

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 19, 2005

1:27 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson
Representative Nancy Dahlstrom
Representative Pete Kott
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

Representative John Coghill

COMMITTEE CALENDAR

HOUSE BILL NO. 92

"An Act relating to the purchase of interests in corporations, including limited liability companies, by the University of Alaska."

- HEARD AND HELD

CS FOR SENATE BILL NO. 67(JUD)(efd fld)

"An Act relating to claims for personal injury or wrongful death against health care providers."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 92

SHORT TITLE: UNIVERSITY OF ALASKA AND CORPORATIONS

SPONSOR(S): REPRESENTATIVE(S) KELLY

01/21/05	(H)	READ THE FIRST TIME - REFERRALS
01/21/05	(H)	EDU, HES
04/05/05	(H)	EDU AT 11:00 AM CAPITOL 106
04/05/05	(H)	Heard & Held
04/05/05	(H)	MINUTE(EDU)
04/06/05	(H)	HES REFERRAL WAIVED
04/06/05	(H)	JUD REFERRAL ADDED AFTER EDU
04/07/05	(H)	EDU AT 11:00 AM CAPITOL 106

04/07/05 (H) -- Meeting Canceled --
 04/12/05 (H) EDU AT 11:00 AM CAPITOL 106
 04/12/05 (H) Moved CSHB 92(EDU) Out of Committee
 04/12/05 (H) MINUTE(EDU)
 04/14/05 (H) EDU AT 11:00 AM CAPITOL 106
 04/14/05 (H) -- Meeting Canceled --
 04/18/05 (H) EDU RPT CS(EDU) NT 1DP 5NR
 04/18/05 (H) DP: LYNN;
 04/18/05 (H) NR: THOMAS, WILSON, GATTO, SALMON,
 NEUMAN;
 04/18/05 (H) JUD AT 1:00 PM CAPITOL 120
 04/18/05 (H) Scheduled But Not Heard
 04/19/05 (H) JUD AT 1:00 PM CAPITOL 120

BILL: SB 67

SHORT TITLE: CLAIMS AGAINST HEALTH CARE PROVIDERS

SPONSOR(S): SENATOR(S) SEEKINS

01/21/05 (S) READ THE FIRST TIME - REFERRALS
 01/21/05 (S) L&C, JUD
 02/08/05 (S) L&C AT 1:30 PM BELTZ 211
 02/08/05 (S) Heard & Held
 02/08/05 (S) MINUTE(L&C)
 03/01/05 (S) L&C AT 1:30 PM BELTZ 211
 03/01/05 (S) Moved SB 67 Out of Committee
 03/01/05 (S) MINUTE(L&C)
 03/02/05 (S) L&C RPT 3DP 1DNP
 03/02/05 (S) DP: BUNDE, SEEKINS, STEVENS B
 03/02/05 (S) DNP: ELLIS
 03/08/05 (S) JUD AT 8:30 AM BUTROVICH 205
 03/08/05 (S) Heard & Held
 03/08/05 (S) MINUTE(JUD)
 03/17/05 (S) JUD AT 8:30 AM BUTROVICH 205
 03/17/05 (S) Heard & Held
 03/17/05 (S) MINUTE(JUD)
 03/22/05 (S) JUD AT 8:30 AM BUTROVICH 205
 03/22/05 (S) Heard & Held
 03/22/05 (S) MINUTE(JUD)
 03/29/05 (S) JUD AT 10:30 AM BUTROVICH 205
 03/29/05 (S) Moved CSSB 67(JUD) Out of Committee
 03/29/05 (S) MINUTE(JUD)
 03/29/05 (S) JUD RPT 2DP 1DNP 1NR 1AM
 03/29/05 (S) DP: SEEKINS, HUGGINS
 03/29/05 (S) DNP: FRENCH
 03/29/05 (S) NR: THERRIAULT
 03/29/05 (S) AM: GUESS
 03/30/05 (S) CORRECTED JUD RPT W/CS SAME TITLE

04/13/05 (S) TRANSMITTED TO (H)
04/13/05 (S) VERSION: CSSB 67(JUD)(EFD FLD)
04/14/05 (H) READ THE FIRST TIME - REFERRALS
04/14/05 (H) JUD, FIN
04/19/05 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE MIKE KELLY
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 92.

ROGER BRUNNER, General Counsel
University of Alaska
Fairbanks, Alaska
POSITION STATEMENT: Responded to questions during discussion of
HB 92.

MICHAEL HAUGEN, Executive Director
Alaska Physicians & Surgeons, Inc. (APS)
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SB 67, and
responded to questions.

ROD BETIT, President
Alaska State Hospital and Nursing Home Association (ASHNHA)
Juneau, Alaska
POSITION STATEMENT: Testified in support of SB 67, and
responded to questions.

CATHY GIESSEL, M.S., FNP-CS (family nurse practitioner -
clinical specialist
Alaska Nurse Practitioner Association (ANPA)
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SB 67, and
responded to a question.

DOUGLAS G. JOHNSON, Attorney
Alaska Academy Of Trial Lawyers (AATA)
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of SB
67 and responded to questions.

DONNA J. McCREADY, Attorney
Alaska Action Trust (AAT)
Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of SB 67 and responded to questions.

PAUL L. DILLON, Attorney
Dillon & Findley, PC
Juneau, Alaska

POSITION STATEMENT: Provided comments during discussion of SB 67 and responded to questions.

PATRICK LUBY, Advocacy Director
AARP Alaska

Anchorage, Alaska

POSITION STATEMENT: Provided comments and suggestions during discussion of SB 67.

KATHY DALE

Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of SB 67, and asked the committee not to lower the existing caps further.

GEORGE D. RHYNEER, M.D.

Anchorage, Alaska

POSITION STATEMENT: During discussion of SB 67, provided comments and responded to questions.

ACTION NARRATIVE

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at [1:27:30 PM](#). Representatives McGuire, Dahlstrom, Gruenberg, and Gara were present at the call to order. Representatives Anderson and Kott arrived as the meeting was in progress.

HB 92 - UNIVERSITY OF ALASKA AND CORPORATIONS

[1:27:50 PM](#)

CHAIR McGUIRE announced that the first order of business would be committee substitute HOUSE BILL NO. 92, "An Act relating to the purchase of interests in corporations, including limited liability companies, by the University of Alaska." [Before the committee was CSHB 92(EDU).]

[1:28:12 PM](#)

REPRESENTATIVE MIKE KELLY, Alaska State Legislature, sponsor, explained that the University of Alaska has proven to be a

valuable tool in Alaska's economic development. With the goal of allowing the university to continue to expand its vital role, this legislation proposes a much needed change in Alaska's corporate liability laws, and is intended to protect the university from liability arising from the "piercing of the corporate veil" concept. He said:

The "piercing of the corporate veil" concept is a judicial process whereby the court will disregard the usual immunity of corporate entities from liability for wrongful corporate activities perpetrated fraud. They can then impose personal liability on stockholders, officers, and directors of the corporation in the case of fraud or other wrongful acts done in the name of the corporation. While this is generally a sound policy, in the university context the application of this theory has the unintended consequences of discouraging university investment in new corporate endeavors resulting from intellectual property generated by faculty research.

The university cannot support various types of economic development initiatives or associate with public groups through nonprofit corporations ... [with] the fear of liability under the piercing the corporate veil theory, which is quite liberal in Alaska. ... In one such immediate example, the university rejected a 501(c)(3) nonprofit corporation, which would have lead the business enterprise institute, because of a potential corporate veil liability. Likewise, the university has not been supportive of faculty members with intellectual property ... [for] start up corporations, recognizing that if liability were incurred by such a corporation, there would be a substantial risk that such liability could pass to the university ..., [that it] could become liable for the tort obligations of a corporate entity it may start up, where the entity was not adequately capitalized or insured. ...

Our intent with HB 92 is to specifically define a university/corporate liability structure intended to encourage new university investment in limited liability and nonprofit corporations resulting from research-generated intellectual property or companies created and managed on university lands. ...

REPRESENTATIVE KELLY relayed that there are three different approaches utilized by universities to "spin-off" companies. The "hands-off" approach entails the faculty member developing the business plan, acquiring venture capital, and paying start up costs; the "hands-on" approach entails the university's involvement in reviewing the faculty member's business plan, helping acquire venture capital, and perhaps providing funding for the venture; and the "up to your neck" approach entails the university putting together the business management team or providing a "business incubator," substantial funding, and other start-up support. All three approaches would fall under the purview of the University of Alaska Board of Regents.

REPRESENTATIVE KELLY said universities that handle "start-ups" thoughtfully and well attract high energy, innovative faculty, who in turn attract top-notch students. Students then often tend to settle near the communities where they attended school. Start-ups can provide training, "get grounds" for students and valuable collaborators for university faculty, as well as provide economic development opportunities. He relayed that the president of the University [of Alaska] has increased funding for research, and that it's the president's strong desire to export that business to the community.

[1:32:52 PM](#)

ROGER BRUNNER, General Counsel, University of Alaska, offered that he was available to answer questions.

REPRESENTATIVE GARA acknowledged that additional funding for the university is needed. He related his belief, however, that the "nub" of potential problems with this legislation resides on page 1, line 14, which states that if the university obtains a nonprofit corporation as part of an effort to obtain economic activity or some other university purpose, the university becomes part owner and therefore is not liable for the obligations of the company, unless the university president signs an agreement saying it is liable.

REPRESENTATIVE GARA said he has two concerns: the first is regarding the purchase of a nonprofit that owes money throughout the community, because the university will not be liable to pay those obligations; second, after the university purchases an interest in the nonprofit and the university garners debt throughout the community, the university is still not liable. Thus, the university could get all the benefits of a corporation but not be obligated to pay the bills or incurred liability. He

noted that presumably in nonprofit corporations there are other owners, so perhaps this legislation could include some provision to ensure that those owners could not shirk their responsibilities to the community. The aforementioned owners could use [bonds or insurance] in order to be held accountable for the [debt incurred].

REPRESENTATIVE KELLY concurred [that the aforementioned option] does protect the university for incurred liability but it risks changing the corporate structure that signifies it's a limited liability arrangement.

[1:36:41 PM](#)

MR. BRUNNER relayed his understanding that the aforementioned question is, how is it fair for the university to profit from a nonprofit corporation without being liable for its debts. He highlighted that nonprofit corporations are not allowed to profit. Both the Alaska statutes and the Internal Revenue Service (IRS) Code prohibit nonprofit corporations from distributing their assets to members. He also offered his belief that it's fair for the university to not be held liable for the debts of a nonprofit because it's prohibited from profiting and, therefore, the concern is unwarranted. In response to a question, he said the university would be putting up money to help the operation get off the ground, and noted that the state has done something similar in setting up the Alaska Railroad Corporation and the Alaska Energy Corporation.

CHAIR MCGUIRE surmised that the university would be similar to a silent partner or a passive capital investor.

MR. BRUNNER said HB 92 would allow the university to [invest in] other entities and the state would be protected because if the corporation fails it won't be possible to go against the state general fund (GF) to collect debt.

REPRESENTATIVE GARA clarified that his concern centers around whether it is fair for the university to receive the "benefit" of being a part owner of a venture and not have the obligations the nonprofit incurred. He added that most nonprofits aren't generally given the right to not pay back debt incurred. He said he is concerned about protecting the vendors and contractors that a nonprofit owes.

MR. BRUNNER offered that corporate structures allow things to start up and encourage further development by offering the

protections of a corporation. This legislation protects the university by offering limited liability status for investment [purposes]. He offered that corporate liability, in Alaska, has become "broad in the courts" and this legislation ensures that the university will receive the same treatment as other corporations.

CHAIR MCGUIRE noted that funding for things like the Alaska Science and Technology Fund, and this leaves entrepreneurs with great ideas without capital funds to invest. This legislation says that it's fair not to pierce the corporate veil beyond the amount of money that is invested, and therefore the public policy issue of "unfairness" is outweighed by the greater public good of allowing for investment, she said.

[1:43:41 PM](#)

REPRESENTATIVE GARA said that if the university wants to be treated like any other owner of a corporation, then any other corporate law would apply; however, this legislation is seeking the exemption that the university isn't liable to pay debt that other owners of corporations would have to pay. What, he asked, is unfair about the current corporate veil rule, which applies to any other corporate owner, that the university wants to be exempted from.

MR. BRUNNER opined that the main difference is the size of the "pocketbook," in that it is the university budget on the line. "Pierce the corporate veil and we can't afford that risk; [if we had a] smaller pocketbook, one, we wouldn't be worried about so much money and, two, we wouldn't have to worry because the plaintiff wouldn't come after us," he added. It's the size of the budget that requires the state to set up different corporations that disclaim liability - so the GF is not on the hook; otherwise, every time money owed isn't paid, the state would get sued.

[1:45:56 PM](#)

REPRESENTATIVE GARA opined that in order to make an exception to the corporate veil rule, [the committee] has to understand what the rule is. He reiterated his understanding of what the current rule is and why is it unfair.

REPRESENTATIVE GRUENBERG referred to the handout entitled in part, "SPIN-OFF COMPANY MODELS FOR UNIVERSITIES:", which states, "Typically universities that regularly enter into start-ups or

have ownership in other corporations use a research foundation/corporation as the intermediary." He asked if the aforementioned [intermediaries] serve as the vehicle for insulating the university.

MR. BRUNNER said, "I don't know."

REPRESENTATIVE GRUENBERG asked that since this legislation insulates the state from creditors or tort liability, could it also provide protection in a vendor situation.

CHAIR MCGUIRE relayed that CSHB 92(EDU) would be held over.

SB 67 - CLAIMS AGAINST HEALTH CARE PROVIDERS

[1:48:18 PM](#)

CHAIR MCGUIRE announced that the final order of business would be CS FOR SENATE BILL NO. 67(JUD)(efd fld), "An Act relating to claims for personal injury or wrongful death against health care providers."

[1:48:47 PM](#)

MICHAEL HAUGEN, Executive Director, Alaska Physicians & Surgeons, Inc. (APS), said that the APS is in strong support of SB 67. He referred to a statewide poll conducted March 8-10 by a coalition calling itself Alaskans for Access to Health Care, of which the APS is a member, and said that the poll indicated that with regard to the question of medical liability reform, 64 percent of Alaskan "voters" were aware of the ongoing debate about medical malpractice liability reform and the corresponding increases in cost to physicians to obtain medical malpractice insurance. He said that the poll also initially indicated that approximately 60 percent of Alaskans are in favor of placing a cap on non-economic damages in medical liability cases, but after the poll then offered people six "facts" about the "state of affairs" in Alaska, the number increased to 67 percent.

MR. HAUGEN offered his interpretation that those statistics mean that "there is strong support for this proposition." The poll also indicated that 72 percent of Alaskan "voters" feel that health care providers are doing a good job in preventing medical errors and promoting public safety; that 58 percent feel that many or some physicians are performing additional tests or procedures that are not necessary but are done to protect physicians from "frivolous" lawsuits; that 48 percent feel that

some physicians have stopped providing high-risk medical services, or are refusing to treat patients with serious illnesses, in order to protect themselves from lawsuits. He offered his understanding that those polled predominately said that that they fear the medical malpractice insurance problem will directly affect them in the form of higher healthcare costs.

MR. HAUGEN offered that the poll has also indicated that 86 percent of those asked were "very or somewhat" concerned that they will have to pay more for healthcare costs; that 72 percent fear not being able to find a specialist when they need one; that 66 percent fear not being able to find a doctor when they need one; and that approximately 80 percent are concerned that they may not be able to afford healthcare insurance. He offered his understanding that others will testify that Alaska has a shortage of physicians and ranks 46th in the nation in the number of doctors per capita, and relayed his belief that those states that have enacted what he termed "meaningful" non-economic damage caps have seen, on average, "about a 12 percent greater per capita number of doctors than those states that have not." He concluded by urging the committee to support SB 67.

[1:52:43 PM](#)

REPRESENTATIVE GARA said he would not be making any decisions based on a poll, but rather would be attempting to determine the validity of the poll. He asked whether the poll posed the question of whether one would be in favor of placing a cap on non-economic damages.

MR. HAUGEN said the poll "started off with a series of more general questions," but then asked whether one would favor a cap.

REPRESENTATIVE GARA asked whether those taking the poll were told that there already is a cap in place.

MR. HAUGEN said that those taking the poll were not told that fact. In response to further questions, he indicated that members' packets contain a copy of the questions asked by the poll, and reiterated when the poll was conducted, who he was speaking on behalf of, and his position with that organization.

[1:55:42 PM](#)

ROD BETIT, President, Alaska State Hospital and Nursing Home Association (ASHNHA), said that the ASHNHA supports SB 67, and noted that the ASHNHA's written comments are included in members' packets. He said that the ASHNHA's membership supports SB 67 primarily because of access issues; there is a growing concern that more and more difficulties are being experienced throughout the state in terms of physicians being available, particularly for those that need specialists. "We think that this bill will better balance the non-economic damage interest entitlement of an individual with the larger community concern of having enough physicians to meet everybody's medical needs," he added, opining that the bill will move Alaska closer to having a medical liability "law" that would make "that" more reasonable and fair. He offered his belief that SB 67 does nothing to reduce economic damages or punitive damages that may be awarded.

MR. BETIT said that the ASHNHA believes that Alaska needs to act now because it feels that the literature regarding the lack of a non-economic damages cap being linked with insurance premium increases, and thus physician shortages, is compelling. In addition to Alaska being 46th in the nation in the number of doctors per capita, more and more physicians are limiting their practice and the services they offer, he remarked, and opined that such is due to malpractice liability as well as the cost of providing "those other services." He offered an example of a physician in Soldotna who limited his practice, and offered his belief that this such is happening throughout the state.

MR. BETIT said that physicians are handicapped in that they cannot simply increase their fees to offset costs, since Medicare and Medicaid, which make up about 50 percent of the "total healthcare system," will not recognize, and thus not pay, such increases; additionally, some people cannot pay for medical services at all, and are thus being provided with healthcare services as a charity by physicians. He offered his understanding that the uninsured rate for Alaska is approximately 20 percent. Also of concern is Alaska's population in comparison with the projected growth of physicians in Alaska; he relayed that the ASHNHA's written comments contain statistics detailing those percentages, read a few of those statistics for the committee, and surmised that they reflect that Alaska's population will be requiring more services by specialty physicians.

MR. BETIT characterized the statistics the ASHNHA provided regarding Alaska's projected physician growth rate, as compared

to the rate projected for the entire nation, into the year 2006 as worrisome, and read some of those statistics for the committee. He stated, "We need more physicians and we need more in certain specialties," and predicted that should the statistics prove correct, Alaska's needs will not be met. He summarized by saying:

We know we have a problem now. We know that it's going to get worse because the population is going to put increasing pressure on the physician community. We know that two-thirds of the public spending ... [on] Medicare/Medicaid is [for] services to the elderly, that Medicare/Medicaid together represent 50 percent of total spending in this country - with very little ability to recover any increased reimbursement through those programs - yet these are the people who are going to have very serious prolonged illnesses in those programs that require a strong physician community to treat [them]. So we think that this increase in specialty physicians in those various fields needs to be addressed, and that the only way we're going to do that is [to] keep our physicians in practice as long as possible - not having a medical school in this state or ... large residency programs - and by creating a fair medical liability environment to attract new physicians from outside the state. For those reasons, ... our membership strongly supports this measure and encourages your support of it as well.

[2:03:54 PM](#)

MR. BETIT, in response to a question, offered his understanding that "Region X" encompasses Washington, Idaho, Oregon, and Alaska.

REPRESENTATIVE GARA asked whether the statistics provided in the ASHNHA's written comments were gathered before 1996.

MR. BETIT said yes.

REPRESENTATIVE GARA noted that he'd asked Legislative Legal and Research Services to get him information regarding physician growth in Alaska, and provided members with a copy of the resulting legislative research report. He relayed that according to that information, between 1996 and 2004, not including "federal physicians," there has been nearly a 50

percent increase in the number of physicians in Alaska, and surmised that this indicates that the statistics provided in the ASHNHA's written comments are wrong. The legislative research report indicates that in 2004, there were 3.54 physicians for every 1,000 Alaskans, whereas in 1996, there were only 2.63 physicians for every 1,000 Alaskans.

MR. BETIT suggested that perhaps the legislative research report includes all physicians that are licensed to practice in Alaska but doesn't indicate how many of them are actually providing services, whereas the information the ASHNHA provided reflects only those physicians that are "employed."

REPRESENTATIVE GARA countered that the legislative research report statistic includes only active state-licensed physicians.

[2:07:22 PM](#)

CATHY GIESSEL, M.S., FNP-CS (family nurse practitioner - clinical specialist), Alaska Nurse Practitioner Association (ANPA), after relaying that she is an advanced nurse practitioner (ANP), said that the ANPA supports SB 67. She said that the bill is important to nurse practitioners - of which there are over 500 in Alaska, delivering primary health care services and providing Alaskans with access to care - because of the impact that liability insurance rates have on physicians. More than 50 percent of nurse practitioners live and work in rural Alaska, and malpractice insurance rates for nurse practitioners have increased 30-50 percent annually over the last two to three years and some premiums tripled for the year 2005.

MS. GIESSEL said that the insurance carriers for nurse practitioners have warned that this trend will continue even though a databank maintained in part by the Department of Health and Human Services (DHHS) - the National Practitioner Data Bank-Healthcare Integrity and Protection Data Bank (NPDB-HIPDB) - reflects that over the last 15 years there have only been three "license actions" in Alaska. Thus, nurse practitioners are not making errors, are not being found liable in malpractice suits. She posited that the increase in insurance rates for nurse practitioners is a ripple effect of what is happening for physicians' insurance rates, and so tort reform regarding this issue is very important to nurse practitioners because they want to continue offering their services to Alaskans. She concluded by reiterating that the ANPA supports SB 67.

2:10:00 PM

REPRESENTATIVE GARA said he is skeptical that insurance companies are going to either reduce or stop increasing premiums if the legislature further limits the amount of damages people are allowed to recover when they are harmed. He asked Ms. Giessel if the liability judgments for nurse practitioners have increased and are thus being used to justify increasing their insurance rates. If the answer is no, why, then, would affecting someone's ability to recover damages result in insurance companies not increasing rates.

MS. GIESSEL said she did not think that SB 67 alone will result in [a decrease] in malpractice insurance rates; instead it is merely a piece of the solution to the increasing of malpractice insurance rates as well as a piece of the solution to the cost of and access to healthcare in Alaska. She said she has information from the American Medical Association (AMA) indicating that once a cap on malpractice claims was instituted in Texas, it resulted in there being 14 insurance carriers providing insurance in that state instead of just the 2 that did so before the cap was instituted; additionally, insurance rates dropped 12 percent after the first year, followed by another 5 percent decrease. She also said:

We know that California's rates are 40 percent lower than Alaska's malpractice [insurance] rates. I believe that part of the answer will be to hold insurance companies accountable, after the institution of a more rigid cap, to reduce those rates, because they'll no longer have the validity for causing these continuing increases. I don't feel that this is the total answer, but it's a piece of the answer. And doing nothing will certainly ensure that rates will continue to climb.

2:12:19 PM

DOUGLAS G. JOHNSON, Attorney, Alaska Academy Of Trial Lawyers (AATA), relayed that he would be speaking on the issue of the appropriateness of the proposed cap on non-economic damages. He said he is often called to speak to youth groups about how and why laws are made, and so he speaks to them about personal responsibility and about justice and fairness for everyone. Therefore, he remarked, "I cannot harmonize this bill with those principles." He went on to say:

You can't harmonize a bill that restricts the damages that a person is entitled to receive, artificially based on evidence that has nothing to do with the facts of the specific case, and yet call it fair. Personal responsibility means that if you break something, you fix it, and it doesn't matter if it's something that's less expensive or more expensive, you take care of what you've done - you make it right. This bill artificially shields people for creating greater harm; it takes away their responsibility for harm created.

This bill disproportionately affects people in our state who have little to say in their representation - the very young, children, [and] the very old, our elders - [and] it disproportionately affects those who have a subsistence lifestyle, because what it says is, the only people who are entitled to be fully compensated are those who have damages of economic losses, but people who can't show large economic losses are not entitled to full compensation for the losses which they suffer. That is not fair and it's not just and it is not appropriate to discriminate against those folks.

This bill violates the right to trial by jury; somehow, if passed, we would be saying that we do not trust the citizens of this state to make correct decisions on placing values on damages or harm done to people through other people's mistakes. Now I recognize that folks who are working on this bill are trying to do good things - they have good purposes - but I think they are severely mistaken in their foundations upon which they base what they're trying to do here.

MR. JOHNSON referred to material provided by the [Alaska Action Trust (AAT)], and noted that statistically, whenever there has been reform of the laws affecting the damages that someone can receive, it is often heralded as something that's going to reduce insurance premiums. However, until a few moments ago, when he'd heard about the information pertaining to Texas, he'd not heard of any instances in which a cap has ever actually resulted in lower rates, he remarked, and added that he would be researching the information pertaining to Texas further to see if the cap truly did result in lower rates. In other states

that have adopted a cap similar to what is being proposed in SB 67, insurance premiums have not gone down.

MR. JOHNSON added:

There's been talk about the number of claims here, and yet, statistically, by the Alaska State Medical Board information, ... the amount paid out in total damages ... between 1993 and 2003, when adjusted for inflation, has stayed exactly the same. And this is for total damages. There has been no change, there has been no rise, or dramatic rise, as we've heard talk about. Basically, Madame [Chair], I cannot harmonize this bill with the principles that I think we all espouse as being just and appropriate and part of what we are supposed to be about here. Thank you.

2:17:10 PM

CHAIR McGUIRE surmised that there are two different perspectives on the issues being raised by the bill. With regard to the issue of fairness, she said that she also has to look at the fact that some people in smaller communities - such as elderly men with heart problems, young adults suffering from head injuries, and young women - don't have access to specialists such as cardiologists or neurosurgeons or those physicians that specialize in obstetrics and gynecology (OB/GYN).

MR. JOHNSON offered his belief that those with the need for such specialists are the very people that the legislature ought to be looking out for, that many of those types of people will suffer disproportionately under the bill because they don't have an earnings history and so won't be justly compensated should they be harmed as a result of a physician's error. Such people will suffer throughout the rest of their entire lives, but will not be able to claim compensation for lost wages and will be limited to only \$250,000 for non-economic damages. He opined that it is not appropriate to say that if harm happens within the medical field that there should not be appropriate and just compensation. With regard to the issue of OB/GYNs, he offered his understanding that the number of such specialists in Alaska has actually increased in the last two years.

MR. JOHNSON opined that reducing the amount of awards that injured people can receive for full and just compensation will do nothing to affect the number of doctors who practice in Alaska.

CHAIR McGUIRE surmised that everyone has a responsibility to address "the problem," and offered her understanding that once the contingency fees charged by the trial lawyers representing those with medical malpractice claims are deducted from the awards, plaintiffs can end up being left with as little as 50 percent of such awards. She asked whether the trial lawyers in such cases bear any responsibility.

MR. JOHNSON opined that the [trial lawyer] profession bears the responsibility of doing everything it can to try to protect injured people, noting that in order to do that, there have to be trial lawyers who are willing to invest two or three years in actively pursuing something for which there is a 50-50 chance or less that they will ever have any compensation for it, whatsoever, while at the same time investing their own funds to make it happen. He added:

I think that absolutely the profession bears responsibility to make sure that these innocent victims are not left out - those who don't have a voice right now, those who don't have many, many, many dollars backing their activities here in Juneau. And so, yes, absolutely, I agree ... we have a responsibility to protect them, equally, along with the rest of the citizens of the state.

CHAIR McGUIRE clarified that her question is whether the trial lawyer profession bears any responsibility for looking for a solution to the "crises we have right now, which is escalating healthcare costs, escalating medical malpractice [insurance] rates, decreasing number of specialists - particularly in areas where we need them - and an escalating population base."

[2:23:06 PM](#)

MR. JOHNSON, in response, offered that when someone calls him because he/she has been seriously injured as a result of some sort of medical negligence, it has been difficult to find an attorney in this state to which that person can be referred to, because of the incredible difficulty of bringing a medical malpractice claim. He predicted that if such attorneys had their fees capped at a certain amount, then the only people that would have access to appropriate legal representation would be those that could pay by some means other than contingency fees. In response to another question, he said that he is troubled by the tremendous cost of pursuing such claims, adding, "The

defenses arrayed against those claims are huge, and the amount of funds that they have to bring to bear to fight against those claims is enormous and almost without bounds."

[2:25:22 PM](#)

REPRESENTATIVE GARA offered his belief that the amount that has been paid for malpractice settlements and judgments is about the same now as it was in 1993. However, insurance rates continue to rise, he remarked, even though he doesn't think that there is any evidence of escalating liability.

MR. JOHNSON, in response to a question, mentioned that non-economic damages generally include things like the fact that one has been severely disfigured, for example, or will live in pain for the rest of his/her life. Non-economic damages can also include the loss of one's ability to hug one's spouse, or enjoy being with one's children, or hold a grandchild, or go hunting and fishing - either for enjoyment or to provide for one's family; non-economic damages are supposed to compensate a person if those abilities are taken away.

[2:28:25 PM](#)

MR. JOHNSON offered the analogy of owning a painting that was of great worth to a person individually but was perhaps originally bought at a very low price. If that painting were to be [destroyed], the recovery of the loss of that painting wouldn't be just the cost of the glass that covered it or the frame around it. In order to be fair and just the recovery would have to include the value the painting had to the owner. The award of non-economic damages is an attempt to put a dollar figure on the suffering that people have incurred but for which an economist can't testify regarding worth.

CHAIR McGUIRE pointed out, however, that in such situations, where a person is severely disfigured or must live in pain for the rest of his/her life, no amount of money in the world will make it right.

MR. JOHNSON concurred, but noted that under the current system, "under our constitution," money has to be put up to try and make it right. "To say that it's tough to figure out how much that is and so we aren't going to do it anymore is not correct," he concluded.

REPRESENTATIVE ANDERSON offered his belief that everyone is trying to find some common ground and a solution to "this." He asked Mr. Johnson whether he thinks the current caps are fair or whether he would prefer to have even higher caps.

MR. JOHNSON said his preference would be to leave it to the jury to decide what a person's injuries and losses are, adding, "I trust the citizens of this state, wherever they may be, to make those decisions in their various communities, more than what we can do here without any of the specific facts of a specific case in front of us."

REPRESENTATIVE ANDERSON suggested that another part of a possible solution might be instituting a cap on attorney fees.

[2:32:16 PM](#)

REPRESENTATIVE ANDERSON asked Mr. Johnson what he thinks would serve as a solution.

MR. JOHNSON clarified that he did not say he agrees that there is a problem; rather, he'd said he thinks that there are good folks working on what they have perceived to be a problem, but he himself considers the basis for the opinions espousing that there is a problem to be false and that such can be shown statistically.

[2:33:24 PM](#)

REPRESENTATIVE GRUENBERG asked whether "hedonistic damages" is a term of art.

MR. JOHNSON relayed that he wouldn't be able to comment on that, but said he would research the issue further.

REPRESENTATIVE GARA said he would provide Representative Anderson with a memorandum by Legislative Legal and Research Services which indicates that Alaska used to have a medical insurance pool. He elaborated:

The last time there was a medical liability problem in the state and there weren't enough insurers, the state said, "Okay, we'll create a pool also." And roughly half the physicians in the state bought into the state pool, which actually made money for the state. It was profitable enough that at some point it was purchased by [NORCAL Mutual Insurance Company ("NORCAL"),

though] there was another problem with it the way it was set up - there was a tax issue that you'd have to work on.

REPRESENTATIVE GARA offered his belief that a wise way to go would be to form a working group that would recreate a pool so that doctors could buy liability insurance if, in the ebb and flow of private insurers in this state, there were to be "a bottoming out at some point." He offered his understanding that the aforementioned pool lasted 10-15 years.

[2:35:42 PM](#)

CHAIR McGUIRE, in response to Representative Gruenberg's question, relayed that Black's Law Dictionary defines "hedonic damages" as:

Damages that attempt to compensate for the loss of the pleasure of being alive. Such damages are not allowed in most jurisdictions. Also termed (erroneously) "hedonistic damages."

[2:36:29 PM](#)

DONNA J. McCREADY, Attorney, Alaska Action Trust (AAT), after noting that she is also a member of the Alaska Academy of Trial Lawyers (AATL) and that she has represented plaintiffs in some medical malpractice cases, indicated that she agrees with Mr. Johnson's comments, particularly with regard to personal responsibility and justice. She noted that there already are non-economic damages caps in Alaska: \$400,000 for physical injuries, and \$1 million for "permanent, severe physical injury or severe disfigurement." She said she is mystified over the amount of energy, money, and resources being spent to further lower Alaska's existing caps on non-economic damages.

MS. McCREADY offered her belief that the bill will not only lower those caps for a citizen that is able to prove that he/she has been seriously harmed by a physician's negligence, it will also completely deny access to justice for certain groups of people such as children, "stay-at-home moms," the elderly, people who are retired or are near retirement, and Alaska Natives living a subsistence lifestyle. This is because such people are either not high wage earners or earn no wages at all. Under the bill, regardless of how bad a physician's conduct is, such groups of people are essentially cut off from the justice

system even if the physician is grossly negligent or reckless or intentionally harms a patient.

MS. McCREADY explained that it is very difficult and expensive to prove that a physician was grossly negligent or reckless or intentionally harmed a patient. A plaintiff must hire expert witnesses in the form of competent physicians - generally from the Lower 48 - who practice in the same field of medicine, and a plaintiff can't bring a case unless such witnesses agree that the standard of care under the circumstances of a particular case has been breached; the plaintiff must then prove that that breach actually caused the harm, which must be serious harm. She offered her belief that the public would agree that such should be the case, that a plaintiff should have to prove that a physician's conduct was bad enough to cause harm, that it shouldn't be easy to bring a malpractice case, that it should involve some risk. The risk currently faced in Alaska by a plaintiff is that if he/she is not the prevailing party, there could be judgment against him/her, and he/she could end up owing costs and [attorney fees] to the prevailing party.

MS. McCREADY relayed that according to information she'd compiled for the legislature last year, doctors are not shy about getting judgments against their patients who have sued them but not prevailed. Reiterating that there is a lot of risk involved in bringing a medical malpractice case to court, she offered her belief that this is the reason that very few attorneys are willing to represent plaintiffs in such cases. She said that if the cap proposed in SB 67 passes, there will be a number of people that she simply could not represent because it wouldn't make any sense, economically, for them to pursue their cases.

MS. McCREADY, on the issue of attorney fees, she relayed that those that come to her [with a medical malpractice suit] generally don't have a lot of economic resources, and so when she takes on that type of case, it ends up being a big investment, monetarily and time-wise, for her firm. Additionally, she might spend a lot of her own money on a case and then realize that she can't continue it because either they won't prevail or the client finally decides that he/she doesn't want to take on the risk; she would then be out whatever money and time she had spent. She relayed that her fee agreements are generally one-third [of an award] plus costs, but that she compromises her fee in certain circumstances because she really is interested in doing what is fair; at the same time, however,

given the amount of time and money she puts into such cases, it is not unfair for her to be compensated for the work she does.

MS. McCREADY added:

I'm really operating as a private attorney general - people come to me ... [but] I can't afford to just take cases just because ... somebody thinks they ... [are] good. They really have to be cases where people are really seriously injured and the conduct on the part of the medical professional is really quite serious. So I view myself as a private attorney general. I think that if doctors realized how much time I spend explaining to people who think they've been harmed by negligence that maybe they really weren't, they might be surprised by that. I spend a lot of time educating the population, [explaining that] it's really not appropriate to sue your physician just because you think that you were harmed, [that] you really have to prove that somebody did something wrong, [that] it's not good enough to have a bad outcome.

[2:43:49 PM](#)

MS. McCREADY also pointed out that just like doctors, lawyers also have to deal with insurance companies and the rising costs of premiums, and opined that there is absolutely no connection between payouts in malpractice cases and healthcare provider insurance premiums. The insurance industry is subject to cycles, and the big increases in premiums that every industry is presently being subjected to are a result of the insurance industry attempting to recoup its losses due to bad or unfruitful investments in the [stock] market. Referring to some of Representative Gara's comments, she added that in the 1970s, the Medical Indemnity Corporation of Alaska (MICA), by allowing physicians to self insure, successfully served as a solution to the problem of a lack of insurance carriers willing to underwrite medical malpractice insurance in Alaska. She suggested that something similar could be used to address the issue of rising insurance premiums.

MS. McCREADY predicted that under SB 67, large groups of people are not going to have access to the court system no matter how badly they are harmed by the conduct of a physician and no matter how bad the conduct of the physician is. She asked the committee to consider who will benefit from the adoption of SB

67. It will not be healthcare providers and it will not be Alaskan citizens; the only ones who will benefit from the passage of SB 67 will be the insurance companies.

REPRESENTATIVE GRUENBERG mentioned that in the past, were someone to bring a lawsuit but lose, he/she could file bankruptcy to escape having to pay the award of attorney fees; as a result of the new bankruptcy law, however, this can no longer be done as easily. He asked Ms. McCready to comment on this issue.

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

MS. MCCREADY offered her understanding that the new bankruptcy law radically changes the existing bankruptcy system, and so the discharging of certain debts will no longer be allowed. She opined that if frivolous medical malpractice lawsuits really are being filed, then they probably are not being filed through attorneys with experience doing medical malpractice lawsuits. She posited that if such lawsuits are being filed, they are probably being brought pro se; such lawsuits won't stay in court for very long and those filing the lawsuits, because they don't have an attorney and thus have no one giving them accurate legal advice, probably won't know that they are subject to the fees provided for in Rule 82 of the Alaska Rules of Civil Procedure.

MS. MCCREADY suggested that under the new bankruptcy law, many people will be so chilled by Rule 82 that they won't bring a suit to trial because of the fear that they will lose what little resources they have. She pointed out that people who come to her for help in medical malpractice suits aren't the type of people that would rely on being able to file bankruptcy should a judgment go against them - bankruptcy isn't something they would take on lightly.

[2:50:16 PM](#)

REPRESENTATIVE GRUENBERG, on the issue of plaintiff attorneys acting as little attorneys general, offered his understanding that if a physician has a number of successful medical malpractice suits brought against him/her, such can be used as evidence before the Alaska State Medical Board when it is in the process of determining whether to take disciplinary action against a physician's medical license. He posited that the compilation of such evidence can then save the state considerable money in the board's investigatory process.

MS. McCREADY confirmed that point, but noted that when a lawsuit is brought against a physician, that one lawsuit by itself won't directly affect that physician's license. However, because of the resources spent in investigating a particular claim, certain practices of that healthcare provider and/or his/her institution that ought to be examined may be brought to light, and so the results of that investigation can certainly save the state money and provide it important information.

REPRESENTATIVE GRUENBERG asked whether doctors are required to carry medical malpractice insurance.

MS. McCREADY said no.

[2:53:10 PM](#)

REPRESENTATIVE GRUENBERG opined that if the insurance industry "did a little policing," it could solve the problem.

[2:53:46 PM](#)

[Representative Anderson returned the gavel to Chair McGuire.]

PAUL L. DILLON, Attorney, Dillon & Findley, PC, relayed that his firm does medical malpractice litigation in its Anchorage office and across the state, and its attorneys [specialize in] a variety of practices; he, for example, specializes in insurance litigation and represents insureds against insurance companies. With regard to the question of whether there is a crisis, he noted that according to material put out by the Division Of Insurance, it doesn't think that there is a crises at this point. For the last three years the Division of Insurance has studied, as part of the tort reform Act, the effects of tort reform with the caps at \$400,000. Those yearly reports clearly indicate that at least as far as insurance carriers are concerned, there isn't a problem. Alaska is a small market and therefore has problems similar to some other western states [with small populations].

MR. DILLON predicted that in so far as the availability of insurance and the affordability of it, should any of the physicians that come before the committee be asked, they would testify that insurance is available to them and that they can afford it, given their practice. He went on to say:

Let's set the stage here, folks. We're talking about physicians who are making six to seven figures every year. ... That means hundreds of thousands [of dollars] or potentially a million [dollars] or more in this state. Now what we're also talking about on the other end of this equation, in terms of ... who you're affecting by this bill, you're talking: kids, moms, and the elderly. Now I'm sorry if you've got a problem with [the fees charged by] lawyers or trial lawyers, but kids, moms, and the elderly aren't going to come and testify before you. So who's going to protect them if you don't.

MR. DILLON, on the issue of caps for non-economic damages, offered:

There is no linkage in the question of premiums and caps. ... We heard from the nurses today indicating a study in Texas; I can show you the latest information, ... that came out March 10 from the state of Texas, wherein they analyzed their tort reform efforts and found that there is no linkage between caps and premiums. ... In an equal and interesting report from the state of Washington, in March, they also have done a review of the question of premiums and caps. Interestingly enough, what that produced was a rebate of millions of dollars, by the insurance company, to ... the doctors because the insurance companies were overcharging in the state of Washington for premiums. [It] might be interesting to take a look at that, but you don't need to go out of this state; you have a very effective Division of Insurance, in the context of the production of the data and the information that's available to you, and I would hope, strongly, that you would take the opportunity to take a look at it.

And ... certainly don't rely on me ... - call in your Division of Insurance, call in the people that have the statistics and the information that set the stage and maybe even provide an answer or two to you. ... The chair asked about, what is a solution. The MICA situation is one that this state studied; it was a model, it was successful, and indeed it was sold to NORCAL, ... [which has] essentially 80 percent of your insurance market for the medical malpractice situation. So, from the perspective of caps, I don't

think that there's going to be an issue between caps and premiums. That isn't to say that there is not a problem, Madame Chairman. Insurance is a problem and you are wrestling with it in [regard to] workers' compensation, [and] you are wrestling with it in [regard to] doctors, ... lawyers, architects, engineers; you are in a small market situation and that is a very tough market.

The facts of life are that ... 600,000 people does not make a lot of money for the "majors" - majors being the major insurance companies. So that's a fact - ... they could go to Cleveland and make more money than they make in the state of Alaska. Although I want you to know that your Division of Insurance is reporting that the insurance companies are making a lot of money here, and that's reported; I can show you those volumes ... and you should just take a minute to thumb through [them] because ... in 10 minutes you can see what their profits are and ... what kind of insurance their offering. And it's broken out by segments in the insurance industry, and one of those segments is medical malpractice.

[3:00:13 PM](#)

MR. DILLON, on the issue of whether there is a crises in terms of [the number of doctors practicing], offered his belief that there is a national crisis brewing, that according to reports regarding decisions made in the 1980s, it looks like there is going to be a national doctor shortage because of the way that medical schools "pushed out the doctors, or didn't push out the doctors in the '80s." He opined that doctors, if they want a big practice, will look at working in places like Houston, Los Angeles, and the big medical centers where "they can tie onto their careers and become the next leading [surgeons]." Therefore, one of the factors to keep in mind is that the state of Alaska has a small population and so it will be difficult to attract professionals whether they be doctors, lawyers, or engineers and architects.

MR. DILLON opined that although Alaska has fine physicians practicing in the state, the lack of neurosurgeons in some Alaskan communities - for example, Juneau - is just a fact of life for those who live here, that passage of SB 67 will not result in a neurosurgeon setting up practice in Juneau. He strongly suggested that the committee consider alternatives to

the bill, such as perhaps creating an insurance company, or at least studying the feasibility of it, before putting Alaska's doctors against Alaska's victims.

MR. DILLON relayed that according to information he is familiar with, doctors themselves have testified that approximately 98,000 people a year die as a result of medical malpractice, that one out three doctors say they or their family members have been the victims of preventable malpractice error, and that approximately 10 percent had some relationship to a family member who died. "Why would this legislature want to pit good doctors, who are trying to earn a living - albeit a very rich living - against the people who are the subject of their errors," he asked, and opined that there is not a professional in Alaska, be it a doctor or a lawyer, that once an error is made, won't own up to a mistake and make amends to the subject of that mistake.

[3:04:55 PM](#)

CHAIR McGUIRE relayed that when she was recently in Washington D.C., U.S. Senator Lisa Murkowski spoke to her of a woman from Alaska who is finishing up her medical residency and who told the Senator that she and her husband want to go home to Alaska and set up practices but won't because of the liability issue in Alaska. Chair McGuire relayed that the committee has looked at various surveys that indicate that medical students are looking at such issues when deciding where they want to set up practice.

[3:06:50 PM](#)

MR. DILLON, noting that Alaska already has caps on non-economic damage awards, opined that they don't affect liability one way or the other. The bill will simply make it impossible, for a select number of Alaskans, to get any form of recovery at all from the insurance industry because those Alaskans won't be able to afford [pursuing a claim]. With regard to the aforementioned soon-to-be physician that Chair McGuire said she'd heard U.S. Senator Lisa Murkowski speak of, he remarked, "The bottom line is, if she thinks that the liability here is going to be any different, in terms of the rules of evidence or the court procedure, she's wrong - flat wrong."

[3:07:34 PM](#)

MR. DILLON, in response to a question, clarified that after the director of Washington's Division of Insurance had the division

review the "medical malpractice issue" in the state of Washington, insurance companies were required to issue a rebate to doctors because they'd been overcharging the doctors for insurance coverage. He offered his belief that Alaska's Division of Insurance has the authority to do something similar.

REPRESENTATIVE GARA asked Mr. Dillon to submit any information he has from the Division of Insurance that he thinks might be helpful to the committee.

MR. DILLON agreed to do so, and suggested that the committee could also ask the Division of Insurance to testify.

REPRESENTATIVE GARA noted that Alaska doesn't have [medical] residencies to the same extent that states with medical schools do, and that a fair number of doctors tend to practice where they do their residencies or where they attend medical school. He offered his belief that in addition to creating an insurance pool, the legislature should fund the Washington, Wyoming, Alaska, Montana, Idaho Medical Education Program (WWAMI) program more and do anything else it can to increase the number of residencies available in Alaska.

[3:10:42 PM](#)

MR. DILLON pointed out that the aspect of competitiveness in the medical field is another issue to consider; there will be a limit to the number of physicians that small population centers can support, since the economic pie can only be sliced just so thin.

REPRESENTATIVE ANDERSON again raised the issue of placing a cap on attorney fees.

MR. DILLON opined that doing so would at least present the legislature with a clear target, adding, "If you want to go after the lawyers, go after the lawyers, but don't go after the kids and the moms and the elderly." In response to a comment, he said:

I'm not going after bad physicians here. I'm not going after bad insurance companies. Everybody has their place here. Everybody's pursuing their occupation in their chosen profession. What I'm talking about is the effect of what this body is doing on Alaskans.

MR. DILLON, in response to a question of whether he would support a cap on attorney fees, noted that that debate has been going on for about 15 years, and suggested that under certain circumstances, the issue of contingency fees is definitely open for debate. But that is not the issue that SB 67 addresses, he pointed out.

CHAIR McGUIRE noted that sometimes when legislation is being discussed, other issues are discussed as well in an effort to arrive at a possible solution.

[3:14:22 PM](#)

PATRICK LUBY, Advocacy Director, AARP Alaska, started off by saying that the AARP is sure that none of Alaska's health professionals get up in the morning thinking about how many people they want to hurt that day. However, [medical] mistakes do happen, even by the most skilled health professional. For this reason, the AARP believes that the legislature should focus on preventing future mistakes, that it should focus on error reduction rather than a reduction on [non-economic] damage caps. The tort system, he opined, encourages healthcare providers to cover up mistakes to avoid lawsuits, and does not encourage them to report errors and learn how to prevent them.

MR. LUBY opined that someone who is hurt by a medical error is entitled to fair compensation, but emphasized that it's more important to ensure that errors are reported in order to prevent future errors. He noted that older people with limited income potential based on life expectancy will receive less in economic damages than younger victims, and informed the committee that the AARP believes \$250,000 is too low a cap for non-economic damages. He also informed the committee that the Institute of Medicine (IOM) has proposed testing non-judicial, no-fault alternatives to the tort system for medical errors. If Alaska adopts one of the IOM's recommended alternatives, he predicted, it would foster fair compensation and error reduction, which should be the real goal of both consumer-oriented reform and the bill.

MR. LUBY explained that under the IOM approach, compensation would be based on "avoidability" of errors rather than on negligence, and there would be preset schedules for compensation, with reasonable limits, that may help stabilize malpractice premiums. He relayed that the IOM believes that mandating the reporting of errors and providing for prompt compensation payments would help experts find system-wide

[solutions] and improve patient safety. With fewer errors, the cost of compensating injured people would decline, and there would be fair and speedy compensation. He concluded by saying that the AARP believes that everyone would benefit from such.

3:16:59 PM

KATHY DALE relayed that she, her husband, and her family are victims of medical malpractice. On May 18, 2000, her husband, who at that time was 56 years of age, went to have rotator cuff surgery, but came out of what was supposed to have been routine surgery with a complex, severe brain injury due to the recklessness of a nurse anesthesiologist. As a result of this brain injury, her husband lost his short term memory, his cognitive abilities, his personality, and his ability to interact with people; in short, she lost her husband of 38 years, her children lost their father, and her grandsons lost their grandfather.

MS. DALE noted that she is a certified public accountant licensed by the State of Alaska, and as such she would address several aspects of the bill. She said that the increase in medical malpractice premiums that physicians experienced several years ago was the result of the steep drop in stock market values. Insurance carriers invest a portion of their reserves in the stock market, so when the value of these investments drop below the actuarially determined reserve requirement, the only way to make up this shortfall is by increasing insurance premiums. Everyone feels the brunt of this practice via increases in homeowners' insurance policies, automobile insurance policies, and liability insurance policies. The market has now recovered some of the value it lost, and insurance carriers' profits have increased; however, according to testimony from doctors, it appears that the insurance carriers have not yet reduced their premiums to reflect this change in market value.

MS. DALE explained that an insurance carrier can assess its risk pool with the existing \$400,000 cap just as easily as it can with the proposed \$250,000 cap. She noted that based on the Consumer Price Index (CPI) increase, the \$250,000 cap that California adopted in 1976 is worth at least \$820,000 in 2005 dollars. She went on to say:

There have been many changes in our lives, and we assumed many risks when we filed the suit. When my husband had rotator cuff surgery, we had planned to

retire in three years. My retirement has been put off because of our uncertain financial situation. I haven't heard ... any doctors say they were putting off their retirement because of insurance premiums. Just the contrary, they plan to retire earlier. My husband was 56 on the date of his surgery; we had savings and we owned our home. When we filed our medical malpractice suit, we took a substantial risk due to Rule 82 [of the Alaska Rules of Civil Procedure].

But we moved forward. When we filed the suit we did not know what had happened to Gene. We just knew it was devastating. Through the use of depositions, expert witnesses, and neurologists at the [Mayo Foundation for Medical Education and Research ("Mayo Clinic")], we were able to get a clear picture of what occurred. With a \$250,000 cap, we would not have been able to move forward with a suit. The cost of developing the case would have been too great to afford us any benefit even if we were successful at getting a settlement at the cap. Don't forget, we had to repay our health insurance carriers the medical payments made on Gene's behalf for his care after surgery; these were the subrogation claims.

There [are] ... existing [caps] of \$400,000 and \$1 million on non-economic damages. At my husband's age, non-economic damages were the only kind of damages we could claim. If you pass this proposed \$250,000 cap, you are robbing the citizens of Alaska of their day in court. Your constituents will not be able to press forward with suits due to the costs of securing expert testimony and help. Texas and California both have \$250,000 caps. The statistics coming from those states ... don't bear out what the insurance carriers and the medical professionals would like us to believe.

MS. DALE, in conclusion, offered to provide the committee with those statistics, and asked the committee not to lower the current caps any further, adding that she wishes she had the words to describe the daily emotional pain that she and her husband suffer as a result of what occurred.

[3:21:05 PM](#)

REPRESENTATIVE GARA asked what the depositions revealed.

MS. DALE explained that the depositions revealed that the nurse anesthetist had lowered her husband's blood pressure further than it should have been lowered by using different medications that had the synergetic effect of lowering blood pressure further than either would have done if used singly. In addition, the nurse anesthetist used too large a dose of those medications, and then stopped monitoring her husband's blood pressure.

3:22:18 PM

GEORGE D. RHYNEER, M.D., relayed that he had just returned from an American College of Cardiology (ACC) meeting at which he represented Alaska as a governor and at which one of the main topics was the difficulty patients in some states are having in finding a physician. Also discussed at that meeting was the difficulty some physicians are having in finding malpractice coverage in the states in which they practice. He said that in Alaska, he and his colleagues have been very fortunate in that they have been able to buy medical malpractice insurance at an affordable rate. Both of the companies that offer malpractice insurance in Alaska are physician owned and thus the cost of premiums exactly offsets the cost of doing business in Alaska; for example, any losses have been made up via premium increases.

DR. RHYNEER offered his understanding that insurance companies are required by law to keep "X number of million dollars in reserve for perceived losses in the future," and this money is usually invested in the stock and/or bond market. He offered his believe that although malpractice insurance rates are high, particularly for some medical specialties, physicians in Alaska can still afford to pay the premiums. He noted that a couple of years ago, there were two other insurance carriers offering medical malpractice insurance in Alaska, but those companies have since stopped doing business in Alaska.

DR. RHYNEER relayed that he and his colleagues feel that it is important to carry [medical malpractice] insurance so that they can "make do, and make up for, and recompense any damage that might occur under our hands." He added, "We feel like we have to carry a large amount of insurance; we carry [\$5 million] and \$7 million worth of insurance because accidents which occur to our patients generally are catastrophic, and we want to make sure that they have things done right for them." He mentioned that of the two insurance companies offering medical malpractice insurance in Alaska, only one is able to provide his firm with

the quantity of insurance coverage it wants. This has left him in the position of not knowing whether, should that one insurance company stop doing business in Alaska, he can continue his practice.

DR. RHYNEER mentioned that a similar situation did occur around the time that MICA was formed, and he had to send all of his patients that required heart surgery to Seattle; he predicted that such a situation could happen again. He opined that the legislature has control over the problem [purported by those in favor of the legislation] and can fix it. He elaborated:

We need to have a situation where insurance companies are happy to do business here. We need to have insurance so that physicians are happy and want to come here despite all the other disincentives that you've already heard about. We are in competition with areas all over the country for physicians ... despite the data that [Representative] Gara alluded to and brought out, which is actually the number of licensed physicians in the state - that is the number who have active licenses.

And actually, many of those don't practice in the state but rather come up here temporarily and work for a short period of time and then leave, or once had a license here, and then keep it up. If you actually look at that list, you'll see that many of the active license holders have addresses which are out of state, and ... a lot of those which are in state [are] no longer actively practicing. So the number of ... actively practicing physicians is probably one half of that number, and that number is much easier to obtain from the Alaska State Medical Association's [ASMA's] executive director, Jim Jordan, who can give you the number of people he actually has on a mailing list
....

DR. RHYNEER suggested that one way of figuring out if there are enough physicians in Alaska would be for legislators to ask their friends how easy it is to find a doctor, when was the last time they tried, and how long they had to wait for an appointment. He said that it is not easy to get an appointment in his office, and that he spends a lot of time trying to recruit new physicians. He opined that there is need for a legislative solution, and noted that daily his patients ask him

not to retire, though he would be forced to do so if he could no longer get insurance. He went on to say:

So we're talking here about the better of two goods, if you like. We think it's good to have insurance to take care of our patients in case there's an injury. We want to have the ability to take care of them. We also think it's absolutely 100 percent fair for a person who's been injured and who has some sort of horrible misery to face for the rest of their life [to] ... have no limit, whatsoever, on the amount of non-economic damages that they should receive. I mean, I couldn't even begin, and neither could you folks begin, to put a value on the loss of your parents, even, or the loss of a limb, or the inability to hold a grandson, or you name it - you can think of a million things for which money can't possibly recompense. ...

So we think that is a good that should be available to all, and we, I personally and all my physician associates, would dearly love to be able to provide that kind of recompense for [an] injured person who had severe non-economic damages. But by the same token, we have to have a legal environment, and a business environment, that allows insurance companies to continue to provide insurance for us to buy. And ... other states which have gone this route and produced a \$250,000 limit on non-economic damages have seen success in this particular endeavor. I don't think this is a panacea, this is not a long-term solution, but this is a short-term solution, and we have a short-term problem, and I think we need a solution, and you folks can provide it.

[3:34:03 PM](#)

CHAIR McGUIRE relayed that her father and many other physicians in Alaska spend a lot of time attempting to recruit new physicians to set up practice in Alaska.

DR. RHYNEER, in response to a question, reiterated that the ASMA keeps a list of the physicians who actually have an office, who are actually practicing, [in Alaska].

REPRESENTATIVE GARA asked Dr. Rhyneer to provide that information to the committee with an affidavit as to its validity.

DR. RHYNEER agreed to do so.

REPRESENTATIVE GARA said he would be providing the committee with a report that indicates that there are between 12 and 24 insurance companies underwriting [medical] malpractice insurance in Alaska. He asked Dr. Rhyneer if he'd researched whether any of those companies would provide him with medical malpractice insurance.

DR. RHYNEER said his firm has only been able to find NORCAL and a company called Medical Insurance Exchange of California (MIEC), both operating out of California, who were willing to underwrite [medical malpractice] insurance for his firm. He offered his belief that there is also what he called a "stock company" that underwrites insurance for one physicians' group in Juneau, and that there was another "fairly large" stock company that underwrote insurance primarily in Fairbanks, but that company has since stopped doing business in Alaska. He offered his understanding that the Division of Insurance maintains a list of insurance companies that have the authority to sell insurance in Alaska; however, although those companies may have the authority to sell insurance in Alaska, they are not doing so. In response to another question, he reiterated that only NORCAL was able to provide his firm with the amount of [medical malpractice insurance it needed.

REPRESENTATIVE GARA offered that another course of action, aside from adopting SB 67, would be to discuss the possibility of creating a medical liability insurance pool, and said he would be happy to work on such a project because although it might not be simple to accomplish, it could offer physicians the extra protection of having an alternative to the companies currently offering insurance in Alaska.

DR. RHYNEER offered his belief that physician would have no problem with that. He relayed that his business partner sat on the MICA board [of directors] and he sat on the NORCAL board [of directors], and so he was privy to the financial operations of those two companies and to the people that ran MICA until it was sold to NORCAL. Everyone heaved a sigh of relief, he remarked, when MICA was sold to NORCAL, because it would then be able to defend "defensible cases." He explained that when a physician-owned insurance company looks at the merits of a case, if it

thinks that the standard of care was not met, it settles the case, period; however, if a physician-owned company, after reviewing the case, thinks that the standard of care was met or thinks that there is still a question of whether the standard of care was met, it will defend the case. This is quite unlike what stock companies did in that that they tended to settle suits of either a small value or a large value if they thought that there was any risk of losing. He surmised that this practice by the stock companies resulted in a lot of suits being "won," but only because the companies were loath to risk any money pursuing those cases.

[3:42:50 PM](#)

CHAIR McGUIRE surmised, then, that with a physician-owned insurance company, those that make the decision to settle will ultimately bear the cost of doing so.

DR. RHYNEER concurred, but added that that cost ends up being small to them but large to the medical community or, in some cases, the entire country. In response to a comment, he said that physicians now have a greater incentive not to give in on suits when they don't think they did anything wrong in the case. This is because a physician who either loses or settles a case will get reported to the State Medical Board and the [National Practitioner Data Bank-Healthcare Integrity and Protection Data Bank (NPDB-HIPDB)]; if enough such reports are filed, then the State Medical Board investigates that physician. He noted that the Alaska State Medical Board is responsible for maintaining the quality of physicians and medical care in the state.

[3:44:29 PM](#)

REPRESENTATIVE GARA relayed that in the one medical malpractice case he took on, the local doctors refused to testify against the physician named in the suit, and although the insurance company was willing to settle the case because there was malpractice, it was offering an insulting amount. Therefore, he remarked, he is not confident that an insurance company will always settle a case when it should. He went on to say:

The other problem is that in many Alaska medical malpractice liability policies, one of the things that ends up costing the system so much is [that] the doctor has the right to veto. So the insurance company will say, "You know, we think you committed malpractice; you should pay up," [but] the doctor has

the right to say "No," because ... they don't want the mark of a malpractice settlement on their professional integrity. So in my own experience, and I'll go to my grave believing this, in a case of really bad malpractice, there wasn't that easy sort of settlement offer from the insurance company when there should have been. ... The whole idea that the [State] Medical Board will protect us - maybe we don't fund them very well, I don't why - but ... I brought [this case] to the [State] Medical Board, [and the State] Medical Board said they didn't see anything wrong with what the doctor did. And I'm angry about that to this day; ... I, frankly, don't think they do that great a job.

DR. RHYNEER said that generally suits arise when there is a difference of opinion, and so it is the job of a jury to arrive at a conclusion.

[3:46:57 PM](#)

REPRESENTATIVE KOTT asked whether there are technologies available that would assist in the prevention of errors.

DR. RHYNEER said that there are, adding that there has been a tremendous push lately to develop such technology.

REPRESENTATIVE KOTT also asked whether physicians are required to carry medical malpractice insurance.

DR. RHYNEER said no, and offered an example of a physician in Seldovia that doesn't carry medical malpractice insurance because his client base is not sufficient for him to be able to afford it. He mentioned that when the state formed its own insurance company, physicians were required to purchase medical malpractice insurance from that company in order to get a license to practice in Alaska, but "that caused a revolt among the physicians." He also mentioned that sometimes the larger hospitals require their doctors to carry medical malpractice insurance, and that sometimes a hospital will assist with that cost because the physicians can't afford to carry it on their own.

REPRESENTATIVE KOTT pointed out, however, that Dr. Rhyneer said in his opening remarks that affordable insurance is available in Alaska.

DR. RHYNEER clarified that when he used the term "affordable," he meant that insurance was affordable for the majority of physicians but not for those who are "subsistence" physicians or those who practice in small communities.

REPRESENTATIVE KOTT asked whether the Division of Insurance is involved in the rate setting of medical malpractice premiums.

DR. RHYNEER offered his belief that it is.

REPRESENTATIVE KOTT referred to Mr. Luby's testimony regarding the IOM and preset schedules, and asked Dr. Rhyneer to comment.

DR. RHYNEER characterized the IOM as a national think tank that published what he termed "highly suspect" data. The IOM is attempting to standardize methods and techniques with the goal of reducing errors, but its ideas and techniques are as yet untested, so it is not yet known how they will work. He offered his understanding that a lot of "schemes" meant to reduce errors have been tried but have been found to have very severe, negative, unintended consequences. He elaborated:

For instance, in New York City, about five years ago, they started to have a report card for heart surgeons. They thought: ... "Every year we'll put up ... the doctor's name, how many heart ... surgeries [he] did, and how many deaths [and complications he] had. ... This will really ... shake things up; from now on these surgeons will do a really good job." Well no one really understood the fact of the matter is that [a] heart surgeon can "dial in" his complication rate. It's really easy, because if you take patients who are in good shape [and] ... have simple problems ..., you can have a complication rate and a death rate of zero.

However, if you want to take on people who ... have a 50 percent chance of dying, ... [you] can turn up having a very high mortality rate ... [in] those report cards. Well, the New York City surgeons ... could see the writing on the wall and they weren't about to be the lowest guy on the totem pole. So in the subsequent years, the referral rate to the "Cleveland clinic," from New York City, went up 30 percent. ... So you can see you have to be very careful, when you decide to develop techniques and schemes and devices to improve quality, how that's going to affect [things]. ...

And this is where the IOM's recommendation comes into play; they recommended having mandatory reporting of errors. Well, in the hospitals, we do that, but right now that's protected in the state statute. So we can sit around ... [and] educate ourselves ... without the fear that every single one of those things which didn't turn out right ... [is] going to wind up in court. So mandatory reporting of errors is one of those things which may have huge, negative, unintended consequences, and that has not yet been tested.

[CSSB 67(JUD)(EFD FLD) was held over.]

ADJOURNMENT

[3:56:09 PM](#)

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:56 p.m.