

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

March 17, 2005

9:05 a.m.

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Charlie Huggins, Vice Chair
Senator Gene Therriault
Senator Hollis French
Senator Gretchen Guess

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 67

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

HEARD AND HELD

SENATE JOINT RESOLUTION NO. 10

Supporting the federal marriage amendment.

SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: SB 67

SHORT TITLE: CLAIMS AGAINST HEALTH CARE PROVIDERS

SPONSOR(s): SENATOR(s) SEEKINS

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|----------|-----|---------------------------------|
| 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

WITNESS REGISTER

Mr. Mike Hogan, Executive Director
Alaska Physicians and Surgeons
Anchorage, AK

POSITION STATEMENT: Testified in support of SB 67

Mr. Pat Luby
AARP
Anchorage, AK

POSITION STATEMENT: Commented on SB 67

Ms. Donna McCready
Alaska Action Trust
Anchorage, AK

POSITION STATEMENT: Opposed to SB 67

Mr. Michael Schneider
Alaska Action Trust
Anchorage, AK

POSITION STATEMENT: Opposed to SB 67

Ms. Kathy Dale
Anchorage AK

POSITION STATEMENT: Opposed to SB 67

Mr. Mike Powers
Fairbanks Memorial Hospital
Fairbanks, AK

POSITION STATEMENT: SB 67 is a necessary part of several systemic reforms that need to be considered

ACTION NARRATIVE

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at [9:05:31 AM](#). Present were Senators Hollis French, Charlie Huggins, and Chair Ralph Seekins.

SB 67-CLAIMS AGAINST HEALTH CARE PROVIDERS

[9:05:31 AM](#)

CHAIR SEEKINS announced SB 67 as the first item of business before the committee. He introduced a committee substitute (CS), which removes legislative findings.

SENATOR GENE THERRIAULT joined the committee.

SENATOR THERRIAULT moved to use Version \G as the working document. Hearing no objections the motion carried.

9:07:50 AM

CHAIR SEEKINS reiterated that the CS removes the findings section and shortens SB 67 to two pages.

9:08:26 AM

MR. MIKE HOGAN, executive director, Alaska Physicians and Surgeons, testified in support of SB 67. He said public access to doctors in Alaska is predicated on doctors getting medical malpractice insurance. Alaska is now down to only two carriers. Insurers see Alaska as an unfriendly environment in which to do business. If the state loses another carrier, present doctors would have to retire, move, or cut out high-risk procedures.

9:10:24 AM

DR. HOGAN said society and the Legislature have to recognize what is fair. In the auto insurance industry there are \$50,000 minimum requirements for coverage. In the workers' compensation system the most a disabled worker can claim is \$800 a month. It is arguable whether those two examples are fair, but as a society we have determined that is what we can afford. As for medical malpractice insurance, \$250,000 is a lot of money since lost wages and punitive damages would still be covered. The two insurance carriers in Alaska are California based. They will do constant evaluations for risk factors. It is critical to keep them and attract new carriers.

9:12:40 AM

SENATOR FRENCH asked DR. HOGAN whether the Alaska Physicians and Surgeons have done an analysis on what role fraud might play in the high price of insurance.

DR. HOGAN replied it has not. Premiums are based on the doctors' claims history. The ability to commit fraud is limited.

SENATOR FRENCH mentioned a news report last week from California about a group of physicians that were defrauding insurance companies.

DR. HOGAN clarified that medical insurance and medical malpractice insurance constitute separate claims. Fraud would not compute similarly.

CHAIR SEEKINS noted medical malpractice claims are normally adjudicated.

[9:15:47 AM](#)

CHAIR SEEKINS added if any fraud occurred it would be between the parties settling the claim.

SENATOR GUESS joined the committee.

SENATOR FRENCH voiced his concern about lowering the cap. He stated Alaska would be taking away from the people who are hurt the most.

DR. HOGAN presented the flip side and asked whether it is fair to all Alaskans to risk the healthcare system.

[9:18:57 AM](#)

DR. HOGAN further stated there are limits beyond which people can afford to do business and Alaska doctors have reached that limit.

SENATOR HUGGINS asked Dr. Hogan to explain how much money the representing attorney gets from the settlement.

DR. HOGAN informed him the injured person generally receives less than fifty percent. The rest of the settlement is eaten up by the system.

[9:20:36 AM](#)

SENATOR GUESS stated that during previous testimony, committee members have heard that a review panel process exists in statute that occurs prior to access to the court system. She said the solution presented seems to pit fairness to victims against access to health care instead of trying to figure out a different way to do business. She asked Mr. Hogan to comment on the review panel and why it isn't used prior to court, or why mediation isn't used often.

DR. HOGAN said if a plaintiff does not get the verdict it wants of the review panel, it ignores that opinion and goes to court anyway. It turns into another expense insurance companies have to go through.

[9:22:40 AM](#)

SENATOR GUESS noted for the record that attorneys have testified to the contrary. Previous testimony suggests other solutions are

out there and the truth is, the solution probably lies somewhere in the middle.

DR. HOGAN said they have talked about systemic changes beyond the scope of the bill. SB 67 is critical and will stop the bleeding. To heal the whole problem would require big changes, which takes time. If SB 67 passes it will be challenged in court. The appeals process takes between 3-6 years. During this time uncertainty will remain for the insurance carriers. They will have to decide whether to continue to do business in Alaska. A long-term fix will require a great deal of study.

[9:24:50 AM](#)

SENATOR GUESS asked Dr. Hogan to present some ideas in written form. She asked whether he has heard about other insurance companies entering the market and driving down rates.

DR. HOGAN responded the issue is not about rates. It is about access of insurance.

[9:25:45 AM](#)

SENATOR THERRIAULT said he wanted clarification on how the arbitration language works.

CHAIR SEEKINS commented any contract could have arbitration. It is common in large ticket items.

[9:28:03 AM](#)

CHAIR SEEKINS commented that 22 other states have a cap on non-economic damages.

[9:28:46 AM](#)

MR. PAT LUBY, advocacy director, AARP, testified the committee should realize that mistakes happen. The AARP believes the Legislature should focus on preventing mistakes and error reduction, not on damages. The current system encourages providers to cover up mistakes to avoid lawsuits rather than report errors. He said citizens who are hurt by a medical mistake are entitled to fair compensation. Errors should be reported so that others can learn from the mistakes. The AARP believes \$250,000 is too low for non-economic damages. The Institute of Medicine has proposed to the court system testing non-judicial no fault alternatives for medical errors. If Alaska would adopt one of the IOM recommendations, it would provide compensation and error reduction, which should be the real goal.

[9:30:47 AM](#)

MR. LUBY added that providers would be required to report errors and make prompt compensation payments. This method would result in fewer errors and overall costs would decline.

[9:31:25 AM](#)

CHAIR SEEKINS stated SB 67 does not suggest covering up medical errors.

[9:31:41 AM](#)

MS. DONNA MCCREADY, member, Alaska Action Trust, addressed Mr. Hogan's testimony regarding access to medical care in Alaska and said SB 67 denies Alaskans access to justice. Economists do not put a large amount of value on children and the aged.

[9:33:54 AM](#)

MS. MCCREADY stated she is uncertain as to what the problem is. The number of medical malpractice cases and payouts throughout the state has been steady. Mr. Hogan testified there is an infinitesimal amount of claims. She wondered why Alaska has not gone back to the Medical Indemnity Corporation Act (MICA). Alaska has always had a dominant carrier. She pointed out there has been no testimony from the insurance companies.

[9:36:04 AM](#)

MS. MCCREADY said, typically, medical malpractice attorneys charge up to 33 percent of recovery plus costs because of the risks. Verdicts are generally in favor of the physicians.

[9:37:57 AM](#)

SENATOR FRENCH commented 22 percent of California medical malpractice trials resulted in favor of the plaintiffs. He asked Ms. McCready whether it is the same in Alaska.

MS. MCCREADY responded that a smaller percentage comes out for the plaintiffs. It is very risky for a patient to take a claim to trial.

[9:39:30 AM](#)

CHAIR SEEKINS asked Ms. McCready the number of medical malpractice cases she has tried.

MS. MCCREADY responded one.

CHAIR SEEKINS asked Ms. McCready the number of medical malpractice claimants she has represented.

MS. MCCREADY responded less than 100. She added she receives many calls about medical malpractice claims and takes on approximately 2 percent. Even if a case has merit, it is sometimes impossible to prove.

[9:40:47 AM](#)

MS. MCCREADY said she investigates 25 to 50 percent of the cases she takes on and then would dismiss those she has determined cannot be won.

[9:42:51 AM](#)

MS. MCCREADY advised the committee they could reference the State Medical Board to find information on physicians who have performed surgeries recklessly.

[9:44:56 AM](#)

MR. MICHAEL SCHNEIDER stated in the history of Alaska there have been only 15 verdicts for plaintiffs in medical negligence cases. It is not a huge problem in Alaska. He said SB 67 and the goals of the Legislature are a poor fit. The insurance industry accounts for 10 percent of the gross domestic product. That industry would be the sole benefactor of SB 67.

[9:47:40 AM](#)

MR. SCHNEIDER added that SB 67 would give away the rights of Alaska citizens to ask a jury for a fair settlement. SB 67 would give the farm away to an unregulated industry. The fix proposal of forming an insurance pool is proven.

[9:49:53 AM](#)

MR. SCHNEIDER added none of the statistics support the ethics of capped legislation. He claimed if SB 67 passes, physicians would face the same crisis in the future because it's a cyclical phenomenon driven by fluctuations in the insurance industry's return on reserve income. It has nothing to do with premiums and claims.

[9:51:54 AM](#)

SENATOR HUGGINS asked Mr. Schneider the name of the insurance pool formed by the attorneys.

MR. SCHNEIDER answered the Attorney Liability Protection Society (ALPS).

SENATOR HUGGINS questioned how many suits were filed against him in the last two years.

MR. SCHNEIDER responded none and said, in fact, he has had none over the last 29 years and nine months.

SENATOR HUGGINS suggested Mr. Schneider presented a case of apples and oranges. He said a number of doctors have had suits brought against them yet Mr. Schneider should not be concerned about being sued.

MR. SCHNEIDER respectfully disagreed and said Senator Huggins might completely misunderstand the playing field. He explained that a plaintiff's attorney must evaluate a case from the standpoint of what a jury will think. He stated, "Attorneys, I am sad to report, are up there with car salesmen and - no offense - politicians and you guys have all read the same studies I have."

CHAIR SEEKINS jested, "Mr. Schneider, this is Chairman Seekins. I am both a car salesman and a politician..."

[9:54:16 AM](#)

MR. SCHNEIDER stated attorney malpractice claims are easier cases than medical malpractice claims.

[9:55:19 AM](#)

CHAIR SEEKINS stated for the record he has looked at the MICA program and has spoken with Senator Robin Taylor at length. He has looked at the structure of both insurance companies, which are both basically insurance pools. The MICA system has not escaped the view of the Legislature.

[9:57:59 AM](#)

CHAIR SEEKINS asked Mr. Schneider to explain the problem with capping.

MR. SCHNEIDER said it denies the most seriously and unfairly injured persons their constitutional right to have a jury of their peers review their claims. Denying that essential freedom would bring the state nothing in return.

[9:59:58 AM](#)

CHAIR SEEKINS asked Mr. Schneider what falls under the category entitled "costs."

MR. SCHNEIDER informed the committee that expert testimony for both parties is required to debate the case. Costs include fees for the expert witnesses, copies of documents, airplane tickets, court recorders and more. He said the amount can be significant

and noted that his out-of-pocket cost for one-half of a deposition in one case cost \$45,000.

MR. SCHNEIDER explained that if he has to retain an expert that would be a cost. Document copies are costs. Airplane travel to talk to a witness would be a cost.

10:01:41 AM

CHAIR SEEKINS asked whether costs include everything other than the direct legal expense.

MR. SCHNEIDER said the fee is for the value of the time spent by his staff, an expert, and his own time.

10:02:33 AM

CHAIR SEEKINS asked, if Mr. Schneider charged \$200 per hour, what that pays for.

MR. SCHNEIDER said on the defense side, people who represent doctors that are sued charge for everybody. Support staff, attorneys, and out-of-pocket expenses are billed out of the rate. On the plaintiff's side, the client can't afford to help with many of those costs so the plaintiff's attorney gets paid for his time and his overhead by the percentage fee. His direct litigation costs associated with that file are an additional cost. If he charges one-third of the gross recovery, that covers his fee, the cost of his paralegal assistant, his secretary, and his overhead cost. If he has a specific expense, such as obtaining an expert witness that would be an additional amount of money taken out of his client's gross recovery if he is successful.

10:04:21 AM

CHAIR SEEKINS said Mr. Schneider mentioned a \$75,000 recovery, and asked how much he took.

MR. SCHNEIDER said that was an interesting case that illustrates the problem. The person he represented was terminally ill with Alzheimer's disease. She suffered severe burns by an act of abject medical stupidity. He took the case because the case made him very angry. He tried to settle the case for \$75,000 but the other party would not settle. He took the case to court and won. His out-of-pocket costs amounted to \$25,000. In order to give the family half of that, he reduced his fee. He said that illustrates the problem in which one can see injustices but economically cannot make them fly.

[10:05:54 AM](#)

MR. MIKE POWERS, administrator, Fairbanks Memorial Hospital, told members this is an extremely difficult issue. He cautioned members that it is important to remember this matter does not pertain to gross negligence, incompetence, or poor performance, whose victims surely must be compensated fairly. He indicated that studies in states with a \$250,000 cap show the need to explore this issue as well as other systemic issues. Voters in Texas recently enacted a \$250,000 cap, which has resulted in a 17% decrease in rates. The general sense is that access issues are close to being addressed as well. In California, the \$250,000 cap has resulted in the highest reported rate for an OB GYN being \$89,953. In Illinois where the state supreme court recently struck down caps, the highest rate was \$230,000.

[10:08:11 AM](#)

MR. POWERS noted that physicians in Nebraska pay some of the lowest premiums in the country. That state credits tort reform, which was enacted in the 1970s.

SENATOR FRENCH asked Mr. Powers if Nebraska has the lowest premiums in the nation.

MR. POWERS said that is correct.

SENATOR FRENCH asked whether Nebraska has caps.

MR. POWERS said Nebraska does have caps.

SENATOR FRENCH noted that the January 2005 chart distributed earlier does not list Nebraska.

MR. POWERS said that could be correct but he added that other tort reforms dating back to the 1970s have been important.

[10:09:34 AM](#)

MR. POWERS said in addition, Pennsylvania, with its \$250,000 cap, has reduced losses and defense costs by 18%. He said the issue of caps around the country is very important to creating additional access for physicians that is conducive to practice. Fairbanks currently has a shortage of ten internal medicine physicians, four psychiatrists, three OBGYNs, two cardiologists and two ophthalmologists. Fairbanks is undergoing an aggressive recruiting campaign but it has no active leads for internal medicine physicians. He pointed out that the Illinois Senate Judiciary Committee took this same issue up two weeks ago. That committee's objective was to compute the reduction of medical

malpractice in loss expenses that would result from capping non-economic damages. Its consultants evaluated reductions for physicians in hospitals. They found that with the \$250,000 cap, a reduction in losses of 24 percent in New York, 17 percent in Florida, 15 percent in Wyoming, and 11 percent in Pennsylvania. He offered to pass that study on to members.

10:12:19 AM

MR. POWERS said regarding Senator Guess's question about whether this is an issue of fairness against creating access, he is having a hard time trying to get positions on that question. He asked members to carefully consider the study and the \$250,000 as an important part of a systemic fix.

SENATOR GUESS said Mr. Hogan said earlier that this is not about rates but about access, yet a lot of the statistics have been about rates going down rather than access. She asked him whether the recruitment problem is about rates and/or access.

MR. POWERS said it is both. He noted Fairbanks Memorial Hospital recruits potential applicants who are concerned about medical malpractice insurance. There is no single solution. If rates dropped by 50 percent, there would not be a flood of applicants.

10:14:26 AM

SENATOR GUESS asked Mr. Powers if he has had any conversations with insurance companies that say they will do business in Alaska if it caps damages. She said her concern is that the Alaska market is just too small.

MR. POWERS said he has not talked with them.

SENATOR THERRIAULT said with regard to attracting doctors, he asked what is happening as far as the number of applicants going through medical schools in the nation.

10:15:45 AM

MR. POWERS said the number is holding steady, but the concern is that lifestyle is very important to younger physicians. They want a work environment that is conducive to raising families. He noted that making Alaska attractive to those who might not first think of Alaska is very important in recruitment efforts.

SENATOR THERRIAULT said in regard to rates, information in members' packets speaks to insurance rates during the 1980s and 1990s. Premiums actually went down because Alaska was very competitive. New entrants to the market were pricing the

insurance product below what was reasonable. There was some talk of a shakeout in the market and that rates would become more realistic. He asked what kind of history Fairbanks Memorial Hospital has with regard to premiums paid by the hospital and its doctors.

[10:17:51 AM](#)

MR. POWERS said the Fairbanks numbers indicate a tremendous run up in the late 1980s and early 1990s, but the rates flattened in the mid-1990s because Fairbanks was self-insured and had reserves. During the last 5 years, malpractice insurance has increased about 276 percent.

SENATOR FRENCH asked about the effect of inflation and its upward pressure on costs. He referred to the Rand study and asked him to speak to the effect of inflation on California's \$250,000 cap in the 1970s and whether patients should be able to index their claims for inflation.

[10:19:54 AM](#)

MR. POWERS thought allowing patients to do so seems reasonable. Michigan has indexed premiums to inflation and its non-economic cap is now over \$350,000. The Michigan State Medical Society is very concerned about it so it is looking at expert witness standards and other mechanisms. He said that to create access a reasonable cap level is necessary. He also believes some type of index is important.

CHAIR SEEKINS asked how long he has been with the hospital.

MR. POWERS replied 19 yrs in July.

CHAIR SEEKINS asked if he has been involved in medical malpractice lawsuits.

MR. POWERS said yes.

CHAIR SEEKINS asked how many.

[10:21:25 AM](#)

MR. POWERS said about 5-10 legal issues arise each year. More recently, many of those cases would be characterized as nuisance cases.

CHAIR SEEKINS asked how many of those have gone to court.

MR. POWERS said about 25%.

CHAIR SEEKINS asked if the hospital usually tries to settle the cases out of court.

MR. POWERS said his opinion over the last five years has been to not settle because the hospital has to draw a line in the sand. Somebody has to say no and take a tougher stand so the hospital has absorbed some additional costs.

CHAIR SEEKINS asked if the ones the hospital takes to court are the ones that have no merit.

MR. POWERS said that is correct. If a case does have merit, the hospital attempts to work with the individual.

[10:23:17 AM](#)

SENATOR FRENCH asked whether the cases go to court because they have no merit or because the hospital just can't come to terms to settle.

MR. POWERS said the answer is not black and white. Some cases have absolutely no merit. In the past year, the hospital has spent \$35,000 defending something with absolutely no merit and the decision was made in 15 minutes. He said the recent increase in the level of nuisance lawsuits has been very noticeable.

SENATOR FRENCH asked his experience with the Fairbanks juries and whether they typically shell out money against the hospital.

MR. POWERS said the Fairbanks juries tend to be tough.

[10:24:33 AM](#)

SENATOR GUESS asked Mr. Powers his opinion of the current review panel and whether it works.

MR. POWERS said he did not have an opinion.

CHAIR SEEKINS said he noticed a member of the review panel is paid a maximum fee of up to \$150 per day. He asked if any doctor could be hired for \$150 per day.

MR. POWERS said every hospital in the state is concerned about what they are doing to pay physicians for sharing medical staff departments, for taking emergency room calls and other things. The burden on physicians is incredible. He said many physicians are advising their children against moving into the medical field because of the onerous regulatory environment. Physicians

must be in their practices taking care of patients in order to earn a reasonable living.

10:26:09 AM

CHAIR SEEKINS said one wouldn't find a lot of volunteers to review medical malpractice cases.

MR. POWERS said it would be very difficult to find such volunteers.

10:26:34 AM

MS. KATHY DALE, Anchorage, testified in opposition to SB 67. She was testifying on behalf of her husband and other family members who are victims of medical malpractice. She said SB 67 will not harm her family but it will harm future victims and constituents. She said the only reason she found out about her husband's permanent brain damage and the cause was because she was found an attorney to take her case. She found out what happened to her husband by listening to expert witnesses and testimony. She cautioned that lowering the cap would protect negligent doctors. SB 67 will not help bring qualified physicians into the state and it will not lower medical malpractice premiums. She reminded members that Alaska already has a cap of \$400,000 on non-economic damages. Lowering the cap will prevent lower income people from being able to file suit. It will keep Medicaid, Medicare, and PERS from recovering medical costs because suits will never be brought. She said that people have already told members how much the \$250,000 cap established in 1976 is worth in current dollars. She noted that although the premiums have gone down in California that is due to the voters and Proposition 103.

10:29:43 AM

SENATOR THERRIAULT asked CHAIR SEEKINS if the existing \$450,000 cap is an absolute cap or if the amount could be higher under certain circumstances.

CHAIR SEEKINS said the cap can be up to 1 million for a severe injury, which was loosely defined in a recent Supreme Court case as something that would cause embarrassment. He said that is, therefore, a soft cap. This would establish a hard cap.

SENATOR FRENCH asked for the citation of that decision.

CHAIR SEEKINS did not have it with him but said the case was not a medical malpractice case but a tort case in Western Alaska. A woman slipped in a shower in a community center. She is now bow-

legged in one leg and reverse bow-legged in the other leg. The court decided the word "severe" is not defined in statute so the court loosely defined it as anything that would cause embarrassment.

[10:32:04 AM](#)

CHAIR SEEKINS apologized for the late start of the meeting, which prevented those wishing to testify from doing so. He would have staff contact those people about the next meeting.

SENATOR THERRIAULT asked Chair Seekins to distribute copies of the case he cited for members and for the study about research done in different states.

CHAIR SEEKINS said he would investigate getting that information.

SB 67 was held in committee.

There being no further business to come before the committee, Chair Seekins adjourned the meeting at [10:33:41 AM](#).