COMMITTEE REPORT

SENATE

FURTHER:

4/18/86

Date 4/30/86

Mr. President

The Committee on FINANCE considered SB 377

relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, 68 and 82; efd.

and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass

[ ] do pass with attached amendment(s)

[✓] replace with/or adopt CS for SB 377 (Fin)
[✓] new title
[ ] same title and recommends Do Pass

[ ] and attached a "LETTER OF INTENT" [✓] NEW FISCAL NOTE
Law 250.0
Admin (460.8)
Court 225.4

[ ] reports it back without recommendation

[ ] recommends referral to ______ Committee

MEMBERS SIGNING DO PASS

Rick Halford
[signature]
[signature]
[signature]

MEMBERS HAVING OTHER RECOMMENDATIONS

[signature] No Rec
Paul Fisk N. Rec

[signature]
Co - Chairman

do pass
Chairman recommendation

5/10/86 Reduces 2 positions of Court Fiscal Note of 4/25/86

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CS SB 377 (Finance)
Title : Act relating to civil actions

Sponsor : Kelly, Abood, Bennett et al
Requester : Senate Finance Committee
Date of Request : May 10, 1986

FISCAL DETAIL

Agency Affected : Alaska Court System
BRU : Trial Courts

Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		80.7	80.7	80.7	80.7	80.7
TRAVEL		2.0	2.0	2.0	2.0	2.0
CONTRACTUAL		0	0	0	0	0
SUPPLIES		1.0	1.0	1.0	1.0	1.0
EQUIPMENT		6.7				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		90.4	83.7	83.7	83.7	83.7
CAPITAL		0	0	0	0	0
REVENUE		0	0	0	0	0

FUNDING : (Thousands of Dollars)

GENERAL FUND		90.4	83.7	83.7	83.7	83.7
FEDERAL FUNDS						
OTHER						
TOTAL		90.4	83.7	83.7	83.7	83.7

POSITIONS :

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

ANALYSIS : Attach a separate page if necessary

Prepared by : _____ Phone : 465-4523
Division : Senator Jan Faiks, Co-chairman Senate Finance Committee Date : May 10, 1986

Approved by Commissioner : _____ Date : _____
Agency : _____

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

10/25/85

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CSSB337 (FIN)
Title : "An Act relating to civil actions: amending Alaska Rules of Civil Procedure 49,52,58,60;..."
Sponsor : Sen. Kelly
Requestor : Senate FIN
Date of Request : April 29, 1986

FISCAL DETAIL

Agency Affected : Department of Law
BRU : Legal Services
Components : Legal Services Component

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		250.0				
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		250.0				
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND		250.0				
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME		-0-				
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

-Please see attached analysis.-

Richard I. Pegues

Prepared by : Richard I. Pegues, Director — Phone : 465-3672
Division : Administrative Services Division — Date : 4/29/86

Richard I. Pegues /FUR/

Approved by Commissioner : Harold M. Brown, Attorney General — Date : 4/29/86
Agency : Department of Law

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

10/25/85

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 337

The committee substitute for this bill calls for a study of the current insurance crisis.

First, a detailed and thorough examination will be undertaken of closed claims by line in Alaska for insurance companies doing business in Alaska. Second, a thorough examination will be made of insurance company financial operations, expenditures, and profitability.

From the closed claims study we will be able to identify:

(a) the extent to which the legal system has or has not been the cause of dramatic liability insurance premium increases and coverage reduction in crisis lines in Alaska;

(b) how victims are faring under the present system; and

(c) what the various specific tort reform proposals will actually accomplish.

The analysis of insurance company finances will enable us to determine:

(a) the extent to which dramatic liability insurance rate increases and coverage limitations in Alaska are -- or are not -- cost-justified,

(b) what alternatives exist to limiting coverage and raising rates; and

(c) the legislative and/or regulatory actions which may be necessary to resolve the State's liability insurance crisis.

In order to undertake the study the Department of Law will hire outside financial management experts to determine the causes of the existing insurance situation, and to advise of possible corrective actions.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST
Bill/Resolution No.: CSSB 377 (4/23/86)
Title: An Act Relating to Civil Actions

Sponsor: Kelly, Abood, Bennet, et al.
Requestor: Faiks
Date of Request: April 28, 1986

FISCAL DETAIL
Agency Affected: _____
BRU: _____

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	-0-	(460.8)	(986.4)	(1,769.4)	(2,715.5)	(3,772.2)
MISCELLANEOUS						
TOTAL OPERATING	-0-	(460.8)	(986.4)	(1,769.4)	(2,715.5)	(3,772.2)
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER	-0-	(460.8)	(986.4)	(1,769.4)	(2,715.5)	(3,772.2)
TOTAL	-0-	(460.8)	(986.4)	(1,769.4)	(2,715.5)	(3,772.2)

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary The final benefit is impossible to accurately project, given that it will only affect liability claims not yet incurred. Based on the State's past liability claims experience, we project a 30% reduction in estimated ultimate loss and loss expense per fiscal year. The attached projection details the calculations using the State of Alaska's actuarial analysis of past claims experience.

Prepared By: Don Hitchcock
Phone: 465-2180
Division: Risk Management
Date: April 28, 1986

Approved by Commissioner: Eleanor Andrews
Date: 4/28/86
Agency: Department of Administration

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

Rev. 11/8/85

8/9K1/0428-02/2

CASH FLOW SAVINGS ESTIMATED BY FISCAL YEAR

		YEAR OF OCCURRENCE					
		1986	1987	1988	1989	1990	1991	TOTAL
YEAR OF SAVING	FY 86	-0-						
	FY 87		460.8					460.8
	FY 88		410.4	576.0				986.4
	FY 89		536.4	513.0	720.0			1,769.4
	FY 90		504.0	670.5	641.3	899.7		2,715.5
	FY 91		378.0	630.0	838.1	801.3	1,124.7	3,772.2
	FY 92		284.4	472.5	787.5	1,047.3	1,001.7	*
	FY 93		262.8	355.5	590.6	984.1	1,309.3	*
	FY 94		237.6	328.5	444.4	738.0	1,230.2	*
	FY 95		216.0	297.0	410.6	555.3	922.6	*
	FY 96		165.6	270.0	371.3	513.1	694.2	*
	FY 97		97.2	207.0	337.5	463.9	641.5	*
	FY 98		46.8	121.5	258.8	421.7	579.9	*
	FY 99			58.5	151.9	323.3	527.2	*
	FY 2000				73.1	189.8	404.2	*
	FY 2001					91.4	237.2	*
	FY 2002						114.2	*
YEARLY TOTALS			3,600.0	4,500.0	5,625.0	7,029.0	8,787.0	

* Additional occurrence years will reflect an increase in savings.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : 4/24/86

REQUEST

Bill/Resolution No. : CSSB 377 (Finance -4/23/86 work draft)
Title : An Act Relating to Civil Actions

Sponsor : Kelly, Abood, Bennett, et al
Requestor :
Date of Request :

FISCAL DETAIL

Agency Affected : Alaska Court System
BRU : Trial Courts

Components :

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		80.7	80.7	80.7	80.7	80.7
TRAVEL		2.0	2.0	2.0	2.0	2.0
CONTRACTUAL		135.0	135.0	135.0	135.0	135.0
SUPPLIES		1.0	1.0	1.0	1.0	1.0
EQUIPMENT		6.7				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		225.4	218.7	218.7	218.7	218.7
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND		225.4	218.7	218.7	218.7	218.7
FEDERAL FUNDS						
OTHER						
TOTAL		225.4	218.7	218.7	218.7	218.7

POSITIONS :

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

ANALYSIS : Attach a separate page if necessary

Prepared by : Karla Forsythe/Robert G. Fisher
Division : Alaska Court System
Phone : 264-8215
Date : 4/24/86

Approved by Commissioner : Arthur H. Snowden, II
Agency : Alaska Court System
Date : 4/24/86

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

10/25/85

CSSB 377 (Finance - 4/23/86 Work Draft) Fiscal Note Narrative

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

Expanded Judicial Workload

It is estimated that the cumulative effect of the provisions of this bill will increase the court's workload by 20% for each trial. This estimate includes judge time expended on additional litigation which will result from attempts to transfer proportional liability to persons who have signed releases before trial. Also, more cases will go to trial because of diminished incentives to settle resulting from restrictions on the award of Civil Rule 82 attorneys fees.

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

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

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

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

Mandatory arbitration of claims under $25,000

The court system assumes for purposes of this fiscal note that under AS 09.43 the court would be required to bear the cost of arbitrators for those parties who are unable to afford this expense. It is estimated that 1000 personal injury and property cases statewide would be subject to the mandatory arbitration provision because they fall under $25,000. It is assumed that 15% of the parties will not be able to afford the expenses of arbitrators. Thus, the court system will be required to bear these expenses in 150 cases.

Assuming an arbitration lasting 6 hours and an estimated average hourly compensation rate for the arbitrator of $150, the cost of an arbitration totals $900. The estimated total cost of an arbitrator for all cases under $25,000 is $135,000. Additionally, the court system assumes that for parties in outlying rural areas who are unable to afford the costs of arbitrators, it will be less costly to fly these persons to central urban areas rather than to fly arbitrators to the outlying areas and pay for their room and board. The additional air fare and per diem costs total $2,066. Based on these assumptions, the total costs of mandatory arbitration of civil damage claims under $25,000 is $137,166.

ALASKA COURT SYSTEM

CSSB 377 (Finance - 4/23/86 Work Draft) - TORT REFORM

FISCAL IMPACT

Personnel:

	Salary	Benefits	Total
Pro Tem, Superior Court Judge (PFT, using fully-vested retired judge) (See Schedule #2)	$19,332	$26,779	$46,111
In-Court Clerk (PFT, 12B)	25,740	8,863	34,603
Total Personnel			80,714
Travel costs for indigent bush parties in mandatory arbitration cases. (See Schedule #3)			2,066
Contractual cost of arbitrators for indigent parties in mandatory arbitration cases. (See Schedule #3)			135,000
Supplies			1,000
Equipment: (one-time items)			
New employee equipment - office furniture and reference materials			6,759
Total FY 87 Cost			$225.400

Schedule #2

ALASKA COURT SYSTEM

ESTIMATION OF JUDICIAL RESOURCES
NEEDED TO PROCESS INCREASED WORKLOAD

CSSB 377 (Finance - 4/23/86 Work Draft) - TORT REFORM

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

Notes:

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

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

Schedule #3

ALASKA COURT SYSTEM

ESTIMATED FISCAL IMPACT OF MANDATORY ARBITRATION

CSSB 377 (Finance - 4/23/86 Work Draft) - TORT REFORM

	Anchorage	Rest of State	Total
Number of district court civil cases (a)	7,168	2,832	10,000
Estimated percentage of personal injury and property damage	10%	10%	10%
Estimated number of personal injury and property damage cases	716	283	1,000
Estimated percentage of indigent parties	15	15	15
Estimated number of cases involving indigent parties	107	42	150
Estimated average length of arbitration hearing in hours	6	6	6
Estimated average hourly rate of arbitrator	$150	$150	$150
Estimated average cost of each case	$900	$900	$900
Estimated total cost of arbitrators	$96,300	$37,800	$135,000
Estimated travel cost for indigent parties living in bush areas. (See Schedule #4)	$0	$2,066	$2,066
Estimated total cost of mandatory arbitration	$96,300	$39,866	$137,066

Notes:

(a) Based on estimated FY 86 case filings. All district court civil case filings assumed to be under $25,000.

Schedule #4

ALASKA COURT SYSTEM

ESTIMATED TRAVEL COSTS FOR INDIGENT BUSH PARTIES

CSSB 377 (Finance - 4/23/96 Work Draft) - TORT REFORM

Bush Courts	Number of Civil Case Filings	Percent Indigent Defendants	Number of Indigent cases	Air Fare to Nearest Urban Court (a)	Estimated Air Fare Cost	Estimated Per Diem Cost (b)	Estimated Total Travel Cost
Barrow	4	50%	2	$500	$500	$315	$1,630
Bethel	1		0				
Kotzebue	0		0				
Nome	0		0				
Valdez	2	50%	1	156	156	280	436
						Total Cost	$2,066

Notes:

(a) Bush courts served by urban courts:

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

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

4/29/86

AMENDMENTS TO CSSB 377 (Finance) Version 2

Amendment #1 (Offered and Pending) By: Sackett

Page 2, lines 12 - 17 Delete Section 2

Page 10, lines 9 -14 Delete Section 8

Renumber remaining sections accordingly

Amendment #1A By: Sackett

If the amendment #1 is adopted, then, on

Page 10, lines 27 - Page 11, line 3 Delete Section 11

Renumber remaining sections accordingly.

Amendment #2 By: Ferguson

Page 8, lines 3 -13 Delete all material and insert a new section to read:

"Sec. 09.17.080. ATTORNEY FEE AGREEMENTS. (a) An attorney may not contract for or collect a contingency fee for representing a person seeking damages in connection with an action for personal injury based on negligence in excess of 25 percent of the amount recovered.

(b) If periodic payments for future damages are awarded, the present value of the periodic payments must be included in computing the total award from which attorney fees are calculated under (a) of this section.

(c) An attorney may not contract for or receive a fee

for defending a person against a claim for damages in connection with an action for personal injury based on negligence in excess of 25 percent of the amount in controversy or the amount recovered by the plaintiff.

(d) The limitations of (a) and (b) of this section apply whether the recovery is by settlement, arbitration, or judgement."

Amendment #3 Ferguson 3- By: Ferguson

H- (7)

Page 4, line 21, after "made," insert the following:

"Periodic payments shall be cumulatively adjusted annually by applying each year the annual rate of change in the consumer price index for all urban consumers for the Anchorage Metropolitan Area as published by the Bureau of Labor Statistics of the United States Department of Labor for the immediately preceding year."

Amendment #4 Eliason 3- By: Eliason

Adopted 4/29/86 pm

Page 8, line 2 After the word "discharge." add the following language:

"However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of AS 09.17.060."

Amendment #5 By: Eliason

Page 10, line 15 Delete Sec. 9 and renumber the following sections accordingly.

Amendment #6 By: Halford

Page 6, line 11 Delete Section 09.17.055 and insert the following new section:

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

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

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

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

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds

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

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

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

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

(3) gratuitous benefits provided to the claimant.

Amendment #7 By: Halford

Withdrawn

Page 8, line 2 After the word "discharge." insert new language to read: "Evidence of release and settlement may be presented as evidence to the jury or to the finder of fact."

Amendment #8 By: Halford

Adopted

Page 9, line 29, after the word "defendant" insert "or the defendant has received a written notification of a claim"

Draft language adopted

SFC-86
4/30/86

Ferguson
3.

REVISED AMENDMENT NO. 7

Page 5, lines 28-29, delete all material and insert the following:

"(4) a member of ~~the~~ a governing body, board, commission or citizen advisory committee of a municipality in the state."

p. 5 Lines 18 - 26

FC-86
4/30/86
Halford
3
4-

April 29, 1986

PROPOSED AMENDMENTS FCSCS 377 SENATOR HALFORD Reconsideration
5-2
4-
2nd time

PAGE 9

After Amendment #8 insert new sentance to read:

" Evidence to be considered by the jury or finder of fact may include the amount of the prejudgement interest which may be added to the award."

PAGE 2 Halford — 3-
Fair Ellio P. Firs. Opposed.

LINE 26
4-

Delete: $250,000

Insert: $500,000

4/29/86 fm

200

SFC-86
4/30/86
Senate
3-
9-

A M E N D M E N T

By Eliason

Offered in the SENATE

TO: CSSB377 (Finance) Version #2

Page 10, line 25 After the word "action" insert the following language:

"for personal injury, death or property damage related to or arising out of fault as defined in AS 09.17.900"

by: Sackett

adoption

AMENDMENT #3

To: CSSB-377 (Fin) Version 2

DELETE: Sec. 23, page 13, lines 17-23 and replace with:

"The Department of Law shall with the assistance of the Department of Commerce and Economic Development contract for a study of closed insurance claims to identify:

a) the extent to which the legal system has or has not been the cause of dramatic liability insurance increases and coverage reduction in crisis lines in Alaska;

b) how victims are faring under the present system; and

c) what the various specific tort reform proposals will actually accomplish,

and a study of insurance company finances to determine:

a) the extent to which dramatic liability insurance rate increases and coverage limitations in Alaska are - or are not - cost-justified;

b) what alternatives exist to limiting coverage and raising rates; and

c) the legislative and/or regulatory actions which may be necessary to resolve the State's liability insurance crisis.

AMEND EXISTING TITLE OF THE BILL TO READ:

"An Act relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, 68, and 82; and authorizing the Department of Law to conduct studies; and providing for an effective date."

Seckett - by request

Accepted

AMENDMENT 6

Delete material beginning at page 8, line 24 through page 9, line 16, and insert the following:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than ~~30~~ 10 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 [AS 45.45.010(a)] and accrued up to the date judgment is entered shall be adjusted as follows:

4/29/82

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

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

Original sponsors: Kelly, Abood,
Bennett, et al

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 377 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil actions; directing the Department of Law to conduct a study; amending Alaska Rules of Civil Procedure 11, 40, 52, 58, 68, and 82; and providing for an effective date."

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

* Section 1. FINDINGS AND PURPOSE. (a) 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 Act 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.

(b) The legislature finds that boroughs, 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.

(c) 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.

(d) 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.

(e) It is the intent of the legislature to reduce costs associated with the tort system, while ensuring that adequate and appropriate compensation for persons injured through the fault of others is available.

* Sec. 2. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

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

(b) The amount of damages awarded by a court or jury under (a) of this section may not exceed $500,000 for each claim based on a separate incident or injury.

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless the claimant proves by clear and convincing evidence that the party defending the claim caused injury to the claimant by an act constituting the commission of a felony under state or federal law, or the act constituted deliberate or malicious conduct.

(b) A person may not claim punitive damages in a civil action,

unless the claimant first establishes a prima facie claim under (a) of this section.

Sec. 09.17.025. DAMAGES RESULTING FROM INTOXICATION OR COMMISSION OF A CRIME. (a) A person who suffers personal injury or death may not bring an action to recover damages for the personal injury or death if the injuries or death occurred while the person was

(1) voluntarily under the influence of intoxicating liquor or under the influence of a controlled substance listed in AS 11.71.-140 - 11.71.190 and the condition of being under the influence of the intoxicating liquor or controlled substance contributed more than 50 percent to the person's injuries or death; if there was 0.10 percent or more by weight of alcohol in the person's blood or 0.10 grams or more of alcohol per 210 liters of the person's breath, it is presumed that the person was under the influence of intoxicating liquor; or

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

(b) The provisions of (a)(1) of this section do not apply to a person who suffers personal injury or death caused by the intentional act of another person or persons.

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

(1) past economic loss;

(2) past noneconomic loss;

(3) future economic loss;

(4) future noneconomic loss; and

(5) punitive damages.

Sec. 09.17.035. PERIODIC PAYMENTS. (a) In an action to recover damages, the court shall, at the request of a party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment if the award equals or exceeds $100,000 in future damages.

(b) The court may require security be posted, in order to ensure that funds are available as periodic payments become due. The court may not require security to be posted if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

(c) A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Periodic payments shall be cumulatively adjusted annually by applying each year the annual rate of change in the consumer price index for all urban consumers for the Anchorage Metropolitan Area as published by the Bureau of Labor Statistics of the United States Department of Labor for the immediately preceding year. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had

no will.

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

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. The party or the attorney of the party shall sign and verify each complaint, answer, cross-claim, and counterclaim that the party files. The verification must include a statement that the person signing the pleading believes the statements made in the pleading are true. If the court finds that a statement made in the complaint, answer, cross-claim, or counterclaim was knowingly untrue, and upon motion of a party the person signing the pleading shall be compelled to show cause why the person signing the pleading should not be held in contempt of court.

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

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

(2) a member of the board of directors of a public or nonprofit hospital or a community-based advisory board of a hospital;

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

(4) a member of a governing board, commission, or citizen advisory committee of a municipality in the state.

(b) Notwithstanding (a) of this section, the duties and liabilities of a director or officer of a nonprofit corporation to the

corporation or the corporation's shareholders may not be limited or modified.

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

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

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

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

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

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

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

introduce evidence of

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

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

(3) gratuitous benefits provided to the claimant.

(e) This section does not apply to a medical malpractice action filed under AS 09.55.

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

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.070; for this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

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

obligation to each claimant in accordance with the respective percentages of fault.

Sec. 09.17.070. EFFECT OF RELEASE. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of AS 09.17.060.

Sec. 09.17.080. CONTINGENT FEE AGREEMENTS. (a) An attorney may not contract for or collect a contingency fee for representing a person seeking damages in connection with an action for personal injury based on negligence in excess of 25 percent of the amount recovered.

(b) If periodic payments for future damages are awarded, the present value of the periodic payments must be included in computing the total award from which attorney fees are calculated under this section.

(c) An attorney may not contract for or receive a fee for defending a person against a claim for damages in connection with an action for personal injury based on negligence, in excess of 25 percent of the amount recovered or if no amount is recovered by the plaintiff, 25 percent of the amount in controversy.

(d) The limitations in (a) - (c) of this section apply whether the recovery is by settlement, arbitration, or judgment.

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent or reckless toward

the person or property of the actor or others, or that subject a person to strict tort liability; the term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages; legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

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

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 [AS 45.45.010(a)] and accrued up to the date judgment is entered shall be adjusted as follows:

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

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

* Sec. 4. AS 09.30.070 is amended to read:

Sec. 09.30.070. INTEREST ON JUDGMENTS. The rate of interest on judgments and decrees for the payment of money is equal to the 12th Federal Reserve district discount rate as determined under AS 45.45.-010(b) [10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

* Sec. 5. AS 09.30.070 is amended by adding a new subsection to read:

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day process is served on the defendant or the day the defendant received written notification of the claim, whichever is earlier. Evidence to be considered by the finder of fact may include the amount of the prejudgment interest that may be added to the award.

* Sec. 6. AS 09.55.548(a) is repealed and reenacted to read:

(a) Except as provided in (b) of this section and AS 09.17, damages in a malpractice shall be awarded in accordance with principles of the common law.

* Sec. 7. AS 09.60.010 is repealed and reenacted to read:

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

for personal injury, death or property damage related to or arising out of fault, as defined in AS 09.17.900.

* Sec. 8. AS 09.16.010, 09.16.020, 09.16.030, 09.16.040, 09.16.050, and 09.16.060 are repealed.

* Sec. 9. AS 09.17.030 and 09.17.060 enacted in sec. 2 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 10. AS 09.17.060 enacted in sec. 2 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 11. AS 09.17.030 and 09.17.060 enacted in sec. 2 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 12. AS 09.17.040 enacted in sec. 2 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of certain pleadings.

* Sec. 13. AS 09.17.080 enacted in sec. 2 of this Act has the effect of amending Alaska Rule of Civil Procedure 82 by limiting the amount that could be awarded as attorney fees in an action for personal injury or property damage.

* Sec. 14. AS 09.30.070(b) as added by sec. 5 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day process is served on the defendant or the day the defendant receives written notice of the claim.

* Sec. 15. AS 09.60.010 as amended by sec. 7 of this Act has the effect

of amending Alaska Rule of Civil Procedure 82 by prohibiting the award of attorney fees in certain civil actions based on fault, unless allowed by statute or by agreement of the parties.

* Sec. 16. APPLICABILITY. Sections 1 - 8 of this Act apply to all causes of action accruing after the effective date of this Act, except that AS 09.17.055(a) enacted in sec. 2 of this Act applies to all contracts for the provision of collateral benefits that are formed or renewed after the effective date of this Act.

* Sec. 17. SEVERABILITY. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.

* Sec. 18. The Department of Law, with the assistance of the Department of Commerce and Economic Development, shall contract for

(1) a study of closed insurance claims to identify

(A) the extent to which the legal system has or has not been the cause of dramatic liability insurance increases and coverage reduction in crisis lines in Alaska;

(B) how victims are faring under the present system; and

(C) what the various specific tort reform proposals will actually accomplish;

(2) a study of insurance company finances to determine

(A) the extent to which dramatic liability insurance rate increases and coverage limitations in Alaska are, or are not, cost-justified in relation to awards, settlements, and relevant court decisions in Alaska involving personal injury, death, or property damage based on fault; and

(B) the extent to which legislative or regulatory actions affecting the tort system in Alaska are necessary to resolve the

state's liability insurance crisis.

* Sec. 19. Except for AS 09.17.080, added by sec. 2 of this Act, this Act takes effect immediately in accordance with AS 01.10.070(c).

* Sec. 20. AS 09.17.080, added by sec. 2 of this Act, only takes effect if sec. 15 of this Act does not pass each house of the legislature by at least a two-thirds majority vote. If AS 09.17.080 takes effect, it takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : HCS CSSB 377 (Jud.)
Title : "An Act relating to civil actions; amending Alaska Rules of Civil Procedure 49, 52, 58, 60;..."
Sponsor : Sen. Kelly
Requestor : House Judiciary Committee
Date of Request : May 7, 1986

FISCAL DETAIL

Agency Affected : Department of Law
BRU : Legal Services

Components : Legal Services Operations

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

The committee substitute substantially reduces the scope of the study to be conducted by the Department of Law eliminating the need for fiscal note funds.

Richard I. Pegues

Prepared by : Richard I. Pegues, Director — Phone : 465-3672
Division : Administrative Services Division — Date : 5/7/86

Richard I. Pegues /FOR/

Approved by Commissioner : Harold J. Brown, Attorney General — Date : 5/7/86
Agency : Department of Law

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

10/25/85

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: May 7, 1986

REQUEST

Bill/Resolution No.: House CS for SSSB 377 (JUD)

Title: An act relating to civil actions, etc.

Sponsor: Kelly, Abood, Bennett, et al.

Requestor:

Date of Request: May 7, 1986

FISCAL DETAIL

Agency Affected:

BRU:

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary House CS for SSSB 377 (JUD) removes or modifies the original bill language to delete any fiscal benefit to the State of Alaska's estimated ultimate loss and loss expense, i.e., "noneconomic damages" limit changed from $250,000 to $1,000,000, "punitive" damages not mentioned in revised bill, "periodic payment" provision changed, "joint and several" provision change, "release or covenant not to sue" provision change, "offers of judgment" provision change.

Prepared By: Donald Hitchcock, Director Phone: 465-2180

Division: Risk Management Date: May 7, 1986

Approved by Commissioner: Eleanor Andrews Date:

Agency: Department of Administration

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

Rev. 11/8/85

8/9K1/0507-03

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CSSB 377 (~~HES~~) Jud
Title : An Act Relating to Tort Reform

Sponsor : _____
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : Alaska Court System
BRU : Trial Courts

Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		80.7	80.7	80.7	80.7	80.7
TRAVEL		6.2	6.2	6.2	6.2	6.2
CONTRACTUAL		797.4	797.4	797.4	797.4	797.4
SUPPLIES		1.0	1.0	1.0	1.0	1.0
EQUIPMENT		6.7				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		892.0	885.3	885.3	885.3	885.3
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND		892.0	885.3	885.3	885.3	885.3
FEDERAL FUNDS						
OTHER						
TOTAL		892.0	885.3	885.3	885.3	885.3

POSITIONS :

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

ANALYSIS : Attach a separate page if necessary

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

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

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

10/25/85

CSSB 377 (L & C) Fiscal Note Narrative

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

Expanded Judicial Workload

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

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

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

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

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

In order to avoid duplicative hearings, the court system favors binding arbitration rather than the option of de novo court trials. In the event that this legislation is not amended to provide for binding arbitration, the court system assumes for purposes of this fiscal note that the court would be required to bear the cost of arbitrators for those parties who are unable to afford this expense. It is estimated that 1341 personal injury cases statewide would be subject to the mandatory arbitration provision because they fall under $100,000. It is assumed that a third of the parties will not be able to afford the expenses of arbitrators. Thus, the court system will be required to bear these expenses in 443 cases.

Assuming an arbitration lasting 12 hours and an estimated average hourly compensation rate for the arbitrator of $150, the cost of an arbitration totals $1,800. The estimated total cost of an arbitrator for all cases under $100,000 is $797,400. Additionally, the court system assumes that for parties in outlying rural areas who are unable to afford the costs of arbitrators, it will be less costly to fly these persons to central urban areas rather than to fly arbitrators to the outlying areas and pay for their room and board. The additional air fare and per diem costs total $6,155. Based on these assumptions, the total costs of mandatory arbitration is $803,555.

ALASKA COURT SYSTEM

CSSB 377 (~~S & C~~ Fin) - TORT REFORM

FISCAL IMPACT

Personnel:

	Salary	Benefits	Total
Pro Tem, Superior Court Judge (PFT, using fully-vested retired judge) (See Schedule #2)	$19,332	$26,779	$46,111
In-Court Clerk (PFT, 12B)	25,740	8,863	34,603
Total Personnel			80,714
Travel costs for indigent bush parties in mandatory arbitration cases. (See Schedule #3)			6,155
Contractual cost of arbitrators for indigent parties in mandatory arbitration cases. (See Schedule #3)			797,400
Supplies			1,000
Equipment: (one-time items)			
New employee equipment - office furniture and reference materials			6,759
Total FY 87 Cost			$892,028

Schedule #2

ALASKA COURT SYSTEM

ESTIMATION OF JUDICIAL RESOURCES
NEEDED TO PROCESS INCREASED WORKLOAD

CSSB 377 (~~L & C~~) - TORT REFORM

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

Notes:

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

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

Schedule #3

ALASKA COURT SYSTEM

ESTIMATED FISCAL IMPACT OF MANDATORY ARBITRATION

CSSB 377 (Jud) - TORT REFORM

	Anchorage	Rest of State	Total
Number of civil damage cases (a)	1,458	638	2,096
Estimated percentage of cases under $100,000	64%	64%	64%
Estimated number of cases under $100,000	933	408	1,341
Estimated percentage of indigent parties	33%	33%	33%
Estimated number of cases involving indigent parties	308	135	443
Estimated average length of arbitration hearing in hours	12	12	12
Estimate average hourly rate of arbitrator	$150	$150	$150
Estimated average cost of each case	$1,800	$1,800	$1,800
Estimated total cost of arbitrators	$554,400	$243,000	$797,400
Estimaced travel cost for indigent parties living in bush areas. (See Schedule #4)	$0	$6,155	$6,155
Estimated total cost of mandatory arbitration	$554,400	$249,155	$803,555

Notes:

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

Schedule #4

ALASKA COURT SYSTEM

ESTIMATED TRAVEL COSTS FOR INDIGENT BUSH PARTIES

CSSB 377 (S) - TORT REFORM

Bush Courts	Number of Case Filings	Percent Under $100,000	Number of Cases Under $100,000	Percent Indigent Defendants	Number of Indigent Cases	Air Fare to Nearest Urban Court (a)	Estimated Air Fare Cost	Estimated Per Diem Cost (b)	Estimated Total Travel Cost
Barrow	5	64%	3	33%	1	$500	$500	$315	$815
Bethel	30	64%	19	33%	6	302	1,812	1,680	3,492
Kotzebue	5	64%	3	33%	1	426	426	280	706
Nome	6	64%	4	33%	1	426	426	280	706
Valdez	6	64%	4	33%	1	156	156	280	436
								Total Cost	$6,155

Notes:

(a) Bush courts served by urban courts:

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

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

AB

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CSSB 377(L&C)
Title :Relating to civil actions; amending Alaska Rules of Civil Procedure 49, 52, 58 68, and 82; and providing for an eff date"
Sponsor : Sen Kelly, et al
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : Court System
BRU : _____
Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	
CAPITAL	0	0	0	0	0	
REVENUE	0	0	0	0	0	

FUNDING : (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	

POSITIONS :

FULL-TIME	0	0	0	0	0	
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Michael Thill, Aide
Division : Senate Labor and Commerce Committee
Phone : 3844
Date : 4/1/86

Approved by Commissioner : Senator Ziaroff, Chairman
Agency : Senate Labor and Commerce
Date : 4/1/86

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

10/25/85

Incorrect title
p. 12) 18
delete: "..."

Original sponsors: Kelly, Abood,
Bennett, et al

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 377 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

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

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

* Section 1. FINDINGS AND PURPOSE. (a) 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 Act 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.

(b) The legislature finds that boroughs, 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.

(c) 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.

(d) 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.

(e) It is the intent of the legislature to reduce costs associated with the tort system, while ensuring that adequate and appropriate compensation for persons injured through the fault of others is available.

* Sec. 2. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

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

(b) The amount of damages awarded by a court or jury under (a) of this section may not exceed $500,000 for each claim based on a separate incident or injury.

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless the claimant proves by clear and convincing evidence that the party defending the claim caused injury to the claimant by an act constituting the commission of a felony under state or federal law, or the act constituted deliberate or malicious conduct.

(b) A person may not claim punitive damages in a civil action,

unless the claimant first establishes a prima facie claim under (a) of this section.

Sec. 09.17.025. DAMAGES RESULTING FROM INTOXICATION OR COMMISSION OF A CRIME. (a) A person who suffers personal injury or death may not bring an action to recover damages for the personal injury or death if the injuries or death occurred while the person was

(1) voluntarily under the influence of intoxicating liquor or under the influence of a controlled substance listed in AS 11.71.-140 - 11.71.190 and the condition of being under the influence of the intoxicating liquor or controlled substance contributed more than 50 percent to the person's injuries or death; if there was 0.10 percent or more by weight of alcohol in the person's blood or 0.10 grams or more of alcohol per 210 liters of the person's breath, it is presumed that the person was under the influence of intoxicating liquor; or

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

(b) The provisions of (a)(1) of this section do not apply to a person who suffers personal injury or death caused by the intentional act of another person or persons.

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

(1) past economic loss;

(2) past noneconomic loss;

(3) future economic loss;

(4) future noneconomic loss; and

(5) punitive damages.

Sec. 09.17.035. PERIODIC PAYMENTS. (a) In an action to recover damages, the court shall, at the request of a party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment if the award equals or exceeds $100,000 in future damages.

(b) The court may require security be posted, in order to ensure that funds are available as periodic payments become due. The court may not require security to be posted if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

(c) A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Periodic payments shall be cumulatively adjusted annually by applying each year the annual rate of change in the consumer price index for all urban consumers for the Anchorage Metropolitan Area as published by the Bureau of Labor Statistics of the United States Department of Labor for the immediately preceding year. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had

no will.

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

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. The party or the attorney of the party shall sign and verify each complaint, answer, cross-claim, and counterclaim that the party files. The verification must include a statement that the person signing the pleading believes the statements made in the pleading are true. If the court finds that a statement made in the complaint, answer, cross-claim, or counterclaim was knowingly untrue, and upon motion of a party the person signing the pleading shall be compelled to show cause why the person signing the pleading should not be held in contempt of court.

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

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

(2) a member of the board of directors of a public or nonprofit hospital or a community-based advisory board of a hospital;

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

(4) a member of a governing board, commission, or citizen advisory committee of a municipality in the state.

(b) Notwithstanding (a) of this section, the duties and liabilities of a director or officer of a nonprofit corporation to the

corporation or the corporation's shareholders may not be limited or modified.

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

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

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

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

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

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

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

introduce evidence of

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

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

(3) gratuitous benefits provided to the claimant.

(e) This section does not apply to a medical malpractice action filed under AS 09.55.

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

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.070; for this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

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

obligation to each claimant in accordance with the respective percentages of fault.

Sec. 09.17.070. EFFECT OF RELEASE. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of AS 09.17.060.

Sec. 09.17.080. CONTINGENT FEE AGREEMENTS. (a) An attorney may not contract for or collect a contingency fee for representing a person seeking damages in connection with an action for personal injury based on negligence in excess of 25 percent of the amount recovered.

(b) If periodic payments for future damages are awarded, the present value of the periodic payments must be included in computing the total award from which attorney fees are calculated under this section.

(c) An attorney may not contract for or receive a fee for defending a person against a claim for damages in connection with an action for personal injury based on negligence, in excess of 25 percent of the amount recovered or if no amount is recovered by the plaintiff, 25 percent of the amount in controversy.

(d) The limitations in (a) - (c) of this section apply whether the recovery is by settlement, arbitration, or judgment.

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent or reckless toward

the person or property of the actor or others, or that subject a person to strict tort liability; the term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages; legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

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

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 [AS 45.45.010(a)] and accrued up to the date judgment is entered shall be adjusted as follows:

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

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

* Sec. 4. AS 09.30.070 is amended to read:

Sec. 09.30.070. INTEREST ON JUDGMENTS. The rate of interest on judgments and decrees for the payment of money is <u>equal to the 12th Federal Reserve district discount rate as determined under AS 45.45.-010(b)</u> [10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

* Sec. 5. AS 09.30.070 is amended by adding a new subsection to read:

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day process is served on the defendant or the day the defendant received written notification of the claim, whichever is earlier. Evidence to be considered by the finder of fact may include the amount of the prejudgment interest that may be added to the award.

* Sec. 6. AS 09.55.548(a) is repealed and reenacted to read:

(a) Except as provided in (b) of this section and AS 09.17, damages in a malpractice shall be awarded in accordance with principles of the common law.

* Sec. 7. AS 09.60.010 is repealed and reenacted to read:

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

for personal injury, death or property damage related to or arising out of fault, as defined in AS 09.17.900.

* Sec. 8. AS 09.16.010, 09.16.020, 09.16.030, 09.16.040, 09.16.050, and 09.16.060 are repealed.

* Sec. 9. AS 09.17.030 and 09.17.060 enacted in sec. 2 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 10. AS 09.17.060 enacted in sec. 2 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 11. AS 09.17.030 and 09.17.060 enacted in sec. 2 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 12. AS 09.17.040 enacted in sec. 2 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of certain pleadings.

* Sec. 13. AS 09.17.080 enacted in sec. 2 of this Act has the effect of amending Alaska Rule of Civil Procedure 82 by limiting the amount that could be awarded as attorney fees in an action for personal injury or property damage.

* Sec. 14. AS 09.30.070(b) as added by sec. 5 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day process is served on the defendant or the day the defendant receives written notice of the claim.

* Sec. 15. AS 09.60.010 as amended by sec. 7 of this Act has the effect

of amending Alaska Rule of Civil Procedure 82 by prohibiting the award of attorney fees in certain civil actions based on fault, unless allowed by statute or by agreement of the parties.

* Sec. 16. APPLICABILITY. Sections 1 - 8 of this Act apply to all causes of action accruing after the effective date of this Act, except that AS 09.17.055(a) enacted in sec. 2 of this Act applies to all contracts for the provision of collateral benefits that are formed or renewed after the effective date of this Act.

* Sec. 17. SEVERABILITY. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.

* Sec. 18. The governor is requested to direct the Department of Law, with the assistance of the Department of Commerce and Economic Development to

(1) contract for a study of closed insurance claims to identify

(A) the extent to which the legal system has or has not been the cause of dramatic liability insurance increases and coverage reduction in crisis lines in Alaska;

(B) how victims are faring under the present system; and

(C) what the various specific tort reform proposals will actually accomplish;

(2) a study of insurance company finances to determine

(A) the extent to which dramatic liability insurance rate increases and coverage limitations in Alaska are, or are not, cost-justified;

(B) what alternatives exist to limiting coverage and raising rates; and

(C) the legislative or regulatory actions that may be

necessary to resolve the state's liability insurance crisis.

* Sec. 19. Except for AS 09.17.080, added by sec. 2 of this Act, this Act takes effect immediately in accordance with AS 01.10.070(c).

* Sec. 20. AS 09.17.080, added by sec. 2 of this Act, only takes effect if sec. 15 of this Act does not pass each house of the legislature by at least a two-thirds majority vote. If AS 09.17.080 takes effect, it takes effect immediately under AS 01.10.070(c).

Faiks Version
Lauterbach
4/24/86

Original sponsors: Kelly, Abood,
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A BILL

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* Section 1. FINDINGS AND PURPOSE. (a) 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 Act 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.

(b) The legislature finds that boroughs, 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.

(c) 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.

(d) 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.

(e) It is the intent of the legislature to reduce costs asscciated with the tort system, while ensuring that adequate and appropriate compensation for persons injured through the fault of others is available.

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

Sec. 09.10.075. ACTIONS THAT MUST BE ARBITRATED. A person may not bring an action for damages based on injury to person or property when the amount in controversy is less than $25,000, exclusive of costs, interest and attorney fees, unless the controversy is first arbitrated under AS 09.43.

* Sec. 3. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

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

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

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise,

unless the claimant proves by clear and convincing evidence that the party defending the claim caused injury to the claimant by an act constituting the commission of a felony under state or federal law, or the act constituted deliberate or malicious conduct.

(b) A person may not claim punitive damages in a civil action, unless the claimant first establishes a prima facie claim under (a) of this section.

Sec. 09.17.025. DAMAGES RESULTING FROM INTOXICATION OR COMMISSION OF A CRIME. (a) A person who suffers personal injury or death may not bring an action to recover damages for the personal injury or death if the injuries or death occurred while the person was

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

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

(b) The provisions of (a)(1) of this section do not apply to a person who suffers personal injury or death caused by the intentional act of another person or persons.

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

as follows:

(1) past economic loss;

(2) past noneconomic loss;

(3) future economic loss;

(4) future noneconomic loss; and

(5) punitive damages.

Sec. 09.17.035. PERIODIC PAYMENTS. (a) In an action to recover damages, the court shall, at the request of a party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment if the award equals or exceeds $100,000 in future damages.

(b) The court may require security be posted, in order to ensure that funds are available as periodic payments become due. The court may not require security to be posted if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

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

no will.

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

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. The party or the attorney of the party shall sign and verify each complaint, answer, cross-claim, and counterclaim that the party files. The verification must include a statement that the person signing the pleading believes the statements made in the pleading are true. If the court finds that a statement made in the complaint, answer, cross-claim, or counterclaim was knowingly untrue, and upon motion of a party the person signing the pleading shall be compelled to show cause why the person signing the pleading should not be held in contempt of court.

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

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

(2) a member of the board of directors of a public or nonprofit hospital or a community-based advisory board of a hospital;

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

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

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

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

Sec. 09.17.055. COLLATERAL BENEFITS. (a) Except when the collateral source is a federal program that by law is required to seek subrogation and except death benefits paid under life insurance, a claimant in an action to recover damages for personal injury or death may only recover damages from the defendant that exceed amounts received by or paid for the benefit of 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 that by law is required to 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 the 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 designating and holding for possible periodic payment that amount of the award that would otherwise have been deducted.

(b) A person who provides collateral benefits admissible under (a) of this section may not bring an action based on the provision of the collateral benefits, nor may the person be subrogated to the

rights of a plaintiff against a defendant.

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

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.070; for this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

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

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

the release, covenant not to sue, or similar agreement provides for discharge.

Sec. 09.17.080. CONTINGENT FEE AGREEMENTS. (a) An attorney may not contract for or collect a contingency fee for representing a person seeking damages in connection with an action for personal injury based on negligence in excess of 25 percent of the amount recovered.

(b) The limitations in (a) of this section apply whether the recovery is by settlement, arbitration, or judgment.

(c) If periodic payments for future damages are awarded, the present value of the periodic payments must be included in computing the total award from which attorney fees are calculated under this section.

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

* Sec. 4. AS 09.30.065 is amended to read:

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

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

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

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

* Sec. 5. AS 09.30.070 is amended to read:

Sec. 09.30.070. INTEREST ON JUDGMENTS. The rate of interest on judgments and decrees for the payment of money is <u>equal to the 12th Federal Reserve district discount rate as determined under AS 45.45.010(b)</u> [10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

* Sec. 6. AS 09.30.070 is amended by adding a new subsection to read:

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day process is served on the defendant.

* Sec. 7. AS 09.43.110 is amended to read:

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

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

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

* Sec. 8. AS 09.43.160 is amended by adding a new subsection to read:

(c) An award made as a result of arbitration required by AS 09.-10.075 may be appealed to the district court. The appeal shall be filed within 60 days after notice of an award is made under AS 09.-43.080. The court shall grant a trial de novo if an appeal is filed under this subsection.

* Sec. 9. AS 09.55.548 is repealed and reenacted to read:

Sec. 09.55.548. WARDS. Except as provided in AS 09.17, damages in a malpractice action shall be awarded in accordance with principles of the common law.

* Sec. 10. AS 09.60.010 is repealed and reenacted to read:

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

* Sec. 11. AS 09.60 is amended by adding a new section to read:

Sec. 09.60.035. COSTS AND ATTORNEY FEES ALLOWED FOR ARBITRATION APPEAL. If a party appeals an award made as a result of arbitration required by AS 09.10.075, and the appellate court increases or

3464
Looks great. But be aware that has never had come the review or other legal review!

decreases the award by more than 10 ling party on appeal shall also be awarded actual costs and fees incurred as a result of the appeal.

* Sec. 12. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.137. CIVIL LIABILITIES OF ZOOS. (a) A person may not recover damages for injury to person or property from a zoo or a zoo operator if

(1) the damages occurred as a result of an inherent risk of attendance at the zoo;

(2) the zoo operator exercised reasonable care to prevent the injury; and

(3) signs are posted at prominent places within the zoo and at each entrance warning that the zoo is not liable for injuries to person or property occurring as a result of dangers or conditions inherent in attending the zoo.

(b) In this section

(1) "inherent risk of attendance" means the dangers or conditions that are an integral part of the physical layout of a zoo and the physical proximity of wild animals;

(2) "zoo" means a place where wild animals are kept for exhibition to the public.

* Sec. 13. AS 22.15.030(a) is amended to read:

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

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

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do

not exceed $25,000;

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

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

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

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

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

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

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

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

(11) over an appeal by a party to an arbitration award under AS 09.43.160(c).

* Sec. 14. AS 09.16.010, 09.16.020, 09.16.030, 09.16.040, 09.16.050, and 09.16.060 are repealed.

* Sec. 15. AS 09.17.030 and 09.17.060 enacted in sec. 3 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060

regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 16. AS 09.17.060 enacted in sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 17. AS 09.17.030 and 09.17.060 enacted in sec. 3 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 18. AS 09.17.040 enacted in sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of certain pleadings.

* Sec. 19. AS 09.17.080 enacted in sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 82 by limiting the amount that could be awarded as attorney fees in an action for personal injury or property damage.

* Sec. 20. AS 09.30.070(b) as added by sec. 6 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day process is served on the defendant.

* Sec. 21. AS 09.60.010 as amended by sec. 10 of this Act has the effect of amending Alaska Rule of Civil Procedure 82 by prohibiting the award of attorney fees, unless allowed by statute or by agreement of the parties.

* Sec. 22. APPLICABILITY. Sections 1 - 14 of this Act apply to all causes of action accruing after the effective date of this Act, except that AS 09.17.055(b) enacted in sec. 3 of this Act applies to all contracts for the provision of collateral benefits that are formed or renewed after the

effective date of this Act.

* Sec. 23. SEVERABILITY. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.

* Sec. 24. LEGISLATIVE INTENT. The legislature intends that the changes made in this Act to the code of civil procedure should be reviewed three years after the effective date of the Act, to determine if additional modifications or changes are necessary. To achieve effective review, the legislature requests that the governor direct the division of insurance to monitor the effect of this Act on premiums being charged for liability insurance and to report the effect to the legislature no later than March 1, in 1987, 1988, and 1989.

* Sec. 25. Except for AS 09.17.080, added by sec. 3 of this Act, this Act takes effect immediately in accordance with AS 01.10.070(c).

* Sec. 26. AS 09.17.080, added by sec. 3 of this Act, only takes effect if sec. 21 of this Act does not pass each house of the legislature by at least a two-thirds majority vote. If AS 09.17.080 takes effect, it takes effect immediately under AS 01.10.070(c).

Version #2
Ford/Lauterbac
4/23/86 ✓

Original sponsors: Kelly, Abood,
Bennett, et al

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 377 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

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

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

* Section 1. FINDINGS AND PURPOSE. (a) 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 Act 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.

(b) The legislature finds that boroughs, 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.

(c) 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 difficu choices, financial instability, and unlimited risk in providing services the public.

(d) The legislature also finds that general liability insurance becoming unavailable or unaffordable to many businesses, individuals, a nonprofit organizations in amounts sufficient to cover potential losse High premiums have discouraged socially and economically desirable acti ities and encourage many to go without adequate insurance coverage.

(e) It is the intent of the legislature to reduce costs associate with the tort system, while ensuring that adequate and appropriate compen sation for persons injured through the fault of others is available.

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

Sec. 09.10.075. ACTIONS THAT MUST BE ARBITRATED. A person ma not bring an action for damages based on injury to person or proper when the amount in controversy is less than $25,000, exclusive c costs, interest and attorney fees, unless the controversy is firs arbitrated under AS 09.43.

* Sec. 3. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

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

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

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may no be awarded in an action, whether in tort, contract, or otherwise

unless the claimant proves by clear and convincing evidence that th party defending the claim caused injury to the claimant by an ac constituting the commission of a felony under state or federal law, o the act constituted deliberate or malicious conduct.

(b) A person may not claim punitive damages in a civil action unless the claimant first establishes a prima facie claim under (a) o this section.

Sec. 09.17.025. DAMAGES RESULTING FROM INTOXICATION OR COMMIS-SION OF A CRIME. (a) A person who suffers personal injury or deat may not bring an action to recover damages for the personal injury o death if the injuries or death occurred while the person was

(1) voluntarily under the influence of intoxicating liquo or under the influence of a controlled substance listed in AS 11.71.- 140 - 11.71.190 and the condition of being under the influence of th intoxicating liquor or controlled substance contributed more than 5 percent to the person's injuries or death; if there was 0.10 percen or more by weight of alcohol in the person's blood or 0.10 grams o more of alcohol per 210 liters of the person's breath, it is presume that the person was under the influence of intoxicating liquor; or

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

(b) The provisions of (a)(1) of this section do not apply to person who suffers personal injury or death caused by the intentiona act of another person or persons.

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

as follows:

(1) past economic loss;

(2) past noneconomic loss;

(3) future economic loss;

(4) future noneconomic loss; and

(5) punitive damages.

Sec. 09.17.035. PERIODIC PAYMENTS. (a) In an action to recover damages, the court shall, at the request of a party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment if the award equals or exceeds $100,000 in future damages.

(b) The court may require security be posted, in order to ensure that funds are available as periodic payments become due. The court may not require security to be posted if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

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

no will.

(d) If the court finds that the judgment debtor has exhibited continuing pattern of failing to make payments required under (c) c this section, the court shall, in addition to the required periodi payments, order the judgment debtor to pay the judgment creditor an damages caused by the failure to make periodic payments, includin costs and attorney fees.

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. The party or the attorney of the party shall sign and verify each complaint, answer cross-claim, and counterclaim that the party files. The verificatio must include a statement that the person signing the pleading believe the statements made in the pleading are true. If the court finds tha a statement made in the complaint, answer, cross-claim, or counter-claim was knowingly untrue, and upon motion of a party the perso signing the pleading shall be compelled to show cause why the perso signing the pleading should not be held in contempt of court.

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

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

(2) a member of the board of directors of a public o nonprofit hospital or a community-based advisory board of a hospital;

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

(4) an elected or appointed official of a political subdi-vision of the state.

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

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

Sec. 09.17.055. COLLATERAL BENEFITS. (a) Except when the collateral source is a federal program that by law is required to seek subrogation and except death benefits paid under life insurance, a claimant in an action to recover damages for personal injury or death may only recover damages from the defendant that exceed amounts received by or paid for the benefit of 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 that by law is required to 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 the 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 designating and holding for possible periodic payment that amount of the award that would otherwise have been deducted.

(b) A person who provides collateral benefits admissible under (a) of this section may not bring an action based on the provision of the collateral benefits, nor may the person be subrogated to the

rights of a plaintiff against a defendant.

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

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

(2) the percentage of the total fault of all of the partie to each claim that is allocated to each claimant, defendant, thir party defendant, and person who has been released from liability unde AS 09.17.070; for this purpose the court may determine that two o more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fac shall consider both the nature of the conduct of each party at faul and the extent of the causal relation between the conduct and th damages claimed.

(c) The court shall determine the award of damages to eac claimant in accordance with the findings, subject to a reduction unde AS 09.17.070, and enter judgment against each party liable on th basis of rules of several liability. The court shall also determin and state in the judgment each party's equitable share of the obliga tion to each claimant in accordance with the respective percentages o fault.

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

the release, covenant not to sue, or similar agreement provides fo discharge.

Sec. 09.17.080. CONTINGENT FEE AGREEMENTS. (a) An attorney ma not contract for or collect a contingency fee for representing person seeking damages in connection with an action for persona injury based on negligence in excess of 25 percent of the amoun recovered.

(b) The limitations in (a) of this section apply whether the recovery is by settlement, arbitration, or judgment.

(c) If periodic payments for future damages are awarded, the present value of the periodic payments must be included in computing the total award from which attorney fees are calculated under this section.

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

* Sec. 4. AS 09.30.065 is amended to read:

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

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

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

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

* Sec. 5. AS 09.30.070 is amended to read:

Sec. 09.30.070. INTEREST ON JUDGMENTS. The rate of interest on judgments and decrees for the payment of money is <u>equal to the 12th Federal Reserve district discount rate as determined under AS 45.45.010(b)</u> [10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

* Sec. 6. AS 09.30.070 is amended by adding a new subsection to read:

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day process is served on the defendant.

* Sec. 7. AS 09.43.110 is amended to read:

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

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

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

* Sec. 8. AS 09.43.160 is amended by adding a new subsection to read:

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

* Sec. 9. AS 09.55.548 is repealed and reenacted to read:

Sec. 09.55.548. AWARDS. Except as provided in AS 09.17, damages in a malpractice action shall be awarded in accordance with principles of the common law.

* Sec. 10. AS 09.60.010 is repealed and reenacted to read:

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

* Sec. 11. AS 09.60 is amended by adding a new section to read:

Sec. 09.60.035. COSTS AND ATTORNEY FEES ALLOWED FOR ARBITRATION APPEAL. If a party appeals an award made as a result of arbitration required by AS 09.10.075, and the appellate court increases or

decreases the award by more than 10 percent, the prevailing party on appeal shall also be awarded actual costs and attorney fees incurred as a result of the appeal.

* Sec. 12. AS 22.15.030(a) is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

(11) over an appeal by a party to an arbitration award under AS 09.43.160(c).

* Sec. 13. AS 09.16.010, 09.16.020, 09.16.030, 09.16.040, 09.16.050, and 09.16.060 are repealed.

* Sec. 14. AS 09.17.030 and 09.17.060 enacted in sec. 3 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 15. AS 09.17.060 enacted in sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 16. AS 09.17.030 and 09.17.060 enacted in sec. 3 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 17. AS 09.17.040 enacted in sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of certain pleadings.

* Sec. 18. AS 09.17.080 enacted in sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 82 by limiting the amount that could be awarded as attorney fees in an action for personal injury or property damage.

* Sec. 19. AS 09.30.070(b) as added by sec. 6 of this Act has the

effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day process is served on the defendant.

* Sec. 20. AS 09.60.010 as amended by sec. 10 of this Act has the effect of amending Alaska Rule of Civil Procedure 82 by prohibiting the award of attorney fees, unless allowed by statute or by agreement of the parties.

* Sec. 21. APPLICABILITY. Sections 1 - 13 of this Act apply to all causes of action accruing after the effective date of this Act, except that AS 09.17.055(b) enacted in sec. 3 of this Act applies to all contracts for the provision of collateral benefits that are formed or renewed after the effective date of this Act.

* Sec. 22. SEVERABILITY. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.

* Sec. 23. LEGISLATIVE INTENT. The legislature intends that the changes made in this Act to the code of civil procedure should be reviewed three years after the effective date of the Act, to determine if additional modifications or changes are necessary. To achieve effective review, the legislature requests that the governor direct the division of insurance to monitor the effect of this Act on premiums being charged for liability insurance and to report the effect to the legislature no later than March 1, in 1987, 1988, and 1989.

* Sec. 24. Except for AS 09.17.080, added by sec. 3 of this Act, this Act takes effect immediately in accordance with AS 01.10.070(c).

* Sec. 25. AS 09.17.080, added by sec. 3 of this Act, only takes effect if sec. 10 of this Act does not pass each house of the legislature by at least a two-thirds majority vote. If AS 09.17.080 takes effect, it takes

effect immediately under AS 01.10.070(c).

Sackett - by request

4/30/86

AMENDMENT 1

- Failed, withdrawn, or incorporated i.e. other amendments

es 20-27 and insert the following:

ONECONOMIC DAMAGES. In an action to

sonal injury based on negligence,

losses shall be limited to

uffering, inconvenience, physical

it, loss of enjoyment of life and

[illegible] damage.

Failed 5-1

4/29/86.spw

Amendment 1. Limits on Noneconomic Damage. Damages in tort actions are of two types: (1) economic damages which consist of medical expenses and wage loss; and (2) noneconomic damages which consist of pain and suffering, disfigurement, loss of enjoyment of life and the like. Under present law, juries lump both of these categories in one total award, with the result that no one in Alaska has any idea how much money juries have awarded in the past for pain and suffering. The only thing we do know is that the vast majority of negligence cases are for small amounts, so that the number of cases that will be affected by a limit of $500,000 on noneconomic damages will be minimal. Imposing a limit then will seriously impact a very few people with catastrophic injuries with no known corresponding public benefit. Until the legislature has some knowledge of who will be affected and how much they will be affected, it should adopt no limits but leave it to juries to decide what is fair in particular cases. If the legislature does adopt a limit, it will be substituting its judgment, having heard no evidence in any case, for that of juries which have heard all of the evidence.

The proposed amendment describes what types of damages may be awarded by a jury but removes the limit on noneconomic damages. Another section of the bill, Sec. 09.17.030, would require juries to specify in their verdicts

how much money is being awarded for noneconomic damages. This provision will at least provide the kind of information necessary for the legislature to make a reasoned judgment at some future time as to the need for and impact of a statutorily mandated limit on noneconomic damages.

Sackett - by request

Failed

AMENDMENT 2

Delete material from page 2 lines 28 through page 3, line 4, and insert the following:

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

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

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

4/29/86 jm

Amendment 2. Punitive Damages. Punitive damages under present law can only be awarded when a parties conduct is in "reckless disregard" of the rights of others, or done with malice toward another. The leading case in Alaska involved a gun manufacturer who knew a gun was defective and likely to cause serious injury to a person using the gun. The manufacturer knew the defect could be remedied for less than $1.75/gun but still decided to sell it to the public without modification. Since the manufacturer had no malice toward any particular individual and the conduct was not a crime, it would not be subject to punitive damages under this bill. It was, however, conduct which recklessly disregarded the safety of persons using the product.

The amendment returns to the Senate Judiciary version. It does not effect the standards under which punitive damages may be awarded but does effect who gets them. Since they are in the nature of a civil fine, 50 percent of them will go to the public; to provide an incentive for a plaintiff to seek them, the remaining 50 percent will go to the plaintiff. Under present law all punitive damages go to the plaintiff.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 377

The committee substitute for this bill calls for a study of the current insurance crisis.

First, a detailed and thorough examination will be undertaken of closed claims by line in Alaska for insurance companies doing business in Alaska. Second, a thorough examination will be made of insurance company financial operations, expenditures, and profitability.

From the closed claims study we will be able to identify:

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(b) how victims are faring under the present system; and

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The analysis of insurance company finances will enable us to determine:

(a) the extent to which dramatic liability insurance rate increases and coverage limitations in Alaska are -- or are not -- cost-justified,

(b) what alternatives exist to limiting coverage and raising rates; and

(c) the legislative and/or regulatory actions which may be necessary to resolve the State's liability insurance crisis.

In order to undertake the study the Department of Law will hire outside financial management experts to determine the causes of the existing insurance situation, and tc advise of possible corrective actions.

Sackett - by request

AKMENDMENT NO. 7

Withdrawn (to be rewritten)

Page 5, line 28, delete "or appointed official"

Burke: Suggested deleting

Purpose -- including all appointed municipal officials in a section granting blanket immunity is overly broad.

AMENDMENT NO 8

Withdrawn

Page 8, delete lines 3-13.

Purpose -- Returns to existing system of allowing persons to make their own contractual arrangements with their own attorneys.

AMENDMENT NO. 9

Withdrawn in favor of Halford Am #8

Page 9, lines 28-29, delete, "process is served on the defendant" and insert, "the cause of action accures."

Purpose -- to preserve existing law relating to prejudgment interest by stating that such interest accrues from the date of injury.

AMENDMENT NO. 10

Failed 5-1

Page 10, lines 19-25, delete all material and renumber remaining sections accordingly.

Purpose -- to retain Rule 82 providing for partial compensation of attorney fees for all prevailing parties in civil actions.

RH: Moved DAMAGE - No. 06

(Suggested by Snowden)

by request

Failed
0-2-4

Amendment #5

Delete all material on page 7, lines 2 - 25, and insert the following:

Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, includng third-party defendants and persons who have been released under AS 09.17.070, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

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

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

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

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

Halford suggested DELETE

Amendment 5. Apportionment of Damages -- Joint and Several Liability. Under present law, if three defendants are held liable for an injury to a plaintiff, they each bear full responsibility for the total amount of the damage. This is "joint and severally" liability. If one of the defendants pays the full amount of the judgment he has rights under law to contribution from the other defendants. If one of those defendants has no money, the courts long ago uniformly concluded that the problem of insolvency is one that the remaining defendants who contributed to the accident will have to bear, rather than reducing the award of an injured plaintiff who is not at fault.

Some persons are concerned that juries are holding some defendants, like states and cities with "deep pockets," only minimally liable, but the result under joint and several liability is that they end up getting stuck for the whole judgment. Accordingly, both the Senate Judiciary Committee and the House Labor and Commerce Committee sought a compromise which would insure that defendants only minimally liable would not be held responsible for all the damage, while still providing a cushion for innocent parties who were seriously injured by multiple defendants, some of whom might be insolvent. Senate Judiciary and House Labor and Commerce produced what we have included as Amendment 5, which in subsection (d) continues the rule of joint and

several liability but changes it to provide that a defendant is never more responsible in damages than for twice his percentage of fault for the injury. If in fact then a defendant is only liable for five percent of an injury, he cannot be held responsible for more than ten percent of the total damages. Only if a defendant is responsible for at least 50 percent of the injury can he be held liable for the entire amount of the damages. Even then, he would still have the right to seek contribution from the other defendants who were also liable for the injury.

The proposed Senate Finance version would limit responsibility on the basis of "several" liability by saying that you are responsible in damages only for your percentage of fault as decreed by a jury. Even if the allocation of fault were an exact science, which it is not, this proposal would entirely shift the risk of insolvent defendants from the remaining defendants who are at fault to a plaintiff who is blameless and injured. Remember the issue here is <u>not</u> whether a party should be responsible in damages for more than their percent of fault; the issue is when a party who <u>is</u> at fault has no money, who should bear the risk -- the plaintiff or other parties at fault. This amendment attempts to compromise that issue.

SFC-86
4/30/86

Withdrawn

FURTHER AMENDMENT RE APPLICATION OF RULE 82

Page 10, lines 25-25, delete "a civil damages action" and insert, "an action for damages for personal injury based on negligence."

-- this language tracks similar language as to applicability throughout the new chapter 17 enacted in section 3 of the bill.

TO: CSSB 377 (Finance) By: Faiks

Amendment #1

Page 13, line 16 insert new section:

* Section 22. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.137. CIVIL LIABILITIES OF ZOOS. (a) A person may not recover damages for injury to person or property from a zoo or a zoo operator, if the damages occurred as a result of an inherent risk of attendance at a zoo, notice of the inherent risk was posted as required under (b) of this section, and the zoo operator exercised reasonable care to prevent the injury.

(b) A zoo operator shall post signs at prominent places within a zoo and at each entrance. Each sign shall include a statement warning that the zoo is not liable for injuries to person or property occurring as a result of dangers or conditions inherent in attending the zoo.

(c) For purposes of this section

(1) "inherent risk of attendance" means the dangers or conditions that are an integral part of the physical layout of a zoo and the physical proximity of wild animals;

(2) "zoo" means a place where wild animals are kept for exhibition to the public.

Renumber remaining sections accordingly

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Renumber remaining sections accordingly

Senate Finance Committee

Senator Jan Faiks, Co-Chairman Senator John Sackett, Co-Chairman

4/29/86

Incorporated in
4/29/86 amendment packet.

A M E N D M E N T

By Eliason

Offered in the SENATE

TO: CSSB 377 (Finance) Version #2

Page 10, line 15 Delete Sec. 9 and renumber the following sections accordingly.

4/29/86

A M E N D M E N T

By Eliason

Offered in the SENATE

TO: CSSB 377 (Finance) Version #2

Page 8, line 2 After the word "discharge." add the following language.

"However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of AS 09.17.060."

Seckett - by request

AMENDMENT 2

Delete material from page 2 lines 28 through page 3, line 4, and insert the following:

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

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

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

Amendment 2. Punitive Damages. Punitive damages under present law can only be awarded when a parties conduct is in "reckless disregard" of the rights of others, or done with malice toward another. The leading case in Alaska involved a gun manufacturer who knew a gun was defective and likely to cause serious injury to a person using the gun. The manufacturer knew the defect could be remedied for less than $1.75/gun but still decided to sell it to the public without modification. Since the manufacturer had no malice toward any particular individual and the conduct was not a crime, it would not be subject to punitive damages under this bill. It was, however, conduct which recklessly disregarded the safety of persons using the product.

The amendment returns to the Senate Judiciary version. It does not effect the standards under which punitive damages may be awarded but does effect who gets them. Since they are in the nature of a civil fine, 50 percent of them will go to the public; to provide an incentive for a plaintiff to seek them, the remaining 50 percent will go to the plaintiff. Under present law all punitive damages go to the plaintiff.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 377

The committee substitute for this bill calls for a study of the current insurance crisis.

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In order to undertake the study the Department of Law will hire outside financial management experts to determine the causes of the existing insurance situation, and to advise of possible corrective actions.

Seckett- by request

AMENDMENT 6

Delete material beginning at page 8, line 24 through page 9, line 16, and insert the following:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 30 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 [AS 45.45.010(a)] and accrued up to the date judgment is entered shall be adjusted as follows:

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

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

Sackett
- by request

AKMENDMENT NO. 7

Page 5, line 28, delete "or appointed official"

Purpose -- including all appointed municipal officials in a section granting blanket immunity is overly broad.

AMENDMENT NO 8

Page 8, delete lines 3-13.

Purpose -- Returns to existing system of allowing persons to make their own contractual arrangements with their own attorneys.

AMENDMENT NO. 9

Page 9, lines 28-29, delete, "process is served on the defendant" and insert, "the cause of action accures."

Purpose -- to preserve existing law relating to prejudgment interest by stating that such interest accrues from the date of injury.

AMENDMENT NO. 10

Page 10, lines 19-25, delete all material and renumber remaining sections accordingly.

Purpose -- to retain Rule 82 providing for partial compensation of attorney fees for all prevailing parties in civil actions.

by FERGUSON

AMENDMENT TO CSSB 377(Fin):

Page 8, lines 3-13, delete all material and insert a new section to read:

"Sec. 09.17.080. ATTORNEY FEE AGREEMENTS. (a) An attorney may not contract for or collect a contingency fee for representing a person seeking damages in connection with an action for personal injury based on negligence in excess of 25 percent of the amount recovered.

(b) If periodic payments for future damages are awarded, the present value of the periodic payments must be included in computing the total award from which attorney fees are calculated under (a) of this section.

(c) An attorney may not contract for or receive a fee for defending a person against a claim for damages in connection with an action for personal injury based on negligence in excess of 25 percent of the amount in controversy or the amount recovered by the plaintiff.

(d) The limitations of (a) and (b) of this section apply whether the recovery is by settlement, arbitration, or judgment."

Offered: 3/20/86
Referred: Judiciary

Original sponsors: Kelly, Abood,
Bennett, et al

IN THE SENATE

BY THE LABOR AND COMMERCE COMMITTEE

CS FOR SENATE BILL NO. 377 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

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

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

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

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

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

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

Sec. 09.17.020. ITEMIZED VERDICTS. In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, and economic loss shall be further itemized by category. Itemization of economic loss by category includes: (1) amounts intended to compensate for reasonable expenses that have been incurred, or which will be incurred, for necessary medical, surgical, x-ray, dental, or other health or rehabilitative services, drugs, and therapy; (2) amounts intended to compensate for lost wages or loss of earning capacity; and (3) all other economic losses claimed by the plaintiff or granted by

the jury. A verdict shall further determine the amounts intended to compensate for injury or losses incurred before the verdict and amounts intended to compensate for losses that will be incurred in the future.

Sec. 09.17.030. PERIODIC PAYMENTS. (a) In an action to recover damages for personal injury, the court shall, at the request of a judgment creditor, enter judgment ordering that amounts awarded for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment if the award equals or exceeds $50,000 in future damages. The court may require a judgment debtor to post security adequate to assure full payment of future damages awarded by judgment.

(b) A judgment ordering payment of future damages by periodic payments shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. The court that rendered the original judgment, may, upon petition of a party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this section.

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

(d) Following expiration of all obligations specified in the periodic payment judgment, the obligation of the judgment debtor to make further payments shall cease and security given under (a) of this section shall revert to the judgment debtor.

(e) A certified copy of a judgment or order of the court issued under this section may be recorded under AS 09.30.010, but may not become a lien upon real property before the date that payment becomes due.

Sec. 09.17.040. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Sec. 09.17.050. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.17.-060, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.060; for this purpose the court may determine that two or more persons are to be treated as a single party.

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

L&C refers to obligation

Effect of Release

Jud refers to tr amt

Effect of Release

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

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.060, and enter judgment against each party liable on the basis of rules of several liability. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

Sec. 09.17.060. EFFECT OF RELEASE. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of AS 09.17.050.

Sec. 09.17.900. DEFINITIONS. In this chapter

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

(2) "future damages" includes damages for future medical

treatment, care or custody; loss of future earning capacity; or any future noneconomic loss.

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

Sec. 09.10.075. PERSONAL INJURY ACTIONS THAT MUST BE ARBITRATED. A person may not bring an action for damages based on personal injury when the amount in controversy is less than $100,000, exclusive of costs, interest and attorney fees, unless the controversy is first arbitrated under AS 09.43.

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

Sec. 09.30.065. OFFERS OF JUDGMENT. On or before the 60th day following the filing of an answer in a civil action, and on the fifth day following the day discovery closes as ordered by the court, [EITHER THE PARTY MAKING A CLAIM OR] the party defending against a claim may serve upon the <u>party making the claim</u> [ADVERSE PARTY] an offer to allow judgment to be entered in complete satisfaction of the claim <u>against that defending party</u> for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the <u>claiming</u> [ADVERSE] party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the <u>claiming party</u> [OFFEREE] than the offer, <u>the claim may not bear interest from the date of the offer to the date of judgment</u> [THE INTEREST AWARDED UNDER AS 45.45.010(a) AND ACCRUED UP TO THE DATE JUDGMENT IS ENTERED SHALL BE ADJUSTED AS FOLLOWS:

(1) IF THE OFFEREE IS THE PARTY MAKING THE CLAIM, THE INTEREST RATE SHALL BE REDUCED BY TWO PERCENT A YEAR;

(2) IF THE OFFEREE IS THE PARTY DEFENDING AGAINST THE CLAIM, THE INTEREST RATE SHALL BE INCREASED BY TWO PERCENT A YEAR].

* Sec. 4. AS 09.43.110 is amended to read:

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

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

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

* Sec. 5. AS 09.43.160 is amended by adding a new subsection to read:

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

* Sec. 6. AS 09.60.010 is amended by adding a new subsection to read:

(b) Notwithstanding (a) of this section, the court may not award attorney fees to a prevailing party in an action for damages to the person or to property in the absence of a specific finding that the party at fault acted with malice, in bad faith, or with reckless disregard of the rights of another in causing the injury. In this subsection, "reckless disregard of the rights of another" means a lack of consideration of the rights of another in a manner that is reasonably likely to cause damage to the person or property of another.

* Sec. 7. AS 22.10.020(d) is amended to read:

(d) The superior court has jurisdiction in all matters appealed

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

* Sec. 8. AS 09.16.010, 09.16.020, 09.16.030, 09.16.040, 09.16.050, and 09.16.060 are repealed.

* Sec. 9. AS 09.17.020 and 09.17.050 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.050 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.020.

* Sec. 10. AS 09.17.050 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 11. AS 09.17.020, 09.17.030 and 09.17.050 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 12. AS 09.30.065 as amended by sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest stops accruing from the date of an offer by a defending party that a claiming party fails to increase at judgment.

* Sec. 13. AS 09.60.010 as amended by sec. 6 of this Act has the effect of amending Alaska Rule of Civil Procedure 82 by allowing costs and attorney fees in an action for personal injury or property damage only after a specific finding of malice, bad faith, or reckless disregard of the rights

of another in causing the injury.

* Sec. 14. APPLICABILITY. Sections 1 - 7 of this Act apply to all causes of action accruing after the effective date of this Act.

* Sec. 15. LEGISLATIVE INTENT. The legislature intends that the changes made in this Act to the code of civil procedure should be reviewed three years after the effective date of the Act, to determine if additional modifications or changes are necessary. To achieve effective review, the legislature requests that the governor direct the division of insurance to monitor the effect of this Act on premiums being charged for liability insurance and to report the effect to the legislature no later than March 1, in 1987, 1988, and 1989.

* Sec. 16. This Act takes effect immediately in accordance with AS 01.-10.070(c).

AMENDMENT

CSSB-377 (Fin) version 2

DELETE: Sec. 2, page 2, lines 12 - 17

Sec. 8, page 10, lines 9 - 14

AND IF THE ABOVE DELETIONS ARE DELETED, THEN:

DELETE: Sec. 11, page 10, lines 27 - line 3 (page 11)

Jackett moved this am - Discussion
Snowden

Ferguson
4/28/86

Senator Joe Josephson
April 28, 1986

Senate Finance Committee Meeting
RE: Senate Bill 377

I have reviewed the 4/23/86 work draft of CSSB 377 (Finance) and want to share some concerns. The problems I cite are generally unrelated to the philosophy, but involve questions of meaning and intent.

1. Section 2. What is the intent with respect to the costs of arbitration? There will be indigent plaintiffs who will not be able to pay the costs of arbitration; is it the intent that the State assume the costs in such a case, just as court costs are borne by the taxpayer? If not, how is the matter to be dealt with?

2. Section 2. "The amount in controversy" is usually considered to be the amount pleaded by the plaintiff's attorney. Has the Committee considered whether Section 2 will tend to raise the demands in smaller cases, instead of to lower the demands, and if so, what effect that will have on the costs to insurers?

3. Section 3, page 3, lines 5-7. Does the Committee intend that before a punitive damages issue can go to the jury or judge, there will be a bifurcated proceeding to establish the "prima facie claim"? If so, is the Committee contemplating two proceedings? Before the same judge and jury? Or before a different judge and/or jury? How else will the claimant "first establish" a prima facie claim?

4. Page 4, lines 13-17. Assuming that there is a bona fide problem of stability in the insurance industry, somebody should be sure that the insurer making periodic payments will be able to perform years into the future. Please see the language in my bill, SB 392, which called for periodic payments but with protections for the victims.

5. Does the periodic payment language provide for post-judgment interest on the amount deferred? If you reduce the award to present value, but have no inflation factor or interest requirement on the amount deferred, then the victim gets devalued dollars later on instead of the real and genuine value of what the jury or judge intended to award as compensation.

6. Page 5. What is a "continuing pattern of failing" to make payments? If payments are made on an annual basis,

4/28/86

would this require the unpaid victim to wait two or three years before asking the court to order relief? Why is not one default sufficient to trigger a court order?

7. Page 5. Limited liability. Does this section purport to exclude the liability of certain corporate directors or officers, etc., for such torts as defamation (libel or slander), fraud, etc.? If not, the language should be changed.

These are a few issues that spring up from the page. I hope this memorandum will be helpful.

Bill file

BILL SHEFFIELD
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 28, 1986

The Honorable Jan Faiks
The Honorable John Sackett
Co-Chairs, Senate Finance Committee
AND
The Honorable M. Mike Miller
Chairman, House Judiciary Committee
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Re: Tort Reform

Dear Senators Faiks and Sackett, Representative Miller:

Today, I am recommending that we take clear and measured steps toward tort reform through a number of moderate changes to our current civil justice system. The first steps I propose include 1) revision of the common law concerning joint and several liability, 2) statutory changes to allow courts to award and monitor periodic payments of future economic damages in appropriate cases, and 3) a requirement that a percentage of all punitive damage awards be turned over to the state, to be used to promote legal services for the poor and disadvantaged of Alaska.

The real goal of tort reform is affordable insurance that will allow small businesses, non-profit groups, and individual Alaskans to operate, secure in the knowledge that they have the coverage they need at rates they can afford. It is to that end that I am recommending these changes.

In addition, and equally important, I am asking the Legislature to authorize and fund a thorough study of both the claims experience and the true financial condition of the insurance industry in Alaska. We need to uncover the real facts behind the present insurance crisis, to determine whether additional modifications to the judicial system are warranted, and to consider whether additional legislative actions might ease the present insurance crisis.

I am not, however, convinced that our civil justice system can be held solely responsible for the current insurance crisis. Nor am I convinced that tort reform will result in

lower insurance premiums or more availability of insurance at any price. Many experts believe the current crisis is simply the result of a downturn in the economic cycle of the insurance industry, and that changes in the cost and availability of insurance may come about in the near future as a consequence of normal market forces.

Both this Administration and the Legislature have been the subject of tremendous lobbying efforts by a variety of interest groups who want to bring about significant changes in our civil justice system. The rationale behind many of the arguments advanced is sometimes confusing and occasionally misleading. I have received hundreds of communications from small businessmen, day-care operators, fishermen, professionals, and people from all walks of life, including those who represent the insurance industry, suggesting that significant tort reform will lead to lower insurance premiums and more availability of insurance coverage.

I have carefully considered the arguments and various proposals concerning tort reform. Generally, before I support any legislation, I must first be assured that the legislation is fair, equitable, and just for all Alaskans, not just certain special interest groups. I also must be assured that the rights of Alaskans who are the unfortunate victims of accidents in this state are fully protected. A balance needs to be struck between the rights of victims to compensation for their injuries and legitimate concerns for a more equitable distribution of the cost and risk of injury. The end result of any modification to our civil justice system must be fairness to all Alaskans, including the small businessman, the professional, the urban resident, the villager, the poor, and the disadvantaged.

Probably the most significant tort reform measure currently under consideration by the Legislature is an amendment to the legal doctrine of joint and several liability. This is an area of law which society has developed over the course of many years. Under this doctrine, when a fact finder determines that two or more defendants are each at fault in causing an injury to a plaintiff, that plaintiff may recover all of his damages against any one defendant and it is the defendants' responsibility to collect among themselves.

Problems arise where one or more of the defendants is insolvent or otherwise judgment proof. In such a case, another defendant may have to pay all of the injured person's damages and the paying defendant may have no recourse to recover the amount he paid in excess of his "fair" share. The doctrine of joint and several liability developed because society, recognizing that some inequities will result in any case where one of the parties responsible for the injury cannot pay his or her share, decided that it would be more equitable for a guilty defendant to bear the added burden, rather than the injured victim.

This doctrine, however, often results in inequities of another form. Where only one of the defendants has the financial ability to pay, that defendant may end up paying 100 percent of the plaintiff's damages, even though that defendant is only 5 or 10 percent negligent in the particular case. This is the so-called "deep-pocket" problem. Municipalities, the State, and persons responsible enough to maintain insurance are often required to pay large sums of money when their actual contribution arguably should be much less.

Given these competing considerations, there is currently under consideration one proposal modifying joint and several liability which attempts to strike a fair balance between the rights of the victim, which must be protected, and the rights of the financially responsible defendant. This version provides that a party may be held liable for up to -- but not more than -- twice the party's percentage of fault in the accident. It recognizes that pure several liability, which is supported by some advocates of tort reform, may result in victims not being adequately compensated for their injuries, while pure joint and several liability, as it is currently applied, may unjustly burden those who are financially responsible.

A second concept drawing much attention is a proposal to put a cap on non-economic damages, which are generally referred to as pain and suffering. One version of a tort reform bill which I have seen purports to limit any award for non-economic damages to 25 percent of the present value of the economic damages awarded, or $500,000.00, whichever is less. Since a significant portion of economic damages frequently involves lost wages, under this provision a successful businessman or a brain surgeon would have a right to more non-economic damages than an Alaskan who lives by a subsistence way of life, a housewife who does not work

outside the home, a teenager who has not yet had the opportunity to demonstrate his or her income earning capabilities, or an older retired Alaskan -- even where the amount of pain and suffering sustained by each was equal. This is unacceptable: it discriminates among Alaskans on the basis of wealth, is constitutionally questionable, and fails to consider the rights of accident victims. As I stated earlier, I cannot support legislation that is not fair and equitable for all Alaskans.

Another tort reform measure currently under consideration is whether society should require parties to arbitrate cases where the amount claimed by the plaintiff is relatively small. Although I agree that there are undoubtedly better ways to resolve disputes than taking all matters to court, I believe this proposal has some serious problems, because it would infringe upon the right of people to be compensated in small cases. Under the proposed legislation, the cost of an arbitration must be borne by the parties. This is in contrast to our traditional system of justice in which the courts are funded by the State and everyone has a right of access to the courts to redress grievances. By requiring the cost of an arbitrator to be borne by the parties -- a cost which could be very significant in any given case -- persons with relatively small but nonetheless legitimate claims will be effectively prevented from recovering for their injuries. In addition, there appears to be little consideration of the difficulties and costs inherent in holding arbitration hearings in the small, more remote villages of Alaska, where the court system already exists but an arbitration mechanism does not. In my opinion, further study of alternative dispute resolution mechanisms is necessary before we enact legislation to require arbitration, and I recommend this idea be considered in the interim by the Legislature.

With respect to the idea of periodic -- rather than lump sum -- payments of awards for future economic loss (such as future wages), I would recommend that the courts be given the discretion to require that the portion of a judgment representing future economic loss be paid into a trust account or used to purchase an annuity and thereafter paid in periodic installments to the victim. The Legislature should indicate that payments for future economic losses should, in the appropriate case, be made on a periodic basis. I would not propose that periodic payments of future economic loss be required in every case, nor should periodic

payments ever be used to reduce the liability or obligations of the defendant.

Finally, with respect to proposals dealing with the award of punitive damages (which frequently result in an undeserved windfall to the plaintiffs), I believe we should provide that 50 percent of all punitive damages awarded in any case be turned over to the State. This money should be placed in a special fund, which we could call the Legal Justice Fund, created for the purpose of providing legal services for the poor. I have asked the Department of Law to advise the Legislature on how this might be accomplished and proposed legislation is attached.

There are several other tort reform proposals presently before the Legislature, but at this time I think that we should proceed with caution. I have suggested a couple of things that can be done at this time. However before we do more, we need to develop the specific information necessary to tailor future modifications to accomplish the desired result.

There are two sides to the tort reform issue. In order to accomplish something meaningful in the years to come, I suggest that any modification to our civil justice system should be coupled with a complete study, financed by the Legislature and performed during the interim, which focuses on two major areas concerning the insurance crisis. First, a detailed and thorough examination should be undertaken of closed claims by line in Alaska for insurance companies doing business in Alaska. Second, a thorough examination should be made of insurance company financial operations, expenditures, and profitability.

From the closed claims study we would be able to identify:

(a) the extent to which the legal system has or has not been the cause of dramatic liability insurance premium increases and coverage reduction in crisis lines in Alaska;

(b) how victims are faring under the present system; and

(c) what the various specific tort reform proposals will actually accomplish.

The analysis of insurance company finances will enable us to determine:

(a) the extent to which dramatic liability insurance rate increases and coverage limitations in Alaska are -- or are not -- cost-justified,

(b) what alternatives exist to limiting coverage and raising rates; and

(c) the legislative and/or regulatory actions which may be necessary to resolve the State's liability insurance crisis.

I believe these proposals represent a genuine first step towards tort reform by successfully balancing the competing interests involved in this issue while guaranteeing that the rights of all Alaskans are protected. In addition, the proposed interim study would greatly assist not only the Legislature -- but Alaskans generally -- to see precisely what has caused our current insurance crisis and what can be done to correct it.

Sincerely,

Bill Sheffield
Governor

Attachments

* Sec. _____ AS 37.05 is amended by adding a new section to read:

Sec. 37.05.153. LEGAL JUSTICE FUND. There is established as a separate trust fund in the state treasury the Legal Justice Fund. The fund consists of amounts contributed by persons who are awarded punitive or exemplary damages in a civil action under AS 09.17.020. Money in the fund may not be diverted for a purpose other than for providing legal services for the poor in civil or criminal matters.

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Each claiming party must agree that 50 percent of any punitive or exemplary damages that may be adjudged against the party defending the claim will be contributed to the legal justice fund established in AS 37.05.-153. Money in the fund shall be held in trust to finance legal services for the poor.

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

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

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

M E M O R A N D U M April 23, 1986

SUBJECT: Limitation of Civil Actions
CSSB 377 (Finance) Version #2

TO: Senator Dick Eliason
Finance Committee

FROM: Terri Lauterbach
Assistant Revisor of Statutes

The following is a sectional analysis of the above referenced Senate bill:

Section 1 - Legislative Findings

Section 2 - Requires that personal injury and property damage actions seeking damages of less than $25,000, exclusive of costs, interest, and attorney fees, must be arbitrated under AS 09.43 before a lawsuit can be commenced.

Section 3 - This section creates a new chapter that generally provides for limits on amount and type of recovery in a civil action. The analysis will discuss each section of this chapter in turn.

Sec. 09.17.010 - Limits the amount that could be recovered for noneconomic damages to $250,000.

Sec. 09.17.020 - Raises the standard of proof for the award of punitive damages by requiring clear and convincing evidence of an act that is felonious, deliberate, or malicious.

Sec. 09.17.025 - Prohibits a personal injury action by a victim who was intoxicated, under the influence of a controlled substance, or committing a felony at the time of injury unless the act causing the victim's injury was intentional.

Sec. 09.17.030 - Requires that verdicts be itemized between punitive damages, economic loss, and noneconomic loss,

and that a verdict must categorize compensation for existing and future losses.

Sec. 09.17.035 - Requires that an award of future damages in excess of $100,000 must be paid to the maximum extent feasible by periodic payments, rather than in a lump sum, if requested by a party. Requires the court to make specific findings regarding periodic payment, and provides the court may require the judgment debtor to post security. A judgment requiring periodic payment must specify the recipient, amount, interval between payments, and number of payments to be made. Judgment may be modified only if the judgment creditor dies, in which case the payments go to persons the judgment creditor owed a duty of support prior to death. Allows the court to penalize a judgment debtor who fails to make required payments.

Sec. 09.17.040 - Requires a person who submits certain pleadings to a court to verify that the person believes that statements in the pleadings are true.

Sec. 09.17.045 - Limits liability of school superintendents, elected or appointed officials of a political subdivision, and certain board members.

Sec. 09.17.050 - Establishes by statute the rule already established by case law, that contributory fault diminishes recovery, but does not bar a plaintiff from seeking compensation.

Sec. 09.17.055 - Provides that a civil award for personal injury or death must be reduced by the amount received by the claimant from other sources for the injury or death. Does not apply to life insurance death benefits or some kinds of recoveries under federal programs.

Sec. 09.17.060 - Requires the jury or court to apportion damages between each party to the lawsuit, if there is more than one party to the action. Each party is assigned a percentage of the fault, and damages are awarded based on the applicable percentage. Changes the existing rule of joint and several liability to one of several liability only. For example, if A sues B and C, and A is not at fault, and B and C are each 50% at fault, assuming damages are $100,000, B and C would each be liable for $50,000 in damages. Under rules of joint and several liability, Party A could collect

the entire judgment of $100,000 from either B or C, in which case B or C would seek contribution if either paid more than their share. Under a rule of several liability, A cannot collect from B or C more than their respective shares of the liability, so if B is insolvent, A is without recourse for that $50,000.

Sec. 09.10.070 - Provides that if a person settles a claim, the settlement does not release anyone else unless the agreement so provides. However, the sum of the total claim is reduced by the amount of the released persons share of the damages, determined under AS 09.17.060.

Sec. 09.17.080 - Limits contingency fees for attorneys who represent plaintiffs in personal injury actions based on negligence.

Sec. 09.17.900 - Definition of "fault."

Section 4 - Changes the time period for when an offer of judgment must be served on a party in order for that offer to be considered a reason for reducing interest on any award made later to the other party.

Section 5 - Changes the interest rate on judgments so that it will float according to the Federal Reserve discount rate.

Section 6 - Provides that prejudgment interest accrues from the day process is served on the defendant unless the parties have agreed otherwise.

Section 7 - Technical change related to section 8.

Section 8 - Provides that appeal of an arbitration award must be filed within 60 days of an award. Also, requires a new trial of the issues, if an appeal is filed.

Section 9 - Technical amendment required so that malpractice actions governed by sections in AS 09.55 are also governed by the limitations of AS 09.17, enacted in this draft.

Section 10 - Provides that attorney fees cannot be awarded unless authorized by statute or an agreement between the parties.

Vet sued for not killing pet dog

CANTON, Ohio (AP) — A veterinarian is being sued by a couple who claim he diagnosed a painful back condition in Barney, their 4-year-old dachshund, but then kept the dog he "didn't have the heart" to destroy.

"I know I probably should have done it, but how do you kill a dog who's wagging his tail and licking your face?" said Dr. Daniel Evans. "I just couldn't do it."

The lawsuit, filed Thursday by Linda G. and Dennis W. Gregory of Perry Township, contends they suffered "severe emotional trauma" from the doctor's treatment of their dog.

The Stark County Common Pleas Court lawsuit, which seeks $100,000 damages from Evans and Massillon Animal Hospital, contends Mrs. Gregory asked Evans to destroy Barney last October, based on his diagnosis of possible continued pain and eventual paralysis.

They learned Barney was alive when they took another animal to Evans' office earlier this month. Barney was returned to them March 5, causing them "another emotional trauma, although admittedly a happy one," the lawsuit said.

Evans said he agreed to destroy the dog after Mrs. Gregory told him she didn't want to spend any money on the dog for treatment of what she said was a painful back condition.

"When I went in to put him to sleep, he jumped all over me and licked my face and wagged his tail," said Evans. " I didn't have the heart to put him to sleep. She said he was in pain and yet there he was jumping around."

Evans said he cared for Barney for the next five months, intending eventually to destroy the dog.

"He became a part of the family. We just loved him and fed him and gave him a good home."

Psychic awarded $1 million

By MICHELE DIGIROLAMO
United Press International

PHILADELPHIA — A woman who blamed a CAT scan for loss of her psychic powers has been awarded more than $1 million by a jury but a "shocked" hospital attorney said Friday the verdict would be appealed.

"If the verdict is allowed to stand, it's an outrage and an example of why the American tort system has to be changed," said Richard Galli, an attorney for Temple University Hospital, where the CAT scan was performed.

A jury deliberated about 45 minutes Thursday before awarding Judith Richardson Haimes, 42, $600,000, plus $418,000 in delay damages. Haimes, of Clearwater, Fla., lived in New Castle, Del., at the time of the test.

Haimes had contended that as a result of the CAT scan she suffered severe headaches when she tried to concentrate to use her psychic powers. Her attorney, Joel Lieberman, said Haimes had previously earned her living as a psychic and was able to read people's auras and help police solve crimes.

After the jury heard Haimes' case, Court of Common Pleas Judge Leon Katz ruled Haimes had failed to prove her claim that the CAT scan left her with headaches that made it impossible for her to use her psychic powers.

Katz ordered the jury to disregard Haimes' allegations about her lost psychic powers and consider only her testimony about the negative allergic reaction she suffered from a dye injected during the CAT scan.

The Associated Press
Judith Richardson Haimes

"There is no way in the world a person who walked out of the hospital, did not pass out, did not lose consciousness, whose heart did not stop beating, who did not stop breathing, is entitled to pain and suffering in that amount of money," Galli said.

"I was shocked," Galli said. "There's no basis for it."

But Lieberman disagreed and maintained the award would have been much higher if the jury had been allowed to consider Haimes' loss of psychic powers and loss of business earnings.

Section 11 - Allows costs and attorneys fees to be awarded to prevailing party in connection with appeal of an arbitration award if the award is increased or decreased ten percent by the appellate court.

Section 12 - Gives the district court jurisdiction over appeals of arbitration awards related to section 8.

Section 13 - Repeals AS 09.16, the existing chapter concerning contribution among joint tortfeasors.

Section 14 - Provides for the amendment of Civil Rule 49.

Section 15 - Provides for the amendment of Civil Rule 52.

Section 16 - Provides for the amendment of Civil Rule 58.

Section 17 - Provides for the amendment of Civil Rule 11.

Section 18 - Provides for the amendment of Civil Rule 82.

Section 19 - Provides for the amendment of Civil Rule 68.

Section 20 - Provides for the amendment of Civil Rule 82.

Section 21 - Provides that the Act will apply to actions accruing after the effective date of the Act.

Section 22 - Severability clause.

Section 23 - States legislative intent that the changes made by this Act be reviewed in three years. Also requests three annual reports from the division of insurance premiums charged for liability insurance.

Section 24 - Effective date for most of the bill.

Section 25 - Provides that AS 09.17.080, added by sec. 3 of the bill, only takes effect if Sec. 10 of the bill does not pass by a two-thirds majority in each house. If sec. 10 passes by a two-thirds majority in each house, then AS 09.17.080 will not take effect.

TL:csh
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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.

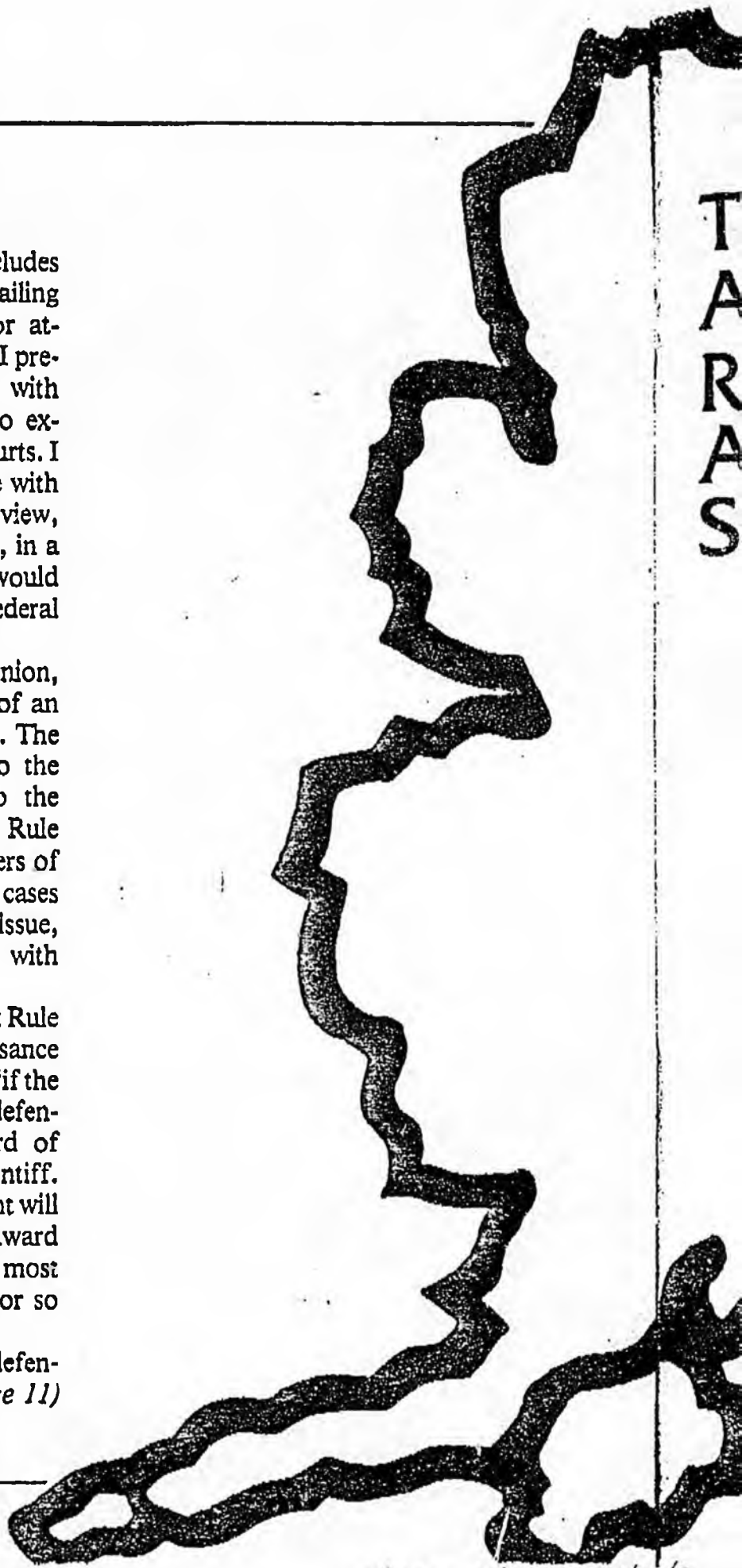
Contrary to Mr. Kleinfeld's opinion, plaintiffs do consider the impact of an adverse Rule 82 award upon them. The Rule 82 award directly applies to the determination of liability and to the amount of the judgment through Rule 68. In my experience, Rule 68 offers of judgment less often control. In cases 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



Reid for Snowden 4/29/86

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.

(Please turn to page 10)

By H. Bixler Whiting

Robert Woolley

(Continued from page 9)

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

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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-

(Please turn to page 53)

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 never 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 the 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.

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2. *See* D. Phillips, *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.

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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,"[17] jurors, witnesses in law suits and, finally, other judges.[18]

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

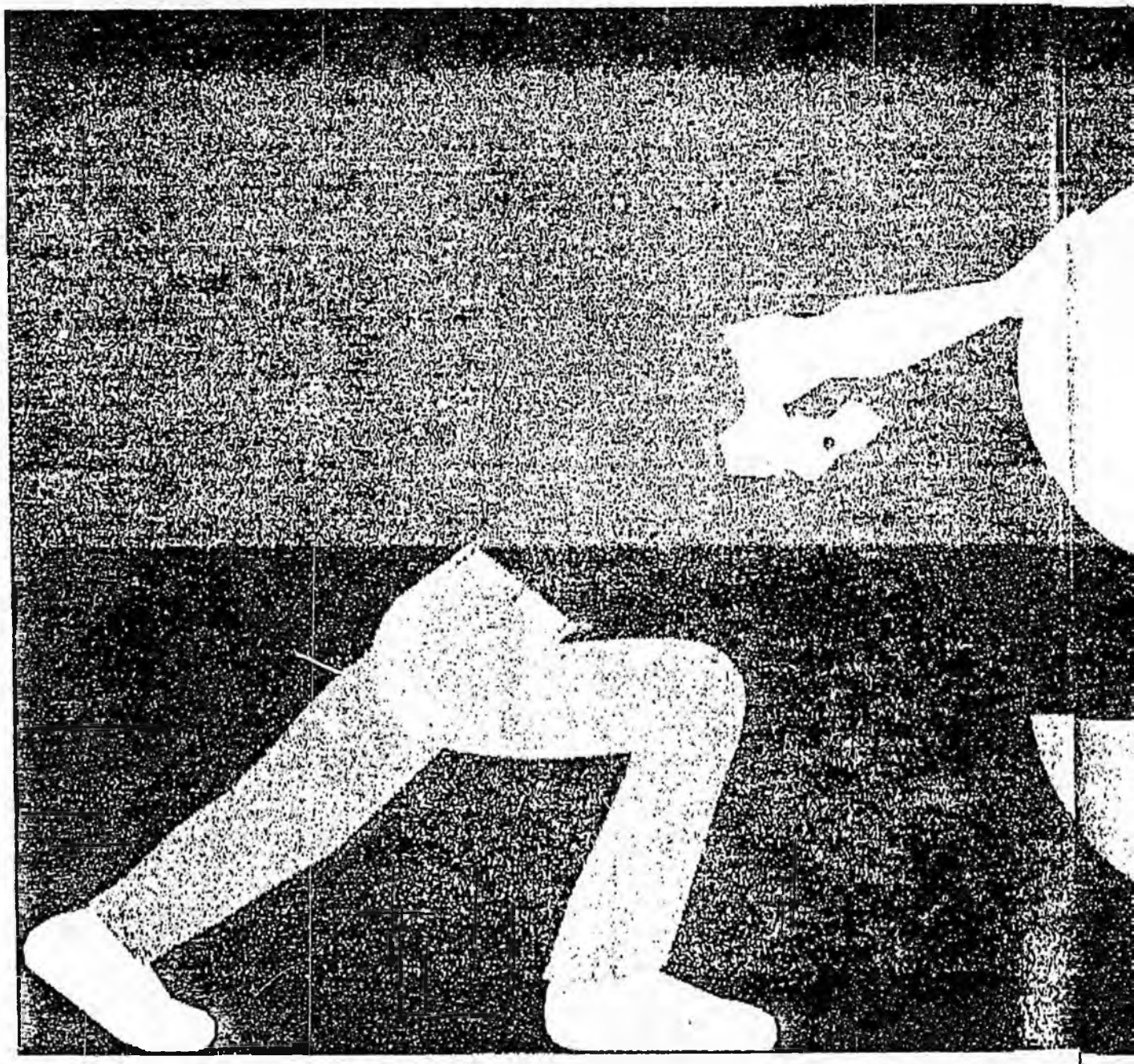
In the judgment of this committee, this Report proposes a dangerous intrusion upon judicial independence for reasons hereafter stated. The individual criticisms are such as to lead us to believe that our concerns for judicial independence cannot be overcome by mere modifications of the proposal.

(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-

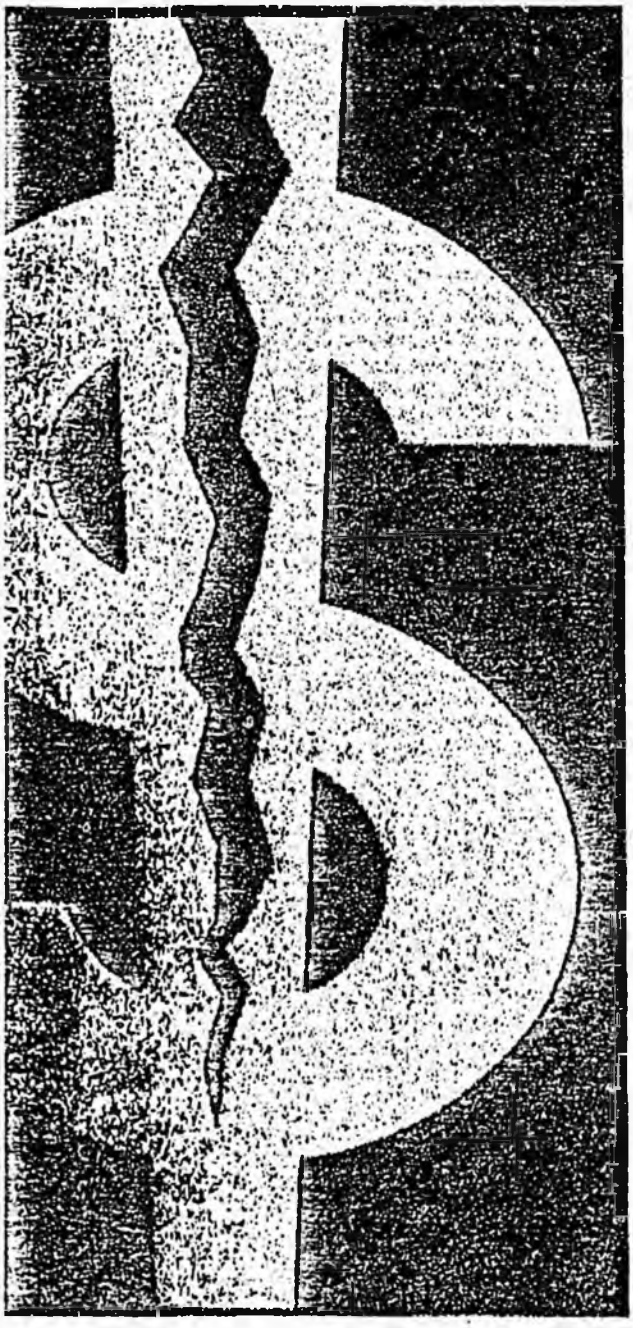
Alaska: Where the Loser Pays the Winner's Fees



Filed 4/29/86

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 successful 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-

Introduced: 1/31/86
Referred: Labor and Commerce, Judiciary and Finance

BY KELLY, ABOOD, BENNETT, COGHILL, DEVRIES, FAIKS, P. FISCHER, KERTTULA, STURGULEWSKI AND ZHAROFF

IN THE SENATE

SENATE BILL NO. 377

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

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

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

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

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

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

(b) The amount of damages awarded by a court or jury under (a) of this section may not exceed $250,000.

Sec. 09.17.020. PUNITIVE DAMAGES. In an action, whether in tort, contract, or otherwise, in which a party seeks to recover damages, any punitive or exemplary damages that may be adjudged against the party defending the claim shall be awarded to the benefit of the state and when paid deposited in the general fund.

Sec. 09.17.030. ITEMIZED VERDICTS. In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, and economic loss shall be further itemized by category. Itemization of economic loss by category includes: (1) amounts intended to compensate for reasonable expenses that have been incurred, or which will

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

Sec. 09.17.040. PERIODIC PAYMENTS. (a) In an action to recover damages for personal injury, the court shall, at the request of a party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment if the award equals or exceeds $50,000 in future damages. In entering judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments that will compensate the judgment creditor for future damages. The court may require a judgment debtor to post security adequate to assure full payment of future damages awarded by judgment.

(b) A judgment ordering payment of future damages by periodic payments shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments shall be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. The court that rendered the original judgment, may, upon petition of a party in interest, modify the judgment to award and apportion the unpaid future damages

in accordance with this section.

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

(d) Following expiration of all obligations specified in the periodic payment judgment, the obligation of the judgment debtor to make further payments shall cease and security given under (a) of this section shall revert to the judgment debtor.

(e) A certified copy of a judgment or order of the court issued under this section may be recorded under AS 09.30.010, but may not become a lien upon real property before the date that payment becomes due.

Sec. 09.17.050. VERIFICATION OF CLAIMS. Every complaint, cross-claim, and counterclaim shall be signed and verified by the claiming party or the attorney of the claiming party and shall bear a statement that the person signing the claim believes the statements made in the claim are true. If the court finds that a statement made in the complaint, cross-claim, or counterclaim is untrue, and upon motion of a party defending against the claim, the person signing the claim shall be compelled to show cause why the person signing the claim should not be held in contempt of court.

Sec. 09.17.060. COLLATERAL BENEFITS. (a) The defendant, in an action for personal injury, may introduce evidence of an amount paid or payable as a benefit to the plaintiff as a result of the personal injury under the United States Social Security Act, a state or federal income disability or workers' compensation act, a health, sickness, or

income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and a contract or agreement of a group, organization, partnership, or corporation to provide, pay for or reimburse the cost of medical, hospital, dental, or other health care services. If the defendant elects to introduce evidence under this section, the plaintiff may introduce evidence of an amount that the plaintiff has paid or contributed to secure the right to an insurance benefit concerning which the defendant has introduced evidence.

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

Sec. 09.17.070. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Sec. 09.17.080. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.17.090, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

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

AS 09.17.090; for this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.090, and enter judgment against each party liable on the basis of rules of several liability. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

Sec. 09.17.090. EFFECT OF RELEASE. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of AS 09.17.080.

Sec. 09.17.900. DEFINITIONS. In this chapter

(1) "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability; the term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and

unreasonable failure to avoid an injury or to mitigate damages; legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault;

(2) "future damages" includes damages for future medical treatment, care or custody; loss of future earning capacity; or any future noneconomic loss.

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

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

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

Sec. 09.30.065. OFFERS OF JUDGMENT. On or before the 60th day following the filing of an answer in a civil action, and on the fifth day following the day discovery closes as ordered by the court, [EITHER THE PARTY MAKING A CLAIM OR] the party defending against a claim may serve upon the <u>party making the claim</u> [ADVERSE PARTY] an offer to allow judgment to be entered in complete satisfaction of the claim <u>against that defending party</u> for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the <u>claiming</u> [ADVERSE] party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more

favorable to the claiming party [OFFEREE] than the offer, the claim shall bear no interest from the date of the offer to the date of judgment [THE INTEREST AWARDED UNDER AS 45.45.010(a) AND ACCRUED UP TO THE DATE JUDGMENT IS ENTERED SHALL BE ADJUSTED AS FOLLOWS:

(1) IF THE OFFEREE IS THE PARTY MAKING THE CLAIM, THE INTEREST RATE SHALL BE REDUCED BY TWO PERCENT A YEAR;

(2) IF THE OFFEREE IS THE PARTY DEFENDING AGAINST THE CLAIM, THE INTEREST RATE SHALL BE INCREASED BY TWO PERCENT A YEAR].

* Sec. 4. AS 09.43.110 is amended to read:

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

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

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

* Sec. 5. AS 09.43.160 is amended by adding a new subsection to read:

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

* Sec. 6. AS 09.55.580(a) is amended to read:

(a) When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission and if the decedent is survived by a spouse, children or other dependents. The action shall

be commenced within two years after the death, and the damages therein shall be the damages the court or jury may consider fair and just. The amount recovered, if any, shall be exclusively for the benefit of the decedent's spouse and children when the decedent is survived by a spouse or children, or other dependents. When the decedent is survived by no spouse or children or other dependents, the action shall be dismissed [THE AMOUNT RECOVERED SHALL BE ADMINISTERED AS OTHER PERSONAL PROPERTY OF THE DECEDENT BUT SHALL BE LIMITED TO PECUNIARY LOSS]. When the plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.

* Sec. 7. AS 09.60.010 is amended by adding a new subsection to read:

(b) Notwithstanding (a) of this section, the court may not award attorney fees to a prevailing party in an action for damages to the person or to property in the absence of a specific finding that the party at fault acted with malice, in bad faith, or with reckless disregard of the rights of another in causing the injury.

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

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

* Sec. 9. AS 09.16 is repealed.

* Sec. 10. AS 09.17.030 and 09.17.080 enacted in sec. 1 of this Act

have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.080 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 11. AS 09.17.080 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 12. AS 09.17.030, 09.17.040 and 09.17.080 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 13. AS 09.17.050 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of claims, counterclaims, and cross-claims.

* Sec. 14. AS 09.30.065 as amended by sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest stops accruing from the date of an offer by a defending party which a claiming party fails to increase at judgment.

* Sec. 15. AS 09.60.010 as amended by sec. 7 of this Act has the effect of amending Alaska Rule of Civil Procedure 82 by allowing costs and attorney fees only after a specific finding of malice, bad faith, or reckless disregard of the rights of another in causing the injury.

* Sec. 16. APPLICABILITY. Sections 1 - 8 of this Act apply to all causes of action accruing after the effective date of this Act.

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

Offered: 4/18/86
Referred: Finance

Original sponsors: Kelly, Abood,
Bennett, et al

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 377 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

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

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

* Section 1. FINDINGS AND PURPOSE. (a) 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 Act 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.

(b) The legislature finds that boroughs, 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.

(c) 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.

(d) 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.

(e) It is the intent of the legislature to reduce costs associated with the tort system, while ensuring that adequate and appropriate compensation for persons injured through the fault of others is available.

* Sec. 2. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

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

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

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

(c) Except for purposes of seeking execution on a judgment, the state may not bring or be joined in an action based on punitive

damages that may be awarded under this section.

Sec. 09.17.025. DAMAGES RESULTING FROM INTOXICATION OR COMMISSION OF A CRIME. A person who suffers personal injury or death may not recover damages for the personal injury or death if the person is determined by the fact finder to be more than 50 percent responsible for the injuries or death and the person was

(1) intoxicated or under the influence of a controlled substance listed in AS 11.71.140 - 11.71.190; or

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

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

Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. The party or the attorney of the party filing a complaint, answer, cross-claim, or counterclaim shall sign and verify the pleading and shall state in

the verification that the signatory believes the statements made in the pleading are true. If the court finds that the signatory knowingly made a false statement in the pleading, upon motion of a party, the court shall order the signatory to show cause why the signatory should not be held in contempt of court.

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

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

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

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

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

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

the value of the benefits under (a) of this section exceeds the amount of payments under (b) of this section.

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

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

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

(3) gratuitous benefits provided to the claimant.

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

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

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

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

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under

AS 09.17.070, and enter judgment against each party liable. The court shall also determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

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

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

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

* Sec. 3. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.075. ACTIONS THAT MUST BE ARBITRATED. A person may

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

* Sec. 4. AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 30 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 45.45.010(a) and accrued up to the date judgment is entered shall be adjusted as follows:

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

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

* Sec. 5. AS 09.30.070 is amended by adding a new subsection to read:

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

* Sec. 6. AS 09.43.110 is amended to read:

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

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

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

* Sec. 7. AS 09.43.160 is amended by adding a new subsection to read:

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

* Sec. 8. AS 09.55.548 is repealed and reenacted to read:

Sec. 09.55.548. AWARDS. Except as provided in AS 09.17, damages in a malpractice action shall be awarded in accordance with principles of the common law.

* Sec. 9. AS 09.60.010 is amended by adding a new subsection to read:

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

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

(2) the likelihood, if apparent to the client, that the

acceptance of the particular employment will preclude other employment by the attorney;

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent;

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

* Sec. 10. AS 09.60 is amended by adding a new section to read:

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

* Sec. 11. AS 22.10.020(d) is amended to read:

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

trial de novo, in whole or in part.

* Sec. 12. AS 22.15.030(a) is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

* Sec. 13. AS 09.16.010, 09.16.020, 09.16.030, 09.16.040, 09.16.050, and 09.16.060 are repealed.

* Sec. 14. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 15. AS 09.17.060 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 16. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 17. AS 09.17.040 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of pleadings.

* Sec. 18. AS 09.30.065 as amended by sec. 4 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day the cause of action accrues.

* Sec. 19. APPLICABILITY. Sections 1 - 13 of this Act apply to all causes of action accruing after the effective date of this Act.

* Sec. 20. This Act takes effect immediately in accordance with

1 AS 01.10.070(c).

COMMITTEE REPORT

SENATE

FURTHER: JUDICIARY
FINANCE

1/31/86

Date 19 MARCH 86

Mr. President

The Committee on Labor & Commerce considered SB 377

relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, 68 and 82; efd.

and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass

[ ] do pass with attached amendment(s)

[X] replace with/or adopt CS for SB 377 (J+C)
[X] new title
[ ] same title and recommends _____

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE

[ ] reports it back without recommendation

[ ] recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS

Dan Blue No Rec

Bill Ray No Rec

Fred F. Zharoff
Chairman

Do Pass
Chairman recommendation

COMMITTEE REPORT

SENATE

FURTHER: FINANCE

3/20/86

Date 4/17/86

Mr. President

The Committee on JUDICIARY considered SB 377

relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, 58, 68 and 82; efd.

and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass

[ ] do pass with attached amendment(s)

[✓] replace with/or adopt CS for SB 377 (JUDICIARY)
[✓] new title
[ ] same title and recommends _____

[ ] and attached a "LETTER OF INTENT" [✓] NEW FISCAL NOTE

[✓] reports it back without recommendation

[ ] recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS

3 Kaufman DO NOT PASS UNLESS AMENDED

Taylor - N/R

Jan Faiks - N/R

Tim Kelly - Do Pass if amended.

Patrick Rodey
Chairman

DO PASS
Chairman recommendation

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

TABLE OF CONTENTS

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 ten 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,

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.

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

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

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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 <u>doubled</u> between 1979 and 1983, and <u>tripled</u> during that period for obstetricians/gynecologists.

- According to a jury verdict reporting service, between 1975 and 1985 the <u>average</u> 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.

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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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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.

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Richard K. Willard
Chairman
Tort Policy Working Group

Robert L. Willmore
Chairman
Task Force on Liability
Insurance Availability

February, 1986

CHAPTER 1

THE CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY

Liability insurance is a linchpin in the operation of the United States economy, yet many American businesses, professionals and municipalities, both large and small, are encountering serious insurance problems arising from premium increases, policy cancellations and refusals to underwrite certain activities.

The liability insurance crisis has three separate but related faces that individually or in various combinations make it difficult for many entities to obtain the desired liability insurance. These problems are availability of insurance, affordability of insurance coverage and adequacy of coverage.

This Chapter describes the current nature and extent of these problems. The Chapter focuses, first, on the problems encountered within the various lines of insurance, and, second, on the effect of those problems on different sectors of the economy.

I. INSURANCE COVERAGE SUMMARIES

The following are insurance summaries taken predominantly from insurance industry reports prepared by the Alliance of American Insurers or published in Business Insurance.

Environmental Impairment Liability Insurance ("EIL")

EIL covers pollution incidents stemming from gradual pollution exposures (as opposed to "sudden and accidental" pollution, which traditionally has been covered under general liability coverage). Two major companies dropped out of the market in 1985, and by the end of the year only two companies were offering EIL coverage. Forty-seven companies were forced to close hazardous-waste management facilities for lack of EIL coverage. Most hazardous waste businesses currently are looking toward captives and self-insurance. Brokers expect significant price increases on the limited insurance still available.

Sudden and Accidental Pollution Coverage

Coverage for sudden and accidental pollution traditionally has been provided as part of general liability coverage. New general liability forms, however, specifically exclude all pollution liability. This is due to court decisions interpreting "sudden and accidental" coverage as also covering gradual and intentional pollution. (See Chapter 3 for a discussion of the new policy forms.) The London market currently is excluding pollution coverage from the large risks it insures.

Directors and Officers Liability ("D & O")

Premiums in 1985 rose 50% to 500%, and include larger deductibles, lower limits, more restrictive endorsements and shorter policy durations. Industries particularly affected include financial institutions, electric (nuclear) utilities, new high technology business, wildcat oil and gas companies, research and development enterprises, real estate developers, highly leveraged businesses, petrochemical companies and the steel industry. Capacity constrictions have hurt larger risks more than smaller risks. Traditional primary and reinsurance capacity has been reduced, but Lloyd's of London, which has in the past not been active in this line, is offering primary coverage up to $20 million. Not surprisingly, business with Lloyd's of London is up to 100% to 200%. Much of the reinsurance market for such coverage has virtually dried up.

Bank Fidelity Bond Coverage

Premiums are up about 300%. A group of fifty banks are creating a mutual insurer to provide D & O and bankers blanket bond coverage.

Motor Carrier Liability Coverage

Bus and trucking companies are having severe difficulties obtaining the insurance coverage required by federal law. The Motor Carrier Act of 1980 requires insurance minimums of from $750,000 for carriers of non-hazardous cargo to $5 million for carriers of hazardous waste and most hazardous materials carried in bulk. The Bus Regulatory Reform Act of 1982 set insurance minimums from $1.5 million to $5 million, depending on the passenger capacity of the bus. Capacity is limited both in the primary and reinsurance markets. Small trucking firms and independent owner-operators have the most difficulty getting insurance.

Liquor Liability Coverage

Liquor liability coverage may be available as part of a commercial lines package, but is severely constrained and virtually nonexistent in some parts of the country as monoline coverage. This line has been affected by the bankruptcy of one of the largest dram shop insurers, Ideal Mutual Insurance Company.

Medical Malpractice Insurance

Availability problems are being encountered by nurse/midwives, obstetricians/gynecologists, pediatricians and dentists. Premiums are being raised and coverage limits are being reduced, sometimes by as much as 50%. Reinsurers are also restricting coverage in this line. St. Paul's Insurance Company, the largest medical malpractice insurer, has placed a moratorium on new policies. St. Paul's writes coverage for approximately 20%

of the Nation's doctors, and wrote an estimated $600 million in malpractice business in 1985. It had a pure loss ratio (excluding loss adjustment expenses and operating expenses) of 81.3% in 1984. Doctor-owned mutual insurance companies account for more than half of the medical liability coverage in the country.

Commercial General Liability ("CGL")

Commercial general liability insurance has undergone significant premium increases. The Insurance Services Office ("ISO"), the property-casualty insurers' statistical and ratemaking organization, has filed a new CGL form which will limit coverage and which contains certain exclusions and policy limitations (see Chapter 3).

Excess Coverage

Excess coverage capacity has been sharply reduced. This coverage currently is offered primarily on a claims-made basis, which may or may not mesh with the primary, reinsurance and other excess layers.

Reinsurance

Reinsurance capacity for the United States market has been severely limited, particularly with regard to Lloyd's of London, which has faced both its own problems and a disillusionment with the American market. This capacity problem is expected to ease somewhat in 1986, but is likely to remain a problem for some time longer.

II. SECTORAL SUMMARIES

The following are summaries of the effect of the insurance availability/affordability crisis on various sectors of the United States economy. This information was obtained from surveys conducted by business groups, articles in the trade press and materials prepared by trade associations or provided by industry representatives. While the following does not include all of the available information, it summarizes the major findings.

Municipalities

Municipalities are among the hardest hit groups by both affordability and availability problems. Local officials preparing their budgets for the next fiscal year report that the market for public entities is "extremely limited" and "diminishing to nothing." Those cities able to secure bids are finding insurance companies' offers prohibitively expensive. Renewal rates have climbed by as much as 400% -- and often for lower coverages with higher deductibles. Some cities are facing premium increases of up to 1,000%.

The United States Conference of Mayors conducted a survey of 39 cities in the summer of 1985. Over half the cities were quoted premium increases of over 100%, and 16 were quoted increases greater than 200%. In addition, a recent report by the Wyatt Company, Public Officials Liability Insurance: Understanding the Market (1986), notes that local governments have reported premium increases of 200% to 300% in the insurance purchased for their officials.

Rather than renew, many cities have decided to "go bare." All cities have been forced to reevaluate and sometimes limit the services they provide their communities. Finally, in the wake of policy cancellations, a number of city and county officials have resigned, fearing personal exposure to lawsuits stemming from their official duties.

Transportation

The American Public Transit Association, the nation's largest organization of transit operators, reports that premiums for those companies able to obtain insurance this year have gone up 500% to 1,000%, and sometimes more. In Los Angeles, the Southern California Rapid Transit District's annual premium jumped from $67,000 to $1.7 million, while coverage was reduced. Transit problems were compounded by the bankruptcy of one of the largest companies involved in insuring mass transit systems. Some local transit systems have had to suspend operations.

Publishing

Newspaper and magazine publishers are finding it more difficult to obtain libel insurance.

Nurse-Midwives

The American College of Nurse-Midwives represents 2,500 members, 1,400 of whom were covered under a blanket policy through the association. The policy was cancelled on July 1, 1985. The association has been unable to obtain other coverage and has been attempting to create a captive insurer. The captive was to have started operation by April 1, 1986, but that deadline will not be met.

Grocers

A survey by the National Grocers Association found that its members' liability insurance premium rates had recently increased from 25% to 500%. The survey covered 161 retailers and 20 wholesalers.

Architects and Engineers

Most architectural and engineering firms, and particularly smaller firms, are experiencing severe availability and affordability problems. Insurance premium rate increases of

200% to 300% have become the norm. Roughly 30% to 40% of smaller firms are going bare. Engineering firms involved in asbestos or other toxic substances abatement activities face extreme difficulties in obtaining insurance, with rate increases, where insurance is available, of 5,000% not uncommon.

Day Care Centers

The National Association for Education of Young Children conducted a survey of day care providers. They covered family day care providers who care for children in a home setting, day care centers and headstart programs. The survey found that 40% of the respondents had had their insurance cancelled or not renewed and the majority of those with coverage had premium increases, most of which rose 200% to 300%..

Toy Manufacturers

The Toy Manufacturers of America recently surveyed its 243 members on insurance cost and availability problems. Final results will not be available until April, but initial responses are:

Members	%Increase in premiums
21	50
9	50-100
12	100-150
2	150-200
11	300-500
7	500-1000
1	over-1000
2	cannot obtain insurance

Companies that normally had three to four months to negotiate a policy renewal have been given only 72 hours to do so this year. This permits insufficient time for policy shopping. The association reports that it had recommended a captive to its members a few years ago. Commercial insurers reduced prices upon learning of the proposal, eliminating industry interest in a captive.

Household Appliance Manufacturers

The household appliance industry has seen sharp reductions in available coverage, and the Association of Home Appliance Manufacturers has lost group coverage it had arranged in 1983. Many companies have been able to obtain only about one-third of the coverage sought for product liability, and the cost of that coverage is increasing. Member companies are having similar problems obtaining D & O insurance.

Automobile Repair

The Automotive Services Councils, an association representing automobile repair shops and garages, conducted a survey with 104 responses. Average premium increases were 70% to 80%. Some 13% of the membership reported purchasing an average of 30% less coverage. Approximately 41% had experienced policy cancellations and 26% were unable to find new carriers.

Medical Equipment

The medical equipment industry has had a captive, MedMarc, an affiliate of the Health Industry Manufacturers Association, since 1979. The captive started with 35 companies and has recently reached 100 member companies. The rate of growth increased in 1985 as the result of cancellations by commercial insurers of about 20% of the Association's members and premium increases of five to ten-fold.

Biotechnology

Biotechnology companies are having a particularly difficult time in the tight market because they are generally new, small companies dealing mostly in research and development in a field largely unknown to insurers. Their inability to obtain coverage causes them difficulty in obtaining bank financing, which, in turn, causes some of these companies to sell out or forego promising research. The industry is exploring the creation of a captive.

Oil and Gas Drilling

The International Association of Drilling Contractors represents 1,500 contractors operating drilling rigs. It estimates maritime liability premium increases of 300% to 700% and inland liability premium increases of 100% to 150%.

Construction Contractors

Constructor magazine (October 1985) estimates average increases in general liability coverage of 40% to 75%. For contractors who were able to negotiate significant discounts in past years increases currently are running up to 300%. In 1985 premium increases for umbrella coverage were approximately 300% for less coverage.

Natural Gas Transportation

The National L-P Gas Association represents 4,100 firms that prepare and transport liquefied petroleum gases for residential and industrial users. According to a spokesman, as many as 25% of the transporters are operating with less than the $5 million in insurance coverage that is required of motor carriers by federal law. Difficulties are attributed to unavailability and prohibitive costs of umbrella insurance.

General Manufacturing

The Machinery & Allied Products Institute ("MAPI") recently conducted a survey of 81 companies producing a broad range of products in the manufacturing industries and obtained an 80% response rate. The typical respondent experienced increases for every type of insurance covered in the survey. The survey covered general liability, D & O, environmental impairment liability, products and other property and casualty coverages. The size of the increases varied with the date of the renewal; consequently, the survey results understate the problem since many of the respondents are not up for renewal until early this year. Significant survey results are shown in the table below.

MAPI Survey Results on Liability Coverages

Premiums	% Higher	% Change (Median)
CGL-Primary	73	40
CGL-Excess	100	250
D & O	72	300
EIL	94	60
Products	95	116
Other	87	40

Lower Limits	% Lower	% Change (Median)
CGL-Primary	13	-36
CGL-Excess	66	-50
D & O	27	-25
EIL	59	-50
Products	33	-50
Other	18	-25

Deductibles & Exclusions	% Higher Deductible	% More Exclusions
GCL-Primary	34	97
GCL-Excess	25	96
D & O	49	95
EIL	50	89
Products	50	100
Other	28	100

In addition to the foregoing, 35% of the MAPI respondents indicated that their general liability coverage excluded "sudden and accidental" pollution coverage, while 49% indicated that it was excluded in some layers and included in others. Some 65% of the respondents indicated that they had some coverages cancelled since January 1, 1985.

Machine Tool Manufacturers

The National Machine Tool Association represents 300 to 400 businesses that manufacture heavy machinery which cuts, shapes and forms metal. Preliminary results of a survey indicated product liability premiums have doubled since 1984, and that about half of the respondents have been or expect to be put on claims-made policy forms.

Battery Recycling & Smelting Companies

Battery recycling companies are typical of many industries where processes create toxic wastes. Recycling 50 million scrap batteries accounts for up to 50% of the annual lead smelter production. If the batteries are not recycled, they will be disposed of in landfills, leading to more serious toxic exposure. One major smelting company was offered a $10 million policy with a $2.5 million deductible at a cost of $650,000. While it deems the policy uneconomic, it has not found an alternative. The problem is widespread with smelters of various metals. The uncertainty of the risk and size of pollution liabilities has lead to substantial reductions in coverage with sharp increases in deductibles and premiums.

Power Equipment Manufacturers

Outdoor power equipment manufacturers had been reporting premium increases of from 50% to 70% during the past year. At the end of the year, with many renewals coming due, some have experienced increases of 400% to 600%. The Association once again is considering establishment of a captive.

General Aviation Manufacturers

The General Aviation Manufacturers Association reports that the cost of liability insurance per aircaft was $51 for the 6,778 business, commuter and private aircraft delivered in 1962, and increased to $211 for the 9,774 delivered in 1972. Currently, for the 2,000 planes delivered in 1985, the liability insurance cost has increased to $70,000 per plane. The cost of liability insurance to air frame manufacturers in 1985 was about $135 million, with a total cost of $175 to $200 million for the entire industry that includes manufacturers of engines, electronics and parts.

Ski Operators

Liability insurance premium increases of up to 400% have been reported by the National Ski Areas Association. Some small ski areas have closed, and the average price of lift tickets has increased substantially.

Aerospace Equipment Manufacturers

Aerospace equipment manufacturers are increasingly concerned that the escalating cost of product liability insurance and other associated costs are causing them to lose their ability to compete with overseas manufacturers of similar equipment.

III. THE NATURE AND EXTENT OF THE INSURANCE AVAILABILITY/AFFORDABILITY CRISIS

The above examples of insurance availability, affordability and adequacy problems demonstrate the broad scope of the liability insurance crisis in the mid-1980's. In a similar crisis in the mid-1970's, the problem areas were largely confined to medical malpractice and product liability. Medical malpractice coverage has been a continuing problem, with almost half that coverage currently underwritten by doctors' and hospitals' mutuals and other alternative markets. Product liability coverage, however, was readily available at declining cost during the late 1970's and early 1980's.

A growing capacity shortage over the last year or more has caused commercial insurers to review carefully their underwriting standards and pricing policies in order to determine where insurance capacity can be utilized most profitably. The inevitable result of this reevaluation has been a severe disruption for insurance buyers.

Insurance Availability

Availability problems are occurring in certain specialty commercial insurance markets. These include pollution, day care, municipal, liquor, motor carrier and D & O liability coverages. The bankruptcies of some specialty insurers, particularly in the lines of motor carrier and liquor liability, have affected the capacity in these coverages.

In each of these lines, insurers have perceived the possibility of significant losses based on highly publicized verdicts and settlements. General line insurers who ordinarily would fill the gap left by specialty carriers are unwilling to do so because they can use their scarcer dollars in less volatile and more profitable lines.

Insurance Affordability

Premiums are increasing in virtually all commercial coverages. Examples of affordability problems include nurse-midwives and general aviation manufacturers, both of which face premium costs which may be warranted by the experience, but are too expensive for the buyers. Solutions to problems like these appear to lie outside of the insurance system.

Insurance Adequacy

Problems of insurance adequacy are being experienced across all commercial lines of coverage. The main problem seems to lie with the fact that many buyers are unable to buy as much

insurance as they desire. This is particularly true for large firms which seek large amounts of excess and higher limits coverage. These problems appear related in part to a capacity crunch created both by the insurance cycle and the withdrawal of capacity by the overseas reinsurers. The lack of capacity related to the insurance cycle shows signs of abating as the corner of the cycle has turned and surplus is increasing. But many firms may have to use alternative market mechanisms for at least a couple of years until this capacity fully returns. It may take much longer to get reentry by overseas reinsurers who have grave concerns about the American tort liability system. A second area of inadequacy lies in the growth of exclusions, deductibles and other policy limitations that are just now being introduced into the market. These are discussed in Chapter 3.

The Insurance Availability/Affordability Crisis

Finally, it should be noted that the crisis in insurance availability and affordability does not appear to be a crisis for the insurance industry. While the industry (as discussed in Chapter 2) is suffering substantial underwriting losses, the Working Group does not perceive this crisis to be a major threat to the financial viability of the industry. Rather, it is a crisis for the insureds who cannot obtain or afford the insurance they believe necessary for their on-going activities. And, to the extent that entities are forced to operate without insurance or with inadequate insurance, it is a crisis for victims of tortious conduct who may find that liable defendants cannot pay them their damages.

CHAPTER 2

THE CAUSES OF THE CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY

A number of reasons have been proffered for the crisis in the availability, affordability and adequacy of liability insurance. Many of these reasons relate to the economic decisions and performance of the insurance industry over the past decade. Other reasons focus on recent developments in tort law. While the two in fact are closely related, this Chapter discusses each of these areas separately. Part A deals with the general economic reasons for the current crisis; Part B reviews the contribution of tort law. 1/

1/ There have been suggestions that the availability/affordability crisis may be caused by certain aspects of state regulation. While some regulatory measures may have aggravated the problem, the Working Group has found little compelling evidence that the crisis is the result of a regulatory failure, either in the sense of insufficient or inadequate regulation, or in the sense of ill-conceived regulation. In this regard, it is worthwhile noting the 1977 report of the Department of Justice to the Task Group on Antitrust Immunities on The Pricing and Marketing of Insurance, which concluded that "in the commercial lines . . . state regulatory schemes are largely illusory and that insurers are generally free to set their own prices." Id., at vii. The report further indicated that rigid state rate regulation, such as is found in automobile insurance, may in fact aggravate an availability problem. Id., at vi.

In this regard, it is worth noting the conclusion of the Medical Malpractice Policy Guidebook (1985), prepared by Henry Manne (general editor) and Barry Anderson, Patricia Danzon, Clark Havighurst, Charles Phelps and Frank Sloan (principal authors) for the Florida Medical Association. The Guidebook concluded that it was difficult to fault the state insurance regulatory system for the high medical malpractice insurance premiums in Florida. Id., at 11. The report concluded that premium increases lag claims costs, and that "malpractice premiums are almost certainly not 'too high' compared to the increases in claims costs emerging over recent years." Id., at 149-50.

Some have pointed to state insurance reserve requirements as a cause of the insurance availability/affordability crisis, to the extent that they believe these requirements to have exacerbated capacity constraints. While the Working Group did not analyze whether state reserve requirements are too high or too low, it should be noted that these requirements exist to ensure the solvency of insurance carriers, and thereby to protect insureds. It also should be noted that the only way that state insurance reserve requirements conceivably could be modified to

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A.

I. INSURANCE INDUSTRY PERFORMANCE

Recent news accounts have presented a seemingly conflicting view of the economic performance of the property-casualty insurance industry. In order to understand the financial condition of the industry itself and of some of its specific lines of business, it is useful to compare the condition of the industry as a whole to what has been happening to premiums in the lines which present significant availability/affordability problems.

The table below presents premium and loss data for the property-casualty insurance industry for the period 1981 through 1985.

Year	Net Premiums Written (000)	Loss and LAE (000)	Expenses (000)	Statutory Underwriting Loss after Policyholder Dividends (000)
1981	$ 98,805,725	$75,764,229	$27,132,052	$- 6,323,534
1982	103,115,653	82.152,241	28,996,122	-10,415,751
1983	107,802,698	87,719,055	30,799,231	-13,285,049
1984	117,743,957	103,720,652	32,980,082	-21,455,300
1985*	142,300,000	126,846,220	37,353,750	-25,200,000

*Estimated

Source: Best's Insurance Management Reports

The most striking number in the table, of course, is the $25 billion underwriting loss estimated for 1985. This number represents the difference between premiums written and expenses, policyholder

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1/ (FOOTNOTE CONTINUED)

produce lower premiums would be if the reserve requirements were relaxed. It would be difficult to justify relaxing reserve requirements, however, in light of the fact that both insurance company insolvencies and the number of insurance companies reported to be in financial difficulty have increased substantially in the last two years.

The Working Group is continuing to review the contribution, if any, of state regulation to the insurance availability/affordability crisis.

dividends, 2/ estimated losses and loss adjustment expenses ("LAE").

The underwriting loss, however, while significant, represents only part of the industry's overall financial picture. Since premiums are collected well in advance of any anticipated payout, they are invested and earn income. In addition, other income is generated which also must be considered in reviewing the industry's financial condition. Overall income in 1985 resulted in the industry showing a $7.6 billion gain in policyholders' surplus (the equivalent of net worth), 3/ on an underwriting loss of $25.2 billion and net investment and other income of $32.8 billion. Thus, the industry appears to have made an overall profit in 1985, though at a lower rate than historical levels or other sectors of the economy.

In discussing the overall financial review of the property/casualty industry, Best's reported that:

> Investor interest in the property-casualty industry cannot be denied. While the Dow Industrial Average had made headlines by surpassing the 1500 mark (a 25% gain for the year), Best's Index of property/casualty companies has jumped 50% at this writing, and security analysts specializing in insurance-and cognizant of 1985's underwriting losses--nevertheless continue to be optimistic about the industry's prospects. 4/

Two factors must be taken into account in assessing the role of the insurance industry's financial performance in the insurance availability/affordability crisis. First, even though the industry currently is making a profit, that profit is well below the profitability of most other major industries, as well as the insurance industry's historical average. For example, in 1984 the property-casualty insurance industry produced an annual rate

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2/ Questions have been raised as to whether or not the $2.1 billion paid out in policyholder dividends should be included in the underwriting loss. Policyholder dividends are offered to some policyholders in some lines, and reduce the net cost of their insurance coverage. Consequently, any reduction in such premiums simply increases the net cost to policyholders.

3/ Policyholders' surplus is the difference between insurers' assets and liabilities. It is considered "the financial security that stands behind every insurance policy and is that which provides the cushion to support the shock of major catastrophe, stock market declines and loss of reserve inadequacies." ISO, Financial Condition of the Insurance Industry -- An Update (1985).

4/ Best's Insurance Management Reports (December 30, 1985).

of return on net income after taxes as a percent of net worth of 1.8%, whereas the median for Fortune 500 companies was 13.6%. 5/ The comparable rate of return for the property-casualty insurance industry from 1975 to 1984 was 10.9%. 6/

Second, the insurance availability/affordability crisis has not manifested itself across the entire spectrum of insurance services, but only in specific lines. These lines account for a relatively small portion of the industry. For example, the entire property-casualty insurance market accounts for only approximately one-third of the overall insurance market in terms of written premiums. 7/ The two property-casualty lines that have been the primary source of availability/affordability problems -- general commercial liability and medical malpractice -- amounted to only 7% of all the property-casualty lines in terms of 1984 written premiums. 8/ (These two lines thus represent approximately 2.5% of the entire industry's written premiums in 1984.) But, as can be seen in Subsection II, about one-fifth of the property-casualty industry's $21.5 billion 1984 underwriting loss came from these two lines. And in 1985, the two lines accounted for almost one-quarter of the property-casualty industry's estimated $25.2 billion underwriting loss. These two lines, as well as the Commercial Multiple Peril line, 9/ are discussed in greater detail in Subsection II.

II. UNDERWRITING RESULTS BY MAJOR LINES

While the industry overall has been profitable, certain lines have made major contributions to the underwriting losses. This section examines the major commercial lines in which availability and affordability problems have been most prominent.

Commercial Multiple Peril

Commercial Multiple Peril ("CMP") is related to the general liability line of insurance in that it is a packaged line of business which includes some commercial general liability coverage and its long-tail losses; that is, losses which may be

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5/ Insurance Information Institute, 1985-86 Property/Casualty Factbook, page 22.

6/ Id. The comparable statutory accounting rate of return was 11.9%. Id.

7/ Congressional Quarterly Weekly Report, page 150 (January 25, 1986).

8/ Insurance Information Institute, 1985-86 Property/Casualty Factbook, page 16.

9/ If the Commercial Multiple Peril line is taken into account, approximately 14% of the property-casualty industry (in terms of 198[illegible] written premiums) accounted for about one-third of its underwriting losses in both 1984 and 1985. Id.

reported many years after the policy year. CMP experience over the past five years is reflected in the chart below.

Commercial Multiple Peril

Year	Net Premiums Written (Billions)	Loss and LAE (Billions)	Underwriting Expenses (Billions)	Statutory Underwriting Loss After Policyholder Dividends (Billions)
1981	$6.8	$4.6	$2.5	$-0.5
1982	6.9	5.3	2.7	-1.2
1983	7.2	5.9	2.9	-1.7
1984	8.2	7.9	3.2	-2.9
1985*	11.7	10.4	4.1	-3.0

*Estimated Source: Best's Insurance Management Reports 12/30/85

While the underwriting losses for CMP rose to $3 billion in 1985, it is readily apparent that until recently there had been little premium growth in the line. Best's predicts that the short-tail, non-liability portion of CMP should provide the ability for a fast turnaround for this line. It also notes that ISO's new CGL claims-made form will be added to the standard CMP form, but that market pressures should assure the availability and affordability of the smaller businessowner's package. 10/

Commercial General Liability

Commercial General Liability ("CGL") coverage includes most of the commercial sectors which are experiencing serious availability/affordability problems. It covers product liability, municipalities, day care centers and other commercial coverages. It is the line for which ISO has introduced its new claims-made form. The experience of this line over the past five years is summarized below.

General Liability

Year	Net Premiums Written (Billions)	Loss and LAE (Billions)	Underwriting Expenses (Billions)	Statutory Underwriting Loss After Policyholder Dividends (Billions)
1981	$6.0	$5.1	$1.8	$-1.0
1982	5.6	5.4	1.8	-1.7
1983	5.7	6.0	1.8	-2.1
1984	6.5	7.8	1.9	-3.2
1985*	11.1	13.2	2.7	-4.6

*Estimated Source: Best's Insurance Management Report

10 Best's Insurance Management Reports (December 30, 1985).

As is apparent, written premiums dropped in 1982 and 1983 and rose slightly in 1984. The figures for 1985, however, show a dramatic increase of 72% over the 1984 premium. Increases are continuing to occur in the line as policies come up for renewal. Losses increased throughout the period, but did so at a relatively even pace until 1984, when losses increased by over $1 billion dollars over the previous year's losses.

Medical Malpractice

Medical malpractice represents only about 1.8% of property/casualty insurance written, but has been the source of major availability/affordability problems. The following chart summarizes the experience of the line over the past five years.

Medical Malpractice

Year	Net Premiums Written (Billions)	Loss and LAE (Billions)	Underwriting Expenses (Billions)	Statutory Underwriting Loss After Policyholder Dividends (Billions)
1981	$1.3	$1.6	$0.2	$-0.5
1982	1.5	2.0	0.2	-0.7
1983	1.6	2.1	0.2	-0.8
1984	1.8	2.8	0.3	-1.1
1985*	2.6	3.6	0.3	-1.4

*Estimated

Source: Best's Insurance Management Report

Medical malpractice experience is receiving considerable attention at the state level. Unlike many lines of coverage such as product liability, rates are based on state claims rather than national data.

III. PREMIUM TRENDS

The recent rapid growth in premiums has been a major element in the current availability/affordability crisis. This section examines this trend. The following data was provided by the ISO.

Cash-flow underwriting is generally acknowledged to have played a role in causing the large underwriting losses presently being experienced in the commercial lines. According to ISO, the industry's current underwriting losses are a result of "a

prolonged period of underpricing and rapidly expanding tort liabilities." 11/ In this regard, the ISO report states:

> For the better part of seven years, the insurance industry has been engaged in a brutal price war. During the early 1980's, the price for commercial insurance was decreasing, sometimes sharply, as insurers vied for premium dollars to invest at the high interest rates then in effect. At the time, commercial customers did not complain. Indeed, many realized that commercial insurance in the United States was being sold below cost, even when investment income was considered. 12/

Chart A, based on ISO data, tracks commercial line premiums in constant 1967 dollars. As can be noted from the chart, 1984 marked the first real increase in premiums (in constant dollars) after five consecutive years of declining written premiums. But 1984 written premiums were almost 20% less than premiums collected in 1978, the year preceding the dramatic decline in premiums. At the same time, losses and expenses in 1984 were at an all-time high. 13/

A similar comparison of the general liability premiums written, premiums earned and line outgo over the past ten years (not in constant dollars) is shown in Chart B.

Analyzing this data, the Best's report notes that during the relevant period (1975 - 1985):

> . . . the inflation of liability awards could have been no secret to any underwriter. Had the ascending line of premiums written that was established in 1975 through 1978 continued to rise, the general liability losses of $13 billion incurred in the last six years largely would have been avoided. 14/

11/ ISO, Financial Condition of the Insurance Industry -- An Update (1985).

12/ Id.

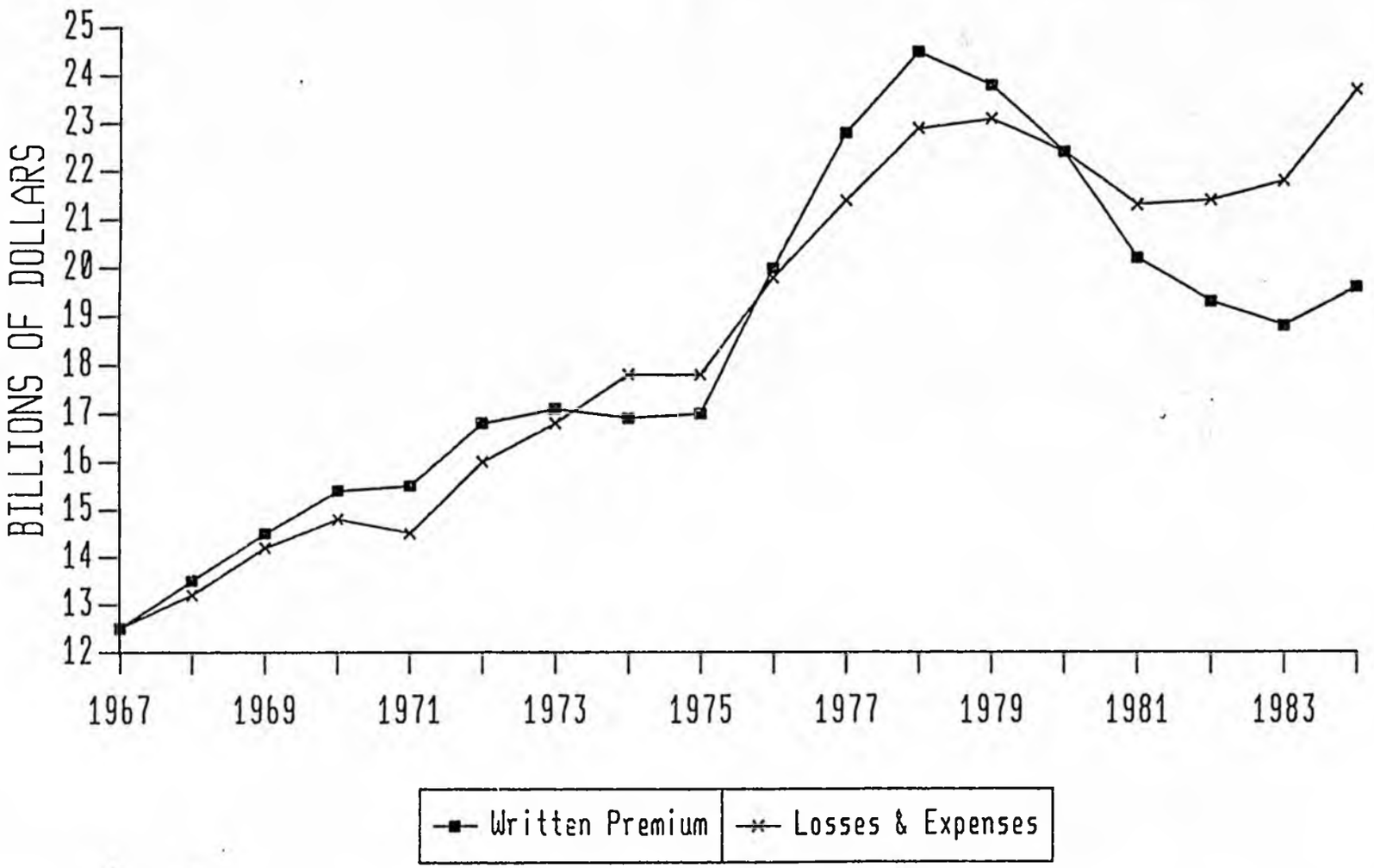
13/ Id.

14/ Best's Insurance Management Reports (December 30, 1985).

CHART A

WRITTEN PREMIUM vs. LOSSES & EXPENSES

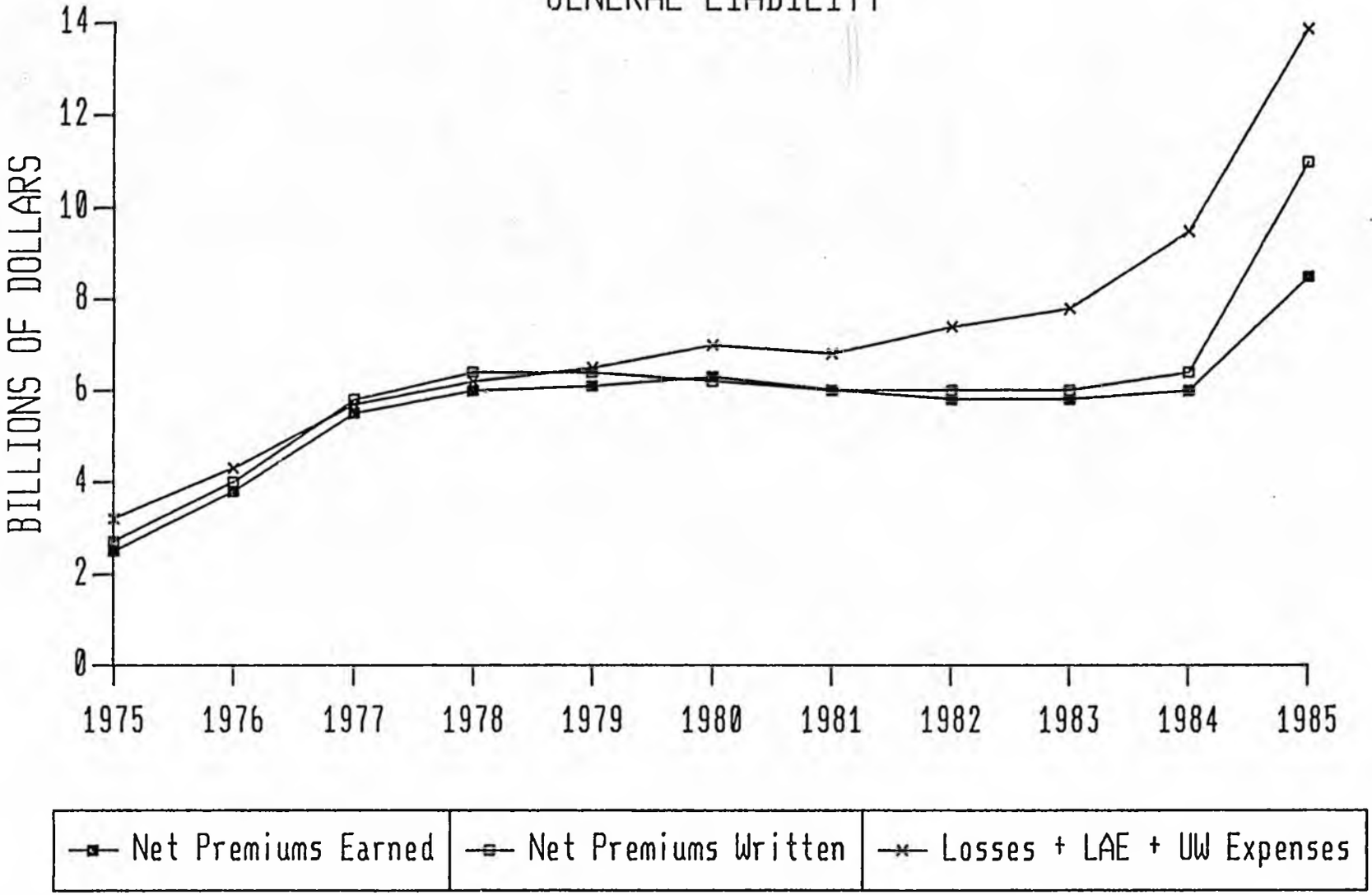
COMMERCIAL LINES IN CONSTANT 1967 DOLLARS



Source: Insurance Services Office

CHART B

GENERAL LIABILITY



Source: Best's Insurance Management Report, 12/30/85

IV. THE ECONOMIC CAUSES OF THE INSURANCE AVAILABILITY/AFFORDABILITY CRISIS

The above discussion indicates that during the late 1970's and early 1980's the insurance industry engaged in significant premium reductions while claim losses increased steadily. The result, not surprisingly, has been massive underwriting losses in recent years.

It is useful in considering the contribution of such economic factors to the insurance availability/affordability crisis to distinquish two different effects which frequently are confused. The first is the inflationary effect on premiums of the recent decline in interest rates. The second is the premium cutting which took place in the late 1970's and early 1980's as a consequence of the industry's desire to take advantage of high interest rates available during that period.

As to the first effect, there is an obvious inverse relationship between premiums and the prevailing interest rate. A significant portion of an insurer's profits stem from the return on the premium income it invests between receipt of the premium and payout of the incurred liabilities. When interest rates are high, premiums tend to be lower since more of the insurer's income comes from such return on investment; and when interest rates are low, premiums will tend to be higher since the insurer is more dependent on the premium principal to cover the anticipated payout. Thus, as interest rates fall -- as they have in the mid-1980's -- insurance premiums inevitably increase.

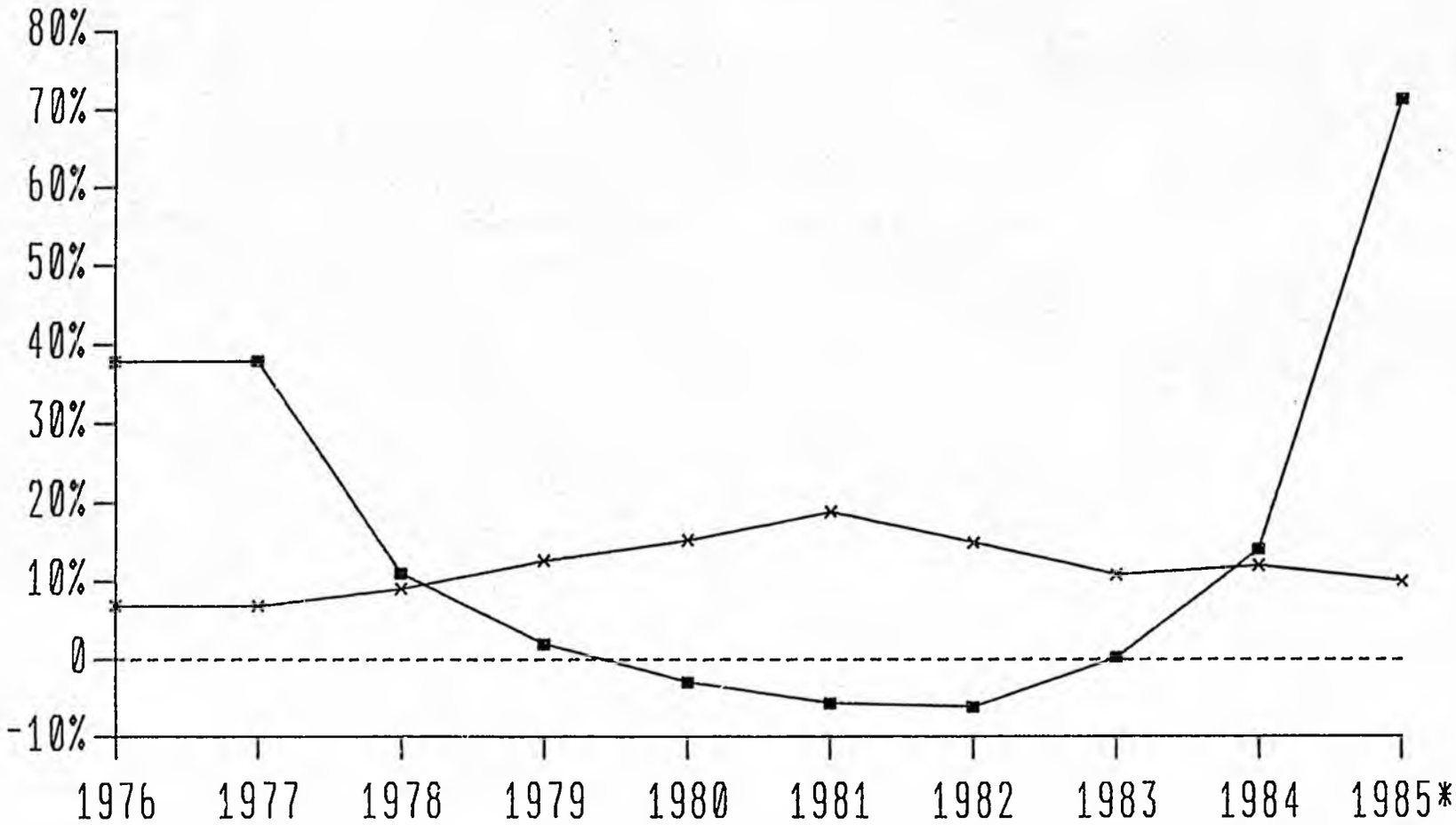
This inverse relationship is illustrated by Chart C, which compares the prime rate in 1976 through 1985 to the annual percentage change of the total Commercial General Liability (CGL) premiums written by the insurance industry in each of those years. 15/ Chart C graphically demonstrates that the rate of growth of the written premiums changes inversely with the movement of the prime interest rate.

To the extent that the recent sharp premium increases are related to the drop in interest rates, there is little the federal (or any) government can or should do to mitigate this market effect. Declining interest rates cause innumerable economic realignments which, on the whole, are quite beneficial to the economy. An increase in insurance premiums resulting from such a reduction in interest rates, while of itself undesirable, is a relatively minor side effect to the far more significant economic consequences of a drop in the interest rate.

15/ The percentage change in 1976 through 1984 is obtained from the Insurance Information Institute's most recent Property/Casualty Factbook. The estimate for 1985 is obtained from the ISO data discussed supra.

CHART C

PERCENTAGE CHANGE IN GCL PREMIUMS COMPARED TO INTEREST RATE



*1985 Data Estimated

Moreover, there is little that can be done to address this source of premium volatility. It would be absurd to try to keep interest rates high simply to keep insurance premiums as low as possible. But as long as interest rates fluctuate, premiums necessarily will reflect such changes.

A second economic factor related to interest rates is the extent to which high interest rates may have triggered "excessive competition" in the insurance industry which led the industry to sell its product too cheaply. For one thing, even assuming one accepts the concept of "excessive competition," it is unclear how such losses in fact contribute to the insurance availability/affordability crisis. As discussed later in this Chapter, such losses are "sunk costs" which the industry cannot recoup simply by charging higher premiums. If premiums in fact are higher than the insured risks and the currently available investment return dictate, either other sources of capital (including insurers who have suffered no losses or lower losses) should offer the same insurance at a lower price, or insureds will retain these "excess profits" for themselves through self-insurance or the formation of captives. The fact that there appears to be little insurance coverage being made available by new or expanding underwriters, and that many insureds are highly reluctant to self insure or form captives (even though many with serious availability problems may have no alternative), strongly indicates that recoupment of losses is not a particularly compelling explanation for the current insurance availability/affordability crisis.

It is particularly puzzling that the proponents of this theory advocate the abolition of the insurance industry's antitrust immunity contained in the McCarran-Ferguson Act (Public Law 79-15) as an appropriate response to the asserted problem of the industry's cash-flow "mismanagement." It is hard to reconcile the argument that the current problems of the insurance industry stem from "excessive competition" with the proffered solution of removing the industry's antitrust immunity. Since the goal of antitrust law is to enhance competition, if one truly believes that the problems of the insurance industry are a result of too much competition, the last thing one would advocate is a legal change which would increase the level of competition. While the Working Group did not review and takes no position on the continuing validity of the industry's antitrust immunity, 16/ it is readily obvious that the suggestion that allegedly "excessive competition" can be cured by even more competition is patently absurd.

16/ Despite the assertions of some, the Working Group found no evidence to suggest that the industry's antitrust immunity is a significant factor in the insurance availability/affordability crisis. It should be noted, however, that the immunity has been criticized for a variety of other reasons. See the 1977 report of the Task Force on Antitrust Immunities, footnote 1, supra.

The reasons why the loss recoupment (or excessive pricing) theories advocated by some make little economic sense can briefly be summarized as follows:

- Insurers, like all profit maximizing companies, charge the price which maximizes their profits. Past gains or past losses are irrelevant to setting the price today which will maximize profits tomorrow. The argument that insurers are charging higher premiums to recoup past losses suggests that absent such losses their premiums would be lower -- that is, that they would not be charging premiums that maximize their profits. That makes little sense.

- Even if excessive premiums were being charged by some insurers to recoup their past losses, for the reasons discussed, other insurers would offer the same coverage at lower prices reflecting the actual risk, or insureds would retain such excess profits for themselves through self-insurance or the formation of captives. 17/

- The commercial lines of insurance, which are at the center of the availability/affordability crisis, in fact are relatively competitive. For example, the 1977 report of the Task Force on Antitrust Immunities (see footnote 1, supra) found that the property-liability insurance industry "appears to possess an atomistic market structure," including over 900 companies. Id., at 7. 18/ The Task Force also found that the restrictions to entry do not appear significant in the property-liability insurance industry, id., at 9, and that there appears to be price competition in this line as a result of "an industry structure that favors competition." Id., at 27-28. 19/ It is, of course,

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17/ Many insurance companies are mutuals, meaning that they are owned by their policyholders. The suggestion that they are charging their policyholder-owners unnecessarily high premiums makes even less sense, since any such excess profits must be rebated through policyholder dividends.

18/ The report states that 20 insurance groups account for 53% of written premiums, and that no single group accounts for a major share of the market. Id., at 8. This is consistent with the analysis of the Medical Malpractice Policy Guidebook (H. Manne, 1985), which found the medical malpractice insurance market in Florida to be "substantially and effectively competitive." Id., at 166.

19/ See also page 348 of the report summarizing the Task Force's
(CONTINUED)

difficult to conceive how premiums are being kept at artificially high levels for a line of insurance in which prices appear to be competitively determined.

- Finally, many of the strongest proponents of the loss recoupment theory also contend that these losses were the result of excessive price competition in the industry. Obviously, it is difficult to reconcile these arguments. 20/

In sum, to the extent that purely economic factors underlie the insurance availability/ affordability crisis, they do not appear to be the type of problems which can be cured by different or more intensive forms of government regulation -- either at the state or federal level -- of the insurance industry. There, however, is a cause of the availability/ affordability crisis at the very heart of that crisis which the government is well placed to address in a variety of constructive ways. That cause is tort law, and its role in the crisis is discussed in Part B of this Chapter.

B.

The above discussion has focused largely on the current financial condition of the insurance industry, and the economic factors leading to that condition. The following discussion examines the state of tort law, and its central role in the insurance availability/affordability crisis.

Unlike the above related economic data on the insurance industry, it is difficult to obtain good empirical data indicating precisely what has happened to tort liability in

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19/ (FOOTNOTE CONTINUED)

conclusion that the "industry is structured in a manner conducive t competition." It should be noted that these conclusions did not appear to apply to some other lines of insurance such as life insurance.

20/ These same points apply equally well to arguments that premiums are set excessively high to recoup losses resulting from mismanaged investment portfolios. Just as past losses are irreleva to determining the premiums which will maximize profits, investment portfolio losses should have no bearing on premiums. In this regar however, it should be noted that the property-casualty industry mad $32.8 billion from net investment and other income in 1985. See supra.

recent years. 21/ It is plain even to the most uninitiated that tort law has changed dramatically in recent years -- from a relatively quiescent legal backwater into one of the most important and dynamic areas of the law today. 22/ Moreover, a growing body of case examples and empirical data suggest that the current tort system has serious problems and is operating quite poorly. The insurance availability/affordability crisis is one symptom -- albeit the most dramatic and acute symptom -- of the dislocations and problems generated by a malfunctioning tort system.

I. PROBLEM AREAS IN TORT LAW

In attempting to understand what has happened to tort liability in the United States, the Working Group has focused on four interrelated areas: fault, causation, damages and transaction costs. Each is discussed separately below.

The Movement Toward No-Fault Liability

One of the most disturbing aspects of the current tort system is the degree to which it has moved toward no-fault liability. While this movement began in earnest over twenty years ago, it appears to have accelerated dramatically in recent years.

Beginning in the early to mid-1960's it became fashionable to reject the twin pillars upon which tort law historically had been constructed -- deterrence and compensation -- in favor of seemingly more enlightened theories based largely on concepts of societal insurance and risk spreading. 23/ While many of these

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21/ The Rand Corporation, through its Institute for Civil Justice, has produced the best empirical data and analyses available in the area. While the Institute has only been able to research discrete areas of civil justice, the conclusions drawn from those analyses are invaluable to understanding many broader problems. The recently published five-year overview of the Institute's program offers an excellent summary of the research, results and continuing work of the Institute's staff.

22/ For example, at the end of fiscal year 1975, what is now the Torts Branch of the United States Department of Justice contained 39 attorneys, who handled or supervised about 4,000 cases totalling approximately $1 billion in claims. At the end of fiscal year 1985, the Torts Branch had grown to 124 attorneys handling or supervising about 11,000 cases totalling approximately $200 billion in claims.

23/ One of the most explicit statements of such a theory can be found in the decision of the New Jersey Supreme Court in Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982), in which the Court expressly denied defendants

(CONTINUED)

theories were couched in terms of economic efficiency, they represented the beginning of a devastating, and to this day, on-going challenge to the role of fault as a predicate of tort liability. The long-term effect of this development has been less to promote a more efficient or sensible tort system, 24/ than to undermine the importance of fault (or wrongdoing) as a moral and doctrinal justification for and limitation on tort liability. As this limitation has been removed or undermined in certain areas of tort liability, tort law increasingly has come to rest only on the pillar of compensation, with compensation often awarded merely for the sake of compensation.

As the tort system moves away from fault it increasingly imposes liability upon persons and companies that have done nothing wrong. This has been accomplished in a variety of ways: by directly reducing or even eliminating the fault requirement; by

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23/ (FOOTNOTE CONTINUED)

the opportunity to raise a "state of the art" defense. The Court held that even if the danger at issue was scientifically unknowable at the relevant time, defendants nonetheless were still liable for having failed to warn of an unknowable risk. As justification for its holding, the Court relied heavily on risk spreading. In the words of the Court, "manufacturers and distributors . . . can insure against liability and incorporate the cost of the insurance in the price of the product." 447 A.2d at 547. The Court went on to opine that the likely increase in premiums to compensate for unanticipated risks was "not a bad result." Id.

24/ The belief that tort liability should be no-fault so as to serve as a risk spreading mechanism for all injuries is in fact quite anti-consumer. Such a view of tort liability effectively would mean that the price of every product and service would include an insurance surcharge for the risk of any injury related to the product or service. It has long been understood, however, that because of the extraordinarily high transaction costs of the tort system, such compulsory insurance through the tort system would be among the most inefficient and costly ways for consumers to purchase insurance. Thus, for every $1 of compensation, the tort system requires the consumer to pay approximately $3 in premiums (assuming, as discussed infra, two-thirds transaction costs), while that same $1 of compensation can be obtained through first-party health and disability insurance for only $1.25. H. Manne, Medical Malpractice Policy Guidebook 143 (1985). It is highly ironic that many proponents of no-fault liability argue that such liability is in the best interest of consumers. In fact, since consumers ultimately pay the premiums of whatever compensation scheme is devised, quite the contrary is the case. See also Epstein, "Products Liability as an Insurance Market," 14 J. Legal Stud. 645 (1985).

defining new duties that effectively create fault where no fault existed previously; and, by engaging in after-the-fact analyses that "find" fault wherever there has been an injury. 25/ The ultimate effect of these developments has been the same -- to shift liability for compensation to "deep pocket" defendants that have the resources to compensate plaintiffs generously. 26/

Fault has not, however, been openly (or completely) rejected as part of our tort law. One reason is that fault remains the only vehicle in tort law capable of distinguishing wrongful (or undesirable) from beneficial (or desirable) conduct. If fault were rejected altogether, it would mean that desirable activities would be just as likely to incur liability as wrongful conduct. An open rejection of fault thus necessarily would result in a sweeping transformation in the public's attitude toward tort law, which continues to be bottomed on the concept of tort liability as a form of justified redress for wrongful conduct. A second reason why fault continues to be part of tort law (and why courts often will engage in amazing distortions of relevant facts or legal doctrines to find fault rather than simply reject the principle of fault) is that fault is the basis of much of the structure and process of tort law.

25/ The duty to warn has been a particularly fertile ground for such after-the-fact compensation oriented findings of fault. It is all too easy after the occurrence of an injury to postulate a warning that might have influenced the plaintiff to be more careful or to reconsider his action, no matter how fanciful or unreasonable such a warning might appear prior to the injury. Such analyses have been a major factor in the medical malpractice and product liability litigation explosion.

26/ A recent and almost classic example of such compensation oriented liability findings is the California Supreme Court's decision in Bigbee v. Pacific Tel. & Tel. Co., 34 Cal.3d 49, 665 P.2d 947 (1983). In that case, a man was injured when an allegedly intoxicated driver lost control of her car, veered off the street into a parking lot, and crashed into a telephone booth in which the man was standing. Suit was brought against the companies responsible for the design, location, installation, and maintenance of the booth. The Court, in an opinion authored by Chief Justice Rose Bird, found that the risk that someone might veer off the road and crash into the phone booth was not unforeseeable as a matter of law. The Court also determined that it was of no consequence that the harm to plaintiff came about through the negligent or reckless acts of an allegedly intoxicated driver. In a concluding footnote, Chief Justice Bird stated that "there are no policy considerations which weigh against imposition of liability" against the defendants even though their "conduct may have been without 'moral blame,'" and referred specifically to "the probable availability of insurance for these types of accidents . . . ." 665 P.2d at 953 n. 14.

If fault were no longer a central element in determining liability, the current tort system would in many ways be wasteful, inefficient and unfair in the extreme. 27/

Tort law thus has gradually (with a marked acceleration in recent years) been moving in the direction of no-fault liability without an adequate acknowledgement of either the existence or the implications of this development. The result is an increasingly common and perverse combination of fault-based levels of compensation based on no-fault liability.

The Undermining of Causation

Tort law traditionally has sought to place liability only upon those actors whose wrongful conduct actually caused an injury. This principle is found in the concept of "proximate cause," which requires a reasonable relationship between a given cause and effect. For some time, however, proximate cause has been under systematic attack. No single doctrinal change can be identified as the primary vehicle for this attack. Rather, the challenge has come through a variety of questionable practices and doctrinal innovations.

One such development has been the increasing use of joint and several liability to shift the cost of compensation to "deep pockets." Joint and several liability developed in the context of defendants acting in concert. 28/ Over the years, however, it increasingly has been used to make a defendant with only a limited role in causing an injury bear the full cost of compensating plaintiff, even in some cases where the plaintiff may have been largely responsible for his own injury. 29/ The result has been that joint and several liability in the absence of concerted action can and does lead to highly inequitable

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27/ For example, the way in which damages are measured and awarded can only be justified, if at all, on the basis of redressing wrongful conduct. Once wrongdoing is removed as an element of liability, many of the principles involving damages become grossly unfair.

28/ See generally Prosser and Keeton on Torts (5th ed. 1984), Chapter 8. As may be obvious, as with so many other aspects of tort law, fault remains a central and essential justification for joint and several liability.

29/ The application of joint and several liability in cases where there in fact is no concerted action is discussed in some detail in Speiser, Krause & Gans, The American Law of Torts § 3:7 (1983). It is interesting to note that the English courts apparently have maintained the traditional common law basis for joint and several liability, and have refused to apply such liability in the absence of concerted action. Id.

treatment of defendants, particularly "deep pocket" defendants. 30/

A related development is the way in which joint and several liability has been applied by some courts to theories of "enterprise" or "market share" liability for injuries caused by generic products (e.g., DES). "Market share" liability, in its pure theoretical sense, allocates liability among manufacturers of a generic product on the basis of their share of the relevant market. While there can be some serious problems and inequities with this approach, as long as all relevant manufacturers (and their respective market shares) are accounted for, and the product is truly generic in nature, such an allocation of liability may be the only way plaintiffs in some cases can obtain compensation for injuries caused by wrongdoing on the part of the manufacturers of such a product. Serious problems with this approach arise, however, when not all relevant manufacturers are accounted for, or where the product is not truly generic in nature. Even more troublesome is the approach of several courts which use some industry liability allocation formula, but then apply joint and several liability to all defendants. See, e.g., Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, cert. denied., 105 S.Ct. 123 (1984); Collins v. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37 (1984). This, in fact, represents a clear abuse of joint and several liability, and cannot be justified on the basis of the unique difficulties plaintiffs sometimes face in identifying the manufacturer of an injury causing generic product.

A third means that has been used to undermine causation -- increasingly common in toxic torts cases -- is the use of presumptions or burden-shifting techniques to force the defendant to prove the lack of causation in order to avoid liability. 31/ Frequently, this amounts to asking the defendant

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30/ The legal doctrine of contribution in theory could serve to mitigate some of those inequities. In certain areas of the law, such as antitrust law, where joint and several liability generally tends to be applied to established businesses, contribution appears to function quite well. (And, in any event, joint and several liability in antitrust cases is virtually always based on concerted action -- the traditional basis for such liability.) In personal injury cases, however, many multi-defendant cases involve a "deep pocket" and one or more defendants who are either judgment proof or have limited assets or insurance coverage. In such cases, the belief that contribution serves as a mitigating factor is largely illusory.

31/ A particularly dramatic example of such a practice can be found in Allen v. United States, 588 F.Supp. 247 (D. Utah 1984), a low-level radiation exposure case in which the court shifted to the government the burden of proving that particular cancers were not caused by radiation exposure.

to meet an impossible burden of proving the negative.

Another way in which causation often is undermined -- also an increasingly serious problem in toxic tort cases -- is the reliance by judges and juries on noncredible scientific or medical testimony, studies or opinions. It has become all too common for "experts" or "studies" on the fringes of or even well beyond the outer parameters of mainstream scientific or medical views to be presented to juries as valid evidence from which conclusions may be drawn. The use of such invalid scientific evidence (commonly referred to as "junk science") has resulted in findings of causation which simply cannot be justified or understood from the standpoint of the current state of credible scientific and medical knowledge. 32/ Most importantly, this development has led to a deep and growing cynicism about the ability of tort law to deal with difficult scientific and medical concepts in a principled and rational way.

These are but four developing areas that are causing defendants to be found liable for injuries they did not cause. The one common attribute of these developments is that the defendants to whom liability is shifted almost invariably happen to be those with the deepest pockets.

The Explosive Growth in Damage Awards

Another area of great concern is the explosive growth in tort damages awards over the last decade. A few statistics will illustrate this point.

Jury Verdict Research, Inc., publishes data on the average jury verdict in product liability and medical malpractice cases. The service's latest report 33/ shows that the average medical

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32/ An instructive decision in this regard is the district court opinion in Johnston v. United States, 597 F.Supp. 374 (D. Kansas 1984). The court there exhaustively reviewed the theories and credentials of a number of plaintiffs' experts on the effects of low-level radiation, and rejected their testimony as biased, contradictory and totally without scientific merit. Of particular interest is the court's frustration that these same experts had played prominent roles in major radiation cases such as Silkwood and Allen, and that their testimony was being used in numerous cases throughout the country. The court noted its disappointment that such "so-called experts can take such license from the witness stand [to] say and conclude things which . . . they would not dare report in a peer-reviewed format." Id. at 415.

33/ Jury Verdict Research, Inc., Injury Valuation: Current Award Trends No. 304 (1986). The 1985 data provided by the service is incomplete, and is subject to refinement. The (CONTINUED)

malpractice jury verdict increased from $220,018 in 1975 to $1,017,716 in 1985 (see Chart D), a 363% increase. 34/ Average product liability jury verdicts during this same period increased from $393,580 to $1,850,452, a 370% increase (see Chart E). 35/

Interestingly, much of this increase can be attributed to a remarkable growth in verdicts above $1 million. In 1975 there were three million-dollar medical malpractice verdicts and nine million-dollar product liability verdicts reported by Jury Verdict Research, Inc. In 1984, the numbers had grown to 71

33/ (FOOTNOTE CONTINUED)

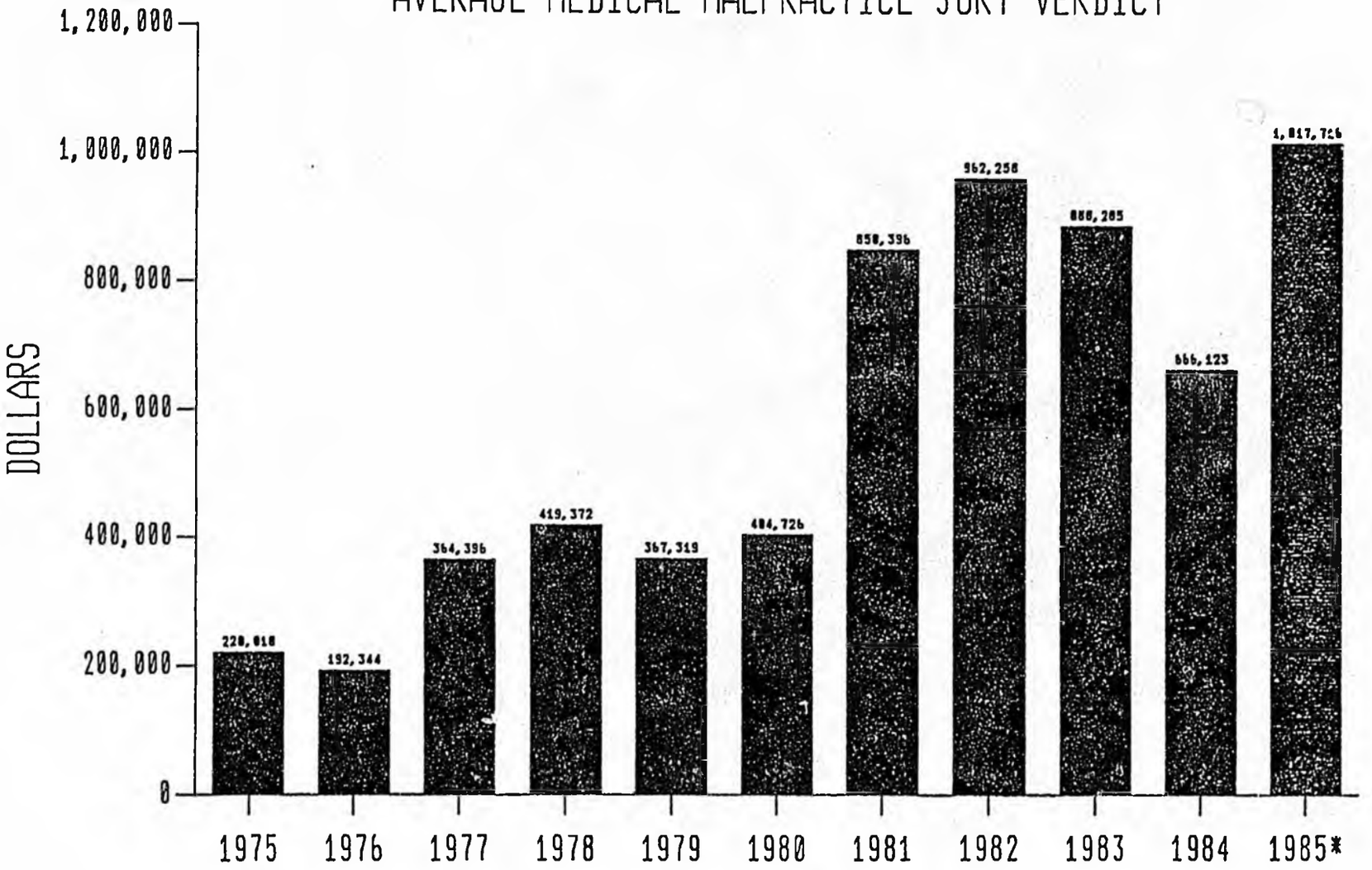
service indicates that it bases "its findings, values and probabilities upon collected verdicts using accepted statistical methods in their analysis and application." Nevertheless, the reported average annual verdicts are not used by the Working Group as an accurate statement (though they may very well be) of the average jury verdict in any particular year. Rather, the Working Group found the Jury Verdict Research data useful for purposes of showing the trend in jury verdicts over the last decade. In this regard, it should be noted that the service has used the same basic methodology since well before the relevant reported years. Moreover, while there are different estimates of average jury verdicts for particular areas and years, a number of other sources that have collected such data -- including the Institute for Civil Justice -- corroborate the overall trends reported by Jury Verdict Research, Inc.

34/ This percentage increase is consistent with a survey of California Superior Court medical malpractice verdicts. That survey shows the average medical malpractice award as increasing from $152,970 in 1975 to $649,210 in 1983, a 324% increase. American Medical Association Special Task Force on Professional Liability and Insurance, Professional Liability in the '80s (October 1984). Because the $250,000 cap in California on awards for non-economic damages in medical malpractice cases was only recently affirmed as constitutional (see Chapter 4), it is unclear what effect, if any, the cap has had on malpractice verdicts in California. It is worth noting, however, that the recent insurance problems for medical malpractice have been far less serious in California than in many other states, and that in California the insurance crisis primarily has affected areas other than medical malpractice (e.g., municipal liability).

35/ This remarkable increase is also reflected in the Institute for Civil Justice study of civil jury verdicts in Cook County, Illinois. For example, the average wrongful death award in Cook County increased (in constant dollar terms) from $166,000 in 1970-74 to $336,000 in 1975-79, a doubling over roughly half a decade. M. Peterson, Compensation of Injuries: Civil Jury Verdicts in Cook County 54 (1984).

CHART D

AVERAGE MEDICAL MALPRACTICE JURY VERDICT

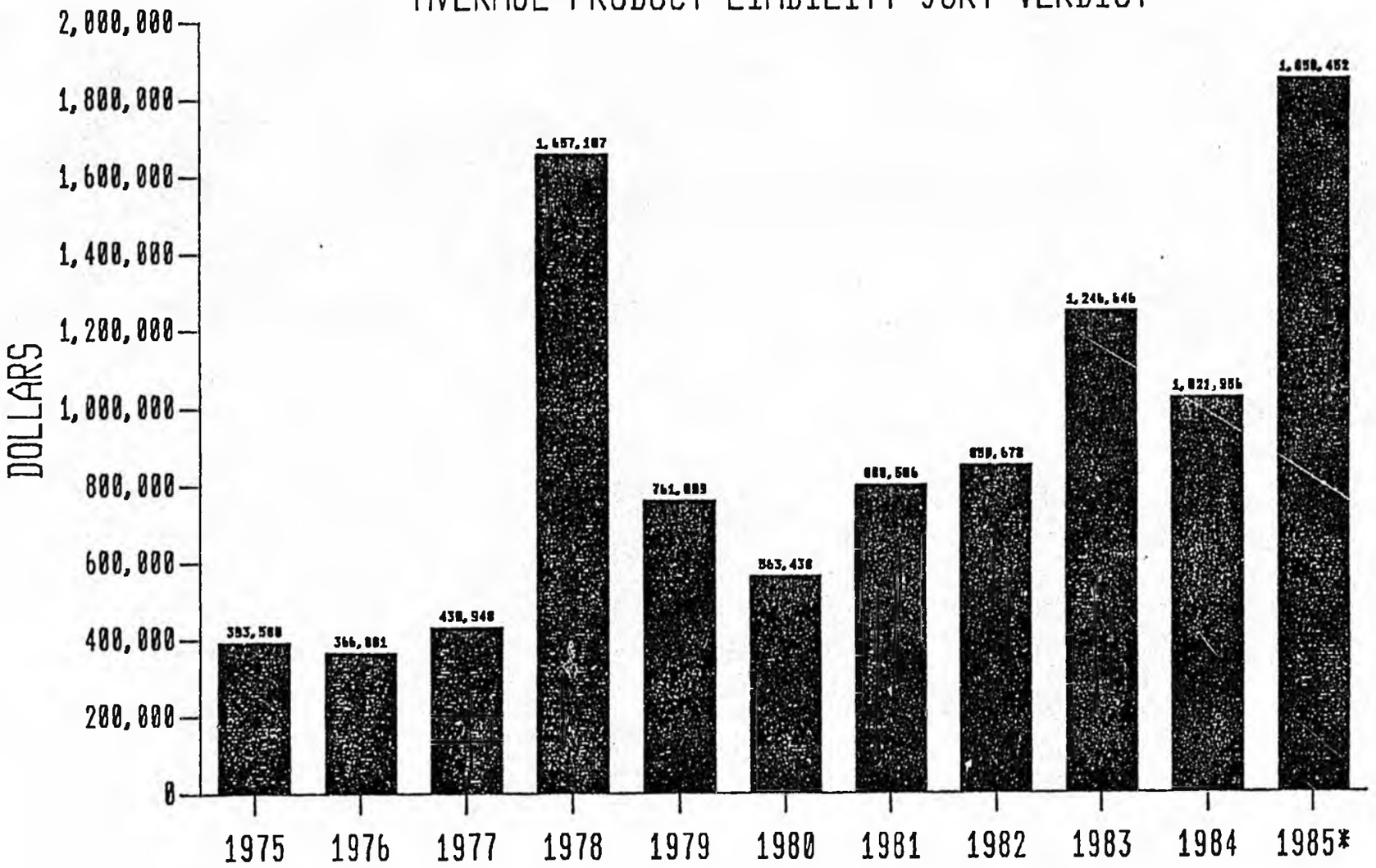


Source: Jury Verdict Research, Inc.

* 1985 Information Not Complete

CHART E

AVERAGE PRODUCT LIABILITY JURY VERDICT



Source: Jury Verdict Research, Inc.

* 1985 Information Not Complete

million-dollar medical malpractice verdicts and 86 million-dollar product liability verdicts (see Chart F), an increase of over 1200% in the number of such verdicts. 36/ If these million-dollar verdicts are deleted, the increase in average verdicts is reduced sharply. For example, the increase in the average medical malpractice jury verdict from 1975 to 1985 drops to 26% and the comparable average product liability verdict jury increase is 87%. 37/ This clearly suggests that the explosion in damages has come largely at the high end of the awards scale.

The Jury Verdict Research data is of only limited value on the absolute number of million-dollar payments, since in all likelihood the vast majority of such payments are through settlements rather than verdicts. The data is highly relevant, however, in that it shows that the percentage rate of increase of verdicts is far higher for large verdicts than for small or medium-size verdicts. Since a significant distinguishing factor between large verdicts and small or medium-size verdicts is that large verdicts tend to be composed to a far greater extent of non-economic damages, 38/ this strongly suggests that non-economic damages play a major role in the explosive growth in large verdicts (as compared to the much more moderate growth in small and medium-size verdicts).

While it is not possible to quantify precisely how much particular elements of damages have contributed to this explosion, it appears that non-economic damages are a substantial factor. Such damages include non-pecuniary compensatory damages for intangible injuries such as pain and suffering and mental anguish, as well as punitive damages. Such non-economic damages are inherently open-ended and subjective, and, therefore, easily susceptible to dramatic inflation. Of interest in this regard is a recent preliminary study by the Institute for Civil Justice which indicates that the average punitive damage award in Cook County, Illinois, increased from $63,000 in 1970-74 to $489,000 in 1980-84 (see Chart G). 39/ Of

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36/ Jury Verdict Research, Inc., supra. The trend toward million-dollar verdicts is also documented by the Institute for Civil Justice. M. Shanley & M. Peterson, Comparative Justice: Civil Jury Verdicts in San Francisco and Cook Counties, 1959-1980 26-30 (1983).

37/ Jury Verdict Research, Inc., supra.

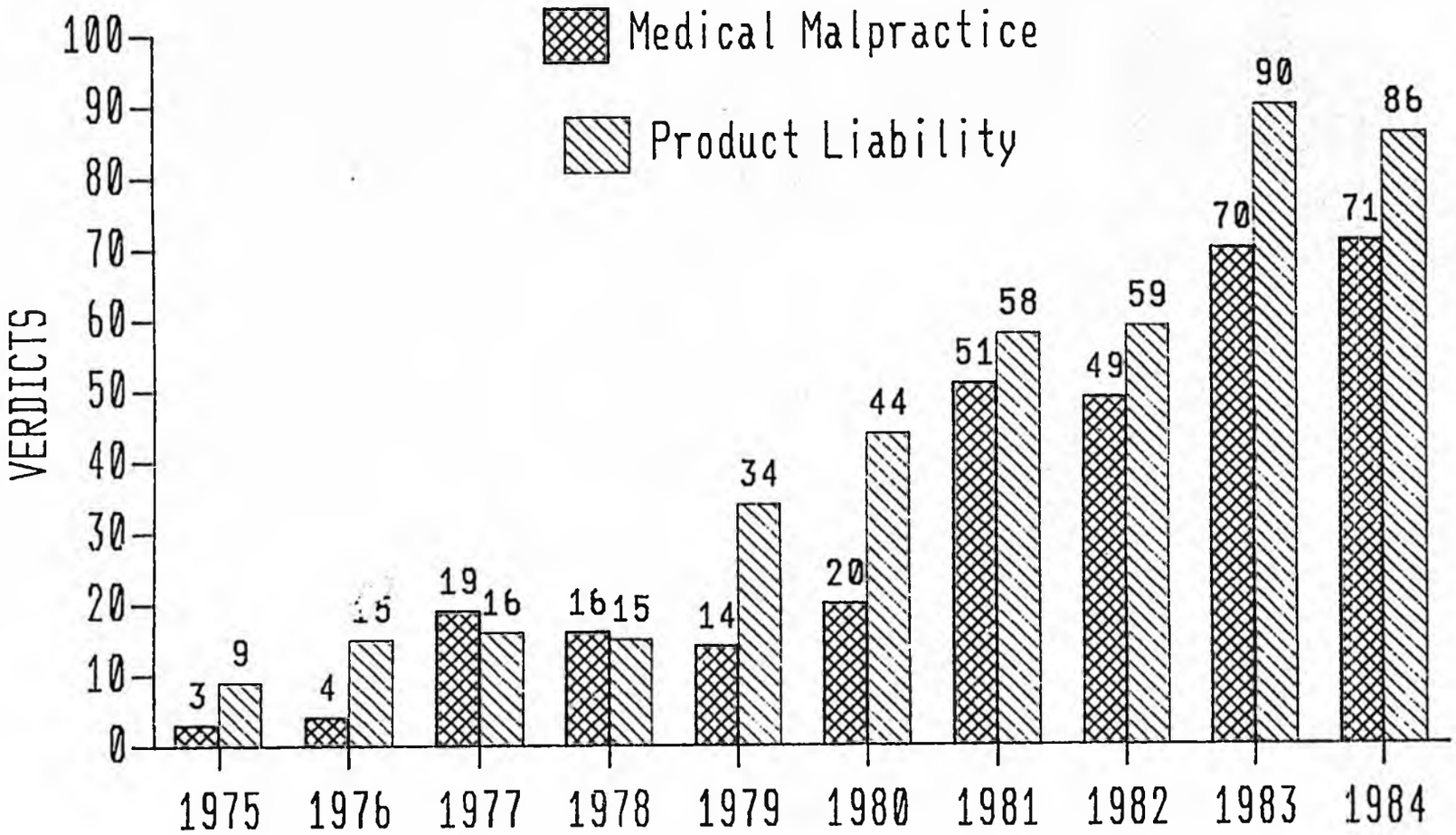
38/ H. Manne, Medical Malpractice Policy Guidebook 138-39 (1985). The study shows that for medical malpractice awards between $100,000 and $200,000, non-economic damages account for approximately 27% of the total award, while for awards above $600,000, the non-economic share increases to 54%.

39/ M. Peterson, Punitive Damages: Preliminary Empirical

(CONTINUED)

CHART F

MILLION DOLLAR JURY VERDICTS

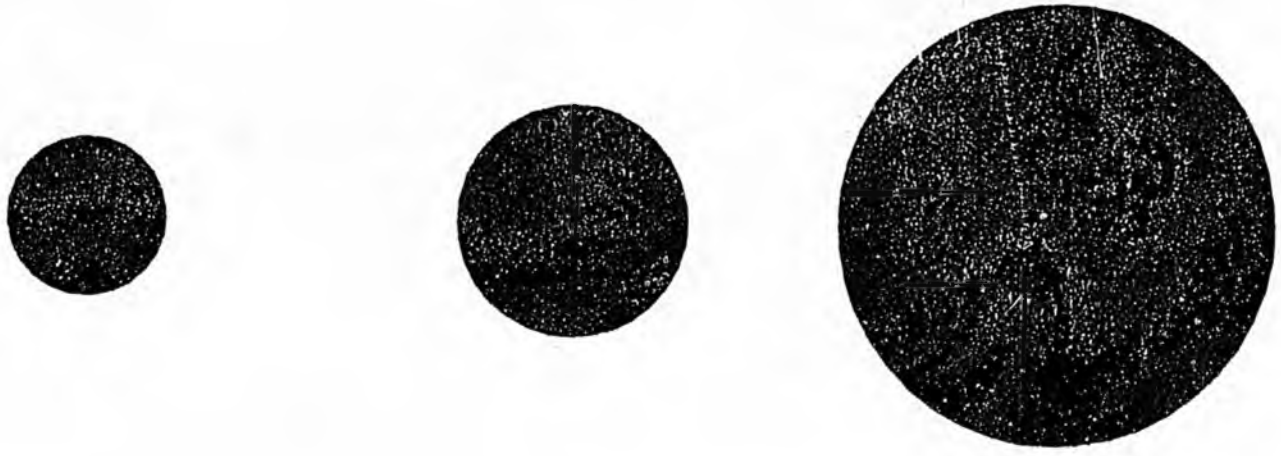


Source: Jury Verdict Research, Inc.

CHART G

AVERAGE PUNITIVE DAMAGE AWARD IN COOK COUNTY*

$63,000 (25 Awards)	$135,000 (39 Awards)	$489,000 (90 Awards)



1970-74	1975-79	1980-84

particular interest is that the average Cook County punitive damage award in personal injury cases increased from $40,000 in 1970-74 to $1,152,174 in 1980-84 (see Chart H). 40/

This explosion in damage awards, particularly in the case of non-economic damages, is vastly in excess of the rate of inflation over the comparable period. 41/ For whatever reasons, tort damage awards have suddenly soared in the United States without any apparent justification.

Excessive Transaction Costs

Another serious problem of the tort system is its extraordinarily high transaction costs. A study by the Institute for Civil Justice of the asbestos litigations shows that out of every dollar paid out by the asbestos manufacturers and their insurers as a result of the asbestos litigation, 62 cents on the verage is lost attorneys' fees and litigation expenses (see Chart I). 42/ This does not include the transaction costs borne by the courts in adjudicating these claims.

It also is worthwhile viewing the transaction costs from the

39/ (FOOTNOTE CONTINUED)

Findings 13 (1985). These averages were adjusted for inflation and are stated in terms of the 1984 dollar. The study's analysis of punitive damage awards in San Francisco also showed an increase in such awards, though of lesser magnitude than in Cook County.

40/ Id., at 25 (also adjusted for inflation). Peterson notes that personal injury punitive damage awards in Cook County between 1980-84 amounted to over half of all punitive damages awarded in all case categories by Cook County juries from 1960-84.

41/ For purposes of comparison, one dollar in 1985 had approximately half the buying power of one dollar in 1975.

42/ J. Kakalik, P. Ebener, W. Felstiner, G. Haggstrom & M. Shanley, Variations in Asbestos Litigation Compensation and Expenses xviii (1984). These costs, of course, include both plaintiffs' and defendants' litigation expenses. In comparing the costs attributable to defendants' litigation expenses to the costs attributable to plaintiffs' litigation expenses it is useful to remember that defendants incur such costs whether or not they prevail, and, indeed, may incur substantial costs defeating even clearly frivolous claims. Measurements of plaintiffs' litigation expenses (such as in Chart I), reflect only those cases in which plaintiffs prevail, while defendants' litigation expenses include all cases, whether or not plaintiffs prevail.

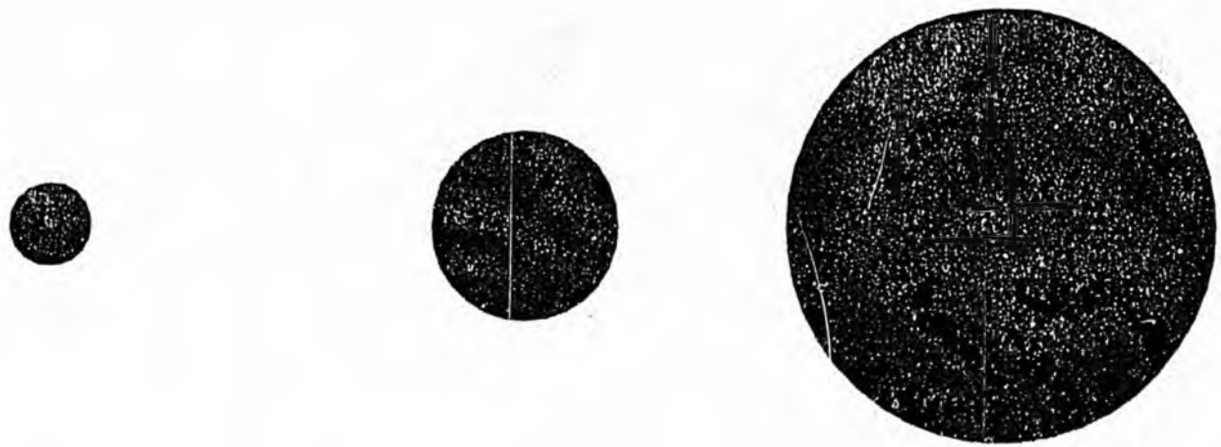
*1984 Dollars

Source: Institute for Civil Justice

CHART H

AVERAGE PERSONAL INJURY PUNITIVE DAMAGE AWARD IN COOK COUNTY*

$40,000 (5 Awards)	$217,000 (6 Awards)	$1,152,000 (23 Awards)



1970-74	1975-79	1980-84

Source: Institute for Civil Justice

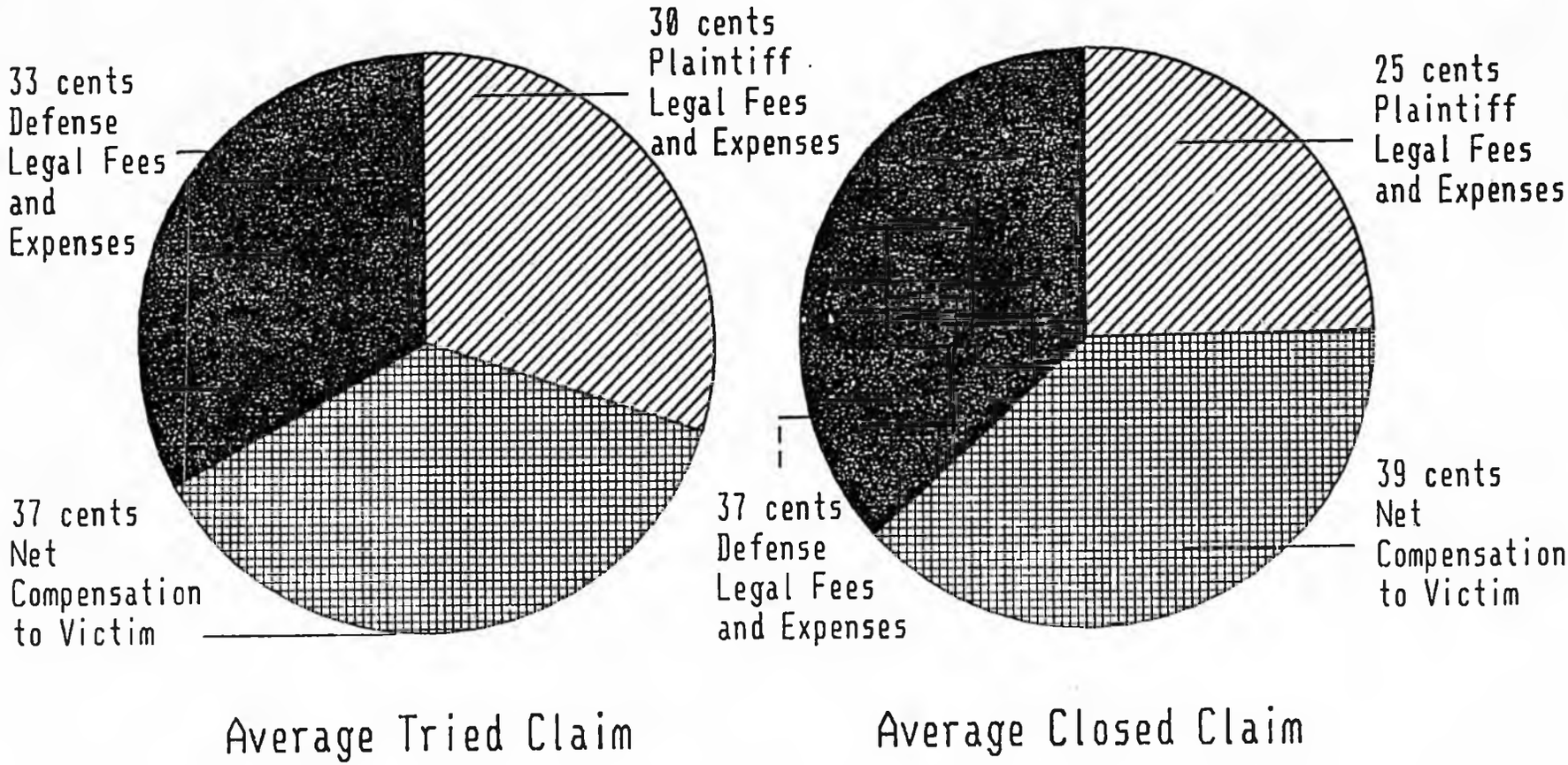
*1984 Dollars

Source: Institute for Civil Justice

*1984 Dollars

CHART I

ALLOCATION OF EVERY DOLLAR PAID OUT IN ASBESTOS CLAIMS



Source: Institute for Civil Justice

perspective of the prevailing plaintiff. The study also shows that for every dollar awarded to plaintiff, 34 cents on the average is lost to legal fees and an additional 5 cents is lost to legal expenses. 43/ In some cases, legal fees alone amounted to as much as 45% of plaintiff's award. 44/

It is difficult to justify such extraordinary transaction costs. But it is particularly difficult to justify such costs when the costs often are borne largely by the seriously injured and by consumers who ultimately must pay for these costs through higher prices for goods and services. The only clear beneficiaries of this system appear to be lawyers.

II. BURGEONING TORT LIABILITY AS A MAJOR CAUSE OF THE INSURANCE AVAILABILITY/AFFORDABILITY CRISIS

The above discussion describes a tort system that in recent years has dramatically increased in scope. One way of measuring that increase is in terms of the increase in the number of tort lawsuits and in the level of damages awarded in such lawsuits. While the available data is limited, and by no means perfect, it clearly confirms that there has been a substantial increase in recent years in both the number of tort lawsuits and awarded damages.

The growth in the number of product liability suits has been astounding. For example, the number of product liability cases filed in federal district courts has increased from 1,579 in 1974 to 13,554 in 1985, a 758% increase (see Chart J). 45/ There is no reason to believe that the states courts have not witnessed a similar dramatic increase in the number of product liability claims.

A similar trend can be found in medical malpractice, where claims 46/ filed against physician-owned companies increased from 10,568 in 1979 to 23,545 in 1983, a 123% increase in four

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43/ Id., at 84. For tried claims, these costs increase to 39 cents and 6 cents respectively. Id.

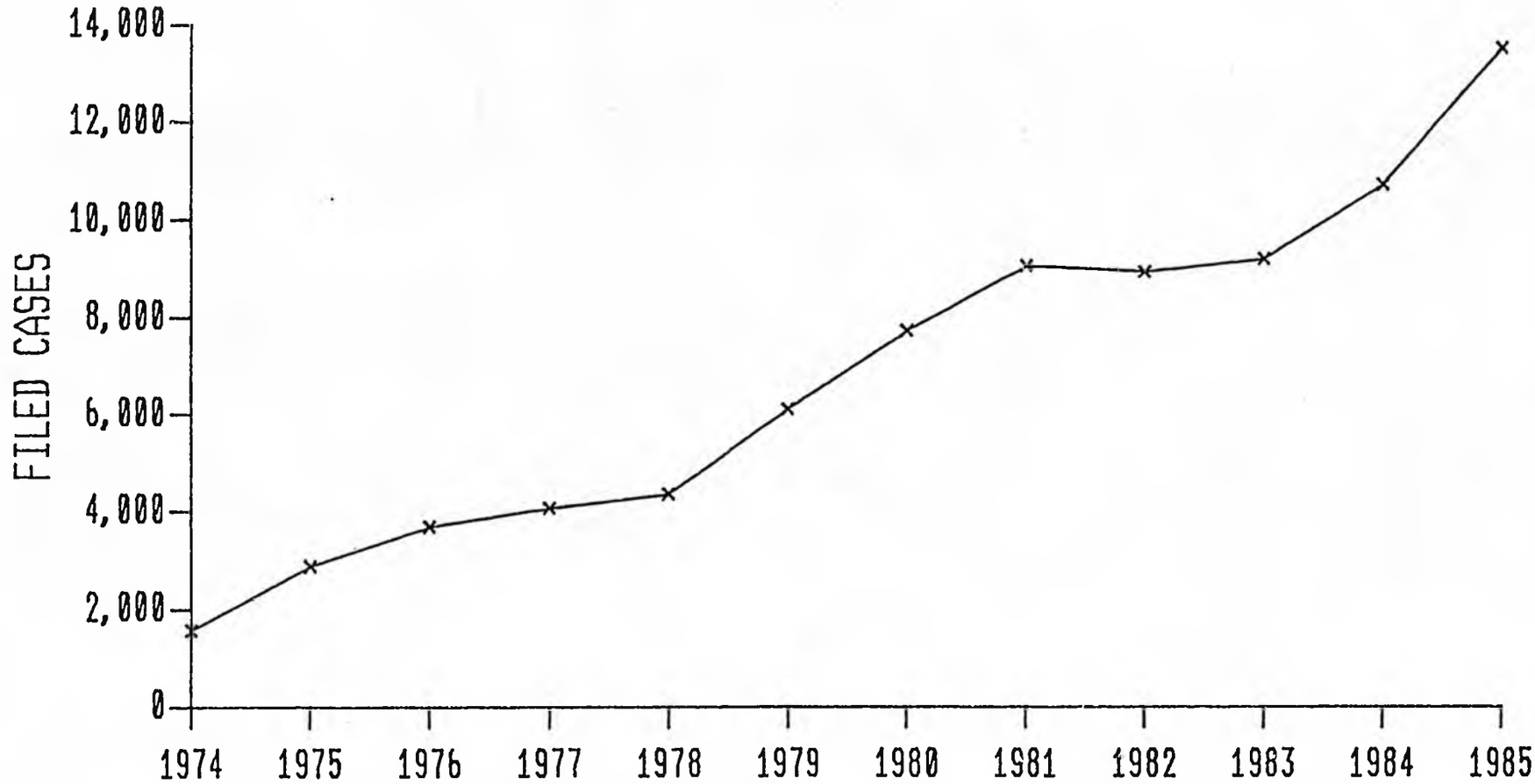
44/ Id. With legal expenses of 5%, prevailing plaintiffs in such cases receive only half of the awarded verdict.

45/ Administrative Office of the United States Courts.

46/ Claims do not, of course, translate directly into lawsuits, since most claims are resolved prior to the filing of litigation. But a substantial increase in claims almost certainly means a corresponding substantial increase in litigation.

CHART J

PRODUCT LIABILITY CASES FILED IN FEDERAL DISTRICT COURT



Source: Administrative Office of the United States Courts

years. 47/ The number of medical malpractice lawsuits per 100 physicians more than doubled from 1976 to 1981, and for obstetricians/gynecologists actually tripled during this period. 48/ In federal courts, which contain only a fraction of all medical malpractice claims, such claims have increased almost three-fold in the last decade (see Chart K). 49/

A similar increase can be found in claims filed against municipal and county officials. A survey of over twelve hundred local governments found that such claims had increased by 141% between 1979 and 1983. 50/ Tort claims against municipalities also have increased dramatically in recent years. For example, New York City witnessed a 375% increase from 1977 to 1985 in personal injury claims, with a corresponding 345% increase in average settlement cost. 51/ The City's long-term liability for tort claims already filed is projected to be $1.5 billion. 52/

The explosive growth in damages over the past decade has already been related in detail. Suffice it to say that the increase in the average tort award appears to have outpaced even the extraordinary increase in the number of such lawsuits. The extent of some of these increases are difficult to comprehend. For example, one verdict reporting service found that the average jury verdict in personal injury lawsuits had increased by approximately 25% or more in three separate years (24.5% in 1980, 30.49% in 1981 and 27.54% in 1983). 53/ The average annual increase in such awards since 1975 has been over 15%. 54/ A subcategory of damages that dramatically illustrates this development is the average jury verdict for the wrongful death

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47/ American Medical Association Special Task Force on Professional Liability and Insurance, Professional Liability in the '80s 6 (November 1984).

48/ H. Manne, Medical Malpractice Policy Guidebook 18 (1985).

49/ Administrative Office of the United States Courts.

50/ Wyatt Co., Public Officials Liability Insurance: Understanding the Market (1986), page 22 (the provided 1984 data is incomplete, see pages 9-10, and therefore is not used for comparison).

51/ Statement by Mayor Edward I. Koch before the Governor's Advisory Commission on Liability Insurance, Feburary 21, 1986.

52/ Id.

53/ Jury Verdict Research, Inc., supra.

54/ Id. This is more than double the average annual CPI increase during the same period. Id.

CHART K

MEDICAL MALPRACTICE CASES FILED IN FEDERAL DISTRICT COURT

Source: Administrative Office of the United States Courts

of an adult male. The average award increased from $223,259 in 1975 to $946,140 in 1985, a more than four-fold (324%) increase in ten years (see Chart L). 55/

The increase in the number of tort lawsuits and the level of awarded damages 56/ (or settlements) in and of itself has an obvious inflating effect on insurance premiums. To illustrate, assuming all other factors are held constant, 57/ if the number of lawsuits against a company or person doubles in ten years, and if the average damage award (or settlement) doubles over this same period, that company or person will experience at least a four-fold increase in insurance premiums over those ten years. As noted above, however, for both medical malpractice and product liability the last ten years have witnessed much more than a doubling in lawsuits and average awards.

The above observation leads to an important but troubling insight into the current insurance availability/affordability crisis. Some have speculated that the crisis is the result of the attempt by the insurance industry to recoup losses resulting from its underpricing in the late 1970's and early 1980's. If this theory is correct, then it would seem likely that as such losses are recouped, premiums would decline. The above analysis, however, suggests that while the insurance industry may have underpriced its product for a period of time, the current explosion in premiums results in large part from the fact that now that the insurance industry is facing substantial underwriting losses, it must price coverage to reflect the actual risks presented by tort law. In other words, for a variety of reasons, the insurance industry appears to have kept prices constant or engaged in price reductions in a period during which the risks generated by tort liability increased

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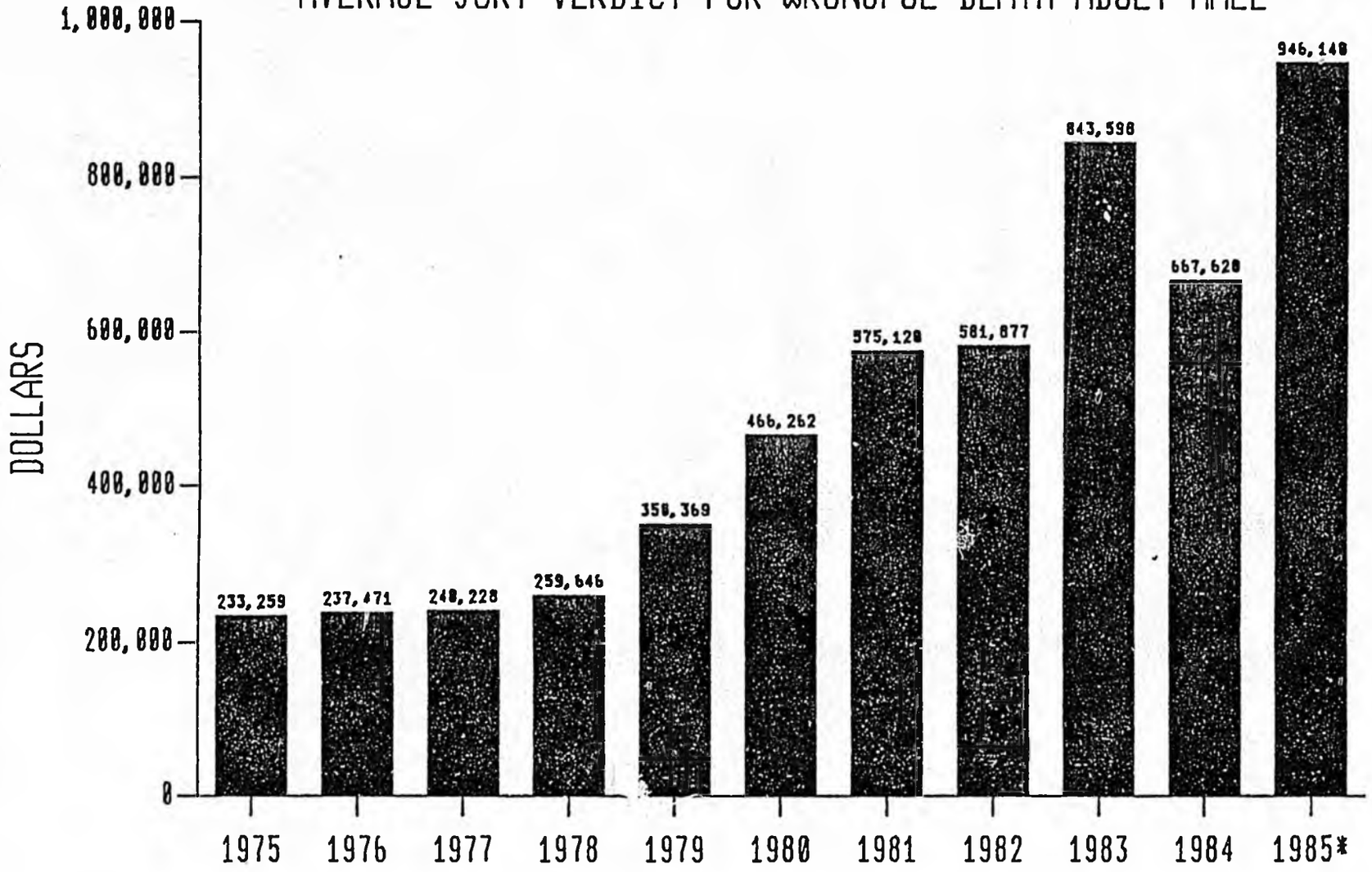
55/ Id.

56/ Jury verdicts, of course, represent only the tip of the claims resolution process. Most claims are resolved before trial. However, settlements by their very nature reflect the range of verdicts available to the plaintiff. Thus, as jury verdicts skyrocket, so do settlements. Settlements also reflect the plaintiff's likelihood of success. As tort law becomes more and more favorable to plaintiffs -- particularly in reducing or even eliminating plaintiff's burden of showing fault or causation -- settlements further increase. Accordingly, in addition to the obvious effect on settlements of increasing jury verdicts, liberalized standards of fault and causation increase the percentage of claims resolved favorably to plaintiff and increase the size of settlements.

57/ Of course, all factors are not held constant. For example, if there is an increase in the percentage of claims resolved favorably to plaintiffs, premiums would have to be increased correspondingly.

CHART L

AVERAGE JURY VERDICT FOR WRONGFUL DEATH ADULT MALE



Source: Jury Verdict Research, Inc.

* 1985 Information Not Complete

dramatically. Now that the industry is attempting to match premiums to risk, there appears to be a dramatic, pent-up increase in premiums to bring premiums back into line with rapidly growing liability risks.

The above analysis, if correct, is troubling in that it suggests that even after the insurance industry's underwriting profitability is restored, premiums are likely to remain relatively high. That is, while the more extreme availability problems may be resolved once the industry controls its underwriting losses, affordability problems may remain as a long-term fixture absent significant reforms of tort law.

There is, however, another important contribution of recent developments in tort law to the availability/affordability crisis which goes beyond the number of lawsuits and size of damage awards. The changing standards of liability and causation have generated tremendous uncertainty. The "rules of the game" of tort liability have changed so dramatically and rapidly in recent years that few are willing to speculate on what those rules will be even a few years hence. Invariably, however, those rules seem to have been changed to the prejudice of parties with pockets sufficiently deep to bear increasingly generous awards of compensation.

This uncertainty as to what the rules of tort liability applicable to any particular company, person or activity will be in future years makes it extremely difficult for the insurance industry to assess risk (and establish appropriate premiums) with any degree of confidence. This undoubtedly exacerbates the affordability problem, and may be a major factor underlying the availability problem. Simply put, insurance, like other business activities, operates most efficiently within a stable legal regime. Tort law, unfortunately, over recent years has been anything but stable.

The recent explosion in tort liability and the lack of legal certainty is a particularly noxious combination that seems to react almost synergistically in promoting the insurance availability/affordability crisis. The rapidly accelerating growth in both the number of tort lawsuits and the size of damage awards in and of itself significantly increases future liability risks. But that risk is magnified by the perception -- based in large part on the lack of a stable legal regime -- that this accelerating growth will continue unabated. The insurance industry thus appears to be extrapolating the massive liability surge of recent years into the future, and seems to be setting its rates in part on the assumption that the on-going deterioration of tort law will continue for some time. Simply put, assessments of future liability risks reflect not only the recent rapid growth in such risks, but the perceived likelihood

that past excesses will be outpaced by the excesses yet to come. 58/

In conclusion, the current problems of tort law can be summarized as follows:

- Too many defendants are found liable (or forced into settlements) where there should be no liability, either because they engaged in no wrongful activity, or because they did not cause the underlying injury.

- Damages have become excessive, particularly in the area of non-economic damages such as pain and suffering, mental anguish and punitive damages. And,

- Transaction costs are far too high.

The ways in which these aspects of the tort system are contributing to the current insurance availability/affordability crisis can be summarized as follows:

- The private sector is being asked to carry a compensation burden which in some instances it simply cannot afford to carry without substantial economic dislocations. Thus, even where insurance is available, in order to carry this compensation burden, it often is priced at unacceptable levels.

- The affordability/availability problem is greatly exacerbated by the lack of a stable legal regime which would allow the insurance industry to assess liability risks with some degree of confidence.

58/ A recent Administration study of the childhood vaccine industry, for example, found that uncertainty as to tort liability was a major factor underlying the severe insurance availability problems facing the industry and jeopardizing the childhood vaccination program. See the Report of the Working Group on Vaccine Supply and Liability (April, 1985).

CHAPTER 3

RECENT INSURANCE INDUSTRY DEVELOPMENTS

The insurance availability/affordability crisis has led both the insurance industry and its customers to consider various changes to the ways in which liability risks are insured. The following is a description of the most significant of these developments and their immediate implications.

I. COVERAGE CHANGES

One of the most important of these changes has been the development of new commercial policy forms by the Insurance Services Office ("ISO"), the statistical and rate-making organization for the property-casualty industry. While these new forms have been filed with each state insurance department, most states have not yet acted on the new submissions.

These new policy forms are more limited in scope than the old forms in that they are written on a claims-made basis and permit certain coverages to be excluded entirely.

Claims-Made Policies

General liability insurance, including product liability coverage, traditionally has been written on an occurrence basis; that is, the policy applies to all injuries and damages that occur during the policy period irrespective of when claims are presented. Under claims-made coverage, the policy covers injuries and damages which occur during the policy period and for which claims are filed during the policy period.

The ISO submission provides that a policyholder can purchase unlimited tail coverage (the period during which claims are covered after termination of the policy) for a cost of up to 200% of the original premium. In addition, a five year extended claims reporting period for known claims is provided for situations where no other insurance is applicable. There is still disagreement over the reinstatement of aggregate policy limits for tail coverage and the effect of defense cost inclusions.

A claims-made policy covers claims occurring after the "retroactive date," ordinarily, the inception date of the policy. Under some circumstances, insurers will be permitted to advance the retroactive date, necessitating the purchase of tail coverage for incidents occurring during the prior period. The retroactive date may be advanced when: (1) there is a change of insurer, (2) there is a change in the insured's operation, (3) if the insured fails to inform the insurer of risks he knew or should have known about, or (4) with the consent of the insured.

The ISO has indicated that it does not intend to limit the use of claims-made policies to specific problem areas such as long-tail or latent injury exposures.

The claims-made forms have not yet been approved by the states, and twelve states have expressly disapproved them as filed. The ISO is working with the Insurance Commissioners to resolve differences.

The insurance industry has indicated that it wishes to use claims-made policies. In general, 1986 is viewed as a transition year during which insurers will train their personnel in the use of the new policy forms and adapt their computers to accommodate the changes. Insurers have indicated that in states where the new forms are not insured, they may use non-admitted subsidiaries or surplus lines carriers to provide the coverage to their clients on claims-made basis for large complex risks and risks in "volatile" classes, or else simply not provide coverage to those risks.

Claims-made policies and other limited coverages also are being adopted by reinsurers. Lloyd's of London has introduced a new claims-made form, as have Weavers and Trenwick American Reinsurance. Each policy is somewhat different. Trenwick, a United States reinsurance company, has stated that it will not write any general liability reinsurance on an occurrence basis after January 1 of this year. Trenwick also has written a claims-made form for use by its ceding companies for "difficult" risks. Other reinsurers have indicated they would reinsure both occurrence and claims-made policies, but would strongly encourage the use of claims-made for heavy casualty risks. As indicated in Chapter 1, some businesses already have been asked to take claims-made coverage for their excess limits coverage. Because of the many different claims-made forms currently being used, this is likely to cause gaps in coverage.

Laser Endorsements

The ISO policy form also includes "laser endorsements" which can be used to limit coverage. These provisions permit an insurer to exclude claims from a specific incident, product or period of time. Several Insurance Commissioners have objected to this provision and stated that, at a minimum, it should be revised to require the signature of the insured indicating an awareness of the exclusion. The inclusion of a laser endorsement would necessitate either the insured's purchase of tail coverage for that product or incident, or the insured's "going bare" for that liability.

Pollution Exclusion

Both the new ISO and Lloyd's of London claims-made commercial general liability policies specifically exclude pollution

coverage. Traditionally, the general liability policy has included the business community's liability for damage caused by the "sudden and accidental" discharge of toxic substances. Environmental Impairment Liability ("EIL") policies are used to cover damages from gradual pollution incidents. In a number of highly controversial cases, courts have expanded the meaning of "sudden and accidental," causing insurers to be liable for EIL-type (gradual pollution) coverage when it was not intended under the policy.

As a result, insurers currently are reluctant to provide any pollution coverage, though Lloyd's of London has indicated a willingness to cover some liability at additional cost on a "named peril" basis only.

Defense Cost Inclusion

Ordinarily, the costs of defending against liability claims are not included within the aggregate limits of the commercial general liability policy. Insurers traditionally have controlled the defense of claims against their insureds by engaging defense counsel and by governing the vigor with which a claim is challenged. The insurers paid all costs, and the full amount of the policy limits were available to pay any settlement or judgment against the insured.

During the product liability crisis of the mid-1970's there were a number of allegations that insurers were, in fact, fueling the claims situation by settling too quickly in many cases that the insureds believed should have been more vigorously contested. As a result, many companies insisted that their insurance contracts include a right to at least partial, if not full, control of defense strategy.

In the mid-1980's, defense costs have escalated rapidly, mostly because of the cost of attorneys' fees, and possibly, in part because of the insureds' desires to contest claims to the fullest degree possible.

In order to control costs, the ISO had proposed to change the commercial general liability form to include defense costs within the aggregate limits of the policy. This practice already is incorporated in at least some other policy forms. 1/

1/ Business Insurance, December 9, 1985, page 1.

The proposal brought a sharp response from insureds, the bar, and the Risk and Insurance Management Society, a trade association of risk managers and insurance buyers. They believe that there will be cases of defense costs exceeding the limits, leaving no money to pay a settlement or judgment. Some are concerned that defense counsel may urge settlement of unworthy claims in order to prevent defense costs from exhausting all available coverage. Others believe that there will be a spate of bad faith claims against insurers when the policy limit is used for legal costs and the insured is left liable for damages.

In response to the concerns of insurance customers, regulators and brokers, the ISO has revised its proposal so that up to 50% of the aggregate limits may be spent on defense costs before the policy limits will begin to be reduced by those expenses. An endorsement will be available so that up to 300% of the limit may be spent on defense costs before the policy limit is affected. A discount will be applied if the policyholder buys less than the 300% endorsement. Insurers apparently will have the option to apply an endorsement which will charge all defense costs to the policy limits. 2/

At its annual meeting in December, the National Association of Insurance Commissioners passed a resolution urging states not to approve the ISO proposal until the proposal can be studied by the Commissioners. The ISO, which had hoped to initiate the defense cost change in July of 1986, will postpone filing its request with the states until at least February 15, 1986. 3/

II. ALTERNATIVE INSURANCE MECHANISMS

As liability insurance becomes unavailable or unaffordable, means of liability protection outside the conventional insurance markets increasingly are being sought and used.

2/ Business Insurance, December 16, 1985, page 1.

3/ Business Insurance, December 23, 1985, page 1.

Insurance Company Creation (Captive or Other)

One response available to large companies unable to buy the insurance coverage they need is to set up their own insurance company. Thirty-three major United States companies recently have established an offshore insurer, A.C.E. Insurance Company, which began operation in November, 1985, and provides up to $150 million in liability coverage. Founding companies include IBM, GE, U.S. Steel and Chase Manhattan, as well as other companies. While A.C.E. offers coverages not available elsewhere, its policies are available only to large companies since it only pays claims exceeding $100 million.

In addition, it recently was announced that a group of fifteen chemical and petrochemical companies are creating a company called CASEX, which would provide excess limits coverage for products, directors and officers, and sudden and accidental pollution liability.

Another group of fifty United States banks are creating a mutual insurer, Bankers' Insurance Co., Ltd., to provide directors and officers liability coverage and bankers blanket bonds.

During the medical malpractice crisis in the early to mid-1970's, groups of medical professionals unable to obtain malpractice coverage formed their own companies, commonly known as bedpan mutuals, to handle their claims. Such insurance groups currently provide about half of the coverage in the malpractice liability market.

Self-Insurance

Some industry groups and trade associations, as well as municipalities in several states, have joined together to self-insure as groups, and others have been able to set up a formal self-insurance program just to handle their own claims. 4/

Self-insurance, either individual or group, also has been a useful vehicle for municipalities for which insurance has become either unavailable or unaffordable.

One major problem encountered by firms seeking to set up self-insurance programs is that reserves for self insurance are not

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4/ A formal self-insurance program is different from "going bare" in that the former sets up reserves to cover claims and treats it similar to an insurance system whereas the latter simply hopes claims do not occur, which may cause financial difficulties if and when they do occur.

accorded the same tax treatment as insurance company reserves, in that self-insurance reserves are fully taxable. While this presents no problem for municipalities and other tax-exempt entities, it is a major hurdle for private entities.

Small firms are generally unable to establish a meaningful self-insurance program individually, but may benefit from group self-insurance if no other insurance is available.

Product Liability Risk Retention Act Groups

The Risk Retention Act ("RRA"), 15 U.S.C. § 3901 et seq., was intended as a mechanism to (1) create an alternative product liability insurance market, and (2) provide a means for smaller insurance buyers to purchase general liability insurance -- including product liability coverage -- as groups. The RRA evolved from an intensive interagency study of the product liability "crisis" in the mid-1970's. President Reagan signed the Act in September 1981, noting that it was a "marketplace solution" to provide product manufacturers, distributors and sellers with affordable product liability insurance.

A Risk Retention Group ("RRG") is formed by any number of product sellers as an insurance company licensed to operate under the laws of any state. The RRG may provide only product liability and completed operations coverage to its members. (Completed operations is work performed by a contractor or product manufacturer installing its product.) The RRG may sell insurance in any state without meeting the licensing or other regulatory requirements of any state other than its domicile. No state may discriminate against an RRG, but states may impose normal premium taxes and enforce compliance with unfair claims settlement practices statutes.

The Act is restrictive in that it limits a RRG to products and completed operations coverage, but permits the establishment of a domestic group captive that is able to do business countrywide.

A Purchasing Group ("PG") may be formed to negotiate for a group policy from any insurer to cover product liability completed operations, and commercial general liability when either of the first two coverages are included. The PG and any entity providing services to the PG are exempt from any state law which would prohibit the PG from purchasing this coverage on a group basis.

A group of companies purchasing together presents an attractive premium base with lower administrative costs to the insurer. In a tight market small companies are subject to cancellation or sharply higher prices because an insurer may prefer to use its

resources on a few large risks. The provisions for purchasing groups was necessary to overcome statutes and regulations in about forty-four states which prohibited so called "fictitious groups" set up for the purpose of buying property or casualty insurance on a group basis.

Very few companies have used the RRA to date, but the rapid change in market conditions likely will lead to a much greater interest in its provision.

One reason that the RRA has been little used is the fact that it is limited to products and completed operations coverages, although groups may include other coverages as long as products is the primary purpose. It is a useful means of expanding insurance capacity, and would provide additional capacity in the alternative market if the products limitation were removed.

III. STATE REGULATORY DEVELOPMENTS

State legislators and insurance regulators have recognized the severity of the liability insurance crisis, and have responded in a variety of ways. One state has barred cancellation or non-renewal of policies and prohibited any increases in the cost of policies in effect. Several other states are considering similar actions. The National Association of Insurance Commissioners adopted a resolution opposing mid-term cancellations and short notices of non-renewal. Other states are implementing or considering the use of Market Assistance Programs, which are voluntary assigned risk pools designed to take risks such as day care centers on a rotating or shared basis. Yet other states are considering joint underwriting associations in which the state regulator mandates the sharing of certain risks

Half the states have "file and use" rate regulation in which the insurance department is notified of a rate increase which becomes effective without action by the regulator. Many of these states reportedly are rethinking their systems because of the sharp increases in the rates of some of the problem lines of coverage.

Regulators normally have viewed commercial insurance as transactions between knowledgeable buyers and sellers, and, accordingly, have refrained from interfering with the market's operation. The recent concerns expressed by the Insurance Commissioners is a measure of the depth of the availability/ affordability crisis, and may foreshadow a heightening in the regulatory "oversight" of commercial insurance.

CHAPTER 4

TORT LAW REFORM

As discussed in Chapter 2, two primary areas have been the focus of the Working Group's examination into the crisis in liability insurance availability and affordability: the current economic difficulties of the insurance industry; and, the extraordinary growth in tort liability in recent years. For the reasons discussed in Chapter 2, while it seems likely that the insurance industry will be able to work its way out of its present economic straits, it is very unclear -- if not doubtful -- that this will significantly alleviate the crisis in insurance availability and affordability. Early indications are that insurers will continue to avoid areas that present a high risk of tort liability, or, where they do provide insurance, will demand high premiums. That is, while the more extreme aspects of the availability crisis may be resolved once the industry regains its desired level of profitability, it appears unlikely at this time that the high premiums that have led to serious affordability concerns will be reduced significantly.

For these reasons, as well as for the other reasons discussed in Chapter 2, there appears to be little that can or should be done by the federal or any other government to "remedy" the economic factors that underlie the current availability/affordability crisis. The excesses of the tort system, however, present a very real opportunity to address a major cause of the insurance crisis with sensible and appropriate reforms. And while some of the changes in the insurance market currently under contemplation (see Chapter 3) probably will relieve some availability/affordability problems, it seems unlikely that these changes will provide long-term, systemic relief without fundamental reforms of tort law.

The following is a list of eight tort reforms that would bring a greater degree of rationality and predictability to tort law, and thereby significantly assist in resolving the availability/affordability crisis. This is by no means an exhaustive list of possible tort reforms. Nor does the accompanying discussion of these reforms indicate how they necessarily should be implemented; that is, on the federal or state level, or through legislative or judicial modification of the law. Rather, this list identifies eight recommended tort reforms which if implemented should return tort law to a credible fault-based compensation system that provides a fair and reasonable level of compensation to deserving plaintiffs through a more predictable and affordable liability allocating mechanism. While these reforms undoubtedly will be resisted by some, they in fact are quite modest and should not dramatically alter the basic principles of tort law as those have existed for centuries.

Recommendation No. 1: Retain fault as the basis for liability.

For the reasons discussed in Chapter 2, fault should be retained as a basis for tort liability. As noted there, fault is the only mechanism in tort law for distinguishing desirable from undesirable conduct, and is an indispensable predicate to many other aspects of the tort liability system without which the system would generate arbitrary and unfair results.

For non-product liability cases, negligence should remain the applicable standard of liability. Strict product liability should under no circumstances be extended outside the traditional area of product injuries. Thus, theories which would apply strict product liability to landlords or to professionals providing services (e.g., pharmacists, architects, etc.) should be strongly resisted and expressly rejected. The trend in some states 1/ to extend strict liability doctrines outside the area of product injuries is a highly pernicious development which will significantly undermine the ability of those sectors of our economy to function properly.

Strict product liability in its traditional sense represents a sensible application of fault-based liability to the realities of modern industrial life. The Working Group, accordingly, does not recommend the abolition of strict product liability, provided the doctrine is kept within its traditional bounds. Unfortunately, strict product liability has been subject to extensive abuse that often has had the effect of transforming the doctrine in practice into absolute liability.

The following are the elements of a strict product liability standard which does not present an impossible or unfair burden to plaintiffs in demonstrating fault on the part of defendant-manufacturers, while at the same time not establishing a scheme of absolute liability which simply uses the manufacturer as an insurer for all risks of injury.

- Liability should be predicated on the existence of a defect which is found to make the product unreasonably dangerous.

- Defendants should only be held liable for uses of a product that are both reasonable and foreseeable. Liability should not be predicated upon unreasonable or unforeseeable alterations of a product that cause the injury, particularly where such alterations are prohibited or warned against. (Alterations, in this regard, can include the failure to provide required and reasonable safeguards, maintenance or inspections.)

1/ See in this regard the recent opinion of the California Supreme Court in Becker v. IRM Corp., 38 Cal.3d 454, 698 P.2d 116 (1985), extending strict product liability to landlords.

- Manufacturers should not be liable for defects which have been the subject of an adequate warning or which are readily apparent to the reasonable consumer. Manufacturers should only be required to warn with regard to uses of a product that are both reasonable and foreseeable.

- Manufacturers should only be held to the state of the art in existence at the time of manufacture of the product. Manufacturers should not be held liable for unknown or unknowable hazards.

The above elements, if applied in a principled manner, should ensure that strict product liability will serve to compensate persons injured as a result of a manufacturer's fault, while preventing that liability doctrine from simply being used as a risk spreading mechanism designed to operate as a product-based insurance scheme.

Recommendation No. 2: Base causation findings on credible scientific and medical evidence and opinions.

One of the most pernicious developments in tort law has been the extent to which causation findings are based on fringe scientific or medical opinions well outside the mainstream of accepted scientific or medical beliefs. Increasingly, juries are asked to make difficult decisions about highly complicated issues of science and medicine. Unfortunately, the personality and demeanor of expert witnesses often may be more critical in making such determinations than decades of evolving scientific and medical investigation and thought.

This problem has resulted in the growing perception that the tort system often is wholly arbitrary in allocating liability in cases involving difficult issues of science and medicine. This is a particularly problematic situation in toxic tort and drug liability cases. 2/

There are a variety of reasons for this problem:

- Many judges do not have the training or inclination to understand complicated scientific and medical concepts, and are unwilling or unable to devote the time and energy needed to educate themselves in a complex body of knowledge.

- In order not to deprive plaintiffs of their opportunity for compensation, many courts allow plaintiffs to take

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2/ For example, see the discussion of Johnson v. American Cyanamid Co., infra.

whatever scientific or medical views they may have -- however incredible -- to the jury.

- Many in the legal system do not appreciate how credible scientific and medical views develop, and the degree to which legal decisionmaking is a poor vehicle for developing such views.

- There often is an understandable frustration with the fact that science and medicine frequently cannot offer the kind of certainty that the legal decisionmaking mechanisms strive to obtain.

The inability of the tort system to deal credibly with complicated scientific and medical issues strikes at the very heart of the ability of tort law to deal with the growing number of cases involving highly complicated scientific and medical issues. While there are no easy answers, there are several remedial actions that the Working Group recommends:

- Greater deference must be paid to government agencies and certain private institutions that have devoted decades of attention and millions of dollars to researching and trying to assess the value of medical and scientific developments. Where such agencies and institutions have determined that particular products, services or techniques are safe or socially beneficial, courts should tread very carefully in overruling those judgments through the vehicle of tort law. Lay juries are a very poor mechanism for second-guessing the judgment of established mainstream scientific and medical views. Other legal mechanisms for determining those views, such as rulemaking and licensing proceedings, generally are far superior in making credible determinations involving complicated issues of science and medicine.

- Courts must be more aggressive in determining the credibility of scientific and medical evidence and opinions before trial, and not simply allow parties to present any theory to the jury. Appellate courts, in turn, should give trial courts greater latitude in making such decisions in early stages of litigation. Judges, where feasible, should receive training on basic methods of scientific, medical and statistical analysis so that they can make such determinations. If necessary, impartial masters with appropriate training should be used for this purpose.

- Studies and opinions that have not been subjected to the peer review process should be presumed invalid. Where peer review has taken place, judges (or masters, where appropriate) should acquaint themselves with the results of such review.

- Courts must learn to accept the reality of uncertainty. They must understand that the fact that some degree of uncertainty always exists does not mean that every scientific or medical belief is as credible as the next. Judges and legislators must not try to "force" scientific certainty where such certainty simply is not possible. Attempts to do so through burden-shifting, presumptions or by requiring agencies to issue scientific "findings," simply create a misleading and deceptive gloss of scientific certainty that in fact does not exist. 3/ Ultimately, the legal system must accept the fact that some things are unknown, and, given existing methods and data, perhaps unknowable for the foreseeable future.

Recommendation No. 3: Eliminate joint and several liability.

One of the most troubling problems in tort law arises from injuries caused by multiple tortfeasors. Historically, such cases were handled by bringing separate actions against each defendant; joint and several liability only existed where concert-of-action was shown (see discussion in Chapter 2). Further, under the doctrine of contributory negligence, a negligent plaintiff could not recover damages from any defendant. Such an approach seemed harsh where plaintiffs were only minimally at fault for their own injuries. Eventually, and in part to remedy the harshness of the old rule, the doctrines of comparative fault and joint and several liability were developed to make it easier for plaintiffs to obtain compensation.

Comparative fault operates to assure that each party, including the plaintiff, is liable for its own fault. Joint and several liability, although originally applied to situations where concert-of-action was shown, is now in many cases applied to all defendants, regardless of their connection to the injury. Comparative fault, when coupled with the doctrine of joint and several liability, allows plaintiffs to recover the entire judgment from "deep pocket" defendants -- even if such defendants are only found to be minimally at fault. Joint and several liability thus frequently operates in a highly inequitable manner -- sometimes making defendants with only a small or even de minimis percentage of fault liable for 100% of plaintiff's damage. Accordingly, joint and several liability in the absence of concerted action has led to the inclusion of many "deep pocket" defendants such as governments, larger corporations, and insured entities whose involvement is only tangential and who probably would not be joined except for the existence of joint and several liability.

3/ As noted, the Working Group does not believe that scientific uncertainty can be handled simply by requiring government agencies to issue pronouncements of risk or causation for which there in fact is no credible basis.

Another problem area is the relationship of joint and several liability to "enterprise" or "market share" liability. See Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980). In theory, "market share" liability such as that established in the California Supreme Court's seminal opinion in Sindell attempts to allocate liability for a generic product (e.g., DES) among various producers on the basis of their share of the relevant market. Even assuming such an allocation is reasonable, 4/ some jurisdictions have devised variations of or alternative approaches to Sindell which apply joint and several liability among the producers of a generic product. 5/ See, e.g., Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, cert. denied, 105 S.Ct. 123 (1984); Collins v. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37 (1984). 6/ The difficulties plaintiffs face in attempting to show which manufacturer of a generic product was responsible for plaintiff's injury in fact can be (but are not always) substantial. While the Working Group does not advocate one approach over another, it firmly believes that any allocation of liability on the basis of market share should limit a manufacturer's liability to its specific share, and that such liability should not, in the absence of actual concerted action, be joint and several in nature.

The Working Group thus recommends elimination of joint and several liability, except in the limited circumstances where the plaintiff can demonstrate that the defendants have actually acted in concert to cause plaintiff's injury. 7/

4/ Because of a number of problems and inequities associated with Sindell, only a few states have embraced the position of the California Supreme Court. See Schwartz & Mahshigian, "Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution," 73 Calif. L. Rev. 941 (1985).

5/ It is unclear whether even Sindell is a true "market share" allocation decision, since under Sindell plaintiff must only sue manufacturers representing a substantial share of the market, and may allocate all liability among those defendants in proportion to their respective market shares.

6/ Particularly disturbing are decisions such as Abel which appear to distort the principles of concerted action to impute concerted action to manufacturers of a generic product.

7/ Joint and several liability as discussed in this report should not be confused with the legislatively enacted schemes for allocating financial responsibility for the cost of cleanup of hazardous waste sites and spills under the Nation's environmental laws, and, in particular, under the Superfund Act

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Recommendation No. 4: Limit non-economic damages to a fair and reasonable amount.

Non-economic damages such as pain and suffering, mental anguish and punitive damages are inherently open-ended. 8/ They are entirely subjective, and often defy quantification. For example, in many instances it simply is not possible, no matter how much money is awarded, to compensate someone fully for the pain and anguish of the loss of a loved one or from a serious injury. Moreover, because such damages are essentially subjective, awards for similar injuries can vary immensely from case to case, leading to highly inequitable, lottery-like results. Accordingly, such damages are particularly suitable for a specific limitation.

The open-ended nature of such damages makes them a particular problem from the standpoint of achieving predictability. Unlike economic damages (medical expenses, lost earnings, etc.), which can be reviewed objectively and thus can be predicted within a given range, non-economic damages are entirely subjective and unpredictable.

Non-economic damages also can serve as a significant obstacle in the settlement process. Plaintiffs and defendants often can

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7/ (FOOTNOTE CONTINUED)

(the Comprehensive, Environmental Response, Compensation and Liability Act of 1980) and the Resource Conservation and Recovery Act (RCRA). Unlike the tort system, which is intended to compensate injured persons and to deter wrongful conduct (see Chapter 2), Superfund and RCRA represent a legislative choice to allocate the cost of these programs among those who contributed to the problems the programs are designed to remedy. Thus, Superfund and RCRA liability, like the liability established under other environmental laws, are founded upon congressional objectives which provide that those who contributed to the problem or profited from the manufacture which created the waste, ought to bear the cost of cleaning it up. Those whose specific contribution to the site can be identified and severed from the whole are not jointly liable under this scheme. Without some degree of joint and several liability under Superfund and RCRA, the effective enforcement of these programs could be seriously impeded as a result of protracted and costly litigation among responsible parties over the precise allocation of cleanup costs.

8/ There are two types of non-economic damages: compensatory (pain and suffering, mental anguish, etc.) and punitive (sometimes called exemplary damages). The latter are designed purely to punish the defendant.

agree quickly on the amount of economic damages, but disagree sharply on non-economic damages. Plaintiffs frequently have unrealistic expectations of non-economic damages in the hundreds of thousands or millions of dollars to which defendants simply are unwilling to agree. Plaintiffs thus often reject settlement offers that from the standpoint of compensation for economic damages are quite reasonable. Plaintiffs' attorneys also often see high non-economic damage awards as necessary to justify high contingency fees, which may lead them to press for a high non-economic damage award when it may be in their clients' interest to obtain a quick and fair settlement.

Nevertheless, plaintiffs should be entitled to reasonable compensation for their pain and suffering and mental anguish. The key in this regard is to provide such compensation, but to ensure that it will be kept within reasonable bounds.

The Working Group believes that $100,000 would be such a reasonable limitation. In this regard, it should be noted that only a handful of claims involve non-economic damages in excess of $100,000. For example, it is estimated that only 2.7% of all medical malpractice claims (5.6% of all paid medical malpractice claims) receive non-economic compensation in excess of $100,000. 9/ However, in those medical malpractice cases going to verdict where non-economic damages above $100,000 are awarded, the non-economic damages award averages between $428,000 and $738,000 (the latter figure being the "best estimate"). 10/ For such awards including non-economic damages in excess of $100,000, on the average 80% of the total award is for the non-economic damages component of the award. 11/ Since the non-economic damages in excess of $100,000 awarded in these cases (including verdicts and settlements) account for between 28% and 50% of all paid out medical malpractice damages, the non-

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9/ H. Manne, Medical Malpractice Policy Guidebook 132-48 (1985). In comparison, approximately half of all claims that end in a jury verdict in favor of plaintiff include a non-economic damages award in excess of $100,000. Id. This suggests that non-economic damages are a major factor in forcing claims to trial.

As discussed in Chapter 2, the Guidebook was prepared for the Florida Medical Association. Henry Manne served as the general editor, and the analysis on the effect of a $100,000 cap was prepared by Patricia Danzon -- "perhaps the most widely known and published economist in the country on the subject of medical malpractice." Id., at 10.

10/ Id.

11/ Id. In this regard, it is worth noting that non-economic damages as a percentage of overall damages increases substantially as the overall damages increase. Id., at 138-39. See discussion in Chapter 2.

economic damages payments in excess of $100,000 alone account for up to half of all medical malpractice damages. 12/ Thus, a $100,000 limitation on non-economic damage awards would affect only a relatively small percentage of all claims, but would introduce substantial predictability into the tort system. 13/

It also is necessary to deal with punitive damages. While some thought was given to an absolute ban on punitive damages, or perhaps a separate limitation, the Working Group concluded that the best approach would be to include punitive damages within the $100,000 limitation on all non-economic damages. Nevertheless, punitive damages should only be awarded for willful conduct bordering on a criminal violation. Specifically, the Working Group recommends that an award of punitive damages be predicated on a demonstration of actual malice.

Even if these recommendations are adopted, punitive damages at best have a tenuous basis in tort law. Increasingly, there has been growing skepticism among legal scholars about the role of punitive damages, 14/ and numerous instances of extraordinary

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12/ Id. The best estimate of the Guidebook is that pain and suffering awards above $100,000 account for nearly 39% of all medical malpractice damages.

13/ Some states have struck down such limitations on constitutional grounds, primarily on the basis of equal protection, on the theory that it is unfair to limit the recoveries of certain plaintiffs (e.g., medical malpractice claimants) while allowing other plaintiffs to receive unlimited recoveries. Recently, however, both the California Supreme Court and the Court of Appeals for the Ninth Circuit upheld such a limitation for medical malpractice verdicts awarded under California law. See Fein v. Permanente Medical Group, 38 Cal.3d 137, 695 P.2d 665 (1985); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985). The Supreme Court refused to hear either case, finding with regard to the former that no substantial federal question was presented. Constitutional concerns such as this, however, can only be sensibly considered in the context of specific legal proposals.

14/ See, e.g., Owen, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 U. Chi. L. Rev. 1 (1982); Seltzer, "Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control," 52 Fordham L. Rev. 37 (1983); Sugarman, "Doing Away With Tort Law," 73 Calif. L. Rev. 555 (1985); Schwartz, "Deterrence and Punishment in the Common Law of Punitive Damages: A Comment," 56 S. Cal. L. Rev. 133 (1982); Ellis, "Fairness and Efficiency in the Law of Punitive Damages," 56 S. Cal. L. Rev. 1 (1982).

abuses. 15/ Punitive damages add considerable uncertainty, and frequently have very little real deterrent effect because they are awarded years after the offending conduct. In any event, the punishment of misconduct is primarily a function of the public law enforcement system, and should not be a common purpose of private litigation.

Nevertheless, the Working Group does not recommend prohibiting punitive damages in tort cases provided they are included within the limitation on non-economic damages. If this is infeasible, the Working Group recommends that punitive damages be abolished. 16/

Recommendation No. 5: Provide for periodic payments of future economic damages.

Traditionally, a losing defendant is required to pay all of plaintiff's future damages in one lump-sum payment. When damages were within reasonable limits, this generally was not a major problem. But as average damages have skyrocketed into the hundreds of thousands of dollars this has become an increasing burden on the defendant (or defendants' insurers). The Working Group, therefore, recommends that future economic damages be paid periodically. 17/

Allowing defendants to pay for plaintiff's damages periodically has several advantages. First, it gives defendants the ability in some cases to digest major adverse judgments by spacing

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15/ One of the most flagrant examples is the $8 million dollar punitive damage award against the defendant in Johnson v. American Cyanamid Co., (District Court No. 81 C 2470), for its decision to produce the Sabin rather than the Salk polio vaccine. Despite the fact that the defendant had complied in this decision with the well established medical judgment of the United States government and virtually the entire medical community, the jury apparently decided to use punitive damages to overrule this judgment and to force the Sabin vaccine off the market. Ironically, the Sabin vaccine has proven far more effective than the Salk vaccine in combating polio. The case presently is on appeal to the Kansas Supreme Court, and the federal government has filed an amicus brief urging reversal.

16/ It frequently is noted that the deterrent effect of punitive damages could be achieved through a system of civil fines.

17/ Where there is legitimate concern that a particular defendant may not be able to make the periodic payments in future years the court should be empowered to require the defendant to ensure the periodic payment through the purchase of an annuity.

payments out over time, much in the same way that many consumers can afford major purchases by buying on installment. Second, society is benefited by the fact that plaintiffs have a guaranteed stream of income, and cannot deplete their awards within a few years. This sharply reduces the possibility that severely injured plaintiffs eventually will become wards of the state.

An important additional advantage of requiring courts to award damages in terms of periodic payments rather than lump-sum awards is that it uses the market's rather than a court's assessment of the applicable interest rate. Under the existing practice in most states, the trial court determines plaintiff's economic loss over plaintiff's lifetime, and then awards plaintiff the present value of those losses in a lump sum. The interest rate used to make that present value calculation is critical, and can significantly reduce or inflate the lump-sum payment. Frequently, courts in making that calculation use interest rates that bear no reasonable relationship to what in fact is available in the market.

A periodic payment requirement effectively avoids this problem by having the court determine the stream of future economic losses and require defendant to purchase an annuity providing a corresponding stream of compensation (where defendant is sufficiently large, an actual annuity probably would be unnecessary). Under such a procedure, the market determines the appropriate interest rate for calculating the present value of those payments (the present value would equal the cost of the annuity). Since the payments are guaranteed through the annuity, subsequent changes in the interest rate would have no effect on plaintiff's compensation. Defendant, on the other hand, would have the market rather than a judge or jury determine the correct interest rate for assessing the present value of future damages.

Periodic payments, as noted, are not unfair to plaintiffs because the payments would be scheduled to be made as the damages are in fact incurred (that is, as earnings are actually lost, or as certain expenses actually occur).

Because the benefits of such a provision would be relatively limited for smaller awards, the Working Group recommends that periodic payments only be required where the total economic damages award exceeds $100,000.

Recommendation No. 6: Reduce awards by collateral sources of compensation for the same injury.

The collateral source rule prohibits the finder of fact from taking collateral sources of income related to the same injury into account in making an award of damages to the plaintiff. This effectively permits the plaintiff to obtain double recovery of certain components of his damages award.

In an era when collateral sources of income were financed largely by plaintiff himself, the collateral source rule may have been sensible. Today, however, when many collateral sources are provided or subsidized by the government or by third parties (such as employers, who often are required by law to provide certain collateral benefits), the traditional justification is called into question. Increasingly, the collateral source rule simply permits a windfall recovery by the plaintiff.

As to publicly provided collateral sources of compensation, there is no justification for not taking such sources into account in determining plaintiff's ultimate damages. The collateral source rule in such circumstances has the effect of requiring citizens to pay compensation twice -- once as taxpayer, and once as the consumer of the product causing the injury. 18/

The situation is somewhat more complicated in dealing with private sources of collateral compensation, particularly where subrogation is involved. 19/ Where a third party (such as an insurer) is subrogated to plaintiff's claim, the collateral source rule may not in fact result in any double recovery. As a practical matter, however, subrogation often is not a significant consideration in many tort actions. In some areas, such as automobile accidents, subrogation is quite common. In other areas, however, such as medical malpractice, subrogation is far less common.

As to private sources, the best approach appears to be to require collateral sources of compensation related to the same injury to be taken into account as long as a third party is not subrogated to that portion of plaintiff's claim. Further analysis may suggest that elimination of subrogation (that is, simply offsetting all collateral sources against the award, and prohibiting subrogation arrangements) may have a limited effect and be justified on the basis of significant reductions in transaction costs.

While the correct approach to workers' compensation benefits must be considered very carefully, workers should be required to seek their workers' compensation benefits where appropriate. The Working Group takes no position on whether subrogation and indemnification actions between employers and manufacturers

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18/ Another reason to be concerned about such a windfall is that much of the windfall is in fact a windfall for attorneys in the form of attorneys' fees.

19/ In the context of insurance, subrogation allows the insurer to obtain from the tortfeasor-defendant all or part of its payments to the insured-plaintiff arising from the injury caused by the tortfeasor.

found liable as third party defendants should be eliminated, as has been proposed in some legislation. The Working Group will continue to review the merits of proposals dealing with such subrogation and indemnification actions.

Recommendation No. 7: Schedule contingency fees.

Currently, plaintiffs' attorneys receive a flat percentage of their clients' awards, usually between 30% and 40%, but sometimes as high as 50%. Where plaintiff's award is moderate, such a contingency fee may, in fact, be quite reasonable, since the attorney has significant costs and may face substantial risks that must be reimbursed. But as the average plaintiff's verdict has increased in recent years, such a high percentage becomes difficult to justify. Increasingly, there are indications of extraordinary abuses where attorneys receive fees in the hundreds of thousands of dollars for limited work. Particularly in mass liability cases where the groundwork for liability has been laid in previous cases by other attorneys, the fees often bear no relationship whatsoever to the work of or the risk to plaintiff's attorney. 20/

Nevertheless, the Working Group does not recommend, as some have suggested, the abolition of contingency fees. Often, such fees are the only means available to the poor to afford an attorney and obtain access to the legal system. The problem with contingency fees emerges when awards become very high, and a flat contingency rate becomes excessive. The Working Group, therefore, believes that contingency fees should be scheduled to decrease as awards increase.

Specifically, the Working Group recommends the following schedule: 25% for the first $100,000, 20% for the next $100,000, 15% for the next $100,000, and 10% for the remainder. Thus, for an award of $500,000, plaintiff's attorney would receive $80,000 rather than $166,666 (assuming a one-third contingency fee), and for an award of $1,000,000, would receive $130,000 rather than $333,333.

There are a number of justifications for scheduling contingency fees:

- Verdicts often are inflated by judges and juries to compensate plaintiff for what is well understood to be high attorneys' fees. Defendants thus pay for such fees through higher insurance premiums or awards,

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20/ As discussed in Chapter 2, the prevailing plaintiff is not only liable to his attorney for the agreed to contingency fee, but also for litigation expenses. Such expenses often can amount to an additional five to eight percent of the underlying award.

which, in turn, are passed on to consumers through higher prices. It is difficult to justify placing such a burden on American consumers for the purpose of paying what often amounts to exorbitant attorneys' fees.

- Similarly, in order to compensate plaintiffs for very high contingency fees, settlements often are higher than otherwise would be the case. As with high awards, these payments ultimately are passed through to the consumer. More problematic, however, is that attorneys' fees often can become a major impediment to settlements since defendants may balk at paying a higher than justified award in order to compensate plaintiffs for exorbitant attorneys' fees. In such situations, attorneys' fees create an additional burden by causing cases not to be settled that otherwise would be settled.

- Contingency fees also distort the incentives of attorneys. Such fees may lead plaintiffs' attorneys to hold out for high non-economic damages (and, potentially, windfall profits for the attorney requiring only minimal additional work on the attorney's part), while the clients may be best served with obtaining economic damages and more limited non-economic damages as promptly as possible.

- Scheduling contingency fees also should substantially reduce the excessive transaction costs presently plaguing the tort system. This is particularly important in such areas as the asbestos litigations where there are only limited resources available to compensate a large pool of plaintiffs.

In this regard, it is worth noting that the Federal Tort Claims Act contains a 25% cap on attorneys' fees for lawsuits filed under the Act, and a 20% cap on attorneys' fees for settlements obtained under the Act's administrative claims process. 28 U.S.C. § 2678. Violations of these limitations are punishable by fine or imprisonment, or both. A similar 25% attorneys' fee cap (with similar sanctions) is found in the Social Security Act. 42 U.S.C. § 406. None of these caps appears to have had any significant effect on the ability of persons suing the government to obtain adequate legal representation. In fact, the number of lawsuits filed under both the Federal Tort Claims Act and the Social Security Act has increased substantially in recent years.

The Working Group has considered and recommends against the adoption of the English Rule on attorneys' fees, which would transfer attorneys' fees to the losing party. While such a rule might deter some frivolous litigation, it also would inhibit many lawsuits that may be merited but where some preliminary discovery may be necessary to determine the strength of plaintiff's claims. Moreover, because many plaintiffs essentially are judgment proof, the widely held belief that such

a rule would significantly deter frivolous litigation may be largely illusory.

A preferable (but still problematic) alternative approach to the English Rule would be to use a transfer of attorneys' fees as a means of motivating parties to settle their claims at an earlier point in litigation. Thus, a rule modeled on Rule 68 of the Federal Rules of Civil Procedure, 21/ but including attorneys' fees, might be useful. Perhaps the most promising approach would be to combine alternative dispute resolution with a transfer of attorneys' fees.

Recommendation No. 8: Develop alternative dispute resolution mechanisms.

The Working Group believes that alternative dispute resolution holds much promise. Experimentation and experience, however, is the only reliable vehicle for determining which systems will work. Alternative dispute resolution proposals range from binding arbitration to mediation, and include such procedural innovations as mini-trials and expedited discovery techniques. Many of these proposals are worthy of serious consideration, and states represent excellent laboratories in which to develop and explore these various alternative dispute resolution proposals.

The Working Group strongly supports alternative dispute resolution, and believes that the organized bars, legislatures, and jurists should be more receptive to alternative dispute resolution proposals. Where necessary, particularly in areas such as medical malpractice, states should be encouraged to consider seriously the necessary constitutional changes to permit the use of alternative dispute resolution.

The Working Group believes that the most promising use of alternative dispute resolution will be to encourage the early settlement of lawsuits. For example, requiring non-binding arbitration where part or all of attorneys' fees shift to the party which rejects an arbitration award and obtains a less favorable result in litigation, much as costs of litigation are shifted for rejected offers of settlement under Federal Rule of Civil Procedure 68 (see supra), might be an effective means

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21/ Rule 68 ("Offer of Judgment") provides that costs of litigation will shift to a plaintiff who has rejected an Offer of Settlement made under the rule and not obtained a judgment more favorable than the rejected offer. There currently is a proposal under consideration to include attorneys' fees in Rule 68, as well as to make other changes to the Rule. Inclusion of attorneys' fees in Rule 68, however, has a number of serious problems that must be considered very carefully. These and other problems have led the Department of Justice to caution against the proposed changes to Rule 68.

for using alternative dispute resolution to facilitate and expedite early settlements.

The Working Group does not believe, however, that alternative dispute resolution needs to or should involve major changes to the standards of liability or causation in tort law. The merits of alternative dispute resolution are largely unrelated to which standard of liability is used in resolving disputes. The value of alternative dispute resolution lies in procedural rather than substantive changes in the law.

CHAPTER 5

GOVERNMENT INSURANCE: A NON-SOLUTION

The growing liability insurance availability/affordability crisis has spawned calls for government insurance or indemnification for persons or companies unable to obtain adequate insurance coverage through the private sector. For the reasons discussed below, such government insurance or indemnification would be highly undesirable and would do nothing to remedy the problems underlying the availability/affordability crisis.

The most serious deficiency with the various schemes for government insurance or indemnification is, as noted, the fact that such proposals do not address the problems that have led to the availability/affordability crisis. Instead, these schemes simply would pass the costs of the crisis directly to the taxpayer. While it is difficult to estimate the potential cost of such a program to the American taxpayer, it should be noted that the insurance industry suffered an estimated $25 billion underwriting loss in 1985 (see Chapter 2). This loss does not include self-insurance or captive insurer losses, which in all likelihood represent additional billions of dollars.

A government insurance or indemnification program would by definition certainly involve the riskiest activities; that is, those activities that even the insurance industry is unwilling to underwrite. To the extent that the government attempts to address affordability problems by offering coverage more cheaply than the industry, the government, of course, simply would be subsidizing certain purchasers of insurance. Again, the cost of such subsidization is difficult to estimate, but considering that the insurance industry paid out over $126 billion in 1985, with related expenses of $37 billion (see Chapter 2), such a subsidy easily could involve tens of billions of dollars annually. 1/ (Again, these figures do not include self-insurance or captive insurers).

Government insurance or indemnification would not only pass these costs to the taxpayer, but could exacerbate the current problems of the tort system. One of the few constraints left in tort law is the recognition that "deep pockets" are not after

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1/ For example, over recent years the National Flood Insurance Fund has been subsidizing flood insurance by roughly $150 million annually. The cumulative loss for the program to date is approximately $1.4 billion. The President, in his latest budget submission, reiterated his intention to continue to phase out this costly subsidy. The riot insurance program, which existed from 1968 to 1984, was able to sustain itself through collected premiums. The relative success of the program, however, was largely due to the decline in urban riots after the program was instituted.

all bottomless -- that there is a finite amount of resources that can be reallocated through tort liability. Government indemnification or insurance would remove that last restraint, since the resources of the Federal Government are all too often viewed as without limit. Thus, courts and juries might be even more willing to skew liability and causation standards to ensure compensation, and to award the most generous compensation conceivable.

There are, however, a number of compelling reasons for rejecting the concept of government insurance or indemnification other than because of its potential cost and the failure to address the real problems underlying the crisis. Perhaps foremost among those reasons is that such a program would most likely jeopardize among the most effective and important mechanisms currently existing in the private sector to protect public health and safety. The insurance industry plays a vital role in promoting public health and safety by policing insureds to ensure that risks of injury are minimized. Insureds who fail to minimize such risks, or who experience higher than normal claim rates, may find the desired level of insurance coverage more difficult to obtain and more expensive. The insurance industry thus plays an important role in creating incentives that protect public health and safety, both in policing insureds, and in passing the benefits of safety back to the insureds through lower premiums.

While the role of insurance in promoting public health and safety is by no means perfect, and the above description admittedly is somewhat idealized, insurance creates important health and safety incentives which cannot be dismissed lightly. This critical function of insurance is undermined to the extent that the government supplants the private sector in providing insurance or indemnification, particularly for high risk activities. The government, even if and when it demonstrates the best of intentions, simply does not have the resources, experience, flexibility or incentives to replicate the activities of the private sector in policing insureds' practices and setting premiums to reflect claims experience. In addition, were the government to undertake such activities, the existing health and safety bureaucracies almost certainly would prove inadequate. Substantial additional funds, personnel and resources would need to be devoted to these activities, and in many areas new bureaucratic structures would need to be established. 2/ If, as seems likely, such additional investments of government resources are not made, government insurance or indemnification would operate as a clear disincentive to greater safety since insureds would receive

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2/ The necessary collection and analysis of relevant information would of itself be a major undertaking requiring substantial investment of additional government resources.

the benefit of a risk transfer to the government (and, accordingly, would have less incentive to protect public health and safety) without any corresponding checks upon their conduct or activities. Both the consumer and the taxpayer would be the ultimate losers.

To the extent that the government institutes an insurance or indemnification program, such a program also would increase significantly in two ways the involvement of the government in the private sector. First, while the government, as noted, cannot replicate the efforts of the insurance industry, it would have to become involved in the activities it has insured or indemnified to ensure that such insurance or indemnification does not lead to completely open-ended liability on the part of the government. This necessarily would involve new additional forms of government supervision and regulation of private sector activities.

A second undesirable but inevitable effect of such a program would be that the government frequently would be forced to manage, or at least actively oversee, the litigation of cases involving the liability of its insureds, since the insureds often would have only a limited incentive to contest aggressively claims, however meritless, against which they are fully insured or indemnified. Even putting aside the consideration of the massive investment of litigation resources that would be needed by both the insuring agencies and the Department of Justice, this could involve the government directly and actively in some of the most controversial and visible tort litigation in our society, much of which would involve litigation in state court under substantive, procedural and evidentiary rules of state law.

An additional consideration is that such a program necessarily would involve the federal government in state regulation of the insurance industry since such regulation could have a significant impact on the kind of insurance or indemnification the federal government would have to provide. For example, state regulators who might wish to avoid approving politically unpopular rate increases or policy provisions might be far more inclined to withhold such approvals if they perceived the federal government as ready and willing to provide an alternative source of insurance. The federal government, in turn, in order to avoid such wholesale transfers of the insurance burden, could very easily find itself compelled to regulate the insurance industry directly, or to regulate the state regulators. Either way, it would represent a substantial intrusion by the federal government into the regulation of the insurance industry.

Finally, a federal program of insurance or indemnification would interfere with and perhaps severely inhibit the ability of the market to devise new policies, insurance mechanisms, and specific contractual provisions to meet changing economic and

social conditions. Where the current services of the insurance industry prove inadequate or unacceptable, insurers and insureds have strong incentives to restructure those services so that the needs of the marketplace can be met (witness, for example, the current discussions over the introduction of claims-made policies and the inclusion of defense costs). Where government insurance or indemnification is available, however, insureds may be far more inclined to seek such insurance (particularly where it is subsidized, either intentionally or unintentionally) than to negotiate with insurers or invest considerable effort and resources shopping for better conditions. Insurers, in turn, who may feel themselves compelled to offer otherwise unattractive services to customers they wish to retain, may find a government insurance or indemnification program a convenient dumping grounds for the risks they would rather spin-off. 3/ The end result could very well be that the ability of the marketplace to respond to new conditions with innovative solutions could be severely chilled if the "safe harbor" of government insurance or indemnification were available to both the insureds and the insurers. 4/

In sum, government insurance or indemnification would be a highly undesirable and counterproductive response to the current availability/affordability crisis. It effectively would amount to the nationalization of a potentially large portion of one of the Nation's leading financial industries. And, given the history of past government involvement in the private sector, it is all too apparent that removing the federal government from the insurance industry once the purported justification for its presence had passed would be an arduous if not ultimately futile endeavor.

3/ Such risks most likely would include the type of long-latency, catastrophic risks endemic to toxic torts. As is apparent from the asbestos litigations, such insurance would expose the taxpayer to potentially massive liability. The problem of insurers spinning off certain types of business very likely would generate pressure for some form of federal regulation of such practices.

4/ It should be noted in this regard that the contractor indemnification provision which the Administration supports in the context of Superfund reauthorization is purely discretionary in nature, is limited to cleanups under the control of the Environmental Protection Agency, is linked to a critical limitation on liability (liability would be predicated only on negligence), and would be provided only because it will be extremely difficult, if not impossible, to keep this vital program in operation without such limited and closely regulated contractor indemnification (which presumably will include both limits and deductibles).

CONCLUSION

This report contains within it a number of observations, conclusions and recommendations. The most important of these, however, for the purposes of the Tort Policy Working Group, are what this report implies as to the appropriate response of the federal government to the current crisis in insurance availability and affordability. In this regard, the pertinent conclusions are straightforward and relatively apparent.

First, tort law appears to be a major cause of the insurance availability/affordability crisis.

Second, there are a number of beneficial reforms of tort law that the federal government can support and promote in sensible and appropriate ways.

Third, to the extent that other factors -- such as the recent large underwriting losses of the insurance industry -- underlie this crisis, there is little the federal government can or should do to remedy these problems. While the contribution of these economic factors seems clear, it is likely that these problems will work themselves out in the short-term as the insurance industry restores its desired level of profitability, and as other insurance industry developments (see Chapter 3) are implemented. It seems highly unlikely, however, that these changes will substantially alleviate the crisis, particularly the affordability aspect of the crisis, without substantial reforms of tort law.

Fourth, the Working Group found nothing to support the suggestion that this crisis could be remedied through federal regulation of the insurance industry or of state insurance regulators.

Fifth, while a federal insurance or indemnification program obviously could provide subsidized insurance where insurance is unavailable or unaffordable, for many reasons (see Chapter 5) such a program would be highly undesirable and ultimately counterproductive.

In sum, tort law appears to be a major cause of the insurance availability/affordability crisis which the federal government can and should address in a variety of sensible and appropriate ways. But significant, long-term reform cannot and should not come solely from the federal government. Ultimately, state governments and courts must address the current excesses of tort law. Their active participation is essential to finding workable solutions to the increasingly debilitating problems of tort law.

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