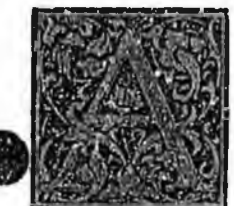
HB
292



LASKA 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

Received
JAN 24
REP

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.

FORUM / LETTERS

Reformed tort system could deliver more doctors

By Fred Wurlitzer

PLANO, TEXAS — Your editorials of Aug. 9 on "Malpractice" and "Reform Options" are a refreshing attempt to address the malpractice insurance problems in Alaska. The tort system in Alaska is discouraging physicians from working there. I speak from personal experience.

I am a board-certified surgeon, Fellow of the American College of Surgeons, who came to Alaska this summer to work in a smaller community. Unfortunately, I felt my financial security was threatened.

Although in all my years of practice I was never sued, the only malpractice insurance available to me had a limit of $500,000. A representative with MEIC, one of the few carriers willing to be at risk in offering medical malpractice insurance in Alaska, informed me that the tort system of "severe and separate liability" discouraged them from offering more insurance. Long-term practitioners

might get additional coverage, he said, but the rates increased sharply.

In Alaska, everyone named in a successful malpractice suit can be held liable for the full judgment amount, e.g., doctors, nurses, laboratory assistants, pharmacists, hospitals, orderlies, etc. In other states, such as California, tort reform meant that physicians could be held partially liable.

Why should physicians come to Alaska to practice under these circumstances? You may attract young doctors with few assets and limited experiences, but not likely middle-aged, more prosperous physicians whose broader experiences are desirable for the smaller communities in Alaska.

The problem is not, as some lawyers allege, one of "thousands of patients — injured or killed each year by incompetent or negligent doctors." (I doubt this inflammatory assertion is based on facts garnered in Alaska.) Nor will guaranteed health insurance give the promised coverage, which Dan Hensley of the Alaska Academy of Trial Lawyers hopes for, unless there are doctors to meet the needs.

In the smaller communities of Alaska where specialist coverage is lacking, the physician is called upon to read X-rays, analyze laboratory results, set fractures, read cardiograms, perform surgery with expert skill, and never make a mistake. The public expectation in these smaller communities is that the state-of-art medicine in university centers in the Lower 48 is the standard of care without the highly trained staff that these university centers provide.

I suggest that the problem is the public unreasonably expecting perfection in medical care, and a tort system that encourages attorneys to capitalize on those expectations. A 99 percent batting average is not satisfactory. The fact is every physician makes honest mistakes from time to time. In the public eye this constitutes malpractice, and law suits are born.

It is dismaying that the medical/legal environment in Alaska is considered so hostile that physicians otherwise willing to practice there all too often go elsewhere.

When insurance companies settle these suits, physicians find themselves compromised in obtaining licensing and privileges. Their insurance premiums rise! More defensive medicine is practiced, and the circle continues! The costs of defensive medicine are far more than people realize.

It is dismaying that the medical/legal environment in Alaska is considered so hostile that physicians otherwise willing to practice there all too often go elsewhere. What needs changing is the tort system in Alaska. Make a start there before you think of other ways to improve your health-care delivery.

☐ Fred Wurlitzer, M.D., F.A.C.S., lives in Plano, Texas.

WLC Annual Meeting

Politics: The Art of the Plausible

by Robert Erickson, Research Director
Nevada Legislative Counsel Bureau

Dr. Thomas Sowell

A highlight of the 1993 Annual Meeting for many delegates was the presentation by featured speaker, Dr. Thomas Sowell. A Senior Fellow at the Hoover Institution of Stanford University, Dr. Sowell is a prominent economist, author, columnist and educator. Dr. Sowell also is the writer of a nationally syndicated newspaper column, "Observations" in Forbes magazine, and a number of books on topics of concern to government policymakers.

Interesting article — Re: TORT REFORM

According to Dr. Sowell, economics is the study of the alternative uses of scarce resources. Unfortunately, he said, politics is something quite different, perhaps more "the art of the plausible" than the "art of the possible." People who work in the political process require far more knowledge than do economists, and often require more information than is available. An inherent problem in government is that the numbers always run far behind reality, so that "by the time that you know what the facts are, the facts may have changed."

...In politics, we are always looking for villains

Dr. Sowell stated that the biggest difference between politics and economics is that politicians usually seek categorical solutions to problems, while economists evaluate incremental trade-offs. As an example, he cited that a political decision to connect two population centers by bridge may cost the lives of a number of workers. On the other hand, many other lives may be saved if the bridge affords shorter travel time to hospitals during emergency situations. The decision to build the bridge is a trade-off instead of a solution.

He also warned that certain laws designed to help a few members of society ultimately may endanger many others. He stated that vaccines used to prevent certain diseases may cost the lives of a few people because of adverse reactions. If laws are enacted which enable the surviving family of such a person to sue the pharmaceutical company which produced the drug, some companies may stop producing the vaccine, thus endangering the lives of many more. An even greater concern is that such laws may discourage the investment of resources into finding cures for other diseases.

Dr. Sowell also warned against seeking solutions that are perfect and totally without risk. The "law of diminishing returns" must be considered by policymakers. For example, it may be better to require that drinking water be 95 percent pure instead of 97 percent pure, because to gain the additional 2 percent could cost many times more. Besides, alternative uses of our scarce financial resources must be considered.

Throughout his presentation, Dr. Sowell interjected subtle humor to support his arguments. For example, he stated his belief that in politics we are "always looking for villains." He said that we may be nearing the philosophy that "every misfortune that happens is the fault of the nearest person with money."

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 292

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 (signed Richard I. Pegues /FOR/)
Agency: Department of Law
Date: February 2, 1994

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Rev 11/93

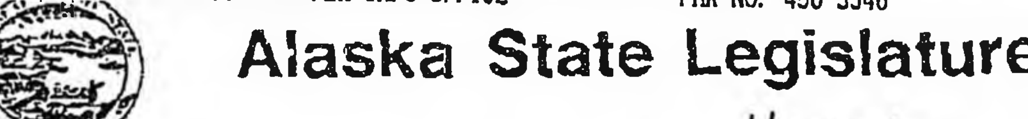
FISCAL NOTE

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.



Alaska State Legislature

Please enter into the record my testimony to the HOUSE FINANCE & JUDICIARY
committee name

committee on HB 292 . dated FEBRUARY 17, 1994
bill/subject

SEE ATTACHED:
2 PAGE LETTER

Signed: Robert B Stephenson
Testifier

Representing (Optional)

1511 Gordenview Dr Fairbanks AK 99709
Address

455 6073
Phone No.

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

February 17, 1994

To: Members of the House Judiciary Committee
Members of the House Finance Committee

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

SENT BY: XEROX Telecopier 7017; 2-16-94 ; 12:34 ; 9074653834;# 1
BY:OCC LIC - ANCHORAGE 02-15-94 01:00PM 9075625781 # 2
FEB-15-94 TUE 14:04 P.02

HB-292

OMNI MEDICAL CENTER

Robert Jay Rowen, M.D.
Diplomate, American Boards of Family Practice, Emergency Medicine, Chelation Therapy

"Biologic Alternatives to Drugs and Surgery"

615 E. 82nd Street, Suite 300
Anchorage, Alaska 99518
(907) 344-7775

February 15, 1994

Post-it™ brand fax transmittal memo 7671	# of pages ▸ 1
To Danielle	From Luck
Co. H. Jud	Co. O. L.
Dept.	Phone # 465-2538
Fax # 465-3834	Fax # 465-2974

Karl 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

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

Received
FEB 0 1 1994
REP BRIAN PORTER

JAN. 31, 1993

HOUSE LABOR AND COMMERCE COMMITTEE
ATTN.:

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

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 907-274-2889

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 it out of committee. Thx!!

David Frazier
[illegible] Shepherdia Dr.
Anchorage 99508

* a Speaker - Mike Leissmeier

DAVID H. THORSNESS
JAMES M. POWELL
BRIAN J. BRUNDIN
MARCUS R. CLAPP*
JOE M. HUDDLESTON
CARL J. D. BAUMAN
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RONALD E. NOEL*
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CARL H. SUTHERLAND
JOHN B. THORSNESS

HUGHES THORSNESS
GANTZ POWELL & BRUNDIN
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Reply to: JUNEAU

February 3, 1994

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

Received
FEB 03 1994
[illegible]

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 no 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 19 (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: [signature]
Michael L. Lessmeier

xmll3600/lp
cc: Members, House Labor
& Commerce Committee

ATRA Tort Reform Record

1212 New York Avenue, N.W. • Suite 515 • Washington, D.C. 20005 • (202) 682-1163

Barry Keeng ✓
(916) 443 - 4900

June 30, 1993

The American Tort Reform Association was organized in 1986 to bring greater fairness and efficiency to the civil justice system through public education and the enactment of state legislation. Today it represents approximately four hundred non-profit organizations, professional societies, trade associations and businesses. ATRA accomplishes its mission primarily by coordinating and supporting the activities of legislative coalitions in each of the states, by keeping its members informed of developments and mobilizing them for action, and by keeping media attention focused on the need for civil justice reform.

The Tort Reform Record is published every June and December to record the accomplishments of the latest legislative year. It includes a single-page state-by-state summary of the reforms enacted by the states since January, 1986. An issue-by-issue elaboration of what each state has done is included. Separate documents are available on professional liability, periodic payment of awards and frivolous suit sanctions. ATRA also provides position papers and model bills on each of these issues.

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	COLLATERAL SOURCES	21	9
	PREJUDGMENT INTEREST	9	12
	PUNITIVE DAMAGES	30	13
	PRODUCT LIABILITY	23	17

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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 reform 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

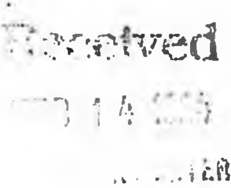
Harold A Jackson

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

PRACTICE LIMITED TO GENERAL SURGERY

BY APPOINTMENT ONLY

February 1, 1994



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

The Guardian of Small Business

-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.

#####

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
REP. 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%

LASKA 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

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: (I)

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##

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 [illegible] Sr — STR #2 Box 9319 Eagle River, AK 344-1921

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

[illegible] — 5901 E 6th Ave SP 191 Anch AK 99504 337-4235

Brian J. [illegible] — 500 Fischer #B Anchorage AK 99518 562-1682

[illegible] — 3750 Ponderosa Cir Anch AK 99515 - 349-7475

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

[illegible] — [illegible]

[illegible] — St Rt Box 9319 Eagle River AK - 694-5100

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

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

[illegible] — [illegible] Anch, AK 99518 561-1579

P.O. Box 93570 Anchorage, Alaska 99509 FAX (9 7) 344-8244 Phone (907) 344-1921

Alaskans For Liability Reform

Received
JAN 27 1994
REP BRIAN PORTER

January 24, 1994

TO: All Alaska Legislators

FROM: Alaskans for Liability Reform

Enclosed herein are some data reports that should be very helpful for you in supporting the General Public Civil Liability Reform of 1993-1994. They are as follows:

1. Highlights From: "The Effect of 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance", read the report from the Division of Insurance, which substantiates the actions and results.

2. "NFIB Alaska Civil Liability 1994 Survey Results".

3. Highlights From: "Product Liability News"

4. Highlights From: "American Consulting Engineers Council Liability Report", and please note the percentage of claims settled without any payment to Claimant.

5. "Tort Cost Trends: An International Perspective", Excerpts from the Tillinghast Report.

P.O. Box 201668
Anchorage, Alaska 99520
Phone: 561-6250

HIGHLIGHTS FROM:

The Effect of 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance

by:

W. KIP VISCUSI
Department of Economics, Duke University, Durham, NC 27708

RICHARD J. ZECKHAUSER
Kennedy School of Government, Harvard University, Cambridge, MA 02138

PATRICIA BORN
Department of Economics, Duke University, Durham, NC 27708

GLENN BLACKMON
Delta Pacific, Olympia, WA 98501

Distributed by Alaskans For Liability Reform
P.O. Box 201668
Anchorage, AK 99520
Phone: 561-6250

Abstract

"A large number of states adopted tort reforms in the mid-1980s to limit the dramatic surge in insurance losses and premiums. Evidence based on liability insurance data by state indicates that these reforms substantially influenced general liability insurance. The levels of losses, premiums, and loss ratios (a measure of insurance profitability) all reflected the impact of the reform. The large-scale reform efforts in 1986 were particularly influential. Medical malpractice insurance was much less sensitive to the reform efforts."

"Liability insurance markets in the mid-1980s were in disarray, with rapidly escalating awards and significant company losses. Substantial pressures were exerted on state legislatures to ease the burdens imposed by liability costs, and the policy process responded in many states. In this article, we examine the effect of those reforms. In particular, we seek to discover whether the tort reforms enacted in the mid-1980s had any effect on the claims paid by insurance companies or the premiums paid by consumers.

This inquiry in to the effects of the tort reforms indicates that the performance of general liability insurance was quite sensitive to the liability regime. States that adopted general reforms experienced increases in insurance profitability, decreased levels of losses, and lower premiums. Although some specific reforms, such as modifications of joint and several liability, appear to be particularly influential, the general change in the liability climate that accompanies the reform effort also appears to be of consequence. The effects of tort reform on medical malpractice insurance proved less pronounced."

Liability reforms, 1985-1987

"Following the explosion in liability premiums in 1985, states became much more interested in liability reforming 1986 [see table]. The most prominent of the 1986 measures were the modifications of joint and several liability rules adopted by 16 states, which composed more than half of all premiums for general liability and medical malpractice. Three other reform measures were adopted in at least ten states: limits on liability, limits on non economic damages, and our catch-all "other reform" measure. Of all the years we will consider in this analysis, 1986 is the most prominent in terms of the extent of liability reform measures."

Liability reforms in 1986

Type of reform	Number of states	Percentage of liability premiums affected: General liability	Percentage of liability premiums affected: Medical mal-practice	State list
Modify joint and several liability	16	53%	55%	Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Hampshire, New York, Utah, Washington, West Virginia, Wyoming [a]
Limits on liability	13	11%	14%	Alabama, Alaska, Colorado, Connecticut, Delaware, Hawaii, Indiana, Maine, Maryland, New Hampshire, Tennessee, Utah, Wyoming
Limits on non economic damages	10	14%	12%	Alaska, Colorado, Florida, Kansas, Maryland, Minnesota, New Hampshire, New Mexico, Oklahoma, Washington
Limits on punitive damages	6	9%	7%	Colorado, Florida, Minnesota, New Hampshire, New Mexico, Oklahoma
Other reforms in 1986:				
Modify collateral source rule	5	13%	9%	Colorado, Connecticut, Indiana, Michigan, Minnesota
Provide for structured or periodic payments	7	12%	10%	Alaska, Connecticut, Iowa, Maine, Michigan, Utah, Washington
Modify dram shop rules	11	17%	18%	Arizona, Colorado, Connecticut, Indiana, Maryland, Michigan, Montana, New Hampshire, Tennessee, Utah, Wyoming
Modify statute of limitations	4	5%	5%	Colorado, Connecticut, Maine, Washington
Limit attorney contingency fees	4	5%	3%	Connecticut, Maine, New Hampshire, Wisconsin

[a] Colorado, Utah, and Wyoming abrogated joint and several liability in 1986. The remaining states modified the doctrine.

Change in real total annual insurer loss and premiums, by line 1985-1988 (in $ millions)

	Losses	Premiums	Loss Ratio 85	Loss Ratio 88
General liability	$-4[illegible]71	$ 5678	1.12	0.62
Medical malpractice	$ - 531	$ 1256	1.22	0.79
Automobile	$ 7924	$14201	0.75	0.71

Conclusion

"Wholly apart from the concern with whether the stringency of the present liability system is optimal, it is, however, clear that the liability reform efforts in the mid-1980s did serve a constructive function. Before these reform efforts were enacted, liability markets were in substantial disarray. Insurance was too unprofitable to be offered at these rates over the long run. Many insurance companies denied coverage to parties seeking insurance. During this disruptive period, motels closed swimming pools, municipalities shut down playgrounds, and many firms withheld innovative but potentially risky products from the market."

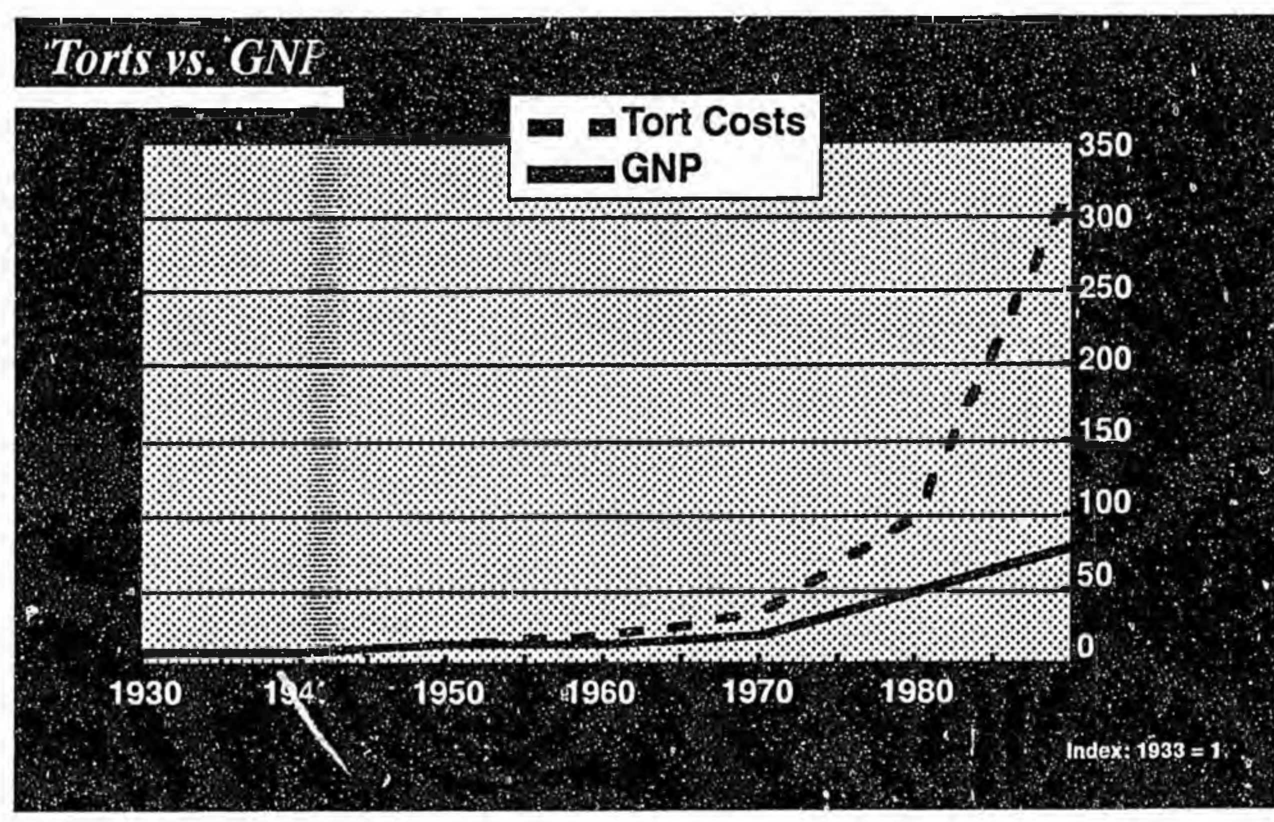
"Insurance, like any other factor of production, should have a ready supply sold at a price that reflects its long-run cost. The liability reform efforts of the mid-1980s did more than constrain the spiraling costs of insurance. They stabilized insurance markets, and thereby fostered the sound functioning of the economy."

Tort Cost Trends: An International Perspective

Excerpts from the Tillinghast Report
Reprinted with permission from Towers Perrin company

Distributed by:
Alaskans for Liability Reform
Post Office Box 201668
Anchorage, Alaska 99520
(907) 561-6250

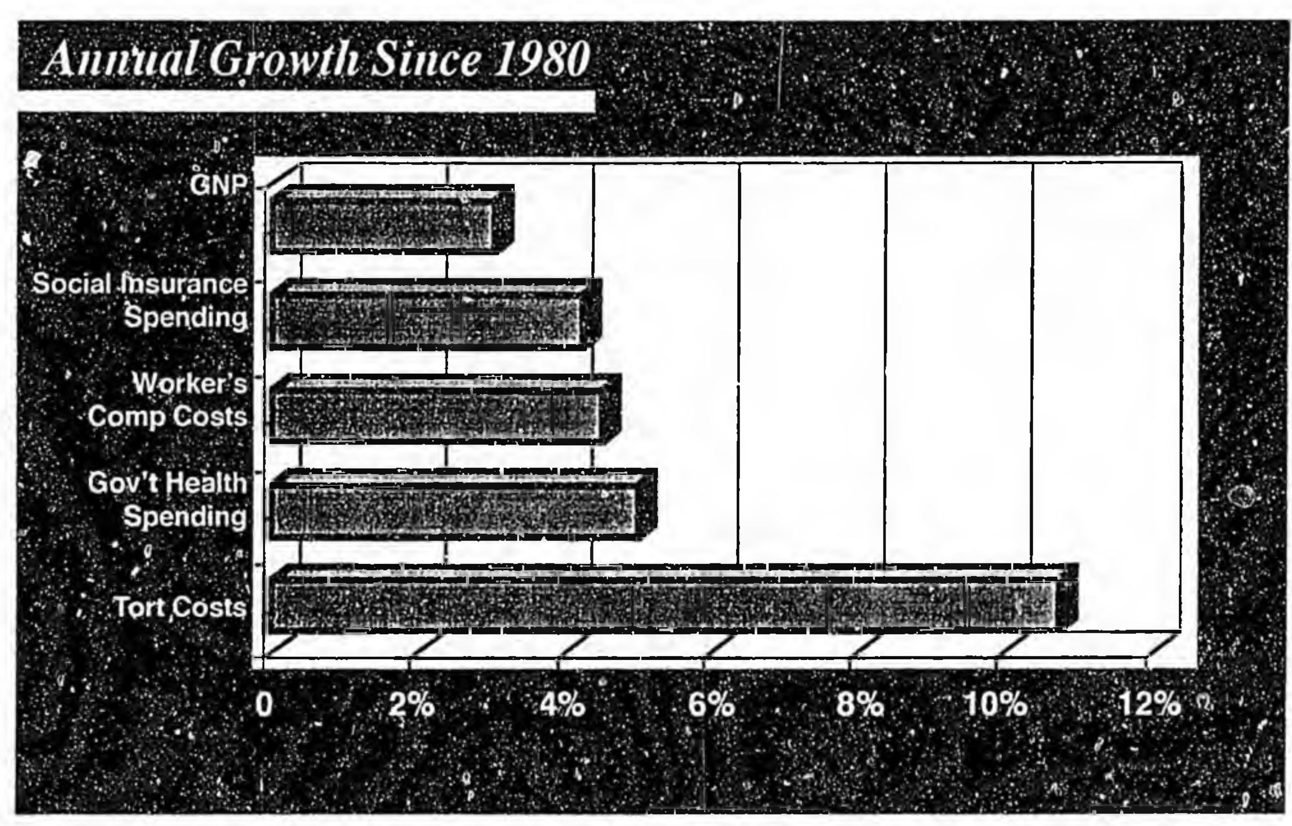
How Does Tort Cost Escalation Compare With GNP Growth?



- Tort cost growth far outstripped GNP growth since 1930, increasing 300 times over this 57-year period, compared with a 50-fold increase for GNP.

- Until shortly after World War II, growth in both tort costs and the GNP ran fairly parallel. Only in the late 1940s and early 1950s did the two diverge, with tort costs consistently outpacing GNP growth.

Since 1980, Cost Increases Have Leveled Off for All Social Systems Save Torts



■ As noted, cost escalation has moderated for all social systems but torts. Between 1980 and 1987, for example, tort costs rose at an annual rate of 16%, or 10.6% when adjusted for inflation. This compares with the following annual increases (also adjusted for inflation) of:

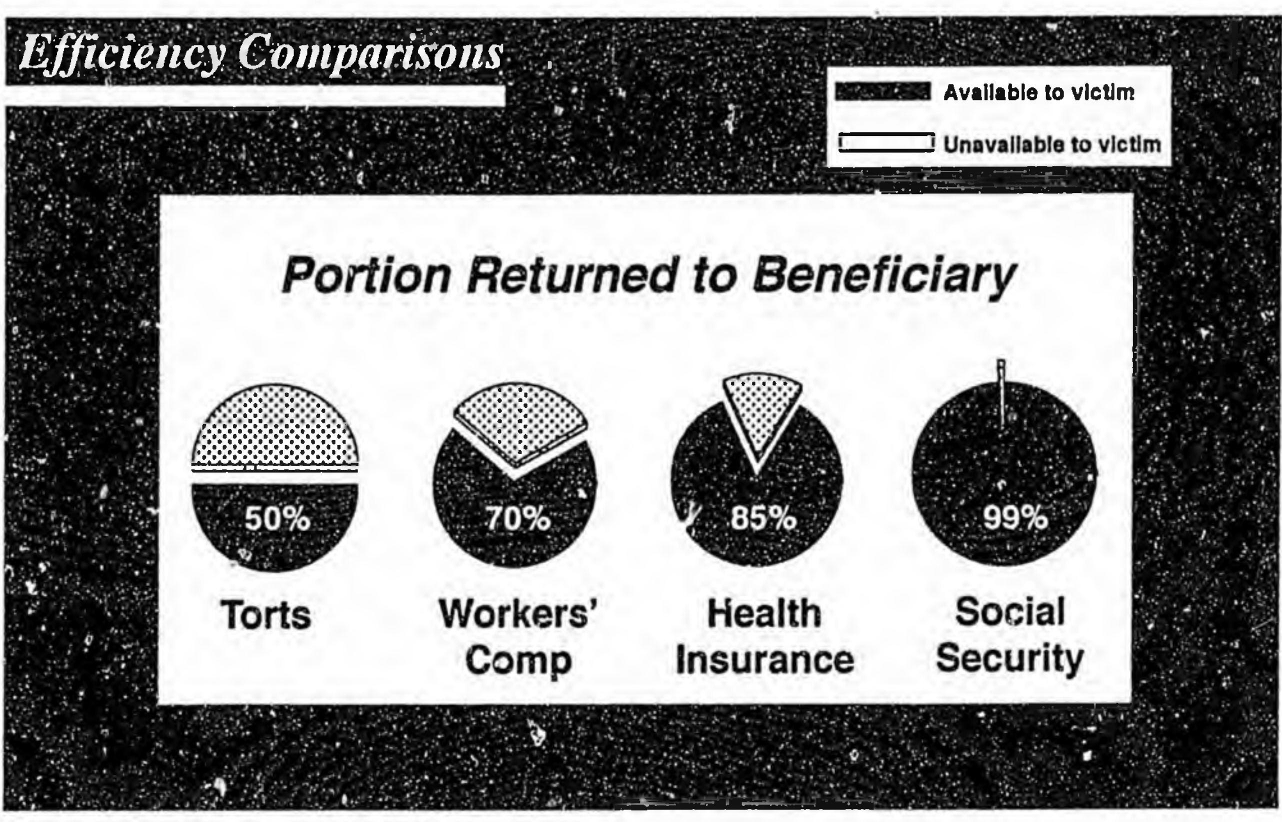
❑ 5% for government health expenditures

❑ 4.5% for workers' compensation costs

❑ 4.2% for Social Security expenditures

❑ 2.7% for GNP.

In the Final Analysis, the Tort System Does Not Effectively Serve Victims' Needs



■ If the tort system is judged as a method of compensating accident victims for their losses, it is both inefficient and unfair. Inefficient, because only half – or less – of the cost goes toward any form of compensation for victims. Unfair, because many victims receive no compensation at all.

HIGHLIGHTS FROM:

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State of Alaska

Department of Commerce and Economic Development

Division of Insurance

Division of Insurance
P.O. Box 110805
Juneau, AK 99811-0805
Phone (907) 465-2[illegible]573

Ninth Floor, State Office Building
333 Willoughby Avenue
Juneau, Alaska 99801
FAX (908) 465-3422

FAX Transmittal

From: Barbara Thurston

Date: January 14, 1994

To: Resa Jerrel

Company:

Fax Number: 789-3433

Number of Pages: 2

Hard Copy to Follow: No

Here is the information you requested on General Liability rate changes. This is a history of the rate changes filed by the Insurance Services Office (ISO) which files on behalf of most of the companies selling General Liability insurance in Alaska.

As you can see, there are several different types of policies here...I've marked with Xs the type of filing (basic limits versus excess limits) and the type of form (professional, premises, or products liability) for each rate change.

This information was taken off a special report generated by ISO in response to my request for historical information. While I believe that it is all correct, I have not verified all the details myself, so can't guarantee that this information is free of any errors.

Let me know if you have any questions as to how to interpret this chart.

History of ISO General Liability Rate Changes In Alaska

				Products	Premises		Professional Liability	
Approval Date	Rate Change (in %)	Basic Limits	Increased Limits	All	Manufacturers & Contractors	Owners, Landlords, & Tenants	Physicians, Surgeons, and Dentists	Hospitals
1/7/84	7.8	x	x	x				
2/1/84	128.8	x	x				x	
2/17/84	40.1		x					x
10/4/84	21	x				x		
10/31/84	20	x		x				
11/29/84	5.6		x				x	
2/2/85	1.3	x			x			
2/6/85	10.7		x		x	x		
7/10/85	23.1	x				x		
11/1/85	43.8	x	x	x				
2/26/86	50	x					x	
4/14/86	7.6	x			x			
6/13/86	15.4		x					x
7/3/86	8.9		x			x		
9/5/86	3.3		x		x			
2/27/87	12.1	x				x		
3/2/87	30.6	x	x	x				
4/3/87	35	x					x	
6/15/87	31.6	x			x			
8/4/87	9.7		x					x
3/30/88	-4.3	x		x				
7/19/89	-20		x	x				
1/11/90	-13.7	x		x				
1/12/90	1.1	x	x			x		
2/19/92	6.1	x			x	x		
2/19/92	-12		x		x	x		
4/1/92	14	x				x		
11/13/92	-3.2		x		x	x		
1/7/93	0		x					x
4/16/93	-2.5	x			x	x		
9/24/93	0	x					x	

Notes:

1. The effective date of an ISO filing is generally 3 to 6 months after the approval date
2. The rate change is the overall average, different "classes" (e.g. neurosurgeon vs general practitioner) will probably have different changes apply to them
3. "Basic" and "Increased" refer to the limits of liability under the policy. Basic limits are about $25,000; everything else is an increased limit. People who only purchase basic limits won't be affected by an increased limit rate change. People who purchase increased limits are affected by both basic and increased limit changes.
4. "Products", "Premises", and "Professional Liability" are different types of policies. Products includes completed operations (such as a construction project); Premises is what is purchased by most small businesses for risks occurring on their premises.
5. The filing approved on 4/1/92 only applied to governmental subdivisions.

NFIB Alaska

National Federation of Independent Business

Resa Jerrel, State Director

Civil Liability 1994 Survey Results

National Federation of Independent Business

Distributed by:
Alaskans For Liability Reform
P.O. Box 201668, Anchorage, AK 99520

The following questions and answers concerning tort reform are the results from the NFIB Alaska (National Federation of Independent Business) 1994 state ballot. Those surveyed were asked:

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 claimants may have received and deduct that amount from judgments?

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%

HIGHLIGHTS FROM:

Product Liability News

Issue No. 7, 1993

A Publication of The Product Liability Coordinating Committee

1001 19th St. N., #800
Arlington, VA 22209
703-276-5045

Distributed by Alaskans For Liability Reform
P.O. Box 201668
Anchorage, AK 99520
Phone: 561-6250

Senate Committee Passes S. 687 by Wide Margin, Sets Stage for Victory in '94

"The (U.S.) Senate Commerce Committee recently approved the Product Liability Fairness Act, S. 687, by an unprecedented 16-4 vote."

Said Bill Fay, executive director Product Liability Coordinating Committee... "This extremely strong vote is a testament to the leadership of the senators who are spearheading the Senate movement to change our current product liability system.

For the first time, a majority of the democrats on the Commerce Committee voted in favor of product liability legislation. The 'aye' vote on November 9 included all of the committee's nine republicans and seven of the 11 committee democrats. In past efforts in the Commerce Committee, the bill has never received more than five out of eleven democratic votes."

Sound Bites

"In 1985, I opposed the legislation then being considered because I thought that it was skewed too much in favor of business. But sensible changes have been made over time to help consumers and promote fairness. Because of these changes, I now strongly support his product liability legislation."

Sen. John D. Rockefeller (D-WV)
in his opening statement at the
Senate hearings on product
liability in September

"If a manufacturer could not count on limiting its liability to risks that were known or knowable at the time of manufacture or distribution, it would be discouraged from developing new and improved products for fear that later significant advances in scientific knowledge would increase its liability."

Supreme Court of California
Anderson v. Owens-Corning
Fiberglass June 4, 1991

"We are the only country in the world in which, if you improve a product, it can be used against you."

Bill Fay, executive director of PLCC
quoted in CoalVoice,
Sept./Oct., 1993

Litigation Taxes: The Hidden Cost

How much do American consumers pay in hidden "litigation taxes" every year? Author Philip J. Hermann went directly to manufacturers, trade associations, insurance consultants, and others to find out. The results can be found in his book *The 96 Billion Dollar Game: You Are Losing*. Here are his findings:

Product/Service	Retail Amount	Litigation Cost	Percentage
Baseball	$ 6.00	**$ 0.18**	3.0%
Lawn Mower, Riding Rotary	700.00	**42.00**	6.0%
Ski Lift Ticket	40.00	**2.00**	5.0%
Step Ladder, 8-foot aluminum	119.00	**23.86**	20.0%
Maternity Delivery	1,200.00	**399.50**	33.0%
Hospital, 2 days for maternity	3,000.00	**500.00**	17.0%
DTP Vaccine	11.50	**2.40**	20.9%
Wheel Chair, Motorized	1,000.00	**170.00**	17.0%

HIGHLIGHTS FROM:

American Consulting Engineers Council

LIABILITY REPORT

Fourteenth Annual Professional Liability Survey Result 1992

ACEC is a Washington, D.C. based national professional association representing over 5,000 private-practice consulting engineering firms. For more information, contact J. Laing Bowles at 202-347-7474

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P.O. Box 201668
Anchorage, AK 99520
Phone: 561-6250

Claims

Year	Claims Made Per 100 Firms	Claims Pending Per 100 Firms
1992	45	82
1991	44	77
1990	40	60
1989	43	79
1988	47	84
1987	46	75

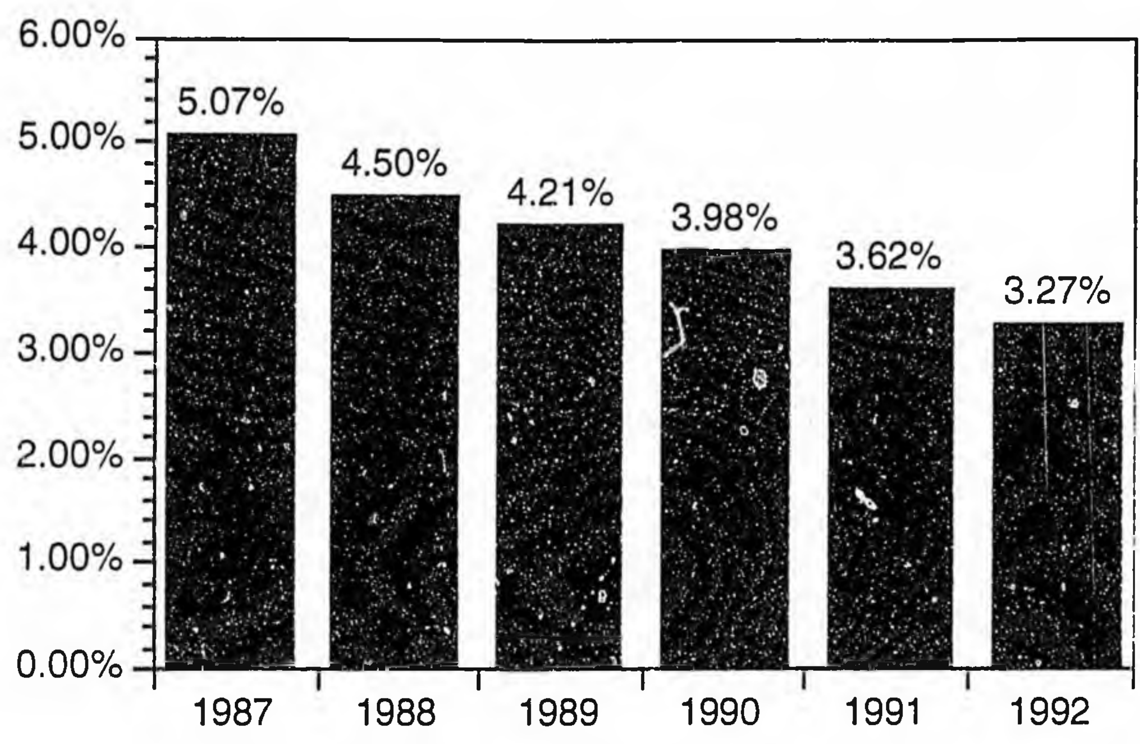
Method of Resolution: 1992	Percent
Negotiation	48 %
ADR: Mediation	10 %
Arbitration	2 %
Other ADR	3 %
Litigation	
Settled Prior to Court Award	20 %
Settled by Court Award	7 %
Other	10 %
Total	100 %

Cost of Claims Settled

	Defense	Award/Settlement
By Firm	$14,791	$20,007
By Insurer	$ 7,421	$46,943

Percentage of Claims Settled Without Any Payment to Claimant: 37%

Insurance Cost As A Percentage of Billings



STATUTES OF LIMITATIONS – HOW DOES ALASKA COMPARE?

Includes statute section number

	Fraud	Conversion	Written Contract	Recovery of Land	Attorney Malpractice	Oral Contract	Wrongful Death	Design/Improve Real Property	Open Account/Debt	Personal Injury	Judgment Foreign/Foreign	Malicious Prosecution	Medical Malpractice	Property Damage	Forfeiture/Penalty	Libel/Slander	Trespass
Alaska	6/10/1yr AK key	[illegible]	6 yr 09.10.050	[illegible]	6 yr 09.10.050	[illegible]	6/2 yr AK key	[illegible]	1 yr 45.14.505	[illegible]	10 yr 09.10.040	[illegible]	2 yr AK key	[illegible]	3/2 yr AK key	[illegible]	6 yr 09.10.050
Arizona	3 yr 12-543	[illegible]	6 yr 12-548	[illegible]	2 yr 12-542	[illegible]	2 yr 12-542	[illegible]	3 yr 12-543	[illegible]	4 yr* 12-544	[illegible]	2 yr 12-542	[illegible]	no info	[illegible]	2 yr 12-542
California	3 yr CCP338	[illegible]	4 yr CCP337	[illegible]	1 yr CCP340	[illegible]	1 yr CCP340	[illegible]	4 yr CCP337	[illegible]	10 yr CCP337	[illegible]	3 yr CCP340	[illegible]	1 yr CCP340	[illegible]	3 yr CCP338
Colorado	3 yr 13-80-101	[illegible]	3 yr 13-80-101	[illegible]	no info	[illegible]	2 yr 13-80-102	[illegible]	6 yr 13-80-103	[illegible]	no info	[illegible]	2 yr 13-80-102	[illegible]	1 yr 13-80-103	[illegible]	no info
Connecticut	3 yr 52-577	[illegible]	6 yr 52-576	[illegible]	3 yr 52-577	[illegible]	2 yr 52-555	[illegible]	6 yr 52-576	[illegible]	20 yr*** 52-598	[illegible]	2 yr 52-584	[illegible]	1 yr 52-585	[illegible]	3 yr 52-577
Florida	4 yr 95.11	[illegible]	5 yr 95.11	[illegible]	2 yr 95.11	[illegible]	3 yr 95.11	[illegible]	no info	[illegible]	5/20 yr 95.11	[illegible]	2 yr 95.11	[illegible]	4 yr 95.11	[illegible]	4 yr 95.11
Georgia	2 yr 9-3-33	[illegible]	6 yr 9-3-24	[illegible]	no info	[illegible]	2 yr 9-3-33	[illegible]	4 yr 9-3-25	[illegible]	5 yr* 9-3-20	[illegible]	2 yr 9-3-71	[illegible]	1 yr 9-3-28	[illegible]	4 yr 9-3-30
Illinois	5 yr †13-215	[illegible]	10 yr †13-206	[illegible]	2 yr †13-214.3	[illegible]	2 yr 70para2	[illegible]	no info	[illegible]	20 yr †13-218	[illegible]	2 yr †13-212	[illegible]	no info	[illegible]	no info
Indiana	6 yr 34-1-2-1	[illegible]	6 yr 34-1-2-2	[illegible]	2 yr 34-1-2-2	[illegible]	2 yr 34-1-1-2	[illegible]	6 yr 34-1-2-1	[illegible]	10 yr 34-1-2-2	[illegible]	2 yr 34-4-19-1	[illegible]	2 yr 34-1-2-2	[illegible]	6 yr 34-1-2-1
Massachusetts	3 yr 260-2A	[illegible]	6 yr 260-2	[illegible]	3 yr 260-4	[illegible]	3 yr 299-2	[illegible]	no info	[illegible]	6 yr 260-2	[illegible]	3 yr 260-4	[illegible]	1 yr 260-5	[illegible]	3 yr 260-2A
Michigan	6 yr 600.5813	[illegible]	6 yr 600.5807	[illegible]	2 yr 600.5805	[illegible]	3 yr 600.5805	[illegible]	no info	[illegible]	10 yr 600.5809	[illegible]	2 yr 600.5805	[illegible]	2 yr 600.5809	[illegible]	no info
Missouri	5 yr 516.120	[illegible]	5 yr 516.120	[illegible]	5 yr 516.120	[illegible]	3 yr 537.100	[illegible]	5 yr 516.120	[illegible]	5 yr 516.120	[illegible]	2 yr 516.105	[illegible]	3 yr 516.130	[illegible]	5 yr 516.120
New Jersey	6 yr 2A:14-1	[illegible]	6 yr 2A:14-1	[illegible]	6 yr 2A:14-1	[illegible]	2 yr 2A:31-3	[illegible]	6 yr 2A:14-1	[illegible]	20 yr 2A:14-5	[illegible]	2 yr 2A:14-2	[illegible]	2 y 2A:14-10	[illegible]	6 yr 2A:14-1
New York	6 yr ◊◊213	[illegible]	6 yr ◊◊213	[illegible]	3 yr ◊◊214	[illegible]	2 yr ††5-4.1	[illegible]	no info	[illegible]	20 yr ◊◊211	[illegible]	2.5 yr ◊◊214	[illegible]	3 yr ◊◊214	[illegible]	1 yr ◊◊215
North Carolina	3 yr 1-52	[illegible]	3 yr 1-52	[illegible]	no info	[illegible]	2 yr 1-53	[illegible]	no info	[illegible]	10 yr 1-47	[illegible]	3 yr 1-15	[illegible]	1 yr 1-54	[illegible]	3 yr 1-52
Ohio	4 yr 2305.09	[illegible]	15 yr 2305.06	[illegible]	1 yr 2305.11	[illegible]	2 yr 2125.02	[illegible]	no info	[illegible]	no info	[illegible]	1 yr**** 2305.11	[illegible]	1 yr 2305.11	[illegible]	4 yr 2305.09
Pennsylvania	2 yr 42-5524	[illegible]	4 yr 42-5525	[illegible]	2 yr 42-5524	[illegible]	2 yr 42-5524	[illegible]	no info	[illegible]	4 yr 42-5525	[illegible]	2 yr 42-5524	[illegible]	2 yr 42-5524	[illegible]	2 yr 42-5524
Texas	2 yr ◊16.003	[illegible]	4 yr ◊16.004	[illegible]	2 yr ◊16.003	[illegible]	2 yr ◊16.003	[illegible]	4 yr ◊16.004	[illegible]	10yr** ◊31.006	[illegible]	2 yr ◊16.003	[illegible]	no info	[illegible]	2 yr ◊16.003
Virginia	2 yr 8.01-243	[illegible]	5 yr 8.01-246	[illegible]	no info	[illegible]	2 yr 8.01-244	[illegible]	no info	[illegible]	20 yr 8.01-251	[illegible]	2 yr 8.01-243	[illegible]	no info	[illegible]	5 yr 8.01-243
Washington	3 yr 4.16.080	[illegible]	6 yr 4.16.040	[illegible]	3 yr 4.16.080	[illegible]	3 yr 4.16.080	[illegible]	no info	[illegible]	10 yr 4.16.020	[illegible]	no info	[illegible]	3 yr 4.16.08	[illegible]	3 yr 4.16.080
Wisconsin	6 yr 893.93	[illegible]	6 yr 893.43	[illegible]	6 yr 893.53	[illegible]	3 yr 893.54	[illegible]	no info	[illegible]	20 yr 893.40	[illegible]	3 yr 893.55	[illegible]	2 yr 893.93	[illegible]	6 yr 893.52

OTHER STATES KEY:

*Foreign **Forum ***6 Real/2 Personal ****Personal

†sec. 110 para. - precedes no. ††EPTL - precedes no.

◊CP&R - precedes no. ◊◊CPLR - precedes no.

ALASKA KEY:

Fraud - 6 yr=09.10.120(if state, political or public corp), 10 yr=09.10.230(land patent), 1 yr after discovery=12.10.020(breach of fiduciary, misconduct by police)

Wrongful Death - 6 yr=09.10.55 (construction) statute ruled unconstitutional by Sup.Crt. Op. 3290, 2 yr=09.55.580

Design - 09.10.055 statute ruled unconstitutional by Sup.Crt. Op. 3290

Personal Injury - 6 yr=09.10.055 (construction) statute ruled unconstitutional by Sup.Crt. Op. 3290, 2 yr=09.10.070

Medical Malpractice - 09.10.070 (after age of majority, 09.10.040 for minors)

Forfeiture - 3 yrs=09.10.060, 2 yrs=09.10.070

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The Informer

Newsletter of Alaskans for Liability Reform January 1994 Vol. 3 No. 1

Fair Awards for Non-Economic Loss

Incorrect information about a cap on non-economic awards has been fed to the public, primarily by trial lawyers who reap the benefit of outrageously high awards.

For example, it has been stated that the cap would be unfair for senior citizens and that calls for reform are fueled by high medical premiums. Neither statement is accurate.

HB 292 extends the definition of non-economic losses to include claims for wrongful death, adds loss of consortium, clarifies what constitutes non-economic loss, and removes the need to prove "negligence," which is difficult to establish.

The bill in no way alters compensation for economic loss, such as medical care or wheelchairs. It does establish a cap of $500,000 for non-economic loss only - that's an extra $500,000 over and above out-of-pocket expenses to an injured party.

Even the trial lawyers agree that the cap effects only 3% of lawsuits filed for personal injury or wrongful death.

An example of 97% of these lawsuits: A person is injured by a privately owned truck whose owner has only $250,000 total in insurance and assets - so no award higher than that is possible. If the same person was injured by a state-owned truck, they could be awarded millions for non-economic loss simply because the state has virtually unlimited funds and insurance.

Is that fair? HB 292 establishes a fair cap for non-economic loss that applies to all plaintiffs and defendants and prevents inflated settlements based solely on ability to pay.

Effects of HB 292 on Non-Economic Awards

Past Wage Loss	**No Effect**
Future Wage Loss (taxed)	~~**No Effect**~~
Past Medical Cost	**No Effect**
Future Medical Cost	**No Effect**
Past Rehabilitation Costs	**No Effect**
Future Rehabilitation Costs	**No Effect**
Other Past Economic Losses	**No Effect**
Other Future Economic Losses	**No Effect**
Past Retirement Benefit	**No Effect**
Future Retirement Benefit	**No Effect**
Pain, Suffering, Inconvenience	**Limit $500,000**
Physical Impairment, Disfigurement	**Limit $500,000**
Loss of Enjoyment of Life	**Limit $500,000**
Loss of Consortium	**Limit $500,000**

Call to ACTION

YOU can make the difference

As of 1/19/94:
HB 292 was in the House Labor and Commerce Committee. Please contact committee members, let them know you support the bill and urge them to move this bill into the House.

To get HB 292 moving, call or FAX:

	phone #	FAX #		phone #	FAX #
Rep. Bill Hudson, chairman	465-3744	465-6790	Rep. Joe Green	465-4931	465-3516
Rep. Eldon Mulder	465-2647	465-3518	Rep. Brian Porter	465-4930	465-3834
Rep. Bill Williams	465-3424	465-3793	Rep. Joe Sitton	465-2327	465-2294
Rep. Jerry Mackie	465-4925	465-3517			

ALR strives for needed reforms

ALR has doubled its efforts to get information about civil liability laws out to business and government leaders and to support passage of bills that will enact needed reforms .

Horace Hunt is now the Executive Director. He brings 16 years e_ erience in marketing and public relations to ALR. Bruce Pozzi joined us recently to implement a public relations campaign that will get the attention of legislators, associations and the public. Lobbyists Sam Kito and Jerry Reinward are working in Juneau to gain support for House Bill 292 and we have the backing of a number of lobbyists representing other groups.

As this legislative session begins, House Bill 292 is in the House Labor and Commerce Committee and a companion bill has been introduced in the Senate.

STATUTES OF LIMITATIONS – HOW DOES ALASKA COMPARE?

Includes statute section number

	Fraud	Conversion	Written Contract	Recovery of Land	Attorney Malpractice	Oral Contract	Wrongful Death	Design/Improve Real Property	Open Account/Debt	Personal Injury	Forum/Foreign Judgment	Malicious Prosecution	Medical Malpractice	Property Damage	Forfeitur./Penalty	Libel/Slander	Trespass
Alaska	6/10/ 1 yr†	no info	6 yr	10 yr	6 yr	6 yr	6/2 yr †	6 yr †	1 yr	6/2 yr †	10 yr	2 yr	2 yr †	6 yr	3/2 yr †	2 yr	6 yr
Arizona	3 yr	2 yr	6 yr	10 yr	2 yr	3 yr	2 yr	8 yr	3 yr	2 yr	4 yr*	1 yr	2 yr	no info	no info	1 yr	2 yr
California	3 yr	3 yr	4 yr	no info	1 yr	2 yr	1 yr	10 yr	4 yr	1 yr	10 yr	no info	3 yr	3 yr	1 yr	1 yr	3 yr
Colorado	3 yr	3 yr	3 yr	no info	no info	3 yr	2 yr	2 yr	6 yr	2 yr	no info	2 yr	2 yr	2 yr	1 yr	1 yr	no info
Connecticut	3 yr	3 yr	6 yr	15 yr	3 yr	3 yr	2 yr	7 yr	6 yr	3 yr	20 yr **	no info	2 yr	2 yr	1 yr	2 yr	3 yr
Florida	4 yr	no info	5 yr	no info	2 yr	4 yr	2 yr	4 yr	no info	4 yr	5/20 yr	4 yr	2 yr	4 yr	4 yr	2 yr	4 yr
Georgia	2 yr	4 yr	6 yr	no info	no info	4 yr	2 yr	8 y.	4 yr	2 yr	5 yr*	2 yr	2 yr	4yr	1 yr	1 yr	4 yr
Illinois	5 yr	5 yr	10 yr	no info	2 yr	5 yr	2 yr	10 yr	no info	2 yr	20 yr	2 yr	2 yr	5 yr	no info	1 yr	no info
Indiana	6 yr	no info	6 yr	no info	2 yr	6 yr	2 yr	10 yr	6 yr	2 yr	10 yr	2 yr	2 yr	6/2 yr ***	2 yr	2 yr	6 yr
Massachusetts	3 yr	3 yr	6 yr	no info	3 yr	6 yr	3 yr	3 yr	no info	3 yr	6 yr	no info	3 yr	3 yr	1 yr	3 yr	3 yr
Michigan	6 yr	no info	6 yr	no info	2 yr	6 yr	3 yr	6 yr	no info	3 yr	10 yr	2 yr	2 yr	3 yr	2 yr	1 yr	no info
Missouri	5 yr	no info	5 yr	10 yr	5 yr	5 yr	3 yr	10 yr	5 yr	5 yr	5 yr	2 yr	2 yr	5 yr	3 yr	2 yr	5 yr
New Jersey	6 yr	6 yr	6 yr	20 yr	6 yr	6 yr	2 yr	10 yr	6 yr	2 yr	20 yr	6 yr	2 yr	6 yr	2 yr	1 yr	6 yr
New York	6 yr	6 yr	6 yr	10 yr	3 y.	6 yr	2 yr	no info	no info	3 yr	20 yr	1 yr	2.5 yr	3 yr	3 yr	1 yr	1 yr
North Carolina	3 yr	3 yr	3 yr	20 yr	no info	3 yr	2 yr	6 yr	no info	3 yr	10 yr	no info	3 yr	3 yr	1 yr	1 yr	3 yr
Ohio	4 yr	4 yr	15 yr	21 yr	1 yr	6 yr	2 yr	10 yr	no info	2 yr	no info	1 yr	1 yr ****	2 yr	1 yr	1 yr	4 yr
Pennsylvania	2 yr	2 yr	4 yr	21 yr	2 yr	4 yr	2 yr	12 yr	no info	2 yr	4 yr	2 yr	2 yr	2 yr ****	2 yr	1 yr	2 yr
Texas	2 yr	2 yr	4 yr	no info	2 yr	2 yr	2 y.	10 yr	4 yr	2 yr	10yr**	1 yr	2 yr	2 yr	no info	1 yr	2 yr
Virginia	2 yr	no info	5 yr	15 yr	no info	3 yr	2 yr	5 yr	no info	2 yr	20 yr	2 yr	2 yr	5 yr	no info	no info	5 yr
Washington	3 yr	3 yr	6 yr	10 yr	3 yr	3 yr	3 yr	6 yr	no info	3 yr	10 yr	no info	no info	3 yr ****	3 yr	2 yr	3 yr
Wisconsin	6 yr	6 yr	6 yr	30 yr	6 yr	6 yr	3 yr	no info	no info	3 yr	20 yr	6 yr	3 yr	6 yr	2 yr	2 yr	6 yr

OTHER STATES KEY:
*Foreign **Forum
***6 Real/2 Personal ****Personal

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Forfeiture - 3 yrs=09.10.060, 2 yrs=09.10.070

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Our Goals Equal Alaskans' Wishes

There are a lot of statistics on these pages, but we'd like you to take few extra minutes to examine the tables so you'll understand exactly where Alaskans stand with current civil liability statutes.

The NFIB survey shows that the majority of Alaskans want reasonable limits and equitable judgments, regardless of the plaintiffs ability to pay. Alaskans want to prohibit suits brought by parties injured or killed while committing a crime and they want juries to know about other awards a claimant has received.

Currently, Alaska's statutes are unclear and sometimes contradictory, allowing unscrupulous parties to benefit from the loopholes while the innocent are often victimized. ALR's goals include bringing our statutes into line with those used fairly by other states and to ensure statutes of limitations are clearly and consistently defined in our state laws.

One example of abuse is the statute of limitations on the design and improvement of a building. Many suits name only the original builder because they have the best ability to pay and ignore the fact that upkeep of the building has been out of their control for decades. Our statutes have no cutoff date for the responsibility of designers and construction companies. The only other category in Alaska's laws with no statute of limitations is murder.

In House Bill 160, ALR proposed a 10-year statute of limitation for liability suits based on construction and design. This bill passed the House but was derailed when Senator Donley increased the time to 15 years and added a 15-year statute of repose. Buildings will be judged by today's standards for work done three decades ago and those responsible for the building's upkeep during those 30 years may not even be named in a suit.

Legislators need to compare our statutes of limitations with those in other states and to recognize that the majority of Alaskans support fair reforms of our civil liability laws.

NFIB Alaska
Civil Liability 1994 Survey Results

The following questions and answers concerning tort reform are the results from the NFIB Alaska (National Federation of Independent Business) 1994 state ballot.

Those surveyed were asked:

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 claimants may have received and deduct that amount from judgments?
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%

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Janet B. Taylor
Managing Editor

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The Informer

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Fair Awards for Non-Economic Loss

Incorrect information about a cap on non-economic awards has been fed to the public, primarily by trial lawyers who reap the benefit of outrageously high awards.

For example, it has been stated that the cap would be unfair for senior citizens and that calls for reform are fueled by high medical premiums. Neither statement is accurate.

HB 292 extends the definition of non-economic losses to include claims for wrongful death, adds loss of consortium, clarifies what constitutes non-economic loss, and removes the need to prove "negligence," which is difficult to establish.

The bill in no way alters compensation for economic loss, such as medical care or wheelchairs. It does establish a cap of $500,000 for non-economic loss only - that's an extra $500,000 over and above out-of-pocket expenses to an injured party.

Even the trial lawyers agree that the cap effects only 3% of lawsuits filed for personal injury or wrongful death.

An example of 97% of these lawsuits: A person is injured by a privately owned truck whose owner has only $250,000 total in insurance and assets - so no award higher than that is possible. If the same person was injured by a state-owned truck, they could be awarded millions for non-economic loss simply because the state has virtually unlimited funds and insurance.

Is that fair? HB 292 establishes a fair cap for non-economic loss that applies to all plaintiffs and defendants and prevents inflated settlements based solely on ability to pay.

Effects of HB 292 on Non-Economic Awards

Past Wage Loss	No Effect
Future Wage Loss	~~No Effect~~ (taxed)
Past Medical Cost	No Effect
Future Medical Cost	No Effect
Past Rehabilitation Costs	No Effect
Future Rehabilitation Costs	No Effect
Other Past Economic Losses	No Effect
Other Future Economic Losses	No Effect
Past Retirement Benefit	No Effect
Future Retirement Benefit	No Effect
Pain, Suffering, Inconvenience	Limit $500,000
Physical Impairment, Disfigurement	Limit $500,000
Loss of Enjoyment of Life	Limit $500,000
Loss of Consortium	Limit $500,000

Call to ACTION

YOU can make the difference

As of 1/19/94:
HB 292 was in the House Labor and Commerce Committee. Please contact committee members, let them know you support the bill and urge them to move this bill into the House.

To get HB 292 moving, call or FAX:

	phone #	FAX #
Rep. Bill Hudson, chairman	465-3744	465-6790
Rep. Eldon Mulder	465-2647	465-3518
Rep. Bill Williams	465-3424	465-3793
Rep. Jerry Mackie	465-4925	465-3517
Rep. Joe Green	465-4931	465-3516
Rep. Brian Porter	465-4930	465-3834
Rep. Joe Sitton	465-2327	465-2294

ALR strives for needed reforms

ALR has doubled its effords to get information about civil liability laws out to business and government leaders and to support passage of bills that will enact needed reforms .

Horace Hunt is now the Executive Director. He brings 16 years experience in marketing and public relations [illegible] ALR. Bruce Pozzi joined us recently to implement a public relations campaign that will get the attention of legislators, associations and the public. Lobbyists Sam Kito and Jerry Reinwand are working in Juneau to gain support for House Bill 292 and we have the backing of a number of lobbyists representing other groups.

As this legislative session begins, House Bill 292 is in the House Labor and Commerce Committee and a companion bill has been introduced in the Senate.

Statutes of Limitations – How Does Alaska Compare?

Includes statute section number

	Fraud	Conversion	Written Contract	Recovery of Land	Attorney Malpractice	Oral Contract	Wrongful Death	Design/Improve Real Property	Open Account/Debt	Personal Injury	Judgment Forum/Foreign	Malicious Prosecution	Medical Malpractice	Property Damage	Forfeiture/Penalty	Libel/Slander	Trespass
Alaska	6/10/ 1 yr†	no info	6 yr	10 yr	6 yr	6 yr	6/2 yr †	6 yr †	1 yr	6/2 yr †	10 yr	2 yr	2 yr †	6 yr	3/2 yr †	2 yr	6 yr
Arizona	3 yr	2 yr	6 yr	10 yr	2 yr	3 yr	2 yr	8 yr	3 yr	2 yr	4 yr*	1 yr	2 yr	no info	no info	1 yr	2 yr
California	3 yr	3 yr	4 yr	no info	1 yr	2 yr	1 yr	10 yr	4 yr	1 yr	10 yr	no info	3 yr	3 yr	1 yr	1 yr	3 yr
Colorado	3 yr	3 yr	3 yr	no info	no info	3 yr	2 yr	2 yr	6 yr	2 yr	no info	2 yr	2 yr	2 yr	1 yr	1 yr	no info
Connecticut	3 yr	3 yr	6 yr	15 yr	3 yr	3 yr	2 yr	7 yr	6 yr	3 yr	20 yr **	no info	2 yr	2 yr	1 yr	2 yr	3 yr
Florida	4 yr	no info	5 yr	no info	2 yr	4 yr	2 yr	4 yr	no info	4 yr	5/20 yr	4 yr	2 yr	4 yr	4 yr	2 yr	4 yr
[illegible]rgia	2 yr	4 yr	6 yr	no info	no info	4 yr	2 yr	8 yr	4 yr	2 yr	5 yr*	2 yr	2 yr	4yr	1 yr	1 yr	4 yr
Illinois	5 yr	5 yr	10 yr	no info	2 yr	5 yr	2 yr	10 yr	no info	2 yr	20 yr	2 yr	2 yr	5 yr	no info	1 yr	no info
Indiana	6 yr	no info	6 yr	no info	2 yr	6 yr	2 yr	10 yr	6 yr	2 yr	10 yr	2 yr	2 yr	6/2 yr ***	2 yr	2 yr	6 yr
Massachusetts	3 yr	3 yr	6 yr	no info	3 yr	6 yr	3 yr	3 yr	no info	3 yr	6 yr	no info	3 yr	3 yr	1 yr	3 yr	3 yr
Michigan	6 yr	no info	6 yr	no info	2 yr	6 yr	3 yr	6 yr	no info	3 yr	10 yr	2 yr	2 yr	3 yr	2 yr	1 yr	no info
Missouri	5 yr	no info	5 yr	10 yr	5 yr	5 yr	3 yr	10 yr	5 yr	5 yr	5 yr	2 yr	2 yr	5 yr	3 yr	2 yr	5 yr
New Jersey	6 yr	6 yr	6 yr	20 yr	6 yr	6 yr	2 yr	10 yr	6 yr	2 yr	20 yr	6 yr	2 yr	6 yr	2 yr	1 yr	6 yr
New York	6 yr	6 yr	6 yr	10 yr	3 yr	6 yr	2 yr	no info	no info	3 yr	20 yr	1 yr	2.5 yr	3 yr	3 yr	1 yr	1 yr
North Carolina	3 yr	3 yr	3 yr	20 yr	no info	3 yr	2 yr	6 yr	no info	3 yr	10 yr	no info	3 yr	3 yr	1 yr	1 yr	3 yr
Ohio	4 yr	4 yr	15 yr	21 yr	1 yr	6 yr	2 yr	10 yr	no info	2 yr	no info	1 yr	1 yr ****	2 yr	1 yr	1 yr	4 yr
Pennsylvania	2 yr	2 yr	4 yr	21 yr	2 yr	4 yr	2 yr	12 yr	no info	2 yr	4 yr	2 yr	2 yr	2 yr ****	2 yr	1 yr	2 yr
Texas	2 yr	2 yr	4 yr	no info	2 yr	2 yr	2 yr	10 yr	4 yr	2 yr	10yr**	1 yr	2 yr	2 yr	no info	1 yr	2 yr
Virginia	2 yr	no info	5 yr	15 yr	no info	3 yr	2 yr	5 yr	no info	2 yr	20 yr	2 yr	2 yr	5 yr	no info	no info	5 yr
Washington	3 yr	3 yr	6 yr	10 yr	3 yr	3 yr	3 yr	6 yr	no info	3 yr	10 yr	no info	no info	3 yr ****	3 yr	2 yr	3 yr
Wisconsin	6 yr	6 yr	6 yr	30 yr	6 yr	6 yr	3 yr	no info	no info	3 yr	20 yr	6 yr	3 yr	6 yr	2 yr	2 yr	6 yr

OTHER STATES KEY:
*[illegible] **Forum
***[illegible]al/2 Personal ****Personal

† ALASKA KEY:
Fraud - 6 yr=09.10.120(if state, political or public corp), 10 yr=09.10.230(land patent), 1 yr after discovery=12.10.020(breach of fiduciary, misconduct by police)
Wrongful Death - 6 yr=09.10.55 (construction) statute ruled unconstitutional by Sup.Crt. Op. 3290, 2 yr=09.55.580
Design - 09.10.055 statute ruled unconstitutional by Sup.Crt. Op. 3290
Personal Injury - 6 yr=09.10.055 (construction) statute ruled unconstitutional by Sup.Crt. Op. 3290, 2 yr=09.10.070
Medical Malpractice - 09.10.070 (after age of majority, 09.10.040 for minors)
Forfeiture - 3 yrs=09.10.060, 2 yrs=09.10.070

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Our Goals Equal Alaskans' Wishes

There are a lot of statistics on these pages, but we'd like you to take few extra minutes to examine the tables so you'll understand exactly where Alaskans stand with current civil liability statutes.

The NFIB survey shows that the majority of Alaskans want reasonable limits and equitable judgments, regardless of the plaintiffs ability to pay. Alaskans want to prohibit suits brought by parties injured or killed while committing a crime and they want juries to know about other awards a claimant has received.

Currently, Alaska's statutes are unclear and sometimes contradictory, allowing unscrupulous parties to benefit from the loopholes while the innocent are often victimized. ALR's goals include bringing our statutes into line with those used fairly by other states and to ensure statutes of limitations [illegible]e clearly and consistently defined in our state laws.

One example of abuse is the statute of limitations on the design and improvement of a building. Many suits name only the original builder because they have the best ability to pay and ignore the fact that upkeep of the building has been out of their control for decades. Our statutes have no cutoff date for the responsibility of designers and construction companies. The only other category in Alaska's laws with no statute of limitations is murder.

In House Bill 160, ALR proposed a 10-year statute of limitation for liability suits based on construction and design. This bill passed the House but was derailed when Senator Donley increased the time to 15 years and added a 15-year statute of repose. Buildings will be judged by today's standards for work done three decades ago and those responsible for the building's upkeep during those 30 [illegible]ears may not even be named in a suit.

Legislators need to compare our statutes of limitations with those in other states and to recognize that the majority of Alaskans support fair reforms of our civil liability laws.

NFIB Alaska

Civil Liability 1994 Survey Results

The following questions and answers concerning tort reform are the results from the NFIB Alaska (National Federation of Independent Business) 1994 state ballot.

Those surveyed were asked:

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 claimants may have received and deduct that amount from judgments?
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%

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Brett JACKSON and Linda Estrada, Petitioners,

v.

John POWER, M.D.; Fairbanks Memorial Hospital; Lutheran Hospital and Homes Society of America, Inc.; Emergency Room, Inc.; William H. Montano, M.D.; and George Vrablick, M.D., Respondents.

No. S-1677.

Supreme Court oı Alaska.

Oct. 16, 1987.

Medical malpractice action was brought against hospital. The Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., denied patient summary judgment and petition for review was filed. The Supreme Court, Burke, J., held that: (1) hospital could not be held vicariously liable for negligence or malpractice of independent contractor/physician under enterprise liability; (2) genuine issue of material fact as to whether hospital held itself out as providing emergency care services to public precluded summary judgment for patient on apparent authority theory; and (3) general acute care hospital's duty to provide physicians for emergency room care was nondelegable.

Affirmed in part, reversed in part, and remanded.

1. Hospitals ⟹7

Doctrine of corporate negligence holds that hospital owes independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise medical treatment provided by members of its medical staff.

2. Hospitals ⟹7

Generally accepted rule is that where employment relationship exists between physician and hospital, hospital will be liable, under traditional rule of respondeat superior, for any negligence or malpractice which results in injury to hospital patient, and conversely, no liability attaches to hospital when physician is independent contractor.

3. Hospitals ⟹7

Hospital could not be held vicariously liable for negligence or malpractice of independent contractor/physician, committed while treating patient in hospital's emergency room under theory of enterprise liability.

4. Hospitals ⟹7

Two factors are relevant to finding of ostensible agen y in hospital context, including whether patient looks to institution, rather than individual physician, for care and whether hospital holds out physician as its employee.

5. Principal and Agent ⟹137(2)

Under theory of agency by estoppel, there must be actual reliance upon representation of principal by person injured.

6. Principal and Agent ⟹99

Traditional rules of apparent authority are applicable to hospital-independent contractor/physician relationship.

7. Judgment ⟹181(33)

Genuine issue of material fact as to whether hospital held itself out as providing emergency care services to public and whether patient reasonably believed that physician was employed by hospital to deliver emergency room service precluded summary judgment for patient in medical malpractice action against hospital on theory of apparent authority.

8. Principal and Agent ⟹159(1)

Application of apparent authority in hospital/emergency room physician situation does not require express representation to patient that treating physician is employee of hospital; nor is direct testimony as to reliance required absent evidence that patient knew or should have known that treating physician was not hospital employee when treatment was rendered.

9. Hospitals ⟹7

Hospital licensed as general acute care hospital had duty to provide emergency

room services and part of duty was to provide physician care in emergency room.

10. Hospitals ⚬7

General acute care hospital's duty to provide physicians for emergency room care was nondelegable, and thus hospital could not shield itself from liability by claiming that it was not responsible for results of negligently performed health care when law imposed duty on hospital to provide that health care.

11. Master and Servant ⚬315

Nondelegable duty is established exception to rule that employer is not liable for negligence of independent contractors.

12. Hospitals ⚬7

Rule that general acute care hospital's duty to provide physicians for emergency room care is nondelegable does not change standard of care with which physician must comply and does not extend to situations where patient is treated by his or her own doctor in emergency room provided for convenience of doctor.

13. Hospitals ⚬7

Acute care hospital was vicariously liable as a matter of law for negligence or malpractice committed by physician on a patient who came to hospital seeking emergency room services; physician was provided by hospital as part of its nondelegable duty to provide nonnegligent physician care in emergency room.

Michael Cohn, Dan A. Hensley, L. Ames Luce, Law Offices of L. Ames Luce, Anchorage, for petitioners.

James J. Delaney, Howard A. Lazar, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, for respondents Fairbanks Memorial Hosp. and Lutheran Hosp. & Homes Soc.

Peter J. Maassen, Burr, Pease & Kurtz, Anchorage, for respondents John Power, M.D. and Emergency Room, Inc.

David C. Crosby, Council & Crosby, Juneau, for Health Ass'n of Alaska, amicus curiae.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and COMPTON, JJ.

OPINION

BURKE, Justice.

This case presents an issue of first impression in this state, concerning health care delivery in hospital emergency rooms. The question that we must resolve is whether a hospital may be held vicariously liable for negligent health care rendered by an emergency room physician who is not an employee of the hospital, but is, instead, an independent contractor. We hold that the hospital in this case had a non-delegable duty to provide non-negligent physician care in its emergency room and, therefore, may be liable.

I

On the evening of May 22, 1981, sixteen year old Brett Jackson was seriously injured when he fell from a cliff. Jackson was airlifted to Fairbanks Memorial Hospital (FMH). Shortly after midnight, he was received in the hospital's emergency room.

Jackson was examined by respondent John Power, M.D., one of two emergency room physicians on duty at the time. Dr. Power's examination revealed multiple lacerations and abrasions of the patient's face and scalp, multiple contusions and lacerations of the lumbar area, several broken vertebrae and gastric distension, suggesting possible internal injuries. Dr. Power ordered several tests, but did not order certain procedures that could have been used to ascertain whether there had been damage to the patient's kidneys. Jackson had, in fact, suffered damage to the renal arteries and veins which supply blood to and remove blood from the kidneys. This damage, undetected for approximately 9 to 10 hours after Jackson's arrival at FMH, ultimately caused Jackson to lose both of his kidneys.

II

Jackson and his mother, Linda Estrada, (hereinafter referred to collectively as Jack-

son) filed suit. In their complaint they alleged negligence in the diagnosis, care and treatment Jackson received at FMH. Jackson moved for partial summary judgment seeking to hold FMH vicariously liable as a matter of law for the care rendered by Dr. Power. In support of his motion, Jackson advanced three separate theories: (1) enterprise liability; (2) apparent authority; and (3) non-delegable duty.

After briefing and argument, the superior court held, as a matter of law, that FMH could not be held liable under an enterprise liability theory, and that genuine issues of material fact precluded summary judgment on the two remaining theories.[1] We subsequently granted Jackson's petition for review of the court's ruling.

III

[1] Initially, it is important to clarify the exact issue that we have been asked to resolve. Jackson has conceded, for purposes of this appeal, that Dr. Power was not an employee of FMH, but an independent contractor employed by respondent Emergency Room, Inc. (ERI), and that ERI and FMH are separate legal entities. Traditional rules of *respondeat superior* are, therefore, inapposite. Jackson also makes no claim that FMH was itself negligent in its selection, retention, or supervision of Dr. Power. Consequently, we have no occasion to consider the doctrine of corporate negligence.[2] Jackson asks us to resolve only whether a hospital should be vicariously liable, as a matter of public policy, for the negligence or malpractice[3] of an independent contractor/physician, committed while treating a patient in the hospital's emergency room, under theories of (1) enterprise liability; (2) apparent authority; or (3) non-delegable duty.

IV

As previously noted, this case presents this court with an issue of first impression.[4]

[2] The generally accepted rule is that, where an employment relationship exists between the physician and the hospital, the hospital will be liable, under the traditional rule of *respondeat superior*, for any negligence or malpractice which results in injury to a hospital patient. *E.g., Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 11, 143 N.E.2d 3, 9 (N.Y.1957); *Weldon v. Seminole Municipal Hospital*, 709 P.2d 1058, 1059 (Okla.1985). Conversely, no liability attaches to the hospital when the physician is an independent contractor. *E.g. Greene v. Rogers*, 147 Ill.App.3d 1009, 101 Ill.Dec. 543, 547, 498 N.E.2d 867, 871 (1986); *Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 499 N.Y.S.2d 904, 908, 490 N.E.2d 823, 827 (1986). *See generally* Comment, *The Hospital–Physician Relationship: Hospital Responsibility for Malpractice of Phy-*

1. The superior court also rejected three motions for summary judgment by various respondents seeking to have Linda Estrada's claim against them dismissed on the ground that it was time barred by the statute of limitations. None of the respondents cross-petitioned for review of that issue.

2. The doctrine of corporate negligence holds that a hospital owes an independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise the medical treatment provided by members of its medical staff. *See Tucson Medical Center v. Misevch*, 113 Ariz. 34, 545 P.2d 958, 960 (1976); *Darling v. Charleston Community Mem. Hosp.*, 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Pedroza v. Bryant*, 101 Wash.2d 226, 677 P.2d 166, 170 (1984); *Johnson v. Misericordia Community Hosp.*, 99 Wis.2d 708, 301 N.W.2d 156 (1981). *See generally*, Janulis & Hornstein, *Damned If You Do, Damned If You Don't: Hospitals' Liability for Physicians' Malpractice*, 64 Neb.L.Rev. 689, 702–08 (1985); Note, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence*, 32 Rutgers L.J. 342, 360–72 (1979).

3. Jackson has yet to prove that any negligence or malpractice did in fact occur. In order to resolve the issue presented here, however, we must assume negligence. We, of course, express no opinion as to the actual merits of Jackson's claim.

4. In *Baker v. Werner*, 654 P.2d 263, 267 n. 6 (Alaska 1982), Baker appealed the trial court's rejection of his theory of vicarious liability in a wrongful death action against a physician, hospital and attending nurse. Because we upheld the jury's finding that the defendants were not negligent, we did not reach the merits of the issue, "any theory of vicarious liability [being] irrelevant." *Id.*

sicians, 50 Wash.L.Rev. 385 (1975) (hereinafter "Comment, *Hospital Responsibility*").

Jackson concedes that Dr. Power was an independent contractor; however, he asserts that Alaska's law of *respondeat superior* mandates a result different than that which would be reached under the general rule.[5] Jackson argues that our decision in *Fruit v. Schreiner*, 502 P.2d 133 (Alaska 1972), establishes that the law of "vicarious legal responsibility" in Alaska is "enterprise liability." Thus, he contends, if the enterprise impacts society and the negligent act occurred during an activity performed for the benefit or in the interest of the enterprise, the enterprise is liable.

[3] Jackson's argument proves unpersuasive. First, Jackson's interpretation of *Fruit* is flawed. A close reading of that case shows that we did not view "enterprise liability" as a separate theory of liability or a distinct cause of action. Rather, enterprise liability was seen as one of two widely accepted theories used by courts to justify imposition of vicarious liability in an established employer/employee context. *Id.* at 138–39. As was noted in *Fruit:*

> [T]he "enterprise" theory ... finds liability whenever the enterprise of the employer would have benefited by the context of the act of the *employee* but for the unfortunate injury.
>
> ....
>
> The rule of *respondeat superior* however, ... is *limited* to requiring an enterprise to bear the loss incurred as a result of the *employee's* negligence. The acts of the *employee* need be so connected to his employment as to justify requiring that the employer bear that loss.

Id. at 140–41 (emphasis added) (footnotes omitted). *See generally* Morris, *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 Yale L.J. 554 (1961).

Additionally, our decisions since *Fruit* show that we have applied the theory of *respondeat superior* only in an employer/employee context, unless one of the well established exceptions to that rule exists. *See, Parker Drilling v. O'Neill*, 674 P.2d 770, 775 (Alaska 1983); *Williams v. Alyeska Pipeline Service Co.*, 650 P.2d 343, 349 (Alaska 1982); *Hammond v. Bechtel Inc.*, 606 P.2d 1269, 1273 (Alaska 1980); *Barton v. Lund*, 563 P.2d 875, 876 (Alaska 1977); *Luth v. Rogers & Babler Construction*, 507 P.2d 761, 763–64 (Alaska 1973). Jackson's theory presents no such exception.

Finally, the cases from other jurisdictions cited by Jackson provide little support for his theory; those cases deal only with theories of apparent agency or corporate negligence. Moreover, although at least two courts appear to have implicitly indicated a willingness to recognize a theory of enterprise liability, *see Alden v. Providence Hospital*, 382 F.2d 163, 166 (D.C. Cir.1967); *Adamski v. Tacoma General Hospital*, 20 Wash.App. 98, 579 P.2d 970, 977 & n. 5 (1978), to date, no court has explicitly embraced that concept.[6]

In short, Jackson's theory of enterprise liability is not yet the law in Alaska.

V

Jackson next argues that the trial court erred in holding that genuine issues of material fact prevented it from granting summary judgment on his theory of apparent authority.

5. The trial court decided the issue of the applicability of enterprise liability as a matter of law. We scrutinize questions of law under a *de novo* or independent judgment standard of review. *Hicklin v. Orbeck*, 565 P.2d 159, 163 n. 6 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). When reviewing a question of law, it is our "duty to adopt the rule of law that is most persuasive in light of precedent, reason and policy." *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

6. Some commentators have suggested an enterprise tort doctrine as a basis for imposing liability for any tort occurring as part of the hospital enterprise. *See* Southwick, *Hospital Liability: Two Theories Have Been Merged*, 4 J. Legal Med. 1, 3–5 (1983); Comment, *Hospital Responsibility*, *supra* at 418–19.

Although we have recognized the doctrine of apparent authority in other contexts, *see City of Delta Junction v. Mack Trucks*, 670 P.2d 1128, 1129–30 (Alaska 1983) (national distributor and local franchise); *Perkins v. Willacy*, 431 P.2d 141, 142 (Alaska 1967) (husband and wife), this is the first time we have been asked to apply this doctrine to a hospital-independent contractor/physician relationship.

Cases from other jurisdictions show a strong trend toward liability against hospitals that permit or encourage patients to believe that independent contractor/physicians are, in fact, authorized agents of the hospitals.[7] These courts have held hospitals vicariously liable under a doctrine labeled either "ostensible" or "apparent" agency or "agency by estoppel." *See Porubiansky v. Emory University*, 156 Ga. App. 602, 275 S.E.2d 163, 168 (1981); *Paintsville Hospital v. Rose*, 683 S.W.2d 255, 257 (Ky.1985); *Mehlman v. Powell*, 378 A.2d 1121 (Md.1977); *Grewe v. Mt. Clemens General Hospital*, 404 Mich. 240, 273 N.W.2d 429, 432–33 (1978); *Arthur v. St. Peters Hospital*, 169 N.J.Super. 575, 405 A.2d 443 (1979); *Hannola v. City of Lakewood*, 68 Ohio App.2d 61, 426 N.E.2d 1187, 1192 (1980); *Weldon*, 709 P.2d at 1060; *Themins v. Emanuel Lutheran Charity Bd.*, 54 Or.App. 901, 637 P.2d 155, 158–59 (1982); *Adamski v. Tacoma General Hospital*, 20 Wash.App. 98, 579 P.2d 970, 977 (1978); *see generally* Janulis & Hornstein, *supra* at 696–702. Although courts and commentators often use these terms interchangeably, they are not theoretically identical.

[4] The "ostensible" or "apparent" agency theory is based on Section 429 of the Restatement (Second) of Torts (1965), which provides:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Two factors are relevant to a finding of ostensible agency: (1) whether the patient looks to the institution, rather than the individual physician, for care; and (2) whether the hospital "holds out" the physician as its employee. *Simmons v. St. Clair Memorial Hospital*, 332 Pa.Super. 444, 481 A.2d 870, 874 (1984); *see also Irving v. Doctors Hospital of Lake Worth*, 415 So.2d 55, 60–61 (Fla.App.1982); *Smith v. St. Francis Hospital*, 676 P.2d 279, 282 (Okla.App.1984).

[5] "Agency by estoppel," in contrast, is predicated on the arguably stricter standard of the Restatement (Second) of Agency § 267 (1958). Section 267 provides:

> One who represents that another is his servant or agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Under this theory, there must be actual reliance upon the representations of the principal by the person injured. *Mehlman*, 378 A.2d at 1123.

> Thus, theoretically, there need be no causal relationship between the principal's conduct and the plaintiff's reliance to warrant a conclusion of ostensible agency; such a causal relationship and such a change of position, however, is the essence of estoppel to deny agency.

Janulis & Hornstein, *supra* at 697.

[6] Jackson, in essence, asks us to adopt a rule of ostensible agency. FMH,

7. The only exception to this modern trend of which we are aware is *Greene v. Rogers*, 147 Ill.App.3d 1009, 101 Ill.Dec. 543, 498 N.E.2d 867 (1986). In *Greene*, the court specifically refused to apply apparent agency to a hospital-emergency room doctor relationship because "[t]he absence of the power to control the decision-making of the emergency room physician demands that the independent relationship between hospital and emergency room physician be recognized." *Id.* 101 Ill.Dec. at 547, 498 N.E.2d at 871. We view *Greene* as an aberration dependent upon reasoning which is not particularly persuasive.

on the other hand, requests that we follow *Greene* and refuse to apply this doctrine in the hospital-physician context or, alternatively, that we adopt a rule which is essentially estoppel by agency. Although we find nothing antithetical about applying the doctrine of apparent authority to a hospital-independent contractor/physician relationship, we perceive no reason to adopt a special rule in this area. We believe that traditional rules of apparent authority provide sufficient guidelines.

In *City of Delta Junction*, we defined the doctrine of apparent authority in Alaska as follows:

> Apparent authority to do an act is created as to third persons by written or spoken word or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

670 P.2d at 1130 (quoting Restatement (Second) of Agency § 27, at 103 (1958)). We went on to emphasize that it is the *principal's* conduct that gives rise to his liability and not the conduct of the alleged agent; "one dealing with an alleged agent must prove that the principal was responsible for the appearance of authority, by doing something or permitting the alleged agent to do something that led others, including the plaintiff, to believe that the agent had the authority he purported to have." *Id.* (quoting W. Seavy, *Handbook of The Law of Agency* § 8, at 13 (1964)).

Relying on *City of Delta Junction*, the trial court held that existing factual disputes required Jackson to submit his apparent authority theory to the jury. When reviewing the denial of a motion for summary judgment, we must determine whether genuine issues of material fact exist, and if not, whether the moving party is entitled to judgment as a matter of law. Alaska R.Civ.P. 56(c); *Shatting v. Dillingham City School District*, 617 P.2d 9, 11 (Alaska 1980). In reaching this decision we must draw all reasonable inferences in favor of the non-moving party and against the movant. *Id.*

Drawing all reasonable inferences in the light most favorable to FMH, the record shows the following: at the time of Jackson's accident, FMH was the only civilian hospital north of Anchorage providing emergency room services in Alaska. Two road signs in Fairbanks note the location of the hospital. However, neither of these signs specifically refer to the existence of emergency room services. The signs were not constructed or situated by FMH. In fact, FMH does no advertising at all.

From the time of its establishment in 1972, FMH has never staffed its emergency room with its own physician employees, but has always relied upon local physicians to provide that service. Prior to the formation of ERI in 1977, FMH's emergency room was serviced by three local clinics, each providing one physician on a nightly basis. After 1977, ERI provided one physician on a nightly basis who worked a 14-hour graveyard shift (6:00 p.m. to 8:00 a.m.).[8] While on duty in the emergency room, the ERI physician was "in charge" and no FMH personnel were responsible for either scheduling or monitoring the emergency room physicians. No contractual arrangement existed between FMH and ERI for the provision of emergency room physicians.

In apparent non-life threatening situations the first person an incoming patient sees at the emergency room is the admissions clerk. Immediately adjacent to the clerk's desk is a sign which indicated that physicians from ERI were working in the emergency room. Although the exact state of Jackson's awareness is not entirely clear, there is evidence suggesting that he was admitted in a conscious state.[9] Nei-

8. The clinics continued to provide an additional physician for the graveyard shift on a rotation basis.

9. Jackson testified at his deposition that he recalled being placed in the helicopter but had no recollection of being removed from it, being taken to FMH, or of meeting the doctor who treated him. On the other hand, the medical records indicate that Jackson appeared to be neurologically stable, completely oriented and gave no indication that he was unconscious or in distress. Moreover, at his deposition, Dr.

ther Jackson nor his mother selected FMH as the place of treatment nor Dr. Power as Jackson's physician.

[7, 8] From the above, a jury could conclude that FMH held itself out as providing emergency care services to the public. A jury could also find that Jackson reasonably believed that Dr. Power was employed by the hospital to deliver emergency room service. It is also possible, however, that a jury could find to the contrary.[10]

Unless the evidence allows but one inference, the question of apparent authority is one of fact for the jury. *City of Delta Junction*, 670 P.2d at 1131; *Themins*, 637 P.2d at 159; *Adamski*, 579 P.2d at 978. In the case at bar, the record is not susceptible to a single inference. Thus, the trial court properly denied summary judgment on this issue.

VI

Jackson's final point is that the trial court erred in refusing to rule, as a matter of law, that FMH, as a general acute care hospital, has a non-delegable duty to provide non-negligent physician care in its emergency room. In essence, Jackson's position is that when a hospital undertakes to operate an emergency room as an integral part of its health care enterprise, public policy dictates that it not be allowed to insulate itself from liability by shunting that responsibility onto another.

FMH, on the other hand, argues that a hospital does not have a non-delegable duty to guarantee safe treatment in its emergency room. Physicians, not hospitals, FMH asserts, have a duty to practice medicine non-negligently. Thus, according to FMH, a hospital cannot be held to have delegated away a duty it never had.

The trial court ruled that "[t]here cannot be a non-delegable duty if there is no contractual relationship." Since it was unclear from the evidence whether or not there was any contractual relationship between ERI and FMH, the court denied Jackson's motion for summary judgment. Initially, we note the trial court's erroneous characterization of the issue. By holding that there can be no "non-delegable duty if there is no contractual relationship," the court confused the question of the existence of a duty with the issue of whether a duty is non-delegable. The flaw in this reasoning is self-evident. As FMH points out, a party cannot be held to have delegated away a duty it never had. Thus, the threshold question is whether FMH had a duty to provide emergency room care. Only if it did, is it necessary to determine what that duty entailed.

[9] FMH is licensed as a "general acute care hospital." [11] As such, it is required to comply with state regulations designed to promote "safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare." AS 18.20.060. These regulations provided, at the time of Jackson's accident, that an acute care hospital *shall* "insure that a physician is available to respond to an emergency at all times." Former 7 AAC 12.110(c)(2).[12] Thus, at a minimum, the law imposed a duty on FMH to provide emergency care physicians on a 24-hour basis.

FMH, however, voluntarily assumed a much broader duty. At the time of Jackson's accident, FMH was accredited by the

Power testified that "Jackson was talking" and "completely oriented."

10. In this regard, we agree with the weight of authority that application of apparent authority in the hospital/emergency room physician situation does not require an express representation to the patient that the treating physician is an employee of the hospital. Nor is direct testimony as to reliance required absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was rendered. *See* cases cited *supra* p. 1330.

11. A general acute care hospital is a "facility which provides hospitalization for inpatient medical care of acute illness or injury and obstetric care." 7 AAC 12.100.

12. In 1983, this regulation was amended to provide that "[a] general acute care hospital *must* provide ... [among other services not relevant here] emergency care services." 7 AAC 12.105 (emphasis added).

Joint Committee on the Accreditation of Hospitals (JCAH).[13] In order to receive and maintain accreditation,[14] FMH had to comply with the JCAH's standards promulgated in the *Accreditations Manual For Hospitals, Emergency Services.* Standard I mandates that all accredited hospitals implement a well defined plan for emergency care based on community need and the capability of the hospital. The JCAH standards also mandate, among other things, that: (1) FMH's emergency room be directed by a physician member of the active medical staff (Standard II); (2) FMH's emergency room be integrated with other units and departments of the hospital (Standard III); (3) that emergency care be guided by written policies and procedures; and (4) that the quality of care be continually reviewed, evaluated and assured through establishment of quality control mechanisms (Standard V).

Additionally, FMH's own bylaws provided for the establishment and maintenance of an emergency room. Article X, section 1(d)(1)(b) of FMH's Medical Bylaws provides for an emergency room as one of the services of the hospital. Article XI, section 3(e) provides for the creation of an emergency room committee which is required among other things to:

(a) formulate rules and regulations for the continuous coverage of the emergency room; and

(b) supervise the clinical work in that department.

[10] Based upon the above, it cannot seriously be questioned that FMH had a duty to provide emergency room services and that part of that duty was to provide physician care in its emergency room. Having so determined, we must next ascertain whether FMH's duty to provide physician care in the emergency room is non-delegable. That is, we must determine whether, having assumed the duty to staff an emergency room, FMH should be allowed to avoid responsibility for the care rendered therein by claiming that the physicians it provides are not its employees. We conclude that it cannot.

[11] A non-delegable duty is an established exception to the rule that an employer is not liable for the negligence of an independent contractor. W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on The Law of Torts,* § 71 at 511–12 (5th ed. 1984). According to the late Professor Prosser, such a duty "may be imposed by statute, by contract, by franchise or by charter, or by the common law." *Id.* Among the duties considered non-delegable are the following:

> [T]he duty of a carrier to transport its passengers in safety, of a railroad to fence its tracks properly or to maintain safe crossings, and of a municipality to keep its streets in repair; the duty to afford lateral support to adjoining land, to refrain from obstructing or endangering the public highway, to keep premises reasonably safe for business visitors, to provide employees with a safe place to work; the duty of a landlord to maintain common passageways, to make repairs according to covenant, or to use proper

13. The JCAH was formed in the early 1950's by the American College of Surgeons, the American College of Physicians, the American Hospital Association, and the American Medical Association. Its purpose was to establish minimum hospital standards for patient care. For details of the program, see Dornette, *The Legal Impact on Voluntary Standards in Civil Actions Against the Health Care Provider,* N.Y.L.Sch.L.Rev. 925, 925–28 (1977); Holbrook & Dunn, *Medical Malpractice Litigation: The Discoverability and Use of Hospitals' Quality Assurance Committee Records,* 16 Washburn L.J. 54, 57 (1976).

14. Hospitals voluntarily seek accreditation for financial and professional prestige reasons. First, accreditation by the JCAH means the hospital qualifies to participate in the federal Medicare and Medicaid programs. Accreditation by JCAH is deemed substantial compliance with the Medicare conditions of participation. 42 U.S.C. § 1395bb (1982); 42 C.F.R. § 405.1901(d) (1986). *See generally,* Dornette, *supra* n. 13 at 927, Holbrook & Dunn, *supra* n. 13, at 58. Second, JCAH accreditation is often a prerequisite to obtaining approval of internship and residency programs. *See generally, American Medical Association Directory of Accredited Residencies 3* (1975–76), *quoted in* Dornette, *supra* n. 13, at 928. Finally, the institution's reputation and standing in the community is affected by whether it receives JCAH accreditation. *See* Holbrook & Dunn, *supra* n. 13.

care in making them, and no doubt others.

Id. (footnotes omitted). However:

It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than *the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.*

Id. at 512 (emphasis added). *Accord, Alaska Airlines v. Sweat,* 568 P.2d 916, 925–26 (Alaska 1977).

Our principal decision on non-delegable duty is *Sweat,* 568 P.2d 916. In that case, Sweat sued Alaska Airlines for injuries sustained in an air crash while traveling aboard a Chitina Air Service plane. *Id.* at 922. Chitina had been engaged under a contract with Alaska Airlines to service a portion of Alaska Airlines' regularly scheduled routes. *Id.* at 921, 922. Alaska Airlines contended that Chitina was an independent contractor and therefore it was not liable for Chitina's negligence. *Id.* at 923. The trial court found Alaska Airlines vicariously liable based on Restatement (Second) of Torts § 428. *Id.* On appeal, we affirmed the trial court's decision on the alternative ground that Alaska Airlines owed a common law nondelegable duty of safety to its passengers. *Id.* at 925. We reasoned:

We believe that the responsibility of a common carrier for the safety of its passengers is so important that the carrier should not be permitted to transfer it to another. A scheduled common carrier such as Alaska is given a monopoly or semi-monopoly primarily for the purpose of furnishing safe and reliable scheduled air transportation. It should not be permitted to barter away its responsibility to the traveling public by means of contracts with other carriers. If this were permissible, an air carrier could avoid liability by engaging in independent contracts for furnishing food, maintenance of its planes and conceivably even for supplying crews. Regardless of whether such contracts may be permitted by regulatory authorities, the traveling public is entitled to look for protection to the certificated carrier responsible for the scheduled route.

Id. at 926.

We have little trouble concluding that patients, such as Jackson, receiving treatment at a hospital emergency room are as deserving of protection as the airline passengers in *Sweat.* Likewise, the importance to the community of a hospital's duty to provide emergency room physicians rivals the importance of the common-carriers' duty for the safety of its passengers. We also find a close parallel between the regulatory scheme of airlines and hospitals. Undoubtedly, the operation of a hospital is one of the most regulated activities in this state. Besides the license,[15] and certificate of need,[16] requirements mentioned above, a hospital must comply with state regulations promulgated to control its activities, AS 18.20.070, 7 AAC 12.610; adopt a state approved risk management program "to minimize the risk of injury to patients," AS 18.20.075; and undergo "annual inspections and investigations" of its facilities, AS 18.-20.080. Failure to comply with these statutory requirements can lead to suspension or revocation of the hospital's license. AS 18.20.050.

The hospital regulatory scheme and the purpose underlying it (to "provide for the development, establishment, and enforcement of standards for the care and treatment of hospital patients that promote safe and adequate treatment" AS 18.20.010), along with the statutory definition of a hospital, (an institution devoted primarily to providing diagnosis, treatment or care to individuals, AS 18.20.130(3)), manifests the legislature's recognition that it is the hospital as an institution which bears ultimate responsibility for complying with the mandates of the law. It is the hospital that is required to ensure compliance with the regulations and thus, relevant to the instant case, it is the hospital that bears final ac-

15. *See* AS 18.20.020.

16. *See* AS 18.07.031.

countability for the provision of physicians for emergency room care. We, therefore, hold that a general acute care hospital's duty to provide physicians for emergency room care is non-delegable. Thus, a hospital such as FMH may not shield itself from liability by claiming that it is not responsible for the results of negligently performed health care when the law imposes a duty on the hospital to provide that health care.

We are persuaded that the circumstances under which emergency room care is provided in a modern hospital mandates the rule we adopt today. Not only is this rule consonant with the public perception of the hospital as a multifaceted health care facility responsible for the quality of medical care and treatment rendered, it also treats tort liability in the medical arena in a manner that is consistent with the commercialization of American medicine. Finally, we simply cannot fathom why liability should depend upon the technical employment status of the emergency room physician who treats the patient. It is the hospital's duty to provide the physician, which it may do through any means at its disposal. The means employed, however, will not change the fact that the hospital will be responsible for the care rendered by physicians it has a duty to provide.

[12] This holding is necessarily limited. We do not change the standard of care with which a physician must comply, nor do we extend the duty which we find non-delegable beyond its natural scope. Our holding does not extend to situations where the patient is treated by his or her own doctor in an emergency room provided for the convenience of the doctor. Such situations are beyond the scope of the duty assumed by an acute care hospital. Rather our holding is limited to those situations where a patient comes to the hospital, as an institution, seeking emergency room services and is treated by a physician provided by the hospital. In such situations, the hospital shall be vicariously liable for damages proximately caused by a physician's negligence or malpractice.

[13] In the instant case, Jackson came to FMH as an institution seeking emergency room services. Dr. Power was a physician FMH had a non-delegable duty to provide. FMH is, therefore, vicariously liable as a matter of law for any negligence or malpractice that Dr. Power may have committed. Accordingly, the trial court's ruling on this issue must be reversed. Jackson is entitled to partial summary judgment on the issue of FMH's vicarious liability.

VII

For the reasons outlined above, the trial court's denial of summary judgment on Jackson's theories of enterprise liability and apparent authority are AFFIRMED. However because we hold that FMH has a non-delegable duty to provide non-negligent physician care in its emergency room, the trial court's denial of summary judgment on the theory of non-delegable duty, is REVERSED and REMANDED with instructions to enter partial summary judgment on the issue of FMH vicarious liability in favor of Jackson.

AFFIRMED in part; REVERSED in part; and REMANDED.

MOORE, J., not participating.

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and that the 50/50 division
ossett is inappropriate.

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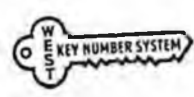
this conclusion, we do not suggest that a court apportionment would be inappropriate in other circumstances, so long as the employer has notice and an opportunity to be heard. Under the facts of this case, however, since Gossett chose the board as the appropriate forum, the board should decide the question.

[2] We reject Gossett's argument that we rule that a 50/50 apportionment is appropriate under the facts of this case as this is a factual determination which cannot be decided in the first instance on appeal. *See Parker v. Northern Mixing Co.*, 756 P.2d 881 (Alaska 1988).

The judgment of the superior court is reversed and this case is remanded to the superior court with instructions to remand it to the Workers' Compensation Board to apportion the settlement proceeds received in the third-party action from the defendant Holmes between the claim of Perry Gossett and that of Marilyn Gossett.

REVERSED AND REMANDED.



Phillip C. LAKE; Cynthia B. Lake; Jerry R. Coburn; Mary L. Coburn; and Wormald Fire Systems, Inc.; Petitioners,

v.

CONSTRUCTION MACHINERY, INC.; JLG Industries, Inc.; McDonald Industries, Inc.; and McDonald Industries Alaska, Inc.; Respondents.

No. S-3027.

Supreme Court of Alaska.

Feb. 23, 1990.

Employee who received workers' compensation benefits for accident brought damage action against several third parties. After the Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., ruled that third parties were entitled to assert, as partial defense, that employee's employer was negligent, employee brought petition for review. The Supreme Court, Burke, J., held that although third parties could not reduce their total liability to employee in proportion to percentage of negligence attributable to employer, evidence of employer's negligence could be relevant and admissible to prove that employer was entirely at fault, or that employer's fault was superseding cause of employee's injury.

Reversed and remanded.

1. Statutes ⚷190, 223.1

Ordinarily, unambiguous statute is enforced as written without judicial construction or modification; however, this rule is not controlling when seemingly unambiguous statute must be considered in conjunction with another act.

2. Workers' Compensation ⚷2249

In tort action brought by injured employee who had recovered workers' compensation benefits, defendants could not reduce their total liability to employee in proportion to percentage of any negligence attributable to employer; however, evidence of employer's negligence could be relevant and admissible to prove that employer was entirely at fault or that employer's fault was superseding cause of injury, with result that jury could allocate all or none of total fault to employer. AS 09.17.-080, 23.30.055.

3. Workers' Compensation ⚷2142.20

As result of exclusive liability provision of workers' compensation law, employ-

third-party settlement to squeeze in ahead of the employer to claim some of the settlement proceeds. On the contrary, we conclude that the statute gives the employer a lien priority for the excess recovery from the third-party claim. Employee's request that we give Marilyn Gossett some of the excess recovery is denied and dismissed.

Marilyn, of course, is not claiming any portion of the excess recovery. The purpose of the apportionment she sought was to separate her recovery from the recovery by the employee. Only a portion of the latter can be considered excess recovery by the employee.

er may be joined as third-party defendant in employee's tort action only when another party asserts express indemnity claim against it. AS 23.30.055.

Robert M. Libbey, Libbey & Suddock, Anchorage, for petitioners, Phillip C. Lake, Cynthia B. Lake, Jerry R. Coburn and Mary L. Coburn.

Gary N. Bloom, Harbaugh & Bloom, Spokane, Wash., for petitioners, Jerry R. Coburn and Mary L. Coburn.

Constance Cates Ringstad and Winston S. Burbank, Call, Barnett & Burbank, Fairbanks, for petitioner, Wormald Fire Systems, Inc.

Michael C. Geraghty and David D. Floerchinger, Staley, DeLisio, Cook & Sherry, Inc., Anchorage, for respondent, Const. Machinery, Inc.

R. Craig Hesser, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for respondent, JLG Industries, Inc.

Paul H. Ashton and Colleen J. Moore, Guess & Rudd, Anchorage, for respondents, McDonald Industries, Inc. and McDonald Industries, Alaska, Inc.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

BURKE, Justice.

An employee injured in the course of his employment brought a damage action against several third parties. He filed this petition after the superior court ruled that the third parties were entitled to assert, as a partial defense, that the plaintiff's employer was negligent. The question that we must decide is whether the employer is one of the parties among whom the finder of fact must allocate fault pursuant to the rule of modified joint and several liability found in AS 09.17.080, thereby reducing the liability of the third parties to the employee. For the reasons set forth below we hold that the employer's negligence, if any, is relevant, but that its use by the jury is limited.

I

The underlying facts are not in dispute. Phillip Lake suffered an injury in the course and scope of his employment with Wormald Fire Systems, Inc., when he fell fifty feet from a manlift.

Lake filed products liability claims against the manlift manufacturer, JLG Industries, Inc.; the distributor, Construction Machinery, Inc.; and several intermediate vendors. The distributor filed a third party complaint against the employer on a theory of express indemnity. The distributor defended partly on the ground that the finder of fact should attribute negligence among all parties allegedly responsible for Lake's injury, including the employer, and that the distributor's ultimate liability to Lake should be determined pursuant to the rule of modified joint and several liability found in AS 09.17.080(d).[1]

Lake moved to strike the defense, Alaska R.Civ.P. 12(f), arguing that the exclusive liability provision of the Workers' Compensation Act, AS 23.30.055, precluded the trier of fact from considering the negligence of the employer. The superior court denied the motion to strike and a subsequent motion for reconsideration. We granted Lake's petition for review.[2]

II

Under the Alaska Workers' Compensation Act, AS 23.30.005–.270, an employer is liable to pay compensation to an employee injured in the course and scope of employment, regardless of fault. AS 23.30.045(a),

1. The distributor's sixth affirmative defense stated:

   Pursuant to AS 09.17.080, any amount of damages which the plaintiffs may have incurred as a result of the aforementioned accident must be reduced by the percentage of fault attributable to [the employer].

2. The caption of this opinion lists as "petitioners" all parties who appeared and argued in favor of reversing the order below; conversely, the "respondents" are all parties who argued that the order should be affirmed.

of fact must fix the damage awards, and determine the respective percentages of fault. *Id.* The court then enters judgment on the basis of modified joint and several liability. AS 09.17.080(c), (d).

III

Petitioners contend that the superior court erred in refusing to strike the challenged defense because AS 09.17.080(a)(2) does not specifically include statutorily immune employers in the group among whom the total fault must be allocated. Respondents contend that the purpose of AS 09.17.080 will be frustrated if the employer's fault is not considered.

This is a question of statutory interpretation subject to the independent judgment standard of review. *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092 (Alaska 1985). We will "adopt the rule of law that is most persuasive in light of precedent, reason, and policy." *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[1] The interpretation of a statute begins with an examination of the language used. Ordinarily, an unambiguous statute is enforced as written without judicial construction or modification; however, this rule is not controlling when a seemingly unambiguous statute must be considered in conjunction with another act. *Hafling v. Inlandboatmen's Union*, 585 P.2d 870, 872 (Alaska 1978). In that case, we will examine the legislative history and adopt a reasonable construction which realizes legislative intent, avoids conflict or inconsistency, and gives effect to every provision of both acts. *Id.* at 873, 875, 877. Thus, we will presume that the legislature enacted AS 09.17.080 with the Workers' Compensation Act in mind.

When we decided *Arctic Structures*, we noted that the view espoused in *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board*, 22 Cal.3d 829, 150 Cal.Rptr. 888, 587 P.2d 684 (1978), had "considerable merit."[7] 605 P.2d at 440. Respondents argue that the legislature recognized the merit of the California rule and incorporated it into the law of Alaska when it adopted AS 09.17.080.

The legislature's intent is not apparent from the plain language of AS 09.17.080(a)(2). Although the legislature has authorized the finder of fact to allocate fault among "each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040," an employer does not fit easily within any of these categories.[8]

[2] When the legislature enacted AS 09.17.080, it left intact the exclusive liability and employer reimbursement provisions,

party defendants and persons who have been released under AS 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040.

....

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.16.040, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

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

7. In *Associated Construction*, the California Supreme Court ruled that the total liability for the employee's injury should be equitably allocated between the employer and third party tortfeasors. 150 Cal.Rptr. at 895–96, 587 P.2d at 691–92. The third parties' liability to the employee is reduced by the employer's share of the fault. *Id.* The employer's right to credit or reimbursement is limited to the amount by which his compensation liability exceeds his proportional share of the injured employee's recovery. *Id.*

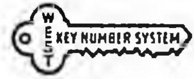
8. *See* Uniform Comparative Fault Act § 2 comment, § 6 comment, 12 U.L.A. 46, 53 (Supp. 1989).

knowing that we had declined to abrogate the rules set forth in those statutes in the past, even though developments in the principles of general tort law might suggest that course. To the contrary, we have consistently and repeatedly refused to alter the comprehensive statutory scheme governing employers' rights and liabilities for workplace accidents. Absent a clear indication of legislative intent,[9] we decline to retreat from the rule of law set forth in *Arctic Structures v. Wedmore.*

[3] It is irrelevant that the employer in this case is a third-party defendant based on an express indemnity agreement. As a result of the exclusive liability provision, an employer may be joined as a third-party defendant only when another party asserts an express indemnity claim against it. *See Manson–Osberg Co. v. State,* 552 P.2d 654, 658–59 (Alaska 1976); *see also Providence Washington Ins. Co. v. DeHavilland Aircraft Co. of Canada,* 699 P.2d 355, 357–58 (Alaska 1985); *Golden Valley Elec. Ass'n v. City Elec. Serv.,* 518 P.2d 65, 69 (Alaska 1974). However, the fact that the employer is a third-party indemnity defendant in any particular case is a fortuity which does not alter the rule applicable to employer fault generally, even though it might affect the ultimate liability of the parties to the agreement.

Our refusal to abrogate the workers' compensation scheme does not necessarily render evidence of employer negligence inadmissible. A third party tortfeasor may escape liability by proving that it was not negligent or that its negligence did not proximately cause the employee's injury. Thus, evidence of the employer's negligence may be relevant and admissible to prove that the employer was entirely at fault, or that the employer's fault was a superseding cause of the injury. However, AS 09.17.080 presents a difficult factual choice: the finder of fact may allocate *all* or *none* of the total fault to the employer. It may not allocate only a portion of the total fault to the employer. Moreover, members of the bench and bar must take care in preparing jury instructions to prevent a panel from attributing to the employee any negligence of the employer.

The decision of the superior court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.



9. The workers' compensation statute was never mentioned during the house and senate debates concerning the 1986 tort reform provisions, ch. 139, § 1, SLA 1986. Alaska State Senate Floor Debate (May 5, 1986) [hereinafter Senate Debate]; Alaska State House Floor Debate (May 8, 1986) [hereinafter House Debate]. It is clear that the legislature was attempting to alleviate a perceived "crisis" in insurance rates and availability. *See* Senate Debate (remarks of Sens. Kelly and Faiks; House Debate (remarks of Rep. Navarre). The section on modified joint and several liability was "the heart and soul of the bill." Senate Debate (remarks of Sens. Kelly, Faiks and Halford); House Debate (remarks of Reps. Navarre, Hanley, and Pignalberi). Legislators who endorsed a form of modified joint and several liability argued that it represented a fair compromise limiting the potential liability of a tortfeasor guilty of only a small degree of negligence while at the same time permitting an injured plaintiff to recover a substantial portion of his or her damages. Senate Debate (remarks of Sen. Josephson); House Debate (remarks of Reps. Navarre and Miller).

Paul A.L. NELSON, Petitioner,

v.

Loretto L. JONES, Respondent.

No. S–2663.

Supreme Court of Alaska.

Feb. 23, 1990.

Following settlement in divorce action, father brought action against mother alleging abuse of process, malicious prosecution, and defamation based upon mother's allegations of sexual abuse of their child. The Superior Court, First Judicial District, Juneau, Duane Craske, J., denied father's discovery requests, and appeal was taken.

HEALTH ASSOCIATION OF ALASKA
March 1990

LEGISLATIVE SUMMARY -- PROPOSED AMENDMENT TO
HB 166 RE LIABILITY OF HOSPITALS FOR
NONEMPLOYEE PHYSICIANS AND OTHER HEALTH PERSONNEL

On October 16, 1987, the Alaska Supreme Court ruled in Jackson v. Power (no. 3237) that a general acute care 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.

** The Jackson decision imposes liability on hospitals for the negligence of non-employee emergency room physicians solely because the hospital is required by law to provide emergency room services and is regulated in the provision of those services, without requiring the plaintiff to show that the hospital has been negligent or that it has violated any specific regulatory requirement.

** The implications of the Jackson decision extend far beyond the emergency room. Although the Jackson case dealt only with the relationship between the hospital and non-employee emergency room physicians, the rationale of the case logically extends to other non-employee physicians and health care providers. Under the common law prior to the Jackson decision a hospital was not vicariously liable for the negligence of the non-employees if the hospital itself was not negligent and had complied with all applicable statutory and regulatory requirements.

** The Jackson decision runs counter to modern trends of apportioning liability according to fault. Recent tort reforms were designed to provide some relief to public entities, which were often named as "deep pocket" defendants, even though their share of the responsibility for the injury was negligible. The Jackson case insures that municipally owned and non-profit hospitals will be named as deep pocket defendants in every case involving physicians negligence, even though the hospital was not negligent and has done everything within its power to comply with statutory and regulatory requirements. In one recent case, for example, the plaintiff dismissed all of the allegedly negligent physician defendants and went to trial solely against the corporate hospital.

** The ruling will not improve hospital and emergency room care because, by definition, the Jackson rule applies where there is no fault on the part of the hospital. Hospitals have always been liable for their own negligence, and would continue to be so liable if Jackson were legislatively repealed.

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Kevin M. Kordziel

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Duke University School of Law

Rule 82 Revisited: Attorney Fee Shifting in Alaska

In 1992, the Alaska Supreme Court amended Civil Rule 82, the state's unique attorney fee-shifting provision. The revision addresses some of the practical deficiencies of former Rule 82, as well as the supreme court's concern that the rule deterred a large segment of the population from access to the courts. In addition to increasing the complexity of the rule, the supreme court has further entrenched a fee-shifting regime that is not adequately justified by its official or perceived purposes. This note concludes that Civil Rule 82 should be subjected to critical, empirical reevaluation.

I. Introduction

The United States is nearly unique in the world in its approach to attorney fees; under the American rule, each side generally bears its own attorney fees in litigation.[1] In contrast, the English "loser pays" rule, used by most other countries, requires the losing party to pay a substantial portion of the prevailing party's attorney fees.[2] Alaska is unique in the United States, since it has abandoned the American rule in favor of a complex fee shifting system that ordinarily requires the losing party to pay a portion of the winner's attorney fees.[3]

The "litigation explosion" in the United States has recently propelled attorney fee shifting into the public limelight. Segments of the business community and other tort reform advocates have called for modification or abandonment of the American rule.[4]

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1. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).
2. *See generally* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 37.
3. ALAN J. TOMKINS & THOMAS E. WILLGING, TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS 32 (1986).
4. During the Bush Administration, the President's Council on Competitiveness issued a report calling for the adoption of a modified form of the English rule as a method to control litigation. Bradley L. Smith, Note, *Three Attorney Fee-*

According to these critics, the American rule does little to discourage borderline cases and marginally motivated plaintiffs.[5] They argue that requiring losing parties to pay the winners' fees would deter plaintiffs from filing non-meritorious claims, and would encourage the settlement of other claims because of the higher stakes involved with losing.[6] Defenders of the American rule, conversely, maintain that all Americans are entitled to their day in court.[7] They strongly oppose a fee system that might discourage individuals of moderate means from instituting actions to vindicate their rights.[8]

Amid this national debate surrounding the future of the American rule, Alaska has recently reevaluated the merits of its unique fee-shifting scheme. While there are now well over 100 federal and 2,000 state fee-shifting statutes in the United States,[9] Alaska is the only jurisdiction that has entirely rejected the American rule.[10] In its place, Alaska has fashioned a complex fee-shifting arrangement that combines a partial shift in favor of the prevailing litigant[11] with a federal-style offer-of-judgment device.[12] After a period of intense scrutiny, the Alaska Civil Rules Committee in 1992 recommended substantial revisions to Rule 82. The Alaska Supreme Court, despite input from a sizeable

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Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives, 90 MICH. L. REV. 2154, 2156 (1992) (citing PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 1, 24-25 (1991)).

5. *See, e.g.*, Phillip S. Figa, *The "American Rule" has Outlived its Usefulness: Adopt the "English Rule,"* NAT'L L.J., Oct. 20, 1986, at 13.

6. *Id.*

7. *See, e.g.*, Roxanne Barton Conlin & Clarence L. King, Jr., *Revisiting the "Loser Pays" Issue: English Rule*, NAT'L L.J., Aug. 3, 1992, at 27.

8. *Id.* (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)).

A number of countries are considering reforms that would bring their legal systems closer to the American approach. Even England, despite its heavily tax-supported legal aid system, has considered modifying the English rule. A 1991 report of Britain's Lord Chancellor called potential liability for an opponent's litigation fees and costs "'arguably the major deterrent against taking legal action.'" *Id.* at 28 (quoting LORD CHANCELLOR'S DEP'T, REVIEW OF FINANCIAL CONDITIONS FOR LEGAL AID: ELIGIBILITY FOR CIVIL LEGAL AID 37 (1991)).

9. TOMKINS & WILLGING, *supra* note 3, at 31.

10. *Id.* at 32.

11. ALASKA CIV. R. 82.

12. ALASKA CIV. R. 68. This arrangement is often referred to as a "two-way" shift, whereas fee-shifting schemes that award fees only to prevailing plaintiffs employ a "one-way" shift.

contingent of the Alaska Bar to eliminate fee shifting entirely, implemented these changes in Order No. 1118, which took effect on July 15, 1993.

This note analyzes the Alaska fee-shifting system in detail and argues that the state should retain the prolix mechanism in its present form only if it improves the legal system in identifiable, desired ways. Part II presents an overview of fee shifting in Alaska, with particular emphasis on former Rule 82 and Rule 68. Part III discusses the events and criticism leading to Rule 82's amendment. Part IV examines the amended version of Rule 82 and speculates as to its probable effects. Part V explores the possible policy rationales for Alaska's fee-shifting system and argues that the mechanism employed is not the best means to achieve these results. Finally, part VI concludes that the usefulness of amended Rule 82 must be reexamined empirically.

II. Overview of Fee Shifting in Alaska Before the Amendment of Rule 82

As there is not yet any reported case law discussing the operation of Rule 82 in its amended form, and since the new rule retains many of the basic provisions of the prior rule, familiarity with Alaska's pre-amendment fee-shifting scheme is essential. Alaska's well-established practice of fee shifting can be traced back to the territorial statutes of the early 1900's.[13] Today, Alaska Civil Rule 82 governs the allocation of attorney fees in conjunction with Rule 68, an offer of settlement device. The Alaska system, although functionally distinct from the fee taxation[14] approach under a pure English rule, employs a similar two-way shift.

Alaska Civil Rule 82, supported by Alaska Statutes section 09.60.010[15] and Civil Rule 54,[16] sets the general framework for

13. Gregory J. Hughes, Comment, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 UCLA-ALASKA L. REV. 129, 143 (1974).

14. The term "taxation," as it is used in this note, refers to the process of determining the portion of one party's litigation expenses that may be charged to another party.

15. Alaska Statutes § 09.60.010 provides:

> 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

attorney fee shifting. Rule 82, before its amendment, provided in relevant part:

(a) Allowance to Prevailing Party

(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein:

ATTORNEY'S FEES IN AVERAGE CASES

Judgment and, if awarded, prejudgment interest	Contested	Without trial	Non-contested
First $25,000	20%	18%	10%
Next $75,000	10%	8%	3%
Next $400,000	10%	6%	2%
Over $500,000	10%	2%	1%

Should no recovery be had, attorney's fees may be fixed by the court in its discretion in a reasonable amount.

(2) In actions where the money judgment is not an accurate criterion for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered. An application for attorney's fees in a default case exceeding $50,000 must specify actual fees.

(3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

(4) Attorney's fees upon entry of judgment by default shall be determined by the clerk. In all other matters the court shall determine attorney's fees. Awards not pursuant to the schedule set forth in subparagraph (1) of this Rule shall be made only upon motion.

(5) A motion for attorney's fees must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1.

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contested as determined by the court.

ALASKA STAT. § 09.60.010 (Supp. 1993).

16. Rule 54 provides in relevant part: "Except when express provision therefore is made either in a statute of the state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." ALASKA CIV. R. 54(d).

> Failure to move for attorney's fees within 10 days or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees.[17]

Alaska's two-way fee-shifting scheme was not designed to reimburse prevailing parties[18] for the full amount of attorney fees incurred. Rule 82, rather, was intended to compensate a prevailing party partially for the productive work done by his or her attorney.[19] The fact that, in practice, the actual bill for attorney fees may have been several times the size of the fee award was considered irrelevant.[20] Because the schedule set out in Rule 82(a)(1) usually provided the basis for taxation when the prevailing party recovered a monetary judgment, partial compensation was the common outcome under Alaska law. In fact, Alaska trial judges estimated that the schedule determined the amount of taxation in over eighty percent of cases with monetary recovery.[21] This percentage scheme allowed judges to expend minimal time and resources in administering schedule-based award cases.

Before the amendment of Rule 82, however, there were many situations in which the schedule was not used to determine the size of a fee award. When the prevailing party did not obtain a monetary remedy, judges had discretion to fix a reasonable fee award.[22] If a judge determined that a schedule-based award did not accurately reflect the value of the legal services rendered, he or she could also depart from the schedule. Typically, this was a concern in equitable or mixed equity-law cases when an equitable remedy was sought, but some monetary relief might have been granted as well.[23] Also, overcompensation was a concern when large monetary recoveries were obtained with a minimum of legal services. Likewise, undercompensation could have resulted from hard-fought cases yielding small recoveries. In such cases, a judge

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17. Alaska Civ. R. 82(a) (repealed 1993).

18. The "prevailing party" is generally "considered to be the party who has successfully prosecuted or defended against the action, the one who is successful on the 'main issue' of the action and 'in whose favor the decision or verdict is rendered and the judgment entered.'" Adoption of V.M.C., 528 P.2d 788, 795 n.14 (Alaska 1974) (quoting Buza v. Columbia Lumber Co., 395 P.2d 511, 514 (Alaska 1964)).

19. State v. Abbott, 498 P.2d 712, 731 (Alaska 1972).

20. *Id.*

21. TOMKINS & WILLGING, *supra* note 3, at 42.

22. Alaska Civ. R. 82(a)(1) (repealed 1993).

23. TOMKINS & WILLGING, *supra* note 3, at 34 n.130.

would then award "a fee commensurate with the amount and value of the legal services rendered."[24] The current system, as amended, similarly allows judges to exercise their discretion when the schedule-based award is obviously inappropriate.[25]

Furthermore, in special instances full compensation was allowed under the pre-amendment rule, and this is permitted after the amendment as well.[26] Bad faith actions are one such instance.[27] Public interest[28] plaintiffs are also permitted full recovery, while defendants who prevail in public interest litigation may be denied any attorney fee compensation.[29]

Judges additionally had discretion to disallow any attorney fee award based upon the equities of the case or other valid reasons.[30] Moreover, the trial court retained the option of not characterizing either party as "prevailing," thereby denying any fee recovery.[31]

The Alaska Supreme Court granted broad discretion to trial court judges in making fee determinations under Rule 82. Upon appellate review, awards made pursuant to the schedule were presumptively valid.[32] Thus, the prevailing party was not required

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24. Alaska Civ. R. 82(a)(2) (repealed 1993).

25. *See* ALASKA CIV. R. 82(b)(3); text accompanying note 120.

26. *See* ALASKA CIV. R. 82(b)(3); text accompanying note 120.

27. *See, e.g.*, Alaska N. Dev., Inc. v. Alyeska Pipeline Serv. Co., 666 P.2d 33, 42 (Alaska 1983), *cert. denied*, 464 U.S. 1061 (1984); Gold Bondholders Protective Council v. Atchison, T. & S. F. Ry., 658 P.2d 776, 779 (Alaska 1983); Davis v. Hallet, 587 P.2d 1170, 1171-72 (Alaska 1978); Malvo v. J. C. Penney Co., 512 P.2d 575, 587-88 (Alaska 1973).

28. The four criteria that determine whether a suit qualifies as one of public interest are:

> (1) Is the case designed to effectuate strong public policies?
> (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit?
> (3) Can only a private party have been expected to bring the suit?
> (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance?

Anchorage Daily News v. Anchorage School Dist., 803 P.2d 402, 404 (Alaska 1990); *see also* Loeb v. Rasmussen, 822 P.2d 914, 921 n.18 (Alaska 1991); Citizens Coalition For Tort Reform v. McAlpine, 810 P.2d 162, 171 (Alaska 1991).

29. *See, e.g.*, *Anchorage Daily News*, 803 P.2d at 404; City of Anchorage v. McCabe, 568 P.2d 986, 993-94 (Alaska 1977); Gilbert v. State, 526 P.2d 1131, 1136 (Alaska 1974).

30. *See* Haskins v. Sheldon, 558 P.2d 487, 495 (Alaska 1976); Cooper v. Carlson, 511 P.2d 1305, 1309-11 (Alaska 1973).

31. Tobeluk v. Lind, 589 P.2d 873, 877 (Alaska 1979).

32. Babinec v. Yabuki, 799 P.2d 1325, 1337 (Alaska 1990).

to supply itemized records of counsel's services to justify such awards.[33] A trial judge's failure to adhere to the schedule without stating the reasons for deviating, however, constituted reversible error.[34] Upon reversal, the appellate court would ordinarily remand the fee determination, forcing the trial judge to apply the schedule or articulate an adequate explanation.[35] But if the trial court specified in the record its reasons for departing from the schedule, it had broad discretion to award amounts greater than those permitted under the schedule.[36] The Alaska courts' lenient abuse-of-discretion standard tended not to disturb trial court awards unless the determination was "arbitrary, capricious, manifestly unreasonable, or . . . stemmed from an improper motive."[37] Moreover, "a trial judge need not [have made] formal findings of fact and conclusions of law to justify his decision denying attorney's fees. An oral explanation on the record . . . [was] sufficient."[38] For example, an award exceeding fifty percent of the actual attorney expenses incurred was deemed reasonable,[39] but one exceeding ninety percent of the amount requested by the prevailing party was held to be excessive when there was no evidence that the losing party's claims were "frivolous, vexatious, or devoid of good faith."[40] An award based on claimed attorney fees that appeared to be clearly excessive required a remand for a new fee award based upon reasonable expenditures.[41]

When the prevailing party recovered no monetary judgment, appellate review differed slightly. As with monetary recoveries, a sufficient explanation was required if the trial court refused to award attorney fees to the prevailing party.[42] A mere statement

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33. *Id.*

34. Stefano v. Coppock, 705 P.2d 443, 446 (Alaska 1985).

35. *Id.*

36. Taylor Constr. Servs. v. URS Co., 758 P.2d 99, 103 (Alaska 1988).

37. Alvey v. Pioneer Oilfield Servs., 648 P.2d 599, 601 (Alaska 1982); *see also* Alaska Placer Co. v. Lee, 553 P.2d 54 (Alaska 1976); Palfy v. Rice, 473 P.2d 606, 613 (Alaska 1970).

38. Urban Dev. Co. v. Dekreon, 526 P.2d 325, 328 (Alaska 1974).

39. Stevens *ex rel.* Park View Corp. v. Richardson, 755 P.2d 389, 396 (Alaska 1988).

40. State v. University of Alaska, 624 P.2d 807, 818 (Alaska 1981).

41. Zeilinger v. SOHIO Alaska Petroleum Co., 823 P.2d 653, 659 (Alaska 1992).

42. Pratt v. Kirkpatrick, 718 P.2d 962 (Alaska 1986); *see supra* note 34 and accompanying text.

that "[u]nder the circumstances justice will best be served if each party bears [its] own costs and attorney's fees" was not considered a sufficient explanation.[43] Generally, courts also had to explain full attorney fee awards.[44] If the trial court did award fees, however, it did not have to supply reasons for its judgment as long as the award was only for partial expenses.[45]

In practice, Alaska's former fee-shifting regime based upon schedule-based taxation was deemed a "fast, uncomplicated, easily managed enterprise" that judges conducted within minutes.[46] With schedule-based fee awards, taxation required nothing more than a simple motion request.[47] The moving party submitted affidavits containing attorneys' billing rates and the number of hours worked on the particular aspects of the case. Since fee shifting had become an accepted institution in the Alaska legal system, schedule-based awards were generally not contested.[48]

Not every case was so straight-forward. In approximately twenty-five to thirty percent of the cases, the prevailing party claimed, under Rule 82(a)(2), that the schedule was not an accurate basis for taxation.[49] In these instances, the parties would file briefs and the judge would decide whether or not to use the schedule. If a trial judge elected not to use the schedule, the taxation process became even more time-consuming. The judge had to determine what constituted a reasonable fee as well as what percentage of it would be awarded. This procedure often entailed longer briefs from the parties, and occasionally hearings and discovery.[50] The judge engaged in a similar reasonable fee and percentage recovery determination when the prevailing party received no monetary judgment.

Alaska judges employed varying procedures for determining what constituted reasonable fees. Some judges carefully examined each entry of the fee petitions for acceptability, recalculating the number of reasonable hours after subtracting unnecessary expendi-

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43. Curran v. Hastreiter, 579 P.2d 524, 530 (Alaska 1978).
44. Moses v. McGarvey, 614 P.2d 1363, 1368-69 (Alaska 1980).
45. Wickwire v. Arctic Circle Air Servs., 722 P.2d 930, 935 (Alaska 1986).
46. TOMKINS & WILLGING, *supra* note 3, at 41-42.
47. *Id.* at 41.
48. *Id.*
49. *Id.* at 41 & n.149.
50. *Id.* at 42.

tures of time and hours spent on non-prevailing issues.[51] Eventually, the judges drafted a fee order containing brief findings of fact supporting the fee award.

Other judges relied on a more intuitive approach. They used their experience and general sense of the case to estimate an acceptable benchmark range for the total fee.[52] These judges looked at the average hourly fees in their districts and multiplied this figure by an estimate of the number of hours required for the type of case at hand. They compared this estimate with the amount requested in the fee petition. A request well above the benchmark estimate would have received closer scrutiny; otherwise, judges often "rubber-stamped" the fee request.[53] Using this methodology, judges completed the entire taxation process in minutes, compared with about an hour for the alternative process outlined above.[54]

After calculating the total reasonable fee under either of the two methods, judges had to determine the appropriate fraction of this fee to shift. The Alaska Supreme Court, before amending Rule 82, provided no set guideline for doing so. The text of former Rule 82 called for reasonable amount "commensurate with the amount and value of legal services rendered."[55] Under this loose standard, trial judges applied widely varying percentages for similar types of cases, creating a high degree of unpredictability. The proportion of fees shifted would fall anywhere between twenty and eighty percent of the reasonable fees, and anything in this range would generally not be reversed on appeal.[56] One practitioner observed that awards at the upper end of this range were more common: "[t]he prevailing party defendant typically receives between 40% and 80% of the actual attorney fees incurred."[57]

In sum, schedule-based taxation operated fairly smoothly and efficiently under former Rule 82. Few schedule-based awards were appealed, computation was a simple process, and the amount of the

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51. *Id.* at 42-43.
52. *Id.* at 42, 44.
53. *Id.* at 44-45.
54. *Id.* at 44.
55. Alaska Civ. R. 82(a)(2) (repealed 1993).
56. Andrew J. Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees*, JUDGES' J., Spring 1985, at 4, 6.
57. Memorandum from Mark E. Wilkerson, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 2 (Oct. 15, 1992) (on file with *Alaska Law Review*).

award was a predictable function of the size of the judgment. When schedule-based computation was inappropriate, however, greater judicial time and resources were required at the trial court level. Additionally, the ambiguity inherent in determining a reasonable fee resulted in a large number of appealed awards. According to a 1982 survey, more than one-fifth of the cases coming before the Alaska Supreme Court contained attorney fee issues.[58]

A complete discussion of the Alaska fee-shifting system also requires consideration of the interaction between Rule 82 and Rule 68, a federal-style offer-of-judgment rule. Singly and in combination, these rules profoundly shape litigation and settlement incentives. Rule 68 provides:

> (a) 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 money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after 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 the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.
>
> (b) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the prejudgment interest 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 will be reduced by the amount specified in AS 09.30.065 [2% per year] and the offeree must pay the costs and attorney's fees incurred after the making of the offer (as would be calculated under Civil Rules 79 and 82 if the offeror were the prevailing party). The offeree may not be awarded costs or attorney's fees incurred after the making of the offer.
>
> (2) if the offeree is the party defending against the claim, the interest rate will be increased by the amount specified in AS 09.30.065 [2% per year].

58. TOMKINS AND WILLGING, *supra* note 3, at 46 n.157 (citing Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 321, 345).

> (c) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.[59]

Under Alaska Civil Rule 68, either party may make a formal offer of judgment to be entered for a specified amount plus costs. In practice, however, the defendant is usually the party that makes the offer. If the plaintiff rejects the offer and later obtains a recovery, which, including prejudgment interest, is less than the amount of the offer plus prejudgment interest, the defendant is treated as the "prevailing party." Consequently, the defendant would be entitled to attorney fees and costs from the time of the offer since, unlike the relatively little-used Federal Rule 68,[60] Alaska Rule 68 permits partial compensation for attorney fees pursuant to Rule 82. Because costs are often minimal, the impact of Alaska Rule 68 stems primarily from its interaction with Rule 82.[61]

The following example illustrates this relationship.[62] Defendant makes a settlement offer to Plaintiff for $50,000 plus costs and attorney fees. If Plaintiff chooses to accept this offer, she may file for Rule 82 attorney fees and Rule 79 costs. Using the "contested without trial" column of the schedule in Rule 82, the fee award equals $6,500. Adding in the minimal costs usually recoverable under Rule 79 (assume $1,500), the total offer is worth approximately $58,000.

Suppose, however, that Plaintiff rejects the offer, proceeds to trial and receives a judgment of only $10,000. Also, assume that the injury occurred three years before the judgment and that the

59. ALASKA CIV. R. 68.

60. The United States Supreme Court in Marek v. Chesny, 473 U.S. 1 (1985), held that a plaintiff who rejects a defendant's Federal Rule 68 offer and obtains a positive judgment less than the amount of the offer loses the right to collect post-offer attorney fees. *Id.* at 10. This rule applies only to cases governed by federal fee-shifting statutes, which are usually pro-plaintiff. Plaintiffs in the federal system, therefore, never risk having to pay the defendant's legal fees by turning down an offer of settlement, since there is no statutory basis for pro-defendant fee-shifts.

61. Kleinfeld, *supra* note 56, at 5.

62. See *id.* at 5-7 (providing the basis for the hypothetical used in this note).

relevant interest rate was 5%. Since the award plus prejudgment interest, approximately $11,500, is less than the $50,000 offer, Defendant will be considered the prevailing party under Rule 82. The result can be disastrous.

If Defendant's reasonable attorney fees are approximately $60,000, and if he wisely made the settlement offer early in the discovery process so that the bulk of the fees were incurred afterwards, Plaintiff suffers a net loss from the litigation. For example, if the court shifts 30% of the reasonable fees,[63] Plaintiff's $11,500 judgment and prejudgment interest will be offset by an $18,000 fee award to the defendant and other costs allowable under Rule 68 (assume $200 for subpoena costs for witnesses). In addition, Plaintiff incurred her own non-reimbursable costs (assume $10,000 for expert witnesses) and pays her attorney whom she hired on a contingent fee basis (assume 30% of $11,500, or $3,450). As an end result of the litigation, Plaintiff's *net loss* reaches $20,150.[64] But for the interplay between Rule 68 and Rule 82, Plaintiff would have been considered the prevailing party and likely been spared any net out-of-pocket expense.

III. The Road Toward Amending Civil Rule 82

In the spring of 1992, Chief Justice Rabinowitz of the Alaska Supreme Court appointed a subcommittee of the Civil Rules Standing Committee to consider possible changes to Rule 82. Specifically, the court requested that the subcommittee consider whether Rule 82 deterred a large segment of the population from voluntary access to the courts.

This issue came to the court's attention partly by virtue of the supreme court's own decision in *Bozarth v. Atlantic Richfield Oil Co.*[65] John Bozarth, a pilot employed by Atlantic Richfield ("ARCO"), was discharged for refusing to participate in his

Bozarth

63. Amended Rule 82 sets a 30% fixed rate for the portion of attorney fees that are recoverable from non-monetary judgments. ALASKA CIV. R. 82; *see also* text accompanying note 120.

64. Actually, the loss is even higher after accounting for the provision on prejudgment interest in Rule 68. *See* ALASKA CIV. R. 68 (b)(1), (2). If, as in the preceding example, Plaintiff's judgment fails to exceed the amount of the offer, the prejudgment interest rate is lowered by 2%. This scenario would reduce her judgment plus interest from $11,500 to $10,900. Her net loss then rises by $420, after accounting for the contingent fee arrangement, to $20,570.

65. 833 P.2d 2 (Alaska 1992).

employer's random drug-testing program.[66] Bozarth sued, claiming that he was fired in retaliation for "whistle-blowing" activities.[67] The trial court granted ARCO's motion for summary judgment on two independent grounds.[68] ARCO then moved for attorney fees equal to 70% of the $156,425 in expenses actually incurred. Finding a small overcharge, the court determined that the full amount of reasonable fees was $152,000. The court awarded 50% of this amount, some $76,000, as partial compensation pursuant to Rule 82.[69]

On appeal, in addition to contesting the summary judgment, Bozarth opposed the attorney fee award. He argued that the $165 to $175 per hour rate charged by defense counsel was excessive.[70] The supreme court found that Bozarth had failed to present evidence that such hourly fees were unreasonable, or that the work performed by the attorneys was unnecessary or inappropriate.[71] Additionally, the majority reasoned that the 50% proportion "[fell] comfortably within the partially compensatory standard of Civil Rule 82."[72] The court, therefore, held that the fee award was valid. However, the majority pointed out that the magnitude of the award was "nonetheless disturbing."[73] The court speculated that the increased costs of litigation may have caused Rule 82 to deter "a broad spectrum of our populace from the voluntary use of our courts."[74] Accordingly, the majority called for the Civil Rules Standing Committee to review this very question.[75]

Justice Matthews desired stronger medicine; he would have reversed *Bozarth* as to the magnitude of the fees. The dissent found the $76,000 award to be fundamentally at odds with the Alaska Constitution's general protection of access to civil courts.[76]

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66. *Id.* at 2-3.
67. *Id.* at 3.
68. *Id.*
69. *Id.*
70. *Id.* at 4.
71. *Id.*
72. *Id.* (citing Brunet v. Dresser Olympic Div. of Dresser Indus., 660 P.2d 846, 847-48 (Alaska 1983); Stevens *ex rel.* Park View Corp. v. Richardson, 755 P.2d 389, 396 (Alaska 1988)).
73. *Id.* at 4 n.3.
74. *Id.*
75. *Id.*
76. *Id.* at 5 (citing Patrick v. Lynden Transp., Inc., 765 P.2d 1375, 1378-79 (Alaska 1988); Bush v. Reid, 516 P.2d 1215, 1218-21 (Alaska 1973); Malvo v. J. C.

Justice Matthews analogized "substantial awards of partial fees against litigants of limited resources" to full fee awards against good-faith plaintiffs.[77] He reasoned that "[i]f a $10,500 attorney's fee award is so great as to 'foreclose a particular party's opportunity to be heard' it has that effect independent of whether it represents the prevailing party's full, or merely partial, fees."[78] Since the Alaska Supreme Court has expressed a concern that full fee awards against good faith plaintiffs may offend plaintiffs' due process "right to be heard," the dissent argued that a similar constitutional concern existed in this case as well.[79] Accordingly, the dissent would have remanded the fee determination to the superior court for consideration of whether the award will "impair the constitutional right of access to the courts."[80]

In addition to the access issue, the subcommittee took a hard look at two other fee-shifting issues: the lack of uniformity in fee awards when the prevailing party did not receive a monetary judgment, and the absence of a requirement that trial judges articulate the reasons for an award when the schedule does not apply (absent full or nearly full fee-shifts).[81] At the first meeting of the subcommittee, a majority voted that no changes to the existing fee-shifting regime were necessary.[82] Interestingly, this initial result mirrored the prevailing opinion of the Alaska Bar.

Penney Co., 512 P.2d 575, 588 (Alaska 1973)) (Matthews, J., dissenting).

77. *Id.* at 6 (Matthews, J., dissenting).

78. *Id.* (quoting Malvo v. J.C. Penney Co., 512 P.2d 575, 587 (Alaska 1973)) (Matthews, J., dissenting).

79. *Id.* (Matthews, J., dissenting).

80. *Id.* (Matthews, J., dissenting). The dissent also noted the frequency with which this issue has arisen in wrongful discharge claims and suggested that awards in such cases not exceed a fraction of the former employee's annual income. *Id.* (citing Van Huff v. SOHIO Alaska Petroleum Co., 835 P.2d 1181 (Alaska 1992) (affirming award of $117,251.50 against an employee despite evidence that it would take employee 10 years to repay the fee; fee award justified by complex pretrial discovery and fact that it was only 30% of employer's actual fees); Zeilinger v. SOHIO Alaska Petroleum Co., 823 P.2d 653 (Alaska 1992) (holding fee award of $80,470 to employer to be excessive)) (Matthews, J., dissenting).

81. See *supra* text accompanying notes 44-45.

82. Robert Richmond, Civil Rule 82: Status of Review 1 (unpublished handout distributed at 1992 meeting of the Anchorage Bar Association) (on file with the Alaska Judicial Council).

According to a survey of the Bar conducted in March of 1992 by the Civil Rules Committee,[83] a majority of the respondents opposed rescinding or substantially amending Rule 82.[84] Surprisingly, the responses remained relatively consistent across lines of representation. In other words, although the strength of their support differed somewhat, both plaintiffs' and defense attorneys favored retention of the existing rule.

Specifically, seventy percent of survey respondents reported that Rule 82 did not deter plaintiffs of moderate means from filing claims.[85] Common explanations were that attorneys sometimes failed to inform clients about the effect of Rule 82, that many plaintiffs did not initially consider the possibility of losing, and that often such plaintiffs remained unconcerned because they were ultimately judgment-proof.[86] Many practitioners indicated that other factors, such as a plaintiff's own attorney fee obligation, acted as a greater deterrent than did Rule 82.[87] Some wrote that Rule 82 had the positive effect of deterring only frivolous or non-meritorious claims.[88] In contrast, the minority view generally asserted that Rule 82 deterred plaintiffs of moderate means from filing valid claims against the government or large business entities and contended that powerful defendants often exploited Rule 82 by consciously incurring large attorney fees to hurt private plaintiffs.[89]

Over two-thirds of those surveyed indicated that former Rule 82 did not put excessive settlement pressure on moderate income

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83. The survey presented "yes or no" questions with space for respondents to supplement their answers with written comments. A summary of these comments, in conjunction with the numerical percentages, provides a great deal of insight into the perceived effects of former Rule 82. *See* Memorandum from Douglas Phillips & David Greene, Law Clerks, to The Honorable Daniel A. Moore, Jr., Alaska Supreme Court (May 4, 1992) (on file with *Alaska Law Review)* [hereinafter "Phillips & Greene Memorandum"].

Although the questionnaire is a useful source of information regarding how Rule 82 functions in practice, it should be remembered that attorneys' interests are not always aligned with those of their clients, who bear the financial burden of Rule 82's sanctions. *See infra* notes 168-173, 196-197, and accompanying text.

84. *See infra* Appendix for a full summary of the survey's numerical results for "yes or no" questions.

85. *See infra* Appendix (referring to question one).

86. Phillips & Greene Memorandum, *supra* note 83, at 3.

87. *Id.*

88. *Id.*

89. *Id.*

litigants.[90] Rather, many attorneys noted that Rule 82 required plaintiffs to assess their claims more realistically, which would often result in the settlement of weaker claims.[91] Respondents who did feel that the settlement pressure was excessive frequently remarked that the amount of that pressure varied depending on the wealth of the opposing party. Thus, insurance companies and other large institutional defendants could exert tremendous pressure since they were able to spend more on their defense. Some such respondents commented that Rule 82 imposed devastating results in cases that did not settle.[92]

When asked straight-out whether they favored rescinding Rule 82, an overwhelming majority of respondents favored retention.[93] In written comments, practitioners praised the rule for encouraging settlement and deterring frivolous litigation.[94] They also remarked that the rule's official rationale, to compensate the prevailing party partially, was an inherently fair result.[95] Abolitionists argued, conversely, that "Rule 82 is unfair to those of moderate means because it deters them from bringing valid claims."[96] In one attorney's opinion, "[w]ealthy business corporations and insurance carriers are unfazed by the rule, while those of moderate means quake in their shoes at the thought of losing their homes."[97] Some plaintiffs' attorneys indicated that the structure of former Rule 82 allowed defendants to receive more than plaintiffs, who could recoup attorney fees generally only to the extent that the schedule provided.[98] Some additionally criticized the rule as being too subjective since it failed to provide guidance as to what constitutes an appropriate award.[99] The judicially created public interest exception also received criticism for not comporting with the underlying rationale of Rule 82.[100]

Although attorneys resoundingly favored retaining Rule 82, the most significant divergence of opinion between plaintiffs' and

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90. *See infra* Appendix (referring to question two).
91. *See* Phillips & Greene Memorandum, *supra* note 83, at 4.
92. *Id.*; see also *supra* notes 62-64 and accompanying text.
93. *See infra* Appendix (referring to question four).
94. *See* Phillips & Greene Memorandum, *supra* note 83, at 6.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 7; see *infra* text accompanying note 184.

defense lawyers occurred over the questions that specifically focused on elements of the *Bozarth* access issue. Two-thirds of the respondents felt that the courts should not consider a party's ability to pay when taxing fees.[101] Many practitioners argued that fairness required the rule to be applied uniformly or not at all.[102] Others worried that consideration of a party's ability to pay would have the following negative effects: add too much complexity to the system; "encourage perpetual litigants and spurious suits;"[103] create too much uncertainty, thereby hampering settlements; or turn the proceedings into a "welfare contest."[104] Proponents of the ability-to-pay criterion, on the other hand, generally indicated that this consideration was essential to preserving access to the courts.[105] Several of these commentors noted that former Rule 82 had driven some plaintiffs into bankruptcy.[106]

Finally, attorneys offered additional comments that focused on the underlying purposes of Rule 82.[107] One frequent comment was that Rule 82 was not intended to be a weapon against frivolous litigation.[108] Rule 82 was designed to compensate prevailing parties only partially, and if deterrence of frivolous litigation is desired, there should be a separate rule earmarked with this particular goal.[109] Many respondents commented that any such rule aimed at deterring frivolous litigation should focus on attorneys, rather than on their clients.[110] Since attorneys are better able to judge whether a claim has merit, Alaska Civil Rule 11 is the proper means for deterring frivolous litigation, according to many.[111] Finally, some respondents remarked that the subjective and unpredictable application of Rule 82 precluded any deterrence effect whatsoever.[112]

After reconsideration and weighing of the preceding concerns, the Civil Rules subcommittee recommended revising Rule 82. The

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101. *See infra* Appendix (referring to question five).
102. Phillips & Greene Memorandum, *supra* note 83, at 8.
103. *Id.*
104. *Id.*
105. *Id.* at 9.
106. *Id.*
107. See *infra* Appendix (referring to question three) and note 212
108. Phillips & Greene Memorandum, *supra* note 83, at 5.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

proposed changes addressed two primary concerns: "(1) the lack of uniformity in fee awards when the prevailing party does not recover a money judgment; and (2) the absence of a requirement that trial judges articulate the reasons for an award."[113] The subcommittee suggested applying a fixed percentage of reasonable fees incurred, either thirty or thirty-five percent, to calculate non-schedule based awards.[114] Additionally, the subcommittee recommended the following set of factors to be considered by the trial court in deviating from the schedule or the fixed percentage: the complexity of the litigation, length of the trial, reasonableness of the attorneys' hourly rates, reasonableness of the number of attorneys used, diligence in efforts to minimize fees, willingness to reach a settlement agreement, reasonableness of claims and defenses pursued by each side, the relationship between the amount of work performed and significance of the matters at stake, as well as other relevant equitable factors.[115] Any variation would have to be explained in reference to these factors.[116]

The subcommittee specifically rejected adding an equitable factor to Rule 82 that would address the *Bozarth* access issue. Members speculated that an ability-to-pay factor would generate too much additional litigation and undermine the uniformity and fairness of Rule 82.[117] The Civil Rules Committee then voted to recommend that the Alaska Supreme Court adopt the subcommittee's proposed changes.[118]

On January 7, 1993, the Alaska Supreme Court issued Order No. 1118, which amended Civil Rule 82.[119] While the court adopted most of the subcommittee's recommendations, it also introduced a factor allowing trial judges to consider the non-prevailing party's ability to pay the opponent's fees. The order provides in relevant part:

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113. Memorandum from Christine Johnson, Esq., Court Rules Attorney, Alaska Court System, to Active Members of the Alaska Bar Association 1 (Sept. 24, 1992) (on file with *Alaska Law Review*).

114. *Id.* at 2.

115. *Id.* at 2-3.

116. *Id.* at 3.

117. *Id.* at 1.

118. *Id.* This vote was not unanimous; several members voted to eliminate the rule entirely, and two members voted to exclude the list of equitable factors. *Id.*

119. Alaska Supreme Court Order No. 1118 (Jan. 7, 1993) (amending Civil Rule 82 and Civil Rule 79). Justice Rabinowitz alone did not support amending Rule 82. *Id.* at 5-6 (Rabinowitz, J., dissenting).

1. Civil Rule 82 is repealed and reenacted to provide:
(a) Allowance to Prevailing Party.
Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) Amount of Award
(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

[Schedule identical to that in former Rule 82]

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal, or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;
(B) the length of trial;
(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
(D) the reasonableness of the number of attorneys used;
(E) the attorneys' efforts to minimize fees;
(F) the reasonableness of the claims and defenses pursued by each side;
(G) vexatious or bad faith conduct;
(H) the relationship between the amount of work performed and the significance of the matters at stake;
(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by

> others against the prevailing party or its insurer; and
> (K) other equitable factors deemed relevant.
>
> If the court varies an award, the court shall explain the reasons for its variation.
>
> . . . .
>
> (e) Effect of Rule. The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.
>
> 2. By adopting these amendments to Civil Rule 82, the court intends no change in existing Alaska law regarding the award of attorney's fees for or against a public interest litigant, . . . or in the law that an award of full attorney's fees is manifestly unreasonable in the absence of bad faith or vexatious conduct by the non-prevailing party.[120]

IV. AMENDED RULE 82 AND ITS PROBABLE EFFECTS

Amended Rule 82, which became effective on July 15, 1993, changed the Alaska fee taxation scheme significantly. First, and perhaps foremost, the new rule dispenses with the wide flexibility that trial judges had to determine the appropriate percentage of fees to tax when the prevailing party did not recover a monetary judgment. Instead, amended Rule 82 fixes non-schedule based recovery at "30 percent of the prevailing party's actual attorney's fees which were necessarily incurred" for cases going to trial, and 20 percent for cases not going to trial.[121] Procedurally, Rule 82 still requires trial courts to scrutinize fee petitions to verify that the attorney's fee represents actual expenses necessarily incurred.[122] Although the language of the new rule is slightly modified, it appears that judges will engage in the same basic reasonableness determination that occurred under the pre-amendment rule. The real difference is that absent variation under subsection three, judges no longer estimate the appropriate fraction of the fee to shift.

The effect of this new standard clearly benefits plaintiffs vis-a-vis defendants. Prevailing plaintiffs, who receive monetary judgments, still receive their awards based on the schedule, which

120. ALASKA CIV. R. 82.
121. ALASKA CIV. R. 82(b)(2).
122. See *supra* text accompanying notes 50-54.

remains the same as under the pre-amendment rule. With this provision, plaintiffs will also be able to predict more accurately the size of the fee award that they will be responsible for should they lose. Prevailing defendants, on the other hand, no longer should receive awards in the range of forty to eighty percent of their actual fees, which was common under the former regime.[123] One Alaska attorney observed that "a review of [s]upreme [c]ourt opinions reveals that the typical award of attorney's fees is usually closer to fifty percent than to thirty or thirty-five percent."[124] Another defense practitioner argued that "creating a cap at anything less than 60% of actual attorneys' fees encourages non-meritorious litigation, reduces the chance of early settlement, and maximizes the chances of a full trial, at considerable expense to the parties and the court system."[125] Although it seems improbable that the new standard tilts the balance of power far enough to have such drastic effects on the litigation process, the provision obviously is designed to address the *Bozarth* access issue by limiting the size of defense awards.

Plaintiffs have a bona fide complaint, however, that the structure of the amended rule continues to institutionalize inequitable fee awards favoring defendants. By confining prevailing plaintiffs to the schedule while allowing prevailing defendants to recover a fixed, albeit lower than pre-amendment, percentage of their actual fees, gross disparity can result between the two parties' potential fee recoveries. Consider the following hypothetical posed by a practitioner:

> For instance in a personal injury case where there was a $50,000.00 judgment, a prevailing plaintiff would receive . . . a total award of about $7,500.00. In the same hypothetical, if a plaintiff's verdict did not exceed defense offers of judgment, the trial court [would] award defendant prevailing party attorney fees based on [thirty percent] of actual [post-offer] fees. In my experience, actual defense costs in a moderate-size personal injury case start at $30,000.00 and escalate rapidly. In this example, I cannot foresee an instance where a prevailing

123. See *supra* text accompanying note 57.

124. Memorandum from Jon T. Givens, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 1 (Oct. 9, 1992) (on file with *Alaska Law Review*).

125. Memorandum from Mark E. Wilkerson, *supra* note 57, at 2.

> defendant would not obtain a substantially larger award than a prevailing plaintiff.[126]

The imbalance appears especially acute in the preceding hypothetical since there is both a monetary award, from which a schedule-based calculation can be made, and a prevailing defendant, requiring application of the new fixed-rate standard. This imbalance also exists independently of Rule 68. One attorney estimated that in the vast majority of small cases, thirty percent of the actual defense fees will far exceed the amount of attorney fees the prevailing plaintiff can recoup under the schedule.[127] While the ideology behind the new fixed rate for non-monetary judgments is a valid consideration, the amendment may fail to redress adequately the inherent asymmetry between the schedule and fixed-rate methods of fee taxation for plaintiffs and defendants respectively.

Another major change to Rule 82 is the addition of a list of factors under which trial courts may vary awards calculated under either the schedule or the fixed-rate approach.[128] The Civil Rules Committee recommended the inclusion of many of these factors as a means of guiding judges when the schedule or fixed percentage seems inappropriate.[129] The factors generally address the unique aspects of the litigation at issue, the reasonableness of the parties' behavior, and the considerations of vexatiousness, bad faith, or other improper motive—all legitimate bases for deviating from the schedule according to the case law surrounding former Rule 82.[130]

The amended rule also contains a more controversial factor that allows trial judges to consider "the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts."[131] The rule's wording targets the *Bozarth* access issue, but it does not articulate any specific standard for trial judges to apply. This vagueness may be intended to avoid the criticism that the "relative ability to pay" and "ability to pay" criteria garnered

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126. Memorandum from Loren Domke, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 1-2 (Oct. 2, 1992) (on file with *Alaska Law Review*).

127. Memorandum from J. Glen Harper, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 2 (Oct. 14, 1992) (on file with *Alaska Law Review*).

128. ALASKA CIV. R. 82(b)(3).

129. See *supra* text accompanying notes 115-116.

130. *See supra* notes 22-31 and accompanying text.

131. ALASKA CIV. R. 82(b)(3)(I).

from the Alaska Bar.[132] However, the Civil Rules Committee rejected even the spirit of the *Bozarth* criteria for the reasons that they would create an unfair lack of uniformity and "would generate too much additional litigation."[133]

Indeed, how will a trial judge be able to determine when an award will have a deterrent effect on subsequent plaintiffs without engaging in an in-depth review of the parties' individual ability to pay? In all likelihood, future adjudicators will need to look at financial statements of losing plaintiffs. As a result, the relative financial strength of such plaintiffs compared to large institutional defendants may be used as a proxy for identifying particular situations where future litigants are likely to be deterred (e.g., the employment law context). This provision is sure to generate a considerable amount of spin-off litigation.

The inclusion of a laundry list of other equitable factors is also certain to generate a new body of case law. On the positive side, setting out the factors in the text of the rule could increase the uniformity of the reasoning process among judges exercising their equitable powers. Accordingly, fee awards might become more predictable. Common sense, however, dictates that subparagraph (b)(3) will spawn numerous appeals where trial judges "failed to take into consideration one factor or another, or placed too much emphasis on some factor or considered a factor which was not truly an 'equitable factor' under [subpart (K)]." [134] Given the sheer number of these factors and their vague wording, virtually any prevailing party will be able to find an avenue to request enhanced fees.[135] Justice Rabinowitz, in his dissent from the court's amendments of Rule 82, foresaw that these new provisions "will unnecessarily and dramatically increase litigation over attorney's fees awards both in our trial courts as well as in this court."[136] Any attorney "worth his or her salt" will request variations from either the schedule or the fixed rate.[137]

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132. See *supra* text accompanying notes 101-104.

133. Memorandum from Christine Johnson, *supra* note 113, at 1.

134. Memorandum from James M. Powell, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 2 (Oct. 9, 1992) (on file with *Alaska Law Review*).

135. Memorandum from Loren Domke, *supra* note 126, at 2.

136. Alaska Supreme Court Order No. 1118, at 5-6 (Jan. 7, 1993) (Rabinowitz, J., dissenting).

137. *Id.* at 6 n.2 (Rabinowitz, J., dissenting).

An additional noteworthy change to Rule 82 involves the addition of a provision that allows the parties to "contract around" the rule privately. The amended rule states that a prevailing party is generally awarded attorney fees "[e]xcept as otherwise provided by law *or agreed to by the parties*."[138] Thus, parties now can decide to adopt the American rule, or some other alternative, if it better serves their mutual purposes. The reasoning behind this provision appears to be that parties are aware of the peculiarities of their transaction or relationship and are therefore better able to tailor a fee arrangement to fit the nature of their anticipated litigation. Assuming that transaction costs are not prohibitively high, and that parties will contract around Rule 82 on occasion, settlement rates will theoretically approach those of jurisdictions with different legal rules.[139] This provision should encourage the Alaska Bar to develop a highly refined body of contractual language that would be widely used and, in some circumstances, more efficient than the existing rule.

Finally, the amended version of Rule 82 alters the treatment of paralegal expenses. Previously, several opinions of the Alaska Supreme Court held that paralegal expenses are a cost item treated under Civil Rule 79(b).[140] Consequently, trial judges often had to handle appeals concerning paralegal costs in a proceeding separate from the attorney fee taxation under Rule 82.[141] Rule 82(b)(2) rectifies this situation by including "fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk" as actual fees.[142] This new provision will streamline the process for computing paralegal expenses by treating them as a portion of normal

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138. ALASKA CIV. R. 82(a) (emphasis added).

139. *See* John J. Donohue III, *Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1095 (1991) (discussing the Coase Theorem, which implies that litigants will select a fee-allocation rule that generates greater total expected wealth).

140. *E.g.*, Yurioff v. American Honda Motor Co., 803 P.2d 386, 390-91 (Alaska 1990); CTA Architects v. Active Erectors & Installers, Inc., 781 P.2d 1364, 1367 (Alaska 1989); Smith v. Shortall, 732 P.2d 548, 550 n.1 (Alaska 1987); Atlantic Richfield Co. v. State, 723 P.2d 1249, 1253 (Alaska 1986); *see also* Memorandum from Ed Husted, Lawyer Support Services, to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 1 (citing Frontier Cos. v. Jack White Co., 818 P.2d 645, 653 (Alaska 1991)) (on file with *Alaska Law Review*).

141. Memorandum from Ed Husted, *supra* note 140, at 3.

142. ALASKA CIV. R. 82(b)(2).

legal fees; trial judges will engage in a single review of all legal services rendered to the prevailing party.[143] In addition to producing greater administrative efficiency, this provision may well reduce the size of legal fees by encouraging firms to use paralegals for genuine surrogate attorney work—at a greatly reduced cost.[144] Finally, as one attorney noted, this revision will eliminate the practice of using paralegals for needless administrative tasks, since it will no longer be possible to obtain reimbursement for these overhead clerical services under Rule 79.[145]

V. The Underlying Rationales for Fee Shifting in Alaska—Is Rule 82 the Proper Mechanism for Achieving These Goals?

Although Alaska's fee-shifting system has grown more complex over the years, with a vast body of case law and several amendments, the official purpose of Rule 82 has remained the same: partial compensation of the prevailing party's attorney expenses.[146] The debate preceding the recent amendment to Rule 82, however, confirms that fee shifting remains in effect in Alaska not merely because of its stated purpose, but rather because of its total perceived beneficial effects on the litigation process: a greater level of fairness, indemnity of the winner, a punitive function, a "private attorney general" effect, and a settlement incentive.[147] Despite the desirability of each of these rationales, Rule 82, in its past or present form, is not the most effective mechanism for achieving these results.

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143. Memorandum from Ed Husted, *supra* note 140, at 3.

144. *Id.*

145. Memorandum from John Suddock, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 1-2 (Oct. 3, 1992) (on file with *Alaska Law Review*).

146. *See supra* notes 18-19 and accompanying text.

147. The author has arrived at these rationales by consulting written responses from the Civil Rules Committee Rule 82 questionnaire, see Phillips & Greene Memorandum, *supra* note 83; comments of the Civil Rules Subcommittee, see Memorandum from Christine Johnson, *supra* note 113; and memoranda from the Alaska Bar which helped shape the amended version of Rule 82, see, e.g., Memorandum from Robert M. Libbey, *infra* note 153; Memorandum from Allison Mendel, *infra* note 167. The categories represent the fee-shifting goals most frequently articulated by these sources. *See also generally* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 (1982).

A. Fairness and Indemnity

Rule 82 was not designed to punish the losing party for pursuing a good faith claim or defense, but rather to indemnify the winner partially.[148] The purpose articulated by the Alaska Supreme Court, on its face, is tautological—justice simply requires partial indemnity.[149] The most persuasive underlying argument for indemnity is that the prevailing party, by virtue of being adjudged legally in the right, should not be required to absorb all of the costs incurred in vindicating his or her position.[150] The problem with this rationale, however, is that the funds used to indemnify come from the losing party's pocket. While the winner may have an equitable justification for reimbursement, the loser often has a cogent conflicting equity: "[a] defeated party . . . may frequently appear to have been justified and reasonable in pressing a strong but ultimately unsuccessful claim or defense."[151] Although the Alaska scheme attempts to accommodate this tension by allowing only partial indemnity, even a fraction of a large corporate defendant's fees is sizeable enough to deter small plaintiffs from using the courts or, in the alternative, to drive them into bankruptcy.

Litigation outcomes are often unpredictable, and the right to have one's day in court is a central concern of the American legal system. Ninth Circuit Judge Andrew Kleinfeld, while still a plaintiffs' attorney in Alaska, observed: "Attorneys' fee awards imply that the loser should have recognized that the winner was right, and not fought the claim. The implication is often unfair in contract (and tort) claims where considerable justice can be found on both sides."[152] The following commentary provided by another Alaska attorney describes the resulting inequity:

> [T]he harshness of the rule as it falls on some persons with legitimate claims for relief, is an inequity that the judicial system can do without. I have seen a number of people driven into

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148. "The purpose of Civil Rule 82 is to partially compensate a prevailing party for the costs and fees incurred where such compensation is justified and *not to penalize a party for litigating a good faith claim*." Malvo v. J. C. Penney Co., 512 P.2d 575, 588 (Alaska 1973) (emphasis added).

149. Rowe, *supra* note 147, at 654.

150. *Id.*

151. *Id.* at 655.

152. Andrew J. Kleinfeld, *On Shifting Attorneys' Fees in Alaska: A Rebuttal*, JUDGES' J., Summer 1985, at 39, 41.

> bankruptcy by an adverse ruling in a case that clearly deserved a determination of the merits. Yet, the cost judgment drove a middle class family with modest means into bankruptcy. Such harsh results inevitably lead to a restriction on the access to our judicial system.[153]

Amended Rule 82 addresses the access issue by fixing the non-monetary judgment recovery at thirty percent of the actual fees and by including a deterrence factor via equitable variation. As discussed previously, however, there still seems to be an imbalance between the size of schedule-based awards, which usually go to prevailing plaintiffs, and fixed-rate awards, which are typically recoverable by prevailing defendants.[154] Moreover, it is questionable to what extent the *Bozarth* access factor[155] will succeed in preventing the prospect of large fee awards from deterring plaintiffs of moderate means from using the courts. There also remains a strong possibility that non-prevailing parties will be forced into bankruptcy merely by bringing a losing claim or defense in good faith. Accordingly, it is debatable whether Rule 82, even as amended, leads to litigation outcomes fairer than those which typically occur under the American rule.[156]

The indemnity argument further breaks down when a party who receives a favorable court judgment becomes a "losing" party because the size of the award does not exceed the amount of a Rule 68 settlement offer.[157] Rule 68 is designed as a settlement device, but to the extent that it shifts attorney fees in addition to costs, it should comport with the articulated partial-indemnity rationale of Rule 82 as well. While one may plausibly assert that trials usually achieve the fair result as to liability, it is a stretch to argue that the amount of monetary judgment accurately gauges the legitimacy of the claim or defense. "It is arbitrary to penalize litigants who made offers within the average [or rejected offers outside the average], but lost because their particular case did not

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153. Memorandum from Robert M. Libbey, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 1 (Oct. 5, 1992) (on file with *Alaska Law Review*).

154. See *supra* text accompanying notes 126-127.

155. *See* ALASKA CIV. R. 82(b)(3)(I).

156. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1634-35 (1993) ("Litigation of basic rights [is] not to be discouraged by rules that den[y] access to the courts.").

157. *See supra* notes 59-64 and accompanying text.

produce the average result."[158] Often, the amount of the offer barely exceeds the judgment, but being close makes no difference. "It is like a sporting contest where one side gets the trophy whether the score was 7 to 6 or 7 to 1."[159] Moreover, litigants rely on their attorneys' advice in valuing their claims; but it is the client, not the attorney, who shoulders the burden when the judgment falls short of the Rule 68 offer.

In sum, partial indemnity of the prevailing party is unconvincing as the articulated purpose of Rule 82. Even the Alaska Supreme Court realizes this, since it has carved out exceptions to the rule for public interest litigants,[160] decreased the percentage of actual fees that prevailing defendants are entitled to recover,[161] and added language that allows trial judges to consider equitable factors such as the access issue in setting fee awards.[162]

B. Punitive Function and Deterrence of Frivolous Litigation

Alaska recognizes a common law exception to the precept that only partial fees may be shifted under Rule 82: "[f]ull or substantially full attorney's fees may be awarded if the trial court finds that the losing party acted in bad faith in asserting a claim or defense."[163] This policy resembles the federal courts' bad faith exception to the American rule, which applies when "a party refuses to recognize a clear legal right or engages in bad faith conduct in litigation."[164]

While penalizing bad faith litigation seems justified, it is not clear that fee shifting provides the optimal measure of deterrence or punishment. The strongest scenario supporting this policy is when the misconduct itself causes unnecessary legal expenses. Often, however, even if no additional legal expenses are incurred,

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158. Memorandum from Paul W. Waggoner, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 1 (Oct. 6, 1992) (on file with *Alaska Law Review*).

159. *Id.*

160. *See, e.g.,* Loeb v. Rasmussen, 822 P.2d 914, 921 n.18 (Alaska 1991); Citizens Coalition For Tort Reform v. McAlpine, 810 P.2d 162, 171 (Alaska 1991); Anchorage Daily News v. Anchorage School Dist., 803 P.2d 402, 404 (Alaska 1990).

161. ALASKA CIV. R. 82 (b)(2).

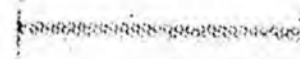
162. ALASKA CIV. R. 82 (b)(3).

163. Alaska N. Dev., Inc. v. Alyeska Pipeline Serv. Co., 666 P.2d 33, 42 n.9 (Alaska 1983), *cert. denied*, 464 U.S. 1041 (1984).

164. *See* Rowe, *supra* note 147, at 661.

vexatious litigation imposes a host of external costs such as delaying other litigants' cases and burdening the court system. Moreover, Rule 82's deterrence effect may depend more on the wealth of the party than on the strength of the claim or defense.[165] The rule will not deter parties who are judgment-proof, no matter how misguided the suit.[166] Similarly, wealthy parties are likely to remain undaunted. However, "[m]iddle income plaintiffs who may have viable and well-founded lawsuits may be deterred because of the potentially disastrous consequences of a fee award against them."[167] Therefore, Alaska's fee-shifting regime may not provide the most effective means of punishment in many contexts.

Another significant problem with the deterrence rationale is that punitive fee shifts under Rule 82 punish the losing party for conduct that is the attorney's responsibility. It is the attorney, not the client, who is trained to decide whether or not a claim has merit. Alaska Civil Rule 11, which directs sanctions at the attorney, is the proper means to combat frivolous litigation.[168]



The purpose of Rule 11 is to encourage the good faith behavior of counsel "by holding them strictly accountable for all

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165. An empirical study of the effects of a two-way fee-shifting statute applied to medical malpractice cases in Florida concluded that plaintiffs dropped more claims under the English rule than under the American rule, but that the tendency of the former to increase defense expenditures suggests that risk aversion, rather than lack of merit, might be the primary incentive for abandoning these claims. Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345, 377-78 (1990); see also *infra* note 185.

166. One author observes that since successful defendants are unable to collect their fees from insolvent plaintiffs, the Alaska system, in practice, results in a one-way shift in favor of bankrupt complainants. Vargo, *supra* note 156, at 1624.

167. Memorandum from Allison Mendel, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 1-2 (Oct. 15, 1992) (on file with *Alaska Law Review*).

168. Rule 11 provides in pertinent part:

> Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his 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 for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation.

ALASKA CIV. R. 11.

allegations contained in the complaint."[169] Before 1989, the rule mandated that the trial court impose "'an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleadings, motion, or other paper, including a reasonable attorney's fee.'"[170] This language is identical to that contained in the federal version of Rule 11.[171] The 1989 amendment to Alaska's Rule 11, however, diluted the strength of this already weak rule by removing the mandatory sanction provision.

Currently, when bad faith litigation occurs, the client typically bears the brunt of the penalty in the form of full attorney fees under Rule 82. In contrast, the attorney often receives a token penalty.[172] In the Civil Rules Committee questionnaire, many respondents commented that deterrence of frivolous litigation was an inappropriate goal of Rule 82 and instead advocated the use of stronger sanctions under Rule 11.[173] The fact that a number of respondents favored more stringent sanctions on themselves, combined with the obvious reality that attorneys are more accountable for the methods of litigation than are their clients, demonstrates that a stronger Rule 11 is a better weapon against frivolous or bad faith litigation than imposing full attorney fee expenses on the hapless client.

C. Private Attorney General Effect

Public interest litigation is another common law exception to the norm of partial fee recovery by the prevailing party. The amendment to Rule 82 preserves this exception,[174] which allows full recovery of fees to prevailing public interest plaintiffs (even if they prevail only on one of many theories) and denies any reimbursement to defendants who win in public interest litiga-

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169. Sanuita v. Common Laborer's and Hod Carrier's Union, 402 P.2d 199, 200 (Alaska 1965).

170. Alaska Civ. R. 11 (amended 1989).

171. *See* FED. R. CIV. P. 11.

172. *See* Keen v. Ruddy, 784 P.2d 653, 659 (Alaska 1989) (rejecting an argument that a $100 Rule 11 sanction was too low compared to the attorney fees imposed against the attorney's client; sanction carried with it a stigma and a message of disapproval, and the trial court reasonably could have considered this penalty sufficient to punish the attorney for his conduct).

173. *See supra* text accompanying notes 108-111.

174. *See* Alaska Supreme Court Order No. 1118, at 4 (Jan. 7, 1993).

tion.[175] The evolution of this doctrine began with the policy decision in *Gilbert v. State*[176] that "it is an abuse of discretion to award attorneys' fees against a losing party who has in good faith raised a question of genuine public interest before the courts."[177] The court reasoned that this holding flowed from the articulated purpose of the rule: "[i]t is not the purpose of Rule 82 to penalize a party for litigating a good faith claim but rather partially to compensate the prevailing party where such compensation is justified."[178] The *Gilbert* decision, however, rests on infirm ground because virtually all litigants, except those found to be acting in bad faith, perceive that they are advancing their claim or defense in good faith and that other parties stand to benefit from their litigation in the future. Nevertheless, in a subsequent case, the supreme court relied upon the questionable logical foundation of *Gilbert* as a basis to authorize full compensation of attorney fees to successful public interest plaintiffs.[179]

The court's reasoning that the private attorney general principle logically flows from the rationale behind Rule 82[180] fails to support adequately the public interest exception. A more appropriate rationale is that public interest litigants need a financial incentive to bring socially beneficial suits when the cost of the litigation exceeds the plaintiff's expected private benefit.[181] If the public interest plaintiff must bear the full cost of the proceeding, the right will be under-enforced. Examples include cases seeking to enforce rights with special social value, occasions when government agencies lack adequate resources to promote the public interest, and claims that will benefit a large number of people if successful.[182] One-way pro-plaintiff fee shifting in civil rights claims at the federal level promotes this private attorney general function.[183]

175. *See supra* notes 28-29 and accompanying text.

176. 526 P.2d 1131 (Alaska 1974).

177. *Id.* at 1136.

178. *Id.* (citing Malvo v. J. C. Penney Co., 512 P.2d 575, 587 (Alaska 1973)).

179. *See* City of Anchorage v. McCabe, 568 P.2d 986, 993-94 (Alaska 1977).

180. *Id.*

181. *See* Rowe, *supra* note 147, at 662-63.

182. *Id.* at 662.

183. The United States Supreme Court has stated that the central purpose of the one-way pro-plaintiff fee shifting under Title VII is "to vindicate the national policy against wrongful discrimination by encouraging the victims to make the wrongdoers pay at law—assuring that the incentive to such suits will not be

The problem with public interest fee shifting in Alaska, however, is that the exemption fundamentally conflicts with the spirit of the rule. Why should *prevailing* defendants be denied the partial attorney fees to which they are entitled under Rule 82, simply because the case is deemed in the "public interest"? One alternative approach would be to burden the public treasury with both the partial fee award owed to prevailing public interest defendants as well as the difference between the partial and full-fee award owed to prevailing public interest plaintiffs. However, as to the latter, it would be both unfair and impractical to collect the fees from the public rather than the defendants whose very conduct warrants deterrence.[184]

In sum, although the stated purpose of Rule 82 fails to justify the one-sided protection given to special interest plaintiffs, the public interest exception serves an important function—providing a financial incentive for certain types of litigation. Therefore, this "exception" should be retained, but the rule or its stated purpose should be modified to achieve greater consistency.

D. Settlement Incentive

Alaska's fee-shifting arrangement combines partial two-way fee shifting, contingency fee arrangements, and an offer-of-settlement device. The precise impact of Alaska's rules on settlement rates, therefore, differs from that of a pure "loser pays" system, which has been the subject of numerous articles. In order to estimate the possible settlement incentives created by Alaska's unique rules, one can refer to current economic models. However, the complexity of Alaska's fee-shifting scheme makes it virtually impossible, using models that assume risk neutrality,[185] to determine the effect of Rule 82 on the rate of settlement. One point that does emerge is that risk aversion may be a crucial factor contributing to higher settlement rates among middle-income plaintiffs.

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reduced by the prospect of attorney's fees that consume the recovery." Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 761 (1989) (citing Newman v. Piggie Park Enters., 390 U.S. 400, 401-02 (1968)).

184. *See* Rowe, *supra* note 147, at 673.

185. "Risk aversion," the preference for a certain outcome over a risky one of equal or greater expected value, is a trait common to plaintiffs, while defendants often exhibit "risk neutrality" or "risk affinity." *See* Vargo, *supra* note 156, at 1593.

Law-and-economics scholars have analyzed the theoretical impact of full fee shifting on settlement rates and timing. Circuit Judge Richard Posner and Professor Steven Shavell have developed an economic settlement model which shows how the English rule leads "to the counterintuitive result of lower settlement rates."[186] The model illustrates that fee shifting adds more factors about which the parties can disagree during settlement negotiations. Accordingly, assuming risk neutrality, the parties' bargaining span will change, pushing them farther apart in their settlement effort.[187]

Professor John Hause reaches the opposite result with his own more recent model, which assumes that cases tend to cost more in a fee-shifting jurisdiction.[188] Since fee shifting raises the stakes of the litigation, it follows that parties will spend more on legal costs to influence the outcome.[189] Hause finds that settlement becomes more attractive under a fee-shifting rule because the prospect of higher trial expenditures increases the cost savings from settling, offsetting the increased number of factors upon which the parties potentially may disagree.[190] As legal expenditures increase, parties may also change their predictions regarding their chances of prevailing in court. It is possible that parties may adopt more realistic estimates of the likelihood of success at trial, since the increased legal expenditures will make more information available to them. These more reasonable expectations will bring the parties closer together despite the fact that increased expenditures tend to widen the gap between them. Conversely, the parties may become more optimistic about their chances of success at trial, thereby encouraging them to litigate rather than to settle.[191]

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186. Bradley L. Smith, Note, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2155 (1992).

187. Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 139, 157.

188. John C. Hause, *Indemnity, Settlement, and Litigation, or I'll Be Suing You*, 18 J. LEGAL STUD. 157, 176 (1989).

189. The Braeutigam-Owen-Panzar model predicts that absent risk aversion, any move away from the American rule will increase the costs in a contested case. Rowe, *supra* note 187, at 158 (citing Ronald Braeutigam, Bruce Owen, & John Panzar, *An Economic Analysis of Alternative Fee Shifting Systems*, LAW & CONTEMP. PROBS., Winter 1984, at 173, 180).

190. Hause, *supra* note 188, at 176.

191. Rowe, *supra* note 187, at 158.

These highly speculative and conflicting effects render an accurate prediction of the net effect of increased spending rather difficult.[192] The current prevailing opinion among law-and-economics scholars is that the English rule generally leads to higher settlement rates[193] because of the expected increase in trial expenditures and the parties' natural risk aversity.[194] This prediction has only a weak applicability to the Alaska scheme. Since partial indemnity, rather than full taxation of fees, is the standard practice in Alaska, it follows that the increase in trial expenditures will be less than under a pure English rule,[195] thereby reducing the settlement incentive. Consequently, no definitive conclusion can be drawn about the magnitude or direction of the settlement effect of the Alaska system, assuming risk neutrality.

Alaska attorneys also regularly employ contingency fee arrangements, which, to some extent, further complicate settlement incentives. Often, plaintiffs' attorneys will contract for one-third of the judgment, plus the attorney fee expenses obtained. Judge Kleinfeld, while still a practitioner, suggested that the broad support for Rule 82 among plaintiffs' attorneys indicates that they have interests different from those of their clients.[196] Kleinfeld maintained, in other words, that "attorneys on contingent fees almost always benefit economically from settlement rather than trial."[197] Kleinfeld's argument, however, applies to jurisdictions under the American rule as well. The only difference is that under their retainer agreements, Alaska attorneys may receive a small additional settlement bonus in the form of one-third of the schedule-based fee award for settled cases.

Economic modeling also supports the assertion that contingency fee arrangements do not alter the settlement incentive calculus. One commentator predicts the same result of increased settlements in two-way fee shifting in a contingency fee context, assuming that the parties bear the risk of indemnification, rather than their

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192. *Id.*

193. A recent empirical study in Florida, however, concluded that the settlement rate decreases under the English rule, despite the fact that more claims are initially dropped. *See* Snyder & Hughes, *supra* note 165, at 377. The authors attribute this increased preference for litigation vis-a-vis settlement to the theory that "optimistic litigants anticipate shifting their fees to their opponents." *Id.*

194. *See* Hause, *supra* note 188, at 176-77; Smith, *supra* note 186, at 2162.

195. Hause, *supra* note 188, at 177.

196. Kleinfeld, *supra* note 152, at 39.

197. *Id.*

attorneys.[198] This conclusion assumes that the client, not the attorney, bears the risk of paying the opposing party's attorney fees[199]—an assumption which coincides with the current practice in Alaska. Consequently, it is doubtful that the contingency fee arrangement has any greater impact on the settlement incentive in Alaska than it does in jurisdictions using the American rule.

Rule 68, the offer-of-settlement device, certainly affects the settlement process in the Alaska system. While the primary purpose of Rule 68 is to encourage the out-of-court resolution of cases, the offer device could, ironically, have the opposite effect when the parties agree about the odds of finding liability but disagree as to the proper amount of damages. Professor Thomas Rowe observes that such offer devices under an English system introduce a new element of disagreement between the parties; fee shifting becomes linked to the issue of damages rather than simply to the liability result.[200] Although it is uncertain whether Rule 68 increases the rate of settlement, it does provide an incentive to make realistic offers as early as possible in the litigation process, since the offeror may recover fees incurred after the date of the offer.[201] Moreover, the offer device should keep the parties honest in settlement negotiations by encouraging the defendant to estimate a reasonable offer that the plaintiff would have little chance of exceeding at trial, and by allowing the plaintiff to "hold out" for a settlement closer to his or her expected judgment.[202] Earlier and more reasonable settlements, therefore, may be Rule 68's primary contribution to the efficiency of the legal process.

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198. Smith, *supra* note 186, at 2186.

199. Strong arguments exist for placing the indemnification responsibility on the attorney. In addition to the deterrence rationale, *see supra* notes 168-173 and accompanying text, attorneys are able to diversify this risk over their pool of clients, while individual clients are typically one-time players in litigation who cannot bear the risk of indemnification adequately. *See* Note, *Fee Simple: A Proposal to Adopt a Two-way Fee Shift for Low-income Litigants*, 101 HARV. L. REV. 1231 (1988); Smith, *supra* note 186, at 2165.

In contrast, an added burden of attorney indemnification would exacerbate the already strong settlement incentive which attorneys have in contingency fee arrangements. *Id.* at 2166. Additionally, absolving the client of the responsibility for his or her decisions inverts the role of the attorney as an adviser who must ultimately abide by a client's decision to accept an offer of settlement. *Id.* at 2165 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1984)).

200. Rowe, *supra* note 187, at 167-68.

201. *Id.* at 169.

202. *Id.*

Since the combined effect of Rule 82 and Rule 68 on the rate of settlement is clouded by offsetting effects on both sides, the individual characteristics of the plaintiff and defendant assume overriding significance. In other words, the risk aversion and the marginal utility of wealth of the respective parties become crucial considerations.[203] By increasing the magnitude of parties' potential gains or losses, Rule 82, Rule 79 and Rule 68 combine to raise the stakes of litigation in Alaska. While "upping the ante" may make it easier for plaintiffs to retain attorneys in small cases, it may also "drive out the players whose resources do not allow them to stay at the table for a long enough time for the probabilities to work themselves out beyond a few bad hands."[204] Repeat players, such as large institutional defendants, are able to insulate themselves from loss by diversification, but individual plaintiffs are often one-time participants in the litigation process.[205] Consequently, plaintiffs, especially those of moderate means, are likely to be risk-averse. Fearing a harsh result,[206] risk-averse plaintiffs cannot prudently turn down defendants' offers, even if they are significantly less than the face value of the claim. Amended Rule 82 mitigates this result if the judge varies from the schedule or the fixed rate pursuant to one or more of the listed factors.[207] But if judges do in fact exercise their equitable powers in future cases, thereby causing risk-averse players to feel less compelled to settle, it is difficult to make any general prediction regarding the effect of Rules 82 and 68 on the rate of settlement.

VI. Conclusion

Although problems were evident, the pre-amendment form of Alaska Civil Rule 82 enjoyed strong attorney support. The amended version of the rule specifically addresses the rule's harsh effects on parties of limited means, but the new list of equitable factors adds an additional layer of complexity to a rule that already has been the source of numerous appeals.

To justify its considerable administrative expense, Rule 82 must prove its utility as a vehicle for accomplishing important

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203. *See id.* at 168.

204. Kleinfeld, *supra* note 56, at 52.

205. Rowe, *supra* note 187, at 142-43.

206. *See* Bozarth v. Atlantic Richfield Co., 833 P.2d 2 (Alaska 1992); see also *supra* text accompanying notes 62-64.

207. *See* ALASKA CIV. R. 82(b)(3).

policy objectives.[208] The rule's articulated purpose, partial indemnification of the prevailing party, is unconvincing. Moreover, there are more appropriate means for punishing bad faith litigants, and it is unclear whether any significant increase in settlement occurs, aside from that attributable to risk aversity. Although the rule may reduce the number of claims filed regardless of merit,[209] this result hardly justifies its existence.

The numerous exceptions and factors allowing for equitable variation now overshadow Rule 82's schedule-based simplicity, its most attractive aspect. As a result of attempts to retain some perceived benefits from fee shifting while simultaneously mitigating its harsh effects, the rule has evolved into such a prolix mechanism that it is no longer possible to theorize about its effects on the litigation process with any degree of accuracy. A thorough empirical study of the effects of amended Rule 82 should be conducted as soon as possible.[210] If the rule cannot be shown to achieve any useful purpose, it should either be abandoned or returned to a simpler form that explicitly states its purposes and justifies its policy tradeoffs.

Kevin Michael Kordziel

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208. "[I]t is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitively to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." O.W. Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897).

209. *See* Vargo, *supra* note 156, at 1635-36.

210. Apparently, the Alaska Judicial Council is scheduled to conduct just such a study. *See* Alaska Supreme Court Order No. 1118, at 6 n.1 (Jan. 7, 1993) (Rabinowitz, J., dissenting).

APPENDIX

EXCERPTS FROM THE CIVIL RULE 82 QUESTIONNAIRE[211]

(Responses received as of March 15, 1992)

1. Does Civil Rule 82 deter people of moderate means from filing valid claims?

	Yes		No		No Answer	
Plaintiffs' Attorney	69		127		9	
Defendants' Attorney	16		136		12	
Attorney for Both	36		108		14	
TOTAL	121	(23%)	371	(70%)	35	(7%)

2. Does Civil Rule 82 put excessive pressure on moderate income people to settle valid claims?

	Yes		No		No Answer	
Plaintiffs' Attorney	70		124		11	
Defendants' Attorney	21		133		10	
Attorney for Both	35		106		17	
TOTAL	126	(24%)	363	(69%)	38	(7%)

3. Is Civil Rule 82 needed in order to discourage frivolous litigation or do other factors, such as the litigant's own attorney's fees, litigation expenses, and the emotional stress of participating in a lawsuit, effectively discourage such cases?[212]

	Yes		No		No Answer	
Plaintiffs' Attorney	90		81		34	
Defendants' Attorney	90		57		17	
Attorney for Both	70		64		24	
TOTAL	250	(48%)	202	(38%)	75	(14%)

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211. The tabular data summarize the results of the "yes or no" questions from a survey of the Alaska Bar conducted by the Civil Rules Committee in March of 1992. The Alaska Bar Association includes approximately 3,000 members. Full questionnaire results are on file with the Alaska Judicial Council.

212. The numerical results of question three should be disregarded, since the question is written somewhat ambiguously. The high number of "no answer" responses seems to support this conclusion.

4. Should Civil Rule 82 be rescinded?

	Yes	No	No Answer
Plaintiffs' Attorney	32	169	4
Defendants' Attorney	29	132	3
Attorney for Both	26	120	12
TOTAL	87 (16%)	421 (80%)	19 (4%)

5. Should Civil Rule 82 be amended to allow the court to consider:

a. the non-prevailing party's ability to pay the prevailing party's attorney's fees?

	Yes	No	No Answer
Plaintiffs' Attorney	87	107	11
Defendants' Attorney	15	142	7
Attorney for Both	45	97	16
TOTAL	147 (28%)	346 (66%)	34 (6%)

b. the parties' relative ability to pay attorney's fees?

	Yes	No	No Answer
Plaintiffs' Attorney	79	106	20
Defendants' Attorney	13	143	8
Attorney for Both	37	105	16
TOTAL	129 (25%)	354 (67%)	44 (8%)

Getting sued is becoming one of life's inevitabilities. But it's less inevitable in some states than in others.

If you gotta get sued, get sued in Utah

Received
FEB 0 1994

By David Frum and Frank Wolfe

Ranking the most litigious states

1. District of Columbia
2. Rhode Island
3. Massachusetts
4. New Mexico
5. Nevada
6. Delaware
7. Florida
8. New York
9. New Hampshire
10. Washington
11. New Jersey
12. Connecticut
13. California
14. Maryland
15. Illinois
16. Michigan
17. Pennsylvania
18. Texas
19. Louisiana
20. West Virginia
21. Maine
22. Georgia
23. Missouri
24. Hawaii
25. Vermont
26. Ohio
27. Alaska
28. Alabama
29. Kentucky
30. Arizona
31. Mississippi
32. Minnesota
33. Oklahoma
34. Virginia
35. North Carolina
36. Montana
37. Iowa
38. South Carolina
39. Wyoming
40. Wisconsin
41. Colorado
42. Tennessee
43. Oregon
44. Idaho
45. Nebraska
46. Arkansas
47. South Dakota
48. Kansas
49. North Dakota
50. Indiana
51. Utah

Washington, D.C. is the most litigious place in America; Utah, the least.

WHERE ARE YOU most likely to hear from a lawyer if you're involved in a car accident? If you're deciding where to set up a medical practice, in which state are you most likely to be sued for malpractice? Which state has the highest concentration of trial lawyers?

There's no central database that tells you how many lawsuits there are in most states or how much money plaintiffs are winning, so FORBES decided to take a bold stab at quantifying litigiousness state by state. As far as we are aware, it's the first time anyone has attempted to do anything remotely like this.

To rank the states, we developed five proxies for litigiousness: the percentage of automobile accidents where lawyers get involved; the average cost for one year's malpractice insurance for an orthopedic surgeon; the number of members of a state's trial lawyers association per 100,000 population; how much each state's chief justice spent to win his last election; and the amount the largest city in each state paid in lawsuits against it in the last fiscal year.

We then ranked the states and the District of Columbia from 1 to 51 in each of the categories. Then we averaged each state's five scores to arrive at a final ranking. When states for one reason or another did not have a score in one of the five categories, we divided their total score by four instead. Where states tied on their overall average, we broke the tie against the state with the lowest mark in any one category: Arizona and Mississippi, for example, had the same average, but since Arizona's worst score was 15 and Mississippi's was 22, we ranked Arizona as the more litigious.

Scientific? Probably not. Fair? We think so.

The lower a state's score, the worse the legal climate. By a big margin, the District of Columbia finished in first place, with Rhode Island, Massachusetts, New Mexico and Nevada rounding out the top five. Utah was a comparably secure last place finisher.

Other highlights:

■ The survey confirms that juries in the city of Detroit are probably the most irresponsible in America. Orthopedic surgeons in Michigan—which ranks number one in medical malpractice litigiousness—pay an average malpractice premium of $100,000 a year, more than eight times as much as the median state in our survey. In Detroit the premium is in excess of $150,000 a year. Premiums for high-risk specialties, like obstetrics, are even higher. Detroit juries are also the most generous in awarding plaintiffs cash when they sue the city—six times as generous as those of the median city, Phoenix.

In showing how much big cities pay to settle lawsuits, we rank by the amount paid per capita. Thus Detroit (pop. 1,028,000) finishes ahead of New York City (pop. 7,323,000).

■ States notorious for their punitive damage awards, such as Texas and Alabama, have the most expensive judicial elections. Texas Chief Justice Thomas R. Phillips, for example, recently spent more than $2 million on his reelection bid. In most cases, the largest source of campaign contributions is trial bar. Does the money influence verdicts? We don't know, but campaign donors must think so.

■ Three states with bad reputations for litigiousness—New York, California and Texas—ranked surprisingly low: New York in 8th place, California in 13th and Texas in 18th. In all three cases, scores improved for the same reason, the relatively small number of trial lawyers in state associations. Omit that number, and New York's average would fall below even the District of Columbia's.

■ Litigiousness can be predicted by geography. Six of the ten most litigious states are in the Northeast. Seven of the ten least litigious states are in the Rocky Mountains or Midwest.

■ Most car accidents are routine affairs that ought to be handled by mail and a phone call or two to your insurance adjuster. But not in Maryland, Massachusetts, New Jersey and the District of Columbia, where more than 60% end up in a lawyer's hands.

■ The cost of malpractice insurance gives a good idea of the cost of malpractice litigation. In some states these averages conceal fantastic local variation: While orthopedic surgeons in rural New York pay some $33,000 a year in malpractice premiums, surgeons in Long Island's Nassau and Suffolk counties must cough up more than $117,000 per year. One caveat: The terms of malpractice insurance contracts vary somewhat from state to state, but—in our view—not so much that they distort the chart.

It should be noted that the sums

Each state's final score is the average of its rank in each of the five categories: auto litigation, malpractice litigation, number of trial lawyers, amount spent by its top judge, and municipal litigation. The lower the rank, the more litigious the state.

here vastly *understate* what litigation actually costs municipal taxpayers. We omitted workers' compensation, even though comp costs are lawyer driven, because they are not reviewed by state courts. We omitted school board and transit system liability, too, because in many smaller cities, one school board and transit system stretch across the entire county.

The municipal liability numbers are also affected by local peculiarities. Seattle ranks high in part because its local electrical utility is municipally owned, making the city liable for its torts. Boise, Idaho ranks as low as it does in part because virtually all the city's roads are owned by the state government—making the state responsible for lawsuits arising from accidents upon them. Some normally litigious states, like Texas, rank rela-

Ranking the states

State	% of auto accidents where claimee is represented by an attorney[1]	Rank	Average malpratice premium for orthopedic surgeon	Rank	Members of state trial lawyers association per 100,000 population	Rank	Amount spent by state chief justice on most recent election or retention campaign	Rank	Amount paid by state's largest city to settle liability claims and judgments	Rank
Alabama	15.4%	49	$12,860	26	44.5	17	$670,687	3	$1,000,000	31
Alaska	23.3	39	45,203	5	36.4	29	less than 1,000	20	930,679	30
Arizona	39.4	19	22,307	15	16.4	51	0	23	4,973,713	25
Arkansas	26.7	36	5,388	49	42.5	18	23,852	15	151,644	43
California	58.9	5	35,218	7	16.8	50	less than 1,000	20	57,164,392	7
Colorado	21.9	42	10,943	31	41.4	20	0	23	1,433,005	33
Connecticut	46.9	12	14,729	22	66.9	5	appointed	—	482,024	32
Washington, DC	61.1	3	25,023	10	53.5	12	appointed	—	13,990,000	5
Delaware	53.3	6	14,079	23	65.8	6	appointed	—	417,820	21
Florida	45.3	14	73,788	2	26.3	41	375,983	5	3,500,000	12
Georgia	43.6	17	13,360	24	38.6	26	0	23	2,598,595	17
Hawaii	31.8	28	24,500	12	24.4	44	appointed	—	5,560,489	8
Idaho	27.8	33	10,624	33	38.2	28	852	18	50,656	47
Illinois	47.2	11	21,764	16	21.9	45	178,324	10	36,273,000	10
Indiana	19.9	45	4,350	51	20.0	49	0	23	1,897,313	37
Iowa	16.9	48	9,462	37	39.6	21	less than 250	22	1,311,990	15
Kansas	17.0	47	6,232	47	36.3	30	0	23	870,684	35
Kentucky	24.9	38	10,383	35	46.1	16	51,658	13	NA	—
Louisiana	51.2	7	7,937	42	47.4	15	540,933	4	1,500,000*	34
Maine	33.9	26	10,050	36	73.3	3	appointed	—	362,234*	20
Maryland	65.7	1	19,287	18	31.4	35	NA	—	4,539,115	18
Massachusetts	62.6	2	36,190	6	33.2	34	appointed	—	7,980,000	9
Michigan	22.8	40	108,762	1	21.5	47	250,015	8	32,524,465	1
Minnesota	31.8	29	7,537	44	38.8	24	38,065	14	1,902,399	24
Mississippi	37.9	22	12,952	25	38.9	23	0	23	298,045	40

[1] 1987. *Current fiscal year. †Incurred. NA: Not available.

Sources: Insurance Research Council; St. Paul Fire & Marine; member companies of the Physician Insurers Association of America; Forbes.

tively low in this category because their state legislatures have adopted caps on municipal liability, which typically prevent juries from making awards in excess of $200,000 or $250,000 against a municipality.

There are many other local variations. Complications arising from these peculiarities prevented the figures from Columbia, S.C. and Charleston, W. Va. from being calculated in time to be used here.

One locality was suspiciously unwilling to help us. A secretive press aide in the Louisville, Ky. mayor's office refused to divulge that city's liability payouts unless told the contents of our story in advance. Either the Louisville mayor's office is terribly dumb or the aide was hiding something. ■

Ranking the states

State	% of auto accidents where claimee is represented by an attorney[1]	Rank	Average malpratice premium for orthopedic surgeon	Rank	Members of state trial lawyers association per 100,000 population	Rank	Amount spent by state chief justice on most recent election or retention campaign	Rank	Amount paid by state's largest city to settle liability claims and judgments	Rank
Missouri	34.1%	24	$23,395	13	28.3	38	0	23	$3,000,000	14
Montana	20.6	43	10,889	32	53.2	13	$209,304	9	38,685	46
Nebraska	18.6	46	4,359	50	38.6	25	0	23	2,282,741*	16
Nevada	38.4	20	28,739	9	79.0	2	350,198	6	1,09[illegible],980	29
New Hampshire	44.8	16	11,148	30	61.3	9	appointed	—	1,069,888	11
New Jersey	60.9	4	22,982	14	33.6	33	appointed	—	1,688,174	19
New Mexico	26.8	35	30,770	8	61.5	8	112,890	11	10,537,000	3
New York	45.1	15	65,451	3	25.0	43	appointed	—	219,000,000	2
North Carolina	32.5	27	7,320	45	57.3	10	65,550	12	310,478*	45
North Dakota	14.5	51	12,032	27	38.5	27	NA	—	93,205	41
Ohio	40.4	18	17,366	21	25.8	42	967,953	2	1,040,853	38
Oklahoma	33.9	25	18,299	19	34.2	32	0	23	1,194,000	36
Oregon	29.9	32	10,415	34	28.1	39	less than 500	21	1,912,864†	28
Pennsylvania	49.2	9	11,904	28	29.5	37	less than 250	22	37,000,000*	4
Rhode Island	49.3	8	46,045	4	54.8	11	appointed	—	898,000	23
South Carolina	48.8	10	6,497	46	34.4	31	appointed	—	NA	—
South Dakota	15.0	50	5,875	48	124.5	1	NA	—	99,044	42
Tennessee	27.0	34	8,057	41	30.7	36	12,054	16	2,169,639	27
Texas	34.6	23	24,868	11	26.5	40	2,646,389	1	7,530,331	26
Utah	20.0	44	7,597	43	21.7	46	NA	—	129,000	44
Vermont	31.0	30	8,564	38	49.4	14	appointed	—	309,888	13
Virginia	45.5	12	8,246	39	42.0	19	appointed	—	439,082	39
Washington	30.5	31	18,258	20	65.7	7	835	19	9,051,655	6
West Virginia	25.8	37	20,502	17	39.0	22	262,464	7	NA	—
Wisconsin	38.3	21	8,111	40	21.4	48	1,914	17	3,600,393	22
Wyoming	22.2	41	11,549	29	70.5	4	0	23	5,416	48

[1] 1987 *Current fiscal year. †Incurred. NA: Not available.

Sources: Insurance Research Council, St. Paul Fire & Marine; member companies of the Physician Insurers Association of America; Forbes.

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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

COMPARISON OF MEDICAL MALPRACTICE COSTS

IN

CALIFORNIA, OHIO, NEW YORK AND ALASKA

1976 - 1992

EXHIBIT 2

Ratio of California Paid Loss and LAE to Countrywide

30%
25%
20%
15%
10%
5%

1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992

Calendar Year

Chart 2-1

California Medical Malpractice Insurance Costs Compared to U.S. Since MICRA - 1976-1992

Year	CA Premium Earned (Millions)	% Change	U.S. Premium Earned (Millions)	% Change	% CA of U.S.Prem.
1976	$288		$1,187		24%
1977	227	-21.2	1,266	+6.7	18%
1978	249	+9.7	1,382	+9.2	18%
1979	239	-4.0	1,235	-10.6	19%
1980	230	-3.8	1,333	+7.9	17%
1981	204	-11.3	1,232	-7.6	17%
1982	211	+3.4	1,361	+10.5	16%
1983	287	+36	1,844	+35.5	16%
1984	375	+30.7	1,835	-0.5	20%
1985	450	+20	2,261	+23.2	20%
1986	629	+39.8	3,435	+51.9	18%
1987	633	+0.6	4,450	+29.5	14%
1988	663	+4.7	5,080	+14.2	13%
1989	633	-4.5	5,120	+0.8	12%
1990	605	-4.4	4,931	-3.7	12%
1991	529	-12.6	4,862	-1.4	11%
1992	526	-0.6	5,138	+5.7	10%

National Association of Insurance Commissioners' Report on Profitability by Line and by State 1976-1992. This report is based on information obtained from insurance company Annual Statements.

Conclusions:

•California medical malpractice premiums have increased from $288 million to $526 million for a total increase of $238 million or 83%.

•U.S. medical malpratice premiums including California have increased from $1,187 billion to $5,138 billion for a total of $3,951 billion or 333%.

•Excluding California, U.S. premiums increased from $899 million to $4,612 million for a total of $3,713 million or 413%.

•Had California premiums grown at the U.S. rate of 413%, California premiums would have increased to $1,189 billion or $663 million above actual 1992 medical malpractice premiums. Therefore, California's Medical Injury Compensation Reform Act (MICRA) saved over $663 million in 1992 alone and several billion dollars since 1975. MICRA has kept the California medical malpractice insurance cost increase an average of 4.9% per year, well below the national average of 11.3% per year.

•MICRA has reduced California's share of US medical malpractice premiums from 23% in 1976 to 10% in 1992.

California Medical Malpractice Insurance
Underwriting Profit and Loss
Since Enactment of MICRA - 1976-1992

Year	CA Premium Earned (Mil)	L.I.	L.A.E.	G.E.	S.E.	T.L.F.	DIV	Annual U.P/L	Cum U.P/L
1976	$288	61.9	35.0	1.7	11.6	-2.8	0.0	-5.3	-5.3
1977	227	38.9	26.5	3.2	6.8	2.3	0.2	+25.7	+20.4
1978	249	41.3	23.4	4.1	10.2	2.4	2.2	+20.0	+40.4
1979	239	42.1	21.2	3.8	8.4	2.5	2.0	+22.9	+63.3
1980	230	44.3	19.9	3.5	8.4	2.6	2.1	+22.7	+86.0
1981	204	61.6	19.9	5.4	9.9	3.2	2.3	-2.5	+83.5
1982	211	81.8	27.6	6.4	10.1	4.0	5.9	-35.9	+47.6
1983	287	70.5	28.7	6.7	10.2	3.1	4.0	-23.6	+24.0
1984	375	92.7	26.7	5.8	10.9	2.7	4.7	-43.4	-19.4
1985	450	80.8	28.7	4.6	10.3	2.8	3.9	-31.1	-50.5
1986	629	68.2	21.9	3.7	9.1	2.6	2.9	-8.5	-59.0
1987	633	63.0	23.6	3.8	10.3	2.6	3.9	-7.2	-66.2
1988	663	52.4	28.6	4.4	9.6	2.8	2.7	-0.6	-66.8
1989	633	39.4	22.1	5.4	9.5	3.1	6.3	+14.2	-52.6
1990	605	35.6	24.5	6.6	7.8	3.0	9.2	+13.3	-39.3
1991	529	9.0	5.6	8.5	8.4	2.8	15.9	+49.8	+10.5
1992	526	39.8	41.1	7.9	8.1	2.0	16.2	-15.0	-4.5
17 Year Average Underwriting Profit or Loss									
Total		923.3	425.0	85.5	159.6	41.7	84.4		
÷17		54.3	25.0	5.0	9.4	2.5	5.0	101.2%	

National Association of Insurance Commissioners' Report on Profitability by Line and By State - 1976-1992. This Report is based on calendar year information obtained from insurance company Annual Statements.

Premiums - California medical malpractice direct premiums earned.
L.I. - Losses Incurred includes losses paid and reserved in current year and change in reserves in prior years.
L.A.E. - Loss Adjustment Expenses includes legal fees paid and reserved in current year and change in reserves in prior years.
G.E. - General Expenses includes all current year salaries, employees benefits, rent, etc.
S.E. - Selling Expenses primarily commissions paid to agents and brokers.
T.L.F. - Taxes, Licenses and Fees - paid to insurance departments. Does not include federal income tax.
DIV - Dividends - includes policyholder cash dividends and premium credits.
U.P/L - Underwriting Profit or Loss - the sum total of L.I.; L.A.E.; G.E., S.E., T.L.F.; DIV.
Cum U.P/L - Cumlative Underwriting Profit or Loss since 1975.

Ratio of Ohio Paid Loss and LAE to Countrywide

Chart 2-4

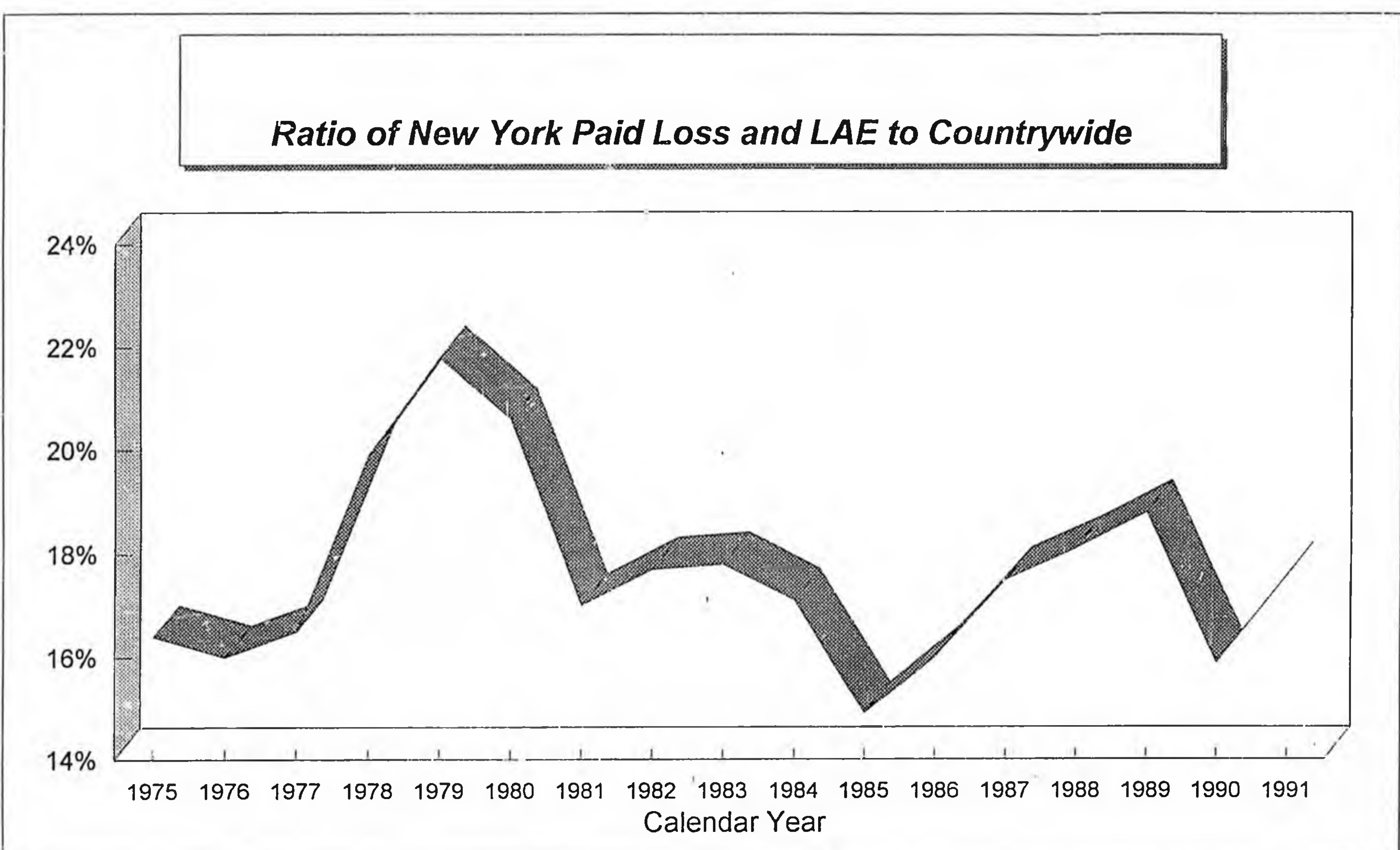

Chart 2-5

Chart 2-6

Alaska Ratio of Paid Loss and LAE to Countrywide

(This chart will be provided)

Alaska Medical Malpractice Insurance Costs

Compared to U.S. and California

1976 - 1992

Year	AK Premium Earned (Thous.)	% Change	U.S. Premium Earned (Millions)	% Change	CA Premium Earned (Millions)	% Change
1976	$781		$1,187		$288	
1977	655	-16	1,266	+6.7	227	-21.2
1978	Not available		1,382	+9.2	249	+9.7
1979	2,233	+240.9	1,235	-10.6	239	-4.0
1980	1,798	-19.5	1,333	+7.9	230	-3.8
1981	2,125	+18.2	1,232	-7.6	204	-11.3
1982	2,276	+7.1	1,361	+10.5	211	+3.4
1983	2,609	+14.6	1,844	+35.5	287	+36.0
1984	3,483	+33.5	1,835	-.50	375	+30.7
1985	4,403	+26.4	2,261	+23.2	450	+20.0
1986	8,480	+92.6	3,435	+51.9	629	+39.8
1986	13,639	+60.8	4,450	+29.5	633	+0.6
1988	15,109	+10.8	5,080	+14.2	663	+4.7
1989	16,341	+8.2	5,120	+.80	633	-4.5
1990	14,983	-8.3	4,931	-3.7	605	-4.4
1991	13,371	-10.8	4,862	-1.4	529	-12.6
1992	13,439	+0.5	5,138	+5.7	526	-0.6

National Association of Insurance Commissioners' Report on Profitability by Line and by State 1976-1992. This report is based on information obtained from insurance company Annual Statements.

Conclusions:

- Alaska medical malpractice premiums have increased from $781,000 to $13,439,000 for a total increase of $12,658,000 or 1,620% overall at an average annual rate of 29%.
- U.S. medical malpractice premiums including Alaska have increased from $1,187 billion to $5,138 billion for a total of $3,951 billion or 333% overall at an average annual increase of 11.3%.
- California medical malpractice premiums have increased from $288 million to $526 million for a total increase of $238 million or 83% overall at an annual average increase of 4.9%.

Chart 2-8

MEDICAL LIABILITY INSURANCE COSTS

National Medical Liability Reform Coalition

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	Arizona Eff. April 1, 1991 Entire State	California Eff. January 1, 1991 L.A. area (4 counties)	Florida Eff. January 1, 1991 Miami area (2 counties)	Illinois Eff. July 1, 1991 Chicago area (9 counties)	Michigan Eff. July 1, 1991 Detroit area (3 counties)	New York Eff. July 1, 1991 Long Island area (2 counties)	Texas Eff. January 1, 1991 Houston area (5 counties)
Anesthesia	$32,000	$12,300	$48,200	$23,000	$47,500	$34,500	$29,000
Cardiovascular surgery	$22,400	$38,000	$110,900	$49,200	$71,300	$65,100	$46,600
Family practice/ Minor surgery, no Ob	$15,400	$8,400	$32,600	$9,900	$34,800	$13,200	$23,200
Family practice/ Major surgery, w/Ob	$29,300	$18,700	$149,500	$20,200	$71,300	$23,400	$32,700
Neurosurgery	$73,900	$51,400	$183,300	$69,700	$154,500	$118,100	$47,900
Obstetrics/ Gynecology	$52,900	$38,000	$149,500	$49,200	$133,900	$101,200	$55,900
Orthopedic surgery	$36,300	$32,300	$110,900	$61,300	$133,900	$89,600	$49,300

1. These costs reflect a typical mature claims made policy of $1 million/$3 million.

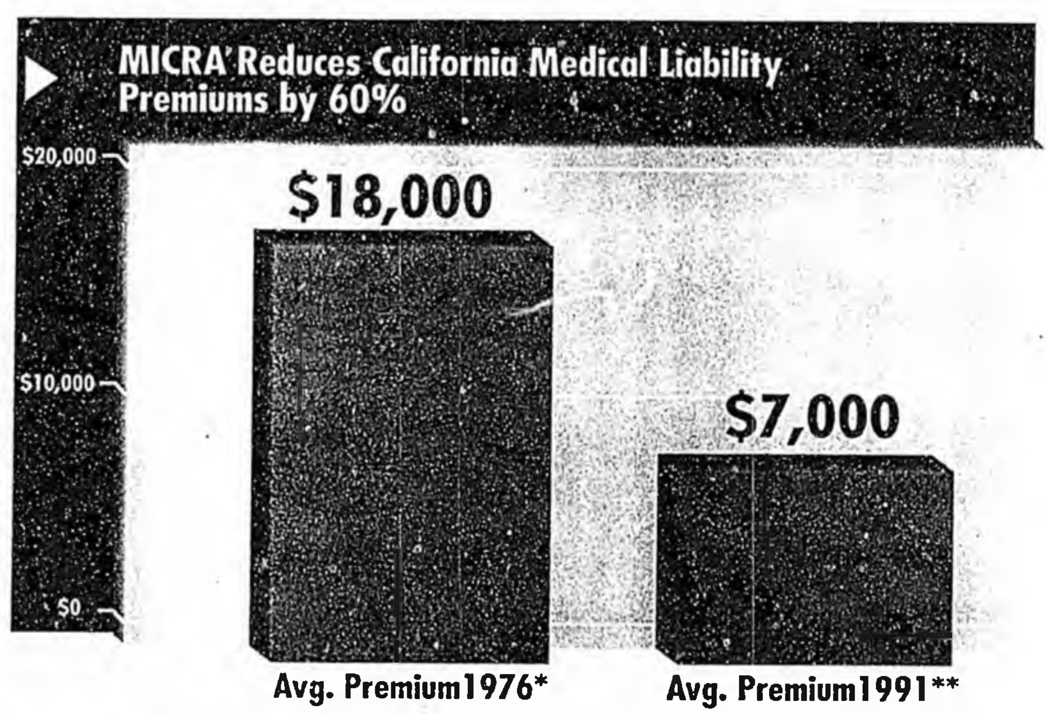
2. Please note: These figures are approximates (rounding to the nearest $100) due to restrictions from the industry.

The National Medical Liability Reform Coalition is a broad-based group of organizations gathered for the purpose of promoting medical liability reform as a key element of health care reform.

Insurance Premiums Cut

MICRA Has Cut Medical Liability Insurance Premiums by 60%

Before MICRA took full effect, California physicians paid an average $18,000 for liability insurance in 1976. By 1991, MICRA had reduced the average liability premium to $7,000 — **a 60% savings.**



— Shown in 1991 dollars

* $7,241 average premium adjusted to 1991 dollars on the December Urban CPI Index

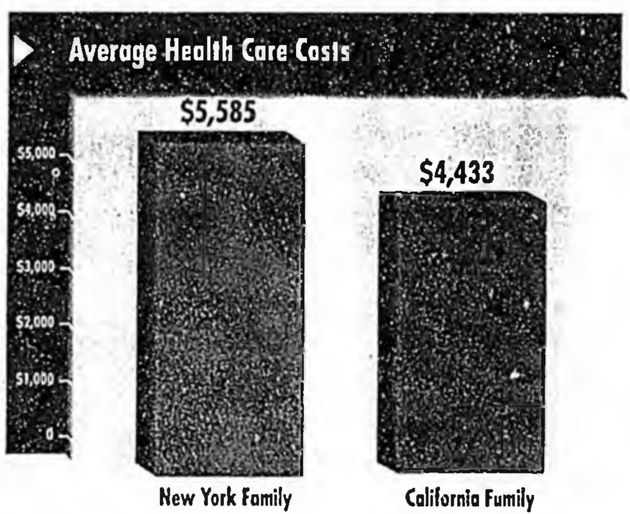
** Dividends from 1990 deducted from 1991 average premium

SOURCE: Physicians Insurance Association of America

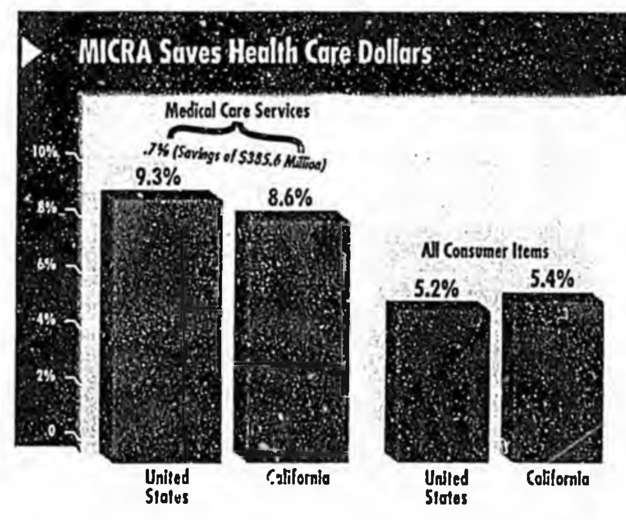
After MICRA: Real Results

MICRA Helps Control Medical Costs in California — Without MICRA, Medical Costs Would Be Even Higher

By controlling the cost of liability insurance, MICRA has slowed the increase of health care costs in California. As illustrated in the first chart, a recent consumer study by "Families USA" shows that health care costs for the average New York family in 1991 were $5,585 — compared to $4,433 for the average California family.



Further, as seen in the second chart, although consumer costs in California generally were higher than the national average in 1991, the state's medical care services index was lower. In 1991, California's medical costs increased less than medical costs for the nation as a whole, saving Californians $385.6 million.



SOURCE:
1. Families USA
2. Source: Consumer Price Index for All Urban Consumers (CPI-U), 1989-1990, based on an average from the Los Angeles and San Francisco Bay Area indexes.

CALIFORNIA'S MEDICAL MALPRACTICE CRISIS

By: Assemblyman Barry Keene, Chairman
Health Committee, California Assembly

EXHIBIT 3

California's Medical Malpractice Crisis

This article 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."

California's Medical Malpractice Crisis

by Assemblyman Barry Keene, Chairman, Health Committee, California Assembly

The Insurance Crisis

California's medical malpractice insurance market has been critically ill for many years. Until 1975, however, it remained only partially diagnosed and completely untreated. By May 1975, its symptoms had accumulated to the point that its disease threatened the public health of California.

Wide public attention was first focused on this crisis on January 1, 1975, when the Pacific Indemnity and Star Insurance Companies notified 2,000 Southern California physicians that their insurance coverage would not be renewed. In addition, Argonaut Insurance increased its premiums 380% for 4,000 doctors in Northern California. These actions by the insurance companies were based upon their determination that the market had become too risky and unstable for financially sound underwriting of medical malpractice insurance.

Statistics supported the companies' contention. In determining rates, insurance carriers must have a reasonable estimate of the potential number and size of outstanding claims. In Northern California the number of claims had increased from 11.8 per 100 physicians in 1968 to 21 per 100 physicians in 1972 and 25 per 100 physicians in 1974. In Southern California the number of claims had increased from 13.5 per 100 physicians in 1968 to 16.5 per 100 physicians in 1972 and 26 per 100 physicians in 1974. This represented an increase of almost 200% in claims frequency. The dollar amounts awarded in judgments or settlements had also increased dramatically. The number of awards exceeding $300,000 had been 3 in 1969, 5 in 1970, 9 in 1971, 13 in 1972, 23 in 1973, and reached 34 in 1974. This was an increase of over 1,100%. The combined effect of these two factors was an increase on the average closing cost of a claim from $4,500 in 1969 to over $5,000 in 1974.

An analysis by Western Insurance Information Service indicated that insurance carriers in California writing medical malpractice insurance over a five-year period ending December 31, 1972, experienced an ultimate claim payoff in excess of $150 for each $100 collected in

premiums. Adding insurance carriers' operating expenses and their sales costs increased the ratio to about $180 paid out for each $100 of collected premiums.

Wesley Kinder, California Insurance Commissioner, has stated his belief that premiums charged to physicians in California have been continuously inadequate since 1957. For example, Argonaut Insurance entered the medical malpractice market in 1974, received $8 million in malpractice premiums and paid out $250,000 in claims during its first year of operation. An actuarial "rule of thumb," however, holds that first-year malpractice claims should be only 1% of premium income. It was Kinder's contention, therefore, that Argonaut's malpractice insurance premium rate should h ve been 3 times greater to assure adequate reserves for future claims. This premium rate inadequacy recently led the Insurance Commissioner to limit the future insurance underwriting authority of one significant insurance carrier in California. The carrier was prohibited from renewing any insurance policies until its reserves become sufficient to assure the continued ability to meet claim obligations.

The traditional litany of causes of the crisis has been well publicized. It includes: 1) the changing doctor-patient relationship, 2) the legal rights explosion, 3) the impact of the media, and 4) the increased proficiency of trial lawyers. However, of greater importance is the development of a "no-fault" mentality in society at large and the belief that insurance companies have an unlimited source of funds.

Evidence of changes in "societal attitude" can be seen in the difference between jury awards prior to the publication of the malpractice crisis and their actions subsequent to it. Since the great public outcry concerning the malpractice crisis, jury awards in Los Angeles County have been significantly smaller than in previous years, and there have been significantly more jury awards in favor of the defense. This change can only be attributable to public awareness of the impact of large jury awards upon insurance costs and medical costs in general. In addition, California has witnessed an expansion of legal doctrines that have widened the scope of medical malpractice and have thereby added to the unpredictability of the malpractice insurance marketplace. The three most important shifts in legal doctrines have been: 1) The abolition of the locality rule. In *Gist v French Hospital* 136 Cal. App. 2d 247, 288 P. 2d 1003 (C.A. 2d. 1955) the court threw out the common law locality rule and replaced it with a nationwide standard of practice. This change enabled injured plaintiffs to obtain and use expert witnesses who do not reside in the immediate community. 2) Expansion of *res ipsa loquitur*. In *Clarke v Gibbons* 66 Cal. 2d 399, 58 Cal. Rptr. 125, 426 P. 2d 525 (1967) the court permitted the jury to draw an inference of negligence when the circumstantial evidence was such that it indicates a probability of neg'igence. This lifted much of the burden of proof from the plaintiff, and it had particular impact in cases concerning surgical procedures. 3) Expansion of informed consent. In *Cobbs v Grants* 8 Cal. 3d 229. 104 Cal. Rptr. 505, 502 p. 2d 1 (1972) the court determined that informed consent should be based on the information needs of a reasonable person, not those of an expert.

Another cause of instability in the medical malpractice insurance market is the relatively small number of insureds who bear the initial cost responsibility for the entire patient population. There are at present approximately 46,000 licensed physicians in California, of which approximately 27,000 carry independent medical malpractice insurance. The remaining physicians are self-insured, working for a

governmental entity, or in an institutional setting. The risk of loss is distributed only among these 27,000 physicians. Therefore, significant changes in the number of claims or the dollar amount has a drastic impact on premium rates for this small group. Consumer "pass-on" of costs is largely limited to patients whose health care is not government-financed. For comparison purposes, the automobile insurance marketplace is 48 times larger than the medical malpractice insurance pool of insureds.

In California, the principle market for medical malpractice insurance is provided by the efforts of county medical societies to organize group programs. The majority of California physicians are covered under the two principal groups, Nor-Cal (Northern California Physicians) and So-Cal (Southern California Physicians). Similarly, the California Hospital Association has a group insurance program for affiliated hospitals.

The financial clout provided by this group arrangement introduces an element of serious bargaining into the process of arriving at premiums and terms of coverage. Until recently, insurance carriers were willing to engage in this bargaining process because of the benefits of offering medical malpractice insurance. The insurance carriers received a tremendous initial dollar flow with incurred losses not expected for a number of years. The investment potential of such favorable cash flow was substantial.

However, competitive bargaining on insurance underwriting has resulted in a pattern of instability. For instance, in 1970 the Southern California Physicians switched from the Nettleship Company to Hartford, and in 1974 from Hartford to Travelers. This switch was due to the fact that Nettleship requested a substantial increase in medical malpractice insurance rates. Hartford and Travelers were willing to enter the market without any rate increase in the belief that the investment potential to the premium dollar would exceed any loss incurred. (Presently, Travelers is requesting a 350% increase in premiums.) This frequent change in carriers has made the development of critical statistics difficult if not impossible. This factor, coupled with California's McBride-Grunsky Open Rating Act (which governs insurance carriers in California and simply requires post-premium rate review at the option of the State Insurance Commissioner), made early detection and understanding of the crisis impossible.

The Political Crisis

Suggested solutions to the medical malpractice insurance crisis are highly dependent upon whom is defining the problem. The legal societies in California, including the California Trial Lawyers' Association and the State Bar, have been very adamant in their position that the cause of the current crisis has been the unrestricted investment policies of insurance companies accompanied by rampant medical malpractice by physicians. The collapse of the stock market was therefore put forward as the catalyst for the carriers' financial woes. However, a detailed analysis by the Department of Insurance and the Auditor General failed to substantiate the assertion. These studies indicated that insurance companies were incurring a $1.50 loss for each premium dollar collected between 1967 and 1972, which was a relatively healthy investment period for the American economy. Further, on the argument that the cause of medical malpractice is malpractice itself, evidence is also very murky. A study commissioned by Johnson and Higgins, an insurance brokerage firm in California, indicated that more multiple suits were brought

against board-certified physicians (presumably the best-educated or most qualified) than non-board certified physicians.

The medical community has asserted that the main causes of the malpractice insurance crisis were the unscrupulous activities of trial lawyers and their high contingency fees. The facts belie this claim. Although in recent years California has experienced a veritable explosion in legal rights, as more and more citizens turn to the courts for social redress, other civil actions in California increased at a rate exceeding the rise of malpractice suits for the same period.

The insurance industry has remained relatively silent, perhaps believing that the legislative process is incapable of resolving this dilemma or, in the case of some companies, out of a desire to leave the marketplace entirely, in which case silence is strategically the best posture.

Legislatively, the first response to the rising cost of medical malpractice insurance occurred in the fall of 1972, when the Assembly established the Select Committee on Medical Malpractice. It was the duty and function of the committee to look into the causes of medical malpractice and propose solutions. (Select committees are investigative committees and have no authority to hear or vote upon bills. They provide guidance and information for the standing policy committees.)

The Select Committee acted as a focal point for public attention on the malpractice issue for the first 3 years of its existence. It held public hearings on this issue, but it developed a somewhat narrow perspective and did not perceive the magnitude of the crisis California was about to experience.

In January 1975, with this magnitude painfully evident, the leadership of the Assembly (the Speaker, the Majority Leader and appropriate chairmen) met to discuss the crisis and possible legislative solutions. At this time responsibilities were delegated to the various committees depending upon their area of expertise.

Responsibility for a short-range solution to the question of access to insurance was delegated to the Finance Insurance and Commerce Committee. The approach eventually agreed upon was the establishment of a Joint Underwriting Association. Under this mechanism, should there be a finding by the Insurance Commissioner that insurance is unavailable, all liability insurance carriers in the state would be required to participate in a Joint Underwriting Association. The JUA would be a separate state entity required to guarantee insurance to doctors at actuarially sound rates.

It was recognized, however, that the cost question cannot be resolved through a JUA. The responsibility for long-range planning to deal with this basic issue was delegated to the Assembly Health Committee. Up to this point, the problem had seemed relatively uncomplicated. In February, 1975, extensive hearings were conducted by the Select Committee on Medical Malpractice, but the nature and extent of the crisis remained obscure and individuals discussed political palliatives rather than substantial solutions.

In January, Argonaut shocked Northern California doctors with its proposed 350% increase in malpractice rates.

By April, the first true political alarms began to sound. California's physicians were considering a walkout in earnest.

On May 1, despite the fact that a JUA bill was on its way to the Governor, physicians in Northern California went on strike. Medical care came to a virtual halt. Doctors, believing that they could not absorb enormous increases in malpractice rates, much less pass them on to their patients, refused to practice. Day and night press attention was directed to the crisis. The first wave of public sympathy was clearly for the doctors. Physician crisis committees were formed in counties throughout the state, as doctors moved to organize their membership into a strong political lobbying force. The political atmosphere electrified.

After two weeks of the strike, word spread among the physicians that the legislature was in fact considering a more comprehensive approach than the JUA bill. Public support for the strike lessened noticeably. The medical community successfully directed its efforts toward a special session of the legislature to deal with the crisis; and ended the strike. Not the least important factor was the general announcement that the Assembly Health Committee, with the cooperation of medical and hospital representatives, was at work on the long-range bill that was to become Assembly Bill 1.

Toward A Solution

The initial research into the medical malpractice crisis commenced in January of 1975. At that time all current literature was examined and requests were made to various interest groups for more substantial information. Som. of the most important foundational information came from the Department of Insurance, which analyzed the costs associated with the litigation of malpractice cases. The department was able to break down the premium dollar into component parts for premium years 1962 through 1972. Results were that at least 46% of the malpractice dollar was consumed by litigation-related costs, 20% was by administrative costs (including premium taxes, brokerage fees, employee salaries, and other costs associated with running a business), and only 34%, at most, of the premium dollar was received by the plaintiff as direct compensation for injuries suffered. This was extremely alarming in light of other insurance benefit structures. By comparison, California law requires 67-1/2% of the premium dollar for workmen's compensation to be returned to workers in the form of compensation for injuries suffered. The inescapable conclusion was that the existing system for resolving medical injury disputes, costly as it was, did not even protect the injured victim.

Our first concern was to review the process of litigating malpractice disputes to determine why 46% of the premium dollar was associated with legal expenses. We concluded that a malpractice case is extremely difficult to prove, demands a great deal of research into causal factors and exhausts a tremendous amount of time on the part of the attorney. Part of the difficulty is that inherent risks are associated with medical treatment. Therefore, it has become the burden of the plaintiff's attorney to distinguish injuries

attributable to physician's negligence from injuries that are within the normal statistical risks of the procedure. It was clear that as long as the compensation system is based on a theory of negligence, the system of litigation itself will be abnormally expensive.

We realized that there were two options facing the legislature: we could provide additional sources of money for the system, or the distribution of existing monies could be done in a more rational manner. As to the first option, monies to fund the medical malpractice system were obviously limited. Physicians had already indicated that they would refuse to pick up any additional medical malpractice insurance costs. We knew that the patient population of California could no longer afford increases in medical bills, and we knew that the Governor (who had repeatedly announced a tight budget, no-new-taxes policy) would not be willing to use general funds to pay for malpractice premium increases. There appeared, therefore, to be no source of additional funds for the system.

We were left with the alternative of evaluating the current system and reallocating the funds in a more efficient manner. To this end, Assemblyman Keene introduced Assembly Bill 926. AB 926 was the progenitor of AB 1 (of the extraordinary session), which was to become California's major malpractice legislation.

AB 926 represented a radical overhaul of the current system for litigation of medical malpractice disputes. It established an independent commission to review medical injuries based upon a worker's compensation type of no-fault system. Limited compensation was provided for all injuries which were the unanticipated results of medical intervention or unreasonable omission. Attorneys' fees were severely restricted, as they currently are under workmen's compensation, where the attorney's burden of proving negligence has been removed. Patients' rights to recovery for non-economic losses, chiefly "pain and suffering," were severely limited in the belief that there are limits to what society can afford in an area of great subjectivity in which it is not always possible to compensate with dollars.

The radical approach in AB 926 was based on the view that the cost of medical malpractice insurance was threatening the stability of the entire health care delivery system in California. A statistical study of medical malpractice cases for 1974 indicated that only 6% of the claims received 67.4% of the awards. In other words, the medical malpractice insurance system provided large benefits for only a small number of California citizens, while it was extremely expensive for a great majority of users of the health care system, perhaps to the point of denying access to some. The escalating costs associated with the system have their most severe impact upon low income and middle class citizenry, particularly those without health insurance to soften the blow. In addition, a great number of California's Medicaid (Medi-Cal) recipients, many of whom are senior citizens, were being informed by doctors that they would no longer be accepted as patients. The Medi-Cal reimbursement rate failed to provide the overhead costs associated with their care, much less the additional burden of large increases in medical malpractice insurance premium rates. Therefore, AB 926 attempted to equalize the form of compensation so that the cost burden would not continue to be inequitably distributed.

Extensive dialogue with the Governor and the leadership of the Assembly and Senate indicated that this approach was much too radical and would not be acceptable. Therefore, when the Special Session was called in May (primarily at the urging of the Assembly leadership), Assemblyman Keene prepared AB 1 as a comprehensive attempt to reform the malpractice insurance system rather than junk it.

AB 1 provided substantial reforms in the area of health care quality control, tort law and insurance review. A general policy (and, as will become evident later, *political*) decision was made that all interested parties must sacrifice in order to reach a fair and rational solution to the insurance crisis. These included physicians, lawyers, insurance companies and patients alike. AB 1 was drafted to include all reforms in order to prevent any one interest group from sabotaging any single-objective bill.

The Keene Bill

In terms of *medical quality control*, the bill reorganizes and restructures the Board of Medical Examiners into an efficient and more powerful Board of Medical Quality Assurance, expands the number of lay representatives on the Board, and eliminates "lifetime licensure" by requiring the continuing education of all physicians in California. It establishes a central file reporting mechanism to assure that doctors who are successfully sued or are disciplined by hospitals are reported to the Board and are immediately investigated to determine their competency. Local district review committees are expanded, given new teeth and non-physician consumer and provider members are added. A system for investigating consumer complaints is established. Delays in implementation of administrative discipline during court appeals are largely eliminated. Health quality control provisions were essential to regain public confidence in the health care delivery system, and to assure that incompetent doctors are not allowed to practice and generate lawsuits. Although the malpractice crisis cannot be solely attributable to bad doctors, a very bad doctor can be very expensive to the system. In California, an infamous Sacramento orthopedic surgeon is reported to have botched some 50 major back surgeries in the last four years. This physician has already cost his insurance carrier over $6.1 million, and there are 30 remaining outstanding claims.

The second general area of reform is that of *tort law*. AB 1 places limitations on *attorney fees* — some have gone well over a million dollars in California — to assure that the plaintiff receives the bulk of the money awarded in a medical malpractice action. The scale in contingency fee agreements range from 40% of the first $50,000 to 10% of any award over $200,000. In part, this reflects the belief that an attorney should not be able to get a windfall if a severely-injured "perfect client" walks into his office. In such cases, it is unconscionable to make the attorney a partner in his client's pain and suffering.

AB 1 also establishes *periodic payments* for any award in which future damages exceed $50,000, to prevent windfalls to non-dependent heirs in case the patient dies in advance of the actuarial prediction.

The measure tightens the *statute of limitations* to assure that claims are brought in a timely manner and to prevent the endless "tail" long associated with medical malpractice disputes.

AB 1 permits the introduction into evidence of *collateral sources* of recovery to preclude double recoveries for the same injury (both malpractice and workman's compensation or private insurance payments, for example).

The bill assures doctors the right to a *90-day prior notice* of a patient's intent to sue to enable the physician to effect a medical or financial solution short of litigation, if possible.

Further, AB 1 encourages and facilitates the *arbitration* of medical malpractice disputes by specifying uniform language to be used in binding arbitration contracts to assure that the patient knows what he is signing and what its ramifications are.

Perhaps the most controversial tort law change was the *limitation on "pain and suffering."* As indicated earlier, we were faced with a moral dilemma. Unless we took drastic steps we were denying patients access to reasonably-priced health care in California; yet if we did, in addition to curtailing a system that provides inordinate benefits to a few, we might run the risk of undercompensating some of those few. We decided to limit the "pain and suffering" portion of awards to $250,000.

Many attorneys questioned the constitutionality of these tort reforms, arguing that we were discriminating against a certain class of claimants and restricting their rights. It was our argument that these reforms fall within the legitimate health, safety and police authority of the state. It is our duty to balance the needs of the individual against the public good in general. There is an analogous argument in the area of defamation cases. Under current California law, one cannot recover for general damages in a defamation suit unless one can show special damages. The argument is that free speech is so important that society does not want any undue burden placed upon it. In our view, health care and access to it is also so essential that steps must be taken to assure its continued availability.

The last major area of reform in the bill deals with *insurance.* First, we prohibit insurance companies from discriminating against doctors who choose to arbitrate disputes rather than try them in a court of law. Many insurance carriers have refused to sell insurance to doctors who seek the right to arbitrate.

More importantly, we open up the malpractice insurance system in California to public scrutiny. Any insured who experiences an increase of 10% or more in his medical malpractice insurance has the right to demand a public hearing before the Insurance Commissioner of the State and participate in a cross-examination of the insurance company as to the reasonableness of the proposed increase. The Insurance Commissioner is given full power to subpoena any documents, individuals or data necessary to make a finding on whether the rate is reasonable. If he finds it is not, he may rescind it. In summary, no longer will insurance rates be established "in the dark" without careful public scrutiny.

Under a companion measure (SB 24), the Insurance Commissioner may create, if private companies withdraw from the market, a non-profit joint underwriting association with an extended life, whose rates are set by a panel of independent actuaries and which is required to offer 2 years of claims made insurance with a guaranteed occurrence rider to be picked up at the end of that time.

The Legislative Process

Since the bill demanded sacrifices from all parties, all parties were opposed to some segment of the bill. Physicians cried out against additional health quality control. Attorneys complained about tort reform. Malpractice carriers opposed the insurance provisions.

How could a bill with so much opposition get through the California Legislature and receive the signature of the Governor? This tormented staff and concerned members alike for the next six months. First, the process was facilitated by the fact that the Governor declared a special extraordinary session of the Legislature to deal solely with the issue of medical malpractice. This focused the attention of the Legislature on the issue and allowed staff to work on the question almost full time. The Governor, in his proclamation of May 1, 1975, set forth several issues which he felt the Legislature should address. Assembly Bill 1 dealt with most of these issues. The Governor called for equal sacrifices; AB 1 demanded such sacrifices.

The bill was introduced by Assemblyman Keene on May 19, the first legislative day following the proclamation. The Speaker of the California Assembly, who is given great discretion in selecting the appropriate committee for the hearing of a bill, considered several alternatives, finally selecting Judiciary, a decision that would become very important in the long history of the bill. The Judiciary Committee is composed of eleven members, nine of whom are members of the State Bar.

The State Bar acted in a very conservative manner through the entire medical malpractice crisis. In late April of 1975, it established a select committee to investigate medical malpractice. The committee was to make recommendations to the State Bar on proposed changes in tort law and other areas deemed necessary. The policy of the Bar was that no action or position should be taken until the committee was back with its report.

At the same time, the posture of the California Trial Lawyers' Association was to blame the insurance crisis on the insurance companies themselves. It continually raised the issue of insurance rate "rip-offs" to pay for tremendous losses in the stock market. Its "villain" was the profit and loss portfolios of insurance companies.

We needed some facts. The State Auditor General undertook, at the request of the California Assembly, an extensive investigation into the losses and profits of insurance companies. The chief conclusion was that malpractice insurance companies are on the verge of bankruptcy principally due to significant increases in medical malpractice claims in recent years. According to the study, rates demanded by insurance companies appear to be actuarially reasonable. Although the Insurance Commissioner and other administrative spokesmen were willing to address this issue over and over again, the Trial Lawyers' Association was never willing to accept this verdict. It was far easier to deal with the villain of insurance company finances than with the substantive cost issues raised in the system of handling malpractice disputes.

As we waited for the report of the State Bar Association's Committee on Medical Malpractice, we proceeded with hearings before the Assembly Judiciary Committee on AB 1. It is highly questionable whether the committee was able to completely divorce itself from its own professional bias, however subconscious. The bill was severely amended in that committee (the press said it was "gutted") in order to limit the impact of the proposed tort reforms. However, the members could not kill the bill outright because of the public outcry that would have developed.

This public factor must be stressed again. Perhaps one of the most significant political forces involved in the medical malpractice crisis was the ability of local doctors to arouse their patients and have those patients *demand* substantial reform. Members of both the California Assembly and Senate were literally swamped with thousands of letters from constituents demanding immediate reform. It was the political force of these constituents which provided the life blood of AB 1.

AB 1 soon became identified in the press as *the* moving bill, the only bill that would address itself significantly to all the issues involved in the crisis. The California Medical Association (CMA) was willing to support AB 1, even though it was uncomfortable with the health quality reforms, because its members realized that tort reforms were essential to the future of medicine in California. (Indeed, the bill did contain all eight points that the CMA had sought in terms of tort reform.) Many Assembly and Senate members desired more stringent health quality controls. This might have been possible had not the Judiciary Committee so severely watered down the tort reforms in the bill, thus eliminating the power necessary to bargain with the doctors.

An additional political impetus behind AB 1 was the concern that the doctors would again go on strike, bringing medical care in California to a standstill, and reducing the possibility of a reasoned solution. The doctors were organized, the doctors were meeting, and the doctors were capable of going on strike with merely a day's notice. No one can be sure, but such a strike would likely have had widespread support among the non-sick populace of California. To that group the Legislature had to demonstrate determination and a capacity to respond.

It was apparent that the State Bar would not develop any great sympathy for its position among the population. The State Bar undermined its own position by not accepting many of the suggestions proposed by its own committee on medical malpractice, some of which paralleled the reforms in AB 1.

AB 1, although amended, survived the Assembly Judiciary Committee and moved with relative ease through the Ways and Means Committee. On the Assembly Floor, it cleared with a tremendous majority (67-8), although the CMA withdrew support due to the amendments.

In the State Senate, the bill was sent to the Insurance and Financial Institutions Committee, which was more responsive to the doctors' outcries and perspective. The bill was again substantially amended, this time to address many of the desires of the medical societies and the demands being articulated in constituent letters. As the bill cleared this policy committee, it was "reinvigorated" to virtually its ultimate form upon enactment. During and immediately following the July recess, in an attempt to

satisfy technically the needs of the various interested groups, AB 1 was amended many times. However, the substantive provisions of the bill remained intact, and the measure bore remarkable similarity to the strong form in which it was first introduced.

In September, the bill came back to the Assembly for concurrence on Senate amendments. After an indescribably bitter controversy for several days over whether to "further refine" the bill in a conference committee (where it would also undergo the risk of again being emasculated), AB 1 was overwhelmingly endorsed by the Assembly (60-19). The bill was then sent to the Governor, who signed it twelve days later.

SOME POLITICAL LESSONS

Reflecting on the conception, advocacy, and successful passage of AB 1, a number of key political judgments appear cumulatively to have made the difference between shipwreck and clear sailing:

1. We pushed for a *comprehensive approach.* There were several reasons: First, no piecemeal solution to the problem was possible. Second, by pitting the various concerned and powerful interest groups against one another, while preserving the delicate balance among them, we had a better chance of getting something out. This is called the "equal bite" theory behind AB 1. Third, it was essential to have a bill of sufficient magnitude to command media attention and concentrate public support. AB 1 was supported by the California Medical Association but it was also supported by consumer groups, union organizations, senior citizen groups and county boards of supervisors. In short, the comprehensive nature of AB 1 assured great public sympathy in support of the bill and precluded any attempt by one interest group to kill it in any specific committee.

2. We arranged *early discussions with the Governor* so that he would have no good political basis on which to veto the bill. The momentum behind a special session required that, in his call, he set forth his proposals for dealing with the problem. However, this was *after* we had discussed our view of it with his advisors and had achieved agreement on most points.

3. We were able to obtain *support from the leadership* of both houses, so that all competing bills were diplomatically laid to rest. We needed the exclusivity not only of public support and media attention, but of the special interests who soon recognized AB 1 as "the only game in town."

4. We convinced the leadership of the Senate to refer the bill to a *neutral committee*, the Insurance and Financial Institutions Committee, even though there was an incomplete subject matter connection. We could not have hoped to bring about change had the measure been referred to a lawyer-dominated committee in both houses. In such committees, there is an unavoidable built-in bias. Our fate in the Assembly was such that we wanted no repeat in the Senate.

5. We prodded the actuaries of the insurance companies and the Department of Insurance to come up with statistical information which showed the *impact of the tort reforms* in AB 1 on the proposed

malpractice insurance rate increases. We had to show the public that there would be some impact and that the sacrifices were necessary to achieve the desired goal. We finally got a general agreement that the bill might in time drop premium levels by about 30-40 percent and contain help to future costs.

6. We recognized that *time and reason were on our side.* Time, because it enabled Assembly members to develop an increasing appreciation of the full magnitude of the problem — a likely breakdown in the state's health delivery system, or at best the denial of care to the economically marginal. It was perceived as a problem for which we had the temerity to propose a solution that was, at least, well thought out. Reason was on our side because the existing system absolutely dictated change. Even if it were not a medical disaster for the rural patient, the Medicaid patient, the acute care patient, the high risk patient, and the economically marginal patient, it was a consumer disaster in terms of the half-billion dollars per year spent on defensive medicine in California, and a disaster for the *lawyer's* injured client who probably receives (in actuality) less than twenty or thirty cents out of each malpractice premium dollar paid in.

7. We learned to *reconcile vastly differing perspectives.* We spoke with people who told us that malpractice insurance is a doctor's problem, failing to recognize that costs are passed on to the patient; with people who were willing to consume our energies searching for a villain when there is none; with people who had *the* magic solution when in reality they lacked basic knowledge of the subject matter and were forever re-inventing the wheel; with people who had very narrow points of view related to their own particular discipline; with people who demanded an iron-clad guarantee that we had the solution; with people who tried to blackjack us into a response; and finally with some people who were totally unappreciative of our efforts on their behalf.

Conclusion

AB 1 was a complex bill to write, and an extremely difficult bill to pass. While its provisions represented many compromises, the net result was a more decisive, stronger measure than any of the protagonists imagined would emerge or had a right to expect. While AB 1's long-range reforms begin the process of changing the medical malpractice insurance system, dialogue will continue in the California Legislature on further changes and refinements.

The crisis is not yet over, but because of AB 1 there is a renewed basis for confidence that the legislature and the democratic process can perform in a reasonable and prudent manner under the intense pressure that such a crisis can produce.

A MICRA RETROSPECTIVE

By: David E. Willett, J.D.

EXHIBIT 4

CALIFORNIA PHYSICIAN

June 1991 — California Medical Association's Monthly Magazine

During a 3-year period, a California general surgeon's professional liability insurance premium rose only 6 percent...

During the same period, a Florida general surgeon's premium rose 41 percent. The reason is...

THE MICRA DIFFERENCE

A look at how the Medical Injury Compensation Reform Act of 1975 has saved professional liability insurance in California—*page 36*

By David E. Willett, J.D.

A MICRA RETROSPECTIVE

An insider's look at the landmark tort reform law that saved the state's professional liability insurance

n 1975, a professional liability insurance crisis erupted in California, threatening the closure of medical practices throughout the state because of high premiums and unavailable coverage. In a short time, the crisis spread throughout the nation. California's solution was the Medical Injury Compensation Reform Act of 1975 (MICRA), an historic piece of legislation that made insurance available and affordable in the state. Other states have not been so lucky.

Protecting MICRA is a top priority for California physicians. Events leading to MICRA's passage, and premium comparisons in other states, explain why MICRA is so important.

The insurance stranglehold

Early in this century, professional liability suits were infrequent. When a physician was sued, CMA's predecessor organization, the Medical Society of the State of California, provided members with both a lawyer and, for some period of time, indemnity coverage as a membership benefit. Later, as malpractice suits became more commonplace, commercial carriers began to provide this coverage. Periodically, crises would erupt as these carriers ran into difficulties. However, the 1975 crisis surpassed prior experience.

In the years immediately prior to 1975, most California physicians were covered under group programs sponsored by local medical societies, underwritten by commercial carriers. One program existed north of the Tehachapis, and the other covered southern California, except for those physicians insured under a relatively small CNA program in San Diego and Riverside counties. By 1975, the southern California program was underwritten by Traveler's, and the northern California program was underwritten by Argonaut.

The 1975 crisis was not the first sign of problems. There were legislative inquiries in 1965 and again in 1972. No significant legislation resulted. In January 1975, the California Legislature

During the legislative campaign for the Medical Insurance Compensation Reform Act in 1975, CMA developed a comprehensive campaign for the bill's passage. Pictured below are ads that were part of a statewide advertising campaign that CMA developed and placed in the state's major newspapers and magazines.

Can the Legislature solve the "malpractice" crisis by SEPTEMBER 15 1975

was considering a report from a Select Committee appointed in 1972, when the crisis began to erupt. Until then, members of the Legislature admit that they did not perceive the magnitude of the crisis California was about to experience, despite medicine's warnings.

The crisis began to reveal itself in January 1975, when Argonaut proposed a 350-percent increase in northern California rates. Traveler's then demanded an increase of the same magnitude. Physicians found these premiums unaffordable. By April, physicians throughout California were making plans to close their offices, because few could risk practicing without professional liability insurance. On May 1, many Bay Area physicians suspended their practices. Although arrangements were made to provide emergency treatment, health care was becoming unavailable.

Governor Jerry Brown had remained aloof from the issue, saying he was not convinced that the problem warranted a legislative solution. Various ad hoc physician organizations emerged in different parts of the state. CMA invited leaders to participate with association leadership, including three officers assigned to work full-time to obtain a solution. On May 16, Governor Brown finally called for a special session of the Legislature.

There were several reasons why California physicians could not obtain affordable professional liability insurance.

- Suits were becoming increasingly frequent, with increased specialization, changes in the physician-patient relationships, technological advances, and increased (and sometimes unreasonable) patient expectations.
- Legal innovation and judicial expansion favored plaintiffs and made liability more likely.
- Professional liability is a difficult risk to insure. Claims may not materialize until years after treatment. This long tail and the prospect of catastrophic losses are unsettling to carriers, who fled the field when adverse experience was recognized.

Affordable insurance still was not available. So physicians themselves organized four new companies, essentially not-for-profit, as MICRA's legislative journey came to a close.

- The insurance base is very small: In 1975, a mere 27,000 physicians and fewer than 600 hospitals had to provide all the funds needed to pay escalating awards.

AB 1XX, which eventually carried MICRA's provisions into law, was introduced on May 19, 1975, but did not pass until September. In the interim, medicine, as well as all the special-interest groups affected by the reform proposals, participated in furious debate. The reform provisions that CMA demanded were ultimately included. A political price for passage was the inclusion of provisions creating the Board of Medical Quality Assurance (now the Medical Board of California) and a structure that included mandatory reporting of verdicts, settlements, and medical staff disciplinary actions.

Even though Governor Brown refused to sign AB lXX, the bill was allowed to become law, together with a clean-up bill, SB 24XX. However, passage of this legislation did not automatically end the crisis. Affordable insurance still was not available. So physicians themselves organized four new companies, essentially not-for-profit, as MICRA's legislative journey came to a close. For survival, these companies would depend upon MICRA's promise of meaningful tort reform.

What MICRA comprised

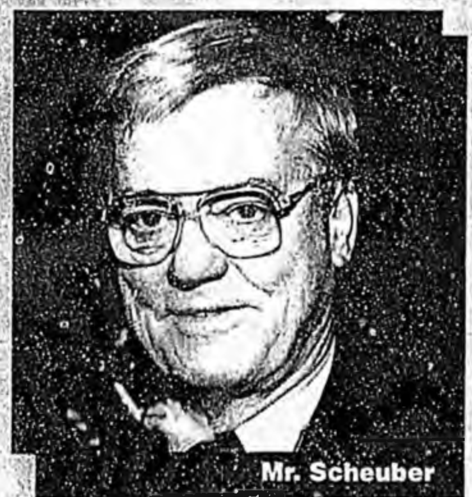
MICRA contained six tort-reform provisions. The four major

Insurers paint gloom

Physicians' professional liability premium rates would soar if the Legislature were to modify the Medical Injury Compensation Reform Act of 1975 (MICRA), officials from California's doctor-owned professional liability insurance companies say.

The carriers unanimously credit the MICRA reforms—specifically the $250,000 cap on so-called pain and suffering awards, attorneys' contingency fee limits, and periodic-payment schedules for awards—for the companies' ability to offer California physicians low premium rates, relative to what doctors pay in other parts of the country.

"If we didn't have MICRA, we could go back to the crisis years of the '70s," when physicians' rates skyrocketed more than 300 percent and commercial insurance companies abandoned their physician policyholders, says William Scheuber, president of Medical Underwriters of California, which is the operating company of Medical Insurance Exchange of California (MIEC).


Mr. Scheuber

In those years, "there was unlimited exploitation by the plaintiffs' bar," Mr. Scheuber explains. With no caps on the amounts on jury awards in malpractice cases, or on fees that trial attorneys charged injured plaintiffs, "the motivation they had to create liability cases—when none really existed—was overwhelming."

The fact that the doctor-owned companies in California "have returned millions and millions of dollars in dividends to policyholders" demonstrates their strength and success, Joseph Sabella, M.D., CEO and chairman of The Doctors' Company, says. "We meet our obligations. The underpinnings of

Dr. Sabella

that success are the MICRA reforms: Without them, this would not have occurred."

"If you took MICRA away, the whole foundation would collapse," Dr. Sabella predicts. "If you took away important parts of MICRA, there would be a partial collapse, which would be very serious."

picture of life without MICRA

Donald Zuk, CEO and president of Southern California Physicians Insurance Exchange (SCPIE), cited two other indicators that prove MICRA's effectiveness: The diminishing frequency of malpractice claims and the actual decrease in professional liability rates over the past couple of years.

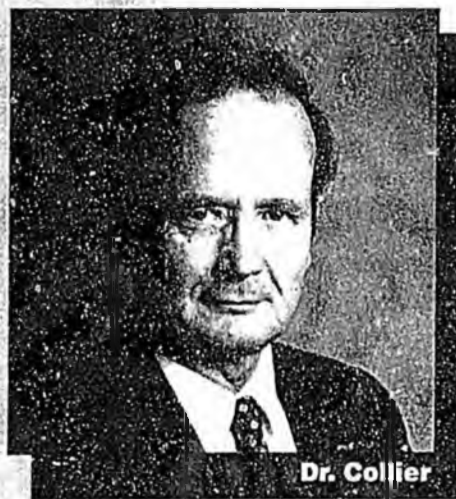
"MICRA has had a tremendous impact in California," Mr. Zuk says. "The proof is so overwhelmingly obvious that it's hard to imagine anyone—

Mr. Zuk

other than someone with a vested interest, basically the plaintiffs' attorney who's out to make a buck—could deny that MICRA has been a terrific help in controlling frivolous and unwarranted litigation."

Any modification to MICRA "will adversely impact the delivery of medical care in California," NORCAL's Chairman Duane Collier, M.D., says. "Medical malpractice insurance will be less available and premiums will be sky high.

"NORCAL has aggressively promoted MICRA in its day-to-day claims operations," Dr. Collier adds. "Tools


Dr. Collier

that are not used get rusty. We want our lawyers to understand MICRA and to use it effectively to protect our insureds."

Cooperative of American Physicians/Mutual Protection Trust (CAP/MPT), an interindemnity arrangement that provides professional liability protection, has also come to depend on MICRA for the way it does business. "Without MICRA, our organization would not have been able to reduce its open lawsuits through arbitration for five straight years, nor would we have been able to give refunds to our membership for four straight years," Carl Blomquist, CEO of CAP/MPT, says.

Although the agreement between organized medicine and the trial lawyers to keep MICRA intact runs through Dec. 31, 1992, the state's doctor-owned professional liability

Mr. Blomquist

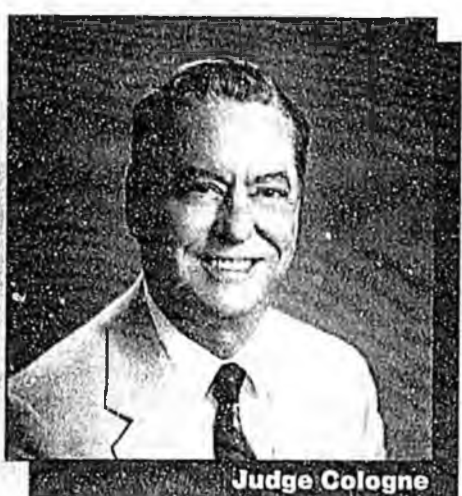
carriers are already discussing strategies to preserve MICRA.

Both independently and through lobbyists, the doctor-owned insurance companies are making sure state legislators understand MICRA's benefits.

The California Association of Professional Liability Insurers (CAPLI), a political action committee set up by The Doctors' Company, MIEC, SCPIE, and NORCAL in 1987, plans to operate very closely with CMA, "adhering to the letter of that agreement, as well as the spirit of it," until its 1992 expiration, CAPLI's lobbyist Judge Gordon Cologne says.

Legislative leaders gave CAPLI "a firm commitment" that no action will be taken on MICRA this year, Judge Cologne says. "Assembly Speaker Willie Brown (D–San Francisco) and Chairman of the Senate Judiciary Committee Bill Lockyer (D–Hayward) have both indicated that they will help us observe the agreement," he says. "To the extent that they're able to, we have their wholehearted support."

CMA, CAHHS Form MICRA Monitoring Committee


Judge Cologne

The California Medical Association–California Association of Hospitals and Health Systems AC Committee was formed in 1988 to ensure that *amicus curiae* briefs are filed in important cases affecting the Medical Injury Compensation Reform Act (MICRA). Especially since MICRA's constitutionality was decided, the courts increasingly have been faced with questions concerning its implementation. "It is crucial that the courts asked to interpret MICRA have a complete understanding of their decision's implications," Catherine Hanson, CMA's legal counsel, says.

In addition to CMA, the California Association of Hospitals and Health Systems and the California Dental Association (on whose behalf the briefs are filed), the current program participants include most of the major medical, dental, and hospital professional liability insurance carriers in California and several prominent self-insured HMOs, hospitals, and medical groups.

The committee's activities have been extremely successful. At the committee's request, a number of cases with adverse implications for MICRA have been

Judge Cologne says the legislators have respect for the agreement between the medical and legal professions and their attempt to honor it. "They're not going do anything to violate the understanding the two professions have with each other as long as that agreement is in place," he says.

CAP/MPT is working with the Association of California Tort Reform, a group that includes utility companies, manufacturers, a railroad company, and some health-related associations. Mr. Blomquist of CAP/MPT says the group "is looking for the extension of MICRA on a broad base." He expects the organization will be particularly persuasive with the legislators, because its varied membership illustrates the fact that professions other than medicine are interested in upholding MICRA.

The carriers agree that MICRA's wholesale destruction is unlikely; however, they are concerned that the trial lawyers will "chip away" at the reforms, primarily by attempting to increase the $250,000 limit on pain and suffering awards.

Although the limit pertains only to court settlements, increasing the cap would have "an umbrella effect over all the cases, the 97 or 98 percent of cases that settle short of trial," Dr. Sabella of The Doctors' Company says. "If the cap is raised for the purposes of trial, it will have a negative effect on our ability to negotiate claims closures at reasonable prices."—*Joan Hess*

provisions are repeatedly cited as a national standard for tort-reform. They include:

- **A $250,000 limit on recovery for noneconomic losses,** defined as "pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages." There is no limit on recoveries for economic or "out-of-pocket" losses. Despite strident objections, the Legislature's decision that this is a fair limit stands up to scrutiny. Blockbuster awards for serious economic losses are not precluded and, indeed, are increasing. There is increasing sentiment that pain and suffering awards, because they are so speculative in nature and can be so large, are out of place in a system that must compensate for injury. Finally, by bringing awards for pain and suffering under control, this cap made insurance available to physicians, and thus to patients who might otherwise find no resource to pay settlements or awards.
- **Periodic payment of future damages of more than $50,000** at the request of either party achieves two goals:
  - If the patient should die, so that the need for future medical treatment, other future expense, or future pain and suffering never occur, the money is not "earned"—least of all by heirs who would otherwise receive it. The elimination of such windfalls leaves such money available for other claims.
  - More importantly, limiting payment of future damages to the plaintiff's lifetime makes it possible to apply actuarial principles and to fund awards by purchasing annuities that provide periodic payments at much lower cost than lump-sum payments to successful plaintiffs. An important benefit is that annuity payments offer the plaintiff security that does not exist when large sums of money are given to individuals unprepared to manage those funds safely.
- **Contingency fee limits** are particularly resented by plaintiffs' lawyers. The original limits were increased as of Jan. 1, 1988, as part of CMA's "truce" with the trial lawyers. Current limits are 40 percent of the first $50,000, 33-⅓ percent of the next $50,000, 25 percent of the next $500,000, and 15 percent of any amount more than $600,000. The same limits apply to settlements and judgments after trial. Before MICRA's passage, 40 percent contingency fee agreements were common, and even 50 percent agreements existed.
- **Collateral-source payments, such as payment of medical expenses under health insurance or Workers' Compensation, can now be described to juries.** Previously, defense counsel could not tell juries that losses claimed by the plaintiff had actually been reimbursed by others. This provision avoids double recoveries; another MICRA provision prohibiting

decertified (that is, wiped off the law books), including:

- *Jordan v. Long Beach Community Hospital*, which had ruled that the $250,000 cap applies per plaintiff rather than per action.
- *Orellana v. Mejia*, which had ruled that post-judgment interest accrues until periodic payments come due, thereby vitiating the purpose of the periodic payments statute.

The committee has also been successful in having cases with helpful language certified for publication, for example:

- *Gorman v. Leftwich*, which properly interpreted the periodic payments statute.
- *Weinholz v. Kaiser Foundation Hospitals*, which ruled that the new higher contingency-fee limits do not apply to fee agreements entered into before Jan. 1, 1990.

Finally, the committee has been successful in getting courts to adopt arguments contained in its AC briefs. For example, *Woods v. Young* (holding that the notice of intent to sue statute only tolls statute of limitations for 90 days from the date the notice is sent, and then only if it is sent in the last 90 days of the statute) in large part tracks the argument made in the committee's AC brief.

One of the committee's goals is to identify MICRA cases before they reach the appellate court level so that the committee can help physicians and other defendant health care providers address the legal issues that will be presented to the court.

Individuals who are involved in such cases may request the committee's assistance by sending a letter identifying the issue, or issues, that they believe the AC Committee should address, indicating the approximate time frame within which an AC brief would have to be filed, and enclosing copies of the relevant pleadings. The letter should be addressed to: Gregory M. Abrams, California Medical Association, P.O. Box 7690, San Francisco 94120-7690.

For further information about the Medical Injury Compensation Reform Act, CMA has published a definitive MICRA manual. Revised annually, the *MICRA Implementation Manual* contains a detailed summary of the MICRA statutes and court rulings, further interpreting this historic tort reform legislation. *Information:* 415/882-5175.

subrogation lien claims by collateral source payers protects the patient.

- **Other MICRA provisions** redefine the statute of limitations in an effort to close loopholes that the courts have created over the years and to require the prompt assertion of claims. MICRA also requires 90 days notice to physicians or other providers, prior to filing malpractice suits. Although useful, the State Bar's refusal to punish offenders has significantly emasculated the statute. Finally, MICRA recognizes and implements arbitration agreements that the parties willingly adopt.

A much-embattled law

Once MICRA became law, it was the subject of great uncertainty for the next decade. Once passed, it should have been the law of the land. However, the plaintiff's bar, represented by the California Trial Lawyers Association, began a continuous barrage, contending that MICRA was unconstitutional. Many plaintiffs' lawyers ignored such MICRA provisions as limits on contingency fees. Worse, many trial judges refused to recognize MICRA. Physicians and their liability carriers lived with the constant fear that appellate rulings would invalidate MICRA. These concerns were aggravated by Governor Brown's appointment of Rose Bird as Chief Justice of the California Supreme Court, because she had previously advised the Governor to veto the legislation.

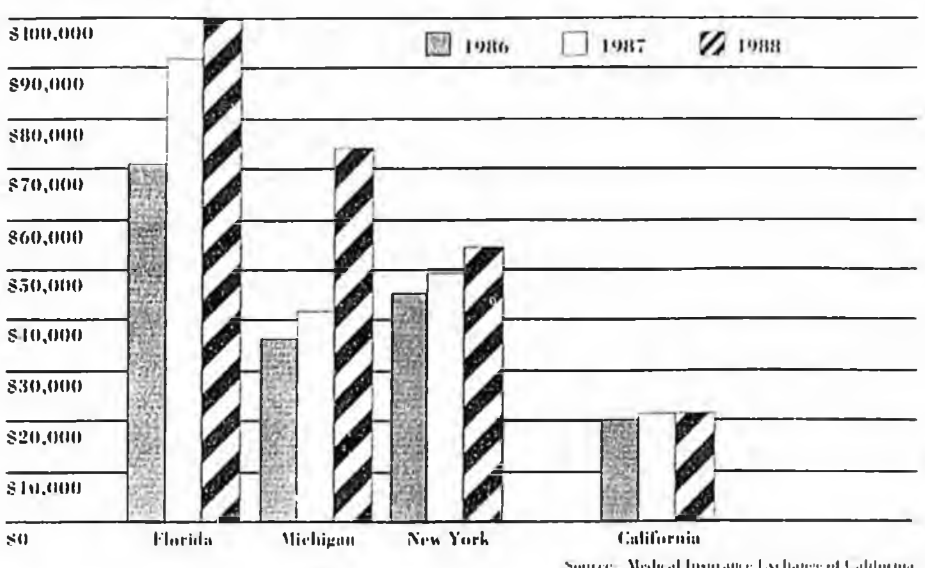
It took nearly 10 years to find out what the California Supreme Court would do with MICRA. The Supreme Court's first decision came in 1984 in *American Bank and Trust Co. v. Community Hospital of Los Gatos-Saratoga* (1984) 36 Cal.3d 359. That decision, upholding MICRA's constitutionality, came only after a stormy course. The original plaintiff, a patient burned in the shower, received a verdict of more than $198,000. The trial judge, not impressed with MICRA, refused to order periodic payment of the damages. Eight months later, the plaintiff died, and her heirs thus received the windfall, which MICRA's periodic-payment provision was intended to avoid. Nonetheless, when the hospital appealed, the Court of Appeal ruled AB 1XX unconstitutional. The opinion was written by Justice Miller, who had opposed MICRA as Chairman of the Assembly Judiciary Committee when AB 1XX was before the Legislature.

In March 1983, an initial Supreme Court decision held that MICRA's periodic-payment provision was unconstitutional, at least where hospitals were concerned. The opinion was criticized immediately and was withdrawn by the Supreme Court, which then granted a rehearing. The Court's eventual 4–3 decision upholding MICRA was authored by Justice Kaus, with Chief Justice Bird writing a dissenting opinion.

The Court examined and dismissed each constitutional objection to periodic payments. The majority, once it found that MICRA is rationally related to a legitimate state interest, refused to second guess the Legislature. The Court upheld the State's authority to enact MICRA because the Legislature

> ... was responding to an insurance 'crisis' that had arisen in a particular area. The problem, which was the immediate impetus to the enactment of MICRA, arose when the insurance companies which issued virtually all of the medical malpractice insurance policies in California determined that the costs of affording such coverage were so high that they would no longer continue to provide such coverage as they had in the past. Some of the insurers withdrew from the medical malpractice field entirely, while others raised the premiums which they charged to doctors and hospitals to what were frequently referred to as "skyrocketing" rates. As a consequence, many doctors decided either to stop providing medical care with respect to certain high risk procedures or treatment, to terminate their practice in this state altogether, or to "go bare", i.e., to practice without malpractice insurance. The result was that in parts of the state medical care was not fully available, and patients who were treated by uninsured doctors faced the

Premium Comparisons of Doctor-Owned Companies
Mature Claims-Made Rates for $1/3 Million Limits
General Surgery



Source: Medical Insurance Exchange of California

There has been very little change in California premiums during the past decade. Generally, premiums range from $4,000 to $50,000 annually for $1 million to $3 million cove age. MICRA is the reason.

prospect of obtaining only unenforceable judgments if they should suffer serious injury as a result of malpractice.

The *American Bank & Trust Co.* decision broke the almost 10-year logjam, although there was still uncertainty about the constitutionality of the $250,000 limit and other MICRA provisions not specifically before the court in *American Bank & Trust*. In February 1985, the California Supreme Court upheld the limit on contingency fees in *Roa v. Lodi Medical Group* (1985) 37 Cal.3d 920. This case was of particular interest to CMA. CMA and other *amici curiae* who joined with CMA provided the only opposition. There was no separate representation for the minor child in this "bad baby" case, whose lawyer complained that the $93,795 awarded him under MICRA—for a policy limits settlement of approximately $500,000 after service of a single set of interrogatories and without a single deposition—was inadequate compensation.

Despite feverish support for the plaintiff from other members of the contingency bar and retention of constitutional law professor Laurence Tribe in a last-ditch appeal to the U.S. Supreme Court, the limits were upheld. Contrary to the arguments of the plaintiff's bar against the contingency-fee limit, capable representation remains available to plaintiffs, and malpractice suits continue to be filed.

Finally, a few weeks after the *Roa* decision, the California Supreme Court upheld the $250,000 limit in *Fein v. Permanente Medical Group*, (1985) 38 Cal.3d 137. Settling the last important issues of constitutionality, the court also upheld MICRA's "collateral source" provision as a protection against "double recoveries."

MICRA's far-reaching impact

MICRA has brought unparalleled stability to the professional liability insurance market in California. Premiums are significant, but insurance is affordable. Physicians can choose among several strong and solvent carriers. There has been very little change in California premiums during the past decade. Generally, premiums range from $4,000 to $50,000 annually for $1 million to $3 million coverage. MICRA is the reason.

In contrast, Florida has no effective tort reform. In 1983, in the metropolitan areas of Dade and Broward counties, premiums ranged from approximately $4,300 to approximately $38,000. Premiums doubled in those counties every two years and reached $19,400 to $192,000 by mid-1987. The rate for obstetrics was $165,320. General surgeons paid more than $96,000. Even in rural Florida, the rate for general surgeons was over $50,000 by 1987, more than twice the California premium. In New York, surgeons paid almost $59,000 in 1987, and in Michigan, the rate for general surgeons was approximately $81,000.

There has been some recent reduction in premiums elsewhere, assisted by a soft insurance market and political compromises in highly regulated jurisdictions. In metropolitan Florida, one company has reduced rates to "only" $13,498 for family practice, $96,023 for obstetrics, and $139,020 for neurosurgery.

MICRA is a national model for effective tort reform, cited frequently by researchers in the field. Proposed federal legislation, both as described by President George Bush and as contained in the Hatch bill (SB 489), is based on MICRA's provisions. For the most part, other states have seen limited tort reform. California is the only major jurisdiction where significant tort reforms are the basis for stable, affordable insurance programs, underwritten by companies unlikely to flee the field if the pendulum swings again. Maintaining MICRA is the best protection for the future. CP

Mr. Willett, who is a partner in the San Francisco law firm of Hassard, Bonnington, Rogers and Huber, is CMA's outside legal counsel. He was involved in MICRA's development.

Addressing the Myths & Misconceptions about Personal Injury & the Civil Justice System

Compiled by
The Alaska Academy of Trial Lawyers

January 1993

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A. Access to Justice

1. Right of Trial by Jury -- The Foundation of Our Society
   a. A fundamental guarantee in the Alaska State Constitution.
   b. The jury, as conscience of the community, promotes safety and equity.
   c. Critics of the jury system are the most likely to request a jury trial.

B. Tort Restrictions Do Not Reduce Insurance Rates

1. Evidence indicates that tort restrictions have no significant impact on insurance premiums or availability
2. A case history -- medical negligence restrictions have little impact on rates

C. The Litigation Crisis: Debunking the Myths

1. Personal injury cases represent a small percentage of the courts' workload
2. If there is a "litigation explosion", it is being driven by businesses suing businesses, not by personal injury actions
3. Most cases are resolved prior to trial

D. Large Jury Verdicts are Uncommon

1. Huge jury verdicts, such as million dollar verdicts, are the exception rather than the rule
2. Jury verdicts can be reduced -- the actual payout to the plaintiff may be less than the jury verdict

E. "Horror Stories" Make Bad Public Policy

1. Some examples of "horror stories"

F. The Costs of Personal Injury

1. Injured Persons Bear the Burden of Personal Injury
   a. The injured person bears the brunt of the cost of injury.
   b. Personal injury liability compensation does not pay for the actual cost of injuries.

G. Civil Justice System Promotes Safety in America's Economy

1. Tort Law Improves American Products
   a. The tort system saves lives, reduces injuries and promotes public safety.
   b. Insurers reap benefits while projections of future losses have decreased.

c. Claims that the tort system stifles innovation is a ruse.
d. The cost of liability claims is minor compared to the GNP.

H. Medical Negligence Facts vs. Myth

1. Medical Negligence Claims -- The Real Facts
   a. Lawsuits protect the public -- the benefits outweigh the costs.
   b. The frequency and severity of medical negligence claims has remained relatively constant.

I. Medical Negligence -- Debunking the Myths

1. Liability claims without merit are not compensated, and the size of the payment is commensurate with the severity of the injury
2. Rather than seeking large settlements, most injured patients sue for other reasons
3. Very few incidents of medical negligence result in a claim
4. Elderly and minority patients are at a greater risk of being injured by medical negligence

J. Physician Discipline System Does Not Remove Bad Doctors

1. The cause of medical negligence is medical negligence -- negligent doctors committing preventable errors
2. A small number of physicians are responsible for most of the negligence
3. Medical disciplinary boards do a very poor job of regulating physicians

K. Medical Negligence Insurance -- Costs and Profits

1. Medical liability insurance is less than 1% of the total cost of health care
2. Medical negligence insurance is highly profitable for both private and physician-owned insurance companies

L. Medical Negligence Restrictions Are No Solution

1. Tort restrictions will not resolve the problem of access to health care

Preface

We have recently celebrated the Bicentennial of the Bill of Rights of the American Constitution. That Constitution and those of the States, including Alaska, declare as fundamental, the right to jury trial and equal access to civil justice for all.

And yet today our civil justice system and the rights of injured victims and consumers are under attack. Politicians in search of solutions to such complex matters as runaway medical costs, the budget deficit and America's competitiveness in the market, oftentimes skew statistics to perpetuate unfounded myths and misconceptions about our legal system in an attempt to pin the problem on lawyers and the injured victims they represent. The multi-million dollar propaganda efforts of insurance companies and their corporate colleagues have borne fruit in biased judges, alienated juries, regressive state and federal legislative efforts, and a social environment permeated by an uncaring attitude toward the rights of the injured victims.

For more than a decade, the legislative debate over the "liability insurance crisis" has assumed that a crisis existed and focused on restriction of the rights of victims of negligence to recover fair compensation to resolve that crisis. Despite any hard data to support their claims, representatives of the insurance industry have asserted that restriction of victims' tort rights will result in lower liability insurance rates. In response to these assertions, the Alaska Legislature has adopted some of the most severe restrictions of those rights of any state in the country.

In 1989, then Speaker of the House, Sam Cotton, at the request of several fellow representatives, formed the Alaska Liability Insurance Task Force. The task force was comprised of legislators and members of medical, insurance, consumer and legal organizations familiar with liability insurance issues. The most significant finding from the data collected by the task force was that, with some exceptions, there is <u>no liability insurance crisis in Alaska.</u>

Although there were minor differences in the conclusions reached in the various studies collected by the Liability Insurance Task Force, the general consensus was that, at best, restrictions on the rights of victims to receive fair compensation through the tort system have had only a "modest", if any, impact on liability insurance rates. More importantly, the consensus among the scholars was that state legislatures should direct their attention away from the tort system and towards alternative solutions to resolving any existing liability insurance problems.

What these studies did not address is the extent to which the public is forced to financially support those tort victims who have been disenfranchised from the legal system because of existing restrictions on tort recovery and the extent to which this gap would widen if further restrictions on tort victims' rights were enacted.

ACCESS TO JUSTICE

RIGHT OF TRIAL BY JURY -- THE FOUNDATION OF OUR SOCIETY

A fundamental guarantee in the Alaska State Constitution.

- A Guaranteed Right: Article I, Section 16 holds that in civil cases where the amount in controversy exceeds $250, the right of trial by jury is preserved.

The jury, as conscience of the community, promotes safety and equity.

- Juries Promote Safety: Over 5 million Americans serve on juries each year. As the conscience of the community, their decisions determine guilt or innocence, safety and security, life and death. Countless improvements aimed at preventing injuries and saving lives might never have occurred without trial by jury and its time-tested ability to bring about changes for the better.

- A Triumph of American Democracy: According to the consumer group, Public Citizen, "The right to collect damages through the civil justice system is one of the great triumphs of American democracy. It allows anyone, no matter how poor, to challenge the largest corporation or government agency and reclaim compensation for wrongful injuries. It forces wrongdoers to change their products and practices to prevent further injuries and avoid further liability."[1]

Critics of the jury system are the most likely to request a jury trial.

- The Ultimate Irony: The loudest critics of the jury system are insurance companies and the defendants they represent in personal injury litigation -- corporations, local government, and doctors. Ironically, the party most likely to request a jury trial in personal injury litigation is the defendant. In fact, insurers almost always demand a jury trial.

TORT RESTRICTIONS DO NOT REDUCE INSURANCE RATES

Evidence indicates that tort restrictions have no significant impact on insurance premiums or availability.

- Insurance Services Office (ISO) Says "NO REDUCTION": A 1987 ISO study determined that tort "reforms" enacted in 1986 would have little or no impact for the majority of liability claims filed with insurers.[2] In October 1986, ISO determined that

its rates would not reflect recent state tort restrictions because ISO was unable to determine any cost effect of the tort law changes.[3]

• Insurers Say "NO REDUCTION": Insurers required to provide Washington State Insurance Commissioner Richard Marquardt with evaluations of the effects of tort reforms on proposed rate filings indicated that there was no way to make such a determination, and that the 1986 law would have a minimal effect on rates. Responses from insurers in other states indicate that tort restrictions do not resolve insurance price fluctuation, reduce rates or increase availability.[4]

• Washington State Insurance Commissioner Says "NO REDUCTION": In 1987, Commissioner Marquardt told a U.S. House committee, "It is difficult, if not impossible, to pin a price tag on tort reform or to even assess accurately its effect on insurance availability and affordability. Based on our research, by the middle of 1986, general liability rates had begun to stabilize throughout the United States -- not just in the states that had adopted tort reform.[5]

• 1991 Washington Insurance Commissioner Report Says "NO REDUCTION": A 1991 report by Marquardt to the Legislature notes that insurance rates in recent years have stabilized and coverage is more readily available, however, tort changes cannot be credited as the reason. Insurers still find it difficult to quantify the impact tort reform on insurance rates. A 1989 law requiring insurers to consider investment income in setting rates was projected to have a much greater impact on insurance rates than changes in the tort system.[6]

• Best's Says "NO REDUCTION": A 1989 Best's Review article on a presentation by David B. Mathis, CEO of Kemper Reinsurance, quoted Mathis as saying, "The only way to achieve stability in the market is through adequate price levels. First of all, despite the publicity it has received, tort reform has turned out to be a non-event in terms of its impact on the big picture.".[7]

A case history -- medical negligence restrictions have little impact on rates.

• 1970 Limitations Fail: A study of medical negligence legislative limits passed in various states from 1974 to 1978 concluded that the changes, either individually or collectively, did not reduce or stabilize insurance rates.[8] Following adoption of MICRA in 1975, California's medical liability insurance premiums continued to rise (increases of 16% to 337% between 1980 and 1986.) Indiana, which adopted the most restrictive medical negligence laws of any state, had premium increases of 53% to 116% during the early 1980s.[9]

• The Crisis of 1985-1986: Despite the fact that tort restrictions had little or no effect on resolving the so-called crisis of the 1970s, a number of states passed laws restricting medical negligence actions during the mid-1980s when liability premiums began to skyrocket.

• Rate Reduction Not Due to Liability Restrictions: Nationwide, medical liability premiums began dropping early in 1989 due to a reduction in claim filings and a reduced increase in the costs to settle claims.[10]

THE LITIGATION CRISIS: DEBUNKING THE MYTHS

Personal injury cases represent a small percentage of the courts' workload.

• The courts are overburdened with over 18 million civil lawsuits filed in state courts each year: This 18 million dollar figure includes millions of routine cases such as small claims, traffic and other ordinance violation cases, domestic relations, estate and contract matters. The most recent figures from the National Center for State Courts show that the number of tort cases filed in state courts was less than half a million, or less than three percent of all state filings.

• Federal Courts: Studies of federal tort filings show lawsuits are on the decline. Over the last thirty years, tort cases as a percentage of federal civil cases dropped by nearly half, from 38.4 percent in 1960 to 20.1 percent in 1990. Product liability litigation is shrinking even faster. It has been reported that federal product liability cases, other than those involving asbestos, have been shrinking steadily in recent years, falling 40 percent between 1985 and 1990.

If there is a "litigation explosion," it is being driven by businesses suing businesses, not by personal injury actions.

• Businesses Suing Businesses: According to a University of Wisconsin study, federal litigation between corporations has increased astronomically, growing more than 1000% between 1971 and 1986.[11]

• State Courts: According to the National Center for State Courts, tort filings are not increasing at a faster rate than other major categories of civil filings. The most dramatic increases in civil cases are real property and contract cases, not torts.[12]

• Federal Courts: Nationally, between 1979 and 1987 contract cases filed in Federal District Courts more than

tripled and property cases quadrupled -- far exceeding growth in personal injury filings.[13]

Most cases are resolved prior to trial.

- Most Cases Are Settled: Only 5% of all personal injury cases filed in state courts go to trial. Complex actions, such as medical negligence cases, are more likely to go to trial than cases such as automobile personal injury (11% of medical negligence cases filed result in trials). Most cases are settled, withdrawn or dismissed prior to trial. 6% of all personal injury cases are uncontested by the defendant.[14]

LARGE JURY VERDICTS ARE UNCOMMON

Huge jury verdicts, such as million dollar verdicts, are the exception rather than the rule.

- Huge Verdicts are Rare: Huge personal injury payouts are a rarity. The largest settlements and verdicts are made to the most seriously injured victims.[15] If anything, juries are very cautious and reticent to adequately compensate injured persons. The multi-million dollar advertising campaigns of the insurance industry have used anecdotal information to make the public feel guilty about fairly compensating persons negligently injured by others.[16]

- Million Dollar Verdicts are Uncommon: According to Business Week, "Over the past 14 year in our nation of 240 million people there has been only 1,642 awards of $1 million or more. Furthermore, two-thirds of the 1,642 cases involved victims who suffered either permanent paralysis, brain damage, amputations or death."[17]

- Alaska Personal Injury Verdicts are Lower than National Verdict Average: Alaska personal injury verdicts currently average 8.1% below national verdict values.[18]

- The Most Severely Injured Persons Receive the Higher Verdicts: Product liability and medical negligence victims generally sustain more severe injuries and are more likely to receive a larger jury verdict. While the 1988 average verdict for personal injury litigation in U.S. state courts was $89,622, the highest average verdict was in the area of medical negligence ($146,831).[19]

Jury verdicts can be reduced -- the actual payout to the plaintiff may be less than the jury verdict.

• Verdicts Can be Reduced on Appeal or Settlement: The actual payout to the plaintiff is reduced after the trial verdict in about 20% of cases. The larger the verdict, the greater the likelihood that the verdict will be reduced. Of the cases where a verdict is reduced, the average actual payout is about half (53%) of the original verdict amount.[20]

"HORROR STORIES" MAKE BAD PUBLIC POLICY

Use of outrageous and atypical examples to create the impression of abuses and/or weaknesses in the civil justice system are common. Cases cited by tort critics alleging frivolous lawsuits and excessive jury verdicts are very often misleading and inaccurate.

Some examples of "horror stories":

• The Pure Fabrication -- The Lawn Mower and the Hedge Story: A widely-circulated story given in the mid-'80s as an example of our litigious society told of a man who successfully sued a lawn mower manufacturer for injuries suffered while using one of their lawn mowers to trim his hedge. In fact, this case is fictitious. It does not exist. It was a fabrication of tort reform proponents.

• Failure to Disclose All Pertinent Facts -- The Phone Booth Near the Road: In 1986, President Reagan noted that it was absurd for a California man to recover damages from a telephone company because he was in one of their booths when it was struck by a drunk driver.[21] The facts conveniently left unstated included: 1) The company knew the booth was too close to the street because it had been hit before; 2) complaints had been filed with the telephone company stating that the booth was difficult to exit because the door jammed; 3) the trial court had granted a lower court summary judgment to the company, but the California Supreme Court remanded the case to the lower court because the risk of injury was foreseeable by the telephone company; and 4) the case was ultimately settled.[22]

• Not Appropriately Placing Blame - Beware of Horse Manure: In 1987, a CBS "60 Minutes" segment focused on a lawsuit against a ladder manufacturer in which the plaintiff recovered $300,000. According to the manufacturer, the plaintiff was injured when the temperature increased from 20 to 40 degrees and the ladder slipped because it had been placed in a manure pile. "We didn't warn him about the viscosity of horse manure," said the manufacturer. To their credit, "60 Minutes" ran a follow-up segment in which a number of

alleged tort horror stories were rebuked. In re-examining the ladder story, reporter Ed Bradley noted, "Several jurors...told us the viscosity of horse manure had nothing to do with their verdict. They said they were persuaded by the plaintiff's contention that the ladder was defective, and that's why he was injured."[23]

• <u>The Tort System Works -- The Psychic and the CAT Scan:</u> A Philadelphia jury awarded $1 million to a woman who claimed she lost her psychic powers after undergoing a CAT scan. <u>In fact</u>, the woman had warned the doctor of previously having had an adverse reaction to a similar procedure. She then suffered anaphylactic shock when the procedure was performed. The jury that returned a $988,000 verdict had been instructed to disregard the woman's alleged loss of earnings because she was no longer able to "read auras." The judge found the verdict excessive and ordered a new trial. This case demonstrates that the safeguards in the process work.[24]

THE COSTS OF PERSONAL INJURY

INJURED PERSONS BEAR THE BURDEN OF PERSONAL INJURY

The injured person bears the brunt of the cost of injury.

• <u>The Injured Person Pays First:</u> Whether or not an injured person is reimbursed for a personal injury from another source, the initial cost of the injury is borne by the injured person and his or her family. The costs of injury include medical bills, lost wages and property damage. Personal injury often causes additional losses, such as the inability to pay bills (the house, the car), increased debt obligations and interest payments, and increased stress on family relationships. The burden of locating reimbursement for medical, wage loss, and other costs of injury falls on the injured person.

• <u>When Defendants Don't Pay and Victims Can't, Taxpayers Do:</u> Most personal injury cases involve significant medical and related expenses. When the victim can't pay and the defendants aren't required to fully compensate for injuries, the uncompensated cost of care is usually borne by government agencies -- in other words, by you and me as taxpayers.

• <u>38% of Economic Damages are Paid Out of Pocket:</u> The total annual economic loss associated with nonfatal injuries in the U.S. is $175.9 billion. 38% of this total economic burden is not reimbursed by any outside source and is paid for out-of-pocket by those who are injured. 64% of wages lost due to injury are not

reimbursed and are borne exclusively by those injured.[25]

Personal injury liability compensation does not pay for the actual cost of injuries.

• <u>Only a Small Number of Victims Receive Personal Injury Liability Compensation:</u> Only 10% of all accident victims receive personal injury liability compensation. The personal injury system plays a greater role in compensating motor vehicle injury victims. Those injured in motor vehicles are more likely to receive personal injury liability compensation (31%) compared to persons injured in some other manner.[26]

CIVIL JUSTICE SYSTEM PROMOTES SAFETY IN AMERICA'S ECONOMY

TORT LAW IMPROVES AMERICAN PRODUCTS

The tort system saves lives, reduces injuries and promotes public safety.

• <u>Product Liability and Tort Law Promote Safety:</u> There are huge benefits of the current tort system. Businesses devote greater attention to safety. There is a heightened consumer perception that products are safer and of higher quality. Workplace and other injuries have been reduced resulting in thousands of lives saved and millions of injuries prevented. The existence of these very large benefits should give policymakers cause for careful reflection as they are pressed to weaken product liability and tort law in general. Reducing the costs of the system may reduce the benefits and leave society worse off.[27]

• <u>The Tort System Contributes to a Competitive Society:</u> Without a strong tort law, the ethical corporation would have a competitive disadvantage and would be tempted to put profits before public safety. The American focus on safety in conjunction with punitive damages will produce the top quality products needed to compete in the international marketplace. "Our analysis suggests that the rules of product liability make a good deal of economic sense."[28]

• <u>Punitive Damage Awards Do Not Undercut United States Competitiveness:</u> Perhaps nothing is more grossly exaggerated than claims about punitive damage awards, particularly in product liability cases. The most comprehensive study ever conducted on punitive damages in product liability cases -- a survey of the past 25 years -- indicated just 355 cases in the entire country. That's only ten per year for the entire country. The

median punitive damage jury award was $1.5 million, with post-trial activity sharply reducing the median amount actually paid to $250,000. The study also found that 82 percent of businesses assessed punitive damages subsequently implemented safety measures such as product recalls or improved warnings and instructions.[29]

• Harmful Products are Removed or Altered: Examples of unsafe products which have been removed from the marketplace due to the tort system include the Dalkon Shield, asbestos, flammable baby clothes, and unsafe infant formula. Examples of products redesigned to improve safety resulting from the tort system include the Ford Pinto, safety devices on machinery and childproof caps.[30]

• Product Liability Expense Adds Little Cost to Consumer Goods: A new study by the National Insurance Consumer Organization (NICO) found that product liability expenses added but a tiny amount to the cost of consumer goods. The total cost of product liability insurance amounts to 0.14 percent of the cost of the more than $1.8 trillion worth of retain sales in the U.S. in 1991. The study used insurance industry data which broke out liability premiums as a separate line item for the first time.[31]

Insurers reap benefits while projections of future losses have decreased.

• A Shift Toward Defendants: During the mid-80's judicial decisions in product liability cases nationwide shifted toward defendants. Dismissal of product claims and new legal grounds for defendants have increased during the past half decade.[32]

• Insurers Continue to Make Big Profits: While projections of future losses have decreased, insurers' reserving practices and insurance rates have not. Why? Insurers are focusing on restricting state and federal liability laws. They can't claim a need for change while recognizing reduced losses and greater profits.[33]

• Insurers Use Natural Disasters to Raise Rates: The day Hurricane Andrew rolled into Miami, a top insurance company executive for American International Group, issued a memo to regional presidents and vice presidents saying "This is an opportunity to get price increases now. We must be first and it begins by establishing the psychology with our own people."[34]

Claims that the tort system stifles innovation is a ruse.

• Dangerous Products Kept From Market for Good Reason: Tort restriction proponents claim that the threat of litigation keeps products off the market. When Consumer Union examined the list of products being held from the market, the reasons they were pulled of the market were based on valid safety concerns. For example, the Jeep CJ-7, which tends to roll over at low speeds, and an anesthesia gas machine for which the manufacturer had failed to conduct tests of the design of critical components, were on the list of products pulled from the market because the tort system was "stifling innovation".[35]

• Corporate Report Says Liability Suits Do Not Impede Competition: "The most striking finding is that the impact of the liability issue seems far more related to rhetoric than to reality...For the major corporations surveyed, the pressures of product liability have hardly affected larger economic issues, such as revenues, market share, or employee retention...Where product liability has had a notable impact - where it has most significantly affected management decision making - has been in the quality of the products themselves."[36] In addition, numerous federal agency studies of industry competitiveness conducted during the 1980's fail to mention the liability system.

The cost of liability claims is minor compared to the GNP.

• The Cost of Liability Claims v. U.S. Productivity: The total compensation from tort liability claims to persons with nonfatal traumatic injuries in the U.S. amounts to only three-tenths of one percent of the Gross National Product of the United States.[37] The total cost of all commercial liability insurance premiums in the U.S. in 1990, including general liability, automobile liability, and umbrella insurance was only $48 billion, less than 1% of the U.S. Gross National Product.[38]

MEDICAL NEGLIGENCE FACTS vs. MYTH

MEDICAL NEGLIGENCE CLAIMS -- THE REAL FACTS

Lawsuits protect the public -- the benefits outweigh the costs.

• Restrict Patients' Rights at Our Peril: One very important aspect of medical negligence litigation is the useful examination of the practice of medicine itself. Because the buyer of medical care cannot be expected to evaluate the quality of medical care, the market cannot adequately identify incompetent health care providers. "The data suggest that to eliminate or seriously restrict

a patient's right to file a malpractice claim is a step we would undertake at our peril."[39]

• Medical Negligence Standard of Care: Under Alaska law, a physician is responsible for the harm caused when the physician fails to use reasonable care in providing medical care. Other professionals, such as architects, bankers, and lawyers are also required to exercise reasonable care in their professional activities.

The frequency and severity of medical negligence claims has remained relatively constant.

• Closed Claim Study in Minnesota: The Minnesota Insurance Commissioner conducted a study of medical negligence insurance claims filed in Minnesota, North Dakota and South Dakota. The study examined all claims filed from 1982 to 1987 for the two largest medical negligence insurers in the region. 27% of the claims were closed with a payment average of $54,629; the median was zero. Only one-tenth of one percent of the claims resulted in a payment exceeding $1 million, and only 4% exceeded $100,000. Of the 3% of cases that actually went to trial, the defense prevailed in 81 percent of them. In the 20 favorable jury verdicts for the period, no pain and suffering damages were awarded. No cases involved punitive damages. A final note on the Commissioner's study: Saint Paul announced a rate cut of 25 percent on its medical malpractice premiums in Minnesota.[40]

• Unjust Payments are Rare: A new study of medical malpractice cases finds that, despite popular belief, unjustified payments are rare. The study is one of the first systematic attempts to asses the quality of care in malpractice cases and was based on 8,231 cases filed in New Jersey over the past 15 years. The data came from the state's doctor-owned insurance company and the authors contend that their findings are relevant to the nation as a whole. In concluding that unjustified payments are not the norm, the study contradicts the conventional wisdom among doctors, which is that malpractice litigation is a lottery and that verdicts often depend on the whim of jurors.[41]

• Stable Rate of Frequency: The Minnesota closed claims study identified little measurable change in claim frequency over a six year period. The frequency rate was actually greater in 1983 than in 1987 and the average payment appeared to be decreasing over the period of the study. In fact, the study concluded the "data does not substantiate the litigation explosions assertion."[42]

Liability claims without merit are not compensated, and the size of the payment is commensurate with the severity of the injury.

- The System Works: The findings of a closed claims study of obstetric claims from a large physician-owned insurance company between 1982 and 1988 indicate that non-meritorious claims were not compensated. Where a claim was paid, poor physician judgment was the primary source of error and "the size of the settlement was commensurate with the seriousness of the injury." The study concluded that "These results should help to reassure physicians who are concerned that the tort process itself is unjust. Frivolous claimants do not, as a rule, prevail."[43]

Rather than seeking large settlements, most injured patients sue for other reasons.

- Lack of Communication -- What Really Happened: According to a recent survey of 187 families who filed suits against physicians, the primary reasons for pursuing litigation were to find out what happened.[44] Poor communication by medical personnel with the patient was often cited by respondents. In addition, a prior relationship with a medical provider did not protect the provider from legal action. Physicians are finding that apologizing reduces litigation and promotes quick resolution of claims. Douglas Phillips, President of the Physicians Insurance Association of America, said that "Communicating with the patient is probably the most important aspect of loss prevention."[45]

Very few incidents of medical negligence result in a claim.

- Few Negligently Injured Patients Receive Liability Compensation: Only one in every ten incidents of medical negligence result in a liability claim, and only one in twenty-five receive compensation through the liability system.[46] Is this evidence of litigiousness -- that 70 or 80 percent of the people injured by an incompetent or negligent act do nothing about it?

Elderly and minority patients are at a greater risk of being injured by medical negligence.

- Increased Risk of Being a Negligence Victim: In a study of New York hospital discharges, patients with the highest risk of being injured due to medical negligence included elderly patients, minority patients in hospitals that treat a high proportion of minorities, patients in

government-operated hospitals and patients in non-teaching hospitals.[47]

PHYSICIAN DISCIPLINE SYSTEM DOES NOT REMOVE BAD DOCTORS

The cause of medical negligence is medical negligence -- negligent doctors committing preventable errors.

• New York Study: A Harvard study reviewed 30,121 hospital patient discharges from 51 New York state hospitals in 1984. Of these, 280 patients included an adverse event which was caused by negligence. It is estimated that 27,177 cases of medical negligence occurred in New York during 1984, resulting in 6,895 deaths and 877 instances of severe permanent disability. Only 1 in 8 injured patients filed suit and only 1 in 16 received any liability compensation.[48]

• Many Deaths are Preventable: Physicians reviewing 182 hospital deaths in 12 hospitals found that in at least 14% of the cases examined, the deaths could have been prevented. In addition, a small number of factors caused most of the preventable deaths.[49]

A small number of physicians are responsible for most of the negligence.

• Florida: 4% of the physicians practicing medicine in Florida have had 2 or more liability claims filed against them. This group is responsible for 42% of the total claims paid out from 1975 - 1986.[50]

• Illinois, Pennsylvania and Texas: 2% of all physicians practicing in Cook County, Illinois (sued 6 or more times) were defendants in 36% of the medical negligence litigation from 1973 to 1986. 57% of the physicians were not named in any lawsuit and 79% of those sued during this period were named only once or twice.[51] Studies in Pennsylvania[52] and Texas[53] had similar results.

Medical disciplinary boards do a very poor job of regulating physicians.

• New York: The New York Office of Professional Conduct takes an average of 236 disciplinary actions annually compared to an estimated 27,000 cases of medical negligence occurring each year.

• A National Disgrace: An estimated quarter million injuries and death resulted from medical negligence in American hospitals in 1988. Medical disciplinary boards in the U.S. issued an annual average of only 1,481

serious disciplinary actions against physicians from 1987 to 1990.[54]

MEDICAL NEGLIGENCE INSURANCE -- COSTS AND PROFITS

Medical liability insurance is less than 1% of the total cost of health care.

• Premiums vs. National Health Care Costs: Insurance companies argue that liability expenses are a primary factor in skyrocketing health care costs. The facts refute this allegation. In 1989, medical negligence insurance premiums in the U.S. were $5 billion.[55] National health care expenditures for 1989 were $604 billion.[56] Thus less than 1% of the national cost of health care can be attributed to medical liability premiums.

• The Texas Experience: A recent study commissioned by the Texas Hospital Association, the Texas Medical Association and the Texas Trial Lawyers Association concluded that medical liability costs -- insurance premiums and damages from lawsuits -- make up less than 1 percent of health care expenditures in Texas, consistent with national findings. The study found that reforming the medical professional liability system would have minimal cost savings impact on the overall health care delivery system in Texas.[57]

• Losses Paid vs. National Health Care Costs: Nationwide, only 43% of medical negligence insurance premiums earned -- $2.14 billion or one third of 1% of the cost of health care -- were paid out for all losses in 1989.[58] Insurers are retaining 57% of the premiums earned.

Medical negligence insurance is highly profitable for both private and physician-owned insurance companies.

• National Data: In 1989, the net profit of medical negligence insurers in the U.S. was 27.9 cents for every dollar of premium earned. From 1985 to 1989, insurers' annual average profit on medical negligence insurance was 9.2% of premiums earned.[59] Between 1985 and 1990, the net worth of medical liability insurance companies more than doubled from $835 billion to $1,691 billion.[60]

• Minnesota Study: A study of medical negligence closed claims from 1982 to 1987 by the Minnesota Commerce Commissioner found no increase in claim frequency, loss payments and loss expenses. Yet, premiums tripled resulting in a determination that St. Paul Companies --

the nation's largest medical liability insurer -- was substantially overcharging policyholders. St. Paul agreed to refund $1.5 million to physicians in Minnesota.[61]

• Physicians Sue Insurer For Excessive Premiums: In 1989, physicians in Colorado won a $4.1 million judgment against PHICO Insurance Company. The court found that the insurer created a sense of crisis and panic to justify a large premium increase.[62] Physicians in Virginia also sued PHICO for illegal conduct when the company canceled thousands of doctors policies in 1986.

• Physician-Owned Companies: An investigation by the Arizona New-Times revealed that MICA, a doctor-owned company, paid out only 30 cents of every dollar it took in. In addition, the company received a 36% rate hike in 1987. Despite a reduction in lawsuits in 1987 and its own data showing claim frequency decreasing, the company still projected increased lawsuits for 1988.

MEDICAL NEGLIGENCE RESTRICTIONS ARE NO SOLUTION

Tort restrictions will not resolve the problems of access to health care.

• The Tail Wagging the Dog: Due to the high cost of health care, a large number of Americans have no health care coverage. Blaming medical liability costs, which are less than 1% of the cost of health care, for the problem of health care access is ludicrous. Altering less than 1% of the health care costs would have no significant impact on the total cost of health care.[63]

• Reasons for Costs of Medical Care: There are numerous reasons for the increased cost of medical care, including technological advances, increases in population, increased wages as well as general and medical inflation. In a recent GAO report, medical liability costs are not even mentioned as a contributing factor of increasing health care costs.[64]

• Restrictions on Compensation Don't Work: Conventional wisdom about medical liability is not supported by the facts. Limits on verdicts and attorney's fees will not curb the incidence of litigation. Nearly 80% of the injured patients receiving liability compensation have economic losses which exceed the compensation received. This percentage is even greater for settlements. Limits on compensation will only exacerbate the current short fall.[65]

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 292

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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Rev 11/93

Municipality of Anchorage

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(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

Received
MAR 04 1994

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\adg\ltr\porter.rlm

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

Received
3 '94
...PORTER

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 8558 • 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 [illegible]e 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.

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 the system.

I recently was involved in a silly lawsuit that racked up way over $100,000 in legal fees. The suit was eventually suspended with no 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 working!

Sewell

Sewell F. Faulkner

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

Received

REP BRIAN PORTER

Received
REP ... PORTER

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

2-23-94

To: Rep Brian Porter & Committee Members

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

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

RWG

TOTAL P.01

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

NOTE: If you did not receive all of the pages or if you have a question, please call the verifying number 907 562 2682.

TO:	FROM:
Name	Name
Address	Subject
Attention	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 it's passage.

Owen J. Sayre

PH 279-2846
wk ph. 562-2682

Voice of **The Times**

The Anchorage Times

Publisher: BILL J. ALLEN
"Believing in Alaskans, putting Alaska first"
Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM J. TOBIN
The Anchorage Times Commentary in this segment of the *Anchorage Daily News* does not represent the views of the *Daily News*. It is written and published under an agreement with former owners of *The Times*, in the interests of preserving a diversity of viewpoints in the community.

Lawsuit limits

YOU'VE SEEN the ads. Designed to provoke your deepest fears. An airplane with a broken wing after a crash that could have injured members of your family . . . a child in a wheelchair after the school gymnasium roof fell in and crushed him. Such horror stories include the warning that if the Legislature enacts pending liability reform legislation, the victims in such tragedies — you — will not be compensated for your medical costs and loss.

The ads are classic bunk!

The trial lawyers associations and other parties that sponsor such misleading information are attempting to confuse the issue sufficiently so that once again they can succeed in preventing passage of needed tort reform.

There is a good reason why some lawyers don't want the law changed. On that rare occasion, under current law, when a person is injured and must sue for compensation — and is successful — a big portion of the settlement money winds up in the pockets of the lawyers involved, not in the victim's hands.

Despite what the ads proclaim, the tort reform being debated in Juneau would not prevent victims of accidents from being compensated for their losses. Just the opposite.

Under House Bill 292 and Senate Bill 254, there would be no limit on a person's right to collect 100 percent of all economic losses, including past and future wage losses, past and and future medical costs, past and future rehabilitation costs, past and future retirement benefits or other past and future economic losses due to the mishap.

The limits on liability under the proposed legislation would be for non-economic losses like pain, suffering and inconvenience. These would be capped at a half-million dollars. This is an important reform for the public.

Current law allows for windfall settlements. As a result, companies and individuals who sell products or services must carry expensive liability insurance. Their customers — each of us — pay a portion of that insurance.

In fact, any chance for meaningful health care reform in Alaska greatly depends first on enactment of the proposed tort reform legislation. Currently, not only do doctors and other health care providers pay horrendous liability insurance premiums, they must practice what is called "defensive medicine." Whether a patient does or doesn't need X-rays, lab work, or whatever, the doctor orders all of them as protection in case of a lawsuit.

A tremendous amount of today's inflated medical costs can be attributed to current liability law.

Don't be fooled by the ads. Tell your legislator to support reform, and be especially wary of a lawmaker who represents the lawyers instead of your best interests in this issue.

ALASKANS FOR LIABILITY REFORM

CONSUMER DATA

ON

LAWSUIT ABUSE

You've heard about all those multi-million dollar liability lawsuits.

Now find out who pays for them.

- ❑ The threat of lawsuits and excessively large jury awards forces business to add a hidden "tort tax" to the price of products and services.

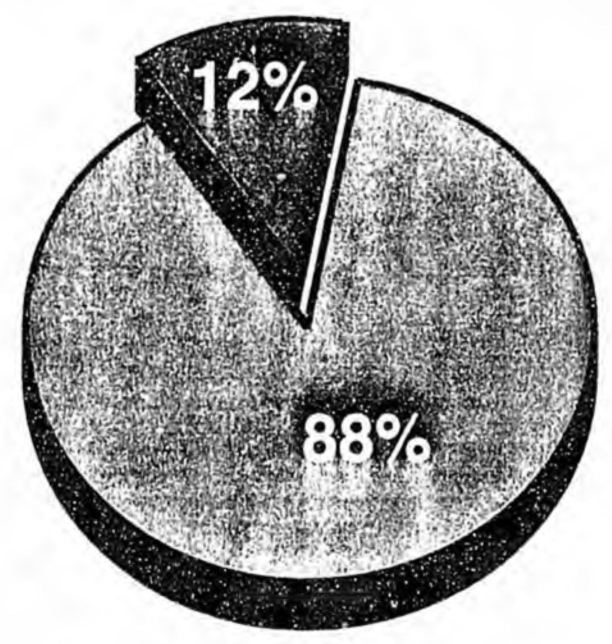
- ❑ This tax costs the American family, on average, about $1,200 a year. We think that's too high a price for anyone to pay.

- ❑ It's time we speak out for civil liability reform.

- ❑ It's time we stop lawsuit abuse.

Lawsuits without Merit

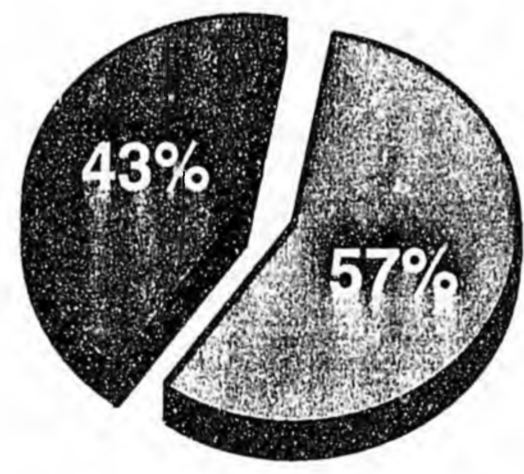
From 1980 – 1989, of the 181 closed MIEC claims, 88% settled without payment



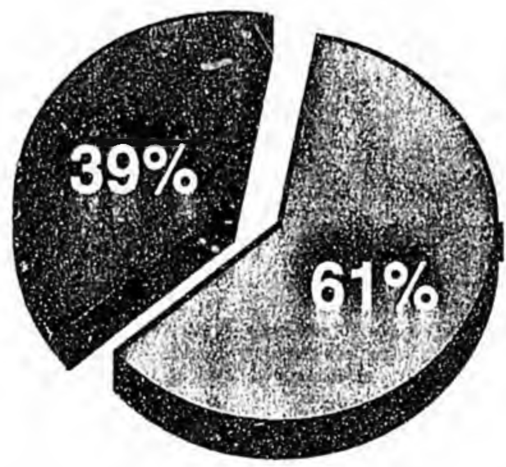
Claims settled without payment
Claims settled with payment

Lawsuits without Merit

From 1977 – 1989, of the 174 MICA lawsuits, 57% settled without payment



From 1977 – 1989, of the 119 MICA claims, 61% settled without payment

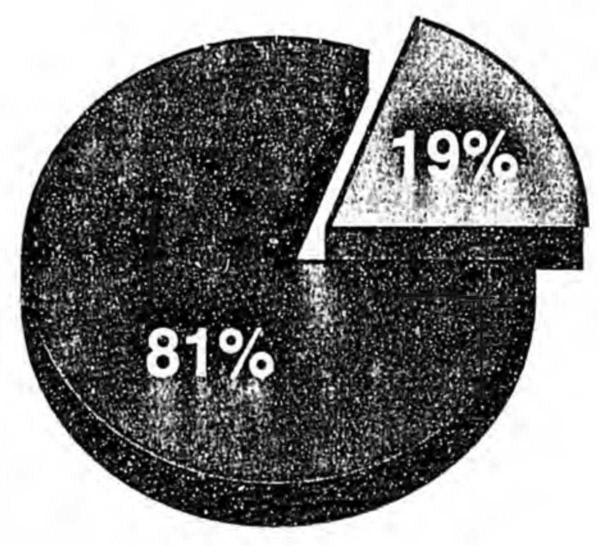


- Lawsuits settled without payment
- Lawsuits settled with payment

- Claims settled without payment
- Claims settled with payment

Lawsuits without Merit

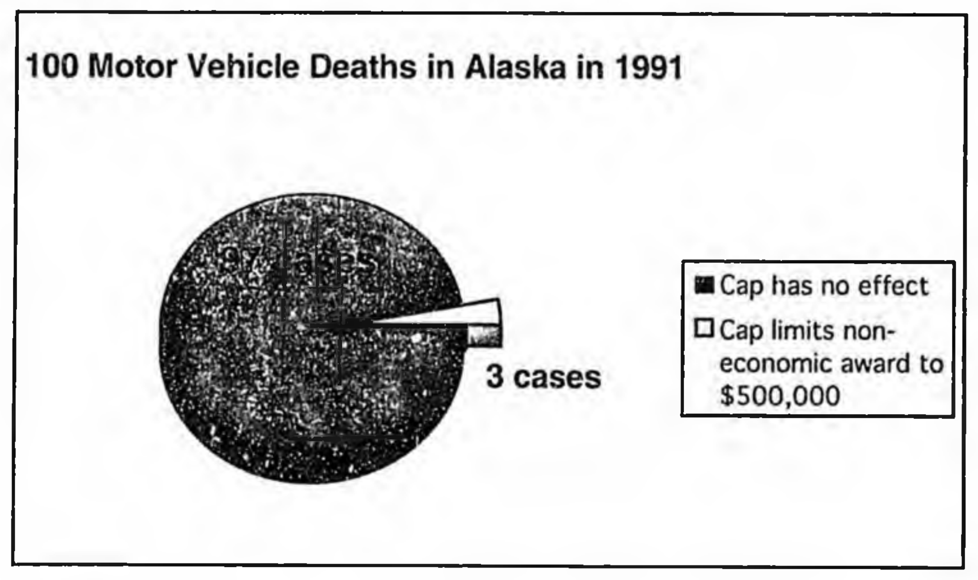
1977 – 1989, cost of defending a MICA lawsuit averaged 19% of amount of settlement paid



Average cost of defense as % of settlement paid
Average settlement paid

Cap on Non-Economic Awards

The $500,000 cap on non-economic awards effects only 3% of lawsuits filed for personal injury or wrongful death. If the estates of everyone that died in a motor-vehicle accident in Alaska in 1991 filed a lawsuit, the cap would only affect three cases.

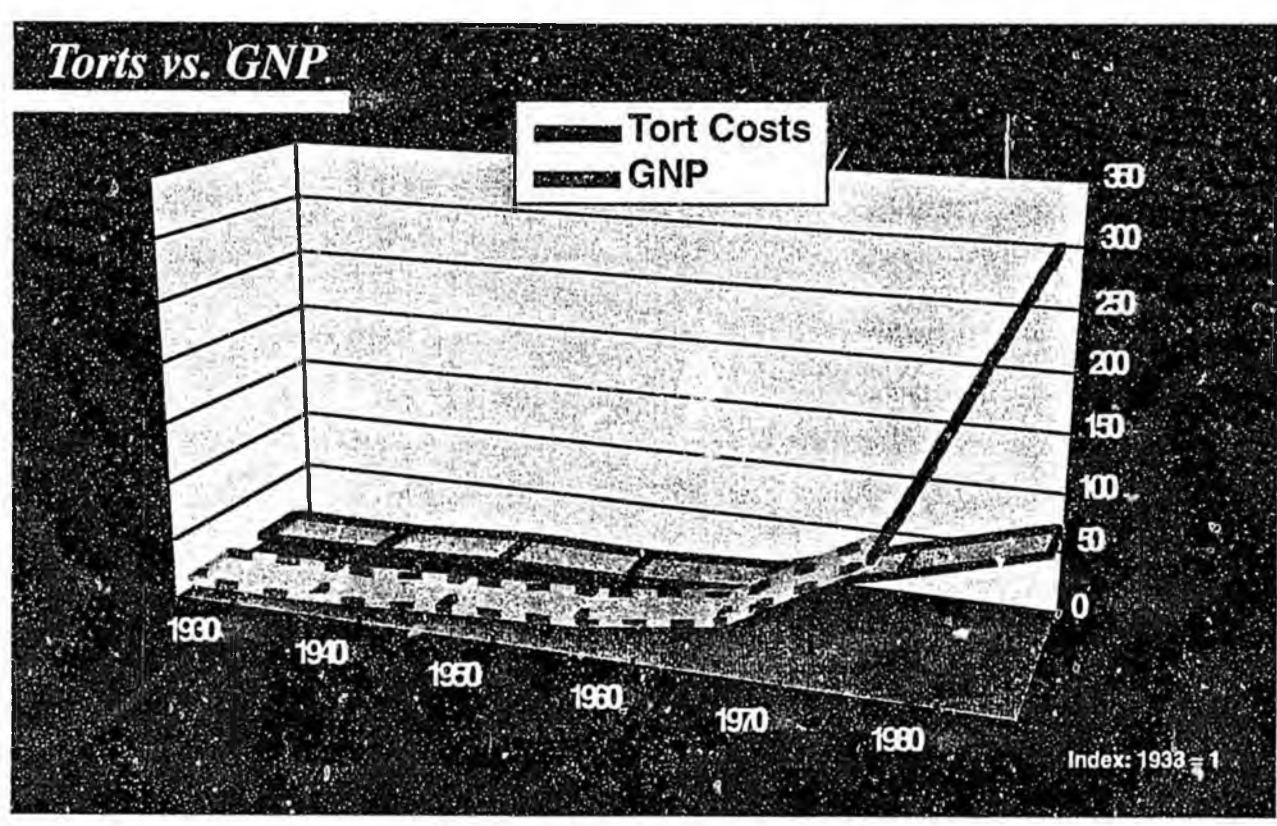


* source: National Safety Council

Effects of HB 292 on Non-Economic Awards

Past Wage Loss	**No Effect**
Future Wage Loss	**No Effect**
Past Medical Cost	**No Effect**
Future Medical Cost	**No Effect**
Past Rehabilitation Costs	**No Effect**
Future Rehabilitation Costs	**No Effect**
Other Past Economic Losses	**No Effect**
Other Future Economic Losses	**No Effect**
Past Retirement Benefit	**No Effect**
Future Retirement Benefit	**No Effect**
Pain, Suffering, Inconvenience	**Limit $500,000**
Physical Impairment, Disfigurement	**Limit $500,000**
Loss of Enjoyment of Life	**Limit $500,000**
Loss of Consortium	**Limit $500,000**

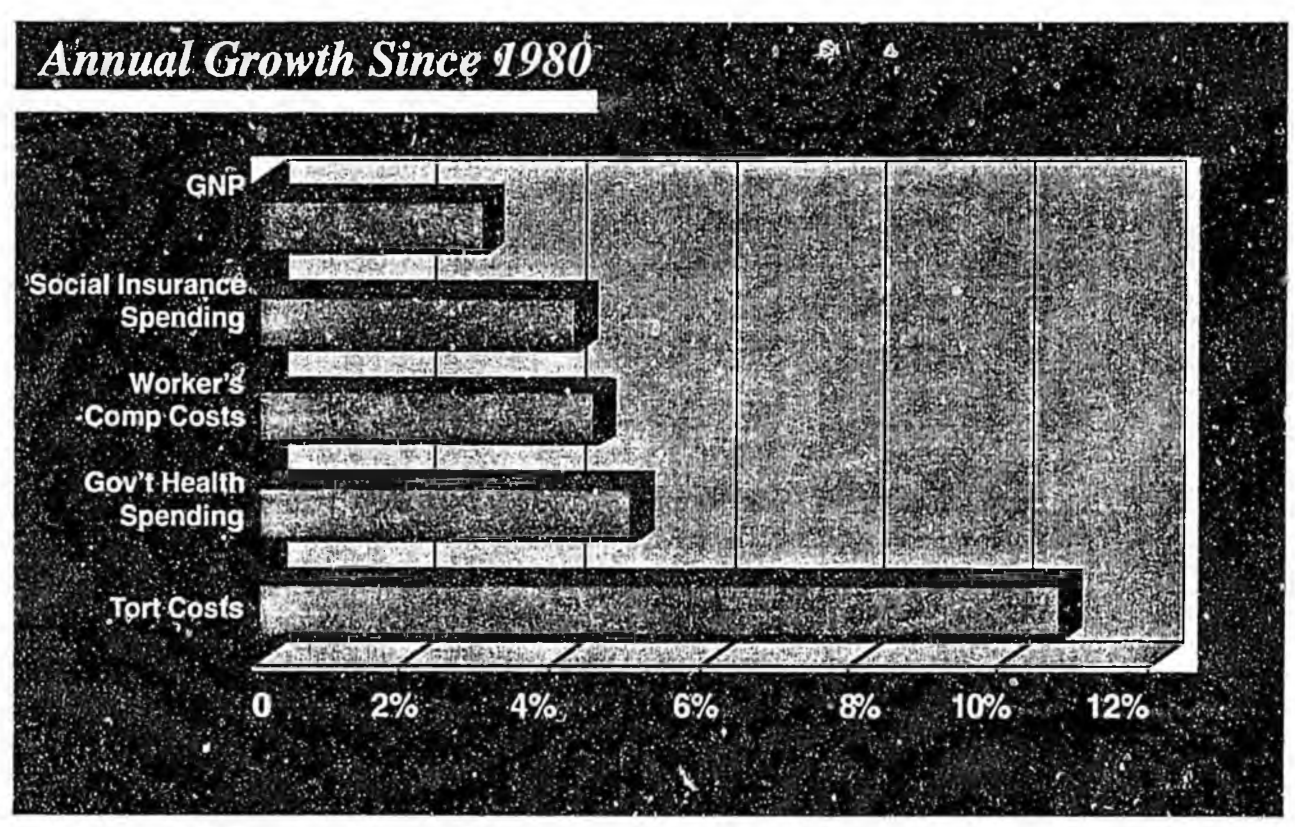
How Does Tort Cost Escalation Compare With GNP Growth?



■ Tort cost growth far outstripped GNP growth since 1930, increasing 300 times over this 57-year period, compared with a 50-fold increase for GNP.

■ Until shortly after World War II, growth in both tort costs and the GNP ran fairly parallel. Only in the late 1940s and early 1950s did the two diverge, with tort costs consistently outpacing GNP growth.

Since 1980, Cost Increases Have Leveled Off for All Social Systems Save Torts



■ As noted, cost escalation has moderated for all social systems but torts. Between 1980 and 1987, for example, tort costs rose at an annual rate of 16%, or 10.6% when adjusted for inflation. This compares with the following annual increases (also adjusted for inflation) of:

- ❑ 5% for government health expenditures
- ❑ 4.5% for workers' compensation costs
- ❑ 4.2% for Social Security expenditures
- ❑ 2.7% for GNP.

Litigation Costs: Everyday Impact of a Hidden Tax on Alaska Families

You have never been involved in a lawsuit and the problem of expensive court cases and settlements for millions of dollars doesn't affect you.

Think again.

As consumers, you should know the facts. When you purchase a product or service, part of your money goes toward the manufacturer or service providers' cost for liability insurance. You'd be surprised how much of your money is spent on the cost of litigation. The following is reprinted from *The 96 Billion Dollar Game: You Are Losing* by Philip J. Hermann:

> The definition of litigation costs used here includes components, accessories, services purchased and attributable to the product or service, as well as distribution and dealer litigation including customer dissatisfaction. The chart below does not include litigation costs for Workmen's Compensation or payment for injury.
>
> Litigation cost for different manufacturers for similar products and services may differ as well as for the same products and services for different years. The difference and the fluctuation of sales volume is an important factor, as is the fluctuation of lawsuits, settlements, consumer prices, better design and litigation controls. However, the estimates are reasonably representative and valid. Manufacturers and purveyors of services are sensitive to the publication of their litigation costs. As a result, names of those cooperating and other sources cannot be published.
>
> Difference in litigation percentages is also influenced by more competitive components and less litigation costs allocated to less expensive components and models.

Product/Service	Retail Price	Litigation Cost	Percent of Total
Auto Insurance: $50,000/100,000 Coverage Liability			
Couple with 17-year-old Daughter with driver training, large Midwestern city, average premium	$2,270.00	$681.00	30%
Age 30, married couple, no driving age dependents, large Midwesterncity, average premium	$1360.00	$408.00	30%
Over 30, married couple, 2 speeding tickets, small Midwestern town/rural area, average premium	$900.00	$270.00	30%
Consumer Product Services			
Baseball	$6.00	$0.18	3%
Mountain Bicycle, 27"	$300.00	$8.00	3%
Exercise Bicycle, fan type	$400.00	$6.00	1.5%
Home wood working shop machines: planer, jointer, band saw, drill press, dust collector	$3000.00	$135.00	4.5%
Lawn mower, riding rotary	$700.00	$42.00	6%
Roller blades	$190.75	$5.72	3%
Roller skating ticket, Friday night	$5.00	$0.25	5%
Ski lift ticket	$40.00	$2.00	5%
Step ladder, 8" Aluminum	$119.00	$23.86	20%
Sweeper, upright	$150.00	$0.75	.005%

PRODUCT/SERVICE	RETAIL PRICE	LITIGATION COST	PERCENT OF TOTAL
Medical Services: Includes defensive medical procedures and litigation costs of support personnel			
Maternity - teaching hospital, doctor on staff, prenatal care	$550.00	$183.15.00	33%
Maternity, doctor on staff - delivery	$1200.00	$398.60	33%
Maternity, doctor on staff, hospital 2 days	$3000.00	$500.00	17%
Hospital, non-teaching, 2 days including prenatal care and delivery-managed care	$3367.00	$1021.81	30%
Open heart surgery, nationally recognized teaching hospital & medical	$35,000.00	$8550.00	24%
Pace maker, state of the art, not including medical to install	$18,000.00	$3000.00	17%
Tonsillectomy	$575.00	$191.00	33%
DPT vaccine	$11.50	$2.40	20.9%
Motorized wheel chair	$1000.00	$170.00	17%
Motor Vehicles - domestic parts and manufacture			
Sub-compact auto	$12,500.00	$375.00	3%
Standard size, fully equipped auto	$23,000.00	$805.00	3.5%
Luxury auto, fully equipped	$30,000.00	$1200.00	4%
Compact station wagon	$15,000.00	$450.00	3%
Standard station wagon, fully equipped	$20,992.00	$734.72	3.5%
Pickup truck, basic	$10,000.00	$350.00	3.5%
Pickup truck, high performance, deluxe	$21,613.00	$972.59	4.5%
Delivery truck	v28,415.00	$1278.56	4.5%
Work truck	$14,700.00	$661.00	4.5%
Personal injury Lawsuits - terminated by trial and settlements			
Average recovery	$37,000.00	$18,500.00	50%
Hotels			
Hotel (upscale) - one night with meals, one or more person to room	$113.95	$00.65	.06%
Restaurants			
Limited menu, no table service, hamburger, fries & coke	$3.75	$00.006	.002%
Meal, limited menu, table service	$9.00	$00.02	.0022%
Meal, full menu, table service with wine	$25.00	$00.045	.0018%

Reprinted from *The 96 Billion Dollar Game: You Are Losing* by Philip J. Hermann

Statutes of Limitations
How Does Alaska Compare?

Includes statute section number

	Fraud	Conversion	Written Contract	Recovery of Land	Attorney Malpractice	Oral Contract	Wrongful Death	Design/Improve Real Property	Account/Debt Open	Personal Injury	Judgment Forum/Foreign	Malicious Prosecution	Medical Malpractice	Property Damage	Forfeiture/Penalty	Libel/Slander	Trespass
Alaska	6/10/ 1 yr†	no info	6 yr	10 yr	6 yr	6 yr	6/2 yr †	6 yr †	1 yr	6/2 yr †	10 yr	2 yr	2 yr †	6 yr	3/2 yr †	2 yr	6 yr
Arizona	3 yr	2 yr	6 yr	10 yr	2 yr	3 yr	2 yr	8 yr	3 yr	2 yr	4 yr*	1 yr	2 yr	no info	no info	1 yr	2 yr
California	3 yr	3 yr	4 yr	no info	1 yr	2 yr	1 yr	10 yr	4 yr	1 yr	10 yr	no info	3 yr	3 yr	1 yr	1 yr	3 yr
Colorado	3 yr	3 yr	3 yr	no info	no info	3 yr	2 yr	2 yr	6 yr	2 yr	no info	2 yr	2 yr	2 yr	1 yr	1 yr	no info
Connecticut	3 yr	3 yr	6 yr	15 yr	3 yr	3 yr	2 yr	7 yr	6 yr	3 yr	20 yr **	no info	2 yr	2 yr	1 yr	2 yr	3 yr
Florida	4 yr	no info	5 yr	no info	2 yr	4 yr	2 yr	4 yr	no info	4 yr	5/20 yr	4 yr	2 yr	4 yr	4 yr	2 yr	4 yr
Georgia	2 yr	4 yr	6 yr	no info	no info	4 yr	2 yr	8 yr	4 yr	2 yr	5 yr*	2 yr	2 yr	4yr	1 yr	1 yr	4 yr
Illinois	5 yr	5 yr	10 yr	no info	2 yr	5 yr	2 yr	10 yr	no info	2 yr	20 yr	2 yr	2 yr	5 yr	no info	1 yr	no info
Indiana	6 yr	no info	6 yr	no info	2 yr	6 yr	2 yr	10 yr	6 yr	2 yr	10 yr	2 yr	2 yr	6/2 yr ***	2 yr	2 yr	6 yr
Massachusetts	3 yr	3 yr	6 yr	no info	3 yr	6 yr	3 yr	3 yr	no info	3 yr	6 yr	no info	3 yr	3 yr	1 yr	3 yr	3 yr
Michigan	6 yr	no info	6 yr	no info	2 yr	6 yr	3 yr	6 yr	no info	3 yr	10 yr	2 yr	2 yr	3 yr	2 yr	1 yr	no info
Missouri	5 yr	no info	5 yr	10 yr	5 yr	5 yr	3 yr	10 yr	5 yr	5 yr	5 yr	2 yr	2 yr	5 yr	3 yr	2 yr	5 yr
New Jersey	6 yr	6 yr	6 yr	20 yr	6 yr	6 yr	2 yr	10 yr	6 yr	2 yr	20 yr	6 yr	2 yr	6 yr	2 yr	1 yr	6 yr
New York	6 yr	6 yr	6 yr	10 yr	3 yr	6 yr	2 yr	no info	no info	3 yr	20 yr	1 yr	2.5 yr	3 yr	3 yr	1 yr	1 yr
North Carolina	3 yr	3 yr	3 yr	20 yr	no info	3 yr	2 yr	6 yr	no info	3 yr	10 yr	no info	3 yr	3 yr	1 yr	1 yr	3 yr
Ohio	4 yr	4 yr	15 yr	21 yr	1 yr	6 yr	2 yr	10 yr	no info	2 yr	no info	1 yr	1 yr ****	2 yr	1 yr	1 yr	4 yr
Pennsylvania	2 yr	2 yr	4 yr	21 yr	2 yr	4 yr	2 yr	12 yr	no info	2 yr	4 yr	2 yr	2 yr	2 yr ****	2 yr	1 yr	2 yr
Texas	2 yr	2 yr	4 yr	no info	2 yr	2 yr	2 yr	10 yr	4 yr	2 yr	10yr**	1 yr	2 yr	2 yr	no info	1 yr	2 yr
Virginia	2 yr	no info	5 yr	15 yr	no info	3 yr	2 yr	5 yr	no info	2 yr	20 yr	2 yr	2 yr	5 yr	no info	no info	5 yr
Washington	3 yr	3 yr	6 yr	10 yr	3 yr	3 yr	3 yr	6 yr	no info	3 yr	10 yr	no info	no info	3 yr ****	3 yr	2 yr	3 yr
Wisconsin	6 yr	6 yr	6 yr	30 yr	6 yr	6 yr	3 yr	no info	no info	3 yr	20 yr	6 yr	3 yr	6 yr	2 yr	2 yr	6 yr

THER STATES KEY:
*Foreign **Forum
***6 Real/2 Personal ****Personal

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† ALASKA KEY:
Fraud - 6 yr=09.10.120(if state, political or public corp), 10 yr=09.10.230(land patent), 1 yr after discovery=12.10.020(breach of fiduciary, misconduct by police)
Wrongful Death - 6 yr=09.10.55 (construction) statute ruled unconstitutional by Sup.Crt. Op. 3290, 2 yr=09.55.580
Design - 09.10.055 statute ruled unconstitutional by Sup.Crt. Op. 3290
Personal Injury - 6 yr=09.10.055 (construction) statute ruled unconstitutional by Sup.Crt. Op. 3290, 2 yr=09.10.070
Medical Malpractice - 09.10.070 (after age of majority, 09.10.040 for minors)
Forfeiture - 3 yrs=09.10.060, 2 yrs=09.10.070

LIABILITY REFORMS IN 1986

Following the explosion in liability premiums in 1985, states became more interested in reforms.

Type of reform	Number of states	Percent of liability premiums affected: General liability	Percent of liability premiums affected: Medical Mal-practice	State list
Modify joint & several liability	16	53%	55%	Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Michigan, Minnesota, Missiouri, New Hampshire, New York, Utah, Washington, West Virginia, Wyoming*
Limits on liability	13	11%	14%	Alabama, Alaska, Colorado, Connecticut, Delaware, Hawaii, Indiana, Maine, Maryland, New Hampshire, Tennessee, Utah, Wyoming
Limits on non-economic damages	10	14%	12%	Alaska, Colorado, Florida, Kansas, Maryland, Minnesota, New Hampshire, New Mexico, Oklahoma, Washington
Limits on punitive damanges	6	9%	7%	Colorado, Florida, Minnesota, New Hampshire, New Mexico, Oklahoma
Modify collateral source rule	5	13%	9%	Colorado, Connecticut, Indiana, Michigan, Minnesota
Provide for structured or periodic payments	7	12%	10%	Alaska, Connecticut, Iowa, Maine, Michigan, Utah, Washington
Modify dram shop rules	11	17%	18%	Arizona, Colorado, Connecticut, Indiana, Ma[illegible]an, Montana, New Hampshire, Tennessee, Utah, W[illegible]
Modify statute of limitations	4	5%	5%	Colorado, Connecticut, Maine, Washington
Limit attorney contingency fees	4	5%	3%	Connecticut, Maine, New Hampshire, Wisconsin

Source: *The Effect of 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance*

*Colo., Utah, & Wyo. abrogated joint and several liability in 1986. The remaining states modified the doctrine.

Result of Reforms Made in 1986

The liability reform efforts did more than constrain spiraling costs of insurance. They stabilized insurance markets and fostered sound functioning of the economy.

Change in real total annual insurer loss and premiums, by line 1985 - 1988

	Losses in $ millions	Premiums in $ millions	Loss Ratio 85	Loss Ratio 88
General liability	–4871	5678	1.12	0.62
Medical malpractice	–531	1256	1.22	0.79
Automobile	7924	14201	0.75	0.71

Source: *The Effect of 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance*

History of ISO General Liability Rate Changes in Alaska

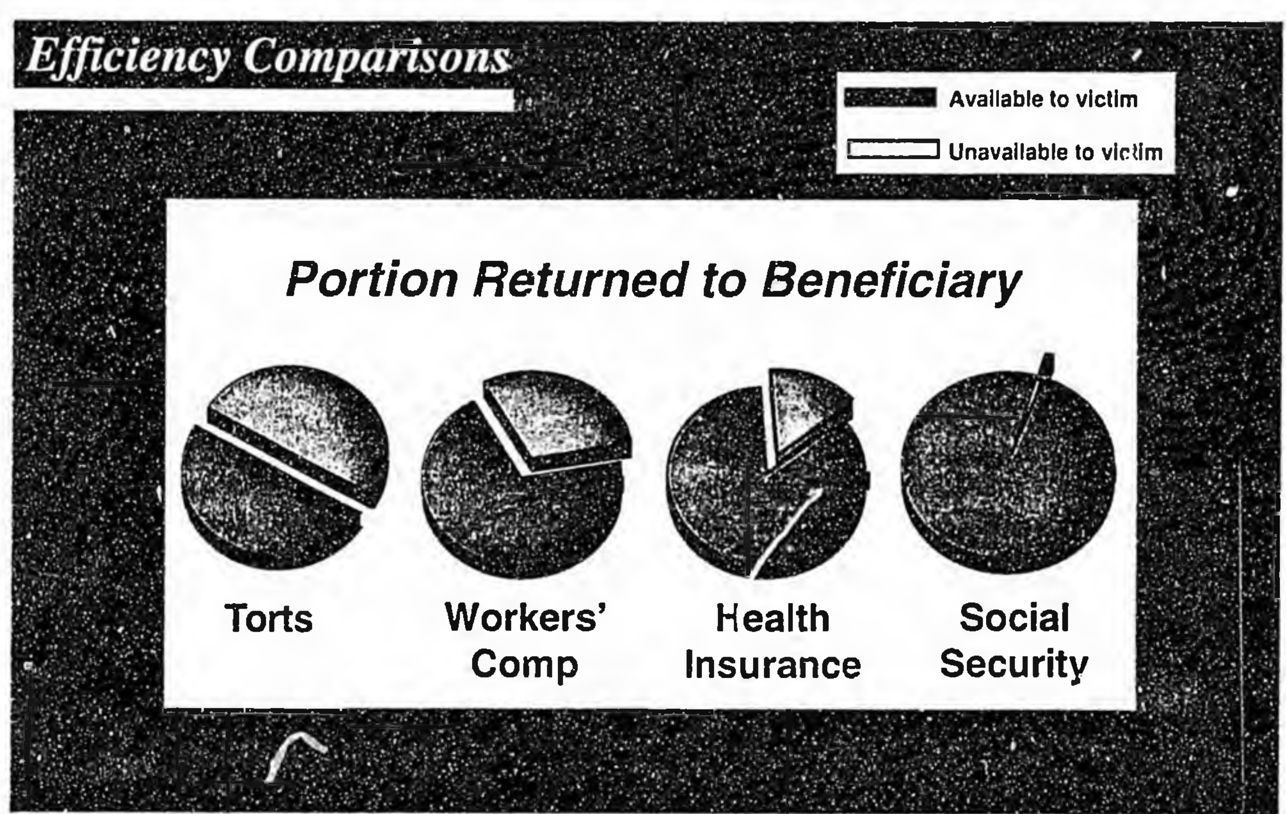
				Products	Premises		Professional Liability	
Approval Date	Rate Change (in %)	Basic Limits	Increased Limits	All	Manufacturers & Contractors	Owners, Landlords, & Tenants	Physicians, Surgeons & Dentists	Hospitals
1/7/84	7.8	x	x	x				
2/1/84	128.8	x	x				x	
2/17/84	40.1		x					x
10/4/84	21	x				x		
10/31/84	20	x		x				
11/29/84	5.6		x				x	
2/2/85	1.3	x			x			
2/6/85	10.7		x		x	x		
7/10/85	23.1	x				x		
11/1/85	43.8	x	x	x				
2/26/86	50.0	x					x	
4/14/86	7.6	x			x			
6/13/86	15.4		x					x
7/3/86	8.9		x			x		
9/5/86	3.3		x		x			
2/27/87	12.1	x				x		
3/2/87	30.6	x	x	x				
4/3/87	35.0	x					x	
6/15/87	31.6	x			x			
8/4/87	9.7		x					x
3/30/88	–4.3	x		x				
7/19/89	–20.0		x	x				
1/11/90	–13.7	x		x				
1/12/90	1.1	x	x			x		
2/19/92	6.1	x			x	x		
2/19/92	–12.0		x		x	x		
4/1/92	14.0	x				x		
11/13/92	–3.2		x		x	x		
1/7/93	0		x					x
4/16/93	–2.5	x			x	x		
9/24/93	0	x					x	

Notes:

1. Effective date of an ISO filing is generally 3 to 6 months after approval date.
2. Rate change is the overall average, different "classes" (e.g. neurosurgeon vs. general practitioner) will probably have different changes apply to them.
3. "Basic" and "Increased" refer to the limits of liability under the policy. Basic limits are about $25,000; everything else is an increased limit. People who only purchase base limits won't be affected by an increased limit rate change. People who purchase increased limits are affected by both basic and increased limit changes.
4. "Products," "Premises" and "Professional Liability" are different types of policies. Products includes completed operations (such as a construction project); Premises is what is purchased by most small businesses for risks occurring on their premises.
5. The filing approved on 4/1/92 only applied to governmental subdivisions.

Source: State of Alaska Department of Commerce and Economic Development – Division of Insurance

In the Final Analysis, the Tort System Does Not Effectively Serve Victims' Needs



■ If the tort system is judged as a method of compensating accident victims for their losses, it is both inefficient and unfair. Inefficient, because only half – or less – of the cost goes toward any form of compensation for victims. Unfair, because many victims receive no compensation at all.

Attorney Commission as Presently Used

Example case of transaction costs in Alaska

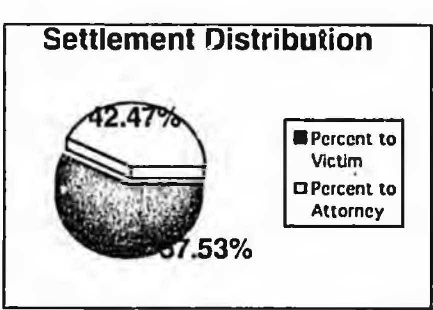
Category of Loss	Actual Claim Dollar Loss	Formula Attorney 40% Fee *see note	Revised New Claim Loss	Actual Recovery Settlement Amount	Recovery Attorney 40% Commission	Actual Amount to Victim	Percent of Recovery to Actual Loss
Past Wage Loss	20,000.00	33,333.33	33,333.33	30,000.00	12,000.00	18,000.00	90.00%
Future Wage Loss (present value)	350,000.00	583,333.33	583,333.33	450,000.00	180,000.00	270,000.00	77.14%
Past Medical Loss	75,000.00	125,000.00	125,000.00	120,000.00	48,000.00	72,000.00	96.00%
Future Medical Loss	120,000.00	200,000.00	200,000.00	175,000.00	70,000.00	105,000.00	87.50%
Other Past Loss	25,000.00	41,666.67	41,666.67	20,000.00	8,000.00	12,000.00	48.00%
Other Future Loss	75,000.00	125,000.00	125,000.00	75,000.00	30,000.00	45,000.00	60.00%
Pain and Suffering	500,000.00	833,333.33	833,333.33	375,000.00	150,000.00	225,000.00	45.00%
Claim Totals	1,165,000.00	1,941,666.67	1,941,666.67	1,245,000.00	498,000.00	747,000.00	64.12%

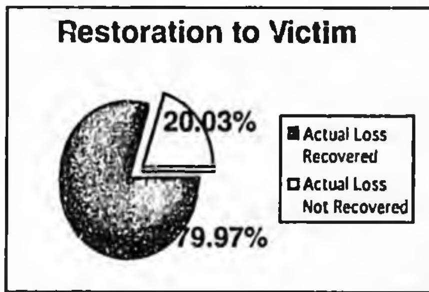
*Attorney Markup is determined by dividing the Claim Dollar amount by 60%.

Additional Deductions from the Claimant's Award

As allowed by the Supreme Court, Alaska Bar Associaltion, and the recovery process.

	Amount	Attorney Costs	Attorney Commission	Amount to Attorney	Amount to Claimant
Gross Recovery	747,000.00	40,000.00	already taken	40,000.00	707,000.00
Rule 82 Fees	124,500.00	0	40.00%	49,800.00	74,700.00
Pre-Judgment Interest	250,000.00	0	40.00%	100,000.00	150,000.00
Deduction Totals				189,800.00	224,700.00
Claim Total				498,000.00	707,000.00
Settlement Total	**1,619,500.00**			**687,800.00**	**931,700.00**





Attorney Commission as Presently Used

Example claim of transaction costs in Alaska
As allowed by the Supreme Court, Alaska Bar Associaltion, and the recovery process.

	Amount	Attorney Costs	Attorney Commission	Amount to Attorney	Amount to Claimant
Claim Totals	1,165,000.00	0	40.00%	498,000.00	747,000.00
Gross Recovery	747,000.00	40,000.00	0	40,000.00	707,000.00
Rule 82 Fees	124,500.00	0	40.00%	49,800.00	74,700.00
Pre-Judgment Interest	250,000.00	0	40.00%	100,000.00	150,000.00
Deduction Totals				189,800.00	224,700.00
Claim Total				498,000.00	707,000.00
Settlement Total	**1,619,500.00**			**687,800.00**	**931,700.00**

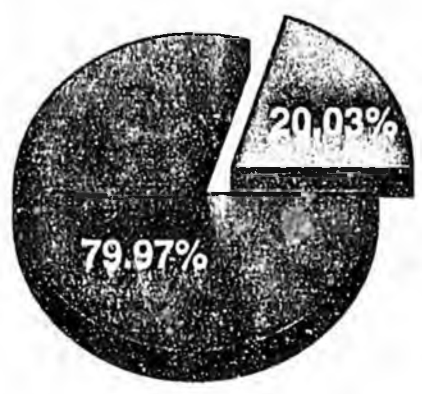
Claimant's Actual Claim Dollar Loss = $1,165,000.00

Settlement Distribution

42.47%
57.53%

Percent to Attorney
Percent to Victim

Restoration to Victim

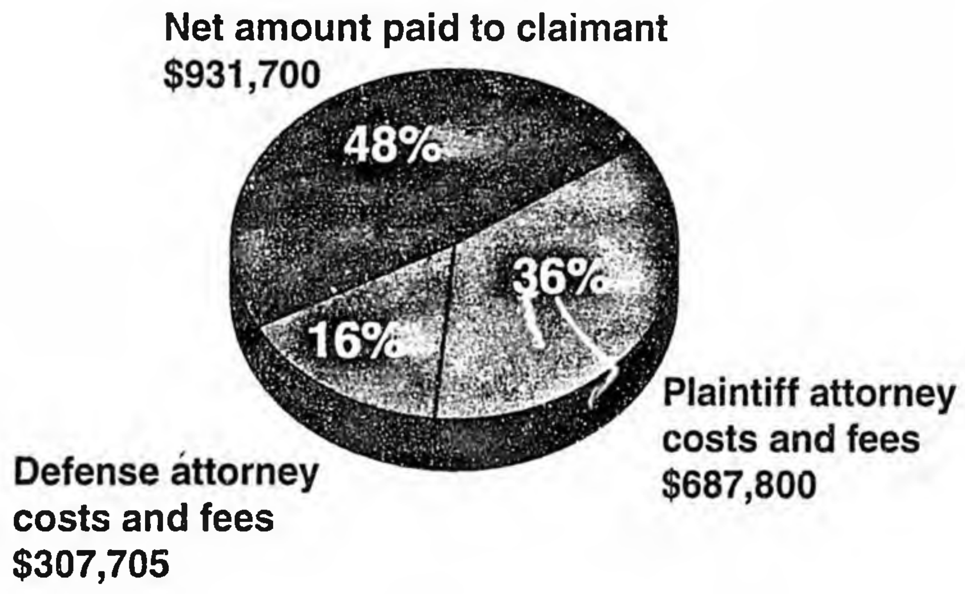


Actual Loss Not Recovered
Actual Loss Recovered

Total Cost Allocations

For a typical lawsuit in Alaska with actual dollar claim losses of $1,165,000.00

Defense Attorney Fees and Costs	$307,705
Plaintiff Attorney Fees and Costs	$687,800
Compensation to Claimant	$931,700
Total Costs	$1,927,205



Percent of total costs paid to claimant:

48%

Litigation Costs: Everyday Impact of a Hidden Tax on Alaska Families

You have never been involved in a lawsuit and the problem of expensive court cases and settlements for millions of dollars doesn't affect you.

Think again.

As consumers, you should know the facts. When you purchase a product or service, part of your money goes toward the manufacturer or service providers' cost for liability insurance. You'd be surprised how much of your money is spent on the cost of litigation. The following is reprinted from *The 96 Billion Dollar Game: You Are Losing* by Philip J. Hermann:

The definition of litigation costs used here includes components, accessories, services purchased and attributable to the product or service, as well as distribution and dealer litigation including customer dissatisfaction. The chart below does not include litigation costs for Workmen's Compensation or payment for injury.

Litigation cost for different manufacturers for similar products and services may differ as well as for the same products and services for different years. The difference and the fluctuation of sales volume is an important factor, as is the fluctuation of lawsuits, settlements, consumer prices, better design and litigation controls. However, the estimates are reasonably representative and valid. Manufacturers and purveyors of services are sensitive to the publication of their litigation costs. As a result, names of those cooperating and other sources cannot be published.

Difference in litigation percentages is also influenced by more competitive components and less litigation costs allocated to less expensive components and models.

Product/Service	Retail Price	Litigation Cost	Percent of Total
Auto Insurance: $50,000/100,000 Coverage Liability			
Couple with 17-year-old Daughter with driver training, large Midwestern city, average premium	$2,270.00	$681.00	30%
Age 30, married couple, no driving age dependents, large Midwesterncity, average premium	$1360.00	$408.00	30%
Over 30, married couple, 2 speeding tickets, small Midwestern town/rural area, average premium	$900.00	$270.00	30%
Consumer Product Services			
Baseball	$6.00	$0.18	3%
Mountain Bicycle, 27"	$300.00	$8.00	3%
Exercise Bicycle, fan type	$400.00	$6.00	1.5%
Home wood working shop machines: planer, jointer, band saw, drill press, dust collector	$3000.00	$135.00	4.5%
Lawn mower, riding rotary	$700.00	$42.00	6%
Roller blades	$190.75	$5.72	3%
Roller skating ticket, Friday night	$5.00	$0.25	5%
Ski lift ticket	$40.00	$2.00	5%
Step ladder, 8" Aluminum	$119.00	$23.86	20%
Sweeper, upright	$150.00	$0.75	.005%

PRODUCT/SERVICE	RETAIL PRICE	LITIGATION COST	PERCENT OF TOTAL
Medical Services: Includes defensive medical procedures and litigation costs of support personnel			
Maternity - teaching hospital, doctor on staff, prenatal care	$550.00	$183.15.00	33%
Maternity, doctor on staff - delivery	$1200.00	$398.60	33%
Maternity, doctor on staff, hospital 2 days	$3000.00	$500.00	17%
Hospital, non-teaching, 2 days including prenatal care and delivery-managed care	$3367.00	$1021.81	30%
Open heart surgery, nationally recognized teaching hospital & medical	$35,000.00	$8550.00	24%
Pace maker, state of the art, not including medical to install	$18,000.00	$3000.00	17%
Tonsillectomy	$575.00	$191.00	33%
DPT vaccine	$11.50	$2.40	20.9%
Motorized wheel chair	$1000.00	$170.00	17%
Motor Vehicles - domestic parts and manufacture			
Sub-compact auto	$12,500.00	$375.00	3%
Standard size, fully equipped auto	$23,000.00	$805.00	3.5%
Luxury auto, fully equipped	$30,000.00	$1200.00	4%
Compact station wagon	$15,000.00	$450.00	3%
Standard station wagon, fully equipped	$20,992.00	$734.72	3.5%
Pickup truck, basic	$10,000.00	$350.00	3.5%
Pickup truck, high performance, deluxe	$21,613.00	$972.59	4.5%
Delivery truck	v28,415.00	$1278.56	4.5%
Work truck	$14,700.00	$661.00	4.5%
Personal injury Lawsuits - terminated by trial and settlements			
Average recovery	$37,000.00	$18,500.00	50%
Hotels			
Hotel (upscale) - one night with meals, one or more person to room	$113.95	$00.65	.06%
Restaurants			
Limited menu, no table service, hamburger, fries & coke	$3.75	$00.006	.002%
Meal, limited menu, table service	$9.00	$00.02	.0022%
Meal, full menu, table service with wine	$25.00	$00.045	.0018%

Reprinted from *The 96 Billion Dollar Game: You Are Losing* by Philip J. Hermann

POSITION PAPER
The Alaska Civil Liabilities Act
by
Alaskans for Liability Reform

Historical Background

Since 1986 Alaskans for Liability for Reform have been continuously working with the Alaska legislature to make needed substantive changes in the Alaska Civil Liberties Act.

In 1988 the organization was responsible for a statewide initiative which limited the percentage of fault on injuries and wrongful deaths. More than 72 per cent of Alaska's voters were in favor and passed into law this act which required judges and juries to allocate awards by percentage of fault. The intent was that all parties whether sued or not were considered.

The reforms sought by this organization have but one common goal -- ensuring all parties in a law suit are treated fairly, suits are brought and concluded within a reasonable time period, and that awards by the courts are both reasonable and fair.

The Issue Today

Broad, statewide support to create further reforms in the Civil Liberties Act has reached an all-time high and involves a variety of organizations and individuals. They have been instrumental in helping put together legislation that will enact further reforms to create a more equitable distribution of the cost and risk of injury. The proposed legislation, House Bill No. 292, and a companion bill in the Senate, S.B. 254, would reduce costs associated with the civil justice system and ensure adequate and appropriate compensation of injuries.

Passage of this important piece of legislation is critical to the well-being of our current and future residents, putting some economic sense and reasonableness back into the judicial system.

Both pieces of proposed legislation have many reform amendments and include seven major points designed to provide fair compensation for injured parties, setting legal and realistic statute limitations, establish fair guidelines for recovery and reduce costs of litigation.

Specifically, the legislation supported by Alaskans for Liability Reform:

Limits Non-Economic Damages

This would allow injured parties to recover all economic damages up to a cap of $500,000 for non-economic losses, generally known as "pain and suffering." It would have no affect on wage

losses, medical expenses, rehabilitative care, dependent care or other costs related directly to the injuries. It would also prevent collecting more than $500,000 by multiple filings for the same incident.

Gillespie v. Beta Construction*
No. 3AN-90-8414 CV

Discloses Double Recovery

The legislation would require that judges and juries be informed whenever a person has already received payment for economic loss from other collateral sources. Claimants could only recover damages that exceed any amount previously paid. It would prevent plaintiffs from collecting more than once for the same injury.

Justice v. Humana
No. 3AN 86-122-CV

Establishes Reasonable Statutes of Limitation on Legal Actions and Health Care Providers

The act would set a fair and reasonable term of limitations of six years on legal actions for injury, death or property damage. All crimes, except murder, have a statute of limitation and the same standard of fairness should apply to civil law.

The legislation would set a fair and reasonable term of limitations of two years on actions against health care providers based on professional negligence or omission. The two year limit would not apply to minors under six years of age.

Johnson v. Siegfried
Alaska Supreme Court Opinion 3890

Limits Punitive Damages

The bill states that punitive damages must be "clear and convincing" actions of malice or conscious disregard of another and that any awards will be at least $200,000 or up to three times the amount of compensatory damages awarded exclusive of pain and suffering.

Underwriters at Lloyds v. The Narrows, L & L Enterprises
No. 3AN 089-09272 CV

Keeps a Person Engaged in a Felony from Suing

The legislation would prevent a person or his estate from suing for personal injury or death that occured while the person was committing a felony.

John Miller v. Anchorage Police Dept.
No. 3 AN-90-8009 CV

Limits Attorneys Fees and Assures Plaintiffs Receive a Larger Share of Award Money

This would require the payment due the attorney on a contingent fee basis to be paid in a lump sum under present value at time of award, and prevent attorneys from getting increases due to payment adjustments for inflation. Plaintiffs would receive a greater share of their settlement award.

Conclusion

All of these major provisions are critical in helping control liability insurance costs and establish fairness, as well as reasonableness, in the civil judicial system. Passage of this legislation is not only necessary, but at last, a thorough, logical and well researched answer to an on-going problem in Alaska.

Many other states have already made specific changes in liability law such as those proposed in the House and Senate bills. California, notably, has been a leader in tort reform and as well, a model for other states in successfully adopting such changes without harm to the judicial system.

By adopting this act, Alaska could become a role model in liability reform by legislative enactment and at the same time solve one of its major civil liberty problems.

*Court cases cited are found in Summary Booklet dated December 1993 by Alaskans for Liability Reform.

State of Alaska

Department of Commerce and Economic Development

Division of Insurance

Division of Insurance
P.O. Box 110805
Juneau, AK 99811-0805
Phone (907) 465-2[illegible]573

Ninth Floor, State Office Building
333 Willoughby Avenue
Juneau, Alaska 99801
FAX (908) 465-3422

FAX Transmittal

From: Barbara Thurston

Date: January 14, 1994

To: Resa Jerrel

Company:

Fax Number: 789-3433

Number of Pages: 2

Hard Copy to Follow: No

Here is the information you requested on General Liability rate changes. This is a history of the rate changes filed by the Insurance Services Office (ISO) which files on behalf of most of the companies selling General Liability insurance in Alaska.

As you can see, there are several different types of policies here...I've marked with Xs the type of filing (basic limits versus excess limits) and the type of form (professional, premises, or products liability) for each rate change.

This information was taken off a special report generated by ISO in response to my request for historical information. While I believe that it is all correct, I have not verified all the details myself, so can't guarantee that this information is free of any errors.

Let me know if you have any questions as to how to interpret this chart.

History of ISO General Liability Rate Changes In Alaska

Approval Date	Rate Change (in %)	Basic Limits	Increased Limits	Products	Premises		Professional Liability	
				All	Manufacturers & Contractors	Owners, Landlords, & Tenants	Physicians, Surgeons, and Dentists	Hospitals
1/7/84	7.8	x	x	x				
2/1/84	128.8	x	x				x	
2/17/84	40.1		x					x
10/4/84	21	x				x		
10/31/84	20	x		x				
11/29/84	5.6		x				x	
2/2/85	1.3	x			x			
2/6/85	10.7		x		x	x		
7/10/85	23.1	x				x		
11/1/85	43.8	x	x	x				
2/26/86	50	x					x	
4/14/86	7.6	x			x			
6/13/86	15.4		x					x
7/3/86	8.9		x			x		
9/5/86	3.3		x		x			
2/27/87	12.1	x				x		
3/2/87	30.6	x	x	x				
4/3/87	35	x					x	
6/15/87	31.6	x			x			
8/4/87	9.7		x					x
3/30/88	-4.3	x		x				
7/19/89	-20		x	x				
1/11/90	-13.7	x		x				
1/12/90	1.1	x	x			x		
2/18/92	6.1	x			x	x		
2/19/92	-12		x		x	x		
4/1/92	14	x				x		
11/13/92	-3.2		x		x	x		
1/7/93	0		x					x
4/16/93	-2.5	x			x	x		
9/24/93	0	x					x	

Notes:

1 The effective date of an ISO filing is generally 3 to 6 months after the approval date

2 The rate change is the overall average, different "classes" (e.g. neurosurgeon vs general practitioner) will probably have different changes apply to them

3 "Basic" and "Increased" refer to the limits of liability under the policy. Basic limits are about $25,000; everything else is an increased limit. People who only purchase basic limits won't be affected by an increased limit rate change. People who purchase increased limits are affected by both basic and increased limit changes.

4 "Products", "Premises", and "Professional Liability" are different types of policies. Products includes completed operations (such as a construction project); Premises is what is purchased by most small businesses for risks occurring on their premises.

5 The filing approved on 4/1/92 only applied to governmental subdivisions.

57% BETWEEN MEDICAL AND 88% OF CIVIL LIABILITY MALPRACTICE, AND CLAIMS ARE WITHOUT MERIT LAWSUITS

Alaskans For Liability Reform

An analysis of frivolous civil liability lawsuits and claims against hospitals and physicians in Alaska from 1977 through 1989*

*Information for this report is based on a March, 1992 report by the Legislative Research Agency and presented to Representative Mark Boyer per his research request # 91.222, "State Approaches to Medical Malpractice."

OVERVIEW

Civil justice in Alaska has generally been developed by the courts on a case-by-case basis. This has resulted in an chaotic system of rules that are often ambiguous and contradictory. The result is high malpractice and liability insurance premiums, lawsuits filed decades after construction or delivery of services, and exorbitantly high costs of litigation to the parties involved and to the taxpayers who pay for our civil justice system.

As the information in these pages shows, a high percentage of the claims and lawsuits filed against Medical Indemnity Corporation of Alaska (**MICA**, a primary medical malpractice insurer created by the Alaska Legislature) and Medical Indemnity Exchange of California (**MIEC**) are settled without payment. This suggests that many claims are frivolous, weak or unfounded. And yet the cost of litigating this avalanche of poorly-supported liability claims takes its toll on the parties involved as well as our civil justice system.

During the period 1977 - 1989, the average cost to defend a MICA lawsuit that resulted in payment equalled 19 percent of the amount eventually paid. Meanwhile, 57 percent of the MICA lawsuits settled without any payment. And 61 percent of the MICA claims that never reached a lawsuit settled without payment. During the period 1980 - 1989, some 88 percent of the closed MIEC claims settled without payment.

Alaskans for Liability Reform support amending the Alaska Rules of Civil Procedure and the Alaska Civil Liabilities Act to ensure all parties in a law suit are treated fairly, suits are brought and concluded within a reasonable time period, and awards made by the courts are reasonable and fair.

1977 - 1989, the cost of defending a MICA lawsuit averaged 19% of the amount of the settlement paid

average cost of defense as % of average settlement paid

average settlement paid

OVERVIEW

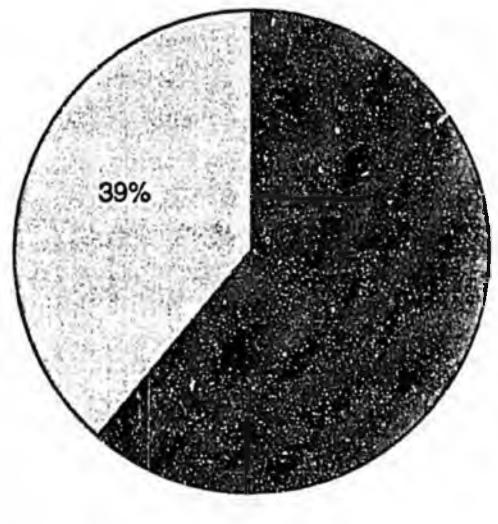
From 1977 - 1989, of the 174 MICA lawsuits, 57% settled without payment

43%

lawsuits settled with payment

lawsuits settled without payment

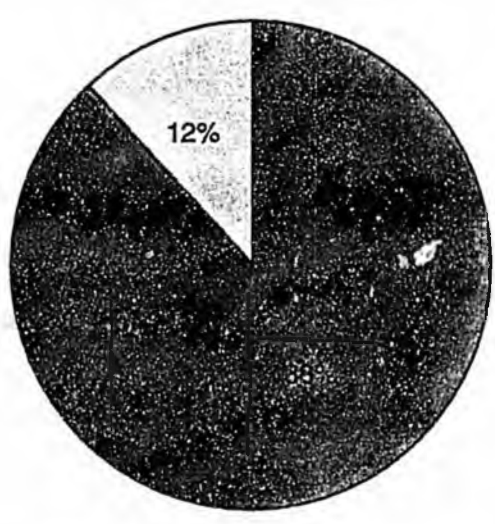
From 1977 - 1989, of the 119 MICA claims, 61% settled without payment



claims settled with payment

claims settled without payment

From 1980 - 1989, of the 181 closed MIEC claims, 88% settled without payment

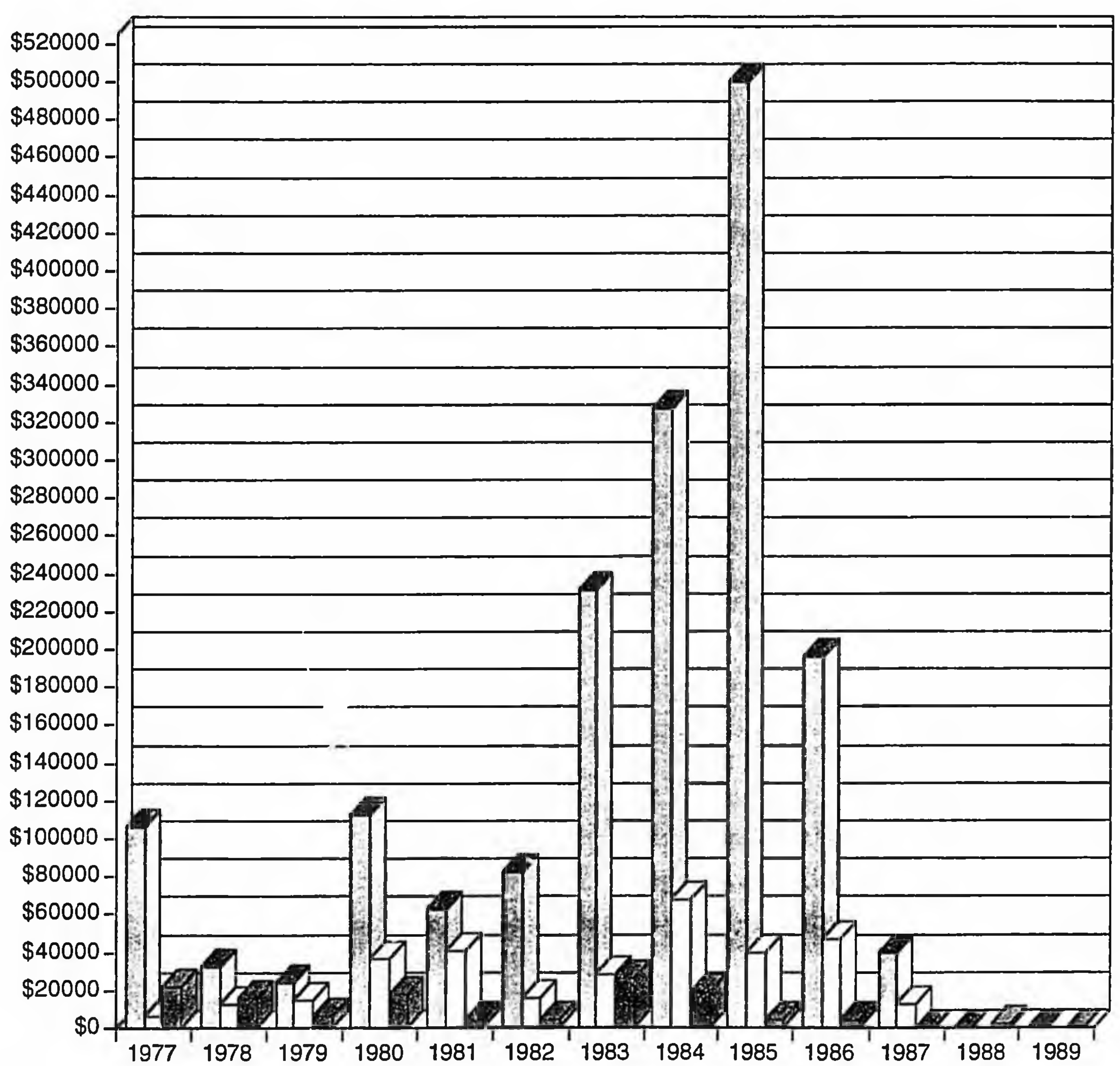


claims settled with payment

claims settled without payment

1977-89 SUMMARY, MICA LAWSUITS

Average cost of defense compared to settlement payment



Average settlement in cases where payment was made

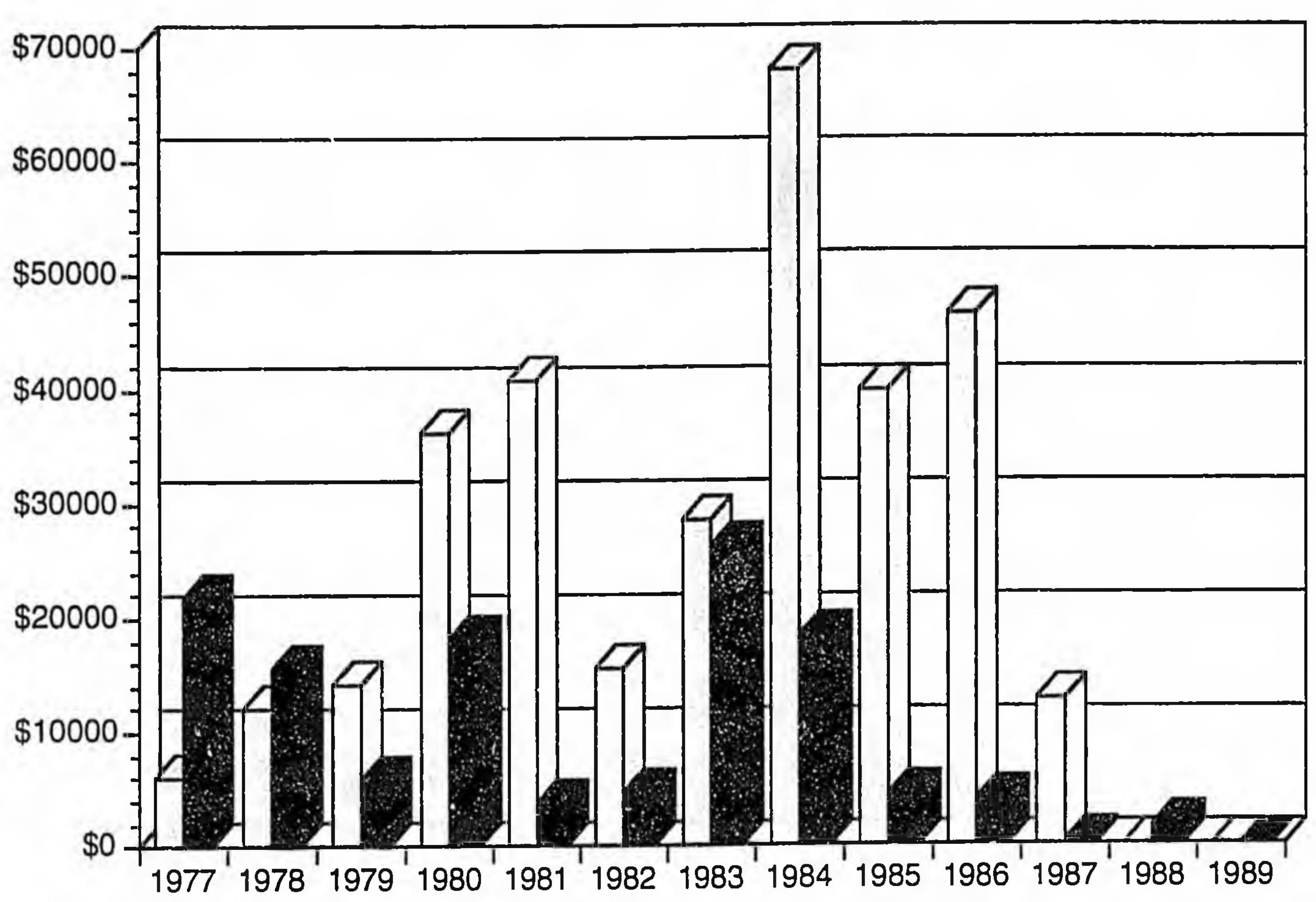
cost of defense in cases where payment was made

cost of defense in cases where no payment was made

SUMMARY, MICA LAWSUITS

1977-89

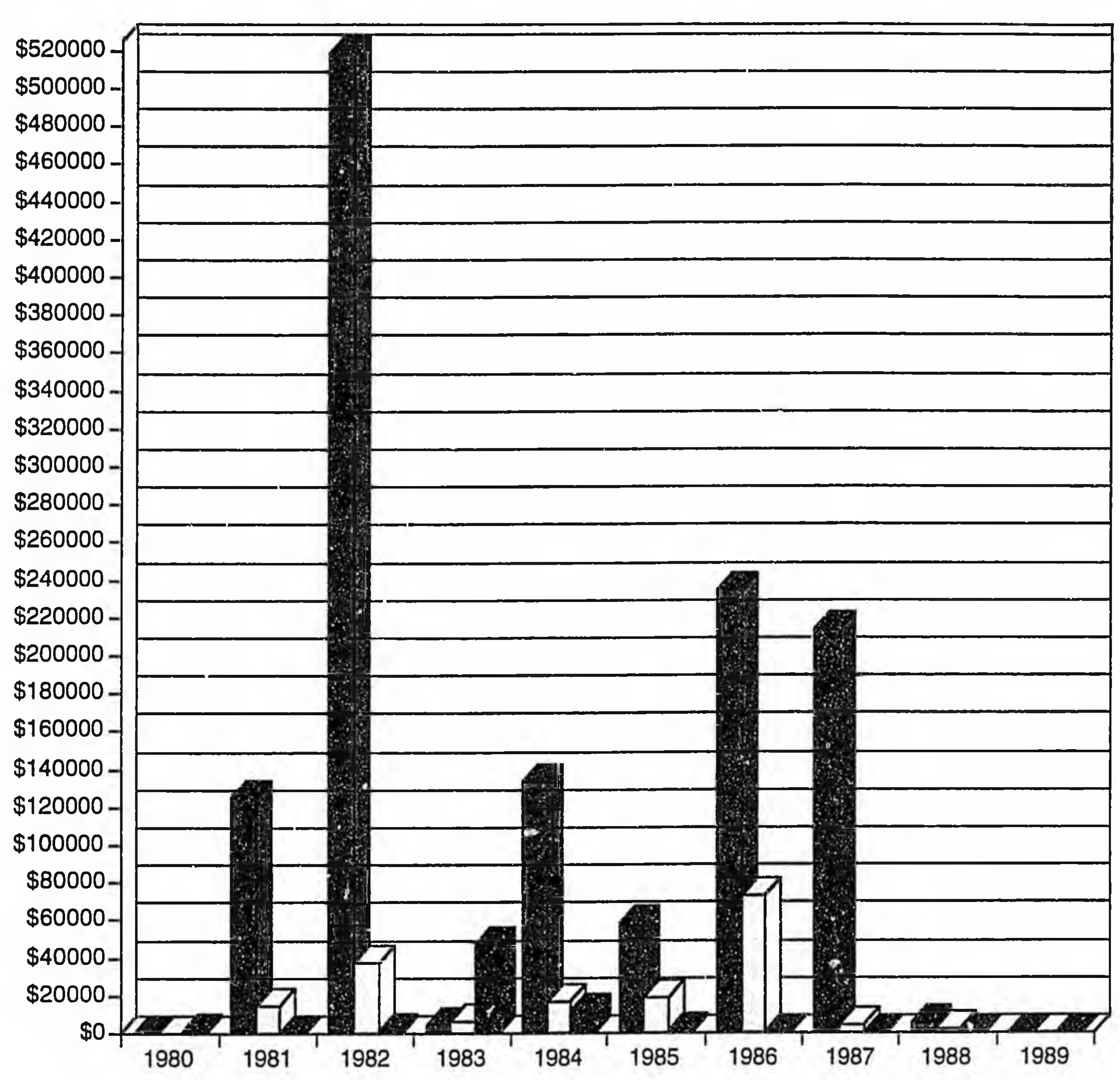
Average cost of defense in cases with payment vs cost of defense in cases without payment



cost of defense in cases where payment was made

cost of defense in cases where no payment was made

Average cost of MIEC defense compared to settlement payment



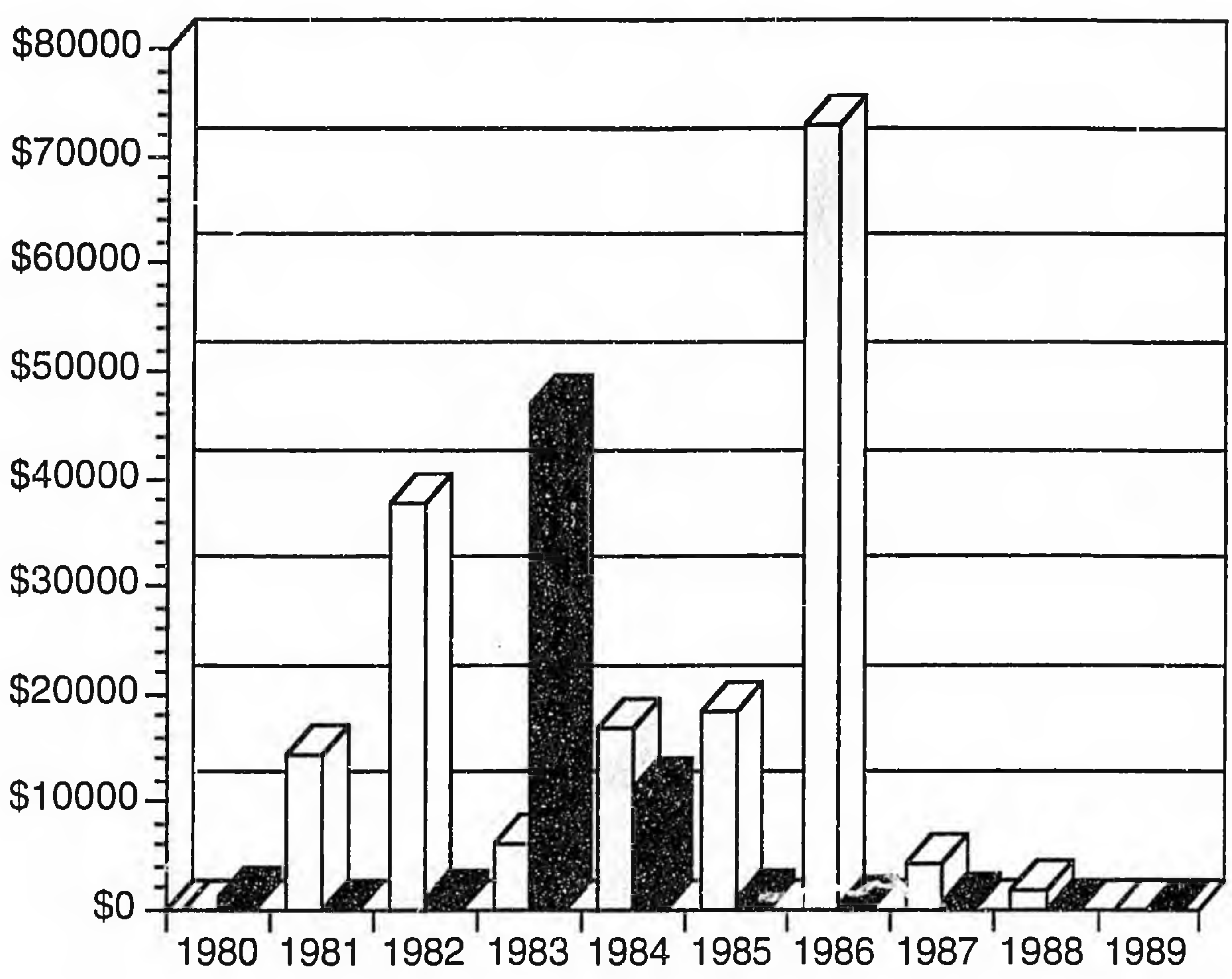
Average settlement in MIEC claims where payment was made

cost of defense in claims where payment was made

cost of defense in claims where no payment was made

SUMMARY, MIEC CLAIMS **1980-89**

Average cost of defense in MIEC cases with payment vs cost of defense in cases without payment



cost of defense in MIEC claims where payment was made

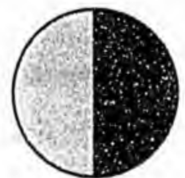
cost of defense in MIEC claims where no payment was made

1977 MICA LAWSUITS & CLAIMS

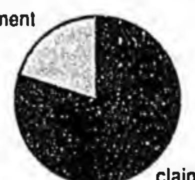
Total number of MICA lawsuits: 8
- Number (and percentage) settled without payment: 4 (50%)
- Number (and percentage) settled with payment: 4 (50%)
- Average settlement: $106,250
- Average cost of defense in cases resulting in no payment: $21,880
- Average cost of defense in cases resulting in payment: $6,053

Total number of MICA claims: 5
- Number (and percentage) settled without payment: 4 (80%)
- Number (and percentage) settled with payment: 1 (20%)
- Average settlement: $7,500
- Average cost of defense in cases resulting in no payment: $12,222
- Average cost of defense in cases resulting in payment: $1,240

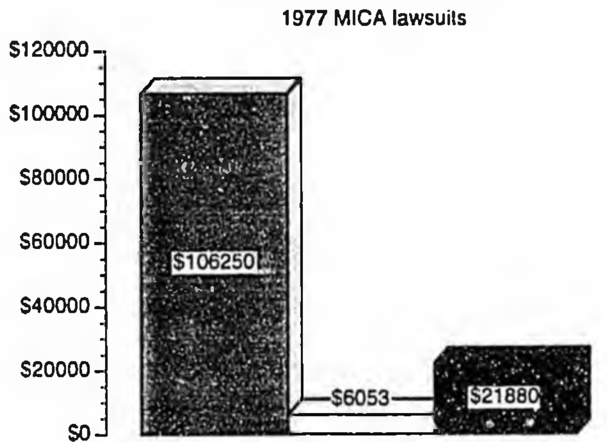
50% of all 1977 MICA lawsuits settled without payment

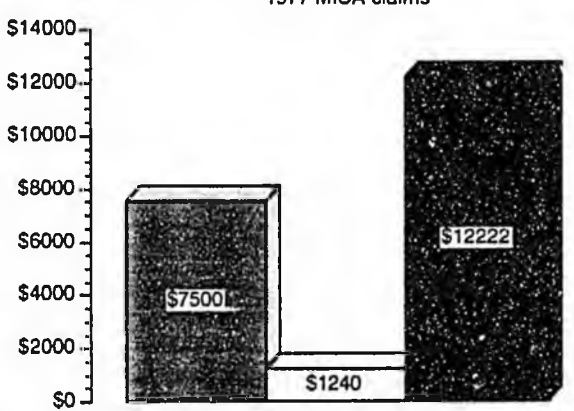


80% of all 1977 MICA claims settled without payment



Cost of defending suits & claims as compared to settlements





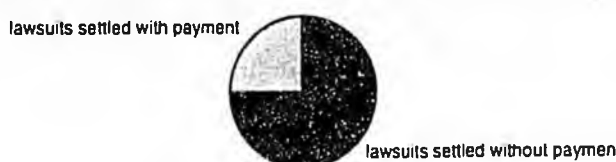
No data available for 1977

1978 MICA LAWSUITS & CLAIMS

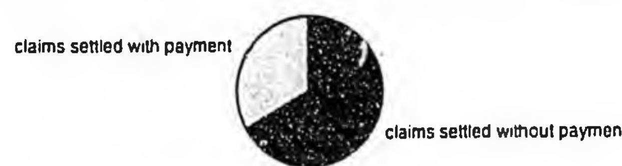
Total number of MICA lawsuits: 8
- Number (and percentage) settled without payment: 6 (75%)
- Number (and percentage) settled with payment: 2 (25%)
- Average settlement: $32,500
- Average cost of defense in cases resulting in no payment: $15,470
- Average cost of defense in cases resulting in payment: $12,148

Total number of MICA claims: 3
- Number (and percentage) settled without payment: 2 (66%)
- Number (and percentage) settled with payment: 1 (33%)
- Average settlement: $35,426
- Average cost of defense in cases resulting in no payment: $190
- Average cost of defense in cases resulting in payment: $0

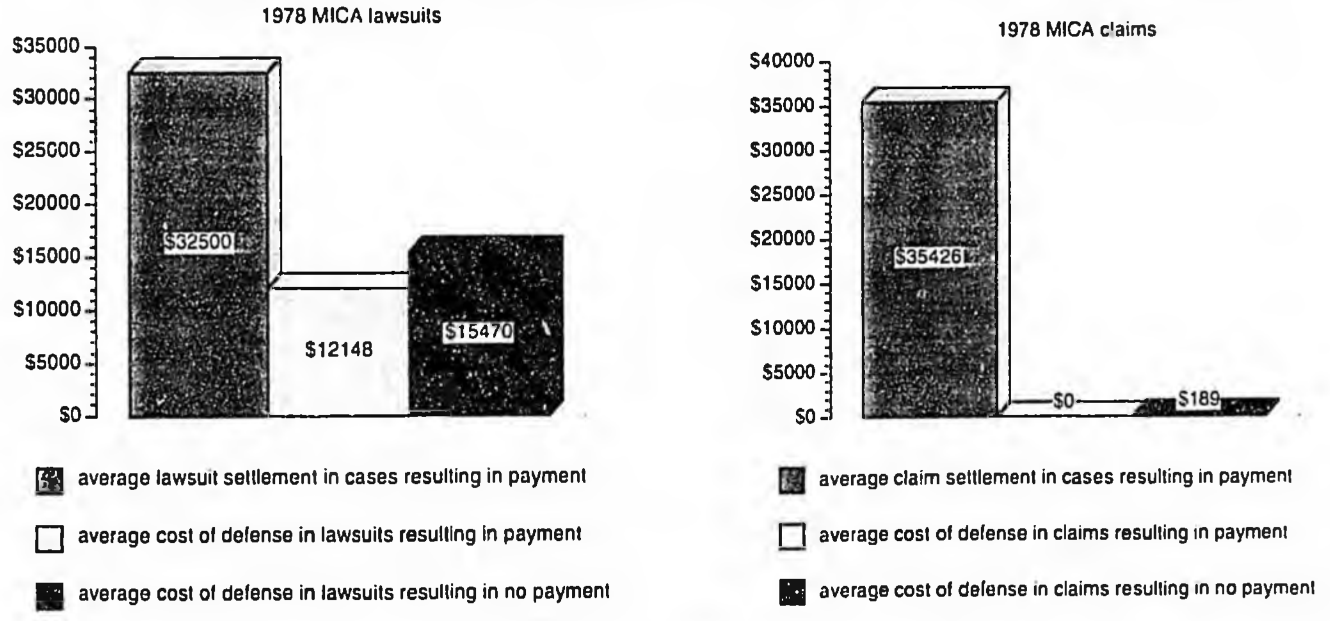
75% of all 1978 MICA lawsuits settled without payment



66% of all 1978 MICA claims settled without payment



Cost of defending suits & claims as compared to settlements



No data available for 1978

1979 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 6

- Number (and percentage) settled without payment: 4 (66%)
- Number (and percentage) settled with payment: 2 (33%)
- Average settlement: $23,500
- Average cost of defense in cases resulting in no payment: $5,850
- Average cost of defense in cases resulting in payment: $14,294

Total number of MICA claims: 2

- Number (and percentage) settled without payment: 2 (100%)
- Number (and percentage) settled with payment: 0 (0%)
- Average settlement: $0
- Average cost of defense in cases resulting in no payment: $545
- Average cost of defense in cases resulting in payment: $0

66% of all 1979 MICA lawsuits settled without payment

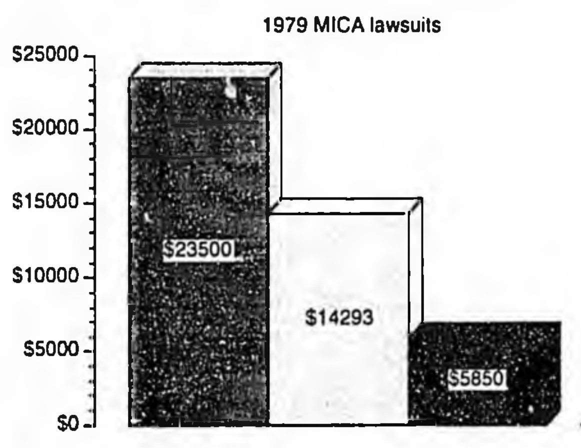
lawsuits settled with payment

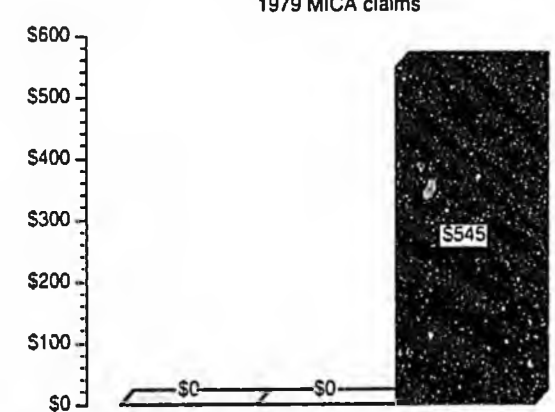
lawsuits settled without payment

100% of all 1979 MICA claims settled without payment

claims settled without payment

Cost of defending suits & claims as compared to settlements





- average lawsuit settlement in cases resulting in payment
- average cost of defense in lawsuits resulting in payment
- average cost of defense in lawsuits resulting in no payment

- average claim settlement in cases resulting in payment
- average cost of defense in claims resulting in payment
- average cost of defense in claims resulting in no payment

No data available for 1979

1980 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 8
- Number (and percentage) settled without payment: 5 (63%)
- Number (and percentage) settled with payment: 3 (37%)
- Average settlement: $112,917
- Average cost of defense in cases resulting in no payment: $18,144
- Average cost of defense in cases resulting in payment: $36,186

Total number of MICA claims: 6
- Number (and percentage) settled without payment: 3 (50%)
- Number (and percentage) settled with payment: 3 (50%)
- Average settlement: $33,904
- Average cost of defense in cases resulting in no payment: $871
- Average cost of defense in cases resulting in payment: $2,351

63% of all 1980 MICA lawsuits settled without payment

lawsuits settled without payment

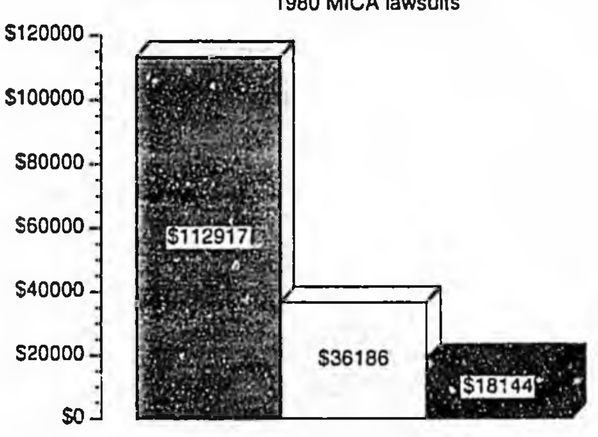
50% of all 1980 MICA claims settled without payment

claims settled with payment

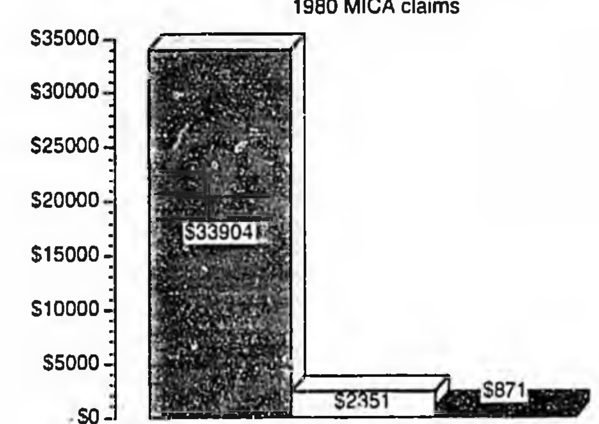
claims settled without payment

Cost of defending suits & claims as compared to settlements

1980 MICA lawsuits



1980 MICA claims



- average lawsuit settlement in cases resulting in payment
- average cost of defense in lawsuits resulting in payment
- average cost of defense in lawsuits resulting in no payment

- average claim settlement in cases resulting in payment
- average cost of defense in claims resulting in payment
- average cost of defense in claims resulting in no payment

MIEC CLAIMS 1980

Total number of MIEC claims: 3

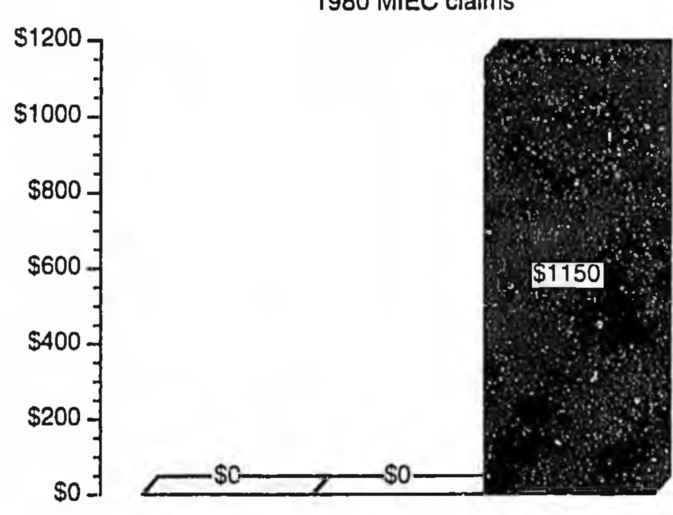
Number (and percentage) settled without payment: 3 (100%)
Number (and percentage) settled with payment: 0 (0%)
Average settlement: $0
Average cost of defense in cases resulting in no payment: $1,150
Average cost of defense in cases resulting in payment: $0

100% of all 1980 MIEC claims settled without payment

claims settled without payment

Cost of defending claims as compared to settlements

1980 MIEC claims



average claim settlement in cases resulting in payment

average cost of defense in claims resulting in payment

average cost of defense in claims resulting in no payment

1981 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 7

- Number (and percentage) settled without payment: 3 (43%)
- Number (and percentage) settled with payment: 4 (57%)
- Average settlement: $62,500
- Average cost of defense in cases resulting in no payment: $3,842
- Average cost of defense in cases resulting in payment: $40,892

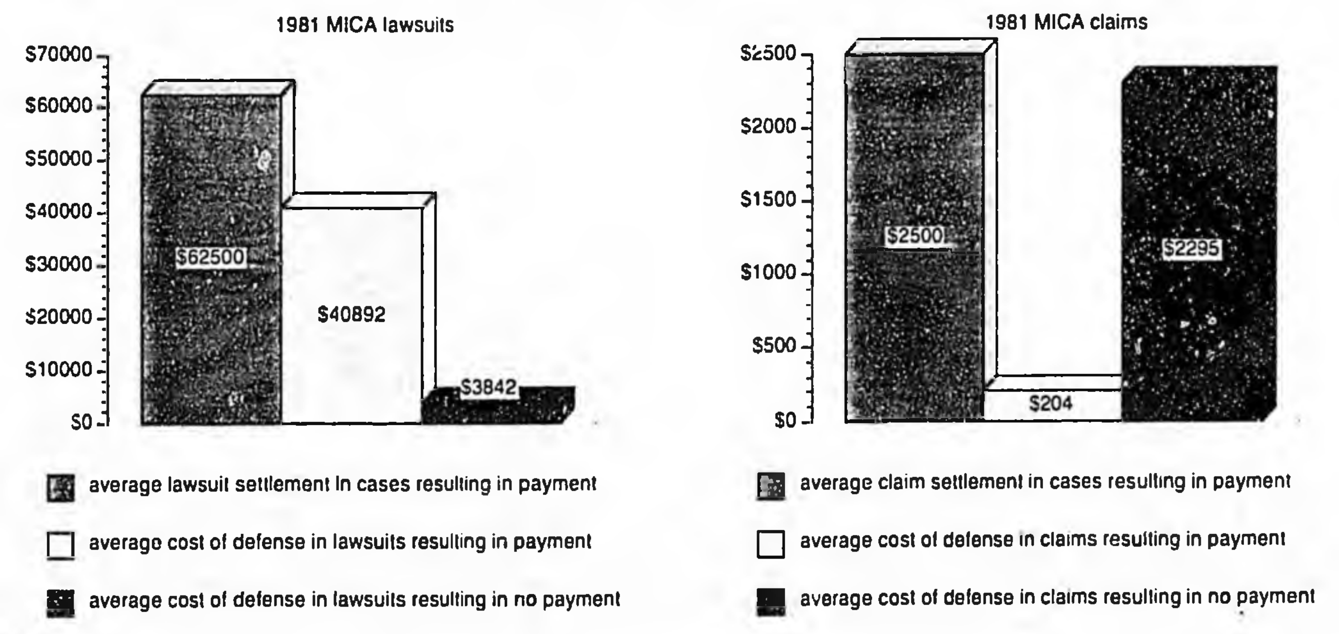
Total number of MICA claims: 7

- Number (and percentage) settled without payment: 1 (14%)
- Number (and percentage) settled with payment: 6 (86%)
- Average settlement: $2,500
- Average cost of defense in cases resulting in no payment: $2,295
- Average cost of defense in cases resulting in payment: $204

43% of all 1981 MICA lawsuits settled without payment

14% of all 1981 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements



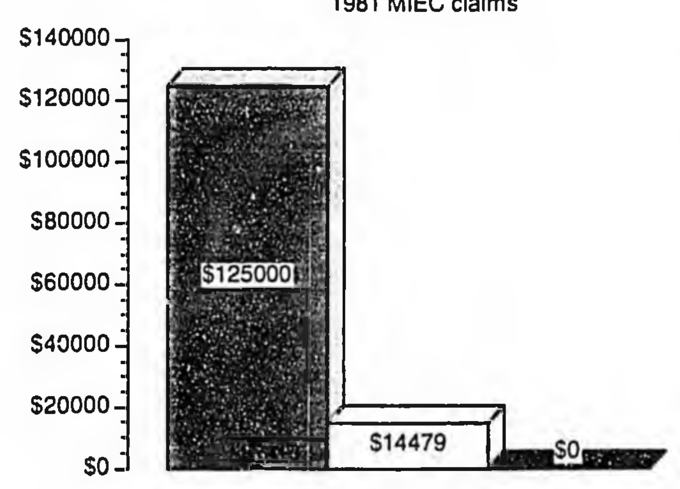
MIEC CLAIMS 1981

Total number of MIEC claims: 6

Number (and percentage) settled without payment: 5 (83%)
Number (and percentage) settled with payment: 1 (17%)
Average settlement: $125,000
Average cost of defense in cases resulting in no payment: $0
Average cost of defense in cases resulting in payment: $14,479

83% of all 1981 MIEC claims settled without payment

Cost of defending claims as compared to settlements



average claim settlement in cases resulting in payment
average cost of defense in claims resulting in payment
average cost of defense in claims resulting in no payment

1982 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 20

Number (and percentage) settled without payment: 8 (40%)
Number (and percentage) settled with payment: 12 (60%)
Average settlement: $82,469
Average cost of defense in cases resulting in no payment: $4,695
Average cost of defense in cases resulting in payment: $15,620

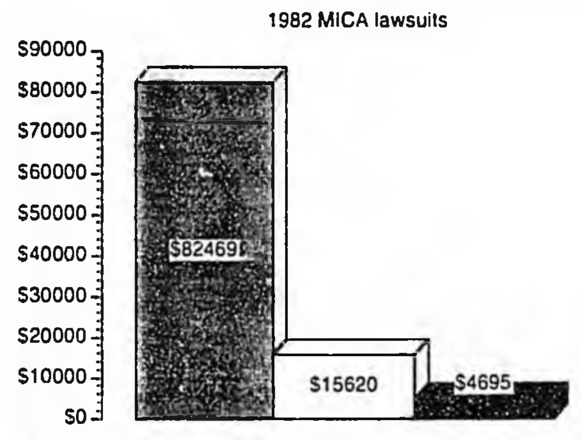
Total number of MICA claims: 5

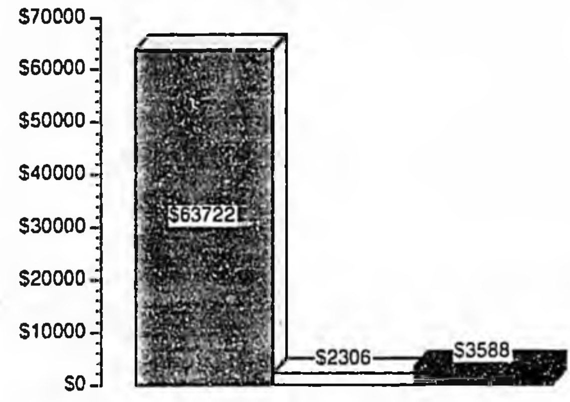
Number (and percentage) settled without payment: 2 (40%)
Number (and percentage) settled with payment: 3 (60%)
Average settlement: $63,722
Average cost of defense in cases resulting in no payment: $3,588
Average cost of defense in cases resulting in payment: $2,306

40% of all 1982 MICA lawsuits settled without payment

40% of all 1982 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements



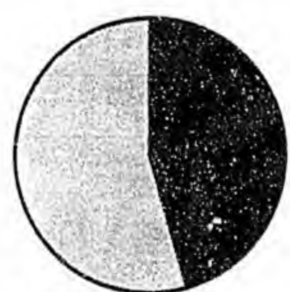


MIEC CLAIMS 1982

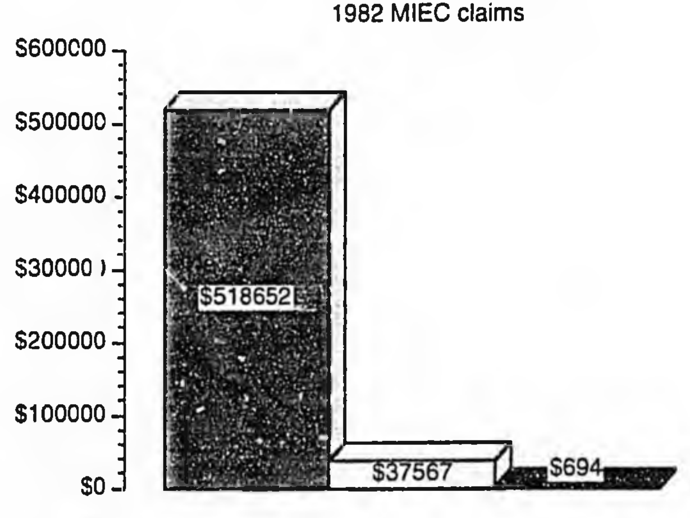
Total number of MIEC claims: 11

Number (and percentage) settled without payment: 5 (45%)
Number (and percentage) settled with payment: 6 (55%)
Average settlement: $518,652
Average cost of defense in cases resulting in no payment: $694
Average cost of defense in cases resulting in payment: $37,567

45% of all 1982 MIEC claims settled without payment



Cost of defending claims as compared to settlements



average claim settlement in cases resulting in payment

average cost of defense in claims resulting in payment

average cost of defense in claims resulting in no payment

1983 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 18

- Number (and percentage) settled without payment: 10 (55%)
- Number (and percentage) settled with payment: 8 (45%)
- Average settlement: $230,938
- Average cost of defense in cases resulting in no payment: $26,252
- Average cost of defense in cases resulting in payment: $28,538

Total number of MICA claims: 7

- Number (and percentage) settled without payment: 4 (57%)
- Number (and percentage) settled with payment: 3 (43%)
- Average settlement: $38,767
- Average cost of defense in cases resulting in no payment: $5,875
- Average cost of defense in cases resulting in payment: $4,244

55% of all 1983 MICA lawsuits settled without payment

lawsuits settled with payment

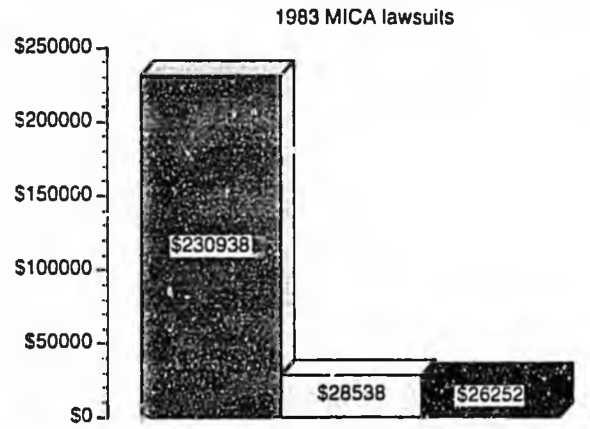
lawsuits settled without payment

57% of all 1983 MICA claims settled without payment

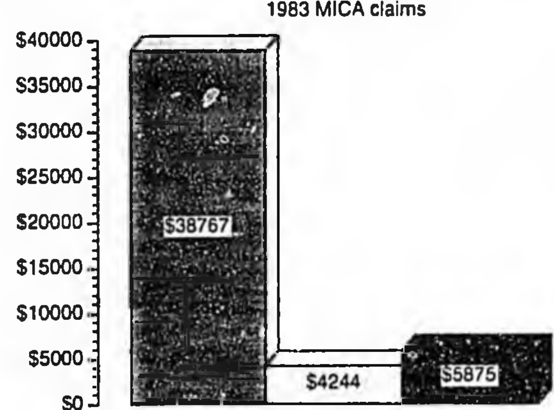
claims settled with payment

claims settled without payment

Cost of defending suits & claims as compared to settlements



- average lawsuit settlement in cases resulting in payment
- average cost of defense in lawsuits resulting in payment
- average cost of defense in lawsuits resulting in no payment



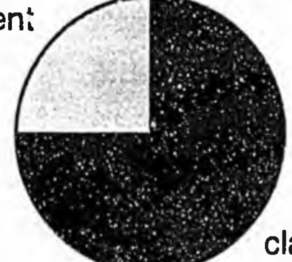
- average claim settlement in cases resulting in payment
- average cost of defense in claims resulting in payment
- average cost of defense in claims resulting in no payment

MIEC CLAIMS 1983

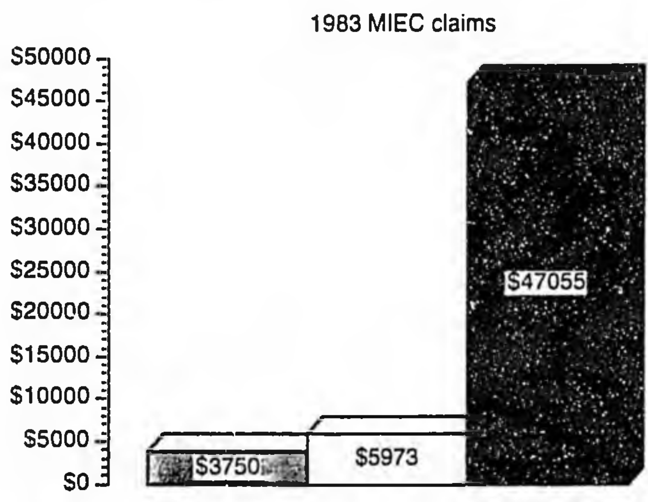
Total number of MIEC claims: 8

Number (and percentage) settled without payment: 6 (75%)
Number (and percentage) settled with payment: 2 (25%)
Average settlement: $3,750
Average cost of defense in cases resulting in no payment: $47,055
Average cost of defense in cases resulting in payment: $5,973

75% of all 1983 MIEC claims settled without payment



Cost of defending claims as compared to settlements



1984 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 32

- Number (and percentage) settled without payment: 17 (53%)
- Number (and percentage) settled with payment: 15 (47%)
- Average settlement: $326,607
- Average cost of defense in cases resulting in no payment: $18,393
- Average cost of defense in cases resulting in payment: $68,101

Total number of MICA claims: 10

- Number (and percentage) settled without payment: 2 (20%)
- Number (and percentage) settled with payment: 8 (80%)
- Average settlement: $68,981
- Average cost of defense in cases resulting in no payment: $740
- Average cost of defense in cases resulting in payment: $1,973

53% of all 1984 MICA lawsuits settled without payment

lawsuits settled with payment

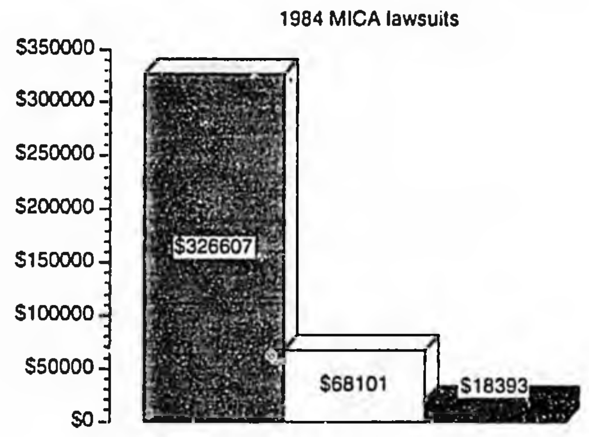
lawsuits settled without payment

20% of all 1984 MICA claims settled without payment

claims settled without payment

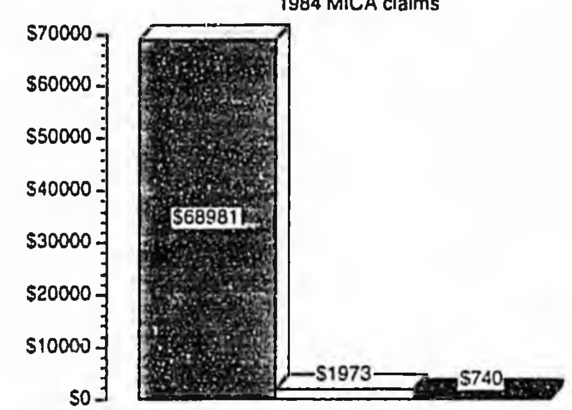
claims settled with payment

Cost of defending suits & claims as compared to settlements



average cost of defense in lawsuits resulting in payment

average cost of defense in lawsuits resulting in no payment



average cost of defense in claims resulting in payment

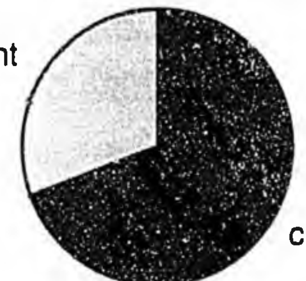
average cost of defense in claims resulting in no payment

MIEC CLAIMS 1984

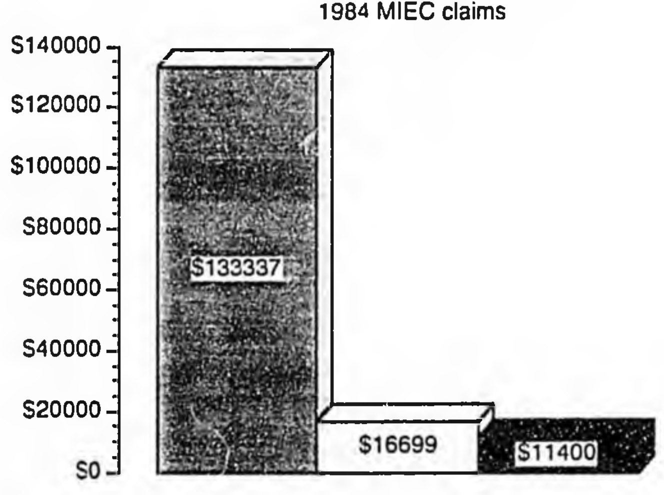
Total number of MIEC claims: 13

Number (and percentage) settled without payment: 9 (69%)
Number (and percentage) settled with payment: 4 (31%)
Average settlement: $133,337
Average cost of defense in cases resulting in no payment: $11,400
Average cost of defense in cases resulting in payment: $16,699

69% of all 1984 MIEC claims settled without payment



Cost of defending claims as compared to settlements



1985 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 32

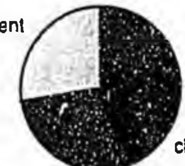
Number (and percentage) settled without payment: 20 (63%)
Number (and percentage) settled with payment: 12 (37%)
Average settlement: $499,950
Average cost of defense in cases resulting in no payment: $4,449
Average cost of defense in cases resulting in payment: $39,950

Total number of MICA claims: 29

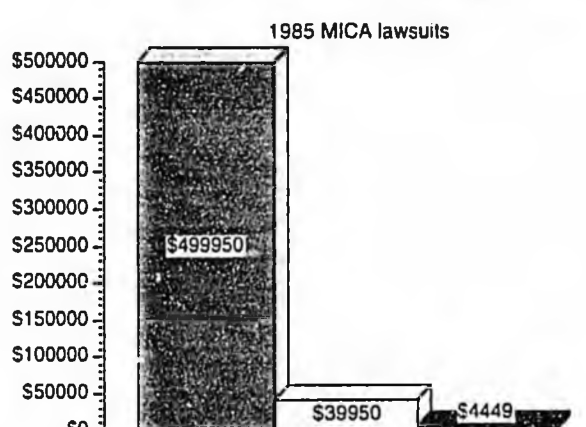
Number (and percentage) settled without payment: 21 (72%)
Number (and percentage) settled with payment: 8 (28%)
Average settlement: $126,672
Average cost of defense in cases resulting in no payment: $705
Average cost of defense in cases resulting in payment: $1,757

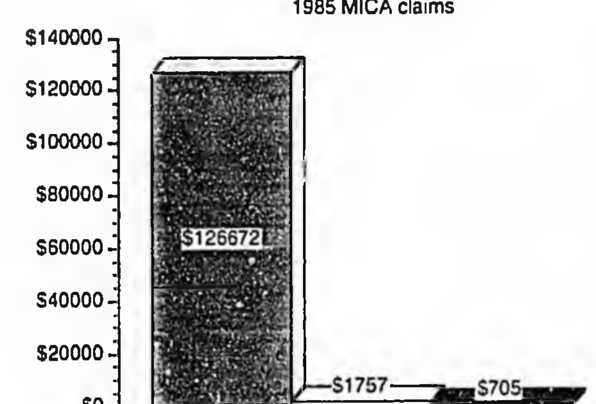
63% of all 1985 MICA lawsuits settled without payment

72% of all 1985 MICA claims settled without payment



Cost of defending suits & claims as compared to settlements





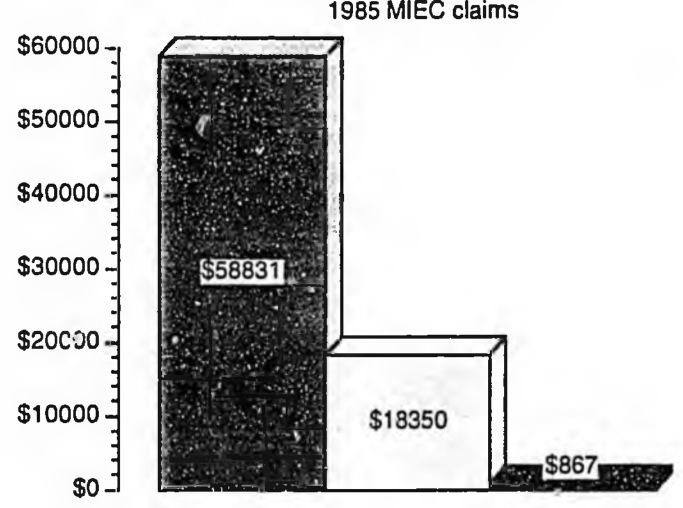
MIEC CLAIMS 1985

Total number of MIEC claims: 60

Number (and percentage) settled without payment: 57 (95%)
Number (and percentage) settled with payment: 3 (5%)
Average settlement: $58,831
Average cost of defense in cases resulting in no payment: $867
Average cost of defense in cases resulting in payment: $18,350

95% of all 1985 MIEC claims settled without payment

Cost of defending claims as compared to settlements



1986 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 22

Number (and percentage) settled without payment: 12 (55%)
Number (and percentage) settled with payment: 10 (45%)
Average settlement: $195,994
Average cost of defense in cases resulting in no payment: $3,904
Average cost of defense in cases resulting in payment: $46,737

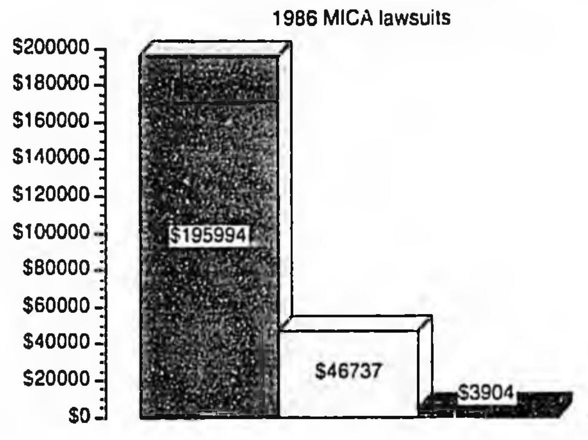
Total number of MICA claims: 16

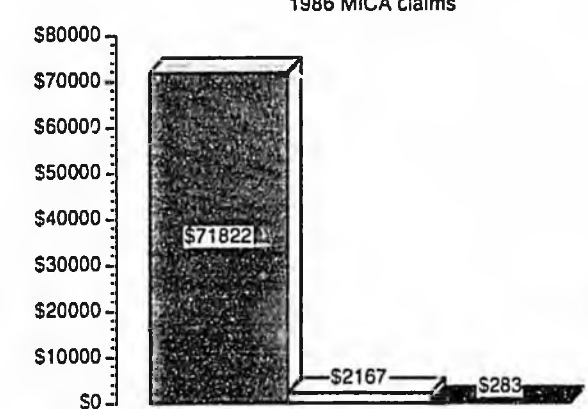
Number (and percentage) settled without payment: 7 (44%)
Number (and percentage) settled with payment: 9 (56%)
Average settlement: $71,822
Average cost of defense in cases resulting in no payment: $283
Average cost of defense in cases resulting in payment: $2,167

55% of all 1986 MICA lawsuits settled without payment

44% of all 1986 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements





average lawsuit settlement in cases resulting in payment
average cost of defense in lawsuits resulting in payment
average cost of defense in lawsuits resulting in no payment

average claim settlement in cases resulting in payment
average cost of defense in claims resulting in payment
average cost of defense in claims resulting in no payment

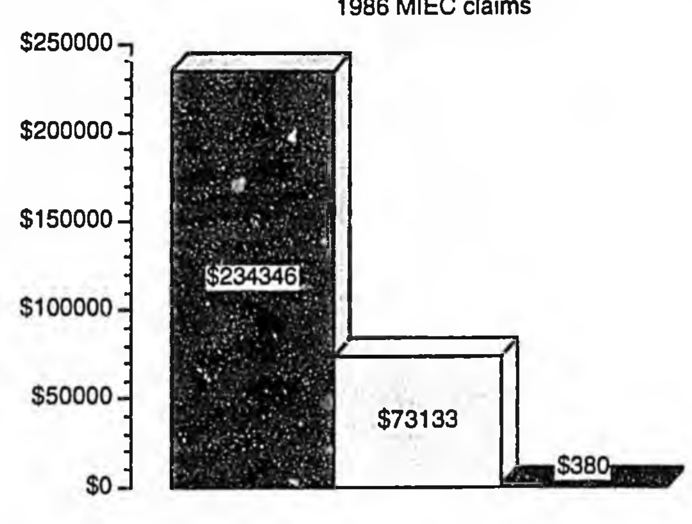
MIEC CLAIMS 1986

Total number of MIEC claims: 60

- Number (and percentage) settled without payment: 58 (97%)
- Number (and percentage) settled with payment: 2 (3%)
- Average settlement: $234,346
- Average cost of defense in cases resulting in no payment: $380
- Average cost of defense in cases resulting in payment: $73,133

97% of all 1986 MIEC claims settled without payment

Cost of defending claims as compared to settlements



1987 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 11

- Number (and percentage) settled without payment: 8 (73%)
- Number (and percentage) settled with payment: 3 (27%)
- Average settlement: $39,607
- Average cost of defense in cases resulting in no payment: $187
- Average cost of defense in cases resulting in payment: $12,781

Total number of MICA claims: 15

- Number (and percentage) settled without payment: 11 (73%)
- Number (and percentage) settled with payment: 4 (27%)
- Average settlement: $50,517
- Average cost of defense in cases resulting in no payment: $378
- Average cost of defense in cases resulting in payment: $5,435

73% of all 1987 MICA lawsuits settled without payment

lawsuits settled with payment

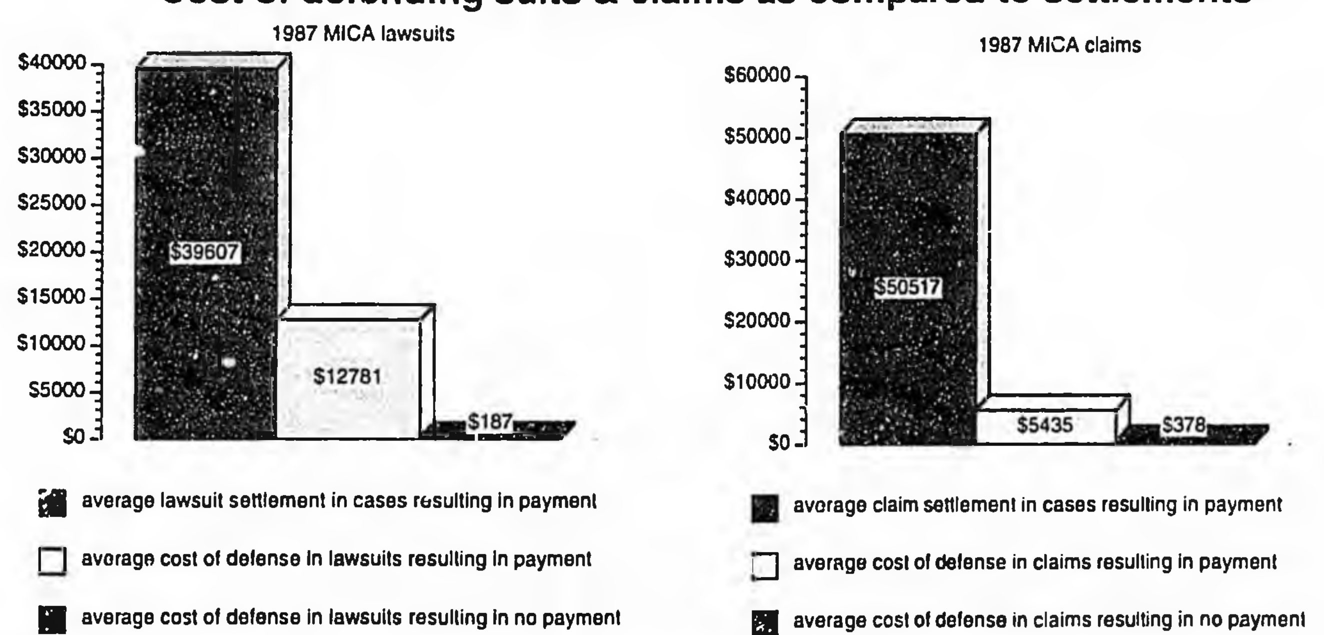
lawsuits settled without payment

73% of all 1987 MICA claims settled without payment

claims settled with payment

claims settled without payment

Cost of defending suits & claims as compared to settlements



MIEC CLAIMS 1987

Total number of MIEC claims: 17

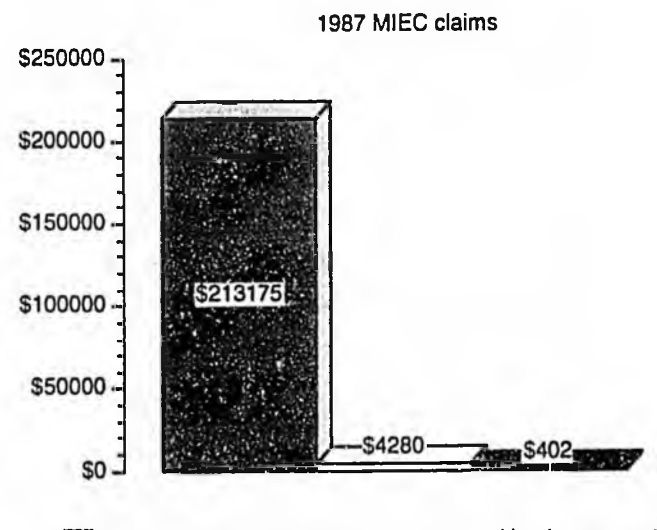
Number (and percentage) settled without payment: 15 (88%)
Number (and percentage) settled with payment: 2 (12%)
Average settlement: $213,175
Average cost of defense in cases resulting in no payment: $402
Average cost of defense in cases resulting in payment: $4,280

88% of all 1987 MIEC claims settled without payment

claims settled with payment

claims settled without payment

Cost of defending claims as compared to settlements



average claim settlement in cases resulting in payment

average cost of defense in claims resulting in payment

average cost of defense in claims resulting in no payment

1988 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 2

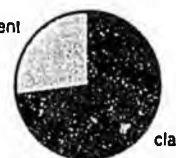
Number (and percentage) settled without payment: 2 (100%)
Number (and percentage) settled with payment: 0 (0%)
Average settlement: $0
Average cost of defense in cases resulting in no payment: $1,609
Average cost of defense in cases resulting in payment: $0

Total number of MICA claims: 11

Number (and percentage) settled without payment: 8 (73%)
Number (and percentage) settled with payment: 3 (27%)
Average settlement: $17,104
Average cost of defense in cases resulting in no payment: $39
Average cost of defense in cases resulting in payment: $1,586

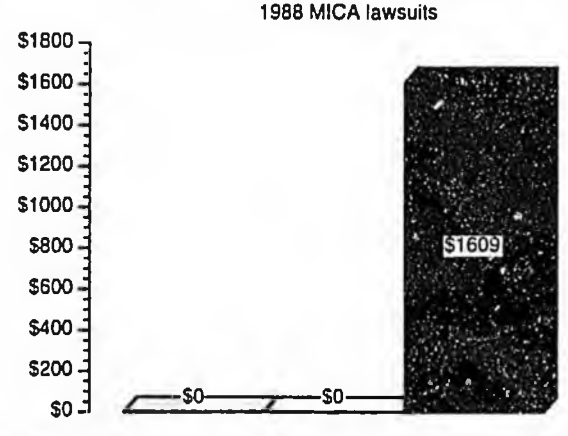
100% of all 1988 MICA lawsuits settled without payment

73% of all 1988 MICA claims settled without payment

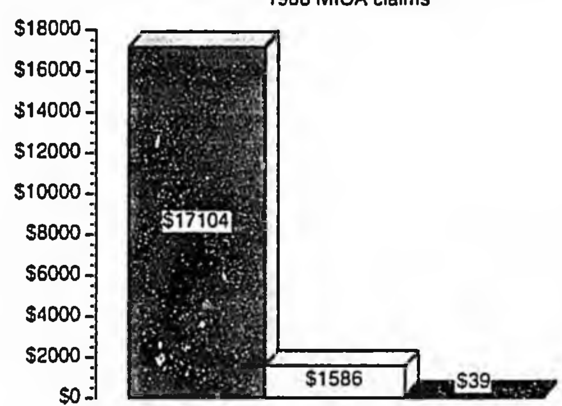


Cost of defending suits & claims as compared to settlements

1988 MICA lawsuits



1988 MICA claims



- average lawsuit settlement in cases resulting in payment
- average cost of defense in lawsuits resulting in payment
- average cost of defense in lawsuits resulting in no payment

- average claim settlement in cases resulting in payment
- average cost of defense in claims resulting in payment
- average cost of defense in claims resulting in no payment

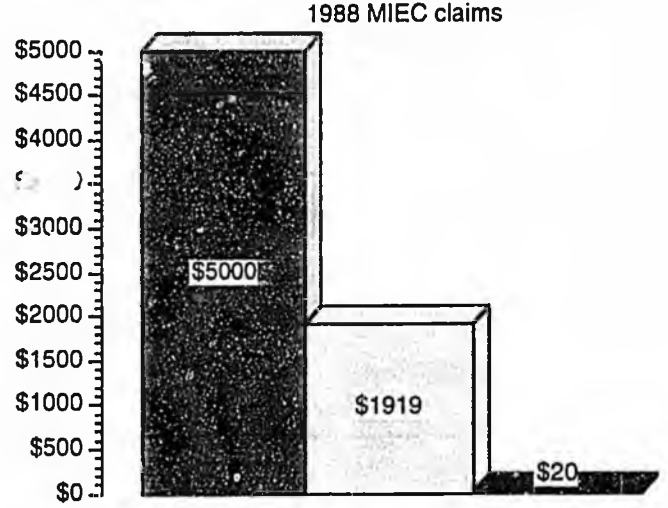
MIEC CLAIMS 1988

Total number of MIEC claims: 3

Number (and percentage) settled without payment: 2 (67%)
Number (and percentage) settled with payment: 1 (33%)
Average settlement: $5,000
Average cost of defense in cases resulting in no payment: $20
Average cost of defense in cases resulting in payment: $1,191

67% of all 1988 MIEC claims settled without payment

Cost of defending claims as compared to settlements



1989 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 0

Number (and percentage) settled without payment:
Number (and percentage) settled with payment:
Average settlement:
Average cost of defense in cases resulting in no payment:
Average cost of defense in cases resulting in payment:

Total number of MICA claims: 3

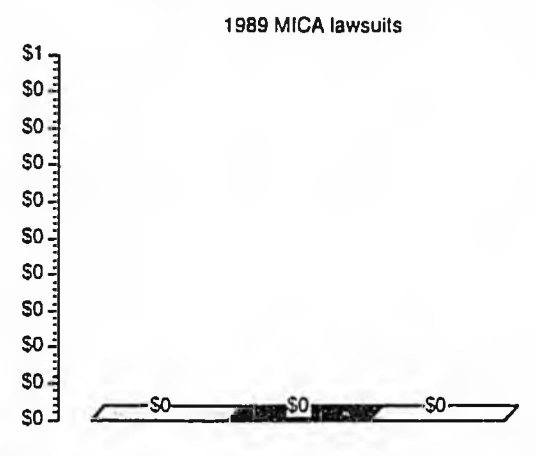
Number (and percentage) settled without payment: 0 (0%)
Number (and percentage) settled with payment: 3 (100%)
Average settlement: $3,459
Average cost of defense in cases resulting in no payment: $0
Average cost of defense in cases resulting in payment: $479

There were no 1989 MICA lawsuits reported settled

0% of all 1989 MICA claims settled without payment

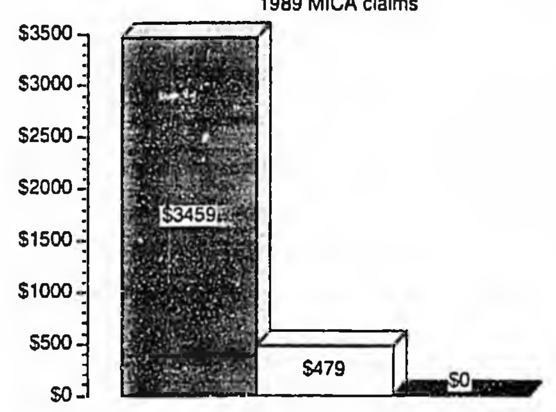
Cost of defending suits & claims as compared to settlements

1989 MICA lawsuits



average lawsuit settlement in cases resulting in payment
average cost of defense in lawsuits resulting in payment
average cost of defense in lawsuits resulting in no payment

1989 MICA claims



average claim settlement in cases resulting in payment
average cost of defense in claims resulting in payment
average cost of defense in claims resulting in no payment

MIEC CLAIMS 1989

Total number of MIEC claims: 0 claims closed

No MIEC claims were closed in 1989.

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APPENDIX A

ALASKA STATUTE SUPPLEMENT

CHAPTER 64 MEDICINE

SECTION 2

as a marital and family therapist in this state is guilty of a class B misdemeanor. (§ 1 ch 129 SLA 1992)

Sec. 08.63.900. Definitions. In this chapter, unless the context indicates otherwise,

(1) "advertise" includes issuing or causing to be distributed a card, sign, or device to a person, or causing, permitting, or allowing a sign or marking on or in a building or structure, or in a newspaper, magazine, or directory, or on radio or television, or using other means designed to secure public attention;

(2) "board" means the Board of Marital and Family Therapy;

(3) "course" means a class of at least three credit hours in a graduate program at an accredited educational institution or an institution approved by the board;

(4) "department" means the Department of Commerce and Economic Development;

(5) "practice of marital and family therapy" means the diagnosis and treatment of mental and emotional disorders that are referenced in the standard diagnostic nomenclature for marital and family therapy, whether cognitive, affective, or behavioral, within the context of human relationships, particularly marital and family systems; marital and family therapy involves

(A) the professional application of assessments and treatments of psychotherapeutic services to individuals, couples, and families for the purpose of treating the diagnosed emotional and mental disorders;

(B) an applied understanding of the dynamics of marital and family interactions, along with the application of psychotherapeutic and counseling techniques for the purpose of resolving intrapersonal and interpersonal conflict and changing perceptions, attitudes, and behaviors in the area of human relationships and family life;

(6) "supervision" means face-to-face consultation, direction, review, evaluation, and assessment of the practice of the person being supervised, including direct observation and the review of case presentations, audio tapes, and video tapes. (§ 1 ch 129 SLA 1992)

Chapter 64. Medicine.

Article

1. State Medical Board (§§ 08.64.101, 08.64.107)
2. Licensing (§§ 08.64.170, 08.64.360, 08.64.362)
3. Miscellaneous Provisions (§§ 08.64.366, 08.64.369)
4. General Provisions (§§ 08.64.370, 08.64.380)

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APPENDIX B

ALASKA STATUTE SUPPLEMENT

CHAPTER 10 LIMITATIONS OF ACTIONS

SECTION 3

SECTION 4

SECTION 5

SECTION 6

Chapter 10. Limitations of Actions.

Section
60. Actions to be brought in three years
140. Disabilities of minority and incompetency

Section
240. Commencement of action after dismissal or reversal

Sec. 09.10.010. General limitations on civil actions.

NOTES TO DECISIONS

Quoted in Pedersen v. Zielski, 822 P.2d 903 (Alaska 1991).

Sec. 09.10.030. Actions to recover real property in 10 years.

NOTES TO DECISIONS

I. General Consideration.
II. Adverse Possession.
A. Generally.
F. Hostile Possession.

I. GENERAL CONSIDERATION.

When the land claimed is not the land described in the deed, the doctrine of color of title does not apply and the 10-year period of this section must be met. Hubbard v. Curtiss, 684 P.2d 842 (Alaska 1984).

Right to trial by jury. — Whether the plaintiff is in possession of the disputed property at the time of the filing of the claim for a prescriptive easement under this section is not determinative of the question of whether the claim is treated as a legal or equitable one, which prevents a party who seizes possession of disputed property from gaining the right to a jury trial. McGill v. Wahl, 839 P.2d 393 (Alaska 1992).

Applied in Swift v. Darrell & Marjorie Kniffen, Fairhill, Inc., 706 P.2d 296 (Alaska 1985).

Quoted in Ault v. State, 688 P.2d 951 (Alaska 1984).

Stated in Smith v. Krebs, 768 P.2d 124 (Alaska 1989).

Cited in Carter v. Hoblit, 755 P.2d 1084 (Alaska 1988).

II. ADVERSE POSSESSION.

A. Generally.

Elements required under AS 09.25.050 and this section.

In order to acquire title by adverse possession, the claimant must prove, by clear and convincing evidence, that for the statutory period his use of the land was continuous, open and notorious, exclusive and hostile to the true owner. Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990).

When title vests. — Title automatically vests in the adverse possessor at the end of the statutory period. Hubbard v. Curtiss, 684 P.2d 842 (Alaska 1984).

Adverse possessions may be tacked.

Successive adverse possessors may tack their periods of possession together to satisfy the statutory duration requirements, if privity exists between them. Hubbard v. Curtiss, 684 P.2d 842 (Alaska 1986).

Adverse possessors could tack the possession of their predecessors to their own possession where the predecessors took possession of the disputed property in March of 1967 after their mistaken purchase of another parcel from the true owner and the adverse possessors remained in continuous adverse possession until agents for the true owner actually rented the house and the tenant they procured moved into it in June, 1977. Hubbard v. Curtiss, 684 P.2d 842 (Alaska 1984).

When privity created. — Privity is created when circumstances surrounding a conveyance of land show that the grantor intended to transfer possession of

the land not described in the deed and the grantee does, in fact, take possession of that land. Hubbard v. Curtiss, 684 P.2d 842 (Alaska 1984).

Claim by prescription.

The requirements to establish a prescriptive easement are the same as those for making a claim of adverse possession, and the required period of adverse use is ten years. McGill v. Wahl, 839 P.2d 393 (Alaska 1992).

This section establishes a time limit during which an action to recover real property may be maintained, constitutes the method by which a claimant may establish title through adverse possession, and constitutes a method for establishing an easement through prescription; thus a party claiming a prescriptive easement need not bring an action as either an action to quiet title, AS 09.45.010, or an ejectment, AS 09.45.630. McGill v. Wahl, 839 P.2d 393 (Alaska 1992).

F. Hostile Possession.

Mistake in deed's description. — Mistake in description on the deed conveyed the true owner did not prevent the possession from being adverse to her. Hubbard v. Curtiss, 684 P.2d 842 (Alaska 1984).

Acquiring record title, after good title acquired by adverse possession. — Adverse possessors did not destroy the adversity of their possession by acquiring record title to the lot because their record title was not good as against previous title based on adverse possession. Hubbard v. Curtiss, 684 P.2d 842 (Alaska 1984).

Sec. 09.10.040. Action upon judgment or sealed instrument in 10 years.

NOTES TO DECISIONS

Section applicable to property settlement agreement. — When the parties incorporate a property settlement agreement into a divorce decree, the applicable statute of limitations is that of this section, not AS 9.10.50, the statute of limitations controlling contracts. Lantz v. Lantz, 845 P.2d 429 (1993).

Stated in Cedergreen v. Cedergreen, 811 P.2d 784 (Alaska 1991).

Cited in Carman v. Prudential Ins. Co. of Am., 748 P.2d 743 (Alaska 1988).

Sec. 09.10.050. Actions to be brought in six years.

NOTES TO DECISIONS

Divorce property settlement agreement. — When the parties incorporate a property settlement agreement into a divorce decree, the applicable statute of limitations is that of AS 9.10.040, not this section, the statute of limitations controlling contracts. Lantz v. Lantz, 845 P.2d 429 (1993).

Breach of collective bargaining agreement. — A claim based upon plaintiff's failure to be paid at a rate commensurate with the work he was doing and upon violation of AS 23.05.140(b), as to payment of wages on termination of employment, is not strictly or solely an action for liability upon a statute, but may be construed to state a cause of action for breach of the collective bargaining agreement. As such, it is controlled by the six-year statute of limitations for contract actions (this section), and the superior court erred in dismissing the count based upon the running of the two-year statute of limitations for actions based upon a statute, AS 09.10.070(3). Reed v. Municipality of Anchorage, 741 P.2d 1181 (Alaska 1987).

Misrepresentation and negligence.

Where a client sued his attorney for malpractice, claiming that the attorney expressly promised to move his case to trial expeditiously and to keep him informed, the essence of the claim was in contract, and the contract limitations period of this section applied. Jones v. Wadsworth, 791 P.2d 1013 (Alaska 1990).

Monthly breach of continuing contract. — A failure to make monthly payments in a contract which requires continuing performance results in a new breach every month, and the limitations period runs against each monthly right of action separately, where there is no evidence of

conduct by the defendant which rises above mere noncompliance with contractual obligations, and the defendant thus fails to repudiate the agreement by his conduct. Trustees for Alaska Laborers-Construction Indus. Health & Sec. Fund v. Ferrell, 812 F.2d 512 (9th Cir. 1987).

Breach of retirement fund agreement. — This section governs where plaintiff trustees allege that defendant, as a successor employer, is bound by a compliance agreement which he breached by failing to make the required contributions to the Alaska Laborer Fund and the action is brought under the Employee Retirement Income Security Act, 29 U.S.C. § 1132. Trustees for Alaska Laborers-Construction Indus. Health & Sec. Fund v. Ferrell, 812 F.2d 512 (9th Cir. 1987).

Actions against corporate directors for breach of fiduciary duty sound in contract, and are governed by the six-year statute. Bibo v. Jeffrey's Restaurant, 770 P.2d 290 (Alaska 1989).

Actions for breach of a fiduciary duty arising out of professional service relationships which primarily involve economic injury, because the duty allegedly breached does in part arise from the contract, are governed by this section and not AS 09.10.070. Lee Houston & Assocs. v. Racine, 806 P.2d 848 (Alaska 1991).

Presumption of death of insured. — Where an insurance beneficiary relies upon the statutory presumption of death arising from the insured's disappearance, the applicable six-year statute of limitations period for actions on contracts begins to run on the date the presumptive death period expires. Moreover, it is reasonable to presume a demand for payment under the policy and an immediate rejection by the insurer on the date the presumptive death period expires. Carman v. Prudential Ins. Co. of Am., 748 P.2d 743 (Alaska 1988).

Mining claims. — Plaintiffs' claims of intentional dilution of ore and unworkmanlike mining arose out of alleged injuries to plaintiffs' personal and real property, and were governed by this section, not AS 09.10.070, which deals with tort claims. McKibben v. Mohawk Oil Co., 667 P.2d 1223 (Alaska 1983).

"Injuring personal property". — The phrase "injuring personal property" incorporates actions for injury to tangible personal property; and, therefore, this section is applicable to a plaintiff's strict liability and negligence claims. Kodiak Elec. Ass'n v. Delaval Turbine, Inc., 694 P.2d 150 (Alaska 1984).

Denial of staff privileges at hospital. — Where medical doctor was denied renewal of his staff privileges at hospital, his claim arose out of his contractual relationship with the hospital defendant, and this section was the appropriate statute of limitations, not the 30 or 90 day limitation for administrative decisions and arbitration. Eufemio v. Kodiak Island Hosp., 837 P.2d 95 (Alaska 1992).

When section does not apply. — Where workers' compensation insurance carrier paid benefits to employee and became subrogated by operation of law to employee's rights against alleged tort-feasor, carrier could claim no right to common-law implied indemnity since it had no preexisting legal relationship with alleged tort-feasor; thus, six-year statute of limitations did not apply. Providence Wash. Ins. Co. v. DeHavilland Aircraft Co., 699 P.2d 355 (Alaska 1985).

Applied in Braham v. Fuller, 728 P.2d 641 (Alaska 1986); Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987).

Quoted in St. Paul Fire & Marine Ins. Co. v. Sauer Elec., Inc., 648 F. Supp. 959 (D. Alaska 1986); Estes v. Alaska Ins. Guar. Ass'n, 774 P.2d 1315 (Alaska 1989).

Stated in Cedergreen v. Cedergreen, 811 P.2d 784 (Alaska 1991).

Cited in Gratrix v. Pine Tree, Inc., 677 P.2d 1264 (Alaska 1984); City of Valdez v. Copper Valley Elec. Ass'n, 740 P.2d 462 (Alaska 1987); Wettanen v. Cowper, 749 P.2d 362 (Alaska 1988); Jenkins v. Daniels, 751 P.2d 19 (Alaska 1988).

Sec. 09.10.055. Certain actions relating to construction in six years.

NOTES TO DECISIONS

Section violates equal protection clause of Alaska Constitution because it bears no substantial relationship between exempting design professionals

from liability, shifting liability for defective design and construction to owners and material suppliers, and the goal of encouraging construction. Turner Constr. Co. v. Scales, 752 P.2d 467 (Alaska 1988).

Sec. 09.10.060. Actions to be brought in three years. (a) No person may bring an action against a peace officer or coroner upon a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the nonpayment of money collected upon an execution, unless brought within three years. This section does not apply to an action for an escape.

(b) No person may bring an action upon a statute for penalty or forfeiture where the action is given to the party aggrieved or to that party and the state unless brought within three years, except where the statute imposing it prescribes a different limitation.

(c) A person who was the victim of sexual abuse may not maintain an action for recovery of damages against the perpetrator of the act or acts of sexual abuse based on the perpetrator's intentional conduct for an injury or condition suffered as a result of the sexual abuse unless commenced within three years. In this subsection, "sexual abuse" means an act committed by the defendant against the plaintiff maintaining the cause of action if the defendant's conduct would have violated a provision of AS 11.41.410 — 11.41.440 or 11.41.450 — 11.41.455 at the time it was committed. (§ 1.06 ch 101 SLA 1962; am § 1 ch 4 SLA 1990)

Effect of amendments. — The 1990 amendment, effective February 2, 1990, added subsection (c).

NOTES TO DECISIONS

Abuse of process and false imprisonment. — In the case of a complaint against city police officers for abuse of process, false arrest (imprisonment) and a violation of civil rights under 42 U.S.C. § 1983, this section applied to the actions for abuse of process and false arrest (imprisonment), and AS 09.10.070 applied to the action for an alleged civil rights violation. Jenkins v. Daniels, 751 P.2d 19 (Alaska 1988).

Cited in Farmer v. State, 788 P.2d 43 (Alaska 1990).

Sec. 09.10.070. Actions to be brought in two years.

NOTES TO DECISIONS

I. General Consideration.
II. Torts.
   A. Generally.
   C. Misrepresentation and Negligence.
   D. Libel.

IV. Other Statutory Liability.
V. Procedure.
A. Generally.
B. Tolling Statute.

I. GENERAL CONSIDERATION.

Action for interference with contract rights. — Alleged acts of interference with contract rights were one-time occurrences, even though they might have continuing consequences; in determining the time from which the period of limitations is measured, such acts were not analogous to a continuing trespass or nuisance, where repeated and continued tortious acts are committed. Blake v. Gilbert, 702 P.2d 631 (Alaska 1985), overruled on other grounds, Bibo v. Jeffrey's Restaurant, 770 P.2d 290 (Alaska 1989).

Suit for breach of implied duty in construction contract. — This section was applicable to a suit against an electrical contractor alleging breach of an implied duty to perform a restaurant construction contract in a workmanlike manner. St. Paul Fire & Marine Ins. Co. v. Sauer Elec., Inc., 648 F. Supp. 959 (D. Alaska 1986).

Actions for breach of a fiduciary duty arising out of professional service relationships which primarily involve economic injury, because the duty allegedly breached does in part arise from the contract, are governed by AS 09.10.050 and not this section. Lee Houston & Assocs. v. Racine, 806 P.2d 848 (Alaska 1991).

Action under federal Civil Rights Act. — Statute of limitations for a civil rights action by a state employee challenging his discharge is two years, since, if Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), is applied retroactively, the applicable period would be the two-year period for personal injury actions, and, if it is not applied retroactively, the applicable period would be the two-year period governing actions founded on a liability created by statute. DeNardo v. Murphy, 781 F.2d 1345 (9th Cir.), appeal dismissed and cert. denied, 476 U.S. 1111, 106 S. Ct. 1962, 90 L. Ed. 2d 648 (1986).

In the case of a complaint against city police officers for abuse of process, false arrest (imprisonment) and a violation of civil rights under 42 U.S.C. § 1983, AS 09.10.060 applied to the actions for abuse of process and false arrest (imprisonment), and this section applied to the action for an alleged civil rights violation. Jenkins v. Daniels, 751 P.2d 19 (Alaska 1988).

Applied in Kodiak Elec. Ass'n v. Delaval Turbine, Inc., 694 P.2d 150 (Alaska 1984); Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Demoski v. New, 737 P.2d 780 (Alaska 1987); In re Glacier Bay, 746 F. Supp. 1379 (D. Alaska 1990).

Quoted in Bibo v. Jeffrey's Restaurant, 770 P.2d 290 (Alaska 1989); Jones v. Wadsworth, 791 P.2d 1013 (Alaska 1990); Lord v. Fogcutter Bar & Stacy Cap, 813 P.2d 660 (Alaska 1991); Pedersen v. Zielski, 822 P.2d 903 (Alaska 1991).

Cited in City of Valdez v. Copper Valley Elec. Ass'n, 740 P.2d 462 (Alaska 1987); Evron v. Gilo, 777 P.2d 182 (Alaska 1989); Cameron v. State, 822 P.2d 1362 (Alaska 1991); Hernandez-Robaina v. State, 849 P.2d 783 (1993).

II. TORTS.

A. Generally.

This section is generally considered, etc.

By its own terms, this section extends to, but not beyond, personal torts unless the action is for an injury to the "rights of another not arising on contract and not specifically provided for otherwise." Thus, for claims that do not involve personal, reputational or dignitary injury, the right(s) allegedly infringed upon must "not aris[e] on contract." Lee Houston & Assocs. v. Racine, 806 P.2d 848 (Alaska 1991).

Construed with tolling statutes. — In a products liability action, neither three days' bedrest necessitated by plaintiff's injuries nor plaintiff's incarceration approximately one year after the accident in question tolled the statute of limitations. Thus plaintiff's complaint, filed two years and one day after plaintiff sustained injuries, was not timely filed. Yurioff v. American Honda Motor Co. & Port Lions Community Store, 803 P.2d 386 (Alaska 1990).

Sex discrimination. — Plaintiff's federal and state law discrimination claims against the municipality were barred by Alaska's two-year tort statute of limitations since the statute of limitations began to run in 1983, when the municipality denied plaintiff admission to the po-

lice academy and she had notice of all facts which reasonable inquiry would disclose, rather than in 1985, when she first became aware of circumstances allegedly indicating that the municipality's acts constituted illegal discrimination. Russell v. Municipality of Anchorage, 743 P.2d 372 (Alaska 1987).

Mining claims. — Plaintiffs' claims of intentional dilution of ore and unworkmanlike mining arose out of alleged injuries to plaintiffs' personal and real property, and were governed by AS 09.10.050, not this section, which deals with tort claims. McKibben v. Mohawk Oil Co., 667 P.2d 1223 (Alaska 1983).

Claims barred. — Where workers' compensation insurance carrier paid benefits to employee and became subrogated by operation of law to employee's rights to all defenses which alleged tort-feasor could have raised against employee, the carrier's failure to sue within two years of accident was a bar to its claim. Providence Wash. Ins. Co. v. DeHavilland Aircraft Co., 699 P.2d 355 (Alaska 1985).

C. Misrepresentation and Negligence.

Legal malpractice.

[illegible] before the statute of limitations begins to run, nor is it necessary that the client know the full extent of his damages. Wettanen v. Cowper, 749 P.2d 362 (Alaska 1988).

D. Libel.

When publication occurred.

For a libel action predicated upon allegedly defamatory affidavits filed pursuant to the dismissal of a criminal prosecution against plaintiff, the statute of limitations began to run on the date the affidavits were filed with the court and released to the press, or at the latest the date of the newspaper article reporting them, even though there were subsequent publications. McCutcheon v. State, 746 P.2d 461 (Alaska 1987).

IV. OTHER STATUTORY LIABILITY.

Breach of collective bargaining agreement. — A claim based upon plaintiff's failure to be paid at a rate commensurate with the work he was doing and upon violation of AS 23.05.140(b), as to payment of wages on termination of employment, is not strictly or solely an action for liability upon a statute, but may be construed to state a cause of action for breach of the collective bargaining agreement. As such, it is controlled by the six-year statute of limitations for contract actions, AS 09.10.050, and the superior court erred in dismissing the count based upon the running of the two-year statute of limitations for actions based upon paragraph (3) of this section. Reed v. Municipality of Anchorage, 741 [illegible] 1181 (Alaska 1987).

V. PROCEDURE.

A. Generally.

Statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action. Dalkovski v. Glad, 774 P.2d 202 (Alaska 1989).

Amendment related back, etc.

Amended complaint substituting a named person for a "John Doe" defendant in an action against the state and two state troopers properly related back to the date of the original complaint where constructive notice could be imputed to the previously unidentified trooper through his counsel, the state attorney general's office, which represented all of the defendants from the outset. Farmer v. State, 788 P.2d 43 (Alaska 1990).

Addition of defendant, etc.

Addition by plaintiff of a new party by means of a "cross claim" against a defendant in another action (brought by a different plaintiff) which was consolidated with the instant action did not relate back to first plaintiff's original complaint where the first plaintiff failed to show that he had made a true mistake regarding the identity or name of the new party. Atkins v. DeHavilland Aircraft Co., 699 P.2d 352 (Alaska 1985).

Claim not barred.

Where employee was terminated on Wednesday, March 31, 1982, under AS 23.05.140(b) employer had until Monday, April 5, 1982, three working days after it terminated him, to pay him his due compensation, and he would have two years — until April 5, 1984 — to bring suit on his claim of violation of AS 23.05.140(b) under AS 09.10.070(3). Since he filed his complaint on April 2, 1984, that part alleging that employer violated AS 23.05.140(b) was timely filed. Reed v. Mu-

nicipality of Anchorage, 741 P.2d 1181 (Alaska 1987).

Equitable estoppel.

Where plaintiff had reason to sue for the defendant's failure to procure the type of insurance coverage which it had promised and defendant allegedly dissuaded it from filing suit by assuring that the loss of the crane was in fact covered under the policy, the reasonableness of plaintiff's alleged reliance on these promises, and the date when defendant's conduct ceased to justify further delay in bringing suit, were questions of fact which it was necessary to resolve in order to determine whether equitable estoppel should have been applied. Gudenau & Co. v. Sweeney Ins., Inc., 736 P.2d 763 (Alaska 1987).

Where defendant was granted a summary judgment based upon plaintiff's failure to file a wrongful death action within the time prescribed by this section, trial court's dismissal of plaintiff's Rule of Civil Procedure 60(2)(b) motion seeking vacation of defendant's summary judgment was reversed and remanded to permit plaintiff to argue that, because defendant fraudulently concealed evidence, plaintiff was prevented from showing that defendant should be equitably estopped from asserting the statute of limitations defense. Palmer v. Borg-Warner Corp., 838 P.2d 1243 (Alaska 1992).

B. Tolling Statute.

Equitable tolling. — A plaintiff must satisfy three requirements in order to establish his right to pursue an otherwise untimely remedy: (1) His pursuit of the initial remedy must give the defendant notice of the existence of a legal claim against it; (2) the defendant must not be prejudiced in its ability to gather evidence by the bringing of the second claim; and (3) the plaintiff must have acted in good faith. Gudenau & Co. v. Sweeney Ins., Inc., 736 P.2d 763 (Alaska 1987).

Courts will not force a plaintiff to simultaneously pursue two separate and duplicative remedies, and where the plaintiff adopts a single course of action which is dismissed or otherwise fails, courts generally allow the plaintiff to pursue a second remedy based on the same right or claim, tolling the limitations period during the pendency of the initial defective action. Gudenau & Co. v. Sweeney Ins., Inc., 736 P.2d 763 (Alaska 1987).

The doctrine of equitable estoppel did not bar a safety helmet manufacturer from asserting the statute of limitations as a defense to a drilling company employee's suit for injuries sustained while wearing a helmet, where although there was enough readily available information to alert the employee to a design problem had he investigated the helmet's alleged design defects within two years after the accident, he simply did not exercise due diligence by attempting to discover the facts. Mine Safety Appliances Co. v. Stiles, 756 P.2d 288 (Alaska 1988).

Discovery of defect. — Statute of limitations was not tolled on a drilling company employee's suit against a safety helmet manufacturer for injuries sustained while wearing a helmet, where the employee discovered an alleged defect in the helmet six years after the accident, after having made no attempt to investigate any role the helmet may have played in the accident within the two-year limitations period. Mine Safety Appliances Co. v. Stiles, 756 P.2d 288 (Alaska 1988).

This section was tolled during plaintiff's minority.

The statute of limitations on actions for loss of parental consortium is tolled until the child reaches the age of majority. Truesdell v. Halliburton Co., 754 P.2d 236 (Alaska 1988).

Attainment of the age of majority is analogous to other events that trigger running of time periods; the limitation period excludes the day of the event (attainment of majority), and includes the last day in the period, unless that day is a holiday. Fields v. Fairbanks N. Star Borough, 818 P.2d 658 (Alaska 1991).

Filing wage claim tolls statute. — Department of labor proceedings are a form of quasi-judicial relief; therefore, filing a statutory wage claim with the department equitably tolls the statute of limitations if the other requirements of that doctrine are established. Dayhoff v. Temsco Helicopters, Inc., 772 P.2d 1085 (Alaska 1989).

Sec. 09.10.100. Other actions in 10 years.

NOTES TO DECISIONS

Quoted in Bibo v. JefF[illegible]'s Restaurant, 770 P.2d 290 (Alaska [illegible]).

Sec. 09.10.120. Actions in name of state, political subdivisions, or public corporations.

NOTES TO DECISIONS

Taxation of escaped properties. — The six-year statute of limitations for actions in the name of a political subdivision applies to the taxation of escaped properties. Municipality of Anchorage v. Alaska Distribs. Co., 725 P.2d 692 (Alaska 1986).

Cited in Williams v. BP Alaska Exploration, Inc., 677 P.2d 236 (Alaska 1983).

Sec. 09.10.140. Disabilities of minority and incompetency. (a) If a person entitled to bring an action mentioned in this chapter is at the time the cause of action accrues either (1) under the age of majority, or (2) incompetent by reason of mental illness or mental disability, the time of a disability identified in (1) or (2) of this subsection is not a part of the time limit for the commencement of the action. Except as provided in (b) of this section, the period within which the action may be brought is not extended in any case longer than two years after the disability ceases.

(b) An action based on a claim of sexual abuse under AS 09.55.650 may be brought more than three years after the plaintiff reaches the age of majority if it is brought under the following circumstances:

(1) if the claim asserts that the defendant committed one act of sexual abuse on the plaintiff, the plaintiff shall commence the action within three years after the plaintiff discovered or through use of reasonable diligence should have discovered that the act caused the injury or condition;

(2) if the claim asserts that the defendant committed more than one act of sexual abuse on the plaintiff, the plaintiff shall commence the action within three years after the plaintiff discovered or through use of reasonable diligence should have discovered the effect of the injury or condition attributable to the series of acts; a claim based on an assertion of more than one act of sexual abuse is not limited to plaintiff's first discovery of the relationship between any one of those acts and the injury or condition, but may be based on plaintiff's discovery of the effect of the series of acts. (§ 1.14 ch 101 SLA 1962; am § 1 ch 46 SLA 1979; am § 1 ch 88 SLA 1986; am §§ 2, 3 ch 4 SLA 1990)

Effect of amendments. — The 1986 amendment, in the first sentence deleted "or (3) imprisoned on a criminal charge, or in execution under sentence of a court for a term less than the person's natural life," preceding "the time of the disability," and in the second sentence substituted "The" for "But the."

The 1990 amendment, effective February 2, 1990, in subsection (a), rewrote item (2) and added the exception at the beginning of the second sentence, and added subsection (b).

Editor's notes. — Section 11, ch. 4, SLA 1990 provides that the 1990 amendments to this section "apply to all actions commenced on or after February 2, 1990, regardless of when the cause of action may have arisen."

NOTES TO DECISIONS

II. Minority.
III. Incompetency.
IV. Imprisonment.

II. MINORITY.

Determination of age.

Attainment of the age of majority is analogous to other events that trigger running of time periods; the limitation period excludes the day of the event (attainment of majority), and includes the last day in the period, unless that day is a holiday. Fields v. Fairbanks N. Star Borough, 818 P.2d 658 (Alaska 1991).

Statute of limitations on actions for loss of parental consortium is tolled until the child reaches the age of majority. Truesdell v. Halliburton Co., 754 P.2d 236 (Alaska 1988).

III. INCOMPETENCY.

English deficiency not mental disability. — An English deficiency alone does not constitute mental incompetency under subsection (a)(2), since it is an individual's mental capacity to understand his rights, not whether the individual actually understood or knew of those rights, that is the dispositive inquiry. Hernandez-Robaina v. State, 849 P.2d 783 (1993).

IV. IMPRISONMENT.

Imprisonment not in effect when claim accrued, etc.

In a products liability action, neither three days' bedrest necessitated by plaintiff's injuries nor plaintiff's incarceration approximately one year after the accident in question tolled the statute of limitations. Thus plaintiff's complaint, filed two years and one day after plaintiff sustained injuries, was not timely filed. Yurioff v. American Honda Motor Co. & Port Lions Community Store, 803 P.2d 386 (Alaska 1990).

Sec. 09.10.160. Disability of alien during war.

NOTES TO DECISIONS

Quoted in Yurioff v. American Honda Motor Co. & Port Lions Community Store, 803 P.2d 386 (Alaska 1990).

Sec. 09.10.170. Injunction against commencement of action.

NOTES TO DECISIONS

Quoted in Yurioff v. American Honda Motor Co. & Port Lions Community Store, 803 P.2d 386 (Alaska 1990).

Sec. 09.10.180. Disability.

NOTES TO DECISIONS

Construed with AS 09.10.140. — In a products liability action, neither three days' bedrest necessitated by plaintiff's injuries nor plaintiff's incarceration approximately one year after the accident in question tolled the statute of limitations. Thus plaintiff's complaint, filed two years and one day after plaintiff sustained injuries, was not timely filed. Yurioff v. American Honda Motor Co. & Port Lions Community Store, 805 P.2d 369 (Alaska 1990).

Sec. 09.10.230. Certain actions relating to real property.

NOTES TO DECISIONS

Editor's notes. — The cited reference is set out below as a correction of the cited reference in the main pamphlet.

Fraud. — In applying the discovery rule for fraud under this section, there is no requirement that a fraud victim must have acted reasonably. Carter v. Hoblit, 755 P.2d 1084 (Alaska 1988).

Where defendant and two other persons had purchased property with the understanding that they would own and later subdivide the property, defendant's failure to disclose the fact that title had been placed in his name alone could be viewed as a fraud. Carter v. Hoblit, 755 P.2d 1084 (Alaska 1988).

Cited in Monroe v. California Yearly Meeting of Friends Church, 564 F.2d 304 (9th Cir. 1977).

Sec. 09.10.240. Commencement of action after dismissal or reversal. If an action is commenced within the time prescribed and is dismissed upon the trial or upon appeal after the time limited for bringing a new action, the plaintiff or, if the plaintiff dies and the cause of action in favor of the plaintiff survives, the heirs or representatives may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal. All defenses available against the action, if brought within the time limited, are available against the action when brought under this provision. (§ 1.24 ch 101 SLA 1962)

Editor's notes. — This section is set out above to correct a minor error in the main pamphlet.

NOTES TO DECISIONS

Dismissal for failure to prosecute. — This section applies to cases dismissed pursuant to Civil Rule 41(e) for failure to prosecute. Smith v. Stratton, 835 P.2d 1162 (Alaska 1992).

Defendant who has requested an indefinite extension of time in which to answer the complaint, resulting in a dismissal for failure to prosecute, was estopped from relying on the statute of limitations to dismiss the refiled claim where the defendant was aware of the claim against her and benefited from the delay because she was not required to retain an attorney to answer the complaint, and the plaintiff acted in good faith in granting extensions of the time to answer. Smith v. Stratton, 835 P.2d 1162 (Alaska 1992).

Quoted in Evron v. Gilo, 777 P.2d 182 (Alaska 1989).

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APPENDIX C

ALASKA STATUTES SUPPLEMENTAL

LIMITATIONS ON CIVIL LIABILITY

SECTION 7

SECTION 8

SECTION 9

SECTION 10

SECTION 11

SECTION 12

SECTION 13

SECTION 14

SECTION 15

SECTION 16

SECTION 17

SECTION 18

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SECTION 29

SECTION 30

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. (§ 1 ch 139 SLA 1986)

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. (§ 1 ch 139 SLA 1986)

NOTES TO DECISIONS

Quoted in State Farm Mut. Auto. Ins. Co. v. Weiford, 831 P.2d 1264 (Alaska 1992).

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. (§ 1 ch 139 SLA 1986)

NOTES TO DECISIONS

Constitutionality. — This section, as applied to an arrestee who filed a personal injury action against state troopers for allegedly using excessive force in apprehending him, did not deprive him of due process under the constitution of Alaska. Sun v. State, 830 P.2d 772 (Alaska 1992).

Plea of nolo contendere. — This section precludes a person who receives injuries in the course of a felony, and pleads nolo contendere to that felony, from later contesting whether he actually committed the felony. Sun v. State, 830 P.2d 772 (Alaska 1992).

Causation. — Arrestee's commission of a felony, i.e., assaulting state troopers who attempted to apprehend him, "substantially contributed to the injury," where nothing in the record showed a break in the nexus between the arrestee's assault and the troopers' instantaneous response thereto with deadly force. Sun v. State, 830 P.2d 772 (Alaska 1992).

Quoted in Lord v. Fogcutter Bar & Stacy Cap, 813 P.2d 660 (Alaska 1991).

Sec. 09.17.040. Award of damages. (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.

(b) The fact finder shall reduce future economic damages to present value. In computing the portion of a lump-sum award that is attributable to future economic loss, the fact finder shall determine the present amount that, if invested at long-term future interest rates in the best and safest investments, will produce over the life expectancy of the injured party the amount necessary to compensate the injured party for

(1) the amount of wages the injured party could have been expected to earn during future years, taking into account future anticipated inflation and reasonably anticipated increases in the injured party's earnings; and

(2) the amount of money necessary during future years to provide for all additional economic losses related to the injury, taking into account future anticipated inflation.

(c) 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).

(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.

(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.

(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.

(g) If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make payments required under (d) of this section, the court shall, in addition to the required periodic payments, order the judgment debtor to pay the judgment creditor any damages caused by the failure to make periodic payments, including costs and attorney fees. (§ 1 ch 139 SLA 1986)

Revisor's notes. — In 1986, the number "665" was substituted for "655" to correct a manifest error in subsection (c).

In 1988, a reference to "(d) of this section" was substituted for "(c) of this section" to correct a manifest error in subsection (g).

Cross references. — For effect of this section on Alaska Rules of Civil Procedure 49 and 58, see §§ 5 and 7, respectively, ch. 139, SLA 1986, in the Temporary and Special Acts.

NOTES TO DECISIONS

Future damages in wrongful death cases. — The clear legislative purpose of subsection (b) is to require the reduction of present value of future economic damages in wrongful death cases in the absence of an agreement of the parties to do otherwise. Beck v. State, 837 P.2d 105 (Alaska 1992).

Sec. 09.17.050. Limited liability of certain directors and officers. (a) Unless the act or omission constituted gross negligence, a person may not recover tort damages for personal injury, death, or damage to property for an act or omission to act in the course and scope of official duties, from one of the following:

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

(2) a member of the board of directors of a public or nonprofit hospital, or a member of a citizen's advisory board of any hospital;

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

(4) a member of the governing body, a commission, or a citizen's advisory committee of a municipality of the state;

(5) a member of the board of directors, an officer, or an employee of a regional development organization.

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

(c) In this section,

(1) "nonprofit corporation" means a corporation that qualifies for exemption from taxation under 26 U.S.C. 501(c)(3) or (4) (Internal Revenue Code);

(2) "regional development organization" has the meaning given in AS 44.33.026. (§ 1 ch 139 SLA 1986; am §§ 1, 2 ch 68 SLA 1993)

Effect of amendments. — The 1993 amendment, effective July 1, 1993, added paragraph (a)(5); and, in subsection (c), added the paragraph (1) designation and added paragraph (2).

Sec. 09.17.060. Effect of contributory fault. In an action based on fault seeking to recover damages for injury or death to a person or harm to prope[illegible], contributory fault chargeable to the claimant diminishes propo[illegible]tionately the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery. (§ 1 ch 139 SLA 1986)

NOTES TO DECISIONS

Ski injury. — While recovery is barred for an injury caused solely by an inherent risk of skiing, comparative fault applies when the injury is caused by a combination of an inherent risk of skiing and the ski area operator's negligence. Hiibschman ex rel. Welch v. City of Valdez, 821 P.2d 1354 (Alaska 1991).

Quoted in Loeb v. Rasmussen, 822 P.2d 914 (Alaska 1991).

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

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

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as evidence under (b) of this section, the court shall deduct from the total award the amount by which the value of the nonsubrogated 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. (§ 1 ch 139 SLA 1986)

Sec. 09.17.080. Apportionment of damages. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040.

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

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.16.040, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault. (§ 1 ch 139 SLA 1986; am §§ 15, 16 ch 14 SLA 1987; am 1987 Initiative Proposal No. 2, § 1)

Cross references. — For effect of this section on Alaska Rules of Civil Procedure 49, 52, and 58, see §§ 5-7, ch. 139, SLA 1986, in the Temporary and Special Acts.

Effect of amendments. — The 1987 amendment substituted "AS 09.16.040" for "AS 09.17.090" in subsection (a) in the introductory language and at the end of paragraph (2) and in the first sentence of subsection (c).

The 1988 amendment, effective March 5, 1989, in subsection (d), substituted "several liability in accordance with that party's percentage of fault" for "joint and several liability, except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party."

Editor's notes. — 1987 Initiative Proposal No. 2, § 4 provides: "Sections 1 — 2 of this Act apply to all causes of action accruing after the effective date of this Act [March 5, 1989]."

1987 Initiative Proposal No. 2, § 5 provides: "If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

AS 09.16.040, referred to in subsections (a) and (c), was repealed by 1987 Initiative Proposal No. 2, § 2.

NOTES TO DECISIONS

Workers' Compensation Act provisions unaffected. — When the legislature enacted this section, it left intact the exclusive liability and employer reimbursement provisions of the Workers' Compensation Act. Lake v. Construction Mach., Inc., 787 P.2d 1027 (Alaska 1990).

Criminal context precluded. — This provision has no direct bearing in the criminal context, where a court's authority to require payment of restitution exists independently of its authority to order payment of damages in civil matters. Noffsinger v. State, 850 P.2d 647 (Alaska Ct. App. 1993).

Joinder of potentially liable actors. — Because the allocation of a portion of fault to nonparties is not permitted by this section, nor practical in the courtroom, the defendant must join any potentially liable actors and articulate in third-party complaints the manner in which those actors caused the plaintiff's injuries. This having been done, the trier of fact will then be able to accurately allocate a portion of fault to each party. Robinson v. U-Haul Co., 785 F. Supp. 1378 (D. Alaska 1992).

Separate trial for contribution issues. — Although a single trial allocating fault among all potentially liable parties may promote judicial economy, nothing in the legislative history of this section indicates that the legislature intended to require a single trial for both first-party and third-party claims. The traditional two-step system of first establishing liability and then seeking contribution is not inconsistent with the comparative negligence principles underlying the Tort Reform Act. Borg-Warner Corp. v. Avco Corp., 850 P.2d 628 (1992).

Liability allocation among all unintentional tortfeasors. — The Tort Reform Act clearly contemplates a relative allocation of fault between all unintentional tortfeasors, whether negligent, grossly negligent or willful and wanton. Borg-Warner Corp. v. AVCO Corp., 850 P.2d 628 (1993).

Employee's action against third-party tortfeasors. — Evidence of an employer's negligence may be relevant and admissible in an employee's action against third-party tortfeasors to prove that the employer was entirely at fault, or that the employer's fault was a superseding cause of the injury. Under this section, the finder of fact may allocate all or none of the total fault to the employer. It may not allocate only a portion of the total fault to the employer. Jury instructions must be carefully prepared to prevent a panel from attributing to the employee any negligence of the employer. Lake v. Construction Mach., Inc., 787 P.2d 1027 (Alaska 1990).

Contribution claims to which Act applicable. — The Tort Reform Act of 1986 applies only when plaintiff's injury occurred on or after June 11, 1986, the effective date of that act. It does not apply to contribution claims accruing after that date, arising from torts which occurred prior to June 11, 1986. Ogle v. Craig Taylor Equip. Co., 761 P.2d 722 (Alaska 1988).

Contribution against joint tortfeasors. — For cases construing former AS 09.16, see Vertecs Corp. v. Fiberchem, Inc., 669 P.2d 958 (Alaska 1983); Foss Alaska Line v. Northland Servs., Inc., 724 P.2d 523 (Alaska 1986); Fellows v. Tlingit-Haida Regional Elec. Auth., 740 P.2d 428 (Alaska 1987); Tommy's Elbow Room, Inc. v. Kavorkian, 754 P.2d 243 (Alaska 1988); Ogle v. Craig Taylor Equip. Co., 761 P.2d 722 (Alaska 1988); Providence Wash. Ins. Co. v. McGee, 764 P.2d 712 (Alaska 1988); Bohna v. Hughes, 828 P.2d 745 (Alaska 1992).

Unless a settlement is shown to be unreasonable and thereafter set aside, a settling tortfeasor must not be considered in determining the number of pro rata shares available for each remaining tortfeasor's individual liability. Colt Indus. Operating Corp. v. Frank W. Murphy Mfr., Inc., 822 P.2d 925 (Alaska 1991).

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APPENDIX D

ALASKA STATUTE SUPPLEMENT

SPECIAL ACTIONS AND PROCEEDINGS

SECTION 22

SECTION 23

SECTION 24

SECTION 25

SECTION 29

Article 4. Official Bonds, Fines, and Forfeitures.

Sec. 09.55.470. Suits on undertakings.

NOTES TO DECISIONS

Liability of surety. — This section contains implication that the surety is liable under circumstances in which the public official whose conduct is bonded would not be liable. Integrated Resources Equity Corp. v. Fairbanks N. Star Borough, 799 P.2d 295 (Alaska 1990).

Article 5. Malpractice Actions.

Section
535. Voluntary arbitration
536. Expert advisory panel
548. Awards, collateral source
560. Definitions

NOTES TO DECISIONS

Liability for negligence of emergency room physician. — A general acute care hospital has a nondelegable duty to provide nonnegligent physician care in its emergency room and, therefore, the hospital may be held vicariously liable for negligent health care rendered by an emergency room physician who is not an employee of the hospital, but is, instead, an independent contractor. Jackson v. Power, 743 P.2d 1376 (Alaska 1987).

Sec. 09.55.535. Voluntary arbitration. (a) A patient and any health care provider may execute an agreement to submit to arbitration any dispute, controversy, or issue arising out of care or treatment by the health care provider during the period that the agreement is in force or that has already arisen between the parties. Execution of an agreement under this subsection by a patient may not be made a prerequisite to receipt of care or treatment by the health care provider.

(b) An agreement to arbitrate executed before care or treatment is provided shall clearly provide in bold print on the face of the agreement that execution of the agreement by the patient is not a prerequisite to receiving care or treatment. If this subsection is not complied with by the health care provider, the agreement to arbitrate is void. The form to be used shall be approved in advance by the attorney general of the state to assure it fairly informs both parties to the agreement and properly protects their interests.

(c) The agreement shall provide that the person receiving health care may revoke the agreement within 30 days after execution by notifying the health care provider in writing. The period for revocation shall be tolled during any period that the person receiving health care is physically unable to execute a revocation. The health care provider may not revoke the agreement after its execution.

(d) An arbitration agreement entered into by the parents or legal guardian of a minor person receiving health care is binding upon the minor person.

(e) An agreement to arbitrate between a patient and a hospital must be reexecuted each time a person is admitted to a hospital. The agreement may be extended by written agreement of all parties to apply to care after hospitalization. A person receiving outpatient care from a hospital or clinic or a member of a health maintenance organization may execute an agreement with the hospital which provides for continuation of the agreement for a continuing program of treatment or during continued membership.

(f) Upon the filing of a malpractice claim which is subject to an agreement to arbitrate, the claim shall be submitted to an arbitration board. The arbitration board shall consist of three arbitrators: one arbitrator designated by the claimant or claimants, one arbitrator designated by the health care provider or providers against whom the claim is made, and a third arbitrator designated by mutual agreement who shall serve as chairperson of the board. If the parties cannot agree on the third person, the court will provide a choice of three or more persons who might serve as chairperson of the arbitration board, which shall be from a list of qualified arbitrators furnished by the attorney general. Claimant or claimants together and health care provider or providers together may each strike one or more names so that after each side has done so at least one name remains, providing a basis for the final selection by the court.

(g) The attorney general shall prepare a list of persons consisting of lawyers or other persons qualified to serve as chairperson of an arbitration board. They shall be selected on basis of their technical expertise, judicial temperament, and capability of impartially acting on malpractice claims. The attorney general shall submit a list of at least three names whenever requested to do so by the court along with detailed biographical information on each person listed.

(h) Each member of the arbitration board shall receive reasonable compensation to be paid by the court based on the extent and duration of services rendered. The court shall pay the costs of expert witnesses called by the board and the costs of expert witnesses called by the parties to the arbitration up to a maximum of three witnesses for each side and $150 per day for each expert witness.

(i) The arbitration board may appoint an expert advisory panel, with the powers of the expert advisory panel under AS 09.55.536, to advise the board on the medical facts of the case.

(j) The court shall specify the shortest practical deadline for completion of the work of the arbitration board, taking into account all the circumstances and the nature of the case.

(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 con-

flict with the provisions of this section; arbitrations 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 — 09.55.548 and AS 09.55.554 — 09.55.560, and AS 09.65.090. (§ 33 ch 102 SLA 1976; am § 22 ch 177 SLA 1978; am § 1 ch 105 SLA 1988)

Effect of amendments. — The 1988 amendment inserted "between a patient and a hospital" in the first sentence in subsection (e).

Sec. 09.55.536. Expert advisory panel. (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 not agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within 20 days after 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. 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.

(b) The expert advisory panel may compel the attendance of witnesses, interview the parties, physically examine the injured person if alive, consult with the specialists or learned works they consider appropriate, and compel the production of and examine all relevant hospital, medical, or other records or materials relating to the health care in issue. The panel may meet in camera, but shall maintain a record of any testimony or oral statements of witnesses, and shall keep copies of all written statements it receives.

(c) Not more than 30 days after selection of the panel, it shall make a written report to the parties and to the court, answering the following questions and other questions submitted to the panel by the court:

(1) What was the disorder for which the plaintiff came to medical care?

(2) What would have been the probable outcome without medical care?

(3) Was the treatment selected appropriate for the case?

(4) Did an injury arise from the medical care?

(5) What is the nature and extent of the medical injury?

(6) What specifically caused the medical injury?

(7) Was the medical injury caused by unskillful care?

(8) If a medical injury had not occurred, how would the plaintiff's condition differ from the plaintiff's present condition?

(d) In any case in which the answer to one or more of the questions submitted to the panel depends upon the resolution of factual questions which are not the proper subject of expert opinion, the report

shall so state and may answer questions based upon hypothetical facts that are fully set out in the opinion. The report shall include copies of all written statements, opinions, or records relied upon by the panel and either a transcription or other record of any oral statements or opinions; shall specify any medical or scientific authority relied upon by the panel: and shall include the results of any physical or mental examination performed on the plaintiff. Each member shall sign the report and the signature constitutes the member's adoption of all statements and opinions contained in it; however, a member may, instead of signing the report, submit a concurring or dissenting report which complies with the requirements of this subsection. A member may not attest to any portion of the report as to which the member is not qualified to give expert testimony.

(e) The report of the panel with any dissenting or concurring opinion is admissible in evidence to the same extent as though its contents were orally testified to by the person or persons preparing it. The court shall delete any portion that would not be admissible because of lack of foundation for opinion testimony, or otherwise. Either party may submit testimony to support or refute the report. The jury shall be instructed in general terms that the report shall be considered and evaluated in the same manner as any other expert testimony. Any member of the panel may be called by any party and may be cross-examined as to the contents of the report or of that member's dissenting or concurring opinion.

(f) No discovery may 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.

(g) Members of a panel are entitled to travel expenses and per diem in accordance with state law pertaining to members of boards and commissions for all time spent in preparing its report. If a panel member is called upon as a witness at trial or upon deposition, the member is entitled to payment of an expert witness fee, which may not exceed $150 per day. All expenses incurred by the panel shall be paid by the court. However, in any case in which the court determines that a party has made a patently frivolous claim or a patently frivolous denial of liability, it shall order that all costs of the expert advisory panel be borne by the party making that claim or denial.

(h) Parties to the case and their counsel may not initiate communication out of court with members of the panel on the subject matter of its inquiry and report or cause or solicit others to do so, except through ordinary discovery proceedings. (§ 33 ch 102 SLA 1976; am § 23 ch 177 SLA 1978)

Editor's notes. — This section is set out above to correct a typographical error in the main pamphlet.

NOTES TO DECISIONS

Lifting ban on discovery before panel report. — Good cause to lift the discovery ban is demonstrated as a matter of law when no report has been issued after 80 days have elapsed from the filing of answer, if the party wishing to begin discovery is not responsible for the delay. Roethler v. Lutheran Hosps. & Homes Soc'y of Am., 709 P.2d 487 (Alaska 1985).

Constitutionality. — This section does not unconstitutionally deprive a litigant of due process of law, does not impair his right to a jury trial, and does not violate separation of powers principles by impermissibly delegating judicial power to members of the panel. Keyes v. Humana Hosp., 750 P.2d 343 (Alaska 1988).

This section does not unconstitutionally deprive medical plaintiffs of their right of access to the courts. Keyes v. Humana Hosp., 750 P.2d 343 (Alaska 1988).

Applied in Kendall v. State, Div. of Cors., 692 P.2d 953 (Alaska 1984).

Quoted in Snyder v. Foote, 822 P.2d 1353 (Alaska 1991).

Sec. 09.55.540. Burden of proof.

NOTES TO DECISIONS

Stated in Yako v. United States, 891 F.2d 738 (9th Cir. 1989).

Sec. 09.55.548. Awards, collateral source. (a) Damages shall be awarded in accordance with principles of the common law. The fact finder in a malpractice action shall render any award for damages by category of loss. The court may enter a judgment that future damages be paid in whole or in part by periodic payments rather than by a lump-sum payment; the judgment shall include, if necessary, other provisions to assure that funds are available as periodic payments become due. Insurance from an authorized insurer as defined in AS 21.90.900 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 includes damages for future medical treatment, care or custody, loss of future earnings, or loss of bodily function of the claimant.

(b) Except when the collateral source is a federal program which by law must seek subrogation and except death benefits paid under life insurance, a claimant may only recover damages from the defendant which exceed amounts received by the claimant as compensation for the injuries from collateral sources, whether private, group or governmental, and whether contributory or noncontributory. Evidence of collateral sources, other than a federal program which must by law seek subrogation and the death benefit paid under life insurance, is admissible after the fact finder has rendered an award. The court may take into account the value of claimant's rights to coverage exhausted

or depleted by payment of these collateral benefits by adding back a reasonable estimate of their probable value, or by earmarking and holding for possible periodic payment under (a) of this section that amount of the award that would otherwise have been deducted, to see if the impairment of claimant's rights actually takes place in the future. (§ 35 ch 102 SLA 1976; am § 7 ch 30 SLA 1992)

Effect of amendments. — The 1992 amendment, effective May 16, 1992, in subsection (a), deleted "or from the Medical Indemnity Corporation of Alaska" preceding "is sufficient" in the fourth sentence and made a stylistic change in the fifth sentence.

Sec. 09.55.560. Definitions. In AS 09.55.530 — 09.55.560,

(1) "health care provider" means an acupuncturist licensed under AS 08.06; an audiologist licensed under AS 08.11; a chiropractor licensed under AS 08.20; a dental hygienist licensed under AS 08.32; a dentist licensed under AS 08.36; a nurse licensed under AS 08.68; a dispensing optician licensed under AS 08.71; a naturopath licensed under AS 08.45; an optometrist licensed under AS 08.72; a pharmacist licensed under AS 08.80; a physical therapist or occupational therapist licensed under AS 08.84; a physician licensed under AS 08.64; a podiatrist; a psychologist and a psychological associate licensed under AS 08.86; and a hospital as defined in AS 18.20.130, including a governmentally owned or operated hospital; and an employee of a health care provider acting within the course and scope of employment;

(2) "board" means an arbitration board established under AS 09.55.535;

(3) "panel" means an expert advisory panel established under AS 09.55.536. (§ 37 ch 102 SLA 1976; am § 24 ch 177 SLA 1978; am § 6 ch 56 SLA 1986; am § 9 ch 131 SLA 1986; § 26 ch 2 FSSLA 1987; am § 9 ch 6 SLA 1990; am § 1 ch 14 SLA 1991)

Effect of amendments. — The first 1986 amendment in paragraph (1) inserted "a naturopath licensed under AS 08.45."

The second 1986 amendment near the beginning of paragraph (1) inserted "an audiologist licensed under AS 08.11."

The 1987 amendment, effective January 1, 1988, inserted "or occupational therapist" in paragraph (1).

The 1990 amendment inserted "an acupuncturist licensed under AS 08.06" near the beginning of paragraph (1).

The 1991 amendment, effective January 1, 1992, in paragraph (1), deleted "a corporate entity covered under AS 21.88.050(b)(11)" following "governmentally owned or operated hospital."

Article 6. Actions by or Against Deceased Persons.

Section
580. Action for wrongful death

Sec. 09.55.570. All causes of action survive.

NOTES TO DECISIONS

Injured party may not recover punitive damages from estate of deceased tortfeasor under this section. Doe ex rel. Doe v. Colligan, 753 P.2d 144 (Alaska 1988).

Cited in Goodlataw v. State, Dep't of Health & Social Servs., 698 P.2d 1190 (Alaska).

Sec. 09.55.580. Action for wrongful death. (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.

(b) The damages recoverable under this section shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.

(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;

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APPENDIX E

ALASKA STATUTES

SPECIAL ACTIONS AND PROCEEDINGS

SECTION 23

SECTION 24

Article 6. Actions by or Against Deceased Persons.

Section
580. Action for wrongful death

Sec. 09.55.570. All causes of action survive.

NOTES TO DECISIONS

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Sec. 09.55.580. Action for wrongful death. (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.

(b) The damages recoverable under this section shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.

(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.

(d) The death of a beneficiary or beneficiaries before judgment does not affect the amount of damages recoverable under this section.

(e) The right of action granted by this section is not abated by the death of a person named or to be named the defendant.

(f) A person whose act or omission constitutes the felonious killing of another person may not recover damages for the death of that person either directly or as a personal representative of that person's estate. In this subsection, a "felonious killing" means a crime defined by AS 11.41.100 — 11.41.140. (§ 4 ch 78 SLA 1972; am §§ 1, 2 ch 164 SLA 1988)

Revisor's notes. — In 1992, "or" was substituted for "of" after "accumulations" in paragraph (c)(1) of this section to correct a typographical error in the 1962 codification of § 61-7-3, ACLA 1949, as amended.

Effect of amendments. — The 1988 amendment added "Except as provided under (f) of this section" at the beginning of the first sentence in subsection (a) and added subsection (f).

NOTES TO DECISIONS

I. General Consideration.
III. Parties.
V. Damages.
VI. Beneficiaries.

I. GENERAL CONSIDERATION.

Discovery rule tolls, etc.

The discovery rule applies to toll the two-year statute of limitations for wrongful death actions contained in this section. Hanebuth v. Bell Helicopter Int'l, 694 P.2d 143 (Alaska 1984).

Reasonable failure of a plaintiff to discover an element essential to the cause of action tolls the running of the two-year period provided by this section within which to commence an action for wrongful death. Hanebuth v. Bell Helicopter Int'l, 694 P.2d 143 (Alaska 1984).

The "discovery rule," which holds that a statute of limitations does not begin to run until a plaintiff discovers, or reasonably should discover, the existence of all the elements of his cause of action, applies to actions for wrongful death. State v. Welch, 805 P.2d 979 (Alaska 1991).

Bar to action found in Workers' Compensation Act. — An action for wrongful death, filed pursuant to this section, is barred by AS 23.30.055, the exclusive remedy provision of the Alaska Workers' Compensation Act; the fact that the estates of deceased workers leaving dependents are entitled to favored treatment over the estates of workers leaving no dependents reflects a legislative determination that the former require greater compensation, is entirely reasonable and does not deprive the estate of a worker leaving no dependents of equal protection of the law. Taylor v. Southeast-Harrison W. Corp., 694 P.2d 1160 (Alaska 1985).

Applied in Kanayurak v. North Slope Borough, 677 P.2d 893 (Alaska 1984); Goodlataw v. State, Dep't of Health & Social Servs., 698 P.2d 1190 (Alaska 1985).

Stated in Beck v. State, 837 P.2d 105 (Alaska 1992).

Cited in Truesdell v. Halliburton Co., 754 P.2d 236 (Alaska 1988); Palmer v. Borg-Warner Corp., 838 P.2d 1243 (Alaska 1992).

III. PARTIES.

When estate may bring suit. — Only where no statutory beneficiary survives the decedent may the estate bring suit under the Wrongful Death Act. Kulawik v. Era Jet Alaska, 820 P.2d 627 (Alaska 1991).

V. DAMAGES.

Beneficiaries not limited to "actual losses". — Statutory beneficiaries are entitled to recover all of the deceased's probable accumulations, and are not limited to only their "actual losses." Kulawik v. Era Jet Alaska, 820 P.2d 627 (Alaska 1991).

Prospective inheritance. — A designated beneficiary in a wrongful death suit can recover "prospective inheritance," the inheritance he or she would have received if the deceased had not died prematurely. Kulawik v. Era Jet Alaska, 820 P.2d 627 (Alaska 1991).

Calculation of future earnings. — Future earnings in a wrongful death case are calculated by (1) determining the decedent's future gross earnings and (2) subtracting the decedent's personal consumption. Kulawik v. Era Jet Alaska, 820 P.2d 627 (Alaska 1991).

Future tax liability should not be considered in calculating either future gross earnings or future personal consumption. Kulawik v. Era Jet Alaska, 820 P.2d 627 (Alaska 1991).

Where the deceased leaves no wife or children, etc.

In accord with 2nd paragraph in main pamphlet. See Osborne v. Russell, 669 P.2d 550 (Alaska 1983).

Theories for determining loss to estate. — The net earnings theory and the net accumulations theory are alternative measures of the same amount when determining loss to the estate under this section — the probable value of the deceased's estate had he not prematurely expired less the actual value of the estate at death. Osborne v. Russell, 669 P.2d 550 (Alaska 1983).

Mental anguish. — Alaska does not expressly allow a widow and children to recover for their own mental anguish. Ehredt v. DeHavilland Aircraft Co., 705 P.2d 446 (Alaska 1985).

When claim for punitive damages allowed. — The language of this section providing that the court or jury should award the damages it "may consider fair and just" allows a claim for punitive damages when there is clear evidence that the wrongdoer acted maliciously, fraudulently, or with a wanton disregard for the plaintiff's safety. Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986).

Right of decedent's estate to seek punitive damages. — The estate of a decedent who dies without statutory beneficiaries is entitled to seek punitive damages. Portwood v. Copper Valley Elec. Ass'n, 785 P.2d 541 (Alaska 1990).

Construction of subsection (c). — Subsection (c) is not to be construed as open invitation to the jury to award damages for any or all injuries or losses resulting from the death. Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986).

**The trial court should have reserved distribution of some or all of the settlement monies paid by some defendants in a wrongful death action until it could determine the full extent of "costs and expenses of suit" under this section, including costs and fees which foreseeably could have been one of the defendants which did not settle the claims against it, in the event that defendant prevailed in the plaintiffs' remaining action. Southcentral Air, Inc. v. Estate of Breitenfeld ex rel. Breitenfeld, 835 P.2d 1215 (Alaska 1992).

Right of prevailing defendant to trace distributed funds. — A defendant which prevailed in a wrongful death action has the right to trace the distributed funds paid by other defendants in the same action who settled the claims against them through the personal representative to each statutory beneficiary. The judgment on costs and attorney's fees should be entered against the personal representatives in their official capacity and also should specify that the judgment is chargeable only upon the actual beneficiaries of the settlement, as it was distributed. Southcentral Air, Inc. v. Estate of Breitenfeld ex rel. Breitenfeld, 835 P.2d 1215 (Alaska 1992).

Recovery by representatives held for decedents' estate. — Any recovery which personal representatives obtained as a result of wrongful death actions brought by them, they held as trustees for the beneficiaries of the decedents set forth in this section. The flow of this recovery to the beneficiaries thus did not pass through the decedents' estates; the estates had no involvement in the case at all, consequently, the trial court had no basis on which to determine that the estates, through the personal representatives,

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APPENDIX F

ALASKA STATUTE SUPPLEMENT

COSTS

SECTION 26

SECTION 33

Chapter 60. Costs.

Section
10. Costs and attorney fees allowed prevailing party

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. (§ 5.14 ch 101 SLA 1962; am § 4 ch 139 SLA 1986)

Cross references. — For effect of the 1986 amendment to this section on Alaska Rules of Civil Procedure 82, see § 8, ch. 139, SLA 1986, in the Temporary and Special Acts.

Effect of amendments. — The 1986 amendment rewrote this section.

Editor's notes. — Section 9, ch. 139, SLA 1986 provides that the 1986 amendment to this section applies "to all causes of action accruing after June 11, 1986."

NOTES TO DECISIONS

I. General Consideration.
II. Right to Costs.
  A. Generally.
III. Award.
  A. Generally.
  B. Attorney's Fees.

I. GENERAL CONSIDERATION.

Quoted in Alaska Fed. Sav. & Loan Ass'n v. Bernhardt, 788 P.2d 31 (Alaska 1990); Alaska Pac. Assurance Co. v. Collins, 794 P.2d 936 (Alaska 1990).

Cited in Kimmons v. Heldt, 667 P.2d 1245 (Alaska 1983).

II. RIGHT TO COSTS.

A. Generally.

Federal law. — Resort to state law favoring the award of at least partial attorney's fees to the prevailing party in civil actions in the absence of an express congressional directive was inappropriate in a federal question case when controlling federal common law existed and directly conflicted with the state rule. Home Sav. Bank v. Gillam, 952 F.2d 1152 (9th Cir. 1991).

III. AWARD.

A. Generally.

Expert witness fees. — Administrative Rule 7(c) permits recovery of $25 per hour expert witness fees for time spent testifying. Atlantic Richfield Co. v. State, 723 P.2d 1249 (Alaska 1986).

Computer research and paralegal expenses are correctly characterized as costs and, if recoverable, should be requested under Civil Rule 79(b). Atlantic Richfield Co. v. State, 723 P.2d 1249 (Alaska 1986).

B. Attorney's Fees.

Attorney's fees not covered by literal requirements of Civ. R. 79(b). This chapter uses the term "costs" in the most general sense, so that it encompasses both expenses of litigation and attorney fees. Civil Rule 79 employs a more specific and limited use of the term

outhcentral Air, Inc. v. Estate of reitenfeld ex rel. Breitenfeld, 835 P.2d 215 (Alaska 1992).

In determining a reasonable amount o award for attorney's fees, the court hall consider all relevant factors, including the nature and value of the services endered, the duration and complexity of he litigation, the novelty of the issues resented, the amount in controversy, and he state's time-keeping procedures. Atantic Richfield Co. v. State, 723 P.2d 1249 (Alaska 1986).

Full reimbursement not automatically to be awarded.

Absent bad faith or vexatious conduct by the losing party, an award of full attorney's fees is manifestly unreasonable, and it constitutes an abuse of discretion. Atlantic Richfield Co. v. State, 723 P.2d 1249 (Alaska 1986).

Public interest plaintiffs.

A prevailing public interest plaintiff is normally entitled to full reasonable attorney's fees. Hunsicker v. Thompson, 717 P.2d 358 (Alaska 1986).

Awards under Civ. R. 82(a)(1). — An award of reasonable attorney's fees to the state under Civ. R. 82(a)(1) is not limited to the hourly salary of the highest paid assistant attorney general times the number of hours worked. Atlantic Richfield Co. v. State, 723 P.2d 1249 (Alaska 1986).

When a money judgment is recovered, a trial court may award attorney's fees according to the schedule provided in Civ. R. 82(a)(1), or it may award a fee "commensurate with the amount and value of legal services rendered" under subsection (a)(2) of that rule. Atlantic Richfield Co. v. State, 723 P.2d 1249 (Alaska 1986).

Attorney's actual travel expenses may be recovered under Civ R. 79(b) if they are necessarily incurred. Atlantic Richfield Co. v. State, 723 P.2d 1249 (Alaska 1986).

Sec. 09.60.040. Costs where party is a representative.

NOTES TO DECISIONS

Extent of individual liability of nonprevailing representative. — The personal representative who fails to prevail in a wrongful death action cannot be held individually liable for costs and fees solely on the basis of representative status, except when the representative is found to have conducted the action with mismanagement or in bad faith. Southcentral Air, Inc. v. Estate of Breitenfeld ex rel. Breitenfeld, 835 P.2d 1215 (Alaska 1992).

The trial court should have reserved distribution of some or all of the settlement monies paid by some defendants in a wrongful death action until it could determine the full extent of "costs and expenses of suit" under AS 09.55.580, including costs and fees which foreseeably could have been one of the defendants which did not settle the claims against it, in the event that defendant prevailed in the plaintiffs' remaining action. Southcentral Air, Inc. v. Estate of Breitenfeld ex rel. Breitenfeld, 835 P.2d 1215 (Alaska 1992).

Disbursement of settlement funds by representatives while action still pending. — Where the personal representatives who brought wrongful death actions against multiple defendants pursued disbursement of the settlement monies obtained from some defendants in the action, while their action against another defendant which did not settle the claims against it remained pending, the representatives were not held individually liable for costs and fees, and were not held to have committed mismanagement or to have acted in bad faith. Southcentral Air, Inc. v. Estate of Breitenfeld ex rel. Breitenfeld, 835 P.2d 1215 (Alaska 1992).

Right of prevailing defendant to trace distributed funds. — A defendant which prevailed in a wrongful death action has the right to trace the distributed funds paid by other defendants in the same action who settled the claims against them through the personal representative to each statutory beneficiary. The judgment on costs and attorney's fees should be entered against the personal representatives in their official capacity and also should specify that the judgment is chargeable only upon the actual beneficiaries of the settlement, as it was distributed. Southcentral Air, Inc. v. Estate of Breitenfeld ex rel. Breitenfeld, 835 P.2d 1215 (Alaska 1992).

Sec. 09.60.060. Security for costs where plaintiff a nonresident or foreign corporation.

NOTES TO DECISIONS

Section held unconstitutional. — This section violates equal protection of law under the Alaska constitution because it unreasonably restricts nonresident access to Alaska courts. Patrick v. Lynden Transp., Inc., 765 P.2d 1375 (Alaska 1988).

Chapter 63. Oath, Acknowledgment and Other Proof.

Section
10. Oath, affirmation, and acknowledgment

Section
40. Verification

Sec. 09.63.010. Oath, affirmation, and acknowledgment. The following persons may take an oath, affirmation, or acknowledgment in the state:

(1) a justice, judge, or magistrate of a court of the State of Alaska or of the United States;

(2) a clerk or deputy clerk of a court of the State of Alaska or of the United States;

(3) a notary public;

(4) a United States postmaster;

(5) a commissioned officer under AS 09.63.050(4); or

(6) a municipal clerk carrying out the clerk's duties under AS 29.20.380. (§ 1 ch 37 SLA 1981; am § 1 ch 35 SLA 1989)

Effect of amendments. — The 1989 amendment, effective August 9, 1989, added paragraph (6) and made related grammatical changes.

Sec. 09.63.030. Notarization.

NOTES TO DECISIONS

"Sworn statement." — Notarized statement was a "sworn statement" even without proof of the administration of a verbal oath, where the declarant showed his identification to the notary, knowingly signed the document in her presence, the document stated that the defendant was duly sworn, and the notary actually notarized it. Gargan v. State, 805 P.2d 998 (Alaska Ct. App.), cert. denied, U.S. , 111 S. Ct. 2808, 115 L. Ed. 2d 981 (1991).

Requirements of oath satisfied. — When the notary is present at the signing of a document which purports to be sworn, and when the notary then notarizes the document, the requirements of the oath have been satisfied; the document qualifies as a sworn statement. Gargan v. State, 805 P.2d 998 (Alaska Ct. App.), cert. denied, U.S. , 111 S. Ct. 2808, 115 L. Ed. 2d 981 (1991).

HB 292

APPENDIX G

ALASKA STATUTES

MISCELLANEOUS PROVISIONS

SECTION 27

SECTION 28

SECTION 34

Acknowledgment

____
Title or Rank

____
Serial Number, if any

(5) By a public officer, trustee, or personal representative:

State of ______________________

__________ Judicial District (or County of __________)

The foregoing instrument was acknowledged before me this (date) by (name and title of position).

____
Signature of Person Taking Acknowledgment

____
Title or Rank

____
Serial Number, if any

(b) If a document is acknowledged before a notary public of the state, the notary public shall

(1) endorse after the notary's signature the date of expiration of the notary's commission;

(2) print or emboss the notary's seal on the document;

(3) comply with AS 44.50.060 — 44.50.080 or other law. (§ 1 ch 37 SLA 1981)

Sec. 09.63.110. Uniformity of interpretation. AS 09.63.050 — 09.63.110 shall be interpreted as to make uniform the laws of those states which enact them. (§ 1 ch 37 SLA 1981)

Sec. 09.63.120. Definition. In AS 09.63.010 — 09.63.130, "notarial acts" means acts that the laws and regulations of the state authorize notaries public of the state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgment of instruments, and attesting documents. (§ 1 ch 37 SLA 1981)

Sec. 09.63.130. Title. AS 09.63.050 — 09.63.100 may be cited as the Uniform Recognition of Acknowledgments Act. (§ 1 ch 37 SLA 1981)

Chapter 65. Miscellaneous Provisions.

Section

20. Successive actions
30. Corporate sureties
40. Parties exempt from giving bond
50. Death or disability of a party
60. Defense not prejudiced by assignment
70. Suits against incorporated units of local government
80. Suits by incorporated units of local government
90. Civil liability for emergency aid

Section
92. Civil liability for voluntary aircraft safety inspection
95. Liability for administration of blood test
100. Examination and treatment of minors
110. Civil liability for shoplifting
120. Definition of death
132. Income assignment order for child support
135. Limitations on claims arising from skiing

Secs. 09.65.010 — 09.65.012. Officers authorized to administer oath or affirmation; certification of documents. [Repealed, § 6 ch 37 SLA 1981. For present provisions, see AS 09.63.]

Sec. 09.65.020. Successive actions. Successive actions may be maintained upon the same contract or transaction when a new cause of action arises under the contract. (§ 5.01 ch 101 SLA 1962)

Cross references. — For related court rules, see Civ. R. 13(e) and 15(d).

Sec. 09.65.030. Corporate sureties. When, by the laws of the state or by a charter, ordinance, rule, or regulation of a political subdivision, municipality, public corporation, or by a board, body, organization, court, or judge, a recognizance, stipulation, bond, undertaking, or bail in an action, suit, proceeding, or matter conditioned for the faithful performance of an act or duty or for the doing of an act or thing is permitted or required to be given with one or more sureties, it is sufficient compliance if the instrument is executed by a corporation which has complied with the laws of the state and is authorized by law to act as surety upon instruments and in proceedings, actions, suits, and matters as set out in this section. (§ 5.02 ch 101 SLA 1962)

Cross references. — For similar court rule, see Civ. R. 80(a).

Sec. 09.65.040. Parties exempt from giving bond. (a) In 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.

(b) No bond for costs on appeal need be filed by a party to an action if a court finds that party to be indigent and the appeal not frivolous; this finding may be made upon an affidavit filed by that party showing that the party is unable to pay for a bond and further stating the grounds for the appeal and the belief that the party is entitled to redress. (§ 5.03 ch 101 SLA 1962; am § 1 ch 82 SLA 1977)

Cross references. — For relationship of 1977 amendments to court rules in effect at that time, see § 4, ch. 82, SLA 1977.

Sec. 09.65.050. Death or disability of a party. In case of the death or disability of a party to an action, the court may at any time within two years after the death or disability, on motion, allow the action to be continued by or against that party's personal representatives or successor in interest. (§ 5.06 ch 101 SLA 1962)

NOTES TO DECISIONS

The substitution of a new party is generally effected by motion, which should ordinarily be made by the party in interest. Nome & Sinook Co. v. Ames Mercantile Co., 187 F. 928 (9th Cir. 1911).

Case continues from point where original party left off. — As a general rule, the substituted party takes up the prosecution or defense at the point where the original party left off, and the pleadings already filed inure to the benefit of the new party. Nome & Sinook Co. v. Ames Mercantile Co., 187 F. 928 (9th Cir. 1911).

Better practice is to direct substituted party to file supplemental pleading. — The substitution having been allowed, probably the better practice would be for the court to direct the substituted party to file a supplemental complaint, showing the transfer and his right to continue the action, or for such party to obtain leave to file such a complaint; but the mere omission to file such a complaint, unless in disobedience of the court's order, does not render the cause subject to judgment on the pleadings. Nor does it furnish grounds for revoking the order of substitution. Nome & Sinook Co. v. Ames Mercantile Co., 187 F. 928 (9th Cir. 1911).

Collateral references. — 1 Am. Jur. 2d Abatement, Survival and Revival, §§ 47 — 112.

1 C.J.S., Abatement and Revival, §§ 114 — 186.

Death of principal defendant as abating or dissolving garnishment or attachment, 21 ALR 272; 131 ALR 1146.

Abatement upon death of cause of action to enforce personal liability of corporate officer, or director, or trustee, 79 ALR 1517.

Effect of death of party to divorce or annulment suit before final decree, 104 ALR 654; 158 ALR 1205.

Tortfeasor's death before death of injured person as precluding action for death, 112 ALR 343.

Death of contestant as affecting contest of will, 120 ALR 324; 124 ALR 751; 127 ALR 868; 150 ALR 819.

Abatement on mortgagee's death after sale of property but before confirmation of sale, 150 ALR 502.

Medical malpractice action as abating upon death of either party, 50 ALR2d 1445.

Sec. 09.65.060. Defense not prejudiced by assignment. If there is an assignment of a thing in action, the action by the assignee is without prejudice to a setoff or other defense existing at the time of, or before notice of the assignment. But this section does not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon valuable consideration before due. (§ 5.07 ch 101 SLA 1962)

NOTES TO DECISIONS

Assignee's rights are coextensive with assignor's. — The rights of an assignee to recover upon choses in action and nonnegotiable contracts is coextensive with that of the party from whom he takes, but no greater. Hugill v. O'Hara Transp. Co., 11 Alaska 420 (1947).

Assignee for benefit of creditors takes subject to all equities and defenses which might be urged against assignor. Rutherford v. Muldoon, 11 Alaska 250 (1946).

And assignee of foreign corporation is barred if corporation failed to comply with statutes. — It is generally, if not universally, held that an assignee from a foreign corporation cannot maintain an action in cases where the foreign corporation, by reason of failure to comply with the laws of the forum, could not maintain the action. Hugill v. O'Hara Transp. Co., 11 Alaska 420 (1947).

Applicability of last sentence of section. — The last sentence of this section has no application where a note has lost its negotiability. Wear v. Farmers & Merchants Bank, Sup. Ct. Op. No. 2009 (File No. 3850), 605 P.2d 27, aff'd on rehearing, Sup. Ct. Op. No. 2030, 606 P.2d 1278 (1980).

Sec. 09.65.070. Suits against incorporated units of local government. (a) Except as provided in this section, an action may be maintained against a municipality in its corporate character and within the scope of its authority.

(b) A municipality may not require a person to post bond as a condition to bringing a cause of action against it.

(c) No action may be maintained against an employee or member of a fire department operated and maintained by a municipality or village if the claim is an action for tort or breach of a contractual duty and is based upon the act or omission of the employee or member of the fire department in the execution of a function for which the department is established.

(d) No action for damages may be brought against a municipality or any of its agents, officers or employees if the claim

(1) is based on a failure of the municipality, or its agents, officers, or employees, when the municipality is neither owner nor lessee of the property involved,

(A) to inspect property for a violation of any statute, regulation or ordinance, or a hazard to health or safety;

(B) to discover a violation of any statute, regulation, or ordinance, or a hazard to health or safety if an inspection of property is made; or

(C) to abate a violation of any statute, regulation or ordinance, or a hazard to health or safety discovered on property inspected;

(2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused;

(3) is based upon the grant, issuance, refusal, suspension, delay or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a rezoning;

(4) is based on the exercise or performance during the course of gratuitous extension of municipal services on an extraterritorial basis; or

(5) is based upon the exercise or performance of a duty or function upon the request of, or by the terms of an agreement or contract with, the state to meet emergency public safety requirements.

(e) In this section

(1) "municipality" means a home rule borough or city, a general law borough or city of any class, a unified municipality established under AS 29.68.240 — 29.68.440, or a municipality established by merger or consolidation under AS 29.68.030 — 29.68.110; the term includes a public corporation established by a municipality;

(2) "village" means an unincorporated community where at least 25 people reside as a social unit. (§ 5.13 ch 101 SLA 1962; am § 1 ch 23 SLA 1964; am § 1 ch 19 SLA 1975; am § 1 ch 215 SLA 1975; am §§ 1-3 ch 37 SLA 1977)

NOTES TO DECISIONS

For history of section and applicability of Oregon decisions, see City of Fairbanks v. Schaible, Sup. Ct. Op. No. 97 (File Nos. 112, 113), 375 P.2d 201 (1962).

This section is clearly substantive in character, for it creates and defines the rights of persons injured by an act or omission of a city and does not merely provide a rule of procedure for enforcing a right otherwise recognized by substantive law. City of Fairbanks v. Schaible, Sup. Ct. Op. No. 97 (File Nos. 112, 113), 375 P.2d 201 (1962).

This section not only removes any procedural disability to maintain a suit against the municipality but is also substantive in character. Lucas v. City of Juneau, 168 F. Supp. 195 (D. Alas. 1958).

Liability generally. — For comprehensive discussion of municipality's tort liability prior to the 1977 amendment, see City of Fairbanks v. Schaible, Sup. Ct. Op. No. 97 (File Nos. 112, 113), 375 P.2d 201 (1962); Scheele v. City of Anchorage, Sup. Ct. Op. No. 167 (File No. 307), 385 P.2d 582 (1963).

Effect of subsection (d). — The Alaska legislature, in its 1977 enactment of subsection (d) of this section, conferred broad immunity upon municipalities in connection with many governmental functions, including land use regulation. Wilcox Assocs. v. Fairbanks N. Star Borough, Sup. Ct. Op. No. 1984 (File No. 4349), 603 P.2d 903 (1979).

AS 09.50.250 is analogous to subsection (d)(2) of this section. Urethane Specialities, Inc. v. City of Valdez, Sup. Ct. Op. No. 2243 (File No. 4451), 620 P.2d 683 (1980).

Municipal notice of claims requirements. — The provisions of this section do not expressly authorize municipal notice of claims requirements; nor does this section expressly prohibit such conditions to suit. Johnson v. City of Fairbanks, Sup. Ct. Op. No. 1672 (File No. 3444), 583 P.2d 181 (1978).

Municipalities prohibited from requiring shorter notice period for tort claims. — This section, authorizing actions against municipalities, impliedly prohibits municipalities from requiring a potential plaintiff to submit notice of tort claims, as a condition to bringing an action, within a period shorter than the period provided by the statute of limitations. Johnson v. City of Fairbanks, Sup. Ct. Op. No. 1672 (File No. 3444), 583 P.2d 181 (1978); De Husson v. City of Anchorage, Sup. Ct. Op. No. 1673 (File No. 2996), 583 P.2d 791 (1978).

A decision by the city manager to issue a warning pertaining to safety hazards was an exercise of a discretionary function. However, the fact that issuance of the warning was a discretionary function did not automatically extend discretionary immunity to the city in regard to the warning's content. Urethane Specialities, Inc. v. City of Valdez, Sup. Ct. Op. No. 2243 (File No. 4451), 620 P.2d 683 (1980).

A city manager was permitted, if not required, to act in the public interest by taking reasonable action in the form of a public warning to the general populace pertaining to a matter of health and safety to prevent the creation of safety hazards even though such warning was defamatory. Urethane Specialities, Inc. v. City of

Valdez, Sup. Ct. Op. No. 2243 (File No. 4451), 620 P.2d 683 (1980).

When there was no evidence before the superior court suggesting that a city's warning of safety hazards was issued with a knowing or reckless disregard for the truth of the statements if contained that communication was protected by a privilege extended to administrative officers making defamatory communications required or permitted in the performance of official duties even though there was no immunity under this section. Urethane Specialities, Inc. v. City of Valdez, Sup. Ct. Op. No. 2243 (File No. 4451), 620 P.2d 683 (1980).

City's failure to follow own rules governing relations with employees. — This section does not immunize city from liability for damages resulting from its failure to follow its own rules governing its relations with its employees. Stanfill v. City of Fairbanks, Sup. Ct. Op. No. 2624 (File No. 6321), P.2d (1983).

Negligence in operation of ambulance. — The object to be accomplished by ambulance service operated and maintained by a city, that of service to the infirm, was so closely related to hospitalization benefits that it could be said to come within the scope of the opinion in Tuengel v. City of Sitka, 118 F. Supp. 399 (D. Alas. 1954), aff'd. 245 F.2d 61 (9th Cir. 1957), and the city could be held liable for any negligence in the operation of the ambulance. Lucas v. City of Juneau, 168 F. Supp. 195 (D. Alas. 1958).

Negligence of fire department. — For case decided prior to second 1975 amendment holding that a city which maintained a fire department could be held liable for injuries resulting from negligence connected with the department's firefighting activities, see City of Fairbanks v. Shaible, Sup. Ct. Op. No. 97 (File Nos. 112, 113), 375 P.2d 201 (1962). See contra: City of Fairbanks v. Gilbertson, 16 Alaska 590 (1957), aff'd, 262 F.2d 734 (9th Cir. 1959), where § 56-2-2 ACLA 1949 (predecessor to this section) was ignored by both the district court and the court of appeals.

Quoted in Atkinson v. Haldane, Sup. Ct. Op. No. 1495 (File No. 2981), 569 P.2d 151 (1977).

Collateral references. — Fire departments as pertaining to the governmental or to the proprietary branch of municipality, 9 ALR 143; 33 ALR 688; 84 ALR 514.

Necessity of consent to suit against state, 42 ALR 1464; 50 ALR 1408.

Municipal immunity from liability for torts, 120 ALR 1376; 60 ALR2d 1198.

Sec. 09.65.080. Suits by incorporated units of local government. An action may be maintained by an incorporated borough, city, or other public corporation of like character in its corporate name, and upon a cause of action accruing to it in its corporate character

(1) upon a contract made with the public corporation;

(2) upon a liability prescribed by law in favor of the public corporation;

(3) to recover a penalty or forfeiture given to the public corporation;

(4) to recover damages for an injury to the corporate rights or property of the public corporation. (§ 2 ch 23 SLA 1964)

Sec. 09.65.090. Civil liability for emergency aid. (a) A person at a hospital or any other location who renders emergency care or emergency counseling to an injured, ill, or emotionally distraught person who reasonably appears to the person rendering the aid to be in immediate need of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering emergency aid.

(b) This section does not preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct. (§ 1 ch 32 SLA 1967; am § 1 ch 119 SLA 1971; am § 38 ch 102 SLA 1976)

NOTES TO DECISIONS

Common law. — At common law there is no duty to rescue. Lee v. State, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, Munroe v. City Council, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

The law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger. Only in certain limited situations, as for example where the actor was responsible for placing the imperiled person in his endangered position, has a duty been recognized. However, once rescue operations have begun, the rescuer is held to a duty of due care. Lee v. State, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, Munroe v. City Council, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

The purpose of this section is to induce voluntary rescue by removing the fear of potential liability which acts as an impediment to such rescue. Lee v. State, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, Munroe v. City Council, Sup. Ct. Op. No 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

This section is directed at persons who are not under some preexisting duty to rescue. Lee v. State, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, Munroe v. City Council, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

A rescuer under a preexisting duty to rescue would not need the added inducement of immunity from civil liability for his ordinary negligence. Lee v. State, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, Munroe v. City Council, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

Such as a police officer. — A holding that police officers have no duty to rescue would not comport with public conceptions of their role. Lee v. State, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, Munroe v. City Council, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

This section, the Alaska Good Samaritan statute, does not shield a police officer from liability for ordinary negligence. Lee v. State, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971), overruled on other grounds, Munroe v. City Council, Sup. Ct. Op. No. 1236 (File No. 2382), 545 P.2d 165, 547 P.2d 839 (1976).

Sec. 09.65.092. Civil liability for voluntary aircraft safety inspection. An aircraft or power plant technician or mechanic certified by the Federal Aviation Administration who participates without compensation in a voluntary aircraft safety inspection program is not liable for civil damage resulting from an act or omission arising out of an aircraft safety inspection in that program unless the act or omission constitutes gross negligence or reckless or intentional misconduct. (§ 1 ch 3 SLA 1982)

Sec. 09.65.095. Liability for administration of blood test. (a) No civil or criminal action arising out of battery may be brought against a health care provider for the act of taking a blood sample if the sample is taken

(1) at the request of a police officer under the circumstances specified in AS 28.35.035 or when the arresting officer has a search warrant or court order authorizing the taking of the blood sample; and

(2) without the use of excessive or unreasonable force.

(b) In this section,

(1) "health care provider" means a nurse licensed under AS 08.68, a physician licensed under AS 08.64, and a person certified by a hospital as competent to take blood samples;

(2) "hospital" means a hospital as defined in AS 18.20.130(1), including a governmentally owned or operated hospital.

(c) Nothing in this section shall be construed to prohibit recovery of damages incident to the improper or negligent withdrawal of blood. (§ 1 ch 80 SLA 1977; am § 5 ch 117 SLA 1982)

Effect of amendments. — The 1982 amendment inserted "under the circumstances specified in AS 28.35.035 or" in paragraph (1) of subsection (a).

Sec. 09.65.100. Examination and treatment of minors. (a) Except as prohibited under AS 18.16.010(a)(3),

(1) a minor who is living apart from the minor's parents or legal guardian and who is managing the minor's own financial affairs, regardless of the source or extent of income, may give consent for medical and dental services for the minor;

(2) a minor may give consent for medical and dental services if the parent or legal guardian of the minor cannot be contacted or, if contacted, is unwilling either to grant or withhold consent; however, where the parent or legal guardian cannot be contacted or, if contacted, is unwilling either to grant or to withhold consent, the provider of medical or dental services shall counsel the minor keeping in mind not only the valid interests of the minor but also the valid interests of the parent or guardian and the family unit as best the provider presumes them;

(3) a minor who is the parent of a child may give consent to medical and dental services for the minor or the child;

(4) a minor may give consent for diagnosis, prevention or treatment of pregnancy, and for diagnosis and treatment of venereal disease;

(5) the parent or guardian of the minor is relieved of all financial obligation to the provider of the service under this section.

(b) The consent of a minor who represents that the minor may give consent under this section is considered valid if the person rendering the medical or dental service relied in good faith upon the representations of the minor.

(c) Nothing in this section may be construed to remove liability of the person performing the examination or treatment for failure to meet the standards of care common throughout the health professions in the state or for intentional misconduct. (§ 1 ch 204 SLA 1968; am § 1 ch 73 SLA 1974; am § 6 ch 208 SLA 1975)

Cross references. — For age of majority, see AS 25.20.010.

Sec. 09.65.110. Civil liability for shoplifting. (a) A person who has attained the age of 18 years or an emancipated minor who shoplifts merchandise is, in addition to any criminal penalty provided by law, liable in a civil action to the owner or seller of the merchandise for all of the following:

(1) actual damages;

(2) a penalty equal to the retail value of the merchandise or $1,000, whichever is less; and

(3) a penalty of not less than $100 or more than $200.

(b) A person having legal custody of an unemancipated minor whc shoplifts merchandise is liable in a civil action to the owner or selle of the merchandise for both of the following:

(1) a penalty equal to the retail value of the merchandise or $500 whichever is less; and

(2) a penalty of not less than $100 or more than $200.

(c) It is a condition precedent to maintaining an action under thi section that the owner or seller of the merchandise send a notic demanding the relief authorized to the defendant by first class mail a the defendant's last known address 15 days or more before the actio is commenced. The Department of Law may adopt regulation prescribing the form of this notice. It is not a condition precedent t maintaining an action under this section that the person wh shoplifted merchandise was charged or convicted under any statute c ordinance.

(d) Judgments, but not claims, arising under this section may b assigned.

(e) For purposes of this section, a person "shoplifts merchandise" i without authority and with intent to deprive the owner of the mercha dise,

(1) the person removes the merchandise of a commercial esta lishment, not purchased by the person, from the premises of the cor mercial establishment;

(2) the person knowingly conceals on, in or about the person t merchandise of a commercial establishment, not purchased by the pe son, while still upon the premises of the commercial establishment;

(3) the person knowingly substitutes or alters a price ticket in ord to pay less than the indicated retail price.

(f) Merchandise found concealed on or about the person which h not been purchased by the person is prima facie evidence of a knowi concealment for purposes of (e)(2) of this section.

(g) The liability of a person for damages and penalties under t section is in addition to liability for an award of reasonable attorne fees that may be made to the prevailing party in a civil action un Rule 82 of the Rules of Civil Procedure.

(h) In this section, "emancipated minor" means a minor whose disabilities have been removed for general purposes under AS 09.55.590. (§ 1 ch 107 SLA 1974; am §§ 1, 2 ch 53 SLA 1980)

Cross references. — For crime of concealment of merchandise, see AS 11.46.220.

Effect of amendments. — The 1980 amendment rewrote the section.

Sec. 09.65.120. Definition of death. A person is considered medically and legally dead if, in the opinion of a medical doctor licensed or exempt from licensing under AS 08.64, based on ordinary standards of medical practice, there is no spontaneous respiratory or cardiac function and there is no expectation of recovery of spontaneous respiratory or cardiac function or, in the case when respiratory and cardiac functions are maintained by artificial means, a person is considered medically and legally dead, if, in the opinion of a medical doctor licensed or exempt from licensing under AS 08.64, based on ordinary standards of medical practice, there is no spontaneous brain function. Death may be pronounced in this circumstance before artificial means of maintaining respiratory and cardiac function are terminated. (§ 1 ch 8 SLA 1974)

Sec. 09.65.130. [Renumbered as AS 25.24.310.]

Sec. 09.65.132. Income assignment order for child support. (a) A judgment, court order, or order of the child support enforcement agency (AS 47.23) providing for the support of a minor child shall contain an income assignment order.

(b) An income assignment order shall direct the obligor, the obligor's employer, future employer, and any person, political subdivision, or department of the state to assign money due or to be due the obligor to the obligee or, where the order is issued to the child support enforcement agency (AS 47.23) or collections are being made through the child support enforcement agency, to that agency, in an amount sufficient to meet the support payments imposed by the court or by the child support enforcement agency under AS 47.23.140.

(c) An obligee or person or public agency designated to receive support payments may request an income assignment order to take effect by alleging in a sworn statement that the obligor has failed to make a support payment in full within 45 days of the date the payment was due and by filing that statement with the court.

(d) If an application has been filed with the clerk of court, notice shall be sent by certified mail, return receipt requested, to the last known address of the obligor. The notice shall be postmarked no later than 10 days after the date on which the application was filed and shall inform the obligor that the income assignment will take effect 15 days after the date on which the notice was received unless the obligor requests a hearing within the 15 days after the notice was sent. If the

obligor requests a hearing, an income assignment may not take effect until the conclusion of the hearing. The court shall hold a hearing requested under this section within 15 days after the date the obligor requests the hearing. If the obligor pays all support payments due before the hearing, an income assignment order may not take effect.

(e) The obligee or person or public agency that requested the income assignment order shall immediately send a copy of the income assignment order by certified mail to persons who may owe money to an obligor. An income assignment order made under this section is binding upon a person, employer, political subdivision, or department of the state immediately upon receipt of a copy of the income assignment order.

(f) An employer may not discharge an obligor on the basis of an assignment under this section.

(g) An income assignment under this section has priority over all other attachments, executions, garnishments, or other assignments unless otherwise ordered by the court. An income assignment is not limited to the wages of an obligor but may include all money owed to the obligor not otherwise exempt by law. The exemptions from execution by judgment debtors under AS 09.35.080(a) and the restrictions from execution by judgment debtors under AS 09.35.080(b)(1) do not apply to income assignments under this section; however, 50 percent of the gross wages of the obligor or $100 a week, whichever is less, is exempt from execution under this section.

(h) The court may order an obligor to pay all court costs involved in an income assignment proceeding under this section. (§ 1 ch 96 SLA 1981; am §§ 16, 17 ch 59 SLA 1982; am § 1 ch 118 SLA 1982)

Effect of amendments. — The first 1982 amendment added "and by filing that statement with the court" at the end of subsection (c) and rewrote subsection (e).

The second 1982 amendment, in subsection (b), substituted "the obligor's" for "his" and inserted "obligee or, where the order is issued to the" and "or collections are being made through the child support enforcement agency, to that agency."

Editor's notes. — Section 12, chapter 96, SLA 1981, provides: "AS 09.65.132 added in sec. 1 of this act has the effect of changing Rule 77 of the Alaska Rules of Civil Procedure by establishing a procedure and time limits for court review of an income assignment order which differ from those generally applicable in civil actions."

AS 09.35.080, referred to in subsection (g), was repealed by § 14, ch. 62, SLA 1982. For present exemption provisions, see AS 09.38.

Sec. 09.65.135. Limitations on claims arising from skiing. (a) A skier may not recover from a ski area operator for injury resulting from an inherent risk of skiing unless the injury occurred when the ski area operator was not providing the information required by (b) of this section.

(b) A ski area operator shall post trail signs at prominent locations within a ski area which shall include a list of the inherent risks of skiing and the limitation on liability of the ski area operator provided by this section.

(c) In this section

(1) "inherent risks of skiing" means the dangers or conditions which are an integral part of the sport of skiing, including, but not limited to,

(A) changing weather conditions;

(B) variations or steepness in terrain;

(C) snow or ice conditions;

(D) surface or subsurface conditions such as bare spots, forest growth, and rocks;

(E) collisions with lift towers, other structures, and their components unless the skier is on the lift;

(F) collisions with other skiers; and

(G) a skier's failure to ski within the limits of the skier's ability;

(2) "injury" means a personal injury or property damage or loss;

(3) "skier" means a person in a ski area engaged in the sport of skiing, sliding downhill on snow or ice on skis, a toboggan, a sled, a tube, a ski-bob, or other device for recreation in snow;

(4) "ski area" means all ski slopes, trails and other places under the control of a ski area operator and administered as a single enterprise in the state;

(5) "ski area operator" means the operator of a ski area. (§ 2 ch 80 SLA 1980)

Cross references. — For required snow safety and operation plan, see AS 18.60.822; for legislative intent, see § 1, ch. 80, SLA 1980, in Temporary and Special Acts.

Chapter 70. General Provisions.

Section
10. Applicability of title
20. Short title

Sec. 09.70.010. Applicability of title. This title governs all proceedings in actions brought after January 1, 1963, and all further proceedings in actions then pending, except to the extent that, in the opinion of the court, their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event, the laws in effect before January 1, 1963, apply. (§ 31.03 ch 101 SLA 1962)

NOTES TO DECISIONS

Cited in Turkington v. City of Kachemak, Sup. Ct. Op. No. 141 (File No. 177), 380 P.2d 593 (1963).

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APPENDIX H

ALASKA STATUTE SUPPLEMENT

JUDGMENTS

SECTION 31

SECTION 32

SECTION 34

(8) "Telecommunications Information Council" means the Telecommunications Information Council established under AS 44.19.502. (§ ch 115 SLA 1967; am § 14 ch 59 SLA 1982; am § 8 ch 200 SLA 1990; am § 104 ch 4 FSSLA 1992)

Effect of amendments. — The 1990 amendment made an internal reference change in the introductory paragraph, added present paragraph (1), renumbered former paragraphs (1)-(3) as paragraphs (2)-(4) while making a minor punctuation change in present paragraph (4), added paragraphs (5) and (6), renumbered former paragraph (4) as paragraph (7), and added paragraph (8).

The 1992 amendment, effective July 1, 1992, deleted the Alaska State Housing Authority from the list at the end of paragraph (5).

Sec. 09.25.230. Privilege relating to domestic violence and sexual assault counseling. Confidential communications between a victim of domestic violence or sexual assault and a victim counselor are privileged under AS 25.35.100 — 25.35.150. (§ 1 ch 95 SLA 1992)

Chapter 30. Judgments.

Article

1. Judgments (§§ 09.30.060 — 09.30.070)
2. Uniform Foreign Money-Judgments Recognition Act (§ 09.30.170)
3. Uniform Enforcement of Foreign Judgments Act (§§ 09.30.200, 09.30.220, 09.30.230)

Article 1. Judgments.

Section

60. Property liable on confession judgments
65. Offers of judgment
70. Interest on judgments

Sec. 09.30.010. Recording copy of judgment as lien.

NOTES TO DECISIONS

Recordable judgment. — Where a judgment was rendered by the United States District Court for the District of Oregon but prior to recording in Alaska, the judgment had not been registered in the District of Alaska pursuant to 28 U.S.C. § 1963, suit had not been brought on the judgment in the District of Alaska, and the Oregon judgment had not been made the subject of proceedings under either the Uniform Foreign Money Judgments Recognition Act (AS 09.30.100 et seq.) nor the Uniform Enforcement of Foreign Judgments Act (AS 09.30.200 et seq.), the judgment was nevertheless "recordable" in Alaska. Oregon Bank v. Young, 72 Bankr. 207 (D. Alaska 1986).

Place of execution. — Execution in the State of Alaska need not be available as a condition to recording a judgment rendered in a federal court in Oregon; it is sufficient if execution may be issued somewhere on the judgment. Oregon Bank v. Young, 72 Bankr. 207 (D. Alaska 1986).

Prohibitions on execution of judgments. — Both AS 13.16.505 and AS 09.35.060 prohibit, at least temporarily, the execution of judgments after the judgment debtor's death. Sheehan v. Estate of Gamberg, 677 P.2d 254 (Alaska 1984).

Sec. 09.30.060. Property liable on confession judgments. When an action upon a contract is pending against one or more defendants jointly liable, judgment may be given on the confession of one or more defendants against all the defendants jointly liable, whether all defendants have been served with the summons or not. However, the judgment may be enforced only against their joint property and against the joint and separate property of the defendant making the confession. (§ 4.06 ch 101 SLA 1962)

Editor's notes. — This section is set out above to correct a minor error in the statutory heading.

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. (§ 3 ch 107 SLA 1930; am § 1 ch 48 SLA 1981; am § 2 ch 139 SLA 1986)

Effect of amendments. — The 1986 amendment at the beginning of the section substituted "At any time more than 10 days before the trial begins" for "On or before the 60th day following the filing of an answer in a civil action, and on the fifth day following the day discovery closes as ordered by the court," in the fourth sentence substituted "AS 09.30.070" for "AS 45.45.010(a)," and in paragraphs (1) and (2) substituted "five" for "two."

Editor's notes. — Section 9, ch. 139, SLA 1986 provides that the 1986 amendment to this section applies "to all causes of action accruing after June 11, 1986."

NOTES TO DECISIONS

Case decisions construing Alaska Civ. R. 68 apply also to interpretation of this statute. LaPerriere v. Shrum, 721 P.2d 630 (Alaska 1986).

Costs and attorney's fees. — An offer of judgment made under this statute does not include costs and attorney's fees not expressly mentioned in the offer. LaPerriere v. Shrum, 721 P.2d 630 (Alaska 1986).

An offer of judgment, made under Civil Rule 68 or this statute requires that costs allowable under Rule 79, and attorney's fees on a noncontested or partially contested basis under Rule 82 be awarded in addition to the principal sum specified in the offer. LaPerriere v. Shrum, 721 P.2d 630 (Alaska 1986).

Borrower's interest payments not included in prejudgment interest. — The superior court erred in permitting the jury's damage award to include prejudgment interest on a borrower's interest payments because this effectively compounds interest and results in double recovery. Tookalook Sales & Serv. v. McGahan, 846 P.2d 127 (1993).

Applied in Fairbanks N. Star Borough v. Tundra Tours, Inc., 719 P.2d 1020 (Alaska 1986).

Quoted in Wood v. Collins, 812 P.2d 951 (Alaska 1991).

Sec. 09.30.070. Interest on judgments. (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.

(b) Except when the court finds that the parties have agreed otherwise, prejudgment interest accrues from the day process is served on the defendant or the day the defendant received written notification that an injury has occurred and that a claim may be brought against the defendant for that injury, whichever is earlier. The written notification must be of a nature that would lead a prudent person to believe that a claim will be made against the person receiving the notification, for personal injury, death, or damage to property. (§ 4.07 ch 101 SLA 1962; am § 1 ch 69 SLA 1969; am § 1 ch 107 SLA 1980; am § 3 ch 139 SLA 1986)

Cross references. — For provisions requiring judgment for plaintiff to include legal interest, see AS 09.50.280; for legal rate of interest, see AS 45.45.010.

Effect of amendments. — The 1986 amendment added subsection (b).

Editor's notes. — Section 9, ch. 139, SLA 1986 provides that the 1986 amendment to this section applies "to all causes of action accruing after June 11, 1986."

NOTES TO DECISIONS

Rate of interest in condemnation proceedings beginning with declaration of taking. — See notes to AS 09.55.440 under analysis line I, "Constitutionality."

Applicability of 1980 amendment. — The 1980 amendment to this section, raising the interest rate from eight percent to 10.5 percent, did not apply to a judgment previously rendered. Alyeska Pipeline Serv. Co. v. Anderson, 669 P.2d 956 (Alaska 1983).

Compound interest. — This section does not provide for compound interest on