SB

377/532 File #3

TORT REFORM

(BILLS, FISCAL NOTES, Amendments)

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	4/10/86	1:30 pm
" "	4/15/86	8:00 Am
" "	4/17/86	8:00 Am
" "	4/17/86	1:30 pm
" "	4/22/86	8:00 Am
" "	4/24/86	8:00 Am
" "	4/25/86	8:00 Am
" "	4/26/86	8:30 Am
" "	4/28/86	8:00 Am
" "	4/29/86	8:00 Am
" "	5/2/86	8:00 Am.
" "	5/3/86	9:00 Am
" "	5/5/86	1:30 pm
" "	5/6/86	8:00 Am
" "	5/6/86	7:00 pm
" "	5/7/86	8:00 Am
" "	5/7/86	1:30 pm

STATE OF ALASKA
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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

Joint House Labor & Commerce
And House Judiciary committee

2-25-86 1:15pm

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CSHB 532 (L&C)
Title : An Act Relating to Tort Reform
Sponsor : _____
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : Alaska Court System
BRU : Trial Courts
Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		80.7	80.7	80.7	80.7	80.7
TRAVEL		6.2	6.2	6.2	6.2	6.2
CONTRACTUAL		721.8	721.8	721.8	721.8	721.8
SUPPLIES		1.0	1.0	1.0	1.0	1.0
EQUIPMENT		6.7				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		816.4	809.7	809.7	809.7	809.7
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND		816.4	809.7	809.7	809.7	809.7
FEDERAL FUNDS						
OTHER						
TOTAL		816.4	809.7	809.7	809.7	809.7

POSITIONS :

FULL-TIME		2	2	2	2	2
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Karla Forsythe/Robert G. Fisher Phone : 264-8215
Division : Alaska Court System Date : 4/9/85

Approved by Commissioner : Arthur H. Snowden, II Date : 4/9/85
Agency : Alaska Court System

Distribution (by Agency preparing fiscal note) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

10/25/85

CSHB 532 (L & C) Fiscal Note Narrative

This legislation impacts the court system in two areas: expanded judicial workload and mandatory arbitration.

Expanded Judicial Workload

The presiding judge for the third judicial district anticipates that new procedures incorporated in this bill (such as hearings to determine whether defendants who have defaulted on periodic payments should be held in contempt and the amount of related damages which should be assessed) will increase the court's workload by 20% for each trial. This estimate also includes judge time expended on additional litigation which will result from attempts to transfer proportional liability to persons who have signed releases before trial, and litigation to resolve interpretation questions with the legislation. Also, more cases will go to trial because of diminished incentives to settle resulting from the prohibition on the award of Civil Rule 82 Attorneys Fees.

It is anticipated that the increased workload could be handled statewide by funding the equivalent of a pro tem judge. Pro tem funding is less costly than funding new judge positions because salary and benefits for retired pro tem judges are significantly lower. Additionally, since these judges are not permanently assigned to one court location, normal space and staffing requirements are avoided.

The provisions of this legislation which establish new procedures for the court come into play only when a case goes to trial. According to figures provided by the Anchorage trial court, approximately 5% of the cases filed go to trial, resulting in 105 personal injury trials statewide.

It is estimated that a personal injury trial averages two weeks. The total number of personal injury trials multiplied by two weeks of a judge's time total 210 judge weeks.

The estimated 20% additional judicial workload attributable to these expanded proceedings totals 42 judge weeks. Since a standard judicial work year averages 40 work weeks (excluding holidays, vacation and training), it is estimated that one judge would be required to process the additional statewide workload.

In order to avoid duplicative hearings, the court system favors binding arbitration rather than the option of de novo court trials. In the event that this legislation is not amended to provide for binding arbitration, the court system assumes for purposes of this fiscal note that the court would be required to bear the cost of arbitrators for those parties who are unable to afford this expense. It is estimated that 1216 personal injury cases statewide would be subject to the mandatory arbitration provision because they fall under $75,000. It is assumed that a third of the parties will not be able to afford the expenses of arbitrators. Thus, the court system will be required to bear these expenses in 401 cases.

Assuming an arbitration lasting 12 hours and an estimated average hourly compensation rate for the arbitrator of $150, the cost of an arbitration totals $1,800. The estimated total cost of an arbitrator for all cases under $75,000 is $721,800. Additionally, the court system assumes that for parties in outlying rural areas who are unable to afford the costs of arbitrators, it will be less costly to fly these persons to central urban areas rather than to fly arbitrators to the outlying areas and pay for their room and board. The additional air fare and per diem costs total $6,155. Based on these assumptions, the total costs of mandatory arbitration is $727,955.

ALASKA COURT SYSTEM

CSHB 532 (L & C) - TORT REFORM

FISCAL IMPACT

Personnel:

	Salary	Benefits	Total
Pro Tem, Superior Court Judge (PFT, using fully-vested retired judge) (See Schedule #2)	$19,332	$26,779	$46,111
In-Court Clerk (PFT, 12B)	25,740	8,863	34,603
Total Personnel			80,714
Travel costs for indigent bush parties in mandatory arbitration cases. (See Schedule #3)			6,155
Contractual cost of arbitrators for indigent parties in mandatory arbitration cases. (See Schedule #3)			721,800
Supplies			1,000
Equipment: (one-time items)			
New employee equipment - office furniture and reference materials			6,759
Total FY 87 Cost			$816,428

Schedule #2

ALASKA COURT SYSTEM

ESTIMATION OF JUDICIAL RESOURCES
NEEDED TO PROCESS INCREASED WORKLOAD

CSHB 532 (L & C) - TORT REFORM

	Anchorage	Rest of State	Total
Number of civil damage cases (a)	1,458	638	2,096
Estimated percentage of cases going to trial	5%	5%	5%
Estimated number of trials	73	32	105
Estimated length of trial in weeks	2	2	2
Estimated judicial time in weeks	146	64	210
Estimated workload increase from legislation	20%	20%	20%
Estimated additional judicial workload in weeks	29	13	42
Estimated average number of work-weeks in judicial year (b)	40	40	40
Estimated number of judges needed to process additional workload	0.73	0.33	1.05

Notes:

(a) Based on FY 85 case filings. All civil damage case filings assumed to be personal injury cases.

(b) Estimated number of work-weeks, net of holidays, vacation and training.

Schedule #3

ALASKA COURT SYSTEM

ESTIMATED FISCAL IMPACT OF MANDATORY ARBITRATION

CSHB 532 (L & C) - TORT REFORM

	Anchorage	Rest of State	Total
Number of civil damage cases (a)	1,458	638	2,096
Estimated percentage of cases under $75,000	58%	58%	58%
Estimated number of cases under $75,000	846	370	1,216
Estimated percentage of indigent parties	33%	33%	33%
Estimated number of cases involving indigent parties	279	122	401
Estimated average length of arbitration hearing in hours	12	12	12
Estimate average hourly rate of arbitrator	$150	$150	$150
Estimated average cost of each case	$1,800	$1,800	$1,800
Estimated total cost of arbitrators	$502,200	$219,600	$721,800
Estimated travel cost for indigent parties living in bush areas. (See Schedule #4)	$0	$6,155	$6,155
Estimated total cost of mandatory arbitration	$502,200	$225,755	$727,955

Notes:

(a) Based on FY 85 case filings. All civil damage case filings assumed to be personal injury cases.

ALASKA COURT SYSTEM

ESTIMATED TRAVEL COSTS FOR INDIGENT BUSH PARTIES

CSHB 532 (L & C) - TORT REFORM

Bush Courts	Number of Case Filings	Percent Under $75,000	Number of Cases Under $75,000	Percent Indigent Defendants	Number of Indigent Cases	Air Fare to Nearest Urban Court (a)	Estimated Air Fare Cost	Estimated Per Diem Cost (b)	Estimated Total Travel Cost
Barrow	5	58%	3	33%	1	$500	$500	$315	$815
Bethel	30	58%	17	33%	6	302	1,812	1,680	3,492
Kotzebue	5	58%	3	33%	1	426	426	280	706
Nome	6	58%	3	33%	1	426	426	280	706
Valdez	6	58%	3	33%	1	156	156	280	436
							Total Cost		$6,155

Notes:

(a) Bush courts served by urban courts:

Barrow served by Fairbanks
Bethel served by Anchorage
Kotzebue served by Anchorage
Nome served by Anchorage
Valdez served by Anchorage

(b) Estimated to require three and one half days of per diem.

Trial Courts
State of Alaska

THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA 99501

GOLDEEN GOODFELLOW
Assistant Area Court Administrator/
Clerk of Court

(907) 264-0440

Memorandum

To: Karla Forsythe
Staff Counsel

From: Goldeen Goodfellow
AACA/Clerk of Court

Re: Personal Injury Statistics

Date: April 9, 1986

We again went through all of the Case Characterization Forms which we have in LeEllen's office at this time. They picked out the personal injury cases and put them into categories of (1) $75,000 or less, (2) more than $75,000 and (3) no amount stated. They looked at a total of 203 Case Characterization Forms for personal injury cases. The breakdown is as follows:

$75,000 and under - 118 cases - 58.1%

more than $75,000 - 61 cases - 30.1%

amounts not stated - 24 cases - 11.8%

If you want me to, I can continue to monitor the Case Characterization Sheets as they come in and add to the above figures.

cc: Douglas J. Serdahely, Presiding Judge
Albert H. Szal, Area Court Administrator

Pouch V
Juneau, Alaska 99811

Alaska State Legislature

House of Representatives

Phone:
(907) 465-3892

Labor and Commerce Committee

TO: Members House Judiciary Committee
FR: Sid Billingsley, Comm. Aide, HL&C
DT: 4/7/86
RE: Table of contents HB 532

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1. Sectional of latest draft
2. Fiscal note
3. Latest draft of bill
4. Copies of each draft of bill
5. Amendments offered (those with blue dots were included)
6. White Paper on Insurance Capacity crunch, South Carolina
7. Arbitration information, AS 09.43.190
8. Memo from Rep. Rieger re collateral sources
9. Letter from Doug Pope re cap on noneconomic damage awards
10. Copy with notes of each civil rule amended in bill
11. Law Review article, Collateral Sources
12. Rand Institute study on arbitration
13. Various state codes re arbitration
14. Washington State's bill on tort reform
15. Definitions from Black's

NB: There is a book, yet to be published, on attorney fees in the U.S. It is by Bill Eldridge, Director of Research Division of Federal Judicial Center, Wash., D.C. (202)633-6344. In it is a chapter by Allen S. Tomkins called State's Taxation of Attorney Fees: The Alaska Program. Essentially, Rule 82 is being used as a model for attorney fees rules in the U.S. I am working on getting a copy of that chapter.

Pouch V
Juneau, Alaska 99811

Alaska State Legislature

House of Representatives

Phone:
(907) 465-3892

Labor and Commerce Committee

TO: Members, House Labor & Commerce Committee
FR: Sid Billingslea, Committee Aide
DT:4/4/86
RE: HB 532 Sectional analysis

The following is a sectional analysis of the latest draft of HB 532. I have excluded policy statements and background information.

.010 Limit and cap on noneconomic damages: Awards shall not exceed 25% of the present value of the amount awarded for economic damages, and in no cases shall the amount exceed 500,000 dollars.

.011 Defines noneconomic damages.

.020 Punitive damages: Raises the burden of proof from current "preponderance of evidence" to "clear and convincing" - the highest standard of proof in civil law. 50% of punitives go to the plaintiff, 50% to the state general fund. Precludes the state from joining a suit for damages.

.025 Damages resulting from intoxication, or in commission of a felony: If a claimant was legally under the influence of drugs or alcohol at the time of injury or death, and if he contributed more than 50% to that harm, he is barred from any recovery. The same applies if the claimant was engaged in the commission of a felony, if the felony was causally related to the injury or death. Nothing in this section is intended to bar the claimant's rights under 42USCsec.1983, the Civil Rights Statute.

.030 Itemized verdicts: Requires a jury or court to divide noneconomic and economic damages and itemize them.

.035 Periodic payments: Where the future damages in a personal injury case exceed 50 thousand dollars the court may require periodic payments to be scheduled, if it is in

the best interest of the party. The fund allocated for the total future damages award would be placed in escrow or trust.
(b) The remaining payments go to the judgment creditor's estate upon his death.
(c) Costs of structuring periodic payments are included in the award to the claimant.
(d) Allows for modification if unanticipated medical expenses arise.
(e) If the judgement debtor displays a continuing pattern of nonpayment, the court may hold him in contempt and order him to pay any damages resulting from his failure to pay, including costs and attorney fees.
(f) If a judgment debtor fails to pay in a timely manner, the judgment creditor may ask the court to order the rest of the periodic payments to be made in a lump sum. The lump sum would not be reduced to present value, and interest may be awarded.

.040 Verification of Claims: Every pleading entered by either the plaintiff or defendant shall be verified. Requires element of intent.

.045 Limits liability of directors, officers and superintendents of non profit corporations, public and private hospitals and school districts to gross negligence and to acts or omissions outside the scope of duty.

.050 Effect of contributory fault. The percentage of fault for which the plaintiff is to blame is reduced from the award, but does not bar recovery.

.055 Collateral benefits: After the award is rendered the defendant may introduce evidence of nonsubrogated benefits received by the plaintiff, which may be deducted from the award. The plaintiff may in response introduce evidence of the cost of the collateral benefits received by him; these may be offset from the amount credited to the defendant. Plaintiff may also admit costs of actual attorney fees which exceeded the amount awarded by the court.
The defendant may not introduce evidence of benefits which are subrogated, life insurance benefits or gratuitous benefits.

.060 Apportionment of damages: Factfinder determines the percentage of fault to each party. Factfinder may treat two parties as a single party in a master-servant, principal-agent relationship also allows two or more persons to be treated as a single person if the cause and the separate acts of each person cannot be distinguished. Example: A&B independently start fires. The fires burn, join, and destroy plaintiff's property. Each fire itself would have destroyed the property, A&B are each 100% at fault. Only 100% may be collected as damages. The

factfinder may hold each defendant jointly liable for 100% of the damages. This is the classic joint liability situation.
(c) Court states each party's share of fault and obligation to pay the award.
(d) Each party is jointly and severally liable for damages, except if a party is under 50% at fault he may be held responsible for no more than twice that percenatage of the award, should there be insolvent defendants, or defendants who cannot pay their entire share.
Example 1: A&B are sued. A is held 10% at fault, B 90%. B has money and can pay his amount. A pays 10% and B 90%
Example 2: same, only B cannot pay all of his portion. A's 10% is doubled, and A is responsible for 20% of the total.
Example 3: If A is 51% or more at fault and B cannot pay, A pays total award.

.070 Effect of release: When a party is released from the suit for whatever reason, the dollar amount of that release is deducted from the award.

.900 Defines fault

09.10.075: Actions under $75,000 must be arbitrated before resorting to the courts.

.065 Offers of judgment: Up until 10 days before trial a party may offer to settle. If the offer is not accepted, and if the offeree does not better the offer in trial, the offeree is penalized by either adding (if the offeree is the defense) or subtracting (if the offeree is the plaintiff) 5% interest to the award per year. The amount is in addition to the statutory percentage. The interest penalty dates back to the occurrence.

.43.110 Confirmation of award

.160 Allows 60 days to file appeal from arbitration for a trial de novo.

.55.548 damages are awarded under principles of common law.
.60.010 Attorney fees: Except where statute authorizes payment of attorney fees, the Supreme Court shall determine by rule or order what fees and costs shall be awarded the prevailing party in a case. But--unless authorized by statute or agreement between parties attorney fees may not be awarded in a civil case. Abolishes Civil Rule 82, by the Supreme Court, authorizing payment of attorney fees.e

.60.035 Costs and Attorney fees for arbitration appeal: If a party appeals from arbitration and does not better his lot by 10% over (or under) the arbitration award, he is to pay the prevailing party's actual costs and fees.

A new section has been added which would enable a party to petition the court for review of the fees that party paid its attorney for reasonableness. Establishes certain criteria the court may consider in its review. Remaining sections grant and restate jurisdiction of the courts and note civil rules amended by the bill.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST
Bill/Resolution No.: CSSSHB 532 L&C
Title: An Act Relating to Civil Actions
Sponsor: Cotton, Binkley, Collins, et al.
Requestor: Navarre
Date of Request: April 4, 1986

FISCAL DETAIL
Agency Affected:
BRU:
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	-0-	(306.0)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)
MISCELLANEOUS						
TOTAL OPERATING	-0-	(306.0)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER	-0-	(306.0)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)
TOTAL	-0-	(306.0)	(658.0)	(1,182.0)	(1,812.0)	(2,514.0)

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary The final benefit is impossible to accurately project, given that it will only affect liability claims not yet incurred. Based on the State's past liability claims experience, we project a 20% reduction in estimated ultimate loss and loss expense per fiscal year. The attached projection details the calculations using the State of Alaska's actuarial experience.

Prepared By: Don Hitchcock
Division: Risk Management
Phone: 465-2180
Date: April 7, 1986

Approved by Commissioner: Eleanor Andrews
Date: 4/7/86
Agency: Department of Administration

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Rev. 11/8/85

8/9K1/0407-10/2

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill No. CSSSHB 532 L&C

CASH FLOW SAVINGS ESTIMATED BY FISCAL YEAR

		YEAR OF OCCURRENCE					
		1986	1987	1988	1989	1990	1991	TOTAL
	FY 86	-0-						
	FY 87		306.0					306.0
YEAR OF SAVING	FY 88		274.0	384.0				658.0
	FY 89		360.0	342.0	480.0			1,182.0
	FY 90		336.0	448.0	428.0	600.0		1,812.0
	FY 91		252.0	420.0	558.0	534.0	750.0	2,514.0
	FY 92			316.0	526.0	698.0	668.0	
	FY 93				394.0	656.0	872.0	
	FY 94					492.0	820.0	
	FY 95						616.0	
	Future		874.0	1,092.0	1,366.0	1,706.0	2,132.0	
	TOTAL		2,400.0	3,000.0	3,750.0	4,686.0	5,858.0	

These represent estimated future payments pattern over a twelve year payout period, i.e., each year.

12 months	12.8%
24 months	11.4%
36 months	14.9%
48 months	14.0%
60 months	10.5%
Balance	36.4%

8/9K1/0408-02/1

2nd B
A. Hanley
mc

AMENDMENT 1(A)

Offered in the HOUSE By Collins

TO: CSSSHB 532(L&C)

include in bill

Page 1, lines 12 - 16, delete all material and insert:

"Sec. 09.17.010. NONECONOMIC DAMAGES. An award of noneconomic damages shall not exceed 25 percent of the present value of the amount awarded for economic damages but in no case shall the award exceed $500,000.00."

Subsistence lifestyles → no $

If a ~~test~~ hospital — no medical costs victims get ∅

A M E N D M E N T 1(B)

Offered in the HOUSE By Collins

TO: CSSSHB 532(L&C)

Page 1, lines 12 - 16, delete all material and insert:

"Sec. 09.17.010. NONECONOMIC DAMAGES. An award of noneconomic damages shall not exceed 25 percent of the present value of the amount awarded for economic damages but in no case shall the award exceed $1,000,000.00."

A. Hawley

TO HB 532 AMENDMENT # 2

BY COLLINS

RE: PERIODIC PAYMENTS

On page 2, line 25, delete "$50,000.00" and insert the figure "$75,000.00."

line 2 p. 3

included

A M E N D M E N T # 3

TO HB 532 BY COLLINS

RE: PERIODIC PAYMENTS

Page 3, after line 23, insert new sections to read:

"(e) If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make payments, under (b) of this section, the court [shall find the judgment debtor in contempt of court] and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor any damages caused by the failure to make periodic payments, including costs and attorney fees."

"(f) If at any time following entry of judgment, a judgment debtor fails to make a payment in a timely fashion according to the terms of the part of the judgment related to periodic payments, the judgment creditor may petition the court that rendered the original judgment for an order requiring payment by the judgment debtor of the outstanding payments in a lump sum. In calculating the amount of the lump-sum judgment under this section, the court shall total the remaining periodic payments due and owing to the judgment creditor. This amount may not be converted to its present value. The court may also require the payment of interest on the outstanding judgment."

A M E N D M E N T # 4

TO HB 532 BY COLLINS

RE: ATTORNEYS' FEES

AS 09.60.010 is amended to read COST ALLOWED PREVAILING PARTY. Except as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in any case. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action. If a court awards attorney fees authorized by statute, the award may not exceed the limits established under AS 09.17.100(a)(1) - (4)."

"AS 09.60.010 as amended by Sec. 11 of this act has the effect of amending Alaska Rule of Civil Procedure 82 by prohibiting the award of attorney fees in civil actions unless specifically authorized by Statute or by agreement between the parties."

p. 9 - 10

include in bill

A M E N D M E N T # 5 A

TO HB 532 BY COLLINS

RE: CONTINGENT FEE AGREEMENTS

Insert new section to read:

"(a) An attorney may not contract for or collect a contingency fee for representing a person seeking damages in connection with an action for personal injury based on negligence in excess of the following limits:

(1) 40 percent of the first $50,000 recovered;
(2) 33-1/3 percent of the next $50,000 recovered;
(3) 25 percent of the next $200,000 recovered;
(4) 10 percent of any amount recovered which exceeds $200,000.

(b) The limits in (a) of this section apply whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or incompetent by reason of mental illness.

(c) If periodic payments are awarded to the plaintiff under AS 09.17.040, the court shall include the present value of the periodic payments in computing the total award from which attorney fees are calculated under this section."

AMENDMENT # 5 B

TO HB 532 BY COLLINS

RE: ATTORNEYS' FEES

A new section is added to read as follows: fee agreement

"The court shall, upon petition by a named party in any tort action determine the reasonableness of that party's attorneys' fees. The court shall take into consideration the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent;

(9) Whether the fixed or contingent fee agreement was in writing and whether the client was aware of his or her right to petition the court under this section.

include in bill

p. 10

AMENDMENT #2

TO CSSSHB 532 BY PEARCE

RE: DEFENSES

On page 3, after line 14, insert a new section to read:

"DEFENSES. It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony, if the felony was causally related to the injury or death in time, place, or activity. However, nothing in this section shall affect a right of action under 42 U.S.C 1983.

HB-532
Draft CS 3/26/86

By Boucher

P. 6 Lines 21 and 22

Delete all after the word "parties" and substitute the following language:

"shall be only severally liable for the percentage of fault allocated to that party."

This amendment makes all those persons who are less than 50% at fault in causing an injury liable only for the amount of damages allocated to them in proportion to their percentage of fault. This will eliminate the so-called deep pocket problem where defendants who possess insurance or substantial assets may pay 100% of judgements in which they were not substantially responsible for the injuries suffered.

Original sponsors: Cotten, Binkley, Collins, et al

IN THE HOUSE

BY THE LABOR AND COMMERCE COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 532 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, 68, and 82; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

Sec. 09.17.010. NONECONOMIC DAMAGES. In an action to recover damages for personal injury based on negligence, damages for noneconomic losses shall be limited to 25 percent of the present value of the damages awarded for economic losses, or $500,000 whichever amount is lower.

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Fifty percent of any punitive or exemplary damages that may be adjudged against the party defending the claim shall be awarded to the benefit of the state and when paid deposited in the general fund.

(b) The amount of punitive damages awarded to the state shall be considered a part of the amount recovered by the claiming party for purposes of calculating an award of attorney fees.

(c) Except for purposes of seeking execution on a judgment, the state may not bring or be joined in an action based on punitive damages that may be awarded under this section.

Sec. 09.17.025 DAMAGES RESULTING FROM INTOXICATION OF

COMMISSION OF A CRIME. A person who suffers personal injury or death may not recover damages for the personal injury or death if the injuries or death occurred while the person was

(1) under the influence of intoxicating liquor or a controlled substance listed in AS 11.71.140 - 11.71.190 and the condition of being under the influence of the intoxicating liquor or controlled substance contributed more than 50 percent to the person's injuries or death; if there was 0.10 percent or more by weight of alcohol in the person's blood or 0.10 grams or more of alcohol per 210 liters of the person's breath, it is presumed that the person was under the influence of intoxicating liquor;

(2) engaged in the commission of a felony, if the felony was causally related to the injury or death in time, place, or activity; however, nothing in this paragraph shall affect a right of action under 42 U.S.C. 1983.

Sec. 09.17.030. ITEMIZED VERDICTS. In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, and economic loss shall be further itemized by category. Itemization of economic loss by category includes: (1) amounts intended to compensate for reasonable expenses that have been incurred, or which will be incurred, for necessary medical, surgical, x-ray, dental, or other health or rehabilitative services, drugs, and therapy; (2) amounts intended to compensate for lost wages or loss of earning capacity; and (3) all other economic losses granted by the fact finder. A verdict shall further determine the amounts intended to compensate for injury or losses incurred before the verdict and amounts intended to compensate for losses that will be incurred in the future.

Sec. 09.17.035. PERIODIC PAYMENTS. (a) In an action where the

damages for personal injury include an award for future damages in excess of $75,000, the court may, if it determines that it is in the interest of the injured party or the public, require that the portion of the total award allocated for future damages be paid into the court and placed in a trust account in a bank or savings and loan association or placed with a licensed escrow agent and paid to the judgment creditor in periodic payments rather than in a lump-sum payment.

(b) A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only as provided in (d) of this section or in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining in the trust shall be distributed in accordance with a will of the deceased judgment creditor or under the intestate laws of the state if the deceased had no will.

(c) The court shall include as part of the costs awarded to the claimant the costs of providing periodic payment of future economic losses through a trust account as required by this section.

(d) The court that rendered the original judgment may, upon petition of the judgment creditor, modify the judgment to award and apportion the unpaid future damages specified in AS 09.17.030 if the judgment creditor incurs unanticipated medical expenses that periodic payments paid to date do not cover.

(e) If the court finds that the judgment debtor has exhibited a

continuing pattern of failing to make payments required under (b) or this section, the court shall, in addition to the required periodic payments, order the judgment debtor to pay the judgment creditor any damages caused by the failure to make periodic payments, including costs and attorney fees.

(f) If at any time following entry of judgment, a judgment debtor fails to make a payment in a timely fashion according to the terms of the part of the judgment related to periodic payments, the judgment creditor may petition the court that rendered the original judgment for an order requiring payment by the judgment debtor of the outstanding payments in a lump sum. In calculating the amount of the lump-sum judgment under this section, the court shall total the remaining periodic payments due and owing to the judgment creditor. This amount may not be converted to its present value. The court may also require the payment of interest on the outstanding judgment.

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. Every complaint, answer, cross-claim, and counterclaim shall be signed and verified by the party or the attorney of the party filing the pleading and shall bear a statement that the person signing the pleading believes the statements made in the pleading are true. If the court finds that a statement made in the complaint, answer, cross-claim, or counterclaim was knowingly untrue, and upon motion of a party the person signing the pleading shall be compelled to show cause why the person signing the pleading should not be held in contempt of court.

Sec. 09.17.045. LIMITED LIABILITY OF CERTAIN DIRECTORS, OFFICERS AND SUPERINTENDENTS. (a) Unless the act or omission constituted gross negligence, a person may not recover damages for an act or omission to act, in the course and scope of official duties, from the following:

(1) a member of the board of directors or an officer of a nonprofit corporation;

(2) a member of the board of directors of a public or private hospital;

(3) a member of a school board or superintendent of a school district;

(4) an elected or appointed official of a political subdivision of the state.

(b) Notwithstanding (a) of this section, the duties and liabilities of a director or officer of a nonprofit corporation to the corporation or the corporation's shareholders may not be limited or modified.

Sec. 09.17.050. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Sec. 09.17.055. COLLATERAL BENEFITS. (a) After the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorney fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation against the claimant by law or contract.

(b) If the defendant elects to introduce evidence under (a) of this section, the claimant may introduce evidence of

(1) the amount that the actual attorney fees incurred by the claimant exceed the amount of attorney fees awarded to the claimant; and

(2) the amount that the claimant has paid or contributed to secure the right to an insurance benefit introduced by the defendant as evidence.

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as evidence under (b) of this section, the court shall deduct from the amount awarded the claimant, the amount by which the value of the benefits under (a) of this section exceeds the amount of payments under (b) of this section.

(d) Notwithstanding (a) of this section, the defendant may not introduce evidence of

(1) benefits that cannot be reduced or offset by federal law;

(2) a deceased's life insurance policy; or

(3) gratuitous benefits provided to the claimant.

Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.17.-070, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.070.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault,

and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.070, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of joint and several liability, except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

Sec. 09.17.070. EFFECT OF RELEASE. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the dollar amount of the release, covenant not to sue, or similar agreement.

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability; the term also includes breach of warranty, unreasonable assumption of risk not constituting an

enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages; legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

* Sec. 2. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.075. ACTIONS THAT MUST BE ARBITRATED. A person may not bring an action for damages based on injury to person or property when the amount in controversy is less than $75,000, exclusive of costs, interest and attorney fees, unless the controversy is first arbitrated under AS 09.43.

* Sec. 3. AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 45.45.010(a) and accrued up

to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be reduced by five [TWO] percent a year;

(2) if the offeree is the party defending against the claim, the interest rate shall be increased by five [TWO] percent a year.

* Sec. 4. AS 09.30.070 is amended by adding a new subsection to read:

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day the cause of action accrues.

* Sec. 5. AS 09.43.110 is amended to read:

Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of a party, the court shall confirm an award unless

(1) within the time limits imposed by AS 09.43.120 and 09.43.130 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in AS 09.43.120 and 09.43.130; or

(2) an appeal is taken under AS 09.43.160(c).

* Sec. 6. AS 09.43.160 is amended by adding a new subsection to read:

(c) An award made as a result of arbitration required by AS 09.10.075 may be appealed to the proper court. The appeal shall be filed within 60 days after notice of an award is made under AS 09.43.080. The court shall grant a trial de novo if an appeal is filed under this subsection.

* Sec. 7. AS 09.55.548 is repealed and reenacted to read:

Sec. 09.55.548. AWARDS. Damages shall be awarded in accordance with principles of the common law. The fact finder in a malpractice action shall render any award for damages in accordance with AS 09.17.

* Sec. 8. AS 09.60.010 is repealed and reenacted to read:

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $25,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value of the property or of the arrears and damage to the property does not exceed $25,000;

(7) for the foreclosure of a lien when the amount in controversy does not exceed $25,000;

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020;

(11) over an appeal by a party to an arbitration award under AS 09.43.160(c) when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $25,000.

* Sec. 11. AS 09.16 is repealed.

* Sec. 12. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060 regarding the amount of damages and the percentages of fault to be

allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 13. AS 09.17.060 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 14. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 15. AS 09.17.040 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of claims, answers, counterclaims, and cross-claims.

* Sec. 16. AS 09.30.065 as amended by sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day the cause of action accrues.

* Sec. 17. APPLICABILITY. Sections 1 - 10 of this Act apply to all causes of action accruing on or after the effective date of this Act.

* Sec. 18. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Ford
3/25/96

Original sponsors: Cotten, Binkley, Collins, et al

BY THE LABOR AND COMMERCE COMMITTEE

IN THE HOUSE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 532 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, and 68; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

Sec. 09.17.010. NONECONOMIC DAMAGES. In an action to recover damages for personal injury based on negligence, damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other nonpecuniary damage.

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Fifty percent of any punitive or exemplary damages that may be adjudged against the party defending the claim shall be awarded to the benefit of the state and when paid deposited in the general fund.

(b) The amount of punitive damages awarded to the state shall be considered a part of the amount recovered by the claiming party for purposes of calculating an award of attorney fees.

(c) The state may not bring or be joined in an action, based on punitive damages that may be awarded under this section.

Sec. 09.17.025. DAMAGES RESULTING FROM INTOXICATION. A person who suffers personal injury or death may not recover damages for the

personal injury or death if the injuries or death occurred while the person was under the influence of intoxicating liquor or a controlled substance listed in AS 11.71.140 - 11.71.190. If there was 0.10 percent or more by weight of alcohol in the person's blood or 0.10 grams or more of alcohol per 210 liters of the person's breath, it is presumed that the persor was under the influence of intoxicating liquor.

Sec. 09.17.030. ITEMIZED VERDICTS. In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, and economic loss shall be further itemized by category. Itemization of economic loss by category includes: (1) amounts intended to compensate for reasonable expenses that have been incurred, or which will be incurred, for necessary medical, surgical, x-ray, dental, or other health or rehabilitative services, drugs, and therapy; (2) amounts intended to compensate for lost wages or loss of earning capacity; and (3) all other economic losses granted by the fact finder. A verdict shall further determine the amounts intended to compensate for injury or losses incurred before the verdict and amounts intended to compensate for losses that will be incurred in the future.

Sec. 09.17.035. PERIODIC PAYMENTS. In an action to recover damages for personal injury, the court may, at the request of a party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment if the award equals or exceeds $50,000 in future damages. The court may require a judgment debtor to post security adequate to assure full payment of future periodic payment damages awarded by judgment.

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. Every complaint,

answer, cross-claim, and counterclaim shall be signed and verified by the party or the attorney of the party filing the pleading and shall bear a statement that the person signing the pleading believes the statements made in the pleading are true. If the court finds that a statement made in the complaint, answer, cross-claim, or counterclaim was knowingly untrue, and upon motion of a party the person signing the pleading shall be compelled to show cause why the person signing the pleading should not be held in contempt of court.

Sec. 09.17.045. LIMITED LIABILITY OF CERTAIN DIRECTORS, OFFICERS AND SUPERINTENDENTS. (a) Unless the act or omission constituted gross negligence, a person may not recover damages for an act or omission to act, in the course and scope of official duties, from the following:

(1) a member of the board of directors or an officer of a nonprofit corporation;

(2) a member of the board of directors of a public or private hospital;

(3) a member of a school board or superintendent of a school district.

(b) Notwithstanding (a) of this section, the duties and liabilities of a director or officer of a nonprofit corporation to the corporation or the corporation's shareholders may not be limited or modified.

Sec. 09.17.050. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Sec. 09.17.055. COLLATERAL BENEFITS. (a) After the fact finder has rendered an award to a claimant, including an award of costs and attorney fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation against the plaintiff by law or contract.

(b) If the claimant elects to introduce evidence under (a) of this section, the claimant may introduce evidence of

(1) the amount that the actual attorney fees incurred by the claimant exceed the amount of attorney fees awarded to the claimant; and

(2) the amount that the claimant has paid or contributed to secure the right to an insurance benefit introduced by the defendant as evidence.

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as evidence under (b) of this section, the court shall deduct from the amount awarded the claimant, the amount by which the value of the benefits under (a) of this section exceeds the amount of payments under (b) of this section.

(d) Notwithstanding (a) of this section, the defendant may not introduce evidence of

(1) benefits that cannot be reduced or offset by federal law;

(2) a deceased's life insurance policy; or

(3) gratuitous benefits provided to the claimant by a relative of the claimant.

Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-

party defendants and persons who have been released under AS 09.17.-070, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.070.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or ommission of each person cannot be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.070, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of joint and several liability, except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

Sec. 09.17.070. EFFECT OF RELEASE. A release, covenant not to

sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the dollar amount of the release, covenant not to sue, or similar agreement.

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability; the term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages; legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

* Sec. 2. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.075. ACTIONS THAT MUST BE ARBITRATED. A person may not bring an action for damages based on injury to person or property when the amount in controversy is less than $75,000, exclusive of costs, interest and attorney fees, unless the controversy is first arbitrated under AS 09.43.

* Sec. 3. AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. <u>At any time more than 10 days before the trial begins</u> [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete

satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 45.45.010(a) and accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be reduced by five [TWO] percent a year;

(2) if the offeree is the party defending against the claim, the interest rate shall be increased by five [TWO] percent a year.

* Sec. 4. AS 09.30.070 is amended by adding a new subsection to read:

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day the cause of action accrues.

* Sec. 5. AS 09.43.110 is amended to read:

Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of a party, the court shall confirm an award unless

(1) within the time limits imposed by AS 09.43.120 and 09.43.130 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in AS 09.43.120 and 09.43.130; or

(2) an appeal is taken under AS 09.43.160(c).

* Sec. 6. AS 09.43.160 is amended by adding a new subsection to read:

(c) An award made as a result of arbitration required by AS 09.10.075 may be appealed to the proper court. The appeal shall be filed within 60 days after notice of an award is made under AS 09.43.080. The court shall grant a trial de novo if an appeal is filed under this subsection.

* Sec. 7. AS 09.55.548 is repealed and reenacted to read:

Sec. 09.55.548. AWARDS. Damages shall be awarded in accordance with principles of the common law. The fact finder in a malpractice action shall render any award for damages in accordance with AS 09.17.

* Sec. 8. AS 09.60 is amended by adding a new section to read:

Sec. 09.60.035. COSTS AND ATTORNEY FEES ALLOWED FOR ARBITRATION APPEAL. If a party appeals an award made as a result of arbitration required by AS 09.10.075, and the appellate court increases or decreases the award by more than 10 percent, the prevailing party on appeal shall also be awarded actual costs and attorney fees incurred as a result of the appeal.

* Sec. 9. AS 22.10.020(d) is amended to read:

(d) The superior court has jurisdiction in all matters appealed to it (1) from a subordinate court; (2) by a party to an arbitration award under AS 09.43.160(c); [,] or (3) an administrative agency when appeal is provided by law. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part.

* Sec. 10. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases and proceedings as follows:

(1) for the recovery of money or damages when the amount

claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $25,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $25,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value of the property or of the arrears and damage to the property does not exceed $25,000;

(7) for the foreclosure of a lien when the amount in controversy does not exceed $25,000;

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020;

(11) over an appeal by a party to an arbitration award under AS 09.43.160(c) when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $25,000.

* Sec. . AS 09.16 is repealed.

* Sec. 12. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060 regarding the amount of damages and the percentages of fault to be allocated among the parties and to the verdict regarding economic and noneconomic loss as specified .17.030.

* Sec. 13. AS 09.17.060 en sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 14. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 15. AS 09.17.040 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of claims, answers, counterclaims, and cross-claims.

* Sec. 16. AS 09.30.065 as amended by sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day the cause of action accrues.

* Sec. 17. APPLICABILITY. Sections 1 - 10 of this Act apply to all causes of action accruing on or after the effective date of this Act.

* Sec. 18. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Ford
3/19/86

Original sponsors: Cotten, Binkley, Collins, et al

Attn: Ted House
BY THE LABOR AND COMMERCE COMMITTEE

IN THE HOUSE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 532 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, and 68; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

Sec. 09.17.010. NONECONOMIC DAMAGES. In an action to recover damages for personal injury based on negligence, damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other nonpecuniary damage.

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Fifty percent of any punitive or exemplary damages that may be adjudged against the party defending the claim shall be awarded to the benefit of the state and when paid deposited in the general fund.

(b) The amount of punitive damages awarded to the state shall be considered a part of the amount recovered by the claiming party for purposes of calculating an award of attorney fees.

(c) The state may not bring or be joined in an action, based on punitive damages that may be awarded under this section.

Sec. 09.17.030. ITEMIZED VERDICTS. In every case where damages for personal injury are awarded by the court or jury, the verdict

shall be itemized between economic loss and noneconomic loss, if any, and economic loss shall be further itemized by category. Itemization of economic loss by category includes: (1) amounts intended to compensate for reasonable expenses that have been incurred, or which will be incurred, for necessary medical, surgical, x-ray, dental, or other health or rehabilitative services, drugs, and therapy; (2) amounts intended to compensate for lost wages or loss of earning capacity; and (3) all other economic losses granted by the fact finder. A verdict shall further determine the amounts intended to compensate for injury or losses incurred before the verdict and amounts intended to compensate for losses that will be incurred in the future.

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. Every complaint, answer, cross-claim, and counterclaim shall be signed and verified by the party or the attorney of the party filing the pleading and shall bear a statement that the person signing the pleading believes the statements made in the pleading are true. If the court finds that a statement made in the complaint, answer, cross-claim, or counterclaim is untrue, and upon motion of a party the person signing the pleading shall be compelled to show cause why the person signing the pleading should not be held in contempt of court.

Sec. 09.17.050. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under

AS 09.17.070, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.070.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, the extent of the causal relation between the conduct and the damages claimed and may determine that two or more persons are to be treated as a single party.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.070, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of joint and several liability, except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

Sec. 09.17.070. EFFECT OF RELEASE. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless

the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the dollar amount of the release, covenant not to sue, or similar agreement.

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability; the term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages; legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

* Sec. 2. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.075. ACTIONS THAT MUST BE ARBITRATED. A person may not bring an action for damages based on injury to person or property when the amount in controversy is less than $50,000, exclusive of costs, interest and attorney fees, unless the controversy is first arbitrated under AS 09.43.

* Sec. 3. AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice

that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 45.45.010(a) and accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be reduced by five [TWO] percent a year;

(2) if the offeree is the party defending against the claim, the interest rate shall be increased by five [TWO] percent a year.

* Sec. 4. AS 09.30.070 is amended by adding a new subsection to read:

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day the cause of action accrues.

* Sec. 5. AS 09.43.110 is amended to read:

Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of a party, the court shall confirm an award unless

(1) within the time limits imposed by AS 09.43.120 and 09.43.130 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in AS 09.43.120 and 09.43.130; or

(2) an appeal is taken under AS 09.43.160(c).

* Sec. 6. AS 09.43.160 is amended by adding a new subsection to read:

(c) An award made as a result of arbitration required by AS 09.-10.075 may be appealed to the proper court. The appeal shall be filed

within 60 days after notice of an award is made under AS 09.43.080. The court shall grant a trial de novo if an appeal is filed under this subsection.

* Sec. 7. AS 09.55.548 is repealed and reenacted to read:

Sec. 09.55.548. AWARDS. Damages shall be awarded in accordance with principles of the common law. The fact finder in a malpractice action shall render any award for damages in accordance with AS 09.17.

* Sec. 8. AS 22.10.020(d) is amended to read:

(d) The superior court has jurisdiction in all matters appealed to it (1) from a subordinate court; (2) by a party to an arbitration award under AS 09.43.160(c); [,] or (3) an administrative agency when appeal is provided by law. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part.

* Sec. 9. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases and proceedings as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $25,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $25,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value of the property or of the arrears and damage to the property does not exceed $25,000;

(7) for the foreclosure of a lien when the amount in controversy does not exceed $25,000;

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020;

(11) over an appeal by a party to an arbitration award under AS 09.43.160(c) when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $25,000.

* Sec. 10. AS 09.16 is repealed.

* Sec. 11. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 12. AS 09.17.060 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of

fault to be allocated among the parties.

* Sec. 13. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 14. AS 09.17.040 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of claims, answers, counterclaims, and cross-claims.

* Sec. 15. AS 09.30.065 as amended by sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day the cause of action accrues.

* Sec. 16. APPLICABILITY. Sections 1 - 9 of this Act apply to all causes of action accruing on or after the effective date of this Act.

* Sec. 17. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Ford-
3/17/36

Original sponsors: Cotten, Binkley, Collins, et al

BY THE LABOR AND COMMERCE COMMITTEE

IN THE HOUSE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 532 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, and 68; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

Sec. 09.17.010. NONECONOMIC DAMAGES. (a) In an action to recover damages for personal injury based on negligence, damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other nonpecuniary damage.

(b) The amount of damages awarded by a court or jury under (a) of this section may not exceed $250,000 for each claim based on a separate incident or injury.

Sec. 09.17.020. PUNITIVE DAMAGES. Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Fifty percent of any punitive or exemplary damages that may be adjudged against the party defending the claim shall be awarded to the benefit of the state and when paid deposited in the general fund.

Sec. 09.17.030. ITEMIZED VERDICTS. In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, and economic loss shall be further itemized by category. Itemization

of economic loss by category includes: (1) amounts intended to compensate for reasonable expenses that have been incurred, or which will be incurred, for necessary medical, surgical, x-ray, dental, or other health or rehabilitative services, drugs, and therapy; (2) amounts intended to compensate for lost wages or loss of earning capacity; and (3) all other economic losses claimed by the plaintiff or granted by the jury. A verdict shall further determine the amounts intended to compensate for injury or losses incurred before the verdict and amounts intended to compensate for losses that will be incurred in the future.

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. Every complaint, cross-claim, and counterclaim shall be signed and verified by the claiming party or the attorney of the claiming party and shall bear a statement that the person signing the claim believes the statements made in the claim are true. If the court finds that a statement made in the complaint, cross-claim, or counterclaim is untrue, and upon motion of a party defending against the claim, the person signing the claim shall be compelled to show cause why the person signing the claim should not be held in contempt of court.

Sec. 09.17.050. COLLATERAL BENEFITS. (a) Except when the collateral benefit is received from a federal program that by law must seek subrogation and except death benefits paid under life insurance, a claimant, in an action for personal injury, may only recover damages from the defendant that exceed the amount received by the claimant as compensation for the same injury from collateral sources, whether private, group or governmental, and whether contributory or noncontributory. Evidence of collateral sources is admissible after the fact finder has rendered an award. The court may take into account the value of a claimant's rights to future or contingent benefits by

including a reasonable estimate of their probable value, or by specifying and holding for possible future payment that amount of the award that would otherwise have been deducted, to determine if payment of the collateral benefit actually takes place.

(b) Collateral benefits introduced under (a) of this section may not be used to recover an amount against the plaintiff nor may the source of the benefits be subrogated to the rights of the plaintiff against a defendant.

Sec. 09.17.060. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Sec. 09.17.070. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.17.080, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.080; for this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault

and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.080, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of joint and several liability, except that a party who is allocated less than 30 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

Sec. 09.17.080. EFFECT OF RELEASE. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined under AS 09.17.070.

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability; the term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages; legal requirements of causal relation apply

both to fault as the basis for liability and to contributory fault.

* Sec. 2. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.075. PERSONAL INJURY ACTIONS THAT MUST BE ARBITRATED. A person may not bring an action for damages based on personal injury when the amount in controversy is less than $50,000, exclusive of costs, interest and attorney fees, unless the controversy is first arbitrated under AS 09.43.

* Sec. 3. AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. On or before the 60th day following the filing of an answer in a civil action, and on the fifth day following the day discovery closes as ordered by the court, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 45.45.010(a) and accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be reduced by five [TWO] percent a year;

(2) if the offeree is the party defending against the

claim, the interest rate shall be increased by five [TWO] percent a year.

* Sec. 4. AS 09.30.070 is amended by adding a new subsection to read:

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day the cause of action accrues.

* Sec. 5. AS 09.43.110 is amended to read:

Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of a party, the court shall confirm an award unless

(1) within the time limits imposed by AS 09.43.120 and 09.43.130 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in AS 09.43.120 and 09.43.130; or

(2) an appeal is taken under AS 09.43.160(c).

* Sec. 6. AS 09.43.160 is amended by adding a new subsection to read:

(c) An award made as a result of arbitration required by AS 09.-10.075 may be appealed to the proper court. The appeal shall be filed within 60 days after notice of an award is made under AS 09.43.080. The court shall grant a trial de novo if an appeal is filed under this subsection.

* Sec. 7. AS 09.55.548 is repealed and reenacted to read:

Sec. 09.55.548. AWARDS. Damages shall be awarded in accordance with principles of the common law. The fact finder in a malpractice action shall render any award for damages in accordance with AS 09.17.

* Sec. 8. AS 22.10.020(d) is amended to read:

(d) The superior court has jurisdiction in all matters appealed to it (1) from a subordinate court; (2) by a party to an arbitration award under AS 09.43.160(c); [,] or (3) an administrative agency when appeal is provided by law. The hearings on appeal from a final order

or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part.

* Sec. 9. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases and proceedings as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $25,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $25,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value of the property or of the arrears and damage to the property does not exceed $25,000;

(7) for the foreclosure of a lien when the amount in controversy does not exceed $25,000;

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(9) over civil actions for taking utility service and for

damages to or interference with a utility line filed under AS 42.20.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020;

(11) over an appeal by a party to an arbitration award under AS 09.43.160(c) when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $25,000.

* Sec. 10. AS 09.16 is repealed.

* Sec. 11. AS 09.17.030 and 09.17.070 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.070 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 12. AS 09.17.070 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 13. AS 09.17.030 and 09.17.070 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 14. AS 09.17.040 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of claims, counterclaims, and cross-claims.

* Sec. 15. AS 09.17.050, enacted in sec. 1 of this Act, has the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to reduce a judgment by the amount of certain collateral benefits received by a claimant.

* Sec. 16. AS 09.30.065 as amended by sec. 3 of this Act has the effect

of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day the cause of action accrues.

* Sec. 17. APPLICABILITY. Sections 1 - 9 of this Act apply to all causes of action accruing on or after the effective date of this Act.

* Sec. 18. This Act takes effect immediately in accordance with AS 01.-10.070( ).

Ford
3/27/86

Original sponsors: Cotten, Binkley, Collins, et al

Navarre attn: Sid

BY THE LABOR AND COMMERCE COMMITTEE

IN THE HOUSE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 532 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, and 68; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

Sec. 09.17.010. NONECONOMIC DAMAGES. In an action to recover damages for personal injury based on negligence, damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other nonpecuniary damage.

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Fifty percent of any punitive or exemplary damages that may be adjudged against the party defending the claim shall be awarded to the benefit of the state and when paid deposited in the general fund.

(b) The amount of punitive damages awarded to the state shall be considered a part of the amount recovered by the claiming party for purposes of calculating an award of attorney fees.

(c) Except for purposes of seeking execution on a judgment, the state may not bring or be joined in an action based on punitive damages that may be awarded under this section.

Sec. 09.17.025. DAMAGES RESULTING FROM INTOXICATION OR

COMMISSION OF A CRIME. A person who suffers personal injury or death may not recover damages for the personal injury or death if the injuries or death occurred while the person was

(1) under the influence of intoxicating liquor or a controlled substance listed in AS 11.71.140 - 11.71.190 and the condition of being under the influence of the intoxicating liquor or controlled substance contributed more than 50 percent to the person's injuries or death; if there was 0.10 percent or more by weight of alcohol in the person's blood or 0.10 grams or more of alcohol per 210 liters of the person's breath, it is presumed that the person was under the influence of intoxicating liquor;

(2) engaged in the commission of a felony, if the felony was causally related to the injury or death in time, place, or activity; however, nothing in this paragraph shall affect a right of action under 42 U.S.C. 1983.

Sec. 09.17.030. ITEMIZED VERDICTS. In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, and economic loss shall be further itemized by category. Itemization of economic loss by category includes: (1) amounts intended to compensate for reasonable expenses that have been incurred, or which will be incurred, for necessary medical, surgical, x-ray, dental, or other health or rehabilitative services, drugs, and therapy; (2) amounts intended to compensate for lost wages or loss of earning capacity; and (3) all other economic losses granted by the fact finder. A verdict shall further determine the amounts intended to compensate for injury or losses incurred before the verdict and amounts intended to compensate for losses that will be incurred in the future.

Sec. 09.17.035. PERIODIC PAYMENTS. (a) In an action where the

damages for personal injury include an award for future damages in excess of $75,000, the court may, if it determines that it is in the interest of the injured party or the public, require that the portion of the total award allocated for future damages be paid into the court and placed in a trust account in a bank or savings and loan association or placed with a licensed escrow agent and paid to the judgment creditor in periodic payments rather than in a lump-sum payment.

(b) A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only as provided in (d) of this section or in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining in the trust shall be distributed in accordance with a will of the deceased judgment creditor or under the intestate laws of the state if the deceased had no will.

(c) The court shall include as part of the costs awarded to the claimant the costs of providing periodic payment of future economic losses through a trust account as required by this section.

(d) The court that rendered the original judgment may, upon petition of the judgment creditor, modify the judgment to award and apportion the unpaid future damages specified in AS 09.17.030 if the judgment creditor incurs unanticipated medical expenses that periodic payments paid to date do not cover.

(e) If the court finds that the judgment debtor has exhibited a

continuing pattern of fai. .g to make payments required under (b) of this section, the court shall, in addition to the required periodic payments, order the judgment debtor to pay the judgment creditor any damages caused by the failure to make periodic payments, including costs and attorney fees.

(f) If at any time following entry of judgment, a judgment debtor fails to make a payment in a timely fashion according to the terms of the part of the judgment related to periodic payments, the judgment creditor may petition the court that rendered the original judgment for an order requiring payment by the judgment debtor of the outstanding payments in a lump sum. In calculating the amount of the lump-sum judgment under this section, the court shall total the remaining periodic payments due and owing to the judgment creditor. This amount may not be converted to its present value. The court may also require the payment of interest on the outstanding judgment.

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. ery complaint, answer, cross-claim, and counterclaim shall be signed and verified by the party or the attorney of the party filing the pleading and shall bear a statement that the person signing the pleading believes the statements made in the pleading are true. If the court finds that a statement made in the complaint, answer, cross-claim, or counterclaim was knowingly untrue, and upon motion of a party the person signing the pleading shall be compelled to show cause why the person signing the pleading should not be held in contempt of court.

Sec. 09.17.045. LIMITED LIABILITY OF CERTAIN DIRECTORS, OFFICERS AND SUPERINTENDENTS. (a) Unless the act or omission constituted gross negligence, a person may not recover damages for an act or omission to act, in the course and scope of official duties, from the following:

(1) a member of the board of directors or an officer of a nonprofit corporation;

(2) a member of the board of directors of a public or private hospital;

(3) a member of a school board or superintendent of a school district;

(4) an elected or appointed official of a political subdivision of the state.

(b) Notwithstanding (a) of this section, the duties and liabilities of a director or officer of a nonprofit corporation to the corporation or the corporation's shareholders may not be limited or modified.

Sec. 09.17.050. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Sec. 09.17.055. COLLATERAL BENEFITS. (a) After the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorney fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation against the claimant by law or contract.

(b) If the defendant elects to introduce evidence under (a) of this section, the claimant may introduce evidence of

(1) the amount that the actual attorney fees incurred by the claimant exceed the amount of attorney fees awarded to the claimant; and

(2) the amount that the claimant has paid or contributed to secure the right to an insurance benefit introduced by the defendant as evidence.

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as evidence under (b) of this section, the court shall deduct from the amount awarded the claimant, the amount by which the value of the benefits under (a) of this section exceeds the amount of payments under (b) of this section.

(d) Notwithstanding (a) of this section, the defendant may not introduce evidence of

(1) benefits that cannot be reduced or offset by federal law;

(2) a deceased's life insurance policy; or

(3) gratuitous benefits provided to the claimant.

Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.17.-070, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.070.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault,

and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.070, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of joint and several liability, except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

Sec. 09.17.070. EFFECT OF RELEASE. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the dollar amount of the release, covenant not to sue, or similar agreement.

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability; the term also includes breach of warranty, unreasonable assumption of risk not constituting an

enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages; legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

* Sec. 2. AS 09.10 is amended by adding a new section to read

Sec. 09.10.075. ACTIONS THAT MUST BE ARBITRATED. A person may not bring an action for damages based on injury to person or property when the amount in controversy is less than $75,000, exclusive of costs, interest and attorney fees, unless the controversy is first arbitrated under AS 09.43.

* Sec. 3. AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 45.45.010(a) and accrued up

to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be reduced by five [TWO] percent a year;

(2) if the offeree is the party defending against the claim, the interest rate shall be increased by five [TWO] percent a year.

* Sec. 4. AS 09.30.070 is amended by adding a new subsection to read:

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day the cause of action accrues.

* Sec. 5. AS 09.43.110 is amended to read:

Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of a party, the court shall confirm an award unless

(1) within the time limits imposed by AS 09.43.120 and 09.43.130 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in AS 09.43.120 and 09.43.130; or

(2) an appeal is taken under AS 09.43.160(c).

* Sec. 6. AS 09.43.160 is amended by adding a new subsection to read:

(c) An award made as a result of arbitration required by AS 09.-10.075 may be appealed to the proper court. The appeal shall be filed within 60 days after notice of an award is made under AS 09.43.080. The court shall grant a trial de novo if an appeal is filed under this subsection.

* Sec. 7. AS 09.55.548 is repealed and reenacted to read:

Sec. 09.55.548. AWARDS. Damages shall be awarded in accordance with principles of the common law. The fact finder in a malpractice action shall render any award for damages in accordance with AS 09.17.

* Sec. 8. AS 09.60 is amended by adding a new section to read:

Sec. 09.60.035. COSTS AND ATTORNEY FEES ALLOWED FOR ARBITRATION APPEAL. If a party appeals an award made as a result of arbitration required by AS 09.10.075, and the appellate court increases or decreases the award by more than 10 percent, the prevailing party on appeal shall also be awarded actual costs and attorney fees incurred as a result of the appeal.

* Sec. 9. AS 22.10.020(d) is amended to read:

(d) The superior court has jurisdiction in all matters appealed to it (1) from a subordinate court; (2) by a party to an arbitration award under AS 09.43.160(c); [,] or (3) an administrative agency when appeal is provided by law. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part.

* Sec. 10. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases and proceedings as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $25,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $25,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the

manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in th manner provided under AS 09.45 70 - 09.45.160 when the value of the property or of the arrears and damage to the property does not exceed $25,000;

(7) for the foreclosure of a lien when the amount in controversy does not exceed $25,000;

(8) for the recovery of money or damages in m/tor vehicle tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020;

(11) over an appeal by a party to an arbitration award under AS 09.43.160(c) when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $25,000.

* Sec. 11. AS 09.16 is repealed.

* Sec. 12. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 13. AS 09.17.060 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 14. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 15. AS 09.17.040 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of claims, answers, counterclaims, and cross-claims.

* Sec. 16. AS 09.30.065 as amended by sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day the cause of action accrues.

* Sec. 17. APPLICABILITY. Sections 1 - 11 of this Act apply to all causes of action accruing on or after the effective date of this Act.

* Sec. 18. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Ford
5/26/86

Original sponsors: Cotten, Binkley, Collins, et al

Cotten, Ford

BY THE LABOR AND COMMERCE COMMITTEE

IN THE HOUSE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 532 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, and 68; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

Sec. 09.17.010. NONECONOMIC DAMAGES. In an action to recover damages for personal injury based on negligence, damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other nonpecuniary damage.

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Fifty percent of any punitive or exemplary damages that may be adjudged against the party defending the claim shall be awarded to the benefit of the state and when paid deposited in the general fund.

(b) The amount of punitive damages awarded to the state shall be considered a part of the amount recovered by the claiming party for purposes of calculating an award of attorney fees.

(c) The state may not bring or be joined in an action, based on punitive damages that may be awarded under this section.

Sec. 09.17.025. DAMAGES RESULTING FROM INTOXICATION. A person who suffers personal injury or death may not recover damages for the

personal injury or death if the injuries or death occurred while the person was under the influence of intoxicating liquor or a controlled substance listed in AS 11.71.140 - 11.71.190 and the condition of being under the influence of the intoxicating liquor or controlled substance contributed more than 50 percent to the person's injuries or death. If there was 0.10 percent or more by weight of alcohol in the person's blood or 0.10 grams or more of alcohol per 210 liters of the person's breath, it is presumed that the person was under the influence of intoxicating liquor.

Sec. 09.17.030. ITEMIZED VERDICTS. In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, and economic loss shall be further itemized by category. Itemization of economic loss by category includes: (1) amounts intended to compensate for reasonable expenses that have been incurred, or which will be incurred, for necessary medical, surgical, x-ray, dental, or other health or rehabilitative services, drugs, and therapy; (2) amounts intended to compensate for lost wages or loss of earning capacity; and (3) all other economic losses granted by the fact finder. A verdict shall further determine the amounts intended to compensate for injury or losses incurred before the verdict and amounts intended to compensate for losses that will be incurred in the future.

Sec. 09.17.035. PERIODIC PAYMENTS. (a) In an action where the damages for personal injury include an award for future damages in excess of $50,000, the court may, if it determines that it is in the interest of the injured party or the public, require that the portion of the total award allocated for future damages be paid into the court and placed in a trust account in a bank or savings and loan association or placed with a licensed escrow agent and paid to the

judgment creditor in periodic payments rather than in a lump-sum payment.

(b) A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only as provided in (d) of this section or in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining in the trust shall be distributed in accordance with a will of the deceased judgment creditor or under the intestate laws of the state if the deceased had no will.

(c) The court shall include as part of the costs awarded to the claimant the costs of providing periodic payment of future economic losses through a trust account as required by this section.

(d) The court that rendered the original judgment may, upon petition of the judgment creditor, modify the judgment to award and apportion the unpaid future damages specified in AS 09.17.030 if the judgment creditor incurs unanticipated medical expenses that periodic payments paid to date do not cover.

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. Every complaint, answer, cross-claim, and counterclaim shall be signed and verified by the party or the attorney of the party filing the pleading and shall bear a statement that the person signing the pleading believes the statements made in the pleading are true. If the court finds that a statement made in the complaint, answer, cross-claim, or counterclaim

was knowingly untrue, and upon motion of a party the person signing the pleading shall be compelled to show cause why the person signing the pleading should not be held in contempt of court.

Sec. 09.17.045. LIMITED LIABILITY OF CERTAIN DIRECTORS, OFFICERS AND SUPERINTENDENTS. (a) Unless the act or omission constituted gross negligence, a person may not recover damages for an act or omission to act, in the course and scope of official duties, from the following:

(1) a member of the board of directors or an officer of a nonprofit corporation;

(2) a member of the board of directors of a public or private hospital;

(3) a member of a school board or superintendent of a school district.

(b) Notwithstanding (a) of this section, the duties and liabilities of a director or officer of a nonprofit corporation to the corporation or the corporation's shareholders may not be limited or modified.

Sec. 09.17.050. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Sec. 09.17.055. COLLATERAL BENEFITS. (a) After the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorney fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of

subrogation against the claimant by law or contract.

(b) If the defendant elects to introduce evidence under (a) of this section, the claimant may introduce evidence of

(1) the amount that the actual attorney fees incurred by the claimant exceed the amount of attorney fees awarded to the claimant; and

(2) the amount that the claimant has paid or contributed to secure the right to an insurance benefit introduced by the defendant as evidence.

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as evidence under (b) of this section, the court shall deduct from the amount awarded the claimant, the amount by which the value of the benefits under (a) of this section exceeds the amount of payments under (b) of this section.

(d) Notwithstanding (a) of this section, the defendant may not introduce evidence of

(1) benefits that cannot be reduced or offset by federal law;

(2) a deceased's life insurance policy; or

(3) gratuitous benefits provided to the claimant.

Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.17.-070, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.070.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or ommission of each person cannot be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.070, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of joint and several liability, except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

Sec. 09.17.070. EFFECT OF RELEASE. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the dollar amount of the release, covenant not

to sue, or similar agreement.

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability; the term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages; legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

* Sec. 2. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.075. ACTIONS THAT MUST BE ARBITRATED. A person may not bring an action for damages based on injury to person or property when the amount in controversy is less than $75,000, exclusive of costs, interest and attorney fees, unless the controversy is first arbitrated under AS 09.43.

* Sec. 3. AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. <u>At any time more than 10 days before the trial begins</u> [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is

considered withdrawn and evidence of that offer is not admissible except proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 45.45.010(a) and accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be reduced by <u>five</u> [TWO] percent a year;

(2) if the offeree is the party defending against the claim, the interest rate shall be increased by <u>five</u> [TWO] percent a year.

* Sec. 4. AS 09.30.070 is amended by adding a new subsection to read:

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day the cause of action accrues.

* Sec. 5. AS 09.43.110 is amended to read:

Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of a party, the court shall confirm an award unless

<u>(1)</u> within the time limits imposed by AS 09.43.120 and 09.43.130 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in AS 09.43.120 and 09.43.130<u>; or</u>

<u>(2) an appeal is taken under AS 09.43.160(c)</u>.

* Sec. 6. AS 09.43.160 is amended by adding a new subsection to read:

(c) An award made as a result of arbitration required by AS 09.43.075 may be appealed to the proper court. The appeal shall be filed within 60 days after notice of an award is made under AS 09.43.080. The court shall grant a trial de novo if an appeal is filed under this

subsection.

* Sec. 7. AS 09.55.548 is repealed and reenacted to read:

Sec. 09.55.548. AWARDS. Damages shall be awarded in accordance with principles of the common law. The fact finder in a malpractice action shall render any award for damages in accordance with AS 09.17.

* Sec. 8. AS 09.60 is amended by adding a new section to read:

Sec. 09.60.035. COSTS AND ATTORNEY FEES ALLOWED FOR ARBITRATION APPEAL. If a party appeals an award made as a result of arbitration required by AS 09.10.075, and the appellate court increases or decreases the award by more than 10 percent, the prevailing party on appeal shall also be awarded actual costs and attorney fees incurred as a result of the appeal.

* Sec. 9. AS 22.10.020(d) is amended to read:

(d) The superior court has jurisdiction in all matters appealed to it (1) from a subordinate court; (2) by a party to an arbitration award under AS 09.43.160(c); [,] or (3) an administrative agency when appeal is provided by law. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part.

* Sec. 10. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases and proceedings as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $25,000;

Sec. 09.60.010. COSTS AND ATTORNEY FEES ALLOWED PREVAILING PARTY. (a) The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action.

(b) The court may, upon petition by a party to a civil action, determine the reasonableness of that party's attorney fee agreement. The court shall take into consideration

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the attorney or attorneys performing the services;

(8) whether the fee is fixed or contingent;

(9) whether the fixed or contingent fee agreement was in writing and whether the client was aware of the right to petition the court under this section.

* Sec. 9. AS 09.60 is amended by adding a new section to read:

Sec. 09.60.035. COSTS AND ATTORNEY FEES ALLOWED FOR ARBITRATION APPEAL. If a party appeals an award made as a result of arbitration required by AS 09.10.075, and the appellate court increases or decreases the award by more than 10 percent, the prevailing party on appeal shall also be awarded actual costs and attorney fees incurred as a result of the appeal.

* Sec. 10. AS 22.10.020(d) is amended to read:

(d) The superior court has jurisdiction in all matters appealed to it (1) from a subordinate court; (2) by a party to an arbitration award under AS 09.43.160(c); [,] or (3) an administrative agency when appeal is provided by law. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part.

* Sec. 11. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases and proceedings as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $25,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $25,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the

manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value of the property or of the arrears and damage to the property does not exceed $25,000;

(7) for the foreclosure of a lien when the amount in controversy does not exceed $25,000;

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $25,000;

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020;

(11) over an appeal by a party to an arbitration award under AS 09.43.160(c) when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $25,000.

* Sec. 12. AS 09.16 is repealed.

* Sec. 13. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 14. AS 09.17.060 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 15. AS 09.17.020 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 16. AS 09.17.040 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of claims, answers, counterclaims, and cross-claims.

* Sec. 17. AS 09.30.065 as amended by sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day the cause of action accrues.

* Sec. 18. AS 09.60.010 as amended by sec. 8 of this Act has the effect of amending Alaska Rule of Civil Procedure 82 by prohibiting the award of attorney fees, unless allowed by statute or by agreement of the parties.

* Sec. 19. APPLICABILITY. Sections 1 - 12 of this Act apply to all causes of action accruing on or after the effective date of this Act.

* Sec. 20. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Table 7

MANDATORY COURT-ANNEXED ARBITRATION PROGRAMS

Jurisdiction	Program Title	Authorization	Earliest Date Authorized	Current Scope (As of Nov. 1984)
State Courts				
[redacted]	Arbitration of Small Claims	State Law--A.S. §09 43.190	1972	[redacted] implemented; jurisdictional limit too low [redacted] useful
Arizona	Arbitration of Claims	State Law--A.R.S. §12-133	1974	Operational in at least 2 counties including Phoenix and Tucson
California	Judicial Arbitration	State Law--C.C.P. §1141.10-32	1978	Operational in 15 counties with 10 or more judges and slowly being adopted in smaller courts
Connecticut	Fact Finding and Arbitration	State Law--Conn. Statutes §52-549N	1983	Statewide implementation but far more cases processed by fact-finding than by arbitration
Delaware	Compulsory Pretrial Arbitration	Superior Court Rule 16(C)	1984	Program began statewide in mid-1984
Michigan	Mediation	Supreme Court Rule (except Wayne County Court); General Court Rule 316	1980	Program under revision; 29 counties expected to implement new program in March 1985
Minnesota	Judicial Arbitration	State Law--Minn. Statutes §480.73	1984	Program to commence in February 1985 in Hennepin County (Minneapolis)
Nevada	Motor Vehicle Damage Actions Arbitration	State Law--N.R.S. §38.215-245	1971	Very little application, but efforts are underway to launch an expanded voluntary arbitration program for all civil damages cases
New Hampshire	Compulsory Arbitration	Supreme Court Rule, Temporary Rules of Compulsory Arbitration	1978	2 counties (Merrimack, Rockingham)
New Jersey	Judicial Arbitration	State Law--Laws of N.J. Ch.358	1983	Being implemented statewide
New Mexico		Supreme Court Rule	1984	Program to commence in 2 counties in July '85 (Albuquerque and Santa Fe)
New York	Alternative Dispute Resolution by Arbitration	State Law 22 N.Y.C.R.R. Part 28	1970	Operational in 31 counties, including New York City

Table 2 (cont.)

Jurisdiction	Program Title	Authorization	Earliest Date Authorized	Current Scope (As of Nov. 1984)
Ohio	Varies by county	Local Judicial Rules-- Hamilton County Rule 24 Stark County Rule 16 Cuyahoga County Rule 29	1970	Operational in approximately 15 counties including Cleveland and Cincinnati
Oregon	Arbitration Program	State Law--Ch.670 Oregon Laws	1981	Operational in 5 counties and expanding statewide by 12/31/84
Pennsylvania	Compulsory Arbitration	State Law--Pa. Con. Stat. Ann. Title 42 §7101	1952	Operational in 53 counties, including Philadelphia and Pittsburgh
Washington	Mandatory Arbitration of Civil Actions	State Law--R.C.W. Ch.7.06	1979	Operational in at least 3 counties (King, Pierce, Yakima)
Federal District Courts				
California-- Northern Dist.	Court-annexed Arbitration	Local Rule--Rule 500	1978	Ongoing program
Connecticut	Court-annexed Arbitration	Local Rule	1978	Disbanded after experimental period concluded
Florida-- Middle Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence January 1985
Michigan-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
Missouri-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
New Jersey	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
North Carolina-- Middle Dist.	Court-annexed Arbitration	Local Rule--Part VI Rules of Practice and Procedure	1984	Program to commence January 1985
Oklahoma-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
Pennsylvania-- Eastern Dist.	Court-annexed Arbitration	Local Rule--Civil Procedure 8	1978	Ongoing program
Texas-- Southern Dist. Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985

Article 2. Arbitration of Small Claims.

Cross references. — For small claims actions in district courts, see AS 22.15.040; for district court rules providing for practice and procedure in small claims actions see DCR 8-22.

Editor's notes. — To date, the supreme court has not adopted rules under this article.

Sec. 09.43.190. Arbitration under court rules. The supreme court may provide by rule for compulsory arbitration of a cause of action filed in a superior or district court, demanding only a money judgment, when it appears that the demand on the cause of action is for $3,000 or less, exclusive of costs, or when it appears to the trial court as a result of a pretrial conference that the amount which will be recovered on the cause is not likely to exceed $3,000. (§ 2 ch 94 SLA 1972)

Sec. 09.43.200. Appointment and compensation of arbitrator. Arbitration of actions shall be by either a member of the Alaska Bar Association or a magistrate appointed and compensated by the court as provided by its rules. (§ 2 ch 94 SLA 1972)

Sec. 09.43.210. Practice and procedure. The practice and procedure for conducting arbitration, the powers of the arbitrators and the assessment of costs shall be prescribed by the court rules. (§ 2 ch 94 SLA 1972)

Sec. 09.43.220. Judgments and appeals. Unless an appeal is taken from the award to the court which ordered arbitration as provided by the court rules, the court shall enter and enforce judgment in accordance with the award of the arbitrator. Any party aggrieved by the award may appeal. All appeals shall be determined in the manner permitted by the rules. (§ 2 ch 94 SLA 1972)

Chapter 45. Actions Relating to Real Property.

Alaska State Legislature
House of Representatives

REPRESENTATIVE STEVE RIEGER
DISTRICT 8, SEAT B

MEMBER
FINANCE COMMITTEE

MEMORANDUM

TO: Representative Mike Navarre

FROM: Representative Steve Rieger

DATE: March 19, 1986

RE: Non-subrogated collateral sources

I understand that in your discussion of CSSSHB 532 (Labor and Commerce) this morning, Susan Burke asked whether there are any collateral sources which do not have subrogation rights. She suggested that if there are no collateral benefits which do not have subrogation rights, then there is no double recovery problem, and therefore no need for the collateral benefits section of the bill.

I was advised that you decided to withdraw the collateral benefits section of the bill pending a response to the question that was raised. I understand your concern on this issue, so I asked my staff to look into the matter. We discovered that there are a number of non-subrogated collateral sources aside from gratuitous benefits provided by family and friends.

According to Mike Lesmegan of Hughes, Thorsness, the largest insurance defense law firm in the State, State Farm Insurance Company's health insurance policies do not contain a subrogation clause. Similarly, the medical payment portion of Allstate's policies do not provide for a right of subrogation. Mr. Lesmegan also suggested that certain group health insurance policies purchased by employers for the benefit of their employees do not permit subrogation.

A broker with Shattuck & Grummett, one of the oldest insurance firms in Juneau, advised us that he is aware of individual accident and disability policies where there is no right of recovery against the insured by the insurer. He also mentioned a form of non-excess coverage where there is no right of subrogation.

We double-checked the above information with Don Koch of the Division of Insurance and again were informed that there are indeed various kinds of insurance policies which do not have rights of subrogation, particularly in the disability area.

Finally, we checked some articles that have been written on the subject. According to a Washburn Law Review article sick leave and disability leave are two more examples of collateral sources which do not have subrogation rights attached to them.

In view of the above information, I hope you will reconsider your tentative decision to delete the collateral benefits section of the bill. If I can provide any additional information on this issue, I'd be happy to do whatever I can.

Pass on w/ S.B. 11

Wagstaff, Pope & Rogers
Lawyers

Robert K. Wagstaff & Associates
912 West Sixth Avenue
Anchorage, Alaska 99501
(907) 277-8611

Douglas Pope
David S. Rogers
124 West 5th Street
Juneau, Alaska 99801
(907) 586-4151

Affiliated with:
Hobbs, Straus, Dean & Wilder
1819 H Street N.W. Suite 800
Washington, D.C. 20006
(202) 783-5100

March 21, 1986

TO: H L & C members
RE: caps on non econ. awards

Hon. Mike Navarre
State Representative
State Capitol Building
Juneau, Alaska
99801

Re: SSHB 532

Dear Rep. Navarre:

Since I don't seem to be able to connect with the committee to testify, I thought I should submit some comments on what is apparently an overlooked matter. Please feel free to distribute this letter if you desire.

The section on **Noneconomic Damages** has been discussed in terms of pain and suffering and the like. Whatever the policy on a cap should be, I'm not aware that the sponsors intend to cap economic loss that is nonpecuniary.

In Alaska, at least two types of economic loss are nonpecuniary, the household services a wife or husband provides to the family or to the spouse, and the subsistence support that is supplied to families in rural areas. Our courts have concluded that an economic value can be attributed to this type of support, even if it is not pecuniary in nature. For example, a typical situation involves a housewife who provides all of the household services to her husband and family, and then is seriously injured or killed by the negligence of a third party. The other typical example is a father in a rural village who supports his family by hunting, fishing and other subsistence activities, and then is seriously injured or killed. In both instances the family and spouse experience just as real a loss of support as if a wage earner were injured or killed. If the market value of those services is equivilent to $20,000.00 per year, the courts and juries use that figure in quantifying loss. It is incumbent on the plaintiff to demonstrate the market value. This is typically done through expert testimony.

The effect of the current approach is to bring parity to the economic value of various forms of support, pecuniary or

nonpecuniary. The sponsor substitute, by defining non-economic loss as "nonpecuniary," is effectively capping the economic loss of household services, subsistence support, and the like.

If the committee wishes to correct this, I suggest that the language and other nonpecuniary damage be deleted from the bill, and be replaced with AND OTHER DAMAGES WHICH DO NOT HAVE AN ECONOMIC VALUE. If you have any questions, please don't hesitate to call me.

Sincerely,

Douglas Pope

Douglas Pope

cc. Rep. Sam Cotten

Rule 11. Signing of Pleadings.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

performed under pertinent terms of contract each pertinent item pleaded as separate exhibit, (b) that defendant had received payment for specific portion of the work performed, (c) that plaintiff's claim for payment of the balance had been rejected. Stock & Grove, Inc. v. City of Juneau, Op. No. 292, 403 P2d 171 (Alaska 1965).

Civil Rule 11

Collateral References

Same as Fed. R. Civ. P. 11

2A Moore, Federal Practice 11.01 – 11.05 (2d ed. 1979)

5 Wright and Miller, Federal Practice and Procedure §§ 1331 – 1335 (1969)

Cases

Sanctions for failure to sign a pleading are a matter in the discretion of the trial court. Sanuita v. Common Laborer's and Hod Carriers Union, Op. No. 290, 402 P2d 199 (Alaska 1965).

Where appellants did not draw the trial court's attention to the failure of counsel to sign the complaint and made no motion to strike under this rule, and it was not contended that counsel's failure to sign was anything other than an oversight, the trial court had no opportunity to pass on the matter and failure to comply with this rule was not considered the first time on appeal. Sanuita v. Common Laborer's and Hod Carriers Union, Op. No. 290, 402 P2d 199 (Alaska 1965).

The purpose of this rule requiring signature of counsel as plainly set out in its present wording has been to insure the good faith of counsel by holding them strictly accountable for all the allegations contained in the complaint. Sanuita v. Common Laborer's and Hod Carriers Union, Op. No. 290, 402 P2d 199 (Alaska 1965).

Civil Rule 12

Collateral References

Generally

2A Moore, Federal Practice 12.01 – 12.04 (2d ed. 1979)

5 Wright and Miller, Federal Practice and Procedure §§ [illegible] 1344 (1969)

Rule 49. Special Verdicts and Interrogatories.

(a) **Returning a Verdict—Polling a Jury—Filing and Entering Verdict.** When the jury, or such a majority of it as may be required by the law or stipulation of the parties, have agreed upon a verdict, they shall be conducted into court, their names called, and the verdict shall be given by the foreman. The verdict shall be in writing and signed by the foreman. Upon stipulation of counsel, the court may permit the foreman of the jury to date, sign and seal in an envelope a verdict reached after the usual business hours. The jury may then separate, but all must be in the jury box to deliver the verdict when the court next convenes or as instructed by the court. Any party may require the jury to be polled as to any verdict, which is done by asking each juror if it is his verdict. If upon such polling it appears that a verdict has not been agreed upon, the jury shall be sent out for further deliberation. After a verdict has been agreed upon, the jury shall be discharged from the case. The verdict shall be filed and an entry thereof made in the minutes of the court. The word "verdict" shall include, where applicable, answers to questions or interrogatories.

(b) **Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so,

...aintiff did not waive her peremptory challenge to a second alternate juror by not challenging the first alternate interviewed. Grimes v. Haslett, Op. No. 2476, 641 P2d 813 (Alaska 1982).

A stockholder's interest in an ANCSA - created village corporation can be the basis of a challenge for cause under this rule when the corporation is involved in the litigation. Noey v. Ukpeagvik Inupiat Corp., Op. No. 2836, 683 P2d 260 (Alaska 1984).

Civil Rule 48

Collateral References

(b) 88 C.J.S. Trial §§ 323–378 (1955); 89 C.J.S. Trial § 468 (1955)

75 Am. Jur. 2d Trial §§ 600–640, 1040 (1974)

(c) 88 C.J.S. Trial § 47 (1955)

75 Am. Jur. 2d Trial §§ 72–86 (1974)

(d) 89 C.J.S. Trial §§ 453–454 (1955)

75 Am. Jur. 2d Trial §§ 945–948, 961, 974–976 (1974)

(e) 50 C.J.S. Juries § 123 (1947)

47 Am. Jur. 2d Jury §§ 133–135 (1969)

(f) 89 C.J.S. Trial §§ 451, 457, 462 (1955)

75 Am. Jur. 2d Trial §§ 940–944, 999–1002, 1005, 1009 (1974)

(g) 89 C.J.S. Trial §§ 465 469 (1955)

75 Am. Jur. 2d Trial §§ 1025–1040 (1974)

(h) 89 C.J.S. Trial § 482 (1955)

76 Am. Jur. 2d Trial § 1072 (1975)

(i) 89 C.J.S. Trial § 482 (1955)

Civil Rule 49

Collateral References

Generally

5A Moore, Federal Practice 49.01, 49.05–49.07 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2501–2503 (1971)

(a) 89 C.J.S. Trial §§ 486–490, 520 (1955)

76 Am. Jur. 2d Trial §§ 1117, 1119–1132 (1975)

(b) Same as Fed. R. Civ. P. 49(a)

5A Moore, Federal Practice 49.02–49.03 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2505–2510 (1971)

(c) Same as Fed. R. Civ. P. 49(b)

5A Moore, Federal Practice 49.04 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2511–2513 (1971)

Cases

It is incumbent on a party requesting a special verdict to see that the court gives the instruction required by Rule 49(b), and failure of a jury to answer special interrogatories is not error where no instruction or explanation was requested and none given. Gregory v. Padilla, Op. No. 139, 379 P2d 951 (Alaska 1963).

Uncontradicted testimony of two witnesses sustained jury's finding in answer to written interrogatories that area was overcut and supported verdict and judgment entered below. United Geophysical Corporation v. Culver, Op. No. 230, 394 P2d 393 (Alaska 1964).

Number and form of interrogatories rested in the sound discretion of the trial judge which was not abused where issue was fairly presented to the jury by the interrogatories he elected to submit. Patterson v. Cushman, Op. No. 233, 394 P2d 657 (Alaska 1964).

Where counsel for the defendant is given an opportunity prior to discharge of the jury to object to plaintiff's verdict and the defense counsel expresses his satisfaction with the verdict, the right to challenge the consistency of answers to jury interrogatories and the verdict is waived. City of Homer v. Land's End Marine, Op. No. 565, 459 P2d 475 (Alaska 1969).

An error in submitting compound interrogatories to a jury does not necessarily constitute plain error. Holiday Inns of America, Inc. v. Peck, Op. No. 1024, 520 P2d 87 (Alaska 1974).

Although one interrogatory of the special verdict was erroneous, other interrogatories plainly instructed the jury to do that which the erroneous one did not, and so rendered the error harmless. Loof v. Sanders, Op. No. 2859, 686 P2d 1205 (Alaska 1984).

Civil Rule 50

Collateral References

Generally

5A Moore, Federal Practice 50.01 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2521–2532 (1971)

(a) Same as Fed. R. Civ. P. 50(a)

5A Moore, Federal Practice 50.02–50.06 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2533–2536 (1971)

(b) Same as Fed. R. Civ. P. 50(b)

5A Moore, Federal Practice 50.07–50.12 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2537–2539 (1971)

(c) Same as Fed. R. Civ. P. 50(c)

5A Moore, Federal Practice 50.13–50.14 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure § 2539 (1971)

(d) Same as Fed. R. Civ. P. 50(d)

5A Moore, Federal Practice 50.15 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure § 2540 (1971)

Cases

I. Standard of Review

A. In General

Granting motion for judgment notwithstanding the verdict did not mean automatic denial of an alternative motion for a new trial based on grounds which were not appropriate for consideration on motion for judgment n.o.v. Alaska Brick Co. v. McCoy, Op.

Rule 52. Findings by the Court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) **Amendment.** Upon motion of a party made not later than 10 days after the date shown in the clerk's certificate of distribution on the judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the court an objection to such findings or has made a motion to amend them or a motion for judgment.

(c) **Preparation and Submission.** The preparation and submission of findings of fact and conclusions of law shall be governed by Rule 78. (Amended by Supreme Court Order 258 effective November 15, 1976; and by Supreme Court Order 554 effective April 4, 1983)

(a) CROSS REFERENCE: Civ. Form 84

negligence, the court's failure to charge the jury in an appropriate manner was not excused by the technical defects in the request to charge. Pepsi Cola Bottling Co. v. Superior Burner Service Co., Inc., Op. No. 411, 427 P2d 833 (Alaska 1967).

Rejection of proposed instruction was not error where the substance of the requested instruction was adequately covered by the instructions which were given by the court. City of Fairbanks v. Nesbett, Op. No. 439, 432 P2d 607 (Alaska 1967).

It was not error for the court to give requested instructions defining the duty of one in a sudden emergency where the circumstances of the sudden emergency were covered by instructions defining negligence generally. Ferrell v. Baxter, Op. No. 688, 484 P2d 250 (Alaska 1971).

Splitting jury instructions concerning loss of consortium into one instruction defining consortium damages and another informing the jury how to evaluate such damages is error. Grasle Electric Co. v. Clark, Op. No. 1074, 525 P2d 1081 (Alaska 1974).

In "slip and fall" tort case, jury need not be instructed as to how a reasonable person peforms the activity of walking. Hatfield v. Universal Services, Inc., Op. No. 2288, 622 P2d 984 (Alaska 1981).

Civil Rule 52

Collateral References

Generally

5A Moore, Federal Practice 52.01 –52.02, 52.13 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2571 – 2573 (1971)

(a) Same as Fed. R. Civ. P. 52(a)

5A Moore, Federal Practice 52.03 –52.10, 52.12 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2574 – 2581 (1971)

(b) Same as Fed. R. Civ. P. 52(b)

5A Moore, Federal Practice 52.11 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure § 2582 (1971)

Cases

I. In General
II. Support for Findings
  A. Requirements
  B. Construction
III. Clearly Erroneous Rule

I. In General

Finding which has the indirect effect of finding that proceedings of a tax sale up to and including the issuance of the tax deed were not erroneous, illegal or void, was set aside where this was not an issue in the case. Wells v. Noey, Op. No. 142, 380 P2d 876 (Alask. 1962).

Civil Rule 52(a) was disregarded by trial judge's failure to direct entry of judgment in the civil docket in the manner provided by Civil Rule 74. Lowe v. Senior, Op. No. 168, 385 P2d 942 (Alaska 1963).

Objections to the findings of fact, conclusions of law or judgment below are not a prerequisite to challenge the insufficiency of evidence on appeal. Isaacs v. Hickey, Op. No. 210, 391 P2d 449 (Alaska 1964).

This rule which requires findings of fact was not applicable to appellate review by the superior court on an administrative agency's decision where the

superior court did not conduct a trial de novo and was not the finder of fact. Employers' Liability Assurance Corp. v. Bradshaw, Op. No. 360, 417 P2d 600 (Alaska 1966).

In disposing of motions for summary judgment it is unnecessary for the trial court to make findings of fact. Palzer v. Serv-U-Meat Company, Op. No. 367, 419 P2d 201 (Alaska 1966); Alaska State Housing Authority v. Contento, Op. No. 435, 432 P2d 117 (Alaska 1967).

Judging the credibility of witnesses and weighing conflicting evidence was the trial court's function. Associated Engineers & Contractors, Inc. v. H. & W. Const. Co., Inc., Op. No. 462, 438 P2d 224 (Alaska 1968).

It is not the intent of Rule 78, requiring counsel for the successful party to prepare findings of fact, to delegate to counsel the trial judge's primary duty of personally finding the facts under this rule. Fairbanks Builders, Inc. v. Morton DeLima, Inc., Op. No. 582, 483 P2d 194 (Alaska 1971).

An appellate court in reviewing a decision, must take the view of the evidence most favorable to the prevailing party in the lower court. Graham v. Rockman, Op. No. 854, 504 P2d 1351 (Alaska 1972).

Where there is a variance between the court's oral ruling on a motion for summary judgment and the written findings prepared by the prevailing party, the oral ruling controls. Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, Op. No. 1093, 527 P2d 447 (Alaska 1974).

Credibility choices are for the trier of facts to make and his selection will generally be accepted by a reviewing court. B.B. & S. Construction Co., Inc. v. Stone, Op. No. 1143, 535 P2d 271 (Alaska 1975).

Failure to object to finding of fact in action tried by court without jury does not waive any objection to such finding on appeal. Casperson v. Meech, Op. No. 1700, 583 P2d 218 (Alaska 1978).

In reviewing superior court's assumed conclusion that petitioner's activity was abnormally dangerous, leading to imposition of absolute liability, the supreme court was free to reach an independent conclusion based on the same nontestimonial record of undisputed facts presented below. Yukon Equipment v. Fireman's Fund Ins. Co., Op. No. 1754, 585 P2d 1206 (Alaska 1978).

In contract action where extrinsic evidence was in dispute, the trial court's factual findings based upon the extrinsic evidence could not be reversed unless clearly erroneous. Jackson v. Nangle, Op. No. 2773, 677 P2d 242 (Alaska 1984).

In guardianship proceeding, incorporation of probate master's report in superior court's order appointing guardian was proper. Matter of O.S.D., Op. No. 2744, 672 P2d 1304 (Alaska 1983).

II. Support for Findings

A. Requirements

The trial court cannot make a temporary restraining order into a preliminary injunction unless it sets forth the findings of fact and conclusions of law in support of its action. Miller v. Atkinson, Op. No. 49, 365 P2d 550, 552 (Alaska 1961).

It is the duty of a trial court to deal adequately with and state with clarity what it finds as facts and what it holds as conclusions of law. The findings and conclusions should be so clear and explicit as to give the supreme court a clear understanding of the basis for the decision made. Dikerson v. Geiermann,

Op. No. 60, 368 P2d 217 (Alaska 1962).

Rule 52(a) is mandatory and must be complied with. Merrill v. Merrill, Op. No. 62, 368 P2d 546 (Alaska 1962).

The purposes of Rule 52(a) are threefold: as an aid in the trial judge's process of adjudication; for the purposes of res adjudicata and estoppel by judgment; and as an aid to the appellate court on review. Merrill v. Merrill, Op. No. 62, 368 P2d 546 (Alaska 1962).

Under Rule 52(a) it is the duty of the trial court, by sufficiently detailed and explicit findings "to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the grounds on which the trial court reached its decision". Merrill v. Merrill, Op. No. 62, 368 P2d 546 (Alaska 1962).

Findings need only be sufficient to indicate the factual basis for the ultimate conclusion. Spenard Plumbing & Heating v. Wright, Op. No. 81, 370 P2d 519 (Alaska 1962).

Where the trial court, as trier of the facts, with every opportunity to judge the credibility of all the witnesses, found the existence of an oral contract and the terms of that contract the supreme court is bound by those findings unless they are clearly erroneous. Nordin v. Zimmer, Op. No. 96, 373 P2d 738 (Alaska 1962).

Trial court committed no error in failing to make findings of fact and conclusions of law where it granted defendant's motion for summary judgement. Lowe v. Boggess, Op. No. 110, 375 P2d 99 (Alaska 1962).

The supreme court's scope of review in judge-tried cases is limited to the determination of whether the court's findings are clearly erroneous. State v. Phillips, Op. No. 619, 470 P2d 266 (Alaska 1970).

The findings of a trial court sitting in admiralty will not be disturbed unless they are clearly erroneous. State v. Stanley, Op. No. 865, 506 P2d 1284 (Alaska 1973).

The supreme court in reviewing a criminal conviction in which there is a challenge to the sufficiency of the evidence cannot add to a finding of fact but will take notice of facts appearing in evidence which are undisputed. Hughes v. State, Op. No. 926, 513 P2d 1115 (Alaska 1973).

In reviewing findings of fact of a trial judge sitting without a jury the supreme court is bound by the "clearly erroneous" standard. Larman v. Kodiak Electric Association, Op. No. 950, 514 P2d 1275 (Alaska 1973).

This rule does not require that findings and conclusions be properly labeled or even that express findings be made on all questions, so long as the record clearly indicates that the court considered the matter and resolved each critical and actual dispute. Urban Development Co. v. Dekreon, Op. No. 1083, 526 P2d 325 (Alaska 1974).

It is the trial court's duty under this rule to make findings sufficient to give a clear understanding of the basis of its decision in order to enable an intelligent review on appeal. State v. l'Anson, Op. No. 1102, 529 P2d 188 (Alaska 1974).

It is the duty of a trial court by sufficiently detailed and explicit findings to give the appellate court a clear understanding of the basis of the trial court's decision and to enable it to determine the ground on which the trial court breached its decision. Wigger v. Olson, Op. No. 1125, 533 P2d 6 (Alaska 1975).

In making a written statement of reasons for denying a motion to appeal at public expense, a judge should take care to state with particularity and in detail preliminary and basic facts upon which he relied. Only if the judge makes such findings will the supreme court be able to have a clear understanding of the basis for the judge's decision. Johnson v. Johnson, Op. No. 1229, 544 P2d 1028 (Alaska 1976).

As a general rule, findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue. State v. Kaatz, Op. No. 1536, 572 P2d 775 (Alaska 1977).

Courts decision to increase child support payments pursuant to a motion to modify original divorce decree was deficient because it contained no findings of fact. Headlough v. Headlough, Op. No. 2463, 639 P2d 1010 (Alaska 1982).

Findings are sufficient if they provide the reviewing court with a clear understanding of the basis for the trial court's decision. Uchitel v. Telephone Co., Op. No. 2519, 646 P2d 229 (Alaska 1982).

When the trial court dismisses a complaint on the ground that the plaintiff has shown no right to relief, it must enter findings of fact and conclusions of law. Winn v. Mannhalter, Op. No. 2988, 708 P2d 444 (Alaska 1985).

B. Construction

In an action involving an attorney's claim for legal services rendered, the trial court ought to have determined whether an attorney-client relationship was created by contract, express or implied, and should have made findings of fact and conclusions of law to disclose the basis for its decision. Dickerson v. Geiermann, Op. No. 60, 368 P2d 217 (Alaska 1962).

If one of the questions presented at trial is controlled by equitable principles which underlie the common law action in assumpsit for money had and received, the superior court ought to have decided whether the evidence disclosed a state of facts which, measured by equitable standards, would have entitled appellant to the recovery which she sought. Dickerson v. Geiermann, Op. No. 60, 368 P2d 217 (Alaska 1962).

Evidence held sufficient to support finding of adequate consideration in action to set aside land contract. Hitz v. Property Investments, Inc., Op. No. 65, 368 P2d 929 (Alaska 1962).

Finding of trial court that enforceable oral contract was formed held justified. Elliot et al. v. Sandal, Op. No. 74, 369 P2d 890 (Alaska 1962).

Finding of trial court that an agency by estoppel existed was supported by adequate evidence. Elliot et al. v. Sandal, Op. No. 74, 369 P2d 890 (Alaska 1962).

Finding that a third person was not a party to an agreement entered into between the parties, and therefore not an indispensable party, was amply supported by the evidence. Nordin v. Zimmer, Op. No. 96, 373 P2d 738 (Alaska 1962).

Evidence supported finding of gross or wanton negligence where defendant left a truck parked on a bush airfield causing plaintiff's airplane to collide with it. McLemore v. Harris, Op. No. 102, 374 P2d 410 (Alaska 1962).

Evidence supported finding that testator was competent to execute will. Kraft v. Kraft, Op. No. 103, 374 P2d 413 (Alaska 1962).

Evidence supported finding that changes made by a lessee in leased premises were alterations instead of redecorations. Anderson v. Jacobs, Op. No. 105, 374 P2d 489 (Alaska 1962).

Findings that fire department was negligent were not clearly erroneous and would not be set aside. **Fairbanks & Lathrop Co. v. Schaible**, Op. No. 97, 375 P2d 201 (Alaska 1962).

Evidence supported finding that a fire was caused by loose fuel fittings. **George v. Willman**, Op. No. 134, 379 P2d 103 (Alaska 1962).

Evidence supported findings that plaintiff was negligent. **Van Reenan v. Golden Valley Electric**, Op. No. 127, 379 P2d 958 (Alaska 1962).

Trial court was correct in finding that defendant had failed to prove the allegations of their counterclaim. Wells v. Nocy, Op. No. 142, 380 P2d 876 (Alaska 1962).

In a case heavy with demeanor evidence and tried without a jury, it was the task of the trial court to resolve apparent conflict between the evidence of the plaintiff and of the defendant. Monsma v. Williams, Op. No. 161, 385 P2d 107 (Alaska 1963).

In action for damages for an alleged assault which was tried without a jury, trial court committed no error in finding defendant's plea of guilty in prior criminal action arising out of the same events persuasive but not conclusive against the defendant. Monsma v. Williams, Op. No. 161, 385 P2d 107 (Alaska 1963).

Oral decision of trial judge indicated a sufficient factual basis for entry of a formal judgment by a successor judge. Hale v. City of Anchorage, Op. No. 189, 389 P2d 434 (Alaska 1964).

For setting aside findings of fact of the trial court as "clearly erroneous," there must exist a stronger basis than a mere difference in personal judgement. Isaacs v. Hickey, Op. No. 210, 391 P2d 449 (Alaska 1964).

Findings of trial court approving a receiver's report and failing to find him guilty of negligence or bad faith could not be set aside under Civil Rule 52(a) although the supreme court may have viewed the facts differently as initial trier of fact, where no clear error and no failure to make a sound survey of or to accord the proper effect to cogent facts appeared from the examination of the records. First National Bank of Fairbanks v. Dual, Op. No. 223, 392 P2d 463 (Alaska 1964).

The trial court's specific finding that defendant had orally promised to be solely responsible for the payment of a promissory note, sufficiently negatived the contention that plaintiff who was co-signer of the note was entitled at the most to sue for contribution and it was not necessary for the trial court to make findings asserting the negative of the issue presented. Herning v. Wigger, Op. No. 284, 398 P2d 1002 (Alaska 1965).

Where the trial judge had a rational basis for concluding that the mother was a fit person to have custody of the child such finding shall not be disturbed on appeal. Wilson v. Mitchell, Op. No. 301, 406 P2d 4 (Alaska 1965).

Findings of trial court which under the record were supported by substantial evidence could not be disturbed on appeal because of some inconsistencies in the testimony. Kenai Power Corporation v. Stranberg, Op. No. 350, 415 P2d 659 (Alaska 1966).

The rule that a trial judge has the duty to make sufficiently detailed and explicit findings of fact in order to afford the reviewing court a clear understanding of the basis for his decision applies to mechanics' and materialmen's foreclosure actions. Moores v. Alaska Metal Buildings, Inc., Op. No. 515, 445 P2d 581 (Alaska 1968).

Strict compliance with provisions of this rule requiring findings of fact and conclusions of law and setting out reasons for the issuance of a preliminary injunction is required particularly in circumstances where the trial court is enjoining enforcement of an administrative regulation or statute. Department of Fish & Game v. Pinneil, Op. No. 586, 461 P2d 429 (Alaska 1969).

Where an order of final judgment incorporates language of an earlier interlocutory order which is supported with necessary findings of fact and

conclusions of law, no prejudice results from a lack of findings and conclusions to support the entry of partial judgment. Moran v. Kenai Towing and Salvage, Inc., Op. No. 1056, 523 P2d 1237 (Alaska 1974).

Finding of oral contract for sale of homestead would not be reversed because not clearly erroneous. Jackson v. White, Op. No. 1334, 556 P2d 530 (Alaska 1976).

Findings of fact and conclusions of law were sufficiently detailed to meet the requirements of paragraph (a) of this rule. City of Kenai v. Filler, Op. No. 1463, 566 P2d 670 (Alaska 1977).

The court's findings of fact concerning its apportionment of percentages in a comparative negligence case were adequate to meet the requirements of this rule. State v. Kaatz, Op. No. 1536, 572 P2d 775 (Alaska 1977).

The determination of whether the doctrine of quasi-estoppel is applicable is essentially a factual one and, as such, will not be disturbed on appeal unless the findings on which it is based are clearly erroneous. Jamison v. Consolidated Utilities, Inc., Op. No. 1576, 576 P2d 97 (Alaska 1978).

In an action on an open account, trial court's implicit factual finding that certain insurance payments were paid was not clearly erroneous. Eagle Air v. Corroon, Etc., Op. No. 2538, 648 P2d 1000 (Alaska 1982).

Where court held that a purported lease agreement created a security interest by giving the lessee the option of owning the property for a nominal consideration, the nominality of the option price was a factual determination which could not be set aside unless clearly erroneous. Western Enterprises v. Artic Office Machines, Op. No. 2707, 667 P2d 1232 (Alaska 1983).

III. Unsupported Findings – Clearly Erroneous Rule

The findings of the trial court were not supported by the evidence and were "clearly erroneous" as to whether there had been a mistake in payment of partnership salaries. Durkee v. Busk, Op. No. 17, 355 P2d 588, 593 (Alaska 1960).

While regard must be given to the opportunity of the trial court to judge the credibility of witnesses, the findings of that court are not conclusive when the entire evidence convinces the reviewing court that a mistake has been committed. Link v. Patrick, Op. No. 52, 367 P2d 157, 159 (Alaska 1961).

Where the trial court has failed to comply with Civil Rule 52(a), the normal practice is for the appellate court to remand the case for appropriate findings of fact and conclusions of law, but where the judgment itself cannot be understood, the court may vacate the judgment and return the case to the superior court for a new trial. Dickerson v. Geiermann, Op. No. 60, 368 P2d 217, 219 (Alaska 1962).

Where the basis for the trial court's decision cannot be determined from the finding of facts, the Supreme Court will remand the cause to the superior court for the purpose of making appropriate findings of fact, and if this cannot be done, the superior court shall, in lieu of making further findings of fact, grant a new trial. Merrill v. Merrill, Op. No. 62, 368 P2d 546, 548 (Alaska 1962).

Evidence held insufficient to support finding that real estate broker had failed to produce a purchaser who was ready, willing and able to purchase in accordance with terms of the earnest money receipt and agreement. Pasley v. Barber, Op. No. 64, 368 P2d 549 (Alaska 1962).

Where findings of fact are clearly erroneous, they will be set aside. Rogge v. Weaver, Op. No. 63, 368 P2d 810, 813 (Alaska 1962).

Finding of trial court that promissory note had been paid held not supported by evidence. Awes, Adm. v. Walker, Op. No. 67, 370 P2d 187 (Alaska 1962).

Where defendant's automobile skidded out of its lane of traffic on an icy street and struck plaintiff, trial court's finding that defendant was not negligent was not supported by the evidence, as the burden of proving excuse or justification for violation fell on defendant and he failed to discharge this burden. Rogers v. Dubiel, Op. No. 94, 373 P2d 295 (Alaska 1962).

Where findings of the trial court were not sufficiently detailed and explicit to give the appellate court a clear understanding of the basis of the decision, case was remanded for the purpose of making sufficient findings of fact. Hamilton v. Lotto, Op. No. 211, 391 P2d 948 (Alaska 1964).

Findings of fact were not adequate to determine with certainty what facts were found by the court, and as a result the conclusions of law served no helpful purpose. Stock & Grove, Inc. v. City of Juneau, Op. No. 292, 403 P2d 171 (Alaska 1965).

Medical malpractice case tried without a jury was remanded for the purpose of making more specific and detailed findings in regard to past and future damages for physical impairment and past and future damages by loss of time and impairment of earning capacity. Patrick v. Sedwick, Op. No. 338, 413 P2d 169 (Alaska 1966).

Where in a case arising under a mechanic's lien statute the findings of fact did not indicate whether a determination of "knowledge" of construction by the owner as required under the applicable statute for the creation of such lien was made by the court, and the conclusions of law were insufficiently articulate as to the rules of law relied on by the court, the case was remanded and the trial judge was empowered, if he so determines, to hear additional evidence or order a new trial. Vaara v. Ketchikan Spruce Mills, Op. No. 441, 432 P2d 618 (Alaska 1967).

Where an action by a prisoner against the state for injuries allegedly sustained while being transported in a truck after a hip operation is dismissed on the merits without any findings of fact being made, the case will be remanded for purposes of making adequate findings of fact and conclusions of law, including findings as to the court's judgment of credibility of the plaintiff and his witnesses. Bohm v. State, Op. No. 543, 453 P2d 410 (Alaska 1969).

Clear error will not be found unless the reviewing court is convinced on the whole record that a mistake has been committed. Paskvan v. Mesich, Op. No. 557, 455 P2d 229 (Alaska 1969).

A preliminary injunction which is granted without setting forth the reasons for the issuance of the injunction and without findings of fact and conclusions of law which articulate grounds for the issuance of the preliminary injunction as required by this rule is procedurally defective and will be vacated. Department of Fish & Game v. Pinnell, Op. No. 586, 461 P2d 429 (Alaska 1969).

The supreme court will vacate rather than remand where a preliminary injunction is procedurally defective and where a hearing has been held on a motion for permanent injunction and where a decision on the merits of the permanent injunction is anticipated in the near future. Department of Fish & Game v. Pinnell, Op. No. 586, 461 P2d 429 (Alaska 1969).

A finding is not clearly erroneous, unless, from a review of the entire record, the supreme court is left with definite and firm conviction that a mistake has been made. State v. Phillips, Op. No. 619, 470 P2d 266 (Alaska 1970).

The clearly erroneous standard of review applies to all factual findings, including findings in cases tried entirely on

the basis of written depositions, documentary evidence and statements of undisputed facts, as well as cases involving demeanor evidence. **Alaska Foods, Inc. v. American Mfr.'s Mut. Ins. Co.**, Op. No. 678, 482 P2d 842 (Alaska 1971).

The clearly erroneous standard of review of findings of fact means something more than merely showing that it is more probable than not that the trial judge was mistaken. The reviewing court must be convinced, in a definite and firm way, that a mistake has been committed and must be well persuaded by the party seeking to have the trial judge's findings set aside. **Alaska Foods, Inc. v. American Mfr.'s Mut. Ins. Co.**, Op. No. 678, 482 P2d 842 (Alaska 1971).

A finding is "clearly erroneous" when, although there may be evidence to support it, the reviewing court is left with the definite and firm conviction on the entire record that a mistake has been committed. **State v. Abbott**, Op. No. 804, 498 P2d 712 (Alaska 1972).

Before the supreme court will reverse a finding of fact as clearly erroneous, the court must be convinced, in a definite firm way, that a mistake has been committed. **Moran v. Holman**, Op. No. 945, 514 P2d 817 (Alaska 1973).

A finding is clearly erroneous and may be set aside on review when, although there may be evidence to support it, the court is left with the definite and firm conviction on the entire record that a mistake has been made. **Peters v. Juneau-Douglas Girl Scout Council**, Op. No. 1018, 519 P2d 826 (Alaska 1974).

A "clearly erroneous" finding which may be set aside in review, is one which leaves the supreme court with a definite and firm conviction in the entire record that a mistake has been made, although there may be evidence to support the finding. **Frontier Saloon, Inc. v. Short**, Op. No. 1345, 557 P2d 779 (Alaska 1976).

A finding of fact by a judge in a trial without a jury will be disturbed by a reviewing court only if clearly erroneous; a finding is clearly erroneous only when the court is left with the definite and firm conviction on the entire record that a mistake has been committed. **Hausam v. Wodrich**, Op. No. 1558, 574 P2d 805 (Alaska 1978).

Finding by trial court that the Alaska Gay Coalition was deleted from City's Blue Book on municipal services because of its political focus was clearly erroneous where it was apparent that the deletion occurred because the coalition was a homosexual organization. **Alaska Gay Coalition v. Sullivan**, Op. No. 1616, 578 P2d 951 (Alaska 1978).

It was clearly erroneous for trial court to conclude that certain facts were so generally known that judicial notice could be taken of them while at the same time deciding that a company, whose work routinely involved those same facts, was not chargeable with at least the same degree of knowledge. **Lewis v. Anchorage Asphalt Pav. Co.**, Op. No. 1639, 579 P2d 532 (Alaska 1978).

The supreme court will only disturb trial court findings when it is convinced that they are clearly erroneous, that is, when it is left with a definite and firm conviction on the entire record that a mistake has been made, even though there may be evidence to support the finding. **Martens v. Metzgar**, Op. No. 1806, 591 P2d 541 (Alaska 1979).

Under the "clearly erroneous" standard of appellate review, the amount of deference that must be given to factual determinations of the sentencing

court will vary, depending upon the extent to which the sentencing court relied upon testimony in which the demeanor and credibility of witnesses played an important role. Juneby v. State, Op. No. 72, 641 P2d 823 (Alaska App. 1982).

The "clearly erroneous" standard is still to be applied when the trial court's findings are adopted from those submitted by the prevailing party. Stack v. Miller, Op. No. 2508, 645 P2d 184 (Alaska App. 1982).

Although breach of contract claim was dismissed by summary judgment, review of trial court's finding that the contract partially integrated would be based upon the "clearly erroneous" standard, since during subsequent trial on reformation of the contract, the court reviewed and reaffirmed its summary judgment findings on the integration issue. Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co., Op. No. 2689, 666 P2d 33 (Alaska 1983).

Although a reviewing court will exercise its independent judgment in reviewing a trial court's interpretation of a written contract when such findings are based exclusively upon documentary evidence, a "clearly erroneous" standard should be applied where extrinsic testimonial evidence has been presented and relied upon by the trial court in formulating its findings. Kennedy Associates, Inc. v. Fischer, Op. No. 2700, 667 P2d 174 (Alaska 1983).

Where trial court heard and relied upon extensive oral testimony in interpreting inspection clause in a disputed real estate loan commitment agreement, application of clearly erroneous standard was appropriate in reviewing the court's resolution of the dispute. Kennedy Associates, Inc. v. Fischer, Op. No. 2700, 667 P2d 174 (Alaska 1983).

Since arbitrator's exclusion of witness did not lead to the complete omission of critical evidence, party was afforded his right to a fair hearing; at most, one form of argument was closed off by the arbitrator, the argument itself was not; accordingly, trial court's conclusion that it was gross error for the arbitrator to exclude the witness was clearly erroneous. City of Fairbanks Mun. Util. System v. Lees, Op. No. 2977, 705 P2d 457 (Alaska 1985).

Findings of fact by trial court will not be overturned unless clearly erroneous. Weason v. Harville, Op. No. 2980, 706 P2d 306 (Alaska 1985).

Whether the parties to an informal agreement became bound prior to the drafting and execution of contemplated formal writings was a question of intent reviewable under the clearly erroneous standard. Juliano v. Angelini, Op. No. 2994, 708 P2d 1289 (Alaska 1985).

Civil Rule 53

Collateral References

Generally

5A Moore, Federal Practice 53.01 – 53.02 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2601 – 2606 (1971)

(a) Similar to Fed. R. Civ. P. 53(a)

5A Moore, Federal Practice 53.03 – 53.04 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2607 – 2608 (1971)

(b) Same as Fed. R. Civ. P. 53(c)

5A Moore, Federal Practice 53.06 (2d ed. 1980)

Rule 58. Entry of Judgment.

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the court or the clerk, upon direction of the court, shall forthwith enter the judgment; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly enter judgment. Every judgment shall be set forth on a separate document. The entry of the judgment shall not be delayed for the taxing of costs, but a blank space may be left in the form of judgment for insertion of costs by the clerk after they have been taxed. (Amended by Supreme Court Order 258 effective November 15, 1976; and by Supreme Court Order 554 effective April 4, 1983)

CROSS REFERENCES: AS 09.30.010; AS 09.30.020; Civ. Forms 113, 114

Rule 58.1. Judgments and Orders—Effective Dates and Commencement of Time for Appeal, Review and Reconsideration.

(a) Effective Dates of Orders and Judgments. Orders and judgments become effective the date they are entered.

(1) *Oral Orders.* The date of entry of an oral order is the date the order is put on the official electronic record by the judge unless otherwise specified by the judge. At the time the judge announces an oral order, the judge shall also announce on the record whether the order shall be reduced to writing. If the oral order is reduced to writing, the effective date shall be included in the written order.

(2) *Written Orders Not Preceded by Oral Orders.* The date of entry of a written order not preceded by an oral order is the date the written order is signed unless otherwise specified in the order.

(3) *Judgments.* The date of entry of a civil judgment is the date it is signed unless otherwise specified in the judgment. All judgments shall be reduced to writing.

(b) Commencement of Time for Appeal, Review and Reconsideration. The time within which a notice of appeal may

be filed and reconsideration or review of orders and judgments may be requested begins running on the date of notice as defined below.

(c) Date of Notice.

(1) *Oral Orders.*

(i) As to the parties present when an oral order is announced, the date of notice is the date the judge announces the order on the official electronic record, unless at that time the judge announces his intention of having the order reduced to writing in which case the date of notice is the date shown in the clerk's certificate of distribution on the written order.

(ii) As to parties not present at the announcement of an oral order, the date of notice is the date shown in the clerk's certificate of distribution of notice of the order. If, however, at the time the judge announces the oral order he announces his intention of having the order reduced to writing, the date of notice is the date shown in the clerk's certificate of distribution on the written order.

(2) *Written Orders.* The date of notice of a written order is the date shown in the clerk's certificate of distribution on the written order.

(3) *Judgments.* All judgments must be reduced to writing. The date of notice of a judgment is the date shown in the clerk's certificate of distribution on the written judgment.

(4) *Other Service Requirements.* The notice provisions apply to the notice of orders and judgments under Rule 73(d) and do not affect the service requirements of any other rule of civil procedure.

(d) Clerk's Certificate of Distribution. Every written notice of an oral order and every written order and judgment shall include a clerk's certificate of distribution showing the date copies of the notice, order or judgment were distributed, to whom they were distributed, and the name or initials of the clerk who distributed them. (Added by Supreme Court Order 554 effective April 4, 1983)

CROSS REFERENCE: App. R. 204

relief for the defendants where defendant had not prayed for any relief whatsoever. Where upon the merits of the controversy the plaintiff is not entitled to a favorable declaration, the court should render a judgment embodying such determination and should not merely dismiss the action. American Building & Loan v. State, Op. No. 112, 376 P2d 370 (Alaska 1962).

A payment document which was filed by the defendant in a personal injury case in the superior court stating in substance that the full policy amount plus $1,000 as "costs to date" were paid into the registry of the court and requesting that the court notify the plaintiff of such tender and relieve the defendant of liability for costs and attorney's fees, was not a confession of judgment in the meaning of this rule. Albritton v. Estate of Larson, Op. No. 413 428 P2d 379 (Alaska 1967).

The general rules of pleading and of civil procedure apply to actions of declaratory relief. Jefferson v. Asplund, Op. No. 579, 458 P2d 995 (Alaska 1969).

All that is required of a complaint seeking declaratory relief is a simple statement of the facts demonstrating that the superior court had jurisdiction and that an actual justiciable case or controversy is presented. Jefferson v. Asplund, Op. No. 579, 458 P2d 995 (Alaska 1969).

Statutory language giving a declaratory judgment the force of a final judgment and making it reviewable as such does not change the effect of this rule's provision that when multiple claims for relief are involved in an action, partial summary judgment may be entered as to one or more, but fewer than all, of the claims or parties only upon the express determination that there is no just reason for delay, and upon express direction by the court for the entry of judgment. Alaska Airlines, Inc. v. Red Dodge Aviation, Inc., Op. No. 640, 475 P2d 229 (Alaska 1970).

Civil Rule 58

Collateral References

Similar to Fed. R. Civ. P. 58

6A Moore, Federal Practice 58.01 – 58.09 (2d ed. 1979)

11 Wright and Miller, Federal Practice and Procedure §§ 2781 – 2787 (1973)

Cases

In determining the time within which an appeal may be taken the term "entry of judgment," as it applies to trials by jury is set forth in Civ. R. 58. Vogt v. Winbauer, Op. No. 117, 376 P2d 1007 (Alaska 1962).

The 30-day period within which notice of appeal had to be given by the appellant commenced to run on the date upon which judgment was noted by the clerk in the civil docket. Vogt v. Winbauer, Op. No. 117, 376 P2d 1007 (Alaska 1962).

Where the court directs that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the directions. Patrick v. Sedwick, Op. No. 154, 387 P2d 294 (Alaska (1963).

It is contrary to the letter and purpose of Rule 58 to postpone entry of judgment until after a formal written judgment has been signed by the judge and filed. McCoy v. Alaska Brick Co., Op. No. 192, 389 P2d 1009 (Alaska 1964).

Where on February 1st, the jury returned a general verdict accompanied by answers to interrogatories, but the court waited until February 8 to direct the entry of a formal judgment, the ten-day period for service and filing of a cost bill commenced at the latter date. Patterson v. Cushman, Op. No. 233, 394 P2d 657 (Alaska 1964).

Where the parties had stipulated that their agreement for settlement of a dispute constituted a final disposition of the litigation and a docket entry was made on January 12, clearly indicating the final settlement and dismissal by the court of the claim and counterclaim by M.O. and on April 6 following a transcript of the proceedings was filed in accordance with the settlement and dismissal and a docket entry of the same date clearly so stated, a final judgment dismissing the complaint and counterclaim with prejudice was entered either on January 12 or at the latest on April 6, and an erroneous docket entry by the clerk dated July 28 of "judgment of dismissal of complaint and counterclaim" which did not correctly reflect what occurred on that date, was not the entry of a judgment from which an appeal could be taken. Gravel v. Alaskan Village, Inc., Op. No. 321, 409 P2d 983 (Alaska 1966).

The Supreme Court will not indulge in literalism in reading the rule that the notation of a judgment in the civil docket as provided by Civil R. 74 constitutes the entry of the judgment where the parties with concurrence of the court below had clearly stipulated that a transcript of proceedings wherein they had agreed to a dismissal with prejudice of their respective complaint and counterclaim constituted a final and complete settlement of their dispute and the docket entries without stating in so many words that a "judgment was entered," nevertheless clearly expressed the intent of the parties and the concurrence of the court. Gravel v. Alaskan Village, Inc., Op. No. 321, 409 P2d 983 (Alaska 1966).

Prejudgment interest is in the nature of damages and is necessary to compensate the plaintiff, not only for the amount by which he has suffered damage in the usual sense but also for the loss of use of the money to which he is entitled. Davis v. Chism, Op. No. 919, 513 P2d 475 (Alaska 1973).

Civil Rule 59

Collateral References

Generally

6A Moore, Federal Practice 59.01 – 59.04 (2d ed. 1979)

11 Wright and Miller, Federal Practice and Procedure §§ 2801 – 2804 (1973)

(a) Similar to Fed. R. Civ. P. 59(a)

6A Moore, Federal Practice 59.05 – 59.08 (2d ed. 1979)

Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

CROSS REFERENCES: Civ. Forms 128, 129, 130

Civil Rule 68

Collateral References

Same as Fed. R. Civ. P. 68

7 Pt. 2 Moore, Federal Practice 68.01–68.06 (2d ed. 1979)

12 Wright and Miller, Federal Practice and Procedure §§ 3001–3005 (1973)

Cases

I. In General
II. Payment of Costs
  A. Construction
  B. Prejudgment Interest

I. In General

A payment document which, in itself, did not have the criterion of an offer of judgment and could, at most, be considered as a deposit in the superior court, made under the provisions of Civil Rule 67(a), was by virtue a stipulation of the parties as reasonably construed converted into an offer of judgment which plaintiffs accepted under the stipulation. **Albritton v. Estate of Larson**, Op. No. 413, 428 P2d 379 (Alaska 1967).

The purpose of this rule is to encourage settlement of civil litigation as well as to avoid protracted litigation. **Miklautsch v. Dominick**, Op. No. 538, 452 P2d 438 (Alaska 1969).

An offer of judgment and acceptance thereof is a contract and the amount of the offer of judgment must be definite so that it is clear there is a meeting of the minds on an essential term of the contract. **Davis v. Chism**, Op. No. 919, 513 P2d 475 (Alaska 1973).

This rule does not apply to eminent domain proceedings. **Anchorage v. Schavenius**, Op. No. 1183, 539 P2d 1169 (Alaska 1975).

The purpose of this rule is to encourage settlement and to avoid protracted litigation. **Continental Ins. Co. v. U.S. Fid. & Guar. Co.**, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

Offer of judgment that paralleled Form 128, Forms for Rules of Civil Procedure, differing only in that it supplied defendant's identity and filled in blank spaces, was valid compliance with Civil Rule 68. **Farnsworth v. Steiner**, Op. No. 1955, 601 P2d 266 (Alaska 1979).

This rule applies not only when the offeree obtains judgment in his favor but also when the offeree does not prevail at all. **Wright v. Vickaryous**, Op. No. 2075, 611 P2d 20 (Alaska 1980).

A contract for an entry of judgment is not formed if the written notice of acceptance of an offer under this rule is not served within the ten day limit. **Gumear v. Interior Credit Bureau**, Op. No. 2339, 627 P2d 647 (Alaska 1981).

A defendant is not bound under this rule to make an offer of judgment commensurate with any degree of compensation. **Rules v. Sturn**, Op. No. 2640, 661 P2d 615 (Alaska 1983).

An offer of judgment under this rule must be in writing to be valid. **Rules v. Sturn**, Op. No. 2640, 661 P2d 615 (Alaska 1983).

An offer of judgment made pursuant to this rule is irrevocable for 10 days after it is served on the adverse party. **Rules v. Sturn**, Op. No. 2640, 661 P2d 615 (Alaska 1983).

Where written offer of judgment by defendant was silent as to an offset for sums which had been advanced to plaintiff for medical treatment, defendant was required to pay the full amount of the offer without the offset. **Rules v. Sturn**, Op. No. 2640, 661 P2d 615 (Alaska 1983).

Joint offers are excluded from the penal cost provisions of this rule. Brinkerhoff v. Swearingen Aviation Corp., Op. No. 2666, 663 P2d 937 (Alaska 1983).

II. Payment of Costs

A. Construction

The provision of this rule that a party who made an offer of judgement which was not accepted, is not responsible for costs incurred after the making of the offer, did not apply to a case where judgment finally obtained was more favorable than the offer and where the offeror was an insurance company which had offered the insurance policy limit, and was not a party to the main cause, but had appealed from a garnishment proceeding. Liberty National Insurance Company v. Eberhart, Op. No. 281, 398 P2d 997 (Alaska 1965).

Even if it may be assumed that appellants were "prevailing party" within the meaning of Civil Rules 54(d) and 82(a)(1), the trial court's determination as to denial of attorney's costs where the action was settled pursuant to Civil Rule 68 was not disturbed on appeal in the absence of a showing of clear abuse of the wide discretion allowed under this rule. Albritton v. Estate of Larson, Op. No. 413, 428 P2d 379 (Alaska 1967).

Where in a personal injury action the defendant had filed a payment document which, in itself, could be considered at best a deposit in court under Civil Rule 67(a) but by stipulation between the parties was converted into an offer of judgment, and by virtue of such stipulation and the court's order appended thereto, plaintiff's causes of action were dismissed with prejudice, the action had been settled pursuant to Civil Rule 68 and under the "with costs then accrued" portion of said rule the trial court was vested with wide discretion in determining award of attorney's fees. Albritton v. Estate of Larson, Op. No. 413, 428 P2d 379 (Alaska 1967).

If the judgment recovered at trial is less than an offer of judgement, the offeree is liable for the costs incurred by the offeror subsequent to the time the offer was made. Miklautsch v. Dominick, Op. No. 538, 452 P2d 438 (Alaska 1969).

For purposes of this rule, an offer of judgement that specifies only a total sum must be construed as including the defendant's assessment of all the damages that the plaintiff is entitled to, including that occasioned by the loss of the use of the money. Davis v. Chism, Op. No. 919, 513 P2d 475 (Alaska 1973).

An offer of judgement will be construed as including the defendant's assessment of all the damages that plaintiff is entitled to, including costs and attorney's fees. Bayly, Martin & Fay, Inc. v. Arctic Auto Rental, Inc., Op. No. 993, 517 P2d 1406 (Alaska 1974).

An award of costs and attorney's fees to both the plaintiff and the defendant are properly computed as of the date the offer of judgment is made and not at a later time when accepted. Bayly, Martin & Fay, Inc. v. Arctic Auto Rental, Inc., Op. No. 993, 517 P2d 1406 (Alaska 1974).

Where radically different standards of partial compensation are applied in awarding attorney's fees to the parties, the award will be considered an abuse of discretion unless there are findings or an explanation by the trial court supporting such disparate treatment. Irving v. Bullock, Op. No. 1261, 549 P2d 1184 (Alaska 1976).

This rule does not require that costs incurred prior to an offer of judgment be awarded; such awards are within the trial court's discretion. Continental Ins. Co. v. U.S. Fid. & Guar. Co., Op. No. 1298, 552 P2d 1122 (Alaska 1976).

An award of $5,000.00 for attorney's fees to defendant, a "limited prevailing party" under Civil Rule 68, was not manifestly unreasonable when actual attorney's fees were $14,053.12, considering that Rule 68 is designed to encourage reasonable settlement after a lawsuit is filed. Scott v. Robertson, Op. No. 1674, 583 P2d 188 (Alaska 1978).

An award of attorney's fees under Civil Rule 68 is designed to "partially" compensate the prevailing party. Scott v. Robertson, Op. No. 1674, 583 P2d 188 (Alaska 1978).

Court should make factual determination of offeror's actual expenses incurred after offer of judgment, then take into account the partial recovery principles of Civil Rule 82 in awarding offeror reasonable partial attorney's fees and costs based on such factual determination. Farnsworth v. Steiner, Op. No. 1955, 601 P2d 266 (Alaska 1979).

Where a judgment on offer and acceptance was signed January 18, but the action was not dismissed by court order until July 24, a request by counsel filed August 1 for a hearing on the amount of attorney fees was timely, July 24 being the proper date from which the request period should have been calculated. Salmine v. Knagin, Op. No. 2501, 645 P2d 148 (Alaska 1982).

Partial attorney's fees, not actual attorney's fees, are to be awarded to a prevailing party after an offer of judgment. Truckweld Equipment Co. v. Swenson Trucking, Op. No. 2545, 649 P2d 234 (Alaska 1982).

B. Prejudgment Interest

The phrase "judgment finally obtained by the offeree" within this rule includes the amount assessed as prejudgment interest but does not require the prejudgment interest to be tacked onto the offer of judgment if the offer is accepted and does not require the trial court to compare the jury's verdict plus prejudgment interest with the defendant's offer of judgment plus prejudgment interest. Davis v. Chism, Op. No. 919, 513 P2d 475 (Alaska 1973).

Prejudgment interest is in the nature of compensatory damages. It is reasonable for the trial court to include that figure in the "judgment finally obtained by the offeree" and to compare that total to the amount of the offer of judgment in order to determine whether the offeree should pay the costs. Davis v. Chism, Op. No. 919, 513 P2d 475 (Alaska 1973).

The date of the offer, not the date of the ultimate judgment, is the critical time in determining whether the offer, including prejudgment interest, is sufficient to avoid the operation of this rule. Davis v. Chism, Op. No. 919, 513 P2d 475 (Alaska 1973).

Trial judge may properly, as an exercise of discretion, refuse to award offeree interest on a judgment from the date of the offer through date of judgment when offeree ultimately recovers less than amount offered. Continental Ins. Co. v. U.S. Fid. & Guar. Co., Op. No. 1298, 555 P2d 1122 (Alaska 1976).

A party who succeeds at trial but who rejected an offer of judgment which exceeded his trial recovery, is permitted to recover expenses and fees—including prejudgment interest, only from the date the cause of action accrues to the date of the rejected offer of judgment. Farnsworth v. Steiner, Op. No. 1955, 601 P2d 266 (Alaska 1979).

Since interest is not "costs," a successful offer of judgment does not terminate the running of prejudgment interest. Farnsworth v. Steiner, Op. No. 2454, 638 P2d 181 (Alaska 1981).

Civil Rule 69

Collateral References

Generally

33 C.J.S. Executions § 1 (1942)

30 Am. Jur. 2d Executions § 1 (1967)

(a) Similar to Fed. R. Civ. P. 69(a)

7 Pt. 2 Moore, Federal Practice 69.01–69.05 (2d ed. 1979)

12 Wright and Miller, Federal Practice and Procedure §§ 3011–3014 (1973)

(b)(1) 33 C.J.S. Executions §§ 361, 366, 373, 378 (1942)

30 Am. Jur. 2d Executions §§ 786, 823–824, 826 (1967)

(b)(2) 33 C.J.S. Executions §§ 376, 380, 383 (1942)

30 Am. Jur. 2d Executions §§ 828, 838 (1967)

(c) 33 C.J.S. Executions §§ 370, 398 (1942)

30 Am. Jur. 2d Executions §§ 835, 840, 844 (1967)

(d)(1) 33 C.J.S. Executions § 266 (1942)

30 Am. Jur. 2d Executions §§ 43–44 (1967)

(e)(1) 33 C.J.S. Executions § 266 (1942)

30 Am. Jur. 2d Executions § 388–391 (1967)

(e)(2) 33 C.J.S. Executions § 266 (1942)

30 Am. Jur. 2d Executions § 390 (1967)

(e)(3) 33 C.J.S. Executions §§ 244, 25[illegible] (1942)

30 Am. Jur. 2d Executions §§ 510, 51[illegible]–516 (1967)

Cases

Offset bid of $2000 on a judgment of $368.13 was a substantial irregularity having a natural tendency to deter the right to redeem and was therefore a proper consideration in trial judge's decision to set aside execution sale. Law Offices of Murphy L. Clark v. Altman, Op. No. 2811, 680 P2d 1125 (Alaska 1984).

Rule 82. Attorney's Fees.

(a) Allowance to Prevailing Party.

(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein:

ATTORNEY'S FEES IN AVERAGE CASES

	Contested	*Without Trial*	*Non-Contested*
First $2,000	25%	20%	15%
Next $3,000	20%	15%	12.5%
Next $5,000	15%	12.5%	10%
Over $10,000	10%	7.5%	5%

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court in its discretion in a reasonable amount.

(2) In actions where the money judgment is not an accurate criteria for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

(3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

(4) Attorney's fees upon entry of judgment by default shall be determined by the clerk. In all other matters the court shall determine attorney's fees. Awards not pursuant to the schedule set forth in subparagraph (1) of this Rule shall be made only upon motion.

(b) Allowance in Mental Cases. In proceedings under the Mental Health Act, the attorney appointed to represent the patient shall be allowed and paid a fee of $25.00, unless the judge, in his discretion, orders otherwise. A lay advisor appointed in such proceedings shall be allowed and paid a fee of $10.00, unless the judge, in his discretion, orders otherwise. (Amended by Supreme Court Order 497 effective January 18, 1982)

Collateral Source

The Collateral Source Rule — The American Medical Association and Tort Reform

Banks McDowell*

I. Introduction

The Collateral Source Rule is a common law rule created by the courts in the 19th century. It has been defined by the reporters of the *Restatement (Second) of Torts* as follows:

> Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability although they cover all or a part of the harm for which the tortfeasor is liable.[1]

This may be merely a rule of evidence preventing admission of proof of collateral benefits, or it may be viewed as a rule of substantive law specifying that collateral benefits are not to be deducted as an element under the appropriate damage formula.

Scholarly analysis over the last two decades has generally concluded that the rule should be abolished.[2] This common law rule could be abrogated by the courts who created it if they felt that the reasons justifying the rule no longer existed. It has, however, been adopted for so long a period and relied on to such an extent that courts should feel reluctant to reverse the precedents. It is more appropriate to seek repeal by statute.[3] Eighteen states have passed statutes eliminating the operation of the Collateral Source Rule in medical malpractice actions.[4] Colorado has abolished the Rule as to first-party insurance ben-

* Professor of Law, Washburn University. B.A., LL.B., University of Tulsa; LL.M., S.J.D., University of Michigan.

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1. Restatement (Second) of Torts § 920A at 513 (1979).

2. Articles critical of the Collateral Source Rule include: Bell, *Complete Emanation of the Collateral Source Rule — A Partial Answer to Criticism of the Present Injury Reparations System*, 14 N.H.B.J. 20 (1972); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966); Pechinpaugh, *An Analysis of the Collateral Source Rule*, 32 Def. Counsel J. 42 (1965); Schwartz, *The Collateral Source Rule*, 4 B.B.J. Rev. 348 (1961); Note, *Diversion in the Law of Damages: The Collateral Source Rule*, 77 Harv. L. Rev. 741 (1964). Articles defending the rule are: Maxwell, *The Collateral Source Rule in the American Law of Damages*, 36 Miss. L. Rev. 669 (1965); Mascari & Messina, *The Collateral Source Rule in Personal Injury Litigation*, 7 Conn. L. Rev. 310 (1972).

3. This is the position of the reporters of the *Restatement (Second) of Torts*, stated in § 920A comment d: "The collateral-source rule is of common law origin and can be changed by statute. Changes made are sometimes in statutes providing a different method of compensation such as the first-party insurance involved in certain motor vehicle reparations acts."

4. Alaska Stat. § 09.55.548 (1983); Ariz. Rev. Stat. Ann. § 12-565 (1982); Cal. Civ. Code § 3333.1 (1976); Del. Code Ann. tit. 18, § 6862 (1974); Fla. Stat. Ann. § 768.76 (Supp. 1983); Idaho Code § 39-4210 (1977); Ill. Ann. Stat. § 110, 2-1205 (Smith-Hurd 1983); Iowa Code Ann. § 147.136 (1972); Kan. Stat. Ann. § 60-471 (1983); Neb. Rev. Stat. § 44-2819 (1978); N.H. Rev. Stat. Ann. § 507-C:7(I) (1983); N.Y. Civ. Prac. Law § 4010 (McKinney 1975 & Supp. 1981); N.D. Cent. Code § 26-40.1-08 (1977, repealed in 1983); Ohio Rev. Code Ann.

efits payable under its automobile accidents no-fault scheme.[5] A more general statute abolishing the Collateral Source Rule in all tort actions has been introduced in the Kansas legislature.[6]

This article will consider a number of problems: (1) Why a rule developed under 19th century fault concepts of tort law may not work well under 20th century compensatory concepts? (2) What is the impact of the lobbying efforts by the medical profession to repeal the rule in malpractice actions? (3) Is it advisable as a matter of legislative policy to generalize this reform to all tort litigation?[7] (4) If the Collateral Source Rule is abolished by statute, what form should the statutes take in order to minimize the problems and achieve the purposes of such reform?

II. Operation of the Rule.

The scope of the Collateral Source Rule is described in comment e to *Restatement (Second) of Torts* section 920A:

> e. The rule that collateral benefits are not subtracted from the plaintiff's recovery applies to the following types of benefits.
>
> (1) **Insurance policies**, whether maintained by the plaintiff or a third party. Sometimes, as in fire insurance or collision automobile insurance, the insurance company is subrogated to the rights of the third party. This additional reason for keeping the tortfeasor's liability alive is not necessary, however, as the rule applies to insurance not involving subrogation, such as life or health policies.
>
> (2) **Employment benefits**. These may be gratuitous, as in the case in which the employer, although not legally required to do so, continues to pay the employee's wages during his incapacity. They may also be benefits arising out of the employment contract or a union contract. They may be benefits arising by statute, as in worker's compensation acts or the Federal Employers' Liability Act. Statutes may subrogate the employer to the right of the employee, or create a cause of action other than subrogation.
>
> (3) **Gratuities**. This applies to cash gratuities and to the rendering of services. Thus the fact that the doctor did not charge for his services or the plaintiff was treated in a veterans hospital does not prevent his recovery for the reasonable value of the services.
>
> (4) **Social legislation benefits**. Social security benefits, welfare payments, pensions under special retirement acts, all are subject to the collateral-source rule.[8]

While the scope and form of the Collateral Source Rule has not changed in the past eighty years, the context in which it most commonly operates has changed markedly. This can be illustrated by comparing the kind of fact situation and the type of collateral source which was first before the courts with a more modern context and modern sources of benefits.

An example of a typical early collateral source problem faced by 19th century courts is the following.[9] The plaintiff, an elderly woman of modest means, was injured by the clear negligence of defendant's servant. It is probable that the defendant did not carry liability insurance, although that would not be known.[10] The plaintiff needed medical and nursing care as a result of her injuries, so her two sons came from out of state to care for her. Their services were performed gratuitously. At the trial, the tortfeasor asked the court to not allow the jury to award the plaintiff "reasonable compensation for nurse hire and attendance" since she had received these services free from her sons. The court refused this request.

In deciding whether to credit the defendant with the value of gratuitous benefits received by plaintiff, the court had to select between two important principles, each of which covers the case and each of which clashes with the other. The first principle is the underlying fault

§ 2309.27 (Page 1971); R.I. Gen. Laws § 9-19-34 (Supp. 1984); S.D. Compiled Laws Ann. § 21-3-12 (1976); Tenn. Code Ann. § 29-26-119 (1980); Wash. Rev. Code Ann. § 7.70.080 (1975-76); Colo. Rev. Stat. § 10-4-713 (1973).

Ga. Kan. S.B. 738, by the Committee on Judiciary, Feb. 20, 1961, which provides:

> (a) In any action for damages for personal injury, including bodily harm, sickness, disease or death, or for property damage the court shall admit into evidence the total amount of all compensation or benefits received or entitled to be received by the claimant from any collateral source.
>
> (b) If a party elects to introduce evidence of compensation or benefits from any collateral source, the courts shall admit evidence of any amount which the party has paid or contributed to secure the party's right to any compensation or benefits concerning which evidence of collateral source compensation or benefits has been admitted.

Id.

7. The collateral benefits problem is not confined to tort litigation. It may be an issue in contract recovery. See Billetter v. Postell, 94 Cal. App. 2d 838, 211 P.2d 621 (1949), where an employer being sued to recover damages for wrongful dismissal was not allowed to set off unemployment compensation benefits against the wages owed. The purpose of expectation damages in contract is to place the plaintiff in as good a position as he would have been if the contract had been performed at the least cost to defendant, so there is little need to award plaintiff more than his net economic loss after collateral benefits have been subtracted. Warren Co. v. Hanson, 17 Ariz. 252, 150 P. 238 (1915); Anderson v. Rexroad, 180 Kan. 505, 306 P.2d 147 (1957); Georgetown Power Co. v. Neale, 137 Ky. 197, 125 S.W. 293 (1910). It may even become an issue in criminal law if some procedure is provided whereby a victim is authorized to recover restitution for his losses from the criminal. In Maine, the statutory right to restitution does not exist to the extent that the victim has been compensated from a collateral source. Me. Rev. Stat. Ann. tit. 17-A, § 1324(2)(C) (1983). In Texas, where victims of crimes may recover from a state compensation fund, the state is subrogated to the insurance benefits of the victim to the amount awarded under the Crime Victim's Compensation Act. Tex. Civ. Stat. Ann. § 8309-1 (the Act) (Supp. 1984).

8. Restatement (Second) of Torts § 920A comment e at 514-15 (1977).

9. The fact situation is patterned after Lewark v. Parkinson, 73 Kan. 553, 85 P. 601 (1906). Similar cases are Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N.E. 874 (1885); Varaham v. City of Council Bluffs, 52 Iowa 698, 3 N.W. 792 (1879); Wells v. Minneapolis Baseball & Athletic Ass'n, 122 Minn. 327, 142 N.W. 706 (1913). Reaching a contrary result by not allowing plaintiff to recover the reasonable value of gratuitous services as items of damage are: Morriss v. Grand Ave. Ry. Co., 144 Mo. 260, 46 S.W. 170 (1898); Goodhart v. Pennsylvania Ry. Co., 177 Pa. 1, 35 A. 191 (1896).

10. Of course the record should be silent because the clear rule in most states is that it is prejudicial to defendants to inject in the trial the fact that defendant had liability insurance. Cottle v. McKinney, 309 F.2d 447 (7th Cir. 1962); Robins Engineering, Inc. v. Cockrell, 384 So. 2d 1 (Ala. 1977); Caylor v. Atchison, T. & S.F. Ry. Co., 189 Kan. 210, 368 P.2d 281 (1962); Miles v. Semple, 571 P.2d 866 (Okla. Ct. App. 1977). My assumption in the text is based on the hypothetical of a small businessman, a livery stable operation, carrying liability insurance in the period before 1906.

concept in tort which says that a defendant should be responsible for all damages flowing naturally and probably from his wrongful act. Such damages would include the reasonable cost of all medical and nursing care the plaintiff needed, whether she could afford to purchase them prior to judgment or not. The second principle is that while plaintiff is entitled to full compensation for her injuries, she is not entitled to double up her recovery or to receive a windfall. When gratuitous benefits have been conferred on the plaintiff, one or the other of the consequences which these principles are designed to avoid must occur. Either the party at fault must pay less than the damages he caused, or the plaintiff receives a windfall, the amount assessed for services which he received gratuitously. The choice is an easy one. One party is innocent, the other at fault. When one must suffer a disadvantageous consequence and the other receive a benefit, the benefit should go to the innocent party and the penalty be suffered by the wrongdoer. The Collateral Source Rule reaches that result.[11]

The modern context in which the Collateral Source Rule operates is very different. Once again, an illustrative example will be used.[12] The plaintiff owned a building in which he operated a business. The business used natural gas. Due to the negligence of the gas company, there was a gas leakage causing an explosion. There was substantial damage to the building and substantial personal injuries to the plaintiff. The plaintiff carried fire insurance and paid the premiums as a business expense. The fire insurer settled plaintiff's property damage claim for $15,800, which was the appraised value of the loss, ($16,100, less a $300 deductible). The plaintiff, a veteran, was hospitalized for three days in a veteran's hospital and was treated by the staff there. His

11. This is a more detailed analysis of the justification behind the Collateral Source Rule than courts usually give. A typical articulation of the justification appears in Revised v. Kansas Power & Light Co., 192 Kan. 346, 354, 388 P.2d 802, 811-12 (1964), where the court said:

> It is well settled that the damages recoverable for a wrong are not diminished by the fact that the party injured has been wholly or partly indemnified for his loss by insurance effected by him, and by the procurement of which the wrongdoer did not contribute. This rule is not affected by the fact that the insurer is entitled to be subrogated to the rights of the insured as against the tortfeasor, or to recover back from him the amount he recovers. The question of the right to the proceeds of the recovery is a matter between the insurer and the insured. It constitutes no defense to the action for damages caused by the wrong, which must be brought in the name of the insured, although it might be for the use of the insurer. The reasons generally given for the rule are that the contract of indemnity and the subsequent conduct of the insurer and the insured in relation thereto are matters with which the wrongdoer has no concern and which do not affect the measure of his liability. . . .

Id.

12. This is an elaboration of the fact situations in *Revised v. Kansas Power & Light Co.*, 192 Kan. 346, 388 P.2d 802 (1964) and *Dawson v. Kansas Elec. Power Co.*, 156 Kan. 97, 131 P.2d 809 (1941). Some other modern cases where the provider of the collateral benefits is not doing so gratuitously and where the real defendant is probably a compensated liability insurer or a self-insurer who can pass the cost of judgment on to consumers are: *Overseen v. United States*, 619 F.2d 1299 (9th Cir. 1980); *Avelleyra v. Hayes*, 511 P.2d 1141 (Alaska 1973); *Taylor v. Hamilton*, 315 S.W.2d 902 (Ky. 1960); *Baumgartner v. Holden*, 541 S.W.2d 530 (Mo. 1976).

medical expenses, if obtained in a private hospital, would have cost $612. When he returned home, his wife nursed him for two weeks. If those services had been performed by a professional nurse, they would have cost $420. While at home he was also treated by his brother-in-law, a physician. His brother-in-law sent him no bill, but his normal charges for these services would have been $428. Plaintiff then sued the gas company for negligence and sought damages of $68,990, consisting of property damage of $16,100, medical expenses of $1,070, nursing expense of $420, loss of earnings of $1,400 and pain and suffering of $50,000. At the trial, the defendant gas company offered evidence of the plaintiff's settlement from his property insurer and the value of the medical and nursing services. The Collateral Source Rule compelled the judge to reject this evidence and to permit the plaintiff to recover his full damages. The equities produced by this result are very different in the tort system of the 1980's, when compared with the way the rule operated at the turn of the century.

In discussing this modern context, I assume that the real defendant in interest was not the gas company, but a liability insurer who defended the action and who must pay the judgment rendered against the gas company.[13] Another real party in interest, although not appearing on the record, was plaintiff's fire insurer, the subrogee of plaintiff's claim to the extent that it has paid the loss.[14]

To analyze the impact of the Collateral Source Rule in this modern context and to contrast that with the consequences of abolishing the Rule, it is necessary to separate the damages sought by plaintiff into three categories: (a) those for which no collateral source benefits have been received, i.e. the claim for pain and suffering, the claim for loss of earnings, and the claim for the $300 deductible under the fire insurance policy, (b) those for which collateral benefits were obtained, but where there is no right of subrogation in the provider of those services—in this case, the reasonable fee for the services of his brother-in-law as doctor and the reasonable value of the nursing services of his wife, and (c) those collateral benefits furnished by a party who is entitled under the doctrine of subrogation to recover the value of these benefits from

13. The gas company might choose to be a self-insurer. What this means is that it administers an insurance plan by charging its customers a small fee to build a fund from which tort losses are to be paid. Thus it would be the innocent consumers that must bear the punitive impact of the Collateral Source Rule rather than the wrongdoing company or its agents.

14. The right of the fire insurer to be subrogated to the claim of the insured whose loss it has paid is well established. *New Hampshire Ins. Co. v. Kansas Power & Light Co.*, 212 Kan. 430, 510 P.2d 1191 (1973); *Hume v. McGinnis*, 156 Kan. 466, 134 P.2d 362 (1943). If the action is brought in the name of the insured who has been partially paid by his own insurer, he holds that part of the recovery received from the tortfeasor for which he has been paid by his insurer in trust for the insurer. *Dorrnet v. Reichart*, 198 Kan. 242, 404 P.2d 174 (1965). If the insured has been fully compensated for his loss, then the insured is not the real party in interest and the action must be prosecuted by and in the name of the subrogated insurer. *Hill v. Leichliter*, 168 Kan. 85, 211 P.2d 433 (1949).

the defendant tortfeasor—here, the fire insurance settlement and the medical care from the veteran's hospital.[15]

In the first category, where there has been no collateral contribution of any kind toward these items of damages, it is clear that the presence or absence of the Collateral Source Rule will have no impact. The plaintiff is entitled to those damages from the defendant (or his liability insurance carrier) in order to be fully compensated.

The abolition of the Collateral Source Rule would change the outcomes in classes (b) and (c). I would like to analyze first the equities involved in class (c), the situation where the collateral benefit has been furnished by an insurer entitled to subrogation. Here the previous analysis made about the appropriateness of the Collateral Source Rule in the typical earlier case does not fit at all. The party who must pay the damages to a plaintiff already compensated by collateral benefits is not a wrongdoing tortfeasor, but his liability insurer. This additional cost must be borne by all insureds of this class. The additional liability under the Collateral Source Rule would increase the defendant's insurance premium only very slightly, but also would increase at the same rate the premiums of this entire class of insureds, whether they be careful or careless. The element of wrongdoing which justifies leaving this cost on the defendant's side is not nearly so clear once liability insurance is introduced. On the plaintiff's side, we are not dealing with what could be described as a windfall, but more accurately as double recovery. Here, plaintiff purchased the right to indemnification from his fire insurer and, in addition, has the right to full compensation given him by the law of torts. Both these rights cover the same injury. The doctrine of subrogation solves the double recovery problem. The plaintiff only gets to keep one recovery, the amount paid by his insurer. That portion of the tort judgment meant to compensate for the property damage belongs to his insurer. In summary, we are not penalizing a wrongdoing defendant, but defendant's compensated liability insurer, and not leaving a benefit with an innocent and poor plaintiff, but with plaintiff's compensated fire insurer.[16] The problem is to determine

15. Hudson v. Lazaros, 217 F.2d 344 (D.C. Cir. 1954). While not entitled to subrogation before 1962, the Veteran's Administration had a practice of taking express assignments from veterans admitted to free treatment in a veteran's hospital who may have a cause of action against a tortfeasor. See 38 C.F.R. § 17.48(d)(3) (1983). If the state has a policy permitting assignments of personal tort claims, this may have the same effect as subrogation. Since 1962, federal law has provided a right of subrogation in the United States for the reasonable value of any medical care which the United States is required or authorized to provide. 42 U.S.C.A. § 2651 (1973).

16. Whether there is in fact any windfall to the plaintiff's insurer depends on whether premiums charged to plaintiff and like insureds are discounted by the amount of subrogation recovery. If so, there is no serious benefit or windfall to the first party insurer. See W. Young, Insurance Cases and Materials 312-43 (1971) where the editor says:

> Insurance subrogation would have more friends than it does if it could be shown that recoveries enter into premium rate calculations in an equitable way. . . . A survey in the early '60's revealed that a number of insurers do not record their subrogation experience by class of insurance. Rating bureaus, it was found, had no information on the volume of subrogation recoveries.
>
> Professor Patterson wrote: "Subrogation is a windfall to the insurer—it plays no part in rate schedules (or only a minor one), and no reduction is made in insuring interest, such as that of the secured creditor, where the subrogation right will obviously be worth something. Hence, in such a case no reason appears for extending it . . . ."

Id.

which insurance is primary. The Collateral Source Rule makes the liability insurance primary; its abolition would make the first party fire insurance primary.

Tort litigation to establish defendant's fault is an expensive and clumsy way to answer the question of whether the first party insurer is entitled to transfer its loss payment to a liability insurer. If we assume a case where the only item of plaintiff's damage was one for which he had been fully compensated by settlement with his insurer, then the only function of the tort action would be to charge defendant's insurer with that amount. In this limited case, the Collateral Source Rule encourages litigation and the attendant legal costs, such as attorney's fees, use of court resources, and time of witnesses, litigants and jurors. That is necessary because the issue of which insurer is primary turns on the determination of fault and this can only be finally answered by litigation. The abolition of the Collateral Source Rule would eliminate this litigation since the first party insurer would not be able to transfer its liability to pay the loss.

In category (b), where the provider of collateral benefits is not entitled to subrogation either because the benefits were furnished gratuitously or because subrogation is not a right extended to this provider, the equities are closer to the original collateral source context. The Collateral Source Rule permits the plaintiff to be overcompensated for his loss, since he would recover a full tort judgment for all his injuries and could retain the value of the collateral benefits as well. Abolition of the rule would save the liability insurer costs which ought to be passed on in the form of reduced premiums to the wrongdoing defendants as well as to prudent actors carrying liability insurance.[17] The choice between these two consequences is more evenly balanced than the choice in the original collateral source context. Which choice is preferable turns on how far our tort system has moved away from being a fault system designed to punish wrongdoing and has become a compensatory system intended to provide victims with full compensation for their losses.[18] If our main purpose is to guarantee compensa-

17. The degree to which our tort system has moved from fault based ends to compensatory ones is evidenced by the adoption of no-fault concepts in automobile injury reparations. See Kansas Automobile Injury Reparations Act, K.S.A. 40-3101 et seq. §§ 40-3101 to -3121 (1981). In Manzanares v. T.R.W., 214 Kan. 589, 522 P.2d 1291 (1974), where there was a challenge to the constitutionality of this approach, the Kansas Supreme Court quoted with approval several studies of the operation of fault-based tort approaches to compensation and concluded:

tion for tortious injuries, that end is fully accomplished without the Collateral Source Rule.

A large majority of the scholarly writing about the Collateral Source Rule in the last two decades has been critical.[18] The most thorough and scholarly analysis was made by John Fleming,[19] who, after surveying the operation of the rule in England, the Commonwealth countries, and the United States, concluded that the Rule should be abolished. As he states in the conclusion:

> In increasing measure, a person who has met with an accident may nowadays look for compensation not only to the law of torts but to other collateral sources. The coexistence of several such regimes of compensation in any individual case calls for important decisions as to their relation one to another. Three solutions are open: first, to let the accident victim cumulate the various benefits; second, to shift the ultimate burden of the accident loss to the tortfeasor, relieving as far as possible other compensation funds; third, to credit the tortfeasor with any benefits received from another source.
>
> The first alternative associated with the "collateral source rule", condones multiple recovery to avoid giving the tortfeasor a "windfall" . . . in contrast to most other countries which are categorically committed to the compensatory and opposed to the punitive theory of tort damages, American courts continue to entertain an ambiguous and uneasy tolerance of double recovery . . . .
>
> Turning from double recovery to a consideration of other alternatives, we note that these differ from the former in posing a decision as to which of two sources of compensation to treat as the primary and which as the secondary. In contrast to cumulation of benefits, they force a confrontation with the basic policy orientation whether accident losses generally, or any particular accident loss, should be absorbed by the tortfeasor or by a collateral source, whether in accordance with the regime of tort law or the regime of private or social insurance . . . .
>
> [The] primarily moralistic postulates [underlying the collateral source rule] are gradually yielding in their appeal to an economic value system which places in the forefront the high collection costs of reshifting the loss from a collateral source to the tortfeasor, the attendant wastefulness of multiple insurance and, most important of all (perhaps), an awareness that in these days, when tort liability qualifies as a significant source of compensation only in case of defendants who can pass on the loss through liability insurance or pricing of their goods or services, the question is not so much whether a wrongdoer deserves to be relieved as which of several competing "risk communities" should bear the loss . . . .[20]

All studies concluded that the risk of tort liability based upon negligence is not a significant factor in inducing vehicle operators to drive more carefully, that the tort system as a means of reparations based on fault is exceedingly expensive and inefficient as a means of compensating automobile crash victims, that compensation distribution to accident victims under the tort system is inequitable in that it commonly results in overpayment of minor injuries, gross underpayment for those more seriously injured, and long delays in receipt of compensation.

Id. at 301.

18. *See supra* note 2.

19. Fleming, *supra* note 2.

Once the fault justification for the Collateral Source Rule has been abandoned, the only modern justification advanced for the rule is that it helps prevent undercompensation for the victim.[21] The plaintiff will usually receive only one-half to two-thirds of the amount awarded by the jury as full compensation.[22] The fee for his attorney and other legal costs must be paid out of the proceeds. Since most plaintiffs' attorneys work on a contingency basis and the usual fee for litigating a case averages one-third of the judgment, but may go as high as one-half,[23] the plaintiff's actual recovery will be diminished by that amount. To the extent that collateral benefits received by plaintiff approach one-third to one-half of the verdict, they would seem to compensate plaintiff for his legal costs and thus correct that unfortunate principle adopted in the American common law that each party must bear the full cost of his own legal expenses, however free of fault he is compared to the other.

The operation of the Collateral Source Rule does not improve the position of the plaintiff. First, it should be clear that only those collateral benefits for which there is no right of subrogation could improve the plaintiff's position. All other collateral benefits for which a corresponding sum was included in the general verdict belong to the subrogee, not the plaintiff.[24] Beyond this, the Collateral Source Rule actually worsens the position of the plaintiff because the base on which the contingency fee is figured is the verdict and this is larger under the Collateral Source Rule than it would be if the rule were abolished.

This result can be illustrated by considering the fact situation discussed above under the modern context for operation of the Collateral Source Rule.[25] There I posited a case where the plaintiff sued to recover damages of $63,990 for personal injuries and property damage which were caused by the negligence of the gas company. Included in this were items for which plaintiff had received collateral benefits of

20. Fleming, *supra* note 2, at 1543-47.

21. *See* Moore & Messina, *supra* note 2, at 311-12 (1972). *See also* the often cited passage from Hudson v. Lazarus, 217 F.2d 344, at 346 (D.C. Cir. 1954), where the court said:

> Legal "compensation" for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm. Moreover, the injured person seldom gets the compensation he "recovers," for a substantial attorney's fee must "come out of it." There is a limit to what a negligent wrongdoer can fairly be consistently with the balance of the individual and social interest, be required to pay. But it is not necessarily reduced by the injured person's getting money or care from a collateral source.

Id.

22. While we are required by the legal theory of fact finding to recognize the general verdict of the jury as the authoritative determination of what constitutes full compensation for plaintiff, that amount may be manipulated away from the jury's best estimate of true compensation by their correct assessment that they assume plaintiff will lose from having to pay attorney's fees or recoup from living assistance. *See infra* notes 25 & 26 and accompanying text.

23. E. McCormick, Contingent Fees for Legal Services ch. 9 (1964).

24. *See supra* note 14.

25. *See supra* notes 12-14 and accompanying text.

$17,290. Of this amount, $16,442 was supplied by a collateral source entitled to subrogation. Now I would like to assume that the jury determines that the full amount prayed for is what plaintiff is entitled to as full compensation and awards judgment for that amount. Secondly, I assume that the plaintiff's attorney has a contingency contract under which he receives as his fee one-third of any recovery. Based on these assumptions, it is possible to compare the operation of the Collateral Source Rule and of its abolition.

	Collateral Source Rule	No Collateral Source Rule	
Verdict	$68,990	$51,700	($68,990 less collateral benefits of $17,290)
less attorney's fees of ⅓ of recovery	$22,996	$17,233	
	$45,994	$34,467	
less subrogated benefits	$16,442	642[26]	
Plaintiff actually receives	$29,552	$33,825	

Abolition of the Collateral Source Rule would permit plaintiff to recover $4,273 more. At the same time, his attorney would recover $5,763 less. Thus, the Collateral Source Rule favors not only first party insurers over third party insurers, but plaintiffs' attorneys over plaintiffs.

This is not to suggest that there is anything improper about the contingency fee concept. It has always been a guarantee that those persons unable to hire a lawyer will have the benefit of counsel when pressing civil claims for injury.[27] But there is nothing in that salutary option that demands it be measured on anything more than the sum suffered by the plaintiff, that is, the sum which is owed by the defendant after collateral benefits have been credited.

One further point should be made about the operation of the Collateral Source Rule. It is one of a series of legal rules designed to keep the decision of jurors untainted by intrusion of the issue of insurance. Other rules aimed at this result are: (1) that a plaintiff only partly compensated from collateral sources is the real party in interest so that his first party insurer subrogated to a part of that tort recovery need not appear as the plaintiff of record,[28] and (2) the introduction of the fact that defendant has liability insurance is so prejudicial to the interests of

26. This assumes that the abolition of the Collateral Source Rule carries with it explicitly or by implication the denial of the right of subrogation to the suppliers of the collateral benefits as far as it is in the power of the state legislature to do so. See supra note 40. The subrogation rights of the United States for the medical services furnished by the veteran's hospital under 42 U.S.C.A. § 2651 would still exist.

27. For a historical discussion of the contingent fee arrangement and a defense of its utility in protecting the poor who are injured, see J. Auerbach, Unequal Justice 45-50 (1976).

28. Dreiner v. Reinhart, 195 Kan. 243, 404 P.2d 174; Jones v. Ryan, 2?? N.W.2d 5?? (Minn. 1978). Some courts have decided that real party in interest statutes, such as Fed. R. Civ. P. 17(a), require that a subrogated insurer be named as a party plaintiff even if it has paid only a part of the plaintiff insured's claim. See Public Serv. Comm'n of Oklahoma v. Black & Veatch, 467 F.2d 1143 (10th Cir. 1972).

the defendant that he would normally be entitled to a new trial.[29] Abolition of the Collateral Source Rule would not conflict with this basic policy because no insurer appears as a party to be affected by the jury's verdict, either as claimant or as the party who must ultimately pay the judgment. All the jury will learn is that some insurance money has already been paid. A question ought, however, to be raised about the underlying policy. When these rules were first developed, insurance was not common, so it was safe to assume that the average juror would suspect there were no insurers behind either the plaintiff or the defendant unless insurance were in the open. Today, all persons of means carry insurance and are moderately sophisticated about the general facts of insurance. Any automobile driver knows about automobile insurance, which he or she is required to carry. Almost every homeowner carries homeowner's comprehensive insurance. Most adults are covered by some form of medical and health insurance. Jurors may well speculate about the availability of insurance and such speculation could influence their decision one way or another. The completely uninsured person may be damaged by the operation of rules designed to protect an insured person and insurers as a class, because the jury might assume the presence of typical insurance protections when they do not in fact exist. The abolition of the Collateral Source Rule which would permit evidence to be admitted on actual insurance protection owned by plaintiff lets the jury have reliable evidence on matters where otherwise they are likely to be speculating and doing so inaccurately.

III. The American Medical Association and the Collateral Source Rule

Rarely does scholarly analysis about a legal problem and the need for reform lead directly to change. Some politically active group who stands to gain by the reform has the responsibility of turning a dispassionate analysis into a new and effective legislative program. That impetus came from the perceived crisis in medical costs when medical malpractice litigation mushroomed in the past two decades. Defendant doctors and, behind them, their liability insurers were particularly outraged when asked to pay in malpractice judgments not only very large sums for pain and suffering and for economic losses, but also to pay for the doctor's own services, corrective services and additional health care for which the patient had been fully compensated by health insurance programs of one sort or another.

In the 1970's, the American Medical Association organized a nationwide campaign to achieve major reforms in the tort system which

29. See cases cited supra note 9.

they hoped would limit the explosion in malpractice judgments and the cost of malpractice insurance. Among the reforms were the introduction of screening panels to weed out unmeritorious claims,[29] the provision for arbitration agreements to be executed between patients and health care providers,[31] the grant of power to courts to review attorneys' fees to ensure that they were reasonable,[32] the abolition of the Collateral Source Rule and the fixing of a maximum dollar limit on recovery in malpractice actions.[33] Having achieved limited success in persuading state legislatures to adopt these reforms, the American Medical Association has turned its attention[34] to supporting a no-fault compensation scheme for malpractice in the federal Congress.[35]

The reform in the Collateral Source Rule is the least radical change in the existing tort system and thus was the most widely adopted.[36] These statutes are in no sense uniform, although they all contain two common elements: (1) they apply only to medical malpractice actions, and (2) they permit the defendant health care provider(s) to introduce evidence of some collateral benefits received by the plaintiff. One of the most elaborate and complete is the Arizona statute, which provides:

> A. In any medical malpractice action against a licensed health care provider, the defendant may introduce evidence of any amount or other benefit which is or will be payable as a benefit to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act, any state or federal workmen's compensation act, any disability, health, sickness, life, income disability or accident insurance that provides health benefits or income disability coverage and any other contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of income disability or medical, hospital, dental or other health care services to establish that any cost, expense, or loss claimed by the plaintiff as a result of the injury or death is subject to reimbursement or indemnification from such collateral sources. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any such benefits or that recovery from the defend-

29. *E.g.*, ARIZ. REV. STAT. § 12-567 (1982); KAN. STAT. ANN. §§ 65-4901 to -4908 (1980).

30. *E.g.*, ILL. ANN. STAT. §§ 110 201-203 (Smith-Hurd 1983).

31. *E.g.*, ARIZ. REV. STAT. § 21-568 (1975), TEX. CODE ANN. § 29-26-120 (1981), WASH. REV. CODE ANN. § 7.70.070 (1975-76).

32. *E.g.*, CAL. CIV. CODE §§ 3333.2 (1976) (limits recovery for noneconomic losses to $250,000), OHIO REV. CODE ANN. § 2307.43 (Page 1971) (limits recovery for general damages to $200,000), N.D. CENT. CODE § 26.1-41-11 (Supp. 1983) (limits recovery to amounts provided by malpractice insurance fund and the maximum recovery is $500,000 for each claim and one million dollars for each policy period), S.D. COMPILED LAWS ANN. § 21-3-11 (1978) (total general damages limited to $500,000, but there is no limit on amount of special damages which are recoverable).

34. *See* Statement of the American Medical Association presented by President James S. Todd, M.D., to the Subcommittee on Health of the Ways and Means Committee of the United States House of Representatives, June 28, 1973.

35. *See* H.R. 5400, introduced in the 98th Cong., 2 Sess. (1984).

36. *See* statutes listed *supra* note 4.

> ant is subject to a lien or that a provider of such collateral benefits has a statutory right of recovery against the plaintiff as reimbursement for such benefits or that the provider of such benefits has a right of subrogation to the rights of the plaintiff in the medical malpractice action.
>
> B. Evidence introduced pursuant to this section shall be admissible for the purpose of considering the damages claimed by the plaintiff and shall be accorded such weight as the trier of the facts chooses to give it.
>
> C. Unless otherwise expressly permitted to do so by statute, any provider of collateral benefits, as described in subsection A, shall not recover any amount against the plaintiff as reimbursement for such benefits nor shall such provider be subrogated to the rights of the plaintiff.[37]

The major issues on which the various statutes differ is: (1) whether it lies in the discretion of the jury to make the deduction,[38] or whether the court must make the deduction as a matter of law;[39] (2) whether the statute specifically denies the right of subrogation to the provider(s) of collateral benefits,[40] or whether this is left to implication,[41] and (3) whether the evidence which may be introduced covers all benefits received by the plaintiff,[42] whether such benefits as life and accident insurance are excluded from admissibility,[43] or whether benefits purchased by the plaintiff or his employer are excluded from admissibility.[44]

These medical malpractice statutes abolishing the Collateral Source Rule have been subjected to rigorous constitutional attack.[45] The grounds argued to establish unconstitutionality are varied. It has been contended that the limited abolition of the Collateral Source Rule violates the requirements of due process and equal protection under the

37. ARIZ. REV. STAT. ANN. § 12-565 (1982).

38. *E.g.*, ARIZ. REV. STAT. ANN. § 12-565(B) (1982), WASH. REV. CODE ANN. § 7.70.080 (1975-76).

39. *E.g.*, FLA. STAT. ANN. § 768.50, N.Y. CIV. PRAC. LAW § 4010 (McKinney 1975 & Supp. 1984).

40. *E.g.*, ARIZ. REV. STAT. ANN. § 12-565(C) (1982), CAL. CIV. CODE § 3333.1(b) (1976).

41. The abolition of the Collateral Source Rule would seem to be implicit in the right of subrogation in the collateral source provider. Otherwise, the plaintiff would receive less than full compensation because there would be a double reduction from his total damages, or else the impact of abolishing the Collateral Source Rule is evaded because the provider in a subrogation action would recover from the defendant dollar for the amount that was deducted from plaintiff's lodement upon introduction of the evidence of the collateral benefit. The courts could avoid this implication only by holding that the evidence of collateral benefits is admissible only as the provider has no right of subrogation. This would mean the abolition would apply only to the category of damages in class (b), but not to class (a) where the equities more strongly justify abolition. *See* discussion *supra* notes 12-18 and accompanying text.

42. *E.g.*, DEL. CODE ANN. tit. 18, § 6862 (1974), IDAHO CODE § 29-1-210 (1979).

43. *E.g.*, FLA. STAT. ANN. § 768.50(2)(a)2 (Supp. 1984), N.Y. CIV. PRAC. LAW § 4011 (McKinney 1975 & Supp. 1984).

44. S.D. COMPILED LAWS ANN. § 21-3-12 (1978), TEX. CODE ANN. § 29-26-115 (1984), WASH. REV. CODE ANN. § 7.70.040 (1975-76).

45. An extended discussion of the constitutional issues may be found in Note, *Collateral Malpractice Compensation Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 823 (1979).

federal Constitution.[46] It has also been argued that state constitutional guarantees of equal protection or due process are violated by such statutes.[47] In addition, challengers have relied on special provisions of state constitutions, such as a prohibition against special legislation,[48] a prohibition against limiting damages[49] or a provision guaranteeing open courts and remedies for all wrongs.[50]

The highest courts of two states, New Hampshire[51] and North Dakota,[52] have held unconstitutional that part of their medical malpractice act which abolished the Collateral Source Rule. In doing so, each court relied primarily on state constitutional provisions and their local views of appropriate constitutional principles. Both courts used a stricter rule of legislative scrutiny—the so-called "substantial relationship" test, requiring a close correspondence between the stated legislative goals and the classifications and means selected by the legislature to achieve those goals. Applying this stricter standard, the Supreme Court of North Dakota was persuaded that the crisis in medical malpractice was not great and thus reform was not essential. The Supreme Court of New Hampshire felt the means chosen by the legislature were not the most effective or were not constitutionally permissible ways to achieve the goals.[53]

46. See Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

47. See Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

48. See Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

49. See Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977).

50. See Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

51. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

52. Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

53. The Kansas statute was declared unconstitutional by a federal district court in Doran v. Priddy, 534 F. Supp. 30 (D. Kan. 1981), on both federal and state constitutional grounds. The judge found that the distinctions between gratuitous collateral benefits which were admissible and collateral benefits paid for by the plaintiff or his employer which were inadmissible created a discriminatory classification. He also found that abolishing the Collateral Source Rule for only one class of tort defendants, i.e., health providers, was an unfair classification. He felt that these classifications violated the right to equal protection under the fourteenth amendment to the United States Constitution and also violated sections 1 and 2 of the Bill of Rights of the Kansas Constitution, which are the state equal protection provisions. The court also found the statute violated article 2, section 17 of the Kansas Constitution in that it was not a law of general nature having a uniform operation across the state. Whether the constitutional analysis is correct and would be upheld by higher federal courts and by the Kansas courts is open to serious doubt.

The constitutional analysis made by Judge Rogers in the unreported case of Holman v. The Menninger Found. (No. 79-4098, D. Kan. 1982) seems sounder and a better prediction of the judgment that higher federal courts and the Kansas Supreme Court would come to than the decision in Doran v. Priddy. Judge Rogers reasoned that the validity of Kan. Stat. Ann. § 60-471 under equal protection analysis turns on which test is used, the "rational basis" test or a stricter "substantial relationship" test. Those decisions which have held such statutes unconstitutional, including Doran v. Priddy, have used the "substantial relationship" test. Those courts which have used the "rational basis" test have found such statutes constitutional. After surveying the federal authorities, he concluded the appropriate test for federal equal protection was the "rational basis" test. Two Kansas Supreme Court cases considering the constitutionality of other parts of the

A substantial majority of courts which have considered the constitutionality of these statutes abolishing the Collateral Source Rule have upheld them as valid.[54] These courts use a less strict rule of legislative scrutiny under due process or equal protection analysis, the rational-basis test. This test accords greater tolerance and respect to legislative judgments about what the needs of society are and which are the best means to achieve these goals.

IV. THE GENERALIZATION OF THE MALPRACTICE REFORM TO ALL CIVIL ACTIONS

The core of the equal protection argument is that there is no rational justification for treating medical malpractice actions differently from all malpractice actions or more generally from all tort actions. In the Florida case testing the constitutionality of their Medical Malpractice Act,[55] Chief Justice Sundberg in his dissent said:

> [The Florida statute in question] essentially abolishes the collateral source rule, but only with reference to the medical profession. This common law rule typically prevents reduction of the plaintiff's tort recovery by any amounts of alternative compensation received from sources such as health insurance or disability benefits. The justifications for the rule are (1) to avoid penalizing [illegible] plaintiff who purchases insurance, (2) to avoid discouraging [illegible] of insurance, and (3) to increase the deterrent effect of [illegible] validity of these rationales has been debated, but [illegible] that if the collateral source rule is modified, there is [illegible] for confining changes to medical malpractice cases.[56]

Chief Justice Sundberg's arguments were not and should not be persuasive to the Supreme Court of Florida on the constitutional question. The constitutional structure should permit the legislatures the choice to legislate differently for medical malpractice if there are justifiable reasons for the differential treatment. The reason advanced by the legislatures which have abolished the Collateral Source Rule was the recent crisis in medical malpractice insurance. The federal Constitution and its constraints should be loose enough to give this discretion to the state legislatures.

Chief Justice Sundberg's analysis is, however, a good indication of

medical malpractice act have applied the "rational basis" test and presumably would do so in evaluating Kan. Stat. Ann. § 60-471. Manzanares v. Sunrise Clinic [illegible] 240 Kan. [illegible] P.2d 232 (1955) and State ex rel. Schneider v. Liggett, 223 Kan. 610, 576 P.2d 221 (1978), appeal dismissed, 439 U.S. 808 (1978).

54. Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); Rudolph v. Iowa Methodist Medical Center, [illegible] N.W.2d 550 (Iowa 1980); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977). Cf. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), where the Supreme Court of Idaho held the appropriate standard was the rational basis test, but remanded the case to the trial court for a finding on whether the national crisis in health care insurance was applicable to Idaho.

55. Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981).

56. Id. at 369-70 (Adkins, J. & Boyd, J. joining Sundberg, C.J., dissenting).

new the legislative discretion should be exercised. The reasons for modifying or abolishing the Collateral Source Rule apply to all tort actions, not just to medical malpractice. Similar crises or potential crises exist in other parts of our torts-compensation system. The cost and administrative delays in ar[illegible]bile compensation led to a variety of attempts to control costs, the most prominent of which has been no-fault legislation. The cost of products liability litigation and compensation is another tort area approaching crisis dimensions. As Jeffrey O'Connell, one of the leading proponents of no-fault approaches to tort liability, has written:

> The main intellectual, rather than political, challenge currently posed by no-fault insurance is the application of the no-fault principle to accidents other than those involving autos, principally to claims arising from medical mistreatment and malfunctioning products. Indeed, the success of no-fault auto insurance has meant that medical malpractice and product liability claims comprise a much greater portion of personal injury claims generally than before the advent of such no-fault laws.
>
> Furthermore, the undesirable characteristics of the present tort liability system are even more evident in medical malpractice and products liability claims than in claims arising out of auto accidents. In medical malpractice and products liability suits, many more victims are left uncompensated. Payment, even when made, is much more delayed. Finally, much more of the premium dollar is spent on legal fees.[57]

If automobile accidents, medical malpractice and injuries from defective products all represent areas of serious cost and administrative problems for our tort system, can there be any justification for abolishing the Collateral Source Rule in one case, but not in the others? And if we decide that these three problem areas require similar treatment by abolishing the Collateral Source Rule, is this not one of those cases where the exceptions would swallow up the rule, because the overwhelming bulk of tort litigation occurs in one of these three areas? Deciding that there ought to be uniform treatment, however, does not determine which way to generalize—whether to retain the rule or to abolish it.

The reasons behind the Collateral Source Rule no longer exist. The widespread and increasing use of liability insurance has virtually eliminated the fault aspects and deterrent operation of the law of tort. Anyone with sufficient assets to pay a tort judgment will almost invariably carry liability insurance. If there is no liability insurer, there is in all probability a judgment-proof tortfeasor. The penalties exacted by the Collateral Source Rule are thus hardly ever paid by wrongdoing

57. O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 11 Sw. U.L. Rev. 589, 595-96 (1980).

tortfeasors, but rather by the entire class of insureds under liability policies. Thus, liability insurance becomes a compensatory scheme for accident victims, no different in quality from other compensation schemes, such as health insurance, accident insurance, disability insurance, wage continuation plans, etc. Once the fault orientation to tort liability has been abandoned, the purpose of the tort system is to ensure that accident victims are fully compensated. That end is adequately and fully achieved if the liability insurer behind the defendant is required to pay only the true loss of the plaintiff, which is that amount not covered by the variety of collateral support plans now available to plaintiffs who have been injured.

The ultimate issue is which system of compensation is primary: liability insurance, or the sources of collateral benefits? To the extent that these collateral benefits have not been provided gratuitously by friends and relatives, they have already been funded, either by tax money, by private insurance premiums or as fringe benefits in exchange for the employee's services. Their coverage is almost always broader than just for those accidental injuries where causal fault of a third party can be proved. The allocated cost of these benefits is usually figured free of the ability of the provider to transfer a portion of those costs to a defendant and his insurance carrier through subrogation or assignment. To the extent that there would be a savings occurring from subrogating first party providers of collateral benefits to the third party liability insurer, this savings is often wiped out by the costs of obtaining such transfers. If subrogation or transfer costs exceed recoupment from subrogation, there is an added burden on the total injury compensation system.

V. Special Problems in the Drafting of a Reform Statute

The conclusion that the Collateral Source Rule should be abolished leaves several subsidiary problems unsolved: (a) Should the statute be evidentiary only, so that the deduction of collateral benefits is left to the discretion of the jury, or should the judge be required to deduct the collateral receipts as a matter of law? (b) Should the reform apply to all collateral benefits, or only to some? (c) Should the plaintiff recover in the tort action the premiums and other consideration paid to the provider for the collateral benefits? (d) Should the providers' right of subrogation be abolished as well? The medical malpractice statutes which have abolished the Collateral Source Rule[58] often do not cover one or more of these problems and, to the extent they do, the problems are resolved in very diverse ways.

58. *See supra* note 4.

A. *Issue of Fact for the Jury or Matter of Law for the Judge*

Whether the judge or the jury should have the power to decide on the impact of collateral benefits is not an issue where there is a clear answer, but there are reasons for leaving the matter to the discretion of the jury. First, there may be fact disputes to be resolved, such as whether the plaintiff actually received the benefits, and what they were worth in dollars. Gratuitously rendered benefits, particularly the delivery of services or goods, often pose such issues. In order to leave the ultimate decision to the judge, it would be possible to set up a two tier procedure, whereby the jury in a special verdict would make the necessary fact determinations, quantifying the benefit, and then the judge would deduct the liquidated amount from the general verdict.[59] This procedure would not be frequently used because unliquidated and gratuitous goods or services are not the most common or important collateral benefits today. Insurance payments, such as property damage settlements, health insurance refunds, or disability payments under private or governmental plans, as well as salary paid under wage continuance plans, are easy to prove and are liquidated.

A more general reason for leaving the deduction to the discretion of the jury arises from the very nature of the general verdict. In arriving at a single final sum as the full compensation for plaintiff's losses, the jury probably balances a number of factors such as the strength of the liability issue as against the seriousness of the injury, the nature and persuasiveness of the proof on the various items of damage, and the relative fault of the plaintiff as compared with the fault of the defendant. Letting the jury know of and be able to balance the amount of collateral benefits received only adds another factor to be used in arriving at a single just award. Not permitting the jury to know about or to balance these items, but instead requiring the judge to deduct it after the verdict is awarded, gives the element of collateral benefits much greater weight than the other factors because it has been removed from the scales.

Furthermore, the solution to this issue should be related to the answer to the next problem, the types of collateral sources which may reduce the defendant's liability. If the judge is required to deduct them as a matter of law, the collateral benefits should be only those which are clearly liquidated. If the question is one for the jury, a broader range of benefits, including gratuities, could be admissible.

Of those legislatures abolishing the Collateral Source Rule in medical malpractice actions, nine of them chose to leave the issue to the

59. Illinois comes the closest to having adopted such a procedure. *See* ILL. ANN. STAT. ch. 110 2 1205 (Smith-Hurd 1983).

discretion of the jury,[60] and five made it a matter of law for the judge.[61] In addition, New York originally left the matter to the jury, but in 1981 amended its statute to make the issue one of law for the judge.[62]

B. *Types of Collateral Benefits Which Should be Admissible*

This is the problem on which the medical malpractice statutes show the greatest divergence. The broadest classification is to cover all collateral benefits of every type and from every source.[63] Another approach is to list quite specifically the collateral benefits for which evidence would be admissible.[64] A good example appears in the Arizona statute quoted above. A third approach is to specify that all collateral benefits are admissible with specific named exceptions.[65] The most common exceptions are death benefits under life insurance policies[66] and insurance purchased with assets of the claimant or members of the claimant's immediate family or paid for by claimant's employer.[67] Another common provision is to limit the collateral benefits to those which are clearly liquidated special damages, particularly payments or reimbursements for medical care, rehabilitative care, and custodial care, as well as for lost earnings.[68]

This welter of approaches to identifying collateral benefits admissible under a statute abolishing the common law Collateral Source Rule raises two important problems: first, whether unliquidated gratuitous assistance given a claimant by friends or relatives should be a collateral benefit reducing a tort judgment, and, secondly, whether life insurance and nonmedical accident insurance should be excluded from admissibility.

There are policy and administrative grounds why the gratuitious unliquidated services should not be used to reduce a tortfeasor's judgment. The administrative reason is the difficulty in proving the receipt, the extent and the value of such services. The policy reason is that we want to reinforce a dwindling tradition in our society, the willingness of family and friends to help someone in need. If the amount of the help could be used to diminish the recovery of the victim in his legal action,

60. *See* the statutes of Arizona, California, Delaware, Kansas, New Hampshire, Rhode Island, South Dakota, Tennessee, and Washington cited *supra* note 4.

61. *See* the statutes of Alaska, Florida, Illinois, Nevada and North Dakota cited *supra* note 4.

62. N.Y. CIV. PRAC. LAW § 4010, first adopted in 1975, then amended in 1981.

63. *See* IOWA CODE § 668.10 (1977).

64. *See* the statutes from Arizona, California and Rhode Island cited *supra* note 4.

65. *See* the statutes from Alaska, Florida and New York cited *supra* note 4.

66. *See* the statutes from Iowa, Kansas, Ohio, South Dakota, Tennessee and Washington cited *supra* note 4.

67. *See* the statutes from Illinois, New Hampshire, New York, Ohio and South Dakota cited *supra* note 4.

this will certainly have a chilling effect on the willingness of such people to make contributions.

Life insurance and accident insurance, except for medical payments, pose much the same issue. A potential victim may in planning for himself or beneficiaries in the event of a serious accident or death choose to provide for certain intangible losses not contemplated by any compensatory scheme. If a planner decides he wants to leave his beneficiaries in a better economic position than would be provided by a wrongful death action, should he not have the freedom to purchase such further protection through private insurance? If he wishes himself to be cared for in the event of a disabling accident more generously than either a tort judgment or other compensatory schemes are likely to provide, should he not also have the power to purchase additional accident insurance? If the purchased protection would be used to reduce the judgment he would receive from a wrongdoer, that would be a disincentive to the exercise of this freedom or power.

The analysis of these two problems suggests that the admissible collateral benefits should be those covering the items of special damage in tort, the medical expenses and loss of earnings. If the impact of the Collateral Source Rule or its abolition is primarily to select which of several compensatory schemes would have primary responsibility for indemnifying the victim, the compensatory schemes which are in competition with the tort system are directed to cover clear economic loss of the victim. The three main types are medical insurance, (either governmental or private), wage continuance plans and private or governmental disability payments. If admissibility is limited to these types, not many collateral benefits of real value will be left out.

C. *Credit for Premiums Paid*

One argument made against abolishing the Collateral Source Rule was that it would discourage victims from purchasing insurance protection.[68] This led some Medical Malpractice Acts to exclude all benefits from insurance purchased by the claimant or by his employer.[69] There would still be strong incentives to continue to purchase insurance because the potential victim never knows whether the loss can be transferred to a wrongdoer. Genuine accidents do occur. To go to the other extreme and permit all collateral benefits to be introduced in diminution of the tort liability of a tortfeasor would work an unfairness. It would give the defendant a windfall, the benefit of the victim's foresightedness in providing insurance protection without the wrongdoer having to pay for that insurance. A widely adopted compromise is to

68. *See* quote from Chief Justice Sundberg, *supra* note 56 and accompanying text.
69. *See* the statutes from Kansas, Tennessee and Washington, cited *supra* note 4.

provide that if the defendant elects to introduce evidence of collateral benefits, the plaintiff is entitled to introduce evidence of the cost of those benefits.[70] The clear import of this is that the jury should diminish the plaintiff's award by the difference between the two. This difference represents the real economic gain which the plaintiff has received from the alternative compensatory schemes and is all the credit the defendant is entitled to.

D. *Abolishing the Provider's Right of Subrogation*

The Collateral Source Rule and the right of subrogation are closely linked. One cannot be altered without requiring changes in the other. This has been recognized by those Medical Malpractice Acts which define the admissible collateral benefits as those for which the provider does not have a right of subrogation.[71] This lets the law of subrogation control the content of the Collateral Source Rule. This is not necessary because state legislatures have the power to abolish the right of subrogation in providers' of collateral benefits except where those benefits are provided by federal governmental programs and federal legislation gives to the provider the right of subrogation.[72]

The state cannot effect the reforms called for by abolishing the Collateral Source Rule, if it leaves the right of subrogation in place. Some of the Medical Malpractice Acts have specifically abolished the right of subrogation in the providers.[73] A powerful argument can be made that unless the admissible collateral benefits are defined in such a way as to retain the rights of subrogation in those providers who have them, a statute revoking the Collateral Source Rule carries with it by implication the abolition of the right of subrogation in the provider.[74] This matter is too important to be left to implication or construction by the courts. The statute should forthrightly address the question and if the decision is made to abolish the Collateral Source Rule, the statute should clearly abolish the right of subrogation as widely as it is in the power of the state to do so. The analysis of this article would call strongly for Congress to abolish the right of subrogation in favor of federal programs of accident or injury compensation.

70. *See* the statutes from Arizona, California, Florida, Kansas and New Hampshire cited *supra* note 4. The statute in New York limits the credit to two years premiums and that of North Dakota to five years premiums.
71. *See* the statute from South Dakota cited *supra* note 4. The Alaska statute excludes from the definition of benefits those payments from federal programs which by law must seek subrogation.
72. An example is 42 U.S.C.A. § 2651 (1973), creating in the United States the right of subrogation against any third person having a tort liability for the reasonable value of the medical care and treatment furnished any victim where the United States is authorized or required by law to furnish such treatment.
73. *See* the statutes from Arizona, California, Florida and Ohio, cited *supra* note 4.
74. See discussion *supra* note 40.

VI. Conclusion

The Collateral Source Rule is an anachronism based on 19th century fault concepts. This rule has survived into a 20th century legal system where the primary goal is to guarantee that accident victims will be adequately compensated for their losses. The rule was an acceptable anachronism until the rapidly inflating costs of automobile accidents, malpractice actions and products liability claims led to closer scrutiny of our torts system in order to find ways to administer it more efficiently. The Collateral Source Rule creates substantial transfer costs in shifting the duty to pay from one compensatory scheme to another without any corresponding benefit to the victim. If anything, it costs victims something in larger legal fees and costs. The reform which decreases cost with the least harm to our current tort system is to abolish this anachronism.

A carefully drawn statute negating the operation of the Collateral Source Rule in all tort actions should be adopted. Such a statute should leave the question of how much to deduct to the discretion of the jury, should limit the admissibility of collateral benefits to those which are clearly liquidated and cover the items of special damage in torts, should insist that the plaintiff receive credit for all premiums or other consideration paid to the providers of the collateral benefits, and should abolish the right of subrogation in the providers of such collateral benefits to the fullest extent possible.

Thirty Years After *Brown*: Looking Ahead

David Hall*
and George Henderson**

I. Introduction

Brown v. Topeka Board of Education[1] is one of the most famous cases in American judicial history. Its landmark status is beyond dispute and its social significance is overwhelming. Some scholars note that in spite of criticism, *Brown* has been accepted in the political processes at large as a fundamental aspect of constitutional law.[2] Most legal scholars consider *Brown* a landmark decision because it sounded the end of legal racial segregation within the United States of America. Indeed, *Brown* has been hailed as the positive turning point in Black-White attitudes within the country and the defeat of institutional racist policies. From this perspective, *Brown* is a "bright day" in American racial jurisprudence and is often cited as an example of the integrity of the American legal system.

Unfortunately, many of the attributes and accolades accorded *Brown* are misplaced. This article will attempt to show that the real contributions to American jurisprudence made by *Brown* are seldom recognized. While a significant factor in public school education, *Brown* did not bring about the equity sought by the plaintiffs and the class of people whom they represented. Furthermore, it is our contention that *Brown* was incorrectly decided and, consequently, created an educational nightmare from which this country has not totally awakened.

It is very difficult to adequately and accurately judge a significant human event such as *Brown* at the time it occurs. Often, immediate circumstances and needs shape and color society's vision of the event. Therefore, time becomes a necessary condition for an objective and realistic analysis. A historical evaluation of an event frequently proves to be the best judgment of its worth. Ergo the saying emerged: Hindsight is better than foresight.

Because of its great significance to Black Americans, it has been heresy for lawyers and scholars to place the *Brown* mandate in anything other than a sacrosanct category. The authors of this article are among those who have generally questioned the *Brown* mandate and its

* Associate Professor of Law, University of Oklahoma School of Law. B.S. (1972), Kansas State University; M.A. (1975); J.D. (1978), University of Oklahoma.
** S.N. Goldman Professor of "Human Relations" and Professor of Education, University of Oklahoma. Ph.D., Wayne State University (1965).

1. 347 U.S. 483 (1954).
2. L. Tribe, American Constitutional Law 12 (1978).

A RAND NOTE

COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE

Patricia A. Ebener, Donna R. Betancourt

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Prepared for

The Institute for Civil Justice

Rand
P.O. BOX 2138
SANTA MONICA, CA 90406-2138

THE
INSTITUTE FOR
CIVIL JUSTICE

LAW

PREFACE

This Note reports the results of a national survey to determine how many state and federal court jurisdictions have authorized court-annexed arbitration for civil cases in their general jurisdiction trial courts. For those jurisdictions that have adopted mandatory arbitration, we present an outline of their program's features. In the jurisdictions where no program yet exists but alternative dispute resolution programs are being considered, we identify the options officials are exploring.

This research was supported by the National Institute for Dispute Resolution.

Other Institute for Civil Justice publications related to the current effort include:

Introducing Court-Annexed Arbitration. A Policymaker's Guide. E. Rolph, R-3167-ICJ, 1984.

Simple Justice. How Litigants Fare in the Pittsburgh Court Arbitration Program. J. W. Adler, D. R. Hensler, and C. E. Nelson, R-3071-ICJ, 1983.

Judicial Arbitration in California. The First Year. D. R. Hensler, A. J. Lipson, and E. S. Rolph, R-2733-ICJ, 1981.

Court Efforts To Reduce Pretrial Delay. A National Inventory. P. A. Ebener with the assistance of J. Wilson-Adler, M. Selvin, and M. S. Yesley, R-2732-ICJ, 1981.

SUMMARY

This Note reports the findings of a national survey to determine the current status of court-annexed arbitration among state and federal trial courts. It provides an update of a similar Institute for Civil Justice survey conducted in 1980. At that time we found ten states and three federal courts had authorized court-annexed arbitration. Since then the number of jurisdictions around the country where court-annexed arbitration is authorized has doubled. Currently sixteen states have authorized arbitration programs and all but two of those have active programs underway in one or more major courts. On the federal side recent funding has resulted in an expansion of court-annexed arbitration to eight additional districts bringing to ten the number of active programs in the federal district courts.

Program features show considerable variation. For example, while most programs provide some upper limit on the value of cases eligible for the program, the range is from a low of $3,000 in Alaska (where for this reason the program has not been implemented) to $150,000 in a number of the federal district courts. Other design features such as the disincentive to appeal arbitrator awards, the number of arbitrators and their rate of compensation also vary from jurisdiction to jurisdiction.

We also found that eight states are considering court-annexed arbitration programs as part of ongoing investigations of alternative dispute resolution options. Some states plan to propose legislation in 1985, while others are conducting much broader inquiries that may not result in actual program proposals in the near future. In other jurisdictions where arbitration is voluntary or little used efforts are underway to expand its scope. Recent interest in arbitration has rekindled among the federal courts where nearly twenty percent of the districts applied for funds to introduce new court-annexed arbitration programs. While the federal funding currently can support only ten programs further expansion may occur over the next few years.

Finally, court officials in 26 states reported that the current demand on judicial resources did not warrant the use of alternative dispute resolution programs. About half of this group felt that arbitration might be attractive in the future, while the balance indicated that adding more judges would be a more likely option for their courts if civil delay became a pressing concern.

ACKNOWLEDGMENTS

We would like to thank the many court officials and representatives of bar associations, special government task forces, study groups, and other organizations who contributed so generously of their time and expertise during our telephone interviews. We would also like to express our appreciation to the National Institute for Dispute Resolution which provided the funding for this research. In addition we are grateful to Deborah Hensler for reviewing the manuscript and to Stephen Carroll and Elizabeth Rolph for their helpful suggestions that assisted in guiding the research.

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INTRODUCTION

During the past few years, courts, bar associations, and legislatures around the country have been examining problems of excessive delay and costs of civil litigation in state and federal trial courts. Much attention has been paid to alternative dispute resolution, especially court-annexed arbitration, as a tool for diverting substantial portions of civil court caseloads to a less expensive, more efficient forum for disposition. Chief Justice Burger has endorsed court-annexed arbitration and called for extending its use around the country.[1] Although it was not declared a panacea for problems of court delay and congestion, the American Bar Association concluded in a 1984 report on arbitration that "court-annexed arbitration programs have met with a great deal of acceptance and support from the courts, attorneys, and the actual parties assigned to arbitration.... Most studies of the arbitration programs have also found widespread satisfaction from all of those involved in the programs."[2] In addition, the U.S. Senate directed attention to court-annexed arbitration by including a session on arbitration in a recent series of hearings on court delay convened by the Judiciary Committee Subcommittee on the Courts.

But what has been the effect around the country of the largely positive evaluation of arbitration at the national level? In 1980 the ICJ conducted a survey to determine how many states had authorized court-annexed arbitration for civil cases in the general jurisdiction trial courts, but since that time no systematic update had been done.[3] To obtain a more current picture, we conducted a similar survey of the status of court-annexed arbitration as of November 1984. This Note describes our results.

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[1] Warren E. Burger. *1983 Year-end Report on the Judiciary*, January 1984, p. 16.

[2] *Report on Court-Annexed Arbitration*, American Bar Association, Litigation Section, Committee on Arbitration, Committee on Federal Procedure, Committee on Litigation Management and Economics, Committee on Corporate Counsel, Committee on Liaison with the Judiciary, 1984, p. 3.

[3] P. A. Ebener with the assistance of J. Wilson-Adler, M. Selvin, and M. S. Yesley, *Court Efforts to Reduce Pretrial Delay. A National Inventory*, The Rand Corporation, R-2732-ICJ, July 1981.

We telephoned officials in state court administration in every state where arbitration had not been authorized as of 1980. In several states we also talked with bar association officials. We determined the current status of court-annexed arbitration in the federal district courts but did not conduct interviews in each district. We not only catalogued the jurisdictions where arbitration has been authorized but also inquired about current proposals and investigations that could result in future adoption of a court-annexed arbitration program.

Other ICJ work has evaluated individual arbitration programs,[4] and a recently published handbook provides a guide for policymakers in designing arbitration programs.[5] These topics are beyond the scope of this survey, whose resources limited us to an investigation of court-annexed arbitration at the state and federal district court level. We did not systematically interview local court officials and have only limited information about the extent to which arbitration has been implemented in local courts within the states and federal jurisdictions where it is currently authorized. Some individual trial courts may have adopted their own arbitration programs, but we have included information about local court programs only to the extent that we learned of them from state level interviews.

Table 1 summarizes the survey results. As of January, 1985, 16 states and 11 federal district courts had authorized court-annexed arbitration. The number of jurisdictions has increased by 60 percent at the state court level and almost tripled at the federal level since our 1980 survey, when ten states and three federal courts had authorized arbitration. In January 1985 eight new programs were approved for the federal district courts. Among the state courts, three new programs were added in 1983 and three more in 1984. Although the Connecticut

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[4]J. W. Adler, D. R. Hensler, C. E. Nelson with the assistance of S. J. Rest, *Simple Justice. How Litigants Fare in the Pittsburgh Court Arbitration Program*, The Rand Corporation, R-3071-ICJ, 1983; and D. R. Hensler, A. J. Lipson, and E. S. Rolph, *Judicial Arbitration in California. The First Year*, The Rand Corporation, R-2733-ICJ, April 1981.

[5]E. Rolph, *Introducing Court-Annexed Arbitration: A Policymaker's Guide*, The Rand Corporation, R-3167-ICJ, January 1984.

Table 1

COURT-ANNEXED ARBITRATION:
THE NATIONAL PICTURE AS OF JANUARY 1985

AUTHORIZED PROGRAMS:

State Courts

Alaska
Arizona
California
Connecticut
Delaware
Michigan
Minnesota
Nevada
New Hampshire
New Jersey
New Mexico
New York
Ohio
Oregon
Pennsylvania
Washington

Federal Courts

California--Northern District
Connecticut
Florida--Middle District
Michigan--Western District
Missouri--Western District
New Jersey
North Carolina--Middle District
Oklahoma--Western District
Pennsylvania--Eastern District
Texas--Southern District
--Western District

INVESTIGATION OF PROGRAMS UNDER WAY:

State Courts

Florida
Georgia
Hawaii
Illinois
Maryland
North Carolina
Texas
Wisconsin
District of Columbia

Federal Courts*

NO CURRENT AUTHORIZATION OR INVESTIGATION:

State Courts

Alabama
Arkansas
Colorado
Idaho
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Massachusetts
Mississippi
Missouri
Montana
Nebraska
North Dakota
Oklahoma
Rhode Island
South Carolina
South Dakota
Tennessee
Utah
Vermont
Virginia
West Virginia
Wyoming

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*We did not individually contact each federal court district. The large number of districts that applied for the funds made available to add eight new program in 1985 suggest that further expansion would occur if additional appropriations are made.

federal program is the only one that has been repealed, implementation never took place in Alaska and in Nevada the program has never been actively implemented. Table 2 and accompanying text briefly describe the extent of implementation within the jurisdictions where programs have been authorized. Eight states and the District of Columbia are considering arbitration either singly or as part of a broad investigation of alternative dispute resolution. The federal district court for Northern Illinois recently rejected an arbitration program proposal, while at least 17 federal districts applied for funds to begin new programs in 1985. Current investigations range from recently formed study committees still formulating agendas to final reports and draft proposals under review by the final decisionmaking organization. In the 26 states that have no program in place and none formally under consideration, our survey respondents generally felt that their courts were not severely delayed or in need of alternative means of case disposition.

COURT-ANNEXED ARBITRATION--PATTERN OF ADOPTION NATIONWIDE

Sixteen states and 11 of the 94 federal district courts have authorized compulsory court-annexed arbitration for civil damages cases. These programs all provide for involuntary assignment of cases within specific eligibility criteria to a hearing by arbitrators. Although assignment to arbitration is not voluntary, the arbitrators' award is nonbinding; any party may appeal and request a trial *de novo*. These programs must be distinguished from traditional labor and contract dispute arbitration, which is usually private, voluntary, and binding upon the parties.

Table 2 shows the date each jurisdiction first authorized its program and the scope of implementation within each jurisdiction as of November 1984. In the six years between 1978 and 1984, the number of jurisdictions with arbitration programs more than tripled. No federal courts and only six states had authorized court-annexed arbitration in their general jurisdiction courts before 1978. New York and Pennsylvania were the only states among the six that had extensively

MANDATORY COURT-ANNEXED ARBITRATION PROGRAMS

Jurisdiction	Program Title	Authorization	Earliest Date Authorized	Current Scope (As of Nov. 1984)
State Courts				
Alaska	Arbitration of Small Claims	State Law--A.S. §09 43.190	1972	Never implemented; jurisdictional limit too low to make program useful
Arizona	Arbitration of Claims	State Law--A.R.S. §12-133	1974	Operational in at least 2 counties including Phoenix and Tucson
California	Judicial Arbitration	State Law--C.C.P. §1141.10-32	1978	Operational in 15 counties with 10 or more judges and slowly being adopted in smaller courts
Connecticut	Fact Finding and Arbitration	State Law--Conn. Statutes §52-549N	1983	Statewide implementation but far more cases processed by fact-finding than by arbitration
Delaware	Compulsory Pretrial Arbitration	Superior Court Rule 16(C)	1984	Program began statewide in mid-1984
Michigan	Mediation	Supreme Court Rule (except Wayne County Court); General Court Rule 316	1980	Program under revision; 29 counties expected to implement new program in March 1985
Minnesota	Judicial Arbitration	State Law--Minn. Statutes §484.73	1984	Program to commence in February 1985 in Hennepin County (Minneapolis)
Nevada	Motor Vehicle Damage Actions Arbitration	State Law--N.R.S. §38.215-245	1971	Very little application, but efforts are underway to launch an expanded voluntary arbitration program for all civil damages cases
New Hampshire	Compulsory Arbitration	Supreme Court Rule, Temporary Rules of Compulsory Arbitration	1978	2 counties (Merrimack, Rockingham)
New Jersey	Judicial Arbitration	State Law--Laws of N.J. Ch.358	1983	Being implemented statewide
New Mexico		Supreme Court Rule	1984	Program to commence in 2 counties in July '85 (Albuquerque and Santa Fe)
New York	Alternative Dispute Resolution by Arbitration	State Law 22 N.Y.C.R.R. Part 28	1970	Operational in 31 counties, including New York City

Table 2 (cont.)

Jurisdiction	Program Title	Authorization	Earliest Date Authorized	Current Scope (As of Nov. 1984)
Ohio	Varies by county	Local Judicial Rules-- Hamilton County Rule 24 Stark County Rule 16 Cuyahoga County Rule 29	1970	Operational in approximately 15 counties including Cleveland and Cincinnati
Oregon	Arbitration Program	State Law--Ch.670 Oregon Laws	1983	Operational in 5 counties and expanding statewide by 12/31/84
Pennsylvania	Compulsory Arbitration	State Law--Pa. Con. Stat. Ann. Title 42 §7101	1952	Operational in 53 counties, including Philadelphia and Pittsburgh
Washington	Mandatory Arbitration of Civil Actions	State Law--R.C.W. Ch.7.06	1979	Operational in at least 3 counties (King, Pierce, Yakima)
Federal District Courts				
California-- Northern Dist.	Court-annexed Arbitration	Local Rule--Rule 500	1978	Ongoing program
Connecticut	Court-annexed Arbitration	Local Rule	1978	Disbanded after experimental period concluded
Florida-- Middle Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence January 1985
Michigan-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
Missouri-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
New Jersey	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
North Carolina-- Middle Dist.	Court-annexed Arbitration	Local Rule--Part VI Rules of Practice and Procedure	1984	Program to commence January 1985
Oklahoma-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
Pennsylvania-- Eastern Dist.	Court-annexed Arbitration	Local Rule--Civil Procedure 8	1978	Ongoing program
Texas-- Southern Dist. Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985

implemented programs at that time. Between 1978 and 1980 three U.S. District Courts began experimenting with arbitration; and four more states authorized programs, including California where the legislature ordered that all counties with ten or more judges must adopt arbitration. Since 1980, California, Michigan, Ohio, and Washington have had considerable increases in the number of counties adopting arbitration; as far as we know, only the federal district for Connecticut has discontinued its program. Since 1982, six more states have authorized court-annexed arbitration. Congress appropriated $400,000 to expand federal court arbitration to eight additional districts. Two of these, the Middle District Court of Florida and the Middle District of North Carolina began in early 1985, while the additional six districts are expected to have launched their programs by September 1985. Four of the most recently authorized state programs (Connecticut, Delaware, New Jersey, and Oregon) were adopted statewide, and the other two (Minnesota and New Mexico) are getting underway only in the large metropolitan courts in each state.

Eleven of the 16 state programs were authorized by state legislation, and the remainder and the federal programs were established by court rule. Often the legislative or court authority specified only broad design criteria and allowed individual courts to decide whether to adopt the program and to specify their own rules for implementation. Individual programs vary considerably within states as a result of this pattern of authorization.

FEATURES OF COURT-ANNEXED ARBITRATION AROUND THE COUNTRY

Types of Disputes and Jurisdictional Limits

Most courts have authorized court-annexed arbitration for civil cases where the claimant seeks only money damages. Contract, debt, and personal injury litigation make up the bulk of cases subject to arbitration. Two jurisdictions currently limit their program only to automobile litigation, and others exclude such categories as malpractice cases.

Over the past several years, jurisdictional limits on the programs have increased. The lowest ceiling among the most recently introduced programs is $15,000 (Connecticut, New Jersey, New Mexico, and Oregon). The Delaware program has a $30,000 limit and Minnesota has $50,000. The federal program in North Carolina has a limit of $150,000. In addition, several state and federal programs in place for longer periods have recently raised their dollar ceilings. For example, the federal court in Northern California has increased its limit from $50,000 to $100,000; in the Eastern District of Pennsylvania the new ceiling effective January 1985 will be $75,000. Arizona, California and Pennsylvania state courts have also had legislative action to expand arbitration by increasing the ceiling and thus capturing a larger percentage of the courts' civil caseloads. Table 3 shows the types of disputes eligible and the jurisdictional limit for each jurisdiction that has authorized a program.

The system for valuing cases to determine their eligibility for arbitration is an important feature of local programs and varies considerably around the country. Elizabeth Rolph's guide for arbitration policymakers provides a useful discussion of the issues and tradeoffs involved in designing this component of an arbitration program.[6]

Arbitrators and Their Compensation

Most programs provide that the parties in a case assigned to arbitration can choose a mutually agreeable arbitrator or accept an arbitrator chosen at random by the program's administrative process. Programs vary considerably in how they assign arbitrators to cases and how hearings are scheduled. Most programs use attorneys from the local bar membership as arbitrators and set certain qualifications for them. The number of arbitrators and their rate of compensation is shown on Table 3. Compensation of arbitrators and program support personnel are the main costs for arbitration programs.[7]

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[6]Rolph, *Introducing Court-Annexed Arbitration*, pp. 21-28.

[7]Rolph includes a discussion of funding arbitration programs on pp. 13-14.

FEATURES OF COURT-ANNEXED ARBITRATION PROGRAMS IN THE UNITED STATES

Jurisdiction	Types of Disputes	Jurisdictional Limit	Number of Arbitrators	Arbitrator Compensation	Appeal Disincentive
State Courts					
Alaska	Money damage suits	$3,000	To be provided by rule	To be provided by rule	To be provided by rule
Arizona	Money damage suits	$15,000	1 unless parties stipulate to 3(a)	$50/day	Arbitrator fee
California	All civil actions except: class actions, equitable matters, small claims, unlawful detainer and family law Act proceedings	$15,000; 25,(($25,000 in Lo. Angeles and San Bernardino Cos., Santa Barbara and Ventura) other counties have been given authority to raise limit to $25,000	1(a,b)	$150/day	Arbitration and trial costs plus other party's trial costs (if trial results are not more favorable to party requesting trial)
Connecticut	Money damage suits	$15,000	Determined by chief court administrator	$100/day plus $25 for each decision filed with the court	None
Delaware	Money damage suits	$30,000	1	$250/case	Arbitrator fee and costs of arbitration (including but not limited to expert witness fees, costs for issuing subpoenas and sheriff's mileage)
Michigan	All civil actions except child custody	None	3	Each party must pay $75 to attorneys on panel	If trial verdict does not better the appellant's position by at least 10%, must pay other party's actual costs and attorney fee as determined by the trial judge
Minnesota	Most civil actions except family, juvenile, mental health	$50,000	1 or 3 depending on experience of arbitrator	$150/day	None
Nevada	Motor vehicle cases	$3,000	1 or more as stipulated by parties or appointed by the court	As provided by award	Appellant must pay all costs of arbitration
New Hampshire	Money damage except malpractice suits	$50,000	1 or 3(b)	None	None

Table 3 (cont.)

Jurisdiction	Types of Disputes	Jurisdictional Limit	Number of Arbitrators	Arbitrator Compensation	Appeal Disincentive
New Jersey	Money damage suits related to motor vehicle use	$15,000	Stipulated by mutual consent of all parties	Set by rules of Supreme Court	Arbitrator fees; in addition, court costs or other reasonable costs of other party assessed if appellant does not better his position
New Mexico(d)	Money damage suits	$15,000	3	$100-150/day	$300 flat fee
New York	Money damage suits	$6,000	1 or 3(b)	$35/case $45/chairman	Arbitration fee plus costs subsequent to award(c)
Ohio	All civil actions except equitable matters and actions relating to title of realty	$10,000-15,000	1 or 3 subject to local rule	Subject to local rule	Appellant must bear all costs and attorney fees incurred after appeal if position not improved
Oregon	Money damage suits	$15,000	1	$150-300/case (depending on local rule)	Appellant pays $150 plus other party's costs if position not improved
Pennsylvania	All civil matters except actions relating to title of realty	$10,000-20,000(e)	3	$200/day	Arbitrators' fee(c)
Washington	Money damage suits	$15,000	1	Same rate as judges pro tem of the Superior Court	Trial and attorney costs if appellant does not better position
Federal District Courts(g)					
California--Northern Dist.	Money damage suits	$100,000	3 unless parties stipulate to 1	$75/day as member of panel $150/day as single arbitrator	Apellant may be assessed costs if position not improved
Connecticut	Money damage suits	$50,000	(f)	(f)	(f)
North Carolina--Middle Dist.	Money damage suits	$150,000	3 unless parties stipulate to 1	$250/day	Arbitration fees and costs if appellant does not improve position
Pennsylvania--Eastern Dist.	Money damage suits	$75,000	3 unless parties stipulate to 1	$75/case	Arbitration fees if appellant does not improve position

(a)Parties may stipulate to their own arbitrator.
(b)Court may substitute retired judges.

Appeal Disincentives

All court-annexed arbitration programs preserve the parties' right to trial by allowing appeal of the arbitration award and trial *de novo* of the case. However, the objective is to make a final disposition of as many cases as possible at the arbitration hearing. Therefore, most programs include disincentives to appeal. These usually involve payment by the appealing party of the arbitrators' fees and costs of arbitration. In some cases the appealing party must pay the subsequent court costs for trial. Often the disincentives are aimed at those who appeal only to delay the disposition of the case, because the penalty is refundable if the appellant considerably betters his or her position as a result of trial. Rolph describes some of the problems associated with imposing the appeal disincentive and providing a mechanism for its administration.[8] Table 3 briefly describes the component for limiting appeals in each jurisdiction that has authorized court-annexed arbitration.

JURISDICTIONS CONSIDERING ADOPTION OF COURT-ANNEXED ARBITRATION

State Courts

From our telephone interviews with state court officials where court-annexed arbitration is not currently authorized, we learned that several states are examining options for diverting portions of their civil caseload to alternative forums for disposition. In some states the planning is specifically aimed at judicial arbitration; in others, broader examination of a range of alternative dispute resolution options is under way. We found that the status of investigations in most states was still at a stage where recommendations had not yet been formulated. In some places report preparation is under way, and in others the agenda for topics to consider is still under consideration. Some local courts around the country are no doubt also interested in the feasibility of court-annexed arbitration, but our inquiry did not systematically extend to the local court level. We also did not investigate current plans to extend arbitration to additional courts in the states where programs

[8] Ibid., pp. 43-47.

have already been authorized, although expansion of this nature appears to be fairly steady in several of those states.

A proposal to adopt judicial arbitration in Illinois is currently under review by the Executive Committee of the Illinois Judicial Council. A committee headed by the chief justice of the Illinois supreme court has completed an investigation of arbitration programs around the country and has recommended for Illinois circuit courts a program patterned after the system that has been in place for many years in the Philadelphia, Pennsylvania Court of Common Pleas. The current Illinois proposal calls for compulsory arbitration of all civil cases under $15,000 in the law division of the circuit courts. Like many already established programs, the Illinois plan calls for a panel of three arbitrators who would enter nonbinding awards after a hearing of the dispute.

The Florida state court system has instituted a study commission on alternative dispute resolution that "was created to examine the feasibility of trial court administered means of dispute resolution."[9] At the time of our survey this commission had met only a couple of times and had not yet decided on what recommendations it would make to the supreme court and the Florida legislature. The commission has scheduled public hearings on the issues and plans to submit a report on its findings by March 1985. This report is expected to include drafts of legislation and court rules, but we do not know whether judicial arbitration will be among the commission's proposals.

In Georgia, a commission appointed by the governor and headed by the chief justice is exploring a wide range of proposals for improvement of the judicial process statewide. This commission plans to explore the feasibility of judicial arbitration as part of its efforts, but it is still a long way from deciding on recommendations for new legislation for the courts in Georgia. We do not know what priority judicial arbitration will attain. However, in Atlanta a proposal to introduce mandatory arbitration for civil cases is pending before the Fulton County Superior Court.[10] A program may be approved and in place in that

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[9]State Court Administrator Memorandum from Chairman of the Study Commission on Alternative Dispute Resolution, October 30, 1984.

[10]See Appendix A for a copy of the draft rules for Fulton County. An index may be found on the first page of this appendix.

court by July 1985. The proposed rules call for compulsory nonbinding arbitration for all civil cases seeking exclusive money damages of $20,000 or less. In addition, a party may request arbitration and a judge may order a case to arbitration at his or her discretion. Should the proposed program be approved, cases would be arbitrated by a panel of three attorneys who meet program qualifications. Compensation of arbitrators is proposed at $200 per day. The proposal requires that a written award be entered by the arbitrators but does not require written findings of fact or conclusions of law. The draft rules state that either party may file notice of appeal of the award and obtain a trial *de novo*. It is left to the trial judge's discretion to assign the arbitrators' fees against an appealing party that does not substantially improve its position at trial.

In Hawaii, where no judicial arbitration program is currently in place, the court has adopted a unique approach to planning for future programs to divert civil cases from the trial list. The court has submitted a proposal for funding to establish a two-year program for experimenting with many dispute resolution alternatives, including judicial arbitration.

The Chairman of the Maryland Bar Association Joint Committee on Alternative Dispute Resolution informed us that the committee is looking at all areas of alternative dispute resolution, including judicial arbitration, but the committee's report has not yet been drafted.

In North Carolina, where the federal court Middle District is planning to initiate a judicial arbitration program early in 1985,[11] there is also a bar association task force examining methods for alternative resolution of civil cases for the state courts. A state bar association representative on this task force informed us that the group plans to complete its work and submit a report to the governor, the legislature, the state bar, and the court by summer 1985.

In Texas and Wisconsin, the state court administrative offices reported that proposals for statutes for upcoming legislative sessions are currently under discussion. In Texas, that legislation will probably propose a mandatory arbitration program for civil cases involving amounts under $15,000. In Wisconsin, a pilot program to

[11]See Appendix B for program rules.

Appendix A

ARBITRATION STATUTES AND RULES: STATE AND LOCAL COURTS

This appendix includes statutes and court rules for those states where an arbitration program is in place, as well as rules for selected counties within some states. Also included are draft local rules and reports for several states.

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Article 2. Arbitration of Small Claims.

Sec. 09.43.190. Arbitration under court rules. The supreme court may provide by rule for compulsory arbitration of a cause of action filed in a superior or district court, demanding only a money judgment, when it appears that the demand on the cause of action is for $3,000 or less, exclusive of costs, or when it appears to the trial court as a result of a pretrial conference that the amount which will be recovered on the cause is not likely to exceed $3,000. (§ 2 ch 94 SLA 1972)

Sec. 09.43.200. Appointment and compensation of arbitrator. Arbitration of actions shall be by either a member of the Alaska Bar Association or a magistrate appointed and compensated by the court as provided by its rules. (§ 2 ch 94 SLA 1972)

Sec. 09.43.210. Practice and procedure. The practice and procedure for conducting arbitration, the powers of the arbitrators and the assessment of costs shall be prescribed by the court rules. (§ 2 ch 94 SLA 1972)

Sec. 09.43.220. Judgments and appeals. Unless an appeal is taken from the award to the court which ordered arbitration as provided by the court rules, the court shall enter and enforce judgment in accordance with the award of the arbitrator. Any party aggrieved by the award may appeal. All appeals shall be determined in the manner permitted by the rules. (§ 2 ch 94 SLA 1972)

explore several alternative dispute resolution options, including judicial arbitration, might be proposed.

In the District of Columbia, which has operated a voluntary court-sponsored arbitration program since 1982, a committee of the bar association is currently considering the pros and cons of expanding that program by making arbitration compulsory for certain civil cases. The committee plans to report to the bar association in the near future.

Federal Courts

Until recently only the U.S. District Courts for the Eastern District of Pennsylvania[12] and the Northern District of California had ongoing court-annexed arbitration programs. One other district had abandoned use of arbitration since an experimental program conducted several years ago was completed. However, the U.S. District Courts for the Northern District of Illinois and the Middle District of North Carolina have proposed their own court-annexed arbitration programs. The Illinois program has recently been rejected by the court, but in North Carolina the court has adopted rules and the program will become effective January 1, 1985.[13]

Elsewhere in the federal courts, recent appropriations have been made to fund court-annexed arbitration demonstration programs in several additional district courts. The Administrative Office of the Courts recently selected eight districts from among 17 or 18 applicants for program funding. The demonstration programs which will bring the number of active federal programs up to ten districts are expected to get under way during 1985.

COURT-ANNEXED ARBITRATION NOT UNDER INVESTIGATION

In our interviews with state court administrators, we learned that 26 states have no court annexed-arbitration program in place and do not expect to have such a program in the near future.[14] Table 4 lists the states where court-annexed arbitration has not been authorized and is not currently under consideration. In most of these states, backlog and

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[12]See Appendix B for program rules.

[13]See Appendix B for a copy of the arbitration rules.

[14]We did not contact local courts in these states, but some state court administrators mentioned that individual courts had initiated

Table 4

STATES NOT USING OR CONSIDERING COURT-ANNEXED ARBITRATION AS OF NOVEMBER 1984

Alabama	Maine	South Carolina
Arkansas	Massachusetts	South Dakota
Colorado	Mississippi	Tennessee
Idaho	Missouri	Utah
Indiana	Montana	Vermont
Iowa	Nebraska	Virginia
Kansas	North Dakota	West Virginia
Kentucky	Oklahoma	Wyoming
Louisiana	Rhode Island	

delay of civil cases is not a problem facing the majority of courts; several court officials stated that cases are tried promptly in their jurisdictions. One court official suggested that too many, rather than too few, judges was a problem in his courts.

We asked officials in these states whether they would consider adoption of arbitration in the future if court delay becomes a serious problem. Some court administrators indicated that arbitration might become a useful tool in the future should an alternative form of disposition for civil cases be needed. One court official said there was sufficient interest in arbitration that it was among a list of topics that the court might pursue in the next year or so. In South Carolina, an arbitration program is in place in the appellate courts. Familiarity with arbitration among the bench and bar there might lead to consideration of arbitration as an option for the trial courts at some point in the future. Similarly, in Virginia the Circuit Court in Fairfax County has an investigation of arbitration underway which could stimulate new interest around that state. Other administrative offices indicated that they are monitoring the programs in place in other jurisdictions.

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their own investigations of arbitration and other alternative dispute resolution options. These efforts, while beyond the scope of our

Court officials in several states told us about alternative dispute resolution programs for small claims, divorce, and other cases. In Maine and Oklahoma, recent legislation has provided for courts to establish more economical and accessible alternatives for resolution of disputes. Some courts in Colorado have experimental voluntary mediation programs for various types of cases. Our 1980 survey of court efforts to expedite litigation identified other states and local courts with mediation and settlement programs.[15]

Other court officials indicated that they would look at different options, such as adding judges and improving case management, rather than arbitration, to solve future court delay problems. Two state court administrators commented that they didn't believe the programs they knew about were completely successful in reducing costs and time to disposition, and others felt their judges were philosophically opposed to arbitration or threatened by the prospect of an alternative form of disposition. In North Dakota, a supreme court advisory committee found little interest in arbitration.

CONCLUSION

Our survey results show that court-annexed arbitration continues to be adopted and implemented around the country as an alternative means of dispute resolution intended to reduce court delay and provide a less expensive forum for civil case disposition. Among the 16 states and 11 federal districts that have authorized arbitration, most have viable programs under way and have continued to expand the scope of their programs. Only two states have never implemented a program after authorization and only the Connecticut federal court has repealed its authorization. Program evaluations conducted in several jurisdictions consistently report favorably on the operation of court-annexed arbitration. In Washington the Seattle program was generally approved of by 90 percent of the lawyers and *pro se* litigants who responded to an evaluation survey. More than 80 percent of the respondents felt the

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survey, may stimulate new interest at the state level in the near future.

[15]Ebener et al., *Court Efforts to Reduce Pretrial Delay*.

program produced faster case dispositions, was less expensive, and produced fair outcomes.[16] In Pittsburgh, where a program has been in place for many years, an ICJ study found that most litigants interviewed about their arbitration experience were quite satisfied with the program.[17]

We found few jurisdictions seriously opposed to court-annexed arbitration, although many respondents indicated that in their courts they would be able to add judges if delay became a problem and would prefer that option. In the jurisdictions considering adoption of arbitration we learned that supporters expect the most serious opposition to come from trial lawyers, whose efforts in some jurisdictions have contributed to defeat of proposals to authorize programs. This opposition has centered in the past on the issue of whether programs like arbitration restrict litigants' access to the courts.

In the future, more jurisdictions that attempt to reduce the time and expense of disposing of small civil cases are likely to adopt court-annexed arbitration programs. We found enthusiastic supporters of arbitration in the eight states and the District of Columbia where alternative dispute resolution options are under consideration. In addition, the renewed federal interest in arbitration may result in additional funding for further expansion among the district courts. Finally, within states where programs are already authorized, we believe the generally positive evaluations by current users will influence other courts to implement their own programs.

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[16]Greg Walters, Wayne Blair, and Carole Greene, "Mandatory Arbitration: Is It Working?" *Seattle-King County Bar Bulletin,* April 1983. See Appendix A.

[17]Adler, Hensler, and Nelson, *Simple Justice.*

(c) The case shall be submitted to arbitration at an earlier time upon the written request of all plaintiffs, subject to a motion by a defendant for good cause shown to delay the arbitration hearing.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration ⇨6.1.
C.J.S. Arbitration §§ 17, 22.

§ 1141.17 Tolling limitations on dismissal for lack of prosecution

Submission of an action to arbitration pursuant to this chapter shall not toll the running of the time periods contained in Section 583 as to actions filed on or after the operative date of this chapter. Submission to arbitration pursuant to a court order within six months of the expiration of the statutory period shall toll the running of such period until the filing of an arbitration award.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Limitation of Actions ⇨131.
C.J.S. Limitations of Actions § 256.

§ 1141.18 Arbitrators; qualifications; compensation; selection; disqualification

(a) Arbitrators shall be retired judges or members of the State Bar, and shall sit individually. A judge may also serve as an arbitrator without compensation. People who are not attorneys may serve as arbitrators upon the stipulation of all parties.

(b) The Judicial Council rules shall provide for the compensation, if any, of arbitrators, except that no compensation shall be paid prior to the filing of the award by the arbitrator, or prior to the settlement of the case by the parties. Compensation for arbitrators shall, unless waived in whole or in part, be one hundred fifty dollars ($150) per day, except that the board of supervisors of a county or a city and county may set a higher level of compensation for that county or city and county.

(c) The board of governors of the State Bar shall provide by rule for the method of selection of arbitrators after consulting with administrative committees established pursuant to Rule 1603 of the Judicial Arbitration Rules for Civil Cases and with county bar associations in counties where there are no administrative committees. These rules shall provide for specialized panels and shall become operative upon approval of the Judicial Council.

(d) Any party may request the disqualification of the arbitrator selected for his case on the grounds and by the procedures specified in Section 170 or Section 170.6 within five days of the naming of the arbitrator.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Derivation: Former § 1141.20, added by Stats.1975, c. 1006, p. 2364, § 1.

Library References
Arbitration ⇨26, 27.
C.J.S. Arbitration §§ 60 to 66.

§ 1141.19 Arbitrators; powers

Arbitrators approved pursuant to this chapter shall have the powers necessary to perform duties pursuant to this chapter as prescribed by the Judicial Council.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration ⇨29.
C.J.S. Arbitration §§ 68, 88, 107, 109.

§ 1141.20 Finality of award; de novo trial; request; limitation; calendar

An arbitration award shall be final if a request for a de novo trial is not filed within 20 days after the date the arbitrator files the award with the court. Any party may elect to have a de novo trial, by court or jury, both as to law and facts. Such trial shall be calendared, insofar as possible, so that the trial shall be given the

same place on the active list as it had prior to arbitration, or shall receive civil priority on the next setting calendar.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

For § 1141.30 operative until July 1, 1979, see Chapter 2.5, ante.

Library References
Arbitration ⇨80
C.J.S. Arbitration §§ 123 to 125.

§ 1141.21 Judgment upon trial de novo less favorable for party electing; payment of nonrefundable costs and fees

(a) If the judgment upon the trial de novo is not more favorable in either the amount of damages awarded or the type of relief granted for the party electing the trial de novo than the arbitration award, the court shall order that party to pay the following nonrefundable costs and fees, unless the court finds in writing and upon motion that the imposition of such costs and fees would create such a substantial economic hardship as not to be in the interest of justice:

(i) To the county, the compensation actually paid to the arbitrator.

(ii) To the other party or parties, all costs including, but not limited to, those specified in Sections 1032.5, 1032.6, 1032a, and 1032b, and the party electing the trial de novo shall not recover his costs.

(iii) To the other party or parties, the reasonable costs of the services of expert witnesses, who are not regular employees of any party, actually incurred or reasonably necessary in the preparation or trial of the case.

Such costs and fees, other than the compensation of the arbitrator, shall include only those incurred from the time of election of the trial de novo.

(b) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs and fees under paragraphs (ii) and (iii) of subdivision (a) shall be imposed only as an offset against any damages awarded in favor of that party.

(c) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs under paragraph (i) of subdivision (a) shall be imposed only to the extent that there remains a sufficient amount in the judgment after the amount offset under subdivision (b) has been deducted from the judgment.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Costs ⇨158.
C.J.S. Costs § 183.

§ 1141.22 Grounds for correction, modification or vacation of award

The Judicial Council rules shall specify the grounds upon which the arbitrator or the court, or both, may correct, modify or vacate an award.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration ⇨76.
C.J.S. Arbitration §§ 160, 167, 169, 186, 187, 177.

§ 1141.23 Award; writing, signature and filing; entry in judgment book; force and effect

The arbitration award shall be in writing, signed by the arbitrator and filed in the court in which the action is pending. If there is no request for a de novo trial and the award is not vacated, the award shall be entered in the judgment book in the amount of the award. Such award shall have the same force and effect as a judgment in any civil action or proceeding, except that it is not subject to appeal and

12. The Supreme Court of New Jersey shall adopt rules of court appropriate or necessary to effectuate the purpose of this act. The Administrative Office of the Courts shall not later than March 1 of each year file with the Governor and Legislature a report on the impact of the implementation of this act on automobile insurance settlement practices and costs, and on court calendars and workload.

13. This act shall take effect immediately but sections 1 through 11 shall remain inoperative until January 1, 1984 or until the adoption of appropriate rules by the Supreme Court of New Jersey, whichever shall be later.

STATEMENT

This bill establishes a system of judicial arbitration for tort action claims, for noneconomic or economic loss, filed in the Superior Court of this State, if the amount in controversy is $15,000.00 or less or, in the case of a greater amount, the parties agree to submit the controversy to arbitration. If the action is for both economic and noneconomic loss, the $15,000.00 shall apply to the amount in controversy for noneconomic damages.

The parties to the arbitration may agree to the number and persons to be designated as arbitrators; otherwise the arbitrators shall be selected from a list of retired judges and practicing attorneys compiled by the assignment judge, in a manner to be prescribed by the State Supreme Court. Controversies on which arbitration decisions have been rendered prior to the filing of the action are exempted from the bill's provisions.

Any party to the arbitration may request a trial de novo of the controversy, during which no reference shall be made to the arbitration proceedings or decision. The party asking for a trial de novo shall pay the arbitrators' fees. That party shall also be assessed court costs and the reasonable costs of the trial to the other parties, including reasonable attorneys' fees, not to exceed the amount of damages awarded that party, if that party is the one to which the award is made; the court may reduce or eliminate the assessment to the extent that the court decision is more favorable to the filing party. The payment of court costs may be waived by the court, upon a finding that the payments would create a substantial economic hardship or are not in the interests of justice.

TRANSCRIPT OF TESTIMONY

(J) The Arbitrators shall not be required to make a transcript of the proceedings before them. If any party shall desire a transcript, he shall provide a reporter and cause a record to be made. The party requesting the same shall pay the cost thereof which shall not be considered costs in the case. Any party desiring a copy of any transcript shall be provided with it by the reporter upon payment therefor, based upon the usual charges made for a copy of a deposition plus one-half of the cost of the reporter at the hearing.

Part IV. Report and Award—Not a Judgment

(A) Within thirty (30) days after the hearing, the Board of Arbitration shall file a report and award in the office of the Arbitration Commissioner acting for the Clerk of Courts, and on the same day shall mail or otherwise forward copies thereof to all parties or their counsel. An award may not exceed $10,000.00 exclusive of interest unless, in an action containing several party claimants, the Court, when referring the case to arbitration at pre-trial, orders that the $10,000.00 limitation apply separately to one or more of the claimants or as agreed to by the parties in accordance with Part I hereof. The report and award shall be signed by all of the members of the Board. In the event all three members do not agree on the finding and award, the dissenting member shall write the word "Dissents" before his signature. A minority report shall not be required unless the dissenting arbitrator elects to submit the same due to unusual circumstances. The Arbitration Commissioner shall make a note of the report and award on his docket and file the original report with the Clerk of Courts forthwith.

LEGAL EFFECT OF REPORT AND AWARD;
ENTRY OF JUDGMENT

(B) The report and award, unless appealed from as herein provided, shall be final and shall have the attributes and legal effect of a verdict. If no appeal is taken within the time and in the manner specified therefor, the Court shall enter judgment in accordance therewith. After entry of such judgment, execution process may be issued as in the case of other judgments.

Part V. Compensation of Arbitrators

(A) Each member of a Board of Arbitration who has signed an award or files a minority report shall receive as compensation, for his services in each case a fee of Forty Dollars ($40.00). When more than one case arising out of the same transaction is heard at the same hearing or hearings, it shall be considered as one case insofar as com-

2. That the action of one or more of the Arbitrators was procured by misconduct or corruption.

Copies of said exceptions shall be served upon each Arbitrator and the Arbitration Commissioner within 48 hours after filing and shall be forthwith assigned for hearing before the Administrative Judge or a judge assigned by him to conduct a hearing thereon.

If such exceptions shall be sustained the report of the Board shall be vacated by the Court and the case set for trial. The filing of exceptions shall tol. the running of the thirty (30) days appeal period provided in (A) above until a determination of the exceptions by the Court.

Amended Feb. 25, 1977; Jan. 3, 1978.

Enrolled

House Bill 2361

Sponsored by COMMITTEE ON JUDICIARY (at the request of Commission on the Judicial Branch)

CHAPTER 670

AN ACT

Relating to civil actions.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) An arbitration program under this Act for civil actions may be established for:

(a) The circuit court in a judicial district by an affirmative vote of a majority of the judges of the court, subject to the approval of the Chief Justice of the Supreme Court, or by an order of the Chief Justice.

(b) The district court for a county or counties by an affirmative vote of a majority of the judges of the court, subject to the approval of the Chief Justice of the Supreme Court, or by an order of the Chief Justice.

(2) Rules consistent with this Act to govern the operation and procedure of an arbitration program established under subsection (1) of this section for a court may be made in the same manner as other rules applicable to the court pursuant to ORS 1.002 (1), 3.065 (3), 3.220, 46.280 or 46.665 (3). Rules to govern the operation and procedure of a program made pursuant to ORS 3.065 (3), 3.220, 46.280 or 46.665 (3) are subject to the approval of the Chief Justice of the Supreme Court.

(3) This Act does not apply to appeals from a county, justice's or municipal court or actions in the small claims department of a district court.

SECTION 2. (1) In a civil action in a circuit or district court having an arbitration program established under section 1 of this Act, where all parties have appeared, the court shall refer the action to arbitration under this Act if:

(a) The only relief claimed is ~~recovery of money or damages, and no party asserts a claim for money or~~ general and special damages in an amount exceeding ~~$15,000 in the circuit court, or in an amount exceeding $3,000 in the district court, exclusive of attorney fees, costs and disbursements and interest on judgment.~~

(b) The action is a ~~domestic relations suit~~, as defined in ORS 107.510, ~~in which the only contested issue is~~ the division or other disposition of property between the parties.

(2) The ~~presiding judge of the court may exempt from arbitration~~ under this Act a civil action that otherwise would be referred to arbitration under subsection (1) of this section, or may remove from further arbitration proceedings a civil action that has been referred to arbitration under subsection (1) of this section, when, in the opinion of the judge, good cause exists for that exemption or removal.

SECTION 3. (1) In a civil action in a circuit or district court having an arbitration program established under section 1 of this Act, where all parties have appeared and ~~agreed to arbitration by stipulation~~, the court shall refer the action to arbitration under this Act if:

(a) The relief claimed is more than or other than recovery of money or damages.

(c) The case shall be submitted to arbitration at an earlier time upon the written request of all plaintiffs, subject to a motion by a defendant for good cause shown to delay the arbitration hearing.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration ⇨1.1.
C.J.S. Arbitration §§ 17, 22.

§ 1141.17 Tolling limitations on dismissal for lack of prosecution

Submission of an action to arbitration pursuant to this chapter shall not toll the running of the time periods contained in Section 583 as to actions filed on or after the operative date of this chapter. Submission to arbitration pursuant to a court order within six months of the expiration of the statutory period shall toll the running of such period until the filing of an arbitration award.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Limitation of Actions ⇨131.
C.J.S. Limitations of Actions § 256.

§ 1141.18 Arbitrators; qualifications; compensation; selection; disqualification

(a) Arbitrators shall be members in good standing of the State Bar, and shall sit individually. A judge may also serve as an arbitrator without compensation. People who are not attorneys may serve as arbitrators upon the stipulation of all parties.

(b) The Judicial Council rules shall provide for the compensation, if any, of arbitrators, except that no compensation shall be paid prior to the filing of the award by the arbitrator, or prior to the settlement of the case by the parties. Compensation for arbitrators shall, unless waived in whole or in part, be one hundred fifty dollars ($150) per day, except that the board of supervisors of a county or a city and county may set a higher level of compensation for that county or city and county.

(c) The board of governors of the State Bar shall provide by rule for the method of selection of arbitrators after consulting with administrative committees established pursuant to Rule 1603 of the Judicial Arbitration Rules for Civil Cases and with county bar associations in counties where there are no administrative committees. These rules shall provide for specialized panels and shall become operative upon approval of the Judicial Council.

(d) Any party may request the disqualification of the arbitrator selected for his case on the grounds and by the procedures specified in Section 170 or Section 170.6 within five days of the naming of the arbitrator.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Derivation: Former § 1141.20, added by Stats.1975, c. 1006, p. 2364, § 1.

Library References
Arbitration ⇨26, 27.
C.J.S. Arbitration §§ 60 to 66.

§ 1141.19 Arbitrators; powers

Arbitrators approved pursuant to this chapter shall have the powers necessary to perform duties pursuant to this chapter as prescribed by the Judicial Council.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration ⇨29.
C.J.S. Arbitration §§ 54, 68, 107, 109

§ 1141.20 Finality of award; de novo trial; request; limitation; calendar

An arbitration award shall be final if a request for a de novo trial is not filed within 20 days after the date the arbitrator files the award with the court. Any party may elect to have a de novo trial, by court or jury, both as to law and facts. Such trial shall be calendared, insofar as possible, so that the trial shall be given the

same place on the active list as it had prior to arbitration, or shall receive civil priority on the next setting calendar.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

For § 1141.20 operative until July 1, 1979, see Chapter 2.5, ante.

Library References
Arbitration ⇨10.
C.J.S. Arbitration §§ 123 to 125.

§ 1141.21 Judgment upon trial de novo less favorable for party electing; payment of nonrefundable costs and fees

(a) If the judgment upon the trial de novo is not more favorable in either the amount of damages awarded or the type of relief granted for the party electing the trial de novo than the arbitration award, the court shall order that party to pay the following nonrefundable costs and fees, unless the court finds in writing and upon motion that the imposition of such costs and fees would create such a substantial economic hardship as not to be in the interest of justice:

(i) To the county, the compensation actually paid to the arbitrator.

(ii) To the other party or parties, all costs including, but not limited to, those specified in Sections 1032.5, 1032.6, 1032a, and 1032b, and the party electing the trial de novo shall not recover his costs.

(iii) To the other party or parties, the reasonable costs of the services of expert witnesses, who are not regular employees of any party, actually incurred or reasonably necessary in the preparation or trial of the case.

Such costs and fees, other than the compensation of the arbitrator, shall include only those incurred from the time of election of the trial de novo.

(b) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs and fees under paragraphs (ii) and (iii) of subdivision (a) shall be imposed only as an offset against any damages awarded in favor of that party.

(c) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs under paragraph (i) of subdivision (a) shall be imposed only to the extent that there remains a sufficient amount in the judgment after the amount offset under subdivision (b) has been deducted from the judgment.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Costs ⇨158.
C.J.S. Costs § 138.

§ 1141.22 Grounds for correction, modification or vacation of award

The Judicial Council rules shall specify the grounds upon which the arbitrator or the court, or both, may correct, modify or vacate an award.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration ⇨76.
C.J.S. Arbitration §§ 149, 157, 159, 164, 167, 177.

§ 1141.23 Award; writing, signature and filing; entry in judgment book; force and effect

The arbitration award shall be in writing, signed by the arbitrator and filed in the court in which the action is pending. If there is no request for a de novo trial and the award is not vacated, the award shall be entered in the judgment book in the amount of the award. Such award shall have the same force and effect as a judgment in any civil action or proceeding, except that it is not subject to appeal and

Statements of attorneys and the brief or summary are not admissible in any court or evidentiary proceeding.

(7) Decision. Within 14 days after the hearing, the panel will make an evaluation of the case and notify each counsel of its evaluation in writing.

(8) Action on Board's Decision. Each party must file a written acceptance or rejection of the panel's evaluation with the mediation clerk within 21 days after the mailing of the panel's evaluation. The failure to file a written acceptance within 21 days constitutes rejection. There may be no disclosure of a party's acceptance or rejection of the panel's evaluation until the expiration of the 21-day period, at which time the mediation clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation.

If the evaluation of the mediation panel is rejected, the mediation clerk shall return to each attorney all the documents submitted by that attorney. The mediation clerk shall place a copy of the mediation evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of the court. The envelope may not be opened in a nonjury case until the trial judge has rendered judgment.

If the mediation evaluation does not exceed the jurisdictional limitation of the district court, the mediation clerk shall so inform the trial judge.

(G) Effect of Mediation. If all the parties accept the panel's evaluation, judgment will be entered in that amount, which includes all fees, costs, and interest to the date of judgment.

If any party rejects the panel's evaluation, the matter proceeds to trial in the normal fashion.

If the defendant accepts the evaluation but the plaintiff rejects it and the matter proceeds to trial, the plaintiff must obtain a verdict in an amount which, when interest on the amount and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is more than 10 percent greater than the board's evaluation, or pay actual costs to the defendant.

If the plaintiff accepts the evaluation but the defendant rejects it and the matter proceeds to trial, the defendant must obtain a verdict in an amount which, when interest on the amount and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is more than 10 percent below the evaluation of the board, or pay actual costs to the plaintiff.

If both parties reject the panel's evaluation and the amount of the verdict, when interest on the amount and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is no more than 10 percent greater or less than the board's evaluation, each party is responsible for his own costs from the mediation date. If the verdict is in an amount which, when interest on the amount and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is more than 10 percent greater than the board's evaluation, the defendant must pay actual costs. If the

verdict is in an amount which, when interest and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is more than 10 percent below the board's evaluation, the plaintiff must pay actual costs.

(H) Actual Costs. Actual costs include those costs taxable in any civil action and a reasonable attorney fee as determined by the trial judge for services necessitated by the rejection of the board's evaluation.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

STAFF COMMENT:

Proposed rule 2.403 was drafted by the Michigan Judges Association Rules Committee and is published for comment by the Court as submitted. The number indicates where it would appear if the proposed Michigan Court Rules (402A Mich) are adopted; if they are not, the rule would appear as GCR 1963, 316. Compare proposed GCR 1963, 316 appearing at 55 Mich State BJ 56 (January 1976).

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

STATE OF MICHIGAN, ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 23rd day of March in the year of our Lord one thousand nine hundred and seventy-nine.

Robin R Davis Clerk
Deputy

MOTOR VEHICLE DAMAGE ACTIONS

38.215 Arbitration required in damage actions arising out of ownership, maintenance or use of motor vehicles where amount in issue does not exceed $3,000.

1. Except as provided in subsection 2, all civil actions for damages for personal injury, death or property damage arising out of the ownership, maintenance or use of a motor vehicle, where the cause of action arises in the State of Nevada and the amount in issue does not exceed $3,000, shall be submitted to arbitration, in accordance with the provisions of NRS 38.015 to 38.205, inclusive.

2. Any such action over which a justice's court has jurisdiction shall be submitted to such arbitration only upon the mutual consent of the parties.

(Added to NRS by 1971, 1170)

38.225 Arbitration prerequisite to trial. No cause of action specified in NRS 38.215 shall be tried until there has been compliance with all the provisions of NRS 38.215 to 38.245, inclusive.

(Added to NRS by 1971, 1170)

38.235 Trial after arbitration; conditions. After an award has been made pursuant to NRS 38.105, either party to the action may request a trial on any or all issues arising out of the action, subject to all of the following conditions:

1. The party requesting the trial, or his attorney, shall make an oath or affirmation that it is not for the purpose of delay that the trial is requested, but for the purpose of alleviating an injustice that was done by the arbitrators in making the award.

2. Such party shall pay all costs that may have accrued up to the time the request is made.

3. Such a request for a trial shall be made, and all costs which have accrued shall be paid within 20 days after the decision and award of the arbitrators has been filed with the court.

(Added to NRS by 1971, 1170)

38.245 Effective date. NRS 38.215 to 38.245, inclusive, shall apply only to those causes of action arising on or after July 1, 1971.

(Added to NRS by 1971, 1170)

6. The arbitrators may, at their initiative or at the request of any party to the arbitration, issue subpenas for the attendance of witnesses and the production of books, records, documents and other evidence. Subpenas shall be served and shall be enforceable in the manner provided by law.

7. Notwithstanding that a controversy was submitted pursuant to subsection a. of section 2 of this act, the arbitration award for noneconomic loss may exceed $15,000.00. The arbitration decision shall be in writing, and shall set forth the issues in controversy, and the arbitrators' findings and conclusions of law and fact.

8. Unless one of the parties to the arbitration petitions the court, within 30 days of the filing of the arbitration decision with the court, a. for a trial de novo, or b. for the modification or vacation of the arbitration decision for any of the reasons set forth in chapter 24 of Title 2A of the New Jersey Statutes, or an error of law or factual inconsistencies in the arbitration findings, the court shall, upon motion of any of the parties, confirm the arbitration decision, and the action of the court shall have the same effect and be enforceable as a judgment in any other action.

9. Except in the case of an arbitration decision vacated by the court or offers of judgment made pursuant to court rules, the party petitioning the court for a trial de novo shall pay to the court the fees of the arbitrators.

10. No statements, admissions or testimony made at the arbitration proceedings, nor the arbitration decision, as confirmed or modified by the court, shall be used or referred to at the trial de novo by any of the parties, except that the court may consider any of those matters in determining the amount of any reduction in assessments made pursuant to section 11 of this act.

11. The party having filed for a trial de novo shall be assessed court costs and other reasonable costs of the other party to the judicial proceeding, including attorney's fees, investigation expenses and expenses for expert or other testimony or evidence, which amount shall be, if the party assessed the costs is the one to whom the award is made, offset against any damages awarded to that party by the court, and only to that extent; except that if the judgment is more favorable to the party having filed for a trial de novo, the court may reduce or eliminate the amount of the assessment in accordance with the extent to which the decision of the court is more favorable to that party, than the arbitration decision, and as best serves the interest of justice. The court may waive an assessment of costs required by this section upon a finding that the imposition of costs would create a substantial economic hardship as not to be in the interest of justice.

RULE 15. ARBITRATION

The judge or judges of general divisions of courts of common pleas shall consider, and may adopt, a plan for the mandatory arbitration of civil cases.

The plan shall specify the amount in controversy which will require submission of the case to arbitration and arbitration shall be required in cases wherein the amount in controversy does not exceed that specified sum. Arbitration shall be permitted in cases where the amount in controversy exceeds the sum specified in the plan for mandatory arbitration where all parties to the action agree to arbitration. The court shall determine at pre-trial whether a case is to be mandatorily arbitrated.

Every plan for the mandatory arbitration of civil cases adopted pursuant to this rule shall be filed with the Supreme Court and shall include the following basic principles:

(A) **Actions Excluded.** Actions involving title to real estate, equitable relief and appeals shall be excluded.

(B) **Arbitrators.** The court shall appoint a board of three arbitrators from a list of those lawyers who have consented to serve in such capacity and who have no interest in the determination of the case or relationship with the parties or their counsel which would interfere with an impartial consideration of the case. The parties may agree to the appointment by the court of a single arbitrator.

(C) **Report and Award.** Within thirty days after the hearing, the board or the single arbitrator must file a report and award with the clerk of the court and forward copies thereof to all parties or their counsel. Such report and award, unless appealed from, shall be final and have the legal effect of a verdict upon which judgment shall be entered by the court.

(D) **Appeals.** Any party may appeal the award to the court if, within thirty days after the filing of the award with the clerk of the court, he:

(1) Files a notice of appeal with the clerk of court and serves a copy thereof on the adverse party or parties accompanied by an affidavit that the appeal is not being taken for delay; and

(2) Reimburses the county for all fees paid to the arbitrators in the case.

All appeals shall be *de novo* proceedings at which members of the deciding board or the single arbitrator are barred as witnesses.

Exceptions to the decision of the board or single arbitrator based on either misconduct or corruption of the board or single arbitrator may also be filed by any party within thirty days after the filing of the report, and if sustained, the report shall be vacated.

[Effective August 12, 1979.]

pensation of the arbitrators is concerned. In cases requiring hearings of unusual duration or involving questions of unusual complexity, the Administrative Judge, on motion of the members of the Board and for cause shown, may allow additional compensation. The members of a Board shall not be entited to receive their fees until after filing the report and award with the Arbitration Commissioner. Fees paid to arbitrators shall not be taxed as costs nor follow the award as other costs.

(B) The Chairman shall receive as compensation the sum of Ten Dollars ($10.00) for each case heard by the Board, in addition to the compensation fixed for members of the Board of Arbitration.

(C) All compensation for arbitrators shall be paid, upon proper warrant, from funds of Cuyahoga County, Ohio which have been allocatd for the operation of the Common Pleas Court of Cuyahoga County, Ohio.

(D) In the event that a case shall be settled or dismissed more than two (2) days prior to the date scheduled for the hearing, the Board members shall not be entitled to the aforesaid fee. In the event that a case has been settled or dismissed within said two-day period, the Board members shall be entitled to receive said fee. Upon receiving notice that the case has been settled or dismissed more than two days before the date set for hearing, the Arbitration Commissioner shall assign another case to the same Board.

APPEALS

Part VI. Right of Appeal De Novo

(A) Any party may appeal from the action of the Board of Arbitration to the Common Pleas Court of Cuyahoga County. No appeal can be withdrawn without consent of all parties. The filing of a single appeal shall be sufficient to require a de novo trial of the entire case on all issues and as to all parties without the necessity of each party filing a separate appeal de novo. The right of appeal shall be subject to the following conditions, all of which shall be complied with within thirty (30) days after the entry of the award of the Board.

NOTICE OF APPEAL AND COSTS

1. (a) A notice of appeal de novo, together with an affidavit that the appeal is not taken for delay but because he believes an injustice has been done, shall be filed by the appellant in the office of the Arbitration Commissioner acting for the Clerk of Courts and shall pay to the Cashier of the Clerk of Courts the sum mentioned in 1(b) below, after first securing the approval of the Arbitration Commissioner.

REPAYMENT OF ARBITRATION FEES

(b) The appellant shall repay to Cuyahoga County, Ohio by depositing with the Clerk of Courts, all fees received by the members of the Board of Arbitration in the case in which the appeal is taken. The sum so paid shall not be taxed as costs in the case and shall not be recoverable by the appellant in any proceeding.

POVERTY AFFIDAVIT AND NOTICE

(c) A party, desiring to appeal an award may concurrently with the filing of a notice of appeal de novo, file a written motion with affidavit averring that by reason of poverty he is unable to make the payments required for an appeal and request the Court to allow an appeal de novo without payment of the amount specified in 1(b) hereof. If after due notice to the opposite parties, the judge is satisfied of the truth of the statements in such affidavit, he may order that the appeal of such party be allowed although the said amounts are not paid by the appellant.

RETURN TO ASSIGNED JUDGE

2. (a) The case shall thereupon be returned to the judge to whom the case was originally assigned for trial.

APPEAL DE NOVO

(B) All cases which have been duly appealed shall be tried de novo.

TESTIMONY OF ARBITRATORS ON APPEAL

(C) In the event of an appeal from the award or decision of the Board of Arbitration, the arbitrators shall not be called as witnesses as to what took place before them in their official capacity as arbitrators upon any hearing de novo.

EXCEPTIONS AND REASONS THEREFOR

(D) Any party may file exceptions with the Clerk of Courts, at the office of the Arbitration Commissioner, from the decision of the Board of Arbitration within thirty (30) days from the filing of the report and award for either or both of the following reasons and for no other:

1. That the Arbitrators misbehaved themselves in the conduct of the case.

(b) The action is in the circuit court, the only relief claimed is recovery of money or damages and a party asserts a claim for money or general and special damages in an amount exceeding $15,000, exclusive of attorney fees, costs and disbursements and interest on judgment.

(2) If a civil action is referred to arbitration under subsection (1) of this section, the arbitrator may grant any relief that could have been granted if the action were determined by a judge of the court.

SECTION 4. In a civil action in a circuit court having an arbitration program established under section 1 of this Act, where all parties have appeared, where the only relief claimed is recovery of money or damages, where a party asserts a claim for money or general and special damages in an amount exceeding $15,000, exclusive of attorney fees, costs and disbursements and interest on judgment, and where all parties asserting those claims waive the amounts of those claims that exceed $15,000, the court shall refer the action to arbitration under this Act. A waiver of an amount of a claim under this section shall be for the purpose of arbitration under this Act only and shall not restrict assertion of a larger claim in a trial de novo under section 5 of this Act.

SECTION 5. (1) At least five days before the date set for an arbitration hearing, the arbitrator shall notify the clerk of the court of the time and place of the hearing. The clerk shall post a notice of the time and place of the hearing in a conspicuous place for trial notices at the principal location for the sitting of the court in the county in which the action was commenced.

(2) The arbitration proceeding and the records thereof shall be open to the public to the same extent as would a trial of the action in the court and the records thereof.

(3) The compensation of the arbitrator and other expenses of the arbitration proceeding shall be the obligation of the parties or any of them as provided by rules made under subsection (2) of section 1 of this Act. However, if those rules require the parties or any of them to pay any of those expenses in advance, in the form of fees or otherwise, as a condition of arbitration, the rules shall also provide for the waiver in whole or in part, deferral in whole or in part, or both, of that payment by a party whom the court finds is then unable to pay all or any part of those advance expenses. Expenses so waived shall be paid by the state from funds available for the purpose. Expenses so deferred shall be paid, if necessary, by the state from funds available for the purpose, and the state shall be reimbursed according to the terms of the deferral.

SECTION 6. (1) At the conclusion of arbitration under this Act of a civil action, the arbitrator shall file the decision and award with the clerk of the court that referred the action to arbitration, together with proof of service of a copy of the decision and award upon each party.

(2)(a) Within 20 days after the filing of a decision and award with the clerk of the court under subsection (1) of this section, a party against whom relief is granted by the decision and award or a party whose claim for relief was greater than the relief granted to the party by the decision and award, but no other party, may file with the clerk a written notice of appeal and request for a trial de novo of the action in the court on all issues of law and fact. After the filing of the written notice a trial de novo of the action shall be held. If the action is triable by right to a jury and a jury is demanded by a party having the right of trial by jury, the trial de novo shall include a jury.

(b) If a party files a written notice under paragraph (a) of this subsection, a trial fee or jury trial fee, as applicable, shall be collected as provided in ORS 21.270 or 46.221.

(c) A party filing a written notice under paragraph (a) of this subsection shall deposit with the clerk of the court the sum of $150. If the position under the arbitration decision and award of the party filing the written notice is not improved as a result of a judgment in the action on the trial de novo, the clerk shall dispose of the sum deposited in the same manner as a fee collected by the clerk. If the position of the party is improved as a result of a judgment, the clerk shall return the sum deposited to the party. If the court finds that the party filing the written notice is then unable to pay all or any part of the sum to be deposited, the court may waive in whole or in part, defer in whole or in part, or both, the sum. If the sum or any part thereof is so deferred and the position of the party is not improved as a result of a judgment, the deferred amount shall be paid by the party according to the terms of the deferral.

(d) Notwithstanding any other provision of law or the Oregon Rules of Civil Procedure, a party filing a written notice under paragraph (a) of this subsection whose position under the arbitration decision and award is not improved as a result of a judgment in the action on the trial de novo shall not be entitled to attorney fees or

costs and disbursements, and shall be taxed the costs and disbursements of the other parties to the action on the trial de novo.

(3) If a written notice is not filed under paragraph (a) of subsection (2) of this section within the 20 days prescribed, the clerk of the court shall enter the arbitration decision and award as a final judgment of the court, which shall have the same force and effect as a final judgment of the court in the civil action and may not be appealed.

SECTION 7. This Act is repealed January 1, 1986.

Approved by the Governor August 2, 1983.
Filed in the office of Secretary of State August 2, 1983.

Chapter 7.06
MANDATORY ARBITRATION OF CIVIL ACTIONS

Sections

7.06.010 Authorization. The superior court of a county by majority vote of the judges thereof may authorize mandatory arbitration of civil actions under this chapter. [1979 c 103 § 1.]

7.06.020 Actions subject to mandatory arbitration. All civil actions, except for appeals from municipal or justice courts, which are at issue in the superior court in counties which have authorized arbitration, where the sole relief sought is a money judgment, and where no party asserts a claim in excess of ten thousand dollars, exclusive of interest and costs, are subject to mandatory arbitration. [1979 c 103 § 2.]

7.06.030 Implementation by supreme court rules. The supreme court shall by rule adopt procedures to implement mandatory arbitration of civil actions under this chapter. [1979 c 103 § 3.]

7.06.040 Qualifications, appointment and compensation of arbitrators. The qualifications and appointment of arbitrators shall be prescribed by rules adopted by the supreme court. Arbitrators shall be compensated in the same amount and manner as judges pro tempore of the superior court. [1979 c 103 § 4.]

7.06.050 Decision and award——Appeals——Trial——Final judgment. Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

If no appeal has been filed at the expiration of twenty days following filing of the arbitrator's decision and award, the clerk shall enter the arbitrator's decision and award as a final judgment in the cause, which shall have the same force and effect as judgments in civil actions. [1979 c 103 § 5.]

7.06.060 Costs and attorney's fees. The supreme court may by rule provide for costs and reasonable attorney's fees that may be assessed against a party appealing from the award who fails to improve his position on the trial de novo. [1979 c 103 § 6.]

7.06.070 Right to trial by jury. No provision of this chapter may be construed to abridge the right to trial by jury. [1979 c 103 § 7.]

7.06.900 Severability——1979 c 103. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1979 c 103 § 9.]

7.06.910 Effective date——1979 c 103. This act shall take effect July 1, 1980. [1979 c 103 § 10.]

WASHINGTON

SUPERIOR COURT MANDATORY ARBITRATION RULES (MAR)

Originally Effective July 1, 1980

Table of Rules

RULES FOR SUPERIOR COURT

VII. TRIAL DE NOVO

VIII. GENERAL PROVISIONS

I. SCOPE AND PURPOSE OF RULES

RULE 1.1 APPLICATION OF RULES

These arbitration rules apply to mandatory arbitration of civil actions under RCW 7.06. These rules do not apply to arbitration by private agreement or to arbitration under other statutes, except by stipulation under Rule 8.1.

Judicial Council Comment

A number of statutes authorize arbitration in specific instances. See, e. g., RCW 3.62.070 (justice court filing fee—city and county); 4.56.240 (personal injury damages—annuity payments); 7.70.030 (medical malpractice); 39.04.120 (public works contracts); 39.12.060 (public works contracts); 41.56.450 (collective bargaining by uniformed personnel); 49.66.090 (health care activities); 59.18.320 (landlord-tenant disputes); 77.12.280 (damages caused by game). The rules do not apply to arbitration under these specialized statutes.

The rules do not apply to arbitration by private agreement except when the parties stipulate to arbitration under these rules of a case which would not otherwise be subject to arbitration under RCW 7.06.

These rules do not restrict voluntary methods of settlement such as mediation.

RULE 1.2 MATTERS SUBJECT TO ARBITRATION

A civil action, other than an appeal from a court of limited jurisdiction, is subject to arbitration under these rules if the action is at issue in a superior court in a county which has authorized mandatory arbitration under RCW 7.06, if the sole relief sought is a money judgment, and if (1) no party asserts a claim in excess of $10,000, exclusive of attorney's fees, interest and costs, or if (2) all parties for purposes of arbitration waive claims in excess of $10,000, exclusive of attorney's fees, interest and costs. Other matters may be arbitrated under these rules only by stipulation under Rule 8.1.

Judicial Council Comment

The rule, up through subdivision (1), parallels RCW 7.06.020. A second provision is added allowing arbitration if all parties waive claims in excess of $10,000 for purposes of arbitration. Thus, for example, a plaintiff who could potentially be awarded more than $10,000 may choose to limit the claim to $10,000 in order to qualify for arbitration. Neither provision restricts the assertion of larger claims upon a trial de novo in superior court. A trial de novo is available, however, only to an aggrieved party. Thus, if the plaintiff asserts a claim for $10,000 and is awarded that amount by the arbitrator, the plaintiff is not entitled to a trial de novo under Rule 7.1. The plaintiff would be entitled to a trial de novo only if the arbitrator's award were less than the amount claimed by the plaintiff.

Reference is made to Rule 8.1, allowing parties to arbitrate by stipulation in cases not otherwise within the statute.

RULE 1.3 RELATIONSHIP TO SUPERIOR COURT JURISDICTION AND OTHER RULES

(a) **Superior Court Jurisdiction.** A case filed in the superior court remains under the jurisdiction of the superior court in all stages of the proceeding, including arbitration. Except for the authority expressly given to the arbitrator by these rules, all issues shall be determined by the court.

(b) **Which Rules Apply.** Until a case is assigned to the arbitrator under Rule 2.3, the rules of civil procedure apply. After a case is assigned to the arbitrator, these arbitration rules apply except where an arbitration rule states that a civil rule applies.

Judicial Council Comment

Rule 1.3 disengages the court from the arbitration process to the extent feasible. The court, after assignment of a case to the arbitrator, will not ordinarily entertain procedural motions, receive

papers for filing, or the like. The case is, for all practical purposes, in the hands of the arbitrator until entry of the award.

The court will intervene in the arbitration process only under the most exceptional circumstances. In most instances, a trial de novo under Rule 7.1 or a motion to vacate under Rule 7.2 will provide an adequate safeguard against an unjust result from arbitration. See also the comment to Rule 3.2.

II. TRANSFER TO ARBITRATION AND ASSIGNMENT OF ARBITRATOR

RULE 2.1 TRANSFER TO ARBITRATION

The point at which a case is transferred to arbitration and the procedures for accomplishing the transfer to an arbitration calendar shall be established by local rule adopted in accordance with Rule 8.2.

RULE 2.2 COURT MAY DETERMINE ARBITRABILITY

(a) Generally. The court may, on its own motion or on motion of a party, determine whether a case is actually subject to arbitration under RCW 7.06.020 and Rule 1.2 and may accordingly order a case transferred to or from the arbitration calendar. Only in extraordinary circumstances after a case has been assigned to an arbitrator under Rule 2.3 will the court order a case returned from the arbitration calendar to the trial calendar.

(b) Effect on Right to Appeal. If a party asserts a claim which disqualifies a case for arbitration but the court nevertheless orders a transfer to arbitration under section (a), any party is deemed aggrieved under Rule 7.1 if the arbitrator awards less than the party's original claim.

Judicial Council Comment

The court may determine whether a case should be arbitrated under Rule 1.2 and the underlying statute. Thus, for example, if frivolous equitable claims or exaggerated damages are asserted for the sole purpose of avoiding arbitration, the court might order the case transferred to arbitration if the case is otherwise eligible for arbitration.

The second sentence of Rule 2.2 reflects the belief that the court should intervene in the arbitration process only under exceptional circumstances. Any party to the arbitration who has asserted a disqualifying claim and has been awarded less than the claimed amount is an "aggrieved party". See also the comments to Rules 1.3 and 3.2.

RULE 2.3 ASSIGNMENT TO ARBITRATOR

(a) Generally. The parties may select an arbitrator by stipulation. If an arbitrator is not chosen by stipulation within 14 days after a case has been placed on the arbitration calendar, the court shall promptly select an arbitrator and notify the arbitrator and the parties of the assignment. The case is deemed assigned for purposes of Rule 1.3 upon the final selection of the arbitrator under this rule.

(b) Communication with Potential Arbitrator Restricted. The restrictions on communication defined by Rule 4.1 apply to communication with a person under consideration as a possible arbitrator in a case.

Judicial Council Comment

Rule 2.3 leaves most of the details of the assignment procedure to be developed by local rule. By local rule, for example, an arbitrator might be selected from a panel on the basis of special expertise or experience. It is expected that by local rule each party will have one opportunity to object to an arbitrator selected by the court, paralleling the opportunity to object to the judge assigned to a trial. Other methods of selection and objection may also be developed locally.

The authority of the arbitrator to act does not arise until the case is assigned to a specific arbitrator and any disputes over the assignment are settled. See Rule 1.3.

III. ARBITRATORS

RULE 3.1 QUALIFICATIONS

Unless otherwise ordered or stipulated, an arbitrator must be a member of the Washington State Bar Association who has been admitted to the bar for a minimum of five years, or who is a retired judge. The parties may stipulate to a non-lawyer arbitrator.

To qualify as an arbitrator, a person must sign and file an oath of office, either to serve in a particular case, or as a member of a panel of arbitrators.

Judicial Council Comment

The rule requires arbitrators to be lawyers unless otherwise ordered or stipulated. Membership in the Washington State Bar Association is required and assures the ability to discipline an arbitrator who acts improperly. Both active and inactive members qualify under the rule.

MAR 3.2 RULES FOR SUPERIOR COURT

RULE 3.2 AUTHORITY OF ARBITRATORS

An arbitrator has the authority to:

(1) Decide procedural issues arising before or during the arbitration hearing, except issues relating to the qualifications of an arbitrator;

(2) Invite, with reasonable notice, the parties, to submit trial briefs;

(3) Examine any site or object relevant to the case;

(4) Issue a subpoena under Rule 4.3;

(5) Administer oaths or affirmations to witnesses;

(6) Rule on the admissibility of evidence under rule 5.3;

(7) Determine the facts, decide the law, and make an award;

(8) Perform other acts as authorized by these rules or local rules adopted and filed under Rule 8.2.

Judicial Council Comment

An arbitrator may exercise the authority conferred by Rule 3.2 only after the case is assigned to a specific arbitrator and any disputes over the assignment are settled. See Rules 1.3 and 2.3. After the case is assigned to an arbitrator, the superior court retains jurisdiction but will intervene in the arbitration process only under the most exceptional circumstances. The court, for example, might entertain a challenge to the qualifications of an arbitrator on grounds which could not reasonably be discovered prior to the assignment of the arbitrator to the case.

Neither the rule nor the underlying statute authorizes the arbitrator to award witness fees or other costs. Costs are not awarded until entry of the judgment on the award.

IV. PROCEDURES AFTER ASSIGNMENT

RULE 4.1 RESTRICTIONS ON COMMUNICATION BETWEEN ARBITRATOR AND PARTIES

No disclosure of any offers of settlement made by any party shall be made to the arbitrator prior to the announcement of the award. Neither counsel nor a party may communicate with the arbitrator except in the presence of, or on reasonable notice to, all other parties.

Judicial Council Comment

The Code of Professional Responsibility also restricts ex parte communication between counsel and an arbitrator.

RULE 4.2 DISCOVERY

After the assignment of a case to the arbitrator, a party may demand a specification of damages under RCW 4.28.360, may request from the arbitrator an examination under CR 35, may request admissions from a party under CR 36, and may take the deposition of another party, unless the arbitrator orders otherwise. No additional discovery shall be allowed, except as the parties may stipulate or as the arbitrator may order. The arbitrator will allow discovery only when reasonably necessary.

Judicial Council Comment

Before assignment of a case to an arbitrator, discovery is allowed to the full extent authorized by the civil rules. In determining the extent of discovery, the arbitrator should consider the amount in controversy and the nature of the case.

RULE 4.3 SUBPOENA

In accordance with CR 45, a lawyer of record or the arbitrator may issue a subpoena for the attendance of a witness at the arbitration hearing or for the production of documentary evidence at the hearing. A subpoena for discovery purposes may be issued only with the permission of the arbitrator or by stipulation.

Judicial Council Comment

Rule 4.3 allows an arbitrator to issue a subpoena regardless of whether the arbitrator is a lawyer.

V. HEARING

RULE 5.1 NOTICE OF HEARING

The arbitrator shall set the time, date, and place of the hearing and shall give reasonable notice of the hearing date to the parties. Except by stipulation or for good cause shown, the hearing shall be scheduled to take place not sooner than 21 days, nor later than 63 days, from the date of the assignment of the case to the arbitrator. The hearing shall take place in appropriate facilities provided or authorized by the court.

Judicial Council Comment

The rule follows the current practice of defining time limits in multiples of seven days. This approach allows time to be computed by the week and ordinarily results in the due date falling on a business day.

MAR 5.1 RULES FOR SUPERIOR COURT

The last sentence of the rule authorizes a court to allow, by local rule, hearings in facilities other than the courthouse.

RULE 5.2 PREHEARING STATEMENT OF PROOF

At least 14 days prior to the date of the arbitration hearing, each party shall file with the arbitrator and serve upon all other parties a statement containing a list of witnesses whom the party intends to call at the arbitration hearing and a list of exhibits and documentary evidence. The statement shall contain a brief description of the matters about which each witness will be called to testify. Each party, upon request, shall make the exhibits and other documentary evidence available for inspection by other parties. A party failing to comply with this rule, or failing to comply with a discovery order may not present at the hearing the witness, exhibit, or documentary evidence required to be disclosed or made available, except with the permission of the arbitrator.

RULE 5.3 CONDUCT OF HEARING

The arbitrator shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the facts, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. A witness shall be placed under oath or affirmation by the arbitrator prior to presenting testimony, a violation of which oath shall be deemed a contempt of court in addition to any other penalties that may be provided by law. The arbitrator may question a witness. The extent to which the Evidence Rules will be applied shall be determined in the exercise of discretion of the arbitrator.

Judicial Council Comment

The first sentence is adapted from Evidence Rule 611(a).

RULE 5.4 ABSENCE OF PARTY AT HEARING

The arbitration hearing may proceed, and an award may be made, in the absence of any party who after due notice fails to participate or to obtain a continuance. If a defendant is absent, the arbitrator shall require the plaintiff to submit the evidence required for the making of an award. In a case involving more than one defendant, the absence of a defendant does not preclude the arbitrator from assessing as part of the award damages against the defendant or defendants who are absent. The arbitrator, for good cause shown, may allow an absent party an opportunity to appear at a subsequent hearing before mak-

ing an award. A party who fails to participate without good cause waives the right to a trial de novo.

VI. AWARD

RULE 6.1 FORM AND CONTENT OF AWARD

The award shall be in writing and signed by the arbitrator. The arbitrator shall determine all issues raised by the pleadings, including a determination of any damages. Findings of fact and conclusions of law are not required.

Judicial Council Comment

Costs are not awarded until entry of a judgment on the award, as in other civil cases.

RULE 6.2 FILING OF AWARD

Within 14 days after the conclusion of the arbitration hearing, the arbitrator shall file the award with the clerk of the superior court, with proof of service of a copy on each party. On the arbitrator's application in cases of unusual length or complexity, the arbitrator may apply for and the court may allow up to 14 additional days for the filing and service of the award. The arbitrator may file with the court and serve upon the parties an amended award to correct an obvious error made in stating the award if done within the time for filing an award or upon application to the superior court to amend.

Judicial Council Comment

The rule does not authorize the use of an amended award to change the arbitrator's decision on the merits. An amended award may only modify an award in order to correct an inadvertent miscalculation or description, to adjust the award in a matter of form rather than substance, or the like. In general, the grounds for modifying an award under this rule parallel the grounds for modifying an award in voluntary, private arbitration. See RCW 7.04.170.

RULE 6.3 JUDGMENT ON AWARD

If within 20 days after the award is filed no party has sought a trial de novo under Rule 7.1, the prevailing party on notice as required by CR 54(f) shall present to the court a judgment on the award of arbitration for entry as the final judgment. A judgment so entered is subject to all provisions of law relating to judgments in civil actions, but it is not subject to appellate review and it may not be attacked or set aside except by a motion to vacate under CR 60.

MAR 6.3 RULES FOR SUPERIOR COURT

Judicial Council Comment

The judgment on an award is not subject to appellate review. As a practical matter, appellate review is precluded by the lack of a record of the arbitration proceeding. The remedy to correct an error or impropriety in the arbitration proceeding is a trial de novo or a motion to vacate the judgment on the award.

The rule does not restrict appellate review of a judgment following a trial de novo or of a ruling on a motion to vacate.

RULE 6.4 WITNESS FEES AND COSTS

Witness fees and other costs provided for by statute or court rule in superior court proceedings shall be payable upon entry of judgment in the same manner as if the hearing were held in court.

VII. TRIAL DE NOVO

RULE 7.1 REQUEST FOR TRIAL DE NOVO

(a) Service and Filing. Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing in the case. The 20-day period within which to request a trial de novo may not be extended.

(b) Calendar. When a trial de novo is requested as provided in section (a), the case shall be transferred from the arbitration calendar in accordance with Rule 8.2 in a manner established by local rule.

Judicial Council Comment

Only an aggrieved party may seek a trial de novo. For an explanation of the relationship between this requirement and the claims originally asserted, see Rule 2.2 and the comment to Rule 7.2.

RULE 7.2 PROCEDURE AT TRIAL

The trial de novo shall be conducted as though no arbitration proceeding had occurred. If tried to a jury, no reference may be made during the trial to the arbitration award, to the fact there had been an arbitration proceeding, or to any other aspect of the arbitration proceeding.

RULE 7.3 COSTS AND ATTORNEY'S FEES

The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's posi-

KING COUNTY LOCAL RULES FOR MANDATORY ARBITRATION

I. SCOPE AND PURPOSE OF RULES

RULE 1.1 APPLICATION OF RULES—PURPOSE AND DEFINITIONS

(a) *Purpose.* The purpose of mandatory arbitration of civil actions under RCW 7.06 as implemented by the Mandatory Arbitration Rules is to provide a simplified and economical procedure for obtaining the prompt and equitable resolution of disputes involving claims of $10,000 or less. The Mandatory Arbitration Rules as supplemented by these local rules are not designed to address every question which may arise during the arbitration process, and the rules give considerable discretion to the arbitrator. The arbitrator should not hesitate to exercise that discretion. Arbitration hearings should be informal and expeditious, consistent with the purpose of the statutes and rules.

(b) *"Director" Defined.* In these rules, "Director" means the Director of Arbitration for the King County Superior Court. The appointment of the Director and other administrative matters are addressed in Local Rule 8.6, Administration.

RULE 1.2 MATTERS SUBJECT TO ARBITRATION [no local rule]

RULE 1.3 RELATIONSHIP TO SUPERIOR COURT JURISDICTION AND OTHER RULES—MOTIONS

All motions before the court relating to mandatory arbitration shall be noted on the civil motions calendar in accordance with Local Civil Rule 12, except as otherwise provided in these arbitration rules.

II. TRANSFER TO ARBITRATION AND ASSIGNMENT OF ARBITRATOR

RULE 2.1 TRANSFER TO ARBITRATION

(a) *Statement of Arbitrability.* In every civil case the party filing the note for trial provided by CR 40(a)(1) and Local Civil Rule 40(a)(1) shall, upon the form prescribed by the court, complete a statement of arbitrability.

(b) *Response to a Statement of Arbitrability.* Within 14 days after the note for trial and statement of arbitrability have been served and filed, any party disagreeing with the statement of arbitrability shall serve and file a response to the statement of arbitrability on the form prescribed by the court. In the absence of such response, the statement of arbitrability shall be deemed correct and the non-re-

sponding party shall be deemed to have stipulated to arbitration if the statement of arbitrability provides that the case is arbitrable. If a party asserts that its claim exceeds $10,000 or seeks relief other than a money judgment, the case is not subject to arbitration except by stipulation.

(c) *Failure to File—Amendments.* A party failing to serve and file an original response within the time prescribed may later do so only upon leave of court. A party may amend the statement of arbitrability or response at any time before assignment of an arbitrator or assignment of a trial date and thereafter only upon leave of court for good cause shown.

(d) *By Stipulation.* A case in which all parties file a stipulation to arbitrate under MAR 8.1(b) will be placed on the arbitration calendar regardless of the nature of the case or amount in controversy.

[Amended Sept. 1, 1981.]

RULE 2.2 COURT MAY DETERMINE ARBITRABILITY [no local rule]

RULE 2.3 ASSIGNMENT TO ARBITRATOR

(a) *Generally; Stipulations.* When a case is set for arbitration, a list of five proposed arbitrators will be furnished to the parties. A master list of arbitrators will be made available on request. The parties are encouraged to stipulate to an arbitrator. In the absence of a stipulation, the arbitrator will be chosen from among the five proposed arbitrators in the manner defined by this rule.

(b) *Response by Parties.* Each party may, within 14 days after a list of proposed arbitrators is furnished to the parties, nominate one or two arbitrators and strike two arbitrators from the list. If both parties respond, an arbitrator nominated by both parties will be appointed. If no arbitrator has been nominated by both parties, the Director will appoint an arbitrator from among those not stricken by either party.

(c) *Response by Only One Party.* If only one party responds within 14 days, the Director will appoint an arbitrator nominated by that party.

(d) *No Response.* If neither party responds within 14 days, the Director will appoint one of the five proposed arbitrators.

(e) *Additional Arbitrators for Additional Parties.* If there are more than two adverse parties, at least two additional proposed arbitrators shall be added to the list with the above principles of selection to be applied. The number of adverse parties shall be determined by the Director, subject to review by the Presiding Judge.

Amended Sept. 1, 1981.

III. ARBITRATORS

RULE 3.1 QUALIFICATIONS

(a) *Arbitration Panel.* There shall be a panel of arbitrators in such numbers as the administrative committee may from time to time determine. A person desiring to serve as an arbitrator shall complete an information sheet on the form prescribed by the court. A list showing the names of arbitrators available to hear cases and the information sheets will be available for public inspection in the Director's office. The oath of office on the form prescribed by the court must be completed and filed prior to an applicant being placed on the panel.

(b) *Refusal; Disqualification.* The appointment of an arbitrator is subject to the right of that person to refuse to serve. An arbitrator must notify the Director immediately if refusing to serve or if any cause exists for the arbitrator's disqualification from the case upon any of the grounds of interest, relationship, bias or prejudice set forth in CJC Canon 3(c) governing the disqualification of judges. If disqualified, the arbitrator must immediately return all materials in a case to the Director.

RULE 3.2 AUTHORITY OF ARBITRATORS

An arbitrator has the authority to:

(a) Determine the time, place and procedure to present a motion before the arbitrator including motions for summary award in a manner generally described in CR 56.

(b) Require a party or attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure of such party or attorney or both to obey an order of the arbitrator unless the arbitrator finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The arbitrator shall make a special award for such expenses and shall file such award with the Clerk of the Superior Court, with proof of service of a party on each party. The aggrieved party shall have 10 days thereafter to appeal the award of such expense in accordance with the procedures described in RCW 2.24.050. If within 10 days after the award is filed no party appeals, a judgment shall be entered in a manner described generally under MAR 6.3.

(c) Award attorney's fees as authorized by these rules, by contract or by law.

[Amended Sept. 1, 1981.]

LMAR 4.1 SUPERIOR COURT FOR KING COUNTY

IV. PROCEDURES AFTER ASSIGNMENT

RULE 4.1 RESTRICTIONS ON COMMUNICATION BETWEEN ARBITRATOR AND PARTIES [no local rule]

RULE 4.2 DISCOVERY

(a) In determining when additional discovery beyond that directly authorized by MAR 4.2 is reasonably necessary, the arbitrator shall balance the benefits of discovery against the burdens and expenses. The arbitrator shall consider the nature and complexity of the case, the amount in controversy, values at stake, the discovery that has already occurred, the burdens on the party from whom discovery is sought, and the possibility of unfair surprise which may result if discovery is restricted. Authorized discovery shall be conducted in accordance with the civil rules except that motions concerning discovery shall be determined by the arbitrator.

(b) *Discovery Pending at the Time Arbitrator is Assigned.* Discovery pending at the time the case is assigned to an arbitrator is stayed pending order from the arbitrator or except as the parties may stipulate or except as authorized by MAR 4.2.

Amended Sept. 1, 1981.

RULE 4.3 SUBPOENA [no local rule]

V. HEARING

RULE 5.1 NOTICE OF HEARING—TIME AND PLACE—CONTINUANCE

An arbitration hearing may be scheduled at any reasonable time and place chosen by the arbitrator. The arbitrator may grant a continuance without court order. The parties may stipulate to a continuance only with the permission of the arbitrator. The arbitrator shall give reasonable notice of the hearing date and any continuance to the Director.

RULE 5.2 PREHEARING STATEMENT OF PROOF—DOCUMENTS FILED WITH COURT

In addition to the requirements of MAR 5.2, each party shall also furnish the arbitrator with copies of pleadings and other documents contained in the court file which that party deems relevant.

RULE 5.3 CONDUCT OF HEARING—WITNESSES—RULES OF EVIDENCE

(a) *Oath or Affirmation.* The arbitrator shall place a witness under oath or affirmation before the witness presents testimony.

(b) *Recording.* The hearing may be recorded electronically or otherwise by any party or the arbitrator.

(c) *Rules of Evidence, Generally.* The Rules of Evidence, to the extent determined by the arbitrator to be applicable, should be liberally construed in accordance with Local Rule 1.1 (Application of Rules) to promote justice. The parties should stipulate to the admission of evidence when there is no genuine issue as to its relevance or authenticity.

(d) *Certain Documents Presumed Admissible.* The documents listed below, if relevant, are presumed admissible at an arbitration hearing, but only if (1) the party offering the document serves on all parties a notice, accompanied by a copy of the document and the name, address and telephone number of its author or maker, at least 14 days prior to the hearing in accordance with MAR 5.2; and (2) the party offering the document similarly furnishes all other parties with copies of all other related documents from the same author or maker. This rule does not restrict argument or proof relating to the weight of the evidence admitted, nor does it restrict the arbitrator's authority to determine the weight of the evidence after hearing all of the evidence and the arguments of opposing parties. The documents presumed admissible under this rule are:

(1) A bill, report, chart, or record of a hospital, doctor, dentist, registered nurse, licensed practical nurse, physical therapist, psychologist or other health care provider, on a letterhead or billhead;

(2) A bill for drugs, medical appliances or other related expenses on a letterhead or billhead;

(3) A bill for, or an estimate of, property damage on a letterhead or billhead. In the case of an estimate, the party intending to offer the estimate shall forward with the notice to the adverse party a statement indicating whether or not the property was repaired, and if it was, whether the estimated repairs were made in full or in part, attaching a copy to the receipted bill showing the items of repair and the amount paid.

(4) A police, weather, wage loss, or traffic signal report, or standard United States government life expectancy table to the extent it is admissible under the Rules of Evidence, but without the need for formal proof of authentication or identification;

(5) A photograph, x-ray, drawing, map, blueprint or similar documentary evidence, to the extent it is admissible under the Rules of Evidence, but without the need for formal proof of authentication or identification;

(6) The written statement of any other witness, including the written report of an expert witness, and including a statement of

opinion which the witness would be allowed to express if testifying in person, if it is made by affidavit or by declaration under penalty of perjury;

(7) A document not specifically covered by any of the foregoing provisions but having equivalent circumstantial guarantees of trustworthiness, the admission of which would serve the policies and purposes expressed in Local Rule 1.1 and the interests of justice.

(e) *Opposing Party May Subpoena Author or Maker as Witness.* Any other party may subpoena the author or maker of a document admissible under this rule, at that party's expense, and examine the author or maker as if under cross examination.

RULE 5.4 ABSENCE OF PARTY AT HEARING [no local rule]

VI. AWARD

RULE 6.1 FORM AND CONTENT OF AWARD

(a) *Form.* The award shall be prepared on the form prescribed by the court.

(b) *Return of Exhibits.* When an award is filed, the arbitrator shall return all exhibits to the parties who offered them during the hearing.

RULE 6.2 FILING OF AWARD

A request by an arbitrator for an extension of time for the filing of an award under MAR 6.2 may be presented to the Director, ex parte. The Director may grant or deny the request, subject to review by the Presiding Judge. The arbitrator shall give the parties notice of any extension granted.

RULE 6.3 JUDGMENT ON AWARD

(a) *Presentation.* A judgment on an award shall be presented to the ex parte department, by any party, on notice in accordance with MAR 6.3.

VII. TRIAL DE NOVO

RULE 7.1 REQUEST FOR TRIAL DE NOVO—CALENDAR

Every case transferred to the arbitration calendar shall maintain its position on the trial calendar as if the case had not been transferred to arbitration unless in the discretion of the Presiding Judge the trial date is accelerated. A case that has been given a trial date will not lose that date by reason of being transferred to arbitration.

Amended Sept. 1, 1981.

RULE 7.2 PROCEDURE AT TRIAL

The clerk shall seal any award if a trial de novo is requested.

RULE 7.3 COSTS AND ATTORNEY FEES

MAR 7.3 shall apply only to costs and reasonable attorney's fees incurred since the filing of the request for a trial de novo.

Added Sept. 1, 1981.

VIII. GENERAL PROVISIONS

RULE 8.1 STIPULATIONS—EFFECT ON RELIEF GRANTED

If a case not otherwise subject to mandatory arbitration is transferred to arbitration by stipulation, the arbitrator may grant any relief which could have been granted if the case were determined by a judge.

RULE 8.2 LOCAL RULES [no local rule]

RULE 8.3 EFFECTIVE DATE

These rules become effective on October 1, 1980. With respect to civil cases pending on that date, if the case has not at that time received a trial date, or if the trial has been set for later than January 1, 1981, any party may serve and file a statement of arbitrability indicating that the case is subject to mandatory arbitration. If within 14 days no party files a response indicating the case is not subject to arbitration, the case will be transferred to the arbitration calendar. A case set for trial earlier than January 1, 1981, will be transferred to arbitration only on stipulation.

RULE 8.4 TITLE AND CITATION

These rules are known and cited as the King County Superior Court Mandatory Arbitration Rules. LMAR is the official abbreviation.

RULE 8.5 COMPENSATION OF ARBITRATOR

(a) *Generally.* Arbitrators shall be compensated in the same amount and manner as judges pro tempore of the superior court. Hearing time and reasonable preparation time are compensable.

(b) *Form.* When the award is filed, the arbitrator shall submit to the Director a request for payment on a form prescribed by the court. The Director shall determine the amount of compensation to

be paid. The decision of the Director will be reviewed by the Presiding Judge at the request of the arbitrator.

RULE 8.6 ADMINISTRATION

(a) The Presiding Judge shall designate a person to serve as Director of Arbitration. The Director, under the supervision of the Presiding Judge, shall supervise arbitration under these rules, and perform any additional duties which may be delegated by the Presiding Judge.

(b) There shall be an administrative committee composed of three judges chosen by the Presiding Judge and three members of the Washington State Bar Association, one each chosen by the Seattle-King County Bar Association, the Washington Association of Defense Counsel, and the Washington State Trial Lawyers' Association. The members of the committee shall serve for staggered three year terms and may be reappointed.

(c) The administrative committee shall have the power and duty to:

(1) Select its chairperson and provide for its procedures;

(2) Appoint the panel of arbitrators provided in Rule 3.1(a);

(3) Remove a person from a panel of arbitrators;

(4) Establish procedures for selecting an arbitrator not inconsistent with the Mandatory Arbitration Rules or these rules;

(5) Review the administration and operation of the arbitration program periodically and make recommendations as it deems appropriate to improve the program.

within ten days of receipt by them of the original list of ten names. In the event the parties fail to submit such a list within the time provided, the clerk shall make the selection of arbitrators at random from the original list of ten names;

(iv) The clerk shall promptly notify the person or persons whose names appear as the first choice or choices of the parties of their selection, or, if no choices have been made, the persons he has selected. If any person so selected is unable or unwilling to serve, the clerk shall notify the person whose name appears next on the list. If the clerk is unable to select an arbitrator or constitute a panel of arbitrators from the six selections, the process of selection under this Rule shall begin anew. When the requisite number of arbitrators has agreed to serve, the clerk shall promptly send written notice of the selections to each arbitrator and to the parties.

(b) **Disqualification.** No person shall serve as an arbitrator in any action in which any of the circumstances specified in 28 U.S.C. 455 exist or may in good faith be believed to exist.

(c) **Withdrawal by Arbitrator.** Any person whose name appears on the roster maintained in the clerk's office may ask at any time to have his name removed or, if selected to serve on a panel, decline to serve but remain on the roster.

(d) **Compensation and Reimbursement.** Arbitrators shall be paid $150 per day or portion of each day of hearing in which they participate serving as a single arbitrator or seventy-five dollars for each day or portion of a day if serving as a member of a panel of three. At the time when the arbitrators file their decision, each shall submit a voucher on the form prescribed by the clerk for payment by the Administrative Office of the United States Courts of compensation and out-of-pocket expenses necessarily incurred in the performance of the duties under this Rule. No reimbursement will be made for the cost of office or other space for the hearing.

500-5. **Hearings.**

(a) **Hearing Date.** The clerk shall set a date for hearing not less than 20 nor more than 120 days after the clerk has been informed of the parties' ranking in accordance with Rule 500-4(a) (or of the clerk's random selection in accordance with Rule 500-4(a)(iii)).

This date shall not be continued except for extreme and unanticipated emergencies as established in writing and approved by the judge assigned to the case. Discovery shall terminate twenty days prior to the hearing.

(b) **Default of Party.** Subject to the provisions of subparagraph (a) above, the hearing shall proceed on the noticed date. Absence of a party shall not be a ground for continuance but damages shall be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrators.

(c) **Conduct of Hearing.** The arbitrator is authorized to administer oaths and affirmations and all testimony shall be given under oath or affirmation. Each party shall have the right to cross-examine witnesses except as herein provided. In receiving evidence, the arbitrator shall be guided by the Federal Rules of Evidence, but shall not thereby be precluded from receiving evidence which he considers to be relevant and trustworthy and which is not privileged. A party desiring to offer a document otherwise subject to hearsay objections at the hearing may serve a copy on the adverse party not less than ten days in advance of the hearing indicating his intention to offer it as an exhibit. Unless the adverse party gives written notice in advance of the hearing of intent to cross-examine the author of the document, any hearsay objection to the document shall be deemed waived. Attendance of witnesses and production of documents may be compelled in accordance with Rule 45, Federal Rules of Civil Procedure.

(d) **Transcript or Recording.** A party may cause a transcript or recording to be made of the proceedings at its expense but shall, at the request of the opposing party, make a copy available to the party at no charge, unless the parties have otherwise agreed. In the absence of agreement of the parties and except as provided in Rule 500-7(b) relating to impeachment, no transcript of the proceedings shall be admissible in evidence at any subsequent de novo trial of the action.

(e) **Place of Hearing.** Hearings shall be held at any location within the Northern District of California designated by the arbitrators. Hearings may be held in any courtroom or other room in any federal courthouse or office building made available to the arbitrators by the clerk's office. When no such room is available, the hearing shall be held at any other suitable location selected by

the arbitrator. In making the selection, the arbitrator shall consider the convenience of the panel, the parties and the witnesses.

(f) **Time of Hearing.** Unless the parties agree otherwise, hearings shall be held during normal business hours.

(g) **Optional Waiver of Trial De Novo; Voluntary Arbitration.** At any time prior to the commencement of the hearing, the parties may by written stipulation approved by order of the assigned judge waive the right to a trial de novo following the award and proceed as in voluntary arbitration. In the event of such a stipulation, the provisions of state and federal law governing review of awards rendered in voluntary arbitration shall govern.

(h) **Authority of Arbitrator.** The arbitrator shall be authorized to make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing before him. Any two members of a panel shall constitute a quorum, but (unless the parties stipulate otherwise) the concurrence of a majority of the entire panel shall be required for any action or decision by the panel.

(i) **Ex Parte Communication.** There shall be no ex parte communication between an arbitrator and any counsel or party on any matter touching the action except for purposes of scheduling or continuing the hearing.

500-6. **Award and Judgment.**

(a) **Filing of Award.** The arbitrator shall file the award with the clerk's office promptly following the close of the hearing and in any event not more than ten days following the close of the hearing. The clerk shall serve copies on the parties.

(b) **Form of Award.** The award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money and other relief if any awarded. It shall be in writing and (unless the parties stipulate otherwise) be signed by the arbitrator or by at least two members of a panel. No member shall participate in the award without having attended the hearing.

(c) **Entry of Judgment on Award.** Promptly upon the filing of the award with the clerk, the clerk shall enter judgment thereon in

RULE 609

ARBITRATION AWARD AND JUDGMENT

(a) Issuance of Award. The arbitrator shall issue his award within fifteen (15) days of the date of the closing of the hearing or the receipt of posthearing briefs, whichever is later.

(b) Award Procedure. The arbitrator shall submit the award and the written record to the clerk, who shall file the same under seal. The award shall dispose of all monetary claims presented to the arbitrator and shall be signed by the arbitrator. The arbitrator is not required to issue an opinion explaining the award. The clerk shall mail a copy of the award to the parties and copies of both the award and the written record to the Private Adjudication Center, such records to be held in confidence by the Center.

(c) Judgment upon Award. Unless the parties, within thirty (30) days after the filing of the award, file a stipulation of dismissal or a party files a demand for trial de novo in accordance with Rule 610, the award shall be unsealed and incorporated within a judgment of the court. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect, as a consent judgment of this court in any civil action.

RULE 610

TRIAL DE NOVO

(a) Thirty Day Limit. Within thirty (30) days after the filing of the sealed arbitration award, any party may file with the court a written demand for trial de novo.

(b) Return to Court Calendar. Upon such a demand for a trial de novo, the action shall be placed upon the court's trial calendar. The arbitration award shall remain under seal until final judgment is entered or the case is dismissed.

(c) Conference With Arbitrator. Within fifteen (15) days after the filing of a demand for trial de novo, the parties or counsel shall confer with the arbitrator who conducted the arbitration hearing. The arbitrator shall frankly discuss with the parties the strengths and weaknesses of their cases. The parties or counsel shall thereafter, within thirty (30) days after the demand for trial de novo, inform the court by letter whether prospects for settlement appear to be excellent, good, fair, poor, or remote.

(d) Evidence From the Arbitration Hearing. At the trial of the action, the court shall not admit evidence that there has been an arbitration proceeding or that an arbitration award has been entered. Recorded testimony given at an arbitration hearing may be used for the same purposes as any deposition under the Federal Rules of Civil Procedure.

(e) Taxation of Arbitration Expense as a Cost. If, after trial before the district court, the party who demanded trial de novo does not obtain a judgment which, exclusive of interest and costs, is more favorable than the award of the arbitrator, the clerk shall tax as a cost against such party the fees and expenses paid to the arbitrator. The cost collected by the clerk under this rule shall be paid to the Treasury of the United States.

RULE 611

EVALUATION OF ARBITRATION RULES

(a) Purpose of Evaluation. These arbitration rules are experimental rules. In order to assess their impact upon the court, the bar, and litigants, it is essential that the rules be evaluated at a reasonably early time so that their performance can be compared with their stated purpose.

(b) Research Committee. The Chief Judge shall appoint at least three members of the bar and at least two representatives of the Private Adjudication Center to a Research Committee. The Chief Judge may appoint such other members as he deems advisable. The Chief Judge and the clerk shall serve as ex officio members of the committee.

(c) Research Techniques. The Research Committee shall be responsible for developing research tools and techniques in order to evaluate the operation of these rules. For the purpose of creating a control group for statistical comparisons, the clerk may exempt cases, on a random basis, from reference to arbitration. If litigant or counsel surveys are conducted, the Research Committee shall afford the information obtained such confidentiality as it shall deem appropriate. The Research Committee may compile statistical information based upon arbitration awards.

(d) Report of the Research Committee. Thirty (30) months after the effective date of these rules, the Research Committee shall file a report with the clerk's office. The report shall be drawn by committee members other than judicial officers and

demand for trial de novo pursuant to Section 7 shall become part of the final judgment with the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal.

Section 7. Trial De Novo.

(a) Within thirty (30) days after the arbitration award is entered on the docket, any party may demand a trial de novo in the district court. Written notification of such a demand shall be served by the moving party upon all counsel of record or other parties. Withdrawal of a demand for a trial de novo shall not reinstate the arbitrators' award and the case shall proceed as if it had not been arbitrated.

(b) Upon demand for a trial de novo and the payment to the clerk required by paragraph (d), infra, the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(c) At the trial de novo, the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for impeachment at a trial de novo.

(d) Upon making a demand for trial de novo, the moving party shall, unless permitted to proceed in forma pauperis, deposit with the clerk of court an amount equal to the arbitration

fees of $75.00 for each arbitrator as provided in Section 2. The sum so deposited shall be returned to the party demanding a trial de novo in the event that party obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. In the event that the party demanding a trial de novo does not obtain a more favorable result, the sum so deposited shall be paid to the Treasury of the United States.

SENATE
JUDICIARY COMMITTEE

Washington State Senate
49th Legislature

435 John A. Cherberg Building
Olympia, Washington 98504
(206) 786-7462

MEMORANDUM

DATE: March 7, 1986

TO: Members, Senate Judiciary Committee

FROM: Dick Armstrong, Cliff Petersen

SUBJECT: ESSB 4630 -- House Version

This is the version that passed

The House of Representative has passed its version of ESSB 4630 -- Tort Reform. Set forth below is a summary of its provisions.

1. ACCELERATED PHYSICIAN-PATIENT PRIVILEGE

Within 90 days of filing action, claimant must elect whether or not to waive privilege. If not waived, claimant may not put physical or mental condition in issue at trial. If waived, then waived as to all physicians or conditions subject to limitations imposed by court rules. Sec. 101

2. ATTORNEYS FEES

In any tort action, a party may petition the court to determine the reasonableness of that party's attorneys' fees. Secs. 201 and 202

3. LIMITATION ON NONECONOMIC DAMAGES

A judgment for noneconomic damages may not exceed the average annual wage in the state multiplied by 0.43 multiplied by the life expectancy of the claimant. A claimant's life expectancy is set at least 15 years for purposes of the formula. The jury may not be informed of the limit on noneconomic damages. Sec 301

4. JOINT AND SEVERAL LIABILITY

Fault is apportioned among all entities which caused claimant's damages, including entities released by claimant, entities immune from liability, and entities with any other individual defense against the claimant. Judgment is entered against each defendant, except those who have been released, are immune, or have an individual defense, in an amount which represents the party's proportionate share of the claimants damages. Liability of each defendant is only for its own share of fault (i.e., several, but not joint liability) if the claimant was also at fault. The section does not apply to causes of action

relating to hazardous wastes or substances or solid waste disposal sites, or to certain business torts and market-share liability claims. Secs. 401 and 402

5. PERIODIC PAYMENT

Provides for periodic payment of an award for future economic damages of at least $100,000 upon the request of a party. Each party submits a proposal which the court may adopt or modify to best provide for the needs of the claimant. If payments are not made in a timely fashion, a court may order that the outstanding payments be paid in a lump sum. Payments for future earnings are not reduced or terminated because of the death of the judgment creditor. Medical expenses cease. Sec. 801

6. HEALTH CARE ACTION STATUTE OF LIMITATIONS

Modifies current law which tolls medical malpractice statute of limitations until the injured person turns 18. Provides that all malpractice actions must be brought within three years of the negligent act or within one year of discovery, whichever is later, but no longer than eight years after the negligent act or omission. For purposes of when the action should have been discovered, the knowledge of a custodial parent or guardian is imputed to a child. Sec. 502

7. INSURANCE PROVISIONS

Provides a credit to policy holders on premiums paid where the Insurance Commissioner determines a credit should be given based on sound actuarial credibility. Gives the Commissioner authority to require a market assistance plan to assist persons who are having a difficult time getting insurance. Insurance report to the Legislature by 1991. Secs. 906-909

8. CIVIL IMMUNITY

Qualified civil immunity for officers and members of boards and directors of nonprofit corporations, and hospital boards. Liable only for acts of gross negligence. Secs. 903 and 905

9. FELONY

Commission of felony is bar to suit if there is a causal relationship between the crime and the injury in time, place, or activity. Sec. 501

10. BUILDER LIMITATION

Builder limitation statute applies equally to private individuals and governmental entities. Sec. 701

11. INDEMNIFICATION AGREEMENTS

Parties may not contractually shift liability for their own negligence to others. Sec. 601

12. DUTIES IMPOSED BY LAW

Breach of duty imposed by statute, ordinance, or rule is not negligence per se but may be evidence of negligence. Exception for electrical, fire, or intoxication laws. Intoxication of a victim bars a suit if the intoxication contributed more than 50 percent of the claimant's injuries. Secs. 901 and 902

13. WORKERS COMPENSATION

Any workers' compensation lien against a third-party recovery is eliminated and benefits to the injured worker continue if fault is allocated to the claimant's employer or co-employee. Sec. 403

14. SCHOOL DIRECTORS

A member of a board of directors or a superintendent of a school district is immune from civil liability unless act or omission constitutes gross negligence. Sec. 904

15. EFFECTIVE DATE OF THE ACT

The act generally applies to actions filed on or after August 1, 1986.

DA:d6-6

TLW:mmc H-4931/86 3rd draft p--1 CR

ESSB 4630 - H Amd to H Comm Amd By Representatives Bristow and Ballard CR85B F H -4931

Tom Bristow
Tim Ballard

MAR 8

ADOPTED

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On page 2 of the amendment, after line 33, strike all material down through "affected." on page 30, line 15 and insert the following: ;1 PART ;7

"PART I

ACCELERATED PHYSICIAN-PATIENT PRIVILEGE

Sec. 101. Section 294, page 187, Laws of 1854 as last amended by section 1, chapter 56, Laws of 1982 and RCW 5.60.060 are each amended to read as follows:

(1) A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse if the marriage occurred subsequent to the filing of formal

~~the cause thereof~~)) except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Within ninety days of filing an action for personal injuries or wrongful death, the claimant shall elect whether or not to waive the physician-patient privilege. If the claimant does not waive the physician-patient privilege, the claimant may not put his or her mental or physical condition or that of his or her decedent or beneficiaries in issue and may not waive the privilege later in the proceedings. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

PART II
ATTORNEYS' FEES

NEW SECTION. Sec. 201. A new section is added to chapter 4.24 RCW

aware of his or her right to petition the court under this section.

NEW SECTION. Sec. 202. Section 201 of this act applies to agreements for attorney's fees entered into after the effective date of this section.

PART III
LIMITATION ON NONECONOMIC DAMAGES

NEW SECTION. Sec. 301. A new section is added to chapter 4.56 RCW to read as follows:

(1) As used in this section, the following terms have the meanings indicated unless the context clearly requires otherwise.

(a) "Economic damages" means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

(b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and

the jury shall not be informed of the limitation contained in subsection ( ) of this section.

PART IV
APPORTIONMENT OF DAMAGES

NEW SECTION. Sec. 401. A new section is added to chapter 4.22 RCW to read as follows:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entities with any other individual defense against the claimant. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or

...ifiable shape, color, or
mar...ng.

Sec. 402. Section 11, chapter 27, Laws of 1981 and RCW 4.22.030 are each amended to read as follows:

Except as otherwise provided in section 401 of this 1986 act, if more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several.

Sec. 403. Section 4, chapter 85, Laws of 1977 ex. sess. as last amended by section 5, chapter 218, Laws of 1984 and RCW 51.24.060 are each amended to read as follows:

(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

(a) The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the balance of

employee are determined under section 401 of this 1986 act to be at fault, (c) and (e) of this subsection do not apply and benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

(2) The recovery made shall be subject to a lien by the department and/or self-insurer for its share under this section.

(3) The department or self-insurer has sole discretion to compromise the amount of its lien. In deciding whether or to what extent to compromise its lien, the department or self-insurer shall consider at least the following:

(a) The likelihood of collection of the award or settlement as may be affected by insurance coverage, solvency, or other factors relating to the third person;

(b) Factual and legal issues of liability as between the injured worker or beneficiary and the third person. Such issues include but are not limited to possible contributory negligence and novel theories of liability; and

(c) Problems of proof faced in obtaining the award or settlement.

(4) In the case of an employer not qualifying as a self-insurer, the department shall make a retroactive adjustment to such employer's experience rating in which the third

interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of such worker or beneficiary mentioned in the warrant, the amount of the unpaid lien plus interest accrued and the date when the warrant was filed. The amount of such warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the injured worker or beneficiary against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee of five dollars, which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the injured worker

notice and order, any property which may be subject to the claim of the department, such property shall be delivered forthwith to the director or the director's authorized representative upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount claimed by the director in the notice together with costs. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer to all exemptions provided for by chapter 7.33 RCW to which the wage earner may be entitled.

PART V
LIMITATION OF ACTIONS

NEW SECTION. Sec. 501. A new section is added to chapter 4.24 RCW to read as follows:

It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony, if the felony was causally related to the injury or death in time, place, or activity. However, nothing in this

of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative; based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic diagnostic purpose or effect.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years. Any action not commenced in accordance with this section shall be barred((~~: PROVIDED, That the limitations in~~

only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after the effective date of this 1986 section.

PART VII
BUILDER LIMITATION

Sec. 701. Section 2, chapter 43, Laws of 1955 and RCW 4.16.160 are each amended to read as follows:

The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That, except as provided in RCW 4.16.310, there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: AND FURTHER PROVIDED, That no previously existing statute of limitations shall be interposed as a defense to any action brought in the name or for the benefit of the state, although such

of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state which are made or commenced after the effective date of this 1986 section.

Sec. 703. Section 1, chapter 75, Laws of 1967 and RCW 4.16.300 are each amended to read as follows:

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. This section is intended to benefit only those persons referenced herein and shall not apply to claims or causes of action against manufacturers.

PART VIII
PERIODIC PAYMENTS

NEW SECTION. Sec. 801. A new section is added to chapter 4.56 RCW to read as follows:

(1) In an action based on fault seeking damages for personal injury

and enter judgment accordingly.

(3) If the court enters a judgment for periodic payments and any security required by the judgment is not posted within thirty days, the court shall enter a judgment for the payment of future damages in a lump sum.

(4) If at any time following entry of judgment for periodic payments, a judgment debtor fails for any reason to make a payment in a timely fashion according to the terms of the judgment, the judgment creditor may petition the court for an order requiring payment by the judgment debtor of the outstanding payments in a lump sum. In calculating the amount of the lump sum judgment, the court shall total the remaining periodic payments due and owing to the judgment creditor converted to present value. The court may also require payment of interest on the outstanding judgment.

(5) Upon the death of the judgment creditor, the court which rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages. Money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor.

(6) Upon satisfaction of a periodic payment judgment, any

person injured or killed was under the influence of intoxicating liquor or any drug and that such condition contributed more than fifty percent to his or her injuries or death. If the amount of alcohol in a person's blood is shown by chemical analysis of his or her blood, breath, or other bodily substance to have been 0.10 percent or more by weight of alcohol in the blood, it is conclusive proof that the person was under the influence of intoxicating liquor.

NEW SECTION. Sec. 903. A new section is added to chapter 4.24 RCW to read as follows:

(1) Except as provided in subsection (2) of this section, a member of the board of directors or an officer of any nonprofit corporation is not civilly liable for any act or omission in the course and scope of his or her official capacity unless the act or omission constitutes gross negligence.

(2) Nothing in this section shall limit or modify in any manner the duties or liabilities of a director or officer of a corporation to the corporation or the corporation's shareholders.

NEW SECTION. Sec. 904. A new section is added to chapter 4.24 RCW to read as follows:

A member of the board of directors or a superintendent of any

writing casualty insurance in this state in either the admitted or nonadmitted market to provide casualty insurance for a class of insurance designated in writing to the plan by the commissioner.

The bylaws and method of operation of any market assistance plan shall be approved by the commissioner prior to its operation.

A market assistance plan shall have a minimum of twenty-five insurers willing to insure risks within the class designated by the commissioner. If twenty-five insurers do not voluntarily agree to participate, the commissioner may require casualty insurers to participate in a market assistance plan as a condition of continuing to do business in this state. The commissioner shall make such a requirement to fulfill the quota of at least twenty-five insurers. The commissioner shall make his or her designation on the basis of the insurer's premium volume of casualty insurance in this state.

NEW SECTION. Sec. 907. A new section is added to chapter 48.19 RCW to read as follows:

The commissioner shall, in reviewing a casualty rate filing, determine in accordance with sound and reliable actuarial principles whether this act requires an insurer to grant its policyholders a credit

availability of insurance coverage and the impact on the civil justice system.

NEW SECTION. Sec. 910. Except as provided in sections 202 and 601 of this act and except for section 904 of this act, this act applies to all actions filed on or after August 1, 1986.

NEW SECTION. Sec. 911. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 912. Section 904 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately."

ESSB 4630 - H Amd to H Comm Amd
By Representatives Bristow and Ballard

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seek a court order compelling answers to discovery questions.

Eve. Evening. The period immediately preceding an important event.

Even. Nothing due or owing on either side; neither a profit nor loss; *i.e.* breaking even.

Evening. The closing part of the day and beginning of the night; in a strict sense, from sunset till dark. In common speech, the latter part of the day and the earlier part of the night, until bedtime. The period between sunset or the evening meal and ordinary bedtime. See also **Nighttime.**

Evenings. In old English law, the delivery at evening or night of a certain portion of grass, or corn, etc., to a customary tenant, who performs the service of cutting, mowing, or reaping for his lord, given him as a gratuity or encouragement.

Event. The consequence of anything; the issue or outcome of an action as finally determined; that in which an action, operation, or series of operations, terminates. Noteworthy happening or occurrence. Something that happens.

Distinguished from an act in that an act is the product of the will whereas an event is an occurrence which takes place independent of the will such as an earthquake or flood.

See also **Fortuitous event.**

Eventus est qui ex causa sequitur; et dicitur eventus quia ex causis evenit (eventus est kway eks koza sekwetur, et dicetur eventus kwaya eks kozas evenit). An event is that which follows from the cause, and is called an "event" because it eventuates from causes.

Eventus varios res nova semper habet (eventus varyows reyz nowva semper heybet). A new matter always produces various events.

Evergreen contract. A contract which renews itself from year to year in lieu of notice by one of the parties to the contrary. Chemplex Co. v. Tauber Oil Co., D.C.Iowa, 309 F.Supp. 904, 908.

Every. Each one of all; all the separate individuals who constitute the whole, regarded one by one. The term is sometimes equivalent to "all", and sometimes to "each".

Every other thing. This phrase, as used in requiring employer to furnish safe place of employment and to do "every other thing" reasonably necessary to protect employees, relates to things of same kind that employer must necessarily do in making place safe.

Evesdroppers. See **Eavesdropping.**

Evict. In civil law, to recover anything from a person by virtue of the judgment of a court or judicial sentence. See **Eviction.**

Eviction. Dispossession by process of law; the act of depriving a person of the possession of land or rental property which he has held or leased. Act of turning a tenant out of possession, either by re-entry or legal proceedings, such as an action of ejectment. Deprivation of lessee of possession of premises or disturbance of lessee in beneficial enjoyment so as to cause tenant to abandon the premises (the latter being constructive conviction). Estes v. Gatliff, 291 Ky. 93, 163 S.W.2d 273, 276.

See also Actual eviction; Constructive eviction; Ejectment; Forcible entry and detainer; Notice to quit; Partial eviction; Retaliatory eviction; Total eviction.

Evidence. [redacted] proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention. Taylor v. Howard, 111 R.I. 527, 304 A.2d 891, 893.

Testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact. Calif. Evid.Code.

All the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. Any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion of the existence or nonexistence of some matter of fact. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. That which tends to produce conviction in the mind as to existence of a fact. The means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact.

As a part of procedure "evidence" signifies those rules of law whereby it is determined what testimony should be admitted and what should be rejected in each case, and what is the weight to be given to the testimony admitted. See **Evidence rules.**

For Presumption as evidence, see **Presumption;** Proof and evidence distinguished, see **Proof;** Testimony as synonymous or distinguishable, see **Testimony;** View as evidence, see **View.**

See also Admunicular evidence; Allunde; Autoptic evidence; Best evidence; Beyond a reasonable doubt; Circumstantial evidence; Competent evidence; Conclusive evidence; Conflicting evidence; Corroborating evidence; Cumulative evidence; Demeanor evidence; Demonstrative evidence; Derivative evidence; Direct evidence; Documentary evidence; Extrajudicial evidence; Extraneous evidence; Extrinsic evidence; Fabricated evidence; Fact; Fair preponderance of evidence; Hearsay; Illegally obtained evidence; Immaterial evidence; Incompetent evidence; Incriminating evidence; Inculpatory; Independent source rule; Indirect evidence; Indispensable evidence; Inference; Laying foundation; Legal evidence; Legally sufficient evidence; Limited admissibility; Material evidence; Mathematical evidence; Moral evidence; Narrative evidence; Newly-discovered evidence; Offer of proof; Opinion evidence; Oral evidence; Original document rule; Parol evidence rule; Partial evidence; Past recollection recorded; Perpetuating testimony; Physical fact rule; Positive evidence; Preliminary evidence; Preponderance; Presumption; Presumptive evidence; Prima facie evidence; Primary evidence; Prior inconsistent statements; Privileged evidence; Probable evidence; Probative evidence; Probative facts; Proof; Proper

evidence; Rebuttal e evidence; Second-ha evidence; dence; Su dence; Vie evidence.

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Identification

Illegally obta Miranda Rule Motion to su

Inculpatory person's invo dence.

Irrelevant evi so related to logical tender vant evidence

Material evid

Oral evidence

Original evide rule.

evidence; Real evidence; Reasonable inference rule; Rebuttal evidence; Relevant evidence; Satisfactory evidence; Scintilla of evidence; Secondary evidence; Second-hand evidence; State's evidence; Substantial evidence; Substantive evidence; Substitutionary evidence; Sufficiency of evidence; Traditionary evidence; View; Weight of evidence; Withholding of evidence.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Autoptic evidence. Type of evidence presented in court which consists of the thing itself and not the testimony accompanying its presentation. Articles offered in evidence which the judge or jury can see and inspect. Real evidence as contrasted with testimonial evidence: e.g. in contract action, the document purporting to be the contract itself, or the gun in a murder trial.

Character evidence. Evidence of a person's character or traits is admissible under certain conditions in a trial, though, as a general rule, evidence of character traits are not competent to prove that a person acted in conformity therewith on a particular occasion. Fed.Evid.R. 404.

Curative admissibility. See Curative.

Exculpatory evidence. A defendant in a criminal case is entitled to evidence in possession or control of the government if such evidence tends to indicate his innocence or tends to mitigate his criminality if he demands it and if the failure to disclose it results in a denial of a fair trial. U. S. v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342. Disclosure of evidence by the government is governed by Fed.R.Crim.P. 16.

Expert evidence. Testimony given in relation to some scientific, technical, or professional matter by experts, i.e., persons qualified to speak authoritatively by reason of their special training, skill, or familiarity with the subject. See also Expert witness.

Identification evidence. See Exemplars.

Illegally obtained evidence. See Exclusionary rule; Miranda Rule; Mapp v. Ohio; McNabb-Mallory Rule; Motion to suppress; Poisonous tree doctrine.

Incriminatory evidence. Evidence tending to show a person's involvement in a crime; incriminating evidence.

Irrelevant evidence. Evidence is irrelevant if it is not at related to the issues to be tried and if it has no logical tendency to prove the issues. See also *Relevant evidence, infra.*

Material evidence. See *Relevant evidence, infra.*

Oral evidence. See Testimony.

Original evidence. See Original; Original document rule.

Preponderance of the evidence. A standard of proof (used in many civil suits) which is met when a party's evidence on a fact indicates that it is "more likely than not" that the fact is as the party alleges it to be. See Fair preponderance of evidence.

Proffered evidence. Evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact. Calif. Evid.Code.

Relevant evidence. Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed.Evid.R. 401. Evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. Calif.Evid.Code. Evidence which bears a logical relationship to the issues in a trial or case.

Tangible evidence. Physical evidence; evidence that can be seen or touched, *e.g.*, documents, weapons. Testimonial evidence is evidence which can be heard, e.g., the statements made by anyone sitting in the witness box. See Demonstrative evidence.

Evidence by inspection. Such evidence as is addressed directly to the senses without intervention of testimony. Tangible; physical evidence. See Demonstrative evidence.

Evidence codes. Statutory provisions governing admissibility of evidence and burden of proof at hearings and trials. See also Evidence rules, *infra*.

Evidence completed. Exists where both sides have offered testimony and rested, or where plaintiff has rested and defendant has made motion for finding on plaintiff's case and stands on motion and declines to offer evidence. Merriam v. Sugrue, D.C.Mun.App., 41 A.2d 166, 167.

Evidence law of. The aggregate of rules and principles regulating the burden of proof, admissibility, relevancy, and weight and sufficiency of evidence in legal proceedings. See Evidence codes; Evidence rules.

Evidence of debt. A term applied to written instruments or securities for the payment of money, importing on their face the existence of a debt. See Bonds.

Evidence of insurability satisfactory to company. Evidence which would satisfy a reasonable person experienced in the life insurance business that insured was in an insurable condition. Bowie v. Bankers Life Co., C.C.A.Colo., 105 F.2d 506, 508.

Evidence of title. A deed or other document establishing the title to property, especially real estate.

Evidence reasonably tending to support verdict. Means evidence that is competent, relevant, and material, and which to rational and impartial mind naturally leads, or involuntarily tends to lead, to conclusion for which there is valid, just, and substantial reason. Kelly v. Oliver Farm Equipment Sales Co., 169 Okl. 269, 36 P.2d 986, 991.

burden, as on interstate commerce, means anything that imposes either a restrictive or onerous load upon such commerce.

Burden of going forward. The onus on a party to a case to refute or to explain as in the case of one who is charged with possession of stolen goods after the government has introduced evidence of the defendant's recent possession of such goods, the inference being that the defendant knew the goods to have been stolen. Barnes v. U. S., 412 U.S. 837, 846, n. 11, 93 S.Ct. 2357, 2363, 37 L.Ed.2d 380.

Burden of persuasion. The onus on the party with the burden of proof to convince the trier of fact of all elements of his case. In criminal case the burden of the government to produce evidence of all the necessary elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368.

Burden of producing evidence. The obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue. Calif.Evid.Code. Such burden is met when one with the burden of proof has introduced sufficient evidence to make out a prima facie case, though the cogency of the evidence may fall short of convincing the trier of fact to find for him. The burden of introducing some evidence on all the required elements of the crime or tort or contract to avoid the direction of a verdict against the party with the burden of proof. Stuart v. D. N. Kelley & Son, 331 Mass. 76, 117 N.E.2d 160.

Burden of proof. (Lat. *onus probandi.*) In the law of evidence, the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

Burden of proof is a term which describes two different concepts: first, the "burden of persuasion", which under traditional view never shifts from one party to the other at any stage of the proceeding, and second, the "burden of going forward with the evidence", which may shift back and forth between the parties as the trial progresses. Ambrose v. Wheatley, D.C.Del., 321 F.Supp. 1220, 1222.

The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. Calif.Evid.Code, § 115.

In a criminal case, all the elements of the crime must be proved by the government beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.

Term has been used to mean either the necessity of establishing a fact, that is, the burden of persuasion, or the necessity of making a prima facie showing, that is, the burden of going forward. State Farm Life Ins. Co. v. Smith, 9 Ill.App.3d 942, 331 N.E.2d 273, 278.

"Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence. U.C.C. § 1-201(8).

See also Shifting the burden of proof.

Bureau /byúrow/. An office for the transaction of business. A name given to the several departments of the executive or administrative branch of government, or their divisions. A specialized administrative unit. Business establishment for exchanging information, making contacts, coordinating activities, etc.

Bureaucracy /byurókrəsiy/. An organization, such as an administrative agency or the army, with the following general traits: a chain of command with fewer people at the top than at the bottom; well defined positions and responsibilities; fairly inflexible rules and procedures; "red tape"; many forms to be filled out; and delegation of authority downward from level to level.

Bureau of Customs. Federal agency charged with responsibility of collecting importing duties for the Government.

Bureau of Land Management. The Bureau of Land Management was established July 16, 1946, by the consolidation of the General Land Office (created in 1812) and the Grazing Service (formed in 1934). The Bureau manages the national resource lands (some 450 million acres) and their resources. It also administers the mineral resources connected with acquired lands and the submerged lands of the Outer Continental Shelf (OCS).

Burford doctrine. Under "Burford Doctrine" of abstention, federal courts have refrained from interfering with complex state regulatory schemes. Clutchette v. Procunier, D.C.Cal., 328 F.Supp. 767, 772.

Burgage /bərgəj/. A name anciently given to a dwelling-house in a borough town.

Burgage-tenure. In English law, one of the three species of free socage holdings; a tenure whereby houses and lands which were formerly the site of houses, in an ancient borough, are held of some lord by a certain rent. There are a great many customs affecting these tenures, the most remarkable of which is the custom of Borough English. Such tenures have been abolished.

Burgator /bərgéydər/. One who breaks into houses or inclosed places, as distinguished from one who committed robbery in the open country.

Burgbote /bərgbowt/. In old English law, a term applied to a contribution towards the repair of castles or walls of defense, or of a borough.

Burgenses /bərjénsiyz/. In old English law, inhabitants of a *burgus* or borough; burgesses.

Burgeristh /bərgərisθ/. A word used in D. lesday, signifying a breach of the peace in a town.

Burgess /bərjəs/. In English law, an inhabitant or freeman of a borough or town; a person duly and legally admitted a member of a municipal corporation. A magistrate of a borough. An elector or voter; a person legally qualified to vote at elections. The

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Clausum /klózəm/. Lat. Close, closed up, sealed. Inclosed, as a parcel of land. A writ was either *clausum* (close) or *apertum* (open). Grants were said to be by *literæ patentæ* (open grant) or *literæ clausæ* (close grant). 2 Bl.Comm. 346. Occurring in the phrase *quare clausum fregit* it denotes in this sense only realty in which the plaintiff has some exclusive interest, whether for a limited or unlimited time or for special or for general purposes.

Clausum fregit /klózəm friyjət/. L. Lat. (He broke the close.) In pleading and practice, technical words formerly used in certain actions of trespass, and still retained in the phrase *quare clausum fregit* (q.v.).

Clausum paschæ /klózəm pæskiy/. In English law, the morrow of the utas, or eight days of Easter; the end of Easter; the Sunday after Easter-day.

Clausura /klozúrə/. In old English law, an inclosure. *Clausura heyæ*, the inclosure of a hedge.

Clavia /kléyviyə/. In old English law, a club or mace; tenure *per serjeantiam claviæ*, by the serjeanty of the club or mace.

Clawa. A close, or small inclosure.

Clayton Act. A Federal law enacted in 1914 as amendment to the Sherman Antitrust Act dealing with antitrust regulations and unfair trade practices. 15 U.S.C.A. §§ 12-27. The Act prohibits price discrimination, tying and exclusive dealing contracts, mergers, and interlocking directorates, where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

Clean. Irreproachable; innocent of fraud or wrongdoing; free from defect in form or substance; free from exceptions or reservations. It is a very elastic adjective, however, and is particularly dependent upon context.

Clean Air Acts. Federal and state environmental statutes enacted to regulate and control air pollution.

Clean bill. Bill of exchange without documents attached.

Clean bill of health. One certifying that no contagious or infectious disease exists, or certifying as to healthy conditions generally without exception or reservation. See Bill (Maritime law).

Clean bill of lading. One without exception or reservation as to the place or manner of stowage of the goods, and importing that the goods are to be or have been safely and properly stowed under deck. One which contains nothing in the margin qualifying the words in the bill of lading itself.

1 Bl.Law Dict. 5th Ed.—9

Clean hands doctrine. Under "clean hands" doctrine, equity will not grant relief to a party, who, as actor, seeks to set judicial machinery in motion and obtain some remedy, if such party in his prior conduct has violated conscience or good faith or other equitable principle. Franklin v. Franklin, 365 Mo. 442, 283 S.W.2d 483, 486.

Clear. Obvious; beyond reasonable doubt; perspicuous; plain. Free from all limitation, qualification, question or shortcoming. Free from incumbrance, obstruction, burden, limitation, etc. Plain, evident, free from doubt or conjecture, unequivocal, also unincumbered. Free from deductions or drawbacks.

Clearance. In maritime law, the right of a ship to leave port. The act of clearing or leaving port. The certificate issued by the collector of a port evidencing the power of the ship to leave port. In contract for exhibition of motion pictures, the interval of time between conclusion of exhibition in one theater and commencement of exhibition at another theater. Waxmann v. Columbia Pictures Corporation, D.C.Pa., 40 F.Su.p. 103, 111.

Clearance card. A letter given to an employee by his employer, at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment.

Clearance certificate. Issued to ship's captain showing that customs requirements have been made.

Clear and convincing proof. Generally, this phrase and its numerous variations mean proof beyond a reasonable, i.e., a well-founded doubt. Some cases give a less rigorous, but somewhat uncertain, meaning, viz., more than a preponderance but less than is required in a criminal case.

Proof which should leave no reasonable doubt in the mind of the trier of the facts concerning the truth of the matters in issue. In Interest of Jones, 34 Ill.App.3d 603, 340 N.E.2d 269, 274.

That measure or degree of proof which will produce in mind of trier of facts a firm belief or conviction as to allegations sought to be established; it is intermediate, being more than mere preponderance, but not to extent of such certainty as is required beyond reasonable doubt as in criminal cases. Fred C. Walker Agency, Inc. v. Lucas, 215 Va. 535, 211 S.E.2d 88, 92.

See also Beyond a reasonable doubt; Burden of proof; Clear evidence or proof.

Clear and present danger doctrine. Doctrine in constitutional law, first formulated in Schenck v. U. S., 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470, providing that governmental restrictions on freedoms of speech and press will be upheld if necessary to prevent grave and immediate danger to interests which government may lawfully protect.

Speech which incites to unlawful action falls outside the protection of the First Amendment where

sary for its commission, while attempt is direct movement toward commission after preparations are made. State v. Quick, 199 S.C. 256, 19 S.E.2d 101, 103. See also Aid and abet.

Prepare. To provide with necessary means; to make ready; to provide with what is appropriate or necessary.

Prepayment penalty. A penalty under a note, mortgage, or deed of trust, imposed when the loan is paid before its due date. Consideration to terminate loan at borrower's election before maturity.

Prepayments. Deferred charges. Assets representing expenditures for future benefits. Rent and insurance premiums paid in advance are usually classified as current prepayments.

Prepense. Forethought; preconceived; premeditated.

Preponderance of evidence. Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Braud v. Kinchen, La.App., 310 So.2d 857, 859. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability. The word "preponderance" means something more than "weight"; it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. There is generally a "weight" of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

That amount of evidence necessary for the plaintiff to win in a civil case. It is that degree of proof which is more probable than not.

Preponderance of evidence may not be determined by the number of witnesses, but by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determines the weight of testimony.

Prerogative /prərógədav/. An exclusive or peculiar right or privilege. The special power, privilege, immunity, right or advantage vested in an official person, either generally, or in respect to the things of his office, or in an official body, as a court or legislature.

Prerogative court. In old English law, a court established for the trial of all testamentary causes, where the deceased left *bona notabilia* within two different dioceses; in which case the probate of wills belonged to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons were originally cognizable herein, before a judge appointed by the archbishop, called the "judge of the prerogative court," from whom an appeal lay to the privy council. The jurisdiction of these courts became obsolete with the transfer of the testamentary jurisdiction of the ecclesiastical courts to the Chancery Division of the High Court.

Prerogative law. That part of the common law of England which is more particularly applicable to the king.

Prerogative writs. In English law, the name was given to certain judicial writs issued by the courts only upon proper cause shown, never as a mere matter of right, the theory being that they involved a direct interference by the government with the liberty and property of the subject, and therefore were justified only as an exercise of the extraordinary power (prerogative) of the crown. In America, issuance is now generally regulated by statute, and such are generally referred to as extraordinary writs or remedies.

Such writs have been abolished in the federal and most state courts with the adoption of Rules of Civil Procedure. The relief formerly available by such writs is now available by appropriate action or motion under the Rules of Civil Procedure. See Rule 81. These writs are the writs of mandamus, procedendo, prohibition, quo warranto, habeas corpus, and certiorari.

Pres /prey/. L. Fr. Near. *Cy pres*, so near; as near. See Cy pres.

Presbyter /prézbadar/. Lat. In civil and ecclesiastical law, an elder; a presbyter; a priest.

Presbyterianism. One of the principal systems of church polity known as the "Christian Protestant Church", occupying an intermediate position between episcopacy and congregationalism. A religious faith or doctrine, based on the Westminster Confession of Faith and the Larger and Shorter Catechisms.

Presbyterium. That part of the church where divine offices are performed; formerly applied to the choir or chancel, because it was the place appropriated to the bishop, priest, and other clergy, while the laity were confined to the body of the church.

Prescribable /praskráybabal/. That to which a right may be acquired by prescription.

Prescribe. To assert a right or title to the enjoyment of a thing, on the ground of having hitherto had the uninterrupted and immemorial enjoyment of it.

To lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; to dictate; to point, to direct; to give as a guide, direction, or rule of action; to give law. To direct; define; mark out.

In a medical sense "prescribe" means to direct, designate, or order use of a particular remedy, therapy, medicine, or drug.

Prescription. A direction of remedy or remedies for a disease, illness, or injury and the manner of using them. Also, a formula for the preparation of a drug or medicine.

Prescription is a peremptory and perpetual bar to every species of action, real or personal, when creditor has been silent for a certain time without urging his claim. Jones v. Butler, La.App., 346 So.2d 791, 791.

Acquisition of a personal right to use a way, water light and air by reason of continuous usage. See also Prescriptive easement.

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Fair pleader. See Beau pleader.

Fair preponderance of evidence. Evidence sufficient to create in the minds of the triers of fact the conviction that the party upon whom is the burden has established its case. The greater and weightier evidence, the more convincing evidence. Belmont Hotel v. New Jersey Title Guaranty & Trust Co., 22 N.J.Misc. 261, 37 A.2d 681, 682. Such a superiority of evidence on one side that the fact of its outweighing the evidence on the other side can be perceived if the whole evidence is fairly considered. Such evidence as when weighed with that which is offered to oppose it, has more convincing power in the minds of the jury. The term conveys the idea of something more than a preponderance. The term is not a technical term, but simply means that evidence which outweighs that which is offered to oppose it, and does not necessarily mean the greater number of witnesses.

Fair rent. A reasonable rent. Shapiro v. Goldstein, 113 Misc. 256, 185 N.Y.S. 234.

Fair return on investment. A net return upon fair value of property. State ex rel. City of St. Louis v. Public Service Commission, 341 Mo. 920, 110 S.W.2d 749, 778. A "fair return" is to be largely measured by usual returns in like investments in the same vicinity over the same period of time. Natural Gas Pipeline Co. of America v. Federal Power Commission, C.C.A.Ill., 120 F.2d 625, 633, 634. Reasonable profit on sale or holding of investment assets. A fair return on value of property used and useful in carrying on the enterprise, performing the service or supplying the thing for which the rates are paid. Labin v. Finkelstein, 82 N.Y.S.2d 329, 335. Term is generally used in reference to setting of rates for public utilities.

Fair sale. In foreclosure and other judicial proceedings, this means a sale conducted with fairness and impartiality as respects the rights and interests of the parties affected. A sale at a price sufficient to warrant confirmation or approval when it is required.

Fair trade laws. State statutes which permit manufacturers or distributors of namebrand goods to fix minimum retail prices. Following a series of court decisions striking down such statutes, Congress in 1976 repealed such statutes.

Fair trial. A hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration of evidence and facts as a whole. A basic constitutional guarantee contained implicitly in the Due Process Clause of Fourteenth Amendment, U.S. Constitution.

A legal trial or one conducted in all material things in substantial conformity to law. Stacey v. State, 79 Okl.Cr. 417, 155 P.2d 736, 739. A trial which insures substantial justice. A trial without prejudice to the accused. An orderly trial before an impartial jury and judge whose neutrality is indifferent to every factor in trial but that of administering justice. One conducted according to due course of law. A trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm. In such trial the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror. Goldstein v. U. S., C.C.A.Mo., 63 F.2d 609, 613. An adequate hearing and an impartial tribunal, free from any interest, bias, or prejudice. The Reno, C.C.A.N.Y., 61 F.2d 966, 968. See also Fair and impartial trial.

Fair use doctrine. "Fair use" is privilege in other than owner of copyright to use copyrighted material in reasonable manner without consent, notwithstanding monopoly granted to the owner. Meeropol v. Nizer, D.C.N.Y., 361 F.Supp. 1063, 1067. Section 107 of the Copyright Act sets forth factors to be considered in determining whether the use made in any particular case is "fair use."

Fair value. Present market value; such sum as the property will sell for to a purchaser desiring to buy, the owner wishing to sell; such a price as a capable and diligent business man could presently obtain from the property after conferring with those accustomed to buy such property; the amount the property would bring at a sale on exec[illegible] shown to have been in all respects fair and [illegible]sonable; the fair market value of the property [illegible] between one who wants to purcha[illegible] and one who wants to sell the property. Where no definite market value can be established and expert testimony must be relied on, fair valuation is the amount which the property ought to give to a going concern as a fair return, if sold to some one who is willing to purchase under ordinary selling conditions. In determining "fair valuation" of property, court should consider all elements entering into the intrinsic value, as well as the selling value, and also the earning power of the property. In re Gibson Hotels, D.C.W.Va., 24 F.Supp. 859, 863. In determining depreciation, "fair value" implies consideration of all factors material in negotiating sale and purchase of property, such as wear, decay, deterioration, obsolescence, inadequacy, and redundancy. Idaho Power Co. v. Thompson, D.C.Idaho, 19 F.2d 547, 566. Price which a seller, willing but not compelled to sell, would take, and a purchaser, willing but not compelled to buy, would pay. Price which buyers of the class which would be interested in buying property would be justified in paying for it. In re Crane's Estate, 344 Pa. 141, 23 A.2d 651, 655.

Within provision of business corporation act for determination of fair value of dissenting stockholder's shares, "fair value" means intrinsic value. Santee Oil Co., Inc. v. Cox, 265 S.C. 270, 217 S.E.2d 781, 783. Among elements to be considered in arriving at "fair value" or "fair cash value" of stock of a stockholder who dissents from a sale of corporate assets are its market value, net asset value, investment value, and earning capacity. Lucas v. Pembroke Water Co., 205 Va. 84, 135 S.E.2d 147, 150.

"Actual value," "market value," "fair value," and the like, are commonly used as convertible terms. See also Fair market value.

Fait /fēyt/. L. Fr. Anything done. A deed; act; fact. A deed lawfully executed.

Fait accompli. Factor deed accomplished, presumably irreversible.

Fait enrolle /fēyt ənrówl/. A deed enrolled, as a bargain and sale of freeholds.

Faith. Confidence; credit; reliance. Thus, an act may be said to be done "on the faith" of certain representations.

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