,000 and \$1 million, and actually ... I think if you calculate it out from a baby injured at birth and a severe injury/disfigurement, I think it can be \$2 million if they live to be 60 years old.

REPRESENTATIVE GARA offered, "Yeah, that's what I meant to say.

REPRESENTATIVE HOLM asked Dr. Gower whether he has seen a significant difference in his "liability" since [the terrorist attacks of September 11, 2001 ("9/11")].

DR. GOWER replied: "Well, yes; I mean my liability insurance has doubled since year 2000, so that's since 9/11, but I don't know whether those are cause and effect. They may be coincidences, and I think they probably are because what has ... driven it is the increased awards ...."

REPRESENTATIVE HOLM mentioned that all of his insurance rates have gone up, and remarked that perhaps rates have gone up because the insurance companies are trying to "spread the wealth" so that they can manage what they're having to pay, instead of rate increases being a function of liability limits. He added, "Just as an observation it seems to me like [they're]

spreading it over a lot of industries that have no real liability, but they can spread that cost."

Number 2241

DR. GOWER noted that the companies that offer medical liability insurance in Alaska are "exclusive medical liability coverage companies" and are "not-for-profit." In response to comments by Representative Ogg, Dr. Gower indicated that primary care physicians in family practice residencies could be trained in Alaska, but mentioned that demographics suggest that Alaska is short over 200 primary care physicians. He remarked that Alaska is ranked the 12th worst in the nation with regard to a physician:patient ratio, even though the trend now seems to be that more physicians are going into family practice, rather than the specialty areas of medicine.

REPRESENTATIVE OGG suggested that higher insurance rates might simply be a result of insurance companies investing in the stock market and then attempting to recover their losses via premium rate increases.

DR. GOWER opined that because the two insurance companies that provide medical malpractice insurance are "mutual no-stockholder" companies, it is the claims experience that drives up medical malpractice insurance rates. In response to a question, he offered his belief that those companies do have to have a certain amount of funds in reserve.

REPRESENTATIVE GARA remarked that historically, Alaska has never had enough doctors, even though according to a report from Legislative Legal and Research Services, the number of "nonfederal" physicians in Alaska has more than doubled since 1990. "We still don't have a great doctor:patient ratio," he remarked, adding that in 1990 it was 1.88:1,000 and today it is 3.24:1,000. He went on to say:

I was left with the impression the other day that doctors were fleeing the state, and what struck me was actually it's going the other way around. And there was also a newspaper article that said Alaska has one of the four highest [increases] in doctors-per-capita rates in the country at this point. And ... I guess if that's the case, I'm ... just wondering what the relevance of Alaska's malpractice [insurance] rates are to the doctor:patient ratio in this state. It

just seems to suggest to me that there's something different going on, but it's not rates.

Number 1848

PHILIP R. HINDERBERGER, Senior Vice President & General Counsel, Assistant Corporate Secretary, NORCAL Mutual Insurance Company ("NORCAL"), relayed that NORCAL is the successor to MICA, which was the company established by the legislature after the "malpractice crisis" in 1975. Since 1991, NORCAL has ensured literally hundreds of physicians and, during that time, NORCAL has seen several efforts to reform Alaska's medical liability laws in an attempt to bring them into parity with other states. Unfortunately, these efforts have not had the desired effect. He said it is the belief of NORCAL that HB 472 is necessary to accomplish what other efforts have failed to do, for example, "the 1997 effort to limit noneconomic damages." He relayed that NORCAL has been settling claims and going to court since 1991; in 1996 and 1997, NORCAL's average indemnity payment was in the range of \$60,000, and "right after this legislation passed it jumped up to \$380,000 and in 1999 it went to \$588,000."

MR. HINDERBERGER noted that NORCAL underwrites less than half of Alaska's physicians, and opined that Alaska is now one of the costliest states to do business in. He offered his belief that Alaska's expensive medical liability premiums are the result of high jury awards and settlements. The average medical liability payment in Alaska in 2001 was \$308,476, and this average payment is the 14th highest in the country. He noted that in comparison, California's average payment was \$178,000. Alaska's physicians pay an average \$30,627 per year, and this is the 8th highest average medical malpractice insurance cost in the country. In comparison, California's physicians pay an average of \$14,564 per year.

MR. HINDERBERGER said that over the years, Alaska has experienced some of the most dramatic increases in the cost of medical liability insurance in the country, and only seven states have had higher increases. Numerous studies have been conducted to determine the cause of higher insurance premiums, larger awards, and more dramatic year-to-year increases; he said that the studies have informally found that medical liability reform is the single most important factor in controlling medical liability premiums and loses. For example, California's Medical Injury Compensation Reform Act (MICRA), which has a cap of \$250,000 on noneconomic damages, has been identified, he relayed, as the best of the efforts undertaken to control the

cost of medical liability insurance. He said, "We believe the \$250,000 cap on noneconomic damages contained in House Bill 472 will go a long way towards bringing the costs of Alaska's medical liability insurance in line with national averages."

Number 1604

MR. HINDERBERGER, in response to questions, offered his belief that the standard of medical practice in Alaska is comparable to that in California; therefore, there seems to be no ascertainable reason, relating to medicine, for the vast difference, between California and Alaska, in the average size of award. Alaskan juries are very generous with regard to awarding noneconomic damages, he opined. He also offered his observation that the doctors at the medical clinic in the Aleutian Islands can get a patient off a fishing boat and onto a jet and down to the Lower 48 in the same time it can take doctors in California to transport patients; an extensive patient transfer system in Alaska sometimes take the place of "high tech" medical facilities and on-site specialists when those facilities and specialists are not available.

MR. HINDERBERGER, in response to a further question, relayed that MICRA was enacted in 1975 but was held up in court until 1986. A couple of years after that, once California's judges and lawyers became "comfortable" with MICRA's provisions, "losses plummeted," he remarked. He offered an example of the difference in insurance premium costs between now and the mid-'80s, adding his belief that MICRA has dramatically changed the claims' environment without taking any "economic dollars" out of the pocket of plaintiffs. He also opined that "these soft dollars that are capped off" are resulting in "the big, high-dollar verdicts that drive companies out of business." He went on to say, "\$250,000 of noneconomic damages added to a \$500,000 economic-damage award is still a big verdict, and \$250,000 is a lot of money; it's not an onerous limitation, I don't think, on the process."

CHAIR McGUIRE agreed that \$250,000 is a lot of money.

REPRESENTATIVE GARA noted that although MICRA passed in 1975, insurance rates skyrocketed between 1975 and 1986, and were still rising in 1987 even after the court case over MICRA was settled. He suggested that the reduction in insurance rates that began to occur after 1987 was due not to MICRA but instead to the fact that in 1988, California voters got fed up with increasing insurance rates and so they put an initiative on the

ballot - Proposition 103 - that gave the state the right to reduce and limit insurance rates.

Number 1190

MR. HINDERBERGER pointed out, however, that like MICRA, it took several years for California's courts to approve Proposition 103, and offered his belief that the proposition had no impact on NORCAL's pricing of insurance. Instead, he offered, the reduction in insurance rates was due to the fact that in 1991, NORCAL and a few other physician owned [insurance] companies went to "the commissioner" and said, "Look, we are seeing huge, huge savings in our loses and we're returning this money whether Prop 103 is upheld or not, and what we'd like to do is voluntarily settle up our obligations under Prop 103, and we will characterize these payments that we're making as our rollback obligation," and this was agreed to by "the commissioner."

MR. HINDERBERGER went on to say, "We paid about \$30 million, I think, in 1991 in dividends to our policy holders, [and] about \$28 million of it was characterized as our rate rollback obligation; the commissioner never asked us to roll our rates back, and during that period of time our rates were pretty stable anyway." Over that period, he relayed, "we paid back about \$250 million in dividends to our policy holders." In response to a question he explained that "after the rebates, we actually credit the dividend against the premiums that are due, so the numbers that we're giving you are the net premiums for the actual doctor payments." In response to a further question, he said that it is his experience that since 1991, NORCAL's premiums in Alaska have gone up at a higher rate than they have in California.

REPRESENTATIVE OGG asked how many actual court judgments are included in the amount of payments made in Alaska.

MR. HINDERBERGER said he didn't have those numbers readily available, but relayed that members could get more detailed statistics from the "national practitioner databank" web site.

REPRESENTATIVE GARA said he wonders whether the number of annual claims a company experiences can be statistically relevant. He asked Mr. Hinderberger what the average number of claims NORCAL has paid out in the last five years is.

MR. HINDERBERGER said that NORCAL typically pays out approximately 20 cases a year. In response to a request for more statistical information, he again suggested that members could find such information on the aforementioned web site.

Number 0871

EMILY NENON, Alaska Advocacy Director, American Cancer Society (ACS), said that the ACS does not have a position on HB 472. However, she went on to say:

What I wanted to bring forward to you all was just a few questions. ... [I'm] sorry Representative Anderson is not here to hear me ... compliment him on what I believe is the intent of the bill, which is to make it easier for doctors to practice medicine in Alaska. That is certainly something that the [ACS] supports in terms of ... access to and quality of health care. So with that, I just have three questions I want to raise before the committee for your consideration as you move forward. One ... of the questions that was asked - and I'd like some information and follow-up - of Mr. Hinderberger: Will this bill actually reduce premiums for malpractice insurance? Is this really going to get at part of what's the problem with malpractice insurance rates in Alaska?

He referenced some independent studies on this issue - I would certainly be interested in getting more information on that. As I said before, we certainly have an interest in seeing that people are able to get access to health care and [that] doctors are able to practice in Alaska. The other question I have is, with the limit proposed in this legislation, I have a question about patients who may be moving forward on malpractice cases [but] who may not have the money up front to pay an attorney and have to hire an attorney on contingency. ... Some question has been raised about a decrease in the interest of attorneys to take on these cases if they know they may not be able to recoup their costs in the end for taking these all the way through.

CHAIR MCGUIRE interjected to say: "Their costs or their profit? They clearly recoup their costs at 40 percent."

REPRESENTATIVE GARA offered: "Often, [Chair] McGuire, and often they lose their shirts."

MS. NENON said that the real question she has is, "Would this legislation have any effect of foreclosing access to the court system?"

CHAIR MCGUIRE said, "Good question."

Number 0697

MS. NENON said that the final question she has is, "What exactly falls under noneconomic damages." She concluded, "Those are the three questions I have, both in terms of protecting our doctors and their ability to practice in Alaska [and] protecting our patients, and then just some final clarification about what the bill actually does."

CHAIR MCGUIRE indicated that she would pass those questions on to Representative Anderson, and offered that noneconomic damages are defined in statute and involve items that are not compensatory such as loss of wages, medical bills, "and things like that." Noneconomic damages can also include things like loss of consortium.

REPRESENTATIVE GARA added that noneconomic damages can also include pain and suffering and loss of enjoyment of life; basically, the changes in someone's life that don't necessarily have an easy dollar value. For example, how does one put value on an inability to walk or an inability to carry a child.

CHAIR MCGUIRE offered that another category of damages are punitive, which are meant to punish. She relayed that according to the sponsor's testimony, one of the reasons he introduced the bill is because the Alaska State Medical Association and other entities came to him and told him that Alaska has a potential looming crisis. She offered her understanding that other testimony has indicated that if HB 472 passes, although there may not actually be a reduction in rates, it might increase the availability of medical malpractice insurance in Alaska without Alaska having to revert back to a MICA-like system. She acknowledged that there has also been testimony that passage may affect whether attorneys will be willing to take on medical malpractice cases, but noted that the legislature will have to weigh this issue with the issue of whether doctors will continue to have access to medical malpractice insurance.

Number 0338

CARMEN E. CLARK, after noting that she is a criminal defense lawyer in Anchorage, indicated that HB 472 will have an impact on those people who are hurt by the mistakes that doctors make. She went on to say:

The most important thing that I've learned is to have confidence [in] our judicial system. And what you're essentially doing, if you pass this bill, is saying you don't believe in the jury system, that you don't think that people who take an oath to listen to a case and decide it fairly can come up with a fair result. ... You took an oath to uphold the constitution, and I did when I was a prosecutor, and the right to trial by jury is such an important right, and I see this bill as truly gutting that. And then you can't imagine, I don't think any of us can, all the situations where people might be injured by doctors. I don't think, before it happened, that anyone imagined that someone like Doctor Ake (ph), who sexually assaulted his patients, (indisc. - coughing) happen to her, but it did. And this \$250,000 limit hurts the people who ... actually have a worse injury, and I think that there should be more flexibility for people, particularly juries, to determine who's really injured and who's really not.

... I heard the [representative] from the American Cancer Society ask what are these things we're talking about. And essentially they're quality-of-life issues, and when we talk about putting a limit on them, I think everyone should say: "How much would I sell my eye for? How much money would it take for me to be willing to wear a colostomy bag for the rest my life? How much money would it be worth for me to never be able to enjoy sex again?" Those are the type of damages that people bring into court. ... The question here is about what's fair, ... and if you're going to set a cap, then I'd like you to be realistic about it.

Number 0161

From my perspective \$400,000 is too low, but it should at least remain there. ... And these are the reasons why. First, the people who are injured, they're going

to pay their lawyers, (indisc.) contingency fee, and whether you agree with that as a system or not, it does allow some people to get into court. But in order to successfully follow up on a medical malpractice case usually you have to hire an expert, and this ... legislative body can't do anything about how much that costs, but these people are paying their experts, who often charge ... [\$50,000] or \$60,000, to come and (indisc.) on the record. They pay those experts out of this money that they recover, not from their compensatory damages because they're already paying those to doctors who gave them follow up care.

MS. CLARK added:

... [Although] \$250,000 ... [is] more than many people make in a year, [it] isn't a lot of money spent over someone's lifetime and it's significantly less than most doctors make in six months. ... The other reason that I think is really important is, if any of you there have ever tried to buy life insurance or insurance of any type, the amount of difference that you pay for a premium that's \$400,000 - from \$250,000 - is about \$300 a year. So for \$300 a year we ought to be able to provide enough protection to people to get \$400,000. So we're not talking about being able to reduce insurance rates by any significant amount, but we are talking about reducing the amount of money that someone can get - for being blinded or having their baby die - by almost half. Now I want to make some comments about the things I heard. First is the question of will this [affect our insurance rates.] [The previous and following bracketed portion was taken from the Gavel to Gavel recording on the Internet.]

**TAPE 04-34, SIDE A**

Number 0001

MS. CLARK continued:

[There's] no reason to believe that. Ohio passed this, and the doctor who testified earlier made a point about Ohio set up it's own insurance board. They did, after they made up their own review of how insurance rates were expanding in ... Ohio, and they found that there was no connection between damage caps

and insurance premiums. What they found instead was that there was a significant connection between insurance rates and how much money the insurance companies lost in the stock market. So they did create their own Ohio insurance board [that] provides the insurance for doctors, but they did so, so that the doctors would not be at the mercy of the profit demand of CEOs of insurance companies.

And you can find that study [not on tape, but taken from the Gavel to Gavel recording on the Internet, was: online, and I strongly advocate that you should read that. In the bottom, there was no change, and in fact, if you go to the doctors' web site - [www.doctorsno.us](http://www.doctorsno.us) (ph) - you will find on the very front page that they say they're (indisc.) cap to try and change the insurance premiums for doctors has been, quote, "colossal failure." And here we've seen no connection between this \$400,000 cap that we've put in place and] insurance premiums at all. In fact, as both the doctor and the insurance [representative] testified, instead they'd gone up.

So (indisc.) I heard the doctor testify earlier that his insurance rates went up in 1999. That kind of surprised me because [in] 1999, he paid a \$250,000 settlement for the alleged negligent transection of a [common] bile duct; in 1992, he also paid \$15,000 for alleged negligence of laparoscopic cholecystectomy .... The point I want to make is that if you want to know how (indisc.) juries are in Alaska, you can go to the [Alaska State] Medical Board [and] they will give you a 16-page printout of every single reported settlement that a doctor has made. And in fact, I have it in front of me .... The high 2001 average that we have is completely related to a \$572,798 settlement against Dr. Peter Hansen for the negligent prescription of medication.

Number 0200

MS. CLARK relayed:

That's what's (indisc.) our record up, it's that one bad doctor. But what I'd like you to know is that wasn't following a jury trial; he settled that case prior to even a compliant being filed. His insurance

company had to pay it, but it wasn't the result of a jury. And the other big myth that you all have been told here is that there are multimillion-dollar lawsuits handed out by juries in Alaska. It's not true. Or, if it is true, they're not being (indisc.) to the medical board, because I have them in front of me. There are only five settlements ... since 1982 greater than \$700,000.

And this is what they are: in 1988, Dr. Owen Bell paid out \$750,000 for failure to treat sepsis in a pregnant woman who later died - he paid that out [with] no jury trial; in 1999, \$800,000 [from] Dr. John Muffoletto for negligent hernia repair - was there a trial, no, a jury didn't [award] ... that money; in 1995, \$725,000 [from] Dr. Duane Odland for failure to monitor anticoagulant in a heart valve that resulted in a significant heart attack - jury trial, no; in 1986, \$800,000 payout by Dr. James Scully for surgery errors that resulted in the death of a patient - trail, no; \$750,000 in 1994 for brain damages caused by negligent treatment by Dr. Stephens - jury trial, no.

So it is absolutely false if people have come in front of you and said that there [are] these multimillion dollar settlements that are driving up medical malpractice [insurance rates] in ... Alaska, because there haven't been any. Or, if [there] have, doctors haven't reported them as they are required to do so by law. So, what I think that you should see here is that no state that has done a significant look at the relationship between insurance premiums and jury awards ... [has found] that jury awards were what drives insurance premiums. But even if there were such a connection, there isn't in ... Alaska.

Number 0349

MS. CLARK concluded:

The report that I have goes back to 1982, and it shows that from 1982 until now, there have only been 280 lawsuits filed against doctors. That's not a significant number, that is not a significant payout that insurance companies have been doing, and for then to be raising the rates for doctors by this amount

that they're talking about here - 1,000 times - cannot possibly be related to the amount of money that they are paying out by the state of Alaska. So, in my final point, what I'd like to say is, caps don't seem to be fair, they don't seem to be trustworthy to juries. [And] ... at the same ... [time], it doesn't appear that there is a crises of money being paid out by insurance companies that ought to have this legislative body pass a law to take the (indisc.) from the person who does it, onto the innocent person who goes to them for treatment.

That is fundamentally unfair, and thus I'm asking you to table the debate, look at these web sites, [and] ... see whether or not the information you've been given by doctors and insurance agents is really correct, because I think you'll find that the \$400,000 cap (indisc.) fair, but ... there hasn't been enough of a connection for people to be going and reducing that to \$250,000 - particularly not when the cost of buying a \$400,000 policy, as opposed to a \$250,000 policy, is practically nothing.

CHAIR MCGUIRE asked about the possibility of paying expert witnesses out of the fees being paid to the plaintiff's attorneys.

MS. CLARK said that no one knows what it will cost to hire an expert witness ahead of time, and that to do as Chair McGuire suggests would create a conflict of interest for the doctor.

REPRESENTATIVE GARA said that it would be illegal for a lawyer to tell a client that he/she is paying for the expert witness, because doing so would be interpreted as enticing a client, by paying the client, to let the lawyer take a case.

CHAIR MCGUIRE asked why, if plaintiffs' lawyers purportedly care so much about their clients, don't they just reduce their contingency fees in such cases.

MS. CLARK replied:

Two reasons: one, there are extreme costs and overhead associated with practicing law - we have our own ... malpractice premiums to pay - but the other thing is ..., if everyone claims to care so much, why aren't doctors doing the initial work for free. The

fact of the matter is, everybody expects to be paid a fair wage for what they do, and that includes the experts. Many doctors who ... find themselves being pariahs for testifying against other doctors in medical malpractice [suits] raise those fees.

Number 0659

MS. CLARK, in response to further questions, said that her yearly income is significantly less than the amount being proposed as a cap, and then provided information about the Alaska State Medical Board's report and agreed to fax it to the committee.

REPRESENTATIVE SAMUELS posited that one of the reasons for an increase in insurance payments, for all industries, is that many cases are simply settled out of court; rarely do cases actually go to trial.

MS. CLARK said she agrees that few cases actually go to trial. She remarked, however, that many times when medical malpractice cases are settled out of court it is because there is actually medical evidence showing that a mistake has been made, and so the amounts being paid out are not deemed to be excessive when considering the type of problems that are resulting because of those mistakes. She offered her belief that when insurance companies get involved in these claims, they are capable of determining what would be considered a fair settlement. She noted that when she sees her employee health care payments go up 600 percent a year she doesn't think that increase is tied to giant lawsuits either. "I think that's just the way the insurance [industry] works, and if we want to be able to have good insurance as well as reasonably priced insurance, the answer is to regulate the insurance [industry], not to ... to take away the right of other people to decide how much damage has really occurred," she concluded."

REPRESENTATIVE SAMUELS mentioned insurance availability as being a problem.

REPRESENTATIVE HOLM noted that some of the settlement amounts Ms. Clark referred to were above the current \$400,000 cap.

MS. CLARK replied:

The damage cap you're talking about for noneconomic stuff is \$250,000, [whereas] the settlements that I

were talking about include those (indisc.) as well as future medical costs [and] actual medical costs. It's a complete settlement, it covers everything, not just the quality of life issues that we're talking about with this cap.

REPRESENTATIVE HOLM offered his belief that in other industries, insurance companies simply look at their exposure risk and then from that decide to "just pay it off." He indicated that he is not convinced that caps are linked with either the cost of insurance premiums or the amount of insurance payouts.

Number 1212

LES SYREN mentioned that he is a plaintiffs' attorney and that he likes doctors even though they make mistakes. He said that philosophically, his problem with caps is the idea of prejudging a case. He elaborated:

Imagine if ... you went into court with your particular case and one of the people on the jury said: "You know what? I haven't heard a single fact about your case, haven't looked at any of the evidence, but there's one thing I sure know - it could never be worth more than \$250,000." I think that kind of ... person would never be allowed to serve on a jury, and that ... just kind of strikes me as little bit unfair that we're going to institutionalize prejudging a case.

The second point I'd like to make is, ... I like the idea of individual responsibility; ... we need more responsibility ... and I think that applies to everybody - doctors too. If you break something, you pay for it. If you walk into a store and you knock something over, you break it you bought it. It's just kind of that simple it seems to me. ... It's irresponsible for a doctor ... to cut off the wrong foot, and just say, "Well, don't look at me."

So we have four groups, it seems to me, here. First we have the insurance companies; they want profits, ... they don't particularly care to pay claims, they're just interested in profits. We've got doctors, and they want profits too, like Dr. Gower, ... and ... there's nothing wrong with that. ... There's nothing sinful about profits in and of

themselves, and I'm sure Dr. Gower wants to help people. ... We've got attorneys on both sides - those who defend the doctors and ... those who sue the doctors - and they want profits too, and like the doctors they want profits but they want to help people as well. And then we have my clients. Mrs. "X" - I'll call her - and Mrs. "Y," and these are real cases.

Mrs. X had some sort of stomach surgery and it was supposed to fix things, and ... about two weeks ... after the surgery she really started to have some ... exquisite pain in her abdomen. So she goes back to ... the same doctor that did the initial surgery; he looks at her and takes some x-rays and says, "Well, we need to do surgery right now." She didn't even have time to call her husband, she was (indisc.) surgery immediately. After the surgery's over, he comes in and has a little chit chat and says, "Oh, by the way, we had to take a sponge out of your abdomen that we left there two weeks ago." ...

Number 1421

Now we have Mrs. Y. She goes to the doctor because she has fibroids on her uterus, a kind of ... scaring that occurs, and the doctor takes a look at her and says, "Okay, well, ... why don't we do a hysterectomy?" And he makes the initial incision and notes in his medical records that the uterus was ... larger than normal and boggy, and that should have tipped him off that she was pregnant. And as it turned out, she was pregnant. There was a hemoglobin blood test that he could have [given] her, that he didn't, and so they didn't catch the fact that she was pregnant. And she was there for fibroids.

MR. SYREN concluded:

Ironically, one of the best treatments for fibroids is to have a child. So this woman will never hear the words, "Mommy, can I go outside to play?" She'll never hear the words, "Mom, I heard from the college; I got accepted." She'll never hear the words, "Mom, we're having a baby; you're going to be a grandmother." So out of these four groups - the insurance companies, the doctors, the lawyers, and

client X and client Y - who should bear the burden?  
Thank you.

CHAIR McGUIRE noted that she's heard similar arguments before and does not think them to be unfounded. There is still the issue, however, of trying to make sure that malpractice insurance remains available to doctors in Alaska. She remarked that she would hate to be the one to have to decide what amount is enough in the two aforementioned examples.

REPRESENTATIVE GRUENBERG said, "It sounds to me like Ohio did something that might be worth looking at, regardless of what [we] do with this bill." He asked for clarification regarding what Ohio did.

MS. CLARK said that Ohio created a special committee to do a study, and ultimately decided that the choices were to cap damages, cap premiums, or create "their own insurance company." The latter is essentially what Ohio did.

REPRESENTATIVE GRUENBERG suggested that perhaps a similar study should be done in Alaska.

Number 1684

JAMES JORDAN, Executive Director, Alaska State Medical Association (ASMA), said that according to his understanding, Ohio "began a joint underwriting association, and that was a residual market mechanism ... that provided coverage for physicians that could not get coverage ... in other elements [for example] if there wasn't availability." That joint underwriting association ceased doing business in 1981, he relayed, "but still had liability attached." What then occurred in the early 1990s was that \$40 million was extracted by the Ohio legislature and put into the general fund; this left the joint underwriting association with about \$12 million to take care of the remaining existing claims. The recent issue of insurance availability in Ohio has brought forth, again, the idea of a joint underwriting association.

REPRESENTATIVE GRUENBERG asked Mr. Jordan whether the ASMA thinks it would be worthwhile for the legislature to look into "creative, out-of-the-box solutions" such as the possibility of establishing a joint underwriting association.

MR. JORDAN said that such would certainly be a noble endeavor. He relayed that the state medical association in Ohio is

recommending that at least \$50 million be added to the joint underwriting association. He mentioned that according to his understanding, the problem Ohio faces today is one of affordability rather than availability.

REPRESENTATIVE GRUENBERG replied, "Cutting to the chase, though, what say we look at it and see what we can come up with."

CHAIR MCGUIRE told Mr. Jordan that anything he could provide on the subject would be helpful. She remarked that one of the biggest problems with the Ohio approach, in terms of applying something similar in Alaska, is that it requires state money.

REPRESENTATIVE GRUENBERG pointed out that establishing a joint underwriting association is simply one possibility, and what he is proposing is to take a look to see what other possibilities they could come up with.

CHAIR MCGUIRE, after ascertaining that no one else wished to testify, closed public testimony on HB 472. She then noted that some amendments had been provided earlier by Representative Anderson.

REPRESENTATIVE GARA offered his belief that one of the aforementioned amendments proposes a significant change in "the law of noneconomic damages," adding that he would like some time to do some research regarding what current law is. He mentioned that his staff has provided members with an additional packet of information that includes information about MICRA and Proposition 103, a copy of the aforementioned Legislative Legal and Research Services report, various newspaper articles, and a comparison study between states with caps - and their insurance premiums - and states without caps - and their premiums. He offered that this comparison study indicates that imposing a cap doesn't necessarily result in a reduction in insurance premiums.

Number 1988

CHAIR MCGUIRE noted that the packet Representative Gara is referring to has as its first page an Anchorage Daily News article from the Internet titled, "Patient Power." She observed that Representative Gara has made some really good points, but suggested that the question is whether Alaska can expect to keep the insurance providers and doctors that it already has and what the state can do to attract new providers and doctors. She went on to list some of the issues raised, in this and earlier

hearings, regarding the factors that influence whether someone will come to Alaska to practice medicine.

REPRESENTATIVE GARA mentioned that at the bill's next hearing he would like to offer an amendment that would establish "a two-tiered hard-cap system," with \$250,000 being the low cap. Such a system would allow people with grievous injuries - people who have been permanently and severely injured - to recover at least a fair amount of partial compensation for pain and suffering, and would also recognize that the legislature wants to adopt a policy wherein "you don't get very much money, in ... terms of pain and suffering, if you don't have a serious injury. He opined that this might address the issue of insurance premiums, and mentioned that he would be amenable to either a sunset provision that would put some pressure on the insurance industry to actually lower rates, or a clause which says that a cap won't go into effect without a commitment from the insurance industry that it will lower rates. "I'm not comfortable giving insurance companies this blank check, which is, 'Here, we'll increase your profits and you don't have to do anything in return'; I'm just not comfortable with that," he concluded.

REPRESENTATIVE GRUENBERG mentioned that he might look into the possibility of offering a conceptual amendment that would establish some sort of group that could look at all the issues raised and that would submit a report, at the beginning of the next legislative session, suggesting possible long-term solutions.

Number 2292

REPRESENTATIVE ANDERSON made a motion to adopt Amendment 1, which read [original punctuation provided]:

Page 2, Line 11-16 Delete all language

Insert:

(c) In an action to recover damages for personal injury or wrongful death based upon the provision of services by a health care provider, damages shall include both economic and non economic damages. Damage claims for non economic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss

of consortium, injury to reputation, and other non pecuniary damage.

Page 4, Line4, after "\*Sec.6." insert:

AS 09.55.560 is amended by adding a new subsection to read:

(6) "Economic damages" means objectively verifiable monetary losses incurred as a result of the provision of, use of or payment for (or failure to provide, use or pay for) health care services or medical products, such as past and future medical expenses, loss of past and future earnings, cost of obtaining domestic services, loss of employment, and loss of business or employment opportunities. All other damages are "non economic" damages.

ReNUMBER language in old Section 6 accordingly.

Number 2297

REPRESENTATIVE GRUENBERG objected.

REPRESENTATIVE ANDERSON said that Amendment 1 is necessary to clearly establish legislative policy with regard to defining the terms "economic" and "noneconomic" as they pertain to the bill. It has been the experience in other states that confusion with regard to these terms in judicial proceedings has led to a gradual erosion of legislative intent, he opined.

MR. JORDAN said it's his understanding that currently, there is no statutory definition of "economic damages". Therefore, it seems logical to put a definition in statute. He noted that the language in Amendment 1 comes from federal legislation that was passed by the House of Representatives this year.

REPRESENTATIVE GARA said:

There are very well-accepted pattern jury instructions in Alaska that define what noneconomic damages are, that define what economic damages are, what the burden of proof is, how much proof has to be offered. And

I've never heard anybody complain ... about them before.

**TAPE 04-34, SIDE B**

Number 2384

REPRESENTATIVE GARA said he didn't know why they should add a statutory definition when the current pattern jury instructions aren't being objected to. He suggested that perhaps Amendment 1 fixes a problem that doesn't exist.

REPRESENTATIVE GRUENBERG asked that [Amendment 1] be tabled until the bill's next hearing.

The committee took an at-ease from 4:20 p.m. to 4:30 p.m.

Number 2361

REPRESENTATIVE ANDERSON withdrew Amendment 1, adding that he would offer it again at the bill's next hearing.

REPRESENTATIVE OGG asked whether other states have adopted the definitions proposed in Amendment 1. He posited that everyone wants a little certainty, and offered his interpretation of the comments made and issues raised thus far. He said that he has a sense that a reasonable cap would be higher than the proposed cap of \$250,000.

CHAIR McGUIRE asked members to have proposed amendments in writing by the bill's next hearing.

REPRESENTATIVE OGG offered his belief that a cap will not cause insurance rates to go down, adding that such would be hard to prove anyway.

REPRESENTATIVE ANDERSON reiterated his intent behind offering HB 472.

CHAIR McGUIRE announced that HB 472 would be held over.

HB 468 - APPEAL BONDS: TOBACCO SETTLEMENT PARTIES

Number 2125

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 468, "An Act relating to the amount of the bond required to stay execution of a judgment in civil litigation

involving a signatory, a successor of a signatory, or an affiliate of a signatory to the tobacco product Master Settlement Agreement during an appeal; amending Rules 204 and 205, Alaska Rules of Appellate Procedure; and providing for an effective date."

CHAIR McGUIRE relayed that HB 468 would be held over in order to allow Jennifer App, American Heart Association, to put together a proposal.

HB 424 - REGULATION REVIEW

Number 2108

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 424, "An Act relating to review of regulations under the Administrative Procedure Act by the Legislative Affairs Agency; and providing for an effective date."

Number 2068

BARBARA COTTING, Staff to Representative Jim Holm, Alaska State Legislature, informed the committee that Ms. Behr, from the Department of Law, helped craft Version 23-LS0732\S, Cook, 3/2/04, which is in members' packets.

Number 2061

DEBORAH BEHR, Assistant Attorney General, Legislation & Regulations Section, Department of Law (DOL), informed the committee that she has been the regulations attorney for 13 years. She explained that she was asked to provide technical assistance in drafting legislation establishing a framework for legislative branch oversight of executive branch regulations. It is intended that this aforementioned oversight is to be done in a constitutional manner that meets separation of powers constraints because the legislature has the ability, under the constitution, to review regulations. Therefore, this legislation establishes the checks and balances of such oversight. She further explained that another goal she was given has been to minimize the fiscal impact of the legislation, and this has led to prioritization of certain types of regulation reviews in order to maximize the dollars and the cost of the attorney time.

MS. BEHR provided the following sectional analysis of Version S. She explained that Section 1, subsection (a) recognizes the

already-existing statutory authority of the Legislative Affairs Agency to review any regulation. She highlighted that Section 1, subsection (a), also specifies that the review will be done by an attorney in order to provide clarity. Therefore, one would want to ensure that attorneys are reviewing things that make the most cost-effective sense to review, rather than the policy decisions that are appropriate for the legislators to review. With the aforementioned in mind, a priority order of reviews was established in Section 1, subsection (b). She pointed out that Section 1, subsection (b)(1), avoids the review of routine regulations. Section 1, subsection (b)(2), focuses on regulations the legislature has decided implicates major policy development. She explained that an example of the aforementioned would be that a standing committee, the Joint Committee on Administrative Regulation Review, or Legislative Council would indicate to Legislative Legal and Research Services that specific regulations would be appropriate to review with regard to major policy development.

Number 1937

MS. BEHR continued with Section 1, subsection (c), explaining that state agencies will send electronic copies of regulations to those entities specified in Section 1, subsection (c)(1)-(4). She explained that if HB 424 passes, she will talk with the director of the Legislative Affairs [Agency] with regard to setting up designated mail boxes for certain regulations, and the state agencies will then be informed of the address for particular regulations. Ms. Behr turned to Section 1, subsection (d), and explained it with the following example. If the legislature prefers to have a special session and have staff working on legislation, the legislature can do so. In such a situation, legal counsel would say that the regulation review is of a lower priority for the time period. The phrase on page 2, line 11, allows the priorities to be set. On page 2, lines 14-18, is [a provision] that avoids attorneys getting involved in policy reviews. Also, the list doesn't include the revising of regulations.

MS. BEHR moved on to Section 1, subsection (e). She explained that the sponsor and his staff indicated the need for a dialogue in doing regulations and only issuing something in writing if there is a disagreement on the legal standards to be used or if the regulation doesn't meet the standards in the legislation. Therefore, if Legislative Legal and Research Services doesn't believe there is a problem with the regulation, then there won't be a written document. Furthermore, if Legislative Legal and

Research Services does raise a legal concern and the [Department of Law] agrees that there is a legal concern and changes the regulation in question, then there is no written document. However, if there is a disagreement [between Legislative Legal and Research Services and the Department of Law], there will be a written document that is sent to the Department of Law, the impacted state agency, the Joint Committee on Administrative Regulation Review, the President of the Senate, and the Speaker of the House.

Number 1805

MS. BEHR continued with Section 1, subsection (f), which specifies that if the assigned attorney finds that the [proposed regulation] may be inconsistent with legislative intent and thus it would be appropriate to have additional oversight hearings, the attorney will notify the Joint Committee on Administrative Regulation Review, the President of the Senate, and the Speaker of the House. She stated that the legislative oversight could result in oversight hearings and a more detailed review by the staff of the Joint Committee on Administrative Regulation Review. Section 1, subsection (g), places a limit on the Legislative Affairs Agency with regard to the release of any information. The aforementioned addresses the fact that because Legislative Legal and Research Services doesn't have an attorney-client relationship with executive branch staff, there is an argument that anything drafted by Legislative Legal and Research Services would come out into the public forum. However, since the intent is to have an informal dialogue and correct errors before regulations are finalized, the goal of Section 1, subsection (g), is that information wouldn't be released by Legislative [Legal and Research Services].

MS. BEHR turned to Section 1, subsection (h), which was prompted by concerns regarding whether the process has to be stopped or suspended while waiting for the Legislative Legal and Research Services' review. This subsection clarifies that there is no suspension of the regulation process. Ms. Behr highlighted the second sentence in Section 1, subsection (h), which says "Suggestions for changes to a proposed regulation made by the Legislative Affairs Agency are not binding on a state agency." The aforementioned language recognizes that there is a separation of powers issue and if [the legislature] decides to go a different way, the legislature always has the option of passing a statute to say that the regulation is inappropriate. Ultimately, the legislature has power over any state regulation, she said. Section 1, subsection (i), addresses a situation in

which the Legislative Legal and Research Services can't conduct a legal review due to staffing issues or because of special session priorities. In such cases, no one can challenge the failure of the agency to conduct a legal review.

MS. BEHR pointed out that Section 1, subsection (j), doesn't include the Board of Fisheries and the Board of Game in the expedited priority review because of the unique processes of the two. She highlighted that the public process of the Board of Fisheries and the Board of Game is one in which any person can place a proposal before the board. Section 1, subsection (k), is merely a definitions section.

MS. BEHR moved on to Section 2, which addresses the Public Records Act. She explained that Section 2 basically specifies that if there is written notification or e-mail correspondence between the Department of Law and Legislative Legal and Research Services regarding the process, the public can't obtain a copy of that notification through a public records request. She likened this to the protections the legislature has with Legislative Council. She reiterated that if a regulation still has problems, legislation can still be passed to change it. She then turned to Section 3, which pertains to the Administrative Procedure Act (APA). Section 3 requires state agencies to send the electronic documents indicated. She highlighted that the important part of this section is that the review will begin concurrently with the public comment period. The aforementioned was done as a cost-containment measure. Ms. Behr noted that the fiscal note for this legislation has decreased considerably due to the changes encompassed in [Version S].

Number 1563

REPRESENTATIVE HOLM, speaking as the sponsor, explained that his goal is to reestablish oversight of the rulemaking process. He highlighted that [Version S] specifies that it is the last iteration [of a regulation] that will go to the public for comment. He characterized the aforementioned as a good step toward minimizing complaints about regulations. Representative Holm offered his belief that it's important for the legislature to continue to maintain its legislative oversight of laws that are drafted, including those that are promulgated by regulation.

REPRESENTATIVE HOLM then asked why the review response isn't going to the sponsor of the legislation.

MS. BEHR recalled that one of the work drafts did include notification of the sponsor of the legislation.

MS. COTTING informed the committee that Representative Ogg had suggested that consultation with the legislation's sponsor isn't permissible. She noted that Tamara Cook, Director, Legislative Legal and Research Services, agreed and suggested that that reference be removed.

REPRESENTATIVE OGG explained that when the courts review regulations or statute, the written record is reviewed. The written record reports when the intent is narrowed. However, if the sponsor is talked to after the fact, the sponsor is looking at it with different eyes, and so the subjectiveness of the review process is lost.

[Chair McGuire turned the gavel over to Representative Samuels.]

MS. COTTING relayed that Ms. Cook informed her that once legislation is submitted to Legislative Legal and Research Services, it's no longer the property of the sponsor. However, Ms. Cotting pointed out that nothing in this CS prohibits the sponsor from having input in the process along the way.

Number 1353

REPRESENTATIVE HOLM moved to adopt the proposed committee substitute (CS) for HB 424, Version 23-LS0732\S, Cook, 3/2/04, as the work draft. There being no objection, Version S was before the committee.

REPRESENTATIVE GRUENBERG directed attention to page 2, lines 23-26, and page 2, lines 28-29. He noted that in the interim, when there is an election year, things are in total disarray and the Speaker of the House and the President of the Senate are likely to change. He mentioned that AS 24.20.065 requires legislative legal counsel to annually examine administrative regulations. Therefore, there is already a process. Representative Gruenberg recalled from his past tenure with the legislature that Legislative Legal and Research Services annually published a book that was provided to the House Judiciary Standing Committee. Every year the House Judiciary Standing Committee would have a hearing and review the cases [dealing with statute and regulations]. Sometimes, he relayed, legislation would result from that review. Representative Gruenberg asked if Ms. Behr would have a problem with that provision into HB 424.

MS. BEHR noted that although she hasn't spoken with the sponsor on this matter, it is her impression that AS 24.20.065 comes later in the process, after the courts have reviewed [the statute or regulation]. This [legislation], however, proposes a review much earlier in the process. She noted her hope that the legal opinions from Legislative Legal and Research Services would come out during the public comment period so that the regulations could be improved.

REPRESENTATIVE GRUENBERG inquired as to how this process would unfold in the interim of an election year.

MS. BEHR said that sending the information to the Department of Law is absolutely necessary because it provides legal advice to the state agency, which needs the information in order to fix the regulation. She pointed out that the Joint Committee on Administrative Regulation Review is a joint committee of both bodies and is staffed during the interim. Additionally, Ms. Behr remarked, the President of the Senate and the Speaker of the House are probably the two most active positions in the legislature during the interim. With regard to including Legislative Council, Ms. Behr said that she didn't have a legal problem with that but would have to discuss it with the sponsor.

REPRESENTATIVE GRUENBERG turned attention to page 2, line 18, and pointed out that often a regulation is promulgated pursuant to several statutes. Therefore, he suggested changing the language to refer to "the applicable statutes".

MS. BEHR remarked that the committee might want to talk with its legislative legal counsel, which took care in reviewing the current language to ensure that the standards [the Department of Law uses] match the standards specified. Furthermore, there is already statute that specifies that singular equals plural and plural equals singular.

Number 1030

REPRESENTATIVE GRUENBERG moved Conceptual Amendment 1, as follows:

Page 2, line 18,  
Delete "statute"  
Insert "applicable statutes"

REPRESENTATIVE GRUENBERG noted that he is offering Conceptual Amendment 1 subject to review of Legislative Legal and Research Services.

REPRESENTATIVE OGG objected.

REPRESENTATIVE HOLM said that he had no opinion on Conceptual Amendment 1, but mentioned that per Ms. Behr's comments Conceptual Amendment 1 seems redundant.

REPRESENTATIVE GRUENBERG indicated that the caveat regarding the Legislative Legal and Research Services review of Conceptual Amendment 1 includes, "if it's in order, they can change it, and if it's redundant, they can drop it out."

REPRESENTATIVE OGG withdrew his objection.

REPRESENTATIVE SAMUELS asked whether there were any further objections to Conceptual Amendment 1. There being none, Conceptual Amendment 1 was adopted.

Number 0984

REPRESENTATIVE GRUENBERG turned to Amendment 2, which read [original punctuation provided]:

Page 1, line 3: After "Act;" insert the following:

repealing obsolete provisions of law concerning  
legislative annulment of regulations and review;

Page 3, Line 19: Insert new bill section 5 and  
renumber sections accordingly:

**\*Sec. 5.** AS 44.62.320 is repealed.

REPRESENTATIVE GRUENBERG informed the committee that AS 44.62.320(a) is unconstitutional per the A.L.I.V.E. Voluntary case. Representative Gruenberg explained that originally he was going to repeal AS 44.62.320(a). However, upon learning from Ms. Cotting that AS 44.62.320(b) isn't observed, he decided to repeal that subsection as well.

MS. COTTING said she'd discussed this repeal with Dave Stancliff, Staff to Representative Gene Therriault, Chair, Joint Committee on Administrative Regulation Review, who'd said that

repealing all of it would be fine because it's unconstitutional. She confirmed that AS 44.62.320(b) isn't observed.

REPRESENTATIVE GRUENBERG interjected that there is a conforming title amendment.

MS. BEHR said that she has no legal objection to Amendment 2 as it clarifies the statutes. However, she remarked, whether this matter should be dealt with in this legislation or in the revisor's bill is something upon which she couldn't comment.

Number 0850

REPRESENTATIVE SAMUELS, although no formal motion was made, upon determining that there were no objections to Amendment 2, announced that Amendment 2 was adopted.

Number 0839

REPRESENTATIVE GRUENBERG moved to report the proposed CS for HB 424, Version 23-LS0732\S, Cook, 3/2/04, as amended, out of committee [with individual recommendations and the accompanying fiscal notes].

REPRESENTATIVE GARA asked about the fiscal notes.

REPRESENTATIVE HOLM relayed that one of the fiscal notes is for \$98,000.

Number 0817

REPRESENTATIVE GARA expressed the need to ensure that the Legislative Affairs Agency has the power to perform this regulatory review. However, he also wanted to ensure that when the workload of Legislative Legal and Research Services is heavy with other priorities, then reviewing regulations wouldn't be [required]. Representative Gara suggested that that fiscal note could be lowered to zero if, on page 2, line 12, the word "shall" is changed to "may". The current language requires that at least one attorney be assigned to review regulations.

REPRESENTATIVE SAMUELS pointed out that on page 1, line 6-7, the legislation specifies, "The Legislative Affairs Agency may review ...." Therefore, there is no [mandate] to review the regulations and, thus, if there is no review, there would be no attorney time used.

MS. COTTING offered her belief that with Representative Gara's proposed language change, there would be an indeterminate fiscal note. She said that an indeterminate fiscal note is even more difficult for the House Finance Committee to address.

Number 0711

KARLA SCHOFIELD, Deputy Director, Legislative Administrative Services, Legislative Affairs Agency, explained that after reviewing the legislation with Legislative Legal and Research Services and the executive director of the Legislative Affairs Agency, it was determined that there isn't enough staff to review more than perhaps one regulation a year. Because the legislature could want a review of more than one regulation a year, the fiscal note reflects the cost of the addition of one attorney who could be assigned regulations review.

REPRESENTATIVE GARA maintained his belief that use of "shall" on page 2, line 12, requires a certain amount of regulation review when perhaps the agency should be given discretion [in reflection of its workload].

REPRESENTATIVE SAMUELS expressed concern that if Legislative Council says there is the need to re-prioritize, then it should be allowed.

REPRESENTATIVE OGG opined that it is only once the "may" language on page 1, line 7, is triggered that the mandatory language comes into play. Furthermore, on page 2, lines 11-13, the caveat of "Within available staff resources and priorities set by the legislative council" comes previous to the "shall" language. Therefore, Representative Ogg said that he didn't see the need for Representative Gara's suggested change.

REPRESENTATIVE HOLM indicated agreement with Representative Ogg.

REPRESENTATIVE GARA withdrew his suggested change.

Number 0539

REPRESENTATIVE OGG moved to report the proposed CS for HB 424, Version 23-LS0732\S, Cook, 3/2/04, as amended, out of committee with individual recommendations and the accompanying fiscal [notes]. There being no objection, CSHB 424(JUD) was reported from the House Judiciary Standing Committee.

#### **ADJOURNMENT**

Number 0521

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:15 p.m.