HB 292

HOUSE COMMITTEE REPORT

(11)
Date Referred: March 23, 1994

FURTHER REFERRALS:

Date of Committee Action: _____

Died

The FINANCE Committee considered:

HB 292

HOUSE BILL NO. 292

CIVIL LIABILITY

"An Act relating to civil actions; amending Alaska Rules of Civil Procedure 49 and 68; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*DNP*	*NR*	*AM*

_____
CHAIRMAN'S SIGNATURE

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE

STATE CAPITOL, JUNEAU, AK 99801-1182
(907) 465-4954

LETTER OF INTENT
CSHB 292(L&C)

The House Labor and Commerce Committee considered House Bill 292, an Act relating to civil actions, and has replaced it with Committee Substitute for House Bill 292 (L&C), and referred it to the Judiciary Committee.

It is the intent of the House Labor and Commerce Committee that the Judiciary Committee reconsider the amendment to current law that would delete the exclusion of disfigurement or severe physical impairment from the cap on noneconomic damages in Section 7 of CSHB 292(L&C) and adopt an amendment that: 1) defines the phrase "disfigurement or severe physical impairment; and 2) restores the exclusion or establishes a more "realistic cap" on these types of injuries, per the commitment of the Chair of the Judiciary Committee.

Bill Hudson

Chair, House Labor & Commerce Committee

No. 1

FISCAL NOTE

Bill Version: CSHB 292 (L&C)
(H) Publish Date: 2/7/94

STATE OF ALASKA
1994 LEGISLATIVE SESSION

Revision Date: February 2, 1994
Title: "...relating to civil actions; amending Alaska Rules of Civil Procedure 49 and 68..."
Sponsor: House Labor and Commerce
Requestor: House Labor and Commerce

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: February 2, 1994

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: February 2, 1994

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 292

ANALYSIS CONTINUATION:

This bill amends Title 9, the Alaska Code of Civil Procedure, to provide various changes that are intended to bring about reforms in the manner in which the state's civil justice system handles personal injury claims. The bill seeks to reduce costs associated with the civil justice system, and the bill seeks to create a more equitable distribution of the cost of risk of injury. The bill does this by changing the existing balance between claimants and defendants, and their respective, competing economic interests, by limiting the time in which certain claims can be filed, and by setting and reducing claims limits. As a result, the existing balance is tilted away from claimants and toward defendants. Consequently, the state's claims exposure and the amount it ultimately pays would be reduced. However, because the total number of claims would probably not be reduced, the impact on the department's defense of personal injury claims will be negligible.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL

No. 2
Bill Version: CSHB 292(JUD)
(H) Publish Date: 3/23/94

Revision Date:
Title: "An Act relating to civil actions. . . ."

Sponsor: House Labor and Commerce
Requestor: House Judiciary

Department Affected: Administration
BRU: Risk Management
Component: Risk Management

COMPONENT SERIAL NO. 71

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUNDING SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY 94) cost: $ 0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

State agency civil liability claims exposure and the amount Risk Management will ultimately pay in loss settlements will be reduced by this legislation. The extent of such savings is difficult to forecast, due to the uncertainty that any of the limitations in the type of claims that may be filed or amounts of damages that can be awarded will actually be realized in future liability claims that have not yet occurred.

Prepared by: Brad Thompson, Director
Division: Risk Management
Phone 465-2180
Date:

Approved by Commissioner: Nancy Bear Usera
Agency: Department of Administration
Date: 3/21/94

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ANALYSIS: (continued)

Risk Management loss funding is collected solely through interagency receipts of premiums assessed each agency. In future years, Risk Management liability premium assessments will reflect the reductions realized as our costs are based on actual claims expense incurred.

FISCAL NOTE

No. 3
Bill Version: CSHB 292(JUD)
(H) Publish Date: 3/23/94

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO

Revision Date: 03/14/94
Title: Tort Reform
Sponsor:
Requestor:

Dept. Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	14.0	14.0	14.0	14.0	14.0	14.0
TRAVEL						
CONTRACTUAL	8.3	8.3	8.3	8.3	8.3	8.3
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	22.2	22.2	22.2	22.2	22.2	22.2
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	22.2	22.2	22.2	22.2	22.2	22.2
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	22.2	22.2	22.2	22.2	22.2	22.2

POSITIONS

FULL-TIME						
PART-TIME	1.0	1.0	1.0	1.0	1.0	1.0
TEMPORARY						

Estimate of current year (FY 94) cost: $ None

ANALYSIS: (Attach a separate page if necessary)
See attached fiscal analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Agency: Alaska Court System
Phone: 264-8228
Date: 03/14/94

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 03/14/94

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ALASKA COURT SYSTEM
FISCAL ANALYSIS
CSHB 292 (JUD)

CSHB 292 (JUD) proposes numerous changes to that portion of the civil justice system which deals with personal injury and property damage. These changes are primarily intended to redistribute costs and risks associated with personal injury and property damage.

The Alaska Court System provides the primary forum in this state for the resolution of tort claims. The fiscal impact on the court system of the majority of these changes will be neutral or is impossible to reasonably predict. However, several of the proposed changes will have the effect of increasing the costs to the state of administering the tort system, at least for the first five to seven years following passage.

At the present time, a defendant has no right to pay a civil judgment for future damages periodically; such damages must be paid as a lump sum unless the plaintiff requests periodic payments. Plaintiffs rarely exercise this option because they generally do not perceive periodic payments as being in their economic best interest. Thus, as a practical matter, the court system does not now hold hearings on this issue. Sections 12, 13, and 14 of the Judiciary CS give a defendant in a superior court case the option of making periodic payments to a successful plaintiff. The judgment must set the amounts of the payments, including any increases for anticipated inflation, the interval between payments, and the number of payments. While the CS instructs the defendant to propose a payment schedule, setting the appropriate amount, number, and inflation factor of these payments will require taking and evaluating conflicting testimony from experts and others representing each party, if the plaintiff objects to the specifics of the defendant's proposal. Such objections are inevitable. The payment hearing will be held before a judge and will not require the expenditure of jury costs. However, additional costs will inevitably arise when many plaintiffs return to court in later years because the defendant has stopped making periodic payments for some reason.

While California has been cited as a state in which mandatory periodic payments do not result in additional court time, this reputed result was not achieved for at least five to six years following passage of the legislation; during this period, substantial court time was expended on the issue of periodic payments, and the question of the constitutionality of such payments was appealed to the California Supreme Court on two separate occasions before it was upheld.

Section 15 of the Judiciary CS relates to collateral benefits. This complex section essentially provides that the amount which a

defendant owes to a plaintiff will be reduced by whatever insurance benefits or other benefits the plaintiff has already received as compensation. Implementation will require extra trial time, in order for the jury to hear testimony regarding the types of coverage which might be involved, the amounts paid, and determining which payments may be offset. The current statute relating to collateral benefits is substantially less complex. Moreover, only the judge hears the testimony, and then only if the jury has returned a verdict for the plaintiff. The proposed system is thus less efficient and results in longer trials and more jury costs.

CSHB 292 (JUD) can be expected to save some judicial costs by reducing the motion practice currently engaged in on issues which were not clearly resolved the last time tort laws were amended. The amount of savings is speculative, and this note assumes that it is offset by the inevitable hearings that result from the failure of defendants to make periodic payments; by the increase in litigation resulting from the repeal of Civil Rule 82; and by the longer trials and increased appeals that will result until the supreme court resolves issues created by the procedural and substantive changes made by CSHB 292 (JUD). In this regard, note that several pro-tort reform insurance defense attorneys who testified in favor of HB 292 conceded that the bill would result in increased litigation for a period of years, until all the legal issues were resolved by appeals to the supreme court. One of these attorneys estimated the period of increased litigation at five to seven years.

This fiscal note makes the following assumptions:

In superior court in FY 93, there were 935 tort cases filed. Approximately 40 tort trials were held, with approximately 50 percent returning a verdict for plaintiff; there were approximately 50 tort cases decided by summary judgment, with all returning a verdict for the defendant; and there were approximately 40 default judgments entered, with all entered for plaintiff. Determining periodic payments will average one day of court time without a jury. Determining collateral benefits will average one-half day of court time, including jury time. Time spent is discounted by two-thirds in default cases.

In district court in FY 93, there were 521 tort cases filed (other than small claims). Approximately 21 tort trials were held; approximately 26 tort cases were decided by summary judgment; and 21 default judgments were entered. Periodic payments will not be made in district court, because of the $50,000 jurisdictional limit of that court. Because of the lower dollar value of cases, not as much time will be invested by litigants in determining collateral benefits; it is assumed that one-half as much court time will be used. District court jury costs are also less, because half as many jurors are used.

Alaska Court System
Fiscal Analysis
CS HB 292 (L&C)

	Salary	Benefits	Total
Personal Services			
Pro Tem Judge, fully vested, Anchorage permanent part-time, 4 months	$8,050	$5,912	$13,962
Contractual Services			
Jury Fees			8,250
Superior Court–			
40 – 1/2 day length collateral benefit hearings with 13 jurors at $12.50 a half day (from trials)		6,500	
District Court–			
20 – 1/2 day length collateral benefit hearings with 7 jurors at $12.50 a half day (from trials)		1,750	
Estimated Total Cost			$22,212

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. CSHB 292 (JUD)

Revision Date: February 2, 1994
Title: "...relating to civil actions; amending Alaska Rules of Civil Procedure 49 and 68..."
Sponsor: House Labor and Commerce
Requestor: House Labor and Commerce

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: February 2, 1994

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: February 2, 1994

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 292

ANALYSIS CONTINUATION:

This bill amends Title 9, the Alaska Code of Civil Procedure, to provide various changes that are intended to bring about reforms in the manner in which the state's civil justice system handles personal injury claims. The bill seeks to reduce costs associated with the civil justice system, and the bill seeks to create a more equitable distribution of the cost of risk of injury. The bill does this by changing the existing balance between claimants and defendants, and their respective, competing economic interests, by limiting the time in which certain claims can be filed, and by setting and reducing claims limits. As a result, the existing balance is tilted away from claimants and toward defendants. Consequently, the state's claims exposure and the amount it ultimately pays would be reduced. However, because the total number of claims would probably not be reduced, the impact on the department's defense of personal injury claims will be negligible.

8-LS0914\I.1
Ford
4/5/94

AMENDMENT 1 Adopt no/obj

OFFERED IN THE HOUSE

TO: CSHB 292(JUD)

Page 3, line 29, after "from":

Insert "prolonged exposure to hazardous waste,"

8-LS0914\I.2
Ford
4/5/94

Adopt

AMENDMENT 2.

OFFERED IN THE HOUSE

TO: CSHB 292(JUD)

Page 15, line 15:

Delete "may"

Insert "shall"

Page 15, lines 19 - 20:

Delete "attorney fees, and monetary sanctions that are not less than $500 nor more than $10,000"

Insert "costs and attorney fees, and monetary sanctions not to exceed $10,000"

1. HOUSE FINANCE COMMITTEE

MEETING OF _____

SUBJECT AM 2

MEMBER	YES	NO
BROWN		✓
FOSTER		
GRUSSENDORF	✓	
HANLEY	✓	
HOFFMAN		
MARTIN	✓	
NAVARRE	✓	
PARNELL	✓	
THERRIAULT	✓	
LARSON	✓	
MACLEAN	✓	
TOTAL	_____	_____

PASSED: 8-1

FAILED: _____

adopted

3-LS0914\N.3
Ford
4/7/94

AMENDMENT 3

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 2, line 18, after "available":

Insert ", except in a few limited circumstances"

2.

HOUSE FINANCE COMMITTEE

MEETING OF 4/9/94

SUBJECT Amend #3 #292

MEMBER	YES	NO
FOSTER	—	
GRUSSENDORF	✓	
HANLEY	✓	
HOFFMAN	—	
MARTIN		✓
NAVARRE	✓	
PARNELL	✓	
THERRIAULT	✓	
BROWN	✓	
MACLEAN	✓	
LARSON	✓	
TOTAL	8	

PASSED: 8

FAILED: 1

8-LS0914\I.27
Ford
4/8/94

AMENDMENT 4

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 2, lines 2 - 3:

Delete all material.

Renumber the following paragraphs accordingly.

Page 3, lines 9 - 10:

Delete all material.

Renumber the following paragraph accordingly.

Page 3, line 13, through page 4, line 11:

Delete all material.

Renumber the following bill sections accordingly.

Page 4, line 14:

Delete "AS 09.10.052 and"

Page 15, line 22:

Delete "sec. 14"

Insert "sec. 13"

Page 15, line 25:

Delete "sec. 15"

Insert "sec. 14"

Page 15, line 29:

Delete "sec. 18"

Insert "sec. 17"

Page 16, line 3:

Delete "sec. 20"

Insert "sec. 19"

Page 16, line 6:

Delete "sec. 25"

Insert "sec. 24"

3. HOUSE FINANCE COMMITTEE

MEETING OF 4/8/94

SUBJECT HB 292 Amend #4

MEMBER	YES	NO
GRUSSENDORF	+	
HANLEY		✓
HOFFMAN	—	
MARTIN		✓
NAVARRE	✓	
PARNELL		✓
THERRIAULT		✓
BROWN	✓	
FOSTER	—	
LARSON	✓	
MACLEAN	✓	
TOTAL		

PASSED: 4

FAILED: 4

AMENDMENT 5

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 3, line 16:

Delete "personal injury, death, or"

Page 3, line 22:

Delete "personal injury, death, or"

Page 3, line 25:

Delete "personal injury, death, or"

Page 3, line 28:

Delete "personal injury, death, or"

Page 4, lines 4 - 7:

Delete all material.

Reletter the following subsection accordingly.

4. HOUSE FINANCE COMMITTEE

MEETING OF 4/9/94

SUBJECT HB 292 Amend #5

MEMBER	YES	NO
HANLEY		✓
HOFFMAN	—	
MARTIN		✓
NAVARRE	✓	
PARNELL		✓
THERRIAULT		✓
BROWN	✓	
FOSTER	—	
GRUSSENDORF	—	
MACLEAN	✓	
LARSON		✓
TOTAL		

PASSED: 3

FAILED: 5

3-LS0914\J.1
Ford
4/7/94

AMENDMENT 6

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 3, lines 18 - 20:

Delete all material.

Renumber the following paragraphs accordingly.

5. HOUSE FINANCE COMMITTEE

MEETING OF 4/8/94

SUBJECT HB 292 Amend #6

MEMBER	YES	NO
HOFFMAN	—	
MARTIN		✓
NAVARRE	✓	
PARNELL		✓
THERRIAULT		✓
BROWN	✓	
FOSTER	—	
GRUSSENDORF	—	
HANLEY		✓
LARSON		✓
MACLEAN	✓	
TOTAL		

PASSED: 3

FAILED: 5

3-LS0914\I.9
Ford
4/7/94

AMENDMENT 7

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 3, lines 23 - 24:

Delete "an intentional or reckless disregard of specific"

Insert "a failure to follow applicable"

6. HOUSE FINANCE COMMITTEE

MEETING OF 4/9/94

SUBJECT Amendment #7

MEMBER	YES	NO
MARTIN		✓
NAVARRE	✓	
PARNELL		✓
THERRIAULT		✓
BROWN	✓	
FOSTER		—
GRUSSENDORF		—
HANLEY		✓
HOFFMAN		—
MACLEAN		—
LARSON	✓	
TOTAL		

PASSED: 3

FAILED: 4

8-LS0914\I.14
Ford
4/7/94

AMENDMENT 8

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 3, line 14:

Delete "SIX" ~~SIX~~ adopted

Insert "~~X~~" 10

Page 3, line 17:

Delete "six" ~~six~~

Insert "~~X~~" 10

7. HOUSE FINANCE COMMITTEE

MEETING OF 4/9-94

SUBJECT to Amend #8 to 10 years

Brown-obj

MEMBER	YES	NO
NAVARRE		✓
PARNELL	✓	
THERRIAULT	✓	
BROWN		✓
FOSTER	—	
GRUSSENDORF		✓
HANLEY	✓	
HOFFMAN	—	
MARTIN	✓	
LARSON	✓	
MACLEAN		
TOTAL		

PASSED: 5

FAILED: 3

8.

HOUSE FINANCE COMMITTEE

MEETING OF 4/9/94

SUBJECT to move the changed amend #8

MEMBER	YES	NO
PARNELL	✓	
THERRIAULT	✓	
BROWN	✓	
FOSTER	—	
GRUSSENDORF	✓	
HANLEY	✓	
HOFFMAN	—	
MARTIN	✓	
NAVARRE	✓	
MACLEAN	—	
LARSON	✓	
TOTAL		

PASSED: 8

FAILED: 0

8-LS0914\M.17
Ford
4/8/94

AMENDMENT 9

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 3, lines 15 - 16:

Delete "Notwithstanding the disability of minority described under AS 09.10.140(a), a"

Insert "A"

Page 4, line 4, after "period":

Insert "the injured person is less than 18 years of age or"

Page 4, line 12, through page 5, line 4:

Delete all material.

Renumber the following bill sections accordingly.

Page 5, lines 15 - 16:

Delete "Notwithstanding the disability of minority described under AS 09.10.140(a), a"

Insert "A"

Page 5, line 20:

Delete ", other than AS 09.10.065"

Page 15, line 22:

Delete "sec. 14"

Insert "sec. 13"

Page 15, line 25:

Delete "sec. 15"

Insert "sec. 14"

Page 15, line 29:

Delete "sec. 18"

Insert "sec. 17"

Page 16, line 3:

Delete "sec. 20"

Insert "sec. 19"

Page 16, line 6:

Delete "sec. 25"

Insert "sec. 24"

AMENDMENT 10

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 4, line 12, through page 5, line 4:

Delete all material.

Renumber the following bill sections accordingly.

Page 5, line 20:

Delete ", other than AS 09.10.065"

Page 15, line 22:

Delete "sec. 14"

Insert "sec. 13"

Page 15, line 25:

Delete "sec. 15"

Insert "sec. 14"

Page 15, line 29:

Delete "sec. 18"

Insert "sec. 17"

Page 16, line 3:

Delete "sec. 20"

Insert "sec. 19"

Page 16 line 6:

Delete "sec. 25"

Insert "sec. 24"

8-LS0914\N.34
Ford
4/8/94

AMENDMENT \\

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 5, line 29:

Delete "$500,000"

Insert "$750,000"

Page 5, line 31:

Delete "$750,000"

Insert "$1,000,000"

3-LS0914\I.10
Ford
4/7/94

AMENDMENT 12

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 5, line 31:

Delete "$750,000"

Insert "$1,000,000"

8-LS0914\I.35
Ford
4/8/94

AMENDMENT 13

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 6, lines 1 - 7:

Delete all material.

Insert "claimant, as a result of the injury suffers severe disfigurement or severe physical impairment."

AMENDMENT 14

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 5, line 23:

Delete "or wrongful death"

Page 5, line 29:

Delete "or death"

Page 6, line 9, after "damages":

Insert "for wrongful death, or noneconomic damages"

Page 12, line 25:

Delete "**AS 09.17.010 and**"

8-LS091-SJ.16
Ford
4/7/94

AMENDMENT 15

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 6, line 20, after "sought":

Insert ", or clear and convincing evidence of gross negligence or reckless misconduct"

8-LS0914\I.29
Ford
4/8/94

AMENDMENT 16

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 6, lines 21 - 29:

Delete all material.

Renumber the following bill sections accordingly.

Page 15, line 22:

Delete "sec. 14"

Insert "sec. 13"

Page 15, line 25:

Delete "sec. 15"

Insert "sec. 14"

Page 15, line 29:

Delete "sec. 18"

Insert "sec. 17"

Page 16, line 3:

Delete "sec. 20"

Insert "sec. 19"

Page 16, line 6:

Delete "sec. 25"

Insert "sec. 24"

8-LS0914\N.22
Ford
4/8/94

AMENDMENT 17

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 7, lines 9 - 22:

Delete all material.

Renumber the following bill sections accordingly.

Page 15, line 22:

Delete "sec. 14"

Insert "sec. 13"

Page 15, line 25:

Delete "sec. 15"

Insert "sec. 14"

Page 15, line 29:

Delete "sec. 18"

Insert "sec. 17"

Page 16, line 3:

Delete "sec. 20"

Insert "sec. 19"

Page 16, line 6:

Delete "sec. 25"

Insert "sec. 24"

3-LS0914\I.11
Ford
4/7/94

AMENDMENT 18

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 7, lines 19 - 22:

Delete all material and insert:

"(2) the amount of federal and state income tax that would be paid on gross earnings under tax rates in effect on the date of the injury or death may be considered by the jury in awarding economic damages for loss of past or future gross earnings."

8-LS0914\I.36
Ford
4/8/94

AMENDMENT 19

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 7, line 19, after "(2)"

Insert "**the court or jury shall determine**"

Page 7, line 20:

Delete "**shall be reduced by**"

Insert "**that is the equivalent of**"

Page 7, line 22, after "**death**":

Insert "**; the verdict shall provide that an amount determined under this paragraph shall be paid to the Internal Revenue Service**"

8-LS0914\I.31
Ford
4/8/94

AMENDMENT 20

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 7, line 23, through page 8, line 4:

Delete all material.

Renumber the following bill sections accordingly.

Page 15, line 22:

Delete "sec. 14"

Insert "sec. 12"

Page 15, line 25:

Delete "sec. 15"

Insert "sec. 13"

Page 15, line 29:

Delete "sec. 18"

Insert "sec. 16"

Page 16, line 3:

Delete "sec. 20"

Insert "sec. 18"

Page 16, line 6:

Delete "sec. 25"

Insert "sec. 23"

8-LS0914\I.T
Ford
4/7/94

AMENDMENT 21

OFFERED IN THE HOUSE BY REPRESENTATIVE [illegible]

TO: CSHB 292(JUD)

Page 7, line 24:

Delete "shall"

Insert "may [SHALL]"

8-LS0914\N.23
Ford
4/8/94

AMENDMENT 22

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 10, lines 2 - 5:

Delete "**, or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to the action**"

8-LS0914\I.32
Ford
4/8/94

AMENDMENT 23

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 1, line 2:

Delete "68,"

Page 11, lines 29 - 31:

Delete all material.

Renumber the following bill sections accordingly.

Page 16, lines 3 - 5:

Delete all material.

Renumber the following bill sections accordingly.

Page 16, line 6:

Delete "sec. 25"

Insert "sec. 24"

3-LS0914\N.18
Ford
4/8/94

AMENDMENT 24

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 12, line 24, through page 13, line 10:

Delete all material.

Renumber the following bill sections accordingly.

Page 16, line 6:

Delete "sec. 25"

Insert "sec. 24"

8-LS0914\M.19
Ford
4/8/94

AMENDMENT 25

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 12, line 25:

Delete "and (g) of this section"

Page 12, line 31:

Delete "economic [PECUNIARY]"

Insert "pecuniary"

Page 13, lines 11 - 20:

Delete all material.

Renumber the following bill sections accordingly.

Page 16, line 6:

Delete "sec. 25"

Insert "sec. 24"

8-LS0914\I.33
Ford
4/8/94

AMENDMENT 26

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 12, line 25:

Delete "**and (g) of this section**"

Page 13, lines 11 - 20:

Delete all material.

Renumber the following bill sections accordingly.

Page 16, line 6:

Delete "sec. 25"

Insert "sec. 24"

8-LS0914\M.15
Ford
4/7/94

AMENDMENT 27

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 13, line 13, after "by a":

Insert "devisee under a will of the deceased or a"

8-LS0914\I.13
Ford
4/7/94

AMENDMENT 28

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 13, line 31, after "if":

Insert "the health care provider is insured under a policy of malpractice insurance with coverage of at least $1,000,000 per occurrence that applies to the practice of medicine by the health care provider at the hospital and if"

Page 14, line 26, after "services":

Insert ";

(4) "malpractice insurance" has the meaning given in AS 21.12.070(10)"

8-LS0914\M.12
Ford
4/7/94

AMENDMENT 29

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 1, line [illegible]:

Delete "68, and 82"

Insert "and 68"

Page 13, lines 21 - 27:

Delete all material.

Renumber the following bill sections accordingly.

Page 16, lines 6 - 9:

Delete all material.

Renumber the following bill sections accordingly.

3-LS0914\I.5
Ford
4/7/94

AMENDMENT 30

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 16, line 12, after "residents of the state":

Insert ", and determine if the enactment of this Act results in a reduction in insurance rates in the state"

8-LS0914\I.26
Ford
4/8/94

AMENDMENT 31

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 3, after line 12:

Insert new bill sections to read:

"* Sec. 2. AS 08.64.326(a) is amended to read:

(a) The board may impose a sanction if the board finds after a hearing that a licensee

(1) secured a license through deceit, fraud, or intentional misrepresentation;

(2) engaged in deceit, fraud, or intentional misrepresentation while providing professional services or engaging in professional activities;

(3) advertised professional services in a false or misleading manner;

(4) has been convicted, including conviction based on a guilty plea or plea of nolo contendere, of

(A) a felony or other crime if the felony or other crime is substantially related to the qualifications, functions, or duties of the licensee; or

(E) a crime involving the unlawful procurement, sale, prescription, or dispensing of drugs;

(5) has procured, sold, prescribed, or dispensed drugs in violation of a law, regardless of whether there has been a criminal action;

(6) intentionally or negligently permitted the performance of patient care by persons under the licensee's supervision that does not conform to minimum professional standards even if the patient was not injured;

(7) failed to comply with this chapter, a regulation adopted under this chapter, or an order of the board;

(8) has demonstrated

(A) professional incompetence, gross negligence, or repeated negligent conduct; the board may not base a finding of professional incompetence solely on the basis that a licensee's practice is unconventional or experimental in the absence of demonstrable physical harm to a patient;

(B) addiction to, severe dependency on, or habitual overuse of alcohol or other drugs that impairs the licensee's ability to practice safely;

(C) unfitness because of physical or mental disability;

(9) engaged in unprofessional conduct or in lewd or immoral conduct in connection with the delivery of professional services to patients;

(10) has violated AS 18.16.010;

(11) has violated any code of ethics adopted by regulation by the board; or

(12) [HAS DENIED CARE OR TREATMENT TO A PATIENT OR PERSON SEEKING ASSISTANCE FROM THE PHYSICIAN IF THE ONLY REASON FOR THE DENIAL IS THE FAILURE OR REFUSAL OF THE PATIENT TO AGREE TO ARBITRATE AS PROVIDED IN AS 09.55.535(a); OR

(13)] has had a license or certificate to practice medicine in another state or territory of the United States, or a province or territory of Canada suspended or revoked unless the suspension or revocation was caused by the failure of the licensee to pay fees to that state, territory, or province.

* Sec. 3. AS 08.68.270 is amended to read:

Sec. 08.68.270. GROUNDS FOR DENIAL, SUSPENSION, OR REVOCATION. The board may deny, suspend, or revoke the license of a person who

(1) has obtained or attempted to obtain a license to practice nursing by fraud or deceit;

(2) has been convicted of a felony or other crime if the felony or other crime is substantially related to the qualifications, functions or duties of the licensee;

(3) habitually abuses alcoholic beverages, or illegally uses controlled substances;

(4) has impersonated a registered or practical nurse;

(5) has intentionally or negligently engaged in conduct that has

resulted in a significant risk to the health or safety of a client or in injury to a client;

(6) practices or attempts to practice nursing while afflicted with physical or mental illness, deterioration, or disability that interferes with the individual's performance of nursing functions;

(7) is guilty of unprofessional conduct as defined by regulations adopted by the board;

(8) has wilfully or repeatedly violated a provision of this chapter or regulations adopted under it; or

(9) is professionally incompetent [;

(10) DENIES CARE OR TREATMENT TO A PATIENT OR PERSON SEEKING ASSISTANCE IF THE SOLE REASON FOR THE DENIAL IS THE FAILURE OR REFUSAL OF THE PATIENT OR PERSON SEEKING ASSISTANCE TO AGREE TO ARBITRATE AS PROVIDED IN AS 09.55.535(a)]."

Renumber the following bill sections accordingly.

Page 12, lines 1 - 7:

Delete all material and insert new bill sections to read:

"* **Sec. 23.** AS 09.55.535 is repealed and reenacted to read:

Sec. 09.55.535. MANDATORY ARBITRATION. (a) A person who files an action for damages against a health care provider resulting from medical malpractice shall also submit the claim to the court for arbitration.

(b) When a claim is submitted as required by (a) of this section, the court shall appoint an arbitrator to review the claim. The arbitrator appointed to review the claim shall interview the parties and examine all records or materials relating to the claim and may compel the attendance of witnesses or consult with medical specialists.

(c) An arbitrator appointed under this section shall conduct a prehearing settlement conference within 30 days after the appointment. The arbitrator shall establish a period for discovery and a date for a hearing. The hearing date may not be more than 120 days after the settlement conference.

(d) An arbitrator shall render a decision within 30 days after hearing a claim under (c) of this section. The decision must contain findings of fact and conclusions

of law. The decision of the arbitrator may be rejected by a party.

(e) If the decision of the arbitrator is rejected by a party, the action may proceed in the appropriate court. The arbitrator's decision is admissible evidence in that action and may be used by a party to support or oppose a claim of damages.

(f) The provisions of AS 09.43.010 - 09.43.180 (Uniform Arbitration Act) apply to an arbitration under this section to the extent the provisions do not conflict with the provisions of this section.

* Sec. 24. AS 09.55.536(a) is amended to read:

(a) In an action for damages due to personal injury or death based upon the provision of professional services by a health care provider when the parties have **failed to resolve the claim after** [NOT AGREED TO] arbitration [OF THE CLAIM] under AS 09.55.535, the court shall appoint within 20 days after **the decision of the arbitrator is rejected under AS 09.55.535(e)** [FILING OF ANSWER TO A SUMMONS AND COMPLAINT] a three-person expert advisory panel unless the court decides that an expert advisory opinion is not necessary for a decision in the case. **The** [WHEN THE ACTION IS FILED THE] court shall, by order, determine the professions or specialties to be represented on the expert advisory panel, giving the parties the opportunity to object or make suggestions.

* Sec. 25. AS 09.55.536(f) is amended to read:

(f) **Except as provided under AS 09.55.535(b),** [NO] discovery may **not** be undertaken in a case until the report of the expert advisory panel is received. However, the court may relax this prohibition upon a showing of good cause by any party. If the panel has not completed its report within the 30-day period prescribed in (c) of this section, the court may, upon application, grant it an additional 30 days."

Renumber the following bill sections accordingly.

Page 15, line 21:

Delete "and AS 09.55.548"

Insert ", AS 09.55.548, and 09.55.560(2)"

Page 15, line 22:

Delete "14"

Insert "16"

Page 15, line 25:

Delete "15"

Insert "17"

Page 15, line 29:

Delete "18"

Insert "20"

Page 16, line 3:

Delete "20"

Insert "22"

Page 16, line 6:

Delete "25"

Insert "29"

8-LS0914\I.24
Ford
4/8/94

AMENDMENT 32

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 1, line 1:

Delete "relating to civil actions"

Insert "requiring certain civil actions for personal injury, death, or property damage to be commenced within six years; requiring a civil action for professional negligence against a health care provider be brought before the injured person's eighth birthday if the injured person is less than six years of age at the time of the negligent act or omission; requiring that civil actions for personal injury, death, or property damage be brought within two years of accrual of the action and amending the limitations period for certain noncontractual rights; limiting the award of noneconomic and punitive damages; relating to the award of damages resulting from the commission of, attempted commission of, or fleeing from the commission of, a felony; requiring itemization of certain verdicts and a reduction of economic damages for the amount that would be paid in federal and state income taxes; relating to future damages being paid by periodic payment; relating to the effect in damages of amounts received from collateral sources; relating to the allocation of fault to a person responsible for damages; establishing the effect of a release from liability; changing the penalty for failing to accept certain offers of judgment; establishing the rate of prejudgment interest and interest on a judgment; prohibiting the award of prejudgment interest for certain damages; limiting damages received for wrongful death; prohibiting the award of attorney fees in certain cases unless authorized by statute or by agreement of the parties; limiting the civil liability of a hospital for a person who is not an employee or actual agent; relating to the signing of certain documents filed in a court action; requiring a report from the division of insurance; relating to computation of future economic damages; and relating to damages in wrongful death actions; requiring the State Medical Board to ask the Alaska State Medical Association to appoint a committee to develop medical practice parameters;"

AMENDMENT 33

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: CSHB 292(JUD)

Page 5, after line 20:

Insert a new bill section to read:

"* Sec. 6. AS 09.10.075 is repealed and reenacted to read:

Sec. 09.10.075. LIMITATION ON ACTIONS INVOLVING INJURY TO PERSON OR PROPERTY. A person may not bring an action for personal injury, death, or property damage unless the action is brought within two years of the accrual of the action."

Renumber the following bill sections accordingly.

Page 6, after line 15:

Insert a new bill section to read:

"* Sec. 8. AS 09.17.010 is repealed and reenacted to read:

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 a jury under (a) of this section may not exceed $500,000 for each claim based on a separate incident or injury.

(c) The limit under (b) of this section does not apply to damages for disfigurement or severe physical impairment."

Renumber the following bill sections accordingly.

Page 6, after line 20:

Insert a new bill section to read:

"* Sec. 10. AS 09.17.020 is repealed and reenacted to read:

Sec. 09.17.020. PUNITIVE DAMAGES. Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence."

Renumber the following bill sections accordingly.

Page 7, after line 8:

Insert a new bill section to read:

"* Sec. 13. AS 09.17.030 is repealed and reenacted to read:

Sec. 09.17.030. DAMAGES RESULTING FROM COMMISSION OF A CRIME. A person who suffers personal injury or death may not recover damages for the personal injury or death if the injuries or death occurred while the person was engaged in the commission of a felony, the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the felony substantially contributed to the injury or death. This section does not affect a right of action under 42 U.S.C. 1983."

Renumber the following bill sections accordingly.

Page 7, after line 22:

Insert a new bill section to read:

"* Sec. 15. AS 09.17.040(a) is repealed and reenacted to read:

(a) 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."

Renumber the following bill sections accordingly.

Page 7, after line 29:

Insert a new bill section to read:

"* Sec. 17. AS 09.17.040(d) is repealed and reenacted to read:

(d) In an action to recover damages, the court shall, at the request of an injured 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."

Renumber the following bill sections accordingly.

Page 8, after line 4:

Insert a new bill section to read:

"* Sec. 19. AS 09.17.040(e) is repealed and reenacted to read:

(e) 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."

Renumber the following bill sections accordingly.

Page 8, after line 19:

Insert new bill sections to read:

"* Sec. 21. AS 09.17.040(f) is repealed and reenacted to read:

(f) 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.

* Sec. 22. AS 09.17.040 is amended by adding a new subsection to read:

(h) Subsection (b) of this section does not apply to future economic damages if the parties agree that the award of future damages may be computed under the rule adopted in the case of Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967)."

Renumber the following bill sections accordingly.

Page 9, after line 22:

Insert a new bill section to read:

"* Sec. 24. AS 09.17.070 is repealed and reenacted to read:

Sec. 09.17.070. 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 by law or contract.

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

(1) actual attorney fees incurred by the claimant in obtaining the award exceed the amount of attorney fees awarded to the claimant by the court; and

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

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as evidence under (b) of this section, the court shall deduct from the total award the amount by which the value of the nonsubrogated sum awarded 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 under federal law cannot be reduced or offset;

(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."

Renumber the following bill sections accordingly.

Page 10, after line 5:

Insert a new bill section to read:

"* Sec. 26. AS 09.17.080(a) is repealed and reenacted to read:

(a) In all actions involving fault of more than one person, including third-party defendants and persons who have been released under AS 09.17.091, 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 that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability under AS 09.17.091."

Renumber the following bill sections accordingly.

Page 10, after line 17:

Insert a new bill section to read:

"* Sec. 28. AS 09.17.080(c) is repealed and reenacted to read:

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.091, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance

with the respective percentages of fault as determined under (a) of this section."

Renumber the following bill sections accordingly.

Page 11, after line 19:

Insert a new bill section to read:

"* **Sec. 31.** AS 09.30.065 is repealed and reenacted to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins 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 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 percent a year;

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

Renumber the following bill sections accordingly.

Page 11, after line 28:

Insert a new bill section to read:

"* **Sec. 33.** AS 09.30.070(a) is repealed and reenacted to read:

(a) The rate of interest on judgments and decrees for the payment of money is 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."

Renumber the following bill sections accordingly.

Page 12, after line 7:

Insert new bill sections to read:

"* Sec. 36. AS 09.55.535(k) is repealed and reenacted to read:

(k) The provisions of the Uniform Arbitration Act, AS 09.43.010 - 09.43.180, apply to arbitrations under this section if they do not conflict with the provisions of this section; arbitration under this section shall be conducted in accordance with procedures established by any rules of court which may be adopted and according to provisions of AS 09.55.540 - 09.55.549 and AS 09.55.554 - 09.55.560, and AS 09.65.090.

* Sec. 37. AS 09.55 is amended by adding a new section to read:

Sec. 09.55.549. AWARDS, COLLATERAL SOURCE. (a) Damages shall be awarded in accordance with principles of the common law. The fact finder in a malpractice action shall render any award for damages by category of loss. The court may enter a judgment that future damages be paid in whole or in part by periodic payments rather than by a lump sum payment; the judgment shall include, if necessary, other provisions to assure that funds are available as periodic payments become due. Insurance from an authorized insurer as defined in AS 21.90.900 is sufficient assurance that funds will be available. Any part of the award that is paid on a periodic basis shall be adjusted annually according to changes in the Consumer Price Index in the community where the claimant resides. In this subsection, future damages include damages for future medical treatment, care or custody, loss of future earnings, or loss of bodily function of the claimant.

(b) Except when the collateral source is a federal program that by law must seek subrogation and except death benefits paid under life insurance, a claimant may only recover damages from the defendant that exceed amounts received by the claimant as compensation for the injuries from collateral sources, whether private,

group, or governmental, and whether contributory or noncontributory. Evidence of collateral sources, other than a federal program that must by law seek subrogation and the death benefit paid under life insurance, is admissible after the fact finder has rendered an award. The court may take into account the value of claimant's rights to coverage exhausted or depleted by payment of these collateral benefits by adding back a reasonable estimate of their probable value, or by earmarking and holding for possible periodic payment under (a) of this section that amount of the award that would otherwise have been deducted, to see if the impairment of claimant's rights actually takes place in the future."

Renumber the following bill sections accordingly.

Page 12, after line 23:

Insert a new bill section to read:

"* Sec. 39. AS 09.55.580(a) is repealed and reenacted to read:

(a) Except as provided under (f) of this section, 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. 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 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."

Renumber the following bill sections accordingly.

Page 13, after line 10:

Insert a new bill section to read:

"* Sec. 41. AS 09.55.580(c) is repealed and reenacted to read:

(c) In fixing the amount of damages to be awarded under this section, the court or jury shall consider all the facts and circumstances and from them fix the award at a sum which will fairly compensate for the injury resulting from the death. In determining the amount of the award, the court or jury shall consider but is not limited to the following:

(1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during the lifetime of the deceased;

(2) loss of contributions for support;

(3) loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries;

(4) loss of consortium;

(5) loss of prospective training and education;

(6) medical and funeral expenses."

Renumber the following bill sections accordingly.

Page 13, after line 27:

Insert a new bill section to read:

"* Sec. 44. 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, unless the civil action is contested without trial or fully contested as determined by the court."

Renumber the following bill sections accordingly.

Page 15, after line 21:

Insert a new bill section to read:

"* Sec. 48. AS 09.10.052, 09.10.065; AS 09.17.020(b), 09.17.020(c); AS 09.30.070(c); AS 09.55.580(g), 09.55.580(h); AS 09.65.096, and 09.65.125 are repealed."

Renumber the following bill sections accordingly.

Page 15, line 22:

Delete "sec. 14"

Insert "sec. 23"

Page 15, line 25:

Delete "sec. 15"

Insert "sec. 25"

Page 15, line 29:

Delete "sec. 18"

Insert "sec. 30"

Page 16, line 3:

Delete "sec. 20"

Insert "sec. 34"

Page 16, line 6:

Delete "sec. 25"

Insert "sec. 43"

Page 16, after line 9:

Insert new bill sections to read:

"* Sec. 54. AS 09.17.080(a), as repealed and reenacted in sec. 26 of this Act, has the

effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatory described in AS 09.17.080.

* Sec. 55. AS 09.30.065, as repealed and reenacted by sec. 31 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by providing that if a judgment is not more favorable to the offeree than the offer, the applicable interest rate shall be adjusted.

* Sec. 56. The repeal of AS 09.30.070(c), by sec. 48 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by removing a provision providing that prejudgment interest may not be awarded for future economic or noneconomic damages.

* Sec. 57. AS 09.60.010, as repealed and reenacted by sec. 44 of this Act, has the effect of amending Alaska Rule of Civil Procedure 82 by removing the absolute prohibition on award of attorney fees in a civil action for personal injury, death, or property damage.

* Sec. 58. The repeal of AS 09.65.125, by sec. 48 of this Act, has the effect of amending Alaska Rules of Civil Procedure 11 and 95 by removing a provision requiring an immediate hearing to consider appropriate sanctions for certain failures relating to the signing of pleadings, motions, or other papers."

Renumber the following bill sections accordingly.

Page 17, line 6:

Delete "This Act"

Insert "Each of secs. 1 - 58 of this Act"

Page 17, line 7, after "of":

Insert "that section of"

Page 17, after line 7:

Insert a new bill section to read:

"* Sec. 63. Sections 6, 8, 10, 13, 15, 17, 19, 21, 22, 24, 26, 28, 31, 33, 36, 37, 39, 41, 44, 48, and 54 - 58 of this Act take effect July 1, 1998."

Renumber the following bill section accordingly.

Page 17, line 8:

Delete "This"

Insert "Except as provided in sec. 63 of this Act, this"

Alaska State Legislature

Official Business

State Capitol
Juneau, AK 99801-1182

MEMORANDUM

To: Representative Ron Larson, Co-Chair
House Finance Committee

Subject: Proposed amendments to CS HB (292) CIVIL LIABILITY

Date: April 20, 1994

The sponsor of HB 292 has made significant changes to the bill and we are enclosing a draft for your review. The changes made to expedite passage from House Finance Committee include the following:

(1) Raise the cap on physical impairment from $750,000 to 1 million.
(2) Raise the cap on punitive damages from $200,000 to $500,000.
(3) Delete the provision on taxing gross earnings on an award.
(4) Delete the section on Offers of Judgment.
(5) Delete the section of Rule 82.
(6) Delete the limitation of the award of wrongful death for non-dependents.
(7) Statute of repose is increased from 8 to 10 years.

We would appreciate you scheduling a hearing on the bill as soon as possible.

8-LS0914\Q
Ford
4/29/94

CS FOR HOUSE BILL NO. 292( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE LABOR AND COMMERCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil actions; amending Alaska Rule of Civil Procedure 68; and providing for an effective date."

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

* Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that

(1) civil justice in this state has generally been developed by the courts on a case-by-case basis; this process has resulted in some significant changes in the law, and the legislature has periodically intervened to bring about needed reforms;

(2) the level of malpractice insurance premiums discourage physicians and other health care professionals from initiating or continuing their practice or offering needed services to the public;

(3) society as a whole cannot afford the price of lawsuits years after the delivery of medical services and other actions; the widespread use of claims-made insurance policies makes it impossible to adequately and economically insure against actions after a health care provider leaves medical practice; likewise it is extremely difficult to defend against

a claim that has become stale after information and witnesses have disappeared;

(4) hospitals that comply with the disclosure requirements set out in this Act should not be liable for the negligence of independent contractors; to this extent this Act is intended to overrule the case of Jackson v. Powers, 743 P.2d 1376 (Alaska 1987);

(5) the issues in the Act were intended to be addressed in a comprehensive way in 1986; however, the legislation passed in 1976, 1978, and 1986 fell short of accomplishing the goals of the legislature and the problems that existed in 1986 still exist in 1994.

(b) It is the purpose of this Act to

(1) enact further reforms that create a more equitable distribution of the cost and risk of injury;

(2) reduce costs associated with the medical malpractice system, while ensuring that adequate and appropriate compensation for persons injured through the fault of others is available;

(3) help match losses with compensation by helping to

(A) ensure that money paid to an injured person is available when anticipated expenses or losses occur;

(B) ensure that a claimant with substantial injury requiring long-term treatment will have money available for future medical care;

(C) reduce reparation system costs by eliminating those portions of awards that are not needed to compensate the claimant;

(D) eliminate duplicate recoveries; and

(E) reduce the costs of litigation;

(4) ensure that in medical malpractice actions involving the fault of more than one person, the fault of each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages be determined and awards be allocated in accordance with their fault;

(5) clarify the circumstances in which hospitals are held directly liable for the actions of health care providers not employed by the hospital.

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

Sec. 09.10.065. LIMITATION ON ACTIONS AGAINST HEALTH CARE

PROVIDERS. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), an action based on professional negligence may not be brought against a health care provider

(1) unless commenced within two years after accrual of the action or within six years of the last act alleged to have caused the personal injury or death, whichever is earlier; or

(2) if the injured person was less than six years of age on the date of the last act alleged to have caused the personal injury or death, unless the action is brought before the person's eighth birthday.

(b) The limitation imposed under (a) of this section is tolled during any period in which there exists

(1) fraud, including fraud or collusion by a parent, guardian, insurer, or health care provider, resulting in the failure to bring an action on behalf of an injured minor; or

(2) intentional concealment of facts that would give notice of a potential action.

(c) In this section, "health care provider" and "professional negligence" have the meanings given in AS 09.55.560.

* Sec. 3. AS 09.17.010 is amended by adding a new subsection to read:

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

* Sec. 4. AS 09.17.040 is amended by adding a new subsection to read:

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

* Sec. 5. AS 09.17.080 is amended by adding a new subsection to read:

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

* Sec. 6. AS 09.55 is amended by adding new sections to read:

Sec. 09.55.538. NONECONOMIC DAMAGES. (a) In an action to recover damages against a health care provider for personal injury or death resulting from professional negligence, all damage claims for noneconomic losses shall be limited to

compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage.

(b) The amount of damages awarded by a court or a jury under (a) of this section for all claims, including a loss of consortium claim, arising out of a single injury or death may not exceed $500,000.

(c) Multiple injuries sustained as a result of a single incident shall be treated as a single injury for purposes of this section.

Sec. 09.55.539. PUNITIVE DAMAGES. (a) Notwithstanding AS 09.17.020, punitive damages may not be awarded in an action against a health care provider for personal injury or death resulting from professional negligence, unless supported by clear and convincing evidence of malice or conscious acts showing deliberate disregard of another person by the person from whom the punitive damages are sought.

(b) The amount of punitive damages awarded by a court or jury under (a) of this section may not exceed three times the amount of compensatory damages awarded or $500,000, whichever amount is greater.

* Sec. 7. AS 09.55 is amended by adding new sections to read:

Sec. 09.55.541. AWARD OF DAMAGES. (a) In an action against a health care provider where damages for personal injury or death resulting from professional negligence are awarded by the court or jury,

(1) the verdict shall be itemized between economic loss and noneconomic loss, if any, as follows:

(A) past economic loss;

(B) past noneconomic loss;

(C) future economic loss;

(D) future noneconomic loss;

(E) punitive damages; and

(2) the amount of economic damages awarded for past or future gross earnings shall be reduced by the amount of federal and state income tax that would be paid on the earnings under tax rates in effect on the date of the injury or death.

(b) In an action to recover damages against a health care provider resulting from professional negligence, the court shall, at the request of a party, enter judgment

ordering that amounts awarded a judgment creditor for future damages that exceed $100,000 be paid to the maximum extent feasible by periodic p yments rather than by a lump-sum payment. If a portion of the judgment awarded is owed to an attorney under a contingent fee agreement, that portion of the judgment shall be reduced to present value and paid in a lump sum.

(c) Except as provided in this subsection, if a judgment entered against a health care provider for professional negligence is paid by periodic payments, the court shall 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 the state or an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

(d) A judgment entered against a health care provider ordering payment of future damages for personal injury or death resulting from professional negligence by periodic payment shall specify the recipient, the dollar amount of the payments, including any increases in future payments for anticipated inflation, 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.

Sec. 09.55.542. INTEREST ON MALPRACTICE JUDGMENTS. In an action against a health care provider based on professional negligence, prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or for punitive damages.

Sec. 09.55.543. APPORTIONMENT OF DAMAGES. (a) In an action based on professional negligence against a health care provider involving the fault of more than one person, regardless of whether the person is or could have been named as a

party to the action, the court shall enter judgment against each person liable on the basis of several liability in accordance with that person's percentage of fault.

(b) An assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in this or another action and may not be used as evidence of civil liability in another action.

* Sec. 8. AS 09.55.548 is repealed and reenacted to read:

Sec. 09.55.548. COLLATERAL BENEFITS. (a) Except when the collateral source is a federally funded program that by law must seek subrogation and except for death benefits paid under life insurance, a claimant in an action against a health care provider for personal injury or death resulting from professional negligence may only recover damages that exceed amounts received by the claimant, or that with reasonable probability will be received in the future by the claimant, as compensation for the injuries from collateral sources, whether private, group, or governmental, and whether contributory or noncontributory.

(b) In an action against a health care provider for personal injury or death resulting from professional negligence, a person defending a claim may introduce into evidence an amount paid or payable as a benefit to the claimant as a result of the personal injury or death under 42 U.S.C. 301 - 1397 (Social Security Act); a state or federal disability or workers' compensation act; health, sickness, or income-disability insurance; insurance that provides health benefits or income-disability coverage; and a contract or agreement of a group, organization, partnership, or corporation, or other collateral source, to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services or lost wages. If a person defending a claim elects to introduce evidence described in this subsection, the claimant may introduce evidence of the amount that the claimant has paid or contributed to secure the claimant's right to an insurance or contractual benefit introduced by the person defending the claim as evidence.

(c) Unless evidence of a collateral source has already been introduced under (b) of this section, evidence of a collateral source, other than a federal program that

by law must seek subrogation and a death benefit paid under life insurance, is only 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 the collateral benefit by adding back a reasonable estimate of their probable value, or by designating and holding for possible periodic payment under AS 09.55.541 that amount of the award that would otherwise have been deducted, to determine if the impairment of the claimant's rights actually takes place in the future.

(d) A person who provides a collateral benefit admissible under (a) of this section may not bring an action based on the provision of the benefit and may not be subrogated to the rights of a claimant against a person defending a claim.

* Sec. 9. AS 09.55.560 is amended by adding new paragraphs to read:

(4) "professional negligence" means a negligent act or omission by a health care provider in rendering professional services;

(5) "professional services" means services provided by a health care provider that are within the scope of services for which the health care provider is licensed, and that are not prohibited under the health care provider's license or by a hospital in which the health care provider practices.

* Sec. 10. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES. (a) A hospital is not liable for civil damages as a result of an act or omission by a health care provider who is not an employee or actual agent of the hospital if the hospital provides notice that the health care provider is an independent contractor. The notice required by this subsection must be posted conspicuously in all admitting areas of the hospital, published at least annually in a newspaper of general circulation in the area, and must be in substantially the following form:

Notice of Limited Liability

The following health care providers are independent contractors and are not employees of the hospital:

(List specific health care providers)

The hospital is responsible for exercising reasonable care in granting staff privileges to practice in the hospital, for reviewing those privileges on a regular basis, and for

taking appropriate steps to revoke or restrict privileges in appropriate circumstances. The hospital is not otherwise liable for the acts or omissions of a health care provider who is an independent contractor.

(b) This section does not preclude liability for civil damages that are the proximate result of the hospital's own negligence or intentional misconduct.

(c) In this section,

(1) "health care provider" means a doctor of medicine, a surgeon, psychologist, osteopath, dentist, optometrist, or certified registered nurse anesthetist, who is licensed in this state;

(2) "hospital" has the meaning given in AS 18.20.130 and includes a governmentally owned or operated hospital;

(3) "independent contractor" means a licensed health care provider who is a member of a hospital's medical staff or who has otherwise been granted specified privileges to render health care services directly or indirectly to patients at the hospital, but who is not an employee or actual agent of the hospital in connection with the rendition of the health care services.

* Sec. 11. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.125. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by the Alaska Rules of Civil Procedure or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument of the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed,

it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If it is alleged or appears that a pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, may set the matter for hearing. If the court determines that a pleading, motion, or other paper is signed in violation of this section, the court shall impose upon the person who signed it, a represented party, or both, an appropriate sanction that may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including costs and attorney fees, and monetary sanctions not to exceed $10,000.

* Sec. 12. AS 09.55.542, enacted in sec. 7 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by providing that in an action against a health care provider prejudgment interest may not be awarded for future economic or noneconomic damages.

* Sec. 13. MEDICAL PRACTICE PARAMETER REPORT. (a) The State Medical Board shall request that the Alaska State Medical Association appoint a committee representative of medical specialties for the purpose of determining the efficacy of practice parameters in the state. The committee required under this subsection shall, at a minimum, report to the State Medical Board on the following:

(1) the perceived costs and time required to develop practice parameters;

(2) an evaluation of the experience with medical practice parameters in other states; and

(3) the extent to which medical practice parameters appear to prevent medical malpractice claims and to eliminate or reduce the practice of defensive medicine undertaken to avoid civil litigation.

(b) By July 1, 1996, the committee appointed under (a) of this section shall complete its evaluation and submit to the State Medical Board a detailed report concluding with a recommendation for or against the development and adoption of medical practice parameters in the state.

(c) Based on the report of the committee appointed under (a) of this section and recommendations submitted under (b) of this section, the State Medical Board shall make a formal recommendation to the governor and the legislature regarding the development and adoption of medical practice parameters in the state by January 1, 1997.

* Sec. 14. SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

* Sec. 15. APPLICABILITY. This Act applies to a cause of action accruing on or after the effective date of this Act.

* Sec. 16. This Act takes effect July 1, 1994.

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

☐ 1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
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FAX: (907) 451-2846

☐ P.O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
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■ Juneau-Annex
Phone: (907) 465-3603
Fax: (907) 465-2539

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 8, 1994

The Honorable Brian Porter
Alaska House of Representatives
State Capitol, Room 516
Juneau, AK 99801-1182

Re: HB 292, tort reform

Dear Representative Porter:

You have asked for our legal opinion on HB 292, otherwise known as the tort reform bill. We have spent considerable time analyzing the legal and constitutional issues raised by the proposed legislation. Our comments below address the most recent version of the bill, CSHB 292 (L&C).

We understand that the House Judiciary Committee, which you chair, and the House Labor and Commerce Committee have invited and received input on this bill from many sources. We appreciate your efforts to consider a variety of viewpoints, as this is a complicated piece of legislation that will have significant impacts. Please do not hesitate to contact us if we can provide further assistance with this bill.

SECTION 3: STATUTE OF REPOSE

Section 3 proposes to enact a "statute of repose" in a new AS 09.10.052. The Alaska Supreme Court has observed:

> A statute of repose differs from a statute of limitation in that the former may bar a cause of action before it accrues, because the statute begins to run from a specific date unrelated to the date of injury. A cause of action thus precluded is *damnum absque injuria*, a loss without a remedy. In contrast, a statute of limitation begins to run when the plaintiff's cause of action accrues or is

> discovered. It operates to prevent a plaintiff from sleeping on his or her rights.

Turner Construction Company, Inc. v. Scales, 752 P.2d 467, 469 n. 2 (Alaska 1988).

The statute of repose in this bill would bar personal injury, death, or property damage claims brought more than six years after the earlier of one of three events. In the product liability context, the six years would run from the date a newly manufactured product was first used for its intended purpose. Proposed AS 09.10.052(a)(1). Where construction is alleged to have caused injury, death, or property damage, the statute is triggered by the date the construction is substantially completed, which is defined as when it can be occupied or used in the manner for which it is intended. Proposed AS 09.10.052(a)(2) and (d). Finally, for all other tort cases, the six years would run from the last act alleged to have caused the personal injury, death, or property damage. Proposed AS 09.10.052(a)(3).

The statute does not apply to a tort that was caused intentionally or resulted from gross negligence, fraud, fraudulent misrepresentation, or breach of an express warranty or guarantee, or if there is intentional concealment of facts that would give notice of a potential claim. Proposed AS 09.10.052(b)(1) and (2). Additionally, the six year period would be tolled during any time that a foreign body without therapeutic or diagnostic purpose or effect remains undiscovered in the body of an injured person, where the action is based on the presence of that foreign body. Proposed AS 09.10.052(c). If another provision of law imposes a shorter period of time for filing suit, the statute of repose will not apply. Proposed AS 09.10.052(b)(3).

The statute of repose would put an outer limit on when claims may be brought, regardless of when the cause of action accrues. For example, in the context of a products liability or defective building case, an action for an injury that occurs more than six years after the product is first used or the building is substantially completed would be barred, regardless of how soon after the injury the claimant brought suit. If the injury occurred within the six-year window, the claimant would have to sue within two years under the tort statute of limitations, or before the six-year deadline, whichever is sooner.

For other types of cases, the implications of the statute of repose are more subtle. The two-year statute of limitations runs from the "accrual" of the cause of action. See AS 09.10.070 and proposed 09.10.075 in section 6 of the bill. In many cases, the cause of action will accrue on the date of injury or the "last

act alleged to have caused the personal injury, death, or property damage," so the clock will start to run for purposes of the statute of limitations and the statute of repose at the same time. In those cases, the two-year statute of limitations will govern. See proposed AS 09.10.052(b)(3). However, there are circumstances in which a cause of action may not accrue when the "last act" occurs. Under Alaska law, a cause of action does not accrue until a person discovers or reasonably should have discovered the existence of all elements of their claim. Cameron v. State, 822 P.2d 1362, 1366 (Alaska 1991). Until a claimant reasonably discovers that she has a claim, her cause of action does not accrue and the statute of limitations does not begin to run. The statute of repose will have the effect of cutting off those claims that have not accrued (reasonably been discovered) within six years of the last act alleged to have caused damage, and may shorten the usual two-year time frame for filing suit for those who discover their claims within the six-year window.

Constitutional Problems.

For a number of reasons discussed below, we believe that the Alaska Supreme Court would probably find the proposed statute of repose invalid under several alternative provisions of the Alaska Constitution, including art. 1, § 1 (equal protection); art. 1, § 7 (due process); art. 1, § 15 (obligation of contracts); and art. 1, § 16 (right to jury trial). Proposed AS 09.10.052 may also be subject to invalidation, at least in part, because of conflicts with federal law pertaining to warranties.

While courts in some states have upheld the constitutionality of statutes of repose, courts in other states have found them unconstitutional.[1] See, generally, 25 A.L.R. 4th 641, *"Validity and Construction of Statute Terminating Right of Action for Product-Caused Injury at Fixed Period After Manufacture, Sale, or Delivery."*[2]

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[1] The Alaska Supreme Court has stricken a six-year statute of repose that was not as broad as the one proposed in this bill, on constitutional grounds. Turner Construction Co., Inc. v. Scales, 752 P.2d 467, 469 n. 2 (Alaska 1988). Because of differences in this bill and in the tort liability picture today, we undertake an independent analysis of the statute of repose proposed in this bill.

[2] Aside from what the courts have done, apparently some legislatures have had second thoughts after adopting laws of this kind. The Florida legislature completely repealed its statute of

(continued...)

Equal Protection.

Cases from other jurisdictions are not particularly helpful in gauging how the Alaska Supreme Court would rule on the constitutionality of this section. The Alaska court applies a different standard to determine whether a law is constitutional under the equal protection clause of the Alaska Constitution than other courts use to analyze their corresponding equal protection clauses. See Wise, *Northern Lights -- Equal Protection Analysis in Alaska*, 3 Alaska Law Review 1 (1986). Since the Alaska Supreme Court overturned an earlier statute of repose (AS 09.10.055) on equal protection grounds under art. 1, § 1 of the Alaska Constitution, the primary analysis of the validity of Section 3 should logically center on the equal protection clause.

The first question the court considers in an equal protection case is whether the constitutional claimant asserts a fundamental constitutional right or the statute uses a suspect classification. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978). If the answer to either question is "yes," then the statute is invalid under the Alaska Constitution absent a compelling state interest. Id.

In Turner Construction Company, Inc. v. Scales, 752 P.2d 467 (Alaska 1988), the court held that the subject statute of repose classified defendants based on their occupation or the nature of the work they perform, while it classified plaintiffs based on the time their injury occurred. The court held that neither classification was a "suspect class" that would trigger the "compelling state interest" standard. Id. at 470 - 71. The court nevertheless found that the right to redress wrongs through the judicial process is "significant." The court therefore analyzed the constitutional claims under the "fair and substantial relationship test" of the Alaska Constitution. Id. at 471.

The court next examined the statutory purpose to determine whether it was a legitimate exercise of the state's police power. The court concluded that encouraging construction and avoiding stale claims by shielding certain defendants from potential future liability were legitimate governmental purposes. Id. The means used by the statute were reviewed to determine

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[2] (...continued)
repose after only a few years. See FSA 95.031(2). The Kansas legislature radically amended its statute in 1991 to revive cases based on disease caused by toxic products, and to allow suits in cases where the plaintiff could prove that the injury occurred during the useful life of the product. See KSA 60-3303.

whether they substantially furthered the purpose articulated by the legislature. In doing so, the Turner decision emphasized, the court did not and will not hypothesize facts which would sustain otherwise questionable legislation. Id. (citing Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976)).

As the final step in the analysis, the state's interest in the means employed by the enactment must be balanced against the nature of the constitutional right involved. State v. Erickson, 574 P.2d at 12.

The court has not wavered in its determination to decide for itself whether an enactment of the legislature actually accomplishes the legislature's stated purpose. In other words, the court will not simply accept the legislature's pronouncement that a given set of circumstances exists or that the facts giving rise to a social problem being addressed by a bill are as the legislature claims them to be. These are called "legislative facts" and the court will delve into them in depth to make up its own mind on the validity of the enactment.

In State v. Erickson, the court said:

> Legislative facts come into play when the court is faced with the task of deciding the constitutionality of a statute, statutory interpretation or the extension or restriction of a common law rule upon grounds of policy. These policy decisions, as in the case at hand, often hinge on social, political, economic, or scientific facts, most of which no longer fall within the classification of irrefutable. Cases involving such decisions cannot be decided adequately without some view of the court of the policy considerations and background upon which the validity of a particular statute or rule is grounded.

Id. at 5.

In that regard, the court has required a showing of "hard facts" to justify the purpose and objective of a regulation. The court has refused to accept the unsupported word of a public official to uphold a regulation. Breeze v. Smith, 501 P.2d 159 (Alaska 1972).

In other words, before an Alaskan court will uphold the proposed statute of repose based on the findings and purpose in Section 1, it will conduct an evidentiary hearing to determine whether the legislature's findings are factually accurate. The

findings and purpose statement in support of the proposed statute of repose is as follows:

> ° the level of malpractice insurance premiums discourage various professionals from initiating or continuing their practice or offering needed services to the public;
>
> ° society as a whole cannot afford the price of lawsuits years after construction, manufacture, delivery of services, and other actions;
>
> ° the widespread use of "claims made" insurance policies makes it impossible to adequately and economically insure against actions for an unlimited period of time;
>
> ° it is extremely difficult to defend against a claim that has become stale after information and witnesses have disappeared;
>
> ° society on the whole is better served with a statute of repose even though a few limited injuries may go without compensation;
>
> ° the purpose of the Act is to create a more equitable distribution of the cost and risk of injury;
>
> ° the purpose of the Act is to reduce costs associated with the civil justice system while insuring that adequate and appropriate compensation for persons injured through the fault of others is available.

We predict that the supreme court would, as it did in Turner Construction, find that these legislative purposes address valid police power objectives. We doubt, however, that the court would go the next step and uphold proposed AS 09.10.052, because it is conceivable that the court would not find that the means chosen by the legislature actually, as a practical matter, further those goals. As to the last step in the analysis, we do not believe that the court would determine that the state interest in the chosen means outweighs the significant interest that Alaskan citizens have in obtaining compensation for physical injuries, property damage, and death brought about by defective products and poorly constructed buildings. Further, we believe that the proposed statute of repose establishes distinctions between classes of

people in a way that is not justifiable under the equal protection clause.

The Goal of Reducing Insurance Premiums.

The first relevant finding of fact is in Section 1(a)(2) where the legislature states its determination that the cost of malpractice insurance premiums discourages physicians, architects, engineers, attorneys, and other professionals from initiating or continuing their practice or offering needed services to the public. In a court hearing, those attacking the constitutionality of the statute of repose would likely attack this finding on two levels: (1) that there is no shortage of professionals in Alaska caused by high malpractice premiums; and (2) that implementation of the statute of repose would not actually lower malpractice insurance premiums in Alaska.

Whatever the court finds on whether malpractice insurance premiums are actually preventing professionals from providing or offering needed services to the public, it is questionable whether the court would find that the statute of repose would actually reduce the level of malpractice insurance premiums in Alaska. There are at least two reasons for being skeptical on this point: first, studies have shown that insurance premiums tend to be governed by factors such as the insurance companies' return on their investments and other money management practices. This explains why, for example, automobile insurance rates (which are unrelated to the perceived increase in product liability or malpractice litigation) have increased at approximately the same rate as malpractice insurance rates during the last fifteen or twenty years despite the perceived "explosion" in products liability and professional malpractice liability. States that have adopted statutes of repose or other tort reform measures have not seen corresponding drops in malpractice insurance rates. See VanKirk, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, Duke L.J. 1689, 1712 - 13 (1989).

Second, it is questionable what effect an Alaskan statute of repose would have on Alaskan insurance premiums that are set on a national basis. Alaska is a minuscule part of the national insurance market. Only one-fifth of one percent of all United States citizens lives in Alaska. The changes to the tort system that a statute of repose would bring about would eliminate some tort claims, but certainly not all of them. Mathematically, therefore, any impact on the national insurance market could be a fraction of an already infinitesimal percentage.

Unless those parties seeking to uphold the validity of proposed AS 09.10.052 are able to introduce concrete evidence that it would actually lower Alaskan insurance rates to a degree that actually results in more doctors or architects practicing in Alaska, the court will not be likely to uphold the law. Cutting off the citizens' existing remedy for injuries caused by products or structures over six years old is a radical way to try to increase the number of professional practitioners in the state. The literature on the subject suggests that this particular means will not serve the end sought by the legislation. If the literature is correct, we predict that the court will not uphold the statute of repose because it does not accomplish what it sets out to accomplish.

The next relevant finding is found in Section 1(a)(3) of the bill. This section essentially contains three findings: that society as a whole cannot afford the price of lawsuits years after construction, manufacture, and delivery of services; that the widespread use of "claims made" insurance policies makes it impossible to adequately and economically insure against actions for an unlimited period of time; and that it is extremely difficult to defend against a claim that has become stale after information and witnesses have disappeared. Again, each of these findings must be evaluated to see first, whether they are true; and second, whether proposed AS 09.10.052 would, as a practical matter, solve the problems.

Societal Considerations.

On the finding that "society as a whole cannot afford the price of lawsuits years after construction, manufacture and delivery of services," the court would be compelled to weigh the costs to society of the current tort system against the costs to society if the statute of repose were implemented. A number of considerations are present. First, the court would necessarily inquire as to whether the statute would actually reduce the "price of lawsuits" which is, to the professionals and manufacturers involved, the "price of insurance." As discussed above, it is questionable whether proposed AS 09.10.052 would reduce the price of insurance.

Second, there are a number of costs that society must bear if the statute of repose is implemented. These costs must be balanced against the benefit to society if the court were to find that the statute actually reduces the price of lawsuits. The first cost to society is that, instead of the wrongdoer paying for injuries inflicted by the wrongdoer's negligence, many injured people, if denied the opportunity to obtain compensation for injuries they suffer through no fault of their own, could wind up

on Medicaid and welfare for the rest of their lives. Instead of being supported by the wrongdoer, who can afford to spread the risk by purchasing insurance and passing those insurance costs along to customers as a price of doing business, the injured parties will, if they cannot work, be supported by Alaskan taxpayers. Since a significant number of the product manufacturers and insurers who would benefit from the statute of repose are located outside of Alaska, it is difficult see how the Alaska Supreme Court would perceive this shift of risk to the Alaskan taxpayers to be a benefit to Alaskan society.

It is unclear whether proposed AS 09.10.052 is intended to apply to actions brought by the state or its political subdivisions. Actions brought in the name of the state or a municipality have a special six-year statute of limitations. See AS 09.10.120. In Alascom, Inc. v. North Slope Borough, 659 P.2d 1175 (Alaska 1983), the Alaska Supreme Court held that this six-year statute applies to actions brought by a state or political subdivision rather than shorter periods provided by another statute. Under this reasoning, proposed AS 09.10.052 may not limit actions by the state or political subdivisions in which a longer statute of limitations arguably applies; however, if a court concluded otherwise, the result could have serious consequences for state and local governments.

The State of Alaska itself is the owner of literally billions of dollars worth of public buildings and facilities. If proposed AS 09.10.052 applies equally to public entities as owners, it would cut off the state's, municipalities', and school districts' ability to recover their losses in the case of negligently designed buildings and facilities with latent defects. For example, the Anchorage School District was recently able to recover millions of dollars in connection with asbestos removal. Under the proposed statute of repose, the school district's ability to collect on its losses would have been cut off six years after building completion, and the taxpayers would have picked up the tab.

In another instance, a rural school roof recently collapsed under a snow load due to what was determined to be a latent design defect. Again, if the costs cannot be recovered from the negligent designer, who is required to have insurance under the design contract, the taxpayers may wind up carrying the load.

This scenario can actually put a double burden on a public agency constructing a building. Public construction contracts uniformly require the contractor to carry insurance, including E&O coverage. That means that the public agency pays for the risk of loss due to design defect when the agency pays for the

construction of the facility. Since the school roof designer (in the above example) included the cost of insurance in its contract bid, the designer did not carry the risk of loss under the present risk-sharing arrangement -- the school district did, because it indirectly paid for the designer's insurance. But if a statute of repose shifts the risk to the taxpayers after the sixth year, the public, in effect, may wind up bearing the risk twice. For these and the other reasons mentioned, it is unlikely that the court would find that the statute serves the legislative purpose of providing a benefit to Alaskan society.

Furthermore, it is unclear whether this proposed statute of repose is intended to apply to statutorily created causes of action[3]; if so, it would have detrimental effects. Specifically, application of proposed AS 09.10.052 to hazardous waste cases would be particularly devastating since the results of such environmental pollution are often not known or felt until decades after the disposal of the waste. For example, in the famous Love Canal case, waste disposed up until the 1930s percolated out of its burial site in the 1970s, resulting in contamination of drinking water and residential homes. In Alaska, abandoned wastes from oil field operations in the Kenai Peninsula during the 1960s have caused contamination of private residences and drinking water wells that was not discovered until the 1980s. Under such a statute of repose, injured property owners would be unable to recover for decreased property values or cleanup costs if the initial disposal of the waste occurred more than six years before the discovery of the waste.

Application of proposed AS 09.10.052 to Alaska's hazardous substance strict liability statute (AS 46.03.822) would impose tremendous costs on property owners as well as the state. Current property owners would be barred from recovering state-mandated cleanup costs from prior owners and operators who may have disposed of hazardous substances on the property over six years before the substances are discovered. Such a rule would also result in the state bearing a greater share of cleanup costs when the strict six-year rule prevents recovery of such costs from the culpable prior polluters. At a minimum, proposed AS 09.10.052 and AS 09.10.070 (in section 5 of the bill) should be clarified to ensure that the statute of repose would not apply to these statutory causes of action.

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[3] See above discussion concerning the Alascom case. It is also unclear whether the proviso being added to AS 09.10.070 in section 5 of the bill, "Except as otherwise provided by law," is intended to make statutory actions for personal injury, death, or property damage subject to the statute of repose in AS 09.10.052.

Public Policy.

Besides imposing the risk of loss on the person who profits from the sale of a product and who is in the best position to spread the risk around, it should be acknowledged that strict products liability encourages the safe design of products. One need look no further than the case of the Ford Pinto with the exploding gasoline tank to see that some companies are willing to sell defective products if it is in their economic interest to do so. Abolition of strict products liability after six years (or any other period of time) would not deter the mind-set that led to the design and sale of the Pinto. Product designers are sophisticated, and there is significant pressure on them to reduce costs in order to boost profits for the corporation. With a six year "home free" provision written into the law, some designers may succumb to the pressure to design products capable of causing great physical harm in a manner that makes them operate safely for only the minimum six year period, and then fail because inferior methods or materials were used in order to save money.

In the case of products like the Chevrolet pickup trucks with the "saddle bag" gasoline tanks, a major debate is currently underway concerning whether General Motors should issue a recall to correct the perceived safety defect. In determining the overall benefit to society that a statute of repose might bring about, the court would likely consider whether the statute would promote the safety and well being of Alaskan citizens. One probable effect of AS 09.10.052 would be to further discourage companies such as General Motors from recalling dangerously designed products, such as the pickup trucks with "saddle bag" gasoline tanks. This is because such companies would consider themselves "home free" after six years of the product being on the market. They would have no incentive, therefore, to recall the product in Alaska in order to make it safe because no matter how dangerous the trucks are, GM would have no exposure under Alaskan law for further liability after the trucks were more than six years old. The court must weigh these considerations in determining whether society as a whole would benefit from the statute of repose, as the legislative findings contend.

We doubt that the court would find Alaskan society as a whole would benefit from the elimination of this public safety feature of product liability law. Again, if Alaskans who suffer serious physical injury are not able to recover from the negligent product manufacturers who reside outside of Alaska, and if they cannot work because of their injuries, they could well wind up being supported by Alaskan taxpayers.

Availability of Insurance.

Section 1(a)(3) asserts that the widespread use of "claims made" insurance policies makes it impossible to adequately and economically insure against actions for an unlimited period of time. Again, the main question for the court is whether the statute of repose would make "long tail" insurance policies more available than they are. As discussed above, to the extent these decisions are made by the insurance industry on the national level and Alaska is an infinitesimal segment of the insurance market, it is highly unlikely that the proposed statute of repose would serve the stated purpose.[4]

Fairness of Defending Older Claims.

Section 1(a)(3) asserts that it is difficult to defend against a claim that has become stale after information and witnesses have disappeared. Several commentators have noted that this is really not the case. Manufacturers and designers document their work. Practice shows that they retain those documents. There is no evidence that products liability cases based on older products have a higher rate of favorable verdicts for plaintiffs or unfavorable verdicts for defendants. See VanKirk, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, Duke L.J. '689, 1712 - 13 (1989).

The Remaining Findings and Purposes.

The remaining findings of fact and stated purposes of the bill that are relevant to the statute of repose are essentially subsumed in the above discussion. Section 1(a)(4) declares that, on the whole, society is better served with a statute of repose

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[4] It is interesting that this tort reform bill, which would provide direct financial benefits to the insurance industry, should be based upon this particular finding. Twenty states, including the State of Alaska, have sued a number of major insurers and re-insurers for conspiring to make "long tail" coverage unavailable in the mid-1980s. The case is pending in the U.S. District Court in the Northern District of California. See In re Insurance Anti-trust Litigation, C-88-1688 (MDL-767). The states recently won a significant victory in the United States Supreme Court, and the case is back in the District Court for trial. It is ironic that the insurance industry would financially benefit from legislation adopted on the ground that "long tail" coverage is not available, when significant evidence exists that many insurance and re-insurance companies illegally conspired to eliminate it.

even though in a few limited instances injuries may go without compensation. Section 1(b)(1) states that the purpose is to enact further reforms that create a more equitable distribution of the cost and risk of injury. Finally, Section 1(b)(2) states that a purpose of the Act is to reduce costs associated with the civil justice system while ensuring that adequate and appropriate compensation for persons injured through the fault of others is available. For the reasons set forth in the discussion of Sections 1(a)(2), (3), and (4) above, it is doubtful that the court would find that proposed AS 09.10.052 would, as a practical matter, further these objectives. Again, we do not suggest that the court would not find these objectives to be laudable and legitimate legislative purposes, but we do not believe that the court would find that the means -- the proposed statute of repose -- materially advances the cause.

The Nature of the Rights Abridged and Discriminatory Effects.

As the last step in Alaskan equal protection analysis, the court balances the state's interest in the particular enactment against the nature of the rights abridged. This has been described as a "sliding scale" under which the state bears a correspondingly heavier burden to prove that its legislation serves the state's interests as the nature of the interest becomes more important. Wise, *Northern Lights -- Equal Protection Analysis in Alaska*, 3 Alaska Law Review 1 (1986).

In Turner Construction, the court noted that "the interest in redressing wrongs through the judicial process is a significant one." 752 P.2d at 471. And in Hanebuth v. Bell Helicopter International, 694 P.2d 143, 147 (Alaska 1984), the court said, "It is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has any reasonable opportunity to do so." Since the court has identified the interests of injured plaintiffs to be "significant rights," and the court has said that it is "profoundly unfair" to deprive a litigant of the right to bring suit, we presume that the court will place a fairly heavy burden on the state to justify the statute of repose.

This is especially true in view of the fact that the statute would, in practice, create distinctions between groups of people without any apparent rational basis for doing so. The distinctions between groups can happen in subtle ways, but if the bill has a discriminatory effect, the court will scrutinize it closely.

The proposed statute of repose might perversely deny compensation to certain people for their good behavior, while allowing others who are less responsible for their own well being

to sue and recover damages. For example, evidence has been developed that cigarette smoking exacerbates and speeds up the disease process caused by asbestos. Suppose two workers were exposed to the same asbestos-related project at the same time; one smoked cigarettes and the other did not. Assume the cigarette smoker came down with cancer in time to file suit against the asbestos manufacturer under the statute of repose. Because the non-smoker had healthier lungs, and was therefore more resistant to the effects of the asbestos, the non-smoker did not come down with cancer for several more years, at which time he found that the statute of repose barred his lawsuit. We doubt that the court would see this outcome as either fair or rational. The same analysis might apply to other dangerous products such as the cancer-causing drug DES; sterility-causing intra-uterine devices; PCBs; dioxins; and silicon gel breast implants. Alaskans with strong immune systems might be denied compensation under the statute of repose while those with weaker immune systems might succumb to the disease process in time to sue.

The statute might also, in practice, draw impermissible distinctions between Alaskans based on wealth. Wealthy people probably own a higher percentage of new cars and other products, while less wealthy people tend to own older-model used cars and other used products. In the case of the Ford Pinto, or the Chevrolet pickup truck with "saddle bag" gas tanks, the defect that injures people is the same on the day that the vehicle leaves the factory as it is seven or eight years later. Of all the people seriously burned or killed in Ford Pintos or Chevrolet pickup trucks, those injured within the first few years of the product's life, before the statute of repose deadline, are likely to be the relatively more wealthy. Those likely to be injured after the product has been in use for several years, and after the deadline has passed are likely to be relatively less wealthy. The statute of repose would allow a relatively greater proportion of claims to be made by those of relatively greater wealth while cutting off the rights of those of lesser wealth, even though the risk of injury from the defective gasoline tanks is exactly the same regardless of the age of the vehicle. While "poverty" has not generally been held to be a "suspect classification" which would trigger the "strict scrutiny test," the courts are not inclined to allow distinctions based on financial ability to go unnoticed when assessing the constitutionality of a statute under the equal protection clause. See Tribe, *American Constitutional Law (2nd)*, § 16-36 through § 16-37, citing Edwards v. California, 314 U.S. 160 (1941). Because this bill draws a potential distinction between classes of people based on wealth, we believe the court would place an increased burden on the state to prove that the overall benefits outweigh the burdens.

Arbitrariness.

Aside from the potential equal protection problem raised by the financial condition of the plaintiff, proposed AS 09.10.052 might be found to be excessively arbitrary in the way that it establishes the six-year statute of repose. An arbitrary classification can violate both the due process and the equal protection clauses of the constitution. In Lankford v. Sullivan, Long & Hagerty, 416 S.2d 996 (Alabama 1982), a ten-year statute of repose was struck down as arbitrary and therefore unconstitutional.

The proposed statute of repose in this bill would certainly have arbitrary consequences in some cases. Take, for example, the case of two different individuals who purchase 1987 Chevrolet pickup trucks. Both trucks are manufactured on the same day in June 1987. One is bought and first used in June 1987 by Buyer #1, and the other is bought and first used by Buyer #2 in August 1987. Both trucks are essentially identical, and both have the same defectively designed gasoline tanks. Both trucks are involved in broadside collisions on July 4, 1993. Both Buyers #1 and 2 are burned to death when their trucks leak gasoline and catch fire. Under proposed AS 09.10.052, the estate of Buyer #2 can recover against General Motors, but Buyer #1's estate cannot, even though the cause of their deaths is exactly the same. Since the clock begins to run under proposed AS 09.10.052 on the date of purchase, Buyer #1's family is left with nothing, even though the death may have been the fault of the manufacturer. We doubt that the Alaska Supreme Court would view this as a rational outcome, but that is the effect this statute of repose could have.

Rationality.

For the above reasons, we doubt that the Alaska Supreme Court would be any more inclined to approve proposed AS 09.10.052 than it was to uphold the statute of repose in Turner Construction. In Hanebuth v. Bell Helicopter International, the Alaska Supreme Court quoted with approval language from Eisenmann v. Cantor Brothers, Inc., 567 F. Supp. 1347, 1352 (N.D. Ill. 1983), in which that court said it would be "absurd" to foreclose a cause of action even before it arose. As the courts have noted, "we would have the anomaly of an action being barred before the cause of action even arose! Mr. Bumble ('the law is a ass, a idiot') would have prevailed once again." Hanebuth, 694 P.2d at 147.

Other courts, including the New Hampshire Supreme Court, have referred to *Alice in Wonderland* when describing laws like this:

> [E]xcept in Topsy Turvy Land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially the same reasons, it has always heretofore been accepted, as a sort of logical 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.* before a judicial remedy is available to a plaintiff.

Heath v. Sears, Roebuck and Company, 464 A.2d 288, 295 (New Hampshire 1983).

Fiscal Note.

The fiscal impact of proposed AS 09.10.052 might be substantial in some unanticipated ways. As noted above, Alaska has spent vast amounts of public money, in the billions of dollars, on public works including highways, airports, buildings, and other facilities. Alaska municipalities and school districts likewise have enormous amounts at stake.

The statute of repose could jeopardize the public's right to recoup money when a structure or facility fails, or a person is otherwise injured, because of a latent defect after six years. But people who are injured by these latent defects (whether in buildings, on the public highways, or at other facilities) will nevertheless continue to sue public entities, because they own the property. The public entity will not, however, have any right of indemnity against the negligent builder or designer in such cases where six years have elapsed, unless an exception to the statute of repose applies.[5]

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[5] Proposed AS 09.10.052(b) creates exceptions to the general six year time bar; the statute of repose would not apply if the personal injury, death, or property damage were the result of, among other things, breach of an express warranty or guarantee. Proposed AS 09.10.052(b)(1). Sophisticated property owners may be able to avoid the harsh effects of the statute of repose in the future to some extent in their contract negotiations with builders and designers. However, if the statute of repose went into effect July 1, 1994, as provided in Section 39 of the bill, and applied to buildings already completed or under construction, the ability of owners to protect themselves by contracting for an express warranty or guarantee may be nil.

The statute of repose will also fiscally impact the state to the extent that state taxpayers will become the sole support for some percentage of Alaskans who are too seriously injured to earn a living or care for themselves, but who are not allowed to recover from the party that injured them.

Consumer Protection and Warranties.

Proposed AS 09.10.052 would also adversely impact the rights of Alaskan consumers with respect to losses caused by consumer products. This section might also serve to limit the rights of Alaskan consumers and businesses under warranties, although to the extent that it limits consumer warranties, it is probably superseded by (and therefore invalid under) the Magnuson-Moss Act, 15 U.S.C. §§ 2301-2312, and art. 1, § 15 of the Alaska Constitution which forbids legislation impairing the obligation of contracts. In any event, the statute of repose can have negative consequences for Alaskan consumers and businesses who suffer physical or financial injury resulting from poorly designed products or buildings more than six years after the products were first used or the buildings were substantially completed.

Conclusion.

For the above reasons, we do not believe that the statute of repose proposed in Section 3 of this bill would be enforceable in Alaska.

SECTION 4: LIMITATION ON ACTIONS AGAINST HEALTH CARE PROVIDERS

Section 4 would create a new AS 09.10.065 regarding the statute of limitations for malpractice actions against health care providers. The statute would require all such lawsuits involving children who are injured when they are less than six years old to be filed before the child's eighth birthday. This would eliminate the tolling of the statute of limitations during the child's minority that currently is authorized by AS 09.10.040(a). The time limit of proposed AS 09.10.065(a) would not apply where fraud causes the failure to timely bring an action on behalf of an injured minor, or facts that would give notice of a potential action have been intentionally concealed. Proposed AS 09.10.065(c). Additionally, this statute of limitations would not apply if proposed AS 09.10.075, discussed below, would provide

a longer period of time for filing suit. Proposed AS 09.10.065(b).[6]

The legislative statement of findings and purpose discussed above with respect to Section 3 also apply to Section 4 of the bill. As with the proposed statute of repose, we believe the court would not be inclined to uphold the new statute of limitations in proposed AS 09.10.065 without a showing that the provisions of that statute of limitations would in reality, and not just in theory, reduce the level of malpractice insurance premiums in Alaska or reduce the price of lawsuits. As was stated above, the court is likely to view the rights of individual Alaskans as substantial. A party attempting to use this statute as a defense would therefore bear a heavy burden to show that the provisions of proposed AS 09.10.065 that limit lawsuits against health care providers actually make serious in-roads against the cost of malpractice insurance.

The impact of a new statute of limitations on Alaska malpractice insurance premiums is questionable.[7] We believe that the court would also consider the actual ability of physicians or other health care providers to purchase insurance and to pass along the cost of insurance to those paying for the health care. All of these considerations would necessarily be included in any determination by the court of whether the statute of limitations proposed in AS 09.10.065 creates a more "equitable distribution of the cost and risk of injury" as claimed in Section 1(b)(1) of the bill.

While the constitutionality of the statute of limitations in proposed AS 09.10.065 may be a closer question than the statute of repose in proposed AS 09.10.052 (because there may be fewer irrational distinctions between potential claimants), we are

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[6] It is unclear how this statute and proposed AS 09.10.052, the statute of repose, would mesh. The statute of repose declares an outside limit of six years in which to bring tort actions, yet this statute of limitations would allow some injured children as much as eight years in which to file a medical malpractice action. The legislature should clarify how the two statutes are meant to relate.

[7] We note that a significant percentage of Alaskan health care providers procure insurance through a single source, which does business in only two states. It is possible, although we make no prediction, that these Alaskan physicians may experience a rate reduction or smaller rate increase if HB 292 becomes law.

nevertheless not confident that the new statute of limitations would survive constitutional scrutiny.[8]

SECTION 6: LIMITATION ON ACTIONS INVOLVING INJURY TO PERSON OR PROPERTY

Section 6 of the bill creates a new statute of limitations in proposed AS 09.10.075, expressly for tort actions. The statutory time limit for bringing an action for personal injury, wrongful death, or property damage would be two years from the accrual of the action. Proposed AS 09.10.075(a).[9] This standard incorporates the concept of the "discovery rule" that is judicially recognized in Alaska case law. Cameron v. State, 822 P.2d 1362, 1366 (Alaska 1991)(cause of action does not accrue until claimant discovers or reasonably should have discovered existence of elements of cause of action).[10]

This statute of limitations in proposed AS 09.10.075 abrogates the tolling provisions of AS 09.10.140(a) for minors, but leaves them in place for incompetent persons in personal injury, wrongful death, or property damage cases. Constitutional problems arise when the legislature limits the ability of a person who is not legally able to enter into contracts to use the courts for the protection of rights.

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[8] We also note that the statute of limitations in Section 4 of this bill appears to present some potential conflicts with the Health Care Reform measure proposed by Governor Hickel. The Governor's bills, SB 270 and HB 414, mandate pre-complaint arbitration procedures; if that legislation were enacted, the interplay between mandatory arbitration and the statute of limitations should be clarified.

[9] The current general tort statute of limitations is two years. AS 09.10.070. However, there is a six-year statute of limitations for certain actions involving destruction and taking of property. See AS 09.10.050. Because proposed AS 09.10.075 would cover "property damage" suits, the legislature should clarify how this proposed statute and existing AS 09.10.050 are to be construed.

[10] As mentioned in the discussion of section 3 above, the proposed statute of repose would set an outer limit of six years from the last act alleged to have caused the personal injury, death, or property damage for the discovery of a claim and filing of an action. This would set a six-year ceiling that does not exist under the discovery rule today.

In Bush v. Reid, 516 P.2d 1215 (Alaska 1973), the Alaska Supreme Court struck down a statute that prevented a parolee from suing during the time he was on parole. In that decision, the court noted that only the tolling provisions of AS 09.10.140 prevented former AS 11.05.070 (which disabled prisoners from maintaining suit until discharged from the criminal sentence) from amounting to "the baldest of takings" in violation of the Due Process Clause.

We believe that the rationale of Bush might well be found applicable to minors. This section eliminates the tolling provision in the case of minors who, because of their age, are not legally entitled to enter contracts or bring suit on their own. Elimination of the safeguard to their rights could well be found a taking under the Due Process Clause, or have an impermissible, unequal impact on groups of people in violation of the Equal Protection Clause. We therefore doubt that Section 6 will survive constitutional scrutiny.

SECTION 7: NONECONOMIC DAMAGES CAP

Section 7 proposes to make several changes to AS 09.17.010. That statute currently lists the type of noneconomic damages that may be recovered in personal injury actions, and establishes a noneconomic damages cap of $500,000 for each claim based on a separate incident or injury. The cap does not apply to damages for disfigurement or severe physical impairment, terms that are not defined in the present law.

The bill would expressly make AS 09.17.010 applicable to wrongful death actions, in addition to personal injury claims. Although the Alaska Supreme Court has not had occasion to determine whether wrongful death actions are already implicitly covered by AS 09.17.010, it has reached that conclusion as to a companion section of the tort reform law, AS 09.17.040. See Beck v. Department of Transportation & Public Facilities, 837 P.2d 105, 117 (Alaska 1992).

Additionally, the bill identifies loss of consortium as a recognized type of noneconomic damages claim. The existing damages cap of $500,000 would be the ceiling for all claims arising out of a single injury or death. The current version of the bill eliminates the exception to the cap for disfigurement or severe physical impairment.[11] AS 09.17.010(c). Instead, the only

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[11] We note that the House Labor & Commerce Committee wrote a letter of intent, indicating its desire that the House Judiciary

(continued...)

circumstances in which more than $500,000 in noneconomic losses could be awarded would be where the defendant had committed or attempted to commit a class A or unclassified felony, the plaintiff was a victim of that offense, and the action is based on that offense. Notably, this new provision does not require that the defendant be convicted of the offense. For the sake of future statutory interpretation, the legislature should clarify what burden of proof applies to this exception.

SECTION 8: PUNITIVE DAMAGES STANDARD

AS 09.17.020 presently provides that the burden of proof for punitive damages is clear and convincing evidence. However, the statute does not specify the level or type of evidence necessary to support an award of punitive damages. Section 8 of the bill would require clear and convincing evidence of "malice or conscious acts showing deliberate disregard of another person by the person from whom the punitive damages are sought." Proposed AS 09.17.020.

This standard generally comports with existing Alaska jurisprudence. The Alaska Supreme Court has found that punitive damages are not favored in law and therefore are to be allowed "only with caution and within narrow limits." Alaska Placer Co. v. Lee, 553 P.2d 54, 61 (Alaska 1976). Consequently, the court has limited punitive damages

> to cases where the wrongdoer's conduct could fairly be categorized as "outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another." Malice may be inferred if the acts exhibit "a callous disregard for the rights of others." However, "where there is no evidence that gives rise to an inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice," the trial court need not, and indeed should not, submit the issue of punitive damages to the jury.

State Farm Mutual Automobile Insurance Co. v. Weiford, 831 P.2d 1264, 1266 (Alaska 1992) (citations omitted).

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[11] (...continued)
Committee consider adopting "an amendment that: 1) defines the phrase 'disfigurement or severe physical impairment'; and 2) restores the exclusion or establishes a more 'realistic cap' on these types of injuries, per the commitment of the Chair of the Judiciary Committee." House Journal, p. 2280 (Feb. 7, 1994).

It should be noted that the proposed statutory standard may be higher than the test quoted above, as it appears to eliminate "reckless indifference to the rights of others" as a basis for a punitive damages award. We see no legal difficulties with this section.[12]

SECTION 9: PUNITIVE DAMAGES CAP

Section 9 adds two new subsections to AS 09.17.020 regarding punitive damages. The first would place a cap on punitive damage awards of either $200,000 or three times the amount of compensatory damages awarded. Proposed AS 09.17.020(b). The Alaska Supreme Court has declined on several occasions to judicially adopt a fixed ratio between punitive and compensatory damages, most recently in Cameron v. Beard, ___ P.2d ___, Op. No. 4032 (Alaska, December 3, 1993).

> This court has refused to prescribe a definite ratio between compensatory and punitive damages. Ben Lomond, Inc. v. Campbell, 691 P.2d 1042, 1048 (Alaska 1984). Though comparing punitive and actual damage awards is one way to determine if punitive damages are excessive, other factors, such as the magnitude and flagrancy of the offense, the importance of the policy violated, and the defendant's wealth, are equally important to the determination.

Clary Ins. Agency v. Doyle, 620 P.2d 194, 205 (Alaska 1980). The Alaska Supreme Court's refusal to apply a ratio test in reviewing punitive damage awards raises some doubt as to how the proposed cap would fare in a court challenge.

The second new subsection would make an exception to the proposed punitive damages cap in cases where the defendant committed or attempted to commit a class A or unclassified felony, the plaintiff is a victim of that offense, and the action is based on that offense. Proposed AS 09.17.020(c). This is similar to the proposed exception to the ceiling on noneconomic damages in AS 09.17.010(c). As in proposed AS 09.17.010(c), this subsection does not specify the applicable burden of proof; the legislature should clarify its intent in this regard.

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[12] Because Section 9, discussed below, creates new subsections (b) and (c) to AS 09.17.010, the text of Section 8 should be designated as (a).

SECTION 10: CRIMINAL CONDUCT BARS RECOVERY OF DAMAGES

AS 09.17.030 was enacted in 1986 in response to public outcry. Individuals engaged in felonious[13] conduct could file lawsuits and seek monetary awards as a result of situations that resulted in personal injury or death brought about or affected by their own criminal wrongdoing. The present statute precludes recovery by a person who suffers personal injury or death if three elements are present: (1) the injury or death occurred while the person was engaged in the commission of a felony, (2) the person has been convicted of the felony (either through a guilty plea or a plea of nolo contendere), and (3) the felony substantially contributed to the injury or death. The current law specifically states that this section does not affect a right of action under 42 U.S.C. § 1983.[14]

Section 10 of the bill amends the language of the first two elements of AS 09.17.030. Rather than being limited to situations where the claimant was actually "engaged in the commission of a felony," the statute would be expanded to apply where the claimant was attempting to commit a felony or fleeing from the commission of a felony. Proposed AS 09.17.030. The bill removes the second element that requires that the claimant be convicted of the felonious conduct.

The existing statute was recently examined by our Supreme Court in Sun v. State, 830 P.2d 772 (Alaska 1992). In Sun, a personal injury complaint was filed against the state and state troopers alleging that the troopers used excessive force by

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[13] A felony is defined as a criminal offense for which an individual may be sentenced to a term of imprisonment of more than one year. See AS 12.55.125 and 12.55.135.

[14] Although AS 09.17.030 does not bar claims brought under 42 U.S.C. § 1983, the Alaska Supreme Court in Lord v. Fogcutter Bar, 813 P. 2d 660 (Alaska 1991), dismissed a § 1983 claim brought by a convicted felon on public policy grounds. Lord, a patron in the Fogcutter Bar, alleged that the bar served him alcohol while he was intoxicated, in violation of AS 04.21.020. As a result of his excessive consumption of alcohol, he claims that he subsequently kidnapped, raped, and assaulted a woman with whom he left the bar. Lord based his complaint upon alleged violations of the dram shop statute and his federal civil rights. The court recognized that even though the dram shop statute does give rise to some claims by individuals who are injured while intoxicated, the statute does not provide a convicted felon, such as Lord, with a cause of action for any damage sustained during the commission of the felony.

shooting the plaintiff a number of times while attempting to apprehend him. The plaintiff claimed that AS 09.17.030 violated the due process clause of the Alaska constitution by, in effect, nullifying Alaska's statutes on the use of excessive or deadly force. The court found that because the law "did not change the substantive law of arrest, and because significant sanctions remain for violations of the substantive law of arrest," AS 09.17.030 did not deprive Sun of due process under the Alaska Constitution" Id. at 775. We do not believe that the proposed changes will have any constitutional ramifications.

SECTION 11: DAMAGE AWARDS FOR LOST EARNINGS TO BE REDUCED FOR TAXES

"The general principle underlying the assessment of damages in tort cases is that an injured person is entitled to be replaced as nearly as possible in the position he would have occupied had it not been for the defendant's tort." Beaulieu v. Elliott, 434 P.2d 665, 670-71 (Alaska 1967). AS 09.17.040(a) presently provides the guidelines that a court or jury must follow when damages are awarded for personal injury.

Damages may be awarded to a plaintiff for past and future economic[15] loss as well as for past and future noneconomic[16] loss. AS 09.17.040(a). Punitive damages may also be awarded if the court or jury finds that the conduct that caused the plaintiff's injury was malicious and outrageous. Id. See Section 8 discussion, supra.

The first change proposed by Section 11 broadens the types of cases in which itemization of damages must occur to include cases where there has been a death, in addition to personal injury cases.

Section 11 also proposes to add a new second subsection to AS 09.17.040(a) that requires all awards for past or future gross earnings to be reduced by the amount of federal or state

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[15] Awards for economic damages compensate plaintiffs for past, as well as future, losses and include, but are not limited to, wages that the party would have been able to earn, medical bills, and the impairment of earning capacity.

[16] Noneconomic damage awards are awarded for past and future losses and compensate plaintiffs for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, and other nonpecuniary damage. See AS 09.17.010(a).

taxes that would have been paid, under the tax rates in effect on the date of the injury or death.[17] Proposed AS 09.17.040(a)(2).

The Alaska Supreme Court has considered tax issues related to damage awards. The leading case in this area mandates that an award for past wage loss should include a deduction for income taxes that would have been paid. This is partly based upon the fact that the tax laws applicable to the income plaintiff would have earned in the past are ascertainable. Beaulieu v. Elliott, 434 P.2d at 673. In that respect, the proposed language of paragraph (a)(2) that applies to past wage compensation is merely a codification of existing Alaska law. But the balance of the proposed language in section (a)(2), that applies to awards for future gross earnings, deviates from established Alaska case law. Id.

The Alaska court has repeatedly held that future income taxes are not to be considered when awarding damages for impairment of future earning capacity. Ehredt v. Dehavilland Aircraft Co. of Canada, 705 P.2d 446, 453 (Alaska 1985); City of Kotzebue v. McLean, 702 P.2d 1309, 1317 (Alaska 1985); State v.Harris, 662 P.2d 946, 948 (Alaska 1983); Yukon Equipment Inc. v. Gordon, 660 P.2d 428, 434-35 (Alaska 1983). When considering and reconsidering this issue, the court has reiterated its holding in Beaulieu, stating that "Income tax rates, provisions relating to deductions and exemptions, and other aspects of income tax laws and regulations are so subject to change in the future that...a court cannot predict with sufficient certainty just what amounts of money a plaintiff would be obliged to pay in federal and state income taxes on income that he would have earned in the future had it not been for a defendant's tortious conduct." Yukon, 660 P.2d at 434.

The rationale given for deducting taxes from gross earnings is that the prevailing party's award will more accurately reflect actual after-tax losses and is not "inflated" by the amount that would have been paid out in taxes. Future gross earnings would have been taxed if received in the normal course of the plaintiff's work history if he had not been injured, whereas they are not subject to federal income tax when part of a personal

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[17] The IRS does not tax personal injury awards. 26 U.S.C. § 104(a) provides that ". . . gross income does not include the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." (Emphasis added.)

injury award.[18] On the other hand, reduction of an award for future gross earnings under proposed AS 09.17.040(a)(2) will give defendants a benefit not previously afforded by the courts.

SECTION 12: FUTURE DAMAGES PAID THROUGH PERIODIC PAYMENTS

Historically, when a plaintiff is compensated for future damages, the award is paid in a lump sum to be used as the need arises, even if the expense is one that will not present itself for a number of years. For example, if a victim is severely injured, the damages are often based upon medical and other expenses that will be incurred over a lifetime. A periodic payment scheme is sometimes fashioned to provide for the payment of these damages by some formula so that the funds will become available as they are needed, rather than at the time of the judgment.

Section 12 amends AS 09.17.040(d) in two ways. Presently, subsection (d) allows only the injured party to request the court to order that the amount of any award for future damages be paid by periodic payments, rather than by a lump sum payment. The proposed language first seeks to amend the statute so that any party to the case, including the party against whom a judgment has been rendered, may request a periodic payment schedule. Since the proposed language limits the periodic payment scheme to awards for future damages only, the injured party theoretically would receive the intended compensation in the same manner as it would have been obtained but for the injury or death in question.

Periodic payment provisions vary throughout the United States. The scheme may be mandatory, or discretionary, depending upon the statutory provision that applies. As in Alaska, periodic payment provisions apply only to future damage amounts. In some states, such a payment scheme is often not triggered unless the award reaches a threshold amount. (The amount ranges from $50,000 to $500,000. In most of the states that have a threshold amount, it is in the $100,000 to $250,000 range.)

It has been suggested that an injured party's ability to actually receive the full amount of the award is threatened by this change, as the defendant might refuse to pay the amount owed over

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[18] It should be noted, however, that when awarded, future economic damages are statutorily reduced to present value and the burden is on the plaintiff to invest the award in such a manner so that the award is augmented to beat inflation and compensate for lost future wage increases. AS 09.17.040(b).

the years or might become insolvent.[19] This is a real concern. Although proposed AS 09.17.040(e) attempts to give plaintiffs some protection by compelling the court to require that some form of security be posted in order to ensure that the funds are available as periodic payments become due, this security is not foolproof and successful litigants may be forced to continuously litigate so that they may receive their due if the defendant, or his insurer, becomes uncooperative or insolvent.

Another change proposed by this section addresses attorney's fees in personal injury suits. Personal injury plaintiffs often enter into a contract to compensate their legal counsel on a contingency basis. By so doing, the plaintiff agrees to bear the costs of the litigation and pay the attorney a percentage of the total award received. The contract may provide for immediate payment at the end of a case or for payment over a period of time. The second proposed change to AS 09.17.040(d) adds language that seeks to reduce to present value the portion of the judgment awarded that a plaintiff has contractually agreed to pay his attorney, and have it paid in a lump sum (rather than by periodic payments).

The proposed statutory change will affect parties' unfettered ability to contract as they wish. Central to the evaluation of this provision is that damages are awarded to a plaintiff for his injuries. He may do with those funds what he wishes. If the damage award is reduced for the portion that is to be paid to the attorney, that may impact the contractual agreement between the litigant and his attorney. See, e.g., State v. Doyle, 735 P.2d 733, 742 (Alaska 1987).[20]

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[19] Insolvency that results in bankruptcy may in fact bar a successful litigant's ability to collect the balance of a damage award.

[20] The Alaska Supreme Court possesses exclusive authority to make rules governing practice and procedure in civil and criminal cases. The legislature may only change court made rules by two-thirds vote. Alaska Constitution, Article IV, § 15. The Alaska Supreme Court in Citizens Coalition v. McAlpine, 810 P.2d 162, 166-171 (Alaska 1991), held that an attempt to propose an initiative that would impose a contingent fee ceiling in personal injury cases intrudes upon the court's power to enact rules and was prohibited by § 7 of art. XI of the Alaska Constitution that limits the people's power to enact legislation directly.

SECTION 13: SECURITY FOR PERIODIC PAYMENTS

Subsection (e) of existing AS 09.17.040 grants the court authority to require, if it wishes, that some form of security be posted in order to ensure that the funds are available as periodic payments become due. The proposed change in section 13 changes the nature of this authority from discretionary to mandatory. As a result, a court would now be compelled to order that security be posted to ensure the availability of funds to make payments as they become due.

The proposed language does not affect the already existing prohibition that does not allow a court to require security "if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment." AS 09.17.040(e). We note that the State of Alaska would not be subject to that exception as an "authorized insurer" under AS 21.90.900. Although the state or a municipality may be able to avoid posting security under AS 09.65.040,[21] proposed AS 09.17.040(e) should be clarified on this point.

Security is not defined in Title 9 and is often not foolproof.[22] Defendants and insurers sometimes become insolvent. As a result, there may be more litigation by successful plaintiffs to recover the full amount of their awards.

SECTION 14: INFLATION ON PERIODIC PAYMENTS

AS 09.17.040(f) presently provides that a judgment ordering the payment of future damages by periodic payment shall specify the recipient and the manner in which the payments shall be made over time. The amendments proposed by Section 14 of the bill first clarify that this provision is to apply to cases involving personal injury or death. The second change in the statute seeks to have the judgment clearly provide what, if any, increase shall be made to payments for inflation.

If the periodic payment scheme is to be fair to plaintiffs, future payments should be adjusted for inflation

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[21] AS 09.65.040(a) states that "[i]n an action or proceeding in a court in which the state or a municipality is a party or in which the state or a municipality is interested, no bond or undertaking is required of the state, a municipality, or an officer of the state or municipality."

[22] "Security" is broadly defined in AS 13.06.050, AS 45.08.102, and AS 45.55.130.

because the trier of fact is required to reduce a future damage award to present value. See AS 09.17.040(b). As a practical matter, however, this can present a difficult and time-consuming task for courts because they will be called upon to determine the inflation rate in effect over the lifetime of the payment scheme.

SECTION 15: COLLATERAL BENEFITS

Section 15 repeals and reenacts AS 09.17.070, changing the way in which collateral benefits may be used as evidence and may reduce a claimant's recovery from a third party. Proposed AS 09.17.070(a) states the initial premise that a claimant may not recover damages for amounts received from collateral sources, except where the collateral source is a federally funded program that by law must seek subrogation or has a right of subrogation by law or contract and except for life insurance death benefits. This change alters the common law rule that bars collateral benefits from being considered in a court action. The common law rule provides that a damages award against a tort defendant will not be reduced by reason of such collateral benefits (i.e., medical bills paid by a health insurer). Where the collateral source has no right to reimbursement from a plaintiff's recovery against a third party (subrogation), the plaintiff at common law may actually recover damages for an expense he has not personally paid. Under proposed AS 09.17.070(a), that plaintiff could not recover damages for benefits he received from a collateral source that has no legal right of subrogation.

Subsections (b) and (c) address how and when evidence of collateral benefits may be used in a lawsuit. These paragraphs are somewhat confusing. First, proposed AS 09.17.070(b) states that various types of disability, workers' compensation, and health benefits paid to a claimant may be introduced into evidence by a defendant. That proposition is qualified by the next sentence: "However, evidence of a collateral source that has a right of subrogation under law or contract may not be introduced under this subsection." Proposed AS 09.17.070(b). We assume that this sentence partially negates the first one, so that the fact finder is not told of collateral benefits from sources that have a legal right of subrogation, even if they are of the type indicated initially as admissible. If that is the intent, it is unclear why the second sentence of subsection (b) does not also include "a federal program that by law must seek subrogation," as that phrase is repeated throughout this section.

Evidence of collateral benefits not introduced under subsection (b), excluding those from a federally funded program or other source with a legal right of subrogation and excluding life insurance death benefits, are only admissible to the court after

the fact finder has rendered an award. Proposed AS 09.17.070(c). Whether introduced as evidence to the fact finder or the court before or after an award is rendered, those collateral benefits that are admissible (i.e., where the source has no legal right of subrogation) will reduce the claimant's recovery, with a few adjustments. Proposed AS 09.17.070(b) and (c).

The last subsection of the new collateral benefits provision states that a "person who provides a collateral benefit admissible under (a) or (b) of this section" may not recover any amount from the claimant as reimbursement for those benefits. This is apparently a misplaced reference to proposed AS 09.17.070(b) and (c), as (a) does not address admissibility of evidence at all. This provision prevents a claimant whose recovery has been reduced by the amount of some collateral benefit (in which the source has no right of subrogation by law or contact) from having to repay that benefit out of the reduced award.

As written, we do not believe this section presents constitutional problems.

SECTIONS 16 and 17: APPORTIONMENT OF FAULT

Sections 16 and 17 amend AS 09.17.080(a), which pertain to the apportionment of fault among those responsible for personal injuries. The present law was passed by the voters as part of the 1987 tort reform initiative, with the express purpose of establishing purely several liability and eliminating joint and several liability. Rather than holding all tortfeasors jointly accountable for the injuries a victim suffered, the intention was to make each tortfeasor liable only for its own percentage of fault. The present law is an imperfect vehicle to that end.

AS 09.17.080(a) currently requires the fact finder in a court action to apportion fault among all "parties" to each claim, including third-party defendants and persons who have been released from the litigation. A dilemma arises when a plaintiff chooses not to sue all potentially liable persons or entities. Can or must the named defendants bring a third-party action against other tortfeasors in order to have their fault considered by the fact finder? Should the court allow the named defendants to argue that others who have never been named as parties to the litigation are fully or partially responsible for the plaintiff's injuries, for purposes of allocation of fault? Or should the plaintiff's choice of defendants limit those among whom the fact finder apportions fault, even though there may be other potentially liable persons who are not parties to the action and the named defendants may thereby be held liable for the fault of others?

These questions have been addressed by both the federal and state courts, but not by the Alaska Supreme Court. The courts are split on how to interpret AS 09.17.080(a)'s directive to apportion fault among "parties," while at the same time adhering to the law's objective of several liability. See Judge H. Russel Holland's opinion in Carriere v. Cominco Alaska, Inc., case no. A91-373 Civil, United States District Court for the District Court of Alaska, March 22, 1993, and Judge Larry Zervos' opinion in Owens v. Robbins, case no. 1SI-90-354 Civil, Superior Court for the First Judicial District at Sitka, September 27, 1991; cf. Judge Dana Fabe's opinion in Dunaway v. The Alaska Village, case no. 3AN-90-3526 Civil, Superior Court for the Third Judicial District at Anchorage, July 25, 1991, and Judge James Singleton's decision in Robinson v. U-Haul Co., 785 F. Supp. 1378, 1383 (D. Alaska 1992).

This bill would resolve the current problem by requiring the fact finder to allocate fault among all persons responsible for the damages to each claimant, regardless of whether they are or could have been named as parties to the action. Proposed AS 09.17.080(a)(2). In addition, section 17 provides that an assessment of a percentage of fault against a person who is not a party does not subject the person to liability in that action or another action and may not be used as evidence of liability in another action. Proposed AS 09.17.080(c).

These changes will better implement the goal of pure several liability, so that those who are named as parties are only held accountable for their own percentage of fault. However, it must be noted that the plaintiff will not be able to collect damages from persons who are not parties to the action merely by virtue of an allocation of fault to those persons. If the plaintiff decides to sue those persons in another action, the fact finder's allocation of fault in the first action is neither binding nor evidence in that separate action.

One other effect should be noted. The bill would allow the finder of fact to allocate fault to entities that the plaintiff cannot sue (e.g., employers in a work-related injury context)[23] or who are immune from liability (e.g., governmental units, Good Samaritans). The plaintiff would not be able to recover for the percentage of such non-parties' fault.

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[23] This would expressly overrule the holding of the Alaska Supreme Court in Lake v. Construction Mach., Inc. 787 P.2d 1027 (Alaska 1990).

SECTION 18: EFFECT OF RELEASE

Section 18 fills in another gap in the current tort reform law, by creating a new section regarding the effect of a settlement with one of two or more potentially liable persons. The bill provides that when a claimant settles with one tortfeasor, it does not discharge the liability of anyone else for an injury or wrongful death unless a release or covenant not to sue or not to enforce judgment explicitly provides otherwise. Proposed AS 09.17.091(1). The release or covenant does discharge the settling tortfeasor from all liability for contribution to any other person, which means that no one else can later claim that the settling person paid the claimant too little. Proposed AS 09.17.091(2).

The bill also provides that a release or covenant not to sue or enforce judgment to one person "reduces the claim" against others who are civilly liable for the same injury or wrongful death to the extent of any stipulated amount or the settlement amount, whichever is greater. Proposed AS 09.17.091(1). This provision is ambiguous and problematic, when read in conjunction with the amendments to AS 09.17.080(a) and (c) proposed in sections 16 and 17. Essentially, AS 09.17.091 provides that the settlement of one tortfeasor reduces the total damages that may be recovered from others, but proposed AS 09.17.080 directs the finder of fact to determine that tortfeasor's percentage of fault. It is unclear how these two concepts are to be reconciled. Assume that one negligent party settles for $100,000 and is later found by a jury to be 50 percent at fault; the non-settling defendant is 50 percent at fault and the plaintiff's total damages were $300,000. Should the $300,000 be reduced by $100,000 before multiplying the percentages of fault? If so, the non-settling defendant gets the benefit of the settlement twice, by having the total damages reduced and having its fault decreased by the percentage allocated to the settling party; it pays only 50 percent of $200,000, instead of 50 percent of the total damages, by virtue of the settlement "reducing the claim" of the plaintiff. If that is not the intent, then clearer language should be used to explain how allocation of fault of settling parties is to mesh with giving credit to non-settling defendants for the settlements of others.

SECTION 21: LIMITATION ON AWARDS OF PREJUDGMENT INTEREST

Section 21 adds a new subsection (c) to AS 09.30.070, which addresses the rate of prejudgment interest and the date it begins to accrue. The new language provides that prejudgment interest "may not be awarded for future economic damages, future noneconomic damages, or for punitive damages." The rationale behind this change is that interest in future damages does not

"vest" in the injured party on the date of the injury but is compensation for the continuing nature of the injury.[24] Prejudgment interest is not generally allowed on punitive damage awards. See Andersen v. Edwards, 625 P.2d 282, 289 (Alaska 1981); Beech Aircraft Corp. v. Harvey, 558 P.2d 879,888 (Alaska 1976). This section does not present legal or constitutional problems.

SECTION 25: CAP ON WRONGFUL DEATH AWARDS

Section 25 creates two new subsections to AS 09.55.580, the statute that governs wrongful death actions. Proposed AS 09.55.580(g) would cap economic damage recoveries at $10,000 in wrongful death cases where the deceased did not have a surviving spouse, minor child, or dependents. In this subsection, the term "dependent" is limited to the following relationships: "father, mother, child, grandchild, or sibling who is dependent on the deceased at the time of death." Proposed AS 09.55.580(g). This definition distinguishes between relatives who are dependent on the deceased at the time of death, and those who may, or probably would have, become dependent on the deceased at some future time. It excludes consideration of others, family or not, who are dependent on the deceased, such as aunts, uncles, grandparents, unmarried companions and their children. Furthermore, this section would limit economic damages even where the deceased leaves heirs and beneficiaries, if they do not fit within the category of spouse, minor child, or dependent.

These classifications would limit economic damage recovery in a number of arguably meritorious situations. An example might be an adult child who is self supporting, but in the early stages of a debilitating disease at the time the parent died. While that parent would have been able to provide support for the child in the later stages of the disease after the disability became real, the tortfeasor who caused the parent's death could invoke the $10,000 cap on the ground that the child was not "dependent on the deceased at the time of death." In light of the possibility the court would find the distinctions made by this section irrational, the statute may not survive due process or equal protection scrutiny.

Additionally, this section would write into law the proposition that it is cheaper to kill someone than it is to merely injure them. In Hanebuth v. Bell Helicopter International, 694

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[24] The court has indicated in dicta that prejudgment interest may be appropriate on an award of compensation for lost earning capacity (which includes future income). Hertz v. Berzanske, 704 P.2d 767, 773 n.9 (Alaska 1985).

P.2d 143, 147 (Alaska 1984), our court adopted the view of former U.S. Supreme Court Justice Harlan who said: "where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be non-actionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception and described in terms such as 'barbarous.'"

Consider this example: a negligent driver on a remote highway crosses the centerline and collides with another vehicle. The negligent driver is essentially uninjured but the other driver is badly injured. There are no witnesses. The negligent driver recognizes the injured party and realizes that the person is a twenty-one year old unmarried woman without any dependents. The negligent driver believes that if he rushes this person to a hospital, or acts quickly to obtain medical aid, the victim will survive, but with permanent injuries. The negligent driver also believes that if he delays in obtaining treatment, the victim will probably die. Proposed AS 09.55.580(g) would tempt the negligent driver to let the victim die because it would save a potentially great sum of money.[25]

While this no doubt sounds like an extreme example, it is the kind of thing that does happen in real life. There are many situations where a tortfeasor will have it in his or her control to decide whether an injured person lives or dies, and there will be no evidence of the process by which that decision was reached. Even if there were clear and convincing evidence that the negligent party delayed getting help so that the victim died of her injuries, this section still caps economic damages at $10,000, which in many cases would be less money than the tortfeasor would have to pay if the victim survived with permanent injuries.

The addition of subsection (h) to AS 09.55.580, which permits higher awards in the case of a "class A" or "unclassified" felony would not change this analysis in many cases. In the

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[25] The criminal penalties do not vary greatly between criminally negligent homicide (the probable charge if the victim dies) and third degree assault (the probable charge if the victim survives with serious injuries). Either charge is a class "C" felony, with the same maximum term of imprisonment. Because it would be difficult, if not impossible, to prove a more serious degree of homicide under these facts (barring a confession to the deliberate delay in obtaining medical help), the criminal penalties would not offer much deterrence to the preference for death that this section writes into the law.

example given above, this exception to the cap would not apply if the death merely amounted to manslaughter or criminally negligent homicide. Many wrongful death situations arise from ordinary negligence -- not conduct that amounts to a felony, such as criminal negligence, recklessness, or intentional misconduct -- so the $10,000 cap will limit economic damages without exception. Moreover, where the exception does apply, it may be more a matter of form than substance, as a lawsuit against a "class A" felon may not result in any actual recovery for the victim because the tortfeasor is likely to be judgment proof, and serving a lengthy term in prison.[26]

Section 25 of the bill will provide a financial motive to let some injured people (particularly children) die when they might have been saved. The question for the Alaska Supreme Court under equal protection analysis will be whether the findings and purpose in Section 1 can possibly justify such a social policy. We question whether the court would uphold a law that creates a financial incentive to allow someone to die -- especially when the benefits of the legislation are apparently so slight. See Hanebuth, 694 P.2d at 147.

SECTION 26: ABOLISHING RULE 82 FEE AWARDS TO PREVAILING PARTIES IN TORT CASES

Rule 82 of the Alaska Rules of Civil Procedure presently provides a scheme that sets the amount a prevailing party may obtain for attorney's fees in a civil action, unless the parties agree otherwise. The amount of attorney's fees that may be awarded is affected by whether the case was uncontested or contested, and if contested, whether it was concluded with or without trial. The rule was recently changed by the Alaska Supreme Court, effective July 15, 1993, after much work and debate that included

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[26] Subsection (h), as written, will also lead to confusion in its application since it does not specify whether a criminal conviction for a felony is a necessary prerequisite to an award above the $10,000 limit. This is in contrast to the existing provision of AS 09.17.030 which limits the recovery of a person who is injured in the commission of a felony -- but only if the person is first convicted of that crime. Subsection (h) should be amended to provide for a burden of proof on the criminal conduct, and guidance should be given about how this exception is to be litigated in the context of a civil wrongful death action.

its evaluation by a committee of practitioners from around the state.[27]

Section 26 of the bill will act to repeal Rule 82 in the context of civil actions for personal injury, death, or property damage related to or arising out of fault. Proposed AS 09.60.010. The courts will be barred from awarding attorney's fees in such cases, unless authorized by statute or agreement between the parties. The Alaska Supreme Court generally does not take a formal position with respect to legislation. Nevertheless, we understand that the court has formally opposed the bill's abolition of Rule 82 in the tort context. It is noteworthy that many tort reform efforts in other states seek to create attorney fee provisions like Rule 82, rather than repeal them.

CONCLUSION

From our perspective, the sections of the bill not explicitly addressed in this letter do not present legal or constitutional difficulties. Thank you for the opportunity to present our comments. Please feel free to contact us if you have further questions.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Jim Forbes
Jim Forbes
Assistant Attorney General

By: Susan D. Cox
Susan D. Cox
Assistant Attorney General

BMB:SDC:JF:pch

cc: Raga Elim, Legislative Liaison
Deborah Behr, AAG

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[27] A poll of all Alaska practitioners was conducted by the committee prior to the amendment to Rule 82. The majority of the practitioners who responded voted to either leave the prior rule alone or repeal the whole concept. The proposed amendment adopts the latter view.

Guess & Rudd

March 11, 1994

VIA FACSIMILE TO 907-465-3834

The Honorable Brian Porter
Alaska House of Representatives
State Capitol, Room 516
Juneau, Alaska 99801-1182

Re: HB 292, Tort Reform

Dear Representative Porter:

Alaskans for Liability Reform asked me to make a quick review (because that is all the time apparently available) and offer you my thoughts with respect to the Attorney General's letter as it relates to the statute of repose proposed in the new Tort Reform Bill, HB 292.

First, I believe the Attorney General's office accurately sets forth the standard of review by which the Alaska Supreme Court will judge this legislation, and particularly the statute of repose. Because the Court addressed a statute of repose before, in Turner Construction, the applicable law is fairly predictable. Our Supreme Court will find that while a classification of individuals is involved, there is no suspect class involved. Thus, the statute of repose would be evaluated under a "fair and substantial relationship" test. The Court will find that the State has a legitimate governmental purpose enacting this legislation and it then will engage in a balancing test as it did in Turner. The question is: Does this statute of repose differ sufficiently from the statute rejected in the Turner case, and has the insurance, economic and political climate changed sufficiently to convince the Court to approve this statute of repose? With a few modifications to alleviate some unfair results, I think our Court would find the proposed statute of repose constitutional.

The Attorney General's office suggests what is obviously true with respect to a showing of hard facts to justify the purpose and objective of the statute -- facts will have to be mustered to demonstrate that there is a real problem that will really be solved, at least in part, by this legislation. However, contrary to the position set forth in the Attorney

General's letter, I believe hard facts justify this legislation. The Alaskans for Liability Reform can muster specific facts and examples to demonstrate, even more clearly today than could be done in 1988, that there is a relationship between insurance premiums and tort reform. More importantly, there is a direct relationship between tort reform getting insurers to write business in Alaska, thereby creating premium competition which of course is essential to keeping rates down and affording the citizens of Alaska fair rates for insurance.

On page 7 of the Attorney General's opinion letter, the argument is made that there would be little effect on insurance rates because Alaska has so few residents compared to the rest of the United States. This analysis is misguided. The question is not how much impact we would have on the national market, but rather whether we can convince an already very reluctant insurance industry to bring insurance to this small population located in a remote area. We can only achieve fair insurance rates for our residents if we can get insurance companies to do business here. From my experience as an insurance defense lawyer, I can tell you that insurers, especially after they have seen a few verdicts in the $60 million range (thankfully it was reversed), flat refuse to do business in Alaska. The State needs to do everything it can to convince a reluctant national and international insurance industry that Alaska is legislatively and judicially stable enough to warrant bringing their business here. Without that business, we will never achieve fair insurance rates for anyone.

One personal example is my own firm's malpractice insurance. About three or four years ago (the last time I was involved in the actual procurement of insurance for the firm), we had no choice about which insurer to go with. There was only one writing business in the State of Alaska at that time.

There are examples of unfairness for any statute of limitations. One individual can recover because he was injured one day after someone else. That seems unfair, but the benefits of finality and predictability outweigh that unfairness. The real difference between existing statutes of limitataion and the proposed statute of repose is there is only a limited (foreign bodies left in patients) "discovery rule" for the proposed statute of repose. I believe much of the risk of unconstitutionality could be alleviated by expanding this limited discovery rule to include toxic tort cases, including asbestosis cases, such as was done by the Kansas Legislature.

I do not think the examples about saddlebag gas tanks are a problem. On evaluation, it is clear that the already existing exceptions in this proposed legislation would allow individuals who are injured even after a six-year period of repose because of defects in "the saddlebag gas tanks" would be allowed to recover. The very nature of the tort revealed in the old Pinto cases was misrepresentation and intentional concealment. The fact is, if a manufacturer of automobiles puts dangerous gas tanks on its cars, one can reasonably expect them to go boom during a six-year period of use. If other cars go boom after six years pass, and a cover up is revealed, those individuals would be allowed to recover.

At page 9 of the Attorney General's opinion letter, AS 09.10.120 is referenced as setting forth a special six-year statute of limitations applicable where the State is the plaintiff. Frankly, all of the Attorney General's arguments of potential unfairness can be applied to argue that the State's special six-year statute of limitations would be unconstitutional. Clearly, a special class was created and equal protection arguments could be raised. For example, a little old lady walks by a building which collapses and crushes her legs. She files a claim two years and one day later. It is barred by the existing two-year statute of limitations. However, the State has another four years in which to bring a claim for damages the falling building caused to the State's snowplowing equipment upon which part of the collapsed building fell. The point here is not to be critical of the existing statute, but rather to point out that examples can be created making any limitations statute seem unfair.

With minor modifications to accommodate toxic tort claims, I think the Alaska Supreme Court would find the proposed statute of repose constitutional.

I hope this memo is of assistance.

Very truly yours,

GUESS & RUDD

Mark E. Wilkerson

MEW:cte
f:\home\mew\porter

Lane Powell Spears Lubersky

SUITE 4100
550 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501

March 11, 1994

The Honorable Brian Porter
House Judiciary Committee
3111 C Street
Anchorage, AK 99503

VIA FACSIMILE
465-3834

Re: HB 292

Dear Representative Porter:

I have had a very brief opportunity to review the Department of Law's lengthy letter dated March 8, 1994, which considers various portions of HB 292.

Because I have very little time, my comments are necessarily brief.

It appears that the only section posing serious concern to the Department of Law is the statute of repose. Essentially, the Department of Law takes issue with the statute of repose, and further concludes that our Supreme Court would hold that provision unconstitutional. I will leave the constitutional law arguments to others, as I understand you are receiving additional comments.

Concerning the general idea of a statute of repose, it is my opinion that a statute of repose, per se, would not be unconstitutional. The idea behind the statute of repose is to provide certainty and finality, and to

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To Daniela Lopez	From D.L.Y.
Co.	Co.
Dept.	Phone #
Fax # 465-3884	Fax # 562-1364

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ANCHORAGE, ALASKA 99501

avoid the multiple problems associated with litigating a claim with stale evidence. I myself have defended numerous claims involving evidence upwards of 30 years old. As a practical matter, a full and fair trial on such stale evidence is impossible. Specifically, I would refer to DES litigation, which the Department of Law refers to in its analysis. Having defended a major drug manufacturer sued in numerous such actions, I can state unequivocally my experience that that litigation did not result in any measurable recovery for any of the claimants. Rather, the true winners in that litigation appeared to me to be the lawyers.

In addition to DES litigation (which was largely concluded four to five years ago), a substantial portion of my practice is product liability defense. In particular, I have defended cases involving products manufactured over 30 years ago, and designed well before then. By the time such claims are brought, the designers are usually deceased, and the corporate records are sketchy at best. It is my opinion that missing evidence makes it impossible to have a fair trial. Moreover, in product liability cases, Alaska law effectively places the burden on the manufacturer to prove a negative -- that is, that the product is <u>not</u> defective. Without evidence available to it, a manufacturer simply cannot meet that burden of proof.

While arguments may be made that a statute of repose of six years is too short, it is my opinion that <u>some</u> statute of repose is an essential element of our

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tort law. Statutes of repose have been around for many years and in many jurisdictions. They serve a useful and important function.

With respect to the remaining items of HB 292, it does not appear that the Department of Law believes them to be insurmountably problematic. I would note that the analysis at page 35 concerning abolition of Rule 82 seems incomplete. In particular, this discussion ignores that fact that HB 292 contains a provision for an offer of judgment. Replacement of Rule 82 with the effective offer of judgment means that a party who is reasonable in his or her settlement position will be compensated for actual attorneys' fees and costs at the expense of an unreasonable party. This is much more effective than the current Rule 82 scheme, and is more akin to attorneys' fees provisions proposed by other states in their tort reform efforts. It also is specifically designed to force parties and their attorneys to realistically evaluate their cases, or bear stiff consequences. I cannot imagine anyone would believe that to be an undesirable goal.

Finally, there appears to be some confusion concerning the limitation on pecuniary loss in wrongful death cases. That limitation applies only to situations where the decedent leaves no dependents, spouse or children. The limitation applies only to pecuniary loss. There is no limitation on non-pecuniary loss. Thus, even where a decedent leaves no dependents, spouse or children, a claim could be brought on behalf of

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certain survivors for non-economic damages, which would then be capped at $500,000.

I must stress that the above was hurriedly dictated. I would be happy to discuss any of the above, or any other aspect of the Department of Law's letter in greater detail. Please feel free to contact me any time should you wish to do so.

Very truly yours,

Brewster H. Jamieson

BHJ/sjw

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AN ASSOCIATION OF PROFESSIONAL CORPORATIONS

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March 11, 1994

VIA FACSIMILE

The Honorable Brian Porter
House of Representatives
State Capitol, Room 118
Juneau, Alaska 99801-1182

Re: House Bill 292

Dear Mr. Porter:

I have reviewed House Bill 292 as originally proposed, the Attorney General's March 8, 1994, opinion referencing House Bill 292 and the case of Turner Construction, Inc. v. Scales, 752 P.2d 467 (Alaska 1968).

I am, therefore, of the opinion that all sections of House Bill 292 will be held constitutional. Specifically, the statute of repose complies with all requirements set forth in Turner v. Scales.

In Turner v. Scales the Alaska Supreme Court struck the six-year statute of repose because of the restrictive nature of the statute. I believe House Bill 292 remedies the justices' concerns by broadening the statute of repose.

Very truly yours,

BISS & HOLMES

Roger F. Holmes

Roger F. Holmes

RFH:rwc

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BRIAN J. BRUNDIN
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JOHN J. TIEMESSEN*
KIMBERLEE A. COLBO
SHANE J. OSOWSKI
JAMES E. CURTAIN**

OF COUNSEL
JOHN C. HUGHES
RICHARD D. GANTZ

Reply to: JUNEAU

March 11, 1994

Representative Brian Porter
Alaska State Legislature
State Capital
Juneau, Alaska 99801-1182

Re: House Bill 292

Dear Representative Porter:

On behalf of State Farm, I have previously written to the House Labor and Commerce Committee regarding HB 292, and I have also testified before your committee. I have just seen a copy of the March 8, 1994 letter from the attorney general and I felt compelled to comment.

Section 3: Statute of Repose. You will recall from our previous correspondence that we took no position on the statute of repose other than to say that reasonable limitations obviously would have a positive impact on the goals this legislation seeks to further. In that light, we would simply make the following observations about the attorney general's letter of March 8, 1994.

The letter seems to be saying that regardless of what kind of statute of repose the legislature seeks to adopt, it will be held on unconstitutional by the Alaska Supreme Court. With this we disagree. We believe the legislature clearly has the power to enact a statute of repose. It has enacted numerous limitations on civil claims, such as statute of limitations, changes in the law relating to the medical malpractice area, and the tort reform of 1986. To our knowledge, the court has never indicated it would strike down all statutes of repose, and indeed, it would

not have gone through the analysis it went through in Turner Construction Company, Inc. v. Scales, 752 P.2d, 467 (Alaska 1988) if that were its position. Contrary to what the attorney general apparently believes, we believe it is clearly within the legislature's power and authority to enact a statute of repose.

We also feel that it is very difficult to predict the action of the Alaska Supreme Court on any particular piece of legislation. The court has historically reversed approximately half of the rulings that are appealed to it. The possibility that it might find this statute unconstitutional in our view is not something that should deter the legislature from acting in this area if it feels that a statute of repose as a matter of policy is a positive thing for the people in Alaska.

There are several other comments we have regarding the analysis of the attorney general regarding the statute of repose. First, the attorney general indicates that insurance premiums tend to be governed by factors such as the insurance companies' return on their investments and other money management practices. I suspect the Division of Insurance would take great issue with this statement, as it is not an approved underwriting practice to set rates based on investment return, rather rates are set by loss experience. For State Farm, our rates in Alaska are determined by our loss experience in Alaska. I suspect this is true also of the medical malpractice carriers who do business in this state.

The second statement we take issue with is the statement that states that have adopted statutes of repose or other tort reform measures have not seen corresponding drops in malpractice insurance rates. This ignores the testimony that was presented by the general counsel of Norcal. As I recall that testimony, their general counsel said that since the enactment of tort reform in the medical malpractice area in 1975, medical malpractice premiums in the state of California have increased by 85 percent, whereas nationwide they have increased by 400 percent and in the state of Alaska by 1,600 percent. This also ignores testimony presented by the director of Risk Management, who testified he thought this legislation would have a positive impact.

The third concern we have about the attorney general's March 8, 1994 letter, is the statement that "automobile insurance rates have increased at approximately the same rate as malpractice insurance rates during the last 15 or 20 years." I can tell you that automobile insurance premiums in Alaska have not increased by 1600 percent since 1975, as have medical malpractice premiums. I have been following the cost of automobile insurance

closely in Alaska since 1983 and rates have been remarkably stable. Those increases which have occurred have been primarily linked to increases in medical costs and the increased cost of buying and repairing automobiles, which have lead to increases in claims severity, coupled with an increased in the frequency of claims. Even so, these increases are far less than the 1,600 percent increase in medical malpractice premiums.

The fourth concern we have about the attorney general's letter is that it implies that Alaska insurance premiums are set on a national basis. Again, as set forth above, this is not so, certainly for homeowner's insurance and automobile insurance. We also suspect it is not so for malpractice insurance.

In considering the constitutionality arguments raised by the attorney general in his letter of March 8, 1994, you should also consider that this provision, as well as the statute of limitations provisions, are but one part of a comprehensive bill, the overall purposes of which are clearly defined in the bill. Theses purposes have been recognized as being legitimate in Beck v. Department of Transportation and Public Facilities, 837 P.2d, 105, 117 (Alaska 1992). It is very difficult to separate one part of this legislation and focus on the role that part alone will play in accomplishing the goals which the legislation seeks to further.

The final concern we have is that the attorney general has ignored the measures this bill contains to study the effectiveness of the legislation and thus, if the legislation does not have its intended effect, appropriate changes can be made. This would in effect provide the overall documentation to support the changes it proposes, the lack of which is the primary basis for the criticisms of the attorney general.

Sections 7, 8, and 9. It does not appear the attorney general sees legal difficulties with section 7, 8, 9 or 10 although the attorney general notes the Alaska Supreme Court's refusal to apply a ratio test in reviewing punitive damage award raises some doubts as to how this cap would fair in a court challenge. Again, we believe this is an area where the legislature clearly has the authority to act. To our knowledge, a punitive damage cap does not pose any kind of constitutional challenge, and we know of no other basis for the court to over turn it.

Section 11: Damage Awards for Loss Earnings to be Reduce for Taxes. This section of the proposed legislation is one we are strongly in favor of. Certainly the attorney general is correct that the Alaska Supreme Court has refused to reduce awards for damages for impairment of future wage earning capacity

by the amount that would have been paid for income taxes on the basis that a court cannot predict with sufficient certainty what amounts a plaintiff would be obliged to pay. Frankly, there are many areas that are much more difficult to predict than issues of future income tax consequences, such as future impairment, future pain and suffering, future wage loss itself, and future medical expenses. Indeed, the federal courts, including the United States Supreme Court, have long ruled that future damage awards must be reduced by the amount one would pay for income taxes Norfolk and Western Railroad Company v. Liepelt, 44 U.S. 490 rehearing denied 445 U.S. 972 (1980). Federal income taxes have been with us for many many years, and we have seen no predictions from anyone that federal income taxes will cease. Unless there is some evidence that federal income taxes will cease, there is simply no good, sound logical reason not to remove this windfall from our current system.

Sections 12, 13 and 14. There does not appear to be significant debate about the logic of periodic payments, rather the debate seems to center around the mechanism for implementing a periodic payment provision. We do not believe this will be as difficult or time consuming as the attorney general seems to feel it is. As practical matter, this issue will be decided by agreement of the parties or expert testimony and presents issues no more difficult or time consuming than courts deal with every day.

Section 15: Collateral Benefits. We believe a better collateral benefits provision is that reflected in the present law regarding medical malpractice claims as contained in AS 9.55.548. We suspect that if the only time this section will be applicable is when there is by contract no right of subrogation, it will seldom, if ever be applicable. AS 9.55.548 (or a predecessor version) has been in effect for a number of years and we think it is a very effective provision.

Sections 16, 17 and 18: Apportionment of Fault. These provisions simply implement the intent of the voters with respect to the several liability initiative and the attorney general evidently has no problem with these provisions, except for Section 18 regarding the effect of a release. To respond to the concerns raised by the attorney general, we would suggest you substitute the words "amount of the jury's verdict" for the words "claim against the others" in subsection 1.

Section 26: Rule 82 Fee Awards. We continue to support the abolition of Rule 82, as prevailing party attorney fees are paid as a matter course in virtually every claim now. Under the concept envisioned by section 19 and section 26, this would no longer be the case, but rather attorney fees would be awarded

only when one party or the other beats their own offer of judgment. We frankly feel this is a much more equitable way of awarding attorney fees, and we also feel it creates far greater incentive for parties to voluntarily come to the bargaining table.

Thank you again for opportunity to comment on this legislation.

Sincerely,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN

By: Michael L. Lessmeier
Michael L. Lessmeier

3673 xmll/ns

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

P.O. BOX 110300 - DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
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OFFICE OF THE ATTORNEY GENERAL

March 23, 1994

The Honorable Brian H. Porter
Alaska House of Representatives
State Capitol, Room 118
Juneau, AK 99801

Re: HB 292

Dear Representative Porter:

Thank you for the opportunity to review correspondence the House Judiciary Committee received following our March 8, 1994, letter on CSHB 292 (L&C). We appreciate the effort that so many people have devoted to this subject.

We recognize that reasonable minds can differ, and that is most certainly true of lawyers. Those attorneys who wrote to you following our March 8 letter disagree with relatively few of the opinions expressed therein; some expressly concur in legal points we made. To the extent there is disagreement, much of it is based on factual arguments on which we express no view. We believe there is consensus that, if this bill is enacted into law, the courts will be the final arbiter of those factual issues and the constitutional questions identified in our opinion.

We have reviewed the materials provided to us by your staff[1], and decline to change the legal opinions we have given. Please feel free to contact us with legal questions about the bill as it moves through the legislature.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

Elizabeth Shaw
Deputy Attorney General

cc: Raga Elim
Deborah Behr

---

[1] Those materials consist of letters from the Anchorage Municipal Attorney Richard L. McVeigh, Michael Lessmeier on behalf of State Farm Insurance, Mark Wilkerson for Alaskans for Liability Reform, Roger Holmes, and part of a letter that appears to be from Lane Powell Spears & Lubersky, and attachments.

Municipality of Anchorage

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4545

TOM FINK,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

March 4, 1994

Via Fax No.:(907) 465-3834

Representative Brian Porter
State Capital
Juneau, Alaska 99508

Re: Tort Reform Legislation

Dear Representative Porter:

Please be advised that the Municipality of Anchorage supports House Bill 292 and Senate Bill 254, commonly known as Tort Reform. Although the Tort Reform legislation originally passed in 1986 accomplished many the goals intended by the Legislature, and reduced spurious litigation against the Municipality of Anchorage, problems remain and should be addressed. After comprehensive review of pending House Bill 292, we believe it addresses many of the problems remaining and accomplishes the goal of creating a more equitable distribution of the costs and risks of injury while at the same time reducing costs associated with the civil justice system. At the same time the legislation ensures that adequate and appropriate compensation for persons injured by tort feasors remains available. The Municipality supports the original bill in its entirety.

If you have any questions or would like to further discuss the Municipality's position in this regard, please feel free to call Assistant Municipal Attorney, Stephanie Galbraith Moore (907) 343-4545 or Harry Sjoberg, the Municipal Risk Manager (907) 343-4201. Thank you for your attention.

Sincerely,

Richard L. McVeigh
Municipal Attorney

misc\sdg\ltr\porter.rlm

February 21, 1994

Representative Pete Kott
House Judiciary Committee
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

Dear Representative Kott:

I am writing to inform you that the Klukwan, Inc. Board of Directors has voted unanimously to support H.B. 292, also known as the Alaska Civil Liability Act of 1993-1994.

Tort reform is an important issue to our corporation. We pay over $1 million in premiums for all types of insurance each year and premiums keep rising.

We believe in fair and adequate compensation for victims. We also believe that the situation has gotten out of hand in recent years, driven by aggressive and sometimes greedy lawyers. Corporations are particularly at risk, since they are often viewed as being able to "afford" large settlements. I can assure you that our shareholders do not agree with this.

The current situation also encourages litigation where other methods of dispute resolution would be quicker and less costly. Our society wastes a tremendous amount of resources on needless litigation each year. Anything we can do to curb this trend will have real benefits for society.

Again, we urge your support of H.B. 292 as a positive step towards reform of our legal system and we sincerely appreciate your consideration of our comments.

Sincerely,

Robert G. Loiselle
President

KLUKWAN, INC.
P.O. BOX 32077 · JUNEAU, ALASKA 99803-2077 · (907) 789-7361

DOOR SPECIALTIES OF ALASKA INC.
STATEWIDE SINCE 1985

March 12, 1994

Rep. Brian Porter, Chair
House Judiciary Committee
Juneau, Alaska 99801

Dear Rep. Porter:

We strongly urge the passage of HB 292.

Sincerely,

H. Vance Taylor, Jr.,
President

Alfred R. Luptor, Jr.,
Sec/Treasurer

RECEIVED
MAR 22 1994
Rep. Brian Porter

4011 Arctic Boulevard, Suite 206 • Anchorage, Alaska 99503 • (907) 563-5570 • Fax 562-0351

ALASKA STATE MEDICAL ASSOCIATION

4107 Laurel Street • Anchorage, Alaska 99508-5334 • (907) 562-2662 • FAX (907) 561-2063

January 21, 1994

Representative Brian Porter
Alaska State Legislature
Room 122, State Capitol
Juneau, Alaska 99801

Dear Representative Porter:

On behalf of the Alaska State Medical Association, I urge you to support H.B. 292, Liability Reform. We believe strongly that any health system reform must include comprehensive liability reform. Our association was involved in the drafting of H.B. 292 and support all reform in the bill. Therefore, we ask you to move H.B. 292 from Labor & Commerce to House Judiciary.

Your support and sponsorship is sincerely appreciated.

Sincerely,

Ray Schalow
Executive Director

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

January 17, 1994

Representative Brian Porter, Member
Labor & Commerce Committee
House of Representatives
Capitol Building
Juneau, Alaska

Re: Support HB 292
Liability Reform

Dear Representative Porter:

On behalf of community hospitals and nursing homes across the state, we ask:

1. Your support of HB 292, the Comprehensive Liability Reform bill currently pending before the Labor & Commerce Committee.

2. Your support for bringing HB 292 to a vote before the Labor and Commerce Committee as early in the 1994 session as possible.

Attached is our position paper on the need for HB 292. We have, and continue to study other solutions to the problem of the cost surrounding liability and the need for the business and health care community to have access to reasonably priced insurance. We continue to believe the best solutions to resolving high liability costs are contained in HB 292.

I will be calling and getting on your appointment calendar to discuss this and any other health issues. Welcome back to Juneau.

Thank you for support

Sincerely,

Harlan R. Knudson
President/CEO

Encl: (1)
cc: Gary Brewer, Alaska Regional Hospital; Sister Suzanne Brennan, Providence Hospital; Kathleen Cronen, Charter North Hospital, Jim Walsh, Valley Hospital: Tom Boling, Our Lady of Compassion Care Center and Joan Fisher, The Mary Conrad Center.

319 SEWARD STREET #11 • JUNEAU, AK 99801 • (907) 586-1790 • FAX (907) 463-3573

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

January 17, 1994

Representative Bill Hudson, Chair
House Labor & Commerce Committee
Capitol Building
Juneau, Alaska 99801-1182

Re: Support HB 292,
Liability Reform

Dear Bill:

We want to thank you and members of the House Labor & Commerce Committee for having HB 292, the comprehensive liability reform bill introduced and for the two excellent hearings you and your committee have held on that bill.

We have reworked our position paper to reflect the information received at the above meetings, and at the meeting with you and the Medical Association on January 5. As mentioned, we congratulate the Trial Bar for finally recognizing there is a very serious liability problem in this state, and for offering solutions to that problem.

Our request to you is to let the House of Representatives vote on liability reform at this 1994 session. From 1988 through the 1992 session, the Labor and Commerce, and Judiciary Committee Chair took it upon themselves to deny the House a vote on this issue. We believe the members of the House, like the public will support the measures contained in HB 292.

You have heard the arguments on all sides, now we ask that you and your committee make a decision on what you feel should be in, added or deleted from HB 292, and move it on to Judiciary.

Sincerely

Harlan R. Knudson, President/CEO

Encl: (1)
cc: Members, House Labor & Commerce Committee; Robert Valliant, Bartlett Memorial Hospital & Grant Asay, St. Ann's Care Center.

319 SEWARD STREET #11 • JUNEAU, AK 99801 • (907) 586-1790 • FAX (907) 463-3573

Alaska State Hospital & Nursing Home Association

POSITION PAPER - SUPPORT HB 292. LIABILITY REFORM
January, 1994

Contact: Harlan Knudson, 586-1790

Liability Problem - Health Providers

1. Cost of the Legal System
2. Slowness of Legal System
3. Cost of Defensive Medicine
4. Injured Party Receives Less than 50% of Award
5. Needed Care Denied Rural Areas
6. No Access or Recourse for Claims under $100,000
7. Health Providers Cannot Afford/Do Not Have Liability Insurance

HB 292, Comprehensive Liability Reform - SB 254 Companion Bill (Note: SB 204/HB 274 contain medical liability reform provisions included in HB 292) Purpose:

1. Reduce cost (health care, business, professional) associated with civil justice system.
2. Assure adequate and appropriate compensation for persons injured through the fault of others.
3. Increase availability and reduce cost liability insurance.
4. Establish fair and equitable timelines for resolving disputes.
5. Accumulate additional information concerning the cost of the civil justice system.

(More)

SECTIONS HB 292 IMPORTANT FOR REDUCING HEALTH COSTS:

Statute of Limitations - Current statutes must be clarified to make sure lawsuits are brought with a reasonable time. Six years is recommended, and for medical liability 2 years from the time of the incident and/or for minors two years from the time of the incident or before the 8th birthday, whichever time period is longer.

Cap on Non-economic Damages - ASHNHA supports caps on non-economic damages to limit the dollar amount of damages which a jury or judge can award a plaintiff. The recommended cap amount is $250,000.00 indexed to the Consumer Price Index.

Limit on Punitive Damages - Provides definition of punitive damages to be "as actions of malice and conscious disregard of another person and establishes punitive damages as $200,000 or up to three times the amount of compensatory damages awarded.

Periodic Payments - Provides for reducing the cost of compensating plaintiffs for future losses; preventing premature dissipation of damages and preventing windfall recoveries if a plaintiff should die.

Collateral Sources - Prevents double compensation for an injury.Current rules prohibits the defendant from introducing evidence that damages suffered by a plaintiff have been paid by a source other than the defendant. The court and a jury should be able to take into account the fact that part of the plaintiff's damages are already covered by other sources.

Liability Hospitals Acts/Omissions Non-Employed Personnel - Community hospitals should not be "automatic" deep pockets when a lawsuit is filed against a physician. This overturns an Alaska Supreme Court decision (Jackson v Power) holding a hospital liability for the action of an emergency room physician, even though the hospital was not negligent and did not violate any legal or regulatory requirements.

ASHNHA has under review the Trial Bar proposal requiring all health professionals to have $5 million in liability insurance; implementing enterprise liability where a state authority, not the provider is sued; mandatory arbitration for all lawsuits under $200,000 with a certificate of merit required before filing a medical liability lawsuit. ##end##

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

February 17, 1994

Representative Brian Porter, Chair
House Judiciary Committee
Capitol Building
Juneau, AK 99801

Re: Support HB 292

Dear Representative Porter:

Community hospitals and nursing homes from across the state join with other health care professional organizations, architects, engineers and the business community in asking the Senate Judiciary Committee to approve HB 292, the 1994 Comprehensive Liability Reform Bill.

Attached is a "position paper" from the Association outlining reasons why Alaska health facilities feel HB 292 is one of the most important issues confronting the Legislature this session.

It will not be possible to reform our health care system, ensuring access to all citizens while controlling health care costs, if we do not control the cost of medical liability.

Sincerely,

Harlan R. Knudson
President/CEO

cc: Members House Judiciary Committee
Encl: (l)

319 SEWARD STREET #11 • JUNEAU, AK 99801 • (907) 586-1790 • FAX (907) 463-3573

ALASKA STATE HOSPITAL & NURSING HOME ASSOCIATION

SUPPORT- SB HB 292 - COMPREHENSIVE LIABILITY REFORM

(February, 1994)

THE LIABILITY PROBLEM - Alaska's community hospitals and nursing homes support HB 292 because:

I) The current legal system costs to much and works too slowly. The cost of claims handling, and litigation (including both plaintiff and defense attorney costs) consume over half of the professional liability dollars, with less than half of those dollars going to the injured patient.

2) The current legal system fails to provide access to the legal system for many, particularly individuals with small claims, less than $100,000.00. The current system awards nothing to some with meritorious claims while lavishing exorbitant amounts on others.

3) The current legal system adds billions of dollars to the nation health care bill by inducing physicians and other health professionals to order more examinations, tests and procedures as a hedge against accusations of neglect or negligence.

4) The current legal system diminishes access to health care, particularly to high risk services such as obstetrical care.

HB 292. COMPREHENSIVE LIABILITY REFORM BILL WILL:

1) Control the liability costs for health professionals, health facilities, other professionals and the business community.

2) Ensure adequate and appropriate compensation for individuals injured through the fault of others.

3) Increase the availability and reduce the cost of liability insurance.

4) Establish fair and equitable timelines for resolving disputes.

5) Collects data on the cost of the civil justice system.

SECTIONS HB 292 IMPORTANT TO HEALTH CARE:
CS HB 292 (L&C) 2/7/94

Sections 1. Findings and Purpose. Support.

Section 2. Practice Parameters. ASHNHA supports the establishment of practice parameters established by the Alaska State Medical Association.

Section 3. Statute of Limitations 6 years. ASHNHA supports a six year statute of limitations. Current statutes need to be clarified to make sure that lawsuits are brought within a reasonable time. Recent court decisions make it possible to file suits in the distant future, making risks totally unpredictable for insurance purposes.

Section 4 and 5. Statute of Limitation for Health Providers. ASHNHA supports a statute for medical liability at two years from the time of the incident. For minors that statute would be two years from the time of the incident or before the 8th birthday, whichever time period is longer.

Section 7. Non-Economic Damages. ASHNHA supports a cap on the non-economic awards for intangible losses such as pain and suffering, for which there is no established economic values. There must be a limit if there is to be predictability for insurance purposes. $250,000 is the recommended cap for these damages.

Section 8 and 9. Punitive Damages. ASHNHA supports a clarification of punitive damages and the limit of such damages to $200,000.00.

Section 12, 13, 14. Periodic Payments. ASHNHA supports that either party may request that a judgement be paid in periodic payments and that in such cases, the attorney's contingent fee be reduced to present value and paid in a lump sum.

Section 15, 16, 17. Collateral Benefits and Determination of Fault. Insurance payments which have been made to an injured party should be disclosed to the jury and should be protected from recover in the event the injured person receives an award. Individuals not at fault should not be liable for damages.

Section 27. Civil Liability of Hospitals. This section does not prevent a hospital from being sued, but it reverses the Supreme Court Decision holding the hospital liable damages when the hospital has not done anything wrong and is not guilty of negligence. It prevents community hospitals from being the automatic deep pocket in all lawsuits against physicians.

On October 16, 1987, the Alaska Supreme Court ruled in Jackson v Power (no. 3237) that a hospital has a nondelegable duty to provide emergency room services, and therefore the hospital is vicariously liable for the negligence of an emergency room physician, regardless of fault. Hospitals will continue to be liable for permitting an incompetent physician to practice and it does not relieve the nospital of liability for failing to fulfill it's responsibilities.

# # # #

John L. George & Associates
9515 Moraine Way
Juneau, Alaska 99801
Tel. 907 789-0172 Fax 907 789-6964

February 7, 1994

The Honorable Brian Porter
Chairman, House Judiciary Committee
State Capitol
Juneau, Alaska 99801-1182

Reference: House Bill 292

Dear Representative Porter,

During the last hearing on HB 292 in the House Labor and Commerce Committee, comments were made relative to my prior testimony on the bill. I had stated that problem causing the need for tort reform was not so much the million dollar awards as it was related to the volume of smaller claims that settle for greater amounts than they would normally justify due to the threat and potential for extremely high awards in court. To clarify and expand on those remarks I offer the following comment.

The threat of unlimited awards for subjective and unquantifiable damages drives the settlements for many claims higher than normal. The threat of court awards that deviate from the predictable norm for similar claims leaves out of court settlements up to emotional arguments and speculation. A similar situation in criminal law happens when an innocent party is charged with a murder he did not commit. Does he risk life in prison or plea bargain to a lesser charge for the certain five year sentence for the crime he did not commit. Principle would dictate a court fight but practicality might dictate the absolute avoidance of a life sentience by taking a known lesser sentence. This would be further exacerbated if the death penalty were a possibility. The higher the stakes the greater the incentive to offer higher than justified settlements. Would you opt for a chance at the gas chamber or the certainty of five years in prison for a crime you did not commit?

Caps on non economic damages are a recognition that significant but not unlimited compensation is proper for pain and suffering. Caps on non economic damages add predictability and upper quantifiable limits to an otherwise completely subjective loss. While a relatively small percentage of awards for non economic damages exceed the proposed caps, they non the less, have the effect of adding great unpredictability to claims settlements and are a meaningful and integral part of the tort reform package.

Sincerely,

John L. George

KODIAK OIL SALES IC
BOX 1487
KODIAK ALASKA 99615
486-3245
486-3205 FAX

JAN. 31, 1993

HOUSE LABOR AND COMMERCE COMMITTEE
ATTN.:

BILL HUDSON	JERRY MACKIE	JOE SITTON
ELDON MILLER	JOE GREEN	
BILL WILLIAMS	BRIAN PORTER	

HB 292

DEAR SIRS:

KODIAK OIL SALES IS A FAMILY OWNED BUSINESS WHICH HAS OPERATED IN ALASKA SINCE 1950. WE LIKE MOST ALASKAN BUSINESS ARE FACED WITH RISING INSURANCE PREMIUMS AND IF WE BECOME INVOLVED IN A LAWSUIT THE POSSIBILITY OF AN OUTRAGEOUSLY HIGH SETTLEMENT THAT MAY THREATEN OUR CONTINUED OPERATION.

ALASKA NEEDS TORT REFORM VERY BADLY, WE NEED TO STOP THE INSANITY IN OUR LEGAL INDUSTRY IN ALASKA. I SAY INDUSTRY INSTEAD OF LEGAL PROFESSION OR LEGAL SYSTEM SINCE THAT WHAT IT IS A MULTI MILLION DOLLAR INDUSTRY THAT PREYS ON THE PEOPLE OF THIS STATE.

HB 292 WILL BEGIN TO BRING SOME SANITY TO THIS OUT OF CONTROL SITUATION. I URGE YOU MOVE THIS BILL INTO THE HOUSE.

YOURS TRULY
JIM RAMAGLIA
VICE PRESIDENT

FAX TRANSMITTAL

FROM DAVID FRAZIER & ASSOC. INC.

PHONE 907-258-1169, FAX 907-258-3638,
ACCOUNTING PHONE & FAX 907-274-2869

Number of Pages 1

Date 2-3-94

To House Labor & Commerce Attention Brian Porter

I'm in support of HB 292 except that the non-Economic damage cap is to high. It should be reduced from $500,000 to $250,000. I urge you to move to out of committee. Thx!

David Frazier
5565 Shepherdia Dr.
Anchorage 99502

* a speaker - Mike Leissmeier

DAVID H. THORSNESS
JAMES M. POWELL
BRIAN J. BRUNDIN
MARCUS R. CLAPP*
JOE M. HODDLESTON
CARL J. O. BAUMAN
DENNIS M. RUMP*
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HUGHES THORSNESS
GANTZ POWELL & BRUNDIN
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**ONE SEALASKA PLAZA
SUITE 303
JUNEAU, ALASKA 99801-1249
TELEPHONE (907) 586-5912
TELECOPIER: (907) 463-3020

Reply to: JUNEAU

February 3, 1994

Representative Bill Hudson
Alaska House of Representatives
State Capital
Juneau, Alaska 99811

Re: CSHB 292

Dear Representative Hudson:

I am writing to you on behalf of State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company. State Farm presently has approximately 32 percent of the automobile insurance market in the state of Alaska. State Farm Fire & Casualty has 43 percent of the homeowners' insurance market. Collectively State Farm has had significant experience with Alaska's civil justice system which goes back for at least 20 years. It is from this perspective that we offer our comments regarding the CS for HB292, which is presently before you.

You probably already know that we had n. involvement in the introduction or drafting of this legislation. Since our day-to-day activities will be affected significantly by this legislation, we feel compelled to comment on it. We feel compelled to comment for another reason, for regardless of whether we wish to be a part of this debate, we nonetheless are brought into it by those who believe the only reason for tort reform is insurance reform.

At the outset we wish to commend your committee for the efforts it has and is making toward finding balance in an area where there are strong feelings on all sides. Many people have

vastly different opinions about where as a matter of fairness to draw the line on issues such as statutes of repose and caps for non-economic damages. While we have no opinion on those particular issues, it is easy to make the observation that efforts to impose reasonable limitations will have a positive effect on the goals your committee seeks to further through the introduction of this legislation. There are other areas addressed by this legislation which we feel strongly about and the following will set forth those areas.

1. Section 11 (Reduction of future wage loss awards by income taxes). We have always questioned the logic behind not reducing awards for future earnings by the amount of federal and/or state income tax. Section 11 would alleviate what is currently a windfall and we are very much supportive of this change.

2. Sections 16 and 17 (several liability). These sections alleviate an obvious problem in the interpretation of the 1988 several liability initiative. We found it incredible that one of the opponents to this legislation has argued the changes proposed by Sections 16 and 17 to be significant when compared to the way things are currently done. Frankly the rulings we have received on this issue have been different in almost every case. We doubt if anyone else's experience has been different.

What we also find to be incredible is how the clear intent of the 1988 initiative has been so frustrated by those who are unwilling to enforce the intent of the voters. As you will recall the voters in 1988 were told that "the initiative would make each party liable for damages only equal to his or her share of fault and repeal the law concerning reimbursement from other parties." Unfortunately this has not proven to be the case. The changes that you propose in Sections 16 and 17 would simply ensure that indeed a party would be held responsible only for his or her percentage of fault, regardless of who the plaintiff chose to sue. We very much support this change as it will simply give effect to what the voters decided in 1988.

3. Section 14 (offers of judgment) is a change we also support. This provision represents an attempt to encourage parties to reasonably and fairly evaluate their cases. We think the effect of a provision such as this will indeed be significant.

4. Section 20 (pre-judgment interest) is a change which is long overdue. The proposal would key pre-judgment interest to what a party could realistically hope to earn on their money, which of course is the intent of pre-judgment interest. No longer would there be the risk that pre-judgment interest is arbitrarily either too high or too low.

5. Section 21 (pre-judgment interest on future damages) is

also a provision we are very much in support of. This again operates to remove the windfall of awarding pre-judgment interest on future damages or punitive damages, which again as a matter of logic and fairness seems most appropriate.

6. Finally, we are supportive of Section 26, which eliminates costs and attorney's fees that are presently awarded as a matter of course in almost every case. The current issue of who is the "prevailing party" in civil litigation is one that is litigated probably more frequently than any other issue. Indeed, every consumer who purchases an insurance policy from us in Alaska pays for Rule 82 coverage. Eliminating this would not only reduce litigation on this issue, but would remove an element of cost that is present in the current system.

Aside from the above comments which relate to specific sections of the proposed legislation before you, we have a general comment we would like to make. We are, of course, aware that any time legislation such as this is proposed, the opponents will respond by arguing it should not be passed unless there are guarantees the passage will reduce insurance rates by a specific percentage. We wish the issues were so simple. To see they are not, we need only look back at the 1988 initiative. Although we thought then and even now the issue of several liability to be a simple one, there has been a great deal of litigation about the issue of whether fault is to be allocated only amongst those parties the plaintiff has chosen to sue, or amongst all. We are now rapidly approaching the five-year anniversary of the effective date of this initiative and this seemingly simple issue has still not been answered.

We suspect that even if the legislation before you is passed, the meaning of many of these provisions will be disputed for years to come. The opponents of this legislation are talented and at least in some cases well-financed groups who have a great deal of personal stake in the enforcement of the provisions before you. It may be years before the true benefit of this legislation will be felt.

There is a second reason the benefit we fully expect to result from this legislation is not easily quantifiable. Many aspects of civil litigation remain subjective and not quantifiable, especially over the short term. One need only look at the natural disasters which have befallen literally every region of our country in the past five years to see that.

Although we fully expect this legislation to have a positive effect on insurance premiums, those that oppose legislation of this nature for the purported reason that there is no guarantee insurance rates will be affected need only to understand that there are a number of controls in the system that prevent an insurer from having an excessive level of profit. The first is

that the insurance industry is highly regulated and indeed, the state of Alaska employs a Director of Insurance and staff for the very purpose of protecting Alaska consumers.

Second, the insurance industry, even though highly regulated, is also highly competitive. The effect of competition is to also provide for a level of control on the cost of insurance products.

Third, this legislation does provide for a study of the costs to society of the civil justice system. If the goals this legislation seeks to accomplish are not furthered, additional changes can be made. This legislation certainly seems to be a significant step in the right direction.

Finally, we believe you should keep the concept of fairness in mind as you examine each of the proposals before you, aside from their effect on insurance rates, as ultimately, the cost of insurance is borne by each one of us. Is it really fair to have pre-judgment interest at an unrealistically high or for that matter low level? Does it really make sense to assume there would be no income taxes paid on a future lost wage award? Is it fair to pay pre-judgment interest on future damages? Do we, as a matter of course, wish to pay for attorney's fees in every single case? Even if you ignore the benefit we believe this legislation will ultimately have on insurance rates, the answer to these questions seems clear. We would urge each one of you to support this legislation.

If we can be of any assistance to you in evaluating any of these provisions or trying to assess the possible effect of these provisions, please let us know and we will be happy to help.

Sincerely,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN

By: Michael L. Lessmeier
Michael L. Lessmeier

xml13600/lp
cc: Members, House Labor
& Commerce Committee

JACKSON CONSTRUCTION

241 ASPEN STREET
SOLDOTNA, AK 99669
907-262-4485

Dear Committee Member !

As a concerned business man and citizen I respectfully urge you to move house Bill 292 into the House for immediate action

Insurance refor ı is long overdue and even tho I believe this bill does not Go far enough it is a step in the right direction.

I will do all I can to assure its passage once it reaches the House.

Respectfully I am

Harold A Jackson

Roland E. Gower, M.D.
A PROFESSIONAL CORP.
2841 DE BARR RD., #41
ANCHORAGE, ALASKA 99508
907 · 279-3564

fill

PRACTICE LIMITED TO GENERAL SURGERY

BY APPOINTMENT ONLY

February 1, 1994

Received

Representative Brian Porter
House of Representatives
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Brian:

A note (from the home front) to encourage you to continue to support tort reform. House Bill 292 looks pretty good to me as it does to others in the medical field. If I can be of any help to you from this end with testimonies, information, etc., please do not hesitate to contact me.

Wishing you a successful year in Juneau.

Sincerely,

Roland E. Gower. M.D.

REG:bar

NFIB Alaska

National Federation of Independent Business

FOR IMMEDIATE RELEASE
January 10, 1993

FFI, CONTACT: Resa Jerrel
(907) 789-4278

TORT REFORM TOP ISSUE FOR NFIB/ALASKA

JUNEAU--Despite civil justice reforms enacted in 1986, Alaska's small business owners still suffer from sky-high liability insurance rates. "Many members tell me their premiums have continued to soar, even though there have been no claims, or only a very minor claim, against their policies," says Resa Jerrel, Director of the 4,400-member Alaska chapter of the National Federation of Independent Business. "I know of several who have been forced to drop their coverage due to premium hikes, leaving them and their customers without meaningful protection."

The failure of the '86 reforms has led NFIB/Alaska, the state's largest small-business advocacy group, to place passage of HB 292, a comprehensive tort reform bill, at the top of its legislative agenda.

A recent survey of NFIB/Alaska members found overwhelming support for all six of the bill's key reforms among the small business community:

* 96 percent approved barring damage suits by people who received their injuries in the course of committing a crime;
* 89 percent approved limiting the filing deadline for lawsuits arising from construction accidents or product liability claims to six years from the time of injury;
* 84 percent approved telling juries of awards already collected by a claimant for the same incident and deducting that amount from any subsequent judgement;
* 83 percent approved capping punitive damage awards at $200,000 or three times the amount of actual loss, whichever is greater;

9159 Skywood Lane
Juneau, AK 99801

-more-

* 79 percent approved barring injury claimants from naming only "deep pocket" defendants;

* 78 percent approved limiting the economic loss awards in fatal accidents to $50,000 if the deceased has no dependents.

"The survey results clearly show small-business owners feel the current civil justice system is neither civil nor just," Jerrel said. "It encourages people to file million-dollar lawsuits on the flimsiest of pretexts, often in the hope of being offered a settlement just to stop being a nuisance. This kind of 'civil extortion' frustrates fairness and clogs the courts, slowing the delivery of justice for all. And, it imposes tremendous costs on society, fueling insurance rate inflation and raising cost of goods and services for all Alaskan consumers."

Jerrel says pre-session conferences have left her feeling up-beat about the prospect of getting meaningful reforms enacted this year. "You get the sense from all parties involved, including the trial lawyers, that progress must be made this year," Jerrel said. "For the first time in all my years of dealing with this issue, there seems to be a determination among all the players to work together, to seek conciliation rather than confrontation.

#####

NFIB Alaska

National Federation of
Independent Business

January 10, 1994

The Honorable Brian Porter
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Porter:

The NFIB/Alaska - National Federation of Independent Business of Alaska - membership is comprised of 4300 small and independent business owners. The typical NFIB/Alaska member employs four workers and rings up gross sales of about $190,000 per year. In aggregate, the organization's members employ nearly 50,000 workers.

The legislative agenda of NFIB/Alaska is determined by our ballot. The ballot is our annual poll of our membership on a series of issues deemed critical to small business. A majority vote, of the members in response to the poll, sets our policy and position on legislative issues. The objective of this letter is to share with you the enclosed results of the 1994 poll.

I hope this information regarding the views of small business owners on these issues will be useful to you. At your convenience, I would be happy to meet with you to discuss this years results or previous years poll results.

I look forward to working with you on these and other issues of importance to small business owners.

Sincerely,

9159 Skywood Lane
Juneau, AK 99801

Resa Jerrel

Resa Jerrel
State Director

Enclosure

Received
JAN 11 1994
BRIAN PORTER

The Guardian of
Small Business

NFIB/ALASKA BALLOT RESULTS
1994

1. Should legislation be passed requiring voter approval of any new state tax or tax increase?

Yes 81% No 14% Undecided 5%

2. Should the legislature reform the Alaska tort law system by making the following changes:

a. Require construction and product liability actions involving personal injury, death, or property damage to be filed within six years of the accident?

Yes 89% No 4% Undecided 7%

b. Prevent injury claimants from naming only those businesses and individuals who have the deepest pockets?

Yes 79% No 9% Undecided 12%

c. Limit punitive damages to not more than three times that awarded for actual loss, or $200,000, whichever is greater?

Yes 83% No 8% Undecided 9%

d. Limit award for economic loss to $50,000 when the deceased is not survived by children, spouse or other dependent?

Yes 78% No 14% Undecided 8%

e. Make the courts and juries aware of any other awards the claimant may have received and deduct that amount from judgements?

Yes 84% No 10% Undecided 6%

f. Prohibit suits for damages if the injury or death occurred while the plaintiff was committing a crime?

Yes 96% No 3% Undecided 1%

3. Should a small-business economic impact statement be attached to all bills considered during session?

Yes 62% No 25% Undecided 13%

4. Should a Small business Advisory Committee in the legislature be established to review proposed legislation and recommend legislation beneficial to small business?

Yes 73% No 18% Undecided 9%

5. Should legislation be enacted permitting a small business to replace workers' compensation insurance with a combination of health and wage replacement insurance (known as 24-hour coverage)?

Yes 51% No 16% Undecided 33%

6. Should there be a limit on the number of bills legislators can introduce?

Yes 60% No 28% Undecided 12%

7. Do you currently provide health insurance to your full-time employees?

Yes 47% No 53% Undecided 0%

7a. If you answered yes to question 7, approximately how much do you currently pay for health insurance for each full-time employee each month?

Up to $75	3%
$76 to $125	13%
$126 to $200	33%
More than $200	51%

7b. If you provide health insurance, who pays for it?

Employer pays 100 percent	66%
Employee pays 100 percent	3%
Employer and employee share the cost.	31%

8. If your firm does not provide health insurance to employees, why not? (Check only one):

43% Premiums are too high or the firm cannot afford to pay for benefits.

17% Employees are generally covered under policy of spouse or parent.

14% The firm does not qualify for a group policy.

7% Employees prefer additional compensation in place of health insurance benefits.

3% Lack of employee interest.

16% Other. (Please detail in the Comment section.)

8a. If you do not provide health insurance, which of the following measures would you likely take to recover costs if you were required to buy health insurance for all your full-time employees? (select those that apply.)

42% Raise prices for my product or service.
22% Eliminate part-time jobs.
35% Eliminate full-time jobs.
23% Reduce hours worked for some employees.
26% Cut or hold down other employee benefits.
51% Cut or hold down employee wage increases.

18% Postpone or cut expenditures for plant and/or equipment.
24% I would be forced out of business.
6% Other. (Please explain in the Comment section.)

9. Who should have the responsibility for making health insurance purchasing decisions?

Employer 45% Individual 42% Undecided 13%

10. Should doctors and hospitals be required to post their fees for the services and procedure they provide?

Yes 76% No 14% Undecided 10%

Weona Corporation

We the following strongly support the passage of H.B. 292.

Please move this bill into the House as soon as possible.

Edward W Wade Sr STR#2 Box 9319 Eagle River, AK 344-1921

H B [illegible] 2910 West 33RD ANCH, AK 99517 344-1921

Gordon O Vernon 5901 E 6TH AVE SP 191 Anch AK 99504 337-4235

Brian J. Kinkaman 500 Fischer #B Anchorage AK 99518 562-1682

James A. Fauske 3750 Rebecca Cir Anch AK 99515 - 349-7425

[illegible] 11700-B Nix Ct. Anch, AK 99515-344-7826

[illegible] [illegible] [illegible]

[illegible] St Rt Box 9319 Eagle River AK - 694-5120

Debra Robertson 501 Nathan Drive #3 Anchorage, AK 99518 344-1921 wk

Mike McGinnis 4021 Rabbit Creek Rd. Anch. AK 344-1921

[illegible] [illegible] [illegible] Anch AK 99518 561-4579

P.O. Box 93570 Anchorage, Alaska 99509 FAX (907) 344-8244 Phone (907) 344-1921

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FROM DAVID FRAZIER & ASSOC. INC.

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ACCOUNTING PHONE & FAX 907-274-2869

Number of Pages 1

Data 3-15-94

To Brian Porter Attention House Judiciary Committee

I think HB292 (Tort Reform) makes alot of economic sense for both the plaintiff and defendant. what I like most is the quick resolution of economic issues without undue cost with mandatory arbitration.

David Frazier
2636 Shepherdia Dr.
Anchorage AK 99508
(District 20)

UNITED BROTHERHOOD OF
Carpenters and Joiners of America
LOCAL UNION NO. 1281
407 DENALI , #100
PHONE 276-3533
ANCHORAGE, ALASKA 99501
Fax: 276-7962

February 28, 1994

Representative Brian Porter
State Capitol, Room 118
Juneau, AK 99801-1182
FAX : 465-3834

FAXED AND MAILED 2/28/94

RE : House Bill 292

Dear Representative Porter,

Many of us, myself included, within the construction industry favor a great deal of that which is contained in HB292. We can agree that tort reform is needed. However, there needs to be an avenue to make sure the savings are realized by those from whom it has been extracted in the first place.

That means that the insurance companies must also step to the plate along with the medical community and others.

Senator Duncan has a good idea in his health care bill. Give the insurance companies so long, in this case 1 year, to drop rates or it will be mandatory. Right on down the line until it gets to the average citizen, the consumer.

That would be ideal, but you must start somewhere, so "YES" to HB292.

Sincerely,

Phil Thingstad
Business Manager
Carpenters Local 1281

PT/wh

CAPE FOX
CORPORATION

March 2, 1994

Representative Brian Porter, Chair
House Judiciary Committee

Dear Representative Porter:

I want to add my voice to those urging your passage of HB 292.

I have been an advocate of Tort reform for many years. The provisions of HB 292 are well thought through, and reasonable. They level the field on which we play in an already too litigious world. They provide adequate protection for successful plaintiffs without ruining any prospect that the losing party will be able to stay in business.

Our insurance costs are high, and the complexity of our potential liability requires expensive professional attention. We are a small company that have never experienced an insurance loss, and still we have to struggle to assure that we have all the coverage we need.

"I'll sue you" is becoming as common a daily greeting in business as "have a nice day". HB 292 is good for Alaska. It is moderate, and fair. I urge you to pass it.

Sincerely,

Ernesta Ballard
Chief Executive Officer

Received
MAR [illegible] 1994

P. O. Box 8550 • Ketchikan, Alaska 99901
Tel: (907) 225-5163 • Fax (907) 225-3137

PAUL M. WORRELL, M.D.

INTERNAL MEDICINE
UNIVERSITY PROFESSIONAL CENTER
3650 LAKE OTIS PARKWAY
ANCHORAGE, ALASKA 99508
561-4402

February 22, 1994

Representative Brian Porter
State Capitol, Rm. 122
Juneau, AK 99801-1182

Dear Representative Porter:

I appreciate your work in the Legislature in moving the Tort Reform bill forward. I hope that we have a chance to say hello when I am in Juneau the 27th and 28th of February or March 1.

The lack of Tort Reform changes has certainly discouraged the medical community far more than is realized. I think Tort costs have also driven up the cost of medical care far greater than people realize.

I certainly appreciate your work this past few months.

Sincerely yours,

Paul M. Worrell, M.D.

Paul M. Worrell, M.D.

President, Anchorage Medical Society
pmw:pk

February 22, 1994

Rep. Brian Porter, Chair

When I moved to Alaska in 1955, attorneys headed my list of most admired professions. Lawyers have done a lot for Alaska and America. However, times have changed.

The legal system has changed to be one of the worst of the profession. Not lawyers, per se, but <u>the system.</u>

I recently was involved in a silly lawsuit that racked up way over $100,000 in legal fees. The suit was eventually suspended with <u>no</u> settlement money. Only the lawyers won.

Please pass any law that will clamp down on liability reform and stop silly lawsuits. Why does Alaska need 10 times more per capita the number of attorneys that practise in growing Japan?

Thank you,
Keep up the fight!
Sewell

Sewell F. Faulkner

P.S. This complaint is about the <u>legal system, not lawyers.</u> There's lots of fine attorneys that must play by the rules of this terrible system.

ARCTIC WELDING SUPPLY INC.

DATE 2/23/94 TIME ____ A.M. ___ P.M. ___ PAGES ____

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TO: Name	FROM: Name
Address	Subject
Location	Fax. No. FAX # (907) 562-2638
Fax No.	Verifying No.

Rep B Porter

I have been actively pushing for some form of Tort Reform for several years.

I believe we need a cap on awards + a cap on attorney fees allowed.

If H.B - 292 speaks to those issues then I hope you will help insure its passage.

Owen J. Sauge

PH 279-2846

wk ph. 562-2681

2·23·94

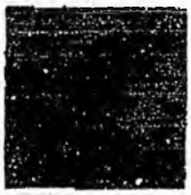
To: Rep Brian Porter & Committee Members

From: R.W. Garner, M.D.

Get MB 292 out of committee & onto the floor. I strongly support it.

RWG

TOTAL P.01



ALASKA STATE MEDICAL ASSOCIATION
4107 Laurel Street • Anchorage, Alaska 99508-5334 • (907) 562-2662

March 11, 1994

TO: Representative Brian Porter
Alaska State Legislature
P. O. Box V (MS 3100)
Juneau, AK 99811

FROM: Dr. Donald Lehmann, President
Alaska State Medical Association

RE: House Bill 292

Dear Representative Porter:

On behalf of the Alaska State Medical Association I would strongly encourage you to support House Bill 292 and pass this bill through your committee. The Alaska Bar Association is currently attempting to smear this bill by passing out a significant amount of misinformation. The current Tort system that we have in this state is unfair, inequitable, and irrational. It is making it increasing difficult for hospitals to stay open and the physicians to practice, especially in rural parts of the state. Tort Reform does work. Experience has shown that fair and comprehensive reform has lowered malpractice costs significantly in California and Indiana, the two states where it has been enacted. Alaska will benefit with the passage of House Bill 292.

If you have any questions that I can answer, do not hesitate to contact me.

JOHN M. SNYDER, M.D.
General Surgery
2841 DEBARR ROAD, SUITE 44
ANCHORAGE, ALASKA 99508
(907) 277-1375
(907) 277-1376 FAX

Dear Representative:

I am writing to voice my objection to the Duncan bill specifically, and in general to any premature attempts by the state legislature to radically change the health care system of Alaska.

As a prelude to my comments I would also like to inform you that the recent sanction of the Duncan bill by the Anchorage Medical Society and by Dr. Korshin is not reflective of the general opinion of the majority of private physicians in Anchorage. The meeting, at which it was voted to support the bill, was attended by less than 50 physicians, several of whom are not members of that body. The vote was 22 for, 10 against, which indicates the attendance. I believe that the Medical Society no longer reflects the desires or opinions of the average physician in practice, but rather the voices of a vocal minority, who by default, secondary to unimaginative and ineffective policies, have assumed leadership roles in the organization. I personally discontinued membership in the Society 15 or so years ago for these reasons.

I acknowledge that problems exist within our current health care system. If you will bear with me for a few moments, I would like to share some of my thoughts with you.

There is only one universal agreement concerning the current system; it costs too much. All other objections are either subjugated to this fact, a result of this fact, or emotional cries of crisis to magnify some of the manifestations of this fact.

The appropriate question is, why does it cost too much?

The answer is not a defective capitalistic system, nor is it economic greed, excess demands or any other obvious practical causality. Medicine in the United States today costs too much because of the underlying philosophical principles under which it is practiced. The basic flaw is that our populace demands, and we physicians, without restriction, offer, health care on the basis of "the least potential good", as distinct from "the most probable good." By least potential good , I mean that we will use any technology, therapy, test, or treatment if the slightest possibility exists that it may be of help. To elucidate why this philosophical error currently is accepted by our society

is beyond the scope of this letter, but some of the results of this approach can be delineated.

The most obvious is that physicians no longer practice within the probabilities of statistical information nor prioritize with regard to probable results. For example, nearly every patient seen in our emergency rooms complaining of headache ends up with a CAT scan of their head to rule out a brain tumor or a vascular abnormality. Why? The probability that an isolated headache is caused by either of these serious diseases is less than 2 in 10,000, the cost of a CAT scan is about $1000. In other words, we are willing to spend $5,000,000 to $10,000,000 to diagnose one case which may or may not be curable. Why? There are two overwhelming reasons. Number one, the patient and family expect it, because cost is no object when we are discussing their personal health, And two, if we fail to diagnose this rare entity we will be successfully sued. Do not misinterpret this to mean that I blame the legal system for the majority of the problem. The litigious nature of our society is a manifestation of another philosophical error that is only capitalized by the attorneys. However, a direct consequence of this error, is the denial of the significance of cost.

Acceptance of the policy of least potential good has also resulted in the common manifestation of health care workers to accept so called "junk science". There are always experts available to testify that electromagnetic waves from power lines, asbestos in walls and drugs such as Bonine could conceivably be health hazards. Even the most remote possibility, despite valid scientific evidence to the contrary, that a threat may exist is justification for radical economic misadventures, such as removal of asbestos from all public buildings. This problem is evident in even the most elemental of patient-doctor discussions concerning a potential health problem. It results in the dilution of decisions based upon science rather than witchcraft.

Another major source of excessive costs arising from the acceptance of the philosophy of least possible good is in the area of regulation. This applies to the FDA who regulates drugs, to JCAH which regulates and certifies hospitals and Medicare/Medicaid regulations which affects both hospitals and physicians. Very few accounts of the costs of meeting JCAH requirements have been published. One such study by a California hospital of 350 beds done several years ago, found they spent 1.5 million dollars a year to meet these stipulations. The sad, but true, reality is that JCAH certification is superfluous in today's modern medicine. The legal environment is such that acceptable standards would be maintained even if physicians and nurses did not independently demand them in their hospitals. Last year two major New York City hospitals declined JCAH review because of the unjustified expense of adherence to illogical

regulation. We should recall the reduction of airline fares that resulted from deregulation of that industry.

Although I could expound for several pages on other direct ills resulting from this philosophical approach, I believe you can envision many for yourself, given this premise.

How does one go about changing the philosophy of a society? The answer is that one cannot. It will require multiple generations of altered values and attitudes, taught by a generation that does not yet exist.

If it is impossible to change the root cause of the problem, what may we do to temporize until such changes can occur?

If we work backwards, by attempting to control the result, ie, excessive costs, there can be but one result, rationing of care. All managed systems, without exception, have this as a common denominator. Is this intrinsically bad? The answer is that it depends upon whether the rationing is arbitrary and indiscriminately applied, or based on sound scientific probabilities of outcome. In the previous example of the patient with the headache, if we elect not to perform a CAT scan we are, in effect, rationing health care. However, it is being rationed on the basis of the statistical improbability of a rare entity. On the other hand, if we are unable to order the CAT scan because funding allotments have been exceeded at that particular point in time, it becomes indiscriminate and arbitrary and thus a denial o health care. I cannot stress enough the difference between these two form of rationing. One is the result of scientific data, proven and accepted, which can result in the greatest probable benefit to the most, while the other is the result of mindless bureaucratic decree. The current situation in Canada is an example of the latter.

I do not innately object to the concept of universal health care coverage for all.

I do not inherently object to the concept of a single payor system. However neither of these systems can be implemented within the framework of medicine as currently practiced in the United States.

We must recognize that the media hype concerning the 36 million uninsured in the United States is a gross misrepresentation and exaggeration of fact. Some 30% of these people are under the age of 25, and therefore have minimal need of insurance. Many have voluntarily decided to forgo the expense of insurance. In 1992 I performed $60,000 worth of uncompensated surgery on the "uninsured" who, according to the media, have no access to health care. If "someone" is now going to reimburse

me and every other surgeon in the country for this surgery, I feel it fair to ask, "How much is this going to cost and where is the money coming from?"

I assure you, it is going to cost several fold your most extreme projections. Whoever that "someone" is, will very soon insist on dictating how the money is spent and we will find ourselves in scenario number two above, arbitrary rationing of care.

If we are to provide universal coverage, let us provide it in relation to its need. The young, subject to accidents, need coverage for catastrophic events. The old, subject to pre-existing illnesses, need assurance of continued coverage. If it is to be universal, it should be truly universal, ie the Veterans Administration and Public Health Service must be dismantled and it should apply to all federal and state employees. This must include senators and representatives.

If we are to provide a single payor system we must insist upon avoidance of the concept of "free care" by including a significant deductible to the patient to encourage the idea of personal responsibility, now glaringly absent, secondary to the third party payor system. There is little doubt that a single payor system would realize considerable savings from paperwork reduction.

Regardless of the practical mechanics adopted, it is necessary to incorporate an alternative philosophical attitude.

I would favor the up front acknowledgment of rationing under a system as adopted by Oregon. If we are obliged to ration care, let us be honest about it. Let our physicians agree upon the most "bang for the buck" and define a rational, scientific, fair system of rationing that would benefit the majority.

This must be combined with reductions of regulation by divorcing hospital reimbursement from JCAH certification and malpractice reform of a meaningful nature. There are a multitude of other minor points that would be of benefit, but these represent my basic suggestions for change.

Thank you for your time, and I hope this may have offered some alternative views for your consideration.

Sincerely,

John M. Snyder M.D.

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February 11, 1994

Daniella Loper
Staff Counsel
Judiciary Committee
House of Representatives
State Capitol
Juneau, AK 99811

RE: HR 292

Dear Ms. Loper:

We are pleased to respond to your request for information regarding California medical malpractice reform legislation. California, like many other states, enacted tort reform legislation in the mid-70s in response to the medical malpractice insurance availability and affordability crisis. The California legislation known as the Medical Injury Compensation Reform Act of 1975 (MICRA) enacted the following tort reforms:

- Capped non-economic damages at $250,000.
- Required periodic payments on judgments over $50,000 at the request of either party.
- Established three-year statute of repose and minors statute requiring claims by children under six within three years or prior to eighth birthday.
- Permitted evidence of collateral source recovery and barred subrogation.
- Authorized health care providers to enter into contracts with patients for binding arbitration of medical malpractice actions.
- Established limits on attorney contingent fees.
- Required 90 days notice prior to commencement of a medical malpractice action.
- Immunity for medical peer review proceedings.

In addition, California law provided the following:

- Certificate of Merit to be filed with medical malpractice action.
- Joint and several liability abolished.
- Pure comparative fault system to establish liability among joint tort-feasors.
- Pleading hurdle for punitive damages.
- Confidentiality of medical peer review proceedings.

These provisions have been included in model medical tort reform legislation which are enclosed as Exhibit 1. Although these model provisions may form the basis for a comprehensive medical tort reform bill, modification of the definitions would probably be required to fit your statutory arrangement and expand coverage beyond medical providers.

A number of studies have been done regarding the relative cost of medical malpractice insurance and the impact of tort reform. Although we have been advised by actuaries that it is impossible to quantify precisely the impact of any particular tort reform, it is widely acknowledged that California's MICRA law has made medical malpractice insurance widely available and affordable in California as compared to other states that have not enacted tort reform. Enclosed as Exhibit 2 are a series of charts comparing medical malpractice experience in California, Ohio, New York and Alaska.

Chart 2-1 is a graph showing that California medical malpractice losses have trended downward since the enactment of MICRA in 1975. Chart 2-2 shows the California medical malpractice insurance data used to develop Chart 2-1. This chart demonstrates that over the 17-year period that MICRA has been in effect, medical malpractice costs have only increased 83% in California while US costs excluding California have increased by over 413%. Had California medical malpractice premiums increased at the same rate as the rest of the United States, California physicians and hospitals would have paid an additional $663 million during calendar year 1992 alone. Total savings to date exceed several billion dollars. Chart 2-3 demonstrates that California medical malpractice insurers have been able to keep losses under control and return surplus to policyholders as dividends while achieving an average ratio of expenditures to premium income of 101.2%. The industry benchmark is a ratio of 100% over the course of the normal claims payout period which depends on the statute of limitations and other factors affecting the resolution of claims.

The experience of other states also graphically demonstrates that tort reform helps control medical malpractice insurance costs. Several states such as Ohio enacted medical malpractice tort reforms similar to California and also saw a gradual reduction in malpractice costs compared to the rest of the United States. However, in 1982, Ohio's medical malpractice tort reforms were substantially weakened and its costs have risen dramatically as shown on the enclosed Chart 2-4.

Some states such as New York have not enacted medical tort reforms and their physicians and hospitals have suffered severe increases in the cost of medical malpractice insurance resulting from swings in the severity and frequency of losses as shown on Chart 2-5.

Chart 2-6 indicates that Alaska experience appears to be similar to New York with wild swings in losses driving medical malpractice premiums up from $781,000 in 1976 to $13,439,000 in 1992. This is a 1,620% total increase in the cost of medical malpractice costs in Alaska over 17 years or an average of 26% per year, more than twice the national annual average increase of 11.3% as shown on Chart 2-7 and more than five times the average annual increase in California for the same period.

It should be noted that these state-by-state changes in medical malpractice costs translate into different premium costs for individual physicians and hospitals depending on where they practice. Chart 2-8 presents a comparison of premium costs for seven medical specialties in California to other states which clearly demonstrates that MICRA has kept California premiums significantly lower. California physicians not only pay less than their colleagues in other states, but they have seen a drop in their premiums when adjusted for the cost of living. Chart 2-9 shows that the average California physician pays 60% less today than before MICRA. These savings are passed along to patients and keep health care costs lower as demonstrated by Chart 2-10 which compares health care costs in California and New York.

Members of the House Judiciary Committee may want to carefully read the article titled, "California's Medical Malpractice Crisis" which was first published in 1975 by the National Conference of State Legislatures and Georgetown University's Health Policy Center as part of a report entitled A Legislator's Guide to the Medical Malpractice Issue which is attached as Exhibit 3. Barry Keene, legislative author of MICRA, tells the story from the California Legislature's perspective and recounts the difficulties of enacting tort reform in the face of intense pressure from the contingency fee trial attorneys.

California's medical tort reforms have worked in spite of strong pressure from the trial bar to overturn them in the Courts or Legislature. Enclosed as Exhibit 4 is an article appearing in the California Physician, June 1991, titled, "A MICRA Retrospective," that gives a retrospective of MICRA over the past decade and a half. As the article demonstrates, real savings did not occur for many years until the California Supreme Court upheld MICRA in 1985. Because trial courts refused to apply MICRA before the Supreme Court ruled on the constitutionality of MICRA, insurers were unable to report savings from tort reform and malpractice insurance increased in cost during the early 1980s. The MICRA debate was finally put to rest in 1987 when the California Legislature refused to repeal or weaken MICRA. Since that time, California trial courts have recognized MICRA and policyholders have received substantial "MICRA" dividends amounting to several hundred million dollars. These MICRA dividends were paid by California's physician-owned insurers from loss reserve savings in the late 1980s. During

the 1990s, California policyholders have had almost no rate increases and continue to receive substantial MICRA dividends.

Medical tort reform has been recognized as a key component of health care reform in all but one of the major health care bills introduced in Congress. Experts familiar with health care costs believe that physicians have been compelled to undertake expensive diagnostic and treatment procedures in order to avoid the risk of unwarranted medical malpractice actions. Commentators call these practices "defensive medicine" and calculate the cost in billions of dollars annually. Exhibit 5 is a report by the respected health care consulting firm of Lewin-VHI that estimates medical tort reform may result in savings as high as $4.3 billion per year. All of the managed care proposals before Congress including the Clinton Administration bill, contain medical tort reform provisions. The Coalition for Effective National Medical Liability Reform advocates California's MICRA reform as the blueprint for effective tort reform. Its pamphlet entitled, Without True Medical Liability Reform, Health System Reform Is Just a Mirage, is attached as Exhibit 6.

Also enclosed are copies of the MICRA Information Manual dated January 1, 1993 prepared by the Californians Allied for Patient Protection, a coalition of health care and other organizations dedicated to the preservation of MICRA. These materials provide a convincing argument for medical tort reform and the benefits that will be provided to Alaska citizens by a stable marketplace for medical malpractice insurance.

In conclusion, if the Alaska Legislature enacts a comprehensive package of tort reforms along the lines of California's MICRA, the rate of increase in the cost of medical malpractice insurance should over time be brought in line with other states that have enacted similar tort reform. Tort reform should also help eliminate the wild swings in the severity and frequency of losses which will foster a stable marketplace for medical malpractice insurance in Alaska.

Very truly yours,

PHILIP R. HINDERBERGER

PRH/rl

Enclosures

bc: James A. Affleck, M.D., NORCAL Mutual Insurance Company
Brad Cohn, M.D., Medical Insurance Exchange of California
Martin Hatlie, Health Care Liability Alliance
Roger Holmes, Biss & Holmes
Harlan Knudson, Alaska Hospital Association
Jay Michael, Californians Allied for Patient Protection
J. William Newton, NORCAL Mutual Insurance Company
Ray Schalow, Alaska State Medical Association
Art Stanford, NORCAL Mutual Insurance Company
Al Tamagni, Alaskans for Liability Reform
David E. Willett, Hassard, Bonnington, Rogers & Huber
James O. Wood, Tillinghast

FEATURE

Product Liability Tort Reform Needed Now

Calvin A. Campbell Jr., President and CEO, Goodman Equipment Corporation, in testimony on the Fairness in Product Liability Act of 1993 (H.R. 1910) before an Energy and Commerce subcommittee.

I can think of no issue of greater importance and concern to American manufacturers than product liability tort law reform. The current product liability system, patchwork in nature and lacking uniformity, deters innovation, results in lost opportunities for job growth, and impairs significantly the ability of American manufacturers to compete against stiff competition from enterprises based in foreign countries. For smaller companies, these effects are magnified.

Runaway tort law results in untoward consequences in another group as well—the consumer. All of us pay more for goods because of a hidden "tort tax" that imbalanced liability law has placed on American consumer products. For example, the American Ladder Institute reports that product liability costs account for 20 percent or more of the price of the ordinary household stepladder. You and I pay a similar "tort tax" almost every time we purchase an item.

Another effect of imbalanced tort law relates to the principle of joint liability, sometimes called joint and several liability, which allows a minimally at-fault "deep pocket" defendant, for instance a manufacturer, to be held liable for the entire cost of an injury. Because of joint liability, manufacturers of useful and needed medical devices and other products face difficulty obtaining the raw materials necessary to manufacture their products. The several liability for noneconomic damages provision in H.R. 1910 will help to alleviate this problem.

The ability of manufacturers to compete in the international marketplace also is challenged by the problem of "long-tail" liability. Capital goods manufacturers in the United States are exposed to liability for products that were manufactured a very, very long time ago. An example of this problem comes from Harris Corporation, which in 1985 was forced to defend a product liability case brought by a Pennsylvania worker whose hand was severely injured in a printing press that was manufactured in the 1890s. Although the product had been modified significantly over the century, a jury rendered a verdict against Harris in the amount of $687,000.

The machine tool industry also is hurt by the current law. Cases involving very old machine tools result in substantial legal costs and put American machine tool builders at a disadvantage with foreign competitors. Generally, foreign companies do not have machines in this country that are over 25 years old. Therefore, they have significantly less liability exposure and pay lower liability insurance premiums than their American counterparts.

The European Community has resolved this problem for manufacturers by establishing a 10-year statute of repose, which places an outer time limitation on litigation for all products. The moderate statute of repose contained in H.R. 1910 would establish a 25-year limit and would apply only to injuries resulting from capital goods for which workers' compensation benefits are available. This assures that no claimant will go uncompensated for a workplace injury caused by a capital good.

The workers' compensation offset section in H.R. 1910 clarifies the relationship between the workers' compensation system and the product liability system by providing rules that keep these systems separate, minimize legal costs and promote safety.

Currently, in most states, an employer can take an action that causes a workplace injury by, for example, removing a guard from a machine tool, resulting in an injury to an employee. If the employee files a lawsuit against the machine tool builder to obtain a recovery in addition to workers' compensation, the employer can join in that action, using a "subrogation lien." If the worker's suit is successful, the employer can recover all of the money it paid in workers' compensation, even though the employer was a principal cause of the accident!

Under the approach in H.R. 1910, a machine tool builder would have an opportunity to abrogate the employer's subrogation lien if it can be proven by clear and convincing evidence that the accident occurred because of the employer's fault.

In sum, H.R. 1910 would restore fairness and provide uniformity in liability law. It also would promote job growth and continued economic recovery, and position American enterprise to compete effectively in the global marketplace.

Washington Correspondent, American Machinist, Feb. 11, 1994

Robert B. Stephenson
P.O. Box 81314
College, Alaska 99708

February 17, 1994

To Whom It May Concern:

It is my understanding that HB 292 would severely limit Alaskans' right to recovery from accidents and negligence.

In 1988, I and two others suffered massive 3rd degree burns from a 500 gallon propane spill and explosion near Fairbanks. Untrained workers were directed to move a large propane tank (1,200 gal. cap., 3' x 18') containing about 500 gallons of liquid propane. That's illegal. They broke a bottom valve, and all 500 gallons leaked out and exploded within minutes. In addition, the resulting fire burned down a huge warehouse, a loss of several million dollars.

I spent a month in the hospital, including two weeks in the intensive care burn unit, and did not recover from my burns and skin grafts for about three years. In fact, my skin will never be the same as it was. My hospital and doctor bills for the first month alone were well over $100,000. None of us will ever be the same after these burns and emotional injuries.

This accident was a result of improper handling of a propane tank. The owner of the tank did not want to remove the propane from the tank BEFORE moving it, as is required.

My burns and skin grafts have healed now, but I will never be the same, as I am sure you can understand.

It was more than a year after the explosion that symptoms of Post Traumatic Stress Disorder (PTSD) began to surface. Nightmares, sleeplessness, fear of the workplace, just to name a few, were common.

I still have flashbacks and nightmares of amputation and death squads.

43% of my body had little or no skin. I could only begin to describe the pain of being lowered into a whirlpool for debriding (dead skin scrubbed off). No amount of morphine can prevent the screaming and the horrible pain.

No amount of money can compensate for that pain, which took place once a day for thirty days. Would you go through that for $10,000 a day? How about $20,000? What's YOUR price? If this happened to your son or daughter or family member, would you want to cap their recovery for pain and suffering?

It would be my recommendation for industry to be regulated by stricter standards and be made to follow existing standards. In my opinion, this would limit the negligence and the injuries to Alaska's work force.

Let's stop the negligence, not prevent the fair recoveries for injured Alaskans.

I believe that HB 292 is completely unfair to innocent victims in Alaska. It would have serious consequences to the citizens of Alaska, your constituents. I strongly urge you to vote against such tort reform bills.

Your response would be greatly appreciated.

Sincerely,

Robert B. Stephenson

Robert B. Stephenson

JOHN W. HENDRICKSON
ATTORNEY AT LAW

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FAIRBANKS OFFICE
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February 11, 1994

Representative Brian Porter
State Capitol (MS-3100)
Juneau, AK 99801-1182

RE: H.B. 292

Dear Brian:

Please oppose H.B. 292 (L & C). It proposes no attorney fees for someone who gets run over by a truck on a crosswalk. This is absolutely crazy. That person has an absolute right to attorney fees as part of his costs.

Why should a banker get attorney fees when he sues you on a note and an injured person cannot. The only people who will benefit from this are large insurance carriers. It is a fact that insurance carriers will not settle large claims even when liability is plain unless the injured parties' damages go far beyond the policy limits. I have been in personal injury cases for 28 years and the foregoing is fact.

Also putting a $10,000.00 limit on the loss of a single person's life, if he or she has no dependents is draconian. Think about some drunk driver killing a single son, daughter or grandchild.

Please put this bill in file 13, We have been tort reformed twice already. What we need is an insurance reform bill.

Very truly yours,

John W. Hendrickson

John W. Hendrickson

kmp

Alaska Court System
State of Alaska
OFFICE OF ADMINISTRATIVE DIRECTOR

CHARLES S. CHRISTENSEN III
Staff Counsel

303 K Street
Anchorage, AK 99501
(907) 264-8228

January 24, 1994

The Honorable Bill Hudson
Chairman, House Labor and
Commerce Committee
State Capitol, Room 108
Juneau, Alaska 99811

Dear Representative Hudson:

Thank you for giving me the opportunity to testify on House Bill 292, relating to civil actions, on November 22, 1993.

As I stated at the meeting, the supreme court generally does not take a position on legislation. Passage of legislation is a matter of public policy which our constitution leaves to the purview of the legislature. The exception to this general rule is when legislation directly affects the internal administration of the courts. The majority of HB 292 does not fall into this category, and the court takes no position on those sections of the bill. However, HB 292 does propose to change one important court rule, Civil Rule 82. As you know, that rule provides that the prevailing party in a civil suit is entitled to recover a portion of its attorney fees. HB 292 would repeal Rule 82 in tort cases. I have been instructed by the supreme court to state its opposition to this change. This position is not taken lightly; this is the first time in many years that the court has formally opposed a change to one of its rules.

I have reviewed the materials submitted by the group "Alaskans for Liability Reform." The stated justification for the repeal of Rule 82 is to "reduce litigation costs and court time, and streamline the civil process for expediency and fairness." The supreme court disagrees that this would be the result of the repeal of Rule 82.

Rule 82 and its predecessors have been around in Alaska since 1884, so we have had a good opportunity to see how it works. The rule has been continuously revised over the years, and the supreme court completed a substantial multi-year revision process in July, 1993. The latest revisions were intended to make the operation of the rule even more fair, and we believe that this goal has been achieved.

In a very basic sense, Rule 82 is a rule which recognizes the reality of attorney's fees. Such fees are an inherent part of any civil justice system. Rule 82 has a dual effect: it provides partial compensation to the party who wins a lawsuit, and it streamlines the civil justice process. These effects are manifested as follows:

First, Rule 82 discourages unfounded lawsuits by plaintiffs. Relatively few plaintiffs are willing to press a frivolous case against a defendant if they know that it is very likely that they will end up paying a substantial amount in attorney's fees to the defendant. Rule 82 weeds out many of those plaintiffs who know that their claim has no real merit.

Second, Rule 82 gives a plaintiff a personal stake in a lawsuit. This personal stake would otherwise be lacking in a case where the plaintiff was represented by an attorney with a contingent fee arrangement. The significance of giving the plaintiff a personal financial stake is that a plaintiff is more likely to disclose the weak points of his case to his attorney up front, and to express a more realistic attitude in evaluating it. This enables the attorney to evaluate the client's case more fairly at the beginning of the process, by shifting the emphasis away from sympathy, revenge, or so-called "principle." Cases which are evaluated fairly and early by the plaintiff and his attorney are more likely to settle early.

Third, Rule 82 makes it more likely that insurance companies will settle claims before the hiring of lawyers or the filing of lawsuits. If a claim is clearly valid, the company has an economic incentive not to allow the plaintiff to file a suit. Thus, Rule 82 gives insurance companies an extra incentive to evaluate claims early and fairly. Without Rule 82, the insurance company of a potential defendant cannot, without incurring expenses to itself, sit around and wait to see if the plaintiff if serious enough to hire an attorney and file a lawsuit.

Fourth, Rule 82 allows plaintiffs with small cases to bring them. Understand that attorneys generally will not handle cases under $20,000 or $30,000 on a contingent fee basis. The amount of work relative to the potential payback makes it too great a risk. Small plaintiffs have to pay attorneys on an hourly bases, just as defendants do. The reality is that a plaintiff will not file a claim for a small amount, if he knows that he will end up giving most of it to a lawyer. Rule 82 ensures that if the plaintiff wins, the defendant will pay at least a portion of the plaintiff's fees. Without Rule 82, defendants would have an incentive to ignore meritorious small claims, because they know that it would not be economical for the plaintiff to hire an attorney.

Fifth, Rule 82 discourages marginal appeals by the losing party. Borderline appellate grounds can be bargained against the Rule 82 fee award in most instances. By this mechanism, the rule again prompts a realistic evaluation of the merits of the case before an appeal is filed.

Finally, in a very basic sense, Rule 82 is fair. In each lawsuit there is a winner and a loser. One party has a claim or a defense that is valid, and the other does not. Rule 82 ensures that the party who prevails is at least partially compensated for the cost of prosecuting or defending the suit. Without Rule 82, the winning party is solely responsible for its own attorney's fees, solely responsible for bearing the costs of a lawsuit in which it should never have been involved. The court does not believe that this is a fair result.

Thank you for your consideration. Please advise if you have any questions or comments.

Very truly yours,

C. S. Christensen III
Staff Counsel

HB-292

OMNI MEDICAL CENTER

Robert Jay Rowen, M.D.
Diplomate, American Boards of
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February 15, 1994

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To Danielle	From Luck
Co. H. Jack	Co. O. L.
Dept.	Phone # 465-2538
Fax # 465-3834	Fax # 465-2974

Kari Luck, Director
Division of Occupational Licensing
3601 C Street
Anchorage, AK 99503

Dear Mr. Luck,

I am writing this in response to proposed legislation entitled, Medical Practice Parameters. I have some significant concerns about this legislation. Notwithstanding the potential cost, I am more than concerned about what impact regulatory practice standards might have on the constantly changing practice of medicine. I am very concerned that regulating the practice of medicine will create more of a nightmare than the problem it is trying to solve. I am not in favor of this legislation.

Who shall pay for this committee representing medical specialties? And of course, what shall be the reimbursement? Since the parameters must be revised every 2 years, this will incur an ongoing significant expense indefinitely.

Some innovative individuals who are on the cutting edge, are accused of quackery, and then their practices are embraced within a few years. Others might be practicing current, accepted standards which may find themselves outmoded even though the practice is still being done. Are we to have cookbook medicine? One of the fears of the profession is that the Clinton administration wishes to set up how medicine should be practiced with a set form of treatment for each diagnosis. That is impossible. Each patient is a human being with different parameters and must be treated individually.

I feel there are other far more appropriate ways to deal with the practice of medicine. As a private physician, I would be happy to discuss this with any member of the legislature concerned about this issue.

The language in this legislation is quite broad and requests an all encompassing document. I cannot see any conceivable or reasonable mechanism by which that can happen by the Alaska State Medical Board or even Alaska physicians. This would ask us to undertake the writing of a major medical textbook for virtually every specialty requested.

Sincerely,

Robert Jay Rowen, M.D.
Alaska State Medical Board Member

DRAFT Comments to: Larry Weiss (907) 333-5862 - 5862 Kennyhill Dr. Anchorage AK 99504 (Professor of Sociology, UAA)

A Few Comments About Tort Reform and Medical Negligence

By Lawrence D. Weiss December 1993

MEDICAL MALPRACTICE

Medical malpractice involves the negligent treatment of patients by a variety of health care providers including physicians. Negligent physicians may be drunk, drug impaired, incompetent, or otherwise unable to exercise adequate judgement or skill in the treatment of patients. The consequences of physician negligence range from no effect to full permanent disability or death. From a public health perspective the key issues involve the negligence of the physician and the consequences for the patient. In other words, what social structures or processes detect and deter medically negligent physicians from harming their patients, and what structures act as obstacles to the detection and deterrence of negligent physicians? What patients are at risk as victims of malpractice, and what are the consequences for those patients?

The media image of medical malpractice has been predominantly formed and conditioned not by the public health perception of malpractice, but rather by the institutions involved with the financial consequences of medical malpractice. These social institutions include primarily the private insurance industry and physicians through their professional organizations. As a result medical malpractice is commonly discussed in the context of the high cost of malpractice insurance premiums and the issue of tort reform rather than the effective control of negligent physicians and the toll they take in medical injury and human suffering.

Public health institutions in both the private and public sectors are starved for resources and have minimum access to the powerful media machines that churn out public opinion. On the other hand the $1.8 trillion insurance industry (Weiss 1992, 17) and the American Medical Association engage legions of public relations flacks, hundreds of lobbyists and scores of millions of dollars each year to influence the media and public opinion. This uneven access to the media during the last couple of decades has resulted in a highly skewed public perception of the various issues related to medical negligence and malpractice. As a result the public discussion has been heavily weighted by vested interests wielding ideological arguments. The bright light of non-ideological research and analysis has been noticeably absent from most public discussion.

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DRAFT Comments to: Larry Weiss (907) 333-5862 - 5862 Kennyhill Dr. Anchorage AK 99504 (Professor of Sociology, UAA)

Magnitude of The Medical Negligence Problem

Until the last few years the only major piece of research addressing the relationship between medical negligence, patient injuries, and malpractice claims was a study conducted in the mid-1970s published by the California Medical Association (Mills 1977). In that study a convenience sample of nearly 21,000 medical records was analyzed for evidence of medical negligence. This study revealed a negligence rate of 0.8 percent, or about eight injuries due to medical negligence for every 1,000 hospitalizations. It was estimated that only about ten percent of those injured as a result of medical negligence ever filed a claim for damages (Danzon 1985, 19).

A more recent and methodologically stronger study confirms the magnitude of the medical negligence problem and suggests that a much smaller fraction of those injured seek compensation than was indicated in the California study. The Harvard Medical Practice Study (Hiatt 1989) selected a random sample of approximately 31,000 records from 51 hospitals in the state of New York in the year 1984. Teams of physicians evaluated these records to uncover injuries caused by medical negligence, i.e. "the failure to meet standards reasonably expected of the average physician, other provider, or institution..." (Hiatt et al. 1989, 481).

The Harvard study revealed a medical negligence rate of 10 in every 1,000 hospitalizations, somewhat higher than the California study (Brennan et al. 1991). The injuries included in the study were at least serious enough to result in a longer hospital stay, disability upon discharge, or death. Further, projecting their findings to the entire state of New York in the year of the study, the researchers estimated over 27,000 serious injuries due to medical negligence among 2.6 million patients discharged from acute care hospitals. These projected injuries included nearly 7,000 deaths and almost 900 cases of permanent and total disability. Table 4.1 summarizes the relationship between adverse events (injuries or illnesses caused by medical intervention) not resulting from negligence, adverse events resulting from negligence, and the resulting litigation.

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Table 4.1 Negligent Injury and Resulting Litigation
Of Every 10,000 Hospital Patients

9,630 will experience no adverse events and
370 will suffer adverse events, but
270 of those will be without negligence. Of the
100 negligent adverse events, in
98 no claims for compensation will be made. Of the
2 claims made, only
1 will receive any compensation.

Source: Saks 1993, 9. (Based on findings of the Harvard Medical Practice Study)

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People 65 years of age and older were particularly likely to be victims of medical negligence regardless of the severity of their initial illness (Brennan et al. 1991, 373) indicating a greater propensity among the elderly to be treated by substandard medical practitioners. In addition, "[t]here was more negligence among the Medicaid patients than the privately insured, and much, much more among the uninsured." (Hiatt 1992, 258) In other words, there is an inverse relationship between wealth and negligent medical treatment.

While the California study (Danzon 1985) found that an estimated 90 percent of those injured by medical negligence never filed a claim, the Harvard Medical Practice Study found that more than 98 percent of all the injuries caused by medical negligence were not followed by a malpractice claim (Localio et al., 1991). In summary the investigators observed that:

> the civil-justice system only infrequently compensates injured patients and rarely identifies and holds health care providers accountable for substandard medical care....The abandonment of malpractice litigation is unlikely unless credible systems and procedures, supported by the public, are instituted to guarantee professional accountability to patients (Localio et al. 1991, 250).

Detection and Deterrence

There is an extensive array of institutional structures across the nation with the nominal purpose of deterring, limiting, or terminating the practices of negligent physicians. Nevertheless, nationwide projections based on the Harvard Medical Practice Study (Brennan et al. 1991) as well as other studies (Wolfe 1992) indicate that physicians cause 100,000 to 300,000 serious injuries and deaths every year resulting from medical negligence. Clearly these facts put in serious question the actual effectiveness of institutional safeguards.

Hospital Peer-review Committees Hospital peer-review committees have the benefit of knowing the professional strengths and weaknesses of physicians with whom they share hospital privileges. The intimacy of the hospital setting, however, makes effective self-regulation among friends and colleagues unlikely. The threat of suits against individuals sitting on the peer-review committees adds to the obstacles inhibiting effective detection and deterrence of negligent physicians by these committees (Schwartz and Mendelson 1989, 1342). In 1991, for example, American hospitals sanctioned only 750 physicians with restrictions lasting longer than one month (Wolfe 1992, 1). This

is the equivalent of 1.25 such sanctions for each 1,000 physicians. Contrast this rate to physician-owned malpractice insurance companies which terminated insurance for 6.6 physicians per 1,000 due to medical negligence (Schwartz and Mendelson 1989:1345). In the latter case physicians are personally liable for a colleague's malpractice, in the former case they are not.

State Licensing Boards At the state level licensing boards have the authority to investigate and discipline physicians for medical negligence as well as other problems relating to their practice of medicine. A maximum of 5 per 1,000 physicians nationally have been disciplined by state boards in a any recent year, and the figure is a fraction of that for serious disciplinary actions such as license revocation or suspension. Moreover, only about 12 percent of all disciplinary actions actually relate to medical negligence. The rest have to do with criminal behavior, overprescribing drugs, ethics issues, etc. The most aggressive states discipline about 10 per 1,000 physicians annually, while the most reticent discipline about one per 1,000. In 1991 state medical boards disciplined only 3,034 physicians, whereas in that same year an estimated 150,000 to 300,000 serious injuries or deaths occurred due to physician negligence in hospitals. These figures do not include estimates of medical negligence that occur in physician office settings outside the hospital (Wolfe 1993c).

Apart from the periodic situation of friends and colleagues reluctant to enforce sanctions against each other, most of these boards face a number of additional obstacles. A most difficult one is the standard of proof state boards are required to use to identify and manage negligent physicians. "'Clear and convincing evidence'" must be produced rather than the less stringent "'preponderance of evidence'" that is typically used in other settings such as state courts (Schwartz and Mendelson 1989, 1345). Another serious obstacle is the widespread shortage of investigators and resources necessary for boards to effectively conduct investigations. As a result boards often have backlogged cases numbering in the hundreds. A third obstacle is that state boards generally do not have extensive peer-review capabilities, inhibiting the quantity and quality of information received during an investigation. Finally, the case of an accused physician who fully contests State licensing board charges typically drags on six to eight years. The physician may remain in practice that entire time. One public interest lawyer wryly noted that '"This system is so slow, so meager, and so trivial that death is weeding out incompetent physicians much faster than is the board."' (Chesteen and Lally 1991)

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Medicare Peer Review Organizations Medicare Peer Review Organizations (PROs) were created in each state by the federal government in 1982 to monitor the quality and cost of hospital care reimbursed by Medicare. Theoretically these organizations wield a big stick. They can discipline problem physicians and hospitals by denying them participation in Medicare, refer serious quality of care problems to the state medical licensing board, or "educate" the offender. A review of their work in the mid-1980s indicates that the rate of PRO recommendations for exclusions from Medicare and Medicaid declined dramatically. The trend corresponds with an emerging policy revision in the Health Care Financing Administration (HCFA) which oversees the PROs. HCFA has decided to adopt the strategy of "educating" errant physicians rather than disciplining them.

A study of eight randomly selected PROs by the Department of Health and Human Services (HHS) Office of the Inspector General (OIG) during a six month period in 1990 found 131 physicians responsible for serious medical negligence or other breaches of quality of care. Despite the fact that these problems had led to hospital readmission, disability, or death; and despite the fact that 30 percent of these physicians had multiple infractions, only two were ever referred to the OIG for termination with Medicare, and three were referred to the state licensing board. The rest of the physicians were notified that a problem had been discovered and were monitored more closely by the PROs to a greater or lesser extent. Most of the physicians also received a phone call or brief letter from the PRO, and that served as the additional "education" they were supposed to receive.

> In fact, the study reveals that PROs squander opportunities for genuine improvement of substandard physicians' skills. And by categorically rejecting more punitive measures in favor of ineffective education, they fail to deter repetition of serious problems by the same--or other--incompetent doctors. (Wolf 1991)

Physician-owned Insurance Companies Approximately 40% of all physicians in patient care are insured against medical negligence claims through physician-owned insurance companies (Schwartz and Mendelson 1989). Unlike the alternative of commercial insurance, and unlike either state licensing boards or hospital peer-review committees, members of physician-owned insurance companies are personally liable for claims made against any of their co-owners. As a result of this financial accountability, applicants to physician-owned insurance companies are often carefully screened for competence by a committee of members prior to admission. Once admitted, members who have had

claims for malpractice filed against them may be rigorously evaluated by peers, outside consultants, and underwriters.

Sanctions against negligent physicians may include additional surcharges on their insurance premiums, deductibles in the event of successful claims, restrictions on practice, additional training, or the termination of insurance. In about a third of the cases, however, the latter sanction takes the form of a resignation from part ownership in the insurance company (and therefor termination of coverage) under pressure from the insurance company. Schwartz and Mendelson (1989, 1345) estimate that in 1985 state boards suspended or revoked the licenses of about 0.08% of all practicing physicians, less than one per 1,000, because of incompetence or negligence. During the same year physician-owned insurance companies terminated coverage for 6.6 per 1,000 member physicians due to medical negligence. In other words the maximum sanction was applied by the physician-owned insurance companies over eight times more frequently than the maximum sanction applied by state boards.

Certainly it can be argued that suspension of license is considerably more serious than loss of insurance so that the penalties are not comparable. However, lesser sanctions for negligence were levied by the physician-owned insurance companies at a rate about thirteen times more frequently than lesser sanctions applied by the boards. There is a strong suggestion in these research findings that structurally the physician-owned insurance companies, characterized by personal financial liability, are far more effective at weeding out negligent physicians than are the state licensing boards.

The occasional revocation of a physician's license by the state board due to negligence, the board's ultimate sanction, may effectively prevent a physician from endangering the people of a particular state. However, that same negligent physician is free to start a practice in another state whose licensing board may be entirely unaware of the physician's history of incompetence. Physician-owned insurance companies administer their ultimate sanction, termination of insurance, far more frequently than boards revoke or suspend licenses, however the social result is the protection of member-physicians' finances rather than protection of the public's health. The sanctioned physician is relatively free to continue his or her flawed practice of medicine with commercial insurance or without insurance coverage at all. In addition he or she may be accepted to practice in the military, or in a state or municipal hospital.

National Practitioner Data Bank In the fall of 1990 the Department of Health and Human Services initiated the National

Practitioner Data Bank. The nominal purpose of this data bank is to collect and disseminate information about medical malpractice payments and a range of adverse professional actions involving physicians and other health care practitioners:

> This system...was created to help meet a national need to restrict the ability of incompetent practitioners to move from state to state without disclosure or discovery of the practitioner's previous damaging or incompetent performance. The data bank contains information on adverse actions taken against a practitioner's license, clinical privileges, and professional society memberships, as well as information on malpractice payments resulting from judgements or settlements (U.S. General Accounting 1992b, 2).

Unfortunately, the political compromises made during the formation of the data bank legislation have seriously flawed the use of this information to protect the public's health. Congress refuses to allow disclosure to consumers of any information that might reveal the identity of an individual practitioner. The only organizations allowed to obtain this information are hospitals and other health care entities, professional societies, state licensing boards, and individual practitioners. Of these, only hospitals are actually required to query the data bank when hiring, granting clinical privileges, or evaluating physicians. Despite the stated major purpose of the data bank, state licensing boards are not required to evaluate data bank information prior to granting new licenses. A recent study by the U.S. General Accounting Office (1993) found that the data bank's effectiveness is further hampered by long delays in providing requested information, lax security regarding sensitive information, inadequate federal monitoring of the data bank contractor, and poor planning for the data bank's future.

Verifying Physicians' Credentials There is no single, public source for information about physicians who have been disciplined because they were drug impaired, incompetent, negligent, unethical, or engaged in criminal behavior. Most state medical societies will release a list of names of physicians that they have disciplined, but that list will not contain the names of physicians who have been disciplined by a myriad of federal agencies, other state medical boards, hospital peer review boards, or a number of other institutions. The closest thing to such a list that may be as accessible as the local library is a book updated every couple of years under the title *Questionable Doctors* (Van Tunen 1991), produced by Public Citizen Health Research Group, a consumer advocacy Ralph Nadar spinoff group. This publication lists in one source physicians

who have been disciplined by several federal agencies and most state medical societies.

While it is almost impossible to find out if a particular physician has been disciplined by all of the institutions that potentially might do so, it is even more difficult for a person seeking health care to verify that a physician has the training and experience that he or she claims. In a study conducted by Reade and Ratzan (1989) their conclusion was that "obtaining access to complete, up-to-date, and verified information about physicians is all but impossible."

Physicians listed in the yellow pages of the phone book typically are free to list just about whatever they want. The phone companies typically run no independent checks on state licensure or specialty credentials listed.

Many state or county medical societies do not independently verify biographical information given to them by physicians such as medical school, residencies, or board certification. Whether they verify such information or not, often medical societies will not release crucial information to the inquiring public such as whether or not the physician is board certified.

The 23 specialty and subspeciality boards of the American Board of Medical Specialities (ABMS) are wildly inconsistent to public inquiries about board certification and other information concerning the qualifications of member-physicians. Some released all pertinent information over the phone, but most did not. Some would release such information only to hospitals, or only to mailed inquiries. Some would only release information with a signed release from the physician, and some boards referred inquiring members of the public to the library, often to a copy of Marquis' *Directory of Medical Specialists* (American Board of Medical Specialities 1991-92)

The *Directory of Medical Specialists* in theory only lists physicians who are board certified. A serious problem with this compendium is that, for a number of reasons, a physician who is board certified in a specialty area may not be listed in here. Finally, only board certification is independently certified. Other biographical information, for example regarding residency and fellowship training, simply reflects what the physician indicated, and is not independently verified.

The American Medical Association directory does contain verified information about state licensure, medical school, and specialty-board certification, but the directory is not easy to find, is heavily coded making it quite user unfriendly, and can be quite misleading to the lay person. In addition the directory provides no information on advanced training or certification in subspecialties.

State licensing boards verify training and certification information to a greater or lesser degree initially, but may not verify additional information given during licensure renewal, for example about advanced training. State boards vary in terms of how much information they will release to the public, and under what circumstances.

Sleep-Deprived Medical Residents. Residents are typically recently graduated medical students who are doing one to four years of additional clinical training, usually on the house staff of a hospital. Residents are terribly exploited, working 100 to 120 hours per week or more, and often working up to 36 hours straight with no sleep or only a quick nap (U.S. General Accounting Office 1992a). A substantial body of research dating back to the early 1970s supports the common sense assumption that fatigued residents are likely more prone to medical negligence than well rested physicians.

The Accreditation Council for Graduate Medical Education (ACGME) accredits the nearly 7,000 residency programs across the United States. For several years during the late 1980s ACGME, the AMA, and the Association of American Medical Colleges (AAMC) worked together to develop accreditation standards that would limit the excessive hours typically worked by medical residents. These efforts were opposed by the American Boards of Medical Specialities (ABMS), in particular the six surgical specialty areas of the 24 medical specialities in the ACGME. Only one of these six surgical specialities restricted the maximum number of hours a resident could work per week, only one of them limited the number of days per week a resident had on-call duty, and only one of them required a minimum of one day per week off (U.S. General Accounting Office 1992a, 45). The surgical specialities wanted virtually no restrictions on their exploitation of medical residents.

Nevertheless, as a compromise ACGME finally adopted the following language the end of 1991:

> 'It is desirable that residents' work schedules be designed so that on the average, excluding exceptional patient care needs, residents have at least one day out of

> seven free of routine responsibilities and be on-call in the hospital no more often than every third night.' (U.S. General Accounting Office 1992a, 3)

This sounds like a mushy equivocating statement because it is. Under these guidelines residents can still work 96 hours or more per week. The guidelines are the result of opposition to a more meaningful policy by the surgical specialties of the ACGME, the American Board of Surgeons, and the American College of Surgeons. Surgeons objected to any ACGME regulations on the basis that "such limits interfere with the development of the resident's sense of commitment to the patient and impede the continuity of care necessary for patient safety." (U.S. General Accounting Office 1992a, 3). Apparently severe fatigue and stress, and the resultant increased risk of medical negligence was not thought to interfere with "patient safety" to a significant degree.

New York State is the only state that attempts to regulate the number of hours residents work. The impetus for this regulation arose from a 1986 New York county grand Jury investigation of the suspicious death of a teenager admitted to New York Hospital who was treated by two overworked and undersupervised residents. New York limits residents to 80 hours per week, averaged over a four week period. The state also requires one full day off each week, a minimum of eight hours off between scheduled on-duty assignments, and a specific level of supervision. The additional personnel required to replace the medical residents now limited to "only" 80 hours per week cost the hospitals of the State of New York an estimated $227 million the first year. This cost projection along with others indicates how widespread the exploitation of cheap, abundant medical resident labor is to the current practice of hospital-based health care nation-wide (U.S. General Accounting Office 1992a, 32-36.

Unfortunately there have been no published studies regarding why surgeons and possibly other groups of physicians are so resistant to allowing residents to have reasonable working conditions, thereby reducing medical negligence caused by fatigue, stress, and sleep deprivation. The additional costs may be a factor, but presumably that is the worry of the hospital administrator and not physicians with training responsibilities or hospital privileges. Perhaps the systematic overwork of the residents is seen as a kind of hazing ritual that functions to bond the residents to the profession while simultaneously loosening ties with patients, family, and non-physician friends. Surely an important impetus to the gross exploitation of the residents' time is fear by the physician-educators that their own

time would be severely impacted by additional work if residents were allowed to cut back. In any case these questions need additional research because the medical and social consequences of the systematic overwork of residents are so serious.

Tort Reform

The American Medical Association and its state affiliates, insurance companies, and the media have combined to make the issues of medical malpractice and tort reform almost inseparable in the public consciousness. A tort is a legal action specifying:

> ...allegations of injury or wrong committed either against a person or against a person's property by a party or parties who either failed to do something that they were obliged to do or did something that they were obligated not to do (Ostrom et al., 1993, 19).

Torts include a wide variety of court actions such as product liability, automobile torts, personal injury, libel, etc. A medical malpractice suit is a particular type of tort requiring a patient to show that he or she was injured during medical treatment, that the physician's treatment (or lack of appropriate treatment) caused the injury, and that the physician failed to provide the generally accepted standard of care. In 1991 an estimated 1.2 million tort cases of all kinds were filed in state courts, a figure which has been fairly stable for several years (Ostrom et al., 1993, 19). However, only about 10% of all torts decided at trial are medical malpractice cases (Ostrom et al., 1992, 81).

Organized Physicians' groups and the insurance industry take the lead in arguing that there is need to reform the legal structure as it pertains to torts, and in particular to medical malpractice cases. Some of the commonly cited reasons include:

> There is an explosion of medical malpractice litigation, and much of it is trivial or unwarranted.
>
> Lawyers' contingency fees are the cause of the high cost of medical malpractice insurance.
>
> Enormous, unfair settlements are the cause of the high cost of medical malpractice insurance.
>
> The high and rising cost of health care can in large part be attributed to the high cost of medical malpractice insurance.

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> Defensive medicine, the ordering of largely unnecessary tests and procedures by physicians trying to avoid malpractice suits, is driving up the cost of health care.
>
> High medical malpractice insurance premiums are forcing physicians to stop delivering babies, to reduce or eliminate other medical procedures, and to quit the practice of medicine altogether.

These allegations provide important ideological ammunition for their respective adherents. The AMA has an interest in diverting attention from the responsibility of physicians in committing widespread medical malpractice, and the insurance industry has an interest in diverting attention from the fact that its profits are derived from increasingly higher premiums. In other words, the insurance industry has historically had little reason for taking an active role in reducing the incidence of malpractice because it has been able to cash in on it (Peck 1986). Nevertheless, two decades of frequently unproven, ideologically-driven allegations pumped up by massive media campaigns and political lobbying efforts have resulted in wide spread tort reform across the United States.

Some of the tort reforms have been aimed at creating barriers to legal suits (Spernak and Budetti 1991). Many states, for example, have "frivolous suit" penalty statutes requiring the party with an allegedly weak claim or defense to pay court costs and attorney fees for the other party. Some states have shortened various statutes of limitation applying to medical injury claims, and a number of states have "good samaritan" statutes giving immunity to negligent physicians who provide emergency care at the scene.

Many states have initiated tort reforms intending to alter the plaintiff's burden of proof. Some of these have increased the plaintiff's burden of proof beyond the standard "preponderance of the evidence." Others, such as *res ipsa loquitur* greatly ease the burden of proof on the plaintiff by allowing the judge to instruct the jury in certain very self-evident cases that negligence did in fact cause the injury. These cases typically settle out of court.

Finally, a major category of tort reform involves laws designed to reduce damage awards. In its most direct form, states have enacted caps on the economic, non-economic, and punitive damages a plaintiff may receive from a jury. Some states allow defendants to pay out large awards in installments rather than all at once. For the defendant this has the added

benefit that the plaintiff may die, perhaps saving the defendant a considerable sum of money.

The consequences of these reforms have varied considerably. (Spernak and Budetti 1991, 13-15). Several studies indicate that limits on damage awards are associated with slightly or modestly reduced insurance premiums, and reduced amount paid per claim. Many of the reforms seem to have had no measurable effect on insurance rates, claims filed or damages paid. Some of the reforms have had consequences opposite those anticipated. For example, the establishment of mandatory pre-trial screening panels has increased average claim payments by over 50 percent.

Most importantly, however, there is no evidence that any of the tort reforms have actually helped to detect or deter the widespread incidence of malpractice known to exist. Further, there is no evidence that any of the tort reforms have made the attainment of compensation easier for the overwhelming majority of victims of medical negligence who never file a claim, who never make a settlement, and who are never paid a penny by the negligent physician or medical facility. These, however, are not the goals of tort reform.

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Box 4.1

MEDICAL MALPRACTICE INSURANCE IN CANADA: MUCH CHEAPER

Canadian physicians are sued about one fifth as often as U.S. physicians despite the lack of evidence that the incidence of medical negligence is significantly less in Canada than in the United States. Moreover, their malpractice insurance costs about one ninth as much as it does for U.S. physicians. The medical malpractice insurance premium in Canada costs on average a mere 1.5% of a physician's net professional income. There are a number of factors that may account for why this is so:

In most Canadian provinces the limitation period, that is the period during which the plaintiff may file a malpractice claim, is considerably shorter than in the U.S.

In Canada punitive damages are rarely awarded, and damages for pain and suffering are considerably less than in the U.S., due in part to a nation-wide cap.

Since there is universal access to health care in Canada, estimated costs for past and future health care needs are a minimal component in the decision to sue, and a smaller part of any award or settlement compared to the United States.

Social security programs in Canada are generous and relatively comprehensive compared to the U.S., minimizing the incentive to sue primarily for these kinds of benefits.

Contingent fee systems are not typically used by lawyers in Canada. This may reduce speculation, but it may also reduce access to compensation by low income people.

Under the Canadian legal system losers must pay a large portion of the winner's legal costs.

Over 95 percent of all medical malpractice claims are defended by one professional liability association, the Canadian Medical Protective Association, in contrast to hundreds of associations and insurance companies in the U.S. This concentration of resources and experience more effectively protects physicians and inhibits marginal claims.

Despite the above facts, the growth of malpractice actions in Canada is comparable to that in the United States. Between 1971 and 1989 the number of malpractice claims against Canadian Physicians grew nearly 700 percent, however only about one third

of those claims resulted in payments. The average malpractice award was $150,640 in 1989 (expressed in 1991 Canadian dollars), and had grown at the rate of 9.7 percent per year between 1971 and 1989, adjusted for inflation. The Average malpractice insurance premium increased nearly 15 percent per year between 1976 and 1988, adjusted for inflation.

In summary, Canadian physicians pay much lower medical malpractice premiums than their U.S. counterparts in large part because Canadian physicians are sued far less often. This appears to be the case due to obstacles in the legal system to the pursuit of compensation, and due to more encompassing health care and social security programs in Canada. The negative consequences of the Canadian system are that low income people and people with legitimate but difficult to prove cases are discouraged from seeking compensation. Furthermore, the Canadian system does not appear to be any more likely to identify and deter negligent physicians from practicing in the first place. Finally, the rate of growth of malpractice claims and payments is comparable to that in the U.S.. This portends controversy in the future for Canadians.

Source: Coyte, Peter C. et al. Medical Practice--The Canadian Experience. *The New England Journal of Medicine* 324 no. 2:89-93.

DRAFT Comments to: Larry Weiss (907) 333-5862 - 5862 Kennyhill Dr. Anchorage AK 99504 (Professor of Sociology, UAA)

Closer Look at Pro-Tort Reform Arguments

Explosion of Medical Malpractice Litigation The growth of all forms of tort filings across the nation has been relatively flat since 1986 (Ostrom et al., 1993, 21). A nine-state study just of medical malpractice filings indicates a similar overall trend, with five of the nine states showing an increase in filings since 1986, and four showing a decrease (Ostrom 1993). Even if the data demonstrated an increase in medical malpractice litigation, it would be expected due to the rising proportion of physicians to population (a 27 percent increase between 1975 and 1985), and due to an increasingly more intensive practice of medicine that involves each physician seeing more patients, and each patient receiving more treatment (Saks 1993, 13). Finally, there is the critical issue of the relationships between the incidence of medical negligence, the actual filings for malpractice, and the potential filings for malpractice:

> Our results surely provide no basis for the charge that the tort system produces excessive litigation. Further, the implications are rather sobering....[T]here was a surge of claims in the 1970s and 1980s. Our data suggest that, absent change, we can anticipate a surge in the 1990s. Indeed, if the number of people who bring claims were closer to the number of people who are injured, we might see not 18 claims per 100 doctors per year as in 1985, but two claims per doctor per year (Hiatt 1992, 259).

Excessive Lawyers' Fees Typically the attorney in a medical malpractice suit claims 30 to 50 percent of the plaintiff's damage award on a contingency fee basis. In 1991 total medical malpractice costs including all claims paid, administrative costs, and attorneys' fees amounted to $9.1 billion (Harty 1992). This was slightly more than one percent of the nation's medical bill. Even if attorney's fees were eliminated altogether the national medical bill would decline less than one-half of one percent. Moreover, there is no research evidence that there is an inverse relationship between attorney fees and insurance premiums, claim severity (the amount of compensation paid for comparable injuries), or the frequency of filing claims (Spernak and Budetti 1991, 13-5). Clearly, this is a hollow issue.

Enormous Settlements For every 100 cases of medical negligence resulting in serious injury, claims will be made for only two of those cases. Ninety percent of these will be resolved without a trial, with the plaintiffs in half of these receiving no compensation. For those that go to trial, only about a third of them will find the defendant liable (Saks 1993,

9, 14). In such a situation the median jury trial award for medical malpractice cases is $200,000 (Ostrom et al. 1992, 84). Studies of medical malpractice torts and other torts indicate that compensation for economic loss is inversely related to the magnitude of the loss. Smaller losses are adequately compensated, larger losses are increasingly undercompensated. A study of medical malpractice awards in five states covering most of the 1970s and 1980s found no statistically significant trends after adjusting for inflation and other relevant factors (Saks 1993, 12-15). In summary, the facts appear to indicate that medical malpractice awards are rarely made, often inadequate, and have been stable for two decades.

The High Cost of Medical Malpractice Insurance In 1991 commercial insurance companies sold about $4 billion worth of malpractice insurance. This represented a steadily shrinking proportion of all insurance sold by property-casualty insurers, down to 1.8 percent in 1991 from 2.2 percent in 1987 (A.M. Best 1992, 67). One very important reason why commercial insurers have stagnated in the medical malpractice market involves the meteoric rise since the mid-1970s of physician-owned medical malpractice insurance companies. These companies now account for 50-60 percent of the malpractice market (Spernak and Budetti 1991, 11). Typically their premiums are considerably lower than insurance commercial companies, and they have more control over who is insured and how much premiums will cost. Altogether commercial malpractice insurance, physician-owned insurance, and other miscellaneous forms of malpractice insurance costs totalled $9.1 billion in 1991, about one percent of the nation's health bill (Harty 1992). Even if malpractice insurance were entirely eliminated it would barely make a dent in the cost of health care in the United States.

Defensive Medicine The American Medical Association estimates that defensive medicine costs $15 to $20 billion each year (Seekins 1993). Critics, however, believe that the real costs of defensive medicine are a fraction of the AMA's estimate. Moreover, some critics, such as Dr. Sidney Wolfe of the Health Research Group in Washington DC, point out that physicians often profit from conducting extra tests and procedures. Such physicians may use the issue of "defensive medicine" simply as a cover for profit-maximizing at the expense of their patients (Hudson 1990a). Another AMA survey conducted in 1987 found that respondents estimated that the time they spend away from their office due to malpractice litigation combined with the extra costs of defensive medicine totalled $19.3 billion. Even if entirely true, these costs were only 4 percent of the total expenditures for health care services that year (Hudson 1990a).

DRAFT Comments to: Larry Weiss (907) 333-5862 - 5862 Kennyhill Dr. Anchorage AK 99504 (Professor of Sociology, UAA)

High Medical Malpractice Insurance Premiums The literature is heavy with studies indicating that family physicians and obstetricians are quitting obstetrics, i.e. the business of delivering babies (Rosenblatt et al. 1990; Rosenblatt et al. 1991; Nesbitt et al. 1992). The most common reasons given are the cost of malpractice premiums and the threat of being sued. During the 1980s thousands of physicians stopped delivering babies. In the last half of the 1980s alone 20 percent of the physicians who had been delivering babies stopped doing so (Nesbitt et al. 1992). This has disproportionally affected women in rural areas who have been hardest hit by the chronic lack of physicians practicing obstetrics, and disproportionally affected low income women who are often refused obstetric services by many of those physicians who continue practicing obstetrics.

There is no question that the cost of malpractice insurance premiums and the threat of suit have some bearing on the physician flight from obstetrics, but the question is "how much?" A study of 26 counties in northern California compared family physicians that continued to practice obstetrics with those that had continued to practice medicine but stopped delivering babies (Nesbitt et al. 1992). The researchers found that those who stopped delivering babies most often cited the cost of malpractice premiums, yet those who continued to deliver babies earned an average of $30,000 per year beyond the cost of their malpractice premiums just from the obstetrics part of their practice. In addition, more than half those physicians who had stopped delivering babies indicated that no "specific circumstances" (such as lower malpractice premiums) could entice them back to obstetrics. Of those who indicated they could be enticed back, the problems of being on call and not making as much money as they thought they should were almost as important as the cost of malpractice premiums. In another study of about 2,000 physicians in four western states the researchers noted that strong tort reform legislation in all four states did not seem to be stemming the tide of physicians abandoning obstetrics. They noted, however, that it might be too early to tell (Rosenblatt et al. 1991).

In summary, medical malpractice is widespread in the American health care establishment, but the issue of negligent physicians has been almost entirely obscured by the carefully cultivated message of tort reform. This message meets the financial needs of the American Medical Association and the insurance industry. Tort reform may enhance the profits of the commercial insurance industry, and may reduce the risk for self-insured groups of physicians, but it will not and cannot reduce the estimated 100,000 annual victims of medically negligent treatment. Physicians have the technical expertise to detect

negligent health care providers, but the social structure of state licensing boards and hospital peer review committees is an obstacle to both detection and deterrence of negligent practitioners. Despite the somewhat better detection record of physician-owned insurance companies, the social consequences of their sanctions protect the company but leave the public's health at risk. Federal efforts to protect the public from medical negligence have been politically compromised and poorly implemented.

The resolution to the problem of pervasive and chronic medical negligence must start with a more public, accountable process of detection and deterence. The Canadian approach of systematic review of records by physicians from another region is an excellent strategy. The placement of more lay-persons on licensing boards and other peer review organizations would help tremendously. Very little work has been done in the area of alternative forms of detection and deterence, but clearly it needs to be seriously discussed.

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Representative Ron Larson
House Finance Committee, Co-Chairman
State Capitol
Juneau, AK 99801-1182

March 4, 1994

Corrected Letter Re: The Fiscal Impact of HB 292 (Limiting the Liability of Tortfeasors).

Dear Representative Larson:

As you may already know, the fiscal impact of HB 292 may be enormous if it is enacted. I hope that you will consider even the few examples listed below in what we hope will be significant hearings in the House Finance Committee. It is undeniable that the State is already struggling to pay for basic services. The public cannot afford to pay what may be millions of dollars of direct General Fund expenditures because of the radical, unprecedented changes in the statute of limitations contained in HB 292. The State will have to pay for a number of losses which will no longer be paid for by the parties who are responsible for them.

HB 292 will, in part, forbid a victim from recovering for its losses and injuries if it does not learn of and file suit against a defendant within 6 years of the defendant's injury-causing "act". This rule displaces the nationally uniform or near-uniform rule allowing a victim two or six years from the date it should learn of its injury to file suit. This radical rule will cost the State an enormous amount of money, and will place great strains on the general fund in a number of direct ways in the event the courts determine that it applies to the State as a plaintiff.

HB 292 is currently unclear as to whether it is intended to apply to "property damage" suits brought by the State just as it is to "property (and other) damage" suits brought by citizens and businesses. We assume below that the bill was not intended to discriminate against private citizens, and that it does not spare the State from the detriment of this provision when it seeks compensation for its losses, when it would deny compensation for those same losses to private citizens. However, if that is the intent behind the bill, then the citizens should be outraged. A rule that is too unfair to be applied to the State is also too unfair to be applied to its citizens.

A Few Examples Of the Great Expenses HB 292 Will Force The State to Incur.

First, the State will be required to rely on the General Fund, or on General Fund money appropriated to the 470 Fund, to pay for

a number of expensive hazardous substance clean-ups now paid for by those responsible for causing hazardous substance contamination. The State rarely discovers hazardous substance contamination within 6 years of the date a defendant committed the last "act" which ultimately led to the contamination. A truism of hazardous substance contamination is that leaks are not found for many years from the date they begin. Also, even where contamination continues currently, it is not known whether each particular defendant's substance began causing contamination more than 6 years back. The State will have to pay for the conduct of these defendants because it will not be able to succeed in the impossible task of proving whose hazardous substance began to leak when, or when the responsible party's last "act" leading to the leak occurred.

Under current law, the statute of limitations allows the State 6 years (or arguably 2 years) from the date it reasonably finds out about the contamination, or incurs expenses in cleaning it up, to seek recovery from the responsible parties. Numerous hazardous substance sites throughout the state have been cleaned up by responsible parties, and not at taxpayer expense, based on this widely accepted rule. It is known as the "date of discovery" rule.

Under HB 292 the State will not be able to order the clean up of many contaminated sites either because:

1) it will not find out of the contamination (normally invisible to the naked eye) within 6 years of the defendant's act which led to the contamination; or,

2) attorneys for each defendant will argue that their client's portion of the contamination was caused more than 6 years before the state files suit, and this new legal defense will be impossible to rebut.

As a result, the state will have to incur millions of dollars to clean up privately contaminated private and public property and waters, including contaminated groundwater and other natural resources. Contaminated site clean-ups regularly run into the hundreds of thousands or millions of dollars per site. Further, average citizens whose land has been contaminated by others will not be able to afford to clean their property up, and the defendants, most of whom have insurance to clean up these hazards, will have shifted their costs of doing business to the taxpayers. Innocent taxpayers will have to contribute to the general fund to clean up both private and public properties which have been rendered useless, and often hazardous, by the conduct of parties who escape responsibility under HB 292. These contaminated properties will remain serious public health hazards until the State conducts the necessary clean ups under AS 46.03, 46.04, and 46.09.

In addition to the millions of dollars the State will have to pick up in cleaning up properties which others have contaminated, the state will also be prevented from recovering for many other

losses. These include, for example, millions of dollars in faulty school, office building and other construction which it does not find out was defective until 6 years from the date of completion. This, too, will pose an expensive problem, as faulty construction rarely begins to deteriorate or otherwise show itself immediately. The State will often not be allowed to recover from parties responsible to faulty construction because it will not have found out about the faulty work for six or more years.

This Radical and Costly Experiment Should Not Be Attempted

The current statute of limitations rule is fair to both victims and wrongdoers. It is followed in federal court, and in all, or almost all states. A victim, including the State, should only be prevented from seeking compensation for its injuries if it does not timely file suit <u>after it should have discovered its injury</u> or the defendant's wrongdoing - the so-called "date of discovery rule". To advance this period under HB 292 so that victims will have to seek legal redress <u>before they even find out they have been injured</u> is both unjust, and will result in enormous costs to taxpayers and individual and business victims.

The fiscal impact of HB 292 should therefore be subjected to vigorous scrutiny in your committee. It should not be passed until the fiscal impacts are calculated with specificity, and the Committee decides the State can afford these costs to engage in a legislative experiment more radical than any attempted in the other 49 states. The costs to the public are of course multiplied when it is considered that all citizens, and not only the State, will be precluded from seeking compensation for significant losses under HB 292.

Thank you for your consideration of this matter.

Sincerely,

Stephen Conn,
Executive Director, AKPIRG

Les Gara,
Former State Assistant
Attorney General, Exxon Valdez
Litigation Section, on his own
behalf (ph: 274-0730)

REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

Statutes of Limitation and Accrual of Actions

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 55

COMMONWEALTH OF VIRGINIA
RICHMOND
1989

September, 1988

State Statutes of Limitations/Repose

ALABAMA

PERSONAL INJURY	1 year for trespass on the case (6-2-38); 2 years malicious prosecution, libel, slander, fraud (from discovery) (6-2-38); 6 years for trespass (6-2-39).
WRONGFUL DEATH	2 years (6-2-38).
PROPERTY DAMAGE	1 year for trespass on the case (6-2-39).
BREACH OF WARRANTY	4 years (6-5-502(c)).
PRODUCT LIABILITY	1 year; 10 year statute of repose held unconstitutional (Lankford v. Sullivan, Long & Hagarty, 416 So.2d 996 (1982).

ALASKA

PERSONAL INJURY	2 years (09.10.070(1)); if fraud, accrues on discovery (09.10.230).
WRONGFUL DEATH	2 years (09.55.580(a)).
PROPERTY DAMAGE	6 years (09.10.050(1)).
BREACH OF WARRANTY	4 years (45.05.242).

ARIZONA

PERSONAL INJURY	2 years (12-542(1)); except 1 year (from discovery) for libel, slander, false imprisonment (12-541) and 3 years for fraud (12-543).
WRONGFUL DEATH	2 years (12-542(2)).
PROPERTY DAMAGE	2 years (12-542(3)-(5)).
BREACH OF WARRANTY	6 years - written (12-548); 3 years - oral (12-543(1)).
PRODUCT LIABILITY	2 years but no more than 12 years after the product was first sold for use and consumption (12-551).

ARKANSAS

PERSONAL INJURY	3 years (16-56-105); 1 year for assault, battery, false imprisonment, slander (16-56-104).
WRONGFUL DEATH	3 years ( ).
PROPERTY DAMAGE	3 years (16-56-105).
BREACH OF WARRANTY	4 years (85-725).

CALIFORNIA

PERSONAL INJURY	1 year - general (includes libel and slander) (CCP 340(3)); if med. mal. 3 years from injury or 1 year from discovery (CCP 340.5) but if injury to minor child received before birth, within 6 years of birth (CCP 29), fraud 3 years from discovery (CCP 338); legal malpractice, 1 year from discovery, maximum 4 years from wrong (CCP 340.6).
WRONGFUL DEATH	1 year (340(3)).
PROPERTY DAMAGE	3 years (338(2)-(3)).
BREACH OF WARRANTY	4 years (CUCC 2725) - does not apply to actions for personal injury, Becker v. Volkswagon of America, Inc.. 125 Cal. Rptr. 326 (1975).

COLORADO

PERSONAL INJURY	2 years for all torts (regardless of theory of recovery) (13-80-102).
WRONGFUL DEATH	See PERSONAL INJURY above.
PROPERTY DAMAGE	See PERSONAL INJURY above.
BREACH OF WARRANTY	4 years (4-2-7-25).

CONNECTICUT

PERSONAL INJURY	3 years for any action founded on tort (52-577); 2 years from date of injury or discovery, injury to person or property (negligence/recklessness,

wanton misconduct or malpractice), maximum 3 years from act or omission (52-584).

WRONGFUL DEATH — 2 years from date injury sustained or discovered, maximum 3 years from act or omission (52-555).

PROPERTY DAMAGE — See PERSONAL INJURY above.

BREACH OF WARRANTY — 4 years (42a-2-75).

PRODUCT LIABILITY — 3 years from injury or discovery, but no more than 10 years from date of sale, lease or bailment, unless still within "useful life" or express warranty present (1979 Conn. Pub. Act 483 Sect. 3).

DELAWARE

PERSONAL INJURY — 2 years (10.8119); if Med. Mal. and not discoverable within 2 years, 3 years from injury (18.6856).

WRONGFUL DEATH — 2 years (10.8107).

PROPERTY DAMAGE — 2 years - Personal property (10.8107); 3 years - Realty (10.8106).

BREACH OF WARRANTY — 4 years (6.2-725).

DISTRICT OF COLUMBIA

PERSONAL INJURY — 3 years (12-301(8)).

WRONGFUL DEATH — 1 year (16-2702).

PROPERTY DAMAGE — 3 years (12-301(2)&(3)).

BREACH OF WARRANTY — 4 years (28:2-725).

FLORIDA

PERSONAL INJURY — 4 years for any action founded on negligence; professional malpractice accrues on discovery (due diligence) (95-11(3)(a)); 2 years from discovery (due diligence) but not more than 4 years from occurrence/incident for Med. Mal. (95-11(4)).

WRONGFUL DEATH	2 years (95-11(4)(d)).
PROPERTY DAMAGE	4 years (95-11(3)(g)&(h)).
BREACH OF WARRANTY	4 years (672.2-725).
PRODUCT LIABILITY	4 years, but must be within 12 years of date of delivery of completed product to original purchaser (95-11(3)(e)).

GEORGIA

PERSONAL INJURY	2 years for general injury to person; 1 year for injury to reputation; 4 years for Loss of Consortium (9-3-33).
WRONGFUL DEATH	2 years (9-3-33).
PROPERTY DAMAGE	4 years (9-3-32).
BREACH OF WARRANTY	4 years (109A-2-725).
PRODUCT LIABILITY	Maximum 10 years from first sale (105-106(b)(2)).

HAWAII

PERSONAL INJURY	2 years (657-7). Accrues when act, damage and causal connection discovered or should have been discovered (reasonable diligence), 648 P.2d 689; med. mal. subject to maximum of 6 years from act/omission (657-7.3).
WRONGFUL DEATH	2 years from death (663-3).
PROPERTY DAMAGE	2 years for personalty (657-1).
BREACH OF WARRANTY	4 years (490:2-725).

IDAHO

PERSONAL INJURY	2 years (5-219(4)) discovery accrual for fraud (5-218(4)), and med. mal. if fraudulent concealment or foreign object (5-219(4)).
WRONGFUL DEATH	2 years from occurrence, act, or omission (5-219).

PROPERTY DAMAGE	3 years (5-218).
BREACH OF WARRANTY	4 years - Sales (28-2-725). 2 years - Personal injury or death (5-219).

ILLINOIS

PERSONAL INJURY	2 years (110-13-202); 1 year - slander or libel (110-13-201).
WRONGFUL DEATH	2 years (70-2).
PROPERTY DAMAGE	5 years (110-13-205).
BREACH OF WARRANTY	4 years (26-2-725).
PRODUCT LIABILITY	2 years from date of known injury or 8 years if unknown; in no case more than 12 years from date product leaves possession of manufacturer, or 10 years from date of first possession by initial owner, whichever period expires earlier (110-13-213); 12-year limitation not applicable to negligence actions, Dintelman v. Alliance Machine Co., 453 N.E.2d 128 (Ill. App., 1983). Constitutionality of statute of repose upheld, Thornton v. Mono Manufacturing Co., 425 N.E.2d 522 (1981)

INDIANA

PERSONAL INJURY	2 years for injury to person, character or personal property (34-1-2-2(1)); 6 years for Fraud (34-1-2-1).
WRONGFUL DEATH	2 years (34-1-1-2).
PROPERTY DAMAGE	6 years - Realty (34-1-2-1(3)). 2 years - Personalty (34-1-2-2(2)).
BREACH OF WARRANTY	4 years (26-1-2-725).
PRODUCT LIABILITY	2 years after cause of action accrues or 10 years after delivery of the product to initial user, provided that if action accrues more than 8 but less than 10 years after initial delivery, it may be brought any time within 2 years of accrual (34-4-20A-5).

APPENDIX B

IOWA

PERSONAL INJURY	2 years for injury to person or reputation, whether contract or tort (614.1(2)); discovery accrual for med. mal (614.1(9)).
WRONGFUL DEATH	2 years (614.1(2)).
PROPERTY DAMAGE	5 years (614.1(4)).

KANSAS

PERSONAL INJURY	2 years from injury or discovery (reasonably ascertainable), maximum of 10 years from the act (60-513(4)); Med. Mal. - maximum of 4 years from act.
WRONGFUL DEATH	2 years from injury or discovery, maximum of 10 years (60-513(5)).
PROPERTY DAMAGE	2 years from injury or discovery, maximum of 10 years (60-513(1)&(2)).
BREACH OF WARRANTY	4 years (84-2-7-25).

KENTUCKY

PERSONAL INJURY	1 year (413.140(1)(a)); 5 years for fraud (413.120(12)). Accrues on discovery if fact of injury not reasonably ascertainable.
WRONGFUL DEATH	1 year (413.140(1)(a)).
PROPERTY DAMAGE	5 years (413.120(6)).
BREACH OF WARRANTY	4 years (355.2-725).
PRODUCT LIABILITY	2 years (411.1).

LOUISIANA

PERSONAL INJURY	1 year (3492).
WRONGFUL DEATH	1 year (3492).
PROPERTY DAMAGE	1 year (3492).
BREACH OF WARRANTY	1 year - Sales.

MAINE

PERSONAL INJURY	6 years - all civil actions, except 2 years for assault and battery, false imprisonment, slander, libel and med. mal. (14 § 752).
WRONGFUL DEATH	2 years (18 § 2-804).
PROPERTY DAMAGE	6 years (14 § 752).
BREACH OF WARRANTY	4 years (11 § 2-725).
PRODUCT LIABILITY	6 years (14 § 752).

MARYLAND

PERSONAL INJURY	3 years for "all civil actions", except 1 year for assault, battery, libel, slander (5-105) and 5 years from injury or 3 years from discovery for med. mal. (5-101).
WRONGFUL DEATH	3 years (3-904).
PROPERTY DAMAGE	3 years (5-101).
BREACH OF WARRANTY	4 years (2-725).
PRODUCT LIABILITY	3 years (5-101).

MASSACHUSETTS

PERSONAL INJURY	3 years for tort, contract (personal injuries), replevin malpractice, assault, battery, libel, slander, false imprisonment, etc. (260 § 2A and 260 § 4).
WRONGFUL DEATH	3 years (229 § 2) (death must occur within two years of death--causing injury).
PROPERTY DAMAGE	3 years (260 § 2A).
BREACH OF WARRANTY	3 years (106 § 2-318).

MICHIGAN

PERSONAL INJURY	2 years, except 1 year for slander or libel (600.5805).

APPENDIX B

WRONGFUL DEATH	3 years (600.5805(8)).
PROPERTY DAMAGE	3 years (600.5805).
BREACH OF WARRANTY	4 years (440.2725).
PRODUCT LIABILITY	3 years (600.5805(9)).

MINNESOTA

PERSONAL INJURY	2 years - med. mal. and torts resulting in personal injury (541.05).
WRONGFUL DEATH	3 years from death, but no more than 6 years after act or omission (573.02) except, 2 years if med. mal.
PROPERTY DAMAGE	6 years (541.05).
BREACH OF WARRANTY	4 years (336-2-725).
PRODUCT LIABILITY	4 years (541.05).

MISSISSIPPI

Reduced to 3yrs. in 1989

PERSONAL INJURY	~~6 years~~ (15-1-49) except 1 year for assault, battery, maiming, false imprisonment, slander, libel (15-1-35) and 2 years for med. mal.
WRONGFUL DEATH	6 years (15-1-49).
PROPERTY DAMAGE	6 years (15-1-49).
BREACH OF WARRANTY	6 years (75-2-725).

MISSOURI

PERSONAL INJURY	5 years for injury to person or rights of another (from discovery, if fraud, subject to 10 year maximum (516.120)), except 2 years for libel, slander, assault, battery, false imprisonment, etc. (516.140) and 2 years for med. mal. (from discovery if foreign object) (516.105).
WRONGFUL DEATH	3 years (537.100).
PROPERTY DAMAGE	5 years (516.120).
BREACH OF WARRANTY	4 years (400.2-725).

APPENDIX B

MONTANA

PERSONAL INJURY	3 years for actions on liability not founded upon an instrument (27-2-204); from discovery for med. mal. (27-2-205) except 2 years for libel, slander, assault, battery, false imprisonment or seduction and fraud or mistake (27-2-203).
WRONGFUL DEATH	3 years (27-2-204).
PROPERTY DAMAGE	2 years (27-2-207).
BREACH OF WARRANTY	8 years if written obligation (27-20-202) or 4 years if contract for sale (30-2-725).

NEBRASKA

PERSONAL INJURY	4 years for injury to rights not arising on contract (from discovery for fraud) (25-207(3)) except 1 year from discovery for professional malpractice and 1 year for libel, slander, false imprisonment, malicious prosecution and 2 years for other professional malpractice (25-208).
WRONGFUL DEATH	2 years (30-810).
PROPERTY DAMAGE	4 years (25-207(2)).
BREACH OF WARRANTY	4 years (2-725).
PRODUCT LIABILITY	4 years, but within 10 years of injury or first sale, or 2 years from "being informed" if asbestos-related disease (25-224).

NEVADA

PERSONAL INJURY	2 years (11.190(4)(e)) except 3 years from discovery if fraud or mistake (11.190(3)).
WRONGFUL DEATH	2 years (11.190(4)).
PROPERTY DAMAGE	3 years (11.190(3)).
BREACH OF WARRANTY	4 years (104.2725).

NEW HAMPSHIRE

PERSONAL INJURY	3 years for all personal actions (from discovery of injury and causal relationship) (508:4).
WRONGFUL DEATH	3 years (508:4).
PROPERTY DAMAGE	3 years (508:4).
BREACH OF WARRANTY	Sales contract - 4 years (382-A:725).
PRODUCT LIABILITY	3 years from injury, but not more than 12 years after product left control of manufacturer (507-D:2). 12-year statute of repose held unconstitutional, Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983).

NEW JERSEY

PERSONAL INJURY	2 years for injury to person from wrongful act, neglect or default (2A:14-2).
WRONGFUL DEATH	2 years (2A:31-3).
PROPERTY DAMAGE	6 years (2A:14-1).
BREACH OF WARRANTY	4 years (12A:2-725).

NEW MEXICO

PERSONAL INJURY	3 years for injury to person or reputation (37-1-8).
WRONGFUL DEATH	3 years (41-2-2).
PROPERTY DAMAGE	4 years (37-1-4).
BREACH OF WARRANTY	4 years (55-2-725). But see, Chavez v. Kitsch, 374 P.2d 497 (1962) - court applied the 3-year period in a personal injury action prosecuted under warranty.

NEW YORK

PERSONAL INJURY	3 years (CPLR 214(5)); 1 year for assault, battery, false imprisonment,

slander, libel (CPLR 215); 2 years 6 months for med. mal. (from discovery for foreign object) (CPLR 214a).

WRONGFUL DEATH — 2 years (EPTL 5-4.1).

PROPERTY DAMAGE — 3 years, (CPLR § 214(4)).

BREACH OF WARRANTY — Sale - 4 years (2-725 UCC); Other - 6 years (CPLR 213(2)).

NORTH CAROLINA

PERSONAL INJURY — 3 years for injury to person or rights of another; accrues when injury was or should have been apparent (1-52(5)&(16)).

WRONGFUL DEATH — 2 years (1-53(4)).

PROPERTY DAMAGE — 3 years from when damage is or should have been apparent (1-52(5)&(16)).

BREACH OF WARRANTY — 4 years (25-2-725(1)).

PRODUCT LIABILITY — 6 years from initial purchase for use or consumption.

NORTH DAKOTA

PERSONAL INJURY — 6 years (28-01-16); 2 years for libel, slander, assault, false imprisonment (28-01-18) and 2 years for med. mal. (28-01-18).

WRONGFUL DEATH — 2 years (28-01-18).

PROPERTY DAMAGE — 6 years (18-01-16).

BREACH OF WARRANTY — 4 years (41-02-104).

PRODUCT LIABILITY — Injury, death or damage occurred within 10 years from initial purchase for use or consumption or 11 years from date of manufacture (28-01.1-02).

OHIO

PERSONAL INJURY — 2 years for bodily injury (2305.10); 1 year for slander, libel, malicious prosecution, false imprisonment and

med. mal. (maximum 4 years from occurrence) (2305.11); 4 years for fraud.

WRONGFUL DEATH — 2 years (2305.10).

PROPERTY DAMAGE — 2 years (2305.10); 4 years for recovery (2305.09).

BREACH OF WARRANTY — 4 years if contractual relationship (1302.98); other - 2 years (2305.10).

OKLAHOMA

PERSONAL INJURY — 2 years for injury to rights of another (12-95(3)); 1 year for assault, battery, libel, slander, malicious prosecution, false imprisonment (12-95(4)).

WRONGFUL DEATH — 2 years (12-1053).

PROPERTY DAMAGE — 2 years (12-95(3)).

BREACH OF WARRANTY — 5 years (12A-2-72.).

OREGON

"STATUTE OF ULTIMATE REPOSE" — Notwithstanding other longer statutory provisions as a result of tolling or delayed commencement of running of the statute of limitations, all actions for negligent injury to person or property must be brought within 10 years from the date of the act or omission complained of (12.115[1]). Constitutionality upheld, Josephs v. Burns, 491 P.2d 203 (1971). Action accrues when injury manifests if injury not previously discoverable by exercise of due diligence. O'Gara v. Kaufman. 726 P.2d 402 (1986).

PERSONAL INJURY — 2 years (12.110(1)); from discovery if fraud, deceit or med. mal. (subject to 5 years max. unless fraud/deceit).

WRONGFUL DEATH — 3 years from death-causing injury (30.020).

PROPERTY DAMAGE — 6 years (12.080(3)&(4)).

BREACH OF WARRANTY	4 years (72.7250).
PRODUCT LIABILITY	2 years from date on which death, injury or damage occurs (from discovery if asbestos related), but not later than 8 years after first purchase of product (30.905).

PENNSYLVANIA

PERSONAL INJURY	2 years (42 § 5524).
WRONGFUL DEATH	2 years (42 § 5524).
PROPERTY DAMAGE	2 years (42 § 5524).
BREACH OF WARRANTY	4 years (12A § 2-725). But, 2 years for third-party personal injury actions based upon warranty. See Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903 (Pa. Super. 1978).

RHODE ISLAND

PERSONAL INJURY	10 years for all civil actions (9-1-13); 3 years for injuries to the person (9-1-14) - from discovery for med. mal. (9-1-14.1); 1 year for actions for words spoken.
WRONGFUL DEATH	3 years (10-7-2).
PROPERTY DAMAGE	10 years (9-1-13(a)).
BREACH OF WARRANTY	4 years (6A-2-725).
PRODUCT LIABILITY	Personal injury - 3 years (9-1-14); Property damage - 6 years (9-1-13); Statute of Repose - 10 years from date of first purchase for consumption (9-1-13(b)) - Unconstitutional. Kennedy v. Cumberland Co., Inc., 471 A.2d 195 (R.I. 1984).

SOUTH CAROLINA

PERSONAL INJURY	6 years for injury to person or rights of another (15-3-530(5)); 3 years from reasonable discovery if med. mal. (15-3-545); 2 years for libel, slander, assault, battery, false imprisonment (15-3-550).

WRONGFUL DEATH	6 years (15-3-530(6)).
PROPERTY DAMAGE	6 years (15-3-530(3)&(4)).
BREACH OF WARRANTY	6 years (36-2-725).
SOUTH DAKOTA	
PERSONAL INJURY	3 years for personal injury (15-2-14(3)); 6 years for other injury to rights of another not arising on contract and for fraud (15-2-13); 2 years for libel, slander, assault, battery or false imprisonment (15-2-15); 3 years for legal malpractice (15-2-14.2).
WRONGFUL DEATH	3 years (21-5-3).
PROPERTY DAMAGE	6 years (15-2-13(3)&(4)).
BREACH OF WARRANTY	6 years (15-2-13(1)).
PRODUCT LIABILITY	3 years from injury, death or damage (15-2-12.2).
TENNESSEE	
PERSONAL INJURY	1 year (28-3-104).
WRONGFUL DEATH	1 year (28-3-104).
PROPERTY DAMAGE	3 years (28-3-105).
BREACH OF WARRANTY	4 years (47-2-725).
PRODUCT LIABILITY	Governed by personal injury and property damage limitations periods but must be brought within 6 years of date of injury, 10 years of first purchase or 1 year of expiration of anticipated life of products: whichever is shorter (29-28-103).
TEXAS	
PERSONAL INJURY	2 years (16.003(a)); 1 year for malicious prosecution, slander, libel ( ).
WRONGFUL DEATH	2 years (16.003(b)).

PROPERTY DAMAGE	2 years (16.003(a)).
BREACH OF WARRANTY	4 years (2-725).
UTAH	
PERSONAL INJURY	4 years for actions not otherwise covered (78-12-25(2)); 2 years for civil rights actions (78-12-28); 1 year for libel, slander, assault, battery, false imprisonment.
WRONGFUL DEATH	2 years (78-12-28(2)).
PROPERTY DAMAGE	3 years (78-12-26(1)&(2)).
~~BREACH OF WARRANTY~~	4 years (70A-2-75).
PRODUCT LIABILITY	Governed by personal injury and property damage limitations periods, but must be brought within 6 years of initial purchase or 10 years of manufacture (78-15-3).
VERMONT	
PERSONAL INJURY	3 years from discovery (12-512(4)); Med. Mal. - 3 years from incident or 2 years from reasonable discovery (12-521).
WRONGFUL DEATH	2 years (14-1492(a)).
PROPERTY DAMAGE	3 years - Personalty (12-512(5)). 6 years - Realty (12-511).
BREACH OF WARRANTY	4 years (9A-2-725(1)).
WASHINGTON	
PERSONAL INJURY	3 years for injury to person or rights of another (4.16.080(2)) - fraud accrues on discovery; 2 years for libel, slander, assault, battery, false imprisonment.
WRONGFUL DEATH	3 years (4.16.080(2)).
PROPERTY DAMAGE	3 years (4.16.080(1)&(2)).
BREACH OF WARRANTY	4 years (62A.2-725).

WEST VIRGINIA

PERSONAL INJURY	2 years (55-2-12).
WRONGFUL DEATH	2 years (55-7-6).
PROPERTY DAMAGE	2 years (55-2-12).
BREACH OF WARRANTY	4 years - Sales (46-2-275); 2 years - Personal injury (55-2-12).

WISCONSIN

PERSONAL INJURY	6 years for injury to character or rights of another (893.53); 3 years for injuries to the person (893.54); 3 years from injury or 1 year from reasonably diligent discovery, subject to maximum of 5 years from act for med. mal. (893.55); 2 years for intentional torts (893.57). Discovery rule adopted for all torts, Hansen v. A.H. Robins, 335 N.W. 2d 578 (1983).
WRONGFUL DEATH	3 years (893.54).
PROPERTY DAMAGE	6 years (893.52).
BREACH OF WARRANTY	4 years (402A.725).

WYOMING

PERSONAL INJURY	4 years for injury to rights (1-3-105[a][iv]); 1 year for slander, libel, assault, battery, false imprisonment ( ).
WRONGFUL DEATH	2 years (1-38-102).
PROPERTY DAMAGE	4 years (1-3-105[a][iv]).
BREACH OF WARRANTY	4 years (34-21-299.5).

ATRA American Tort Reform Association

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LIMITS ON NONECONOMIC DAMAGES

As os February 1994

Alaska	$500,000	noneconomic damages, excluding cases of disfigurement or severe physical impairment.
California	$250,000	noneconomic damages in medical liability actions.
Colorado	$250,000	noneconomic damages in medical liability actions unless court finds clear justification to exceed, but in no event more than $500,000; total recovery not to exceed $1 million.
Florida	$250,000/ $350,000	noneconomic damages in medical liability actions ; $250,000 limit applies to binding arbitration and $350,000 limit applies to arbitration cases which proceed to trial.
Hawaii	$375,00	pain and suffering (does not include mental anguish, disfigurement, loss of enjoyment of life, loss of consortium). Sunsets 1995.
Idaho	$400,000	noneconomic damages in personal injury cases, increases/decreases annually according to state's adjustment of average annual wage.
Kansas	$250,000	noneconomic damages in all personal injury cases.
Maryland	$350,000	noneconomic damages in all personal injury actions, except wrongful death.
Michigan	$225,000	noneconomic damages in medical liability actions, limit increased annually by increase in consumer price index.
Minnesota	$400,000	intangible losses in all civil actions (embarrassment, emotional distress, loss of consortium, not pain and suffering or disfigurement).

Missouri	$350,000	noneconomic damages in medical liability actions, increased or decreased annually according to figures determined by U.S. Department of Commerce.
Oregon	$500,000	noneconomic damages in all personal injury cases.
Utah	$250,000	noneconomic damages in medical liability actions.
West Virginia	$1 million	noneconomic damages in medical liability actions.

LIMITATIONS ON AWARDS OF NON-ECONOMIC DAMAGES

1986

Alaska
$500,000 cap (except for physical impairment or disfigurement)

Colorado
$250,000 cap (unless court finds justification by "clear and convincing evidence" for a larger award which cannot exceed $500,000)

Hawaii
$375,000 cap but cap applies only to actual physical pain and suffering; other non-economic damages have no limit

Maryland
$350,000 cap

Minnesota
$400,000 cap on all awards based on loss of consortium, emotional distress, or embarrassment (not pain and suffering)

1987

Idaho
$400,000 cap – adjusted for annual wage increase

Kansas
$250,000 cap on pain and suffering (not other non-economic losses)

Oregon
$500,000 cap on non-economic damages

April 1985

STATUTE OF LIMITATIONS

A statute of limitations is a law cutting off a cause of action, including medical liability actions, after the expiration of a specified time period. With respect to medical liability, the statute usually begins to run from either the date of occurrence or the date the alleged medical injury was or should have been discovered.

The primary purpose of a statute of limitations is to require that a claim be asserted within a specified time period while the pertinent evidence is available, and while witnesses are still available. Also, it is generally believed that the spectre of a lawsuit should not continue for an indefinite time. In the medical liability area, a shorter, more definite statute of limitations eliminates a "long tail" in claims, thereby making the writing of medical liability insurance more actuarially predictable.

a) Specific medical liability statutes of limitations

Every state has a statute of limitations applicable to medical liability actions. However, in some states the statute is a general one, applicable in all tort actions. States establishing a specific statute of limitations for medical liability cases are as follows:

1. Alabama*
2. Arizona (repealed 1985)*
3. Arkansas
4. California
5. Colorado*
6. Connecticut*
7. Delaware
8. Florida
9. Georgia*
10. Hawaii
11. Idaho
12. Illinois*
13. Indiana*
14. Iowa
15. Kansas*
16. Kentucky
17. Louisiana
18. Maine*
19. Maryland
20. Massachusetts
21. Michigan
22. Minnesota
23. Mississippi
24. Missouri
25. Montana
26. Nebraska
27. Nevada
28. New Hampshire*
29. New Mexico
30. New York
31. North Carolina
32. North Dakota
33. Ohio*
34. Oklahoma*
35. Oregon
36. Rhode Island
37. South Carolina
38. South Dakota
39. Tennessee*
40. Texas*
41. Utah*
42. Vermont
43. Washington
44. Wisconsin
45. Wyoming

b) Maximum statute of limitations period

In many states the statute of limitations for medical liability actions begins to run only upon discovery of the injury. Since such injuries may be discovered several years after the treatment was rendered, the time period for filing an action may be very uncertain under such statutes. This period of uncertainty is often referred to as the "long tail." The "long tail" is often cited by insurance companies as a major difficulty in establishing medical liability insurance premiums on an actuarially sound basis.

* See section entitled Court Decisions: Statute of Limitations

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Some states have sought to eliminate the "tail" by placing an absolute maximum time period within which medical liability suits may be brought ("statute of repose"). Such statutes commonly provide for bringing an action within a certain number of years after the occurrence of the alleged injury and within an additional number of years (beyond the regular limitation period) where the injury could not have been discovered through the reasonable diligence of the injured person.

An exception to the time period is provided in some of these statutes where foreign objects are left in the body, or where the health care provider has fraudulently concealed the fact of injury.

States providing some form of definitive maximum time limitations are as follows:

1. Alabama*
2. Arizona (repealed 1985)*
3. Colorado*
4. Connecticut*
5. Delaware
6. Florida
7. Hawaii
8. Illinois*
9. Iowa
10. Louisiana
11. Missouri
12. Nebraska
13. New Mexico
14. New York
15. North Carolina
16. North Dakota
17. Ohio*
18. Oregon
19. South Dakota
20. Tennessee*
21. Utah
22. Vermont
23. Washington
24. Wisconsin

c) Minors

Most state statutes of limitations provide that if an injury is incurred by a minor, the statute is tolled (i.e., stops running) on the minor's cause of action until he reaches the age of majority.

Several states have amended their statutes of limitations in medical injury cases where minors are involved, typically by providing that the statute applies to a minor upon reaching a certain age. For example, if a two-year statute of limitations is provided, a state may provide that actions which accrue to a minor before the age of six must be brought before his eighth birthday. In statutes of this type, after the minor reaches the age of six the general two-year time limitation becomes applicable for minors as well as for adults. Most of the state statutes which have been modified relative to minors are of this variety.

However, the states of Louisiana and Utah provide that there is no special treatment for minors in their statutes of limitations, applicable to medical liability, so that minors are subject to the same statutory limitation period as applies to adults.

In addition, the North Carolina and Kansas statutes provide that a person who has incurred a cause of action as a minor must pursue his claim either within the general limitation period applicable to adults or within one year after reaching the age of majority, whichever period is the longer.

States which have amended their statutes of limitations (for medical liability cases) relative to minors are as follows:

1. Alabama*
2. Arizona (repealed 1985)*
3. Arkansas
4. California
5. Colorado
6. Delaware
7. Indiana*
8. Kansas*
9. Louisiana
10. Maryland
11. Massachusetts
12. Mississippi
13. Missouri
14. New Hampshire
15. New Mexico
16. New York
17. North Carolina
18. Ohio*
19. Rhode Island (repealed 1984)
20. South Dakota
21. Texas*
22. Utah
23. Wisconsin
24. Wyoming

Court Decisions: Statute of Limitations

Alabama

In Reese v. Rankin Fite Memorial Hospital, the Alabama Supreme Court found that the statute of limitations applicable to minors did not violate the state or federal constitutions. The Alabama statute prohibits commencement of a cause of action more than four years after the occurrence of the act complained of, except that a minor under four years of age has until his eighth birthday to bring a cause of action. The plaintiff argued that the statute violates the due process and equal protection provisions of both the state and federal constitutions in that it treats minors with medical injuries differently from minor victims of other torts. The court stated that it need only find that the classification made by the legislature was not arbitrary or unreasonable in order for the statute to withstand the equal protection challenge. It found that other statutory provisions favored minors and that the court could not say that the equal protection provision of the constitution restricts the legislature's authority to withdraw the legislative grace given minors. The court stated that it cannot substitute its judgment for that of the legislative branch, whose enactments come clothed in a presumption of validity. The court also held that the medical liability act is not a "special law" (which would violate the state constitution) because the act is a law which applies to the whole state, operating alike on all the people or all the people of a class. [403 So. 2d 158 (Ala. 1981)]

In Bowlin Horn v. Citizens Hospital, the Alabama Supreme Court upheld the medical liability statute of limitations which provides that in no event may an action be commenced more than four years after the alleged negligent act. The court found that fraudulent concealment or the act of leaving a foreign object in a patient's body did not toll the statute of limitations unless the legislature specifically so provided. The court found that the statute of limitations was not unconstitutional. [425 So. 2d 1065 (Ala. 1982)]

Arizona

In Kenyon v. Hammer, the Arizona Supreme Court held that the three year statute of limitations for medical injuries violated the equal protection clause of the state constitution in cases where an injured person could not have known of his injury.

The statute of limitations provided that a cause of action for medical injury accrues as of the date of injury and must be prosecuted within three years after the date of injury. It further provides exceptions to the three year limit for actions involving foreign objects, intentional concealment, and minors. The statute legislatively abolished the common law discovery rule which provided that the statute of limitations did not begin to run until the date the claimant discovers, or reasonably should have discovered, that he had been injured.

The court stated that the statute of limitations discriminates between claims against health care providers and other malpractice claims and also discriminates between classes of medical liability claimants. Because the court found that the right to pursue an action is a "fundamental right" guaranteed by the state constitution, it applied the "strict scrutiny" test in reviewing the constitutionality of the statutes. Under this test, a statute can be held valid only if it serves a compelling state interest and is necessary to the attainment of that interest.

The court noted that the statute was intended by the legislature to be a remedial act in response to the difficulties the medical profession had had in obtaining liability insurance. The court found that the state had neither a compelling nor legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged of access to, and remedy by, the judicial system.

Defendants argued that the statute was necessary in order to decrease the costs of medical care and to increase the availability of medical services. In considering this argument, the court questioned whether the abolition of the discovery rule was necessary to reduce liability insurance premiums. The court stated that if actuarial certainty is required, reduction of the statute of limitations would have been a more rational method of achieving the compelling state interest than abolition of the discovery rule and consequent abrogation by select exceptions. No evidence was provided to support the necessity of the legislative discrimination between most medical claimants and those claimants coming within the statute's exceptions.

The court held that given the lack of either legislative or adjudicative record to demonstrate the effect that abolition of the discovery rule might have on liability premiums, it could not find that the abolition of the discovery rule was a necessary step to achieve the compelling state interest of reducing the cost of medical care or increasing the availability of such care.

The court held that the imposition of an absolute bar three years from the date of injury on most, but not all, medical injury claimants, the abolition of the general tolling provisions recognized for all other tort claims, and the internal distinctions among medical liability claimants all discriminate against and among medical liability claimants in a manner which infringes upon fundamental rights. As a result, the statute of limitations was found to violate the state constitution insofar as it purports to abolish or limit the discovery rule. The three year statute of limitations remains in effect subject to the application by the courts of the discovery rule. [688 P.2d 961 (Ariz. 1984)]

In Barrio v. San Manuel Division Hospital, the Arizona Supreme Court held unconstitutional the statute of limitations applicable to minors in medical injury lawsuits. The statute had provided that, in actions against licensed health care providers, minors who are injured and are under the age of seven must bring the cause of action for damages before reaching the age of ten.

The Arizona state constitution provides that "[t]he right of action to recover damages for injury shall never be abrogated, and the amount recovered shall not be subject to any statutory provision." Pursuant to this provision, the court deemed the right to bring a suit for medical injury a constitutionally guaranteed "fundamental right." [The Arizona constitutional provision is stronger and more explicit than "open courts" provisions contained in other state constitutions.]

The court found that the medical injury statute of limitations applicable to minors "abrogates the right of action" and therefore the statute was held to be an unconstitutional violation of a fundamental right. [No. 17165-PR (December 10, 1984)]

Colorado

In Mishek v. Stanton, the plaintiff argued that the absolute maximum statute of repose provision applicable only to medical professionals violated the constitutional guarantee of equal protection and constitutes impermissible special legislation since "no reasonable basis exists for separating medical and healing professionals from other professionals and lay persons and granting them the special protection afforded by the [absolute] maximum statute of limitations." The Colorado Supreme Court rejected the argument outright, relying on its previous decision in McCarty v. Goldstein, 376 P.2d 691 (1962) which found that the health care provider statute of limitations constituted neither special legislation nor violated equal protection principles. [616 P.2d 135 (Colo. 1980)]

In Austin v. Litvak, the Supreme Court of Colorado held that the absolute maximum on the time within which a medical liability suit may be brought was unconstitutional insofar as it applies to persons whose claims are premised on negligent misdiagnosis. The court created an

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Background Paper

Impact of Legal Reforms on Medical Malpractice Costs

U.S. Congress

Office of Technology Assessment

IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS

Background Paper
prepared by the

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State	Medical Malpractice Arbitration Provisions[b]	Attorney Fee Limits[c]	Caps on Damages	Collateral Source Offset	Periodic Payment of Awards	Pretrial Screening Panels
				M = Mandatory	D = Discretionary	V = Voluntary
Alabama			O	D	M	
Alaska	√		√	D	D	M
Arizona		√		D	M	
Arkansas					D	V
California	√	√	√	D	M	
Colorado	√		√	M	M	
Connecticut		√		M	D	V
Delaware		√		D	D	V
D.C.						
Florida	√		√O	M	D	O
Georgia	√			O		
Hawaii	√	√	√			M
Idaho			√O	M	D	M
Illinois	√	√	O	M	M	O
Indiana		√	√	D	D	M
Iowa		√		M	D	
Kansas		√	√O	MO	O	V
Kentucky				D		
Louisiana	√		√		M	M
Maine		√		M	M	M
Maryland		√	√	D	D	M
Massachusetts		√	√	M		M
Michigan	√	√	√	M	M	M
Minnesota				M	D	
Mississippi						
Missouri			√		M	O
Montana				M	D	M
Nebraska		√	√			M
Nevada						M
New Hampshire		√	O	O	O	V
New Jersey	√	√		M		
New Mexico			√	M	M	M

State	Medical Malpractice Arbitration Provisions[b]	Attorney Fee Limits[c]	Caps on Damages	Collateral Source Offset	Periodic Payment of Awards	Pretrial Screening Panels
				M = Mandatory	D = Discretionary	V = Voluntary
New York	√	√		M	D	
North Carolina						
North Dakota			O	D[O]	D	
Ohio	√		O	M	M	
Oklahoma		√				
Oregon			√	D	D	
Pennsylvania		O		O		O
Rhode Island				M	D	O
South Carolina					D	
South Dakota	√		√	D	M	
Tennessee		√		M		M
Texas			O			
Utah	√	√	√	M	M	M
Vermont						M
Virginia	√		√			V
Washington		√	O		M	
West Virginia			√			
Wisconsin		√	√			
Wyoming						O

Abbreviations:
M = Mandatory
D = Discretionary
V = Voluntary
O = A malpractice specific provision was overturned by Court. In certain States, the legislature corrected the constitutional deficiency.

Footnotes:
[a]For additional details on all categories, see app. A.
[b]A "√" indicates States with voluntary, binding arbitration provisions that are designed specifically for medical malpractice cases. Voluntary, binding arbitration is an option in every State under general arbitration statutes. In Hawaii the provision applies to mandatory non-binding arbitration.
[c]A "√" in "Attorney Fees" means this statutory provision limits attorney fees to a specific percent of award. In a few States the courts are given the authority to determine or approve attorney fees (see app. A).

SOURCE: Office of Technology Assessment, 1993.

EXPLANATION OF METHODS USED BY OTA TO COMPILE DATA

The tables, figures, and accompanying notes in appendix A were derived from a variety of sources and synthesized by OTA to reflect the most recent information available on selected State medical malpractice reforms.

The primary published sources were 1991 and 1993 editions of a compendium developed for the Federal Agency for Health Care Policy and Research (AHCPR),[1] selected State statutes, and judicial cases. Two additional sources were used to update, cross-check, and supplement the AHCPR compendia.[2]

After compiling information from these sources into summary tables, OTA sent draft copies of the information to the attorneys general in all 50 States on March 24, 1993, for confirmation or amendment. Information was changed to reflect respondents' comments. Where conflicts arose between the attorney general response and information found elsewhere, the attorneys general's responses were favored. Unresolved questions were addressed through follow-up phone conversations with attorney general respondents and statutory research. The revised drafts were sent again to all 50 State attorneys general on June 25, 1993, for a final review and any corrections were incorporated.

For States that responded to the first survey only, information is current to March 1993. For States that responded to the second survey, information is current to June 1993. For the 10 States[3] that did not respond to either review and the District of Columbia, information was cross-checked and supplemented through followup telephone calls and/or review of the relevant State codes where possible. Where confirmation was not possible, information in this appendix reflects that presented in the 1993 edition of the AHCPR compendium.

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[1]U.S. Department of Health and Human Services, Agency for Health Care Policy and Research, "Compendium of State Systems for Resolution of Medical Injury Claims," prepared by S.M. Spernak, Center for Health Policy Research, The George Washington University (Rockville, MD: AHCPR, April 1993), AHCPR Pub. No. 93-0053; U.S. Department of Health and Human Services, Agency for Health Care Policy and Research, "Compendium of State Systems for Resolution of Medical Injury Claims," prepared by S.M. Spernak and P.P. Budetti, Center for Health Policy Research, The George Washington University (Rockville, MD: DHHS, February 1991), DHHS Pub. No. (PHS)91-3474.

[2]These sources were: Fisk, M.C., "The Reform Juggernaut Slows Down," The National Law Journal 15(10):1,34-37, Nov. 9, 1992; American Nurses Association, "Report to ANA Board of Directors on Tort Reform, Part 3: Presentation of Selected Summary of State and Local Legislation Related to Tort Reform and Review of Insurance Company Practices and Policies Related to Nursing Negligence with Recom-mendations," December 1991.

[3]DE,FL,HI,KS,KY,MS,NJ,NM,TX,WV.

Table A-1—Collateral Source Offset Provisions,[a] by State, 1993

Mandatory	Discretionary	No provision
CO*	AK*	AR
CT	AL	DC
FL	AZ	GA[O]
IA	CA	HI
IL*	DE	LA
ID	IN	MO*
KS[O]*	KY	MS
MA*	MD*	NC
ME	ND[O]*	NE
MI	OR	NH[O]
MN*	SD	NV*
MT*		OK
NJ		PA[O]
NM		SC
NY		TX
OH*		VA
RI*		VT
TN		WA*
UT		WI
		WV
		WY

[a]The traditional collateral source rule forbade evidence of the plaintiff's collateral sources of income and reimbursement (e.g., medical insurance, disability payments) from being entered into evidence. States classified as "mandatory" or "discretionary" in this table have modified the traditional evidence rule to allow certain types of collateral sources to be admitted as evidence. Statutes which require that the plaintiff's award be offset by certain collateral sources are classified as mandatory. Statutes that leave the decision of whether to offset to the jury or judge are classified as discretionary. States with no provision have not modified their traditional collateral source rules. It is of note that a number of States reduce the malpractice award by the collateral source payments, but credit the plaintiff with any premiums he or she has paid or will pay to obtain the insurance (e.g., MN, MI, CT, RI, IL and NY).

O = Provision overturned.

* See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

ADDITIONAL NOTES FOR TABLE A-1

Cases Overturning Collateral Source Offset Rules:

Georgia--Denton v. Con-Way Southern Express Inc., 402 S.E.2d 269 (Ga. 1991) (statute mandating evidence of collateral sources violates guarantee of impartial and complete governmental protection).

Kansas--see explanation below.

New Hampshire--Carson v. Maurer, 424 A.2d. 825 (N.H. 1980).

North Dakota--Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) held an earlier statute for collateral source offsets unconstitutional.

Pennsylvania--The Pennsylvania Supreme Court struck down as unconstitutional the State statute providing for pretrial screening panels. The collateral source provision was a part of that statute and was nullified. Mattos v. Thompson 421 A.2d. 190 (1980).

Selected Additional Information:

Alaska--Collateral source offset determined by the court (Alaska Stat. Supp. Secs. 9.55.548; 9.17.070 (1992)).

Colorado--Collateral source offset determined by the court (Colo. Rev. Stat. Sec. 13-64-402 (1992)).

Illinois--Reduction of collateral source is for 50 percent of collateral payments for lost wages or disability benefits and 100 percent of medical benefits (with exceptions), but no more than 50 percent of the total verdict (735 ILCS 5/2-1205 (West 1992)).

Kansas--When claimant demands $150,000 or more, evidence of collateral sources admissible. Reduction of award by collateral source amount is subject, however, to certain limitations (KSA Secs. 60-3801 - 3807 (Supp. 1992)). This statute applies to all personal injury suits. The original statute abrogating collateral source for medical malpractice suits only was struck down (Farley v. Engelken 740 P.2d 1058 (1987)). Also, in Wentling v. Medical Anesthesia Services, P.A., 701 P.2d 939 (Kan. 1985), court held that collateral source offsets were unconstitutional in wrongful death medical malpractice cases.

Maryland--An award of damages by a medical malpractice arbitration panel may be reduced by the amount of damages reimbursed by certain collateral sources (Md. Cts. & Jud. Proc. Code Ann. Sec. 3-2A-05(h) (Michie 1989)). (See table A-5 and Additional Notes to table A-5 for description of Maryland's arbitration panel provision.)

Massachusetts--Collateral source offset determined by the court (Mass. Gen. Laws Ann. ch. 231, Sec. 60G (Lexis 1992)).

Minnesota--Offset is mandatory if defendant brings in evidence of payments made to plaintiff by collateral sources (Minn. Stat. Sec. 548.36 (1992)).

Missouri--Damages paid by defendant (or his insurer or any authorized representative) prior to trial may be introduced as evidence. Such introduction shall constitute a waiver of any right to a credit against a judgment (R.S.Mo. Sec. 490.715 (1991)).

Montana--Collateral offset determined by judge after jury verdict (Mont. Code Ann. Sec. 27-1-308 (1992)).

Nevada--In actions against providers of health care, damage awards must be reduced by the amount of any prior payment made by health care provider to the injured person or claimant to meet reasonable expenses and other essential goods or reasonable living expenses (Nev. Rev. Stat. Sec. 42.020 (Supp. 1991)).

ADDITIONAL NOTES FOR TABLE A-1 (Continued)

North Dakota--Under North Dakota law, collateral source "does not include life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages" (N.D.C.C. Sec. 32-03.2-06 (Lexis 1991). (An earlier collateral source offset provision was overturned in the courts--see above.)

Ohio--Collateral sources do not include insurance benefits paid for by plaintiff or employer (Ohio Rev. Code Ann. Sec. 2305.27 (Baldwin 1992)).

Rhode Island--Collateral source is mandatory if evidence is admitted (R.I. Gen. Laws Sec. 9-19-34 (1992)).

Washington--Washington's statute allows information on collateral source to be entered into trial, except the collateral source rule excludes insurance purchased by the plaintiff or insurance purchased by the employer for the plaintiff (RCW Sec. 7.70.080). However, offset of collateral sources is governed by case law, and in practice there is no offset for collateral sources. See Sutton v. Shufelberger, 643 P.2d 920 (Ct. App. Wash. 1982); Bowman v. Whitelock, 717 P.2d. 303 (Ct. App. Wash. 1986).

SOURCE: Office of Technology Assessment, 1993.

Table A-2--Caps on Damages[a] and State Patient Compensation Funds, by State, 1993

Noneconomic cap	Economic and noneconomic	No statutory limits	PCF (Patient Compensation Fund)
AK: $500,000*	AL:[O] Total recovery capped at $1 million.*	AR	FL: Physicians may participate in fund by obtaining liability coverage of $250,000 per claim and $500,000 per occurrence. Fund will pay malpractice awards exceeding maximum physician liability of $250,000 per claim, up to $1 million per claim and $3 million aggregate per policy.
CA: $250,000		AZ	
FL:[O] $350/250,000	CO: Total recovery capped at $1 million. $250,000 cap on noneconomic.*	CT	
HI: $375,000		DC	
ID:[O] $400,000*		DE	
KS:[O] $250,000*	IN: $750,000	GA	
MD: $350,000	LA: $500,000*	IA	
MA: $500,000	NE: $1,250,000	IL[O]	
MO: $465,000*	NM: $500,000*	KY	
OR: $500,000	SD: $1,000,000*	ME	
UT: $250,000	VA: $1,000,000	MN[R]	
WV: $1,000,000		MS	IN: *Provider not liable for that portion of any malpractice award which exceeds* $100,000. Any amount due the plaintiff which is in excess of the total liability of all health care providers, shall be paid from the PCF, with total payments from the PCF not to exceed $750,000.
WI: $1,000,000		MT	
		NC	
		*ND[O]	
		NH[O]	
		NJ	
		NV	
		NY	
		OH[O]	
		OK[R]	
		PA	
		RI	KS: Physicians must carry $200,000 in malpractice insurance per claim ($600,000 per annum) then can choose one of three options for excess coverage from PCF. For each option, the physician pays the initial $200,000 in damages and then the fund will pay some portion of the remainder depending on how the physician chooses to distribute fund liability across potential claims: 1) fund liable for next $100,000 per claim ($300,000 aggregate per provider); 2) fund liable for next $300,000 ($900,000 aggregate per provider); and 3) fund liable for up to $800,000 per claim.
		SC	
		TN	
		*TX[O]	
		VT	
		WA[O]	
		WY	

Table A-2–Caps on Damages[a] and State Patient Compensation Funds, by State, 1993 (Continued)

Noneconomic cap	Economic and noneconomic	No statutory limits	PCF (Patient Compensation Fund)
			LA: Provider liability limited to $100,000 for injuries or death to plaintiff. Fund will pay total amount recoverable for all injuries or death of a plaintiff exclusive of future medical care and related benefits, up to $400,000 for private providers. The State pays all damages up to $500,000 for State health care providers.
			NE: The PCF shall cover liability exceeding $200,000 up to $1.25 million.
			NM: Health care provider liability is capped at $100,000, with the remainder to be paid by the PCF. Total payment from PCF not to exceed $500,000 per occurrence per year.
			PA: The fund shall pay any amount exceeding $100,000 per occurrence, up to $1 million per claim.
			SC: The fund will pay awards in excess of $100,000 per claim (no upper limit).
			WI: Physicians must have $400,000 of malpractice coverage per incident and $1,000,000 in coverage per annum. The fund will pay for damages exceeding the physician's coverage. Each health care provider is also assessed an annual fee to help finance the fund.

[a]NOTE: OTA's review did not include caps that apply only, or separately, to claims against State-employed or State-owned health care providers.

O = Provision overturned.
R = Provision repealed.

*See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

ADDITIONAL NOTES FOR TABLE A-2

Cases Overturning Caps on Damages:

Alabama--Moore v. Mobile Infirmary, 592 So.2d 156 (Ala. 1991) ($400,000 cap on noneconomic and punitive damages overturned, but $1 million cap on total recovery not challenged--see notes below).

Florida--Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987).

Idaho--Jones v. State Board of Medicine 555 P.2d 399 (Idaho 1976) *cert denied* 431 U.S. 914 (1977).

Illinois--Wright v. Central DuPage Hospital, 347 N.E.2d 736 (Ill. 1976).

Kansas--Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988) (cap on total damages and noneconomic damages in medical malpractice cases overturned).

New Hampshire--Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991).

North Dakota--Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

Ohio--Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

Texas--Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988); Baptist Hospital of S.E. Texas v. Barber, 672 S.W.2d 296 (Tex. App. 1984), *aff'd*. 714 S.W.2d 310 (Tex. 1986).

Washington--Sophie v. Fibreboard Corporation, 771 P.2d 711 (Wash. 1989).

Selected Additional Information:

Alabama--Total recovery in medical malpractice cases must not exceed $1 million. If jury returns a verdict in excess of $1 million, judge must reduce it to $1 million or lesser amount as deemed appropriate. Mistrial declared if jury is informed of cap beforehand. Total cap is adjusted annually to reflect changes in the consumer price index. (Ala. Rev. Stat. Sec. 6-5-547 (1987)) Separate cap on noneconomic damages was overturned (see above).

Alaska--Limit does not apply to damages for disfigurement or severe physical impairment (Alaska Stats. Supp. Sec. 9.17.010 (1992))

Colorado--Court has some discretion to exceed cap limit (Colo. Rev. Stat. Sec. 13-64-302 (1992)).

Florida--In arbitration, noneconomic damages limited to $250,000 per incident. Economic damages limited to 80 percent of wage loss and loss of earning capacity and medical expenses, offset by collateral sources. If defendant refuses to arbitrate, the claim will proceed to trial and there will be no limit on damages. In addition, if plaintiff wins at trial, she will be awarded prejudgment interest and attorney fees up to 25 percent of award. If claimant rejects arbitration, noneconomic damages at trial limited to $350,000. Economic damages limited to 80 percent of wage losses and medical expenses (Fla. Stat. Secs. 766.207-209 (1993 Supp.)). This provision was recently challenged. The trial court found the provision unconstitutional, as did the District Court of Appeals. However, the Supreme Court of Florida reversed holding the limitation on damages imposed if the plaintiff does not accept arbitration is not unconstitutional. University of Miami v. Echarte, 585 So.2d 293 (Fla. App. 3 Dist. 1991) *reversed and remanded* University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993).

Idaho--Original cap applied to malpractice suits only and was overturned (see above). Existing cap applies to all torts. Cap increases or decreases yearly ac-

ADDITIONAL NOTES FOR TABLE A-2 (Continued)

cording to the State's adjustment of the average annual wage (Idaho Code Sec. 6-1603 (Lexis 1993)).

Kansas--Original cap for malpractice suits only was overturned (see above). Existing cap applies to all personal injury suits.

Louisiana--The total amount of damages for a medical malpractice claim against a "qualified provider" may not exceed $500,000, plus interest and costs, exclusive of future medical care and related benefits. Qualification under the patient compensation fund requires a private health care provider to pay into the fund and provide evidence of insurance up to $100,000 per claim. "Qualified providers" exclude State health care providers. For qualified providers, the provider is liable for up to $100,000 and the State patient compensation fund for the remaining amount not to exceed $400,000 exclusive of future medical care and related benefits. For State health care providers, total damages, exclusive of future medical care and related benefits, may not exceed $500,000 (LA-R.S. Sec. 40:1299.42-45; LA-R.S. Sec. 40: 1299.39-39.1) Future medical expenses and related benefits in excess of $500,000 are paid as submitted.

Massachusetts--Pain and suffering capped at $500,000 unless there is substantial or permanent loss or impairment of bodily function o substantial disfigurement or other circumstances making limitation unfair (Mass. Gen. Laws Ann. ch. 231, Sec. 60H (Lexis 1992)).

Michigan--Noneconomic damages limited to $225,000 unless there has been a death, intentional tort, injury to reproductive system, foreign body wrongfully left inside the patient's body, concealment o injury by health care provider, limb or organ wrongfully removed or patient has lost vital bodily function. The limit on damages increases each year by the increase in Consumer Price Index (M.C.L. Sec. 600.1483 (1990)). The exceptions to the cap are so extensive that, as of August 1993, the cap had yet to be applied to a single case (154).

Missouri--Noneconomic damages recoverable by injured party capped at $465,000 per defendant per occurrence (1993 limit). Original limit was $350,000, but this is adjusted annually to reflect changes in the implicit price deflator for personal consumption published by the U.S. Department of Commerce (R.S.Mo., Sec. 538.210 (1986)).

New Mexico--The limitation on caps on damages does not apply to past and future medical care and related benefits (N.M. Stat. Ann. Sec. 41-5-6, 41-5-7 (Michie 1989)). These expenses will be paid on an ongoing basis. In 1995, the cap on damages will be increased to $600,000 and the Patient Compensation Fund will require the physician to be responsible for the first $200,000 of a malpractice claim (N.M. Stat. Ann. Sec. 41-5-6 (Michie 1989)).

North Dakota--Awards in excess of $250,000 may be reviewed for reasonableness (N.D. C.C. Sec. 32-03.2-08 (Lexis 1991)).

South Dakota--South Dakota's medical malpractice cap is currently being challenged in the court on constitutional grounds (Schultz, J.S., Legal Counsel, Division of Administration, Office of Administrative Services, Department of Health, South Dakota, letter to the Office of Technology Assessment, U.S. Congress, Washington, DC, April 2, 1993).

Texas--The $500,000 limit on damages in medical malpractice (Vernon's Texas Civil Stat. Art. 4590i, Sec. 16.02-11.03 (Supp. 1992)) was struck down as unconstitutional in Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988). The Texas Supreme Court subsequently decided that the damage limitation was constitutional in wrongful death cases only (Rose v. Doctors Hosp., 801 S.W.2d 841 (Tex. 1990)).

SOURCE: Office of Technology Assessment, 1993.

Table A-3--Periodic Payment of Awards,[a] by State, 1993

Mandatory	Discretionary	No provision
AL > $150,000*	AK*	DC
AZ	AR > $100,000	GA
CA > $50,000	CT > $200,000*	HI
CO > $150,000	DE	KS[O]
IL > $250,000*	FL > $250,000	KY
LA ≥ $500,000*	IA	MA
ME ≥ $250,000	ID > $100,000	MS
MI	IN	NC
MO > $100,000*	MD	NE
NM	MN > $100,000	NH[O]
OH > $200,000	MT > $100,000	NJ
SD > $200,000	ND*	NV
UT > $100,000	NY > $250,000*	OK
WA > $100,000*	OR	PA
	RI > $150,000*	TN
	SC > $100,000	TX
		VA
		VT
		WI
		WV
		WY

[a]Periodic payment provisions are often not triggered unless the award reaches a threshold amount. The specific thresholds are noted parenthetically in the table. Periodic payment provisions apply only to future damages. The schedule of payments is either negotiated by the parties or determined by the court. Some statutes offer guidelines for determining the schedule. The mandatory category includes statutes in which periodic payment is mandatory upon reaching the threshold or upon unilateral request by defendant or plaintiff.

O = Provision overturned.

* See additional notes on following page.

SOURCE: Office of Technology Assessment, 1993.

ADDITIONAL NOTES FOR TABLE A-3

Cases Overturning Periodic Payment Provisions:

Kansas--Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988).

New Hampshire--Carson v. Maurer, 424 A.2d 825 (N.H. 1980).

Selected Additional Information:

Alabama--A recent Alabama Supreme Court case overturned a periodic payment provision that applied to personal injury suits, excluding malpractice. This provision was similar to the medical malpractice periodic payment provision, thereby calling its constitutionality into question (Clark v. Container Corp., 589 So.2d 184 (Ala. 1991)).

Alaska--Periodic payment of future damages is discretionary in personal injury cases except if requested by injured party (Alaska Stat. Supp. Sec. 09.17.040 (1992)).

Connecticut--When award reaches $200,000 or more, parties have 60 days to negotiate periodic payment agreement. If no agreement reached, a lump sum award will be awarded (Conn. Gen. Stat. Sec. 52-225d).

Florida--Mandatory periodic payment of future losses exceeding $250,000, but defendant may elect to pay lump sum for future economic loss and expenses, reduced to future present value (Fla. Stat. Sec. 766.78 (1986)).

Illinois--Both parties can agree to elect periodic payment, or, if future damages exceed $250,000, plaintiff can unilaterally elect periodic payment. Defendant can elect periodic payment if: 1) the future economic damages are in excess of $250,000, 2) defendant can produce a security (e.g. bond, annuity) in the amount of the claim for both past or future damages, or $500,000, whichever is less, and 3) future damages likely to occur over a period of more than one year (735 ILCS Sec. 5/2-1705 (West 1992)).

Louisiana--If damages exceed $500,000, the PCF or the State pays future medical care and related benefits as they are submitted. (See table A-2 for a description of Louisiana's cap on damages provision.)

Missouri--Mandatory periodic payment of future damages at request of any party (R.S.Mo. Sec. 538.220, (1991)).

New York--Any requirement to pay periodically applies to no more than the portion of future damages in excess of $250,000. The parties may agree to lump sum payments of future damages otherwise payable periodically (N.Y. CPLR Sec. 5031 (McKinney 1992)).

North Dakota--The court has discretion to permit the trier of fact to make a special finding regarding future economic damages if an injured party claims future economic damages for continuing institutional or custodial care that will be required for a period of more than two years (N.D.C.C. Sec. 32-03.2-09 (1989)).

Rhode Island--Mandatory conference for purposes of determining viability of voluntary agreement for periodic damage (R.I. Gen. Laws Secs. 9-21-12; 9-12-13 (Lexis 1991)).

Washington--Mandatory at the request of parties (Wash. Rev. Code Sec. 4.56.260 (1986)).

SOURCE: Office of Technology Assessment, 1993.

Table A-4--Statutes of Limitations,[a] by State, 1993

	Years within date of injury	Years within date of discovery	Maximum number of years	Foreign object exception**
AL:	2 years	6 months	4 years	-
AK:	-	*2 years	-	-
AR:	2 years	-	-	1 year
AZ:	-	2 years	-	-
CA:	3 years	1 year	3 years	1 year
CO:	-	2 years	3 years	2 years
CT:	-	2 years	3 years	-
DC:	3 year	-	-	-
DE:	2 years	3 years	-	-
FL:	2 years	2 years	4 years	-
GA:	2 years*	-	5 years	1 year
HI:	-	2 years	6 years	-
ID:	2 years	-	-	1 year*
IN:	-	2 years	-	-
IL:	-	2 years	4 years	-
IA:	-	2 years	6 years	2 years
KS:	-	2 years	4 years	-
KY:	-	1 year	5 years	-
LA:	1 year*	1 year	3 years	-
MA:	3 years	-	7 years	General Exception
ME:	3 years	-	3 years	Upon "reasonable discovery"
MD:	5 years	3 years	-	Exception for minors only
MI:	2 years*	6 months	6 years	6 months
MN:	2 years*	-	-	-
MS:	-	2 years	-	-
MO:	-	2 years	10 years	2 years after discovery 10 years max.
MT:	3 years	3 years	5 years	-
NE:	2 years	1 year	10 years	-
NV:	4 years	2 years	-	-
NH:	3 years	3 years	-	-
NJ:	-	2 years*	-	-
NM:	3 years*	-	-	-
NY:	2 years, 6 months	-	-	1 year
NC:	3 years	-	4 years	1 year after discovery, 10 year max
ND:	-	2 years	6 years	-
OH:	-	1 year	-	-
OK:	-	2 years	3 years O*	-
OR:	-	2 years	5 years	-
PA:	2 years	2 years	-	-
RI:	3 years	3 years	-	-
SC:	3 years	3 years	6 years	2 years
SD:	2 years	-	-	-
TN:	-	1 year	3 years	1 year
TX:	2 years*	-	-	-
UT:	-	2 years	4 years	1 year

Table A-4--Statutes of Limitations,[a] by State, 1993 (Continued)

Years within date of injury	Years within date of discovery	Maximum number of years	Foreign object exception**
VT: 3 years	2 years	7 years	2 years
VA: 2 years	-	10 years	1 year
WA: 3 years	1 year	8 years	1 year
WV: 2 years	2 years	10 years	-
WI: 3 years	1 year	5 years	1 year
WY: 2-2.5 years	2 years	-	-

Explanatory Notes for Table A-4

Column 1: Statutory time limit for bringing a suit is measured from the time the injury occurs or from the date of termination of the medical treatment that led to the claim.

Column 2: The statutory time limit for bringing suit is measured from the time at which the plaintiff could have reasonably discovered the injury. Often States allow the time limit to run from either the time of injury or the time of discovery, depending on the nature of the injury.

Column 3: The maximum period in which a claim can be brought, regardless of whether the limit is measured from the date of injury or act or the date of discovery. In most States, this maximum does not apply to the foreign body exception (see column 4).

Column 4: Because of the difficulty of discovering a foreign body (e.g., a surgical sponge) left inside a patient during invasive procedures, a number of States make special exceptions to the statute of limitations for these cases.

[a]This table does not cover special provisions for minors, disabled plaintiffs or cases involving fraud or concealment on the part of the healthcare provider.

O = Provision overturned.

* See additional notes on following page.

** Within year of discovery, maximum number of years do not apply unless stated.

SOURCE: Office of Technology Assessment, 1993.