SB

377/532 File #5

TORT REFORM

(REPORTS & CASE LAW)

not received 5/29/86

THE
INSTITUTE FOR
CIVIL JUSTICE
THE RAND CORPORATION

1700 Main Street, P.O. Box 2138, Santa Monica, CA 90406-2138 • (213) 393-0411

Gustave H. Shubert
Director

22 April 1986

MEMORANDUM TO INSTITUTE FRIENDS AND SPONSORS

Re: Senate Testimony on Medical Malpractice

On March 26, 1986, ICJ consultant Patricia Danzon* appeared before the U.S. Senate Judiciary Committee to deliver testimony on *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims: A Summary of Research Results*. We have reprinted her remarks and are sending them to you under separate cover.

In her previous work for the Institute, the author analyzed medical malpractice claims data for the years 1974-1978. This early analysis, while contributing valuable information to a growing debate, could not purport to measure the long-term impact of tort reforms enacted since 1975. For her most recent research, Patricia has used claims data for the full decade 1975-1984. Her testimony summarizes this new research and compares the results to her earlier work.

The Institute will publish the full version of Dr. Danzon's updated research results in early summer. Her testimony is a preview of her full report.

Sincerely,

GHS:tp

* Dr. Danzon is now Associate Professor of Health Care Systems and Insurance at The Wharton School, The University of Pennsylvania.

not needed
5/27/86

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Gustave H. Shubert
Director

30 April 1986

MEMORANDUM TO INSTITUTE FRIENDS AND SPONSORS

Re: Senate Testimony on Tort Liability

On February 27, 1986, ICJ senior researcher Dr. Deborah R. Hensler delivered testimony on the tort liability system before the U.S. Senate Commerce Committee. We have reprinted her remarks as an ICJ Paper, *Summary of Research Results on the Tort Liability System,* P-7010-ICJ, and are sending a copy to you under separate cover.

Institute research reports have addressed many of the key questions now facing policymakers in their debate on the liability "crisis." In her summary for the Commerce Committee, Dr. Hensler highlighted five topics on which the ICJ has conducted research: trends in civil jury verdicts, corporate responses to product liability lawsuits, public expenditures for personal injury litigation, mass toxic torts, and the use of alternative dispute resolution procedures.

I'm sure you will find Debby's remarks interesting and germane to the continuing debate on the liability system in this country.

Sincerely,

Gustave H. Shubert

GHS:tp

rata contribution is that it terminate the litigation. Criterion Ins. Co. v. Laitala, Sup. Ct. Op. No. 2599 (File No. 6014), 658 P.2d 112 (1983).

Sec. 09.16.040. Release or covenant not to sue. When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor. (§ 1 ch 80 SLA 1970)

NOTES TO DECISIONS

Section applies where settlement was made after effective date of chapter. — Although causes of action arose at the time of the accident before the effective date of this chapter, this section is applicable where the settlement was made after this chapter became effective. Layne v. United States, 460 F.2d 409 (9th Cir. 1972).

This section is intended to include those vicariously liable. Alaska Airlines v. Sweat, Sup. Ct. Op. No. 1464 (File Nos. 2912, 3105), 568 P.2d 916 (1977).

The language "one of two or more persons liable in tort for the same injury . . ." seems to include a party who is vicariously liable. Alaska Airlines v. Sweat, Sup. Ct. Op. No. 1464 (File Nos. 2912, 3103), 568 P.2d 916 (1977)

Implied indemnity between concurrently negligent tortfeasors. — Public policy dictates that Alaska should not adopt implied indemnity between concurrently negligent tortfeasors. Vertecs Corp. v. Reichhold Chems., Inc., Sup. Ct. Op. No. 2647 (File No. 6566), P.2d (1983); State Mechanical, Inc. v. Liquid Air, Inc., Sup. Ct. Op. No. 2684 (File Nos. 6145, 6172), P.2d (1983).

Plaintiff permitted to receive only amount of adjudged damages. — While this section changed the common law in one respect (i.e., by providing that release of one joint tortfeasor does not automatically release the other joint tortfeasors), it retained that part of the common law rule embodying the sound public policy of permitting a plaintiff to receive only the amount of his adjudged damages and no more, regardless of the source of the recovery. Layne v. United States, 460 F.2d 409 (9th Cir. 1972).

Amount paid for release reduces pro tanto judgment against another. — Whether or not the release party is in fact jointly liable with the defendant against whom a judgment is rendered, to prevent recovery by plaintiff of more than his legitimate damages, the amount paid for the release or covenant not to sue must reduce pro tanto the injured person's judgment against another. Layne v. United States, 460 F.2d 409 (9th Cir. 1972).

Whether released party is joint tortfeasor is not relevant. — Since the principle is that there can be but one satisfaction for the same injury, whether or not the released party is in fact jointly liable with the defendant against whom a judgment is rendered is not relevant. Layne v. United States, 460 F.2d 409 (9th Cir. 1972).

To require proof at trial that the released party was in fact a joint tortfeasor before this section can operate to cause a pro tanto reduction in the award equal to the amount recovered in the settlement would effectively thwart the major policy justifications for encouraging extra-judicial settlements — the disposition of claims without litigation, and the reduction and simplification of the issues requiring judicial determination. The language or intent of this chapter does not require such a result. Layne v. United States, 460 F.2d 409 (9th Cir. 1972).

Settlement for less than entire liability. — A joint tortfeasor may remove

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, including attorneys fees, and interest, 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 in bringing the claim exceed the amount of attorney fees awarded to the claimant under Rule 82; 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 total award the amount by which the value of the nonsubrogated sums under (a) of this section exceed the amount of payments under (b) of this section.

Sec. 09.55.546. Advance payments. In an action to recover damages under AS 09.55.530 — 09.55.560, no advance payment made by the defendant health care provider or the professional liability insurer of the defendant to or on behalf of the plaintiff is admissible as evidence or may be construed as an admission of liability for injuries or damages suffered by the plaintiff; however, a final award in favor of the plaintiff shall be reduced to the extent of any advance payment. The advance payment shall inure to the exclusive benefit of the defendant or the insurer making the payment. (§ 35 ch 102 SLA 1976)

Sec. 09.55.547. Pleading of damages. In a cause of action against a health care provider for malpractice, the complaint or any other pleadings may not contain an ad damnum clause or monetary amount claimed against the defendant health care provider, except as necessary for jurisdictional purposes. (§ 35 ch 102 SLA 1976)

Sec. 09.55.548. Awards, collateral source. (a) 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 by category of loss. The court may enter a judgment that future damages be paid in whole or in part by periodic payments rather than by a lump-sum payment; the judgment shall include, if necessary, other provisions to assure that funds are available as periodic payments become due. Insurance from an authorized insurer as defined in AS 21.90.080 or from the Medical Indemnity Corporation of Alaska is sufficient assurance that funds will be available. Any part of the award which is paid on a periodic basis shall be adjusted annually according to changes in the consumer price index in the community where the claimant resides. In this subsection, future damages includes damages for future medical treatment, care or custody, loss of future earnings, or loss of bodily function of the claimant.

(b) Except when the collateral source is a federal program which by law must seek subrogation and except death benefits paid under life insurance, a claimant may only recover damages from the defendant which exceed amounts received by the claimant as compensation for the injuries from collateral sources, whether private, group or governmental, and whether contributory or noncontributory. Evidence of collateral sources, other than a federal program which must by law seek subrogation and the death benefit paid under life insurance, is admissible after the fact finder has rendered an award. The court may take into account the value of claimant's rights to coverage exhausted or depleted by payment of these collateral benefits by adding back a reasonable estimate of their probable value, or by earmarking and holding for possible periodic payment under (a) of this section that amount of the award that would otherwise have been deducted, to see if the impairment of claimant's rights actually takes place in the future. (§ 35 ch 102 SLA 1976)

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

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)

Plaintiff's view:

In his article, Mr. Kleinfeld concludes that Rule 82, under which the prevailing party is compensated partially for attorneys' fees, should be abolished. I presume this expresses disagreement with Chief Justice Burger's proposal to expand the approach to the federal courts. I respectfully, but sincerely, disagree with Mr. Kleinfeld's conclusion. In my view, Rule 82 does encourage settlement, in a fair and meaningful manner, and would be especially appropriate in the federal system.

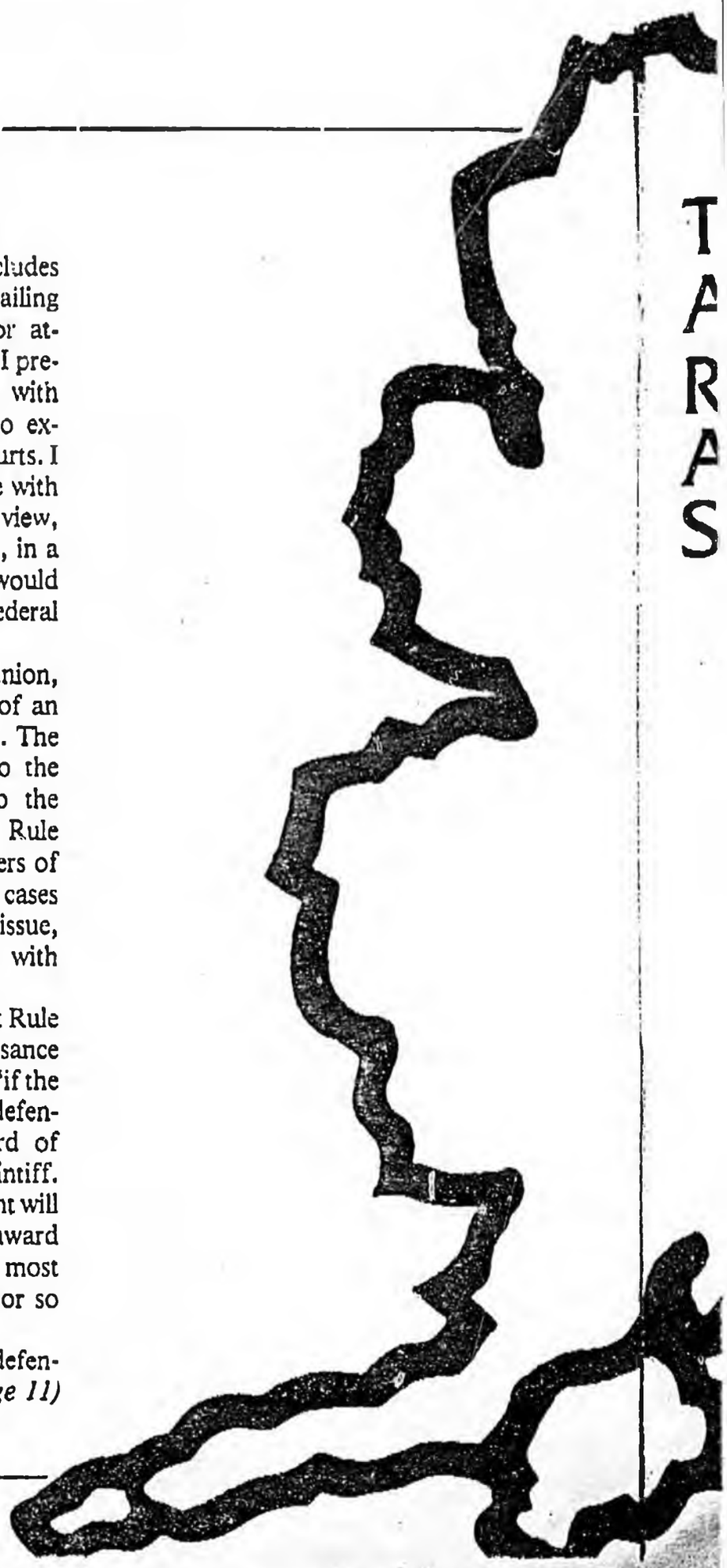
Contrary to Mr. Kleinfeld's opinion, plaintiffs do consider the impact of an adverse Rule 82 award upon them. The Rule 82 award directly applies to the determination of liability and to the amount of the judgment through Rule 68. In my experience, Rule 68 offers of judgment less often control. In cases where damages are the primary issue, parties are usually able to settle, with some help from Rules 82 and 68.

Mr. Kleinfeld also concludes that Rule 82 is ineffective in discouraging nuisance cases. He does so on the basis that "if the case is litigated through trial, the defendant will probably win an award of $5,000 to $10,000 against the plaintiff. But because the cost to the defendant will exceed the award, and because the award will probably be uncollectible, most defendants will pay up to $5,000 or so even on frivolous claims."

My experience has been that defen-

(Please turn to page 11)

By James A. Parrish



The Alaska Rules Are a Success

Defense view:

Civil Rule 68, which has been in operation in Alaska for many years, permits only the defendant to make an offer of judgment. However, with the passage of Alaska Statute § 09.30.055 in 1980, either party may make an offer of judgment. The difference is that Rule 68 provides for awards of costs and attorneys' fees, while the statute increases or decreases the prejudgment interest by 2 percent, making a 4 percent difference when applied to both sides' costs. That could be substantial if the case were large and several years old at the time of judgment.

I strongly support both the rule and the statute. The benefit of Rule 68 is to the defendant. Even Mr. Kleinfeld does not suggest abolishing Rule 68. The purpose of Rule 68 is to provide protection to the defendant against Alaska Rules 82 and 79, which allow for awards of costs and attorneys' fees to the prevailing party. If Rule 68 did not exist, a plaintiff might claim $1 million and demand in settlement $100,000, but only recover $10,000 and still be the prevailing party. If, under those circumstances the defendant recognizes the claim as a $10,000 claim and makes an offer of judgment for $10,000, he can protect himself against a subsequent award of costs and attorneys' fees; thus, in effect, making himself the prevailing party. Without Rule 68 he would be helpless to protect himself against costs and attorneys' fees short of paying an unreasonable demand.

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By H. Bixler Whiting

Robert Woolley

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The benefit to the court system is that offers of judgment create some stark realities to clients. I have not found anything more difficult to explain to a client, or more helpful in making an otherwise unreasonable client recognize the true value of his case, than having to explain the effect of a Rule 68 offer of judgment. When such an offer is made, one must have a very serious conversation with his client along the lines described in Mr. Kleinfeld's article. The client needs to have the effect of Rule 68 explained to him and some appraisal of costs and attorneys' fees which might be assessed against him if he does not prevail. Of course, it also makes the plaintiff's lawyer very realistic, requiring him to examine the merits of his case prior to going forward.

I do not think defense attorneys in general use Rule 68 effectively, although there are some who are adept at using it. Those generally tend to be the defense attorneys who are professionally interested in protecting their clients as opposed to some defense attorneys who put their personal financial gain ahead.

As far as the plaintiff is concerned, Rule 68 is useless. Under the statute, a plaintiff could make an offer to settle a case at the high end of the settlement range and hope to beat it before the jury, but the risk is a 4 percent difference on the interest if he does not beat the offer. A plaintiff cannot very well make an offer at the low end of his settlement range because of the impact that might have on future settlement negotiations. We all know that it is very difficult to negotiate a settlement if the plaintiff begins demanding more money.

In conclusion, I think Rule 68 is extremely effective if used properly. I know for a fact that it deters litigation. I have used it myself to do so, as have many other lawyers.

Rule 68 clearly provides incentives to settle, even improving on prejudgment interest provisions, which do not come into effect until the eve of trial. Rule 68, however, is not a substitute for prejudgment interest, because at the eve of trial, the defendant is facing the prospect of an adverse judgment plus prejudgment interest, which might have accumulated over a 3-to-5 year period. The two elements can work together to enhance settlements with prejudgment interest providing a return on investment if the case is not settled.

CIVIL RULE 82

Civil Rule 82 has the same effect as the laws providing for prejudgment interest, except that Rule 82 can work to the benefit of either party and the prejudgment interest provision really only benefits the plaintiff. Rule 82 is the biggest factor which comes into play when one has to consider a Rule 68 offer of judgment, as Mr. Kleinfeld has pointed out.

Rule 82 is a rule which recognizes the reality of attorneys' fees. I do not think there is any provision in Alaska law regarding civil litigation that has been clarified so extensively by the Alaska Supreme Court. In my opinion, the rule is well-balanced. It certainly does not fully compensate a party for attorneys' fees. If it did, I fear that it would have a chilling effect upon potential litigation, including meritorious litigation. It, thus, offers a proper balance between creating a chilling effect and providing some compensation to the prevailing party in litigation in which he was wrongfully involved.

Rule 82 compensates the prevailing party with an additional 10 percent of the judgment for attorneys' fees. The normal attorney's fee in a contingent fee case is one-third of the recovery. In most plaintiffs' recoveries, Rule 82 compensates the plaintiff for approximately one-third of the attorneys' fees he has paid. For defendants who prevail, the court is required to make an equitable award based on the work done.

Like Rule 68, Rule 82 definitely forces sobering reality on both parties when evaluating settlement. The plaintiff must explain to his client the prospect of the defendant recovering attorneys' fees if the case is lost. Rule 82 discourages people from filing and prosecuting lawsuits that they know they are likely to lose but are willing to try as long as they stand to lose nothing.

Another beneficial effect of Rule 82 is to give a sued party some incentive to defend against meritless claims. If it were not for Rule 82, insurance companies—as well as other defendants—would be more prone to pay a nuisance value on a meritless claim rather than spend the money to defend. Rules 68 and 82 give those unjustly sued defendants some substantial protection by allowing the wrongfully sued person to recover costs and fees.

I do believe that Rule 82 does have an effect on settlements by increasing the amount, but I do not think that

The late **H. Bixler Whiting** was an attorney in Fairbanks, Alaska. **James A. Parrish** is a partner in the Parrish Law Office, Fairbanks, Alaska.

is unjust considering the fact that the recipient has been obligated to incur attorneys' fees to recover the money to which he is entitled.

Attorneys spend very little time preparing a cost bill and motion regarding same. The cost bill is decided by the clerk, not the court. A party may ask the court to review the clerk's rulings, but that does not even require a hearing in most cases, and the costs to the awarded are pretty well-established. Attorneys' fees can be awarded without any hearing at all by the trial judge, although sometimes hearings are held. The time spent on this aspect of the case is normally very small and should probably not have any effect on considering the merits of Rule 82.

I strongly support the provisions for prejudgment interest and Rule 82 attorneys' fees, primarily because they recognize economic and legal reality and are equitable. I support them secondarily because they tend to promote settlement of cases.

Ultimately, the bench and bar are responsible for resolving disputes, whether by settlement or litigation, and I believe these provisions advance that.

Parrish

(Continued from page 8)

dants, especially insurers, do not pay unfounded nuisance claims. Any win is a win for the company involved. The less merit there is to a case, the less likely it is to settle.

Whether an average award of $5,000 to $10,000 upon a successful defense is full compensation says nothing about the impact upon prospective plaintiffs considering such suits. Even impecunious plaintiffs are usually morally responsible and are especially sensitive about incurring attorneys' fees against them. It is the rare plaintiff, well-heeled or not, who is willing to press an obviously unfounded claim at the risk of incurring $5,000 to $10,000 liability. The mere filing of such a judgment creates a lien on any real property he might acquire.

To the extent there are those plaintiffs or attorneys who would file nuisance cases at the risk of a substantial attorney fee award, abolishing Rule 82 would not help. Those claimants base their claim on what they think the defendant will pay to avoid defending a lawsuit. There is no prospect of obtaining an affirmative attorney fee award in such cases. As to this class of litigant, imposing Rule 82 is, at worst, neutral. At best, it discourages the filing of some of what would otherwise be nuisance cases.

The other side of the problem is the nuisance defense. Rule 82 is flexible enough to allow full or nearly full attorneys' fees to a plaintiff who has been forced to try a case over a nuisance defense. Absent such a rule, institutional or well-heeled private defendants can literally drive plaintiffs' attorneys out of the market in small-to medium-size cases. It is simply impossible, even with a clear liability and clear damage case, in the $10,000 to $20,000 range, to make a profit against an obstructive defense in the absence of an attorneys' fees rule. Even simple contract cases can be forced to take 10 days actual trial time without regard to the amount at issue. If the claim is in the $20,000 range, counsel must charge by the hour. Without an award of attorneys' fees, the justly deserving claimant can actually lose money.

Although such cases can happen, even with attorneys' fee awards, they are much more likely to happen without them. When they do occur, it is mandatory that the plaintiff receive an award for attorneys' fees, hopefully near actual expenses.

On a practicing level, a plaintiff's attorney faced with Rule 82 is required to advise his client, up front, of the possibility of an adverse Rule 82 award. This advice usually prompts the client to more completely disclose the weak points of his case to the attorney and to express a more realistic attitude toward evaluating it.

In other words, once the client has a *personal* stake in a lawsuit—over and above the mere possibility of recovering money in his favor—he takes much more interest in it. This enables the attorney, early on, to evaluate the case more fairly by shifting the emphasis away from sympathy, revenge, or so-called "principle." Cases, which are evaluated fairly and early, tend to settle early. Where this does not happen, interim resources are wasted, making settlement difficult to achieve, if at all. Thus, when the plaintiff is financially realistic, Rule 82 serves a very beneficial purpose to all.

ECONOMIC DURESS ON PLAINTIFFS

I think Mr. Kleinfeld protests too much concerning the economic duress on plaintiffs. He fails to consider several factors:

(1) the impact of Rule 82 on settlement before the hiring of counsel or filing of litigation;

(2) the real need to at least partially compensate plaintiffs with bona fide claims for the attorneys' fees they incur;

(3) the resolve of average plaintiffs to pursue a bona fide claim even at some risk of paying attorneys' fees; and

(4) the very real economic impact which Rule 82 has upon defendants.

Rule 82 applies in uncontested as well as contested litigation. It applies to nearly all civil claims, contractual or tort in nature. In the presence of Rule 82, a potential defendant cannot, without incurring expenses to himself, force the plaintiff to hire an attorney and file a lawsuit just to see if he is serious.

In undisputable claims, which would not be contested in court, the mere filing of a complaint provides for an award of attorneys' fees based upon the uncontested schedule. Thus, in contract and debt cases, there is considerable incentive to avoid delaying payment to creditors to the point of forcing litigation.

In tort cases, Rule 82 provides an added incentive for insurance companies to affirmatively seek settlement prior to selection of legal counsel. Aside from the obvi-

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donment of his appeal. This promotes settlements, but not necessarily in a just manner.

SUPREME COURT INCONSISTENCY

An oddity of Alaska Supreme Court practice suggests an inference that the court does not really believe in the justice of the doctrines it has imposed.

Although the supreme court awards attorneys' fees to prevailing parties, it does not follow anything like Rule 82. Instead, it routinely awards $250 to $750. The prevailing party is ordinarily not allowed to submit evidence of his actual fees, and the court does not consider them. Actual attorney's fees on appeals in substantial civil cases are typically in the $5,000 to $15,000 range. If a trial court followed this practice, it would be reversed.

The Alaska Supreme Court has ..ever explained its anomalous practice on attorney's fees awards to prevailing parties. Does the court wish to avoid discouraging appeals? Then why not similarly avoid discouraging trials? Delay is a more serious problem in Alaska at the appellate than at the trial level, so administrative considerations do not favor keeping the door open wider at the appellate level.

Supreme court results are unpredictable, but so are trial results. Trial results in similar cases may approximate a bell shaped curve, with most in a predictable range, but substantial tails on the low and high ends. In certain kinds of cases, such as the weak liability, high damages personal injury case, the results may be an even more unpredictable dumbbell curve, with clusters around zero, and at very high levels, and few in between. In some cases, a plaintiff or his lawyer may be unreasonable in going to trial, but in many, trial is as good a means as settlement to decide how much money, if any, ought to be taken from one party and given to the other.

ABOLISH RULE 82

I suppose the above criticism implies that the rules are too effective, rather than not effective enough, in promoting settlement. The plaintiff is forced to settle his case for less than it is worth because of his lesser ability than the defendant to try the case on a double or nothing basis.

Some may feel that encouraging settlement is of such great value as to justify this result. Where the stakes are so high, my own values place a greater weight on justice than administrative convenience, so I cannot accept this outcome as desirable.

The Alaska Bar Association passed a resolution more than a decade ago calling upon the supreme court to repeal Rule 82. The court has never acted, nor explained its inaction, regarding this resolution. I think the bar was correct. We have gone too far in the direction of threatening litigants with catastrophe to compel them to settle. We ought to use our luxuriously expensive system of courts to try cases, not frighten people of moderate means out of trying them.

Parrish

(Continued from page 11)

ous fairness of forcing an insurance company to share plaintiff's costs of counsel in bona fide litigated cases, Rule 82 provides an economic incentive to insurers to avoid involving counsel altogether. The rule promotes settlement of litigation before it starts, as much as after. Wise insurers should, and I believe do, take this cost into account in deciding upon prelitigation settlement policies.

RULE 82 PROVIDES PARTIAL COMPENSATION

Although the prospect of an adverse award does promote a more meaningful evaluation, I doubt that it discourages the filing of many bona fide claims. Clients as a class are self-righteous, especially when they have a good case.

I also question whether the system suffers that much when a plaintiff who lacks confidence in his position, even though it may be well-founded, elects not to pursue his claim. At least his decision is predominantly free, coerced only by fair risks which are beneficial to the integrity of the system. What detriment there is in this situation is small in comparison to the alternative. The greater injustice by far is the bona fide case which cannot, as a matter of economics, be brought at all. Without fee awards, the freedom to bring bona fide claims in the $20,000 range can be lost altogether. We should not attempt to avoid one injustice by imposing a larger one.

Of course, there is the occasional case where a plaintiff without a serious injury and a reasonably good liability position loses to a jury and suffers a fee award. This can be harsh, but the trial courts have sufficient discretion to temper the awards in light of the plaintiff's circumstances and the quality of the case.

Also, as Mr. Kleinfeld noted, marginal appellate grounds can be bargained against the fee award in most instances. But by this mechanism, the rule again prompts realistic consideration of the merits of the case before proceeding into the appellate court. The plaintiff, who could otherwise not have anything to lose on appeal, suddenly does.

Average contingent fees in contested cases are one-third. As a result, plaintiffs, even with clearly bona fide claims, are rarely fairly compensated for their losses. Aside from the occasional run-away verdict, which is so often publicized, plaintiffs rarely come out ahead. To the extent Rule 82 covers approximately one-third (10 percent divided by 33⅓ percent) of fees actually paid, it reduces the under-compensation.

The successful defendant also is partially compensated. Thus, Rule 82 effects a redistribution of resources. Because both sides usually come out behind, it is better that the prevailing party suffers less.

Whether a rule providing for full attorney fees in normal cases should be adopted is an interesting question. Theoretically, it would benefit plaintiffs overall. From a practical standpoint, I doubt that it would work or be beneficial.

Without a personal stake in the amount of attorneys' fees charged to a successful plaintiff, there would be no market force to sustain competition as to the contingent fee contract percentage. A plaintiff under a contingent fee pays only if he wins. If a plaintiff will be repaid full attorneys fees, he could care less what percentage the attorney charges. With unlimited attorneys fees, contingent fee contracts would edge, if not leap, upward.

On the defense side, it would be impossible to police hours and rates charged by counsel for a successful defendant. When a successful defendant must still pay a large proportion, usually about two-thirds, of his attorney's billings, those billings are adequately policed. But where a successful defendant might pay nothing, he could encourage the largest billing from his attorney so as to punish his adversary.

In my view, full fee awards as a matter of course would be difficult to enforce fairly. The primary goals can be achieved without them. The loss of market control would cause more unfairness than it would resolve.

NO INTERFERENCE WITH THE FEE AGREEMENT

Mr. Kleinfeld's reference to "tinkering" with the fee agreement between the attorney and client does not in my opinion merit serious consideration. Rule 82 does not and should not govern the private fee agreement.

The right to counsel is fundamental. To protect this right, clients must be free to negotiate fees in the manner they wish. Otherwise, clients with money will always be able to afford attorneys. A limitation on contingency fees would mean that some people without money will be denied attorneys that they might otherwise have retained.

I believe any system that would limit contractual attorneys fees to given scheduled amounts or that would require court-awarded attorneys' fees to be paid exclusively to the attorney would be abhorrent. These are matters between attorney and client which must be left to the competitive forces of the market.

Although interference with attorneys' fee agreements in workmen's compensation cases and federal tort claims has successfully limited attorneys' fees, it has done so at the expense of access. My own office turns away many cases that should otherwise be brought because fair compensation to the attorney for prosecuting those cases is not possible. Countless people, especially those without funds, have been denied representation, and therefore relief, which they could have received but for such "tinkering."

SUPREME COURT INCONSISTENCY

In Alaska, Rule 82 applies at the trial level but not at the appellate level. I do not believe this is an inconsistency, much less one that merits discarding the rule altogether.

Rule 82 applies after trial but is not effective unless the case is affirmed. If the case is reversed, a new award, under the same rule, would eventually be required.

Applying Rule 82 at the appellate level would be difficult. When an appellant wins a retrial, the ultimate outcome of the litigation is rarely known. It also would not be beneficial to compensate for purely technical victories, because an appellate court with a limited record before it would have difficulty assessing who the prevailing party is, and, especially, whether the prevailing party's action has actually advanced the litigation. The Alaska Supreme Court, more so than trial courts, has better things to do than evaluate attorneys' fee claims.

More importantly, the Alaska Supreme Court does not wish to discourage the raising of bona fide legal claims on appeal. Likewise, it does not wish to encourage attorneys to bring appeals unless the clients are serious enough about the issue to bear the cost. This allows free access to the court and maintains strict adversity. Also, the absence of significant fee awards tends to keep the court's focus on legal issues, thereby maintaining a "detached" image and attitude essential to an appellate body.

As a practicing plaintiff's lawyer, with extensive appellate experience in the Alaska Supreme Court, I would like to see larger attorneys' fee awards to the successful party on appeal. Fees usually run $250 to $750 even for three weeks' work on an appellate brief. I have found no consistency in the fees awarded in my cases and, by the nature of the system, have not had the opportunity to set fee awards in others. I assume with clearly frivolous appeals that fee awards are more substantial, but I do not know. I accept our court's trivial and unexplained awards knowing they have not diverted the court from important matters.

Finally, whether there is any merit to the Alaska Supreme Court's method of awarding fees on appeal seems entirely beside the point. The issue is whether Rule 82 should be enforced in trial courts. To the extent Rule 82 is beneficial there, it should be used.

The Alaska Supreme Court's appellate fee practice may be "an oddity," but I do not believe that it "suggests an inference that the court does not really believe in the justice of the doctrines it has imposed." The supreme court has been firm, consistent, and predictable regarding awards of attorneys' fees pursuant to Rule 82. There is nothing in its cases applying Rule 82 that suggests that it does not believe in the justice of the rule.

ADOPT RULE 82 IN THE FEDERAL SYSTEM

Rule 82 is effective. From one who represents plaintiffs, let it be said they are better off with it. Fewer cases would have to go to lawyers or to trial if Rule 82 were adopted in the federal system. (The rule is followed by the U.S. District Court of Alaska, where civil trials are rare. [Local Rule 21.1.]) If this rule were followed by other federal courts, plaintiffs with bona fide claims would receive a greater proportion of their fair recovery, and many nuisance claims would be discouraged.

Although the Alaska Bar Association passed a resolution more than a decade ago calling upon the Alaska Supreme Court to appeal Rule 82, my office was not aware of it. I am not aware that it is a current issue today. To the extent it is, I doubt that those who represent individuals, and not large companies, would support abolishing Rule 82.

In my view, Rule 82 does not compel litigants to settle by threatening them with catastrophe. On the contrary, it should be strengthened some to further settlement. Every potential litigant, whether plaintiff or defendant, ought to consider the extreme cost of entering the courts and trying cases. Except in unusual circumstances, each litigant should be faced with the prospect of bearing part of his opponent's costs if he loses. We all tend to be considerably more introspective, less arrogant, and more willing to hear our opponent's view of the case when we must stand ready to pay a reasonable part of his costs.

Overall, the rule enhances the image and effectiveness of the judiciary. No institution that regularly allows its costs to devour its benefits can merit respect. Provision for partial fees in most cases, and full fees in appropriate ones, goes a long way to advance the primary goal of the judicial system: the fair and efficient resolution of private disputes. ⊞

Taylor/Buchanan

(Continued from page 35)

*K. Phillip Taylor and Raymond W. Buchanan are authors, with David U. Strawn of the book, *Communication Strategies for Trial Lawyers*, published by Scott, Foresman and Co., and priced at $7.95 for the paperback edition.

1. M. Ludden, *In death penalty was, a short letup*, SENTINEL STAR, *December 8, 1981*, pp. 1, 6A.

2. *See* D. Phillip, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, AMERICAN JOURNAL OF SOCIOLOGY (July 1980) 139-148; G. Kleck, *Capital Punishment, Gun Ownership and Homicide*, AMERICAN JOURNAL OF SOCIOLOGY (January, 1979), 882-910; D. Lester, *Effect of Gary Gilmore's execution on homicide behavior*, PSYCHOLOGICAL REPORTS (December, 1980), 1262.

3. M. McLaughlin, T. Cheatham, K. Erickson, and B. Waggenspack, *Juror Perceptions of Participants in Criminal Proceedings*, J. OF APPLIED COMMNICATIONS RESEARCH 2 (November, 1979), 91-102.

4. *See* C. KIESLER, THE PSYCHOLOGY OF COMMITMENT, Academic Press, New York, New York 1971; B. Pryor, K.P. Taylor, R.W. Buchanan, D.U. Strawn, An Affective-Cognitive Consistency Explanation of Comprehension of Standard Jury Instructions, COMMUNICATION MONOGRAPHS (March, 1980), 68-76.

5. J. Cooper and S. Worchel, *Role of Undesired Consequences in Arousing Cognitive Dissonance*, 16 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 2 (1970), 199-206; J. Cooper, *Personal Responsibility and Dissonance: The Role of Foreseen Consequences*, J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 3 (1971), 354-363

6. V. BUGLIOSI and K. KURWITZ, TILL DEATH US DO PART, W.W. Norton & Co., New York, New York, 1978, pp. 364-365.

7. C. Millin, *The Jury System in Death Penalty Cases: A Symbolic Gesture*, LAW AND CONTEMPORARY PROBLEMS (Autumn 1980), 137-153.

8. *See* D. Myers and H. Lamm, *The Polarizing Effect of Group Discussion* PSYCHOLOGICAL BULLETIN, (1976), 602-627; K. P. Taylor, R.W. Buchanan, B. Pryor, D.U. Strawn, *How Do Jurors Reach a Verdict?* J. OF COMMUNICATION, (1981), 37-42; K. P. TAYLOR, R.W. BUCHANAN, D.U. STRAWN, COMMUNICATION STRATEGIES FOR TRIAL ATTORNEYS, Scott Foresman & Co., Glenview, Illinois 1984.

Special

(Continued from page 28)

statistics concerning volume," jurors, witnesses in law suits and, finally, other judges."

A major concern of the Report is "confidentiality"[19] as to the source of information, in order to protect the "informant" from "reprisal,"[20] presumably from the judge! The Report expressly rejects any concern that such a shield will be misused, encouraging vindictiveness or other meanly-based motives for attack upon the judge.

No corresponding concern appears for the reputation of a judge wrongly accused. The Report would keep the evaluations confidential "except to the extent required by the particular program."[21]

ANALYSIS AND RECOMMENDATIONS

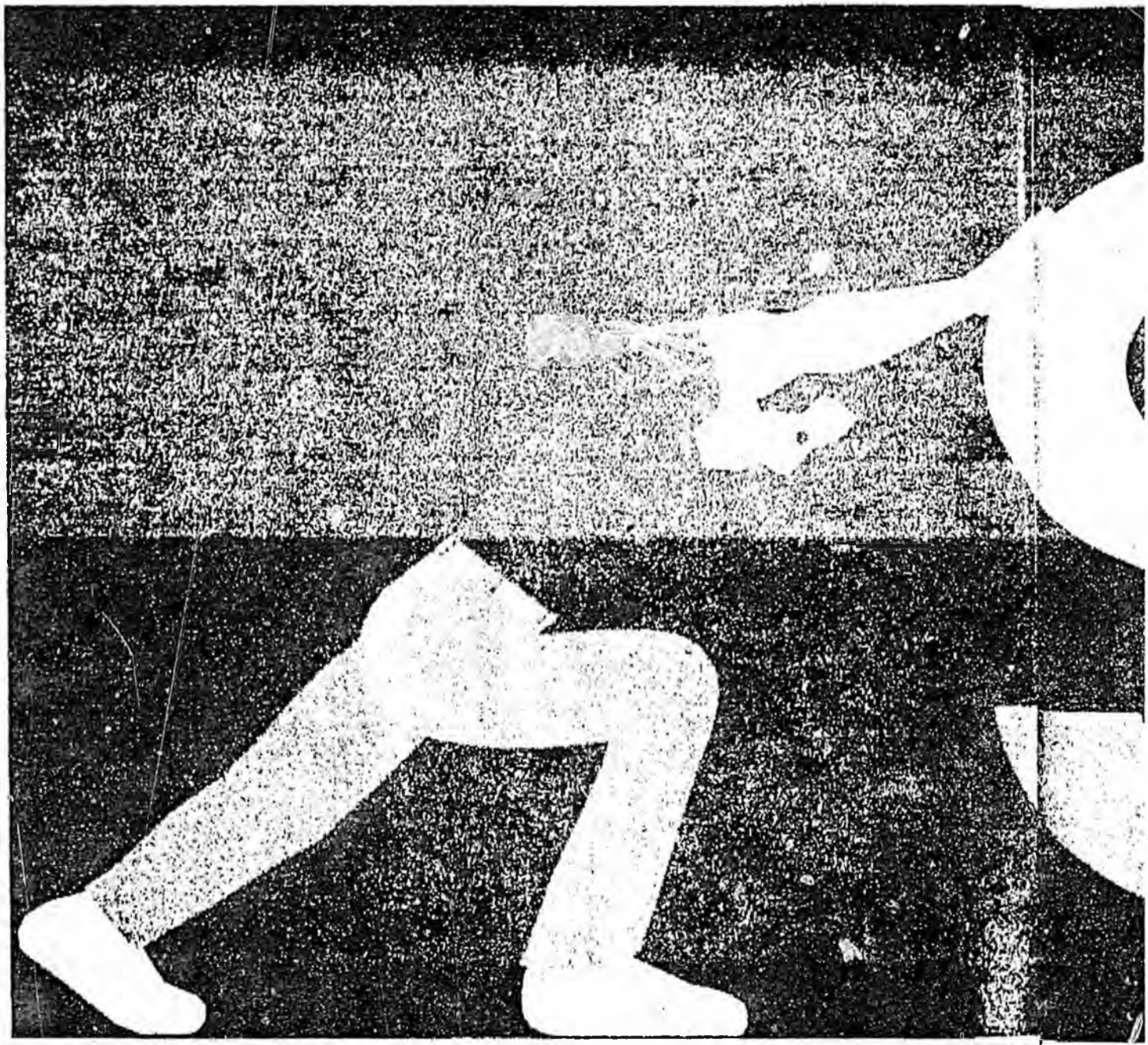
In the judgment of this committee, this Report proposes a dangerous intrusion upon judicial independence for reasons hereafter stated. The individual criticisms are such as to lead us to believe that our concerns for judicial independence cannot be overcome by mere modifications of the proposal.

(1) Judicial evaluation committees are superfluous. Judges are continually undergoing "judicial performance evaluations." The appellate process is precisely such an evaluation, on a case-by-case basis, of judicial performance. As a judge continues in the judicial system, the accumulation of appellate reviews constitutes a far more knowing description of judicial performance than any which could be provided by the proposed evaluation committees.

True, the appellate process does not deal with judicial temperament, mannerisms, punctuality, and matters of that sort except in the most egregious cases meriting comment or even reversal. On the other hand, such conduct is the very reason for the existence of our judicial discipline commissions.

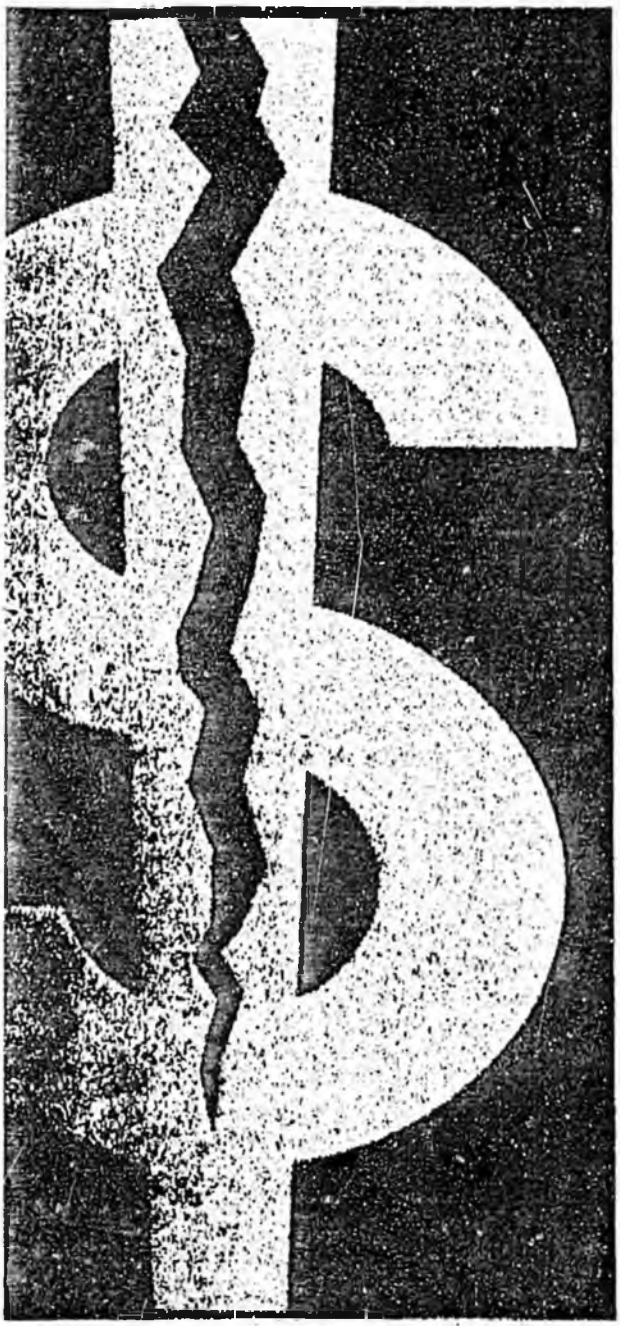
(2) *Reliability.* The information to be collected by the proposed judicial evaluation committee is almost guaranteed to be unreliable. The sources are most likely to be losers, the uninformed, and the merely venal. The design of record collecting and protection is such as to invite the comment of such people without any means whatever for evaluating its accuracy. Thus, the disgruntled clerk who is not permitted to catch a four o'clock train to his out-of-county home becomes a source of information; the lawyer, unfamiliar with the rules of evidence whose objection or tender of evi-

Alaska: Where the Loser Pays the Winner's Fees



Only one state has this provision (with an offer of judgment rule). How is it working?

By Andrew J. Kleinfeld



Alaska combines a federal-style Rule 68 offer of judgment rule with the English rule awarding attorneys' fees to the prevailing party in civil litigation. This article summarizes the Alaska system and discusses its effect on litigation and settlement.

Under Alaska Civil Rule 68, as under the federal rule, a party, ordinarily the defendant, may at any time prior to judgment make a formal offer to allow judgment to be taken against himself for a specified amount plus costs. If the plaintiff rejects the offer and subsequently wins a verdict lower than the amount of the offer plus interest, the defendant is deemed the prevailing party from the time of the offer and is entitled to costs from the time of the offer.

Costs (other than attorneys' fees) allowed under the rule are much less than actual out-of-pocket costs. For example, a party is likely to have to pay a physician who testifies in court $500 to $1,500 for routine, brief testimony, but will usually receive only the subpoena rate for expert witnesses—less than $50 in most cases—under Rule 68.

The Rule 68 offer would have little force were it not for Alaska's use of the English rule on attorneys' fees. The risk that a few hundred, or at most, a few thousand dollars in a costs award may be shifted will ordinarily not affect the settlement evaluation of a plaintiff anticipating an award ten or a thousand times as large.

The power of Rule 68 offers of judgment in Alaska derives from Civil Rule 82, requiring that the prevailing party should ordinarily recover partial com-

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pensation for attorneys' fees. The rule works slightly differently for plaintiffs and defendants. Rule 68 offers of judgment work mainly with defense awards, but both sides of the rule should be understood.

For successful plaintiffs, the courts ordinarily follow a schedule provided in the text of the rule. Cases are broken down into three categories: noncontested (defaulted); contested without trial (resolved after an answer or motion by defense but before trial); and contested through trial.

Awards on contested without trial cases are 20 percent of the first $2,000, 15 percent of the next $3,000, 12.5 percent of the next $5,000, and 7.5 percent of everything over $10,000. Thus, the substantial case entails an award of $1,475 plus 7.5 percent of everything over $10,000, if resolved before trial, as by acceptance of a Rule 68 offer of judgment—attorneys' fee awards being in addition to offer of judgment. If a case is tried, the Rule 82 award to a prevailing plaintiff is $1,850 plus 10 percent of the excess over $10,000.

Rule 82 computations are performed on the sum of the verdict and prejudgment interest. For example, a verdict of $100,000 three years after the accident yields a judgment of $131,500 with prejudgment interest at 10.5 percent and $145,500, including Rule 82 attorneys' fees at the contested rate of $1,850 plus 10 percent of the excess over $10,000. Thus, with costs, a $100,000 jury verdict yields about a $150,000 judgment after a typical lag.

On the defense side, the operative language of the rule is that the award should be "in a reasonable amount" which is "commensurate with the amount and value of legal services rendered." The Alaska Supreme Court has provided little guidance for trial judges on what this language means.

The Alaska Supreme Court has made it reversible error to award full or substantially full compensation for his attorney's fees to the prevailing party, if the unsuccessful party litigated in good faith. Awards are to "partially" compensate the prevailing party, not fully compensate him. *Malvo v. J.C. Penney Co., Inc.*, 512 P.2d 575 (Alaska 1973).

The Supreme Court will also reverse denial of attorneys' fees to the prevailing party without some good reason articulated by the trial judge. *Stordahl v. Government Employees Insurance Co.*, 564 P.2d 63 (Alaska 1977). The trial judge has broad discretion, but must award some partially compensatory amount based upon the actual work done and fees charged by the prevailing party's attorney.

Awards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not reversible. These awards can amount to substantial four- or even five-figure judgments against unsuccessful plaintiffs.

Here is how Rule 68 and Rule 82 fit together.

The defendant offers to allow the plaintiff to take judgment against him for x dollars plus costs and attorney's fees.

If the plaintiff accepts the offer, he may file a Rule 79 costs bill and move for a Rule 82 attorney's fee award, which will ordinarily be the scheduled "contested without trial" amount. For example, a $45,000 Rule 68 offer is worth $49,100 plus allowable Rule 79 costs, for a total in the neighborhood of $50,000. Prejudgment interest is already accounted for in the amount of the offer. Usually plaintiff's and defendant's attorneys agree on these amounts over the telephone and avoid the extra filings.

If the plaintiff rejects the Rule 68 offer and the case is tried to a verdict, a little arithmetic must be performed to determine which party obtains a Rule 82 attorney's fees award. The court must compute prejudgment interest to the date of the offer of judgment, using the amount of the verdict as the principal amount.

If the sum of the verdict plus interest is less than the offer of judgment, then the defendant is entitled to a Rule 82 award from the date of the offer to the date of judgment. This may be a great deal of money, since trial of a substantial case is likely to entail defense attorneys' fees of $10,000 to $50,000, or more, for protracted and complex litigation. The wise defendant will have made an offer of judgment early in the discovery process, so that most of the attorneys' fees will have been incurred after the Rule 68 offer and will be subject to Rule 82.

Thus, the plaintiff who wins an award lower than the Rule 68 offer plus interest faces an often catastrophic result. For example, in a personal injury case with a projected value in the $10,000 to $30,000 range, if the defendant makes a Rule 68 offer of $10,000, and the jury award with interest is less, the plaintiff will lose money on the litigation. The plaintiff will have to pay the defendant's attorney fees award—probably in the $5,000 to $10,000 range—and the plaintiff's own nonreimbursable costs for medical experts and so forth in the $1,000 to $5,000 range.

The knife also gets a little twist from a new Alaska statute on prejudgment interest. Under the statute, either side may make an offer of judgment within the first 60 days of the litigation, or five days after discovery ends. If the party does better than its offer

The rules do not substantially reduce the burden of attorneys' fees for successfu' plaintiffs

(lower for a defendant's offer, higher for a plaintiff's), then the prejudgment interest rate will be raised or lowered 2 percent for its benefit. Thus a plaintiff who wins a verdict higher than its offer is entitled to 12.5 percent prejudgment interest, and a successful defendant lowers the interest rate to 8.5 percent.

DO THESE RULES SERVE THEIR INTENDED PURPOSES?

This combination of rules is intended to serve two purposes—achieving more perfect justice between the litigants and encouraging settlement. They serve the latter objective better than the former.

The model villain, against whom the entire complex of rules is aimed, is the "bad man" who acknowledges the justice of the plaintiff's demand, but refuses to pay the obligation in order to profit from delay or use the plaintiff's anticipated litigation expenses as leverage to obtain an unjustly low settlement. The honest claimant, whom the rules are intended to benefit, is the person who demands what he is entitled to—and prevails. He is supposed to obtain sufficient interest and compensation for his attorneys' fees so that his victory is not Pyrrhic.

First, the rules do not substantially reduce the burden of attorneys' fees for successful plaintiffs. Here are the mechanics for typical contingent fee arrangements.

The scheduled percentages are much less than the percentages conventionally charged by plaintiffs' attorneys. Contingent fees in Alaska, as elsewhere, range from 25 percent to 50 percent. Most Alaska plaintiff attorneys' fee contracts, in my experience, provide that the Rule 82 award is rolled into the total recovery against which the contractual percentage is applied. Thus, if a case is settled, without trial, for the defendant's $100,000 liability insurance policy limit and Rule 82 attorneys' fees of $8,225, the usual one-third contingent fee will be applied to $108,225, yielding an actual fee of $36,075, and compensation to the plaintiff of only $72,150, a far cry from the $100,000 he should supposedly receive.

The obvious tinkering would be to limit attorneys' fees actually charged to the amount awarded, as in workers' compensation. But unless the scheduled percentages were raised to market levels, this might dry up the supply of attorneys willing to handle plaintiffs' personal injury claims, particularly the smaller ones.

Analogously, it has become extremely difficult during the last year or so for injured workers to hire attorneys in Alaska to prosecute moderately sized workers' compensation claims, because fees awarded by the workers' compensation board are below the amounts needed to make handling of the claims as profitable as alternative work.

If the Rule 82 schedule were raised to market rates, liability insurance premiums would have to be increased substantially in order to spread the much higher cost. This might well increase the amount of evasion of Alaska's very loose new mandatory insurance law.

If the rules designated the Rule 82 award as the amount actually to be paid to the plaintiff's attorney, an additional problem would develop around personal injury cases, resulting in judgments higher than the defendant's liability insurance policy limits A line of Alaska cases holds that the Rule 82 award should be calculated on the total verdict plus interest, not merely the policy limit. And unless the insurance policy clearly provides otherwise, the total verdict plus interest must be paid by the insurer as costs on top of its policy limit. If a defendant has a $100,000 policy limit, and the verdict plus prejudgment interest is $2 million, then the Rule 82 award is $200,850 (again, $1,850 + 10 percent of the excess over $10,000). Under current practice, the attorney would get his contingent fee percentage computed on the amount actually recovered from the insurance company—the $100,000 policy limit plus the $200,850 Rule 82 award and the Rule 79 costs would be rolled together, and the client would receive the rest. If the rules were changed so that the attorney received the Rule 82 award and nothing else, he would wind up with about twice as much as his client in this not extraordinary situation.

Second, the rules do not effectively discourage nuisance claims. These are claims for which the plaintiff knows that in all likelihood, a jury will find no liability or no damages, but suit is filed in hope of a settlement. If the case is litigated through trial, the defendant will probably win an award of $5,000 to $10,000 against the plaintiff, but the cost to the defendant will exceed the award, and the award will probably be uncollectible, so most defendants will pay up to $5,000 or so, even on frivolous claims.

Third, the rules do not really promote settlement in the manner contemplated. Alaska Supreme Court opinions have suggested that defendants would be more eager to settle because the stakes at trial are raised to include prejudgment interest and attorneys' fees. But the plaintiffs' attorneys are equally aware of the "add-ons" and factor them into their settle-

(Please turn to page 52)

matters to the disciplinary counsel, is that the ABA Standing Committee on Professional Discipline is advocating referring every minor infringement of the ethical rules.

Obviously, that is not the case; nor is it the problem. If I have overemphasized the need to refer misconduct in this article, it is because judges as a group are not referring the misconduct they observe or become aware of. I have attempted to show why referral is appropriate and also ethically mandated by Canon 3B(3). I believe that for the judge referral is usually the most advantageous response to lawyer misconduct.

Judges and judicial organizations interested in further information on disciplinary agencies or other information in this article may contact the author, Timothy McPike, ABA Center for Professional Responsibility, 11th Floor, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

Kleinfeld

(Continued from page 7)

ment demands. The arithmetic consequence is that if the plaintiff's and defendant's attorneys evaluate the case differently, the difference is magnified, not shrunk, by the "add-ons." Interest and attorney's fees are proportional, so if the parties are far apart, their mutual awareness of the rules pushes them further apart.

ECONOMIC DURESS ON PLAINTIFFS

A positive feature of the rules is that by making a small case larger, they make it easier for plaintiffs with small cases to induce attorneys to accept them. But this increasing of the stakes works both ways—and has a serious negative side effect.

The combination of Rule 68 offers, statutory adjustment of prejudgment interest rates, Rule 79 costs, and Rule 82 attorney's fees, greatly raises the stakes in litigation. As was shown above, if the defendant loses a $100,000 case, he pays about $150,000. If the plaintiff wins a $10,000 verdict after rejecting a higher offer of judgment, he winds up owing money to the defendant as well as to his own lawyer.

The economic effect is like doubling the stakes in a poker game. It drives out the players whose resources do not allow them to stay at the table for a long enough time for the probabilities to work themselves out beyond a few bad hands.

Plaintiffs suffer more from the increased stakes than defendants. To understand why, one must consider the varying abilities of persons and institutions to bear risk. An institutional defendant, such as a large business or an insurance company, can afford the risk of a single adverse judgment much more easily than the person or firm of moderate resources who rarely litigates.

Consider the plaintiffs in a clear liability but unpredictable damages case. Most typical are the preexisting condition plaintiffs. These individuals present themselves to the jury with substantial disabilities, but the defendant has a good opportunity to show that their disabilities should be attributed to conditions which preexisted the accident. It is not at all unusual in these cases to have an offer of judgment around $50,000, a demand around $100,000, and jury verdict substantially lower than the offer or higher than the demand.

Now consider the risks to each side. In order to try the case, the defendant must risk a judgment which, with interest and attorneys' fees, may be twice the demand. But a professional litigant, such as a liability insurer, would be wise to take this risk rather than pay the demanded amount, because the occasional high verdict will be more than offset by the general run of moderate verdicts and the occasional low one.

The real pressure on insurers to settle these cases arises not from the interest and attorneys' fees rules, but instead from the risk of a judgment in excess of insurance policy limits, leading to a bad faith claim. Many cases worth $40,000 have settled for $50,000 policy limits plus Rule 82 attorneys' fees because of the bad faith risk. But sophisticated insurers are now learning to take the cap off their policy limit rather than be forced by the risk of a bad faith claim to pay more than a claim is worth.

The plaintiff faces a much more brutal choice. This is probably the only lawsuit he will ever have, so he cannot balance the occasional low verdict against the occasional high one. His resources are probably limited, so the difference between collecting the offered settlement and perhaps collecting nothing—because of a verdict lower than the offer of judgment—matters more to him than the same dollar difference matters to the institutional defendant. A four-or five-figure judgment against him for attorneys' fees and costs, because he did not beat the defendant's offer of judgment or lost on liability, may be catastrophic.

As a practical matter, if the defendant makes an offer of judgment early in the litigation at the low end of the likely value of the case, or even 10 percent to 20 percent less, the plaintiff takes an imprudent and unaffordable risk if he rejects it. The risk is made unaffordable by the impact of Rule 68, Rule 82, Rule 79 costs, and the new interest statute. In effect, the defendant is empowered to turn the plaintiff's reasonable bet on the outcome into a double or nothing bet which the plaintiff cannot prudently risk. The chance of recovering his loss plus all the add-ons is not worth the risk of having defendant's add-ons set off against his recovery.

When a plaintiff runs the risk of trial against a moderate offer of judgment and loses, the defendant often has enough leverage to prevent appeal. Typically the defendant offers to drop his costs and attorneys' fee awards in exchange for the plaintiff's aban-

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MEMORANDUM

TO: House Judiciary members

FROM: Rep. John Sund

DATE: April 24, 1986

RE: The state of our insurance companies

I have distributed a copy of an internal memo from the Division of Insurance which indicates that Alaska's insurance companies are far from hurting during our nationwide "insurance crisis."

Note especially the summary — first paragraph on page 4.

MEMORANDUM State of Alaska

TO: John L. George, Director

DATE: March 17, 1986

FILE NO.:

THRU:

TELEPHONE NO.:

SUBJECT: 1985 Underwriting Results
Other Liability

FROM: Donald DeMuth
Chief Financial Examiner

You have asked me to review the underwriting results of approximately the 10 leading writers of the line "Other Liability" "(17)" in the State of Alaska. The results of my study follow.

You will note that I have actually supplied statistics on 13 companies. The reason for the three additional companies are: You stated that you did not want companies like "State Farm" - companies that are not traditionally considered to be writers of Other Liability included. For this reason, I did not know if you wanted ARECA Insurance Exchange included or not. I added one company and you may exclude "ARECA" if you wish. I also question the accuracy of the Continental Insurance Company's Alaska direct losses incurred figure, and both noted a probable aberration in schedule "P" figures and am aware that CIGNA made some big reserve adjustments which may well be without basis at year-end, and which may have skewed Alaska Pacific Assurance Company's figures. You may, hence, eliminate the figures for these two companies if you wish and still be left with the statistics on 10 companies. I also eliminated the figures for the Insurance Company of North America as their page 14 figures for this line are probably erroneous and meaningless.

The first area of experience that I looked at was the company's direct underwriting results in Alaska. The results are summarized as follows:

Rank by Premium Written In Alaska		Alaska Direct Premium Written	Alaska Direct Premium Earned	Alaska Direct Losses Paid	Alaska Direct Losses Incurred	Alaska Loss Ratio
12	Federal Insurance Company	$ 759,348	$ 556,132	$ 4,380	$ 32,347	5.8%
13	The Continental Ins. Co.	552,533	558,869	299,050	(387,290)	*
	Pacific Marine Insurance Co. of Alaska	792,416	808,528	150,530	245,804	30.4%
2	Alaska National Ins. Co.	3,938,343	2,703,705	1,581,666	2,173,774	80.4%
1	AK Pacific Assurance Co.	4,148,556	4,329,380	1,845,266	2,960,272	68.4%
7	Fremont Indemnity Co.	1,581,809	1,600,374	283,530	856,617	53.5%
9	ARECA Insurance Exchange	975,398	975,398	50,849	175,312	18.0%
6	Providence Washington Insurance Co. of Alaska	1,827,910	2,424,073	4,275,334	2,817,529	116.2%

5	Industrial Indemnity Company of Alaska	1,838,269	1,842,175	1,226,617	1,423,207	77.3%
4	Alaska Insurance Company	1,870,196	1,539,729	576,349	896,926	58.3%
3	Nat'l Union Fire Ins. Co.	3,732,736	2,636,895	170,668	677,159	21.9%
11	Employers Insurance of Wausau, A Mutual Company	759,889	675,147	124,435	992,116	147.0%
8	General Accident Ins. Company of America	1,004,405	996,593	22,857	733,765	75.7%
		$23,781,808	$21,649,998	$10,621,731	$13,497,538	62.3%

* Meaningless

The column above entitled "Alaska Direct Losses Paid" is not of much significance. I included it only to illustrate the great disparity between losses paid and losses incurred in certain cases. There are a number of possible reasons for this disparity, but I cannot identify which reason is responsible for the cases reflected in the above exhibit.

For comparative purposes, I attempted to develop the same information for the same companies on a national basis. The companies are not required to provide this information on a national basis, but a few companies volunteer and, hence, complete page 14 of the annual statement on a national basis. The results of this comparative study does not reveal very much information, but the results are as follows:

Rank by Premium Written In Alaska		National Direct Premium Written	National Direct Premium Earned	National Direct Losses Paid	National Direct Losses Incurred	National Loss Ratio
12	Federal Insurance Company	Information not available.				
13	The Continental Ins. Co.	Information not available.				
10	Pacific Marine Insurance Co. of Alaska	Information not available.				
2	Alaska National Ins. Co.	Information not available.				
1	AK Pacific Assurance Co.	Information not available.				
7	Freemont Indemnity Co.	$31,645,042	$34,211,163	$25,679,707	$53,934,431	157.0%
9	ARECA Insurance Exchange	National experience same as Alaskan experience.				
6	Providence Washington Insurance Co. of Alaska	Information not available.				
5	Industrial Indemnity Company of Alaska	Information not available.				
4	Alaska Insurance Company	National experience same as Alaskan experience.				
3	Nat'l Union Fire Ins. Co.	Information not available.				
11	Employers Insurance of Wausau, A Mutual Company	Information not available.				
8	General Accident Ins. Company of America	Information not available.				

In an attempt to get some kind of comparative information - Alaska vs. National - I then decided to take a look at the same companies' net national business. This is not a direct comparison due to the fact that net business is net of assumed and ceded reinsurance, but the annual statement does not reflect direct national premium earned, only written, so I had no choice.

The result of this study is as follows:

Rank By Premium Written In Alaska		National Net Premium Written	National Net Premium Earned	National Net Losses Paid	National Net Losses Incurred	National Net Loss Ratio
12	Federal Insurance Company	$223,854,784	$166,392,450	$ 42,483,524	$ 85,539,084	51.4%
13	The Continental Ins. Co.	38,763,790	32,026,227	19,576,743	30,650,173	95.7%
10	Pacific Marine Insurance Co. of Alaska	Not Applicable				
2	Alaska National Ins. Co.	2,077,776	1,547,010	222,217	1,051,834	68.0%
1	AK Pacific Assurance Co.	3,884,456	3,271,879	3,995,018	5,151,751	157.5%
7	Freemont Indemnity Co.	33,624,745	26,542,239	11,277,702	36,844,816	138.8%
9	ARECA Insurance Exchange	823,895	823,895	50,949	175,312	21.3%
6	Providence Washington Insurance Co. of Alaska	Not Applicable				
5	Industrial Indemnity Company of Alaska	Not Applicable				
4	Alaska Insurance Company	Not Applicable				
3	Nat'l Union Fire Ins. Co.	357,841,310	283,621,245	80,724,018	222,277,500	78.4%
11	Employers Insurance of Wausau, A Mutual Company	112,716,611	104,759,066	73,570,268	73,177,983	69.9%
8	General Accident Ins. Company of America	31,868,701	29,249,804	10,955,921	20,886,903	71.4%
		$805,656,070	$648,233,815	$242,856,260	$475,756,156	73.4%

I also felt that it might be interesting to make a similar review on an accident year basis rather than on a calendar year basis. The reason for this comparative review is that reserve changes made during 1985 applicable to prior year business is reflected in the calendar year 1985 experience, but not in the 1985 accident year experience. The accident year business only reflects the company's experience on accidents that actually happened during 1985. The result of this review is as follows:

Rank By Premium Written In Alaska		Nat'l Net 1985 Accident Year Premium Earned	Nat'l Net 1985 Accident Year Loss Payments	Nat'l Net 1985 Accident Year Losses Incurred	Nat'l Net 1985 Accident Year Loss Ratio
12	Federal Insurance Company	$166,392,450	$ 8,109,100	$ 77,210,574	46.4%
13	The Continental Ins. Co.	32,026,247	1,618,902	24,550,326	76.7%

10	Pacific Marine Insurance Co. of Alaska	Not Applicable			
2	Alaska National Ins. Co.	1,547,010	34,420	1,012,476	65.5%
1	AK Pacific Assurance Co.	3,271,879	414,259	2,790,689	85.3%
7	Fremont Indemnity Co.	26,542,239	1,605,638	26,435,512	100.0%
9	ARECA Insurance Exchange	823,895	30,435	362,961	44.1%
6	Providence Washington Insurance Co. of Alaska	Not Applicable			
5	Industrial Indemnity Company of Alaska	Not Applicable			
4	Alaska Insurance Company	Not Applicable			
3	Nat'l Union Fire Ins. Co.	283,621,245	7,168,480	211,149,406	74.5%
11	Employers Insurance of Wausau, A Mutual Company	104,759,072	6,085,504	50,311,511	48.0%
8	General Accident Ins. Company of America	29,249,801	1,126,201	16,247,129	55.6%
		$548,233,838	$ 26,192,939	$410,070,584	63.3%

Overall, in spite of all the tears that the insurance industry is shedding, it appears to me that the insurance industry is doing quite well for this line. Unfortunately, accident year direct statistics are not available for Alaska, but I would guesstimate that if they were, they would reflect a loss ratio down around 50%. I also note that the paid loss ratio for accident year 1985, on a national basis, is down around 4%. Fat city on investment income coming up in 1986, particularly in those states that do not allow pre- and postjudgment interest.

I would suggest that you have your market conduct "rate section" follow-up on this memo - perhaps doing some research work in some of the companies offices. I hope to take a look at Providence Washington Insurance Company of Alaska and Industrial Indemnity Insurance Company of Alaska shortly, as both are overdue for an examination.

I would also suggest that you have your rate people perhaps take a look at 1984 experience for comparative purposes. It might also be interesting to do a policy year review of the same companies for 1984. This information should now be available but it is not reported in the annual statement. It would entail a special statistical call.

All figures reflected in this memo were taken from filed annual statements, but I have no idea how accurate the information is.

DD/mst3523m
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IN THE LEGISLATURE
of the
STATE OF WASHINGTON

CERTIFICATION OF ENROLLED ENACTMENT

SUBSTITUTE SENATE BILL NO. 4630

Chapter 305, Laws of 1986

49th Legislature
Regular Session

EFFECTIVE DATE: June 11, 1986
Except: Section 904 which becomes effective on April 4, 1986.

Passed the Senate February 15, 19 86
Yeas 32 *Nays* 13

Passed the House March 6, 19 86
As Amended
Yeas 66 *Nays* 31

3/10/86 - The Senate concurred in the House amendments and passed the bill as amended by the House.

YEAS 31 NAYS 16

CERTIFICATE

I, Sidney R. Snyder, Secretary of the Senate of the State of Washington do hereby certify that the attached is enrolled Substitute Senate Bill No. 4630 *as passed by the Senate and the House of Representatives on the dates hereon set forth.*

Secretary of the Senate

ENGROSSED SUBSTITUTE SENATE BILL NO. 4630
AS AMENDED BY THE HOUSE

State of Washington 49th Legislature 1986 Regular Session
by Committee on Judiciary (originally sponsored by Senator Talmadge)

Read first time 2/5/86.

AN ACT Relating to civil actions; amending RCW 5.60.060, 4.22.030, 51.24.060, 4.16.350, 4.24.115, 4.16.160, 4.16.310, and 4.16.300; adding a new section to chapter 4.22 RCW; adding new sections to chapter 4.24 RCW; adding new sections to chapter 4.56 RCW; adding new sections to chapter 5.40 RCW; adding a new section to chapter 7.70 RCW; adding a new section to chapter 48.19 RCW; adding a new section to chapter 48.22 RCW; creating new sections; repealing RCW 4.56.240; and declaring an emergency.

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

NEW SECTION. Sec. 100. PREAMBLE. Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance. In order to improve the availability and affordability of quality governmental services, comprehensive reform is necessary.

The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from

initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.

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 charges against the defendant, nor to a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian, nor to a proceeding under chapter 71.05 RCW: PROVIDED That the spouse of a person sought to be detained under chapter 71.05 RCW may not be compelled to testify and shall be so informed by the

court prior to being called as a witness.

(2) An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

(3) A clergyman or priest shall not, without the consent of a person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

(4) A ((regular)) physician or surgeon or osteopathic physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient, ((but--this--exception-shall-not-apply-in-any-judicial proceeding-regarding-a-child's-injuries,-neglect-or-sexual-abuse,--or 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 to read as follows:

The court shall, upon petition by a named party in any tort action, except those provided for in RCW 7.70.070, 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.

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, nonconetary 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 humiliation, and destruction of the parent-child relationship.

(c) "Bodily injury" means physical injury, sickness, or disease, including death.

"Average annual wage" means the average annual wage in the state of Washington as determined under RCW 50.04.355.

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) 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 for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or

marking.

Sec. 402. Section 11, chapter 27, Laws of 1961 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 the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for compensation and benefits paid;

(i) The department and/or self-insurer shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary to the extent of the benefits paid or payable under this title: PROVIDED, That the department or self-insurer may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and attorneys' fees.

(ii) The sum representing the department's and/or self-insurer's proportionate share shall not be subject to subsection (1) (d) and (e) of this section.

(d) Any remaining balance shall be paid to the injured worker or

beneficiary;

(e) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance. Thereafter, such 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;

(f) If the employer or a co-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 party claim has been included to reflect that portion of the award or settlement which is reimbursed for compensation and benefits paid and, if the claim is open at the time of recovery, applied against further compensation and benefits to which the injured worker or beneficiary may be entitled.

(5) In an action under this section, the self-insurer may act on behalf and for the benefit of the department to the extent of any

compensation and benefits paid or payable from state funds.

(6) It shall be the duty of the person to whom any recovery is paid before distribution under this section to advise the department or self-insurer of the fact and amount of such recovery, the costs and reasonable attorneys' fees associated with the recovery, and to distribute the recovery in compliance with this section.

(7) The distribution of any recovery made by award or settlement of the third party action shall be confirmed by department order, served by registered or certified mail, and shall be subject to chapter 51.52 RCW. In the event the order of distribution becomes final under chapter 51.52 RCW, the director or the director's designee may file with the clerk of any county within the state a warrant in the amount of the sum representing the unpaid lien plus 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 or beneficiary within three days of filing with the clerk.

(8) The director, or the director's designee, may issue to any person, firm, corporation, municipal corporation, political

subdivision of the state, public corporation, or agency of the state, a notice and order to withhold and deliver property of any kind if he or she has reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property which is due, owing, or belonging to any worker or beneficiary upon whom a warrant has been served by the department for payments due to the state fund. The notice and order to withhold and deliver shall be served by the sheriff of the county or by the sheriff's deputy, or by any authorized representatives of the director. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice and order to withhold and deliver. In the event there is in the possession of the party named and served with such no order, any property which may be subject to the c department, such property shall be delivered forthwi director or the director's authorized representative upon d the party served and named in the notice and order fails to answe 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 section shall affect a right of action under 42 U.S.C. Sec. 1983.

Sec. 502. Section 1, chapter 80, Laws of 1971 as amended by section 1, chapter 56, Laws of 1975-'76 2nd ex. sess. and RCW 4.16.350 are each amended to read as follows:

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976 against:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) 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-this-section-shall-not-apply-to-persons-under-a-legal disability-as-defined-in-RCW-4:16:190)).

PART VI

INDEMNIFICATION AGREEMENTS

Sec. 601. Section 2, chapter 46, Laws of 1967 ex. sess. and RCW 4.24.115 are each amended to read as follows:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property:

(1) Caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable;

(2) Caused by or resulting from the concurrent negligence of (a) the indemnitee or the indemnitee's agents or employees, and (b) the indemnitor or the indemnitor's agents or employees, is valid and enforceable 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 statute may have run and become fully operative as a defense prior to February 27, 1903, nor shall any cause of action against the state be predicated upon such a statute.

Sec. 702. Section 2, chapter 75, Laws of 1967 and RCW 4.16.310 are each amended to read as follows:

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: PROVIDED, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes

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 or property damage in which a verdict or award for future economic damages of at least one hundred thousand dollars is made, the court or arbitrator shall, at the request of a party, enter a judgment which provides for the periodic payment in whole or in part of the future economic damages. With respect to the judgment, the court or arbitrator shall make a specific finding as to the dollar amount of periodic payments intended to compensate the judgment creditor for the future economic damages.

(2) Prior to entry of judgment, the court shall request each party to submit a proposal for periodic payment of future economic damages to compensate the claimant. Proposals shall include provisions for: The name of the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, the number of payments or the period of time over which the payments shall be made, modification for hardship or unforeseen

circumstances, posting of adequate security, and any other factor the court deems relevant under the circumstances. After each party has submitted a proposal, the court shall select the proposal, with any changes the court deems proper, which in the discretion of the court and the interests of justice best provides for the future needs of the claimant 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 obligation of the judgment debtor to make further payments shall cease and any security posted pursuant to this section shall revert to the judgment debtor.

NEW SECTION. Sec. 802. Section 5, chapter 56, Laws of 1975-'76 2nd ex. sess. and RCW 4.56.240 are each repealed.

PART IX

MISCELLANEOUS

NEW SECTION. Sec. 901. A new section is added to chapter 5.40 RCW to read as follows:

Sec. 901

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to electrical fire safety, the use of smoke alarms, or driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

NEW SECTION. Sec. 902. A new section is added to chapter 5.40 RCW to read as follows:

It is a complete defense to an action for damages for personal injury or wrongful death that the 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 school district 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.

NEW SECTION. Sec. 905. A new section is added to chapter 7.70 RCW to read as follows:

Members of the board of directors or other governing body of a public or private hospital are not individually liable for injuries resulting from health care administered by a health care provider granted privileges to provide health care at the hospital unless the decision to grant the privilege to provide health care at the hospital constitutes gross negligence.

NEW SECTION. Sec. 906. A new section is added to chapter 48.22 RCW to read as follows:

The commissioner shall by regulation require insurers authorized to write casualty insurance in this state to form a market assistance plan to assist persons and other entities unable to purchase casualty insurance in an adequate amount from either the admitted market or nonadmitted market.

For the purpose of this section, a market assistance plan means a voluntary mechanism by insurers 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 in such casualty rate filing. Upon determining that data in support of such a credit is actuarially credible, the commissioner shall approve or disapprove such casualty rate filing in accordance therewith. The commissioner shall not approve any casualty rate that is inadequate, excessive, or unfairly discriminatory.

NEW SECTION. Sec. 908. The commissioner shall, as chairman of the tort reform study commission, require the task force to study the effectiveness of joint underwriting authorities throughout the United States to specifically determine:

(1) The price as it relates to a filed Insurance Services Organization rate;

(2) The solvency of such mechanisms;

3) The effect it has on the admitted market;

(4) The effect it has on the nonadmitted market;

(5) The effect or availability on the voluntary market; and

(6) What effect it has on lines or classes of insurance not designated.

NEW SECTION. Sec. 909. The insurance commissioner shall submit a report to the legislature by January 1, 1991, on the effects of this act on insurance rates and the 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.

Passed the Senate March 10, 1986.

John A. Cherberg
President of the Senate.

Passed the House March 6, 1986.

Speaker of the House.

Approved April 4, 1986

Governor of the State of Washington

FILED

APR 4 1986

SECRETARY OF STATE
STATE OF WASHINGTON

7:37 pm.

"(2) First time homebuyer requirement.—The amendments made by subsection (c) [amending subsec. (e)] shall also apply to obligations issued after April 24, 1979, and before the date of the enactment of this Act [Sept. 3, 1982] but only to the extent that the proceeds of such obligations are not committed as of the date of the enactment of this Act [Sept. 3, 1982]."

For effective dates of further amendments to this section by Pub.L. 97-248 with respect to applicability to obligations issued after December 31, 1982, see section 310(d) of Pub.L. 97-248.

Effective Date of 1980 Amendment. Pub.L. 96-595, § 5(c), provided that the amendment by Pub.L. 96-595 shall take effect as if included in the amendments made by section 1102 of Pub.L. 96-499.

Effective Date. Pub.L. 96-499, § 1104, as amended by Pub.L. 97-248, § 221(c)(2), provided that, except as otherwise provided in section 1104(a)(2) through (*o*)(2) of Pub.L. 96-499, this section shall apply to obligations issued after Apr. 24, 1979.

§ 104. Compensation for injuries or sickness

(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

(3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980; and

(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a violent attack which the Secretary of State determines to be a terrorist attack and which occurred while such individual was an employee of the United States engaged in the performance of his official duties outside the United States.

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c)(1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee.

(b) Termination of application of subsection (a)(4) in certain cases.—

(1) In general.—Subsection (a)(4) shall not apply in the case of any individual who is not described in paragraph (2).

(2) Individuals to whom subsection (a)(4) continues to apply.—An individual is described in this paragraph if—

(A) on or before September 24, 1975, he was entitled to receive any amount described in subsection (a)(4),

(B) on September 24, 1975, he was a member of any organization (or reserve component thereof) referred to in subsection (a)(4) or under a binding written commitment to become such a member,

(C) he receives an amount described in subsection (a)(4) by reason of a combat-related injury, or

(D) on application therefor, he would be entitled to receive disability compensation from the Veterans' Administration.

(3) Special rules for combat-related injuries.—For purposes of this subsection, the term "combat-related injury" means personal injury or sickness—

(A) which is incurred—

(i) as a direct result of armed conflict,

(ii) while engaged in extrahazardous service, or

(iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

In the case of an individual who is not described in subparagraph (A) or (B) of paragraph (2), except as provided in paragraph (4), the only amounts taken into account under subsection (a)(4) shall be the amounts which he receives by reason of a combat-related injury.

(4) Amount excluded to be not less than veterans' disability compensation.—In the case of

any individual described in paragraph (2), the amounts excludable under subsection (a)(4) for any period with respect to any individual shall not be less than the maximum amount which such individual, on application therefor, would be entitled to receive as disability compensation from the Veterans' Administration.

(c) Cross references.—

(1) For exclusion from employee's gross income of employer contributions to accident and health plans, see section 106.

(2) For exclusion of part of disability retirement pay from the application of subsection (a)(4) of this section, see section 1403 of title 10, United States Code (relating to career compensation laws).

(Aug. 16, 1954, c. 736, 68A Stat. 30; Sept. 8, 1960, Pub.L. 86-723, § 51, 74 Stat. 847; Oct. 10, 1962, Pub.L. 87-792, § 7(d), 76 Stat. 829; Oct. 4, 1976, Pub.L. 94-455, Title V, § 505(b), (e), Title XIX, § 1901(a)(18), 90 Stat. 1567, 1568, 1766; Oct. 17, 1980, Pub.L. 96-465, Title II, § 2206(e)(1), 94 Stat. 2162; Jan. 14, 1983, Pub.L. 97-473, Title I, § 101(a), 96 Stat. 2605.)

Editorial Notes

Effective Date of 1983 Amendment. Pub.L. 97-473 amended subsec. (a)(2) to exclude from gross income damages received as lump sums or as periodic payments, applicable to taxable years ending after Dec. 31, 1982.

References in Text. Section 831 of the Foreign Service Act of 1946, referred to in subsec. (a) (4), is classified to 22 U.S.C.A. § 1081, Foreign Relations and Intercourse.

§ 105. Amounts received under accident and health plans

(a) Amounts attributable to employer contributions.—Except as otherwise provided in this section, amounts received by an employee through accident or health insurance for personal injuries or sickness shall be included in gross income to the extent such amounts (1) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (2) are paid by the employer.

(b) Amounts expended for medical care.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include amounts referred to in subsection (a) if such amounts are paid, directly or indirectly, to the taxpayer to reimburse the taxpayer for expenses incurred by him for the medical care (as defined in section 213(d)) of the taxpayer, his spouse, and his dependents (as defined in section 152). Any child to whom section 152(e) applies shall be treated as a dependent of both parents for purposes of this subsection.

(c) Payments unrelated to absence from work.—Gross income does not include amounts referred to in subsection (a) to the extent such amounts—

(1) constitute payment for the permanent loss or loss of use of a member or function of the body, or the permanent disfigurement, of the taxpayer, his spouse, or a dependent (as defined in section 152), and

(2) are computed with reference to the nature of the injury without regard to the period the employee is absent from work.

[(d) Repealed. Pub.L. 98-21, Title I, § 122(b), Apr. 20, 1983, 97 Stat. 87.]

(e) Accident and health plans.—For purposes of this section and section 104—

(1) amounts received under an accident or health plan for employees, and

(2) amounts received from a sickness and disability fund for employees maintained under the law of a State or the District of Columbia,

shall be treated as amounts received through accident or health insurance.

(f) Rules for application of section 213.—For purposes of section 213(a) (relating to medical, dental, etc., expenses) amounts excluded from gross income under subsection (c) or (d) shall not be considered as compensation (by insurance or otherwise) for expenses paid for medical care.

(g) Self-employed individual not considered an employee.—For purposes of this section, the term "employee" does not include an individual who is an employee within the meaning of section 401(c)(1) (relating to self-employed individuals).

(h) Amount paid to highly compensated individuals under a discriminatory self-insured medical expense reimbursement plan.—

(1) In general.—In the case of amounts paid to a highly compensated individual under a self-insured medical reimbursement plan which does not satisfy the requirements of paragraph (2) for a plan year, subsection (b) shall not apply to such amounts to the extent they constitute an excess reimbursement of such highly compensated individual.

insurance contracts did not qualify as insurance under the estate tax law.

In the instant case the taxpayer is considered to have purchased two contracts, one a life annuity contract and the other a contract which, while designated a life insurance contract, has no element of "insurance" and is, therefore, not a contract of the type contemplated in section 101(a) of the Code.

Accordingly, it is held that the annual payments received under the annuity contract will be subject to the provisions of section 72(b) of the Code. The proceeds of the other contract, even though received by reason of the insured's death, will not be excludable from gross income under section 101(a) of the Code and will be subject to income tax to the extent they exceed the net premiums paid for that contract.

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26 CFR 1.101–2: Employees' death benefits.

Treatment of payments under annuity contracts purchased by certain exempt organizations. See T.D. 6783, page 180.

SECTION 104.—COMPENSATION FOR INJURIES OR SICKNESS

26 CFR 1.104–1: Compensation for injuries or sickness. (Also Section 61; 1.61–1.)

Rev. Rul. 65–29

Income realized from the investment of a lump-sum payment representing the discounted present value of a damage award for personal injuries is not excludable from gross income under section 104 of the Internal Revenue Code of 1954.

Advice has been requested whether income realized from the investment of a damage award computed as stated below may be excluded from the taxpayer's gross income under section 104(a) of the Internal Revenue Code of 1954 for any period of time.

A sued *B* for tortious injury to his spouse. The Court found that due to *B*'s negligence *A*'s spouse was rendered 100 percent and permanently disabled, and that her life expectancy was thereby shortened to 10 years. The reasonable cost of care, medicine, and medical attention was found to be 1 x dollars per week, totaling 520 x dollars (1 x dollars times 52 weeks times 10 years).

The Court awarded *A* 416 x dollars, which amount represents the present value of 520 x dollars payable over a 10-year period.

Section 61(a) of the Code provides that except as otherwise provided in subtitle A, gross income means all income from whatever source derived, expressly including various types of investment income.

Section 104(a)(2) of the Code provides, in relevant part, that gross income does not include the amount of any damages received by suit or agreement on account of personal injuries or sickness.

As *A* has unfettered control over the lump-sum payment and over the income from the investment of such payment, it is concluded that

only the lump-sum payment, 416 x dollars, is received as damages within the meaning of section 104(a)(2) of the Code.

Accordingly, it is held that none of the investment income may be excluded from the gross income of A, under section 104 of the Code.

SECTION 107.—RENTAL VALUE OF PARSONAGES

26 CFR 1.107–1: Rental value of parsonages. Rev. Rul. 65–124
(Also Sections 1402, 3121, 3401; 1.1402(a)–11, 31.3121(b)(8)–1, 31.3401(a)(9)–1.)

Unordained members of a religious denomination which provides for ordination of ministers, who are commissioned by a church or a related religious organization without investing them with the authority of ordained ministers, do not qualify as ministers of the gospel for purposes of section 107 of the Internal Revenue Code of 1954.

Further, such individuals may not be regarded as "duly ordained, commissioned, or licensed ministers of a church" for purposes of section 3121(b)(8)(A) of the Federal Insurance Contributions Act, section 1402(e) of the Self-Employment Contributions Act, as amended, or section 3401(a)(9) of the Code relating to the Collection of Income Tax at Source on Wages.

Advice has been requested whether unordained religious workers, members of a religious denomination which provides for ordination of ministers, who have been commissioned by a church, denominational convention, religious organization, or integral agencies thereof under the circumstances described below, qualify as ministers of the gospel for purposes of section 107 of the Internal Revenue Code of 1954.

An administrative denominational convention adopted a resolution which provided that, in order to clarify the status of those serving as ministers of education, ministers of music, and those serving in the administration and maintenance of religious organizations and their integral agencies who have been ordained, commissioned, or licensed by a church as such, or who have been commissioned by a denominational convention or its integral agencies to serve in an administrative capacity in that convention and who are deemed to be serving in the capacities as stated above, shall be recognized as commissioned ministers of the gospel.

Pursuant to this resolution, the individuals involved were commissioned by their respective churches, the denominational convention, religious organizations, and integral agencies thereof.

In one instance, the resolution of a State convention stated that for many years the convention had employed lay workers to do full-time religious work, operating under the same regulations and with the same benefits as clergy employees. This resolution further stated that it was the opinion of the convention that these lay employees, even though not ordained, were definitely commissioned as religious workers and were giving their life to that work. Pursuant to this resolution several lay workers were commissioned by a committee of the State convention to serve in a promotional and administrative capacity.

In another instance, an individual was licensed to preach by a local church, but such license did not clothe him with the authority to perform sacerdotal functions of the church usually performed by a pastor or assistant pastor. If called to a pastoral position he then would be ordained accordi
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rived from investing the original proceeds of the series B issue in 4.345-percent Treasury obligations. (However, the yield on the acquired obligations, taking into account $15,000 of administrative costs paid on January 1, 1983, would be only 4.252 percent. The yield on the series B issue would also be 4.252 percent.)

(9) Column E of Table II shows when the original proceeds of the series B issue would be spent. The original proceeds would be $4,915,000 (*i.e.*, $4,950,000 less issuing expenses of $35,000). All these original proceeds would be used to pay interest on the prior issue except for $15,000 that would be used to pay administrative costs of investing the original proceeds of the series B issue.

(10) Column F of Table II shows administrative costs of carrying and repaying the series B issue and investing the proceeds of the series B issue. These administrative costs would be paid with investment proceeds of the series B issue.

(11) Column G of Table II shows the amount of original proceeds of the series B issue that would be invested in Treasury obligations as of the end of the corresponding day in column A.

(12) Column H of Table II shows small amounts of original and investment proceeds of the series B issue that would be kept in a checking account. These amounts would be temporary investments (see § 1.103-14(e)(3)(ix)).

(d) Based on items (a), (b), and (c) of this example, the following conclusions may be drawn:

(1) All of the excess proceeds of the series B issue and substantially all (*i.e.*, all but $6,106) of the excess proceeds of the series A issue would be used to pay principal and interest on the series B issue.

(2) All of the excess proceeds of the series B and series A issues would be investment proceeds.

(3) All of the principal and interest on the series B issue would be paid with proceeds of the series B and series A issues.

(4) The series B issue would be discharged on January 1, 1990, the same day as the prior issue.

(5) The proceeds of the series B issue would not be spent faster than principal and interest on the series B issue and administrative costs of the series B issue would be paid. For example, on January 1, 1984, $956,500 of proceeds of the series B would have been spent (*i.e.*, $752,416 of original proceeds plus $204,084 of investment proceeds), which is the same as the $956,500 of principal, interest, and administrative costs of the series B issue that would be paid on or before January 1, 1984 (*i.e.*, $750,000 of principal plus $190,500 of interest plus $16,000 of administrative costs).

(e) Based on the conclusions in item (d) of this example, the series A and series B bonds are not treated as arbitrage bonds under this section (see paragraph (c) of this section).

This Treasury decision is issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

JEROME KURTZ,
Commissioner of Internal Revenue.

Approved May 8, 1979.

DONALD C. LUBICK,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on May 31, 1979, 8:45 a.m., and published in the issue of the Federal Register for June 7, 1979, 44 F.R. 32657)

Section 104.—Compensation for Injuries or Sickness

26 CFR 1.104-1: Compensation for injuries or sickness.
(Also Sections 61, 451; 1.61-1, 1.451-1.)

Damages; monthly payments; amount excludable. An insurance company purchased and retained exclusive ownership in a single premium annuity contract to fund monthly payments stipulated in settlement of a damage suit. The recipient may exclude the full amount of the payments from gross income under section 104(a)(2) of the Code rather than the discounted present value. Payments made to the estate after the recipient's death are also fully excludable.

Rev. Rul. 79-220

ISSUE

Does the exclusion from gross income provided by section 104(a)(2) of the Internal Revenue Code of 1954 apply to the full amount of monthly payments received in settlement of a damage suit or only to the discounted present value of such payments?

FACTS

A, an individual, sued *B* for damages for personal injuries. *B* is insured by *M*, an insurance company. Before trial, *A* accepted *M*'s offer to settle the suit for a lump-sum payment of $8,000 and *M*'s agreement to provide *A* with the discounted present value of the monthly payments of $250 for *A*'s lifetime or 20 years, whichever is longer, the payments to be made to *A*'s estate after *A*'s death if *A* should die before the end of 20 years. *A* had no right to which, at date of settlement, was less than the total monthly payments to be provided) or to control the investment of that amount.

To provide the monthly payments for *A*, *M* purchased a single premium annuity contract from *O*, another insurance company. *M* advised *O* to make payments directly to *A*. However, *M* is the owner of the annuity contract and has all rights of ownership, including the right to change the beneficiary. *A* can rely on only the general credit of *M* for collection of the monthly payments.

LAW AND ANALYSIS

Section 61(a) of the Code and the Income Tax Regulations thereunder provide that, except as otherwise provided by law, gross income means all income from whatever source derived.

Section 104(a)(2) of the Code provides that except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical and dental expenses) for any prior taxable year, gross income does not include the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness.

Section 1.104-1(c) of the regulations provides, in part, that the term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settle-

ment agreement entered into in lieu of such prosecution.

However, if a lump-sum damage payment is invested for the benefit of a claimant who has actual or constructive receipt or the economic benefit of the lump-sum payment, only the lump-sum payment is received as damages within the meaning of section 104(a)(2) of the Code, and none of the income from the investment of such payment is excludable under section 104. See Rev. Rul. 65-29, 1965-1 C.B. 59, relating to damages awarded a claimant for tortious injuries in a lump-sum payment of 416*x* dollars over which claimant had unfettered control. The 416*x* dollars represented the discounted value of 520*x* dollars, which was found to be the reasonable cost of care, medicine, and medical attention for the injured person over a 10-year period. Rev. Rul. 65-29 holds that only the lump-sum payment, 416*x* dollars, is received as damages within the meaning of section 104(a)(2). See also Rev. Rul. 76-133, 1976-1 C.B. 34, which reaches a similar conclusion with regard to a court approved settlement awarded a minor and transmitted by the clerk of the court, in the name of the minor, to a savings and loan association for deposit in certificates of deposit.

In the instant case, there is a continuing obligation by *M* to pay $250 per month to *A* for the agreed period. *M*'s purchase of a single premium annuity contract from the other insurance company was merely an investment by *M* to provide a source of funds for *M* to satisfy its obligation to *A*. See Rev. Rul. 72-25, 1972-1 C.B. 127, which relates to a similar arrangement made by an employer to provide for payment of deferred compensation to an employee. In Rev. Rul. 72-25, as here, the arrangement was merely a matter of convenience to the obligor and did not give the recipient any right in the annuity itself.

HOLDINGS

The exclusion from gross income provided by section 104(a)(2) of the Code applies to the full amount of the monthly payments received by *A* in settlement of the damage suit because *A* had a right to receive only the monthly payments and did not have the actual or constructive receipt or the economic benefit of the lump-sum amount that was invested to yield that monthly payment. If *A* should die before the end of 20 years, the payments made to *A*'s estate under the settlement agreement are also excludable from income under section 104.

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26 CFR 1.104-1: Compensation for injuries or sickness.

✓ **Disability benefits; payments increased yearly.** A taxpayer received payments for personal injury in settlement with an insurance company as a result of an accident. The insurance company agreed to make fifty consecutive annual payments, each of which would be increased by five percent a year. The entire amount of the payments received is excludable from gross income under section 104(a)(2) of the Code.

Rev. Rul. 79-313 ✓

ISSUE

Are payments received by the taxpayer, under the circumstances described below, excludable from the gross income of the taxpayer under section 104(a)(2) of the Internal Revenue Code?

FACTS

In 1977, the taxpayer sustained severe and permanent personal injuries as the result of being struck by an automobile. Thereafter, the taxpayer brought an action against *X*, the owner-operator of the automobile. *X* carried automobile liability insurance with *M*, an insurance company.

In 1979, *M* proposed a settlement of taxpayer's suit against *X*, which the taxpayer accepted. Pursuant to the settlement agreement, *M* agreed to make fifty consecutive annual payments to the taxpayer, the first payment to be made one year after the date of settlement. These payments are for "personal injury, pain and suffering, disability, and loss of bodily function." The amount of each annual payment will be increased by five percent over the amount of the preceding annual payment.

The settlement also provides that the taxpayer does not have the right to accelerate any payment or increase or decrease the amount of the annual payments specified.

Under the agreement, *M* is not required to set aside specific assets to secure any part of its obligation to the taxpayer. The taxpayer's rights against *M* are no greater than those of *M*'s general creditors. *M*'s obligations to the taxpayer result solely from the settlement out of court of the legal action that the taxpayer instituted against *X* who was insured by *M*.

LAW AND ANALYSIS

Section 104(a)(2) of the Code provides that except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 for any prior taxable year, gross income does not include the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness.

Section 1.104-1(c) of the Income Tax Regulations provides that the term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.

The annual payments to be received by the taxpayer are amounts received through a settlement agreement entered into in lieu of the prosecution of a legal suit based upon tort or tort

expenses for household and dependent care services necessary for gainful employment).

(2) Earned income.—The term "earned income" shall have the meaning given such term in section 32(c)(2), but such term shall not include any amounts paid or incurred by an employer for dependent care assistance to an employee.

(3) Employee.—The term "employee" includes, for any year, an individual who is an employee within the meaning of section 401(c)(1) (relating to self-employed individuals).

(4) Employer.—An individual who owns the entire interest in an unincorporated trade or business shall be treated as his own employer. A partnership shall be treated as the employer of each partner who is an employee within the meaning of paragraph (3).

(5) Attribution rules.—

(A) Ownership of stock.—Ownership of stock in a corporation shall be determined in accordance with the rules provided under subsections (d) and (e) of section 1563 (without regard to section 1563(e)(3)(C)).

(B) Interest in unincorporated trade or business.—The interest of an employee in a trade or business which is not incorporated shall be determined in accordance with regulations prescribed by the Secretary, which shall be based on principles similar to the principles which apply in the case of subparagraph (A).

(6) Utilization test not applicable.—A dependent care assistance program shall not be held or considered to fail to meet any requirements of subsection (d) merely because of utilization rates for the different types of assistance made available under the program.

(7) Disallowance of excluded amounts as credit or deduction.—No deduction or credit shall be allowed to the employee under any other section of this chapter for any amount excluded from the gross income of the employee by reason of this section.

(Added Pub.L. 97-34, Title I, § 124(e)(1), Aug. 13, 1981, 95 Stat. 198, and amended Pub.L. 97-448, Title I, § 101(e), Jan. 12, 1983, 96 Stat. 2366; Pub.L. 98-369, Title IV, § 474(r)(6), July 18, 1984, 98 Stat. 339.)

Editorial Notes

Effective Date of 1984 Amendment. Amendment by section 474(r)(6) of Pub.L. 98-369 applicable to taxable years beginning after Dec. 31, 1983, and to carrybacks from such years, pursuant to section 475(a) of Pub.L. 98-369.

Effective Date. Section 124(f) of Pub. L. 97-34 provided that this section is applicable to taxable years beginning after Dec. 31, 1981.

Prior Provisions. A prior section 129 was renumbered section 130 of this title.

§ 130. Certain personal injury liability assignments

(a) In general.—Any amount received for agreeing to a qualified assignment shall not be included in gross income to the extent that such amount does not exceed the aggregate cost of any qualified funding assets.

(b) Treatment of qualified funding asset.—In the case of any qualified funding asset—

(1) the basis of such asset shall be reduced by the amount excluded from gross income under subsection (a) by reason of the purchase of such asset, and

(2) any gain recognized on a disposition of such asset shall be treated as ordinary income.

(c) Qualified assignment.—For purposes of this section, the term "qualified assignment" means any assignment of a liability to make periodic payments as damages (whether by suit or agreement) on account of personal injury or sickness—

(1) if the assignee assumes such liability from a person who is a party to the suit or agreement, and

(2) if—

(A) such periodic payments are fixed and determinable as to amount and time of payment,

(B) such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments,

(C) the assignee does not provide to the recipient of such payments rights against the assignee which are greater than those of a general creditor,

(D) the assignee's obligation on account of the personal injuries or sickness is no greater than the obligation of the person who assigned the liability, and

(E) such periodic payments are excludable from the gross income of the recipient under section 104(a)(2).

(d) Qualified funding asset.—For purposes of this section, the term "qualified funding asset" means any annuity contract issued by a company licensed to do business as an insurance company under the laws of any State, or any obligation of the United States, if—

expenses for household and dependent care services necessary for gainful employment).

(2) Earned income.—The term "earned income" shall have the meaning given such term in section 32(c)(2), but such term shall not include any amounts paid or incurred by an employer for dependent care assistance to an employee.

(3) Employee.—The term "employee" includes, for any year, an individual who is an employee within the meaning of section 401(c)(1) (relating to self-employed individuals).

(4) Employer.—An individual who owns the entire interest in an unincorporated trade or business shall be treated as his own employer. A partnership shall be treated as the employer of each partner who is an employee within the meaning of paragraph (3).

(5) Attribution rules.—

(A) Ownership of stock.—Ownership of stock in a corporation shall be determined in accordance with the rules provided under subsections (d) and (e) of section 1563 (without regard to section 1563(e)(3)(C)).

(B) Interest in unincorporated trade or business.—The interest of an employee in a trade or business which is not incorporated shall be determined in accordance with regulations prescribed by the Secretary, which shall be based on principles similar to the principles which apply in the case of subparagraph (A).

(6) Utilization test not applicable.—A dependent care assistance program shall not be held or considered to fail to meet any requirements of subsection (d) merely because of utilization rates for the different types of assistance made available under the program.

(7) Disallowance of excluded amounts as credit or deduction.—No deduction or credit shall be allowed to the employee under any other section of this chapter for any amount excluded from the gross income of the employee by reason of this section.

(Added Pub.L. 97-34, Title I, § 124(e)(1), Aug. 13, 1981, 95 Stat. 198, and amended Pub.L. 97-448, Title I, § 101(e), Jan. 12, 1983, 96 Stat. 2366; Pub.L. 98-369, Title IV, § 474(r)(6), July 18, 1984, 98 Stat. 839.)

Editorial Notes

Effective Date of 1984 Amendment. Amendment by section 474(r)(6) of Pub.L. 98-369 applicable to taxable years beginning after Dec. 31, 1983, and to carrybacks from such years, pursuant to section 475(a) of Pub.L. 98-369.

Effective Date. Section 124(f) of Pub.L. 97-34 provided that this section is applicable to taxable years beginning after Dec. 31, 1981.

Prior Provisions. A prior section 129 was renumbered section 130 of this title.

§ 130. Certain personal injury liability assignments

(a) In general.—Any amount received for agreeing to a qualified assignment shall not be included in gross income to the extent that such amount does not exceed the aggregate cost of any qualified funding assets.

(b) Treatment of qualified funding asset.—In the case of any qualified funding asset—

(1) the basis of such asset shall be reduced by the amount excluded from gross income under subsection (a) by reason of the purchase of such asset, and

(2) any gain recognized on a disposition of such asset shall be treated as ordinary income.

(c) Qualified assignment.—For purposes of this section, the term "qualified assignment" means any assignment of a liability to make periodic payments as damages (whether by suit or agreement) on account of personal injury or sickness—

(1) if the assignee assumes such liability from a person who is a party to the suit or agreement, and

(2) if—

(A) such periodic payments are fixed and determinable as to amount and time of payment,

(B) such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments,

(C) the assignee does not provide to the recipient of such payments rights against the assignee which are greater than those of a general creditor,

(D) the assignee's obligation on account of the personal injuries or sickness is no greater than the obligation of the person who assigned the liability, and

(E) such periodic payments are excludable from the gross income of the recipient under section 104(a)(2).

(d) Qualified funding asset.—For purposes of this section, the term "qualified funding asset" means any annuity contract issued by a company licensed to do business as an insurance company under the laws of any State, or any obligation of the United States, if—

(1) such annuity contract or obligation is used by the assignee to fund periodic payments under any qualified assignment,

(2) the periods of the payments under the annuity contract or obligation are reasonably related to the periodic payments under the qualified assignment, and the amount of any such payment under the contract or obligation does not exceed the periodic payment to which it relates,

(3) such annuity contract or obligation is designated by the taxpayer (in such manner as the Secretary shall by regulations prescribe) as being taken into account under this section with respect to such qualified assignment, and

(4) such annuity contract or obligation is purchased by the taxpayer not more than 60 days before the date of the qualified assignment and not later than 60 days after the date of such assignment.

(Added Pub.L. 97–473, Title I, § 101(b)(1), Jan. 12, 1983, 96 Stat. 2605.)

Editorial Notes

Effective Date. Section 101(c) of Pub.L. 97–473 provided that this section shall apply to taxable years ending after December 31, 1982.

§ 131. Certain foster care payments

(a) General rule.—Gross income shall not include amounts received by a foster parent during the taxable year as qualified foster care payments.

(b) Qualified foster care payment defined.—For purposes of this section—

(1) In general.—The term "qualified foster care payment" means any amount—

(A) which is paid by a State or political subdivision thereof or by a child-placing agency which is described in section 501(c)(3) and exempt from tax under section 501(a), and

(B) which is—

(i) paid to reimburse the foster parent for the expenses of caring for a qualified foster child in the foster parent's home, or

(ii) a difficulty of care payment.

(2) Qualified foster child.—The term "qualified foster child" means any individual who—

(A) has not attained age 19, and

(B) is living in a foster family home in which such individual was placed by—

(i) an agency of a State or political subdivision thereof, or

(ii) an organization which is licensed by a State (or political subdivision thereof) as a child-placing agency and which is described in section 501(c)(3) and exempt from tax under section 501(a).

(c) Difficulty of care payments.—For purposes of this section—

(1) Difficulty of care payments.—The term "difficulty of care payments" means payments to individuals which are not described in subsection (b)(1)(B)(i), and which—

(A) are compensation for providing the additional care of a qualified foster child which is—

(i) required by reason of a physical, mental, or emotional handicap of such child with respect to which the State has determined that there is a need for additional compensation, and

(ii) provided in the home of the foster parent, and

(B) are designated by the payor as compensation described in subparagraph (A).

(2) Limitation based on number of children.—In the case of any foster home, difficulty of care payments for any period to which such payments relate shall not be excludable from gross income under subsection (a) to the extent such payments are made for more than 10 qualified foster children.

(Added Pub.L. 97–473, Title I, § 102(a), Jan. 14, 1983, 96 Stat. 2606.)

Editorial Notes

Effective Date. Section 102(c) of Pub.L. 97–473 provided that this section shall apply to taxable years beginning after December 31, 1978.

§ 132. Certain fringe benefits

(a) Exclusion from gross income.—Gross income shall not include any fringe benefit which qualifies as a—

(1) no-additional-cost service,

(2) qualified employee discount,

(3) working condition fringe, or

(4) de minimis fringe.

(b) No-additional-cost service defined.—For purposes of this section, the term "no-additional-cost service" means any service provided by an employer to an employee for use by such employee if—

(1) such service is offered for sale to customers in the ordinary course of the line of business

by the jury of the seriousness of the crime, and ultimately by the judge in setting sentence where the punishment may then fit the crime.

Accordingly, the court finds that it is not necessary for defendant to have prior knowledge that the stolen purse contained C.D.S. for him to be convicted of theft of C.D.S. pursuant to *N.J.S.A.* 2C:20–3 a. The jury will therefore be instructed as follows:

> In your deliberations you are further instructed that it is not necessary for the State to prove that the defendant had prior knowledge that the victim's purse contained C.D.S. in order for you to convict him of a theft of the C.D.S.

186 N.J.Super. 381

Johanna Marie LANDGRAF, an infant, by her guardian ad litem, John LANDGRAF, and John Landgraf and Mari-Jean Landgraf, individually, Plaintiffs,

v.

John William Henry GLASSER, M.D., Ellezer Ronen, M.D., William J. Muster, Jr., M.D., and Valley Hospital, individually, severally and/or jointly, Defendants.

Superior Court of New Jersey,
Law Division, Bergen County.

Decided Sept. 17, 1982.

Attorney applied for approval of attorney fee in excess of contingent fee provided for in retainer agreement and allowable under rule of court governing contingent fees. The Superior Court, Law Division, Bergen County, Simpson, A. J. S. C., held that inasmuch as medical malpractice panel split in determination as to malpractice, attorney was also physician, and written retainer contained standard provision reserving attorney's right to apply for additional fee, request for increase in fee from 10% to 20% of recovered amount was reasonable.

Order accordingly.

1. Attorney and Client ⇐148(3)

Secrecy provisions of in camera provision of statute governing professional medical liability in malpractice actions are not intended to preclude reference thereto by assignment judge in determining reasonable fee pursuant to rule of court governing contingent fees. R. 1:21–7(f); R. 4:21–7.

2. Attorney and Client ⇐148(3)

Skill and ability of such lawyer doctor were factors supporting reasonableness of increased fee in medical malpractice action, even though dual qualification might have permitted attorney to develop case in less time than lawyer without medical training. R. 1:21–7(f).

3. Attorney and Client ⇐148(3)

Although parents of infant plaintiff who brought medical malpractice action relied on fee schedule provided by rules of court that was incorporated in retainer agreement, where written retainer agreement also contained standard provision reserving attorney's right to apply for additional fees pursuant to rule governing contingent fees, fee was already discounted to present value by calculation on net recovery based upon present cost of deferred annuity and balloon payments, and attorney who brought action was also physician, request for increase in allowable attorney fees from 10% to 20% was reasonable. R. 1:21–7(c, d, f).

Kenneth A. Anderson, Englewood, for plaintiffs (Goldsmith & Tabak, Englewood, attorneys).

Jeffrey A. Lester, Hackensack, guardian ad litem, for Johanna Marie Landgraf (filed a report of guardian ad litem respecting proposed settlement).

No appearance was required on behalf of any of the remaining parties.

SIMPSON, A.J.S.C.

This is an application under *R.* 1:21–7(f) for approval of an attorney's fee in excess of the contingent fee provided for in the retainer agreement and allowable under *R.* 1:21–7(c). The request is for an increase of the 10% otherwise allowable under *R.* 1:21–7(c)(6) as to recovery over $250,000, to 20%, relying upon *Merendino v. F.M.C.*, 181 *N.J. Super.* 503, 438 *A.*2d 365 (Law Div.1981).

The trial judge approved a structured settlement for the benefit of an infant plaintiff, as well as reimbursement to the parents for $16,500 expenses, disbursements by counsel totalling $8,812.36, and a guardian *ad litem* fee of $772.50. The child, Johanna Marie Landgraf, was born December 30, 1976, is severely brain damaged, and is totally incapable of caring for herself. A medical malpractice action was commenced against an obstetrician, an anesthesiologist and a pediatrician. The anesthesiologist was uninsured, but ultimately contributed $100,000 of the settlement. The same insurance carrier covered the other two doctors, with the policy limits being $1,000,000 for the obstetrician and $500,000 for the pediatrician. The difficulties of the case are apparent from the findings of the *R.* 4:21 medical malpractice panel. A unanimous disposition would have been admissible at trial pursuant to *R.* 4:21–5(e). Two panelists determined that, as to one claim of malpractice, the obstetrician and anesthesiologist deviated from accepted standards of medical practice which was a proximate cause of the brain injury; but the third panelist disagreed. The panel unanimously rejected all other claims of malpractice, except that as to one claim against the pediatrician they unanimously found deviation from accepted standards but that such deviation was not a proximate cause of any injury to the infant.

The case was settled with the aid of the trial judge on the day of trial and after a full day's negotiations. The terms were $250,000 cash, $40,000 a year for the life of the child with a ten-year guarantee, and $100,000 lump sum at the end of ten years. For fee purposes the settlement may be summarized as follows:

Cash	$250,000.00
Cost [1] of $40,000 a year annuity	283,254.00
Cost [1] of $100,000 lump sum payable in ten years	35,242.00
Gross aggregate recovery	$568,500.00
Less: disbursements	8,812.36
Net sum recovered [R. 1:21-7(d)]	$559,687.64

The allowable and requested fee calculations are:

R. 1:21-7(c)	%	On	Allowable	Requested
(1) Limited by (7)	25	$ 1,000.00	$ 250.00	$ 250.00
(2) Limited by (7)	25	2,000.00	500.00	500.00
(3) Limited by (7)	25	47,000.00	11,750.00	11,750.00
(4)	25	50,000.00	12,500.00	12,500.00
(5)	20	150,000.00	30,000.00	30,000.00
(6)	10	309,687.64	30,968.76	61,937.53
		$559,687.64	$85,968.76	$116,937.53

[1] For attorney fee purposes, this case is similar to three other situations where increase of *R.* 1:21–7(c)(6) allowances from 10% to 20% were approved. *Merendino, supra; Pacillo v. Harris*, 182 *N.J.Super.* 322, 440 *A.*2d 1168 (Law Div.1982); *Tobias v. Autore*, 182 *N.J.Super.* 328, 440 *A.*2d 1171 (Law Div.1982). In addition, the split *R.* 4:21 panel determination as to malpractice is a factor supporting allowance of the requested increase in attorney's fee. *R.* 1:21–7(f); DR 2–106(A)(1). The secrecy provisions of *R.* 4:21–7 are not intended to preclude reference thereto by an assignment judge determining a reasonable fee pursuant to *R.* 1:21–7(f).

[2] Two other aspects of the present case require consideration. This was a difficult medical malpractice case that was fully prepared for trial by an attorney who is also a physician. Although it was suggested that this dual qualification might have permitted plaintiff's attorney to develop the case in less time than a lawyer without medical training, the skill and ability of such a lawyer-doctor are factors supporting the reasonableness of the increased

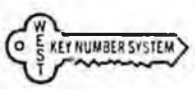
1. The present cost of future annuity and lump sum payments are the recovery figures to be utilized for contingent fee calculation purposes.

Merendino v. F.M.C., supra at 509, 438 *A.*2d 365.

fee. DR 2-106(A)(1) and (7). Additionally, the parents of the infant plaintiff object to the increased fee application despite their complete satisfaction with the settlement.

[3] The objections of the parents are understandable. Although the written retainer agreement contains the standard provision reserving the attorney's right to apply for an additional fee pursuant to *R.* 1:21-7(f), they relied upon the *R.* 1:21-7(c) schedule incorporated in the retainer. They also suggested that the fee should be "structured" since the settlement was—but this overlooks the fact that the fee has already been discounted to present value by calculation on the net recovery based upon the present cost of the deferred annuity and "balloon" payments. In virtually all cases, it is impossible for lay persons to make an informed judgment as to the reasonableness of an attorney's contingent fee. To safeguard against the possibility of such a fee improperly affecting the outcome of settlement negotiations, the New Jersey Supreme Court has limited *R.* 1:21-7(f) applications to the assignment judge. Under all the circumstances of this case, I am satisfied that the requested increase is reasonable and a total fee of $116,937.53 is approved.

An appropriate order should be submitted pursuant to *R.* 4:42-1.



186 N.J.Super. 386

STATE of New Jersey, Plaintiff.

v.

John GARCIA, Defendant.

Superior Court of New Jersey, Law Division, Hudson County.

Decided Oct. 4, 1982.

After defendant pled guilty to third-degree burglary but before sentencing, the Superior Court, Law Division, Hudson County, Stern, J.S.C., held that under statute presuming that first offender convicted of offense other than crime of first or second degree should not be imprisoned and explicitly excluding from benefit of the presumption any person who has previously been convicted of offense, prior uncounselled conviction for nonindictable offense did not constitute prior offense so as to make presumption inapplicable.

Order accordingly.

Criminal Law ⇐1202(1)

Under statute creating presumption that first offender convicted of offense other than crime of first or second degree should not be imprisoned and explicitly excluding from benefit of presumption any person who has previously been convicted of offense, prior uncounselled conviction for nonindictable offense did not constitute prior offense so as to make presumption inapplicable. N.J.S.A. 2C:44-1, subd. e.

Denise Teich, Asst. Prosecutor, for plaintiff (Harold J. Ruvoldt, Jr., Hudson County Prosecutor, attorney).

Thomas Kilcoyne, Asst. Deputy Public Defender, for defendant (Joseph H. Rodriguez, Public Defender, attorney).

STERN, J. S. C.

Defendant has pled guilty to third degree burglary, *N.J.S.A.* 2C:18-2, and is awaiting sentencing. He has been convicted of one or more nonindictable offenses[1] but has never been convicted of a crime. The question for consideration is whether the "presumption" against imprisonment applies when defendant's prior convictions are only for nonindictable offenses which may have followed disposition without the assistance of counsel.

N.J.S.A. 2C:44-1(c) provides:

1. The disposition of two complaints downgraded to charge "nonindictable" offenses is not indicated in the presentence report. Those matters will be the subject of a further report from the probation department before sentencing.

[12] During this period of time, which was between October 14, 1980 and December 15, 1980, Burroughs was a member of the statutorily protected class and entitled to a request for an extension if one was to be made. Any other conclusion would give Board the discretion to eliminate all bidders but its favorite, then give this bidder an extension which would work to the bidder's benefit in a number of ways.

In this case the benefit becomes obvious. Honeywell had a problem with the 90-day delivery schedule. On December 15, 1980 it did not have the equipment. However, it readily admits that it is *now* in possession of the necessary equipment and that it became available during the *unilaterally* extended period of time.

Nothing in the specifications remotely suggests that bidders should state how long their bids were effective and that Board may possibly utilize such criteria in awarding the bid. Certainly, a bidder may voluntarily set a time limitation on its bid; however, this voluntary limitation, which is in excess of the statutory 60-day period, cannot be utilized to the benefit of that bidder unless the contracting unit has given the same opportunity to all bidders at the time of the original advertisement for bids. Otherwise, Honeywell would be placed in the position of a legislator creating laws for its own benefit. A different interpretation would do violence to the legislative purposes and judicial policy of this State.

As Justice Francis stated and has often been quoted as stating in *Hillside Twp. v. Sternin*, 25 *N.J.* 317, 136 *A.*2d 265 (1957):

> In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way. [at 326, 136 *A.*2d 265]

To open the door, as requested by Honeywell, by loosely construing and violently stretching the intentions of the Legislature as expressed by unambiguous words and phrases, would clearly give too much discretion to Board. It would also create the possibility of favoritism, improvidence, extravagance and corruption.

Both bidders for this reason, and for all of the reasons heretofore expressed, are declared ineligible and both motions for partial summary judgment are granted. Board is hereby permitted to readvertise for bids.

181 N.J.Super. 503

Rose Ann MERENDINO, Administratrix Ad Prosequendum of the Estate of Joseph Merendino, Jr., and General Administratrix of the Estate of Joseph Merendino, Jr., Plaintiff,

v.

FMC CORPORATION, Wayne Manufacturing Company, Inc. and North Jersey Equipment Company, Inc., Defendants.

Superior Court of New Jersey,
Law Division, Bergen County.

Decided Nov. 6, 1981.

Application was filed for approval of attorney fees in wrongful death action in excess of contingent fee provided for in retainer agreement or allowable pursuant to rule. The Superior Court, Law Division, Bergen County, Simpson, A. J. S. C., held that: (1) multiplier to be used in determining fee was the lower multiplier as between those set forth in retainer agreement and those provided in the rule itself; (2) proper base figure to which percentage multiplier should be applied was the "cost" of settlement which was part in cash and part by purchase of annuities; and (3) in light of excellent settlement achieved, ten percent attorney fee as to amounts recovered over $250,000 as provided in rule was inadequate, and award would be increased to allow 20% on all amounts recovered over $100,000.

So ordered.

1. Attorney and Client ⇐147

Since infant's share in wrongful death recovery was directly involved in application for approval of attorney fees in excess of contingent fee provided for in retainer agreement or allowable pursuant to rule, concurrences by guardian ad litem and by the widow were not controlling. R. 1:21–7(c, f).

2. Attorney and Client ⇐147

Twenty-five percent fee limitation on first $50,000 of recovery in the case of an infant, pursuant to rule governing contingent fees, was not applicable in case where the class of beneficiaries in wrongful death action included both adults and infants. R. 1:21–7(c)(7).

3. Attorney and Client ⇐147

In determining maximum fee allowable under contingent fee rule, the lower multipliers, as between those set forth in retainer agreement and those provided by rule itself, were applicable. R. 1:21–7(c, e).

4. Attorney and Client ⇐147

Proper base or "recovery" figure to which percentage multipliers should be applied in determining attorney fee under contingent fee rule was the cost of settlement, which was paid part in cash and part by purchase of annuities, representing the actual present value of the settlement, rather than a "value" of the settlement based on assumption of 8.5% rate or interest return. R. 1:21–7(c).

5. Attorney and Client ⇐147

In light of excellent settlement obtained, ten percent attorney fee as to amounts recovered over $250,000 as provided in rule concerning contingent fees was inadequate, and award would be increased to allow 20% on all amounts recovered over $100,000. R. 1:21–7(c)(6).

Alan Y. Medvin, Newark, for plaintiff (Horowitz, Bross, Sinins, Imperial & Medvin, Newark, attorneys).

Paul L. Potenza, New Milford, guardian ad litem for Justine Merendino, filed a report as guardian ad litem respecting proposed settlement.

No appearance was required on behalf of any of the remaining parties.

SIMPSON, A. J. S. C.

This is an application under *R.* 1:21–7(f) for approval of an attorney's fee in excess of the contingent fee provided for in the retainer agreement or allowable pursuant to *R.* 1:21–7(c). The retainer and rule schedule are identical, except the retainer only provides for 33⅓% of the first $3,000 recovered while the rule permits up to 50% on the first $1,000 and 40% on the next $2,000. Plaintiff's counsel seeks a fee of $103,691.25 and asserts that $81,293.55 is allowable under *R.* 1:21–7. I find that $73,495.80 is allowable under the cited rule, but determine pursuant to *R.* 1:21–7(f) that $87,824.93 is a reasonable fee in light of all the circumstances.

Plaintiff is the administratrix *ad prosequendum* and general administratrix of the estate of Joseph Merendino, Jr., her husband, who died March 21, 1979 while operating a street sweeper as an employee of the City of Garfield. The widow, Rose Ann Merendino, was born September 3, 1947 and the only child, Justine, was born February 27, 1969. Workers' compensation death benefits under *N.J.S.A.* 34:15–13, and based upon decedent's weekly wages of $167.69, are $92.20 for 419 weeks until Justine is 18 and then $84.10 for an additional 31 weeks. The 450 weeks total compensation would be $41,238.90, and since this is less than the settlement of the third-party wrongful death claim (the first $50,000 of which is subject to counsel fees of at least 33⅓% under the retainer or *R.* 1:21–7(c)), one-third thereof or $13,746.30 is the employer's obligation under *N.J.S.A.* 34:15–40 for its pro rata share of the attorney's fee. *Owens v. C. & R. Waste Material*, 76 *N.J.* 584, 388 *A.*2d 977 (1978). Worker's compensation paid to date totals $12,736.00, so that Rose Ann Merendino is now entitled to $1,010.30 plus $200 litigation costs. *N.J.S.A.* 34:15–40(e). Depending upon future contingencies, the widow may be entitled after the

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450 weeks to further weekly payments from the employer (or carrier) representing additional pro rata share of the attorney's fee not exceeding 33⅓% of additional weekly payments otherwise due pursuant to *N.J.S.A.* 34:15–40(e) and 34:15–13(j). The absolute maximum, of course, would be the $87,824.93 herein allowed as a counsel fee in the third-party action (including the $13,746.30 calculated as above for the first 450 weeks).

The trial judge handling the products liability-wrongful death action approved a proposed "structured" settlement, and allocation between the widow and child pursuant to *N.J.S.A.* 2A:31–4, as follows:

1. $210,000 cash "up front" to the widow, Rose Ann Merendino, from which attorney's fees and litigation expenses are to be paid.

2. Annual payments to the widow, beginning with $11,928.00 and increasing at 6% a year, compounded annually, for 25 years certain. Appendix A schedules these payments and the cumulative totals. The final payment is $48,295.76 and the cumulative total is $654,424.66.

3. Five annual payments to the daughter, Justine Merendino, beginning in six years when she will be just under 18 years of age, in the amounts of $11,000, $12,000, $13,000, $14,000 and $22,000. The grand total is $72,000.

The annual payments to the widow and child are guaranteed, with appropriate survivorship provisions, and the trial judge had the benefit of a guardian *ad litem* report essentially concurring in the settlement provisions. For purposes of trial, plaintiff's expert economist had prepared an "Appraisal of Economic Loss" due to the death of Mr. Merendino which, discounted to present value, was asserted to be $343,647. *Tenore v. Nu Car Carriers*, 67 *N.J.* 466, 474, 341 *A.2d* 613 (1975). For purposes of settlement, trial court approval thereof, and this application for counsel fees in excess of the amount allowable under *R.* 1:21–7(c), plaintiff's attorney retained a "mediator and negotiator," one Daniel Bellin, president of Litigation Support Corporation. Bellin's opinion was that the "value of the settlement could be conservatively stated as $472,722," calculated as follows:

Cash	$210,000
Value at 8.5% net rate of return for Justine Merendino payments	36,738
Value, at same rate, for Rose Ann Merendino payments	225,984
Total	$472,722

Litigation Support Corporation apparently was also instrumental in obtaining insurance company funding of the annuities on a basis that makes the proceeds payable to Rose Ann and Justine Merendino without any federal income taxation thereon.[1] The cost to defendant of the annuities, however, was less than Bellin's valuations, so that the actual present cost of the package is:

Cash	$210,000
Cost of Justine Merendino Annuity	29,622
Cost of Rose Ann Merendino Annuity	159,938
Total	$399,600

Although no trial or appeal was required, and no novel questions of law appear to have been involved, this case resulted in an excellent recovery for the widow and minor child of decedent. The imaginative blending of cash and annuities, on an after-tax basis and capitalizing on the power of compound interest, places the case, for attorney fee purposes, somewhere between the situations in *Murphy v. Mooresville Mills*, 132 *N.J.Super.* 197, 333 *A.2d* 273 (App.Div.1975), certif. den. 68 *N.J.* 156, 343 *A.2d* 444 (1975), and *Bolle v. Community Memorial Hospital*, 145 *N.J.Super.* 592, 368 *A.2d* 935 (App.Div. 1976), certif. den. 74 *N.J.* 275, 377 *A.2d* 679 (1977). When an attorney considers the fee permitted by *R.* 1:21–7(c) to be inadequate, he may seek approval by the assignment judge "of a reasonable fee in light of all the circumstances." *R.* 1:21–7(f). Pursuant to *R.* 1:21–7(e) all contingent fees must con-

1. One of the defendants is obligated to make all periodic payments to Rose Ann and Justine Merendino. Said defendant owns the annuity contracts. The periodic payments are therefore fully excludable, for federal income tax purposes, from gross income. I.R.C. § 104(a)(2); *Treas. Regs.* § 1.104 1(c); *Rev. Rulings* 79 220 and 79 313.

form to DR 2-106(A) that include, in pertinent part, as "guides in determining the reasonableness of a fee":

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

. . . . . .

(4) The amount involved and the results obtained.

. . . . . .

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

[1, 2] The trial judge approved the settlement on the basis of the above-described annuities and an indicated distribution of $100,000 of the $210,000 "up front" money to Rose Ann Merendino. Plaintiffs' counsel requests the balance of $110,000 for counsel fees and all disbursements, including the guardian *ad litem's* fee and costs. Disbursements were $4,459.45 and the trial judge allowed the guardian *ad litem* an $1,800 fee plus disbursements of $49.30. These items total $6,308.75; hence the requested counsel fee is $103,691.25. It was agreed, however, that any reduction of this requested counsel fee would inure to the benefit of Justine Merendino. At a hearing before me Mrs. Merendino testified that her attorneys did an outstanding job, she was very satisfied, and she and her brother (also a New Jersey attorney) believed the attorneys deserved the requested fee. The guardian *ad litem* did not oppose the fee application either. Since the infant's share is directly involved, these concurrences are not controlling. *Murphy v. Mooresville Mills, supra* at 200, 333 *A.*2d 273. The 25% fee limitation on the first $50,000 recovery in the case of an infant, pursuant to *R.* 1:21-7(c)(7), is not applicable in a case such as this, however, where the class of beneficiaries in a wrongful death action includes both adults and infants. *McMullen v. Maryland Cas. Co.*, 127 *N.J.Super.* 231, 239, 317 *A.*2d 75 (App.Div.1974), aff'd 67 *N.J.* 416, 341 *A.*2d 334 (1975).

[3, 4] In determining the maximum fee allowable under *R.* 1:21-7(c) the first question is the multipliers to be used—those set forth in the retainer agreement or those provided by the rule itself. In view of *R.* 1:21-7(c), the lower multipliers are applicable—but the differences are only as to the first $3,000 recovered and in this case the difference is *de minimis.*

The second and more important question is the proper base or "recovery" figure to which the percentage multipliers should be applied. Plaintiffs' counsel suggests "value" of $472,722 as set forth above, rather than "cost" of $399,600 as also analyzed above. I find that the lower figure is the correct one, which represents the actual present value of the settlement. Bellin's calculation assumes an 8.5% rate or interest return, whereas the cost of the annuities reflects the actual present value in the marketplace. The marketplace cost is the acid test in a case like this—with fixed, guaranteed, periodic payments not requiring actuarial assumptions as to life expectancy or survivorship—rather than calculations of "value" that involve interest rate estimates for the future. In addition, presumably defendants would be willing to alternatively pay the total cash cost of the package, or $399,600, to plaintiffs now—since they are presently expending such total to plaintiffs and the annuity underwriter. From this figure disbursements of $6,308.75, as set forth above, are deducted pursuant to *R.* 1:21-7(d), leaving an aggregate sum of recovery of $393,291.25 upon which to calculate the contingent fee.

Applying the retainer agreement percentage to the first $3,000 and the *R.* 1:21-7(c) percentages to the rest of the $393,291.25 results in the following initial calculation of allowable counsel fees:

R.1:21-7(c)	%	On	Fee
(1) – Retainer agreement	33 ⅓	$ 1,000.00	$ 333.33
(2) – Retainer agreement	33 ⅓	2,000.00	666.67
(3) – Rule	33 ⅓	47,000.00	15,666.67

R. 1:21-7(c)	%	On	Fee
(4) - Rule	25	$ 50,000.00	$12,500.00
(5) - Rule	20	150,000.00	30,000.00
(6) - Rule	10	143,291.25	14,329.13
	Totals	$393,291.25	$73,495.80

The difference between plaintiffs' attorney's calculation of $81,293.55 as allowable under *R.* 1:21–7(c) and the court's calculation of $73,495.80 is largely due to the different bases upon which the multiplications are made. In any event, the application is under *R.* 1:21–7(f) for an attorney fee of $103,691.25 plus disbursements of $6,308.75 (including guardian *ad litem* allowance and costs) for a total of $110,000.00.

This presents the third and most important question of additional allowance, if any, to rectify any inadequacy, as permitted under *R.* 1:21–7(f), in order to provide a total "reasonable fee in light of all the circumstances." In my view, it is preferable to provide such allowance by adjustment of one or more of the *R.* 1:21–7(c) percentages rather than an undetailed flat figure. This will facilitate future calculation of possible additional payments to Rose Ann Merendino by decedent's employer (or carrier) representing additional pro rata share of attorney's fee, as noted above in connection with worker's compensation benefits.

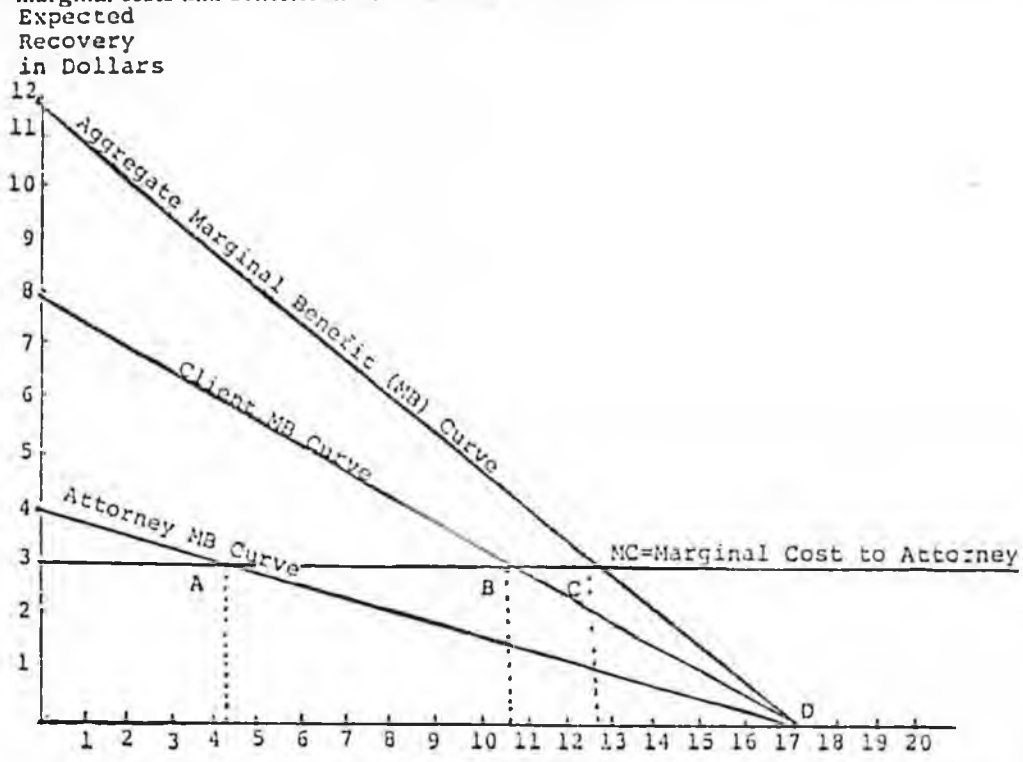
In this case, for the reasons already stated and those to be hereafter chronicled, I have concluded that the 10% attorney's fee allowance as to $143,291.25 under *R.* 1:21–7(c)(6) is inadequate and should be increased to 20%. This amounts to an additional allowance of $14,329.13 which, when added to the $73,495.80 calculated as above, results in a total attorneys' fee of $87,824.93. Disbursements of $6,308.75 are also allowable for a total of $94,133.68. The remaining balance of the $210,000 cash payments is distributable to the infant, Justine Merendino, so that the "up front" moneys will be distributed as follows:

Rose Ann Merendino	$100,000.00
Justine Merendino[2]	15,866.32
Counsel fees and disbursements (including guardian *ad litem* allowance and costs)	94,133.68
Total	$210,000.00

[5] In a case such as this, with the excellent "structured" settlement already described, the 10% attorney's fees as to amounts recovered over $250,000 provided by *R.* 1:21–7(c)(6) is inadequate. Contingent fees are an imaginative solution to the problem of the cost of legal services being an obstacle to vindication of a claim even when the plaintiff's stakes are very large. It is sometimes argued that contingent fees are often exorbitant, but the concept permits quality representation plaintiffs could otherwise not afford. By pooling a number of such claims, the lawyer specializing in such matters can reduce the risk of loss or inadequate return on invested legal services. Additionally, the contingent fee compensates the lawyer for the loan of his services until the case is won or settled—usually a matter of years. *R.* 1:21–7(b) always requires that the client have the opportunity to decline a contingent fee arrangement and retain an attorney on the basis of reasonable value for services rendered. The contingent fee is therefore consensual, with court rule protection against overreaching. The remaining problem is to structure permissible fees, both generally and in specific cases, to try to attain the maximum aggregate marginal benefit for the client and the attorney. From an eco-

2. To be placed in the Bergen County Surrogate's Intermingled Account, pursuant to *R.* 4:57-2(b), unless otherwise ordered by the court. This account currently earns interest at 15% compounded daily, for an effective annual yield of 16.122% to October 1, 1982.

nomics point of view, the relationship of marginal costs and benefits involved in contingent fee contracts may be modeled as follows:



Units of Legal Effort

The vertical axis reflects increasing expected recovery due to increasing units of legal effort as shown on the horizontal axis. The marginal benefit curves show the expected value in dollars of marginal increases in the number of units of legal effort. It is assumed all units of legal effort, borne by the attorney under a contingent fee contract, cost the same—and are diagrammed as MC on the model. The intersecting points of the attorney, client, and aggregate marginal benefit curves with the attorney marginal cost line are significant and labelled A, B, and C for reference. Marginal benefit curves are incremental and reflect probabilities of recovery and risks of loss, and it is assumed that attorney and client marginal evaluations of expected value to them of additional units of legal effort are in a ballpark range of reasonable accuracy. The vertical dash lines from points A, B, and C, to the horizontal scale enable measurement of the units of legal effort expended at such critical points and permit the following logical deductions:

A. From a self-interest point of view, an attorney is motivated to expend only 4+ units of effort—because the expected value *to him* of effort past that point is less than the cost to him of that effort.

B. From his self-interest point of view, a client would like an attorney to continue expending units of legal effort all the way to 17 or point D—continuing beyond point B, since the marginal costs of additional units of legal effort are borne solely by the attorney.

C. To maximize the expected value with equal weight to the interest of both the attorney and the client, under a contingent fee contract where the attorney bears the marginal costs—the units of legal effort should be 12+ or the point at which the aggregate marginal benefit curve intersects the MC line.

From an ethical point of view, it seems clear that an attorney should continue legal efforts at least to point C on the model and our contingent fee rules should encourage

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3. See generally, S
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proof. (See section 100055.1.) There is nothing in the statute to support appellant's contention that the preceding year's corporate configuration should be the factor utilized in determining revenue vehicle mileage in the preceding year.[3]

Appellant argues that any reading of the statutes, other than its own, avoids the legislative intent by enabling the District to buy out only so much of an existing system as to put the remainder of that existing 1508 system outside of the statutory definition. However, the Legislature has clearly shown by section 100055.1 that it has such an intent by providing that the District could not establish service until it had completed purchase of the existing system *or any part thereof.* Clearly, an otherwise "existing system" could fall outside of the definition as a result of a partial purchase. Since appellant as it existed in 1973 was not an existing system within the statutory definition, there was no restriction imposed upon respondent which precluded establishment of the San Jose—Fremont run. Nothing in the Act prevents competition between the District and a system which is not an existing system as defined in the Act.

In light of this conclusion, appellant's other contentions need not be addressed.[4] The judgment of the trial court is affirmed.

SCOTT, Acting P. J., and BROWN (Judge of the Superior Court, assigned by the Chairperson of the Judicial Council), J., concur.

3. Had there never been a connection between the Santa Clara Division and the rest of appellant's system, purchase of the Santa Clara Division would clearly have satisfied the statute. Competition with appellant's Oakland Division would have been permitted by the statute because appellant would not have had the required minimum of 40 percent of its revenue miles in Santa Clara County.

76 Cal.App.3d 509

Hill SAYBLE and Sayble and Raphael, a Professional Corporation, Plaintiffs and Appellants, 1509

v.

Frances FEINMAN, Defendant and Respondent.

Civ. 50732.

Court of Appeal, Second District, Division 2.

Jan. 4, 1978.

Hearing Denied March 2, 1978.

Attorneys, who represented client in wrongful death claim which resulted in settlement for client of $200,000 cash payment plus life annuity of $2,500 per month, commenced declaratory relief action to have phrase "28⅓% of any money recovered" in contingent fee contract prepared by them construed. The Superior Court, Los Angeles County, Delbert Wong, J., entered judgment in favor of client's interpretation of contract, and attorneys appealed. The Court of Appeal, Beach, J., held that whether meaning of phrase "28⅓% of any money recovered" was clear and precise or was ambiguous and uncertain, client's interpretation that attorneys were entitled to 28⅓% of life annuity portion of settlement only as she received funds in each monthly installment was correct, rather than attorneys' oppressive, inflexible interpretation that they were entitled to 28⅓% of present cash value of annuity.

Judgment affirmed.

1. Contracts ⇐176(1)

Construction of written contract is essentially judicial function to be exercised

4. One of appellant's other contentions should be commented upon. The trial court specifically found no fraud committed by respondent, and appellant contends this was error. The evidence appellant produced did not establish fraud as a matter of law. Therefore we must accept the finding of the trial court, as the trier of fact, that appellant did not sustain its burden of proof on this issue

according to generally accepted canons of interpretation.

2. Appeal and Error ⇐842(8)

A reviewing court is free to adopt its own construction of a contractual clause on attorney fees, resolving any uncertainties in favor of a fair and reasonable interpretation.

3. Appeal and Error ⇐1169(1)

Appellate court must determine that trial court's interpretation of written contract is erroneous before it may properly reverse a judgment.

4. Attorney and Client ⇐148(3)

If meaning of phrase "28⅓% of any money recovered" in contingent fee employment contract of attorneys representing client in wrongful death claim was clear and precise, rather than ambiguous and uncertain, language of contract would be followed. West's Ann.Civ.Code, § 1638.

5. Contracts ⇐154

Where one construction would make contract unusual and extraordinary and another construction, equally consistent with language employed, would make it reasonable, fair, and just, latter construction must prevail.

6. Contracts ⇐147(1)

Court of Appeal looks to contract itself and interprets it so as to give effect to intent of parties. West's Ann.Civ.Code, §§ 1639, 1643.

7. Attorney and Client ⇐148(1)

In view of uncertainty as to what would have been reasonable intentions of attorneys and client when contingent fee contract was made had they anticipated that part of client's settlement for her husband's wrongful death claim would be life annuity, words of contract were to be understood in their ordinary and popular sense, rather than in their strict legal meaning, unless there was evidence parties intended to use words in technical sense or to give words special meaning. West's Ann. Civ.Code, § 1644.

8. Contracts ⇐143(3)

Court of Appeal has neither power to make for parties a contractual arrangement which they themselves did not make nor to insert in agreement language that appealing party wishes were there. West's Ann. Code Civ.Proc. § 1858.

9. Attorney and Client ⇐148(3)

If meaning of phrase "28⅓% of any money recovered" in contingent fee employment contract prepared by attorneys representing client was clear and certain, client's interpretation that attorneys were entitled to 28⅓% of life annuity portion of settlement only as she received funds in each monthly installment was correct, rather than attorneys' interpretation that they were entitled to 28⅓% of present cash value of annuity, in that claimant did not recover any money from annuity until actually receiving each monthly payment.

10. Attorney and Client ⇐148(3)

Even if meaning of phrase "28⅓% of any money recovered" in contingent fee employment contract prepared by attorneys representing client was ambiguous, client's interpretation that attorneys were entitled to 28⅓% of life annuity portion of settlement only as she received funds in each monthly installment was correct, rather than attorneys' interpretation that they were entitled to 28⅓% of present cash value of annuity, in that any uncertainties were to be resolved against oppressive, inflexible interpretation of attorneys as contract preparers.

11. Attorney and Client ⇐148(3)

Attorneys' interpretation that phrase "28⅓% of any money recovered" in contingent fee contract prepared by them entitled them to 28⅓% of present cash value of life annuity portion of client's settlement for her husband's wrongful death claim was unreasonable and absurd, where there was every indication client would continue to pay attorneys 28⅓% of annuity as she received funds in each monthly installment and under attorneys' interpretation they were entitled immediately to 80% of money recovered thus far. West's Ann.Civ.Code, §§ 1638, 1643.

Memel, Jacobs,
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and appellants.

Tannenbaum, N
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respondent.

[511] BEACH, Assoc

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Memel, Jacobs, Pierno & Gersh, by Stanley K. Jacobs, Los Angeles, for plaintiffs and appellants.

Tannenbaum, Neiman & Billet by Paul L. Stanton, Los Angeles, for defendant and respondent.

[511] BEACH, Associate Justice.

Hill Sayble and Sayble and Raphael, a professional corporation, appeal from a judgment in favor of Frances Feinman construing the terms of payment in a contingent fee retainer agreement between appellant attorneys and respondent client.

FACTS:

Respondent Frances Feinman retained appellant attorneys to represent her claims arising out of the wrongful death of her husband. The parties entered into an attorney retainer agreement drafted by appellants. The contract provides in relevant part: "Attorney(s) shall be paid 28⅓% of *any money recovered* in this matter . . ." (Emphasis added.)

Appellants and respondent agree that at the time of the making of the contract, neither party contemplated a settlement other than a lump sum of cash. Appellants achieved an out-of-court settlement for respondent with a cash payment of $200,000, plus an annuity of $2,500 per month for her lifetime. Respondent's life expectancy at the time of settlement was 46.7 years.

Prior to the acceptance of the settlement in the wrongful death action, a dispute arose between the parties as to the amount and method of payment of attorneys' fees. Appellants contend that they were entitled immediately to their entire fee as a lump sum of 28⅓ percent of the $200,000 paid to respondent in cash plus 28⅓ percent of the present cash value of the annuity portion of the settlement. Respondent agreed that appellants were entitled to 28⅓ percent of the $200,000; but she maintained they were entitled to 28⅓ percent of the annuity only as she received the funds in each monthly installment.

[512] Pursuant to respondent's authorization and direction, the settlement of the original action was consummated without the resolution of the dispute. The parties were subsequently unable to resolve their dispute, and appellants commenced a declaratory relief action seeking the court's interpretation of the retainer contract and a declaration of the rights and duties of the parties under that agreement. The trial was bifurcated to permit the court to construe the retainer agreement as a matter of law without the presentation of evidence. The matter was submitted on the facts admitted by the pleadings and the stipulation of facts.

The court entered judgment in favor of respondent's interpretation of the contract and concluded as a matter of law that appellants were entitled to be paid 28⅓ percent of the settlement funds received to date by respondent, plus 28⅓ percent of each monthly payment of the life annuity portion of the settlement, as and when received by her and not before. This appeal followed.

CONTENTIONS ON APPEAL:

1. The trial court's findings and decision are not binding on the question of law presented.

2. The trial court misconstrued how the contingent fee retainer contract is to be applied to the annuity portion of the wrongful death settlement. Appellants contend that they have earned all their fees and are now entitled to receive 28⅓ percent of the present cash value of the annuity portion of the settlement in addition to the 28⅓ percent of all funds received to date.

DISCUSSION:

1. *The findings of the lower court are not binding on the question of law presented.*

[1-3] The construction of a written contract is essentially a judicial function to be exercised according to generally accepted canons of interpretation. A reviewing court is free to adopt its own construction of a contractual clause on attorneys' fees,

resolving any uncertainties in favor of a fair and reasonable interpretation. (*Ecco-Phoenix Electric Corp. v. Howard J. White, Inc.*, 1 Cal.3d 266, 272, 81 Cal.Rptr. 849, 461 P.2d 33.) But an appellate court must determine that the trial court's interpretation of a written contract is erroneous before it
513 may properly reverse a judgment. (*Parsons v. Bristol Development Co.*, 62 Cal.2d 861, 866, 44 Cal.Rptr. 767, 402 P.2d 839.)

2. *The court below properly interpreted the phrase "any money recovered" as it applies to respondent's life annuity.*

Here we are called upon to construe a provision of an attorney's contingent fee employment contract. The parties stipulated that when the contract was made, neither one considered a settlement other than by a lump sum of cash. Neither party contends that the contract is ambiguous or that it has been modified.

Nevertheless, appellants contend that unforeseen contingencies, such as the life annuity portion of respondent's settlement, are to be handled in light of the purpose of the contract and the mutual intentions of the parties at the time the contract was made. Appellants argue that their expectations resulting from such a "mutual intention" entitled them to receive immediately 28⅓ percent of the discounted present cash value of respondent's life annuity once the settlement became final. They argue that the trial court's interpretation of the retainer agreement was clearly erroneous and contrary to basic contract law in holding that they are entitled only to 28⅓ percent of the monthly payments as and when paid to respondent and not before. For the reasons that follow, we disagree with appellants and affirm the trial court's judgment.

[4, 5] The general rules pertaining to the interpretation of contracts have been succinctly summarized elsewhere (see *Moss Dev. Co. v. Geary*, 41 Cal.App.3d 1, 9, 115 Cal.Rptr. 736) and need not be repeated here. Whether the meaning of the phrase "28⅓% of any money recovered" is clear and precise or is ambiguous and uncertain does not alter the result in the case at bench. If the meaning is clear, the language of the contract will be followed. (Civ.Code, § 1638.) Moreover, where one construction would make a contract unusual and extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail. (*Rost v. Bryson*, 118 Cal.App.2d 489, 258 P.2d 72.)

[6, 7] We look to the contract itself and interpret it so as to give effect to the intent of the parties. (Civ.Code, §§ 1639, 1643; *Advance Medical Diagnostic Laboratories v. County of Los Angeles*, 58 Cal.App.3d 263, 269, 129 Cal.Rptr. 723.) But the parties herein stipulated that when the contract was made, they contemplated only a lump sum settlement. Consequently, it is uncer-
514 tain what would have been the reasonable intentions of the parties had they anticipated that part of the settlement would be a life annuity. In such circumstances, the words of the contract are to be understood in their ordinary and popular sense, rather than in their strict legal meaning unless there is evidence the parties intended to use them in a technical sense or to give them a special meaning. (Civ.Code, § 1644; *Berman v. Dean Witter & Co., Inc.*, 44 Cal.App.3d 999, 119 Cal.Rptr. 130.)

"Money," in the ordinary and popular sense, means something generally accepted as a circulating medium of exchange issued under governmental authority.[1] Appellants' stipulation that their only expectation was that the settlement would be a "lump sum of cash" indicates they used the word money in the retainer contract in its ordinary sense. This is consistent with respon-

1. The Random House Dictionary of the English Language defines money as: "1. gold, silver, or other metal in pieces of convenient form stamped by public authority and issued as a medium of exchange and measure of value. 2. See *paper money*." Black's Law Dictionary (4th ed.) defines money as: "In usual and ordinary acceptation it means gold, silver, or paper money used as circulating medium of exchange, and *does not embrace* notes, bonds, evidences of debt, or *other personal or real estate*." (Emphasis added.)

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dent's position that the right to be paid from an annuity, or even the present value of that right is not "money recovered."

In California, "'Money' means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency." (Com.Code, § 1201, adopting U.C.C. § 1201.) The Uniform Commercial Code Comment 24 to section 1201 states: "The test adopted is that of sanction of government . . . . which recognizes the circulating medium as a part of the official currency of that government." Likewise, "Money, checks, deposit accounts, and the like are 'cash proceeds.' All other proceeds are 'noncash proceeds.'" (Com. Code, § 9306.) This sharp distinction between money and other forms of personal property is also apparent in Code of Civil Procedure section 17.[2]

In the instant case, respondent does not, in fact, recover any *money* from her annuity until she actually receives each monthly payment. The life annuity is a promise of future payments which may or may not occur. Respondent properly contends that had appellants provided in their own contract that their fee would be 28⅓ percent of "the recovery," or "the full recovery," or "the value of the entire recovery," or "the amount realized," then their argument might be persuasive. However, appellants did not use such language in drafting their retainer agreement, and they cannot now alter that phrase to include what they claim they meant to say specifically to apply to a situation they were more qualified to anticipate than the client they, in their fiduciary capacity, undertook to serve and protect.

[8] This court has neither the power to make for the parties a contractual arrangement which they themselves did not make nor to insert in the agreement language that appellants now wish were there. (Code Civ.Proc., § 1858; *Pauley v. Faucett*, 124 Cal.App.2d 406, 269 P.2d 89.)

[9] If anything prevented the immediate payment of all attorneys' fees as soon as the settlement became final, it was appellants' failure specifically to express that intention in the contract. Respondent has and continues to fulfill her obligation to pay attorneys' fees according to the unambiguous terms of the contract. Therefore, under the hypothesis that the meaning of the phrase "28⅓% of any money recovered" is clear and certain, the interpretation of respondent and the court below is correct.

[10] Since appellants prepared this contract and in light of the oppressive nature of their interpretation of the clause at issue even if it can be argued the contract is ambiguous, we resolve any uncertainties in favor of a fair and reasonable interpretation and against the inflexible construction urged by appellants. (*Ecco-Phoenix Electric Corp. v. Howard J. White Inc.*, *supra*, 1 Cal.3d 266, 272, 81 Cal.Rptr. 849, 461 P.2d 33.)

[11] We also note that appellants have already received fees in excess of $56,000 (28⅓ percent of the $200,000 lump sum) plus 28⅓ percent of each monthly annuity payment received to date by respondent pursuant to that portion of the settlement. There is every indication respondent will continue to fulfill her contractual obligation hereafter. To agree with appellants would be to hold that they are entitled immediately to some 80 percent of the money recovered thus far. Such an interpretation of a contingent fee contract would be unreasonable and absurd. (Civ.Code, §§ 1638, 1643.)

We need not address the essentially impossible task of rewriting this contract to reflect what the parties might have said had they anticipated the problem of how a contingent fee contract is to be applied to a tort recovery part of which is to be paid in installments as an annuity. (Code Civ. Proc., § 1858; *Milstein v. Security Pac. Nat. Bank*, 27 Cal.App.3d 482, 487, 103 Cal.Rptr. 16.) We conclude that the trial court's interpretation of the disputed phrase, "money recovered," was proper.

The judgment is affirmed.

ROTH, P. J., and FLEMING, J., concur.

2. Code of Civil Procedure section 17 states in pertinent part: "The words 'personal property' include money, goods, chattels, things in action, and evidences of debt."

EXEMPT ORGANIZATIONS REQUIREMENTS • TESTS UNRELATED INCOME

[¶ 3001] EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

Sec. 501. [1954 Code] (a) EXEMPTION FROM TAXATION.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

(b) TAX ON UNRELATED BUSINESS INCOME AND CERTAIN OTHER ACTIVITIES.—An organization exempt from taxation under subsection (a) shall be subject to tax to the extent provided in parts II, III and VI of this subchapter, but (notwithstanding parts II, III and VI of this subchapter) shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

(c) LIST OF EXEMPT ORGANIZATIONS.—The following organizations are referred to in subsection (a):

(1) Any corporation organized under Act of Congress which is an instrumentality of the United States but only if such corporation—

(A) is exempt from Federal income taxes—

(i) under such Act as amended and supplemented before the date of the enactment of the Tax Reform Act of 1984, or

(ii) under this title without regard to any provision of law which is not contained in this title and which is not contained in a revenue Act, or

(B) is described in subsection (l).

(2) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section.

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

(5) Labor, agricultural or horticultural organizations.

(6) Business leagues, chambers of commerce, real estate boards, boards of trade or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(7) Clubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder.

(8) Fraternal beneficiary societies, orders, or associations—

(A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

(B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.

(9) Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

(10) Domestic fraternal societies, orders, or associations, operating under the lodge system—

(A) the net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and

(B) which do not provide for the payment of life, sick, accident, or other benefits.

(11) Teachers' retirement fund associations of a purely local character, if—

(A) no part of their net earnings inures (other than through payment of retirement benefits) to the benefit of any private shareholder or individual, and

(B) the income consists solely of amounts received from public taxation, amounts received from assessments on the teaching salaries of members, and income in respect of investments.

(12)(A) Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations, but only if 85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses.

(B) In the case of a mutual or cooperative telephone company, subparagraph (A) shall be applied without taking into account any income received or accrued—

(i) from a commercial telephone company for the performance of communication services which involve members of the mutual or cooperative telephone company,

(ii) from qualified pole rentals, or

(iii) from the sale of display listings in a directory furnished to the members of the mutual or cooperative telephone company.

(C) In the case of a mutual or cooperative electric company, subparagraph (A) shall be applied without taking into account any income received or accrued from qualified pole rentals.

(D) For purposes of this paragraph, the term "qualified pole rental" means any rental of a pole (or other structure used to support wires) if such pole (or other structure)—

(i) is used by the telephone or electric company to support one or more wires which are used by such company in providing telephone or electric services to its members, and

(ii) is used pursuant to the rental to support one or more wires (in addition to the wires described in clause (i)) for use in connection with the transmission by wire of electricity or of telephone or other communications.

For purposes of the preceding sentence, the term "rental" includes any sale of the right to use the pole (or other structure).

(13)(A) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(14)(A) Credit unions without capital stock organized and operated for mutual purposes and without profit.

(B) Corporations or associations without capital stock organized before September 1, 1957, and operated for mutual purposes and without profit for the purpose of providing reserve funds for, and insurance of shares or deposits in—

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April 23, 1986

The Honorable M. Mike Miller
Chairman of House Judiciary Committee
PO Box 5
State Capitol
Juneau, AK 99811

Dear Representative Miller:

Thank you very much for your response to my letter regarding the tort reform issue. You raise some very cogent concerns and questions. It is certainly a most complex issue and the vested interests that are involved do not make it any easier to understand. Not very many people to whom I have spoken nor any of my colleagues are under the illusion that a tort reform will bring about any immediate changes in liability rates or insurance company policies. I think that a wait-and-see policy on the part of insurance companies is not only expected but probably lies. Legislation regarding the liability issue is bound to go through a process of appeals and amendations before any final product is obtained. Until all of the turmoil settles down, it would be hard to expect insurance companies to make any changes in policy since the changes that have been made are design to protect them from the present escalation.

I am sure that you are familiar with the report of the Tort Policy Working Group established by the Attorney General. Enclosed is a copy of a summary that provides many of us with a working guideline for our deliberations regarding this problem. Even though quick or immediate resolution of the problem, that is to say some reduction of current liability rates and the like, may not be forthcoming, it is clear that stopping the process of unrestrained, uncontrolled and unreviewed liability, lay suits and awards is a sine quanon of any lasting solution to the problem.

I would hope that the other representatives and senators in the Legislature are as open minded and thoughtful as you show yourself to be regarding these issues. Thank you very much for taking time out of your busy schedule to respond to my letter and address yourself to the questions I raised.

Very truly yours,

David T. Mayschak, M.D.

DTM:ljb

Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability

February 1986

INTRODUCTION

AND

EXECUTIVE SUMMARY

In October of last year the Attorney General established the Tort Policy Working Group, an inter-agency working group consisting of representatives of seven agencies and the White House. One of the tasks the Working Group was asked to undertake was to examine the rapidly expanding crisis in liability insurance availability and affordability.

The following is the report of the Tort Policy Working Group on the causes, extent and policy implications of this crisis. The primary contributing agencies included the Department of Justice, the Department of Commerce and the Small Business Administration.

Chapter 1 of the report (The Crisis in Insurance Availability and Affordability) describes in detail the significant problems many businesses, professionals and municipalities are having obtaining liability insurance. The Chapter documents a dramatic change in the last two years in the availability, affordability and adequacy of liability insurance. Where insurance is available (and in some areas it simply is not), premium increases of several hundred percent over the last year or two have become commonplace. Few if any private or public entities that rely on liability insurance have escaped the problems generated by this crisis.

Part A of Chapter 2 (The Causes of the Crisis in Insurance Availability and Affordability) reviews the current financial condition of the insurance industry, and the economic factors leading to that condition. The property-casualty industry in the past two years has suffered significant underwriting losses ($21 billion in 1984; $25 billion in 1985) which have limited its ability to offer as much insurance as its customers desire, and have made it reluctant to insure high risk activities which may expose it to further substantial underwriting losses. These underwriting losses appear to be largely a result of coverage written in the late 1970's and early 1980's which may have been underpriced due to the industry's desire to obtain premium income to invest at the then prevailing high interest rates.

Nonetheless, there is little to suggest that the recent massive increases in premiums is related solely to these losses, or that the cost of liability insurance will decline significantly as the industry limits its underwriting losses and restores its desired level of overall profitability. To the contrary,

indications are that developments in tort law are a major cause for the sharp premium increases. 1/

Part B of Chapter 2 reviews the contribution of tort law to the insurance availability/affordability crisis. The Working Group found that in the past decade there has been a veritable explosion of tort liability in the United States. Four specific problem areas are identified and discussed:

- The movement toward no-fault liability, which increasingly results in companies and individuals being found liable even in the absence of any wrongdoing on their part.

- The undermining of causation through a variety of questionable practices and doctrines which shift liability to "deep pocket" defendants even though they did not cause the underlying injury or had only a limited or tangential involvement.

- The explosive growth in the damages awarded in tort lawsuits, particularly with regard to non-economic awards such as pain and suffering or punitive damages. And,

- The excessive transaction costs of the tort system, in which virtually two-thirds of every dollar paid out through the system is lost to attorneys' fees and litigation expenses.

The Working Group was particularly struck by the extraordinary growth over the last decade of the number of tort lawsuits and the average award per lawsuit. A few examples amply illustrate this point:

- Between 1974 and 1985 there has been a 758% increase in the number of product liability lawsuits filed in federal district court.

- The number of medical malpractice lawsuits per 100 physicians doubled between 1979 and 1983, and tripled during that period for obstetricians/gynecologists.

- According to a jury verdict reporting service, between 1975 and 1985 the average medical malpractice jury

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1/ The Working Group also considered whether state regulation of the insurance industry may be a cause of the crisis, and found little compelling evidence that state regulation is a major cause of these problems.

verdict increased from $220,018 to $1,017,716, and the average product liability jury verdict increased from $393,580 to $1,850,452. 2/

- A survey of punitive damage awards in Cook County, Illinois indicates that the average personal injury punitive damage award (measured in constant 1984 dollars) increased from $40,000 in 1970-74 to $1,152,174 in 1980-84.

The above data demonstrates that the insurance industry was selling coverage at constant or even reduced cost over a period of years during which tort liability was undergoing a dramatic expansion. This suggests that a major factor underlying the availability/affordability crisis is the industry's attempt to bring premiums quickly back into line with rapidly growing liability risks. 3/ The high -- and in some areas unaffordable -- insurance premiums reflect the fact that tort law is now placing a massive compensation burden on the private sector.

A second important contribution of tort liability to the availability/affordability crisis is the tremendous uncertainty that has been generated by rapidly changing standards of liability and causation. The "rules of the game" have become so unpredictable that the insurance industry often cannot assess liability risks with any degree of confidence. This appears to have severely exacerbated the problem.

Chapter 3 of the report (Recent Insurance Industry Developments) summarizes a number of responses of the insurance industry, its customers and state regulators to the crisis. These developments include the use of claims-made policies, the inclusion within policy limits of all or part of defense costs, the increasing use of self-insurance and captives, and more exacting state regulation.

In Chapter 4 of the report (Tort Law Reform) the Working Group concludes that while some of the above recent developments in the insurance industry, along with a likely improvement in the industry's financial condition, should relieve some of the current availability/affordability problems, it is unlikely that these changes will provide long-term, systemic relief without

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2/ For purposes of comparison, the dollar lost approximately half of its purchasing power during this period.

3/ While some have suggested that the dramatic premium increases are an attempt by the industry to recoup its past underwriting losses, for the reasons discussed in the report such a theory makes little economic sense.

some fundamental reforms of tort law. Indeed, there are good reasons to believe that absent such reforms, particularly the insurance affordability problem will remain a long-term fixture of the American economy.

The Working Group recommends eight reforms of tort law that should significantly alleviate the crisis in insurance availability and affordability. The Working Group does not at this time recommend how these reforms should be implemented (whether at the federal or state level, or through legislative or judicial modification of the law); nor are these reforms meant to be an exhaustive list of potential reforms. The recommended reforms are:

- Return to a fault-based standard for liability.
- Base causation findings on credible scientific and medical evidence and opinions.
- Eliminate joint and several liability in cases where defendants have not acted in concert.
- Limit non-economic damages (such as pain and suffering, mental anguish, or punitive damages) to a fair and reasonable maximum dollar amount.
- Provide for periodic (instead of lump-sum) payments of damages for future medical care or lost income.
- Reduce awards in cases where a plaintiff can be compensated by certain collateral sources to prevent a windfall double recovery.
- Limit attorneys' contingency fees to reasonable amounts on a "sliding scale."
- Encourage use of alternative dispute resolution mechanisms to resolve cases out of court.

Chapter 5 of the report (Government Insurance: A Non-Solution) details the reasons why government insurance or indemnification would be highly undesirable and would do nothing to remedy the problems underlying the availability/affordability crisis. Such a federal insurance or indemnification program would not only be extremely expensive, but also could exacerbate the problems of tort law by making the "deep pocket" of the taxpayer available in many cases. In addition, such a program could undermine public health and safety, require more extensive government regulation of private sector activities, involve the government in substantial litigation, lead to increased federal involvement in state insurance regulation, and inhibit the ability of the private sector to adapt insurance services to changing economic and social conditions.

The Conclusion to the report lists five conclusions as to the appropriate response of the federal government to the current crisis in insurance availability and affordability. In sum, the Working Group concludes that while there are a number of factors underlying the insurance availability/affordability crisis, tort law is a major cause which the federal government can address in various sensible and appropriate ways. As for some of the other factors underlying the crisis, such as the insurance industry's recent large underwriting losses, there is little the federal government can or should do to remedy these problems.

In that both the tort liability and insurance developments in this report are highly dynamic, and because more detailed data and other studies undoubtedly will become available, the Working Group will continue to follow developments in this area, and, where appropriate, supplement its conclusions and recommendations.

Richard K. Willard
Chairman
Tort Policy Working Group

Robert L. Willmore
Chairman
Task Force on Liability
Insurance Availability

February, 1986

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The Executive Letter

March 3, 1986 Vol. 18 No. 42

ADMINISTRATION GIVES A PREVIEW OF ITS TORT REFORM VIEWS

Assistant Attorney General Richard Willard last week gave the Federal Bar Association a preview of the Reagan administration's review of tort law problems. Willard heads the interagency task force which is producing a series of reports, the first of which is due in mid-March.

He said the current liability insurance crisis is due to two factors: insurers' cash-flow underwriting in the past and the "explosion of civil liability." The latter is due to the combined effects of three changes in the law: the trend to no-fault liability; the erosion of the doctrine of causation, including the rise of joint liability; and sharp increases in the size of damage awards. He warned that "tort liability cannot be a constantly expanding concept" and indicated that the Justice Department will recommend efforts to change overall public attitudes rather than pursue specific tort reform proposals.

The task force is not likely to recommend indemnification of federal contractors, because that would merely transfer the cost rather than solve the tort law problem, Willard said. It is looking at the liability problems of federal government employees and also the impact of federal civil rights laws on local government liability. While endorsing federal product liability law in concept, the administration is not embracing any specific legislation at this point.

PRODUCT LIABILITY LEGISLATION DEBATED

Insurers, consumer groups, manufacturers and attorneys last week presented to the Senate Commerce Committee their views on new product liability legislation. The bill (S.1999), introduced by Committee Chairman Sen. John C. Danforth (R-MO), will establish a uniform federal liability standard which would incorporate a no-fault victim compensation system. Danforth admitted that his bill is "not perfect and leaves room for improvement." Consumer advocates said they would favor an incentive system which would award those manufacturers who work out a prompt settlement with victims and punish those who carry on with unreasonable litigation.

Attorneys, who have been at odds with Congress over federal product liability legislation, remained firmly opposed to any changes in the current system. Manufacturers, while acknowledging their reservations about the bill, generally favor the idea of a uniform law in the hopes it would improve the affordability and availability of liability insurance. Les Cheek of Crum & Forster offered specific suggestions for changes in the legislation, indicating that the standard of liability in the alternative claims mechanism was unworkable.

HIGH COURT LETS CITIES OFF THE ANTITRUST HOOK

The Supreme Court last week eased the threat of antitrust lawsuits against local governments that regulate economic activities. In an 8-to-1 decision, the Court said municipal rent control laws do not violate federal antitrust statutes. By extension, the ruling also validates local zoning laws, taxicab regulation, cable TV franchises and other rules that were under legal challenge. The decision clarifies a 1978 case in which the Court ruled that local governments could be held liable under antitrust law for economic regulation that exceeded authority granted to them by the state. The latest decision came in Fisher vs. City of Berkeley (Docket No. 84-1538).

HAZARDOUS WASTE OPERATORS DEBATE INSURANCE DEADLINE CHANGE

Representatives of the hazardous waste management industry last week presented opposing views on legislation (HR.3917) which would extend the period allowed for compliance with federal financial responsibility requirements. Testifying before the Senate Environmental Pollution Subcommittee, small hazardous waste management companies said the unavailability of adequate liability insurance made it impossible to meet the Nov. 1, 1985, deadline. Extending the deadline, they added, would allow them to develop alternatives to commercial insurance. Technically, those not in compliance are operating illegally.

Representatives of larger companies noted, however, that the insurance problem will not disappear in a year and that granting an extension will not help resolve the problems of those who are unable to comply with financial responsibility requirements. They said an extension of the deadline would be unfair to those companies which did meet the compliance deadline. The bill was passed by the House of Representatives last December and awaits action by the Senate.

PENNSYLVANIA GOVERNOR VETOES BILL TO RETAIN GENDER-BASED RATING

Insurers are considering their options following Pennsylvania Gov. Dick Thornburgh's veto of a bill (HB.452) which would have retained gender-based rating for auto insurance (see ExL 2/18/86). The governor said he could not support legislation "which affords less protection against unfair sexual classifications than is (legally) afforded against unfair classifications

based upon race, religion or national origin." He said what should be identified are underlying rating factors which better reflect actual variations in driving and safety records of many males and females. "While such factors might coincide with the sex of the insured, rates should be based on those underlying factors and not per se on sex."

Since the bill was passed by more than a two-thirds margin in both houses and a veto can be overturned by such a majority, insurers may lobby for that to be done. Another possibility is lobbying for Senate concurrence with the House-passed bill (SB.1037), which would, among other things, postpone implementation of unisex rating for 18 months while the State Government Commission -- a legislative body -- develops a plan for implementation. Some insurers believe the commission might find that the problems of unisex outweigh the supposed benefits, resulting in a commission recommendation for a modification of the unisex directive. The governor said he could support legislation to delay unisex implementation while a "legislative-executive inquiry" seeks alternative methods for determining auto insurance rates, but his veto message seems to flatly rule out use of sex as a rating classification.

COOK COUNTY SUIT AGAINST ASBESTOS MANUFACTURERS DISMISSED

A Cook County Circuit Court (Chicago) judge has dismissed lawsuits filed by 34 school districts in Illinois against dozens of asbestos manufacturers seeking to force the companies to pay the cost of removing the substance from school buildings. Judge Richard Curry rejected the suits (Cook County Circuit Court 85-CH-811, 812 and 3905) ruling the school districts, including the Chicago school system, failed to prove the companies knew of the dangers of the substance when they sold it to the schools. The cost of removing the asbestos, he ruled, should be paid by the school districts or the state under the Illinois Asbestos Abatement Act. Only about $3 million has been appropriated for the act, however, significantly less than the $55 million expected cost for removal of the asbestos from the schools. The suits were filed last year against 78 firms that mine, manufacture, sell and install the material. An appeal is expected.

INSURERS AND INDUSTRY CRITICS CLASH AT ICAN MEETING

Industry critics such as Ralph Nader, Robert Hunter and several trial lawyers clashed with insurance industry representatives in Los Angeles Feb. 21 and 22 at a meeting of the Insurance Consumer Action Network (ICAN). Most of the approximately 100 persons attending were plaintiff attorneys, with representatives from government and insurance companies and some consumers also present. Insurance Information Institute spokespersons represented the industry on two panels: one dealing with insurance company profits, and another dealing with auto insurance questions including territorial rating and compulsory insurance. ICAN, which bills itself as "a network of consumer insurance

advocates ... dedicated to defining and protecting insurance consumers' rights," received its start-up funds from a past president of the California Trial Lawyers Association.

TRIAL LAWYER TOURING COUNTRY TO PROMOTE BOOK

William M. Shernoff, a past president of the California Trial Lawyers Association and a force behind the Insurance Consumer Action Network (see item above), is on a 15-day tour promoting through television appearances his new book, "Payment Refused." Published by Richardson & Steirman of New York, the book reviews in detail "bad faith" claims brought by Shernoff involving all lines of insurance. The Insurance Information Institute and the American Council of Life Insurance are arranging for industry representatives to appear with Shernoff, as was the case last week in New York City where he kicked off his tour with appearances on two stations.

MICHIGAN'S AUTO LAWS GET MODIFIED

Efforts to modify the auto insurance provisions of Michigan's Essential Insurance Act (EIA) appear headed for success. Unlike last year's package, the 1986 version apparently has Gov. James Blanchard's support. The major thrust of the reform measure is to relieve the onerous rating provisions of the old law, allowing rates outside of Detroit to be set competitively while retaining some restrictions on Detroit rates.

The law also mandates a 20% discount for personal injury protection rates after Feb. 1, 1987, to reflect the state's seat belt usage law. Other sections of the proposed law deal with auto theft, including the establishment of an auto theft authority.

R.I. GOVERNOR NAMES INDUSTRY PANEL ON AVAILABILITY

Rhode Island Gov. Edward D. DePrete has established a 25-member Governor's Insurance Council, made up of insurance industry executives, to address problems of availability and affordability in the current insurance market. The governor, a former insurance agent, has targeted three main purposes for the Council: to ensure that the needs of the insurance consumer are being met; to establish communications between the insurance industry and state government; and to retain existing jobs as well as to create new employment.

VERMONT BANKING AND INSURANCE COMMISSIONER NAMED

Vermont Gov. Madeleine Kunin has named Thomas P. Menson, former executive vice president and chief operating officer of the Bank of Vermont, as the new banking and insurance commissioner. He succeeds David Bard, who resigned to become president of the New England IBM Credit Union.

Carl C.A. Lee, Editor

T.B.R. OUTLINES OF ALASKA LAW

TORTS

P.O. Box 1312
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1982-1

TORTS

TORTS

I. INTENTIONAL TORTS

A. Examples:

1. Assault and Battery

a) An act with intent to cause a harmful or offensive contact which actually places the victim in imminent apprehension of such a contact fulfills the elements of assault and battery. Malice is not an element. Merrill v. Faltin, 430 P.2d 913 (Alaska 1967).

b) Damages: A person is not entitled to actual or compensatory damages for assault and accordingly, not entitled to punitive damages if he/she suffers no mental or physical injury. Hamerly v. Denton, 359 P.2d 121 (1961).

2. False Imprisonment

a) False arrest is one way to commit false imprisonment. Since the arrest involves restraint, it inherently involves imprisonment. City of Nome v. Ailak, 570 P.2d 162 (1977).

b) Defense: Where a shopkeeper has reasonable grounds to believe that the person has concealed upon his person unpurchased merchandise, such grounds acts as a defense to false imprisonment actions, if the person is detained in a reasonable manner for not more than a reasonable time to permit investigation or questioning. Malvo v. J. C. Penney Co., 512 P.2d 575 (Alaska 1973).

c) Alaska does not permit an individual to bring an action against the state for recovery of damages for various intentional torts, assault, battery, false imprisonment, libel, slander, etc. AS 09.50.250(3). But suit permitted where plaintiff's wrongful incarceration was caused by negligent record keeping, and not false imprisonment. Zerbe v. State, 583 P.2d 845 (Alaska 1978). See, Alaska State Tort Claims Act, Sec. V.A.

Emotional Injury

3. Emotional Injury. Intentional Infliction of Emotional Distress. Despite the fact that Worker's Compensation (AS 23.30) is the exclusive remedy for the injured worker, (See Sec. V) conduct by the employer's insurance carrier subsequent to the injury in which the carrier intentionally and maliciously misled the worker about his right to compensation and discouraged him from exercising his rights, will support a claim for emotional injury. Stafford v. Westchester Fire Ins. Co. of New York, Inc., 526 P.2d 37 (Alaska 1974).

Intentional Interference w/ Contract Right

4. Intentional Interference with Contract Right. A contracting party has a claim against a third party who intentionally procures breach of contract. A prima facie case is established by proof of a breach intentionally procured. Defendant then must show that his conduct was justified. Plaintiff need not show malice or ill will. Lon v. Newby, 488 P.2d 719 (Alaska 1971).

Trespass & Conversion

5. Trespass and Conversion. Plaintiff shall be awarded damages which would place him in a substantially equivalent position to that which he would have occupied had the trespass not been committed. Thrift Shop, Inc. v. Alaska Mutual Savings Bank, 398 P.2d 657 (Alaska 1975).

II. INJURY TO REPUTATION

A. Defamation

1. Definition of Libel: Every false and unprivileged publication which exposes a person to hatred, contempt, ridicule or obloquy, or causing him to be shunned or avoided or which tends to injure him in his occupation is "libelous". Golden North Airways v. Tanana Pub. Co., 15 Alaska 303, 218 F.2d 612 (1955).

2. Privilege.

a) A publication that is defamatory in itself is itself an injury entitling the injured one to recover damages unless it is shown to be true or that it is privileged. Pearson v. Fairbanks Pub. Co., 413 P.2d 711 (1966).

b) Truth is a complete defense, Fairbanks Publishing v. Pitka, 376 P.2d 190 (Alaska 1962) 445 P.2d 685 (Alaska 1968), Urethane Specialties v. Valdez, 620 P.2d 683 (Alaska 1980).

Absolute Privilege

c) Absolute Privilege: Judicial officers, attorneys, witnesses, jurors, legislators, government executive officers and others are accorded absolute privilege of publishing false and defamatory matter within certain limitations. Fairbanks Pub. Co. v. Francisco, 390 P.2d 784 (1964). Defamatory matter published in a judicial proceeding, although made maliciously, is absolutely privileged. Smith v. Bannister, 9 Alaska 632 (1939). This extends to affidavits as well as in-court testimony. Nizinski v. Currington, 517 P.2d 754 (1974).

Conditional Privilege

d) Conditional Privilege: News media is accorded "conditional privilege" to publish reports of a government official even though report may contain false and defamatory matter. This privilege is recognized because it is considered in public interest that information be made available as to what takes place in public affairs. Fairbanks Pub. Co. v. Francisco, 390 P.2d 784 (1964).

Malice negates conditional privilege

e) Malice: A defamatory statement made with the knowledge that it is false or with a reckless disregard of whether it is false negates the conditional privilege. Pearson v. Fairbanks Pub. Co., 413 P.2d 711 (1966). Restatement (Second) of Torts § 600 (1977) Urethane Specialties v. Valdez.

III. NEGLIGENCE

A. Overview: Prima Facie case of negligence is established by the existence of an act or omission which is a breach of a duty of due care and which is the proximate cause of the plaintiff's injury.

1. Duty

a) Defendant must have owed a duty of care to the plaintiff.

Duty of Care

b) Generally, the duty of care is the duty to act with that amount of care which a reasonably prudent person would use under the same or similar circumstances. Leigh v. Lundquist, 540 P.2d 492 (Alaska 1975).

i) Inaction may also constitute a breach of duty. Sharp v. Fairbanks North Star Borough, 569 P.2d 178 (Alaska 1977).

Breach

2. Breach.

a) That duty must have been breached.

b) The breach of duty may be "misfeasance" or "nonfeasance". Transamerica Title Ins. Co. v. Ramsey, 507 P.2d 492 (Alaska 1973).

Causation

3. Causation:

Cause-in-fact

a) Cause-in-fact. The breach of duty must be the cause in fact of the injury, and

Proximate
foreseeable
probable
not extraordinary

b) Proximate cause. The injury to plaintiff must have been proximately caused by the breach. Larman v. Kodiak Electric Ass'n, 514 P.2d 1275 (Alaska 1973).

4. Damage. The plaintiff must have been injured. The injury may be to the person or to property.

5. Defenses. There are two types of defenses:

a) Defenses which may deny liability. See Comparative Negligence, Immunities, Statute of Limitations, Sec. III F.

b) "Defenses" which may reduce damage recovery. See Contribution, Indemnity, Sec. VI.

B. Duty. There are several duties in Alaska in addition to the basic duty to behave as a reasonable person would. Some of these special duties are created by statute, some by case law.

1. Duty Not to Violate Legislative or Administrative Standard or Negligence per se. The source of this special duty is judicial. The court may adopt as its standard of conduct for a reasonable

person the requirements of a legislative or administrative regulation. The purpose of the doctrine is to make the general reasonable person duty specific and precise.

a) Originally enunciated in Ferrell v. Baxter, 484 P.2d 250 (Alaska 1971) and refined in Bachner v. Rich, 554 P.2d 430 (Alaska 1976).

Special Duty based on regulation or law

Per se

b) In order for a regulation to qualify as a special duty for determining negligence per se, the purpose of the regulation violated must be:

i) To protect a class of persons which includes the one whose interest is invaded;

ii) To protect the particular interest which is invaded;

iii) To protect that interest against the particular hazard from which the harm results;

iv) To protect that interest against the kind of harm which has resulted.

c) The regulation may be employed as the applicable standard of care where the rule of conduct contained therein is expressed in specific, concrete terms.

i) The regulation may not be used as the standard of care where the regulation merely sets out a general or abstract standard of care. Northern Lights Motel, Inc. v. Sweaney, 561 P.2d 1176, rehearing 563 P.2d 256 (Alaska 1977).

ii) Nor will a safety clause in a government contract be considered the applicable standard of care toward a non-employee or non-business related person on the job site. Macey v. United States, 454 F.Supp. 684 (D.C. Alaska 1978).

Negligence per se

d) The elements listed in (b) are necessary to a finding of negligence per se; however, the fact of adopting the regulations is discretionary with the trial court. Bachner.

e) If the trial court adopts the regulation or statute for purposes of determining negligence per se, the effect is that the statute or regulation will become a substitute for the usual common law reasonable person standard as the standard of care. The jury, so instructed, must then apply the standard of care to the remaining elements necessary to a determination of negligence.

f) A prior criminal conviction may be conclusive as to negligence if it arose from the same facts as the subsequent negligence action. Scott v. Robertson, 583 P.2d 188 (Alaska 1978). (Earlier conviction for driving while impaired, conclusive evidence of facts necessarily determined in subsequent civil action arising from same incident.)

2. Duty of Owner and Occupier of Land. Alaska has abandoned the common law classifications of trespasser, licensee and invitee as a means of determining the type of duty owed by the land owner or occupier.

a) Now a reasonable person standard applies. The owner must maintain his property in a reasonably safe condition in view of all the circumstances, including:

b) A land owner is not liable if 1) the injury results from the natural conditions of the land, and 2) the injured person was under no duty to pay the owner for his use of the property.

i) The likelihood of injury to others;

ii) The seriousness of the injury;

iii) And the burden on the respective parties of avoiding the risk. Webb v. City & Borough of Sitka, 561 P.2d 731 (Alaska 1977).

Health Care Provider's Duties

3. Duty of the Health Care Provider. This duty has its source in the Medical Malpractice Act, AS 09.55.535-560.

a) The legislature has determined that the reasonableness of the conduct of a "health care provider" is measured by the degree of care ordinarily exercised in the field or specialty in which the defendant is practicing. AS 09.55.540(a)

i) The plaintiff has the burden of proving by a preponderance of the evidence the degree of care ordinarily exercised in the field or specialty, the defendant's failure to abide by this degree of care, as well as the burden of proving that plaintiff's injuries were the "proximate result" of the breach of duty. AS 09.55.540(a)

ii) Priest v. Lindig, 583 P.2d 173, (Alaska 1978), applies a community rather than national standard.

iii) There is no presumption of negligence on the part of the defendant. 09.55.540

iv) A "health care provider" includes a physician, psychologist, dentist, nurse, chiropractor and physical therapist. 09.55.560.

b) The health care provider is also under a duty to obtain the informed consent of a patient under certain circumstances.

i) The provider is liable for failure to obtain informed consent if claimant establishes by a preponderance of the evidence both failure to inform of common risks and reasonable alternatives and that but for the failure to inform, claimant would not have consented. 09.55.560.

ii) It is a defense to a claim of lack of informed consent that the risk was either commonly known or too remote, the

patient had already indicated lack of heed of any risk, consent was not possible, or disclosure would have had an adverse effect on the patient's condition. 09.55.560(b).

c) A patient and a health care provider may execute an agreement to submit to arbitration. 09.55.535.

i) Any claim filed after such an agreement is formed shall be submitted to an arbitration board, which may appoint an expert advisory panel.

ii) The report of the expert advisory panel is admissible in court as if its contents were testified to by its preparers. 09.55.536(e).

d) No advance insurance payment is admissible as an admission of liability. 09.55.546

e) Damages are awarded in accordance with principles of common law. 09.55.548

f) Good Samaritan Act AS 09.65.090 waives liability for simple negligence even when committed at a hospital by a doctor in an emergency.

Common Carrier Duty of Care

4. Duty of the Common Carrier. A higher standard of care is imposed on common carriers transporting passengers for hire. They must exercise the highest degree of care for the safety of passengers. Widmyer v. Southeast Skyways, Inc., 584 P.2d 1 (Alaska 1978).

5. The common carrier duty also applies to a prisoner. Wilson v. Kotzebue (Op. No. 2331, May 1981).

Employer's Duty to Employee

6. Employer's Duty Regarding Defects in Machinery. The employer has a special statutory duty to protect employees from defects or insufficiency in machinery on the job and is liable to the employee or representative. AS 23.25.010.

a) Contributory negligence is not a defense if the employee's contribution to the injury

was slight and the negligence of the employer gross. AS 23.25.010.

b) This statutory remedy is not available for an employee covered by worker's compensation. Haman v. Allied Concrete Products, 495 P.2d 531 (Alaska 1972). (See worker's Compensation Sec. V. E.)

Dram Shop Act in Alaska

7. Duty of Innkeeper/Bartender. There is now a Dram Shop Act in Alaska. In Alesna v. LeGrue, 614 P.2d 1387 (1980) the Supreme Court gave a private right of action against the licensee to a person injured by a drunk. Recent enactment of AS 04.21.020 provides for civil liability for a licensee who provides alcohol to a minor or a drunk.

Bailee

8. Duty of a Bailee.

a) Standard of Care: Bailee is liable for any loss or injury to bailed goods caused by failure to exercise degree of care of a reasonably careful owner.

i) This liability may be modified by contract so long as the provision is not unconscionable.

ii) Alaska refuses to exempt bailee from liability when bailment is at the bailor's risk but there is no provision concerning bailee's own negligence.

iii) A provision requiring the bailor to provide insurance does not absolve the bailee from liability for negligence.

iv) Strict liability is applied if otherwise appropriate to bailors and lessors. It is attached on the basis of the existence of a defect in the product rather than on negligent conduct. Bachner v. Pearson, 479 P.2d 319 (Alaska 1970).

b) Burden of Proof: Once loss or damage to bailed property is shown, burden shifts to bailee. Dresser Indus., Inc. v. Foss Launch & Tug Co., 560 P.2d 393 (Alaska 1977).

C. Breach. The determination of breach of the applicable duty involves factual analysis of whether the conduct that actually occurred was a deviation from the applicable standard of care.

1. Means of Establishing. Breach may be established by direct or circumstantial evidence, or by res ipsa loquitur.

2. In the doctrine of res ipsa loquitur, circumstantial evidence may establish a prima facie case of negligence where:

i) The accident is of the type which does not ordinarily occur in the absence of someone's negligence;

ii) The instrumentality is within the exclusive control of the defendant;

iii) The occurrence was not due to any voluntary action by the plaintiff. Widmyer v. Southeast Skyways, Inc., 584 P.2d 1 (Alaska 1978); Crawford v. Rogers, 406 P.2d 189 (Alaska 1965).

D. Causation. Recall that both cause-in-fact and proximate cause are necessary for the determination of negligence.

1. Cause-in-fact may be established in either of two ways:

a) "But-for" cause. Plaintiff would not have been injured but for defendant's negligence; or

b) "Substantial factor" cause. Even if defendant's conduct was not a "but for" cause (i.e., if either one of two acts would cause the injury), defendant is still liable if his conduct was a substantial factor in bringing about the injury. State v. Guinn, 555 P.2d 530 (Alaska 1976) (Failure of State to remove disabled truck was substantial factor cause in death of motorist who collided with truck.) See also, State v. Abbott, 498 P.2d 712, 726-

27 (Alaska 1972) and Sharp v. Fairbanks North Star Borough, 569 P.2d 178, 181-182 (Alaska 1977).

Proximate Cause
Foreseeable
Probable
Not Extraordinary

2. Proximate Cause. A public policy determination of liability for unexpected types or methods of injury. Vance v. United States, 355 F.Supp. 756 (D.C. Alaska 1973).

a) Recall the difference between problems of direct causation (where there are no intervening forces) and indirect causation.

"Intervening Force

b) "Intervening force" (the foreseeability of which determines defendant's liability) is one which actively operates after the defendant has acted. Sharp v. Fairbanks North Star Borough, 569 P.2d 178 (Alaska 1977).

E. Damages

1. What Damages Can Be Recovered

a) In general, all damages proximately caused by a party's tortious actions are recoverable. ERA Helicopters v. Digicon Alaska, 518 P.2d 1057 (Alaska 1974).

b) Past damages, that is those damages already suffered at the time of award, may include past economic loss, medical expenses, lost earnings and past pain and suffering. City of Whittier v. Whittier Fuel & Marine Corp., 577 P.2d 216 (Alaska 1978); Alaska Airlines v. Sweat, 568 P. 2d 916 (Alaska 1977).

c) Future damages, or those damages yet to be suffered at the time of award may include prospective medical bills, lost earnings and pain and suffering. Sweat.

Future economic loss awards not reduced to present value
- inflation offset
- investment risk shouldn't be placed on P

i) Special Alaska rule does NOT reduce future economic loss awards to present value. Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967).

ii) Reason for NOT reducing plaintiff's award to its present value by subtracting an amount equivalent to that which would

be realized by prudent, safe investments: the court believed that any earnings from a reduction to present value would be offset by inflationary pressures. Further, there is an inherent risk involved in investments and the plaintiff should not be forced to assume that risk. Beaulieu.

lost wages computation

iii) In computing future lost wages, no allowance is made for salary increases. This, however, has been slightly modified in State v. Guinn, 555 P.2d 530, 545-546 (Alaska 1976), where automatic wage increases keyed to longevity may be included in an award for lost wages. In Guinn, the step increases were contained in a collective bargaining agreement and could be accurately predicted.

iv) Regarding income taxes, the court indicated in Beaulieu that future earning capacity is not reduced by future income taxes since such taxes are speculative, but past wages lost are subject to a reduction for state and federal income taxes since they may be accurately computed.

d) Interest:

i) Prejudgment interest is the interest earned from the time the cause of action accrues until the time of judgment. State v. Phillips, 470 P.2d 266 (Alaska 1970). The rate of prejudgment interest in Alaska is 10 1/2% under AS 45.45.010 on cases filed after July 1, 1980. Cases filed before 1980 bear interest at 8%. Juneau v. Commercial Union, 598 P.2d 957 (Alaska 1979).

ii) Post-judgment interest is that interest earned from the time of settlement or judgment until the amount is paid. Guin v. Ha, 591 P.2d 1281 (Alaska 1979). Judgments after July 1, 1980 bear interest at 10 1/2% prior to July 1, 1980, at 8%.

Obligation to mitigate damages

e) Mitigation of Damages. Plaintiff has duty to mitigate damages by seeking alternate employment; however, the duty does not extend to taking employment which is temporary and of significantly less responsibility than original employment. Univ. of Alaska v. Chauvin, 521 P.2d 1234 (Alaska 1974).

Collateral Source Rule

f) Collateral source rule prevents the defendant from showing at trial that plaintiffs received payments through insurance or other sources for injury caused by defendant's negligence. Aydlett v. Haynes, 511 P.2d 1311 (Alaska 1973).

2. Who is Liable For Damages

Respondeat superior

a) Respondeat Superior. Employer liable for negligent acts or omissions of employee committed in the scope of employment. Luth v. Rogers & Babler Construction, Co., 507 P.2d 761 (Alaska 1973). Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972).

Independent Contractor

b) Independent Contractor. Generally the employer is not vicariously liable for the negligence of an independent contractor. Hobbs v. Mobil Oil Co., 445 P.2d 933 (Alaska 1968). Exceptions:

Exceptions:

i) Where employer has retained control over the actual manner of work. Hobbs. State v. Morris, 555 P.2d 1216 (Alaska 1976) (State did not have sufficient control over work of private employer contractor, and was thus not liable for contractor's failure to provide safety equipment; dissent held state inspector should have known of violations of safety regulations and would have imposed liability).

ii) Where the delegated duties involve unreasonable risk of harm to others. Alaska Airlines v. Sweat, 568 P.2d 916 (Alaska 1977). (Scheduled air carrier should not be permitted to barter away its responsibility to passengers by contracts with other carriers.) See Restatement Second Of Torts § 428.

iii) Where plaintiffs can bear burden of showing independent negligence on the part of the employer, such as failing to turn over premises to independent contractor that are free of safety hazards. Sloan v. Atlantic Richfield Co., 552 P.2d 157 (Alaska 1976).

Defences

F. Defenses to Negligence

Alaska is Comparative Neg. State.

Abolished are: contributory neg. last clear chance assumption of risk

1. Comparative negligence is adopted in Alaska. Contributory negligence, (which defeated plaintiff's claim if he were even slightly negligent himself) last clear chance, and assumption of risk are abolished in Alaska. Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

a) Pure form comparative negligence originating in admiralty and judicially adopted in California and Florida is adopted in Alaska.

b) Under a "pure form", the plaintiff's damages are simply reduced in proportion to the amount of negligence which is attributed to him. Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

c) Alaska rejected the "modified form", such as Wisconsin's 50% system, in which a negligent plaintiff may recover only so long as the amount of his fault does not exceed 50% of the total fault attributable to the parties.

d) Assumption of risk had previously been judicially abolished in Leavitt v. Gillaspie, 443 P.2d 61 (Alaska 1968).

2. Immunities. See IMMUNITIES AND SPECIAL STATUS PARTIES, Sec. V.

3. Statute of Limitations. See T.B.R. CIVIL PROCEDURE OUTLINE.

Products Liability

IV. PRODUCTS LIABILITY

A. Overview:

1. Products liability is the general category for ascertaining the liability of a commercial SUPPLIER

of a PRODUCT to a person INJURED by the product. In a fact pattern which includes a PRODUCT furnished by a commercial SUPPLIER which INJURES, always consider the following avenues of recovery:

a) - liability based on supplier's representation.

b) - liability based on supplier's negligence.

c) - liability based on supplier's implied warranty.

d) - strict liability in tort.

Strict Liability

B. Strict Liability in Tort.

1. Duty. A strict duty is owed by a commercial supplier who must provide a product free from defects.

Duty owed by commercial supplier of a product (not service)

a) The purpose of imposing strict liability on manufacturer or retailer is to insure that the costs of injury resulting from defective products are borne by suppliers rather than by consumers. Cloud v. Kit Manufacturing, 563 P.2d 248 (Alaska 1977).

b) Recall that the defendant must be the supplier of a PRODUCT, not merely a service.

i) The Supreme Court, in an important recent case, held that a company that installed and repaired truck parts is not strictly liable in tort because it did not sell a PRODUCT. It held itself out only as a repair SERVICE. (However, a business that sells used products may be strictly liable in tort.) Restatement (Second) of Torts § 402-A. Swenson Trucking v. Truckweld, 604 P.2d 1113 (Alaska 1980).

To whom owed: consumer or user

c) To whom is the duty owed? Any user or consumer.

econ. loss not recoverable

d) To what types of harm? Personal injury and sudden and calamitous property damage are recoverable; purely economic loss such as decline in value of property (purchased item a

Personal Injury + sudden property ~~loss~~ damage are recoverable

"lemon") is not recoverable. Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976).

e) Personal injury and property damages are grounded in tort law which applies in products liability. Economic loss is a contract law theory and is not recoverable in products liability. Contract damages are intended to fulfill reasonable economic expectations. Tort damages are concerned with the safety of products. Northern Power & Engine Corp. v. Caterpillar, 623 P.2d 324 (Alaska 1981). Engine failure is not "sudden and calamitous."

3. Breach. The plaintiff must show that the product is defective in either manufacture or design.

a) Defect in Manufacture. Elements are:

i) Manufacturer placed product in the stream of commerce.

ii) Manufacturer knew that the product was to be used without inspection for defects.

iii) The product was "defective", i.e., that it deviated from the manufacturer's intended result.

iv) The defect caused the personal injury and property damage alleged.

Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969); Sturm, Ruger & Co., Inc., v. Day, 594 P.2d 38, (Alaska 1979); rehearing 615 P.2d 621 (Alaska 1980).

b) Defect in Design. Elements are:

i) Manufacturer placed product in the stream of commerce.

ii) Manufacturer knew that the product was to be used without inspection for defects.

iii) The product was defective in that it either:

1) Failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; or

Design Defect

Manufacturer failed to prove benefits of the design outweighed the risks inherent in the design. Beck

2) Was designed in such a way that the design caused the injury, and that the manufacturer failed to prove that the benefits of the design outweighed the risks of danger inherent in the design (knowledge of manufacturer of danger measured at time of manufacture. Caterpillar Tractor Co. v. Beck, 593 P.2d 87 (Alaska 1979); Heritage v. Pioneer Brokerage Sales, Inc., 604 P.2d 1059 (Alaska 1979). The factors to be considered in weighing the risks and benefits include

Factors

a. the gravity of the danger,

b. the likelihood that such danger would occur, and

c. the mechanical feasibility at the time of sale, cost and adverse consequences of alternative designs.

iv) The defect caused the personal injury and property damage alleged.

Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979).

c) Special problem with design defect cases:

i) Intended use: lack of direction or warnings may be a defect. Failure to warn is established by:

A. Manufacturer put the product in the stream of commerce.

B. The manufacturer knew that the product was to be used without inspection for defects.

C. The defect caused the personal injury or property damage alleged.

D. The product is deemed to be defective without a warning or instructions if the jury finds that the manufacturer did not accompany the product with sufficient warning as to make the product safe (if no warning would make the product safe, the danger must be eliminated).

E. These warnings must be made in a form that will reach the ultimate consumer.

Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38 (Alaska 1979).

Supplier must anticipate types of consumer misuse

ii) Supplier is also charged with the duty of anticipating likely consumer misuse. Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975), 555 P.2d 42 (Alaska 1976).

3. Causation.

a) Actual - where plaintiff claims that the defect was failure to warn, he must also show that but for failure to warn, harm would not have occurred.

Failure of intermediary to discover defect does not excuse supplier's liability

b) Proximate - defendant supplier's liability is not extinguished by intermediary's failure to discover defect.

4. Damages.

a) See Damage Sec. III. Recall that Alaska denies recovery for purely economic loss. Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

Punitive damages possible

b) Punitive damages. In Sturm Ruger v. Day, 594 P.2d 38 (Alaska 1979), the court upheld the applicability of punitive damages to some

strict liability cases, for the purposes of punishment of the wrongdoers, deterrence of others and prevention of disadvantage to the socially responsible competitor. On remand for a new trial, the court set a ceiling on punitive damages. (The court indicated that the punitive damage award of $2.9 million was the product of passion or prejudice.)

5. Defenses.

a) Comparative negligence (See Sec. V.): The manufacturer must show that the user:

i) Was actually aware of the defect and

ii) Voluntarily and unreasonably encountered the risk known to him, or

iii) That he misued the product and that this was a proximate cause of the injury.

Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975), 555 P.2d 42 (Alaska 1976); Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979).

C. Liability Based on Supplier's Negligence.

1. Duty - commercial suppliers owe a duty of care to anyone injured by the product. Larman v. Kodiak Electric Ass'n, 514 P.2d 1275 (Alaska 1973); Restatement Second Of Torts § 395. ("reasonably prudent supplier").

2. Breach - the defective product must be caused by defendant's negligence.

a) In manufacturing defect cases, the plaintiff may use direct evidence, circumstantial evidence or res ipsa loquitur.

b) In design defect cases, the plaintiff must show that the designer:

i) Knew or should have known that the product was likely to be dangerous without proper warning or instructions.

ii) Had no reason to believe that the user would recognize the danger.

iii) Actually failed to give a warning which adequately conveyed the required information to the user.

Restatement (Second) Of Torts § 388

3. Causation - the supplier's failure to exercise reasonable care must have proximately caused the injury. Larman.

4. Damages - recall that mere economic loss is not recoverable. New Moon.

5. Defenses.

a) Comparative negligence. The manufacturer must show that the plaintiff failed to exercise the care of a reasonably prudent person, which failure contributed to the accident; damages are reduced in proportion to the degree of fault attributed to the plaintiff. Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

Representation D. Liability Based on Supplier's Representation.

Express Warranties 1. Express Warranties of ~~Fitness for a Particular Purpose~~. Elements:

a) Seller expressly tells or promises the buyer that the product is safe and fit for a particular purpose.

i) Note that defendant must be a seller. One who repairs is not vulnerable to warranty claim. Swenson v. Truckweld, 604 P.2d 1113 (Alaska 1980).

b) The product is not in fact fit for such purposes.

c) The fact that the product is not fit for such purposes causes the accident.

AS 45.05.094 (Alaska's adoption of Uniform Commercial Code § 2-313); Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

2. Defenses - Recall that the statute of limitations for breach of warranty is four years and that the breach occurs when delivery is made. However, if warranty explicitly extends to future performance, cause of action accrues when breach is or should have been discovered. AS 45.05.242. See CIVIL PROCEDURE OUTLINE, Statute of Limitations.

Implied warranty/

E. Liability Based on Implied Warranty.

- Fitness for particular Purpose

1. Implied Warranty of Fitness for a Particular Purpose. Elements:

a) The manufacturer, at the time of the sale, had reason to know of a particular purpose for which the product was required.

b) The manufacturer, at the time of the sale, had reason to know that the buyer was relying on the retailer's skill or judgment in furnishing suitable goods.

c) The product was not in fact fit for the purpose for which it

d) The unfitness of the product for a particular purpose caused the accident.

AS 45.05.098 (Alaska's adoption of Uniform Commercial Code § 2-314) Prince v. LeVan, 486 P.2d 95 (Alaska 1971); Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

Implied warranty of merchantability

2. Implied Warranty of Merchantability. Elements:

a) The product (may be food or alcohol) was sold in the regular course of defendant's business, and defendant sold the particular product in question.

b) The product was not fit for the ordinary purposes for which it was used, or did not conform to the promises or affirmations of fact made on the container or label.

c) The product's failure to be fit for its intended purposes caused the injury.

AS 45.05.096 U.C.C. § 2-313; Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

3. Warranty Defenses on Personalty.

a) The plaintiff did not give the seller notice of the breach of warranty within a reasonable time after the plaintiff discovered or should have discovered the breach. AS 45.05.174(c)(1). (U.C.C. § 2-607).

b) The parties modified or limited the buyer's remedies for damages, AS 45.05.230, U.C.C. § 2-719) and such modifications or limitations are not unconscionable. AS 45.05.072 (U.C.C. § 2-302).

c) The warranties were excluded or modified, and such exclusions or modifications were not unreasonable nor unconscionable.

i) To be effective, modifications and exclusions of the warranty of merchantability must mention merchantability and if they are in writing, must be conspicuous.

ii) To be effective, modifications and exclusions of the warranty of fitness must be both in writing and conspicuous.

AS 45.05.100(b); (U.C.C. § 2-316) Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

d) Statute of Limitations. 4 years. AS 45.05.242. See IV D(2).

V. IMMUNITIES AND SPECIAL STATUS PARTIES

State Tort Claims Act

A. The State Tort Claims Act: The State as a Defendant.

1. Under the State Tort Claims Act, AS 09.50.250, the State is immune from suit in certain circumstances. Sec. 1 immunizes the State from suits based on the act or omission of an employee exercising due care in the execution of a statute or regulation and from suits based upon the exercise or performance (or failure of exercise or

performance) of a discretionary function on the part of a state agency or employee.

Section 2 immunizes the state from suit for damages caused by the imposition of quarantine.

Section 3 immunizes the state against actions arising out of assault, battery, false imprisonment or arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights. See INTENTIONAL TORTS Section I. 2(c).

2. The most important of these immunities is the DISCRETIONARY FUNCTION SOVEREIGN IMMUNITY. The state is protected from suit on its discretionary, policy making functions (such as the decision of where to build roads or overpasses) (Jennings v. State, 566 P.2d 1304 (Alaska 1977)), but remains vulnerable to suit for its operational functions (such as the actual removing of snow from the roads) (State v. Abbott, 498 P.2d 712 (Alaska 1972)).

3. In Carlson v. State, 598 P.2d 969 (Alaska 1979) the State was found liable for personal injuries inflicted by a bear, when the bear was attracted to the site of the attack by garbage that had accumulated on State-owned property.

The attack occurred after the State had ceased its litter removal for the vacation season. The lower court found that appellee's decision regarding maintenance of the highway was a discretionary functior for which the State was immune from suit under AS 09.50.250(1). The Supreme Court found that the State's decision on the broad question of whether to maintain highway turnouts in the winter was indeed a policy determination that could not give rise to tort liability. But, the decision made pursuant to that policy, on how to implement it, or when to cease maintenance are operational decisions. As to those, the State is under a duty to act with reasonable care, and is thus not immune under the State Tort Claims Act.

4. Summary: If state's action is discretionary, planning or policy-making, state is immune from suit under Sec. 1 of State Tort Claims Act, AS 09.50.250. If state's action is operational or

ministerial, state is vulnerable. Adams v. State, 555 P.2d 235 (alaska 1976); State v. I'Anson, 529 P.2d 186 (Alaska 1974).

B. Suits Against Municipality. AS 09.65.070 prohibits the following claims against the municipality:

1. Those based on failure to inspect property for violation of law or safety hazard, to discover a violation of law or health hazard if inspection is made, or to abate a violation of law or health hazard once it is discovered, or

2. Those based on a discretionary function, or

a) Urethane Specialties v. Valdez, 620 P.2d 683 (Alaska 1980). Lesser government official in issuing a public warning exercises a discretionary function, but City is not immune with regard to the warning's content. Injured party must show malice (i.e., knowledge that the statement is false or is made with reckless disregard of the truth), or

3. Those based upon a licensing or zoning proceeding or

4. Those based on the gratuitous extension of city services outside the city, or

5. Those based on agreement with the state to meet emergency public safety requirements.

In addition, a city cannot further restrict the period of time in which to bring an action through ordinance. Johnson v. Fairbanks, 583 P.2d 181 (Alaska 1978).

C. Family Immunity (Spouse, Minors, Family)

1. Interspousal tort immunity is not recognized. Cramer v. Cramer, 379 P.2d 95 (Alaska 1963).

2. Parent or guardian who signs for minor is liable for damages resulting from minor's negligent driving, unless minor can prove financial responsibility (e.g. insurance). AS 28.15.071.

3. Minor has the right to bring claim for relief against parents for negligent infliction of harm. Hebel v. Hebel, 435 P.2d 8 (Alaska 1967).

4. A child employed in violation of child labor laws may waive Worker's Compensation benefits and proceed against the employer in tort. Receipt of Worker's Compensation benefits is not determinative of whether a child has exercised a conscious intent to choose compensation benefits as opposed to bringing a claim in tort. Whitney-Fidalgo Seafoods, Inc. v. Beukers, 554 P.2d 259 (Alaska 1976).

Death & Survival

D. Death and Survival

1. Wrongful Death AS 09.55.580. Action must be commenced within two years after the death. Haakanson, Personal Representative of the Estates of Simeon and Annie Squartsoff v. Wakefield Seafoods, Inc., 600 P.2d 1087 (Alaska 1979). Even though the statute requires that the 'personal representative' bring the wrongful death action within two years, the disability of minority will toll the running of the statute of limitation. This case was brought on behalf of two surviving children more than two years after the death of their parents.

2. Survival Statute AS 09.55.570. At common law, personal tort actions were extinguished by the death of the plaintiff. However, under this statute, all causes of action, except defamation, survive both the death of the plaintiff victim and the defendant tortfeasor and may be maintained by the plaintiff's personal representative against the defendant's personal representative.

3. Death of a Minor AS 09.15.010. Besides the wrongful death act and the survival act there is a special provision that parents or guardian may sue for the injuries to or death of a child.

Worker's Compensation

E. Worker's Compensation AS 23.30.

1. The statutory remedies under AS 23.30 are the exclusive remedy of the injured employee against employer for injuries received in the course of employment.

2. The dual capacity doctrine provides that an employer apparently protected by the exclusive liability of worker's compensation insurance may become liable to the employee in tort if, in respect to that tort, he occupies a position which places upon him obligations independent and distinct from his role as an employer. In, State v. Purdy, (601 P.2d 258 (Alaska 1979), the Supreme Court rejected the dual capacity doctrine and upheld its prior decisions that the recovery under worker's compensation is exclusive, i.e., it is in place of all other liability to which the employer might be subjected because of the injury to the employee.

Dual Capacity Doctrine has been rejected in Alaska

VI. CONTRIBUTION

A. The Uniform Contribution Among Joint Tortfeasors Act AS 09.16.010 - 060. Alaska adopted the 1955 version of the Uniform Act in 1970.

1. The statute abrogates the common law rule of no contribution (that is, no sharing of damages among defendants) and provides for a right of contribution among defendants who are jointly and severally liable, even though judgment has not been recovered against all of them. AS 09.16.010(a).

2. The Uniform Act provides that a tortfeasor is compelled to make contribution only up to his pro rata share of the entire liability.

Pay pro rata share only

a) example: If there are three defendants, each is liable for 33 1/3% of the total liability even though one of the defendants was 90% at fault.

b) California has interpreted its own version of the Uniform Act to permit comparative contribution, that is, contribution among the defendants in proportion to fault. American Motorcycle v. Superior Court, 578 P.2d 899 (Calif. 1978).

3. In Artic Structures v. Wedmore, 605 P.2d 426 (Alaska 1979), an employee, injured in the course of his employment, sued various third party defendants that had made safety inspections and provided the scaffolding from which he fell. Some defendants urged the abolition of the rule of joint

and several liability in Alaska. The question was whether the liability of multiple third party defendants should be apportioned on the basis of fault or several liability. Petitioners argued for comparative fault under Kaatz. After discussing the legislative history and commissioner's comments, the court concluded that the legislature intended that:

a) liability be joint and several;

unlike Calif., Alaska's contribution is pro rata, not comparative (which would apportion based on liability)

b) contribution be pro rata and not comparative, thus breaking with California's holding in American Motorcycle;

c) Worker's Compensation be the exclusive employee remedy against the employer;

d) the employer not be required to contribute. Neither would the worker's award be offset by any comparative negligence of the employer.

The court has reaffirmed Arctic Structures in State v. Wien Air, 619 P.2d 119 (Alaska 1980).

Indemnity

B. Indemnity

1. There are situations in which one defendant such as a manufacturer or wholesaler may be held to INDEMNIFY another defendant, such as a retailer. The concept has its origin in contract. Burgess Construction Co. v. State, 614 P.2d 1380 (Alaska 1980)

a) It may arise without agreement and by operation of law to prevent a result which is regarded as unjust or unsatisfactory. PROSSER at 310 (4th ed.)

b) Application: Alaska has refused to adopt the active/passive dichotomy which compels the active tortfeasor to indemnify the passive tortfeasor as in California. State v. Kaatz, 572 P.2d 775 (Alaska 1977).

Pouch V
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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 nonprofit 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.

Richard BEAULIEU, Appellant,
v.
James V. ELLIOTT, Appellee.

James V. ELLIOTT, Appellant,
v.
Richard BEAULIEU, Appellee.

Nos. 765, 766.

Supreme Court of Alaska.

Dec. 5, 1967.

Action for damages for personal injuries sustained in automobile accident. The Superior Court, Third Judicial District, Hubert A. Gilbert, J., entered judgment for plaintiff and defendant appealed. The Supreme Court, Dimond, J., held that record which disclosed implicit finding that plaintiff's wage earning capacity had been impaired for remainder of his work life of 20 years and disclosing testimony that plaintiff's inability to work would only continue from one to five years did not set forth findings of fact to enable reviewing court to have clear understanding of basis of trial court's decision that plaintiff sustained permanent 50 percent impairment of earning capacity and case would be remanded for more detailed and explicit findings of fact.

Judgment set aside and case remanded with directions.

1. Administrative Law and Procedure ⇐=501

Findings or judgment of quasi-judicial administrative agency in proceedings before it are not admissible in subsequent action against person not a party to such proceedings.

2. Attorney and Client ⇐=86

Admissions of fact by counsel during course of trial are binding on his client if made with express purpose of dispensing with formal proof of some fact at trial and are thus used as substitute for legal evidence of the fact.

3. Evidence ⇐=264

Even if statement in defendant's brief filed subsequent to close of trial suggesting award to be made plaintiff for damages from personal injuries and containing computation based on 50 percent disability rating for next five years did constitute admission of fact binding on defendant, it admitted only that plaintiff's earning capacity had been 50 percent impaired for period of five years and not for plaintiff's remaining work life.

4. Trial ⇐=388(1)

Trial court must comply meticulously with requirements of rule with respect to making of findings of fact in order to give reviewing court clear understanding of basis of trial court's decision and to enable reviewing court properly to appraise elements which entered into award of damages. Rules of Civil Procedure, rule 52(a).

5. Appeal and Error ⇐=1177(8)
Trial ⇐=395(1)

Record which disclosed implicit finding that plaintiff's wage earning capacity had been impaired for remainder of his work life of 20 years and disclosing testimony that plaintiff's inability to work would only continue from one to five years did not set forth findings of fact to enable reviewing court to have clear understanding of basis of trial court's decision that plaintiff sustained permanent 50 percent impairment of earning capacity and case would be remanded for more detailed and explicit findings of fact. Rules of Civil Procedure, rule 52(a).

6. Appeal and Error ⇐=1176(1)

Whether trial court improperly used Air Force physical evaluation board's findings to award plaintiff $16,088 for impaired earning potential caused by depressive reaction could not be determined where trial court in awarding total of $160,937.25 made no mention of award for $16,088 for depressive reaction and trial court would be directed to make more detailed and explicit findings of fact on remand. Rules of Civil Procedure, rule 52(a).

7. Damages ⇐15

General principle underlying assessment of damages in tort cases is that injured person is entitled to be restored as nearly as possible in position he would have occupied had it not been for defendant's tort.

8. Damages ⇐226

Damages awarded for future loss of earnings should not be reduced to present value.

9. Damages ⇐50

Disability retirement pay which plaintiff became entitled to upon retirement from Air Force by reason of injuries sustained in automobile accident would not be used to mitigate damages and reduce award for loss of future earnings.

10. Damages ⇐100

Damage award for impairment of earning capacity should not be reduced by amount representing estimated income taxes that injured party would have to pay on future income.

11. Damages ⇐99

Amount of income taxes which injured party would have had to pay had he earned amount awarded prior to trial should be deducted from the award for past loss of wages.

12. Damages ⇐60

Damages in form of past loss of wages sustained by serviceman as result of automobile accident could not be diminished or mitigated on account of payments received by serviceman from Air Force by virtue of contractual arrangement between serviceman and government for payment during periods of physical incapacity from performing his duty.

13. Damages ⇐132(9)

Evidence that osteomyelitis had developed in bone of plaintiff's ankle injured in automobile accident and testimony that it was reasonable medical probability that osteomyelitis would remain with plaintiff for rest of his life supported award of $71,241 for pain and suffering that plaintiff would experience for expected 29 years remaining of his life.

14. Damages ⇐97

In determining amount of award for pain and suffering, juror or judge should not arbitrarily be guided by some reasonable and practical consideration and should endeavor to make reasonable or sane estimate.

15. Damages ⇐97

There is no fixed measure of compensation in awarding damages for pain and suffering.

16. Damages ⇐97

Assessing damages for future pain and suffering by using per diem formula was not manifestly unfair or unjust.

17. Appeal and Error ⇐1013

Ultimate question for decision on review of award for damages for pain and suffering is whether sum awarded is reasonable and not how it was arrived at.

18. Appeal and Error ⇐1013

Award of damages will not be set aside on claim of excessiveness unless it is so large as to appear manifestly unjust or result of passion or prejudice or disregard of evidence or rules of law.

19. Damages ⇐226

Amount awarded for future pain and suffering will not be reduced to present worth.

20. Damages ⇐185(1)

Record disclosing no testimony by plaintiff's physician that he told plaintiff to bear as much weight as possible on injured ankle and disclosing that physician prescribed that plaintiff use crutches to tolerance by testing how much weight he would be able to put on his foot would not substantiate defendant's claim that plaintiff's pain and suffering were attributable to plaintiff's failure to follow orders of his doctor in not bearing as much weight as possible on his ankle.

21. Appeal and Error ⇐1176(1)

Record which failed to disclose why trial court used plaintiff's military pay rather than civilian pay scales in computing

plaintiff's impairment of future earning capacity as result of injury to ankle, where plaintiff indicated that he might have retired from military service if he had not received medical discharge because of injury, was insufficient to enable reviewing court to determine whether award for impairment of future earning capacity was inadequate and trial court would be directed to make further findings on remand.

22. Appeal and Error ⇐1177(8)

Findings disclosed by record were not sufficient for purpose of determining whether evidence established that impairment of plaintiff's earning capacity was total or near total rather than 50 percent as determined by trial court.

23. Appeal and Error ⇐984(5)

Where liability is admitted but amount of damages is contested, question of which category of rule pertaining to computation of attorney fees is applicable is matter within discretion of trial court. Rules of Civil Procedure, rule 82(a)(1).

24. Costs ⇐173(1)

Where liability for injury to plaintiff's ankle was admitted but question of damages was contested in four-day trial resulting in award of $169,937.25 compensatory damages, trial court's assessing attorney's fees at rate prescribed by rule for cases concluded without trial was not abuse of discretion. Rules of Civil Procedure, rule 82(a)(1).

25. Appeal and Error ⇐984(1)
Costs ⇐12

Taxing of costs rests largely in sound discretion of trial court and reviewing court will not interfere with exercise of that discretion except in cases of abuse.

26. Costs ⇐151

Refusal to include in costs assessed against defendant certain expenses incident to taking of depositions which allegedly were necessary to establish liability, where plaintiff did not point out what depositions were involved, how they related to liability, when they were taken, or when concession of liability was made by defendants, was not abuse of discretion.

James J. Delaney, Jr., and James K. Singleton, of Delaney, Wiles, Moore & Hayes, Anchorage, for appellant in No. 765 and appellee in 766.

Robert M. Libbey, of Kay, Miller, Jacobs & Libbey, Anchorage, for appellee in No. 765 and appellant in 766.

Before NESBETT, C. J., and DIMOND and RABINOWITZ, JJ.

OPINION

DIMOND, Justice.

As a result of an automobile accident on April 13, 1963, James Elliott suffered a fracture dislocation of his right ankle. He brought this action for damages against Richard Beaulieu. Liability was conceded by Beaulieu, and the issue of damages was tried by the court without a jury. The trial court filed findings of fact and conclusions of law and entered judgment awarding Elliott $169,937.25 compensatory damages, costs of $82.10, and attorney's fees in the amount of $13,870.20. Both parties have appealed. We shall consider first Beaulieu's appeal.

Beaulieu's Appeal

In his brief on appeal, Beaulieu states 21 specifications of error. These resolve themselves into six principal issues to be reviewed and determined by this court.

1. *Impairment of Earning Capacity.*

There is no question but that Elliott suffered a permanent injury. The fracture dislocation of his right ankle, after several unsuccessful operations, resulted in a lack of a true ankle joint per se. As Dr. Scholtens said: "There is simply a ragged margin of rather sclerotic bone." He also stated, "It's not a joint any more but it's just a couple of pieces of bone grating against each other." Dr. Wichman testified that the joint was such that Elliott's ankle could be used only as a "peg". In

addition, osteomyelitis developed in the ankle bone and both Skelton and [illegible] testified that the reasonable medical probabilities were that such disease would continue for the remainder of Elliott's life.

In its third conclusion of law the trial court stated:

> That plaintiff will suffer a future wage loss in the amount of $30,110.40, after taking into consideration the fact that his wage earning capacity has been impaired to the extent of fifty (50%) per cent plus the further fact that his rate of pay at the time of discharge was $402.30 per month and plus the further fact that he has a remaining work life of twenty-nine (29) years.[1]

Beaulieu contends that there is no evidence to support the court's determination that Elliott suffered an impairment of earning capacity which would result in a loss of future wages.

On this point we must remand the case to the trial court for the making of more explicit findings of fact. The court's conclusion as to loss of future wages contains the implicit finding that Elliott's wage earning capacity had been impaired for the remainder of his work life of 29 years. The court gives no indication, however, of the factual basis for such an ultimate finding, nor does it indicate how it reconciles such a finding with the testimony of two physicians who spoke on the subject of Elliott's capacity to be gainfully employed. Dr. Foster testified that in his opinion, while Elliott was unable to work at the time of the trial in 1966, this inability would at the most only continue from one to five years, and that the condition of Elliott's ankle would steadily improve so that within that period of time he would be able to engage in a sedentary type of occupation that would not involve prolonged walking, running or heavy lifting. It was Dr. Foster's opinion that Elliott's future earning capacity was impaired only to the extent that he must move to clerical work rather than truck driving which he had done prior to 1963. Dr. Weidman testified that the prognosis of the condition of Elliott's ankle was satisfactory, that he would be limited in many activities because he would have to use his ankle as a peg and would be deprived of the movements that a normal ankle offers, that it would be possible for him to be gainfully employed in a sedentary type of occupation, but that he could not give an estimate as to when that might be because he did not know how much dead bone was present in the ankle.

As to the extent of impaired earning capacity, the court reached the conclusion that there was a 50% impairment. But the court does not say how it arrived at that figure. And we are unable to tell from our review of the record.

Conceivably, the court's determination of a percentage impairment was influenced by Elliott's testimony that he had received a medical discharge from the United States Air Force in January of 1956, and that he was receiving from the government a 60% disability compensation, 40% of which was attributable to his ankle, and the remaining 20% to other medical problems not related to the accident. That this may have influenced the court appears to be a possibility, because the court made Finding of Fact No. 19 which provided as follows:

> That on October 17, 1961, plaintiff was discharged from the hospital to "travel status"; that on January 11, 1956, plaintiff was given a medical discharge from the Air Force, as above mentioned; that the physical evaluation board, found plaintiff to be 60% disabled, assigning a 40% disability because of the injuries to plaintiff's right ankle, a 10% disability to a "depressive reaction" and a 10% disability due to an impairment of vision; that the latter disability is not related to the accident of April 13, 1963.[2]

[1] If the court based its conclusion as to degree of impairment of earning capacity upon certain findings of an Air Force physical evaluation board, this would have been error. The findings or judgment of a quasi-judicial administrative agency in proceedings before it are not admissible in a subsequent action against a person not a party to such proceedings.[3]

The trial court also may have been influenced in its determination of the existence of a 50% impairment of earning capacity by what Elliott characterizes as admissions made by Beaulieu's trial counsel. In his opening statement at the trial, counsel for Beaulieu admitted that Elliott had sustained a "permanent injury", that this did not render him 100% disabled, and that the question for determination was just how much "he will lose in the future because of the injury." In his brief filed subsequent to the close of the trial Beaulieu's counsel said this:

> In summary, it is suggested by the defense that the Court make its award to the Plaintiff on the basis of the figures set forth below. These figures take into consideration: The prognosis established by the medical experts; the 60% disability rating established by the Air Force, of which 50% is attributable to Plaintiff's ankle injury; and, the Plaintiff's ability to be gainfully employed in the future as a clerk or transportation specialist in the transportation industry, or as a travel agent.
>
> * * * [I]t is * * * suggested that the following award be made:

For past lost wages	$10,000.00
For future "lost wages", or diminution of earning capacity, based on 50% disability rating for the next five years ...	11,500.00
For past pain and suffering	5,000.00
For future pain and suffering	10,000.00
For permanent disability and injury to ankle	25,000.00
Total	$61,500.00

[2, 3] It is true that admissions of fact by counsel during the course of the trial are binding on his client,[4] if they are made with the express purpose of dispensing with the formal proof of some fact at the trial, and are thus used as a substitute for legal evidence of the fact.[5] It does not appear that this was the purpose of counsel's statement in his brief filed subsequent to the trial. But even if it did constitute an admission of fact binding on Beaulieu, it is an admission only that Elli-

1. The pertinent part of Conclusion of Law No. 3 originally read:
   "That plaintiff will suffer a future wage loss in the amount of $30,110.40, after taking into consideration the fact *that his disability is 50%*. * * * [Emphasis added.]
   The italicized words were amended by the court on Elliott's motion to read: "that his wage earning capacity has been impaired to the extent of fifty (50%) per cent."

2. Apart from Elliott's testimony just mentioned, we do not know where the trial court obtained information regarding the findings of the Air Force physical evaluation board. Such findings were not introduced into evidence at the trial.

3. Cady v. Fraser, 122 Colo. 252, 222 P.2d 422, 425 (1950).

4. Ferroline Corp. v. General Aniline & Film Corp., 207 F.2d 912, 916-917 (7th Cir. 1953), cert. denied, 347 U.S. 953, 74 S.Ct. 678, 98 L.Ed. 1098 (1954), reh. denied, 347 U.S. 979, 74 S.Ct. 784, 98 L.Ed. 1118 (1954), reh. denied, 348 U.S. 851, 75 S.Ct. 19, 99 L.Ed. 671 (1954).

5. Dolce v. Stencil, 48 Wash.2d 619, 295 P.2d 312, 311 (1956); Humble Oil & Refining Co. v. Sun Oil Co., 190 F.2d 705, 711 (5th Cir. 1951), cert. denied, 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 687 (1952).

ott's earning capacity had been 50% impaired for a period of five years, and 10% for the remaining work life of [illegible] 20 years as found by the trial court. Consequently, what Beaulieu's counsel said in his brief does not satisfactorily explain or establish the basis for the trial court's Conclusion of Law No. 3 which dealt with impairment of earning capacity.

[4, 5] It is most important that the trial court comply meticulously with the requirements of Civil Rule 52(a) [6] with respect to the making of findings of fact in order to give us a clear understanding of the basis of the trial court's decision, and to enable us to properly appraise the elements which entered into the court's award of damages.[7] This was not done in this case. Our review of the record leaves us with the conclusion that the trial court's findings with respect to damages for future impairment of earning capacity are not sufficiently detailed to afford us a clear understanding of the basis for the court's award.[8] We therefore will remand this case to the trial court for the purpose of making detailed and explicit findings as to Elliott's earning capacity and the degree of impairment in respect thereto.[9]

In his Finding of Fact No. 19 the trial court referred to the fact that the Air Force physical evaluation board had found Elliott to be 60% disabled, and that 10% of that disability was due to a "depressive reaction". In Finding of Fact No. 22 the court stated that a psychiatric evaluation of Elliott had been made, that the psychiatric findings were that Elliott had developed a depressive reaction attributable to permanent crippling, deformity of the lower extremity, semi-isolation, and a protracted period of surgery and recovery, and that such depressive reaction was proximately caused by the accident of April 13, 1963. Beaulieu contends that the judge used the Air Force physical evaluation board's findings to award Elliott $16,083.69 for that part of his impaired earning potential caused by a depressive reaction, and that this was error.

[6] We are unable to review this point because nowhere in the court's finding of fact or conclusions of law or judgment is there any mention of an award of $16,083.-69 for a depressive reaction as an element of Elliott's impaired earning capacity. It may be that the trial court intended that of the 50% impairment of earning capacity which is found to exist, 10% was due to a depressive reaction. However, we are unable to determine if that is the case from the record as it now exists. This point should be clarified on a remand of the case for more detailed and explicit findings of fact.

2. *Future Wage Loss—Present Value.*

The trial court did not reduce the amount it found as damages for future impairment of earning capacity to present value. Instead, the court stated that "The interest rate reduction and decline in purchasing power of the dollar is off-set by pay increases plaintiff could have expected in the future from his military service." Beaulieu contends that the failure to reduce the damages to present value was prejudicial error.

[7] The general principle underlying the assessment of damages in tort cases is that an injured person is entitled to be

6. Civ.R. 52(a) provides in part:
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 direct the entry of the appropriate judgment • • •.

7. Patrick v. Sedwick, 413 P.2d 169, 174-176 (Alaska 1966); Hamilton v. Lotto, 391 P.2d 968, 969 (Alaska 1964); Spenard Plumbing & Heating Co. v. Welsh Const. Co., 370 P.2d 549, 525, 526 (Alaska 1962); Merrill v. Merrill, 365 P.2d 516, 518 (Alaska 1962); Dickerson v. Gelermann, 368 P.2d 217, 219 (Alaska 1962).

8. Patrick v. Sedwick, note 7 supra, 413 P.2d at 175.

9. Patrick v. Sedwick, note 7, supra, 413 P.2d at 176.

replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort.[10] In the case of impairment of future earning capacity, it is reasoned that a failure to reduce damages to present value would be to place the injured person in a better position than he would have occupied except for the defendant's tort, because the injured person would get all of his future wages long in advance and would be able to invest the lump sum and realize earnings on such investment during the intervening period.[11] For this reason—that money has the power to earn money—it has become the generally accepted rule that damages awarded for future loss of earnings should be reduced to present worth.[12]

[8] In applying the general rule, the Supreme Court of Washington has stated a formula for reducing awards of future earnings to present value which involves the "rate of interest (which) could fairly be expected from safe investments which a person of ordinary prudence, but without particular financial experience or skill, could make in that locality." [13] This formula, although empirical at best, is probably as definite as any that has been devised. But we believe that the rule for reducing awards, including the formula applied by the Washington court, ignores facts which should not be ignored. Annual inflation at a varying rate is and has been with us for many years. There is no reason to expect that it will not be with us in the future. This rate of depreciation offsets the interest that could be earned on government bonds and many other "safe" investments. As a result the plaintiff, who through no fault of his own is given his future earnings reduced to present value must, in order to realize his full earnings and not be penalized by reduction of future earnings to present value, invest his money in enterprises, other than those which are considered "safe" investments, which promise a return in interest or dividends greater than the offsetting rate of annual inflation. But ours is a competitive economy. By their very nature some enterprises backed by investors' money are going to fail with resulting loss to individuals. Thus, instead of being assured of earnings at rates greater than the annual rate of inflation, the injured plaintiff stands a chance of entirely losing his future earnings by unlucky or unwise investments. Since the plaintiff, through the defendant's fault and not his own, has been placed in the position of having no assurance that his award of future earnings, reduced to present value, can be utilized so that he will ultimately realize his full earnings, we believe that justice will best be served by permitting the trier of fact to compute loss of future earnings without reduction to present value. The plaintiff is more likely to be restored to his original condition under the rule we adopt than under the prevailing rule which calls for a discounting of the award for future earnings.

Our conclusion is fortified by another factor which also may not be ignored. This is the factor, relied upon by the trial judge, which involves wage increases that the injured plaintiff might have expected to receive in the future had he not been injured.

10. Hill v. Varner, 4 Utah 2d 166, 290 P.2d 448, 449 (1955); Restatement, Torts § 924 comment d, at 631-35 (1939); McCormick, Damages § 86, at 304 (1935). Accord United States v. Hatahley, 257 F.2d 920, 922, 70 A.L.R.2d 668 (10th Cir. 1958); Hughett v. Caldwell County, 312 Ky. 85, 96, 230 S.W.2d 92, 21 A.L.R.2d 373 (1950).

11. McCormick, Damages § 86, at 304 (1935).

12. Wentz v. T. E. Connolly, Inc., 45 Wash. 2d 127, 273 P.2d 485, 491 (1954); Borcherding v. Eklund, 156 Neb. 196, 55 N.W.2d 668, 650 (1952); Daughtry v. Cline, 224 N.C. 381, 30 S.E.2d 322, 324, 154 A.L.R. 789 (1944); Rigby v. Pifer, 290 Mo. 10, 234 S.W. 828, 832 (1921); Restatement, Torts § 924 comment d, at 631-35 (1939); McCormick, Damages § 86, at 304 (1935); Annots., 77 A.L.R. 1439, 1446 (1932) 154 A.L.R. 796, 797 (1945).

13. Wentz v. T. E. Connolly, Inc., supra note 12, 273 P.2d at 492.

It is a matter of common experience that as one progresses in his chosen occupation or profession he is likely to increase his earnings as the years pass by. In nearly any occupation a wage earner can reasonably expect to receive wage increases from time to time. This factor is generally not taken into account when loss of future wages is determined, because there is no definite way of determining at the time of trial what wage increases the plaintiff may expect to receive in the years to come. However, this factor may be taken into account to some extent when considered to be an offsetting factor to the result reached when future earnings are not reduced to present value. Thus, if there is any fear that failure to reduce the present value will give the plaintiff more than he is entitled to because of the possibility of his making successful investments of the sum awarded at returns greater than the annual rate of inflation, such fear is obviated by the fact that the award may well be deficient in that it does not take into account probable wage increases that the plaintiff would ordinarily be expected to receive in the future.

3. *Retirement Pay.*

Elliott testified that he would receive disability retirement pay from the Air Force in the amount of $191.00 a month for the remainder of his life. Beaulieu contends that the trial judge committed prejudicial error in refusing to deduct the net present value of future retirement pay from the award for future loss of earnings. Beaulieu's argument is that to allow Elliott damages for future wage loss, in addition to his retirement pay, is to unjustly enrich Elliott by allowing him double compensation for his injuries.

[9] The general principle underlying the assessment of damages in tort cases is that an injured person is entitled to be replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort.[14] Elliott had been in the Air Force for about 18 years at the time of his discharge and he testified that he had intended to remain in the service for at least 20 years. If he had not been injured, Elliott could have continued to earn to his full capacity and, in addition, after 20 years' service, would have been entitled to retire and draw retirement pay.[15] By reason of his injuries, Elliott was entitled under law to be retired early for disability and draw retirement pay in lieu of retirement on a regular basis after completion of 20 years' service.[16] The award of damages for impaired earning capacity has the effect of putting Elliott in the same position he would have occupied had it not been for the injury, because the damages represent what Elliott could have earned had he not been injured and the disability retirement pay represents that which Elliott had earned and become entitled to under law by reason of his years of service in the Air Force. In other words, Elliott now receives an amount representing wages he could have earned were it not for the injury, plus retirement pay; had he not been injured, he would have received the full wages he could have earned during his remaining work life, in addition to receiving the retirement pay to which he would become entitled by reason of his years of service in the Air Force. Thus, Elliott, under the court's award, is getting no more than he would have gotten had he not been injured. The disability retirement pay Elliott is receiving should not be used to mitigate damages and reduce the award for loss of future earnings.

4. *Income Taxes.*

Beaulieu argues that the trial judge erred in failing to deduct from the damages awarded for impairment of future earning capacity an amount representing income taxes that Elliott would have had to pay on future income.

The courts are divided on this question. It is the more general view, supported by a majority of American decisions, that an amount representing future income taxes should not be deducted from the award.[17] As was stated by the Supreme Court of Rhode Island:

> This view has been adopted by the various courts on diverse grounds but primarily on the ground that the quantum of such taxation is of necessity in the realm of conjecture.[18]

[10] We adopt the majority rule. Income tax rates, provisions relating to deductions and exemptions, and other aspects of income tax laws and regulations are so subject to change in the future that we believe that a court cannot predict with sufficient certainty just what amounts of money a plaintiff would be obliged to pay in federal and state income taxes on income that he would have earned in the future had it not been for a defendant's tortious conduct. We hold that a damage award for impairment of earning capacity should not be reduced by an estimated amount representing income taxes that the injured party may be required to pay on future income. In awarding damages to Elliott for impaired earning capacity, the court did not err in failing to take income tax consequences into consideration.

[11] The rule we adopt has no application, however, as to the court's award of past wages in the amount of over $10,000.00. The reason for the rule—inability to predict with sufficient certainty what taxes would have to be paid—does not exist here, because taxes on income earned prior to trial can be easily calculated based on income tax laws and regulations as they existed at the time the wages would have been earned. The court erred in failing to deduct from the award for past loss of wages the income taxes Elliott would have had to pay had he earned the amount awarded prior to the trial.

5. *Past Loss of Wages.*

Elliott testified that he had not lost any military pay or allowances between the date of the accident in April 1963 and the date of his military discharge in January 1966. During that period of time Elliott was either hospitalized or on leave, except for the period January to August, 1964, when he was on duty status. The trial court awarded $10,752.85 for a partial past wage loss covering the period from the date of the accident to the day of Elliott's discharge from the Air Force, but excepting the period between January and August, 1964, when Elliott was on duty status.

Beaulieu contends that this award for past wages was error. His argument in essence is that the general principle underlying the assessment of damages in tort cases is that the injured person is entitled to be replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort, and that since Elliott suffered no loss of wages during the period involved he should be awarded none.

[12] In arguing that the award should be sustained, Elliott urges the adoption of the collateral source rule, which provides that damages may not be diminished or mitigated on account of payments received by plaintiff from a source other than the defendant.[19] We applied this rule as to workmen's compensation benefits in Ridgeway v. North Star Terminal & Stevedoring Co.[20] We apply the rule in this instance. By entering the military service, Elliott in effect agreed to perform certain duties and fore-

14. See to 10 supra.

15. 10 U.S.C.A. §§ 8911, 8889–8891 (1959).

16. 10 U.S.C.A. §§ 1201, 1401 (1959).

17. Annot., 67 A.L.R.2d 1336, 1396 (1959).

18. Odlo v. Carol, 218 A.2d 373, 377 (R.I. 1966). See also Dixie Feed & Seed Co. v. Byrd, 52 Tenn.App. 619, 376 S.W.2d 745, 749 (1963); appeal dismissed, 379 U.S. 15, 85 S.Ct. 117, 13 L.Ed.2d 84 (1964); Cunningham v. Roderiet Vinderegen, 333 F.2d 308, 313-315 (2d Cir. 1964); Spencer v. Martin K. Eby Const. Co., 186 Kan. 345, 350 P.2d 18, 22-23 (1960); Kawamoto v. Yasutake, 40 Haw. 42, 110 P.2d 976, 981 (1956).

19. Bell v. Primeau, 101 N.H. 227, 183 A.2d 729, 730, 7 A.L.R.3d 512, 514 (1962). The collateral source rule is followed in most jurisdictions. Annot., 7 A.L.R.3d 516, 520 et seq. (1966).

20. 378 P.2d 617, 620 (Alaska 1963).

tions in exchange for certain benefits to be given him by the government. One of these benefits was that he was to receive additional pay and allowances during periods of physical incapacity from performing his duties. This was in the nature of a contractual arrangement between Elliott and the government when he became a member of the armed forces, and which he may have paid for by accepting wages lower than those he might have obtained from the performance of like duties in civilian life. The income that Elliott received from the government is not the result of earnings, but of such previous contractual arrangement.[21] Such a contractual arrangement was made for Elliott's own benefit, and not for the benefit of a tort feasor, such as Beaulieu. The latter has no right to claim the benefit of such an arrangement by having the damages awarded against him reduced by the amount that Elliott was paid by the government during the period of his disability. The trial court did not err in awarding damages for loss of wages during the period of Elliott's disability while he was still in the military service.

6. Future Pain and Suffering.

The court awarded Elliott $71,244.00 for pain and suffering that he would experience for the remainder of his life. Beaulieu contends that the evidence does not justify such an award.

An infection, osteomyelitis, had developed in the bone of Elliott's injured ankle. Elliott testified that from the time of the onset of the osteomyelitis he was required to keep his ankle in an upright position for a period of from four to five days on an average of once a month to alleviate the pain he experienced, that he suffered pain of a sufficient intensity to keep him awake the better part of the night on an average of one night per week, and that there was an open, draining sinus on his ankle. Beaulieu concedes that Elliott's testimony was sufficient to justify an award for past pain and suffering.[22] However, Beaulieu contends that there is a lack of substantial medical evidence to justify an award for pain and suffering in the future.

Dr. Wichman testified that the osteomyelitis would cause the sinus tract in Elliott's ankle to become obliterated or plugged by bone particles in the drainage fluid—osteomyelitis being the type of infection caused by the healing process in draining away or discarding dead bone—and that this would cause a pressure build up and a swelling with resulting pain.

Dr. Foster testified that the probable source of Elliott's pain was the presence of injured tissues which, throughout the injury, operation and infection, became so altered that with use they became sore. It is true, as Beaulieu points out, that Dr. Foster said that within approximately five years from the time of trial, Elliott would be able to return to work and would no longer be limited by the infection. But the doctor also testified that at the end of the five-year period Elliott would still have some pain, and that it was a reasonable medical probability that the osteomyelitis would remain with Elliott the rest of his life.

Dr. Scholtens gave his opinion as to the reasonable medical probability of the infection in Elliott's ankle continuing for the remainder of his life. He said:

> Yes, I have an opinion, and my opinion is that the infection present, by all odds, will continue, there's an excellent possibility for the rest of his life, no matter what medical attempts are made to clear the infection in the ankle. Present—the experience with osteomyelitis indicates that it's very, very difficult to treat, that cures are relatively infrequent. Recurrences of those that appear to be cured are frequent. For those reasons, I would feel that he, at present, has a chronic infection. He has the fuel for the infection, dead bone, and I think that this will continue in the future for as far as I can see.

And as to the reasonable medical probability of the general condition of the ankle improving or remaining the same, Dr. Scholtens said:

> I'd say that the chances are that his ankle will stay very much the same as it is, with no appreciable change. This is by far the greatest probability. • • • There's—there's a slight chance that it could get worse. There's a slight chance that it could get better, but—and I'm not talking in terms that if he never sees a doctor again. I mean if he's treated, I think the chances of this appreciably improving are slim or really of getting a great deal worse, that's what I'm saying.

[13] The trial court found that it was a reasonable medical probability that Elliott's condition, including the infection in the ankle and the pain, would continue for the remainder of his life. The medical evidence supports such a finding; we cannot say that it is clearly erroneous. Such a finding, in turn, justifies the court's conclusion that Elliott should be awarded damages for pain and suffering for the remainder of his life. An award of such damages was not error.

The trial court used a per diem formula in assessing damages for future pain and suffering. In its Conclusion of Law No. 5 the court said:

> That plaintiff is entitled to recover from defendant the sum of $78,630.00 for past and future pain and suffering, for his general physical disability and permanent crippling and for the fact that he will no longer be able to lead that sort of life to which he had become accustomed. The past pain and suffering is set at the sum of $7,500.00. The future pain and suffering of $71,244.00 is based upon a finding of $20.00 per day for 52 days per year and an additional $3.00 per day for 313 days per year for a total sum of $1,079.00 per year multiplied by 36 years.

Beaulieu contends that such a method of ascertaining damages constituted prejudicial error.

A similar contention was made by a defendant in Imperial Oil, Ltd. v. Drift, 231 F.2d 4 (6th Cir. 1956), cert. denied, 352 U.S. 911, 77 S.Ct. 261, 1 L.Ed.2d 236 (1956), where the trial court had used a per diem formula in awarding damages for pain and suffering. It was argued there that damages for pain and suffering cannot be properly computed by using a mathematical formula. In answer to this argument, the Court of Appeals said:

> It remains to be considered whether the method used by the District Judge in determining the total amount was error as a matter of law. It may be that it was a novel one but it does not follow that it invalidates the award. In determining the amount of an award for pain and suffering a juror or judge should necessarily be guided by some reasonable and practical considerations. It should not be a blind guess or the pulling of a figure out of the air. At the same time there is no exact or precise measuring stick. Exact compensation is impossible in the abstract but the juror or judge should endeavor to make a reasonable or sane estimate. The practical considerations influencing a particular juror or judge or the reasoning used by him may very well differ with the method used by another juror or judge, yet each of such different methods or modes of reasoning may be a reasonable method of reaching the desired result. We are more concerned with the result, reached by a reasonable process of reasoning and consistent with the evidence, than we are with which one of several suitable formulas was actually used by the juror or judge. It is not necessary for us to adopt the method used by the District Judge as a rule of law for the proper disposition of such an issue, and we do not do so. In our opinion, it was not an arbitrary or unreasonable approach to the problem presented and its application was so adjusted in the present case as to be consistent

21. Restatement, Torts § 920 comment e (1939).

22. The trial judge awarded Elliott $7,500 for past pain and suffering.

with the evidence and to reach a result which does not appear to us to be manifestly unjust. United States v. Pusecker, 5 Cir., 231 F.2d 5; City of Knoxville, Tenn. v. Bailey, 6 Cir., 222 F.2d 570, 231.[24]

[14-17] We agree with the foregoing. As we stated in Patrick v. Sedwick,[25] there is no fixed measure of compensation in awarding damages for pain and suffering, and such an award necessarily rests in the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation. We can see nothing manifestly unfair or unjust about the method used by the trial court in assessing damages for future pain and suffering. In fact, as was suggested in the dissenting opinion in the Kansas case of Taylor v. Atchison, Topeka & Santa Fe Ry. Co.,[26] it appears to be a fair argument and a rational approach to treat damages for pain the way it is endured—day by day, month by month, year by year. Ultimately, however, the question for decision is whether the total sum is reasonable or not, regardless of how it was arrived at. We find no error in the method used by the trial court in awarding damages for future pain and suffering.

[18] Beaulieu contends that the total sum awarded is unreasonable and is grossly excessive. We shall not set aside an award on a claim of excessiveness unless it is so large as to strike us that it is manifestly unjust, such as being the result of passion or prejudice or a disregard of the evidence or rules of law.[27] Considering the evidence of permanent damage to Elliott's ankle, the bone fracture, and the pain and suffering without reduction to present worth.

Finally, Beaulieu contends that the greater part of Elliott's pain and suffering was attributable to his failure to follow his doctor's orders in not bearing as much weight as possible on his ankle, and therefore that such pain and suffering cannot be the basis for the recovery of damages.

Dr. Wichman did state that if he were asked by Elliott for treatment, he would suggest as much ambulation as possible, and that it was his opinion that complete ambulation would be his suggestion or prescription. However, there is no evidence that Dr. Wichman ever told Elliott to bear as much weight as possible on his ankle. All that Wichman said was that this is what he would prescribe if he were to treat Elliott for his injury.

[20] There is also no testimony by Dr. Foster that he told Elliott to bear as much weight as possible on his ankle. The doctor stated that he prescribed crutches and advised Elliott to use them to tolerance by testing how much weight he would be able to put on his foot, absorbing the rest with the crutches. When Dr. Foster was asked what his suggested course of procedure would be, based on his examination of Elliott's ankle, he stated:

> My suggested course of procedure is for Sergeant Elliott to continue bearing what—weight he can on his foot, to treat it when it becomes inflamed and sore and red by warm soaks and elevation, to continue on the use of the crutches up to the limits of comfort, to maintain his brace on his ankle as basis.

There is nothing in the evidence to show that Elliott had not done what Dr. Foster suggested that he do. The record does not substantiate Beaulieu's claim that Elliott's pain and suffering was attributable to his failure to follow the orders of his doctor.

Elliott's Appeal

As a basis for computing Elliott's impairment of future earnings for the remainder of his work life of 29 years, the court used Elliott's wage scale in the Air Force at the time of his discharge in the amount of $462.30 a month. On his appeal, Elliott claims that his future wage loss was greater than that determined by the court. The basis for his claim is that, considering evidence of his experience in truck driving and traffic management, the court ought to have determined what earnings Elliott probably would and could have received in civilian life—the wage scale there being higher for the same type of work than in the military service.

[21] We have held that this case must be remanded to the trial court for the purpose of making detailed and explicit findings as to Elliott's earning capacity and the degree of impairment in respect thereto. Such findings may contain the answer to the question as to why the court used Elliott's military pay, rather than civilian pay scales for equivalent work, as a basis for computing future wage loss for the entire period of 29 years, when Elliott had indicated that he may have retired from the Air Force at the end of 20 years of service which would have been approximately two years after his discharge if he had not received a medical discharge. In the absence of adequate findings and a clear understanding of the basis for the court's award, we are unable to pass upon Elliott's contention that the award for impairment of future earning capacity was inadequate.

[22] Similarly, we are unable to pass upon Elliott's contention that the evidence established that the impairment of his earning capacity was total, or near total, rather than 50% as determined by the court. Adequate findings as to Elliott's degree of impairment of earning capacity may afford a clear understanding of the basis for the court's determination. The findings are not sufficient for that purpose now.

Elliott's next point has to do with attorney's fees allowed by the court. Civil Rule 82(a) (1) provides as follows:

> Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be followed

23. 231 F.2d at 11. See Annot., Per Diem or similar mathematical basis for fixing damages for pain and suffering, 69 A.L.R.2d 1347 (1959).

24. 413 F.2d 169, 176 n. 21 (Alaska 1969).

25. 190 U.S. 261, 271 F.2d 58, 61 (1922).

26. Inland Oil Ltd. v. Delk, 234 F.2d 4, 11 (9th Cir. 1956), cert. denied 352 U.S. 911, 77 S.Ct. 261, 1 L.Ed.2d 236 (1956).

27. Accord, Peters v. Benson, 425 P.2d 189, 192 (Alaska 1967); National Bank of Alaska v. McHugh, 416 P.2d 239, 241 (Alaska 1966); Patrick v. Sedwick, 413 P.2d 169, 175 (Alaska 1966).

28. 11 Wis.2d 603, 106 N.W.2d 271, 279, 16 A.L.R.2d 227, 236 (1960).

29. See also Bigler v. Prior, 200 Mo. 10, 27, S.W. 528, 532 (1921); Comment, 60 Mich.L.Rev. 612, 629-30 (1962).

to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:

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 as a part of the costs of the action, in its discretion, in a reasonable amount.

The court awarded Elliott $15,670.29 attorney's fees based on the percentages listed in the "without trial" category of the above rule. Elliott claims that this was an erroneous application of the rule, and that a correct computation of attorney's fees should have been under the "contested" category[30] because even though liability was admitted, the question of damages was in issue and was contested in a four-day trial.

[23] In a case like this where liability is admitted but the amount of damages is contested, the question of which category of Civil Rule 82(a) (1) is applicable in computing attorney's fees is a matter within the discretion of the trial court. We limit our review in matters of this type to the question of whether the court exceeded the bounds of such discretion—whether such discretionary authority has been abused.[31]

[24] The court's reasons for awarding attorney's fees as it did was that liability was admitted, that the total recovery of damages was large, and that the attorney's fees allowed were adequate. Considering the character of this litigation and the amount of recovery,[32] we cannot say that the court's reasoning was not sound and that the manner of applying the rule amounted to an abuse of discretion.[33]

Costs were awarded against Beaulieu in the amount of $82.40. Elliott claims that it was error to not include in the costs certain expenses incident to the taking of depositions necessary to establish liability.[34]

[25, 26] The taxing of costs rests largely in the sound discretion of the trial court, and we shall not interfere with the exercise of that discretion except in cases of abuse.[35] Elliott claims that the depositions taken were necessary to establish liability. But he does not point out what depositions were involved, how they related to liability, when they were taken, or when the concession of liability was made by Beaulieu. In these circumstances we cannot find any abuse of discretion in the court's refusal to allow as costs the expenses incident to the taking of these depositions.

The judgment is set aside. The case is remanded to the superior court for the purpose of making appropriate findings as to the damage issues referred to in this opinion and for the further purpose of entering an appropriate judgment thereon.

30. Attorney's fees computed under the "Contested" category of the rule would have amounted to $17,813.73.

31. McDonough v. Lee, 420 P.2d 159, 165 (Alaska 1966); Kenai Power Corp. v. Strandberg, 415 P.2d 659, 661 (Alaska 1966); Patrick v. Sedwick, 413 P.2d 139, 178-179 (Alaska 1966); Preferred Ins. Co. v. Raffetto, 391 P.2d 951, 954 (Alaska 1964); Davidson v. Kirkland, 382 P.2d 1068, 1070-1071 (Alaska 1963).

32. Elliott's total recovery, in addition to costs and attorney's fees, was $169,867.92.

33. McDonough v. Lee, 420 P.2d 159, 165 (Alaska 1966).

34. Civ.R. 79(b) provides that "A party entitled to costs may be allowed * * * the necessary expenses of taking depositions for use at trial * * *."

35. Euler v. Waller, 295 F.2d 765, 769, 97 A.L.R.2d 135, 137-138 (10th Cir. 1961).

Warren A. TAYLOR, Appellant,
v.
DISTRICT COURT FOR the FOURTH JUDICIAL DISTRICT, AT FAIRBANKS, Appellee.
No. 764.

Supreme Court of Alaska.
Dec. 8, 1967.

The Superior Court, Fourth Judicial District, Everett W. Hepp, J., affirmed judgment of the district court which held attorney in contempt for failure to appear for trial at time set. Upon the attorney's appeal, the Supreme Court, Dimond, J., held that action of the attorney in agreeing to a trial setting in the superior court two days before date previously set for trial of another case in the district court, with result that the attorney was unable to appear for the district court trial when the superior court trial extended longer than two days, did not give rise to an inference, which would support judgment of contempt, of a willful disregard or disobedience by the attorney of the district court order in setting the district court case for trial.

Reversed and remanded with directions.

1. Contempt ⇐2

In order for there to be contempt, it must appear that there has been a willful disregard or disobedience of the authority or orders of the court. Rules of Civil Procedure, rule 90.

2. Contempt ⇐20

Attorney's failure to appear in court at time specified by order of the court may amount to an indirect, but not a direct, contempt of court. Rules of Civil Procedure, rule 90.

3. Contempt ⇐51(1)

Purpose of civil rule relating to contempt in requiring a motion in indirect contempt proceedings to be supported by affidavits is to afford one charged with contempt the procedural due process requirement of notice of the charge against him. Rules of Civil Procedure, rule 90(b).

4. Contempt ⇐51(1)

In proceeding by district court judge to hold attorney in contempt of court for failure to appear for trial at time required, it was unnecessary under rule for judge to have filed in his own court his affidavit stating that the attorney had failed to appear at the time required, in view of fact that the attorney was duly apprised of the charge against him by the district court's order directing the attorney to show cause why he should not be punished for the alleged contempt. Rules of Civil Procedure, rule 90(b).

5. Contempt ⇐20

Action of attorney in agreeing to a trial setting in the superior court two days before date previously set for trial of another case in the district court, with result that the attorney was unable to appear for the district court trial when the superior court trial extended longer than two days, did not give rise to an inference, which would support a judgment of contempt, of a willful disregard or disobedience by the attorney of the district court order in setting the district court case for trial. Rules of Civil Procedure, rule 90.

A Preliminary Examination

of Available Civil and Criminal

Trend Data in State Trial Courts

for 1978, 1981, and 1984

Produced by:
Court Statistics and Information Management Project
National Center for State Courts
300 Newport Avenue
Williamsburg, VA. 23187-8798

April 1986

NOTE: The following tables are excerpts from a larger volume to be published later this Spring 1986 called, State Court Caseload Statistics: Annual Report, 1984.

National Center for State Courts • 300 Newport Avenue • Williamsburg, Virginia 23187-8798

NEWS RELEASE

For release: 6:00 p.m.
Monday, April 21, 1986,

Contact: Robert T. Roper
(804) 253-2000

Study reveals no
litigation explosion
in state courts

WILLIAMSBURG, VA--"Careful amination of current available trial court data relating to , contract, real property rights and small claims cases, from a representative group of state courts, provides no evidence to support the existence of a national 'ligitation explosion' in state trial courts during the 1981-84 time period," according to Dr. Robert Roper, director of the Court Statistics and Information Management (CSIM) project of the National Center for State Courts.

Twenty states, which include 29 limited and general jurisdiction statewide court systems, reported reliable and comparable tort, contract, and real property rights statistics on the number of lawsuits filed for the years 1978, 1981, and 1984. The data revealed a 14 percent increase in filings for 1978-81, and a 4 percent decrease in 1981-84.

Small claims suits might best measure the inclination of Americans to sue because of easy accessibility, relatively inexpensive cost, and prospects for a quick resolution Twenty-nine limited and general jurisdiction statewide court systems in 25 states were chosen for analysis due to their reliable and comparable small claims statistics. Small claims filings increased 18 percent in 1978-81, but decreased 6 percent in 1981-84.

-MORE-

In the area of torts alone, which is a subset of civil filings, total filings increased slightly in both the 1978-81 and the 1981-84 periods. However, all of the three states that reported significant increases during 1981-84 also reported the largest increases in population (Alaska, California, and Hawaii). During 1981-84, tort filings increased 7 percent while population increased 4 percent. For the entire period 1978-84, total tort filings increased 9 percent, but the population also increased by 8 percent.

The data provide a basis for the following observations:

- An upward trend in litigation in any one period is not necessarily attributable to an increase in the tendency of the average American to sue, but may indicate a simple increase in the number of average Americans.
- There may have been significant increases in civil filings which peaked around 1981; however, civil filings (defined as tort, contract and real property right cases) decreased slightly during the 1981-84 period. In fact, in state courts that reported data for the 1981-84 time periods, there were decreases in the total number of civil filings.

According to Dr. Roper, several reasons could account for the downward trend in litigation. Insurance companies and attorneys may increasingly find it in their interest to settle conflicts before the cases ever reach the courts. Also, people may be deterred from filing suits at all because of widespread reports about the cost of litigation, and the prospect of civil suits taking years before disposition.

The often cited litigation explosion thus appears to be exaggerated with respect to the total number of civil filings during the period of 1981-84. The source of the perception that there is a litigation explosion may be founded in a changing mix of civil cases, increased complexity of the cases being filed, and widespread media reports of enormous awards in relatively few civil cases.

Complete supporting data will be available later this spring from the Williamsburg-based National Center for State Courts, in a volume entitled "State Court Caseload Statistics, 1984."

* * * * *

Published annually since 1975 (with the exception of 1982 and 1983) the state court caseload statistics series was developed by the Center's CSIM project in cooperation with the Conference of State Court Administrators. Work on the 1984 volume was completely funded by the National Center for State Courts; however, previous work on this project was funded by the Bureau of Justice Statistics. These reports are designed to collect, compile, analyze, and disseminate comparable state court caseload statistics; they are based on data provided by the state court administrators' offices and the offices of the state appellate court clerks. The series presents a methodology for reporting caseload statistics, nationwide current caseloads, as well as trends useful in future court planning.

-MORE-

NATIONAL CENTER FOR STATE COURTS ADD THREE

The National Center's basic mission is to help courts better serve both litigants and the general public. Courts at all levels are involved in one or more of the Center's projects, which range from research aimed at reducing delay in the litigation process to work conducted by the Center's regional offices on such subjects as automation of court operations and personnel administration. Emphasis is given to the training of court managers and presiding judges through the National Center's Institute for Court Management. In addition, the National Center serves as a clearinghouse for information on state courts. Besides its headquarters in Williamsburg, the Center maintains offices in North Andover, Mass., San Francisco, Denver, Arlington, Va., and Washington, D.C.

4/14/86-rtr

Questions about the "litigation explosion" in the state trial courts are among those most frequently received by CSIM Project staff. Part II of this 1984 Annual Report is a preliminary effort to shed some light on the question, "Is there a 'litigation explosion' in the state trial courts?"

Dates chosen for trend data.

The years 1981 and 1984 were chosen as two of the data points for these tables because the State Trial Court Jurisdiction Guide for Statistical Reporting was first applied to the 1981 trial court data, and the 1984 data is the most recent available. Since those two years represent a three-year interval, an earlier three-year interval was needed to bring balance to the trend line. Therefore, the first point chosen was 1978.

Case types selected for analysis

When talking of a "litigation explosion," most people reference an increased propensity, in the mindset of individuals, to sue for damages and punitive awards. Some of the CSIM case types that address this issue are tort, contract, and real property rights cases. In addition, small claims procedures are easily accessible, relatively inexpensive to file in and work within, and provide a comparatively speedier disposition of justice, and therefore, are a more interesting measure of the public's propensity to litigate.

Additionally, these case categories were chosen because they have, over the years, been reported separately, by many courts, without having any other minor case types included in their totals. The same is not true of other case categories, such as domestic relations, where subcategories are often reported with juvenile cases, miscellaneous, or special civil proceedings.

Criminal cases do not reflect on the "litigation explosion" as it is defined above, however, felonies are included in these trend data to provide a more complete picture of the courts' workloads over time.

The first table presents the general picture by displaying data for the combined category of tort, contract, and real property rights cases. This table is followed by a table for small claims. The final two civil tables break down the general table into one for tort, and one for contract cases. There were insufficient data over the seven year period to justify compilation of a table for real property rights cases. The final table evaluates trend data for felony cases.

Population as an indicator of caseload changes.

Earlier volumes in this Annual Report series have documented that the single best predictor of civil filings in state courts is the total state population. Total population explained over 90% of the variance in civil filings among the state courts. Therefore, the percentage increase in state population has been included in these tables for all three time periods--1978-1981, 1981-1984, and 1978-1984 in order to explain, at the outset, what kind of case filing increases might be anticipated as a result of changes in the state populations.

At this point, it is not possible to accurately predict what percentage increase in filings one would expect for every percent increase in the population. Therefore, for purposes of this Report, a rough one to one relationship has been assumed, i.e., for every percent increase in population, a one percent increase in filings would be expected.

Courts included in the tables

Some state courts do not appear in these tables for a variety of reasons: they do not report statewide data at all, they do not provide sufficient detail to identify the case types reported in these tables, they have changed reporting categories over time, and finally, the jurisdiction and organization of some courts have changed so dramatically between 1978-84 that their data were not comparable. Therefore, the courts displayed on the following tables do not include complete nationwide data; however, they are representative of general jurisdiction courts in this country, and are adequate for addressing the issue of whether there is a litigation explosion. For example, Table 33, on small claims, has statewide data from 33 states from across all geographical regions, and from large and small states. Although Tables 32 and 34-36 do not have as much complete state data as does Table 33, the data are more often than not from general jurisdiction courts. Since these are the courts most likely to hear the serious cases, these courts complement the small claims data found in Table 33.

Summary statistics presented on the facesheets.

Three summary measures. Each of Tables 32-36 display the number of filings for the years 1978, 1981 and 1984, and the percent changes in total state populations and filings for each of the three time periods 1978-81, 1981-84 and 1978-84. The accompanying facesheet for each table summarizes the data presented in each table using the following three measures: (1) the aggregate data contained in the table for those courts that reported complete data for each of the three years; (2) a summary description of how many courts experienced increased or decreased filings for the two periods 1978-1981 and 1981-1984; and (3) a chart which identifies patterns of change, and specifically lists the courts within each pattern.

Patterns across time. the "up-up" and "up-down" patterns. There are two basic patterns that can be used to test crudely whether there continues to be a "litigation explosion." The first group represents those courts whose filings increased during the 1978-81 period, and continued to rise during the 1981-84 period (i.e., and "up-up" pattern). This "up-up" pattern alone, however, does not represent prima facie evidence of a "litigation explosion." This "up-up" category must be separated into three components: (3-a) courts whose upward increases in both time periods were at approximately the same rate of increase and whose increases significantly exceeded the rate of increases in

the total population; (3-b) courts whose filings increased, during 1981-84, at a rate significantly less than the rate they were increasing at during 1978-81--which indicates a slowing of any upward trend that might have occured during earlier years; and (3-c) courts whose filings increased significantly during the period 1978-81, but whose filings increased at a rate which approximated or was less than the rate at which the population increased during 1981-84. The last component (i.e., 3-c), represents courts where there is not a "litigation explosion," because filings did not increase at a rate equal to or significantly different from population increases. Therefore, the only "up-up" pattern which may indicate unusual increases in filings is a "3-a'--where court filings increased significantly over both periods.

The second major group of courts, which run counter to the "up-up" pattern, are those courts which exhibited significant increases in filings during 1978-81, but whose filings actually decreased during the 1981-84 period (i.e., an "up-down" pattern). Courts that fall into this category are clearly "over the hump," and no longer experiencing increases in the number of civil suits.

Other miscellaneous patterns appear sporadically throughout the tables. These can clearly be identified as either supportive, or not supportive of the claim of a "litigation explosion." For example, some courts may not have experienced any significant change in filings for both time periods. On the other hand, filings in some courts went down during the 1978-81 period, and have increased significantly during the latter period. These situations will be discussed as they occur in each of the tables.

Limitations on the data

The data presented on the following tables are the most accurate, reliable, and comprehensive data yet brought to bear on the question of whether there is a "litigation explosion" in the state courts. This is a preliminary look at the topic, however, and the reader should consider the following caveats when evaluating the analysis--none of which are thought to affect general conclusions that can be drawn from these tables: although the data are representative from all the states, they do not include all of the courts and states in the country; due to limited resources, Project staff were unable to complete the trend table for the missing years or identify all jurisdictional changes in those courts over time; the data are only as current as 1984 and changes may have occured during 1985; the data do not include many other civil case types which may have included different trends during that time period (e.g., divorce, support/custody, adoption, estate, civil appeals, and miscellaneous civil cases); and the findings are restricted to the state courts only.

General findings and explanations

A careful examination of available data relating to tort, contract, real property rights, and small claims cases from a representative group of state courts provides no evidence to support the often cited existence of a national "litigation explosion" in the state trial courts during the 1981-84 time period.

There are some state courts that have experienced significant increases in the case types described throughout this section, but the impact of that finding is reduced when one realizes that these are the courts in states that have also experienced significant increases in their total populations. Changes in the number of these filings are not attributable to an increase in the propensity of the average American to sue, but rather to a simple increase in the numbers of average Americans.

The findings, however, can be extended one further step. Not only is the evidence missing to indicate a significant national increase in filings above the increase in population, but a clear pattern emerges which generally supports the "up-down" model described earlier. In a significant number of state courts, selected civil filings have decreased between the period 1981-1984 (see the individual tables for specific details).

It may be that there was a litigation explosion that peaked around 1981. The evidence from these charts tends to support that observation. There were significant increases in filings between 1978-81, far exceeding the increases in population. In fact, the increases were so large during 1978-81, that despite the decreases that occurred during 1981-84, the percentage changes from 1978-84 are still showing moderate increases.

The often cited myth of a continuing upward trend of civil lawsuits in the state courts could result from several factors: (1) intensive media focus on the enormous size of the awards in a few selected and well publicized civil cases; and (2) increased workload in the courts, not caused by an increase in the rate of civil lawsuits, but by more complex cases, and perhaps fewer resources available to the courts to handle expected increases in filings which results in larger backlogs.

Additionally, there are a variety of potential explanations for the leveling off or decreases in civil suits: (1) The public's attitude toward lawsuits may be changing. People may be deterred from filing as a result of concerns about costs and civil litigation that is likely to take years--except for the more serious cases, it may not be worth the effort; (2) For years people speculated that greater numbers of laws resulted in increased litigation to interpret those laws--this testing of new legislation and judicial rules may have run its course; and (3) Finally, insurance companies and attorneys may be increasing their efficiency in settling conflict before cases reach the courts. Whatever the explanation, there is no evidence to support the notion of a nationwide increase in lawsuits in the state trial courts between 1981-84.

TABLE 32: Trend data for state courts that specifically reported tort, contract, and real property rights case filings for 1978, 1981, and 1984.

Courts included in this table.

For inclusion in this table, a court must have reported an identifiable tort, contract, and real property rights caseload, separate from all other civil cases, in at least two of the three target years. Five states reported tort, contract, and real property rights cases for all the courts which had jurisdiction over tort, contract and real property rights cases in those states. A total of 37 statewide courts, in 25 states, reported data. Of the 37 courts, 12 were general jurisdiction courts.

Comparison of aggregated filings over time.

The following data are from the 29 courts in 20 states that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 32.

The increase in tort, contract, and real property rights filings between 1978-81 was 14%, while the population for the states reporting these data increased by 3%. Between 1981-84, the population continued to grow another 3%, but the new filings decreased by 4%. These aggregate figures provide preliminary evidence for the existence of the "up-down" pattern discussed earlier in this section.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose tort, contract, and real property rights filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	19	7
No significant difference between the change in population and filings:	5	3
Filings did not increase measureably during this period:	0	3
Filings increased at a rate slower than the population:	0	2
Filings decreased during this period:	5	22
Comparable data were not available for the period:	8	0

The "up-down" pattern described in the introduction to this section is illustrated in the above chart. Most of the courts reporting tort, contract, and real property rights cases during 1978-81 experienced significant increases in their filings. During the 1981-84 period, however, the pattern reversed itself--the majority of courts reported decreases in filings of these case types. Less than twenty-five percent of the courts reporting tort, contract, and real property rights cases during 1981-84 experienced increases in their filings at a rate significantly higher than increases in their populations. These patterns are more firmly established in the following chart.

The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods to test, more specifically, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous one by listing and categorizing courts by the patterns they followed. These patterns are explained in the introduction to this section (i.e., Part II). These are the patterns for those 29 courts in 20 states that reported comparable data for all three years. The (G) or (L) after each court indicates whether it is a general or limited jurisdiction court:

1. "Up-up" Pattern (no caveats):	Civil Court of NYC (L)
2. "Down-up" Pattern (no caveats):	Alaska Superior Court (G) New Mexico Magistrate Court (L) Oregon Justice Court (L)
3. "Up-up" Pattern (change in '81-'84 filings was less than '78-'81 increase in filings):	Nebraska County Court (L)
4. "Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):	Hawaii Circuit Court (G) Hawaii District Court (L) Delaware Justice of the Peace (L)
5. "Up-no significant change":	Delaware Court of Common Pleas (L)
6. "No significant change - no significant change":	Delaware Superior Court (G)
7. "Up-down" Pattern:	Alabama District Court (G) Arkansas Chancery and Probate Court (G) Colorado District Court (G) Colorado County Court (L) Indiana County Court (L) Indiana Municipal Court of Marion County (L) Kentucky District Court (L) Maine District Court (L) North Carolina Superior Court (G) North Carolina District Court (L) Ohio Municipal Court (L) Ohio County Court (L)

TABLE 32: Trend data for state courts that specifically reported tort, contract, and real property rights case filings for 1978, 1981, and 1984. (continued)

	Pennsylvania District Justice Court (L)
	Tennessee Circuit Court and Chancery (L)
8. "No significant change-down":	Oregon District Court (L)
	Rhode Island District Court (L)
	Washington Superior Court (G)
9. "Down-down" Pattern:	
	District of Columbia Superior Court (G)
	Colorado Water Court (G)

Of the courts studied in Table 32, the Civil Court of New York City is the only court whose filings have continued to increase significantly more than the population over the two time periods studied in this Report. Three additional courts followed the "down-up" pattern with significant increases reported during 1981-84. Another four courts experienced increases in filings between 1981-84, but the increases were either less than or not significantly different from population increases during that same time period, or the increases were less than the increases reported during the 1978-81 period. The remaining 18 courts showed no evidence of a "litigation explosion" during 1981-84, and 17 of those courts experienced a decrease in filings during that period.

TABLE 32: Trend data for state courts that specifically reported tort, contract, and real property rights case filings for 1978, 1981, and 1984.

State and court title	Jurisdiction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
COMPLETE STATE DATA.										
Exclusive court jurisdiction:										
District of Columbia:										
Superior Court	G	121,931	108,426	96,975	-6%	-11%	-1%	-11%	-7%	-20%
Kansas:										
District Court	G	NC	54,005	57,140	--	--	2%	6%	--	--
Not exclusive court jurisdiction:										
Colorado (STATE TOTAL)		79,480	105,028	99,205	7%	32%	7%	-6%	14%	25%
District Court	G	22,561	36,168	32,032	7%	60%	7%	-12%	14%	42%
Water Court	G	2,868	2,321	1,688	7%	-19%	7%	-23%	14%	-41%
County Court	L	54,051	66,539	65,485	7%	23%	7%	-2%	14%	21%
Hawaii (STATE TOTAL)		12,204[i]	17,379[i]	17,960[i]	6%	42%[i]	6%	3%[i]	12%	47%[i]
Circuit Court	G	2,786[i]	3,830[i]	3,992[i]	6%	37%[i]	6%	4%[i]	12%	43%[i]
District Court	L	9,418	13,549	13,968	6%	44%	6%	3%	12%	48%
North Carolina:		54,738	65,856	58,118	4%	20%	4%	-12%	7%	6%
Superior Court	G	11,541	13,756	12,482	4%	19%	4%	-9%	7%	8%
District Court	L	43,197	52,100	45,636	4%	21%	4%	-12%	7%	6%
INCOMPLETE STATE DATA:										
Alabama:										
District Court	L	40,130	55,818	51,805	2%	39%	2%	-7%	4%	29%
Alaska:										
Superior Court	G	2,683	2,312	3,107	3%	-14%	21%	34%	25%	16%
Arkansas:										
Chancery and Probate Court	G	6,642	7,545	5,151	2%	14%	2%	-32%	5%	-22%
Delaware:										
Superior Court	G	2,457	2,522	2,520	0%	3%	3%	0%	3%	3%
Court of Common Pleas	L	2,898	3,740	3,755	0%	29%	3%	0%	3%	30%
Justice of the Peace	L	15,844	20,028	20,806	0%	26%	3%	4%	3%	31%
Indiana:										
Municipal Court Marion County	L	8,901	14,364	10,131	0%	61%	1%	-29%	1%	14%
County Court	L	3,550[i]	5,573[i]	3,664[i]	0%	57%[i]	1%	-34%[i]	1%	3%[i]
Kentucky:										
District Court	L	48,808	57,627	56,359	1%	18%	2%	-2%	3%	15%
Maine:										
District Court	L	17,751[i]	20,072	16,146	2%	13%[i]	2%	-20%	4%	-9%[i]
Minnesota:										
County Court	L	NC	28,074	21,582	--	--	2%	-23%	--	--
Montana:										
District Court	G	NC	7,764	6,492	--	--	4%	-16%	--	--
Nebraska:										
County Court	L	9,236	11,128	13,027	1%	20%	2%	17%	3%	41%
Municipal Court	L	NC	17,781	17,712	--	--	2%	0%	--	--
New Hampshire:										
District Court	L	NC	10,382	9,815	--	--	4%	-5%	--	--
New Mexico:										
Magistrate Court	L	14,276	14,117	18,308	3%	-1%	7%	30%	14%	28%
Bernalillo County Metropolitan Court	L	NC	8,290	9,744	--	--	7%	18%	--	--
New York:										
Civil Court of New York City	L	130,131	151,159	195,163	-1%	16%	1%	29%	0%	50%
Court of Claims	L	NC	1,330	1,678	--	--	1%	26%	--	--
Ohio:										
Municipal Court	L	241,951[i]	250,068[i]	221,523[i]	0%	7%[i]	0%	-15%[i]	0%	-8%[i]
County Court	L	5,854[i]	11,302[i]	9,542[i]	0%	93%[i]	0%	-16%[i]	0%	63%[i]

TABLE 32: Trend data for state courts that specifically reported tort, contract, and real property rights case filings for 1978, 1981, and 1984. (continued)

State and court title	Jurisdiction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
INCOMPLETE STATE DATA (continued):										
Oregon:										
District Court	L	31,600	33,862	24,518	6%	7%	1%	-28%	7%	-22%
Justice Court	L	1,102[1]	942[1]	1,336[1]	6%	-15%[1]	1%	42%[1]	7%	21%[1]
Pennsylvania:										
District Justice Court	L	163,556	188,199[d]	183,143	0%	15%	0%	-3%[d]	0%	12%
Rhode Island:										
District Court	L	22,394	23,689	18,759	0%	6%	1%	-21%	1%	-16%
Tennessee:										
Circuit Court and Chancery Court	G	20,561	23,442	21,505	3%	14%	2%	-8%	6%	5%
Texas:										
District Court	G	NC	68,451	85,873	--	--	8%	25%	--	--
Washington:										
Superior Court	G	32,029	34,922	33,140	9%	9%	3%	-5%	12%	3%
Totals for 29 courts in 20 states reporting comparable data for all three years		1,090,707	1,239,120	1,185,666	3%	14%	3%	-4%	5%	9%

G = General jurisdiction court
L = Limited jurisdiction court
NC = Data are not comparable with other years.
d = The number of dispositions was the only data element provided that year.
-- = Data element is not applicable.

[1]Data are not complete:
Hawaii-Circuit Court--Data do not include "unreported cases."
Indiana--County Court--Data do not include "other" cases or "redocketed civil" cases.
Maine--District Court--Due to implementation of a new reporting system, data are missing from two locations.
Maryland--Circuit Court--Data do not include "unreported cases."
Ohio--Municipal Court and County Court--Data do not include cases classified as miscellaneous civil.
Oregon--Justice Court--Not all courts reported data.

TABLE 33: Trend data for state courts that specifically reported small claims case filings for 1978, 1981, and 1984.

Courts included in this table:

For inclusion in this table, a court must have reported an identifiable small claims caseload, separate from all other civil cases, in at least two of the three targeted years. Twenty-nine states reported small claims cases for all the courts which had jurisdiction over small claims cases in those states. A total of 39 statewide courts, in 33 states, reported data. Of the 39 courts, 11 were general jurisdiction courts.

Comparison of aggregated filings over time:

The following data are from the 29 courts, in 25 states, that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 33.

The increase in small claims filings between 1978-81 was 18%, as the population for that same period rose only 2%. The period between 1981-84 again provides a different picture. During this second period, the population continued to increase at a rate of 2% for those states reporting these data, yet small claims filings decreased by 6%. These aggregate figures tend to support the "up-down" pattern discussed in the introduction to this section.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose small claims filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	21	6
No significant difference between the changes in population and filings:	6	10
Filings did not increase measureably during this period:	0	1
Filings increased at a rate slower than the population:	0	1
Filings decreased during this period:	3	19
Comparable data were not available for the period:	9	2

During the period 1978-81, the majority of courts experienced significant increases in small claims filings; however, that pattern was reversed during the following three years when most of the courts reporting data experienced decreases in small claims filings. Small claims data fit the "up-down" pattern described in the introduction to this section of the Annual Report.

The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods to test, more explicitly, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous one by listing and categorizing courts by the patterns they follow. These are the patterns for those 29 courts, in 25 states, that reported comparable data for all three years:

1.	"Up-up" Pattern (no caveats):	North Dakota County Court (L) Rhode Island District Court (L)
2.	"No significant change-up":	New Jersey Superior Court (G)
3.	"Up-up" Pattern: (change in '81-'84 filings was less than '78-'81 increase in filings):	Colorado County Court (L) Hawaii District Court (L) Illinois Circuit Court (G) Maine District Court (L) Missouri Circuit Court (G) Vermont District Court (L)
4.	"Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):	Alaska District Court (L) New Hampshire District Court (L)
5.	"Down-up" Pattern (Change in '81-'84 population exceeds or approximates change in '81-'84 filings):	District of Columbia Superior Court (G) New York District Court and City Court (L)
6.	"No significant change - No significant change"	Idaho District Court (L) Ohio Municipal Court (L)
7.	"Up-down" Pattern:	California Municipal Court (L) Indiana Superior Court and Circuit Court (G) Indiana County Court (L) Kansas District Court (G) Kentucky District Court (L) Nebraska County Court (L) New Hampshire Municipal Court (L) North Carolina District Court (L) Ohio County Court (L)

TABLE 33: Trend data for state courts that specifically reported small claims case filings for 1978, 1981, and 1984. (continued)

Oregon District Court (L)
Pennsylvania-Philadelphia Municipal Court (L)

8. "No significant change-down":
   California Justice Court (L)
   Iowa District Court (G)

9. "Down-down" Pattern:
   Alabama District Court (L)

Only two courts had significant and continuous increases in small claims filings during both 1978-81 and 1981-84. In addition, the New Jersey Superior Court experienced a significant increase during 1981-84. Ten other courts also reported increases in their small claims filings, but the increases were either significantly less than the earlier increase during 1978-81, or were less than or approximated the population change for that same period which would indicate no "litigation explosion" at all. Eleven courts fit the "up-down" pattern, and another three courts also experienced decreases in small claims filings during 1981-84.

TABLE 33: Trend data for state courts that specifically reported small claims case filings for 1978, 1981, and 1984.

State and court title	Jurisdiction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
COMPLETE STATE DATA:										
Exclusive court jurisdiction:										
Alabama:										
District Court	L	95,928	91,550	76,694	2%	-5%	2%	-16%	4%	-20%
Alaska:										
District Court	L	7,948[i]	10,143[i]	10,735[i]	3%	28%[i]	21%	6%[i]	25%	35%[i]
Colorado:										
County Court	L	10,294	13,683	16,460	7%	33%	7%	20%	14%	60%
Connecticut:										
Superior Court	G	NC	90,447	73,096	--	--	1%	-19%	--	--
District of Columbia:										
Superior Court	G	32,797	24,490	25,323	-6%	-25%	-1%	3%	-7%	-23%
Florida:										
County Court	L	NC	172,208	163,171	--	--	8%	-5%	--	--
Hawaii:										
District Court	L	1,313	3,355	5,388	6%	156%	6%	61%	12%	310%
Idaho:										
District Court	L	13,504	14,217	14,174	5%	5%	4%	0%	10%	5%
Illinois:										
Circuit Court	G	175,454	205,055	217,641	0%	17%	0%	6%	1%	24%
Iowa:										
District Court	G	72,054	75,258	71,666	-1%	4%	0%	-5%	0%	-1%
Kansas:										
District Court	G	10,670	14,707	14,229	2%	38%	2%	-3%	5%	33%
Kentucky:										
District Court	L	27,585	34,550	28,525	1%	25%	2%	-17%	3%	3%
Maine:										
District Court	L	14,350	21,053	22,718	2%	47%	2%	8%	4%	58%
Minnesota:										
County Court	L	NC	99,420	90,271	--	--	2%	-9%	--	--
Missouri:										
Circuit Court	G	11,745	15,110	19,106	1%	37%	1%	19%	3%	63%
New Jersey:										
Superior Court	G	40,535	42,012	51,137	1%	4%	1%	22%	2%	26%
North Carolina:										
District Court	L	171,612	226,604	194,321	4%	32%	4%	-14%	7%	13%
North Dakota:										
County Court	L	5,396	6,446	8,523	1%	19%	4%	32%	5%	58%
Oklahoma:										
District Court	G	77,798	NC	85,181	--	--	--	--	13%	9%
Pennsylvania:										
Philadelphia Municipal Court	L	26,043	29,328	26,253	0%	13%	0%	-10%	0%	1%
Rhode Island:										
District Court	L	6,802	8,383	12,087	0%	23%	1%	44%	1%	78%
South Dakota:										
Circuit Court	G	NC	17,999	19,259	--	--	4%	7%	--	--
Vermont:										
District Court	L	6,252	7,978	8,952	4%	28%	3%	12%	6%	43%
Washington:										
District Court	L	21,456	26,706	NC	9%	24%	--	--	--	--
Wisconsin:										
Circuit Court	G	NC	173,220	168,563	--	--	1%	-3%	--	--
Not exclusive court jurisdiction:										
California (STATE TOTAL)		453,662	561,908	512,804	6%	24%	6%	-9%	12%	13%
Justice Court	L	32,128	35,477	30,225	6%	10%	6%	-15%	12%	-6%
Municipal Court	L	421,534	526,431	482,579	6%	25%	6%	-8%	12%	14%

TABLE 33: Trend data for state courts that specifically reported small claims case filings for 1978, 1981, and 1984. (continued)

State and court title	Jurisdiction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
Indiana: (STATE TOTAL)	NC	172,013[1]	156,705[1]	--	--	1%	-9%[1]	--	--	
Superior Court and Circuit Court	G	29,682[1]	44,593[1]	35,042[1]	0%	50%[1]	1%	-21%[1]	1%	18%[1]
Small Claims Court of Marion County	L	NC	49,899	54,380	--	--	1%	9%	--	--
County Court	L	66,011[1]	77,521[1]	67,283[1]	0%	17%[1]	1%	-13%[1]	1%	2%[1]
New Hampshire (STATE TOTAL)		22,816	28,246	29,513	5%	24%	4%	4%	9%	29%
District Court	L	22,114	27,408	28,993	5%	24%	4%	6%	9%	31%
Municipal Court	L	702	838	520	5%	19%	4%	-38%	9%	-26%
Ohio (STATE TOTAL)		90,615	94,324	93,817	0%	4%	0%	-1%	0%	4%
Municipal Court	L	77,671	80,254	82,155	0%	3%	0%	2%	0%	6%
County Court	L	12,944	14,070	11,662	0%	9%	0%	-1%	0%	-10%
INCOMPLETE STATE DATA:										
Nebraska:										
County Court	L	10,033	12,561	11,613	1%	25%	2%	-8%	3%	16%
New York:										
Civil Court of NYC	L	NC	59,728	52,065	--	--	1%	-15%	--	--
District Court and City Court	L	44,176	43,822	47,897	-1%	-1%	1%	9%	0%	8%
Oregon:										
District Court	L	43,422	54,457	37,548	6%	25%	1%	-31%	7%	-14%
Utah:										
Circuit Court	L	NC	27,888	31,467	--	--	9%	13%	--	--
Totals for 29 courts in 25 states reporting comparable data for all three years:		1,490,699	1,762,364	1,659,439	2%	18%	2%	-6%	4%	11%

G = General jurisdiction court
L = Limited jurisdiction court
NC = Data are not comparable with other years
-- = Data element is not applicable

[1]Data are incomplete:
Alaska--District Court--Data do not include cases from low volume courts.
Indiana--Superior Court and Circuit Court, County Court--Data do not include cases classified as "other."

TABLE 34: Trend data for state courts that specifically reported tort case filings for 1978, 1981, and 1984.

Courts included in this table:

For inclusion in this table, a court must have reported an identifiable tort caseload, separate from all other civil cases, in at least two of the three targeted years. Five states reported tort filings for all the courts which had jurisdiction over torts in those states. A total of 21 statewide courts, in 17 states, reported data. Of the 21 courts, 17 were general jurisdiction courts.

Comparison of aggregated filings over time:

The following data are from the 17 courts in 13 states that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 34.

The increase in tort case filings between 1978-81 was only 2%, while the population for those states grew 4% during the same time period. Between 1981-84 the population grew another 4% while tort filings increased by 7%. For the entire period 1978-84 total tort filings increased 9%, however, the population also increased by 8%. This is the one case type, of those studied in this section, where the aggregate number of cases increased over both time periods evaluated. This does not qualify as a "litigation explosion", however, since the population increased at approximately the same rate as did the tort filings.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose tort filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	8	5
No significant difference between the changes in population and filings:	5	5
Filings increased at a rate slower than the population:	1	1
Filings decreased during this period:	5	8
Comparable data were not available for the period:	2	2

Although the aggregate filings increased somewhat over the years studied in Table 34, the above chart indicates that tort filings increased significantly in less than half of the courts reporting data in this table. During the period 1981-84, only one-third of the courts reporting data had a significant increase in tort filings--more courts experienced decreases than significant increases in tort filings during 1981-84. The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods, to test more explicitedly, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous chart by listing and categorizing courts by the patterns they followed. These patterns are explained in the introduction to this section (i.e., Part II). These are the patterns for those 17 courts that reported comparable data for all three years. The (G) and (L) after each court indicates whether it is a general or limited jurisdiction court.

1.	"Down-up" Pattern (no caveats):	Alaska Superior Court (G) California Superior Court (G) Florida Circuit Court (G)
2.	"Up-up" Pattern: (change in '81-'84) filings was less than '78-'81 increase in filings):	Hawaii Circuit Court (G) Washington Superior Court (G)
3.	"Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):	Alaska District Court (L)
4.	"Down-up" Pattern (Change in '81-'84 population exceeds or approximates change in '81-'84 filings):	North Dakota District Court (G)
5.	"No significant change - no significant change"	Ohio Court of Common Pleas (G) Maine Superior Court (G)
6.	"Up-down" Pattern:	Colorado District Court (G) Hawaii District Court (L) Kansas District Court (G) New York Supreme Court and County Court (G) Ohio County Court (L) Ohio Municipal Court (L) Tennessee Circuit Court and Chancery Court (G)
7.	"No significant change-down":	Idaho District Court (G)

Of the courts reporting comparable data for all three years, none experienced significant increases during both 1978-81 and 1981-84. Three additional courts reported decreases during the first period but significant increases in the 1981-84 period. These three courts, however, are in states that also experienced some of the

TABLE 34: Trend data for state courts that specifically reported tort case filings for 1978, 1981, and 1984. (continued)

largest increases in population (i.e., Alaska, California, and Hawaii).

The largest numerical increase in tort filings between 1981-84 is in the California Superior Court (i.e., an increase of over 16,000 cases). This increase, almost single handedly, accounts for the entire increase in the aggregate figures between 1981-84. Between the years 1978-84 however, the increase in the rate of filings was 12%, but was matched by a 12% increase in the population.

In addition to the fact that most states which have large increases in filings also have the largest increases in population, and therefore do not qualify as being especially litigious, another eight courts reported decreases in filings, and two other state courts reported no significant change in their filings over both periods studied. Although tort filings do not fit the "up-down" pattern as strongly as do other case types, neither do they provide any evidence of an increased propensity of the American public to sue.

TABLE 34: Trend data for state courts that specifically reported tort case filings for 1978, 1981, and 1984.

State and court title	Juris-diction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
COMPLETE STATE DATA:										
Exclusive court jurisdiction:										
Kansas--District Court	G	3,249	4,517	4,033	2%	39%	2%	-11%	5%	24%
Idaho--District Court	G	1,728[i]	1,744[i]	1,729[i]	5%	1%[i]	4%	-1%[i]	10%	0%[i]
Not exclusive court jurisdiction:										
Alaska (STATE TOTAL)		1,356[i]	1,428[i]	1,885[i]	3%	6%[i]	21%	31%[i]	25%	39%[i]
Superior Court	G	921	886	1,305	3%	-4%	21%	47%	25%	42%
District Court	L	435[i]	552[i]	580[i]	3%	27%[i]	21%	5%[i]	25%	33%[i]
Hawaii (STATE TOTAL)		2,032[i]	2,505[i]	2,304[i]	6%	23%[i]	6%	-8%[i]	12%	13%[i]
Circuit Court	G	1,155[i]	1,468[i]	1,611[i]	6%	27%[i]	6%	10%[i]	12%	39%[i]
District Court	L	877	1,037	693	6%	18%	6%	-33%	12%	-21%
Ohio (STATE TOTAL)		39,645	41,603	36,171	0%	5%	0%	-13%	0%	-9%
Court of Common Pleas	G	21,587	21,906	22,149	0%	1%	0%	1%	0%	3%
County Court	L	127	705	519	0%	455%	0%	-26%	0%	309%
Municipal Court	L	17,931	18,992	13,503	0%	6%	0%	-29%	0%	-25%
INCOMPLETE STATE DATA:										
California:										
Superior Court	G	86,729	80,970	97,068	6%	-7%	6%	20%	12%	12%
Colorado:										
District Court and Denver Superior Court	G	3,481	5,089	4,199	7%	46%	7%	-17%	14%	21%
Florida:										
Circuit Court	G	21,761[i]	21,063[i]	26,815[i]	12%	-3%[i]	8%	27%[i]	20%	23%[i]
Maine:										
Superior Court	G	1,803	1,914	2,083	2%	6%	2%	9%	4%	16%
Maryland:										
Circuit Court	G	7,902[i]	8,125[i]	NC	1%	3%[i]	--	--	--	--
Montana:										
District Court	G	NC	1,465	1,519	--	--	4%	4%	--	--
New York:										
Supreme Court and County Court	G	35,684	39,234	37,847	-1%	10%	1%	-4%	0%	6%
North Dakota:										
District Court	G	732	516	550	1%	-30%	4%	7%	5%	-25%
Tennessee:										
Circuit Court, Chancery Court (Law and Equity Court in 1978 and 1981)	G	10,457	12,046	11,775	3%	15%	2%	-2%	6%	13%
Texas:										
District Court	G	NC	28,698	34,224	--	--	8%	19%	--	--
Utah:										
District Court	G	872	775	NC	11%	-11%	--	--	--	--
Washington:										
Superior Court	G	6,882	7,919	8,997	9%	15%	3%	14%	12%	31%
Totals for 17 courts in 13 states reporting comparable data for all three years		215,539	220,556	235,456	4%	2%	4%	7%	8%	9%

G = General jurisdiction court
L = Limited jurisdiction court
NC = Data are not comparable with other years
-- = Data elements are inapplicable

[i]Data are incomplete:
Alaska--District Court--Data do not include low volume courts.
Florica--Circuit Court--Data do not include professional tort cases.
Hawaii--Circuit Court--Some tort cases are included in transfers.
Idaho--District Court--Some torts are included in the unclassified category.
Maryland--Circuit Court--Data do not incluoe "unreported cases."

TABLE 35: Trend data for state courts that specifically reported contract case filings for 1978, 1981, and 1984.

Courts included in this table:

For inclusion in this table, a court must have reported an identifiable contract caseload, separate from all other civil cases, in at least two of the three targeted years. Two of the states reported contract filings for all the courts which had jurisdiction over contract cases in those states. A total of 15 statewide courts, in 13 states, reported data. Of the 15 courts, 11 were general jurisdiction courts.

Comparison of aggregated filings over time:

The following data are from the 11 courts in 10 states that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 35.

The increase in contract case filings between 1978-81 was 14%, while the population for those states grew 5% during the same period. Between 1981-84, the population grew another 4%, however, new contract filings decreased by 15%--a clear reversal in the earlier trend of caseload expansion. For the entire period 1978-84, total contract filings decreased 4% while the population increased 9%. These aggregate data support the "up-down" pattern for contract filings.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose contract filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	7	2
No significant difference between change in population and filings:	1	1
Filings increased at a rate slower than the population:	1	2
Filings decreased during this period:	2	10
Comparable data were not available for the period:	4	0

Once again, the "up-down" pattern materializes. Most of the courts studied during the 1978-81 period experienced significant increases in filings, while this trend reversed itself during the period 1981-84 when most courts experienced decreases in their filings of contract cases. The Florida Circuit Court and the Texas District Court were the two courts that experienced significant increases in their case filings, yet they also recorded the largest increases in population for those courts that reported data during 1981-84. The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods to test, more specifically, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous one by listing and categorizing courts by the patterns they followed. These patterns are explained in the introduction to this section (i.e., Part II). These are the patterns for those 11 courts that reported comparable data for all three years. The (G) or (L) after each court indicates whether it is a general or limited jurisdiction court:

1. "Up-up" Pattern (no caveats): Florida Circuit Court (G)

2. "Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):
   - Hawaii Circuit Court (G)
   - Hawaii District Court (L)

3. "Up-down" Pattern:
   - Colorado District Court (G)
   - Maine Superior Court (G)
   - North Dakota District Court (G)
   - Ohio County Court (L)
   - Ohio Municipal Court (L)
   - Tennessee Circuit Court and Chancery Court (G)

4. "Down-down" Pattern:
   - Arkansas Court of Common Pleas (L)
   - Washington Superior Court (G)

The Florida Circuit Court is the only court that can lay claim to a large increase in contract filings. Courts in 8 other states followed the down trend after 1981.

TABLE 35: Trend data for state courts that specifically reported contract case filings for 1978, 1981, and 1984.

State and court title	Juris-diction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Popu-lation	Percent change 1978-1981 Filings	Percent change 1981-1984 Popu-lation	Percent change 1981-1984 Filings	Percent change 1978-1984 Popu-lation	Percent change 1978-1984 Filings
COMPLETE STATE DATA:										
Exclusive court jurisdiction:										
Kansas:										
District Court	G	NC	39,175	41,982	--	--	2%	7%	--	--
Not exclusive court jurisdiction:										
Hawaii (STATE TOTAL)		9,175[i]	13,460[i]	14,055[i]	6%	47%[i]	6%	4%[i]	12%	53%[i]
Circuit Court	G	1,434[i]	2,047[i]	2,131[i]	6%	43%[i]	6%	4%[i]	12%	49%[i]
District Court	L	7,741	11,413	11,924	6%	47%	6%	4%	12%	54%
INCOMPLETE STATE DATA:										
Arkansas:										
Court of Common Pleas	L	377[i]	300	102	2%	-20%[i]	2%	-66%	5%	-73%[i]
Colorado:										
District Court	G	14,147	22,395	15,270	7%	58%	7%	-32%	14%	8%
Florida:										
Circuit Court	G	27,005	29,677	38,650	12%	10%	8%	30%	20%	43%
Massachusetts:										
Superior Court	G	1,318	1,456	1,103	2%	10%	2%	-24%	4%	16%
Maryland:										
Circuit Court	G	NC	6,576[i]	5,496[i]	--	--	2%	-16%[i]	--	--
Montana:										
District Court	G	NC	5,860	4,420	--	--	4%	-25%	--	--
North Dakota:										
District Court	G	3,095	4,412	4,062	1%	43%	4%	-8%	5%	31%
Ohio:										
Municipal Court	L	171,166[i]	187,657[i]	149,334[i]	0%	10%[i]	0%	-20%[i]	0%	-13%[i]
County Court	L	3,648[i]	7,749[i]	5,740[i]	0%	112%[i]	0%	-26%[i]	0%	57%[i]
Tennessee:										
Circuit Court, and Chancery Court	G	7,327	8,830	7,582	3%	21%	2%	-14%	6%	3%
Texas:										
District Court	G	NC	38,902	51,152	--	--	8%	31%	--	--
Washington:										
Superior Court	G	21,679	18,748	13,891	9%	-14%	3%	-26%	12%	-36%
Totals for 11 courts in 10 states reporting comparable data for all three years		258,937	294,684	249,787	5%	14%	4%	-15%	9%	-4%

G = General jurisdiction court
L = Limited jurisdiction court
NC = Data are not comparable with other years.
-- = Data elements are inapplicable.

[i]Data are incomplete:
Arkansas--Court of Common Pleas--One county reported no data in 1978.
Hawaii--Circuit Court--Some cases are included in transfers.
Maryland--Circuit Court--Data do not include some "unreported cases."
Ohio--Municipal Court and County Court--Some contract cases are included in miscellaneous civil cases.

TABLE 36: Trend data for state courts that specifically reported triable felony case filings for 1978, 1981, and 1984.

Courts included in this table:

For inclusion in this table, a court must have reported an identifiable triable felony caseload, separate from all other criminal cases, in at least two of the three targeted years. A total of 28 statewide courts in 28 states reported data. All of these courts are general jurisdiction courts.

Comparison of aggregated filings over time:

The following data are from the 24 courts in 24 states that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 36.

The increase in triable felony cases between 1978-81 was 28%, while the population for the states reporting these data increased by 3%. Between 1981-84, the population continued to grow another 3%, and new triable felony filings increased by 7%. The pattern for these aggregate filings evidence a considerable slowing of the filing pattern during 1981-84. In fact, during the 1981-84 period, triable felony case filings did not increase at a rate significantly greater than the rate at which the population increased.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose triable felony filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	22	8
No significant difference between the changes in population and filings:	0	6
Filings did not increase measureably during this period:	0	1
Filings increased at a rate slower than the population:	0	2
Filings decreased during this period:	2	11
Comparable data were not available for the period:	4	0

Approximately three-fourths of those courts reporting triable felony filings between 1978-81 experienced significant increases in their caseloads. This tendency for increased filings, however, was greatly diminished during 1981-84 when almost twice as many courts reported decreases in their felony filings as courts who reported filing increases significantly greater than population increases. This observation is more clearly illustrated in the following chart.

The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods to test, more specifically, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous one by listing and categorizing courts by the patterns they follow. These patterns are explained in the introduction to this section (i.e., Part II). These are the patterns for those 24 courts in 24 states that reported comparable data for all three years.

1. "Up-up" Pattern (no caveats):
   - Alaska Superior Court
   - District of Columbia Superior Court
   - New Jersey Superior Court

2. "Down-up" Pattern (no caveats):
   - Minnesota District Court

3. "Up-up" Pattern: (change in '81-'84 filings was less than '78-'81 increase in filings):
   - Arkansas Circuit Court
   - Hawaii Circuit Court
   - Illinois Circuit Court
   - New York Supreme Court and County Court

4. "Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):
   - Arizona Superior Court
   - California Superior Court
   - Colorado District Court
   - Idaho District Court
   - North Dakota District Court
   - Virginia Circuit Court
   - Washington Superior Court

5. "Up-down" Pattern:
   - Georgia Superior Court
   - Kansas District Court
   - Maine Superior Court
   - North Carolina Superior Court
   - Ohio Court of Common Pleas
   - Oregon Circuit Court
   - Rhode Island Superior Court
   - Wyoming District Court

6. "Down-down" Pattern:
   - Wisconsin Circuit Court

Of the 24 statewide courts reporting data in Table 36, only four experienced increases in filings that continued to increase significantly more than the population. The number of triable felony filings decreased during the period 1981-84 in nine of the statewide courts reported

TABLE 36: Trend data for state courts that specifically reported triable felony case filings for 1978, 1981, and 1984. (continued)

in this table. As is the case with torts, it appears as though the rate of increases in felony filings has decreased. Additionally, downward trends were experienced in a large number of statewide courts. This trend in felony cases, may be a function of changes in a variety of variables ranging from: the actual crime rate, the rate of reported crime, the police clearance rate, state criminal law, and prosecuting rates.

TABLE 36: Trend data for state courts that specifically reported triable felony case filings for 1978, 1981, and 1984.

State and court title	Filings			Percent change 1978-1981		Percent change 1981-1984		Percent change 1978-1984	
	1978	1981	1984	Population	Filings	Population	Filings	Population	Filings
Alaska:									
Superior Court	778	1,194	1,846	3%	53%	21%	55%	25%	137%
Arizona:									
Superior Court	10,390[i]	14,357[i]	15,360[i]	11%	38%[i]	9%	7%[i]	21%	48%[i]
Arkansas:									
Circuit Court	8,997[j]	14,565[j]	17,993[j]	2%	62%[j]	2%	23%[j]	5%	100%[j]
California:									
Superior Court	55,369[j]	64,993[j]	74,412[j]	6%	17%[j]	6%	14%[j]	12%	34%[j]
Colorado:									
District Court	10,604	13,868	14,783	7%	31%	7%	7%	14%	39%
District of Columbia:									
Superior Court	3,415	4,283	6,035	-6%	25%	-1%	41%	-7%	77%
Georgia:									
Superior Court	26,293	37,338	33,725	5%	42%	5%	-10%	10%	28%
Hawaii:									
Circuit Court	1,729[i]	2,291[i]	2,655[i]	6%	33%[i]	6%	16%[i]	12%	54%[i]
Idaho:									
District Court	2,845	3,302	3,649	5%	16%	4%	11%	10%	28%
Illinois:									
Circuit Court	34,260[j]	41,795[j]	46,107[j]	0%	22%[j]	0%	10%[j]	1%	35%[j]
Iowa:									
District Court	NC	8,166[j]	7,658[j]	--	--	0%	-6%[j]	--	--
Kansas:									
District Court	10,333	12,121	11,397	2%	18%	2%	-6%	5%	11%
Maine:									
Superior Court	2,790[j]	3,281[j]	3,189[j]	2%	18%[j]	2%	-3%[j]	4%	14%[j]
Minnesota:									
District Court	10,678	10,155	12,162	2%	-5%	2%	20%	4%	14%
New Hampshire:									
Superior Court	NC	3,652	3,813	--	--	4%	4%	--	--
New Jersey:									
Superior Court	24,311	29,101	37,135	1%	20%	1%	28%	2%	53%
New York:									
Supreme Court-County Court	31,506[j]	41,587[j]	49,191[j]	-1%	32%[j]	1%	18%[j]	0%	56%[j]
North Carolina:									
Superior Court	30,576	42,792	42,160	4%	40%	4%	-1%	7%	38%
North Dakota:									
District Court	916	1,233	1,284	1%	35%	4%	4%	5%	40%
Ohio:									
Court of Common Pleas	31,575	41,076	37,073	0%	30%	0%	-10%	0%	17%
Oregon:									
Circuit Court	16,097	20,198	19,913	6%	25%	1%	-1%	7%	24%
Rhode Island:									
Superior Court	2,396	4,576	4,232	0%	91%	1%	-8%	1%	77%
South Dakota:									
Circuit Court	NC	2,654	2,606	--	--	3%	-2%	--	--
Texas:									
District Court	NC	82,872	87,249	--	--	8%	5%	--	--
Virginia:									
Circuit Court	29,354	40,444	42,642	3%	38%	4%	5%	7%	45%
Washington:									
Superior Court	11,168	15,442	15,432	9%	38%	3%	0%	12%	38%
Wisconsin:									
Circuit Court	15,835[j]	14,601[j]	13,607[j]	2%	-8%[j]	1%	-7%[j]	3%	-14%[j]
Wyoming:									
District Court	1,404	1,772	1,462	14%	26%	4%	-17%	19%	4%

TABLE 36: Trend data for state courts that specifically reported triable felony case filings for 1978, 1981, and 1984. (continued)

State and court title	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
Totals for 24 courts in 24 states reporting comparable data for all three years	373,609	476,361	507,444	3%	28%	3%	7%	6%	36%

Note: All of the courts listed above are general jurisdiction courts.
NC = Data are not comparable with other years.
-- = Data element is not applicable.

[1]Data are incomplete:
Arizona--Some felonies are included in an unclassified category.
Hawaii--Felony figures do not include reopened prior cases included in the unclassified civil category.

[J]Explanation of data included in the category:
Arkansas--Felony figures include DWI/DUI cases.
California--Felony figures include DWI/DUI cases.
Illinois--Felony caseload data include preliminary hearings from courts "downstate."
Iowa--Felony cases include third offense DWI/DUI cases in 1981 and 1984.
Maine--Felony figures include classes A, B, and C.
New York--Felony figures include DWI/DUI cases.
Wisconsin--Felony figures include limited felony cases.

A Preliminary Examination

of Available Civil and Criminal

Trend Data in State Trial Courts

for 1978, 1981, and 1984

Produced by:
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National Center for State Courts
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Study reveals no
litigation explosion
in state courts

WILLIAMSBURG, VA--"Careful examination of current available trial court data relating to tort, contract, real property rights and small claims cases, from a representative group of state courts, provides no evidence to support the existence of a national 'ligitation explosion' in state trial courts during the 1981-84 time period," according to Dr. Robert Roper, director of the Court Statistics and Information Management (CSIM) project of the National Center for State Courts.

Twenty states, which include 29 limited and general jurisdiction statewide court systems, reported reliable and comparable tort, contract, and real property rights statistics on the number of lawsuits filed for the years 1978, 1981, and 1984. The data revealed a 14 percent increase in filings for 1978-81, and a 4 percent decrease in 1981-84.

Small claims suits might best measure the inclination of Americans to sue because of easy accessibility, relatively inexpensive cost, and prospects for a quick resolution. Twenty-nine limited and general jurisdiction statewide court systems in 25 states were chosen for analysis due to their reliable and comparable small claims statistics. Small claims filings increased 18 percent in 1978-81, but decreased 6 percent in 1981-84.

-MORE-

In the area of torts alone, which is a subset of civil filings, total filings increased slightly in both the 1978-81 and the 1981-84 periods. However, all of the three states that reported significant increases during 1981-84 also reported the largest increases in population (Alaska, California, and Hawaii). During 1981-84, tort filings increased 7 percent while population increased 4 percent. For the entire period 1978-84, total tort filings increased 9 percent, but the population also increased by 8 percent.

The data provide a basis for the following observations:

- An upward trend in litigation in any one period is not necessarily attributable to an increase in the tendency of the average American to sue, but may indicate a simple increase in the number of average Americans.

- There may have been significant increases in civil filings which peaked around 1981; however, civil filings (defined as tort, contract and real property right cases) decreased slightly during the 1981-84 period. In fact, in state courts that reported data for the 1981-84 time periods, there were decreases in the total number of civil filings.

According to Dr. Roper, several reasons could account for the downward trend in litigation. Insurance companies and attorneys may increasingly find it in their interest to settle conflicts before the cases ever reach the courts. Also, people may be deterred from filing suits at all because of widespread reports about the cost of litigation, and the prospect of civil suits taking years before disposition.

The often cited litigation explosion thus appears to be exaggerated with respect to the total number of civil filings during the period of 1981-84. The source of the perception that there is a litigation explosion may be founded in a changing mix of civil cases, increased complexity of the cases being filed, and widespread media reports of enormous awards in relatively few civil cases.

Complete supporting data will be available later this spring from the Williamsburg-based National Center for State Courts, in a volume entitled "State Court Caseload Statistics, 1984."

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Published annually since 1975 (with the exception of 1982 and 1983) the state court caseload statistics series was developed by the Center's CSIM project in cooperation with the Conference of State Court Administrators. Work on the 1984 volume was completely funded by the National Center for State Courts; however, previous work on this project was funded by the Bureau of Justice Statistics. These reports are designed to collect, compile, analyze, and disseminate comparable state court caseload statistics; they are based on data provided by the state court administrators' offices and the offices of the state appellate court clerks. The series presents a methodology for reporting caseload statistics, nationwide current caseloads, as well as trends useful in future court planning.

NATIONAL CENTER FOR STATE COURTS ADD THREE

The National Center's basic mission is to help courts better serve both litigants and the general public. Courts at all levels are involved in one or more of the Center's projects, which range from research aimed at reducing delay in the litigation process to work conducted by the Center's regional offices on such subjects as automation of court operations and personnel administration. Emphasis is given to the training of court managers and presiding judges through the National Center's Institute for Court Management. In addition, the National Center serves as a clearinghouse for information on state courts. Besides its headquarters in Williamsburg, the Center maintains offices in North Andover, Mass., San Francisco, Denver, Arlington, Va., and Washington, D.C.

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Part II. Trends

Questions about the "litigation explosion" in the state trial courts are among those most frequently received by CSIM Project staff. Part II of this 1984 Annual Report is a preliminary effort to shed some light on the question, "Is there a 'litigation explosion' in the state trial courts?"

Dates chosen for trend data.

The years 1981 and 1984 were chosen as two of the data points for these tables because the State Trial Court Jurisdiction Guide for Statistical Reporting was first applied to the 1981 trial court data, and the 1984 data is the most recent available. Since those two years represent a three-year interval, an earlier three-year interval was needed to bring balance to the trend line. Therefore, the first point chosen was 1978.

Case types selected for analysis.

When talking of a "litigation explosion," most people reference an increased propensity, in the mindset of individuals, to sue for damages and punitive awards. Some of the CSIM case types that address this issue are tort, contract, and real property rights cases. In addition, small claims procedures are easily accessible, relatively inexpensive to file in and work within, and provide a comparatively speedier disposition of justice, and therefore, are a more interesting measure of the public's propensity to litigate.

Additionally, these case categories were chosen because they have, over the years, been reported separately, by many courts, without having any other minor case types included in their totals. The same is not true of other case categories, such as domestic relations, where subcategories are often reported with juvenile cases, miscellaneous, or special civil proceedings.

Criminal cases do not reflect on the "litigation explosion" as it is defined above, however, felonies are included in these trend data to provide a more complete picture of the courts' workloads over time.

The first table presents the general picture by displaying data for the combined category of tort, contract, and real property rights cases. This table is followed by a table for small claims. The final two civil tables break down the general table into one for tort, and one for contract cases. There were insufficient data, over the seven year period to justify compilation of a table for real property rights cases. The final table evaluates trend data for felony cases.

Population as an indicator of caseload changes.

Earlier volumes in this Annual Report series have documented that the single best predictor of civil filings in state courts is the total state population. Total population explained over 90% of the variance in civil filings among the state courts. Therefore, the percentage increase in state population has been included in these tables for all three time periods--1978-1981, 1981-1984, and 1978-1984 in order to explain, at the outset, what kind of case filing increases might be anticipated as a result of changes in the state populations.

At this point, it is not possible to accurately predict what percentage increase in filings one would expect for every percent increase in the population. Therefore, for purposes of this Report, a rough one to one relationship has been assumed, i.e., for every percent increase in population, a one percent increase in filings would be expected.

Courts included in the tables

Some state courts do not appear in these tables for a variety of reasons: they do not report statewide data at all, they do not provide sufficient detail to identify the case types reported in these tables, they have changed reporting categories over time, and finally, the jurisdiction and organization of some courts have changed so dramatically between 1978-84 that their data were not comparable. Therefore, the courts displayed on the following tables do not include complete nationwide data; however, they are representative of general jurisdiction courts in this country, and are adequate for addressing the issue of whether there is a litigation explosion. For example, Table 33, on small claims, has statewide data from 33 states from across all geographical regions, and from large and small states. Although Tables 32 and 34-36 do not have as much complete state data as does Table 33, the data are more often than not from general jurisidiction courts. Since these are the courts most likely to hear the serious cases, these courts complement the small claims data found in Table 33.

Summary statistics presented on the facesheets.

Three summary measures. Each of Tables 32-36 display the number of filings for the years 1978, 1981 and 1984, and the percent changes in total state populations and filings for each of the three time periods 1978-81, 1981-84 and 1978-84. The accompanying facesheet for each table summarizes the data presented in each table using the following three measures: (1) the aggregate data contained in the table for those courts that reported complete data for each of the three years; (2) a summary description of how many courts experienced increased or decreased filings for the two periods 1978-1981 and 1981-1984; and (3) a chart which identifies patterns of change, and specifically lists the courts within each pattern.

Patterns across time, the "up-up" and "up-down" patterns. There are two basic patterns that can be used to test crudely whether there continues to be a "litigation explosion." The first group represents those courts whose filings increased during the 1978-81 period, and continued to rise during the 1981-84 period (i.e., and "up-up" pattern). This "up-up" pattern alone, however, does not represent prima facie evidence of a "litigation explosion." This "up-up" category must be separated into three components: (3-a) courts whose upward increases in both time periods were at approximately the same rate of increase and whose increases significantly exceeded the rate of increases in

the total population; (3-b) courts whose filings increased, during 1981-84, at a rate significantly less than the rate they were increasing at during 1978-81--which indicates a slowing of any upward trend that might have occured during earlier years; and (3-c) courts whose filings increased significantly during the period 1978-81, but whose filings increased at a rate which approximated or was less than the rate at which the population increased during 1981-84. The last component (i.e., 3-c), represents courts where there is not a "litigation explosion," because filings did not increase at a rate equal to or significantly different from population increases. Therefore, the only "up-up" pattern which may indicate unusual increases in filings is a "3-a"--where court filings increased significantly over both periods.

The second major group of courts, which run counter to the "up-up" pattern, are those courts which exhibited significant increases in filings during 1978-81, but whose filings actually decreased during the 1981-84 period (i.e., an "up-down" pattern). Courts that fall into this category are clearly "over the hump," and no longer experiencing increases in the number of civil suits.

Other miscellaneous patterns appear sporadically throughout the tables. These can clearly be identified as either supportive, or not supportive of the claim to a "litigation explosion." For example, some courts may not have experienced any significant change in filings for both time periods. On the other hand, filings in some courts went down during the 1978-81 period, and have increased significantly during the latter period. These situations will be discussed as they occur in each of the tables.

Limitations on the data

The data presented on the following tables are the most accurate, reliable, and comprehensive data yet brought to bear on the question of whether there is a "litigation explosion" in the state courts. This is a preliminary look at the topic, however, and the reader should consider the following caveats when evaluating the analysis--none of which are thought to affect general conclusions that can be drawn from these tables: although the data are representative from all the states, they do not include all of the courts and states in the country; due to limited resources, Project staff were unable to complete the trend table for the missing years or identify all jurisdictional changes in those courts over time; the data are only as current as 1984 and changes may have occured during 1985; the data do not include many other civil case types which may have included different trends during that time period (e.g., divorce, support/custody, adoption, estate, civil appeals, and miscellaneous civil cases); and the findings are restricted to the state courts only.

General findings and explanations

A careful examination of available data relating to tort, contract, real property rights, and small claims cases from a representative group of state courts provides no evidence to support the often cited existence of a national "litigation explosion" in the state trial courts during the 1981-84 time period.

There are some state courts that have experienced significant increases in the case types described throughout this section, but the impact of that finding is reduced when one realizes that these are the courts in states that have also experienced significant increases in their total populations. Changes in the number of these filings are not attributable to an increase in the propensity of the average American to sue, but rather to a simple increase in the numbers of average Americans.

The findings, however, can be extended one further step. Not only is the evidence missing to indicate a significant national increase in filings above the increase in population, but a clear pattern emerges which generally supports the "up-down" model described earlier. In a significant number of state courts, selected civil filings have decreased between the period 1981-1984 (see the individual tables for specific details).

It may be that there was a litigation explosion that peaked around 1981. The evidence from these charts tends to support that observation. There were significant increases in filings between 1978-81, far exceeding the increases in population. In fact, the increases were so large during 1978-81, that despite the decreases that occurred during 1981-84, the percentage changes from 1978-84 are still showing moderate increases.

The often cited myth of a continuing upward trend of civil lawsuits in the state courts could result from several factors: (1) intensive media focus on the enormous size of the awards in a few selected and well publicized civil cases; and (2) increased workload in the courts, not caused by an increase in the rate of civil lawsuits, but by more complex cases, and perhaps fewer resources available to the courts to handle expected increases in filings which results in larger backlogs.

Additionally, there are a variety of potential explanations for the leveling off or decreases in civil suits: (1) The public's attitude toward lawsuits may be changing. People may be deterred from filing as a result of concerns about costs and civil litigation that is likely to take years--except for the more serious cases, it may not be worth the effort; (2) For years people speculated that greater numbers of laws resulted in increased litigation to interpret those laws--this testing of new legislation and judicial rules may have run its course; and (3) Finally, insurance companies and attorneys may be increasing their efficiency in settling conflict before cases reach the courts. Whatever the explanation, there is no evidence to support the notion of a nationwide increase in lawsuits in the state trial courts between 1981-84.

TABLE 32: Trend data for state courts that specifically reported tort, contract, and real property rights case filings for 1978, 1981, and 1984.

Courts included in this table.

For inclusion in this table, a court must have reported an identifiable tort, contract, and real property rights caseload, separate from all other civil cases, in at least two of the three target years. Five states reported tort, contract, and real property rights cases for all the courts which had jurisdiction over tort, contract and real property rights cases in those states. A total of 37 statewide courts, in 25 states, reported data. Of the 37 courts, 12 were general jurisdiction courts.

Comparison of aggregated filings over time.

The following data are from the 29 courts in 20 states that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 32.

The increase in tort, contract, and real property rights filings between 1978-81 was 14%, while the population for the states reporting these data increased by 3%. Between 1981-84, the population continued to grow another 3%, but the new filings decreased by 5%. These aggregate figures provide preliminary evidence for the existence of the "up-down" pattern discussed earlier in this section.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose tort, contract, and real property rights filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	19	7
No significant difference between the change in population and filings:	5	3
Filings did not increase measureably during this period:	0	3
Filings increased at a rate slower than the population:	0	2
Filings decreased during this period:	5	22
Comparable data were not available for the period:	8	0

The "up-down" pattern described in the introduction to this section is illustrated in the above chart. Most of the courts reporting tort, contract, and real property rights cases during 1978-81 experienced significant increases in their filings. During the 1981-84 period, however, the pattern reversed itself--the majority of courts reported decreases in filings of these case types. Less than twenty-five percent of the courts reporting tort, contract, and real property rights cases during 1981-84 experienced increases in their filings at a rate significantly higher than increases in their populations. These patterns are more firmly established in the following chart.

The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods to test, more specifically, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous one by listing and categorizing courts by the patterns they followed. These patterns are explained in the introduction to this section (i.e., Part II). These are the patterns for those 29 courts in 20 states that reported comparable data for all three years. The (G) or (L) after each court indicates whether it is a general or limited jurisdiction court:

1. "Up-up" Pattern (no caveats):	Civil Court of NYC (L)
2. "Down-up" Pattern (no caveats):	Alaska Superior Court (G) New Mexico Magistrate Court (L) Oregon Justice Court (L)
3. "Up-up" Pattern (change in '81-'84 filings was less than '78-'81 increase in filings):	Nebraska County Court (L)
4. "Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):	Hawaii Circuit Court (G) Hawaii District Court (L) Delaware Justice of the Peace (L)
5. "Up-no significant change":	Delaware Court of Common Pleas (L)
6. "No significant change - no significant change":	Delaware Superior Court (G)
7. "Up-down" Pattern:	Alabama Distrct Court (G) Arkansas Chancery and Probate Court (G) Colorado District Court (G) Colorado County Court (L) Indiana County Court (L) Indiana Municipal Court of Marion County (L) Kentucky District Court (L) Maine District Court (L) North Carolina Superior Court (G) North Carolina District Court (L) Ohio Municipal Court (L) Ohio County Court (L)

TABLE 32: Trend data for state courts that specifically reported tort, contract, and real property rights case filings for 1978, 1981, and 1984. (continued)

	Pennsylvania District Justice Court (L)
	Tennessee Circuit Court and Chancery (L)
8. "No significant change-down":	Oregon District Court (L)
	Rhode Island District Court (L)
	Washington Superior Court (G)
9. "Down-down" Pattern:	
	District of Columbia Superior Court (G)
	Colorado Water Court (G)

Of the courts studied in Table 32, the Civil Court of New York City is the only court whose filings have continued to increase significantly more than the population over the two time periods studied in this Report. Three additional courts followed the "down-up" pattern with significant increases reported during 1981-84. Another four courts experienced increases in filings between 1981-84, but the increases were either less than or not significantly different from population increases during that same time period, or the increases were less than the increases reported during the 1978-81 period. The remaining 18 courts showed no evidence of a "litigation explosion" during 1981-84, and 17 of those courts experienced a decrease in filings during that period.

TABLE 32: Trend data for state courts that specifically reported tort, contract, and real property rights case filings for 1978, 1981, and 1984.

State and court title	Juris-diction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Popu-lation	Percent change 1978-1981 Filings	Percent change 1981-1984 Popu-lation	Percent change 1981-1984 Filings	Percent change 1978-1984 Popu-lation	Percent change 1978-1984 Filings
COMPLETE STATE DATA:										
Exclusive court jurisdiction:										
District of Columbia:										
Superior Court	G	121,931	108,426	96,975	-6%	-11%	-1%	-11%	-7%	-20%
Kansas:										
District Court	G	NC	54,005	57,140	--	--	2%	6%	--	--
Not exclusive court jurisdiction:										
Colorado (STATE TOTAL)		79,480	105,028	99,205	7%	32%	7%	-6%	14%	25%
District Court	G	22,561	36,168	32,032	7%	60%	7%	-12%	14%	42%
Water Court	G	2,868	2,321	1,688	7%	-19%	7%	-23%	14%	-41%
County Court	L	54,051	66,539	65,485	7%	23%	7%	-2%	14%	21%
Hawaii (STATE TOTAL)		12,204[i]	17,379[i]	17,960[i]	6%	42%[i]	6%	3%[i]	12%	47%[i]
Circuit Court	G	2,786[i]	3,830[i]	3,992[i]	6%	37%[i]	6%	4%[i]	12%	43%[i]
District Court	L	9,418	13,549	13,968	6%	44%	6%	3%	12%	48%
North Carolina:		54,738	65,856	58,118	4%	20%	4%	-12%	7%	6%
Superior Court	G	11,541	13,756	12,482	4%	19%	4%	-9%	7%	8%
District Court	L	43,197	52,100	45,636	4%	21%	4%	-12%	7%	6%
INCOMPLETE STATE DATA:										
Alabama:										
District Court	L	40,130	55,818	51,805	2%	39%	2%	-7%	4%	29%
Alaska:										
Superior Court	G	2,683	2,312	3,107	3%	-14%	21%	34%	25%	16%
Arkansas:										
Chancery and Probate Court	G	6,642	7,545	5,151	2%	14%	2%	-32%	5%	-22%
Delaware:										
Superior Court	G	2,457	2,522	2,520	0%	3%	3%	0%	3%	3%
Court of Common Pleas	L	2,898	3,740	3,755	0%	29%	3%	0%	3%	30%
Justice of the Peace	L	15,844	20,028	20,806	0%	26%	3%	4%	3%	31%
Indiana:										
Municipal Court Marion County	L	8,901	14,364	10,131	0%	61%	1%	-29%	1%	14%
County Court	L	3,550[i]	5,573[i]	3,664[i]	0%	57%[i]	1%	-34%[i]	1%	3%[i]
Kentucky:										
District Court	L	48,808	57,627	56,359	1%	18%	2%	-2%	3%	15%
Maine:										
District Court	L	17,751[i]	20,072	16,146	2%	13%[i]	2%	-20%	4%	-9%[i]
Minnesota:										
County Court	L	NC	28,074	21,582	--	--	2%	-23%	--	--
Montana:										
District Court	G	NC	7,764	6,492	--	--	4%	-16%	--	--
Nebraska:										
County Court	L	9,236	11,128	12,027	1%	20%	2%	8%	3%	41%
Municipal Court	L	NC	17,781	17,712	--	--	2%	0%	--	--
New Hampshire:										
District Court	L	NC	10,382	9,815	--	--	4%	-5%	--	--
New Mexico:										
Magistrate Court	L	14,276	14,117	18,308	6%	-1%	7%	30%	14%	28%
Bernalillo County Metropolitan Court	L	NC	8,290	9,744	--	--	7%	18%	--	--
New York:										
Civil Court of New York City	L	130,131	151,159	195,163	-1%	16%	1%	29%	0%	50%
Court of Claims	L	NC	1,330	1,678	--	--	1%	26%	--	--
Ohio:										
Municipal Court	L	241,951[i]	260,068[i]	221,523[i]	0%	7%[i]	0%	-15%[i]	0%	-8%[i]
County Court	L	5,854[i]	11,302[i]	9,542[i]	0%	93%[i]	0%	-16%[i]	0%	63%[i]

TABLE 32: Trend data for state courts that specifically reported tort, contract, and real property rights case filings for 1978, 1981, and 1984. (continued)

State and court title	Jurisdiction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
INCOMPLETE STATE DATA (continued):										
Oregon:										
District Court	L	31,600	33,862	24,518	6%	7%	1%	-28%	7%	-22%
Justice Court	L	1,102[i]	942[i]	1,336[i]	6%	-15%[i]	1%	42%[i]	7%	21%[i]
Pennsylvania:										
District Justice Court	L	163,556	188,199[d]	183,143	0%	15%	0%	-3%[d]	0%	12%
Rhode Island:										
District Court	L	22,394	23,689	18,759	0%	6%	1%	-21%	1%	-16%
Tennessee:										
Circuit Court and Chancery Court	G	20,561	23,442	21,505	3%	14%	2%	-8%	6%	5%
Texas:										
District Court	G	NC	68,451	85,873	--	--	8%	25%	--	--
Washington:										
Superior Court	G	32,029	34,922	33,140	9%	9%	3%	-5%	12%	3%
Totals for 29 courts in 20 states reporting comparable data for all three years		1,090,707	1,239,120	1,185,666	3%	14%	3%	-4%	5%	9%

G = General jurisdiction court
L = Limited jurisdiction court
NC = Data are not comparable with other years.
d = The number of dispositions was the only data element provided that year.
-- = Data element is not applicable.

[i]Data are not complete:
Hawaii-Circuit Court--Data do not include "unreported cases."
Indiana--County Court--Data do not include "other" cases or "redocketed civil" cases.
Maine--District Court--Due to implementation of a new reporting system, data are missing from two locations.
Maryland--Circuit Court--Data do not include "unreported cases."
Ohio--Municipal Court and County Court--Data do not include cases classified as miscellaneous civil.
Oregon--Justice Court--Not all courts reported data.

TABLE 33: Trend data for state courts that specifically reported small claims case filings for 1978, 1981, and 1984.

Courts included in this table:

For inclusion in this table, a court must have reported an identifiable small claims caseload, separate from all other civil cases, in at least two of the three targeted years. Twenty-nine states reported small claims cases for all the courts which had jurisdiction over small claims cases in those states. A total of 39 statewide courts, in 33 states, reported data. Of the 39 courts, 11 were general jurisdiction courts.

Comparison of aggregated filings over time:

The following data are from the 29 courts, in 25 states, that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 33.

The increase in small claims filings between 1978-81 was 18%, as the population for that same period rose only 2%. The period between 1981-84 again provides a different picture. During this second period, the population continued to increase at a rate of 2% for those states reporting these data, yet small claims filings decreased by 6%. These aggregate figures tend to support the "up-down" pattern discussed in the introduction to this section.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose small claims filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	21	6
No significant difference between the changes in population and filings:	6	10
Filings did not increase measureably during this period:	0	1
Filings increased at a rate slower than the population:	0	1
Filings decreased during this period:	3	19
Comparable data were not available for the period:	9	2

During the period 1978-81, the majority of courts experienced significant increases in small claims filings; however, that pattern was reversed during the following three years when most of the courts reporting data experienced decreases in small claims filings. Small claims data fit the "up-down" pattern described in the introduction to this section of the Annual Report.

The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods to test, more explicitly, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous one by listing and categorizing courts by the patterns they follow. These are the patterns for those 29 courts, in 25 states, that reported comparable data for all three years:

1.	"Up-up" Pattern (no caveats):	North Dakota County Court (L) Rhode Island District Court (L)
2.	"No significant change-up":	New Jersey Superior Court (G)
3.	"Up-up" Pattern: (change in '81-'84 filings was less than '78-'81 increase in filings):	Colorado County Court (L) Hawaii District Court (L) Illinois Circuit Court (G) Maine District Court (L) Missouri Circuit Court (G) Vermont District Court (L)
4.	"Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):	Alaska District Court (L) New Hampshire District Court (L)
5.	"Down-up" Pattern (Change in '81-'84 population exceeds or approximates change in '81-'84 filings):	District of Columbia Superior Court (G) New York District Court and City Court (L)
6.	"No significant change - No significant change"	Idaho District Court (L) Ohio Municipal Court (L)
7.	"Up-down" Pattern:	California Municipal Court (L) Indiana Superior Court and Circuit Court (G) Indiana County Court (L) Kansas District Court (G) Kentucky District Court (L) Nebraska County Court (L) New Hampshire Municipal Court (L) North Carolina District Court (L) Ohio County Court (L)

TABLE 33: Trend data for state courts that specifically reported small claims case filings for 1978, 1981, and 1984. (continued)

Oregon District Court (L)
Pennsylvania-Philadelphia Municipal Court (L)

8. "No significant change-down":
California Justice Court (L)
Iowa District Court (G)

9. "Down-down" Pattern:
Alabama District Court (L)

Only two courts had significant and continuous increases in small claims filings during both 1978-81 and 1981-84. In addition, the New Jersey Superior Court experienced a significant increase during 1981-84. Ten other courts also reported increases in their small claims filings, but the increases were either significantly less than the earlier increase during 1978-81, or were less than or approximated the population change for that same period which would indicate no "litigation explosion" at all. Eleven courts fit the "up-down" pattern, and another three courts also experienced decreases in small claims filings during 1981-84.

TABLE 33: Trend data for state courts that specifically reported small claims case filings for 1978, 1981, and 1984.

State and court title	Juris-diction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Popu-lation	Percent change 1978-1981 Filings	Percent change 1981-1984 Popu-lation	Percent change 1981-1984 Filings	Percent change 1978-1984 Popu-lation	Percent change 1978-1984 Filings
COMPLETE STATE DATA:										
Exclusive court jurisdiction:										
Alabama:										
District Court	L	95,928	91,550	76,694	2%	-5%	2%	-16%	4%	-20%
Alaska:										
District Court	L	7,948[i]	10,143[i]	10,735[i]	3%	28%[i]	21%	6%[i]	25%	35%[i]
Colorado:										
County Court	L	10,294	13,683	16,460	7%	33%	7%	20%	14%	60%
Connecticut:										
Superior Court	G	NC	90,447	73,096	--	--	1%	-19%	--	--
District of Columbia:										
Superior Court	G	32,797	24,490	25,323	-6%	-25%	-1%	3%	-7%	-23%
Florida:										
County Court	L	NC	172,208	163,171	--	--	8%	-5%	--	--
Hawaii:										
District Court	L	1,313	3,355	5,388	6%	156%	6%	61%	12%	310%
Idaho:										
District Court	L	13,504	14,217	14,174	5%	5%	4%	0%	10%	5%
Illinois:										
Circuit Court	G	175,454	205,055	217,641	0%	17%	0%	6%	1%	24%
Iowa:										
District Court	G	72,054	75,258	71,666	-1%	4%	0%	-5%	0%	-1%
Kansas:										
District Court	G	10,670	14,707	14,229	2%	38%	2%	-3%	5%	33%
Kentucky:										
District Court	L	27,585	34,550	28,525	1%	25%	2%	-17%	3%	3%
Maine:										
District Court	L	14,350	21,063	22,718	2%	47%	2%	8%	4%	58%
Minnesota:										
County Court	L	NC	99,420	90,271	--	--	2%	-9%	--	--
Missouri:										
Circuit Court	G	11,745	16,110	19,106	1%	37%	1%	19%	3%	63%
New Jersey:										
Superior Court	G	40,535	42,012	51,137	1%	4%	1%	22%	2%	26%
North Carolina:										
District Court	L	171,612	226,604	194,321	4%	32%	4%	-14%	7%	13%
North Dakota:										
County Court	L	5,396	6,446	8,523	1%	19%	4%	32%	5%	58%
Oklahoma:										
District Court	G	77,798	NC	85,181	--	--	--	--	13%	9%
Pennsylvania:										
Philadelphia Municipal Court	L	26,043	29,328	26,253	0%	13%	0%	-10%	0%	1%
Rhode Island:										
District Court	L	6,802	8,383	12,087	0%	23%	1%	44%	1%	78%
South Dakota:										
Circuit Court	G	NC	17,999	19,259	--	--	4%	7%	--	--
Vermont:										
District Court	L	6,252	7,978	8,952	4%	28%	3%	12%	6%	43%
Washington:										
District Court	L	21,456	26,706	NC	9%	24%	--	--	--	--
Wisconsin:										
Circuit Court	G	NC	173,220	168,563	--	--	1%	-3%	--	--
Not exclusive court jurisdiction:										
California (STATE TOTAL)		453,662	561,908	512,804	6%	24%	6%	-9%	12%	13%
Justice Court	L	32,128	35,477	30,225	6%	10%	6%	-15%	12%	-6%
Municipal Court	L	421,534	526,431	482,579	6%	25%	6%	-8%	12%	14%

TABLE 33: Trend data for state courts that specifically reported small claims case filings for 1978, 1981, and 1984. (continued)

State and court title	Jurisdiction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
Indiana: (STATE TOTAL)	NC	172,013[1]	156,705[1]	--	--	1%	-9%[1]	--	--	
Superior Court and Circuit Court	G	29,682[1]	44,593[1]	35,042[1]	0%	50%[1]	1%	-21%[1]	1%	18%[1]
Small Claims Court of Marion County	L	NC	19,899	54,380	--	--	1%	9%	--	--
County Court	L	66,011[1]	77,521[1]	67,283[1]	0%	17%[1]	1%	-13%[1]	1%	2%[1]
New Hampshire (STATE TOTAL)		22,816	28,246	29,513	5%	24%	4%	4%	9%	29%
District Court	L	22,114	27,408	28,993	5%	24%	4%	6%	9%	31%
Municipal Court	L	702	838	520	5%	19%	4%	-38%	9%	-26%
Ohio (STATE TOTAL)		90,615	94,324	93,817	0%	4%	0%	-1%	0%	4%
Municipal Court	L	77,671	80,254	82,155	0%	3%	0%	2%	0%	6%
County Court	L	12,944	14,070	11,662	0%	9%	0%	-1%	0%	-10%
INCOMPLETE STATE DATA:										
Nebraska:										
County Court	L	10,033	12,561	11,613	1%	25%	2%	-8%	3%	16%
New York:										
Civil Court of NYC	L	NC	59,728	52,065	--	--	1%	-15%	--	--
District Court and City Court	L	44,176	43,822	47,887	-1%	-1%	1%	9%	0%	8%
Oregon:										
District Court	L	43,422	54,457	37,548	6%	25%	1%	-31%	7%	-14%
Utah:										
Circuit Court	L	NC	27,888	31,467	--	--	9%	13%	--	--
Totals for 29 courts in 25 states reporting comparable data for all three years:		1,490,699	1,762,364	1,659,439	2%	18%	2%	-6%	4%	11%

G = General jurisdiction court
L = Limited jurisdiction court
NC = Data are not comparable with other years
-- = Data element is not applicable

[1]Data are incomplete:
Alaska--District Court--Data do not include cases from low volume courts.
Indiana--Superior Court and Circuit Court, County Court--Data do not include cases classified as "other."

TABLE 34: Trend data for state courts that specifically reported tort case filings for 1978, 1981, and 1984.

Courts included in this table:

For inclusion in this table, a court must have reported an identifiable tort caseload, separate from all other civil cases, in at least two of the three targeted years. Five states reported tort filings for all the courts which had jurisdiction over torts in those states. A total of 21 statewide courts, in 17 states, reported data. Of the 21 courts, 17 were general jurisdiction courts.

Comparison of aggregated filings over time:

The following data are from the 17 courts in 13 states that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 34.

The increase in tort case filings between 1978-81 was only 2%, while the population for those states grew 4% during the same time period. Between 1981-84 the population grew another 4% while tort filings increased by 7%. For the entire period 1978-84 total tort filings increased 9%, however, the population also increased by 8%. This is the one case type, of those studied in this section, where the aggregate number of cases increased over both time periods evaluated. This does not qualify as a "litigation explosion", however, since the population increased at approximately the same rate as did the tort filings.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose tort filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	8	5
No significant difference between the changes in population and filings:	5	5
Filings increased at a rate slower than the population:	1	1
Filings decreased during this period:	5	8
Comparable data were not available for the period:	2	2

Although the aggregate filings increased somewhat over the years studied in Table 34, the above chart indicates that tort filings increased significantly in less than half of the courts reporting data in this table. During the period 1981-84, only one-third of the courts reporting data had a significant increase in tort filings--more courts experienced decreases than significant increases in tort filings during 1981-84. The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods, to test more explicitedly, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous chart by listing and categorizing courts by the patterns they followed. These patterns are explained in the introduction to this section (i.e., Part II). These are the patterns for those 17 courts that reported comparable data for all three years. The (G) and (L) after each court indicates whether it is a general or limited jurisdiction court.

1.	"Down-up" Pattern (no caveats):	Alaska Superior Court (G) California Superior Court (G) Florida Circuit Court (G)
2.	"Up-up" Pattern: (change in '81-'84 filings was less than '78-'81 increase in filings):	Hawaii Circuit Court (G) Washington Superior Court (G)
3.	"Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):	Alaska District Court (L)
4.	"Down-up" Pattern (Change in '81-'84 population exceeds or approximates change in '81-'84 filings):	North Dakota District Court (G)
5.	"No significant change - no significant change"	Ohio Court of Common Pleas (G) Maine Superior Court (G)
6.	"Up-down" Pattern:	Colorado District Court (G) Hawaii District Court (L) Kansas District Court (G) New York Supreme Court and County Court (G) Ohio County Court (L) Ohio Municipal Court (L) Tennessee Circuit Court and Chancery Court (G)
7.	"No significant change-down":	Idaho District Court (G)

Of the courts reporting comparable data for all three years, none experienced significant increases during both 1978-81 and 1981-84. Three additional courts reported decreases during the first period but significant increases in the 1981-84 period. These three courts, however, are in states that also experienced some of the

TABLE 34: Trend data for state courts that specifically reported tort case filings for 1978, 1981, and 1984. (continued)

largest increases in population (i.e., Alaska, California, and Hawaii).

The largest numerical increase in tort filings between 1981-84 is in the California Superior Court (i.e., an increase of over 16,000 cases). This increase, almost single handedly, accounts for the entire increase in the aggregate figures between 1981-84. Between the years 1978-84 however, the increase in the rate of filings was 12%, but was matched by a 12% increase in the population.

In addition to the fact that most states which have large increases in filings also have the largest increases in population, and therefore do not qualify as being especially litigious, another eight courts reported decreases in filings, and two other state courts reported no significant change in their filings over both periods studied. Although tort filings do not fit the "up-down" pattern as strongly as do other case types, neither do they provide any evidence of an increased propensity of the American public to sue.

TABLE 34: Trend data for state courts that specifically reported tort case filings for 1978, 1981, and 1984.

State and court title	Jurisdiction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
COMPLETE STATE DATA:										
Exclusive court jurisdiction:										
Kansas--District Court	G	3,249	4,517	4,033	2%	39%	2%	-11%	5%	24%
Idaho--District Court	G	1,728[i]	1,744[i]	1,729[i]	5%	1%[i]	4%	-1%[i]	10%	0%[i]
Not exclusive court jurisdiction:										
Alaska (STATE TOTAL)		1,356[i]	1,428[i]	1,885[i]	3%	6%[i]	21%	31%[i]	25%	39%[i]
Superior Court	G	921	886	1,305	3%	-4%	21%	47%	25%	42%
District Court	L	435[i]	552[i]	580[i]	3%	27%[i]	21%	5%[i]	25%	33%[i]
Hawaii (STATE TOTAL)		2,032[i]	2,505[i]	2,304[i]	6%	23%[i]	6%	-8%[i]	12%	13%[i]
Circuit Court	G	1,155[i]	1,468[i]	1,611[i]	6%	27%[i]	5%	10%[i]	12%	39%[i]
District Court	L	877	1,037	693	6%	18%	6%	-33%	12%	-21%
Ohio (STATE TOTAL)		39,645	41,603	36,171	0%	5%	0%	-13%	0%	-9%
Court of Common Pleas	G	21,587	21,906	22,149	0%	1%	0%	1%	0%	3%
County Court	L	127	705	519	0%	455%	0%	-26%	0%	309%
Municipal Court	L	17,931	18,992	13,503	0%	6%	0%	-29%	0%	-25%
INCOMPLETE STATE DATA:										
California:										
Superior Court	G	86,729	80,970	97,068	6%	-7%	6%	20%	12%	12%
Colorado:										
District Court and Denver Superior Court	G	3,481	5,089	4,199	7%	46%	7%	-17%	14%	21%
Florida:										
Circuit Court	G	21,761[i]	21,063[i]	26,815[i]	12%	-3%[i]	8%	27%[i]	20%	23%[i]
Maine:										
Superior Court	G	1,803	1,914	2,083	2%	6%	2%	9%	4%	16%
Maryland:										
Circuit Court	G	7,902[i]	8,135[i]	NC	1%	3%[i]	--	--	--	--
Montana:										
District Court	G	NC	1,465	1,519	--	--	4%	4%	--	--
New York:										
Supreme Court and County Court	G	35,684	39,234	37,847	-1%	10%	1%	-4%	0%	6%
North Dakota:										
District Court	G	732	516	550	1%	-30%	4%	7%	5%	-25%
Tennessee:										
Circuit Court, Chancery Court (Law and Equity Court in 1978 and 1981)	G	10,457	12,046	11,775	3%	15%	2%	-2%	6%	[illegible]
Texas:										
District Court	G	NC	28,698	34,224	--	--	8%	19%	--	--
Utah:										
District Court	G	872	775	NC	11%	-11%	--	--	--	--
Washington:										
Superior Court	G	6,882	7,919	8,997	9%	15%	3%	14%	12%	31%
Totals for 17 courts in 13 states reporting comparable data for all three years		215,539	220,558	235,456	4%	2%	4%	7%	8%	9%

G = General jurisdiction court
L = Limited jurisdiction court
NC = Data are not comparable with other years
-- = Data elements are inapplicable

[i]Data are incomplete:
Alaska--District Court--Data do not include low volume courts.
Florida--Circuit Court--Data do not include professional tort cases.
Hawaii--Circuit Court--Some tort cases are included in transfers.
Idaho--District Court--Some torts are included in the unclassified category.
Maryland--Circuit Court--Data do not include "unreported cases."

TABLE 35: Trend data for state courts that specifically reported contract case filings for 1978, 1981, and 1984.

Courts included in this table:

For inclusion in this table, a court must have reported an identifiable contract caseload, separate from all other civil cases, in at least two of the three targeted years. Two of the states reported contract filings for all the courts which had jurisdiction over contract cases in those states. A total of 15 statewide courts, in 13 states, reported data. Of the 15 courts, 11 were general jurisdiction courts.

Comparison of aggregated filings over time:

The following data are from the 11 courts in 10 states that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 35.

The increase in contract case filings between 1978-81 was 14%, while the population for those states grew 5% during the same period. Between 1981-84, the population grew another 4%, however, new contract filings decreased by 15%--a clear reversal in the earlier trend of caseload expansion. For the entire period 1978-84, total contract filings decreased 4% while the population increased 9%. These aggregate data support the "up-down" pattern for contract filings.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose contract filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	7	2
No significant difference between change in population and filings:	1	1
Filings increased at a rate slower than the population:	1	2
Filings decreased during this period:	2	10
Comparable data were not available for the period:	4	0

Once again, the "up-down" pattern materializes. Most of the courts studied during the 1978-81 period experienced significant increases in filings, while this trend reversed itself during the period 1981-84 when most courts experienced decreases in their filings of contract cases. The Florida Circuit Court and the Texas District Court were the two courts that experienced signifcant increases in their case filings, yet they also recorded the largest increases in population for those courts that reported data during 1981-84. The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods to test, more specifically, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous one by listing and categorizing courts by the patterns they followed. These patterns are explained in the introduction to this section (i.e., Part II). These are the patterns for those 11 courts that reported comparable data for all three years. The (G) or (L) after each court indicates whether it is a general or limited jurisdiction court:

1. "Up-up" Pattern (no caveats): Florida Circuit Court (G)

2. "Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):
   - Hawaii Circuit Court (G)
   - Hawaii District Court (L)

3. "Up-down" Pattern:
   - Colorado District Court (G)
   - Maine Superior Court (G)
   - North Dakota District Court (G)
   - Ohio County Court (L)
   - Ohio Municipal Court (L)
   - Tennessee Circuit Court and Chancery Court (G)

4. "Down-down" Pattern:
   - Arkansas Court of Common Pleas (L)
   - Washington Superior Court (G)

The Florida Circuit Court is the only court that can lay claim to a large increase in contract filings. Courts in 8 other states followed the down trend after 1981.

TABLE 35: Trend data for state courts that specifically reported contract case filings for 1978, 1981, and 1984.

State and court title	Jurisdiction	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
COMPLETE STATE DATA:										
Exclusive court jurisdiction:										
Kansas:										
District Court	G	NC	39,175	41,982	--	--	2%	7%	--	--
Not exclusive court jurisdiction:										
Hawaii (STATE TOTAL)		9,175[i]	13,460[i]	14,055[i]	6%	47%[i]	6%	4%[i]	12%	53%[i]
Circuit Court	G	1,434[i]	2,047[i]	2,131[i]	6%	43%[i]	6%	4%[i]	12%	49%[i]
District Court	L	7,741	11,413	11,924	6%	47%	6%	4%	12%	54%
INCOMPLETE STATE DATA:										
Arkansas:										
Court of Common Pleas	L	377[i]	300	102	2%	-20%[i]	2%	-66%	5%	-73%[i]
Colorado:										
District Court	G	14,147	22,395	15,270	7%	58%	7%	-32%	14%	8%
Florida:										
Circuit Court	G	27,005	29,677	38,650	12%	10%	8%	30%	20%	43%
Maine:										
Superior Court	G	1,318	1,456	1,103	2%	10%	2%	-24%	4%	16%
Maryland:										
Circuit Court	G	NC	6,576[i]	5,496[i]	--	--	2%	-16%[i]	--	--
Montana:										
District Court	G	NC	5,860	4,420	--	--	4%	-25%	--	--
North Dakota:										
District Court	G	3,095	4,412	4,062	1%	43%	4%	-8%	5%	31%
Ohio:										
Municipal Court	L	171,166[i]	187,657[i]	149,332[i]	0%	10%[i]	0%	-20%[i]	0%	-13%[i]
County Court	L	3,648[i]	7,749[i]	5,740[i]	0%	112%[i]	0%	-26%[i]	0%	57%[i]
Tennessee:										
Circuit Court, and Chancery Court	G	7,327	8,830	7,582	3%	21%	2%	-14%	6%	3%
Texas:										
District Court	G	NC	38,902	51,152	--	--	8%	31%	--	--
Washington:										
Superior Court	G	21,679	18,748	13,691	9%	-14%	3%	-26%	12%	-36%
Totals for 11 courts in 10 states reporting comparable data for all three years		258,937	294,684	249,787	5%	14%	4%	-15%	9%	-4%

G = General jurisdiction court
L = Limited jurisdiction court
NC = Data are not comparable with other years.
-- = Data elements are inapplicable.

[i]Data are incomplete:
Arkansas--Court of Common Pleas--One county reported no data in 1978.
Hawaii--Circuit Court--Some cases are included in transfers.
Maryland--Circuit Court--Data do not include some "unreported cases."
Ohio--Municipal Court and County Court--Some contract cases are included in miscellaneous civil cases.

TABLE 36: Trend data for state courts that specifically reported triable felony case filings for 1978, 1981, and 1984.

Courts included in this table:

For inclusion in this table, a court must have reported an identifiable triable felony caseload, separate from all other criminal cases, in at least two of the three targeted years. A total of 28 statewide courts in 28 states reported data. All of these courts are general jurisdiction courts.

Comparison of aggregated filings over time:

The following data are from the 24 courts in 24 states that reported comparable data for all three reporting years. These figures can be found on the bottom line of Table 36.

The increase in triable felony cases between 1978-81 was 28%, while the population for the states reporting these data increased by 3%. Between 1981-84, the population continued to grow another 3%, and new triable felony filings increased by 7%. The pattern for these aggregate filings evidence a considerable slowing of the filing pattern during 1981-84. In fact, during the 1981-84 period, triable felony case filings did not increase at a rate significantly greater than the rate at which the population increased.

Comparison of courts whose filings increased or decreased during each of the time periods.

The following chart displays the number of courts whose triable felony filings have increased or decreased during the two time periods:

	1978-81	1981-84
Filings increased significantly more than the population:	22	8
No significant difference between the changes in population and filings:	0	6
Filings did not increase measureably during this period:	0	1
Filings increased at a rate slower than the population:	0	2
Filings decreased during this period:	2	11
Comparable data were not available for the period:	4	0

Approximately three-fourths of those courts reporting triable felony filings between 1978-81 experienced significant increases in their caseloads. This tendency for increased filings, however, was greatly diminished during 1981-84 when almost twice as many courts reported decreases in their felony filings as courts who reported filing increases significantly greater than population increases. This observation is more clearly illustrated in the following chart.

The chart above displays how all of the courts which reported data during either of the two periods fit into specific categories. The following chart links the filing patterns of specific courts across the two time periods to test, more specifically, the various patterns identified earlier.

Comparison of patterns among the courts.

The following chart expands on the previous one by listing and categorizing courts by the patterns they follow. These patterns are explained in the introduction to this section (i.e., Part II). These are the patterns for those 24 courts in 24 states that reported comparable data for all three years.

1. "Up-up" Pattern (no caveats):
   - Alaska Superior Court
   - District of Columbia Superior Court
   - New Jersey Superior Court

2. "Down-up" Pattern (no caveats):
   - Minnesota District Court

3. "Up-up" Pattern: (change in '81-'84 filings was less than '78-'81 increase in filings):
   - Arkansas Circuit Court
   - Hawaii Circuit Court
   - Illinois Circuit Court
   - New York Supreme Court and County Court

4. "Up-up" Pattern (change in '81-'84 population exceeds or approximates change in '81-'84 filings):
   - Arizona Superior Court
   - California Superior Court
   - Colorado District Court
   - Idaho District Court
   - North Dakota District Court
   - Virginia Circuit Court
   - Washington Superior Court

5. "Up-down" Pattern:
   - Georgia Superior Court
   - Kansas District Court
   - Maine Superior Court
   - North Carolina Superior Court
   - Ohio Court of Common Pleas
   - Oregon Circuit Court
   - Rhode Island Superior Court
   - Wyoming District Court

6. "Down-down" Pattern:
   - Wisconsin Circuit Court

Of the 24 statewide courts reporting data in Table 36, only four experienced increases in filings that continued to increase significantly more than the population. The number of triable felony filings decreased during the period 1981-84 in nine of the statewide courts reported

TABLE 36: Trend data for state courts that specifically reported triable felony case filings for 1978, 1981, and 1984. (continued)

in this table. As is the case with torts, it appears as though the rate of increases in felony filings has decreased. Additionally, downward trends were experienced in a large number of statewide courts. This trend in felony cases, may be a function of changes in a variety of variables ranging from: the actual crime rate, the rate of reported crime, the police clearance rate, state criminal law, and prosecuting rates.

TABLE 36: Trend data for state courts that specifically reported triable felony case filings for 1978, 1981, and 1984.

State and court title	Filings			Percent change 1978-1981		Percent change 1981-1984		Percent change 1978-1984	
	1978	1981	1984	Population	Filings	Population	Filings	Population	Filings
Alaska:									
Superior Court	778	1,194	1,846	3%	53%	21%	55%	25%	137%
Arizona:									
Superior Court	10,390[i]	14,357[i]	15,360[i]	11%	38%[i]	9%	7%[i]	21%	48%[i]
Arkansas:									
Circuit Court	8,997[j]	14,565[j]	17,993[j]	2%	62%[j]	2%	23%[j]	5%	100%[j]
California:									
Superior Court	55,369[j]	64,993[j]	74,412[j]	6%	17%[j]	6%	14%[j]	12%	34%[j]
Colorado:									
District Court	10,604	13,868	14,783	7%	31%	7%	7%	14%	39%
District of Columbia:									
Superior Court	3,415	4,283	6,035	-6%	25%	-1%	41%	-7%	77%
Georgia:									
Superior Court	26,293	37,338	33,725	5%	42%	5%	-10%	10%	28%
Hawaii:									
Circuit Court	1,729[i]	2,291[i]	2,655[i]	6%	33%[i]	6%	16%[i]	12%	54%[i]
Idaho:									
District Court	2,845	3,302	3,649	5%	16%	4%	11%	10%	28%
Illinois:									
Circuit Court	34,260[j]	41,795[j]	46,107[j]	0%	22%[j]	0%	10%[j]	1%	35%[j]
Iowa:									
District Court	NC	8,166[j]	7,658[j]	--	--	0%	-6%[j]	--	--
Kansas:									
District Court	10,303	12,121	11,397	2%	18%	2%	-6%	[illegible]%	11%
Maine:									
Superior Court	2,790[j]	3,281[j]	3,189[j]	2%	18%[j]	2%	-3%[j]	4%	14%[j]
Minnesota:									
District Court	10,678	10,155	12,162	2%	-5%	2%	20%	4%	14%
New Hampshire:									
Superior Court	NC	3,652	3,813	--	--	4%	4%	--	--
New Jersey:									
Superior Court	24,311	29,101	37,135	1%	20%	1%	28%	2%	53%
New York:									
Supreme Court-County Court	31,506[j]	41,587[j]	49,191[j]	-1%	32%[j]	1%	18%[j]	0%	56%[j]
North Carolina:									
Superior Court	30,576	42,792	42,160	4%	40%	4%	-1%	7%	38%
North Dakota:									
District Court	916	1,233	1,284	1%	35%	4%	4%	5%	40%
Ohio:									
Court of Common Pleas	31,575	41,076	37,073	0%	30%	0%	-10%	0%	17%
Oregon:									
Circuit Court	16,097	20,198	19,913	6%	25%	1%	-1%	7%	24%
Rhode Island:									
Superior Court	2,396	4,576	4,232	0%	91%	1%	-8%	1%	77%
South Dakota:									
Circuit Court	NC	2,654	2,606	--	--	3%	-2%	--	--
Texas:									
District Court	NC	82,872	87,249	--	--	8%	5%	--	--
Virginia:									
Circuit Court	29,354	40,444	42,642	3%	38%	4%	5%	7%	45%
Washington:									
Superior Court	11,168	15,442	15,432	9%	38%	3%	0%	12%	38%
Wisconsin:									
Circuit Court	15,855[j]	14,601[j]	13,607[j]	2%	-8%[j]	1%	-7%[j]	3%	-14%[j]
Wyoming:									
District Court	1,404	1,772	1,462	14%	26%	4%	-17%	19%	4%

TABLE 36: Trend data for state courts that specifically reported triable felony case filings for 1978, 1981, and 1984. (continued)

State and court title	Filings 1978	Filings 1981	Filings 1984	Percent change 1978-1981 Population	Percent change 1978-1981 Filings	Percent change 1981-1984 Population	Percent change 1981-1984 Filings	Percent change 1978-1984 Population	Percent change 1978-1984 Filings
Totals for 24 courts in 24 states reporting comparable data for all three years	373,609	476,361	507,444	3%	28%	3%	7%	6%	36%

Note: All of the courts listed above are general jurisdiction courts.
NC = Data are not comparable with other years.
-- = Data element is not applicable.

[1]Data are incomplete:
Arizona--Some felonies are included in an unclassified category.
Hawaii--Felony figures do not include reopened prior cases included in the unclassified civil category.

[J]Explanation of data included in the category:
Arkansas--Felony figures include DWI/DUI cases.
California--Felony figures include DWI/DUI cases.
Illinois--Felony caseload data include preliminary hearings from courts "downstate."
Iowa--Felony cases include third offense DWI/DUI cases in 1981 and 1984.
Maine--Felony figures include classes A, B, and C.
New York--Felony figures include DWI/DUI cases.
Wisconsin--Felony figures include limited felony cases.

ALASKA BAR ASSOCIATION

April 15, 1986

Representative M. Mike Miller
Alaska State Legislature
Pouch V (MS 3100)
Juneau, AK 99811

Dear Representative Miller:

The Board of Governors of the Alaska Bar Association would like you to have a copy of the transcript of the "Hearings on Liability Insurance and Personal Injury Law," held on March 22, 1986, which was sponsored by the Board.

Sincerely,

Deborah O'Regan

Deborah O'Regan
Executive Director

vu

Enclosure

P.O. Box 100279, Anchorage, Alaska 99510 • 907-272-7469

HEARINGS ON LIABILITY INSURANCE AND PERSONAL INJURY LAW

MARCH 22, 1986

Sponsored by the Board of Governors
of the Alaska Bar Association

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SPEAKER: HARRY BRANSON

I'd like to welcome you all to what I hope will be an enlighting program on the subject of casualty insurance, the casualty insurance market today, and the casualty insurance rates. There's apparently, if you read the newspapers, or magazines, watch television, there's been a lot of publicity in the last year or so about the cost of insurance and about a subject called tort reform and we're here to talk about those things. Just this morning I picked up a copy of the latest Time Magazine, it has on it the headline "Sorry America Your Insurance Has Been Cancelled." That's a very dramatic headline in a major newsmagazine in this country. The story that follows the headline is not as dramatic and perhaps a little more balanced. We hope that the program today will be even more balanced. We've invited some of the more knowledgeable people in the community to talk to us about the so-called crisis in the insurance industry today and the crisis in the tort reform movement, and they'll be addressing I believe among other things the situation that brings us here today and that's the skyrocketing rates and property and casualty insurance coverage for business, professional people and government within the past few years. In addition to the skyrocketing rates we're going to be looking at the reduced or unavailable coverage, the most extreme statement about which I had just read to you "Sorry America your insurance has been cancelled." There are a couple of theories floating around about how all this happened. One is

that the insurance companies with double digit inflation and a very high interest return a couple of years ago, back when we were able to get something like a sixteen percent return on investments, went out and competed very vigorously for premiums sold a lot of policies at premium rates that were competitive and perhaps lower than they should have been. After the interest rates went down the reinsurance market, particularly the London insurance market, began looking at the situation and starting pulling back on reinsurance. As a result rates have been going up at what the people who have to buy insurance I think in this audience and elsewhere would say are alarming to cover what may be simply a market condition and a situation tha involves a judgment about where interest rates were going to go a couple of years ago. Thats one explanation. Another one is that there has been a steady increase of litigation, that juric have been awarding higher and higher verdicts, and defense cost and fees and plaintiff costs and fees have been going up. The awards have necessitated, made it necessary for insurance companies to raise their rates to cover not only the increased risk in the future, but also just to cover the cost of paying these policies. These are some of the theories. One group nationwide is not a single group and every state in the Union that I'm aware of there are tort reform movements, or tort reform committees. People who have to pay these insurance premiums have been getting together and they've organized and they are approaching legislatures asking them to change the

laws, asking them to change the basic tort law in the United States and some legislatures are doing that. Some are considering these laws, modifications in our laws. Some of them are radical, some of them are not, some of them are perhaps necessary. All of this is being done I believe, in the hope that it will reduce oue insurance rates. We are facing a situation with municipalities, professionals, businesses, where you either may find yourself in a situation where you can't afford the insurance or where the insurance that is available to you, or that there isn't any at all or you can't afford. Of course the result of that is the public that isn't protected. If we can't have this kind of insurance, we can't have this kind of coverage. Then people are going to find themselves in situations where they go to court for redress for harms that they have suffered and there isn't going to be any money to pay them. The tort reform movement has come up with some proposed solutions for this problem that I assume they believe will lower insurance rates among other things. Some of these reforms include eliminating or reducing certain kinds of awards. There are caps or limits being suggested on pain and suffering awards in personal injury cases. There is talk of eliminating punitive damages or directing monies from punitive damages to the state rather than to the plaintiff in an injury case. There's a requirement that's being asked for in legislation that payments be made on a periodic basis rather than a lump sum basis. There's talk of lowering or limiting contingent fee agreements

between plaintiffs' attorneys and their clients and also talk of limiting or eliminating in whole or in part attorneys' awards for fees from the courts. In some cases there is talk of lowering statute of limitations, and also I'm aware of, at least in Alaska, that there's some interest in eliminating wrongful death actions in the case of children or people who don't have dependents. There are other answers that have been proposed, not by I think as organized not organized groups, as much as individuals that talk about increased state and federal regulation of the insurance industry, publishing information about rates so that people can understand not only rates but what it cost the insurance companies, actually cost them, to provide insurance to the public, asking for greater accountability from the insurance industry. As I said, in order to shed some light on this crisis, we've asked some of the best people we know to come forward and talk to us. These are knowledgeable and I believe reasonable people who are more interested I hope in shedding light than heat on this subject, I know there's a lot of heat, theres a lot of feeling about it. I think anytime you look at an insurance bill and find that your insurance rates have doubled and tripled you're going to be pretty upset about it. I notice in the audience there are buttons on some of the people that are sitting out there that say "Tort Reform Now" and I assume they feel passionately about this subject. We can always use more information and in that light the Board of Governors of the Alaska Bar Association has

put together this program. As president of the Association I have the task of moderating. The speakers are going to be first of all Dr. David McGuire, the president of the Alaska Medical Association, a prominent Anchorage surgeon. He will be followed by Eric T. Sanders of the law firm of Young and Sanders and I promised Eric that I would tell you that he is a prominent plaintiffs' attorney in Anchorage; Keith Brown of Hagans, Brown & Gibbs, a defense attorney; Sandra Kay Saville, of Kay, Saville, Coffey, Hopwood & Schmidt, who primarily I believe, in her experience has done plaintiffs' work, she had done some defense work; Richard L. Block, former insurance commissioner for the State of Alaska, admitted to the practice of law in Alaska and California, president of the Alaska National Insurance Company; and Robert M. Libbey of Libbey, Suddock and Hart, who is president of the Alaska Academy of Trial Lawyers. Each one of these pople will have 15 minutes approximately to give you a presentation on the subject and after they have finished they will answer questions from the Board of Governors of the Alaska Bar Association. I would like at this time to introduce the members of the Board of Governors that are going to question the speakers. To my immediate left, far left, is Judith Bazeley, from Anchorage, Alaska, an attorney in Anchorage in private practice. Next to her is Larry Weeks from Juneau, Alaska. Larry is a former District Attorney in Anchorage, and he is now in private practice in Juneau. Mike Thompson of Ketchikan, Alaska, in private practice of law there. Gail Roy

Fraties, District Attorney, Anchorage, Alaska. Going again to the far right, we have two public members of the board that are present today. The first is Jan Ackerman on the far right. Jan is from Fairbanks, Alaska. Next to Jan is Andonia Harrison, public member from Anchorage. Next to her is Stanley Ditus, attorney in private practice in Anchorage, Alaska. Next to Stanley is seated Ralph Beistline. Ralph is going to be the next president of the Alaska Bar Association. He is president-elect, and Bob Wagstaff is seated immediately next to the camera. Bob is in private practice in Anchorage, Alaska. These are the members of the Board of Governers. I am their president, my name is Harry Branson. At this time I would like to turn the lectern over to Dr. David McGuire who will be our first speaker.

SPEAKER: DR. DAVID MCGUIRE

Good Morning. Thank you to the Board of Governors for the opportunity to speak to you about this issue. For those in the audience who will no doubt not agree with me, my name is David, not Daniel, this is the Bar, not the Lions Club. I'd like to tell you about some history that has happened in the state of Alaska, and make some observations about that history, and point out to you that I think it is not a unique history and that there are lessons that we can learn from that history and apply to other areas of our community. There's I think little doubt that there's a problem with insurance, and so, I think we don't

need to spend too much time convincing ourselves that indeed there is a problem and we need to do somthing about. The question then, as Mr. Branson has said, is this a problem related to the insurance companies, or is this the problem related to the tort system, or is it a problem related to the tort feasors, or all those negligent people out there that are doing bad things to everybody, or is it a combination of the above. Well, let me make some observations. In 1975, and let me hasten to say that even though I am a physician, I am also a citizen, and even though I talk about examples that have occurred in medicine, I don't mean to single medicine out. I don't think that the problems that the doctors or the hospitals have faced are any different than the problems that the rest of you are facing now. The difference is that it started ten years ago, and now the same thing that was happening to us ten years ago is now happening to lots of people across the board. It's no longer sufficient to say that the reason that there's a malpractice crisis is because the doctors are such crummy surgeons and do such terrible things, because that doesn't really explain why the day cares can't get insurance, and why the municipalities can't get insurance and so on. So, please take this in the context that I'm reporting to you a history that I think occurred earlier than than the present history, but I don't think the problems are any different, and I think that the observations are parallel and are useful. In 1975 we couldn't get insurance at any price, no one would sell it to

us. We were told that the problem was the insurance companies and they were ripping everybody off and that that's where we ought go to look to point the finger. We were also told that if we weren't such greedy, avaricious, arrogant people who did such terrible things we wouldn't get sued so much. And we said well, as a matter of fact, we don't know the answer to either one of those questions. We went down to Juneau and we asked for three basic things. We asked for a panel to review the malpractice cases so that we could learn more about who does and who doesn't do malpractice and what it really means. We asked for some mechanism of insurance because we didn't have any, and we asked for tort reform. We got the first two. We got a screening panel that now screens most if not all malpractice cases. We've learned a great deal from that screeing panel. It's going to disappoint some of you to know that the numbers of doctors that are sued for malpractice are not necessarily the worst doctors. Some of the best doctors who are in the prime of their field, are who are well thought of, are being sued because they are doing dangerous problems. We then asked for an insurance mechanism, we got it, its called MICA, and it's important to hear the history of what has happened. Medical Insurance Corporation of Alaska was founded with a loan from the State and the concept was that the doctors would insure themselves, and the doctors would see to it that they reviewed themselves, and if they did that we would get away from the evil insurance company and the outrageous profits they were getting from us.

Well, it seemed to work for a while. Matter of fact it seemed to work pretty good. Rates indeed did stablize for awhile. MICA, I think, has done an excellent job. They did risk management, the Commissioner of insurance reviewed rates, sat on the Board with them, told them how much they should charge and why, and they did pretty much exactly what he said. They didn't do any speculative investments, they didn't do predatory pricing, they didn't do speculation and all these other things that the insurance companies are accused of doing. Their goal was to provide insurance to the doctors that would recompense the patient who was injured by negligenc activity. Well what happened? Everything went along find until this year, then problems began to arise. At first the problem was that MICA couldn't get reinsurance, and so everybody said, well, the problem is the reinsurance companies again are behind this whole deal and and they're running things up. Well, so in December MICA said well look, what we are going to do is go ahead and do this without reinsurance but then their actuary said in order to do that they had to double the rate this year, and they had to decrease the coverage to one fourth, which meant that the maximum level that could be obtained was $500,000 and it meant that the rate was doubled. Now $500,000 in these days and age if you're delivering babies is probably not enough insurance, but never mind that for a moment. In February they were able to obtain reinsurance. But the cost of that reinsurance now increased the premium to 140 to 170 percent. Now it seems to me

clear that the cost of the basic insurance with MICA was double and the premium was or the coverage was reduced to one fourth and the cost of the reinsurance with Lords of London was the 40 to the 70 percent above it. Now what does that mean to the doctors and the people in the State of Alaska? Well it means that in Dillingham, here's a little number to work through, there are 75 babies delivered every year in Dillingham. That's because that's all the pregnant women there are. Doctors can't work any faster, okay? There's five doctors delivering. If you divide 5 into 75 you come out with 15. Now the way MICA structures the premium goes like this, if you are doing general practice work, cuts and bruises and broken bones, you pay X. If you're doing deliveries you pay X plus Y. Y very nearly equals X. If you divide the number of babies that are delivered by the price per baby that is delivered, it came out to $500 before the premium entries for MICA. Now remember that this is the company that's nonprofit state regulated and all that kind of thing, okay? So now when you double the rate then it goes up to a $1000 if you add the 40 and the 70 percent, you can do the math. Well, $1200 or so is what they are charging for a delivery in Dillingham. So what the doctors in Homer now are doing, is they have no insurance, and the doctors in Cordova have no insurance, and these are not the avaricious Anchorage surgeons that are ripping everybody off, okay, these are the practitioners out there in Homer that are trying to deliver babies cause the ladies don't want to come to Anchorage or can'

get out. Well, so for those that say that the whole thing is the insurance mechanism, then there must be an explanation of what happened to MICA and why it went that way. If you pay 1 million dollars to one baby who is born with a birth problem, you have to do 10,000 deliveries without another problem. 1,000 - 10,000, alot. So we've said that we think there's a problem more than just the insurance companies and what is it? Well we've taken a look at the tort system and how it's come to be. There have been significant changes in the tort system and those have occurred in the last 20 years or 25. We've gone from a system of contributory negligence to now one of strict liability in the case of products, and there's even some reason to believe that strict liability will soon be applied to professionals. That means that anything that goes wrong has to be compensated regardless if you were negligent, regardless if you were at fault. There's a long delay in the system. It takes two to five years or longer to get through the system. It's expensive. Even if you win it's expensive. And if you win, if you are judged innocent by the court, you still have to pay the cost of your defense and there's no where to go get it from. With this insurance company we've begun to see where the dollars go a little bit, and from MICE, which is another organization very similar to MICA, we know that one-third of all the dollars that are spent in premiums go to defense, one-third goes to the plaintiff's bar and one-third goes to the patient or the victim that's been injured. Now at the very least ladies and

gentlemen, that's an insufficient system. Workman's comp is able to produce a much more efficient system that's at least 70 to 80 percent effective. So if we can't do anything else we ought to be able to do something to increase the efficiency of the situation. Now someone has said well, we're going to restructure the tort system or we want to get rid of the tort system or we want to make everybody immune from lawsuit. That's not true at all. The court system has undergone change and we think that the change was not in the right direction and we'd like to bring it back to what it was. We'd like to bring it back so that if you are negligent yourself and contribute to your injury, that there's some observation of that negligence. We'd like to bring it back so that if you are at fault you ought to pay, but if you're not at fault you shouldn't pay just because you have the money. So, we've proposed a series of things that we think would do this. Now some people say it's radical, well I don't think it's radical. Some people say that we're trying to put this on the back of the victim. I don't think so, and I'd like to take to some time to explain it to you if I may. We went to California first because California was the only state that had a comprehensive package of tort reform proposals that were upheld and allowed to become law. Many other states passed many other legislation, but they did it piecemeal. Somebody tesified that Iowa did tort reform and that it didn't work, but if you look at what Iowa did, it isn't tort reform, it's one or two piecemeal little things that were passed

and were not very effective. It's not a surprise. California laws all of you I'm sure know, was upheld by the California Supreme Court, split decision 4 to 3. It was then appealed to the U.S. Supreme Court and allowed to stand and I do understand the difference. The points in the California law, non-economic damages. Now when people say we want to cap awards, please be sure that you understand that what we're saying is we are not capping economic awards, we are capping pain and suffering awards and what's the rationale? You see we have a situation where in my view we have the fortunate, unfortunate few. If you have something terrible happen to you, you may or may not be compensated for it depending on who was around at the time it happened. If there was a driller or a trucker or somebody that has insurance and you have a terrible injury you're apt to get paid very well. If you happen to be walking down the street when the bank robber or the criminal or burglar came out and shot you, you are just as paralyzed but you are not going to get a million dollars for your pain and suffering. So there's an inequity there. Furthermore, I spend a lot of my days looking at pain and suffering and I don't know how to measure it, I don't know how to compensate for it and I'm persuaded that there's so much pain and suffering in this world that I don't think there's enough money to give everybody $500,000 or whatever it is for it, so we've said look, what we have is a mechanism of reparation for injuries, in the end this is society's money that we're talking about, this is a consumer

issue. The dollars that go to pay these premiums don't come from the tortfeasor anymore if they ever did, they come from the person who uses the goods and services. The price of goods and services goes up everytime the liability goes up or else the person goes without insurance, that's what happens. So we're talking about society's resources and how to allocate them, and we don't think its wrong to say that look, for this entity that we can't measure, we're going to pay-up to this amount, but no more because we can't afford it. Now, the economic losses should be compensated for completely. But they should be proven and demonstrable and they should be compensated for in a fashion which they would otherwise have occurred. The way we do it now. If you're hurt age 35 you've got to go to 65, 30 years. 30 years times $30,000, $900,000 and it's paid in a lump sum. The interest alone on that is three times greater than the actual economic loss per year. Furthermore, those awards are tax free. Now you don't even get a lump sum from the New York lottery. Why should we have lump sum awards here, it doesn't make sense, it's very expensive and we have good evidence that it doesn't always do what it was intended to do. Many, how many, well, we're doing further research. Many of these awards five years later the victim doesn't have any money. They still are just as paralyzed, they still have all the problems they had before, but they don't have any money. We proposed structured settlements with periodic payments. If you lose $30,000 you should get $30,000, you should get a $2500 a month, you should

get it tax free. There should be an escalator to compensate for increasing costs of living, etc. And you can put together this that then assures the victim that they'll have the money. Its there when they need it, and you can do it at something like one half to one third to the cost of society or if you want to say, to the insurance company, but go back to my example of MICA. Now I don't think that that's unfair to the victim, it compensates them reasonably and if we do things like t[illegible], we'll keep our insurance mechanism alive and if we don't we're going to have people out there that are bare, that don't have any insurance and then what do you do with your 10 million dollar judgment. You can pay for the wall or make confetti, there's no money to support it. We've talked about collateral sources. We want to talk about collateral sources because we view these resources as society's. If you buy health insurance it's not an investment that you're making, you are joining a pool and the benefit is that more people are going to be healthy that year than are sick, that's the only reason it works. Now when you are sick, yes, you get compensated, but when you are sick and injured and then you sue somebody and you get compensated here and you get compensated here, to me its double dipping. You are taking your sources from both sides of the fence. Okay, so the person spent money to obtain this and they should be compensated. You bet, here's what we ought to do. For all the dollars that they spent for the health insurance or whatever other coverage that they spent, let's give them back that part

of the award, and then let's bar subrogation by any of those insurance companies that pay the benefit. You can't take it away here and then let the insurance company come over here and sue the victim for it. Those are reasonable things and remember I'm talking about society's resources. I'm not talking about the tort feasor, and I'm not talking about the insurance company because then the bottom line, that's where it is, and I think I've given you again the example of MICA. Joint and several liability is a problem, its a problem for everybody, particularly the municipalities. It didn't use to be that way. It used to be that if you were contributorily negligent you were barred from recovery and I would agree that that's not right, if you're one percent at fault and you don't get anything that doesn't make any sense. It should be comparative and if you're at fault you ought to pay, but just because you exist and have a pocket and happen to be in the vicinity of something that occurs is not a reason that you should be forced to pay. When the municipalities are one percent at fault and they have to pay the entire judgment, ladies and gentlemen, who pays that judgment? Its the taxpayers, that's where the money comes from. Right now many of those municipalities don't have insurance companies anymore so you can't say that it's the insurance company that's ripping it off. When they pay a judgment it's going to go right back to the taxpayer. Now, I think it's reasonable that the fault ought to have a relationship to whether or not you pay. Punitive damages, punitive damages are intended to deter conduct

that society doesn't want. Three-fourths to two-thirds of all the medical malpractice suits right now contain a clause to punitive damages. Now no matter how much you don't like doctors, and I understand that, do you really believe that three out of four of the doctors went out there deliberately intending to harm their patients, and the attorneys tell me that we don't get any recovery from punitive damages and so I ask myself well how come they're always in there then. What good are they if you don't get any money and if they don't seem to do it, well, here's what happens. Punitive damages are not insurable and so the attorney comes to the person at fault or the defendant and said look, you know, if you lose under this punitive damage issue, you got a real problem because you're going to have to make up for it out of your pocket, the insurance company is not going to pay for it. So what you really ought to do, is you ought to think about talking to your insurance company about settling this quickly for the maximum policy limits. Now, I don't argue that there should be punishment, but I argue that it's the State that has the right to punish, not individuals who on their own decide that something needs to be punished. So we've said if really punitive damages do a good thing for the State, then let's help everybody be altruistic, and what we'll do is we'll give all the proceeds from that lottory activity back to the state and they can use it to help pay for all those other people out there that don't get compensated. One of the prominent PI attorneys in town said that he couldn't afford to

take a case unless there's at least $100,000 on the table. Well, yet we have the situation in which the contingent fee is supposed to allow those people who are indigent to pursue their litigation, but it sounds like what he's saying is that unless you got a $100,000 at stake folks, I don't want to deal with you. Well we've said that we ought to have arbitration. We've said that it would be a lot quicker, it would be more efficient, it would be better for the victim if sums in question of less than $100,000 make it 25, make it 50, make it some number that's meaningful, were first arbitrated. That would avoid the expense of jury trials, all the filings, all the rest and you can get it done much more efficiently. Now, to be sure that there's a safety valve, there should be an opportunity to appeal from the arbitration. If someone is unfairly treated or believes themselves to be so, they ought to have a jury trial. But listen to this, when someone is accused in our society, they have to defend themselves, and it's a punishment even if you're innocent, cause you've got to pay for the defense. So there should be some thing that makes the appeal responsible. So if the arbitration award or if the jury award is not materially different than the arbitration award, how about if the person who appealed has to pay the expense both to society and the other individual. That's not unfair, that's not barring the right to trial, it's saying if you really believe you've got a bad deal, we've got a mechanism to deal with it, but you have t understand you must use it responsibly, you can't just paper th

walls with a word processor and $50 bucks and sue everybody. Well, don't let me run away with myself here. Rule 82 in the contingent fee. Now I understand that I've not met a single attorney in my life who believes that the contingent fee should be anything but what it is. But let me pose some questions to you. If you don't like the sliding scale that we have now, if you look at Rule 82 the way its set up by the court, there's a sliding scale, it's in there, so you have sliding scales for some things already, how come we can't have them for some other things. If an attorney takes this thing to arbitration and if the award is made in three weeks, or two months, should we give him forty percent of the $100,000? Does that seem reasonable? It settled cases where from the time of the event until the time of the payment by the insurance company, less than 90 days have elapsed. Is it reasonable that any human being is paid a million bucks for their services? Can we afford it? I don't think so, apparently not, apparently people are going bare. I know of at least one attorney in town who owns a bar and he has no coverage on the bar. So you know there's a prominent attorney in Miami, who's one of the top PI guys, and he can't get insurance anymore. Now we haven't said that we have all the answers, we said we think that there needs to be a look at the statute of limitations, why? Well, if you know what claims made is, then you understand the need for statute of limitations. Let me just take a minute more to tell you about claims made. We're used to buying occurrence insurance. That means that if

you buy it and something happens and you're sued 10 years down the road you're covered. Well the problem is that the statute of limitations allows action from the date of discovery or reasonable discovery, not from the date of occurrence, so that in the case of an infant that's 21 or 23 or whatever it turns out to be. The insurance companies don't have a mechanism of predicting how much to charge for that period of time, so what they've done is very ingenuious. If it's good for them, it's terrible for the rest of us. What they've said is look, here's how it's going to work. You have to be insured when it happens and you have to be insured when you get sued. Now, let me just take you through that for a minute and then I'll quit. If you pay one thousand this year and you get coverage, next year you pay two thousand you say I'm concerned the cost is going up, next year you pay ten thousand, you say now I'm really concerne but there's not no other choice and you pay it. Let's look at what happens in the fourth year. They come to you and they say its going to be $20,000 grand. These are not, I mean these are not unreal numbers, this is reality, its happening. So you say well I can't pay it. Okay, here's what happens, if you don't pay it and you get sued in year four for what you did in year one, two or three, you're not covered, and your $13,000 that yo put over here in the insurance company is zip, gone, you get nothing from it. So then they say well you can make a tail. You can buy a tail at the average cost of one and half times what it was that you paid already. Then if you get sued in yea

four for what you did in one, two, three, you're in good shape, you're covered. The problem is you're not covered in year four. It goes on from there. You can't change companies. Once you decide to go with the company on claims made, you've got married and you didn't know about it, and it takes alot to get divorced. Now, furthermore, this is going to happen not just to professionals who allegedly can afford it, it's going to happen to everybody across the board because the insurance companies can't predict what the liability is down the road, so leave the statute of limitations the way it is to the legislatures. If that's what you want, everybody to be on is claims made insurance rate. That's what going to happen, but I don't think it's unreasonable to say, other states have done this. We have statute of limitations on other kinds of activity, including some criminal activity. I think we can change it so that it was reasonable, made insurance predictable and still didn't disenfranchise the individual who may have an action. Well, we obviously need a lot of help. This is a problem. This is not a problem that one special interest group is bringing to you. The citizens coalition is not just doctors, its not just dentists, and its not just hospitals, it's daycares and nurseries and truckers and air taxis and municipalities and right down the road, so our legal system needs some addressing, and we need some help addressing it, and thank you for the opportunity to talk to you.

SPEAKER: ERIC T. SANDERS

Mr. Branson and all the members of the Board of Governors, than you very much for giving us the opportunity to give some insigh on what we consider to be a problem in the insurance industry and touch on also some of the problems in the Alaska civil justice system. Before I start, I'd like to just say I appreciate very much Dr. McGuire taking time out from his busy practice to give us his insights on the problems we're facing. I know he has devoted a lot of time and I appreciate that, and appreciate other people that are attending this today trying to get some insights on the problems and possible resolutions to those problems. Dr. McGuire didn't talk about the lawyers as being citizens. We're citizens too, and we pay insurance rates and I can only speak for myself that my insurance rates have gone up over a 1000 percent in two years, so I'm equally concerned about the insurance crisis and I have a personal stak in what's happening in the insurance industry. And I'm curious as to why it is that my insurance rates have gone up that much in two years. And that's basically why we're here and why the people in the audience are here is because I think they feel th same pinch that there's is a problem getting insurance, they're concerned about the increase in cost of insurance. Alaska citizens are being told that the solution to this problem is to change the civil justice system. I attended a legislative hearing about a month ago, which many prominent people testifie and many of the people that testified were so-called experts in

the insurance industry, people that have been running insurance programs in California and other parts of the country and the State legislators wanted hear their views on why we are where we are. One of the people that spoke was a gentlemen by the name of Robert Hunter, who was the former federal insurance administrator under the Ford and Carter administrations. Mr. Hunter had some very interesting observations to make. One, he said that despite any changes are made, if no changes are made or significant changes are made this crisis, this present insurance crisis will be over in 18 months. So that if there is absolutely no changes in the civil justice system, the increasing insurance rates, and the problems arising from that would be over. One of the legislators was so astounded by that comment that he asked the insurance reform people, the people that were speaking on behalf of the tort changes, if that was true and the answer was, yes, that is true, it's going to be over in 18 months, even if you do nothing. And that was a shocking answer and it didn't come from an attorney, it didn't come from somebody who's got a vested interest in changing, it came from somebody that was speaking on behalf of making these changes in the civil justice system. One of the insurance experts speaking on behalf of making changes in the tort system was also asked if we make every change that you're proposing here, will insurance rates go down, will they go down in the next six months, or the next year, because my constituents are having problems with insurance today, and I need to know if we

make these changes, is there going to be a dramatic decrease in insurance rates, or is there going to be a leveling off. Again keep in mind that this is somebody that is speaking on behalf o the insurance industry, and that representative said, it will b seven to ten years before we know whether there will be any effect at all on rates. We don't know, but we should do something. And I tell you that if it's going to take between seven and ten years to find out whether are these dramatic changes they're proposing are going to have an effect on our insurance rates, and I think we need to be very careful about making some dramatic changes in the civil justice system, and again, the legislators were quite surprised to find out that we're looking at 1995 or 1996 before we know if in fact these changes have an impact. The fact is, if all the proposals for changing the tort system were passed by the Alaska legislature today, insurance rates will not go down and then your future, and I think that's why the people in this audience are concerned, and that's why people throughout the State of Alaska are concerned, they want to know what is going to happen to their insurance rates now, and what's going to happen in the next six months or year, because they're being squeezed now and a solution that has an impact maybe in ten years is not what they're interested in. So I think it's important to distinguis if we're going to make changes in the civil justice system, let's make changes because the civil justice system needs to be changed, not because its going to have an immediate impact on

our insurance rates. I think there does need to be some changes in the civil justice system. Some people disagree with me. They say we like it just the way it is. Some people say it needs to be overhauled completely. I think there does need to be some changes. I question whether or not they have to be as drastic as Dr. McGuire would propose. I think there are some very good proposals in the legislation that is now before the legislature, and one of them Dr. McGuire touched on at some length, and that is mandatory arbitration. I think that it's fair to say based on statistics we've been given, that about 90 to 95 percent of all claims that are brought within the Alaska justice system, the Alaska court system, are claims less than $50,000, and I think it's fair to assume that a certain percentage of claims are never brought to the justice system, only if they cannot be resolved with the insurance company itself, does it end up in the court system. So, maybe it's 98 percent of all injury claims involved damages less than $50,000. If that's the case, we're talking about a significant, a vast majority of cases that can be handled more efficiently. The civil justice system does a very poor job in my mind of dealing with these small claims. A small case takes as much time to get through our system as a million dollar case. A million dollar case may be that one in a thousand, or one in ten thousand case and for that the court system may be more efficient, but for the smaller case it's absolutely absurd that we should have to wait three years to get to the point where a

jury can determine whether or not the claim is worth $50,000 or $12,000 or nothing, and so I agree wholeheartedly with Dr. McGuire that these cases should be funneled into an alternative resolution system. It's my opinion that the time would be cut dramatically. It's my opinion that the costs to the insurance companies would be reduced substantially. Right now any law suit for $30,000, it takes three years to process. You can fairly well assume that if the insurance defense fees are not $10,000 they may be more, because as Dr. McGuire said a third o the ultimate award is paid to defense costs. That's inefficient. That's not the way it should be. These claims should be resolved promptly and I think they can be promptly resolved efficiently through the arbitration system. So I just want to make it clear that although Dr. McGuire and I don't agree on everything, we wholeheartedly agree with each other on that point. There are some changes in the bill and I'm not going to address everything that Dr. McGuire said, but there ar some things that he said that I do not disagree with him on, an I don't think they're a good idea. The bill that is now being considered both by the Senate and by the House, basically does away with punitive damages. It's kind of a cute trick to say well, let's just give all the damages to the State because let's face it, litigation is not fun, people don't engage in litigation for the sheer thrill of it, and nobody is going to pursue a punitive damages claim if they don't feel there's something in it for them, and none of you there, and certainly

myself would say, yeah, I'm going to engage in three or four years of intense litigation and waste my time and my energy and my money so that if I prevail, all of the fruits of my labors go to the State of Alaska. The fact is that if we propose that, and it's passed forget punitive damages, it's not going to be there. Punitive damages has very little if anything to do with the increase in insurance rates. Virtually all insurance companies exclude punitive damages in the policies they write, they say we will not award punitive damages. So that has nothing to do with insurance rates. They simply write it out of a risk that they cover. There is a real reason why insurance companies want to put an end to punitive damages, and that is that there is a body of law out there that says if insurance companies engage in bad faith handling of claims, then they may be liable for punitive damages. This is a book by an author named John McCarthy and its entitled "Punitive Damages in Bad Faith Cases." Its a book of hundreds of pages of cases in which insurance companies have engaged in bad faith practices, denying claims to people, refusing to defend people that have been sued, delaying payments, refusing to make payments they're obligated to pay. Now if you have a claim in which an insurance company, and again, this can be your own insurance company, it's not simply somebody that it's insuring somebody you're suing, your own insurance company refusing to defend you wrongfully, or refuses to make a reasonable settlement on your behalf, and forces you, the defendant to be dragged through the court system

for three or four years, and then maybe get hit with a judgment in excess of your insurance policy, solely because the insurance company said our practice is for the time being, we need more money, we're not going to pay any claims, we're going to fight these things to the end and if you're the insured and you end up getting stuck because of that policy, what's your recourse? You have the right to go against your insurance company. I think that's extremely reasonable, if the insurance company has engaged in bad faith. We're not talking about insurance companies that handle claims reasonably. Bad faith practices by insurance companies. Now if an insurance company refuses to pay your reasonable claim for $5,000, pay the plaintiff on your behalf $5,000, and you get dragged through the court system for years on end, and you end up having to pay more than that $5,000 policy you may have, what's your recourse? Well you have the recourse to pay the money out of your own pocket to the claimant, and then you have the right to go after your insurance company because they put you in that position. Well if the damages are a few thousand dollars or $10,000, obviously there's not much incentive there, if that's all the insurance company has to do is pay your actual damages and if they have to pay punitive damages, to kind of punish them to make them realize they can't get away with these kinds of bad practices, they're going to think twice about engaging in bad faith, and that's really the purpose of punitive damages. It's not, this bill is intended to get rid of punitive damages because insurance

companies don't like the idea of having to pay extra if they engage in bad faith. So, as far as I'm concerned, since punitive damages can be excluded on liability policies, the sole purpose of this legislation is to protect insurance companies engaging in bad faith from having to pay punitive damages themselves. Again, that book is full of cases, hundreds and hundreds of cases where insurance companies have engaged in bad faith. Obviously the vast majority of insurance companies, and the vast majority of claims are handled in good faith. They're properly handled, they're fairly handled, people are satisfied with the representation they've got by their insurance company, and so punitive damages are rarely awarded, but there are instances where it is appropriate, and that's why it's there. To me, its like the saying that locks keep honest people honest, and I think insurance companies by and large are honest and ethical, but punitive damages keep insurance companies honest, and the honest one's don't have to worry about punitive damages. The one's that aren't honest, do have to worry about punitive damages, and I would refer interested people to a book by Andrew Tobias called the "Invisible Bankers" and that's how he refers to insurance companies as invisible bankers, and he cites in there a number of instances in which insurance companies engage in these outrageous practices of bad faith and I think that if anybody took the time to read some of those examples they would wholeheartedly agree that the insurance company did deserve to be punished. So it's my opinion that

there is a justification for keeping punitive damages. It's not because they are paid on liability claims. In my experience there are maybe two or three punitive damages awards that have been given in Alaska, none of them involving doctors, there's not a doctor in this State that has ever paid one dime in punitive damages that I'm aware of. The other thing I'd like to touch on that he, that Dr. McGuire addressed is the idea of making these periodic payments rather than a lump sum. This is somewhat complicated, but basically what the insurance companies want to do is rather than paying a lump sum award they want to pay it out over a period of time. And this would result in a tremendous windfall for the insurance companies and it's made, it's the one part of the proposals pushed by the tort change people that is really the most outrageous in my opinion. Dr. McGuire referred to the million dollar lottery, is, is not a million dollars, well that's true. If you look at what those lotteries do, they say, you won a million dollars, but we will pay it to you, $20,000 a year for the next 50 years. In the meantime, they invest the money that this person supposedly won, and by the time they pay that $20,000 payment that year 50, the present value of that is about $50, or $1000, it's not much, so they're not paying a million dollars, they're paying a million dollars over 50 years, which today's value is about one tenth of that, and that's really what they're intending to do here. The insurance industries want to make periodic payments so they can ultimately pay less and an example of that is, is, think back

ten years ago, twenty years ago, or thirty years ago, what a car cost, what a house cost, what a candy bar cost, and think about what it's going to cost in thirty years, and if somebody's injured now making $30,000 a year, under our present system, if that person, and we use Dr. McGuire's example, the 35 year old person who is making $30,000 a year and is a quadriplegic, can never walk again, he's entitled under Alaska law, the jury may award him, his lost earning capacity, what he'll be entitled to receive in the future, so over a thirty year period he's entitled to receive $30,000 for each year. Now, so let's add, $900,000, and I'll do that example. Now, clearly most people do not earn at age 35 what they're going to earn at age 40, or at age 45. People generally get promotions, just on inflation alone they're going to increase their wages over their lifetime. Under Alaska law, you're not entitled to do that, Alaska law says that you cannot consider inflationary wage increases, so even if that person would have earned had he kept his present job $30,000 till he was 35, he may have earned $60,000 at age 45, but under Alaska law, he's not entitled to get that from the jury. The jury will award him, may award him, no more than that $30,000, and cannot consider inflation. So if they really want to have this structured settlement system work right, the periodic payment plan, the least it could do, would be to consider the fact that the person may be making $30,000 in 1986, but 10 years from now if inflation keeps at its present rate, he may be making a lot more than that, and their system

doesn't do that, it is a, would result in a tremendous windfall for the insurance companies. That's a complicated concept and I'm sorry I can't example it any simplier, but the fact of the matter is that the end result under that periodic payment plan is that it is, substantially reduces the amount of money that an insurance company would have to pay for a dramatic injury or a catastrophic injury. The system may need changes, and I'm not saying that the system is perfect, no system is. Years and years ago I worked in terms of trying to change the criminal justice system and we spent three or four years trying to do that, but the end result was we ended up with mandatory sentences. Everybody was very happy at the time, at least everybody but the criminals was happy with the way things were working. Now we realize that that has to be changed again because the prison system can't accomodate the lengthy sentences that we recommended at that time. Now we're going back and changing again. I think that if a system needs changes, a system that's been in process since statehood, we'd better be very, very careful about what changes we're making, and are they changes that are good for themselves, and I guess what I'm saying is that, if the system needs changes, let's make sure they're good changes. Let's make sure they're productive changes, and I think, my bottom line is, let's make some changes in the civil justice system if they're going to improve the system. But the idea that if we make any change at all, or if we make dramatic changes in the next few months, they are not

going to have any impact at all on Alaska insurance rates this year or next year, they may, although they may not, have an affect in 10 years, we won't know, and, I think that if we're going to change the system we'd better do it right, and not rush through it, and that's really what a lot of people are proposing, let's make these changes now to affect insurance rates. If we make these changes now they may or may not have an impact in 10 years, and I guess my question is, what's the rush? Let's do it right, let's not rush through it and end up with a system that's even worse than what we've got now. Thank you.

SPEAKER: KEITH E. BROWN

Thank you. I think it's particularly appropriate that the Alaska Bar Association has taken this opportunity to view, inspect in some detail one of the most perplexing problems facing all of us in Alaska today, that is the soaring cost of liability insurance. I view this as an opportunity not only to discuss this issue with members of the Board of Governors, but also to serve in some small way as a medium by which the public can be educated at least in part as to some of the many ramifications of what is a most significant problem. It may surprise you that from the standpoint of my standpoint as a defense lawyer that there is at some degree of agreement between the kinds of things that I'm going to be talking about today and what Mr. Sanders has talked about. I think that if there are going to be changes enacted in the tort liability system, those

kinds of actions do have to be done with some care. Where I would differ in the approach, where I think that public has to be particularly aware of what's going on, is that it may be correct to say that immediate chanaes in the tort liability system will not result in immediate decrease in the price of t product, but the converse of that is this, if there aren't som very favorable changes in legislation involving the tort liability system within the immediate future, we aren't going be talking next year about the price of insurance, we're going to be talking about availability and presence in the marketplace. The industry is looking to us to give them a signal, a signal of change, the signal of departure from the jurispurdence that has developed in this area within the last years, probably more particuarly within the last 5 years. It comes as no secret to those of you who are members of the Bar that this is viewed as being a somewhat liberal or recovery oriented jurisdiction. That is to say that all things being equal, the plaintiffs are looking at some pretty good case law that supports their position. That the cases in Alaska tend t be somewhat recovery oriented, and the industry is looking towards the legislature and the people of the State of Alaska send them the signal that the system is now going to be adjusted, and I think it's appropriate that we discuss now wha form those adjustments might take. It's my perception that on of the principle problems facing the industry in Alaska today the absence of predictability. It is their perception right o

wrong that Alaska is a wild and woolly place in which to do business. It is their perception right or wrong that this is a land of high jury verdicts, I sort of take exception to that characterization because I don't really think Alaska's all that different from a number of other jurisdictions including, like California for example, or some of the pacific coast states. Nonetheless, that is the perception, and it is that perception that controls in large measure their willingness to do business within this state. I think that this dispute has been characterized as being a question of tort reform and we might all argue about what is meant by the word reform. I prefer to think of the process as not being one of reformation because I think the tort liability system works. Essentially it is a fair and equitable system and it works, but from time to time, just like everything else, it needs a bit of fine tuning, and it is in that area that I think that our legislature should spend some time, and I see some positive efforts in that direction through some of the bills that are now being considered, such as Senate substitute for House bill 532. That is not to say that I'm endorsing all of the provisions of that particular piece of legislation, but let's look at some of the things that could be done to change some of the problems confronting Alaskans today. I think that the first problem that we run into in terms of the availability of coverage here in the State and the perception problem is the problem that there are different rules that pertain in Alaska that are not familiar to those insurers who do

not do business here regularly and those who do do business her regularly, they don't like them. And they have to do with some peculiar quirks in our law that were created in large measure b the process of several years of decisions by our Supreme Court. It's not to say that the decisions were ill-intended. They weren't, but they've been in place now for several years and th effect of them is becoming obvious and they have to be changed. The first of those has to do with the problem of awards for a loss of future income. Under present case law since 1967, the Alaska Supreme Court has decreed that there shall be no reduction to present value for awards involved with loss of future earnings. Moreover, the court has decreed that there will be no deduction for the effect of future taxation on the awards for loss of future earning capacity. One mechanism for dealing with that problem, although it does not deal with it in its entirety, is the mandatory structured payments suggestion that Dr. McGuire addressed a short while ago. Incidentally the version of the Senate Bill and the House bill that I looked at made that discretionary and unmandatory. It is not the only means by which that problem can be resolved. Elimination of th strictures of the Buoy case which provides that there's no reduction in the present value, would accomplish a fair and equitable result and be consistent with current economic thinking. The case has been critized in a number of national law review article. It lacks in my judgment a continuing vitality, I think it's no longer a viable economic analysis of

future earnings loss, and I think it ought to be changed. I think you would be hard pressed, and even plaintiff's counsel I think would concede this, to find any economist who could justify failing to deduct out the effect of future income taxation on awards. And yet today the jury is never informed in a personal injury case or a wrongful death action of the effect of future income taxation, and it doesn't take a great deal of imagination to realize that when you have a young well field worker who has been killed through some tragic accident, that the fact of the matter is that income taxation would have taken a large chunk of his future income. Instead his estate and beneficiaries receive a huge chunk of money not reduced to present value and as to which no deduction has been made for the effect future income taxation. In my view that's wrong, I think it ought to be changed. It's not a major change contrary to what many of you might believe. Indeed, the other jurisdictions that I referred to earlier, some of which are viewed as being liberal, California being an example, but do not have that approach to loss of future earnings. But it's this kind of peculiarity that insurance companies focus on and they say we don't understand that approach, it's different, we don't know how to rate it, get rid of it please, and I think it's time to do that. I think that there are other things that have occurred in Alaska as a result of case law which need reanalysis, and I urge you as members of the Board to consider these kinds of issues individually and make your own independent decisions

about them, but one of those problems is the matter of prejudgment interest. In Alaska since the State v. Phillips decision in 1970, prejudgment interest has been awarded on jury verdicts and plaintiffs' personal injury cases and in wrongful death actions whereby interest begins to run from the date of the accident, and in effect you run into a situation where interest is being awarded, not only from the date of the accident but upon sums of money that have not even been earned and that are going to come due at some time in the future. There are, as I understand it, some states which have adopted certain forms of prejudgment interest, but which are much less onorous than those which exist in Alaska. One step which could be taken to solve this problem would be for the State to have prejudgment interest run not from the date of the accident, which can be quite a long time, particularly in medical malpractice actions, which tend to have a long exposure, but from the date the suit is filed, or from [illegible] the plaintiff first offers to settle the case. If [illegible] that prejudgment interest is somehow socially desirable, my question whether it is, if you take that view then it seems to me the cost of committing to that kind of program is reduced by a more reasonable approach to the award of prejudgment interest. It's a distinction in our system that is unparalled elsewhere within the country and it's one of the things that has led to our reputation among insurance companies as a wild and woolly State. One of the sometimes more controversial aspects of the

so-called issue of tort reform is the question, what to do about Rule 82, Attorney Fees? For those members of the public who may not be familiar with the concept, Rule 82, Attorney's Fees, are essentially in a trial situation where the plaintiff recovers 10 percent plus $1950 added pursuant to a schedule to the judgment entered against the defendant. Let me give you an example of the combined effects of prejudgment interest and Rule 82 attorneys fees on a $500,000 case. If you assume a case is worth $500,000, and it's five years old, at current interest rates, adding in the effect of the Rule 82 attorney's fees, that judgment that will be entered on a verdict of half a million dollars will be multiplied or extended to a net verdict or net judgment rather of $840,600, plus whatever costs in addition to the attorney's fees that the lawyer may have incurred. Insurance companies don't understand that concept. They don't really know how to read it. Alaska is such a small market, that it doesn't really seem worth their while administratively to deal with those kinds of problems. One of the things that I believe that will result in an adverse market selection by certain insurance companies. I think it may be correct to say as Mr. Sanders has suggested that the effects of tort reform, if we're going to call it that, are not going to be manifest immediately, but if we don't change the things that make us different, and that are not understood by foreign insurers, they're not going to be here with their product for us to buy, it's that simple. It happened once before in 1975, when, when

for a period of time malpractice insurance was not available to physicians. It could well happen again. I believe it's likely to happen again. I think that we need to send them the signal that we're examining our system and that we are prepared to mak changes in those things which they don't understand, and which are really not justified upon closer analysis. There are other proposals that I think should be considered carefully by the Board, and by the public, and the like. Not all of them are universally accepted by lawyers. I think it's a mark of our profession that we present both the pros and the cons of this issue and you'll find very few lawyers which can agree about whether two or three aspects of this very perplexing issue. Bu some of the things that we could do, include a revision of the concept of joint and several liability. Dr. McGuire alluded to that earlier. Essentially, under our system in Alaska, we have a system of pure comparative negligence. Theoretically, it is possible for a person who is himself 99 percent negligent to recover for that one percent that he is not negligent for, if I can use that term. In practice of course it doesn't work that way. But, as a practical matter, a defendant which is only 10 percent negligent can have the whole judgment collected against him alone where the other defendant is insolvent. It happens frequently, we see situations where there are attractive deep pocket targets, such as major oil companies, with perhaps limited exposure if you were to look at the fault concept and yet, because they have that deep pocket, that 10 percent

exposure is enough to get them 100 percent of an adverse judgment. I don't think that system is entirely fair, and it's not without its social cost. It seems to me that at minimum we should be looking at a system which returns more closely to principles of fault allocation than to risk spreading. We've spread the risk far enough, Let's return to the principles of fault, and if we look at the fault principles, there're a couple of things you can do in the area of joint and several liability. You can either eliminate it completely, which is viewed by many as an extreme position, and perhaps rightly so, because there are going to be people in that situation who will never recover or otherwise they would do so. But at a minimum, I urge you to consider adoption of the Uniform Comparative Fault Act. A portion of that act is contained in the Senate Substitute for House bill 532. Would add what is described as an amendment to Title IX, Chapter 17 and appears to be in its present form a modification of the Uniform Comparative Fault Act. It would more closely, that is to say the jury verdict that would be awarded in that situation, the ultimate judgment would more closely be allocated along principles of fault then is presently the case. I think it goes beyond the time period that we have here to explain fully the concept of the Uniform Comparative Fault Act, but it would be a much more equitable means of sharing the responsibility for a civil wrong. Incidentally, in its present form, that particular House bill seems deficient in that sections 4, 5 and 6 of the Uniform Act

need to be added, they're out right now, they deal with the principles of contribution, but that is an area of reform or fine tuning to the system that needs close examination. A sho while ago Mr. Sanders mentioned the problem that is presented 90 percent of the claims, and that is that they're small, and that the present system doesn't serve them very well. I agree There is an alternative means to resolving those problems that think deserves at least as much consideration as arbitration does. To many trial lawyers arbitration is (indiscernible). That means splitting things down the middle. Of course that isn't the way it always works, but that's the way its perceive by many of us who try cases. An alternative to that would be increase the jurisdictional limits of the district court to $50,000 or $100,000 and have those cases tried on a fast track system in district court with very limited discovery. That would mean decreased costs to the plaintiff, decreased costs t the insurance companies, where there are insurance companies involved in defending them, and a faster, and I believe more equitable distribution or adjustment of the dispute, I think it's an alternative that really should be examined closely. I not prepared to endorse the arbitration concept in its entiret indeed, perhaps we've gone too far. I note that one of the proposals would permit a new trial in an arbitration system. Even the American Bar Association which has looked at arbitration as a means of resolving small disputes, has determined that the arbitration judgment ought to be binding.

I'm not a fan of arbitration, but I think it's fair to say that the problem with the smaller claims needs to be resolved and it needs to be resolved now. It's a problem not just for insurance rates, but it's a problem to the public and we should attend to it. As to the problem of punitive damages I take a slightly different view of that. It is a perplexing problem because there are obviously situations where each one of us could conceive that punishment might be appropriate, but it's not always the answer. There's a very intriguing law review article in the Vanderbilt Law Review in Volume 37. It's written by two members of Fulbright & Jaworski firm from Houston. It calls for complete abolition of punitive damages. That's a pretty extreme position, but they make some pretty compelling arguments for doing that. They point out that in many instances municipalities, for example are held responsibile vicariously for the acts, outrageous acts of their employees which were done with malice or illwill and which resulted in a grievous injury to a particular person. But the concept itself, that is of deterence, doesn't work. The municipality has economic incentives to hire appropriate personnel, it has supervisory systems in place, and only in the very rare instance would the award of punitive damages truly serve its stated purpose of deterence. I think that's a concept that really has to be examined in somewhat more detail, but there are some interesting areas of possible reform. One of them has already been suggested by Dr. McGuire, and that is, if you're going to retain

punitive damages, let's award the damages to the State. The authors of the law review article I mentioned a moment ago have taken that position, as a fall back position, if you will to th concept that punitive damages really ought to be abolished. They point out that if punishment is appropriate, we have a criminal justice system in place, and that will serve as an appropriate system to exact punishment. And the insurance example that Mr. Sanders gave you awhile ago, it can be argued that there is regulatory mechanism that is in place that can punish insurance companies who engage in the kind of conduct that he has described. For example, if outrageous conduct is engaged in by insurance companies, and their certificates to do business in the State, their licenses are pulled, or suspended, you can bet that you'll get their attention. If it's a nonadmitted carrier, and there's a surplus linesbroker involved and you might get him responsible for the conduct of his, the carrier for whom he is placing insurance, and you suspend his license, I think you've got their attention. That problem need not be resolved by punitive damages, but if you're going to retain punitive damages, here are some of the things that you ought to do. You ought to require a rewriting of the standards for the application of a punitive damage type award. We should crank back in the fault system, we should tell the jury that malice and illwill is required. In this particular law review article, the authors point out that Alaska has one of the more whishy washy, if I can use that term, standards. In Alaska one

of the basis for the imposition of the award of punitive damages is what is described as "reckless indifference to the rights of others". No one really knows what that means, least of all, many of the lawyers who practice in our courts and some of our judgments. We think we have an idea, we think we can give some guidance to the court system when we're talking about these cases, but we really don't know. And as a result of that, and because of the vagueness of that language, courts have been reluctant to dismiss frivolous punitive damages claims on motions for summary judgment, so the kinds of problems that Dr. McGuire described awhile ago are very real problems. Particularly, because in most instances of course, insurance policies may not provide coverage for those kinds of damages. So at a very minimum, we ought to require a stringent showing that the defendant acted with ill motive or malice. That's easily enacted piece of legislation. It would do much to improve the problem that we now face in this State with those kinds of claims. You could change the level of proof that is required to sustain punitive damages. For example, right now all you have to show is a preponderance of the evidence, and yet we're talking about something that is designed to punish, much as we do in the criminal justice system. At a minimum the authors of the Vanderbilt Law Review article suggest that clear and convincing evidence should be required. They probably prefer beyond a reasonable doubt. Those are possiblities which deserve serious consideration, because I believe that there is

an abuse of the process on a widespread scale in the sense that there are a number of frivolous punitive damage claims being filed in this State. There is support to argue that judges should decide such awards under tighter guidelines. There have been suggestions that the awards be capped. I really don't kno that that's necessary, but there are going to have to be some changes in the way in which punitive damages are managed in thi jurisdiction. Absent those, this is going to remain a very unattractive place for insurance companies to operate. I think there are a number of other minus, or modest rather proposals that could be accomplished that would do much to stabilize our insurance market. And to make this a more favorable place for all to do business, and they're not take away type measures. One of them is to restore the Aaron judgment instruction that was taken from doctors several years ago by the Alaska Supreme Court. It's not quite clear from the opinions in Baker v. Warner why the court acted in the manner in which it did, but that instruction is almost universal in every other State in-th country including California. That instruction should be restored. It simply, it permits us to tell the juries that a physician is not necessarily negligent because he or she errs i judgment or because he or she does not effect a cure, and it's reasonable kind of instruction to give the jury. There are other modest modifications that are possible and there are othe major ones that probably deserve your attention, but given the time strictures, the only other one I'm going to mention is the

collateral source rule. Collateral source rule is a litigation (indiscernible) There are instances of double dipping that Dr. McGuire has talked about, and there are instances in which you could argue that you really shouldn't penalize the victim for having the prudence to purchase certain types of insurance. There are two sides to the argument, I'm not going to try and pretend otherwise, but its results more than anything else, I'm sorry to tell you, in a multiplicity of litigation in law suits. Where there are collateral sources that is, health insurance plans, or campus military benefits which are paid to a particular injured party, that insurance carrier or health care provider is entitled to subrogate against the tortfeasor. It results in additional litigation and generates a lot busy for lawyers and I think you wouldn't find very much uniform support within the Bar for abolishing the collateral source rule. It's the kind of thing clogs the court and really doesn't add anything toward tort system it seems to me. In some instances the risk spreading has become too costly to be justified. I think this is one of those instances, so I urge all of you to consider some of these proposals very carefully. To the members of the public that might be watching this show, I think it would be appropriate to direct you to the March 24th article in Time Magazine which everyone has talked about so much. It really lays out the problem in a rather nice way, it's readily understandable, I think most of the issues are fairly raised, and I think it behooves all of us as citizens of this great

State to educate ourselves as to some of the problems that are presented by the current insurance crisis. Thank you.

SPEAKER: SANDRA K. SAVILLE

I, like all the other speakers before you am pleased that I have this opportunity to speak to you. I am not one of the standard speakers at these types of forums, although I do represent plaintiffs in personal injury actions and I do pay insurance premiums. I just finished negotiating, if I could use that word, premiums for my law firms, you know, insurance for next year and I have the same horror stories as everyone else. But I do feel that I'm probably a little less accustomed to talking out about this issue and in preparing for making this presentation, I thought that I needed to be sure and catch up on all the information that I could find about the current situation, so I did a lot of reading, and I read the Time article hot off the press on Thursday when I find it in the newsstand, and I read testimony that had been presented to the legislature, and I read articles that I could find from both sides, and I read statistics, and I thougnt about my own experiences and the more I read, the less clear it all became. I realized that it is a very complex and confusing issue. That there are an awful lot of accusations, there are statistics, there are studies, there are graphs, there are charts, there are horror stories on both sides. Horror stories about verdicts, horror stories about malpractice, about actions by insurance

companies, some of which I could find had been substantiated, some of which I couldn't find. But what I really came away with as my total sense of the whole situation was panic, stampede, emergency, the whole feeling, the whole feeling of the Time Magazine article, "Sorry American Your Insurance Has Been Cancelled." And I realized that what was happening is we were all stampeding, we were all running around like chickens with our heads cut off, we were all screaming, the sky is falling, the sky is falling, don't stop, don't do anything, yes, do everything. And it didn't appear to be that anybody new whether any of the actions we were taking or advocating not taking would have any affect at all on insurance rates. And the problem, the problem was premiums, the problem was no insurance, the problem was a short term very important problem. But the solutions, many times the justifications for them were things like, I don't think it's fair, that an attorney gets a big fee after 90 days, I don't think it's fair that somebody who is injured gets paid $900,000 today when they might not have had it in the future. And this isn't right and there are lots of changes, and suddenly it sounds like any idea somebody happened to think of while they were in the shower, that might be a great solution to some things, is being thrown into the pot. Well this is a problem, let's try this, oh, let's try that, or I read about a study where they suggested the other. Nowhere can you find any correlation, any studies, any kind of analysis that if you do this thing, A, here's how it will have an effect on your

insurance premium B, and I'm particularly amused when I hear talk about we have to change here in Alaska, because we're different. Well we might well be very different, but we seem t have the very same problem that everybody in the whole rest of the United States has, so why do we have unique problems in Alaska that we're going to solve in a unique way and how will that ever have any impact on our insurance premiums or our insurance rates. I think one of the things I started to contemplate when I was thinking about well what is the problem, and what kinds of solutions might there be, with the fear that had that what we were doing was panicing, what we were doing wa making significant encroachments on tort law as it has existed for hundreds of years essentially, but at least for decades in this State, and that we hadn't truly looked at not only would the solution solve the problem, but what problems would he solutions cause. And I don't mean by that that my fee might be lower, that's a problem, but that's my personal problem, but what would it cause in terms of the policies and the philosophies that have gone into our tort system over the perio of years that it's developed. You know we in the United States have a very high regard for human life. It might be too high a regard for human life, I don't know, if it's my life I have a very high regard for it. And I was thinking about that when I watched television last night and saw the CNN News about a recall of contact and dietac and some other drugs that had been recalled because of a caller who said I've put cyanide in some

of these capsules and the news reporter was saying that the last time there has been a recall of contact, many years ago, it had cost the company 400 million dollars to recall the product. Presumably, recalling three products, and as the reporter announced, reconsidering using capsule medicine at all was going to cost at least that amount of money, maybe a whole lot more money than that. And I began to think about that amount of money, and I thought, well the last time there was actually cyanide, seven people died and then the last time that, or not the last time, the previous time in Chicago, the very last time, one person died. This time so far no one has died and yet in this particular instance we as a society I think are willing to have this company pay, and it does spread out to society just like insurance premiums, we're willing to have them pay 400 million dollars. I was, I was willing for them to recall all that medicine so one person didn't die, and so I could feel safe when I go into a drug store and buy a medication, and yet it's a high cost, it's a very high cost. It might mean that the next time I have to buy a cold medicine, it costs four times what it used to cost. I don't know, but rather than run in and say well that's too high a cost, let's just let them out there, everybody can take their own risk, we'll see if anything happens, we'll compensate the victim if they take it and die, we've made this choice to spend this money to prevent loss of life. And if we're going to change our philosophy about the value of the loss of life, or about the value of the pursuit of happiness, in

other words, the amount of money, we as a society are willing t
pay victims, we have to think about it, we have to think how
that permeates our whole philosophy, how that changes the way w
live in the United States, how that might change the degree of
comfort that we have when we walk into a drug store. And we
know that in the United States because of our value of human
life, which is reflected in the tort system, we can be fairly
comfortable, accidents happen, unfortunate things happen, but ir
general, we have a philosophy, that we will try to avooid it,
well take care of it, and if we start changing it, that all
changes. If it becomes economically viable to make a decision
like in the Ford Pinto case, to make a decision that this
improvement to the product that will make it more safe is not
worth making because we can pay x numbers of claims, rather tha
make the improvement, we suffer, it's less safe for us. So I
think that what my bottom line, my bottom line position on tort
reform is that I'm not sure that the tort system is perfect.
I'm not sure that some of the issues that Dr. McGuire raises or
others on the side of tort reform raise are not valid. I think
they deserve further investigation, I think that we can take a
look at it. I don't think however, that we should be stampeded
into making willy nilly changes to the tort system in the hope
that our insurance premiums are lower. To me it does not appea
to be that simple, the solution, the problem is more difficult
and more complex, and the solution is very radical and can have
a tremendous affect on the quality of life. I know that ten

years ago I know there was another insurance crisis. I read the testimony of Robert Hunter, whom Mr. Sanders referred to, the insurance commissioner for Presidents' Ford and Carter, and he said that at that time there was a rush to have tort reform. In Alaska we didn't see too much of it, but in other states no-fault insurance was in place as a direct result of the complaints about insurance rates and insurance premiums. I know that Dr. McGuire talked about the changes that were put in place when the doctors felt a malpractice problem several years back. And he talked about the panel, the advisory panel that was put into place and MICA the insurance company. Recently, President Reagan appointed a commission to study tort reform and they came back with recommendations and surprisingly to me one of their recommendations was we must do away with no-fault insurance, so then I thought, what, ten years ago they wanted no-fault insurance. Ten years ago it was thought to be a solution to a problem. Obviously just maybe like mandatory minimum sentencing, it wasn't, and five years ago the doctors thought that an advisory panel would be the solution and MICA would be the solution, today they say, it isn't. And the problem with the reforms that are being proposed now, is they're even more wide ranging, they're even more far reaching, and if we've made an error, and if they're in place, and if things as a result are mucked about, and if we won't know for seven to ten years whether they were right or wrong, we risk seven to ten years of living under damaging and maybe forever damaging situations that

can't be corrected. So I think that what we have to do is take a very careful look at the problem, take a very careful look at the proposed solutions, take a very careful look at the benefit exactly how much benefit will we have from this solution, and then look very carefully at the down side, exactly what are we giving up, and for the general public to make decisions based on panic and fear, that they won't have insurance, that their rate will be too high, that they'll have-to go out of business, without understanding that some of these quick and easy solutions might have an even more diastrous effect. It's not just somebody out there who got injured will only get $250,000 for pain and suffering, that's not the problem, everybody thinks it won't be them, the problem is does it have other, more ominous, more far reaching ramifications which are going to affect the general public, and there are certainly many people who argue that it will. It was amazing to me when I read through all the information, because I was trying to see where is it that the insurance companies say that if we get these reforms this, we've worked out these statistics and this is how our earnings will change, and this is how our procedures will change, and this is why we'll be able to give you lower rates and more predictability in your insurance. And it appears to me, and this is born out again by Mr. Hunter's testimony, that A, the insurance companies have not been willing to give out total information about their earnings histories, about their loss histories, about their investment histories, B, their

accounting mechanisms appear to be obscure at best, so that even the information they will give out is not easily and readily understandable by people trying to analyze it, and C, they don't appear to be combining any proposals about tort reform with any proposals about insurance reform in the sense of consumer protection. There are some people, other people who are, but it does not appear to me that it's not a package. There's not a willingness for full disclosure. There's not a willingness for regulation for more tightly controlled hearings about rate increases. There's not a willingness about cancellation policies, and so we're being asked again to make drastic changes in a very old system based on their promises that, or in Mr. Brown's estimation, a showing by us of good faith that we'll try to do things to make them happier, to be up here in Alaska. So it appears to me that number one, what should be done about the immediate problem is that all the information that's possible to be obtained, be obtained, that if this takes legislation, fine, do it, if this is voluntary, fine, do it, but obtain as much information as possible about the problems, about verdict sizes, about inflation sizes, any other problems that need to be looked into. But apparently it's two different problems. If there's a problem with the tort system, that's a problem that has to do with fairness and equity, that should be looked at by experts in that area, if there's a problem with insurance rates, that should be looked at by experts in that area, but let's get all the information and then let's sit down and look at what

solutions are possible, what solutions seem to work, and we can argue the merits of whether a proposed tort reform is the best way to go. I certainly have my own opinions about some of the changes that are being recommended, and some of the arguments that I have and feel against some of the changes. I'll briefly touch on them, but I don't think that's really the relevant issue. The relevant issue is, do we have enough information to make all of these changes, and do we think that they'll be of any benefit to anyone? One of the things that's been talked about quite a bit is the collateral source rule. What concerne me about the proposal for the collateral source rule was A, I didn't really think that the legislation proposed was very clea about how it intended to do away with the subrogation rights of people, for instance, the federal government, their own health insurance plan or workers comp, and so I was very concerned about whether it was even possible, feasible, or could be done, but let's assume it was done, and let's assume there were no subrogation rights. All that meant to me was that I was going to pay more for the primary insurance I was carrying, for my health insurance, for my workers comp insurance. Because if they never get reimbursed for any losses, even though a third person might have been responsible, it only made sense to me that they were going to make less money and therefore I was going to pay a higher premium. Now I'm not an actuary and I don't know, but that makes sense to me, because now the way it happens, is if I'm representing a plaintiff who is injured and

they've received money from workers comp, and they get a verdict of $100,000, they pay back workers comp the $20,000 that workers comp paid them. And workers comp presumably then has that as a credit on their books, and presumably that keeps the workers' comp. insurance rates lower. And until somebody fully explains that to me, I'm a little worried about supporting what appears to be, oh well, don't worry, it's no loss to the plaintiff, because they don't have to pay it back anymore, that's an unanswered question to me. Rule 82 attorneys fees and prejudgment interest, amazingly enough in part of what I read, I found that Rule 82 attorneys fees or the concept of Rule 82 attorneys fees was being touted by all of the country as a big tort reform. And I thought what, isn't this what I heard they don't want Rule 82 attorneys fees in Alaska because it makes us unpredictable? Elsewhere, including President Reagan's advisory task force, but also in some other states, there's legislation being introduced to pay attorneys fees to the prevailing party. The theory being that it will stop frivolous law suits, encourage settlement and that it will be an ultimate benefit to the insurance companies and the fact I believe it is. I know my clients take settlements at times, because they don't want to risk an award of attorneys fees against them. So I'm not sure I understand why that's being opposed here and it just points out to me again that the right hand doesn't know what the left is doing, nobody really knows whether any of these solutions are going to solve the problem. Prejudgment interest again, the

theory behind it is really quite simple, the insurance company has this sum of money, they reserve a sum of money for a claim and they make interest on that sum of money, if there's no incentive to pay the claim, it's obviously going to take longer there's incentive to drag it out, because if you can make more interest or any interest, if you have no prejudgment interest, if you can make any interest on your money, you may as well hol it as long as you can. So the theory behind it is not a windfall to the plaintiff. It's an incentive to settle and if the case can't be settled it's an incentive to at least give th plaintiff the benefit of the money that the plaintiff should have had at the time of the injury, now I don't know if it work or not, but the explanation seems to be a positive one, it seem to make sense, and before throwing it out, and seeing that then it takes five years to get cases through litigation, or defense costs escalate by triple, we should see, we should analyze that because it seems to have a good rational basis. I'm sure that during the question and answer period we'll get some more tough questions about the issues that are involved but, my pitch, my bottom line is only I don't think anything should be done without clear thought, clear investigation and a consensus that what we're doing is making it better and not making it worse. Thank you.

SPEAKER: RICHARD L. BLOCK

Thank you very much for an opportunity to appear before the Board of Bar Governors and whatever public I guess this tape becomes used for, to have an opportunity to explain to the extent that I'm capable of doing so the role of the insurance, the property and casualty insurance industry, both in this debate, but more importantly, in understanding how we got where we are, as where we are as defined by those who argue that we are currently in an insurance crisis. I was asked to appear on a television program a couple of weeks ago on the public broadcasting network statewide, the title of the program was something having to do with the insurance crisis and I think I nonplused the moderator by telling her that I did not think that we had an insurance crisis. Number one, it was not an insurance problem at all, and I could demonstrate why that was, and more than that, it really isn't a crisis and I could demonstrate that. My argument was that in reality when you understand what the insurance industry is and how it functions in a bodily injury reparation system, you realize that there's got to be some other fundamental background that causes an increase in costs other than the insurance industry itself. And that if you really want to analyze and understand why costs are going up, or why insurance is becoming available, you need to look at the fundamental underlying costs of the insurance industry, the money that is being spent and where it is being spent, and why it is being spent, and when you see that you realize it is not

being spent on or to or for the insurance industry. It is bein spent by the insurance industry on or for or to people who are injured in an ever changing legal climate and thus, it is this legal climate, the judicial system climate, that I think needs to be look at. And I guess while Harry Branson introduced this forum this morning by saying we're here to talk about insurance and five of the six invited guests will talk about insurance, I'm here to redirect your attention back to the judicial system which I say has a material bearing on what is regarded as an insurance problem. Secondly, to bolster my viewpoint that it i not a crisis, I create my own definition of what a crisis is. And I say that a crisis is something that comes along which is serious, immediate, dramatic, unexpected change in circumstances. Something that is so totally out of the flow of what one might expect, that we must react with emergency and with radical and immediate responses. And it is my suggestion to you that if you accept that definition of a crisis, that we don't have a crisis. That what we have is a current manifestation of a longstanding problem that has been existed nationwide and in the State of Alaska for many, many years. As a matter of fact the thing that brought me to Alaska ten years ago was what was then billed as an insurance crisis, although it was then build in the narrow sense of a medical malpractice insurance crisis and I was invited up here from my position as an executive with an insurance company in Los Angeles to act as a consultant to the Governor's, then Governor Hammond's medical

malpractice insurance commission that was then chaired by Tony Motley. And at that time we explored the problem that generated the unavailability of insurance for physicians in hospitals and concluded as Dr. McGuire has pointed out to you, that there were a variety of things that could be done in order to eliminate or alleviate, at least alleviate that problem. But that fundamentally, what we had was a growing change in the definition of liability and the public perception of entitlement in the event of injury and that that was the underlying problem. And there was at that time a recognition, that any changes that might be made in the tort law, the law that defines the rights of the people who are injured against those who are perceived to have caused that injury, any change in that law would in fact take awhile, take a long time to have an effect for a variety of reasons. And that is why there were several sets of recommendations made at that time, the tort reform recommendations that were as I recall six or seven specific recommendations in the medical malpractice report that came out and went to the legislature, that there be an insurance mechanism be put into place so that there would be an immediate relief for the physicians, even though the tort reforms might take a long time, and a recognition that the medical profession themselves had to clean up their act and why certain changes in the way they practiced and the way they were licensed, and the way the licensing board governed what they did, or implemented, and as Dr. McGuire pointed out, those recommendations affecting

the practice of medicine were adopted and those recommendations creating a new insurance mechanism were adopted but the recommendations with respect to tort reform were not adopted. And it can be argued I think with some persuasiveness, as did Dr. McGuire and as I believe the very statistics in the medical indemnity corporation of Alaska's records will demonstrate, the failure to adopt those tort reforms have been MICA back in the same position the rest of the insurance industry is today. It' interesting to note that in 1977 I believe it was, or maybe as late as 1978 that Governor Hammond appointed another commission to review the tort law in the State of Alaska and that commission was populated by attorneys and physicians and insurance executives, numerous people who could bring to bear their expertise on the subject of the liability of people found to be at fault to those who were injured. And that commission came out with numerous recommendations, many of which called fo changes in the tort law, and what is interesting to me is that the changes recommended in the medical malpractice commission report in 1976 or 1975 and the recommendations in the tort reform commission of 1977 or 1978 are essentially the same recommendations that are coming up today. So that I do take issue with the concept, A, that this is a crisis problem and it just all of a sudden jumped out at us. This problem has been with us for a long period of time and I have to reject the argument that the solutions are immediate hysterical reactions. They're not, these are the same recommendations that have been

studied by many commissions over a long period of time and have been thoroughly debated and are only being brought up again at this time as you might say well worn recommendations that at some point in time are going to have to deserve favorable recognition by those who make public policy in this State. Now what is the role of the insurance industry in the reparation system? To me, we serve as an intermediary, a financial service as an intermediary in this system. That is to say, we are analogous to a pipeline, through which funds are funneled from a group of people which is defined either by public policy or by market forces as those who should put money into the system and we pay that money out to those people who public policy as defined either by the legislature or by the courts of this land, ought to be entitled to the money paid in by this group over here. We are a financial intermediary and thus other than the fact that we, in order to make a profit peel off a piece as it flows through the pipeline, really have no particular economic interest in who gets it over here or how much they get, other than, since ours in effect a cost plus type of business, the more that must be paid over here, thus the more that's collected over here, obviously the more plus we'll be able to get as it flows through. So what I am saying to you is, as a matter of corporate self interest it probably makes little or no difference to us how you define the rights and liabilities of those who are injured and those who ought to pay and that as a matter of fact it may in the short term at least be in our

economic self interest for you not to make changes in the tort law and to continue to allow the costs to escalate. Now, if yo think I am here on a (indiscernible) mission, there must be som hidden motivation, let me say that I do have a concern. I have a concern because some of the things that I have feared over th last 15 years that might come about by not changing the tort system and changing the exorbitant amount of monies that are flowing through this pipeline are beginning to manifest themselves in the legislature. And I am down there not only talking on issues of tort reform, but protecting the industry backside on such issues, as the State getting into the insurance industry, as there are being permitted irresponsibile means of so called pooling, but because people are frustrated and try to pull themselves out of the insurance industry, and so they're moving into self insurance or what is euphemistically and incorrectly called group self insurance and a variety of regulatory impositions on our industry as if those things would solve the problem. So my, my motivation for being involved in this is to see that the system remains a reasonable one so that we can continue to provide this service in a reasonable and competitive environment. When you see it in this light, then you realize that such comments as has been made here this morning, that if you were to change a particular provision of the law to reduce the benefits that are paid to an injured person such as was made I believe by Eric Sanders, that if you went to a discounting to present value of large awards would be

windfall to the insurance industry is utter nonsense because it will in fact reduce the level of loss, but it will mean that we can collect less from those who pay into the system. And when you hear people who make comments that you're going to punish the insurance industry by punitive damage awards in bad faith cases, this is equally nonsense because certainly in the short term it means money paid out that they haven't allowed for, but in the long term it's going to get rolled back into the cost of coverage and will, as Sandy Saville pointed out, eventually be borne by the public. So when you're talking about windfalls to the insurance industry or punishment to the insurance industry, keep in mind that the insurance industry is an intermediary financial service and is a pass through function of the money. And what you are doing is not defining the money to be paid or retained by the insurance industry, you are talking about the money to be paid by or retained by the public who pays for the losses ultimately. And one last point before I move on to my description of the economics in the insurance business. One of the other reasons I say that this is not an insurance crisis is because the exact same problems are affecting those people who do not buy insurance, and I'm not talking those who are not buying it because they can't afford it, but who would like to have it, I'm talking about major enterprises such as the State of Alaska or the municipality of Juneau and other municipalities who appeared or were represented on this same t.v. program I referred to earlier who deliberately do not purchase insurance

because they can't contain losses within their own economics or other very large corporate enterprises in the State of Alaska who have set up a risk management program that does not involve the purchase of insurance. They are also having the problem because they also must pay this money and while they may not pa it as the rest of us do, by paying it in the form of insurance premiums to be administered by the industry and paid out the other end of the pipeline, they have a more direct relationship. They pay it directly without the advantage o: spreading the risk or spreading the risk only among their own exposure and they're having the same problem. Thus, I say to you that it must be something more fundamental and more indigenous to the system than just the fact that it's insurance involved. Now, alot has been said raising questions about the economics in the insurance business and in fact Sandy Saville pointed out that it's very hard to know what's going on in the insurance business because the information isn't there. I was very, very disappointed to have a legislator tell me the same thing, that they're not getting access to the information. It' disappointing to me because we must report to the regulatory agencies in one of the most comprehensive financial reporting documents that exists for any industry in this country, all financial document that we have to file runs anywhere from a minimum of 50 to several hundred pages. It details our investments, our purchases, our sales of investments. It details our reserves by line, including every single expense

item. This is broken down by line, by expense item. by state, and that document is a public record. And that document is filed not several hundred feet from the legislature in the new state office building and it has been filed every year by every insurance company doing business in this state. Those records are there and they're available, and more than that, there are agencies, that is to say private enterprise companies that engage in the business of keypunching-that information so that it can be reported in statistically useful means and made available to anyone who wishes to purchase it. The information is there and it is public, and it keeps the requirements to provide data are continually expanding, there is no excuse for anyone saying they do not have the data. Now, this organization to which I refer, that does this keypunching and has this information, A.M. Vest Company located back east, publishes information on individual insurance companies and aggregates the data by state and by line and by any other matrix you wish to see it and then they publish graphs and information. As a matter of fact in this Time article that's becoming kind of talked about this morning, on page 24 of Time magazine is a graph not very dissimilar from what I would like to show you this morning. Now unfortunately it's not very large and you're not all going to be able to see it, but I understand that for the television the graphics will be dubbed in and you will be able to see it. And what I would like to show you here, these are statistics taken from the period 1967 to 1984 actually,

affecting calendar year 1984 is to show you some of the key aggregate numbers for the insurance industry nationwide. Now this line right here that's black on the chart shows the level of loss in aggregate gross dollars back in 1967 and you can see that over the period of not quite 20 years, 19 years, this line continues to march right on up. That's the loss one, that's th amount of money that is paid or incurred by the insurance industry and paid out ultimately in losses. This line is the line that shows the written premium over the same period of time. You will notice that the written premium line is above higher than the loss line. And if you have an appreciation for simple economics you'll recognize that that's the way it should be. It has to be above the loss line to cover the profit in th insurance industry and the costs of operating the insurance company mechanisms, and you will find that over a period of tim it contains to march up tracing the loss line. But there was some aberrations, it does dip down and it does go up, cycling, and as a matter of fact this period right here is rather interesting to me it's the 1975 period. You remember that's when we had the last crisis when the thing started down and the all of a sudden it started back up again and it went up until 1981, 1982 one of the highest levels in the history of the insurance business. Still above the loss line but not by any greater margin, in fact by a lessor margin than it was in earlier periods. And then the line started back down again, probably not unreasonable to expect here we are at the ten year

cycle. It's time for us to go out and compete and for the insurance industry, to shoot it's economic foot off again, only this time, they not only shot off their foot, they shot it off at the knee. Because now for the first time, the written premiums that are collected in gross are less than the losses that are being incurred in gross and the line comes down below the losses, the premium line comes down below the loss line until here in 1983 it is at the lowest-point below the lost line that it has ever been. Now why is that? Well we have heard some comment about why that might be and we hear about bad investments and we hear about predatory pricing and we hear about excessive competition and we hear about a variety of things, and I am here to tell you that many of the charges that have been made about the conduct of the insurance industry that led to the pricing that shows this phenomenon that I just described to you are in fact absolutely true. There is one thing that has been said about the insurance industry that is not true, and I want to clarify that. You will recall in the period about 1981, 1982 when the premiums were at their zenith, was also the time that interest rates in this country began to grow at unprecedented levels, when you talked about savings accounts being generously awarded at 4 1/2% and then within a period of about a year the prime rate and interest rates were up at 15, 16 and 17%, you have an enormous incentive to draw in a lot of money to invest, the investment yields are just fantastic. So what did the insurance industry do, which tends

to invest in long term high yielding income investments. It said we can afford to charge just a little bit less than we might ordinarily have to in order to attract in money because if we attract in this money we can invest it in 15 to 17% and make up the difference with investments and increase our overall income by so doing. Well Company B said the same thing only he went just a little lower than Company A and Company C went a little lower that and we spiraled ourselves into charging less for the product that we were (indiscernible) to in order to capture the money to invest. We called this cash flow underwriting. Even though it was a dumb thing to do, we gave it a name to glorify it. So out of this incentive to make money, to draw in money to invest, we did engage in what would appear to any outsider as predatory pricing. Now, has that hurt the public? Let me show you another chart, and were the investments bad investments? This chart which also tracks the same period 1967 to 1985 shows this is 0 and this is billions of dollars of profit and this is billions of dollars of loss and you will find that on an underwriting basis, premiums less losses and less the expenses of operating have always hovered around 0, dipped below zero, very seldom ever go above zero, but what you do have is this investment income line that plods along here in rather normal expectancies until you get out to about 1980 and 1981 the investment curve jumps way up for the phenomenon that I talked about. What did it do to that income? Well that income plods along here as the sum of the underwriting result and the

investment result and so you're always making money. You're always enough above the zero or the break even point to make a reasonable return. In fact up here it went up rather nicely, but what happens here is that the losses so vastly exceeded the premium, the losses were so high that the underwriting result plummeted to the point that even with the increased investment income, this line for the first time in the history of the insurance business went below the break even point. And so what you have is, the public has been benefited by this pricing phenomenon because the prices have gone down, but the result is it was at the expense of the insurance business to the extent in 1984 of 6.6 billion dollar loss, 6.6 billion dollar invasion or reduction in the industry's net worth, which in effect, you'd have to say was paid back to the public in the form of markedly reduced prices. And so what you find now is the inevitable response and that is the premium line is going to have to go back up and get again above the loss line, and that's what's taking place today. Now, we can focus on the investment issues, we could focus on the predatory pricing issue, we can focus on the lack of information issue, we can focus on any issue affecting the insurance industry's operations that you wish to look at, including whether we are operating effectively and efficiently. And if anyone of you would like to come in and show me how I could reduce the phone bill or the salaries I pay or the rent I pay or anything, you are more than welcome to show me how I can improve on that portion of the premium dollar I pay

in operating expenses to make the system go, and I would commer to you as members of the Bar and as the leaders of the Bar my biggest single expense is what I pay my defense lawyers. If you've got a way to address that, help me out, but I would suggest to you that the area that deserves your most prominent concern, no matter what you may say about the insurance industr and how well or how badly it operates, is you have to at some point focus on the loss line, because that is the real outflow of dollars through the pipeline and that is that to which I wis to address my comments at this point. And I would like to poin out to you that for the reasons I've pointed out, whatever is done by the makers of public policy, whether it's the courts or the legislature, that affects the loss line will definitely, that is to say that changes the definition of liability, that says we are to pay less to him than we have in the past will definitely affect the loss line. Now it has been said, and I think truly, that we cannot predict the effect on the premium line, and the reason for that is not because we can't predict the impact on losses. We can almost give you a dollar for dollar measurement on the impact on losses by changing certain provisions of the tort law. But you can see that there are so many other economic impacts of what premiums are that it is ver difficult to perdict with certainty, or with honesty what might happen. For example, it has been said, quoting Robert Hunter, that if you did nothing, the rates are likely to go down anyway. He may or may not be right depending on economic and

competitive forces, and how much new capital comes into the insurance industry. I can take advantage of that and say if you adopt the tort law, rates are going to go down rather immediately. And if you adopt the changes in the tort law and the rates go down I can say, see I told you so. And Hunter will say it would have happened anyway. And that's because this premium line goes up and down for a whole variety of reasons. But you can rely on the fact that if you develop a public policy that says, we're going to pay X number of dollars to these people and no more, and the X is less than what we're paying now, the loss line is going to go down. And if you believe that this industry has so many players in it, and that it is so vigorously competitive, that this kind of phenomenon can happen, then you've got to believe that by lowering the loss line competition will take care of driving the premium line to follow it. So what is our position on tort reform? I have no position on tort reform. I cannot tell you that I favor it or that I disfavor it. I can only tell you that I sit and watch it on a day to day basis as the numbers float across my desk and I try to remain cognizant of what's going on in our claim files. And all I can do to you is humbly tell you the impact on the costs on the current attitude by our judicial system towards reparations of injured people and share with you what I observe as what's going on and then those who are responsible for the making of public policy can decide whether they like or whether they don't like it, whether commerce is being burdened by the

cost of this reparation system or whether maybe the costs have gotten out of hand and we have to do an economic and public policy balancing between the cost to the public and the rights of these individuals. Let me tell you some of the areas that I think I see from my perspective as the touch points of great concern. One is excessive litigation. We litigate too much. Now I'm going to cite as an example of this and obviously as I believe Sandy pointed out we all reach for the most exorbitant example to make our case and I guess that's logical. Unfortunately this example that I'm about to give you is unusual but it is not unique, and it's rather current, so please excuse me if I don't make it overly specific, but we were involved in a situation involving a person who slipped and fell coming out of a camp on the Slope and hurt himself. He was employed by Company A that was insured by another insurance company that paid the workers comp, then this claimant turned around and sued others for a variety of causes of action having to do with maintenance of the camp and the construction of the design and a whole lot of other theories, and sued our insured and we defended. Now there was some complications in the litigation, it's unimportant to get into the litigation, the complications of it for purposes of this discussion, but the fact of the matter is that a rather unusual judgment, we're not sure whether we won it or lost it was handed down, it was a little of both I guess and that was that. And because of the unusual nature of the judgment, we commenced an appeal. The attorney representing

the person who was injured, on behalf of his client filed a direct action against our insurance company alleging things that might be regarded as bad faith and fraud. That got our attention, and maybe as a result of that and maybe for other reasons, it was reasonable to settle that litigation and it was settled. Now you've got to realize that the claimant here has been paid his workers comp and now he's been paid whatever he was entitled to out of the settlement, and he's left the State, so that ought to be the end of it. Except that now the insurance company who had paid the workers comp is suing the lawyer for breach of contract for not paying over the workers comp lien that should have been paid and we are going to have to step in and indemnify that attorney and we are going to have to bring an action against that insurance company who was representing the injured persons employer for failure to honor an indemnity contract in the subcontract between our insured and the other company's insured. So what do we have, we have one large complicated workers compensation proceeding before the Workers Comp Board, and four separate lawsuits, attention, in order to get an amount of money to a person who's already left the State and couldn't care less what happens among all these insurance companies. Now what kind of a bizzare legal system have we built that fosters that kind of litigation that accomplishes absolutely nothing in getting the money to the injured person. What about the size of the award? The size of the award is important, a point has been made here, and I think

it's quite correct, that the vast majority of the number of cases that we deal with in the insurance setting are small cases. We don't have large numbers, thank goodness, of six million dollar verdicts, or three million dollars potential exposure. The problem isn't with those cases, and those that say the insurance industry can't afford to pay a six million dollar judgment are nuts, because we just got through paying about 600 million for a blown up satellite. We can afford the judgments if we know about them and can collect the premiums for them, the pipeline is big enough and flexible enough to accommodate that. Why then does the big judgment present a problem, well it presents a problem because it sets the precedent, it sets the guidelines by which the 98% of the number of cases in that realm that Eric talked about of the $50,000 or $100,000 and less are settled. And so if we begin to see that the tenor of the court is to expand theories of liability and if the extent of the jury is to make awards, we don't go down to the jury to say but don't do it in this case. We stay away from the jury, we stay away from the courts. What kind of a judicial system have we built when those people are afraid to go to court for an equitable result and the areas that are driving up the size of the awards are obviously the size of the damages which we think is not a unreasonable reason to increase the size of the awards, but what is happening is that we see new theories of law being developed to expand the entitlements, to expand the reasons for giving awards, new kinds of damages that are being

discussed, including, punitive damages. And while it has been said that punitive damages is not something that's been awarded very often in this State, it has been awarded, and it's been awarded in other States. And it becomes a primary concern to anyone who has to indemnify against these losses and contrary to what has been said, one way or another it finds its way back into the insurance losses because if you may be able to argue that punitive damages aren't covered in the policy, but when they present this array of damages there are certain times you don't want to go fight and find out. Probably the most, the third thing, and probably the one that is of most trouble to us is the unpredictability of the law. Now I don't want to unduly accuse anyone on the Board of Governors when I say that I look around the room and I see contemporaries and why, because I do, I say unduly accuse you. I will assure you as I say that, that my gray hair is premature, so I am not unduly charging you when I say you are contemporaries of mine, and when we went to law school when one the doctrines that was enunicated and drilled into us as important and part of our common legal system was the doctrine of stare decisis, a term forgotten here I think in the last several years. The doctrine of stare decisis says that our common law is built on precedent, that we can look at a set of facts and if that set of facts is similar to our set of facts, we can look to the rule of law in that case and assume with some reasonableness that it applies in our case. But what do we do when we think we understand the law by looking at prior similar

fact situations and their legal outcome and find that the court decides to change the rules? Change the rules in a case involving a claim arising out of a policy sold several years, priced on the assumptions made several years ago about the stat of the law as we knew it then. It is this unpredictability tha has probably more than anything else, that's making it difficul to acquire insurance in certain lives. Not so much the pricing but just insurance companies cannot live in an unpredictable world, anymore than you or anyone else can, and just as you see insurance to level out unpredictablility and make it predictable, the insurance industry looks for a certain amount of predictability and finally the fourth, bad faith. I heard i said that the reason the insurance industry has tried to do awa with punitive damages in its tort reform has to do with bad faith. That's nonsense, and the reason I say it's nonsense is because the statutes that are being proposed have to do with punitive damages against the person charged with negligence leading to the injuries of the injured party and have nothing t do with the punitive damages so far as I've been able to see affecting the insurance industry in a completely separate and different cause of action, having nothing to do with the injuries of the injured person. So when you analyze punitive damages in the context to which it comes up in these bills, I think you should focus on where it was intended to be and that is punitive damages for the wrongdoer causing the injury to the injured person and not the insurance industry. It's a separate

and distinct question, but I got to tell you, that the bad faith litigation is causing a very serious concern among the insurance people, because how can we operate in an environment what is defined by our juridicial systems as an adversary system, where the plaintiff lawyer is out there arguing as hard as he can on behalf of his client which is his sworn duty to do, and we, having the contract with our insured to defend our insured go out and do the same thing, to defend to the highest extent both ethically and morally permitted, and if we do that and we do it too aggressively, we're charged with bad faith. These to me are the four areas that I think are causing serious problems leading to the high cost of loss, the excessive litigation, the size of the awards, the unpredictability of the law, and the bad faith exposure directly imposed on insurance companies, and these are the areas that if you wish to accomplish something, you are going to have to address. What ought to be done. Well I don't tell you what ought to be done, but I would tell you I think a standard by which anything you do ought to be judged, we are talking here about a reparation system. We're talking not just about a single component of it, the law that defines the rights and parties, but we're talking about the whole thing. We're talking about the role of the insurance companies, the role of the lawyers, both plaintiff and defense, we're talking about the role of the courts, we're talking about the role of self insurance and self insurance administrators, we're talking about the role of the legislature and the role of the appellate

courts. They are all part of the reparation system, and if you look at it systemically, what ought to be the standards for determining whether this is a good system, whether it's the right system for reparations of injuries, I would commend to yo these four standards. And anything that is done ought to meet these four tests, one, it ought to be fair, now that's broad an general enough, almost anything will fit within it, but what I mean by that is this, it's got to be fair to all parties. It's got to be fair to the injured person. He's got to be made whole, but it's got to be made fair for the public, who is paying the tab. And I am unfortunately of the view that the court has concerned itself so much with fairness to the individual irrespective of balancing it against the cost to the public, not just the cost to this guy who may be at fault, obviously that's a concern, but the courts have seemed, as Keith has pointed out earlier, we've gone beyond looking at fault and we're looking to this as a cost reimbursement system almost without regard to fault because insurance or some other financial resource is available. And if we're going to do that, then let's go all the way and look at what the cost is to the public for this reparation system. Secondly, it's got to be predictable. I don't care what kind of system you adopt, if we can't look at it and have some reasonable basis for anticipating what it's going to cost and thus establish reasonable pricing, it's never going to work. Thirdly, its got to be cost effective. Now, one of the arguments that was made by Sandy

Saville in connection with the subrogation question was why are we going to subrogate? Why are we going to eliminate subrogation from the liability system to the workers compensation system? Let me give you one reason why I think leaving it with the workers compensation system may have some merit and why I think the whole argument for collateral sources ought to be thought up with this new element. If you'll look at the cost of operating the third party liability system, by that I mean the amount of money that goes in at this end of the pipe and look at the money that goes out this end of the pipe, but to the person who is injured, not to everybody, the lawyers and everybody, but just to the person who was injured, who was the original intended beneficiary of the system, by the time you take off the money that goes to the insurance industry in the pipeline and the amount of money that we pay for the defense of our cases which is one of the expenses we have agreed to incur, and the amount of money that goes out the other end and gets paid to the plaintiff's lawyer and to their systemic costs, it is reasonably estimated by those who have studied, not me, but in studies going back ten and fifteen years ago, that less then 30 to 35% of the money that goes in this end, gets to the injured people. And you compare that with other reparation systems like the workers compensation system, where approximately 75% of the bucks that go in the pipeline get to the person who is injured, or compare it with health insurance programs where 85% or even more in the case of the blue cross

programs are getting to the injured people you can see that wha we're arguing is that you transfer the cost away from the least efficient to one that's more efficient, and if there's no other value in the collateral source doctrine that's being advocated, then moving money to the person who is injured through a more efficient vehicle, that itself ought to be value enough to do it. And finally, I said it should be fair, predictable, cost effective and finally we're going to have to find one that's affordable. It's being picked up by the public and the public has said we've had enough. The public has said it because the doctors have said, because the dentist and other health care providers have said it, the AGC, air carriers, people engaged i education, the municipalities of the State has said it. We've had enough, we cannot afford the existing coverage, and since this ultimately being passed on to the public, I think what we've done is we've said the definition of what should be paid to injured people has probably reached its zenith, and it's tim now to pear it back to the level that with all the other intended expenses, it become affordable to the Alaskan public. Now I think I've about used up my, I see Harry smiling and standing, I think I know what that means, thank you very much.

SPEAKER: ROBERT M. LIBBEY

Thank you Mr. Branson and thank you members of the Board of Governors for the opportunity to add what I can add to what has been said at length in this forum today. Thank you Mr. Block

and thank you Dr. McGuire for, on behalf of the Bar Association, and I am a member, for coming in here and sharing your view points, providing what insight you can provide into our problem. And thank you who have stayed attached to your seats throughout this presentation, for being willing to stay and hear the last word that will be said today about this whole matter. I appreciate that you're respectful enough to hear my views, although we have now gone on for nearly three hours. The insurance crisis was here when we started, that is, this debate today. Most of us acknowledged and lived with the insurance crisis. For the first today and I've heard Mr. Block speak before, and I have great deference for Mr. Block as an insurance representative, but for the first time today I have heard someone say in this long (indiscernible) which has lasted nearly six months now, that there is no insurance crisis. That's not what we have. Well I guess that's a matter of perspective. Maybe if you are simply trying to match a loss line with a premium line and to do so you have to increase premiums, maybe that's not a crisis, maybe that's something else. If on the other hand you see your premium increase six hundred fold, six fold, six hundred percent in one year or more as I heard from a thousand percent, ten fold, and you're told that the insurance may not be available at all, then personally to you it's a crisis. To me it's a crisis because I saw my premium increase six fold from last year to this year. And I'm puzzled about that because I look back over 20 years of law practice doing

about the same thing in the same community right here and no on has ever sued me. No one has ever made a claim against me, no one has ever invaded or benefited from the insurance that I hav provided over those years, and yet overnight I'm a bad risk, my insurance costs must rise six hundred percent and I'm a little touchy and I feel that I'm facing a crisis. I feel that I'm entitled to an answer, and what I have heard as I followed this debate through the public mediums and through the legislature i that this crisis unfolded over the last three or four years and I know I'm redundant, but I want to trace it again, because I think it's important to keep that fact in perspective, that thi crisis came along over the last three or four years. Three years ago I was insured, you were insured as members of the public, we had reasonable premiums, we had the same tort system that we had today and insurance companies made a profit, made a profit from selling us insurance. About four years ago, a new mode of selling insurance, a new mode of making profit from insurance entered the picture, rates were cut to compete for market shares. The expectation of insurance carriers was that that loss that was inevitable that would follow those low rates would be recouped in investment profits. Unfortunately that expectation ran afoul of the steep decline in interest rates an its impact on other investments and there was no investment income to recoup those inevitable losses. Now it seems to me that the insurance industry has decided to balance that line, clean up that graph, recoup those substantial losses that they

inflicted upon themselves in one or two years with a premium increased that brings a new era to most of us in terms of insurance costs. Bewilderness made us ask the questions, one, is there something wrong with me, two, is there something wrong with the system, three, is there some fraud afoot in the land that has somehow made me a victim of the system. One thing that has come out of this debate and it can be substantiated by reference to the records of the legislative hearing, wherein the industry, the insurance industry was well represented by qualified people, the lawyers spoke out, victims spoke out, businessmen from this community spoke out who were bearing the costs of these premium increases, but several things were actually admitted, admitted on record by the insurance industry, and they're pertinent. For one thing it was admitted that if all of these so-called reforms were enacted tomorrow, as a package, that we would not have solved our insurance crisis, our premium increase problems, that if any benefit would flow to us in terms of reduced premiums, of that benefit we could expect somewhere between seven and ten years from now. That's a long time, that's a long time to be in a crisis, and most of the speakers today will be in retirement when that premium increase, perhaps all of us but Dr. McGuire will be in retirement when that premium decrease takes affect. It's not going to help us much today, it is not the kind of answer that we're looking for. Secondly, the industry admitted that in our neighboring country in Canada, in the province of Ontario, back in the 1970s

they adopted all these changes, all these take aways from tort victims, where are they today, where are the people of Ontario today? They are right where you are, they are facing an idential insurance crisis, it affects the same industries in their community that it affects here in Alaska, it affects in Iowa, it affects in Utah and California. It didn't help the people of Ontario that they took away the rights of victims under their civil justice system. And finally the insurance industry has admitted repeatedly that if left alone, if the civil justice system is left alone, profitability will return i about a year to eighteen months and that they will be again writing premiums on a profitable basis, probably competing by cutting rates, competing for a larger market share of your and my insurance needs. Given these admissions the bottom line is that the industry as a whole has admitted that in terms of the current insurance crisis, that is the incredible rate increases that we have had to bear, there is no cause and effect, there i no direct cause and effect relationship between any problems in the civil justice system. If there is anything to be gained by tampering with the civil justice system they've admitted it is indefinite and long term and not the kind of solution or quick fix that the country as a whole needs. Why then do we hear so much about tort reform? What is tort reform? Tort reform as w see it in legislation today is not the broad concept of tort reform or reform that we are generally familiar with. Tort reform in the sense that we are dealing with it in the

legislature is a narrow menu for the taking away of the rights of injury victims, for the taking away of compensation to injury victims. There is a substantial body of interest groups supporting such narrow reform, in large part it is very much like the shrill cry one could perdict when suddenly one's insurance premiums are increased six or ten fold. A demand for something, a demand for an answer and a willingness to accept anything that sounds good at the time. It matters little that, in that state of mind, that even if we rush that entire menu through, we will still have to live with insurance problems because we want to do something, we want to try and change this thing and something is better than nothing, but we're tampering with a very precious commodity. We're tampering with a very precious aspect of what it means to be an American, and when we have been told there is no direct cause and effect between some problem in the tort system and the problems of the insurance industry when that nexus does not exist, it is inappropriate to rush in and adopt anybody's menu of solutions without a thorough airing, without thorough and objective consideration of each and every one, without requiring that each change, each change stand on its own merits. And how can the public ever know if any change in the civil justice system can stand on its own merits. I submit that it requires responsible people to get close to the system, to find out what our legal system as a whole is, to find out what the tort system as a whole is, and what it means to us, to gain some perspective from which to judge these proposed

changes. Perspective is a very essential part of any rational act. Perspective can be very, or poor perspective can be very distorting, very, very misleading. For example, as we drive down the road on a smooth, dry highway and we can see for a mil and a half and it looks like there's a pool of water in the road. And yet we drive on and we get closer and we can see in more detail and the road is dry, there was no pool of water. Merely an impairment in our perspective. Or we look off into the distance and we see a jumbo jet approaching Anchorage International, and it looks like that jumbo jet is barely moving, less than a mile an hour. In fact he traveling in excess of 200 miles an hour, but we just don't have the perspective and we need it here. What is true for that jumbo jet, what is true in life generally about perspective is true with the legal system, we have to get close enough to have in a meaningful perspective into it and we have to avoid getting so close that we cannot see the forest for the trees, but that's our obligation, if we want to make a fair and meaningful appraisal of the current justice system. We've got to be able it seems to me to think about the tort system as a whole, we have got to be able to examine each and every proposal for change in context, with that clear perspective that we have gained through study, gained through listening, gained through discussing. The tort system, we've heard an awful lot today about the cost of the tort system, and of course ultimately that's what brought the tort system to our attention, cost, cos

in terms of dollars paid for insurance policies, but the tort system to the public means a lot more. In its simpliest form the tort system provides the public, provides you and me in terms of these dollars spent with two essentials, one of which is direct and the other of which is tentative. The first essential is that it provides within the public a deterence of unsafe conduct. The tort system stands in many instances as the only deterent to unsafe conduct. It follows me wherever I go with my automobile, with my rifle, it follows the manufacturer into his laboratories for research and development, it follows the doctor into the operating room. It is that force in society that requires us to be careful, that requires us to live up to the level of knowledge in caution that we have come to expect as citizens. In addition, the system provides compensation for victims who fall victim of accidents caused by the fault of others. I've heard it suggested here today that there is a system at large where really no one has to be at fault, there is no fault at all in the accident, there is nevertheless recovery, I'd like to know what that system is. I've worked awfully hard for nothing if that system in fact exists and Mr. Block has paid an awful lot to defense lawyers for nothing if they're defending in cases where there really is no defense. Of course there's fault, there's fault and that is the essence of our recovery system. Every juror requires it when he sits to resolve a case and it is the force of the civil law that forms the deterent ultimately, that holds that fault at a tolerable level. Now, if

we're talking about the deterent force of the law, any system that provides harshness in its civil penalities is the best system. If deterent is the only consideration, as we weaken th rule of law, as we take the harshness out, we impair or impact the deterent force. As we impair or detract from the deterent force of the law we compromise the public safety, so if we want a strong deterent in our civil law we have got to retain harshness. Mr. Block asked the question and he's asked it before, as a compensation system, how much is the public willin to pay, how many of these rules will they retain, how many are they willing as a group to pay for. I submit the competing question in that, in that calculus is how much public safety is the public willing to compromise, how much of the deterent forc that provides us safe streets, safe products, a safe workplace, is the public willing to give up in order to make insurance again profitable for the companies that write it. In terms of the deterent force of the law, one of the various items propose by the tort reformers is the abolishment of joint liability. Joint liability for members of the public is the concept of the law, hundreds of years old, not three or four years old, but hundreds of years old. Wherein if you are at in any means of fault for someone elses misfortune and loss, and if there are others who combined with you in fault in bringing about that loss, and if those others or one of those others is himself insolvent, unable to help compensate the victim, then because you are in part at fault, you as the defendant, you as the tort

feasor are required to pay the entire damages suffered by the plaintiff. That rule has been ameliorated in Alaska by virtue of the comparative negligence rule which indicates that to the extent and to the percent that the victim presented himself to injury by his own negligence, by his own carelessness, that percent is to be deducted from his damages, but the balance is to be paid by any tort feasor found in any degree at fault, be it 1%, 5% or 70%. Now, granted there is a public policy debate or contest over the, over the justification of that principle. But the courts have addressed it several times, this state has addressed it, nearly every other state in the United States has addressed, and nearly every state has resolved that issue in favor of holding the defendant liable for the entire damages if he is at all at fault, whether that fault is 1%, 5% or 70%, or 100%. And the basis and the justification for those rulings is simply that in that way, and only in that way can we give, can we maintain the maximum deterent force of the civil law that was offended, of the civil law that resulted in that defendant's negligence, and in that way, and in only that way can we give the public the greatest protection against carelessness, against unsafe products, against outright recklessness. Some say that that doctrine is unfair, some say that it's time to change it, some say that we should create a formula and if someone is only 5% at fault, they should pay only 5% of the damages, if they're only 5% at fault, they should pay only 50% of the damages, there are various substitutions that have been proposed. I submit

that the question ultimately will be how much of the deterent leverage of the law the public is willing to give up. After al a man or a corporation or a municipality, if they are even 5% a fault are indeed at fault in the eyes of some jury, they have been, they have engaged in some act of carelessness or recklessness that has brought about an injury to someone. The fact that there is someone more at fault, whose negligence or carelessness combined with the same act to cause the injury, doesn't change the fact that the 5% offender is at fault, had there been no other tort feasor, had there been no other person more at fault, they would have paid the whole judgment because jury found them at fault. That's the way that the law is today and a change, if there is one has to be a balancing, and there has to be a significant reason to lift the deterent force and compromise the essential product of safety that follows. The other, the other side of the civil law, or the civil justice system is to compensate the victim, it goes back again, hundred of years, the concept that we have accepted as Americans is tha we compensate the victim with money and the amount of that mone is as, is the sum that will as nearly as possible make that person whole again. The idea is that we are to take the money and as near as money can do place the person back in the position that he would have been in had this carelessness not happened, had it not occurred, had it not brought about his injury, had it not caused his losses. That process is presentl delivered, that question is resolved by a jury of your

community, if you're the victim of a tort, if you're the victim of negligence, the victim of an unsafe product. You have a right today to have a jury of twelve people drawn from your commuinity decide what you have lost, decide what you are, your wage impairment is worth, decide what your pain and suffering is worth. That concept is an old concept, it goes back to the time when we distrusted the king and his delegees to determine our rights, we wanted our fellow citizens to make that determination. And now, and now it is being proposed that we pass that right to that determination on to the legislature to create some general rule that will in some way compensate everyone fairly, that will do it more fairly than a jury of twelve of our fellow citizens. Well I suggest that that proposition, that proposal be very carefully considered. One express provisions or item in the reform package that is aimed at the jury, aimed at that right is the so-called cap. What is the so-called cap? Well it sounds harmless enough in the abstract. We aren't going to allow anybody to have a pain and suffering award that exceeds $500,000, a half a millon dollars. After all, a half a millon dollars is enough for anybody in terms of his suffering, isn't it? Well, I'm not willing to answer that question until I have sat on somebody's jury who has been catastrophically injured, who has been committed to a life of living in a body that functions neither physically nor mentally for him, that is captive for a lifetime in a body that has been essentially destroyed, essentially turned into a

prison. When I've heard that evidence and when I've looked that person in the eye, and when I have heard the comments and discussion of my fellow jurors, I'll make that determination for myself, and not until then, whether $500,000 is enough for that person. I think is a very difficult question and one that cannot be generalized and one that cannot be answered nearly as well by the legislature in the throes of an insurance crisis as it can be answered by twelve fellow citizens of mine sitting in the courtroom. The trouble with that cap, well there are a number of troubles. Let's talk about that cap. Let's talk about it first of all in terms of the victim. The trouble with that cap is that it affects only the mostly seriously injured victims. In other words we're going to save insurance dollars at the expense of those who have been most grossly, most completely destroyed by someone's negligence. That $500,000 cap is not going to mean anything to the whiplash victim, or the broken leg, or to the five broken ribs, or any of another, a number of other injuries that occupy the courts day in and day out. It's going to affect that person who has been catastrophically injured, and only he will pay the subsidy that somehow affects our insurance premiums for that particular item the cap. That's not right. It's not right to ask that person to give up his rights so that I, as healthy as I am, can maybe save a few dollars over my lifetime on my insurance premium. Secondly, because it is a catastropic case that's involved, and because it's only this person with a multimillion dollar claim,

it's going to affect only a tiny fraction of the overall cost or burden on the insurance premium. The vast majority of the claims don't come anywhere near that figure. The last study that was done, on just who does get the insurance premium in terms of victims indicated that that particular person is extremely rare, and not a significant factor in the overall cost of insurance. Pain and suffering altogether when last studied, pain and suffering which is to be capped by this provision, in terms of the insurance dollar, when last studied pain and suffering burdened approximately 1 to 2% of the insurance dollar. So if we were to abolish all pain and suffering, not just the pain and suffering above $500,000, but all pain and suffering as a remedy, we could only save between 1 and 2% of the insurance premium dollar. In contrast the cost of defending insurance claims has now reached in excess of 50% of the insurance dollar. We talk about the pipeline and how it's somehow eventually, how the money somehow flows out of the pipeline to the victim. Well, over 50% of the insurance dollar sticks in the pipeline with the insurance industry and it's attorneys. Something less than 50% flows out the end to the victim to be divided between him and his attorney. If we're going to reduce the cost of insurance, if we're going to somehow resolve an insurance crisis, if we're going to bring prices into line, we've got to go at that portion of the insurance dollar that is meaningful, we can't fool around with items that may sound good, that may, that may be sexy, that may have

superficial appeal, but really don't impact the insurance dollar, we can't do that. In the end it'll be meaningless. Certainly, we do not live with a perfect system. Certainly any system invented by the human race has had imperfections, certainly every system is subject to, appropriate subject to review from time to time. This system should be reviewed. I agree that it is an expensive and a very protracted system. It is unfair to victims. It is unfair to defendants, that when a case is filed the resolution is some three years away. It's inappropriate and embarrassing that the system is as expensive as it is, and changes should be considered. I have a formula for changes too, it differs a little from Mr. Block, but perhaps it talks a little less about the cost of insurance and a little more about the other aspects of the civil justice system which the public has an interest. I submit that any change we make first of all in the justice system, we must know will have a meaningful affect on the cost of insurance, not some tiny fraction of a percent, but some meaningful impact on the cost of our insurance. Secondly, that the change will not significantly reduce the deterent force of the law, will not significantly reduce the power of the law to bring about and maintain public safety. And thirdly, that the changes will not deprive the injury victim of full and fair compensation. That, those considerations bear on review of the tort system, those considerations have nothing to do with the immediate problem of insurance premiums. In the legislature there is legislation

that is aimed directly at the insurance crisis. I support it because I believe that it will bring some relief, and I think that relief will be much more immediate. There is for example, legislation that will enable school districts or municipalities to group together and become self insured entities, where they don't pay anybody to accept their risk, they simply share it as a group, as an affiliated group. That at least will create some competition for the private sector of insurance so that what insurance we get we will know is competitive, competitively rated. It will also give some of the more distressed, insurance lead to stressed industries such as daycare centers, some hope of finding an alternative to private insurance, In addition, the legislature has proposed a more careful regulation of the industry. I don't think the data is available to our legislators. I don't think it's available to our regulators. A great deal of the insurance written in this State is not written by companies that are, as Mr. Block, registered to do business. It's written by surplus lying companies that are not regulated by the State of Alaska, are not registered to do business, and their data which is significant and extensive is not available to the legislature. It's not available to the insurance commission and it's not available to the consumers to evaluate the causes of this crisis. We can get to those surplus line carriers through additional regulative procedures. Finally, the legislature has looked for a way to transfer a leverage from the industry to the insurance buyer, to give the buyer some rights

with regard to this company, when the company threatens cancellation, or mid-term increases in premiums, that legislation is good, ultimately it will make the insurance industry more careful how they rate and, and justify their premiums initially. All these things deserve consideration. Everything that has been mentioned today, deserves consideration. The important thing as we approach is as Sandy Saville warned us, not to be too hasty, not to rush in because we feel the crush of increased premiums, to be willing to commit ourselves to gain some perspective, to put these issues in context, and to keep them in context, not to be carried away by somebody's anecdotal, a story about what happened in some part, somewhere a long way from here, sometime ago, but to approach each of these proposals objectively, with a view toward whether or not we really are improving a system that is perhaps the distinguishing feature between, we as Americans and the rest of our fellow humans. I understand that everybody is tired and I think that everything has been said. Thank you for your time again.

BREAK

SPEAKER: HARRY BRANSON

Thank you. Okay, we're going back in the session. We have each of the speakers here in front of us. We've all agreed because of the time and the depth of the discussion that we're going to

limit this questioning to thirty minutes. I've asked each of the Board members to try to focus their questions to take into account anything they think may not have been covered or they're confused, and I've asked the panel members to try to give us succinct answers, so we get as many questions answered as possible during this period, and with that I believe the first person that wanted to ask a question was Bob Wagstaff.

BOB WAGSTAFF

Q: My first question is to Mr. Block. You made the statement that in 1984 there was an insurance industry loss of 6 point - some billion dollars. As I understand it, the insurance industry has claimed that 1985 the subsequent year that it lost 5.5 billion. Is that figure . . .

MR. BLOCK

A: I don't have the figures for 1985, they're only now being collated and so we won't know the end result until, the figures are all massaged. I think we can find is that there will either be less of a loss and maybe even an income overall or profit overall for the industry, but I also think what you're probably going to find is that in the policy for the year in question, the 1985 year, it probably was profitable looking at the policies sold this year and the losses attributable to that year, what your also going to find is probably . . .

BOB WAGSTAFF

Q: Mr. Block we want to keep this focused.

MR. BLOCK

A: Well I'm trying to answer your question.

BOB WAGSTAFF

Q: Well let me restate the question. As I understand the insurance industry has claimed a 5.5 billion dollar loss in 1985 and according to the National Insurance Consumer Organization, that this loss, in this loss, claim loss, the industry neglected to include federal tax credits, a capital gains of 8.4 billion and also neglected to inclu 2.1 billion in dividends paid to stockholders and when those are in fact included that rather than a 5.5 billio dollar loss in 1985, that the insurance industry really had a 5 billion dollar profit, that's information obtain from the National Insurance Consumer Organization. Woul you care to comment on that?

MR. BLOCK

A: Yes. The National Insurance Consumer Organization apparently doesn't understand or doesn't wish to correct present insurance accounting or even gap accounting. Th dividends I believe that they're refering to are policyholder dividends which are part of the cost of insurance and relates to the premium. Taking into accou unrealized capital gains or losses really doesn't, well does to some extent, but in the insurance accounting

doesn't affect the profitability of the insurance business, and we're going to talk about a consistent basis. That is to say the years in which we make a statutory profit and they have to use a consistent basis in assessing statutory losses, and the key fundamental factors that affecting the profitability in the insurance industry are the losses. Well the point I was trying to make a moment ago was, that one of the things that's taking place in 1985 as I can observe it, by many of the insurance companies is reestablishing loss reserves on prior years losses to bring them up to the level of what they're really going to cost.

BOB WAGSTAFF

Q: With regard to losses, as I understand it the institute for civil justice has reported that jury verdicts as a whole remained about the same over the last quarter century, verdicts in terms of the dollars, with fact, inflation factor done, they remained about the same, the number of lawsuits per capita has stayed constant, and jurors have found generally as often for defendants as plaintiffs in the last 25 years, is that an accurate statement?

MR. BLOCK

A: Well I'm not prepared to agree or disagree with it if their research is based on facts, I'd have to agree with it.

MR. WAGSTAFF

Q: Now with regards to information that insurance companies make available, there is certain information that you have, do you not that you refer to as proprietary.

MR. BLOCK

A: I'm sure there is.

MR. WAGSTAFF

Q: But you do not reveal.

MR. BLOCK

A: I'm sure that there's information we haven't put into our reports.

MR. WAGSTAFF

Q: For instance would it be possible for a consumer organization to perform claims, audits of your claims in your insurance company?

MR. BLOCK

A: Well, I can tell you that that's frequently done, the brokers who are representatives of their insurance do com in and review the claims. Many of the people who are, fo whom we are administering claims either on a retrospectiv basis or on an administrative basis, where they have a genunine equitable interest in the outcome of the claims, come in and review our claims. Our claims are reviewed b reinsurers. Our claims are reviewed by the Division of Insurance. They're reviewed by numerous outside organizations.

MR. WAGSTAFF

Q: Are all of your books opened to customers of your company?

MR. BLOCK

A: No, they're not. They're not supposed to be.

MR. WAGSTAFF

Q: The question I have for Mr. Brown. Some of these proposed, what's referred to as changes reforms of insurance, they don't include and tort law includes such things as and I haven't heard mention today, but one of them is that there will be no longer any wrongful death claims for a person who is killed that does not have a dependent.

MR. BROWN

A: I did not advocate that position.

MR. WAGSTAFF

Q: That is one of the . . .

MR. BROWN

A: I've heard that said that, that is one of the proposals, I've not read it.

MR. WAGSTAFF

Q: Well in that, using that as an example, would you agree that there is a constitutional overlay to a lot of these proposed changes that the legislature does not have free range and do whatever it wants to, aren't there some constitutional ramifications . . .

MR. BROWN

A: It may well be, you didn't hear me advocate that particular proposal, I think you're asking the wrong person.

MR. WAGSTAFF

Q: Well, I'm not asking you if you advocated. My question i . . .

MR. BROWN

A: To answer your question, that's true as to a number of these measures, and if it was true in California for example, what are termed micromeasures, those advocated b Dr. McGuire earlier today were passed in California. The had to pass constitutional muster. The legislature isn't free to do things willy-nilly and they have to stand the test of the constitution. I'm not aware of any particula infirmities that there are in the legislation that's bein proposed by Dr. McGuire. There may well be in the exampl you just gave me.

MR. WAGSTAFF

Q: That every citizen has the right of access to the courts. And every citizen has a right to equal protection of law and the due process of law.

MR. BROWN

A: Certainly.

MR. WAGSTAFF

Q: Regardless of whether they have children, dependents or not.

MR. BROWN

A: Of course.

MR. WAGSTAFF

Q: With regards to Dr. McGuire, a couple of questions I have for you, you made a statement towards the end of your remarks that if we do these things, that we will be able to keep insurance. What assurances or agreements are you aware of with the insurance industry that such will occur?

DR. MCGUIRE

A: I'm aware of none, but that's not sufficient to answer the question.

MR. WAGSTAFF

Q: What is sufficient then?

DR. MCGUIRE

A: The statement was made earlier that this is a problem that's come upon us in the last four years, that's simply not true, it's been with us for at least 10 years. The statement was made that there's no evidence that any of these proposals will be of help, that's not true. The RAND Corporation has done a very good and thorough study on it, and I refer you to it. They propose that they would estimate that 25% of premium dollars could be saved by the measures of micro if they were applied across the

board The RAND Corporation has done three studies. There was another study done by an actuarial group which gave the only deficit that it was sponsored by the AMA, which showed that significant savings would be obtained in the area of malpractice liabilities alone, so there is information. The California doctors this year, under MIEC which is the same corporation that is in Alaska competing with MICA had a 5% increase in their premiums overall, we had soemthing on the order of 80 to 90%.

MR. WAGSTAFF

Q: Well the problem with MICA as I understand it, is not MICA itself, but its reinsurance.

DR. MCGUIRE:

A: It's not true. And as I said in the statement today, and I think that the history illustrates it, in December they were unable to get reinsurance. They decided to go it alone. When they decided to go it alone the actuaries told them that they had to double, increase by 100%, average, the premium and they had to because of no reinsurance, decrease the cover to $500,000. In February . . ., that was a doubling of the rate without reinsurance. In February of 1986 they were able to get reinsurance from Lords. Then the rate had to go up a 140 to 170%, now it seems reasonable that the 40 to 70 is related to the reinsurance.

MR. WAGSTAFF

Q: That's all tied in to reinsurance. The existence of it, nonexistence of it, or the increased premiums charged by the reinsurer.

DR. MCGUIRE

A: It really isn't and I think what you . . .

MR. WAGSTAFF

Q: Maybe we're, I thought that's what you just said.

DR. MCGUIRE

A: No. I said that without reinsurance in the picture, nevermind reinsurance, they had to double the rate. When they weren't able . . .

MR. WAGSTAFF

Q: Because of the lack of reinsurance.

DR. MCGUIRE

A: No. Because that's how much they'd lost in order to stay solvent. They had to double the rate in order to account for the loss experience, nevermind the reinsurance. When they reinsurance, the additional cost of the increased coverage provided by the reinsurance was an additional 40 to 70 percent over the 100 percent, and you can verify that with David Frazier and all the rest of MICA.

MR. WAGSTAFF

Q: The reinsurance company that you eventually have gone with, what access do you have to their books and records?

DR. MCGUIRE

A: Well, I haven't gone with them because I'm not insured by MICA. I don't know the answer to the question.

MR. WAGSTAFF

Q: Then you made a statement or told the, towards the end of your talk an incident where an attorney had apparently received a million dollar fee for 90 days work in a case. What case was that?

DR. MCGUIRE

A: Well, you see one of the problems we have which I think is terms of information that we should make available, the information in settlements that are outside of jury trials, there's a little document in there that says that nobody can relay the information, and that's one of the things that we ought to make open, is what the terms of these settlements are.

MR. WAGSTAFF

Q: Do you know the name of that case, Doctor?

DR. MCGUIRE

A: No, but . . .

MR. WAGSTAFF

Q: Do you know the name of the people involved?

DR. MCGUIRE

A: Yes.

MR. WAGSTAFF

Q: And have you approached them and talked to any of them?

DR. MCGUIRE

A: I have.

MR. WAGSTAFF

Q: And do you think a wrong was done?

DR. MCGUIRE

A: I think that we have to decide that as a society. Do we want to have a . . .

MR. WAGSTAFF

Q: Do they? Do the people involved feel a wrong was done?

DR. MCGUIRE

A: To whom?

MR. WAGSTAFF

Q: To either the attorney or the person he's representing.

DR. MCGUIRE

A: I'm not sure I understand your question. I talked about the dollars of society that were allocated to the mechanism and here's an example of one in which this was allocated. The issue is, is that how we want it to be?

MR. WAGSTAFF

Q: Your suggesting that that was an excessive attorney's fee.

DR. MCGUIRE

A: I'm suggesting that none of us working 90 days are probably worth a million dollars.

MR. WAGSTAFF

Q: Well that, you're saying that that's excessive.

DR. MCGUIRE

A: I think it's excessive.

MR. WAGSTAFF

Q: Why doesn't yourself or the person who has agreed to this the client, who has been charged an excessive fee in your judgment, while don't they file a grievance with the Alaska Bar Association.

DR. MCGUIRE

A: Because I don't think the client perceives that they are aggrieved. They got a million dollars too. The aggrieve party if there is any are the people that paid the insurance to begin with and the consumers that gave them the money in order that they could pay it.

MR. WAGSTAFF

Q: Well why don't you file a grievance if you feel so strongly about it.

DR. MCGUIRE

A: Well, I am filing a grievance. What I'm doing is I'm going to the legislature and trying to get them to correc this situation.

MR. WAGSTAFF

Q: Thank you. I don't have any other questions.

DR. MCGUIRE

A: Thank you.

MR. FRATIES

Q: A couple of questions for Mr. Block. Mr. Block in a former incarnation I ran an insurance company, and so I would be concerned to know whether or not, for example, the fact that two of my brethen here are paying in the case of Mr. Sanders his premiums have been increased by ten fold and in the case of Mr. Libbey, six times. Do you have a loss experience that indicates to you that these increases are necessary in the, taking lawyers as a class for example, have malpractice claims against lawyers increased to the point that it is necessary to charge them as a class, these premiums?

MR. BLOCK

A: Well I have to limit my answer to the areas that I know about and the areas that my company engages in are the ones I've got to know about most readily and we do not insure that class so I don't have the statistics.

MR. FRATIES

Q: Well, generally speaking as a, you'd agree with me that, would you not that, that investment problems to one side, if you don't have investment problems, the loss experience generally would dictate rates.

MR. BLOCK

A: That certainly should be the most predominant factor.

MR. FRATIES

Q: And that underwriting, good underwriting has something to do with your loss experience.

MR. BLOCK

A: Sure it does.

MR. FRATIES

Q: Now there was a period in time if I understand what's been said here today, when the insurance company, or when the insurance industry more or less went out on a limb because of the favorable investment climate and sought premium dollars.

MR. BLOCK

A: That is correct.

MR. FRATIES

Q: But they made a mistake because of the investment climate turned wrong or their, the percentage of their investment didn't meet their expectations. Am I correct in hearing that?

MR. BLOCK

A: Well . . .

MR. FRATIES

Q: Interest rates went down in other words.

MR. BLOCK

A: Whether you would regard that as a mistake or not is an individual management judgment. I tend to think it wasn't very smart, but managers of the companies that did it, probably don't regard it as a mistake.

MR. FRATIES

Q: Well, I don't mean to critize them as having done anything wrong or immoral or illegal, but what happened was that their investment didn't turn out as well as they thought it would, is that not so?

MR. BLOCK

A: No. I don't think it had anything to do with the investments not turning out, they turned out fine, it's that what they did was the losses were so high compared with the premium they collected to invest, that they got trapped.

MR. FRATIES

Q: Well, that's what I'm getting at. Isn't it true that at that time in an effort to obtain money to invest in this favorable investment climate, that the insurance companies either relaxed their underwriting standards or they went or they lowered their rates disastrously to compete for the money that they needed for investment?

MR. BLOCK

A: Well, what you're saying is that had they not done that, then we would have hit today's point about three years ago.

MR. FRATIES

Q: I'm not saying anything of the sort. What I'm asking you is that aren't you in a way proposing that we revamp or if you like, junk a tort system that has taken us two or

three hundred to develop in order that we may compensate for your disastrous underwriting policies?

MR. BLOCK

A: No, that's not at all what's being said, because what I just said is still true, and that is had the insurance industry not reduced its prices below cost, then we would be at this insurance pricing crisis about three years ago and then we would have the same crisis. The fact of the matter is that whatever may be the prices charged by the insurance industry, the losses continue to go up, that's the problem that has to be addressed and because the insurance industry may have masked it for a period of time by underpricing the product doesn't mean that the problem isn't there. Now if you regard the crisis as this sharp increase, this phenomenon of the cycle, on the sharp increase comparing this years prices with last, yes there is a crisis and that could have been avoided by a continual pattern of increasing pricing and not engaging in this competitive cycle but it doesn't . . .

MR. FRAITES

Q: Mr. Block what I'm really asking you is if you have a loss ratio in any of these categories that we're talking about that justifies the drastic increase in premiums that your asking for, because the normal underwriting standards, isn't it true, that losses and loss ratios and good underwriting dictate what you're going to charge the customer.

MR. BLOCK

A: That is correct, and what I was pointing out here is that the loss ratios justify substantial increase in prices.

MR. FRATIES

Q: The loss ratios as compared to the premiums that you've been collecting.

MR. BLOCK

A: That's correct.

MR. FRATIES

Q: During that period of time when you lowered premiums in order to compete for money in the market in order to invest properly.

MR. BLOCK

A: That and the loss ratios that are developing from years prior to that, that's correct.

MR. FRATIES

Q: Well, is there a possibility Mr. Block to come back to my original question, that the increase in premiums that you're asking for, and the general revamping of this tort system that we're concerned with here, is an effort to collect money that has nothing to do with the impact on the insurance industries of the way we settle our torts claims, is rather a matter of trying to get well from an accident that occurred a few years ago due to improper investment practices in the insurance industry.

MR. BLOCK

A: Well, I think what you're asking me to say here is . . .

MR. FRATIES

Q: I'm not asking you to say anything Mr. Block. Really, I'm not trying to be unfriendly, I'm just concerned because I didn't hear a word up to this time about loss ratios. I haven't heard any indication whatsoever for example, of lawyers as a class have suddenly become a disastrous insurance risk, but anytime that you take somebody's insurance premiums and multiply them by ten you've suddenly gone from pig iron under water to dynamite factories so far as the risk that entering and I'm wondering whether we're looking at the risk or whether we're simply getting wealth from an economic disaster in the industry of some sort.

MR. BLOCK

A: There are three factors that are going to be looked at predominantly. One is the current and past level of profitability and you might want to call it the getting well factor. That plays a role in it. Number 2, the actual reported losses and how those are reflected on the books. The loss ratio that you referred to, that plays a predominant factor. And the third is the perceived exposure based on the development of the law. And if an insurance company's told, that it can only write X number of dollars of insurance, which is less than what it would

have had to be writing in the past for any number of reasons, it's going to tend to be more selective and pick those areas where the legal environment and whatnot predicts the higher level of profitability, and if there are areas where it is either unpreditable or predictedly a high exposure they're going to avoid it or price it in order to minimize that exposure.

MR. FRATIES

Q: Well then let me ask you this final question Mr. Block. You've talked about the get well factor. Now talking about loss ratios and predictability, what is there that you could tell us about for example that in terms of predictability that makes you feel what Mr. Sanders, or in terms of his past loss ratio, and I understand that Mr. Libbey hasn't had any losses, would make you feel that it is necessary to increase their premiums by ten fold and six times respectively?

MR. BLOCK

A: Well, if your past incarnation you were in the insurance business you know that you don't . . .

MR. FRATIES

A: I was.

MR. BLOCK

A: that you don't just evaluate whether how you write legal malpractice based on Mr. Libbey's performance or Mr. Sander's performance. You base it on the performance of

the industry as a whole and what the changing legal environment is as to legal malpractice and as the exposur expands, and you find the courts awarding more liberal awards for whatever reason and in changing law, then the rates are going to have to go up to reflect the exposure. That's not a reflection on Mr. Libbey's practice, it's a reflection on the character of the law affecting lawyers exposure to the public.

MR. FRATIES

Q: That's what concerns me because from my vantage point suc as it is on the Board of Governors of this State, of the Bar of the State, I haven't seen anything whatsoever to indicate that there is a massive increase in exposure on the part of lawyers and that's the only aspect of it that I know about. Well I can see one of my colleagues there in the looking wildly around, but the fact remains that there may be some reserve setup, but I haven't heard of any claims being paid out.

MR. BLOCK

A: Well I would invite you to talk to the legal insurance carriers that are providing legal malpractice insurance. I'm sure they can justify their figures in one way or another, it's not my field, so you'll have to talk to them. Fundamentally, that's what taking place.

MR. FRATIES

Q: Thank you.

MR. BLOCK

Thank you.

MR. BRANSON

Q: Mr. Thompson, you had some questions.

MR. THOMPSON

Q: I have a couple of questions for Mr. Block. I'm sorry if we seem to be picking on you, but you have the most figures of anyone, you actually had numbers that we could come to grips with. You were using numbers which we could come to gri with and many of the people talking general principle. M. Wagstaff asked earlier about the loss of the insurance industry over the last couple of years and I believe his question was predicated on this National Insurance Consumer Organization which I took you're not impressed with.

MR. BLOCK

A: Not really.

MR. THOMPSON

Q: Okay. How about Best review, A and Best, that's sort of the regular handbook of the industry isn't it?

MR. BLOCK

A: It tends to be, yes.

MR. THOMPSON

Q: I mean that's what's externally accepted and its industry creature . . .

MR. BLOCK

A: That's right.

MR. THOMPSON

Q: Alright, I'm bringing this information from Best Review o January of this year in the case that the casualty property casualty insurance industry grew by 7.6 billion dollars in net worth last year, 1985.

MR. BLOCK

A: That's probably so.

MR. THOMPSON

Q: And its increased from 35 billion to 71 billion since 1978, in net worth.

MR. BLOCK

A: Yep, it's probably right.

MR. THOMPSON

Q: I'm not an accountant, that sounds to me like you're making a lot of money.

MR. BLOCK

A: Over the long term we have and I would suspect over the long term we'll continue to for the reasons I pointed out

MR. THOMPSON

Q: Okay. See it's difficult for me as an attorney and not a accountant to tie that kind of profitability to the kind of increases we're seeing in the premiums. These increases allegedly are reflecting losses that are increasing your net worth. Your net worth is blowing up like a balloon.

MR. BLOCK

A: Alright, well, there's other things that contribute to net worth, such as contributions of capital and other things that go to increase the net worth, but you know I think all you're doing is emphasizing the point that I made a little earlier during my main presentation. Insurance industry as long as its permitted to exists is going to continue on the long term to make a profit by charging somewhat more than what it takes to cover the losses and you know there may be a period when we didn't do that and it's going to, the premiums are going to go back up to accomplish that end, and yes there's going to be on the long term, growth in capital and there's going to be growth in earnings and all the things that you're citing. That's the natural, that's the natural thing that you could expect in a free enterprise econoomy.

MR. THOMPSON

Q: I just, I don't understand why the net worth is up 7.6 billion when you lost over 5 billion. I don't, I don't - there's a disparity there that I can't come to grips with.

MR. BLOCK

A: Well I'm not entirely sure, I would have to pull the figures up, make sure I'm reading the same ones you are to explain it, but you know first of all we ought to use a consistent basis of accounting and whatever basis you like

we'll just use it consistently throughout. The problem with the MEECO report is it's making up a few of its own amendments to the standard accounting system.

MR. THOMPSON

Q: Well, I was . . .

MR. BLOCK

A: The best figures which you now are harking back to show comparisons over 1978, almost an eight year period, I have to agree with you that business has been profitable over the eight year period and it's going to continue to be profitable hopefully over the next eight to ten year period no matter what happens to the tort system. That's that's the point I was trying to make.

MR. THOMPSON

Q: The comments that you had about the requirements that you report various information and whatnot, are you aware of the problems we've been having in trying to find out something about legal malpractice rates? I mean we've been scratching for months and we can't get any information that any of us can understand?

MR. BLOCK

A: I'm not intimately familiar with the problem you're having, no, and if you'd like me to help you get that information, I'll point you in the right direction, or work with you to get it.

MR. THOMPSON

Q: I think we knew . . . we were pointed in the right directions and we went and got the information that was there, but it doesn't tell us anything.

MR. BLOCK

A: Well, I don't know what you've got, so I can't, you're ahead of me on that, so I just don't know.

MR. THOMPSON

Q: That's the only question I had concerning the rates.

MR. BRANSON

Q: Mr. Block I have a short question, I wonder is it necessary for you to increase rates . . .

MR. BLOCK

A: What's that?

MR. BRANSON

Q: Is it necessary for the insurance industry to increase rates by the multiple that they've been increased? I mean look at somebody that's never had a claim in 20 years and suddenly they're paying six times as much as he paid before, or ten times as much as he paid before. I recognize that you dipped under that line a little bit and you've got to make that up and I guess you want to make it up right away, because these rates seemed to reflect it. You want that money yesterday, you want it back, so you're going to raise these rates, but do you really have to raise them this high? Do you have to raise 200, 300

percent for some insurers and more to get that line that you showed us awhile ago. To get that, you didn't dip 200, 300%, you didn't dip six times, ten times, but those are the kinds of rate increases we seem to be seeing. Is that, do you, maybe I'm, I'm not a statistician, so maybe I'm looking at the wrong kind of measurements, but seems to me you're raising the rates much higher than you have to, to bring yourself back up on line from this momentary swing in your economic situation.

MR. BLOCK

A: Okay. Well let me give you the short answer to your shor question.

MR. BRANSON

Q: Thank you.

MR. BLOCK

A: The fact of the matter is, I mean I, without knowing what policy or what line of insurers you're specifically referring to, there's another phenomenon that perhaps I didn't dwell on quite long enough, but let me just say that there's another aspect to what happens when you have a significant loss in the insurance business and it eats up a lot of capital. You find that the insurance industr then can provide less coverage overall, and demand begins to exceed supply. And whenever that happens, the insurance industry is going to have to make some choices. Do we sell this kind of insurance? Or that kind of

insurance? Do we sell it in this state, or in that state? Do we accept these large risks, or do we accept the pig iron under water type of risks? And when you start to make those choices, what you find is the insurance industry is naturally going to gravitate to the lines and the level of risks, and the classes, and the state's, and the jurisdictions, where profitability is more predictable. More certain. And so, in the area of property insurance, and workers compensation insurance, there is other lines of insurance you're not seeing. Those kinds of increases, you're seeing increases, but you're not seeing the 2, 3, 5 and 10 manifold by the rate increases. You're seeing 20, 30 or 40 percent increases maybe. Now, what happens is, if they use up that capacity writing those kinds of insurance, then what happens, the demand for these other more risky types of coverages become so critical that I would imagine the insurance industry has got to respond like any other limited availability of vendors, they're going to get the prices up to meet the market. And where you have high risk covers, like legal malpractice has become, or medical malpractices in many classes and daycare centers because of phenomenon in their particular industry the insurance industry has got to respond by rapidly increasing those many manifold pies because of the three things that I said. Because of the recoupment problem that was referred

to over here. Because of the loss ratio that Mr. Fraties referred to. And because of the insurance industry's perception prospectively of the legal environment they're buying into.

MR. BRANSON

Q: Thank you. One other question. Dr. McGuire, during the break you asked me to ask you a question, that you felt something had been misstated and I'd like to give you an opportunity to respond to that. It had to do, I believe with a statement made by Mr. Libbey about the Canadian or Ontario insurance experience, and if you'd like to . . .

DR. MCGUIRE

A: Thank you for that opportunity. We were told in the House labor and commerce hearings in Juneau that Iowa and Ontario had passed substantive tort reform and that they hadn't worked there and so it wasn't going to work anywhere else. Well the fact of the matter is that Iowa didn't pass any substantive tort reform and that's why it didn't work. The second fact is that Ontario passed no legislation in 1970. By case law there was a cap on pain and suffering. There were restrictions on punitive damages and addendum clause and restriction on contingent fees and the penalties for frivilous suits. This is case law, it was not legislated and so to say that it was legislated is misleading. Thank you.

MR. BRANSON

Q: I don't remember Mr. Libbey. Did you say this WAS legislative, case law, or you have a . . .

MR. LIBBEY

A: I said it existed in the 1970s. I may have said it was passed, I listened to the same evidence at the hearing that Dr. McGuire did and that was basically my source.

MR. BRANSON

Q: I have been told by our television director Mary Hughes that I have five minutes left, are there any other questions from the Board? Mr. Ditus.

MR. DITUS

Q: Dr. McGuire did you indicate you're not a member of MICA?

DR. MCGUIRE

A: That's true.

MR. DITUS

Q: Have you ever been?

DR. MCGUIRE

A: No. I have never been.

MR. DITUS

Q: As I recall, where you here in 1976?

DR. MCGUIRE

A: I came in 1976 to start private practice.

MR. DITUS

Q: At that time there was a great crisis from the medical profession indicating they had no insurance.

DR. MCGUIRE

A: That's true.

MR. DITUS

Q: And I believe the legislature gave them six million dollars, interest free to set up an insurance fund.

DR. MCGUIRE

A: I'm not sure if they gave it to them or loaned it them.

MR. DITUS

Q: But it was several million, interest free?

DR. MCGUIRE

A: Yes. It's true.

MR. DITUS

Q: And at that time Mr. Block was the commissioner I believe or the director of the Division of Insurance.

DR. MCGUIRE

A: True.

MR. DITUS

Q: And part of this program was that it would be mandatory.

DR. MCGUIRE

A: True.

MR. DITUS

Q: So that every doctor would have to purchase this insurance and create a fund that in time would build up into something that would perhaps take care of this problem forever?

DR. MCGUIRE

A: That was said.

MR. DITUS

Q: And did you initially join, or you never joined?

DR. MCGUIRE

A: I never joined.

MR. DITUS

Q: And then some physicians refused to join?

DR. MCGUIRE

A: They did.

MR. DITUS

Q: And they were threatened that they wouldn't be able to practice if they didn't join?

DR. MCGUIRE

A: They were.

MR. DITUS

Q: And then later the Attorney General withdrew those demands and they were allowed . . . the law was modified to make it voluntary?

DR. MCGUIRE

A: It's true.

MR. DITUS

Q: How many physicians joined MICA when it was set up?

DR. MCGUIRE

A: Roughly 50 percent of the doctors are presently insured.

MR. DITUS

Q: How many were here at the time MICA was first set up?

DR. MCGUIRE

A: I don't know.

MR. DITUS

Q: You know how many were in MICA at the time it was set up? How many?

DR. MCGUIRE

A: I do not know.

MR. DITUS

Q: You know how many phsicians there are in Alaska today?

DR. MCGUIRE

A: There's 625 in private practice.

MR. DITUS

Q: And how many of them belong to MICA today?

DR. MCGUIRE

A: Roughly half.

MR. DITUS

Q: Approximately 300? So half of them saw fit to use the creature that was created by the State and half haven't?

DR. MCGUIRE

A: May I respond to why?

MR. DITUS

Q: Were you ever a member of it?

DR. MCGUIRE

A: May I respond to why I wasn't?

MR. DITUS

Q: You want to respond?

DR. MCGUIRE

A: I'd like to.

MR. DITUS

Q: Why didn't you ever join?

DR. MCGUIRE

A: Because it was claims made insurance. Because it was mandatory and if we ever got on that bandwagon without any competing factor there would be no upper limit to the premiums that we would be forced to pay and would have no choice as to whether we could continue to practice with or without insurance. It was a dead end.

MR. DITUS

Q: Doctor are you familiar with what we call civil rule 68?

DR. MCGUIRE

A: No. I don't think so.

MR. DITUS

Q: Has any lawyer ever explained that to you?

DR. MCGUIRE

A: No.

MR. DITUS

Q: Have you ever been sued for malpractice?

DR. MCGUIRE

A: Yes.

MR. DITUS

Q: And did you have an attorney?

DR. MCGUIRE

A: Yes.

MR. DITUS

Q: Did he indicate to you that if you made an offer of judgment, and that the recovery of the party who was claiming to have been injured, that if he recovered less than that offer, that you would recover from him not only your attorneys fees and expenses and costs of litigation, but that they would also be denied to him and that would be subtracted from any recovery?

DR. MCGUIRE

A: Now that you remind me he told me that. The problem was he didn't have any money so there wasn't anything to recover. And now that you remind me again, I did have another where we got a judgment to recover and the same problem occurred. So in effect . . .

MR. DITUS

Q: You do remember now?

DR. MCGUIRE

A: I remember that he said that was the case yes.

MR. DITUS

Q: You got another attorney I take it you say?

DR. MCGUIRE

A: No, I . . .

MR. DITUS

Q: You had the same one both times?

DR. MCGUIRE

A: I didn't recall that I had heard the rule. I didn't recognize Rule 68. Now that you explained it to me I understand that he told me that was true that if . . .

MR. DITUS

Q: What do you mean when you say we go bare?

DR. MCGUIRE

A: It means we don't have insurance.

MR. DITUS

Q: I mean what is that? What does that mean?

DR. MCGUIRE

A: It means you're not covered by insurance.

MR. DITUS

Q: That you're willing to let, to accept responsibility for any act or omission on your part from your own resources. Say rather than an insurance company carrier?

DR. MCGUIRE

A: True. That the measure of the cost of insurance relative to what one can possibly pay makes it so that there isn't any choice and so therefore you may not like the risk, but you take it, cause you don't have a choice.

MR. BRANSON

Q: Mr. Ditus we have a public member. We have time for one more question. Our public member Andonia Harrison wantec to ask a question.

MS. HARRISON

Q: Well I do have one general question to ask probably to Mr Block. As I sat on this Board I think somewhere in between attorneys and the insurance industry, I am a little bit concerned of some of the things that I hear that perhaps as a community person, or a public person ma have and to give up some rights that I feel that has been a part of our system for such a long time. And I guess m question would be, what is the insurance industry, its compensating, what are they having to give or what are they offering for this exchange?

MR. BLOCK

A: Andonia, the last place I would want to find myself as a citizen is somewhere between lawyers and the insurance industry. This is not a negotiation or a balancing of interests between the insurance industry and the public, or even between the insurance industry and that segment o the public that you would, say, characterize as the victims, or people who are injured. It's not that kind o a situation. And the situation is a balancing between what we, what you're trying to set up as what should be the legitimate entitlements of people who

are injured at the cost of the people who are paying the cost of that, which isn't the insurance industry. We are the funnel, we're the vehicle for getting that job done. But is the public who pays the premium, or the public who pays the loss directly, that pays that cost. And so, what you have to ask yourself then is, what is the proper balancing? Not between injured victims and the insurance industry. But what's the proper balance between injured victims and the rest of society? How much should society be asked to pay for the injuries of someone who's injured. And you know when you say, should they be compensated fully for their medical expenses? I don't think there's anyone in this room would say that they should receive one dime less than hundred percent compensation of their medical expenses. Should they receive compensation for their lost wages during the time they're disabled? I don't think anyone in this room would argue that they should get a dime less than all of that. And you can march on through the, call them the entitlements and evaluate each one of them and say, is this something they should be getting? And what you're hearing are really arguments about noneconomic or redundant compensations. You're hearing about should they receive twice? Should they receive their medical expenses from their medical insurance provider and then be reimbursed again by society through the tort law system,

and get a double recovery? Well, if you think they should, fine. If you think they shouldn't, then we're going to have to modify the system. Do you think there should be unlimited awards for the noneconomic loss? If you think there should be some or all or none. You have to make up your mind. It's a public policy question. An the same with everyone of these. So it's not a negotiation between the victims and the insurance company

MR. BRANSON

Q: Thank you Mr. Block. Thank you all. That was very enlighting.

A RAND NOTE

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Deborah R. Hensler

March 1986

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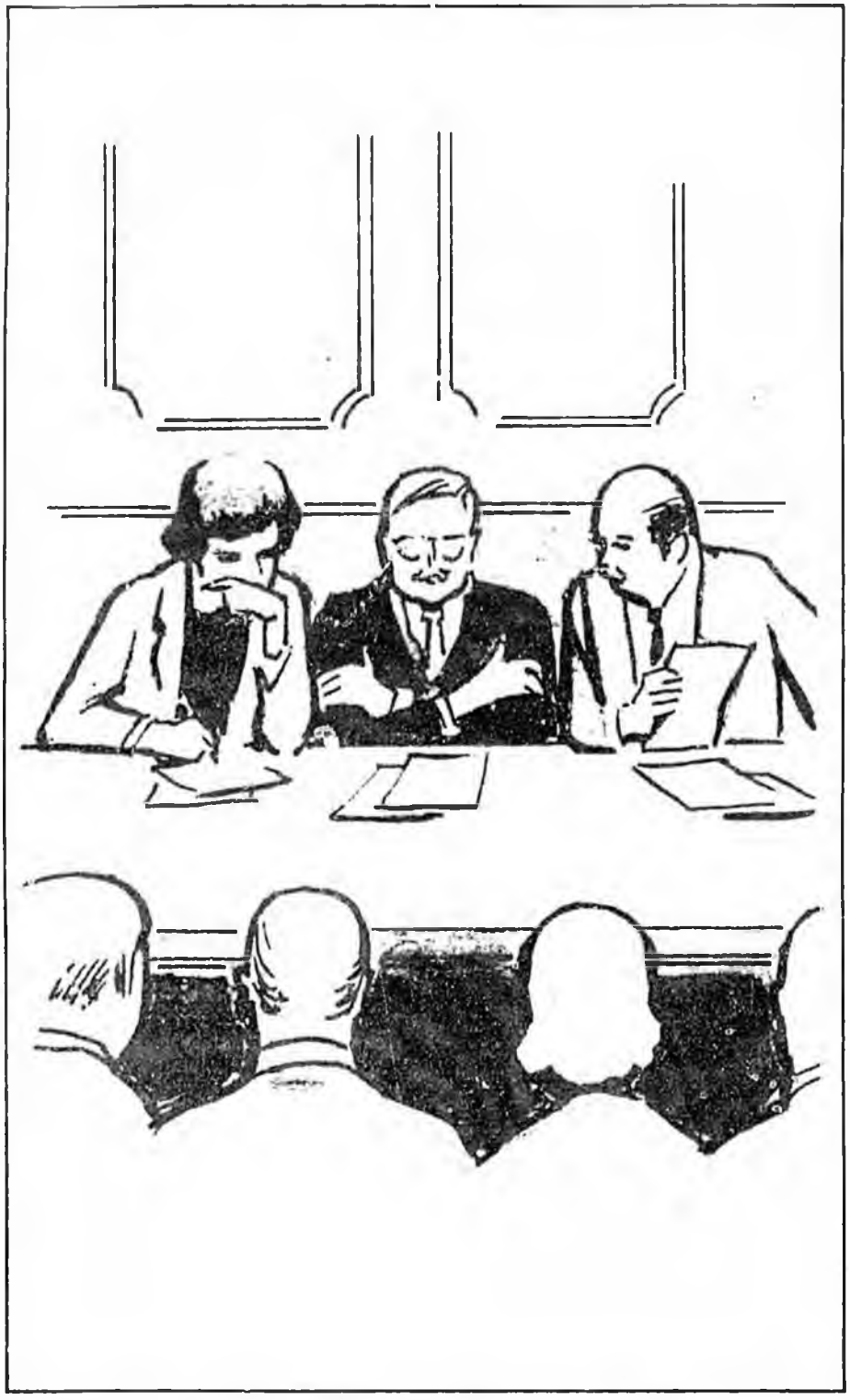
The Institute disseminates the results of its work widely to state and federal officials, legislators, and judges, to the business, consumer affairs, labor, legal, and research communities, and to the general public.

PREFACE

This Note is a reprint of an article that appeared in the February-March, 1986 issue of *Judicature*, Volume 69:5. It summarizes the results of research conducted by The Institute for Civil Justice in the area of court-administered arbitration, describing what we have learned to date and what questions remain to be answered. Other ICJ publications on this subject are listed at the back of this Note and can be obtained from the Institute.



What we know and don't know about court-administered arbitration

by Deborah R. Hensler

Over the past decade, interest in alternative dispute resolution has increased enormously. Initially, attention focused on establishing alternative forums, such as neighborhood justice centers, outside the court system. Proponents of such alternatives believed that they would relieve pressure on the criminal and civil justice systems, while providing a qualitatively better form of dispute processing—one that would be more reflective of community norms and better tailored to the needs of individual disputants. Although many communities now have community-based dispute resolution programs, the available evidence suggests that most disputants do not seek out these programs on their own.[1]

In recent years, as the dispute resolution movement has acquired legitimacy, attention seems to have shifted to the use of alternative dispute resolution procedures within the court system. Most of these alternatives provide some sort of arbitral or mediative process, diverting particular classes of cases from the regular trial court calendar while retaining administrative control over them. Some legislatures view the establishment of such alternatives primarily as a means of reducing judicial workload, and hence, reducing the demand for new judgeships. Judges and court administrators frequently view them as components of a differentiated strategy for caseload management, in which specific categories of cases are assigned to different treatments. Lawyers may view the alternatives as a means of clearing the trial calendar for "more important" litigation. Public and private interest groups may regard alternative dispute resolution procedures as a means of saving litigants' time and money, while perhaps providing a better quality of justice. Just what is meant by "better quality" is often unclear.

Despite the attention that the dispute resolution movement has drawn, there has been little systematic study of its outcomes. It is difficult to determine how much implementation there is to back up the rhetoric, what types of procedures have been established, and what has resulted from different approaches. Thus, it is difficult for policymakers to decide whether they should adopt any of the available approaches and to determine how to design a specific procedure to

maximize its potential for producing benefits to the courts, lawyers and litigants.

Since 1979, the Institute for Civil Justice (ICJ) at the Rand Corporation has been engaged in a program of research on a particular alternative dispute resolution procedure, *court-administered arbitration*, that many court officials and lawyers feel has particular promise for civil lawsuits. In the course of this research we have monitored the spread of court-administered arbitration programs, evaluated the effects of implementing programs, and studied the implications of alternative program designs. Our work has encompassed systematic surveys of court officials, case studies of specific programs surveys of lawyers' and litigants' attitudes toward court arbitration, and technical assistance to local court officials involved in designing or modifying court programs. This article describes what we have learned to date, and what questions remain to be answered.

A profile

Court-administered arbitration programs may be established by statute, by supreme court rule, or by local court rule. However established, all programs authorize trial courts to require arbitration of civil damage suits that fall within a specified jurisdictional limit, as a precondition for placing those suits on the trial calendar. Arbitration results in a verdict that has the force of a court judgment. If any of the parties is dissatisfied with the verdict, however, he or she may reject it and request that the case be calendared for a trial *de novo*. In many programs, appellants who request *de novo* trials are required to reimburse the court for the arbitrators' fees; in addition, in some programs, court costs and attorney fees may be levied on unsuccessful appellants. Such fees are intended to discourage frivolous appeals.

Court-administered arbitration is neither voluntary nor binding.

In all court-administered arbitration programs, cases assigned to arbitration are heard by one or more private attorneys or retired judges who volunteer to serve as arbitrators. Usually, attorneys' time is provided, at least in part, *pro bono*, since they typically receive only a small honorarium for their participation. Arbitration hearings are private, informal, and usually quite brief, the proceedings are generally not recorded, and relaxed rules of evidence prevail. In particular, in lieu of witnesses, medical and other reports are usually sufficient as evidence. In some programs only limited discovery is permitted prior to the hearing. Before they begin the hearing, some arbitrators may ask the parties if they would like assistance in attempting to settle the case, but once a hearing begins, arbitration proceeds as an adjudicative process. The facts of the dispute are heard, albeit in an abbreviated fashion, and the litigants are usually present and may testify. The neutral third party(ies) deliberates and issues a verdict, usually within a few days.

Although court-administered arbitration shares many features with other alternative dispute resolution procedures, it is distinguished from them in several important ways. Unlike private commercial arbitration, court-administered arbitration is neither voluntary nor binding. Unlike a traditional mediator, the arbitrator is not trying to help the disputants fashion a mutually agreeable compromise. And unlike most judicial settlement conferences, there is a true hearing of the case and an opportunity for litigants to participate in that hearing.

The spread of arbitration

The first court-administered arbitration program was established in 1952, in Philadelphia, by amending an 18th century statute that provided for the referral of trial cases to arbitrators. By the 1960s, similar arbitration programs had been established in courts across Pennsylvania, and word of their success in resolving small money damage suits had spread outside the state's limits.[2] In the early 1970s, as many trial courts were struggling to find ways of dealing with sharply increasing civil caseloads, a number of states adopted mandatory arbitration programs patterned after Pennsylvania's.

More recently, during the late 1970s and early 1980s there was a third wave of program adoption. By December 1984, 16 states had authorized mandatory court-administered arbitration programs.[3] A national conference on court-administered arbitration, sponsored by the National Institute of Dispute Resolution in May 1985, may have given further impetus to this recent wave of adoptions; by October 1985, two additional states had passed legislation authorizing mandatory arbitration programs (Illinois and North Carolina).

Early interest in court-administered arbitration was confined to the state court systems. But in 1978, the federal courts decided to experiment with mandatory arbitration in three district courts. Following the formal completion of the experiment, one of the three courts discarded its program while the remaining two maintained theirs. In 1984, under Public Law 98-411, Congress appropriated $500,000 of fiscal year 1985 funds to support a new arbitration initiative in the federal district court system. The new funds are being used to mount mandatory arbitration "demonstrations" in eight districts, bringing the total number of federal courts with authorized systems to ten. Table 1 lists the states and federal district courts that have authorized mandatory court-administered arbitration programs to date.

Once established, arbitration programs have tended to spread within regions from one state to another, and within states from one jurisdiction to another. Table 1 indicates what we learned about the status of local arbitration programs in the course of our last national survey. Based on this information, we estimate that court-administered arbitration programs now exist in approximately 200 of the country's trial courts.

Court-administered arbitration pro-

This article is based in part on a presentation delivered by the author to the First National Conference on Court-Administered Arbitration, sponsored by the National Institute for Dispute Resolution, May, 1985.

1. Merry and Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984).

2. Adler, Hensler, and Nelson, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (Santa Monica, CA: The Rand Corporation, 1983).

3. Ebener and Betancourt, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE (Santa Monica, CA: The Rand Corporation, 1985).

Table 1 Mandatory court-annexed arbitration programs

Jurisdiction	Program title	Authorization	Earliest date authorized	Current scope
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
Illinois	Mandatory Arbitration	State Law—C.C.P. Ch. 110 Part 10A	1985	Rule drafting underway
Michigan	Mediation	Supreme Court Rule (except Wayne County Court); General Court Rule 316	1978	Operational in 28 of 55 circuit courts
Minnesota	Judicial Arbitration	State Law—Minn. Statutes 484.73	1984	Experimental implementation 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 damage 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	Statewide implementation
New Mexico		Supreme Court Rule	1984	Awaiting funding
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
North Carolina	Court-ordered Arbitration	State Enabling Act	1985	Pilot program authorized in 3 districts
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 9 counties
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
Florida—Middle Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
Michigan—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
Missouri—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
New Jersey	Court-annexed Arbitration	Local Rule	1985	Operational
New York—Eastern Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by January 1986
North Carolina—Middle Dist.	Court-annexed Arbitration	Local Rule—Part VI Rules of Practice and Procedure	1984	Operational
Oklahoma—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
Pennsylvania—Eastern Dist.	Court-annexed Arbitration	Local Rule—Civil Procedure 8	1978	Ongoing program
Texas—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational

Source: Ebener, and Betancourt, **Court-Annexed Arbitration: The National Picture** (Santa Monica, CA: The Rand Corporation, 1985), updated to January 1, 1986

grams have also expanded by extending their case jurisdiction: typically, the first arbitration program(s) within a state is established with a monetary jurisdictional limit in the neighborhood of $15,000; over time the limits are increased to $25,000 or more. In recent years, the initial jurisdictional limits of programs have been set higher, especially in the federal district courts. Figure 1 shows the change in monetary jurisdictional limits across courts from 1979 to 1985.

Program objectives

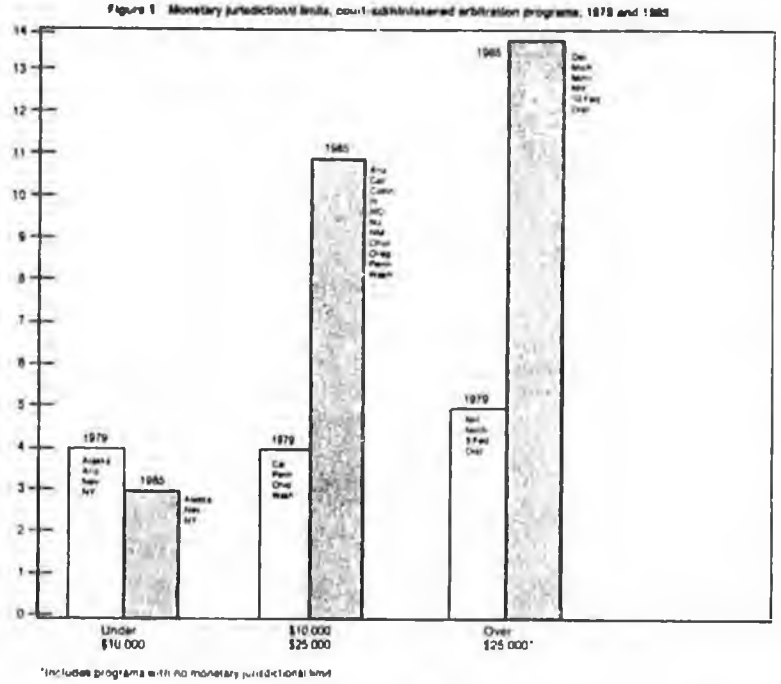
Whatever their historical origins, most court-administered arbitration programs now share the following objectives:

- Reduce congestion on the trial calendar by diverting and dispose of cases through arbitration;
- Reduce (or stabilize) court costs by reducing judicial time spent on the civil caseload;
- Reduce time to disposition by providing an expedited process for arbitration-eligible cases and by removing these cases from the trial queue, thereby reducing time to trial for other cases;
- Reduce litigation costs for parties;
- Improve access to court for diverse users by reducing the time and expense required and by providing a simpler and, perhaps, fairer form of dispute resolution.

Supporters of court-administered arbitration programs do not generally expect to change case outcomes. Instead, the distribution of outcomes prevailing prior to establishing an arbitration program is frequently viewed as the benchmark for assessing arbitration's effect on equity, and a program is viewed as successful if it does not perceptibly alter that distribution to the advantage or disadvantage of any of the major participants in the system.

Evaluating effectiveness

As in the case of other "court reforms" there has been no comprehensive attempt to evaluate court-administered arbitration programs' effectiveness in meeting these objectives. During the past five years, however, the ICJ has conducted evaluations of arbitration programs in California, Pittsburgh (Allegheny County) and Bucks County, Pennsylvania, and Burlington and Union Counties in New Jersey that shed considerable



light on the issue.[4] The empirical data from these studies suggest that court-administered arbitration can contribute significantly to reducing court congestion, costs and delay and to diminishing the financial and emotional costs of litigation for parties. But the data also indicate that arbitration's ability to fulfill this potential is critically dependent on program design and implementation decisions, and on lawyers' responses to arbitration, and that arbitration cannot, by itself, be depended upon to "solve" all of the problems that characterize contemporary civil litigation.

Reducing court congestion. In both California and Pittsburgh, about 50 per cent of civil money suits (including personal injury, property damage and contract disputes) are diverted to arbitration; in Bucks County the percentage is closer to 90 per cent. The percentage of cases diverted by any particular program is dependent on the program's eligibility rules, the proportion of cases that are eligible under those rules and the procedures that are used for determining eligibility. Some state program rules permit so few cases to be diverted to arbitration that local jurisdictions have been reluctant to invest resources in program implementation. Some assignment procedures provide incentives and opportunities for parties and their lawyers to bypass arbitration and obtain placement on the trial calendar. And in every court it is possible for arbitration cases to appear on the court's trial calendar after arbitration is completed, as a result of the trial *de novo* process.

It is clear, however, that it is possible for any court to develop rules and procedures that will result in the diversion of a substantial fraction of its civil money suits and it is likely (as we shall see below) that most of these cases can be permanently diverted. Policymakers should note, though, that a court's total civil damage caseload may only represent a modest fraction of its overall caseload which will generally include many criminal cases, family law cases, equitable disputes, and other matters. As long as arbitration is considered appropriate only for civil damage suits, and only for the lower-value cases among these,[5] it may ease court congestion but cannot eliminate it.

Reducing court costs. Cost savings due to arbitration depend on three factors: how much the court would spend on arbitration-eligible cases in the absence of an arbitration program, how much it costs to administer the arbitration program itself, and how many cases require court attention after arbitration. Unfortunately, most courts cannot provide reliable data on all three factors, making estimation of savings due to arbitration extremely problematic.

The best data available relate to program administration costs. These generally have two components: costs to process cases (determining eligibility, notifying parties of assignment to arbitration, selecting arbitrators to hear specific cases, etc.) and fees to arbitrators. How much it costs to administer an arbitration program depends critically on program design and implementation decisions. California's statutory requirement that the court assess whether a case is eligible for arbitration placed a new burden on judges' time. In addition, a complex procedure that provides for the parties' attorneys to participate in arbitrator selection adds to the tasks that must be carried out by the program's administrative staff. An honorarium of $150 per day paid to the single arbitrator who hears each case further drives up the cost of the program. A recent Judicial Council report estimated that the cost to process a case through arbitration in California in Fiscal Year 1982 was about $123 for each case assigned to the program, and about $299 for each case actually heard by an arbitrator.[6] These estimates do not include the cost of judge time allocated to determining arbitration eligibility.

In Pittsburgh, when the plaintiff's attorney files a case, he or she is asked whether it is eligible for arbitration. If it is declared eligible, the court clerk automatically assigns it to the program and schedules a hearing date for it. Arbitrators are assigned to hear cases on the day of the hearing, using a pragmatic approach to achieve a roughly random assignment. Three-person panels hear each case, but in a single day they are likely to hear four or five cases. Although each arbitrator is paid $100 per day, the average arbitrator fee per case works out to about $65. When

4. The California study, conducted during the first year of program implementation, focused on arbitration's potential for cutting congestion, court costs and delay (Hensler, Lipson, Rolph, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (Santa Monica, CA: The Rand Corporation, 1981)). The Pittsburgh study focused on the effects of arbitration on litigants (Adler et al., *supra* n. 2). Bucks County is one of three sites in an on-going ICJ study of litigants' perceptions of "procedural justice." Burlington and Union Counties were pilot sites for the New Jersey arbitration program; the ICJ collaborated with the Administrative Office of the New Jersey Court in designing and analysing surveys of lawyers and litigants (see Hensler, REFORMING THE CIVIL LITIGATION PROCESS: HOW COURT ARBITRATION MAY HELP (Santa Monica, CA: The Rand Corporation, 1984)).

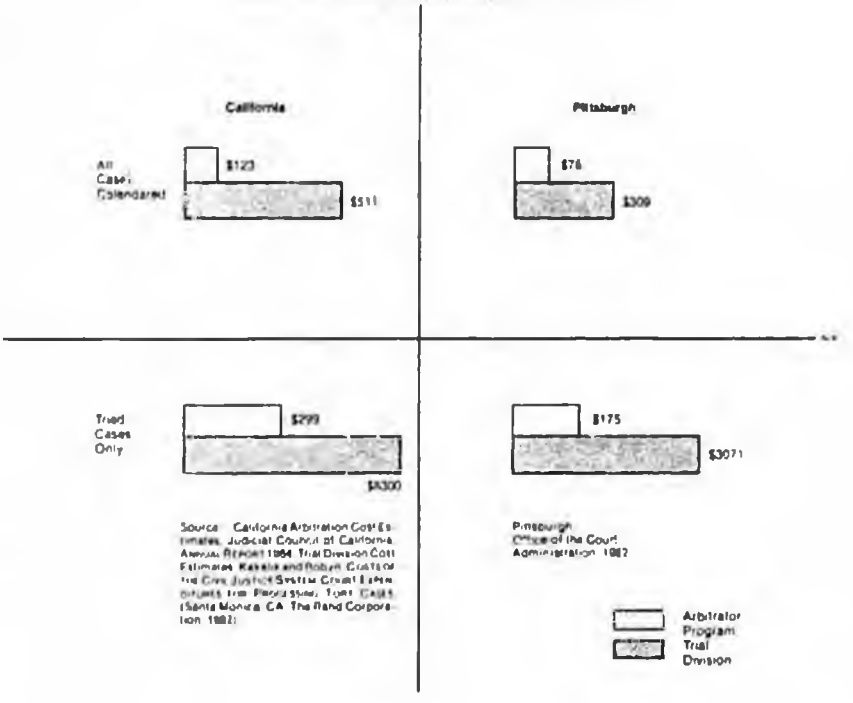
5. This assumption is being challenged in some locales which are considering broader jurisdiction for arbitration programs.

6. Judicial Council of California, ANNUAL REPORT, 1984.

fee reimbursements from appellants are taken into account, this amount is reduced even further. The average cost to process a case diverted to arbitration in Pittsburgh in 1982 was about $76 for each case assigned to the program, and about $175 for each case heard.[7]

Figure 2 compares the costs of processing arbitration cases to the costs of processing non-arbitration cases that remain on the civil trial calendar. In the upper section of the figure, we see the cost differential between the average per case processing costs for California and Pittsburgh. In the lower section, we have broken out the costs of those cases "tried" (either by arbitrators or jury). These comparisons suggest that, overall, arbitration offers a three- to five-fold savings over traditional civil case processing. The difference in the average cost to "try" a case in arbitration and the average cost to try a case before a jury is many times greater.

Figure 2 Comparative case processing costs (per case)



The cost differentials shown in Figure 2 may be deceptive, however, if a substantial fraction of the arbitrated cases turn up on the trial calendar thereafter, as a result of *de novo* appeals. It is reasonable to assume that cost savings will be substantial where appeal rates are low, and smaller or non-existent where they are high. (Indeed, one can imagine situations in which arbitration programs would actually increase the net costs of processing civil cases.)[8]

Across the country, *de novo* appeal rates vary substantially from program to program. In California, the rate of appeal has been running in the neighborhood of 50 per cent. In the older Pennsylvania programs it ranges between 15 per cent and 25 per cent of all cases heard, and some court administrators elsewhere report even lower appeal rates.[9] But the majority of appealed cases in all jurisdictions settle without trial. In California, a Judicial Council docket study in a sample of four Superior Courts found that the rate of trial after arbitration was about seven per cent.[10] In Pittsburgh, the ICJ found that three-quarters of all cases that were appealed settled without trial.[11] It is an open question whether the costs to courts of disposing of these *de novo* appeals generally outweigh the savings attributable to arbitration.

Expediting disposition. Success in expediting cases through arbitration depends on formal program rules and informal implementation practices. When courts want to use arbitration to speed case disposition, when they have the resources available to process cases efficiently, they are not unduly constrained by statutory or other formal limits on the speed of disposition, and when attorneys cooperate in making the program work, arbitration can result in speedy case disposition.

In California, we found that arbitration's effectiveness in reducing time to disposition was constrained by the availability of judge time to assess case value, by statutory requirements that established relatively lengthy time intervals for different stages of the process, by the practice of placing administrative control over the hearing process in the arbitrators' hands, and by the lack of court resources to monitor the arbitrators' performance in carrying out these responsibilities. As a result of these factors, we found that in some courts arbitration did little to expedite case resolution, while in others it *increased* time to disposition. Time to disposition by arbitration varied between nine months and more than three years.

In Pittsburgh, on the other hand, the practice of scheduling cases for arbitration at the time of filing, a policy of encouraging all active bar members, regardless of type or length of experience, to serve as arbitrators, and a centralized form of program administration combine to expedite case processing. The average time to reach arbitration hearing in Pittsburgh is three months from the filing date; awards are decided immediately after the hearings and sent to the parties at the close of business each hearing day. Other Pennsylvania courts have achieved similar results: in Philadelphia in recent years cases have reached arbitration hearings within eight months of filing. In Bucks County, cases are heard within four months of the filing of a certificate of readiness.

Whether speeding cases through arbitration actually reduces the time to disposition for cases on the regular trial calendar is still an open question. The factors that affect time to disposition generally are so complex and so difficult to measure that there has yet to be an empirical analysis of the connection between expediting arbitration cases and expediting regular jury trial cases.

Reducing costs to litigants. Some supporters of court-administered arbitra-

7. Cost information for 1982 provided to the author by Mr. Charles Starrett, Allegheny County Court Administrator.

8. Hensler et al., *supra* n. 4, at 62-67.

9. In most programs, 25 to 50 per cent of the cases assigned to arbitration settle before the hearing date. Thus, the per cent of appeals as a fraction of all cases assigned to the program may be as little as 5 to 10 per cent.

10. *Supra* n. 6, at 9.

11. *Supra* n. 2, at 46.

tion assume that it will produce substantial cost savings for litigants. Our research suggests that such savings are possible, but whether they are realized depends on the behavior of lawyers in response to arbitration.

Individual plaintiffs' costs to litigate generally have three components: the value of their own time spent on the process, lawyers' fees, and expert witness and other direct expenses. In Pittsburgh and New Jersey we found that litigants on average spent 1 to 1½ days preparing for and participating in arbitration hearings. As might be expected given liberal evidentiary requirements, they spent less than $50 on expert witness fees and other direct expenses.

Lawyers' fees were by far the largest component of litigants' expenses. Plaintiffs in Pittsburgh either had a traditional contingent fee arrangement with their lawyer (typically paying one-third the amount obtained in arbitration or settlement) or paid a flat fee to the lawyer (usually $250) for preparing the case and representing them at the hearing. Lawyers offering flat fee arrangements to clients usually conducted a high volume arbitration practice, representing several different clients at hearings in the course of a single morning. This type of practice was made possible by the brief duration of the hearings (45 minutes on average) and tightly-administered hearing schedule. Efficient use of attorney time was also reflected in hourly rate defense costs of approximately $400 per arbitrated case.

In California and New Jersey, on the other hand, most plaintiff and defense lawyers have apparently not changed their billing practices as a result of arbitration.[12] Thus, any cost savings due to the streamlined arbitration procedure may be passed on to defendants, who are usually billed on an hourly rate basis, but not to plaintiffs who retain lawyers on a contingent fee basis.[13]

Even if fee arrangements are not substantially revised litigants on both sides should save when their cases are arbitrated rather than tried, because they will generally spend less of their own time in arbitration than at trial, and they will pay less in expert witness fees and other direct expenses. In the absence of arbitration programs, however, most civil money damage suits are not tried, but settled. The difference between litigants' costs to arbitrate cases and their costs to settle these cases is not yet known.[14] Current ICJ research comparing litigants' outcomes when different modes of disposition are used may shed some light on this question.

Access to justice

When considering the adoption of court-annexed arbitration programs, some policymakers assume that litigants must benefit from the provision of a rapid, inexpensive form of dispute resolution. Others, however, are concerned that arbitration, with its abbreviated procedures and rapidly decided outcomes, will provide "second-class" justice. Our study of court arbitration in Pittsburgh systematically examined what litigants obtain from the program and how they feel about it. We investigated the pattern of program usage, the distribution of arbitration awards, and the role of the appeals process. We also measured litigants' satisfaction with arbitration, and, in particular, their views of the fairness of the arbitration procedure. More recently, we have been able to replicate some of these analyses among New Jersey and Bucks County litigants.

Based on the results of these analyses, we have concluded that court-administered arbitration delivers generally acceptable outcomes and is viewed by most individual litigants as a fair way of resolving civil disputes. Attorneys sometimes demur at court arbitration's departure from traditional trial norms, but most view arbitration as an acceptable procedure for resolving smaller civil damage suits.

Program usage. In Pittsburgh, we found that the program was used by a diverse set of litigants, with a broad range of disputes involving money. Arbitrated cases included consumer disputes (sometimes brought by the consumer, sometimes brought by a business person seeking payment), contract disputes, automobile and other property damage cases, and personal injury cases. The amount of money involved in these cases was generally less than $5000. (At the time of our study the jurisdictional limit in Pittsburgh was $10,000.) The types of disputants included private citizens, small and large businesses, and public agencies. Our Bucks County sample was limited to personal injury cases, although the program handles all money damage suits worth $20,000 or less. Preliminary data analyses in Bucks indicate that arbitration litigants are a cross-section of that county's population.

Case outcomes. About 80 per cent of the Pittsburgh plaintiffs whose cases we sampled obtained some amount of compensation from the arbitrators. Burlington County, New Jersey pilot program data indicate a similarly high level of plaintiff victories. Of course, in both Pittsburgh and Burlington many plaintiffs obtained lower awards than the amount they originally claimed. In Pittsburgh, there was some variation in the relative success of plaintiffs (i.e. award amount compared to prayer) but we could find no evidence that any particular class of litigants or suits is disadvantaged by arbitration. The only exception in this finding regards *pro se* litigants: surprisingly numerous in Pittsburgh, these litigants appeared to be systematically disadvantaged when they faced represented opponents.

Outcomes of appeals. About 25 per cent of the arbitrated cases in our Pittsburgh sample were appealed, but most of the appealed cases were settled without further court intervention. After examining the outcomes of settlement and trial after appeal, we concluded that the appeal mechanism serves its intended purpose as a corrective device for individual arbitration errors or misjudgments, while preserving the pattern of outcomes delivered by the arbitrators. We also concluded that the costs of appealing were rarely worth the mone-

12. It may be that volume arbitration practices of the sort we observed in Pittsburgh take many years to develop.

13. Insurance company representatives frequently assert that lengthy court calendars increase their transaction costs for small cases. If arbitration reduces time to disposition for these cases, these defendants may obtain additional cost savings as a result.

14. In many jurisdictions, plaintiff lawyers charge a somewhat lower contingent fee for settling a case rather than trying it, for example, 33 per cent compared to 40 per cent. In California and perhaps elsewhere plaintiff lawyers may treat the arbitration hearing as a trial, charging the same percentage of the amount won if a case is arbitrated as they would if it had been tried. Since many cases that reach arbitration hearings formerly would have been settled, plaintiffs could actually be paying *increased* fees with the advent of arbitration. Of course, if outcomes at arbitration are significantly better for plaintiffs then plaintiffs might nevertheless obtain a net benefit.

tary gain obtained post arbitration.

Litigants' perceptions. We have now measured litigant satisfaction with arbitration programs in four different jurisdictions, with substantially different program rules. In each jurisdiction, the overwhelming majority of individual litigants whom we surveyed were quite satisfied with the program. Although winners are generally more satisfied than losers, a majority of the latter are at least somewhat satisfied with the program. This high level of satisfaction is apparently attributable to litigants' satisfaction with the arbitration *procedure* itself. We have found that most individual litigants have a simple definition of what constitutes a fair dispute resolution procedure: they want an opportunity to have their cases heard and decided by an impartial third party. In courts that offer an arbitration alternative, unlike most metropolitan courts in which an expensive and time-consuming trial is the only alternative to settlement, litigants with small suits are accorded this opportunity. Most find it a fair process.

Program design variations

As should be clear from the discussion above, although all court-administered arbitration programs share certain key features, program design varies substantially. Even within a state, where all programs are operating under the same authorizing statute, there may be considerable variation from jurisdiction to jurisdiction. Typically, programs are designed in part through legislative decisionmaking (with inputs from state judicial councils or court administrative offices, from the bar, and from other lobbying organizations) and in part through the formal court rulemaking process. Often special bench and bar committees are established locally as well to draft rules of local program operation.

Historically, there was a tendency for these groups to fashion new programs after previously established programs in neighboring states and jurisdictions. Now that information about program design is more readily available, the process of program design may be somewhat more systematic. But ensuring that a program is acceptable to key constituencies—lawyers, insurance companies, public advocates—is still a key component of program design. Our evaluation research suggests that there are many ways of designing court-administered arbitration programs to meet their objectives.

ICJ researchers have identified a small number of key decisions that must be made in designing and implementing court-administered arbitration programs. We discuss the range of options open to policymakers and administrators in making these decisions, and their implications for program outcomes, in a manual entitled *Introducing Court Arbitration: A Policymaker's Guide.*[15] Below I briefly summarize this material, highlighting the most significant design features.

What cases should be eligible for the program? Most programs are limited to money damage suits that fall below a specified dollar amount. The higher a program's jurisdictional limit, the greater the proportion of the caseload that may be diverted from the trial calendar, and the greater the potential for reducing congestion on that calendar.

Who should determine eligibility? In the normal court routine, the court does not attempt to determine the dollar value of a suit, and the plaintiff's own assessment has a strategic purpose, which raises questions about its accuracy. If court personnel assess case value, they can be assured of diverting most eligible cases to arbitration, but the time they must take to do so increases court costs. If litigants (e.g., the plaintiff's attorney) assess eligibility, a considerable number of cases may evade the program[16] and be placed on the trial list, but the court will be spared additional expense.

What qualifications should be required of those who volunteer to serve as arbitrators? If arbitrators are required to have extensive and/or specialized experience (e.g., at least five years of personal injury trial experience), then they are more likely to deliver awards that are satisfactory to other practitioners. But the candidate pool will be limited, and the supply of arbitrators may therefore be insufficient to hear cases in a timely fashion. If qualifications are loose, the supply will be greater but the decisions may be less acceptable, leading to more appeals for trial.

How many arbitrators should decide a case? If only one arbitrator is required to hear each case, it will be easier to administer the program and easier to meet the demand for volunteer arbitrators. But attorneys may be more inclined to question the decision of a single arbitrator, leading to a higher rate of appeal. If three or five arbitrators are required, the task of administering the program will be greater, and the per case costs for arbitrator fees may be more, but practitioners may be more inclined to accept the arbitration outcome.[17]

Who should select the arbitrators to hear each case? If the attorneys have some say in the selection, they may be more inclined to accept the award, but providing for attorney participation may require a cumbersome and time-consuming process. If the court is in charge of assigning the arbitrators, the process may be expedited but litigant and attorney satisfaction may decrease.

Where should the hearings be held? If they are held outside the courthouse, there is no need to set aside space for them, and litigants will be spared the possible emotional strain of coming into court. But it will be more difficult for the court to monitor the scheduling of hearings, and the arbitrators may grow lax in adhering to the court's guidelines for timely disposition. If the hearings are held in the courthouse, court personnel can maintain control over the schedule and the litigants may be more inclined to feel they have had their "day in court." Rather than moving cases "out of the courthouse," however, the court will simply have set up another specialized division to resolve cases.

Should there be a financial disincentive for appeal? If there is no disincentive, the rate of appeals may be so high as to wipe out any reductions in the size of the trial list due to case diversion. If the disincentive is too high, achieving political acceptance of the program will be difficult, and the disincentive itself may ultimately be declared an unconstitutional burden on the right to trial.

Who should fund the arbitration program? If a legislature requires courts to adopt the program, perhaps the state

15. Rolph, INTRODUCING COURT ARBITRATION: A POLICYMAKER'S GUIDE (Santa Monica, CA: The Rand Corporation 1984).

16. Plaintiffs' attorneys may bypass arbitration because they wish to delay setting a value on the claim, because they want to send a signal to the defense regarding the strength of their position, or because they object to the program per se.

17. Multiple-arbitrator panels are often constructed to represent plaintiff and defense perspectives, which may lead to greater acceptance of their decision.

should pay for the additional administrative expenses. (Traditionally, most trial court expenses are borne by county governments.) But if the program effectively reduces trial court workload, the court should experience savings in the trial division that it can divert to supporting the arbitration program and it may, over the long run, actually experience a reduction in total court costs. Alternatively, if arbitration provides litigants with a more expeditious and less expensive means of resolving their disputes, perhaps they should pay a special arbitration fee to support the program. If the court requires such a payment, however, it is put in the perhaps questionable position of charging litigants with small-value suits a higher fee to file their cases than is charged for filing higher-value, trial-bound cases.

Necessary information

With the multiplication of research monographs and conferences on court-administered arbitration, judicial policymakers may find themselves in the position of having more assistance in designing and implementing programs than they can handle. But it is too early to conclude that we understand the full ramifications of instituting mandatory arbitration requirements. As pressure from legislatures and interest groups to adopt and expand arbitration mounts, I believe we need to give more attention to answering the following questions.

What kinds of cases are not good candidates for arbitration? As jurisdictions become comfortable with arbitration, there is often a move to expand the jurisdictional limits of a program, either by incorporating new kinds of cases, or raising the monetary limits on money damage suits, or both. Is it sensible to subject all kinds of civil suits to mandatory court arbitration? In my conversations with court officials and practitioners, I frequently ask: "What kinds of cases do you think are inappropriate for arbitration?" The usual reply is that some cases are simply too complicated to be amenable to a streamlined process: they require extensive discovery, briefing of the issues and the full panoply of a court trial. Complicated cases, I am told, occur with some frequency among smaller value monetary claims and there are simple cases in which large amounts of money are at stake. Should we relegate all small cases to alternative dispute resolution mechanisms, while preserving more expensive traditional procedures for big stakes cases whether or not they "need" them? We need to do more hard thinking, and perhaps some careful experimentation, regarding this question.

What factors affect decisions to appeal? Most judicial policymakers feel that some financial disincentives are necessary to discourage frivolous appeals from arbitration but that it is improper (and probably infeasible) to require that litigants pay substantial amounts of money as a precondition for appeal. We know very little about how the average litigant decides whether to appeal, or indeed whether the lawyer or the litigant plays the primary role. Where appeal rates from arbitration are low, we tend to assume that most litigants find the arbitration verdicts roughly acceptable; instead, they may simply decide that they have no other option but to "lump it."[18] Institutional litigants presumably assess the costs of appeal somewhat differently; even if these costs outweigh the amount at stake in the individual case, they may take appeals as a matter of policy, in order to "keep the system honest"—that is, operating in a fashion that is acceptable to them. Understanding the role of appeals in the arbitration litigation process is important to understanding the equity implications of instituting mandatory arbitration programs.

How does arbitration affect settlement? Much of the discussion and research about arbitration focuses on differences between arbitration and trial, but most cases that are currently arbitration-eligible have little or no likelihood of being tried. The real significance of instituting arbitration may lie in its effects on the settlement process. How does arbitration affect lawyers' and insurers' negotiation strategies? How does it affect the timing of settlements? Perhaps most important, how does it affect settlement outcomes? We need to focus more attention on these questions as well.

How does arbitration affect the practice of law? Finally, underlying all these questions is perhaps the most important of all, how does arbitration affect what lawyers do? Lawyers in many jurisdictions are understandably wary of arbitration programs. Some believe mandatory arbitration represents a small but dangerous step away from the right to jury trial. Some see it as moving further in the direction of production line litigation that is the antithesis of the individually-crafted form of lawyering that they learned at school. Underlying many lawyers' discomfort with arbitration is a concern about its impact on their fees. How lawyers modify their behavior in the light of arbitration may ultimately determine the future of this form of alternative dispute resolution. □

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18. Felstiner, Abel, and Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 Law & Soc'y Rev. 631 (1980-81).

Other ICJ Publications

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LIMITING LIABILITY FOR AUTOMOBILE ACCIDENTS: ARE NO-FAULT TORT THRESHOLDS EFFECTIVE?

James K. Hammitt, John E. Rolph

October 1985

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PREFACE

This Note is a reprint of an article that appeared in *Law & Policy*, Volume 7:4, 1985. Using insurance claims data, the authors analyze the effectiveness of no-fault tort thresholds in limiting the number of automobile accident victims who seek compensation through the tort system.

The analysis contained in this Note is described in greater detail in the first two volumes of a four-volume study on automobile accident compensation, conducted by the authors for The Institute for Civil Justice. These four reports are included in a listing of current ICJ publications at the back of this Note and can be obtained from the Institute.

Limiting Liability for Automobile Accidents: Are No-Fault Tort Thresholds Effective?

JAMES K. HAMMITT and JOHN E. ROLPH*

"No-fault" automobile insurance plans are designed to supplant the tort system by requiring motorists to purchase no-fault insurance and allowing victims to file liability insurance claims and tort suits only if their injuries exceed a legislated "tort threshold." While thresholds vary among states, many are satisfied if the victim incurs medical expenses as low as a few hundred dollars. Using insurance claims data, we estimate the effectiveness of several states' thresholds. We find that tort thresholds are surprisingly effective: modest tort thresholds reduce the number of successful tort claimants by half, and the strictest thresholds may exclude nine-tenths of potential claimants. Moreover, we find little evidence of claimants "padding" their claims to exceed the dollar thresholds.

No-fault compensation plans for automobile accident victims were developed to replace the traditional tort liability system. Early no-fault advocates criticized the tort system under which the motorist who is legally at fault or his liability insurance company compensates the accident victims as providing "too little, too late, unfairly allocated, at wasteful cost, and through means that promote dishonesty and disrespect for the law." (Keeton and O'Connell, 1965: 3). In contrast, no-fault plans establish mandatory "no-fault" insurance that reimburses the policyholder, his passengers, and any pedestrians he may injure, without regard to who "caused" the accident. No-fault insurance is intended to provide quicker and more certain compensation, at less cost, because there is no need to ascertain legal responsibility for the accident.

No state has yet adopted a no-fault plan that totally replaces the tort system. All no-fault states attempt to prevent certain automobile accident victims—those with less severe injuries—from using the tort law to obtain compensation, but allow more seriously injured victims to pursue tort compensation in addition to collecting no-fault insurance benefits. The two classes of victims are defined by whether their injuries exceed a "tort threshold," which may be either a "dollar" or "verbal" threshold.[1]

Under a dollar tort threshold, accident victims are not entitled to tort compensation unless their medical expenses exceed the threshold value.

* The Institute for Civil Justice, The Rand Corporation. We thank Joseph Ferreira, Robert Houchens, Sandra Polin, Timothy Quinn, Donald Segraves and three anonymous reviewers for their contributions to this research.

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Thresholds range from $200 (net of hospital and diagnostic expenses) in New Jersey to $4,000 in Minnesota. To breech a verbal threshold, victims must have suffered one of a specified set of injuries. Verbal thresholds are typically quite stringent, requiring permanent and significant disfigurement, disability, or death. In a few states, however, the verbal threshold is satisfied by less serious injuries: a fracture (Massachusetts), or any injury not confined to soft tissue (New Jersey).[2]

All states with dollar thresholds also have verbal thresholds, but three no-fault states (Florida, Michigan and New York) have only verbal thresholds. In these states, regardless of medical expenses incurred, a victim is not entitled to tort compensation unless his injuries exceed the stringent verbal threshold.

Whether an accident victim is entitled to tort compensation or must be satisfied with no-fault insurance benefits can have a substantial effect on the amount of compensation he or she receives. No-fault insurance pays only for a victim's economic losses (called "special damages"), primarily medical expenses and lost wages.[3] In contrast, under tort law the victim can potentially collect compensation for "pain and suffering" and other nonpecuniary losses (called "general damages") as well as for special damages. Although payments for general damages differ widely between accident victims, they often exceed the victim's special damages. For automobile accident victims with $500 in medical expenses the median payment for general damages in our data (described below) is about $1,000. For those with $5,000 in medical expenses the median payment for general damages is about $6,500. (Hammitt, 1985, see figure 1.) Thus the lure of compensation for general damages provides a substantial incentive for a victim to seek tort compensation if another motorist is arguably liable for his injuries.

Because payments for general damages can be so large relative to the compensation a victim can obtain from no-fault insurance, one would expect accident victims to file lawsuits or claims against another driver's liability insurance in all but minor cases. Indeed, one might expect that some victims would attempt to circumvent the tort threshold either by fraudulently claiming medical expenses in excess of the dollar threshold, or by incurring additional, unnecessary, medical treatment in order to surmount the threshold. In some cases accident victims do receive liability insurance payments, including compensation for general damages, even though their injuries may not have exceeded the tort threshold. These payments are made because almost all automobile liability claims are settled without recourse to trial. In cases where it is not clear whether a claimant could prove that his injuries exceed the tort threshold the liability insurer may offer some payment to settle the claim and avoid further expense.

Because the possible gain in seeking compensation from a liability insurer is so large, there is some debate about how effectively tort thresholds, especially low-to-moderate dollar thresholds, reduce the

number of victims who file liability claims.[4] In this article we present an analysis of insurance claims data designed to address this issue. In the states studied, we find that even relatively weak thresholds appear to prevent a large proportion of accident victims from obtaining tort compensation. For example, we estimate that the $500 tort threshold in Massachusetts reduces the number of victims who are paid under automobile liability insurance there by more than half. Stricter tort thresholds, such as the verbal one in Michigan, appear to prevent about 90 percent of auto accident victims from obtaining tort compensation. We surmise that the much smaller chance of recovering compensation if one's injuries do not exceed the tort threshold discourage large numbers of victims from filing liability claims and lawsuits. Interestingly, we find no evidence to suggest that victims systematically exaggerate their expenses, or incur additional medical expenses, to surmount dollar tort thresholds.

We turn now to describing the closed automobile insurance claims data that we analyze. We then describe our two methods for estimating the proportion of automobile accident victims excluded from tort claims by the tort threshold. Finally we present our analysis of claims to determine whether they have been padded or exaggerated in an effort to surmount the tort threshold.

DATA

The data we analyze consists of claims paid by automobile insurers under the Bodily Injury (BI) and Personal Injury Protection (PIP) coverages. BI insurance is liability insurance; it pays damages to a third party (the accident victim) for which the policyholder is liable. PIP insurance is no-fault insurance; it pays benefits to the policyholder, his passengers, and pedestrians without regard to legal fault.

The data were collected by the All-Industry Research Advisory Council (AIRAC), an insurance-industry association, and include all claims that were closed with some payment to the claimant by the participating insurers during a two-week period in autumn, 1977; claims that were denied payment are not included. At the time of the survey, the twenty-nine participating insurers had a 62 percent share of the national market for private passenger automobile insurance. For each closed claim, insurance company claims adjusters and supervisors provided detailed information on the claimant's personal characteristics, medical and other economic losses, type and severity of injury, and the payment made by the insurer. The data are described more fully in AIRAC (1979).

As part of a study of compensation under tort and no-fault rules (Hammitt, 1985; see also Rolph et al., 1985), we selected four no-fault states for analysis—Massachusetts, New Jersey, Pennsylvania and Michigan. Generalization of results from one state to another is always problematic; however, based on the frequency with which claimants retain attorneys and file

Table 1. Cumulative Distribution of Total Payments

Payment Less than	Personal Injury Protection		Bodily Injury	
	Michigan	Massachusetts*	California	Massachusetts
	Percentage of Claimants Paid			
$100	34	40	12	6
$300	59	65	29	13
$500	69	72	37	18
$1,000	80	82	51	28
$5,000	95	100	89	74
$15,000	98	100	98	93
$50,000	100	100	100	100
	Percentage of Dollars Paid			
$100	1	4	0	0
$300	5	12	1	0
$500	8	18	3	1
$1,000	15	32	7	2
$5,000	42	94	42	32
$15,000	64	100	70	64
$50,000	100	100	88	100

* PIP policies in Massachusetts are required to provide for medical benefits of at least $2,000; additional coverage is available as an option.

lawsuits, these four states appear to be more litigious or claims-conscious than most other states. Consequently the proportions of accident victims that the thresholds prevent from recovering tort compensation in these states is likely to be smaller than the proportion that similar thresholds would bar in other, less claims-conscious, states.[5] There may be other states however, that are even more claims-conscious than the four we analyze. For example, knowledgeable insurance industry followers assert that the original $1000 tort threshold in Florida had almost no effect on the number of BI claims paid there; it was not until Florida established an entirely verbal threshold, and an anti-fraud bureau, that the number of victims receiving tort compensation declined (Personal communication; see also O'Connell, 1977: 159–60, and U.S. Dept. of Transportation, 1977). Thus there may be some states where our conclusions do not hold. However, we believe our analysis is based on assumptions that apply in all but exceptional circumstances.

Table 1 presents an overview of claims payments under both PIP and BI insurance, for three representative states. The majority of claims are quite modest; as shown in the first panel of the table, more than half the PIP claimants are paid less than $300, while about four-fifths receive less than $1,000. BI payments are somewhat larger, because they usually include payments for general damages in addition to economic loss. Even so, half of the California BI payments are less than $1,000. The Massachusetts BI payments are much higher than the California payments, because the Massachusetts tort threshold excludes claimants with relatively mild injuries.

As a result, only 28 percent of Massachusetts BI payments are less than $1,000.

The second panel of the table reveals that the distribution of dollars paid by insurers is dominated by the larger claims. While most claims payments are modest, these account for only a small share of total payments. As shown in the second panel, both the two percent of Michigan PIP claimants and of California BI claimants who were paid more than $15,000 each received about one-third of the total dollars paid.

METHODS

Our strategy for estimating the effect of tort thresholds in each of the four states studied is to generate independent estimates for each state. When we compare these states to states without tort thresholds using the "BI-file method" (described below), we also generate independent estimates for each comparison of states. This disaggregated estimation approach is appropriate in view of the diversity of the states we are comparing. The alternative of simultaneously estimating the effects of tort thresholds for all states with a statistical model (like regression) that shares information about relationships across states is not feasible without comprehensive and comparable data for litigation affecting factors in each state. Such data are needed to statistically adjust for differences between states that might affect how tort thresholds operate. We have not been able to locate such sufficiently comprehensive data.

We estimate the fraction of accident victims who are denied tort compensation because of tort thresholds using two different methods and compare the results. First, we use the "PIP-file method" to compare the number of PIP claimants who are eligible to obtain BI compensation (as reported by the survey respondents) to the number who would have been eligible prior to the adoption of the tort threshold in their state. Since PIP pays all victims without regard to fault or injury severity the PIP claims file includes most types of accident victims (the main exception is uninsured motorists and their passengers). The fraction of PIP claimants who would have been eligible for BI payments prior to the threshold, but who are no longer eligible, is our PIP-file method estimate of the effect of the tort threshold in reducing the number of successful BI claimants in that state. Note that this method estimates only the number of potential claimants that are no longer entitled to tort compensation, but does not account for their likelihood of actually filing BI claims.

Our second method, the "BI-file estimate," is based on a comparison of the populations of claimants who are paid by BI insurance in the no-fault state and in a reference state that has no tort threshold. The validity of this estimate depends on the extent to which the distributions of accident victims in the no-fault and the reference state are similar, with respect to economic loss, type of injury, legal fault, propensity to file insurance claims

and to retain an attorney, and other factors that might affect the number of successful BI claimants. We attribute the difference between the numbers of successful BI claimants to the tort threshold. Unlike the PIP-file method, the BI-file method does account for victims' likelihood of filing BI claims. However, it does not allow for the estimation of any separate effect (in addition to the tort threshold) that the existence of no-fault insurance has on the number of liability insurance claims filed. (Since victims can almost always collect under PIP, they may be less likely to also file a BI claim.) However, since the results of both of our estimation methods are in general agreement, we conclude that tort thresholds are the primary cause of fewer liability insurance claims in no-fault states.[6]

To determine the accuracy of the BI-file method we generate independent estimates of the tort-threshold effect using several different reference states. If the potential-claimant populations are distributed identically in all states, the estimates would be the same for all reference states up to statistical fluctuations. The extent to which the choice of reference state affects the estimate is an indication of the degree to which the populations differ, and thus is a measure of the precision of the method.[7]

Some commentators have suggested that the adoption of a no-fault system will increase the number of automobile accidents, since drivers may be less careful when the deterrent of tort liability is removed.[8] Others doubt such an adoption will have a significant effect, since the tort deterrent is largely diluted by liability insurance, and other factors are probably more important influences on driving behavior. Our estimates do not take account of this effect, should it exist. We estimate the change in the proportion of accident victims who are paid by BI insurance; if the adoption of a no-fault plan increases the number of accident victims our estimates will overstate the reduction in BI claims paid. We describe both our methods and results in more detail below.

ANALYSIS AND RESULTS

A large proportion of accident victims in the four no-fault states we studied did not seek or were denied payment under BI insurance because of a tort threshold. Our estimates of the fraction affected by the threshold vary, depending on the method used and the reference state chosen. But, as shown below, the order of the estimates is consistent with the order defined by the apparent stringency of the thresholds.

Table 2 gives our estimates of the proportion of BI claimants excluded by the thresholds using both the PIP-file method and the BI-file method with our four reference states. The New Jersey threshold ($200 medical loss, net of hospital and diagnostic expenses) was the weakest of the four.[9] We estimate that roughly half of the potential claimants were excluded by this threshold. Stated another way, the number of accident victims obtaining compensation from another motorist's liability insurance company

Table 2. Estimated Percentage of Potential BI Claimants Excluded by Tort Thresholds

No-fault State (threshold)	PIP-file Method	BI-file Method			
		Reference State			
		California	Washington	North Carolina	Maryland
New Jersey ($200)	48%	39%	51%	66%	41%
Massachusetts ($500)	60%	50%	64%	76%	69%
Pennsylvania ($750)	72%	—	—	—	—
Michigan (verbal)	89%	—	—	—	—

Note: We did not calculate BI-file estimates for Pennsylvania and Michigan because too few BI claimants were paid in those states to generate reliable estimates.

would have been about twice as large if there were no threshold. We estimate that Massachusetts' $500 threshold excluded roughly 60 percent of potential claimants, Pennsylvania's $750 threshold excluded about 70 percent, and Michigan's verbal threshold excluded almost 90 percent of all victims who would otherwise have been paid under BI.[10] (We did not calculate BI-file method estimates for Michigan and Pennsylvania because the number of BI claimants in our sample is too small to give reliable estimates.)[11]

While there is substantial variability among the estimates for each state, the relative ordering of the no-fault states is the same for each set of estimates. The exact percentages differ with the method, but all of our estimates suggest that even modest tort thresholds have a large (if not precisely known) effect on the number of BI claims paid.

Large decreases in the number of BI claims paid do not, however, translate to equally large effects on total BI payments. Because the claimants who are prevented from making claims are those with the smallest economic losses and least serious injuries, they account for a relatively small share of all BI payments. By comparing the total BI payments to reference-state claimants, classified by whether or not they exceeded the no-fault states' thresholds, we estimate that total BI payments are about 7 to 16 percent lower in New Jersey (compared to 39 to 66 percent of claimants excluded) and 15 to 31 percent lower in Massachusetts (compared to 50 to 76 percent of claimants excluded), than they would be in the absence of a threshold.[12] Moreover, because of inflation in the costs of medical care, the fixed-dollar thresholds in New Jersey, Massachusetts and Pennsylvania are undoubtedly less effective in reducing both the number of BI claims and claims costs today than they were in 1977, the year to which our estimates apply. We turn now to a discussion of the details of each of the analyses.

PIP-FILE ESTIMATES

The PIP-file method for estimating the number of potential claimants who were denied BI compensation because of a state's tort threshold is based on data for victims who filed claims under a no-fault (PIP) policy. For each PIP claimant, claims adjusters reported 1) whether the claimant qualifies for a BI or tort payment under his state's current no-fault law, and 2) whether the claimant would have qualified prior to the imposition of the law. Although the instructions that accompanied the survey forms do not define "qualification," respondents seem to have interpreted the question as asking whether the claimant would be likely to obtain some payment if he filed a BI claim.[13]

The PIP-file estimate of the proportion of potential BI claims that were either denied or not filed because of the tort threshold is the number of PIP claimants no longer qualifying for BI recovery divided by the number who would have qualified before the threshold was imposed. That is:

$$\text{PIP File estimate of fraction denied} = 1 - \frac{\text{Number of PIP claimants eligible for BI with threshold}}{\text{Number of PIP claimants eligible for BI without threshold}}$$

Although a claimant who qualified for BI recovery would not necessarily have filed a BI claim, the direction in which this factor would bias our estimate is unclear. Our PIP-file estimate is based only on victims who filed PIP claims. The incentives to file BI claims are in some respects stronger than the incentives to file PIP claims, and in other respects weaker.[14] On balance, we believe that the PIP-file estimates are more reliable than the BI-file estimates since they rely solely on data for the particular no-fault state in question. As a comparison of the two sets of estimates shows, however, the two methods produce roughly consistent results.

BI-FILE ESTIMATES

To estimate the proportion of potential claimants denied payment because of a tort threshold using the BI-file method we categorize potential BI claimants in no-fault states into three groups, as illustrated in Figure 1. Claimants in Group 1 have injuries greater than the tort threshold and are paid by BI insurance. Claimants in Group 2 have injuries that are not serious enough to breach the threshold, but nevertheless these claimants also obtain BI payments, presumably because the BI insurer would rather make some payment to settle the claim than continue to defend it. Claimants in Group 3 have injuries that do not exceed the threshold and are unable to obtain BI payments. As a result, Group 3 claimants are not included in our sample; it is their number that we estimate.[15]

The successful BI claimants in a reference (tort or add-on) state include all three groups, though we cannot, of course, distinguish between Group 2

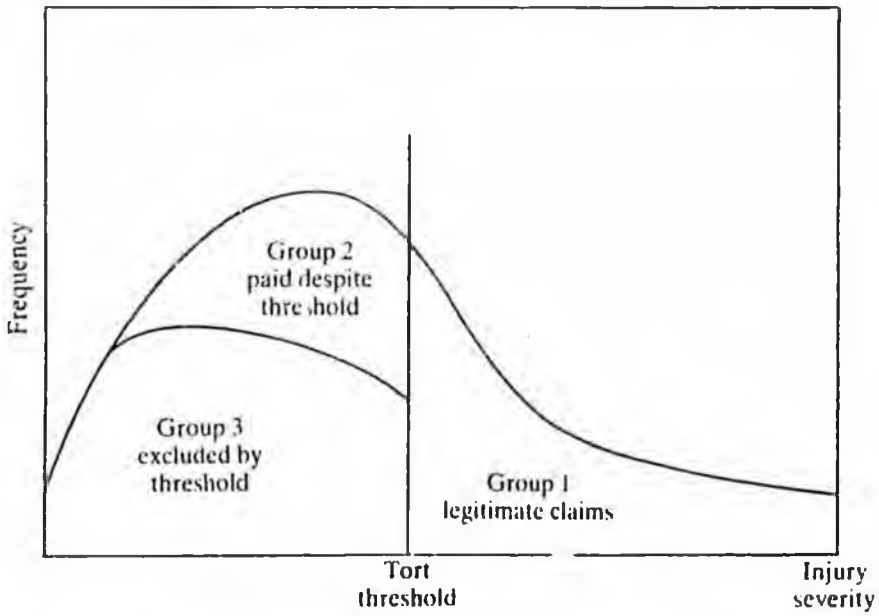

Figure 1. BI Claims Excluded by the Tort Thresholds

and 3 claimants in these states. If the populations of potential claimants are distributed similarly in the no-fault and reference states, the ratio of the number of successful no-fault-state claimants whose injuries exceed the threshold (Group 1) to the total number of potential no-fault-state claimants (all three groups) is equal to the corresponding ratio in the reference state. We use this relationship to derive our estimate of the size of Group 3, the claimants excluded by the threshold.

Table 2 above presents our estimates of the proportion of all potential no-fault state claimants (Groups 1, 2 and 3) that are excluded by the tort threshold (Group 3). We calculate these estimates as follows. Let r be the proportion of paid reference-state claimants whose injuries exceed the no-fault state's tort threshold r is equal to the ratio of the number of Group 1 claimants to the total number in Groups 1, 2 and 3 in the reference state). Similarly, let p be the proportion of no-fault-state claimants in our data whose injuries exceed the tort threshold p is equal to the number of Group 1 claimants divided by the number of Group 1 and Group 2 claimants in the no-fault state). Let x be the unknown ratio of the number of Group 3 claimants to the number of paid (Groups 1 and 2) no-fault state claimants. We wish to estimate ß, the proportion of all potential claimants excluded by the threshold (the ratio of the number of Group 3 claimants to the total number in all three groups), where

$$\beta = \frac{x}{1+x}. \qquad (1)$$

We assume that the distribution of injuries in the no-fault and reference states is the same, or, more specifically, that the proportion of potential

claimants in each state whose injuries exceed the no-fault state's threshold is the same,

$$r = \frac{p}{1 + x}. \tag{2}$$

Combining equations (1) and (2), we obtain our estimate

$$\beta = \frac{x}{1 + x} = 1 - \frac{r}{p}.$$

As shown in Table 2, the estimates using different reference states differ by as much as 27 percent, reflecting differences between the potential-claimant populations in the different states. These differences arise for various reasons, including differences between states in the mix of accident types, victim characteristics, and the cost of medical care. In addition, potential BI claimants may be less likely to file BI claims in a state such as Maryland where PIP insurance is required if they can more easily obtain compensation from their PIP coverage. If this effect were large, it could affect the estimates of tort-threshold effects that use Maryland as the reference state. As Hammitt (1985) reports, however, comparisons between BI-claimant populations do not provide any evidence that the availability of PIP benefits in Maryland reduces the number of BI claimants in that state, and the tort-threshold estimates that use Maryland as the reference state are comparable to those derived using other reference states.

In addition to differences between accident-victim populations in different states, our BI-file estimates are affected by the difficulty of determining which reference-state claimants would have satisfied a particular tort threshold, that is, distinguishing Group 1 claimants from the others. For the no-fault-state claimants, the survey forms record whether the tort threshold was exceeded, allowing us to distinguish between Group 1 and Group 2 claimants. But for the tort state claimants we had to estimate, using reported medical expenses and injury severity, whether the claimant's injuries would have exceeded the no-fault state's tort threshold. In order to make the comparison between tort and no-fault states consistent, we considered claimants in both states to have exceeded the threshold (Group 1) only if their recorded injuries exceeded the threshold.

We could not determine unambiguously whether a claimant exceeded the tort threshold from the recorded injury descriptions. For example, the Massachusetts threshold is exceeded if the claimant suffers permanent and serious disfigurement, but the questionnaire we used does not ask about the severity of a permanent disfigurement. Somewhat arbitrarily, we define all claimants with permanent disfigurement to have exceeded the threshold.[16]

We check the accuracy of this classification procedure by comparing the proportions of no-fault-state claimants recorded as having exceeded the threshold to the proportions estimated by our method of classifying claimants using their reported injuries; this is presented in Table 3. Our classification procedure labels more claimants as being over the threshold in both

Table 3. Percentage of All Paid BI Claims that Exceed the Tort Threshold

	NJ	MA
Recorded over threshold	88%	76%
Classified over threshold	89%	80%
Either recorded or classified over threshold	97%	88%

New Jersey and Massachusetts. However, the differences between proportions are small—at most 4 percent. The discrepancies probably result from two factors. First, our classification procedure counts too many claimants over the threshold because of the ambiguity in the injury descriptions (some of the permanently disfigured claimants were not sufficiently disfigured to exceed the threshold). Second, the proportion recorded in the questionnaire as having exceeded the threshold is probably too small. The multiple-choice question from which this proportion is derived asks how the claimant exceeded the threshold but does not ask whether he did so. We assume that all claimants for whom no answer was given (and whose medical expenses did not exceed the dollar threshold) did not exceed the tort threshold, but there are surely some claimants who exceeded the threshold but for whom, for whatever reason, the question was not answered.

Although our classification procedure is not perfect, the effect of the imperfections on our estimate of the proportion of claimants excluded by the tort thresholds is unclear. Since we use the same classification method for both no-fault and reference states the errors should be offsetting. The similarity of the BI-file and PIP-file estimates suggests that the effect of the classification errors is not large, relative to the other inaccuracies of the procedure.

CIRCUMVENTING THE TORT THRESHOLD

Do claimants in some no-fault states inflate their medical expenses, either by incurring needless treatment or by claiming (perhaps with the assistance of an unscrupulous doctor) to have incurred such treatment? We find no evidence of such padding in our data.

Claimants face a strong incentive to breach the threshold because doing so enhances the possibility of their receiving payments for general damages, which are not covered by PIP insurance. Moreover, by breaching the threshold, claimants may be able to recover for their economic losses twice: once from their PIP insurers, and once under their BI claims. This double recovery may be possible if the PIP insurer does not require reimbursement from the BI payment, or if the insurer fails to enforce the reimbursement provision.

If a significant number of claimants whose injuries do not exceed the threshold manage to obtain BI payment by "padding" their claims, we would expect to find a "hump" in the distribution of medical losses—a dis-

proportionately large number of claimants whose reported medical expenses exceed the tort threshold by only a little. To assess how many Massachusetts and New Jersey claimants overcome the tort thresholds by padding their medical expenses, we compare the proportion of claimants whose injuries exceed the dollar threshold by no more than $100 and $500 to the proportion predicted in each of the four states without thresholds. In total, we make sixteen comparisons (two no-fault states times two medical expense intervals times four reference states). In twelve of the sixteen cases, fewer claimants have recorded medical expenses in the interval just above the threshold than predicted. In the other four cases, using the above method, the estimate of the number of paid claimants who exaggerate their injuries in order to breach the threshold is between 2 and 16 percent of all claimants who appear to exceed the threshold.[17]

Because twelve of our sixteen comparisons provide no evidence of padding, we conclude that the data give little support to the notion that claims are systematically padded to circumvent tort thresholds. Further, since these states are more litigious than most, as discussed above, we would expect to find more evidence of padding claims here than in most other no-fault states. Alternatively, the effect of any padding that does occur may be offset by other factors such as other claimants' reluctance to file BI claims when they have already been compensated under PIP, or their uncertainty about the definition of the tort threshold and whether they are eligible to make BI claims.

SUMMARY

Contrary to what one might expect, modest tort thresholds appear to have a substantial effect on the number of accident victims who obtain compensation from liability insurance, at least in the states we studied. The availability of first-party insurance benefits probably contributes to this reduction, but our data do not allow us to estimate this effect separately in the four no-fault states.[18] Stringent tort thresholds, like the Michigan verbal threshold, deny tort compensation and, with it, compensation for pain and suffering to nine out of ten automobile accident victims. Also, contrary to some reports, we find little evidence in the states studied to support the view that many accident victims incur unnecessary medical treatment as a means of circumventing the tort threshold. The thresholds appear to serve their purpose of acting as gates to limit the number of automobile accident victims who enter the tort system and they thereby defeat the no-fault reforms.

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NOTES

1. States are classified as tort, add-on, and no-fault. No-fault insurance is not sold in tort states. In add-on states, insurers are required to offer and motorists may be required to buy no-fault coverage. In no-fault states, motorists are required to buy no-fault insurance and accident victims are not entitled to tort compensation unless their injuries exceed the tort threshold.
2. In 1983 New Jersey adopted a law allowing automobile insurance buyers to choose the threshold to which they will be subject if injured. Buyers can elect either the $200 threshold which applied to all motorists from 1973 to 1983, or a new, higher threshold of $1500 in medical expenses, net of hospital, x-ray and other diagnostic expenses, to be adjusted annually in accordance with the Consumer Price Index. The verbal portion of the new threshold is also stricter than the old. Under the old threshold, a victim could sue for tort compensation if his injuries were not confined to "soft tissue," but this language has been omitted from the new threshold.
3. Most no-fault plans further limit compensation for each type of loss. Maximum policy limits on medical benefits range from $2,000 to unlimited, while wage-loss policy limits on benefits are often 75 or 85 percent of lost wages, up to only $100 or $200 per week.
4. An accident victim may file a claim directly with another party's liability insurer, may file a lawsuit against the other party and/or his insurer, or do both. Because of filing fees and other costs, only about one-fifth of those who file liability claims (primarily those with larger claims) also file suit (see Hammitt, 1985).
5. The proportion of claimants denied BI compensation in a claims-conscious state will be a lower bound for the proportion that would be denied in a less claims-conscious state if claims-consciousness disproportionately increases the number of claims filed by victims with relatively mild injuries, that is, if severely injured victims in the less litigious state are as likely to file claims as those in the more litigious state.
6. Using a similar method, we estimate that the availability of no-fault insurance alone has little effect on the number of liability claims filed in Maryland, an add-on state that requires motorists to carry no-fault insurance (see Hammitt, 1985).
7. As reference states, we used the four other states—California, Washington, North Carolina, and Maryland—that we had selected for our larger study (Hammitt, 1985). The first three are tort states, while Maryland is a mandatory add-on state, meaning that motorists are required to carry PIP insurance.
8. Landes (1982) analyzed fatal accident rates across states and years. She asserts that, after controlling for other factors, fatalities are more numerous in states with higher thresholds, and that comparatively strict thresholds may increase the fatal-accident rate by 10 to 15 percent.
9. The New Jersey tort threshold was $200 at the time the claims data were collected, but was changed in 1983. See note 2 *supra*.
10. The tort thresholds are defined as follows:
    New Jersey: (1) $200 medical expenses net of hospital and diagnostic expenses, (2) death, (3) permanent disability, (4) permanent significant disfigurement, (5) partial or total loss of body member, (6) any injuries not confined to soft tissue.
    Massachusetts: (1) $500 medical expense, (2) death, (3) loss of body member, (4) permanent serious disfigurement, (5) loss of sight or hearing, (6) any fracture.
    Pennsylvania: (1) $750 medical expense net of diagnostic x-ray and rehabilitation costs in excess of $100, (2) death, (3) serious permanent injury, (4)

permanent, irreparable, severe cosmetic disfigurement, (5) total disability exceeding 60 days.
Michigan: (1) death, (2) serious impairment of bodily function, (3) permanent, serious disfigurement.

11. Our estimates are consistent with those available from other sources. According to a study by Thomas Jones, then Michigan Insurance Commissioner, BI claims in that state declined 87 percent after no-fault insurance was adopted. It is not clear whether this figure refers to claims filed or paid (see Widiss et al., 1977: 383). The U.S. Department of Transportation published ratios of paid BI claims to insured cars for fourteen no-fault states covering the years 1969 to 1975. These data were obtained from the State Farm Insurance Companies, which had a 14 percent national market share at the time. By comparing the average paid claim frequencies for all reported years before and after no-fault was adopted, we calculate that BI claims declined 62 percent in New Jersey, 82 percent in Pennsylvania, and 88 percent in Michigan (see U.S. Department of Transportation, 1977: 26–28).
12. The share of total BI payments made to claimants whose injuries do not exceed the New Jersey tort threshold is 7 percent in California, 8 percent in Maryland, 9 percent in Washington, and 16 percent in North Carolina. The share of payments to claimants whose injuries do not exceed the Massachusetts threshold is 15 percent in California, 18 percent in Washington, 25 percent in North Carolina, and 31 percent in Maryland. These estimates assume that none of the claimants whose injuries do not exceed the threshold would be paid, and that they consequently overstate the reduction in claims payments. In contrast, our procedure for estimating the number of claimants that are excluded because of the threshold accounts for the fact that some are paid, even though their injuries do not exceed the threshold (see the "BI-File Estimates" subsection). As shown by Table 3 *infra*, as many as one-quarter of paid claimants in the no-fault states may have injuries that do not exceed the threshold.
13. See AIRAC (1979) for the actual questionnaire. Although all claimants would "qualify" before the threshold was established, in the sense that they were not barred from filing a claim because of a tort threshold, only those to whom another motorist was likely to be liable were described as qualifying for recovery. Thus drivers in single-car accidents were not included in this definition. Because PIP compensation is available to nearly all accident victims the proportion of PIP claimants who would have qualified for BI compensation prior to the imposition of the tort threshold is an estimate of the proportion of accident victims who are injured in circumstances that allow compensation under tort liability. The proportion is close to two-thirds in each of our four no-fault states: Michigan—56 percent, Pennsylvania—64 percent, Massachusetts—65 percent, New Jersey—69 percent.
14. Filing a BI claim will not affect one's own insurance rates, as filing a PIP claim might, and the victim may file a BI claim as retribution. On the other hand, a victim may feel that he must retain an attorney to handle a BI claim, he may find it more unpleasant to negotiate with an adversary insurance firm, or he may pity the at-fault driver.
15. There is also a fourth group—accident victims whose injuries exceed the threshold but who do not file BI claims, or whose claims are denied for other reasons. Because we are interested in the number of potential claimants excluded by the threshold, this group does not concern us. We assume that the number of eligible claimants who do not file claims, or whose claims are incorrectly denied, is the same fraction of claims that are properly paid in each state. That is, we assume that no claims are incorrectly denied for not exceeding the threshold when the claimant's injuries do exceed the threshold.

16. The tort thresholds are reported at note 10 *supra* We assume that the claimant exceeded the Massachusetts threshold if his medical expenses exceeded $500, he died, or he suffered permanent disability or a fracture. The New Jersey threshold is deemed to be satisfied if medical expenses net of hospital and x-ray expenses exceeded $200, the claimant suffered permanent disability or a fracture, or he died.
17. More precisely these are estimates of the percentages of "excess" claimants—the data do not indicate the reasons. In Massachusetts, the estimates of the percentage of "excess" claimants between the dollar threshold ($500) and $100 higher ($600) is 13, 2 and 2 percent using California, Washington and Maryland respectively as reference states. In New Jersey the corresponding percentage is 16 percent using a $500 range and California as the reference state.
18. As described at note 6 *supra*, using our BI-file method we found little evidence that the availability of PIP benefits alone significantly reduces the number of BI claims in Maryland.

REFERENCES

ALL-INDUSTRY RESEARCH ADVISORY COMMITTEE (AIRAC) (1979) *Automobile Injuries and Their Compensation in the United States*. Chicago.

HAMMITT, J. (1985) *Automobile Accident Compensation Vol. II: Payments by Auto Insurers*. The Institute for Civil Justice, The Rand Corporation, R-3051-ICJ.

——, R. HOUCHENS, S. POLIN, and J. ROLPH (1985) *Automobile Accident Compensation Vol. IV: State Rules*. The Institute for Civil Justice, The Rand Corporation, R-3053-ICJ.

KEETON, R. and J. O'CONNELL (1965) *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*. Boston: Little, Brown and Company.

LANDES, E. (1982) "Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents," *Journal of Law and Economics* 25, pp. 49–65.

O'CONNELL, J. (1977) "Operation of No-Fault Auto Laws: A Survey of the Surveys," *Insurance Law Journal*, pp. 152–172.

ROLPH, J., J. HAMMITT, R. HOUCHENS, and S. POLIN (1985) *Automobile Accident Compensation Vol. I: Who Pays How Much How Soon?* The Institute for Civil Justice, The Rand Corporation, R-3050-ICJ.

U.S. DEPARTMENT OF TRANSPORTATION (1977) *State No-Fault Automobile Insurance Experience: 1971–1977*. DOT P 6100.2 Washington, D.C.: U.S. Government Printing Office.

WIDISS, A., J. LITTLE, R. CLARK and T. JONES (1977) *No Fault Automobile Insurance in Action: The Experiences in Massachusetts, Florida, Delaware and Michigan*. New York: Oceana Publications, Inc.

Other ICJ Publications

R-2716-ICJ
The Law and Economics of Workers' Compensation
Policy Issues and Research Needs
L. Darling-Hammond and T. J. Kniesner
1980

R-2717-ICJ
Models of Legal Decisionmaking
Research Design and Methods
D. A. Waterman and M. A. Peterson
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Court Efforts to Reduce Pretrial Delay
A National Inventory
P. Ebener, with the assistance of J. Adler, M. Selvin, and M. Yesley
1981

R-2733-ICJ
Judicial Arbitration in California
The First Year
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1981

R-2792-ICJ
The Resolution of Medical Malpractice Claims
Modeling the Bargaining Process
P. M. Danzon and L. A. Lillard
1982

R-2793-ICJ
The Resolution of Medical Malpractice Claims
Research Results and Policy Implications
P. M. Danzon and L. A. Lillard
1982

R-2870-ICJ/HCFA
The Frequency and Severity of Medical Malpractice Claims
P. M. Danzon
1982

R-2881-ICJ
The Civil Jury
Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979
M. A. Peterson and G. L. Priest
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Cost-Benefit Analysis and Voluntary Safety Standards for Consumer Products
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Costs of the Civil Justice System
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Educational Policymaking Through the Civil Justice System
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