HB

158

Work Draft
3/3/95

HOUSE BILL NO. 158

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES PORTER, Toohey

Introduced: 2/6/95
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil actions; amending Alaska Rules of Civil Procedure 49, 68, and 95; amending Alaska Rule of Evidence 702; and providing for an effective date."

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

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

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

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

(3) society as a whole cannot afford the price of lawsuits years after design and construction, the delivery of services, and other actions; the widespread use of claims made insurance policies makes it impossible to adequately and economically insure against actions

for an unlimited period of time; likewise, it is extremely difficult to defend against a claim that has become stale after information and witnesses have disappeared;

(4) on the whole society is better served with a statute of repose even though in a few limited instances injuries may go without compensation;

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

(6) tortfeasors should not be held responsible for the negligence of an employer; to this extent, this Act is intended to overrule the case of Lake v. Construction Machinery, Inc., 787 P.2d 1027 (Alaska 1990);

(7) the issues in this Act were intended to be addressed in a comprehensive way in 1986; however, the legislation passed in 1986 fell short of accomplishing the goals of the legislature and many of the problems that existed in 1986 still exist in 1995;

(8) the civil justice system for resolving medical negligence claims has not adequately protected patients, health care providers, or the public;

(9) many medical negligence claims involve complex issues of medical fact that require expert medical testimony to assist the trier of fact in reaching a decision;

(10) many patients have been unable to obtain compensation through the current civil justice system because of the high costs of litigation;

(11) injured parties are being compensated by the courts with punitive damages when punitive damages should be awarded to deter and punish people who act with malicious or deliberate disregard for the safety of others;

(12) the size and unpredictability of damage awards has driven up the cost of liability insurance, thereby compromising the availability and affordability of insurance coverage for many health care providers, and leading in turn to decreased availability or complete unavailability of health care services in some geographic areas of the state and high prices for health care services generally;

(13) the civil justice system is an expensive and inefficient method of resolving medical liability disputes, with less than one-half of the total dollars spent on malpractice insurance ever reaching the injured patient;

(14) existing legal standards governing medical negligence have resulted in

unpredictability. adversarial relationships, and unfairness to both patients and health care providers;

(15) fear of lawsuits has prompted physicians to conduct unnecessary tests that have greatly increased the cost of medical care; and

(16) malpractice premiums continue to escalate in this state substantially faster than premiums in other states where legislation to change the civil justice system has been implemented.

(b) It is the purpose of this Act to

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

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

(3) help match losses with compensation by helping to

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

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

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

(D) eliminate duplicate recoveries;

(E) reduce the costs of litigation;

(F) establish appropriate thresholds for a damage award in order to allow predictability of liability exposure; and

(G) reduce the ultimate costs to the state and to local governments of providing medical services to those who cannot otherwise afford those services;

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

(5) reduce the amount of litigation proceeding to trial by modifying the

allocation of attorney fees and court costs based on the offer of judgment and the final court award thereby providing a financial incentive to both parties to settle the dispute;

(6) enact a statute of repose that meets the tests set out in Turner Construction Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988);

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

(8) encourage health care providers to provide quality medical care in all areas of this state at a cost that is affordable;

(9) stabilize the rapidly escalating costs of health care by curtailing the rapid escalation in malpractice premiums and thereby make broader based health care available to more residents of the state;

(10) require that one-half of punitive damages awarded by a court be deposited into the general fund for the benefit of the public welfare and to deter future harm to the public.

* **Sec. 2.** AS 09.10.055 is repealed and reenacted to read:

Sec. 09.10.055. STATUTE OF REPOSE OF EIGHT YEARS. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, or property damage unless commenced within eight years of the earlier of the date of

(1) substantial completion of the construction alleged to have caused the personal injury, death, or property damage; however, the limitation of this paragraph does not apply to a claim resulting from an intentional or reckless disregard of specific project design plans and specifications or building codes; or

(2) the last act alleged to have caused the personal injury, death, or property damage.

(b) This section does not apply if

(1) the personal injury, death, or property damage was caused intentionally or resulted from gross negligence, fraud, fraudulent misrepresentation, or breach of an express warranty or guarantee;

(2) facts that would give notice of a potential cause of action are intentionally concealed; or

[New Text Underlined] [DELETED TEXT BRACKETED]

(3) a shorter period of time for bringing the action is imposed under another provision of law.

(c) The limitation imposed under (a) of this section is tolled during any period in which there exists the undiscovered presence of a foreign body, that has no therapeutic or diagnostic purpose or effect, in the body of the injured person and the action is based on the presence of the foreign body.

(d) In this section, "substantial completion" means the date when construction is sufficiently completed to allow the owner or a person authorized by the owner to occupy the improvement or to use the improvement in the manner for which it was intended.

* **Sec. 3.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.065. LIMITATION ON ACTIONS AGAINST HEALTH CARE PROVIDERS. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), an action based on professional negligence may not be brought against a health care provider if the injured person is, on the date of the alleged negligent act or omission, less than six years of age, unless the action is commenced before the person's eighth birthday.

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

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

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

(3) the undiscovered presence of a foreign body, that has no therapeutic or diagnostic purpose or effect, in the body of the injured person and the action is based on the presence of the foreign body.

(c) In this section,

(1) "health care provider" has the meaning given in AS 09.55.560;

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

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

* **Sec. 4.** AS 09.10.070 is amended to read:

Sec. 09.10.070. ACTIONS FOR CERTAIN TORTS AND CERTAIN STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. **Except as otherwise provided by law, a** [A] person may not bring an action (1) for libel, slander, assault, battery, seduction, or false imprisonment [, OR FOR ANY INJURY TO THE PERSON OR RIGHTS OF ANOTHER NOT ARISING ON CONTRACT AND NOT SPECIFICALLY PROVIDED OTHERWISE]; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

* **Sec. 5.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.075. LIMITATION ON ACTIONS INVOLVING INJURY TO PERSON OR PROPERTY. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, property damage, or injury to the rights of another not arising on contract, unless the action is brought within two years of the accrual of the action.

(b) This section does not apply if a shorter period of time for bringing the action is imposed under another provision of law.

* **Sec. 6.** AS 09.17.010 is repealed and reenacted to read:

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

(b) Except as provided under (c) of this section, the amount of damages awarded by a court or a jury under (a) of this section for all claims, including a loss of consortium claim, arising out of a single injury or death may not exceed $300,000.

(c) In an action for personal injury, the damages awarded by a court or jury

that are described under (b) of this section may not exceed $500,000 when the claimant, as a result of the injury,

(A) is a hemiplegic, paraplegic, or quadriplegic and has permanent functional loss of one or more limbs resulting from injury to the spine or spinal cord; or

(B) has permanently impaired cognitive capacity, is incapable of making independent, responsible decisions, and is permanently incapable of independently performing the activities of normal, daily living.

(d) The limit under (b) or (c) of this section does not apply to noneconomic damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony, if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

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

*** Sec. 7.** AS 09.17.020 is amended to read:

Sec. 09.17.020. PUNITIVE DAMAGES. Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence **of malice or conscious acts showing deliberate disregard of another person by the person from whom the punitive damages are sought**.

*** Sec. 8.** AS 09.17.020 is amended by adding new subsections to read:

(b) The amount of punitive damages awarded by a court or jury under (a) of this section may not exceed three times the amount of compensatory damages awarded or $300,000, whichever amount is greater.

(c) The limit under (b) of this section does not apply to punitive damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

(d) If a person receives an award of punitive damages, the court shall require

that one-half of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

*** Sec. 9.** AS 09.17.040(a) is amended to read:

(a) In every case where damages for personal injury **or death** are awarded by the court or jury [,]

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

(A) [(1)] past economic loss;

(B) [(2)] past noneconomic loss;

(C) [(3)] future economic loss;

(D) [(4)] future noneconomic loss; [AND]

(E) [(5)] punitive damages**: and**

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

*** Sec. 10.** AS 09.17.040(d) is amended to read:

(d) In an action to recover damages, the court shall, at the request of **a** [AN INJURED] party, enter judgment ordering that amounts awarded a judgment creditor for future damages **that exceed $100,000** be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment. **If a portion of the judgment awarded is owed to an attorney under a contingent fee agreement, that portion of the judgment shall be reduced to present value and paid in a lump-sum.**

*** Sec. 11.** AS 09.17.040(e) is amended to read:

(e) **Except as provided in this subsection, if a judgment is paid by periodic payments, the** [THE] court **shall** [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 **the state or** an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

*** Sec. 12.** AS 09.17.040(f) is amended to read:

(f) A judgment ordering payment of future damages **for personal injury or death** by periodic payment shall specify the recipient, the dollar amount of the payments, **including any increases in future payments for anticipated inflation,** the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had no will. **In this subsection, "inflation" means the change in the Consumer Price Index for Anchorage, all items index, compiled by the Bureau of Labor Statistics, United States Department of Labor.**

Sec. 13. AS 09.17.070 is repealed and reenacted to read:

Sec. 09.17.070. COLLATERAL BENEFITS. (a) A claimant in an action for personal injury or death may only recover damages that exceed amounts received by the claimant, or that with reasonable probability will be received in the future by the claimant, as compensation for the injuries from collateral sources, whether private, group, or governmental, and whether contributory or noncontributory, except when

(1) the collateral source is a federally funded program that by law must seek subrogation;

(2) the collateral source has a right of subrogation under federal law; or

(3) the benefit consists of death benefits paid under life insurance.

(b) A person defending a claim may introduce into evidence an amount paid or payable as a benefit to the claimant as a result of the personal injury or death under 42 U.S.C. 301 - 1397 (Social Security Act); a state or federal disability or workers' compensation act; health, sickness, disability, accident, or income-disability insurance; insurance that provides health benefits or income-disability coverage; and a contract or agreement of a group, organization, partnership, or corporation, or other collateral

source, to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services, disability, or lost wages. However, evidence of a collateral source that is a federally funded program that by law must seek subrogation or that has a right of subrogation under federal law, or evidence of death benefits paid under life insurance, may not be introduced under this subsection. If a person defending a claim elects to introduce evidence described in this subsection, the claimant may introduce evidence of the amount that the claimant has paid or contributed to secure the claimant's right to the collateral benefit, including the cost to the claimant resulting from depleted or exhausted coverage.

(c) Notwithstanding AS 23.30, a person who provides a collateral benefit admissible under (b) of this section may not recover any amount against the claimant as reimbursement for those benefits and may not be subrogated to the rights of a claimant against a person defending a claim.

*** Sec. 14.** AS 09.17.080(a) is amended to read:

(a) In all actions involving fault of more than one **person** [PARTY TO THE ACTION], including third-party defendants and persons who have been released under **AS 09.17.091** [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 09.17.091, or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to the action** [AS 09.16.040].

*** Sec. 15.** AS 09.17.080(c) is amended to read:

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under **AS 09.17.091** [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 **as determined under (a) of this section. An assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that action and may not be used as evidence of civil liability in another action**.

* **Sec. 16.** AS 09.17 is amended by adding a new section to read:

Sec. 09.17.091. EFFECT OF RELEASE. When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons civilly liable for the same injury or the same wrongful death

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

(2) it discharges the person to whom it is given from all liability for contribution to any other person.

* **Sec. 17.** AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, **the offeree shall pay costs as allowed under the Alaska Rules of**

Civil Procedure and all reasonable attorney fees incurred by the offeror from the date the offer was made [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].

no problem

* **Sec. 18.** AS 09.30.070(a) is amended to read:

(a) Notwithstanding AS 45.45.010, the [THE] rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percent above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered [10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

* **Sec. 19.** AS 09.30.070 is amended by adding a new subsection to read:

(c) Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or for punitive damages.

* **Sec. 20.** AS 09.55.535(k) is amended to read:

(k) The provisions of the Uniform Arbitration Act, AS 09.43.010 - 09.43.180, apply to arbitrations under this section if they do not conflict with the provisions of this section; 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 - 09.55.547 [AS 09.55.540 - 09.55.548] and AS 09.55.554 - 09.55.560, and AS 09.65.090.

* **Sec. 21.** AS 09.55 is amended by adding new sections to read:

Sec. 09.55.551. MEDICAL EXPERT WITNESS QUALIFICATION. In an action based upon professional negligence brought against a health care provider, a

person may not testify as an expert witness on the issue of the appropriate medical standard of care unless the witness is a health care provider or is licensed as a health care provider in another state or country and

(1) is trained and experienced in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue;

(2) is certified by a board recognized by the State Medical Board as having acknowledged expertise and training directly related to the particular health care or matter at issue; and

(3) within one year of the date of the alleged occurrence giving rise to the claim, was in active practice as a health care provider or devoted a substantial portion of time teaching at an accredited school in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue.

Sec. 09.55.552. MEDICAL BOARD OVERSIGHT OF MEDICAL EXPERT WITNESSES. A physician who testifies as an expert witness in this state in an action based on professional negligence brought against another physician is authorized to practice medicine in this state for the purpose of providing testimony as an expert witness and is subject to the authority of the State Medical Board and the provisions of AS 08.64.

Sec. 09.55.553. MEDICAL EXPERT WITNESSES. (a) In an action based upon professional negligence brought against a health care provider, the court may allow cross-examination of a medical expert witness as to the

(1) amount of compensation that the witness is receiving for the witness's consultation and testimony;

(2) proportion of the witness's professional time devoted to expert witness activities; and

(3) frequency with which the witness testifies for either plaintiffs or defendants.

(b) Expert medical testimony may not be admitted in court if the testimony

(1) has been obtained under an agreement with a third party who receives a contingency fee for

(A) providing a medical expert for review of medical injury

claims;

(B) locating medical expert witnesses; or

(C) arranging the provision of medical expert testimony; or

(2) is provided by a medical expert witness who has agreed to provide medical testimony on a contingency fee basis.

* **Sec. 22.** AS 09.55.560 is amended by adding new paragraphs to read:

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

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

* **Sec. 23.** AS 09.60 is amended by adding a new section to read:

Sec. 09.60.080. CONTINGENT ATTORNEY FEE AGREEMENTS. If an attorney contracts for or collects a contingency fee in connection with an action for personal injury, death, or property damage and the damages awarded by a court or jury include an award of punitive damages, the contingent fee due the attorney shall be calculated after that portion of punitive damages due the state under AS 09.17.020(d) has been deducted from the total award of damages.

* **Sec. 24.** AS 09.65 is amended by adding a new section to read:

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

Notice of Limited Liability

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

(List specific health care providers)

The hospital is responsible for exercising reasonable care in granting staff privileges to practice in the hospital, for reviewing those privileges on a regular basis, and for taking appropriate steps to revoke or restrict privileges in appropriate circumstances. The hospital is not otherwise liable for the acts or omissions of a health care provider who is an independent contractor.

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

(c) In this section,

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

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

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

* **Sec. 25.** AS 09.65.210 is amended to read:

Sec. 09.65.210. 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 **committing or attempting to commit a felony, or fleeing from** [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 **action** [FELONY] substantially contributed to the injury or death. [THIS SECTION DOES NOT AFFECT A RIGHT OF ACTION UNDER 42 U.S.C. 1983.]

* **Sec. 26.** AS 09.68 is amended by adding a new section to read:

Sec. 09.68.125. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party

represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by the Alaska Rules of Civil Procedure or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument of the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If it is alleged or appears that a pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, may set the matter for hearing. If the court determines that a pleading, motion, or other paper is signed in violation of this section, the court shall impose upon the person who signed it, a represented party, or both, an appropriate sanction that may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including costs and attorney fees, and monetary sanctions not to exceed $10,000.

* Sec. 27. AS 09.55.548 is repealed.

* Sec. 28. AS 09.17.080(a), as amended by sec. 14 of this Act, has the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatory listed in AS 09.17.080(a)(2), regarding the percentages of fault to be allocated among the parties.

* Sec. 29. AS 09.30.065, as amended by sec. 17 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by providing that if a judgment is not more favorable to the offeree than the offer, the offeree shall pay costs as allowed under the Alaska Rules of Civil Procedure and reasonable attorney fees incurred by the offeror, and by deleting interest adjustments.

* **Sec. 30.** AS 09.30.070(c), added by sec. 19 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest may not be awarded for future economic or noneconomic damages.

* **Sec. 31.** AS 09.55.551, enacted by sec. 21 of this Act, has the effect of amending Alaska Rule of Evidence 702 by requiring certain qualifications from a person testifying as an expert medical witness.

* **Sec. 32.** AS 09.55.553(b), enacted by sec. 21 of this Act, has the effect of amending Alaska Rule of Evidence 702 by prohibiting certain testimony by a medical expert.

* **Sec. 33.** AS 09.68.125, as enacted in sec. 26 of this Act, has the effect of amending Alaska Rule of Civil Procedure 95, by requiring imposition of sanctions for certain failures to sign pleadings, motions, or other papers.

* **Sec. 34.** SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

* **Sec. 35.** APPLICABILITY. This Act applies to all causes of action accruing on or after the effective date of this Act.

* **Sec. 36.** This Act takes effect July 1, 1995.

3/3/95

Amendment #24 (idea passed)

Representative Porter

page 3, line 24
insert after lump sum "to the attorney
by judgment debtor".

page 3 line 21
insert "after determining all attorney fees associated with
judgment modification action"

page 3 line 22 delete [IF A]
insert "The total"

page 3 line 23 delete [is]
insert "that may be"

page 3 line 23, 24 delete [that portion of the judgment]

Statute of Repose Amendments

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

Page 1, line 12, through page 2, line 4: } findings

Delete all material.

Renumber the following paragraphs accordingly.

Page 4, lines 3 - 4: — findings re Statute of Repose

Delete all material.

Renumber the following paragraphs accordingly.

Page 4, line 15, through page 5, line 10: — deletes Statute of repose

Delete all material.

Renumber the following bill sections accordingly.

Page 16, line 23:

Delete "sec. 14"

Insert "sec. 13"

Page 16, line 27:

Delete "sec. 17"

Insert "sec. 16"

Renumbering for above

Page 17, line 1:

Delete "sec. 19"

Insert "sec. 18"

Page 17, line 4:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 7:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 9:

Delete "sec. 26"

Insert "sec. 25"

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

Page 4, line 18:

Delete "personal injury, death, or"

Page 4, line 21:

Delete "personal injury, death, or"

Page 4, line 24:

Delete "personal injury, death, or"

Page 4, line 27:

Delete "personal injury, death, or"

leaves Statutes repose only to construction record

Page 5, lines 3 - 6:

Delete all material.

Same

Reletter the following subsection accordingly.

Page 14, line 16:

Delete "personal injury, death, or"

Exclude P.I. + wrongful death cases from contingent fee provision that ally can collect contingent fees based on punitive

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

Page 5, line 11, through page 6, line 4:

Delete all material.

Renumber the following bill sections accordingly.

Delete SOL for Kids + medical malpractice

Page 16, line 23:

Delete "sec. 14"

Insert "sec. 13"

Page 16, line 27:

Delete "sec. 17"

Insert "sec. 16"

Page 17, line 1:

Delete "sec. 19"

Insert "sec. 18"

Page 17, line 4:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 7:

Delete "sec. 21"

Insert "sec. 20"

Numbers accordingly

Page 17, line 9:

1 Delete "sec. 26"

2 Insert "sec. 25"

9-LS0328\F.6
Ford
3/1/95

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

Page 6, line 30:

Delete "$300,000"

Insert "$1,500,000"

noneconomic damages

Page 7, line 1:

Delete "$500,000"

Insert "$3,000,000"

noneconomic damages for paraplegia

Ford
3/1/95

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

Page 8, lines 19 - 20:

Delete "a [AN INJURED]"

Insert "an injured"

- periodic payments - Returned to choice by injured party

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

Page 7, line 22:

Delete "new subsections"

Insert "a new subsection"

Page 7, lines 23 - 30:

Delete all material.

Reletter the following subsection accordingly.

deletes. up to punitives

9-LS0328\F.7
Ford
3/1/95

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

This is multiple injuries to be treated as a single injury for noneconomic damages cap

1 Page 7, lines 15 - 16:

2 Delete all material.

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

Page 9, line 15, through page 10, line 13:

Delete all material.

Renumber the following bill sections accordingly.

Page 16, line 22:

Delete all material.

Renumber the following bill sections accordingly.

Page 16, line 23:

Delete "sec. 14"

Insert "sec. 13"

Page 16, line 27:

Delete "sec. 17"

Insert "sec. 16"

Page 17, line 1:

Delete "sec. 19"

Insert "sec. 18"

Page 17, line 4:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 7:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 9:

Delete "sec. 26"

Insert "sec. 25"

9-LS0328\F.15a
Ford
3/1/95

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

deleting change to CR 49 (Special Verdicts & Interrogatories

Page 1, line 1:

Delete "**49,**"

Page 1, line 2:

Delete the comma.

this finding of fact should not be held responsible for the negligence of employers

Page 2, lines 8 - 10:

Delete all material.

Renumber the following paragraphs accordingly.

finding that non-parties be attributed a portion of fault

Page 3, lines 27 - 30:

Delete all material.

Renumber the following paragraphs accordingly.

Page 10, lines 15 - 16:

Delete "person [PARTY TO THE ACTION]"

Insert "party to the action"

fault may only be attributed to parties

Page 10, lines 22 - 27:

Delete:

"(2) the percentage of the total fault [OF ALL OF THE PARTIES TO EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant, [AND] person who has been released from liability under AS 09.17.091, or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to

the action [AS 09.16.040]."

Insert:

"(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.091 [AS 09.16.040]."

Page 11, lines 2 - 7:

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

Page 16, lines 23 - 26:

Delete all material.

Renumber the following bill sections accordingly.

contains necessary deletion for non-parties not being ~~AS 09.17~~ fraud negligence

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

Page 3, line 31, through page 4, line 2:

Delete all material.

Renumber the following paragraphs accordingly.

Deletes funding re allocation of atty fees & costs

Page 11, line 19, through page 12, line 9:

Delete all material.

Renumber the following bill sections accordingly.

Deletes § requiring the offeree of better offer than vended pay all costs + reas atty fees

Page 16, lines 27 - 31:

Delete all material.

Renumber the following bill sections accordingly.

Deletes § Amg CR 68 (offers 7 9)

Page 17, line 1:

Delete "sec. 19"

Insert "sec. 18"

Page 17, line 4:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 7:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 9:

Delete "sec. 26"

insert "sec. 25"

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 158

Revision Date:
Title: Tort Reform
Sponsor: Rep. Porter
Requestor:

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

EXPENDITURES/REVENUES (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	9.3	9.3	9.3	9.3	9.3	9.3
TRAVEL						
CONTRACTUAL	7.9	7.9	7.9	7.9	7.9	7.9
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	17.2	17.2	17.2	17.2	17.2	17.2
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	17.2	17.2	17.2	17.2	17.2	17.2
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	17.2	17.2	17.2	17.2	17.2	17.2

POSITIONS

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

Estimate of current year (FY 95) cost: $ None

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Agency: Alaska Court System
Phone: 264-8228
Date: 02/21/95

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 02/21/95

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Rev 1/95 10:00 AM

years, until all the legal issues were resolved by appeals to the supreme court. One of these attorneys estimated the period of increased litigation at five to seven years.

This fiscal note makes the following assumptions:

In superior court in FY 94, there were 875 tort cases filed. Approximately 38 tort trials were held, with approximately 50 percent returning a verdict for plaintiff; there were approximately 47 tort cases decided by summary judgment, with all returning a verdict for the defendant; and there were approximately 38 default judgments entered, with all entered for the plaintiff. Determining periodic payments will average one day of court time without a jury. Determining collateral benefits will average one-half day of court time, including jury time. Time spent is discounted by two-thirds in default cases.

In district court in FY 94, there were 532 tort cases filed (other than small claims). Approximately 21 tort trials were held; approximately 26 tort cases were decided by summary judgment; and approximately 21 default judgments were entered. Periodic payments will not be made in district court, because of the $50,000 jurisdictional limit of that court. Because of the lower dollar value of cases, not as much time will be invested by litigants in determining collateral benefits; it is assumed that one-half as much court time will be used. District court jury costs are also less, because half as many jurors are used.

WALTER J. HICKEL, GOVERNOR

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 8, 1994

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

Re: HB 292, tort reform

Dear Representative Porter:

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

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

SECTION 3: STATUTE OF REPOSE

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

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

repose vs. limitation

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

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

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

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

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

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

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

Constitutional Problems.

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

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

---

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

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

(continued...)

Equal Protection.

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

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

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

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

---

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

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

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

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

In State v. Erickson, the court said:

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

Id. at 5.

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

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

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

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

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

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

The Goal of Reducing Insurance Premiums.

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

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

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

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

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

Societal Considerations.

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

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

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

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

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

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

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

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

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

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

---

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

Public Policy.

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

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

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

Availability of Insurance.

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

Still tail problem

Fairness of Defending Older Claims.

Section 1(a)(3) asserts that it is difficult to defend against a claim that has become stale after information and witnesses have disappeared. Several commentators have noted that this is really not the case. Manufacturers and designers document their work. Practice shows that they retain those documents. There is no evidence that products liability cases based on older products have a higher rate of favorable verdicts for plaintiffs or unfavorable verdicts for defendants. See VanKirk, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, Duke L.J. 1689, 1712 - 13 (1989).

The Remaining Findings and Purposes.

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

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

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

The Nature of the Rights Abridged and Discriminatory Effects.

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

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

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

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

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

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

Arbitrariness.

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

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

Rationality.

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

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

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

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

Fiscal Note.

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

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

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

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

Consumer Protection and Warranties.

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

Conclusion.

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

SECTION 4: LIMITATION ON ACTIONS AGAINST HEALTH CARE PROVIDERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 7: NONECONOMIC DAMAGES CAP

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

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

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

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

(continued...)

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

SECTION 8: PUNITIVE DAMAGES STANDARD

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

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

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

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

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

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

SECTION 9: PUNITIVE DAMAGES CAP

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

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

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

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

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

Out of Bill

SECTION 10: CRIMINAL CONDUCT BARS RECOVERY OF DAMAGES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 12: FUTURE DAMAGES PAID THROUGH PERIODIC PAYMENTS

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

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

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

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

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

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

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

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

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

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

changed to mandatory authority

SECTION 13: SECURITY FOR PERIODIC PAYMENTS

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

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

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

SECTION 14: INFLATION ON PERIODIC PAYMENTS

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

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

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

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

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

SECTION 15: COLLATERAL BENEFITS

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

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

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

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

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

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

SECTIONS 16 and 17: APPORTIONMENT OF FAULT

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

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

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

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

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

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

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

SECTION 18: EFFECT OF RELEASE

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

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

SECTION 21: LIMITATION ON AWARDS OF PREJUDGMENT INTEREST

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

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

SECTION 25: CAP ON WRONGFUL DEATH AWARDS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Jim Forbes
Jim Forbes
Assistant Attorney General

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

BMB:SDC:JF:pch

cc: Raga Elim, Legislative Liaison
Deborah Behr, AAG

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

Tort Reform

9-LS0328\A
Ford
1/4/95

faxed 12:15 P.M.

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE PORTER

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil actions; amending Alaska Rules of Civil Procedure 49, 68, and 95; amending Alaska Rule of Evidence 702; and providing for an effective date."

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

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

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

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

(3) society as a whole cannot afford the price of lawsuits years after construction, manufacture, the delivery of services and other actions; the widespread use of claims made insurance policies makes it impossible to adequately and economically insure against actions for an unlimited period of time; likewise, it is extremely difficult to defend against a claim that has

become stale after information and witnesses have disappeared;

(4) on the whole, society is better served with a statute of repose even though in a few limited instances injuries may go without compensation;

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

(6) tortfeasors should not be held responsible for the negligence of an employer; to this extent, this Act is intended to overrule the case of Lake v. Construction Machinery, Inc., 787 P.2d 1027 (Alaska 1990);

(7) the issues in the Act were intended to be addressed in a comprehensive way in 1986; however, the legislation passed in 1986 fell short of accomplishing the goals of the legislature and the problems that existed in 1986 still exist in 1995;

(8) the civil justice system for resolving medical negligence claims has not adequately protected patients, health care providers, or the public;

(9) the civil justice system relies upon public adversarial proceedings and has impaired the conventional relationship between patients and their health care providers by making each suspicious of the other and thereby interfering with a relationship fundamental to the provision of effective care;

(10) many medical negligence claims involve complex issues of medical fact that are not optionally decided by lay juries, whose decision making ability is restricted by the civil justice method of examining and cross-examining witnesses;

(11) many patients have been unable to obtain compensation through the current civil justice system because of the high costs of litigation;

(12) the size of damage awards in medical injury cases has increased dramatically in relation to awards for comparable nonmedical injuries, leading to unequal legal treatment of individuals with virtually identical injuries;

(13) the size and unpredictability of damage awards has driven up the cost of liability insurance, thereby compromising the availability and affordability of insurance coverage for many health care providers, and leading in turn to decreased availability or complete unavailability of health care services in some geographic areas of the state and high prices for health care services generally;

(14) the civil justice system is an expensive and inefficient method of resolving

medical liability disputes, with less than one-half of the total dollars spent on malpractice insurance ever reaching the injured patient;

(15) existing legal standards governing medical negligence have resulted in unpredictability and unfairness to both patients and health care providers;

(16) fear of lawsuits has prompted physicians to conduct unnecessary tests that have greatly increased the cost of medical care; and

(17) malpractice premiums continue to escalate in this state substantially faster than premiums in other states where legislation to change the civil justice system has been implemented.

(b) It is the purpose of this Act to

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

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

(3) help match losses with compensation by helping to

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

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

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

(D) eliminate duplicate recoveries;

(E) reduce the costs of litigation; and

(F) reduce the ultimate costs to the state and to local governments of providing medical services to those who cannot otherwise afford those services;

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

(5) reduce the amount of litigation proceeding to trial by modifying the allocation of attorney fees and court costs based on the offer of judgment and the final court award thereby

providing a financial incentive to both parties to settle the dispute;

(6) enact a statute of repose that meets the tests set out in Turner Construction Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988);

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

(8) encourage health care providers to provide quality medical care in all areas of this state at a cost that is affordable;

(9) stabilize the rapidly escalating costs of health care by curtailing the rapid escalation in malpractice premiums and thereby make broader based health care available to more residents of the state.

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

Sec. 09.10.052. STATUTE OF REPOSE OF 15 YEARS. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, or property damage unless commenced within 15 years of the earlier of the date

(1) a newly manufactured product was first used for its intended purpose; however, the limitation of this paragraph does not apply to a claim for faulty maintenance of a product;

(2) of substantial completion of the construction alleged to have caused the personal injury, death, or property damage; however, the limitation of this paragraph does not apply to a claim resulting from an intentional or reckless disregard of specific project design plans and specifications or building codes; or

(3) of the last act alleged to have caused the personal injury, death, or property damage.

(b) This section does not apply if

(1) the personal injury, death, or property damage was caused intentionally or resulted from gross negligence, fraud, fraudulent misrepresentation, or breach of an express warranty or guarantee;

(2) facts that would give notice of a potential cause of action are intentionally concealed; or

(3) a shorter period of time for bringing the action is imposed under another provision of law.

(c) The limitation imposed under (a) of this section is tolled during any period in which there exists the undiscovered presence of a foreign body, that has no therapeutic or diagnostic purpose or effect, in the body of the injured person and the action is based on the presence of the foreign body.

(d) In this section, "substantial completion" means the date when construction is sufficiently completed to allow the owner or a person authorized by the owner to occupy the improvement or to use the improvement in the manner for which it was intended.

* **Sec. 3.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.065. LIMITATION ON ACTIONS AGAINST HEALTH CARE PROVIDERS. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), an action based on professional negligence may not be brought against a health care provider unless commenced within six years of the last act alleged to have caused the personal injury or death, or two years from the date the injury is or should have been discovered, whichever occurs first; except if the injured person is, on the date of the alleged negligent act or omission, less than six years of age, the action shall be commenced before the person's eighth birthday.

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

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

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

(3) the undiscovered presence of a foreign body, that has no therapeutic or diagnostic purpose or effect, in the body of the injured person and the action is based on the presence of the foreign body.

(c) In this section,

(1) "health care provider" has the meaning given in AS 09.55.560;

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

(3) "professional services" means services provided by a health care provider that are within the scope of services for which the health care provider is

licensed, and that are not prohibited under the health care provider's license or by a hospital in which the health care provider practices.

*** Sec. 4.** AS 09.10.070 is amended to read:

Sec. 09.10.070. ACTIONS FOR CERTAIN TORTS AND CERTAIN STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. Except as otherwise provided by law, a [A] person may not bring an action (1) for libel, slander, assault, battery, seduction, or faise imprisonment [, OR FOR ANY INJURY TO THE PERSON OR RIGHTS OF ANOTHER NOT ARISING ON CONTRACT AND NOT SPECIFICALLY PROVIDED OTHERWISE]; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

Why Remove

*** Sec. 5.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.075. LIMITATION ON ACTIONS INVOLVING INJURY TO PERSON OR PROPERTY. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, property damage, or injury to the rights of another not arising on contract, unless the action is brought within two years of the accrual of the action.

(b) This section does not apply if a shorter period of time for bringing the action is imposed under another provision of law.

Restate Here new

*** Sec. 6.** AS 09.17.010 is repealed and reenacted to read:

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

New - spell out Acronyms

(b) Except as provided under (c) of this section, the amount of damages awarded by a court or a jury under (a) of this section for all claims, including a loss of consortium claim, arising out of a single injury or death may not exceed $300,000.

(c) In an action for personal injury, the damages awarded by a court or jury that are described under (b) of this section may not exceed $500,000 when the claimant, as a result of the injury,

(A) is a hemiplegic, paraplegic, or quadriplegic and has permanent functional loss of one or more limbs resulting from injury to the spine or spinal cord; or

(B) has permanently impaired cognitive capacity, is incapable of making independent, responsible decisions, and is permanently incapable of independently performing the activities of normal, daily living.

(d) The limit under (b) or (c) of this section does not apply to noneconomic damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony, if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

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

*** Sec. 7.** AS 09.17.020 is amended to read:

Sec. 09.17.020. PUNITIVE DAMAGES. Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence ~~of malice or conscious acts showing deliberate disregard of~~ malicious action by the person from whom the punitive damages are sought.

*** Sec. 8.** AS 09.17.020 is amended by adding new subsections to read:

(b) The amount of punitive damages awarded by a court or jury under (a) of this section may not exceed three times the amount of compensatory damages awarded or $300,000, whichever amount is greater.

(c) The limit under (b) of this section does not apply to punitive damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

(d) If a person does receive an award of punitive damages, the court shall require that one-half of the award be deposited into the general fund of the state.

*** Sec. 9.** AS 09.17.040(a) is amended to read:

(a) In every case where damages for personal injury or death are awarded by the

court or jury [,]

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

(A) [(1)] past economic loss;

(B) [(2)] past noneconomic loss;

(C) [(3)] future economic loss;

(D) [(4)] future noneconomic loss; [AND]

(E) [(5)] punitive damages; and

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

* **Sec. 10.** AS 09.17.040(d) is amended to read:

(d) In an action to recover damages, the court shall, at the request of a [AN INJURED] party, enter judgment ordering that amounts awarded a judgment creditor for future damages that exceed $100,000 be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment; If a portion of the judgment ~~awarded~~ is owed to an attorney under a contingent fee agreement, that portion of the judgment shall ~~be reduced to present value and~~ paid in a lump sum.

* **Sec. 11.** AS 09.17.040(e) is amended to read:

(e) Except as provided in this subsection, if a judgment is paid by periodic payments, the [THE] court shall [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 the state or an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

* **Sec. 12.** AS 09.17.040(f) is amended to read:

(f) A judgment ordering payment of future damages for personal injury or death by periodic payment shall specify the recipient, the dollar amount of the payments, ~~including any increase in future payments for anticipated inflation,~~ the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the

judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had no will. **In this subsection, "inflation" means the change in the Consumer Price Index for Anchorage, all items index, compiled by the Bureau of Labor Statistics, United States Department of Labor.**

*** Sec. 13.** AS 09.17.070 is repealed and reenacted to read:

Sec. 09.17.070. COLLATERAL BENEFITS. (a) A claimant in an action for personal injury or death may only recover damages that exceed amounts received by the claimant, or that with reasonable probability will be received in the future by the claimant, as compensation for the injuries from collateral sources, whether private, group, or governmental, and whether contributory or noncontributory, except when

(1) the collateral source is a federally funded program that by law must seek subrogation;

(2) the collateral source has a right of subrogation under federal law; or

(3) the benefit consists of death benefits paid under life insurance.

(b) A person defending a claim may introduce into evidence an amount paid or payable as a benefit to the claimant as a result of the personal injury or death under 42 U.S.C. 301 - 1397 (Social Security Act); a state or federal disability or workers' compensation act; health, sickness, disability, accident, or income-disability insurance; insurance that provides health benefits or income-disability coverage; and a contract or agreement of a group, organization, partnership, or corporation, or other collateral source, to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services, disability, or lost wages. However, evidence of a collateral source that is a federally funded program that by law must seek subrogation or that has a right of subrogation under federal law, or evidence of death benefits paid under life insurance, may not be introduced under this subsection. If a person defending a claim elects to introduce evidence described in this subsection, the claimant may introduce evidence of

the amount that the claimant has paid or contributed to secure the claimant's right to an insurance or contractual benefit, including the value of the claimant's rights to depleted or exhausted coverage, ~~introduced by the person defending the claim as evidence.~~

(c) Notwithstanding AS 23.30, a person who provides a collateral benefit admissible under (b) of this section may not recover any amount against the claimant as reimbursement for those benefits and may not be subrogated to the rights of a claimant against a person defending a claim.

*** Sec. 14.** AS 09.17.080(a) is amended to read:

(a) In all actions involving fault of more than one person [PARTY TO THE ACTION], including third-party defendants and persons who have been released under AS 09.17.091 [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 09.17.091, ~~or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to the action~~ [AS 09.16.040].

*** Sec. 15.** AS 09.17.080(c) is amended to read:

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.091 [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 as determined under (a) of this section. An assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that or another action and may not be

used as evidence of civil liability in another action.

* **Sec. 16.** AS 09.17 is amended by adding a new section to read:

Sec. 09.17.091. EFFECT OF RELEASE. When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons civilly liable for the same injury or the same wrongful death

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

(2) it discharges the person to whom it is given from all liability for contribution to any other person.

* **Sec. 17.** AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, **the offeree shall pay costs as allowed under the Alaska Rules of Civil Procedure and reasonable attorney fees incurred by the offeror from the date the offer was made.** [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].

* **Sec. 18.** AS 09.30.070(a) is amended to read:

(a) Notwithstanding AS 45.45.010, the [THE] rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percent above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered [10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

* **Sec. 19.** AS 09.30.070 is amended by adding a new subsection to read:

(c) Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or for punitive damages.

Good - must be case now?!

* **Sec. 20.** AS 09.55.535(k) is amended to read:

(k) The provisions of the Uniform Arbitration Act, AS 09.43.010 - 09.43.180, apply to arbitrations under this section if they do not conflict with the provisions of this section; 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 - 09.55.547 [AS 09.55.540 - 09.55.548] and AS 09.55.554 - 09.55.560, and AS 09.65.090.

* **Sec. 21.** AS 09.55 is amended by adding new sections to read:

Sec. 09.55.551. MEDICAL EXPERT WITNESS QUALIFICATION. In an action based upon professional negligence brought against a health care provider, a person may not testify as an expert witness on the issue of the appropriate medical standard of care unless the witness is a health care provider or is licensed as a health care provider in another state or country and

X?? no locals?

(1) is trained and experienced in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue;

(2) is certified by a board recognized by the State Medical Board as having acknowledged expertise and training directly related to the particular health care or matter at issue; and

(3) within one year of the date of the alleged occurrence giving rise to the claim, was in active practice as a health care provider or devoted a substantial portion of time teaching at an accredited school in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue.

Sec. 09.55.552. MEDICAL BOARD OVERSIGHT OF MEDICAL EXPERT WITNESSES. A physician who testifies as an expert witness in this state in an action based on professional negligence brought against another physician is authorized to practice medicine in this state for the purpose of providing testimony as an expert witness and is subject to the authority of the State Medical Board and the provisions of AS 08.64.

Sec. 09.55.553. MEDICAL EXPERT WITNESSES. (a) In an action based upon professional negligence brought against a health care provider, the court may allow cross-examination of a medical expert witness as to the

(1) amount of compensation that the witness is receiving for the witness's consultation and testimony;

(2) proportion of the witness's professional time devoted to expert witness activities; and

(3) frequency with which the witness testifies for either plaintiffs or defendants.

(b) Expert medical testimony may not be admitted in court if the testimony

(1) has been obtained under an agreement with a third party who receives a contingency fee for

(A) providing a medical expert for review of medical injury claims;

(B) locating medical expert witnesses; or

(C) arranging the provision of medical expert testimony; or

(2) is provided by a medical expert witness who has agreed to provide medical testimony on a contingency fee basis.

* Sec. 22. AS 09.55.560 is amended by adding new paragraphs to read:

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

(5) "professional services" means services provided by a health care provider that are within the scope of services for which the health care provider is

licensed and that are not prohibited under the health care provider's license or by a hospital in which the health care provider practices.

* **Sec. 23.** AS 09.65 is amended by adding a new section to read:

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

Notice of Limited Liability

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

(List specific health care providers)

The hospital is responsible for exercising reasonable care in granting staff privileges to practice in the hospital, for reviewing those privileges on a regular basis, and for taking appropriate steps to revoke or restrict privileges in appropriate circumstances. The hospital is not otherwise liable for the acts or omissions of a health care provider who is an independent contractor.

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

(c) In this section,

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

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

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

* Sec. 24. AS 09.65.210 is amended to read:

Sec. 09.65.210. 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 committing or attempting to commit a felony, or fleeing from [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 action [FELONY] substantially contributed to the injury or death. [THIS SECTION DOES NOT AFFECT A RIGHT OF ACTION UNDER 42 U.S.C. 1983.]

* Sec. 25. AS 09.68 is amended by adding a new section to read:

Sec. 09.68.125. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by the Alaska Rules of Civil Procedure or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument of the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If it is alleged or appears that a pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, may set the matter for hearing. If the court determines that a pleading, motion, or other paper is signed in violation of this section, the court shall impose upon the person who signed it, a represented party, or both, an appropriate sanction that may include an order to pay to the other party the

amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including costs and attorney fees, and monetary sanctions not to exceed $10,000.

* Sec. 26. AS 09.55.548 is repealed. - Collateral Source Statute

* Sec. 27. AS 09.17.080(a), as amended in sec. 15 of this Act, has the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatory listed in AS 09.17.080(a)(2), regarding the percentages of fault to be allocated among the parties.

* Sec. 28. AS 09.30.065, as amended by sec. 17 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by providing that if a judgment is not more favorable to the offeree than the offer, the offeree shall pay costs as allowed under the Alaska Rules of Civil Procedure and reasonable attorney fees incurred by the offeror, and by deleting interest adjustments.

* Sec. 29. AS 09.30.070(c), added by sec. 19 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest may not be awarded for future economic or noneconomic damages.

* Sec. 30. AS 09.55.551, enacted by sec. 21 of this Act, has the effect of amending Alaska Rule of Evidence 702 by requiring certain qualifications from a person testifying as an expert medical witness. 702 by

* Sec. 31. AS 09.55.553(b), enacted by sec. 21 of this Act, has the effect of amending Alaska Rule of Evidence 702 by prohibiting certain testimony by a medical expert.

* Sec. 32. AS 09.68.125, as enacted in sec. 25 of this Act, has the effect of amending Alaska Rule of Civil Procedure 95. by requiring imposition of sanctions for certain failures to sign pleadings, motions, or other papers.

* Sec. 33. SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

* Sec. 34. APPLICABILITY. This Act applies to all causes of action accruing on or after the effective date of this Act.

* Sec. 35. This Act takes effect July 1, 1995.

Alaskans For Liability Reform

February 17, 1995

Representative Brian Porter, Chairman
House Judiciary Committee
Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

RE: House Bill 158

Dear Representative Porter,

After years of trying to remedy many of the problems with tort reform in Alaska, we appreciate your efforts to bring this issue forward once again.

Alaskans for Liability Reform represents more than 2100 individuals and groups that want to see this bill receive a full and complete hearing. Hopefully, when this is done, we will have a bill to present to the Goverenor that closely resembles the bill you have prepared and one that he will support and sign.

We applaud your efforts thus far and pledge to work closely with you on this legislation.

Sincerely,

Richard Cattanach

Richard Cattanach (AJT)
President

P.O. Box 201668
Anchorage, Alaska 99520-1668
Phone: 561-6250

ATRA Legislative Watch

Volume 7 Number 5a February 16, 1995

State Activity

Illinois--House Passes Reform Bill: 63-52!!!

In a surprise early vote Thursday, the Illinois House passed HB 20 by a vote of 63-52! HB 20, sponsored by Speaker Lee Daniels (R), needed sixty votes for successful passage Passage was assured late Wednesday and early Thursday when several House Republicans who had been undecided announced their support of the legislation

HB 20 is the most comprehensive tort reform bill ever to be considered by the Illinois General Assembly No Republicans voted against the bill, although Rep Salvi voted present The plaintiffs' bar filled a third of the House gallery after spending days fighting the effort, yet this comprehensive tort reform took a major step toward enactment. Attention now turns to the Senate where legislation will be considered during the week of March 1. Governor Edgar has promised to sign the bill The Illinois Civil Justice League encourages interested parties to contact Members of the Senate and urge their support for this legislation, and to thank the Representatives who supported HB 20!

If enacted, HB 20 would 1) limit awards for non-economic damages to $500,000, 2) limit punitive damages to 100% actual damages or $500,000, whichever is less; 3) prohibit punitive damage awards unless conduct is "knowing, wilful, wanton and outrageous", 4) allow evidence of collateral sources of payment, 5) provide a state of the art and a government standards defense; and 6) establish premises liability reform A copy of the bill is available from ATRA For a copy of the roll call of those Representatives who supported HB 20, and any additional information, contact Ed Murnane with ICJL at 312-263-0817 or ATRA at 202-682-1163

Texas-- Punitive Damages Bill Passes The Senate: 30-0!!!

On February 15, SB 25 (Sibley-R), the punitive damages legislation, passed the Senate unanimously with a 30-0 vote The Senate Economic Development Committee introduced the revised punitive damages bill, released after a week of discussions between Members of the House and Senate, and representatives of the Governor, Lt. Governor and House Speaker SB 25 would require proof of "malice" to claim punitive damages, a "clear and convincing evidence" standard of proof, and a limit on punitive damages awards of $200,000 *or* two times economic damages plus an amount equal to any non-economic damages found by the jury up to $750,000, whichever is greater.

As we go to press, the hearing of the Senate Economic Development Committee on SB 26 (Bivens-R), "The Deceptive Trade Practice and Consumer Protection Act" is taking place A hearing for the companion House legislation, HB 668 (Junell D) is scheduled in the House State Affairs Committee on February 27 TCJL reports that the opposition has come out in full force for these hearings, and

expect heated opposition to continue Substantive talks among key players are taking place on SB 28 (Sibley-R) which replaced current joint and several liability with proportionate liability and SB 32 (Montford-D) which establishes venue rules to restrict forum shopping. Finally, SB 30 (Sibley-R), medical malpractice reform legislation, is expected to be heard in the Senate Economic Development Committee next week **Interested parties are urged to remain active and contact Ralph Wayne or Alex Short of TCJL at 512-320-0474.**

New Jersey--The Assembly Insurance Committee has rescheduled the hearing expected today for February 23. This scheduling change grants additional time for interested parties to contact key legislators and urge them NOT to support the current version of the bills which have been weakened by the Senate

The New Jersey Citizens Against Lawsuit Abuse (NJ CALA) supports amendments which will meet Governor Whitman's call for meaningful tort reform. Interested parties are urged to contact Assembly Speaker Chuck Haytaian (R) 908-850-8800; Assembly Majority Leader Jack Collins (R) 609-769-3633, and Members of the Assembly Insurance Committee at the following district offices: Chairman Garrett (R), 201-579-7585, Vice-Chairman Felice (R), 201-796-3636, Assemblyman Bagger, 908-232-3673, Assemblyman Charles, 201-432-1400; Assemblywoman Farragher (R),908-462-9009; Assemblyman Kramer (R) 609-586-1330, and Assemblyman Pascrell (D), 201-942-7755.

The bills as released by the Senate include: SB 1493 (Kyrillos Cardinale) a certificate of merit bill. SB 1494 (Kyrillos Cardinale) changing the threshold for joint and several liability to 70%, but including an environmental harm exception, SB 1495 (Cardinale/Kyrillos) limiting retailer liability, SB 1496 (Cardinale) requiring a "clear and convincing evidence" standard in punitive damage cases, but not providing for a cap on punitive damages; and SB 1497 (Cardinale) which limits medical providers liability with respect to medical devices Contact Eugene Deutsch of the New Jersey Citizens Against Lawsuit Abuse at 1-800-278-9575 for more information

Wisconsin--AB 36 (Green) passed through the Assembly and is currently in the Senate Judiciary Committee A public hearing is scheduled on February 22 AB 36 limits non-economic damages in medical malpractice claims to $350,000, and as amended, allows plaintiffs' lawyers to be paid in a lump sum before the plaintiff begins to receive the award in periodic payments

SB 11 (Huelsman-R) is expected to be on the Senate floor on March 1. SB 11 1) provides for proportionality as to punitive damages, 2) allows punitive damages only where defendant acts "maliciously or in a willful disregard for the rights of the plaintiff", and 3) eliminates joint and several liability Interested parties must contact their legislators to express support for this legislation *as introduced*. The Wisconsin Coalition for Civil Justice urges supporters to contact the following Members of the Senate Judiciary Committee at 1-800-362-9472: Representatives Huelsman (R), Petak (R), Drzewiecki (R), Darling (R), Risser (D), Adelman (D), and Burke (D) For an update, contact Co-Chairs of the Wisconsin Coalition for Civil Justice Bill Smith at 608-255-6083 or Nick George at 608-258-3400

Alaska--Alaskans for Liability Reform are supporting the comprehensive tort reform package, HB 158 (Porter-R). HB 158 establishes a limit of three times compensatory damages or $300,000, whichever is greater, on punitive damages, limits noneconomic damages to $300,000, modifies

comparative fault and collateral source provisions, enacts an eight year statute of repose after substantial completion of a construction, modifies statute of limitations provisions, establishes periodic payments for awards exceeding $100,000, and addresses expert witness testimony, prejudgement interest, and felon lawsuits. HB 158 is currently in the House Judiciary and Finance Committee with a hearing date set for February 17. For more information about this comprehensive legislation, contact Richard Cattanach, Chairman of Alaskans for Liability Reform at 907-349-4568, or contact ATRA for a copy of HB 158 at 202-682-1103.

Montana-- SB 217 (Bishop), a joint and several liability measure which restores the tort reform measure passed in 1987, was heard by the Judiciary Committee on February 14. No further action was taken.

HB 309 (Grimes), which limits noneconomic damages in medical malpractice claims to $250,000, was passed on second reading in the House by a 69-31 vote. As we go to press, the measure is scheduled for its third reading today. Interested parties should contact Jim Tutwiler of the Montana Liability Coalition at 406-442-2405.

North Dakota--HB 1369 passed the House on February 15, by a 89-5 margin. HB 1369 (Payne, Berg) enacts a 10 year statute of limitation and repose in product liability actions, 2) creates a rebuttable presumption against defects in product liability actions, 3) provides a "clear and convincing" evidence standard in punitive damage cases, 4) requires an actual malice standard for punitive damage awards. For more information, contact Jess Cooper of the North Dakota Coalition for Liability Reform at the Greater North Dakota Association at 701-222-0929.

Opposition Activity

Florida--They are at it again! The plaintiffs' bar has reintroduced its "Litigation Reduction Act" in an effort to return the state to the deep pocket theory of joint liability. SB 644 (Weinstein-D) would overrule the Florida Supreme Court Case, Fabre v. Marin, which upheld the joint and several liability reforms of 1986. This repeal effort was defeated by only one vote last year. Interested parties must get involved NOW!

In addition, the tort reformers anticipate strong resistance when they introduce a proactive measure to retain a provision requiring 35% of punitive damage awards to be paid to a state fund. This requirement is scheduled to sunset this year. There will be legislation to prohibit the vicarious imposition of punitive damages introduced as well. Contact Jim Brainerd, Center for Civil Justice Reform, at the Florida Chamber of Commerce for more information at 904-425-1213.

Federal Activity

Our sources indicate that full markup of HR 10, "The Common Sense Legal Reforms Act", is expected in the House Judiciary Committee on Wednesday, February 22. As the legislation moves quickly, the possibility for floor action in March remains likely.

The House Commerce Committee approved the Securities Litigation title of HR 10, the Republican's "Contract With America," by a bipartisan vote of 33-10 on Thursday! The full House Judiciary Committee held hearings on the product liability section of HR 10 on February 13. The House Commerce Committee has scheduled a hearing on HR 10 for the afternoon of Tuesday, February 21. The full House of Representatives is scheduled to consider HR 10 as early as March 3.

Interested parties are urged to contact Members of the House Judiciary Committee. Letters may be addressed to "The Honorable ___" at the U.S. House of Representatives, Washington, DC 20515 or call the Committee directly at 202-225-3951. Members of the Committee include:

Republicans

Henry Hyde (R-IL), Chairman

Carlos J. Moorhead (R-CA)
F. James Sensenbrenner Jr. (R-WI)
Bill McCollum (R-FL)
George W. Gekas (R-PA)
Howard Coble (R-NC)
Lamar Smith (R-TX)
Steven H. Schiff (R-NM)
Elton Gallegly (R-CA)
Charles T. Canady (R-FL)
Bob Inglis (R-SC)
Robert W. Goodlatte (R-VA)
Steve Buyer (R-IN)
Martin R. Hoke (R-OH)
Sonny Bono (R-CA)
Fred Heineman (R-NC)
Ed Bryant (R-TN)
Steve Chabot (R-OH)
Michael Patric Flanagan (R-IL)
Bob Barr (R-GA)

Democrats

John Conyers Jr. (D-MI)
Patricia Schroeder (D-CO)
Barney Frank (D-MA)
Charles E. Schumer (D-NY)
Howard L. Berman (D-CA)
Rick Boucher (D-VA)
John Bryant (D-TX)
Jack Reed (D-RI)
Jerrold Nadler (D-NY)
Robert C. Scott (D-VA)
Melvin Watt (D-NC)
Xavier Becerra (D-CA)
Jose E. Serrano (D-NY)
Zoe Lofgren (D-CA)
Sheila Jackson Lee (D-TX)

For a copy and summary of HR 10, the **Common Sense Legal Reforms Act**, contact ATRA's document retrieval service at 202-895-2930 or 1-800-996-0056.

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 158

pre judgment interest

Page 12, lines 10 - 18:

Delete all material.

Renumber the following bill sections accordingly.

Page 17, line 1:

Delete "sec. 19"

Insert "sec. 18"

Page 17, line 4:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 7:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 9:

Delete "sec. 26"

Insert "sec. 25"

9-LS0328\F.25
Ford
3/2/95

AMENDMENT

Deletes non-economic damages cap & released funding of fund

OFFERED IN THE HOUSE

TO: HB 158

Page 3, line 22, after "litigation;":

Insert "and"

Page 3, lines 23 - 24:

Delete all material.

Reletter the following subparagraph accordingly.

Page 6, line 22, through page 7, line 16:

Delete all material.

Renumber the following bill sections accordingly.

Page 16, line 23:

Delete "sec. 14"

Insert "sec. 13"

Page 16, line 27:

Delete "sec. 17"

Insert "sec. 16"

Page 17, line 1:

Delete "sec. 19"

Insert "sec. 18"

Page 17, line 4:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 7:

Delete "sec. 21"

Insert "sec. 20"

Page 17, line 9:

Delete "sec. 26"

Insert "sec. 25"

Alaska State Legislature

Representative Brian S. Porter

CHAIRMAN
HOUSE JUDICIARY COMMITTEE

MEMBER
HOUSE LABOR & COMMERCE COMMITTEE
SELECT COMMITTEE ON LEGISLATIVE ETHICS

MEMBER
FINANCE SUBCOMMITTEES
DEPARTMENT OF LAW
DEPARTMENT OF PUBLIC SAFETY
COURTS

SESSION:
STATE CAPITOL, ROOM 118
JUNEAU, ALASKA 99801-1182
PHONE: (907) 465-4930
FAX: (907) 465-3834

INTERIM:
716 W. 4TH AVE., SUITE 640
ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

DISTRICT 20

Sponsor Summary

for

HB 158 CIVIL LIABILITY

Many individuals and businesses have already experienced the nightmare of suits that **drag on for years** and **high legal costs** that go with them. The ability to recover costs and damages in a civil lawsuit, to be made whole again is not just a privilege - it is every Alaskans right! And protection from **frivilous lawsuits**, from accusations over alleged actions that took place decades ago, and from reasonably high legal costs and court settlement should also be the right of every citizen and business.

In the same respect ,the civil justice system for resolving medical negligence claims has **not adequately protected patients, health care providers, or the public.** Injuries that result from faulty health care not only lead to much personal trauma, they also occassion wild flunctuations in insurance payments, huge legal costs and long delays before settelments or verdicts are ever reached. Such unpredictibility has lead to skyrocketing, medical malpractice insurance rates and a **large public out-cry for reform.**

Tilinghast, a consulting actuarial firm reported in 199? that **only 43% of tort costs of some $132 billion nationwide went to the injured party**. The remaining 57% went to the cost of litigation. In fact, many patients have been unable to obtain compensation through the currect civil justice system because of the high costs of litigation.

Municipality of Anchorage believes HB 158 "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." In fact, injured parties, historically, were wrongfully compensated by punitive damage awards. **Punitive damage awards are to punish** malicious or deliberate disregard acts by a person or company for the safety of others. HB 158 corrects this fault and requires one-half of punitive damages awarded by a court be deposited into the general fund for the benefit of the public welfare.

SHAUB & ASSOCIATES

217 Second Street, Suite 206
Juneau, Alaska 99801
Phone: 463-5118 Fax: 463-5128

HB 158 Civil Liability (Tort Reform) Introduced by Representative Brian Porter and referred to the Judiciary and Finance Committees.

Key Provisions:

- Limits non-economic damages such as pain & suffering to $300,000 and for specified injuries to $500,000. This does not limit money awarded for economic damages such as lost wages and medical costs.

- Prohibits punitive damages unless malice or conscious acts showing deliberate disregard of another person can be shown. Punitive damages are in excess of economic and noneconomic damages and are used to punish a defendant for a malicious, intentional act.

- Provides for punitive damages of at least $300,000 or three times the amount of compensatory damages awarded, whichever is greater. Further requires that one half of punitive damages be deposited into the general fund of the state.

- Allows juries to be told of awards already collected by a claimant for the same injury and deduct that amount from any subsequent judgment.

- Prevents injury claimants form naming only "deep pocket" defendants by allowing the court to determine each party's share of obligation to each claimant.

- Establishes guidelines for the use of expert witnesses.

- Bars damage suits by people who received their injuries in the course of committing a felony.

- Provides for monetary sanctions of up to $10,000 against any attorney in civil cases for filing frivolous, unnecessary and legally deficient pleadings.

- Limits the filing deadline for lawsuits regarding construction liability to eight years from the date of completion or the last action alleged to have caused injury.

Representative Brian S. Porter

CHAIRMAN
HOUSE JUDICIARY COMMITTEE

MEMBER
HOUSE LABOR & COMMERCE COMMITTEE
SELECT COMMITTEE ON LEGISLATIVE ETHICS

MEMBER
FINANCE SUBCOMMITTEES
DEPARTMENT OF LAW
DEPARTMENT OF PUBLIC SAFETY
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DISTRICT 20

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Sectional Summary

of

HB 158 CIVIL LIABILITY

Section 1

FINDINGS AND PURPOSES

Section 2

GENERAL STATUTE OF REPOSE

Statute of Repose: A law that prevents suits from being brought after a certain period of time, regardless of whether or not the statute of limitations has expired. Statutes of repose begin running when a product is sold or a procedure is performed, instead of at the time an injury is discovered.

The purpose of this section is to make it clear that legal actions involving personal injury, death, or property damage be brought within fair and reasonable time. All crimes have a statute of limitations in our legal code. The same standard of fairness should also apply to civil lawsuits.

This section is considered a statute of repose, prescribing an eight year period within which any civil action involving injury, death, or property damage must be filed with the courts. The time period is measured from the date the construction was completed or the last act that allegedly caused the harm.

The eight year period would not apply if the injury, death, property damage was caused by an intentional act or if there was intentional concealment of facts that resulted in a delay of over eight years before the basis for legal action was known. This section does apply if a shorter period of time for bringing a particular legal action imposed under another provision of law.

The terms for completed construction are defined and clarified so as not to be misinterpreted by litigants or courts.

Section 3

LIMITATION ON ACTIONS AGAINST HEALTH CARE PROVIDERS

Statute Of limitations: A law that requires lawsuits to begin within a specified time period from when the plaintiff knew they were injured. When the statute of limitations has expired, the lawsuit can no longer be brought.

Current law, in medical malpractice claims one may file a claim within two years upon discovering the injury. This section states that the two-year limitation does not apply to minors under the age of six. Minors must bring legal actions within two years or before their eight birthday - which is longer. Tolling of the time limitation provides additional protection for minors. The clock stops, if fraud by a parent, guardian, insure health provider is the reason action was not taken. Time is also extended for minors if there was an intentional concealment of facts to intentional concealment or undiscovered presence of a foreign body with no therapeutic or diagnostic purpose, provided this specification applies to the legal action being brought.

The third part of this amendment defines terms to ensure that the statute is understood and applied fairly.

Section 4

CERTAIN STATUTORY LIABILITIES TO BE BROUGHT INTO YEARS

This section removes unclear and conflicting language from the statute. The existing two year limit for actions involving libel, slander, assault, battery, seduction, or false imprisonment remains the same.

Section 5

GENERAL STATUTE OF LIMITATIONS

This section places a two-year limit on actions involving injury, death, or property damage after the date claimants could reasonably believe they had a claim.

Requires that a person commence a civil action for personal injury, death, or property damage within two years of the time the person knows or should have known of the injury, death or damage. Provides that this section does not apply if a shorter period of time is required under another provision of law.

Section 6

NONECONOMIC DAMAGES

Noneconomic damages: Money awarded that does not compensate the injured person for monetary loss, but rather, for example, for pain and suffering.

Economic damages: Money awarded to an injured person to compensate for his or her actual monetary loss. For example, economic damages compensate for medical costs and lost wages.

This section extends the definition for noneconomic losses to include claims for wrongful death as well as personal injury. The definition clarified by removing "negligence", which is difficult to establish or disprove. The change further defines noneconomic losses to include loss of consortium (i.e., the right to a husband's or wife's fellowship).

This section provides that damages for noneconomic losses are limited to certain types of injuries, such as pain and suffering. Limits damages for noneconomic losses to $350,000 , except that damages are limited to $500,00 for certain specified injuries. Provides an exception for damages awarded against a person committing or attempting to commit a felony. Provides that multiple injuries sustained as a result of a single incident shall be treated as a single injury for the purpose of this section.

Section 7

PUNITIVE DAMAGES

Punitive damages: Sometimes called exemplary damages, punitive damages are awarded in to punish a defendant for malicious, intentional act rather than one that is merely negligent.

The current statute allows punitive damages to be awarded when there is "clear and convincing evidence," but, does not explain evidence in what actions. This section requires that punitive damages may not be awarded unless malice or conscious acts showing deliberate disregard of another person by the person from whom the punitive damages are sought is shown.

Section 8

LIMIT OF PUNITIVE DAMAGE AWARD

Any awards for punitive damages will be at least $300,000 or up to three times the amount of compensatory damages awarded. Further, one-half of the award will be deposited into the general fund of the state.

Section 9

DAMAGE CALCULATION

The term "death" is added so that the statute applies to damages awarded for legal actions involving both personal injury and death.

The added text states that after past and future economic and noneconomic losses have been calculated by the court, the amount of state and federal taxes that would have been paid is subtracted from the award. The amount of tax should be calculated using the state and federal tax rate at the time of the injury or death.

IRS code 104(A)(2) allows income from awards involving personal injury or death to be exempt. Under current statutes, awards are calculated as the gross loss to the claimant. Therefore, the prevailing party is awarded their actual past and projected loss, plus the amount they would have paid in taxes under normal circumstances. Claimants are being compensated as if future earnings were tax exempt.
This section ensures that the prevailing party is fairly compensated for actual after-tax losses. Specifying how the tax rate should be calculated removes the need to speculate how much future taxes will be and prevents future litigation for award adjustments.

Section 10

PERIODIC PAYMENTS

Periodic payments: Under a periodic payment system, lawsuit awards are paid to the plaintiff throughout his or her lifetime, for the period of disability or for any other set period, instead of a lump sum.

This section changes the phrase "an injured party" to " a party." This allows anyone involved in the suit, rather than just the claimant, to request periodic payments for amounts awarded for future damages.

Requires that future economic and noneconomic damages that exceed $100,000 be paid periodically whether or not it is requested by a party. Provides that a portion of a judgment owed to an attorney under a contingent fee agreement, must be reduced to present value and paid in a lump sum.

Section 11

SECURITY FOR PERIODIC PAYMENTS

Require that the court require security be posted for periodic payments, except when the obligation is recognized by the state or an insurer. Requires that the judgment include increases for future anticipated inflation. Provides to the judgment creditor damages caused by the failure to make periodic payments, including costs and attorney fees.

Section 12

INFLATION ADJUSTMENTS FOR PERIODIC PAYMENTS

The words "for personal injury or death" are added to the statute. This section clarifies what types of damage awards are being regulated by this statute.

Courts must specify the percentage or the method for increases by future periodic payments will increase to cover inflation.

By specifying the amount or method allowed for inflation, the amendment prevents future litigation for an adjustment of the original award.

Section 13

COLLATERAL BENEFITS

Collateral Source Rule: A trial rule where the jury is not told that the injured person has received money for their injury from other sources, such as an insurance policy or another defendant.

This prevents unjust enrichment from claimants who collect multiple awards for the same loss.

Prohibits a claimant from recovering damages that duplicate amounts received from collateral sources. Provides exceptions for certain collateral sources that are subrogated to the claimant, and for death benefits and workers' compensation benefits. Allows a person defending a claim to introduce evidence of amounts received from certain collateral sources. Prohibits a person who provides a collateral benefit that is introduced into evidence from recovering that amount from the claimant or being subrogated the rights of the claimant.

Section 14

APPORTIONMENT OF FAULT

Provides that the court shall determine each party's equitable share of the obligation to each claimant. Provides than assessment may only be used to measure percentages of fault and not to subject a person to civil liability.

The word "party" creates a loophole that restricts apportionment fault to those

named in the legal action. By considering all persons or entities which contributed to a loss, each is fairly apportioned a degree of fault based on their own actions.

Thus, this section provides that the court shall determine each party's equitable share of the obligation to each claimant. Provides that an assessment may only be used to measure percentages of fault and not to subject a person to civil liability.

Section 15

APPORTIONMENT OF FAULT

Changes the statute number to conform with revised law and clarifies the rules so that while all parties that contributed to injury or death are fairly considered when assessing the percentage of fault.

Section 16

EFFECT OF RELEASE

Provides that a release given in good faith does not discharge another person from liability, but does reduce the total amount awarded by the jury or court by the amount stipulated in the release or the consideration paid for it, whichever is greater.

Section 17

OFFERS OF JUDGMENT

The existing statute says that prior to 10 days before trial begins, either party can make an offer to settle a claim, plus accrued cost. This must be accepted within 10 days and correctly recorded by the clerk.

If the court's judgment is less favorable to the recipient of the offer, the person who refused the offer must pay the offerer's costs and attorney fees incurred since the date when the higher offer to settle was made.

Section 18

PREJUDGMENT INTEREST

The section changes the interest rates on judgments and decrees from a set 10.5% a year to a floating rate of 3% above the federal discount rate in effect January 2nd of the year of the judgment. This rate is not used if a different rate has previously been agreed to by contract.

Federal discount rates have been as low as 1%(1942) and as high as 14%(1981). Allowing annual adjustments for prejudgment interest brings charges in line with the current market and prevents unfairly high or low rates.

Provides that the rate of interest on judgments and decrees, including prejudgment interest, is equal to prejudgment interest for certain future damages or punitive damages.

Section 19

PREJUDGMENT INTEREST

The purpose for the prejudgment interest is to allow claimants reimbursement of funds that would normally have been in their possession plus any interest that amount could have earned prior to the trial. This is not the case in damages awarded for future losses and these sums can be invested and interest earned on the funds.

Prejudgment interest is subject to federal income tax and attorney fees commission.

Section 20

UNIFORM ARBITRATION ACT

Amends the section on application of the Uniform Arbitration Act so that it applies to the statutes as listed after adoption of House Bill 158.

Section 21

MEDICAL EXPERT WITNESS QUALIFICATION

This section establishes qualifications for an expert witness to testify on issues relating to appropriate medical standard of care unless the witness is a health care provider.

MEDICAL BOARD OVERSIGHT OF MEDICAL EXPERT WITNESSES

MEDICAL EXPERT WITNESSES

Establishes guidelines for the court as to when to allow a medical expert witness to testify in cross-examination.

Section 22

DEFINITIONS

Provides definitions for professional negligence and professional services.

Section 23

CONTINGENT ATTORNEY FEE AGREEMENTS

Provides that if an attorney collects a contingency fee in connection with an award of punitive damages, the contingent fee due the attorney shall be calculated after that portion of punitive damages due the state has been deducted from the total award of damages.

Section 24

CIVIL LIABILITY OF HOSPITALS FOR NON EMPLOYEES

The purpose of this section is to clarify the circumstances in which hospitals are held directly liable for the actions of health care providers not employed by the hospital. Current law permits claimant to sue only the hospital rather than the independent contractor who may have less ability to pay.

Provides that a hospital is not liable for civil damages resulting from an act or omission by a health care provider who is not an employee or actual agent of the hospital. However, the hospital must provide notice that the health care provider is an independent contractor and a notice of limited liability must be posted in all admissions areas and published in area newspapers annually.

The hospital must also use caution and prudence in granting privileges to independent health care providers, have a review proceeding to monitor independent contractors, and be prepared to revoke or restrict privileges when needed.

Hospitals are libel for civil damages if the hospital or its employees were negligent or acted with intentional misconduct.

The final section defines health care providers and hospital as the terms are used in this statute.

Section 25

DAMAGES RESULTING FROM COMMISSION OF A CRIME

Provides that a person committing, attempting to commit, or fleeing from the commission of a felony whose action substantially contributed to the person's injury or death, is prohibited from recovering damages for personal injury or death.

Section 26

SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

Sanctions for failure to sign a pleading or filing a frivolous lawsuit is a matter in the discretion of the trial court. This section imposes monetary sanctions against any attorney in civil cases for filing frivolous, unnecessary and legally deficient pleadings.
If it is alleged or appears that a pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, may set the matter for hearing. If the court determines that the motion is in violation, monetary sanctions will be implemented.

Section 27

Repealing AS 09.55.548

Section 28 through 33

Technical sections relating to amending Alaska Rule of Civil Procedure 49,68,702 and 95.

Section 34

Severability

Section 35

This Act applies to all causes of action accruing on or after the effective date of this Act.

Section 36

This Act takes effect July 1, 1995

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

February 15, 1995

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

Re: Support HB 158

Dear Representative Porter
& Members, House Judiciary Committee:

Community hospitals and nursing homes from across the state join with other health care organizations, architects, engineers and the business community in asking the Judiciary Committee to approve HB 158, the 1995 Comprehensive Liability Reform Bill.

HB 158 addresses one of the most important issues confronting the Legislature this session. The cost of health care.

It will not be possible to control costs within our healthcare system, if we do not control the costs related to the inefficiency of the liability system. Tillinghast, a consulting actuarial firm reported in 1992 that only 43% of tort costs of some $132 billion nationwide went to the injured party. The remaining $57% went to the cost of litigation. (Administrative costs, 24%; defense costs 18% and plaintiff costs 15%.)

Medical liability costs include the cost of insurance, defensive medicine and the costs borne by the manufacturers of medicines and medical supplies.

Section 24 on page 14 in HB 158 is very important to Alaska hospitals. This section removes the hospital as the deep pocket when uninsured or under-insured physicians are sued. An Alaska Supreme Court decision holds hospitals liable for emergency room physician actions, even though the hospital or it's personnel did nothing wrong.

We look forward to working with you and the Judiciary Committee on this most important issue.

Sincerely,

Harlan R. Knudson
President/CEO

310 Seward Street #11 • Juneau, AK 99801 • (907) 586-1790 • Fax (907) 463-3573

Denali Center
Fairbanks Memorial Hospital

Denali Center
1949 Gillam Way
Fairbanks, AK 99701
(907) 452-1921
Fax (907) 452-4522

Fairbanks Memorial Hospital
1650 Cowles Street
Fairbanks, AK 99701-5996
(907) 452-8181
Fax (907) 458-5324

2/16/95

To: Representative Brian Porter

From: Barbara S. ECHO, M.D.
Attending Physician, Emergency Department
Fairbanks Memorial Hospital
President, Alaska College of Emergency Physicians.

Re: HB 158

I am very concerned about liability Reform for the state of Alaska. Emergency Physicians practice in a particularly risky environment. We need improved protection from liability. I would therefore like to express my support for HB 158

Sincerely,

Barbara S. Echo M.D.

2-15-95

Dear Brian!

I've just become aware of HB 158 and after reading it, I wanted you to know that I support it whole-heartedly and hope that it passes unmodified by the lawyers. Good luck!

Best regards,

Don Rogers, MD

(recently and happily retired)

A L A S K A

NFIB
National Federation of
Independent Business

February 15, 1995

Representative Brian Porter
State Capitol
Juneau, AK 99801-1182

Dear Representative Porter,

With nearly 4,590 Alaska members, the National Federation of Independent Business/Alaska is the state's largest small-business advocacy organization. On behalf of the Alaska membership I would like to thank you for again introducing tort reform legislation and offer our support for HB 158.

The ever increasing costs of litigation and liability insurance has a staggering impact to small business and the U.S. economy. An explosion of product liability and personal injury cases and the unpredictability of damage awards has been a primary cause of the upward spiral of costs.

Each year, NFIB/Alaska polls its diverse membership on a variety of issues. The federation uses the poll results to form its legislative agenda. The 1994 and 1995 ballots covered a variety of tort reform issues. The Alaska membership has voted overwhelmingly in favor of many of the provisions in your legislation.

Following are the results of three tort issues on the 1995 NFIB/Alaska ballot:

Should the legislature reform the Alaska tort law system by making the following changes?

a. Limit awards for non-economic losses, generally known as "pain and suffering", to $500,000 for each incident. (93.6% responded yes)
b. Prevent plaintiffs from collecting more than once for the same injury? (96% yes)
c. Prohibit damage suits by people who receive their injury in the course of committing a crime. (99.4% yes)

I look forward to working with you on this and other issues of importance to the small and independent business members of NFIB/Alaska.

Sincerely,

Thyes Shaub

217 Second Street, Suite 206 • Juneau, AK 99801 • 907-463-5118 • Fax 907-463-5128

NORCAL Mutual Insurance Company

NORCAL Mutual Insurance Company
Alaska Office

4000 Old Seward Highway, Suite 203
Anchorage, Alaska 99503
Fax: (907) 562-7804
(907) 563-3414

FAX

Page #1 of 1 pages.
If you do not receive all of the pages, please call (907) 563-3414 as soon as possible.

TO: Alaska State Legislature
ATTN: Representative Brian Porter
FROM: Art Stanford, Underwriting Manager - Alaska
DATE: February 16, 1995
RE: Support for H.B. 158

This message is to express support for H.B. 158.

NORCAL also supported tort reform efforts during the last legislative session and Phil Hinderberger, NORCAL's Corporate Counsel, submitted testimony in support of the bill pending at that time. He advises that his testimony is equally relevant to HB158 and he would again submit testimony if the current bill goes to hearing.

We feel that California's experience in effecting meaningful tort reform demonstrates the value of this type of legislation which has served to the benefit of healthcare providers, patients and the public as well. Clearly, the substantial cost reduction (not to mention availability) of malpractice insurance premiums in California since the passing of M.I.C.R.A. amply demonstrate its efficacy. Furthermore, it created a professional liability insurance market stability that previously was one of the most volatile lines of coverage.

Art Stanford

Note: Please number each page to be transmitted, starting with this cover sheet
This page will be retained as a corporate fax record

ALASKA STATE MEDICAL ASSOCIATION

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

February 13, 1995

The Honorable Brian Porter
Chairman, House Judiciary Committee
Alaska State Legislature
State Capitol (MS 300)
Juneau, Alaska 99801-1182

Re: House Bill 158

Dear Representative Porter:

The Alaska State Medical Association and its member physicians strongly support the passage of House Bill 158.

Liability insurance costs are out of control. Physician insurance liability premiums significantly restrict access to health care, particularly in high risk medical specialties like obstetrics. About 60% of family physicians, who used to provide about two thirds of obstetrical care in rural areas, have discontinued the practice of obstetrics because of these concerns. About 40% of OB-GYN's have restricted their obstetrical practices.

Liability concerns can convert a "caring" doctor-patient relationship into one which is less trusting and may even become adversarial. Liability concerns lead to physicians ordering additional documenting X-rays and tests for protection in case there is litigation. Partly because of liability concerns, physicians now practice in an extraordinarily stressful environment. Unfortunate outcomes, which are for the most part simply endemic risks of life now lead to courtroom challenges to their professional competence and personal integrity.

The current laws benefit lawyers more than injured patients. We recommend no limit whatsoever on a patient's right to recover out-of-pocket losses, such as medical expenses, lost wages and rehabilitation costs. Everyone is entitled to full compensation for their actual losses. But the current compensation system for non-economic damages such as pain and suffering has no limitations, and this has put the system out of control. When injured patients currently receive less than a third of the liability premium. The system needs to be fixed.

We believe HB 158 is good step toward making the liability system work better for all injured Alaskans.

Sincerely,

Raymond Schalow
Executive Director

PAUL M. WORRELL, M.D.
INTERNAL MEDICINE
UNIVERSITY PROFESSIONAL CENTER
3650 LAKE OTIS PARKWAY
ANCHORAGE ALASKA 99508
561-4402

February 16, 1995

Representative Brian Porter

Dear Representative Porter:

I would like to let you know that I appreciate House Bill 158. I think it is 20 years overdue for Tort Liability Reform. I am glad to see that this Legislature is willing to take some responsibility and begin to solve these substantial problems in our community.

Sincerely yours,

Paul M. Worrell, M.D.

pmw:pk