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June 14, 1996

The Honorable Gail Phillips
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Post-It Fax Note 7671		Date 6-14	# of pages 8
To Brian	From Juneau		
Co/Dept	Co.		
Phone #	Phone #		
Fax # 277-8787	Fax # 258-5510		

Dear Speaker Phillips:

Under authority of art. II, sec. 15, of the Alaska Constitution, I have vetoed the following bill:

Senate CS for CS for House Bill 158 am S (ct rls fld S)
"An Act relating to civil action."

I agree with many Alaskans that meaningful reform of Alaska's civil justice system is necessary. The system should be more efficient yet just, and we should reduce frivolous litigation while preserving the ability of innocent victims to be compensated for injuries caused by others. Alaska businesses are faced with the risk of excessive lawsuit awards, high liability insurance rates and the threat of settlement or costly litigation. These costs ultimately are passed on to Alaska consumers. I believe we can improve the system while protecting the rights of all Alaskans. Unfortunately, this bill does not fairly and reasonably address these problems.

During this year's legislative session, some good concepts for reforming our civil justice system were discussed, including reasonable limits on punitive damages, cutting back on frivolous lawsuits, insurance rate reductions and mediation to encourage early settlement of suits. Few of those concepts survived in this bill in a form that improves the situation. Instead, the current version was hastily rewritten in the dead of night and subject to little public review. When problems were identified by my Administration and others, they were ignored. (True?)

As a result, this bill falls far short of the mark of meaningful and responsible tort reform. It is extreme, seriously flawed and fails to implement these positive aspects of tort reform.

in a reasonable way. In fact, in some cases, this bill makes problems worse by increasing litigation expenses, lengthening the litigation process and clouding the rights of thousands of Alaskan families. A growing number of Alaskans from all walks of life -- fishermen, Native organizations, local governments, conservation groups -- oppose the bill.

I am vetoing this bill for three primary reasons: it was the product of a flawed public process, it dictates poor public policy, and it contains serious legal defects and constitutional problems.

Flawed public process. Although the bill was the subject of many hearings, the Legislature chose to ignore the progress made during that process. Instead, the bill was largely rewritten by the Senate Rules Committee with little public notice or involvement.

One result of that process, which supporters of the bill claim is unintentional, is dangerous and likely unconstitutional. This bill would retroactively preclude certain punitive damage awards to innocent victims, even after a jury has issued a verdict. In a case familiar to all Alaskans, I am advised this provision could jeopardize the rights of 30,000 Alaskans affected by the Exxon Valdez oil spill. No responsible public official can or should take that risk.

Even legislative leaders recognized this flaw in the bill when, on the 28th day of the 30-day special session, they requested another opportunity to correct the bill.

Poor public policy. The bill is littered with poor public policy provisions which complicate, instead of streamline, the civil justice system which increases the amount, cost and complexity of litigation and which limit the rights of innocent Alaskans to reasonable and just compensation for injuries caused by others.

Certainly a key provision of any tort reform effort should be reduced insurance rates so individuals and businesses receive some relief from the high cost of insurance. Yet, there is no guarantee of reduced insurance rates resulting from this bill. Despite many efforts by my Administration and others to provide meaningful relief in liability insurance rates as part of this bill, the Legislature rejected them.

Legal defects and constitutional problems. The bill contains contradictions, legal defects and provisions which are likely unconstitutional. For example, the "statute of repose" provision would prevent a suit being filed against a wrongdoer after 10 years, even if the injury did not occur until after this period of time. The Alaska Supreme Court has already indicated this provision may be unconstitutional.

The restrictions on expert testimony could prevent family doctors from testifying as experts about medical conditions of their long-term patients, a provision which is likely unconstitutional. The burden on injured workers to reimburse their employer for workers'

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compensation benefits out of partial damages collected from another wrongdoer is unfair and unworkable.

My Administration and others identified many of these problems and offered solutions, but they were ignored. Attached to this letter is a detailed analysis of HB158.

I remain ready to work with the Legislature and all affected Alaskans to develop a new bill through an open public process that achieves fairness, efficiency and reduction of insurance rates. To that end, I will appoint an advisory task force charged with reporting back to me before the next legislative session recommendations for accomplishing the following goals:

1. Make the civil justice system more efficient and reduce frivolous litigation;
2. Provide for fair and just, but not excessive, compensation for those injured by wrongdoing;
3. Lower liability insurance rates; and
4. Provide for reasonable punitive damage awards sufficient to deter conduct and practices that harm innocent Alaskans, without hampering a positive business environment or allowing excessive windfall recoveries.

I look forward to working with you to reform Alaska's civil liability system.

Sincerely,

S/S TONY KNOWLES
Tony Knowles
Governor

ANALYSIS OF SCS CSHB 158 (Rls) and S (ct rls fld s) -TORT REFORM

Throughout the Legislative process, the consistent Administration position has been that tort reform legislation should do three things: 1) make the civil justice system more efficient and reduce frivolous litigation; 2) still allow for fair and just compensation for injured parties, and not create major constitutional problems through unfair treatment of those who have been injured; and 3) lower liability insurance rates. The corollary to these precepts is that tort reform legislation should *not* 1) increase the cost, complexity, and amount of litigation; or 2) cut off the rights of injured Alaskans to recover reasonable compensation for injuries sustained by another party's negligent acts. Although some of the provisions included in this bill arguably comply with these basic tenets, when viewed as a whole this bill fails to meet most, if not all, of these tests.

The bill will increase the amount, cost, and complexity of litigation.

The Department of Law has prepared a detailed analysis outlining the numerous legal issues raised by this bill. It is worthwhile to briefly list the principal issues identified by Law, since each would likely lead to additional litigation.

1. *Commercial Recreational Activities (sec. 2).* This section of the bill was added very late in the legislative process, without adequate time for public comment or legal review. No other state has similar statutes. Law has now identified several ambiguities in the section, which will likely lead to extensive clarifying litigation. Also, the section probably violates constitutional equal protection guarantees.
2. *Statute of Repose (sec. 3).* This provision would prevent a suit from being filed against a wrongdoer after 10 years, even if the injury did not occur until after this period of time.¹ The Alaska Supreme Court has already indicated that such a statute may be unconstitutional.
3. *Retroactivity of Punitive Damages Limitations (sec. 24).* By far the most disturbing section of the bill is the clause providing a retroactive effective date for the bill's punitive damages limits. This provision is probably unconstitutional as a violation of due process, and might also constitute an unlawful taking, especially because the section appears to be designed to benefit specific private parties to existing lawsuits. Furthermore, an argument can, and most certainly would, be made that the section applies to the punitive damages award in the *Exxon Valdez* litigation.
4. *Allocation of Fault (secs. 10-11).* The proposed changes would allow the fact finder in a trial (the jury, or the judge in a case tried without a jury) to apportion responsibility for the accident not only among the parties in court, but to any parties responsible for the injuries, even if one or more of those responsible are immune from liability. It creates the classic "empty chair" situation, where all those potentially liable to plaintiff argue that the majority of fault lies with those not in court.² Also, because the bill section was not coordinated with worker's compensation statutes, the injured

person could be required to give back some of his recovery to his employer, even though he could not receive compensation for the employer's fault in causing the accident.

5. *Offers of Judgment (sec. 13).* Without getting into the complexities of the legal analysis, the practical effect of the changes proposed could be to *reduce*, rather than increase, the incentives for early settlement of cases.

6. *Admissibility of Expert Testimony (sec. 15).* The restrictions on expert witnesses are at best confusing, and if interpreted by a court expressly as written, would likely be unconstitutional.

7. *New Civil Causes of Action for Frivolous Practice (sec. 19).* This section would create extensive additional litigation, providing an avenue for litigious litigants to bring many new claims and new lawsuits, adding to the cost and complexity of litigation.³

The bill will cut off the rights of injured Alaskans to reasonable and just compensation for injuries.

1. *Statute of Repose (sec. 3).* As noted above, operation of the statute of repose would cut off a person's right to recover, even if the accident had not yet occurred.⁴

2. *Hospital Non-Liability (sec. 18).* The bill would allow a hospital to exempt itself from liability for damages caused by the negligence of its emergency room doctors, if those doctors carry at least \$500,000 in insurance. That amount of insurance is probably inadequate to compensate for most serious emergency room injuries.

3. *Commercial Recreational Activities (sec. 2).* Although the tort reform advocates claim that this section merely codifies current law, the extensive lobbying efforts of the visitor industry clearly demonstrate that industry believes this section will reduce their liability to injured customers.

4. *Mandatory Arbitration (sec. 17).* In general the concept of alternative dispute resolution procedures such as arbitration and mediation can, in some cases, reduce the overall costs of litigation. However, the provisions in this bill could have the additional effect of foreclosing legitimate damage claims. The arbitration procedures set out in the bill have been made applicable only to relatively small cases where the amount claimed is less than \$50,000; by requiring the parties to pay all costs associated with the arbitration, the bill might effectively cut off a smaller claimant's ability to bring suit in the first place.

5. *Offers of Judgment (sec. 13).* The provisions relating to offers of judgment place an almost impossible burden on a plaintiff in a case involving multiple defendants, because the plaintiff will be required not only to reasonably predict how much he or she will recover in the case, but also the relative percentage of responsibility for each defendant; if the predictions for any single defendant are wrong, the plaintiff risks being held liable for all costs and attorney fees of the defendant who made the offer. Many injured plaintiffs cannot afford to take such risks and will be forced to accept unreasonably low settlement offers.

The Legislature totally failed to utilize a public, consensual process in crafting this bill.

Although this legislation went through several committees and had numerous hearings, the Legislature chose to ignore the results of that process and instead adopt a new version of the bill in the final hours without any public process. This session, several hearings were held on HB 158 in the Senate Judiciary and Finance Committees, in which many of the suggestions raised by the Administration and others were incorporated into the bill.

However, the Finance Committee version of the bill was essentially and a totally new version adopted by the Senate Rules Committee, apparently with the assistance and input of the strongest tort reform advocates. Included in this final version for the first time were the provisions relating to commercial recreational activities, a new arbitration procedure, and the retroactive limitations on punitive damages. The only public hearing on the final bill was a 15 minute Rules Committee hearing, held minutes after the bill was made available to the public for the first time.

The Legislature was unwilling to work to adopt acceptable, reasonable tort reform. For example, the tort reform advocates argued that tort reform would help reduce liability insurance rates. However, the Legislature refused to require a 10 percent reduction in rates as a precondition for the bill's taking effect, because the advocates argued that it would take a few years of the bill being in place before any results would be realized.

In response to this argument, Senator Phillips offered an amendment on the Senate floor to sunset the bill in five years if rates did not come down, thereby giving the bill's provisions a chance to have an impact before the rate reduction would be required; this amendment was also rejected.

Conclusion

Last year, Alaskans were charged with 28,370 misdemeanors, 2,778 felonies, came to court 68,761 times for traffic offenses, filed 8,692 domestic relations cases (including 3,984 for divorce or dissolution), and filed 9,717 small claims cases. There were 21,378 cases filed in Superior Court. However, there were only 993 personal injury cases filed —4.6 percent of the total. Only 43 civil jury trials were held last year in the state, and these included not only tort claims, but debt collection, review of administrative orders, and contract disputes. Thus, contrary to the claims of tort reform advocates, there is no explosion of tort litigation in Alaska.

Nonetheless, there are several features of this bill that could improve our civil justice system and form the basis for effective, responsible tort reform. Placing a reasonable limit on the amount of punitive damages that may be awarded in future cases (sec. 7) may be worthy of consideration, and a requirement that some percentage of such awards be turned over to the state (sec. 7) can maintain the benefits of the punitive damage process without giving plaintiffs an unreasonable windfall recovery. Tying interest rates on judgments to a variable market rate makes sense (sec. 14). Allowing hospitals to avoid liability for negligence of their emergency room doctors (sec. 18) may be a laudable goal, provided the doctors are required to carry sufficient insurance to protect patients. Prohibiting a person who is injured while committing a felony from recovering for such injuries

(sec. 20) does not offend most people's sense of justice. And enhancing the penalties under Civil Rule 11 against attorneys who file frivolous pleadings (sec. 21) could help reduce litigation and ensure better judicial practice. Other related concepts that warrant consideration, discussed at various times during the hearing process on this bill, include some method to ensure insurance rate reductions, and mandatory mediation similar to that proposed in CSHB 414 (Jud).

In short, there are many aspects of tort reform that could help reduce the costs and complexity of litigation, and presumably the cost of liability insurance in Alaska, without at the same time cutting off our citizens' right to recover reasonable compensation for injuries caused by the fault of others. Unfortunately, in passing HB 158, the Legislature chose a less humanistic approach: it elected to simply grant unwarranted benefits to insurance companies by cutting off injured parties' rights.

Alaska Department of Commerce and Economic Development, 6/13/96



LAWS OF ALASKA

1996

Source

SCS CSHB 158(RLS) am S(ct rls fld S)

Chapter No.

AN ACT

Relating to civil actions.

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

THE ACT FOLLOWS ON PAGE 1

AN ACT

1 Relating to civil actions.

2

3 * **Section 1. PURPOSE.** It is the purpose of this Act to

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

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

9 (3) help match losses with compensation by helping to

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

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

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

- 1 (D) eliminate duplicate recoveries;
2 (E) reduce the costs of litigation;
3 (F) establish appropriate thresholds for a damage award in order to
4 allow predictability of liability exposure; and
5 (G) reduce the ultimate costs to the state and to local governments of
6 providing medical services to those who cannot otherwise afford those services;
7 (4) reduce the amount of litigation proceeding to trial by modifying the
8 allocation of attorney fees and court costs based on the offer of judgment and the final court
9 award thereby providing a financial incentive to both parties to settle the dispute;
10 (5) enact a statute of repose that meets the tests set out in Turner Construction
11 Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988);
12 (6) clarify the circumstances in which hospitals are held directly liable for the
13 actions of emergency room physicians who are not employees of the hospital;
14 (7) encourage health care providers to provide quality medical care in all areas
15 of this state at a cost that is affordable;
16 (8) stabilize the rapidly escalating costs of health care by curtailing the rapid
17 escalation in malpractice premiums and thereby make broader based health care available to
18 more residents of the state;
19 (9) require that 75 percent of punitive damages awarded by a court be
20 deposited into the general fund for the benefit of the public welfare and to deter future harm
21 to the public.

22 * Sec. 2. AS 05 is amended by adding a new chapter to read:

23 **CHAPTER 50. CIVIL LIABILITY FOR COMMERCIAL**
24 **RECREATIONAL ACTIVITIES.**

25 **Sec. 05.50.010. ACCEPTANCE OF INHERENT RISKS.** Participation in
26 a commercial recreational activity constitutes acceptance of the inherent risks of the
27 commercial recreational activity that are or should be apparent to an ordinarily prudent
28 person.

29 **Sec. 05.50.020. REDUCTION FOR NEGLIGENCE.** A person who accepts
30 an inherent risk of a commercial recreational activity as described in AS 05.50.010 is
31 negligent to the extent that the inherent risk causes injury, death, or property damage.

1 In an action seeking to recover damages for injury or death to a person or harm to
2 property resulting from an inherent risk of a commercial recreational activity,
3 compensatory damages shall be reduced by the injured person's negligence as provided
4 under AS 09.17.060.

5 Sec. 05.50.030. RESPONSIBILITIES OF PARTICIPANTS. A participant in
6 a commercial recreational activity has the responsibility to

- 7 (1) learn about and expressly accept the risks of the activities;
- 8 (2) act within the limits of the person's abilities;
- 9 (3) heed all warnings regarding participation in the commercial
10 recreational activity;
- 11 (4) maintain control of the participant's person, the participant's
12 children, and any equipment, devices, or animals the participant is using;
- 13 (5) refrain from acting in a manner that may cause or contribute to
14 injury of the participant or another person.

15 Sec. 05.50.040. RESPONSIBILITIES OF OPERATORS OF COMMERCIAL
16 RECREATIONAL ACTIVITIES. A person who operates a business that offers a
17 commercial recreational activity shall

- 18 (1) explain to a participant the
 - 19 (A) fundamental inherent risks of the commercial recreational
20 activity; and
 - 21 (B) skills or equipment required to participate in the commercial
22 recreational activity that are not apparent to an inexperienced participant;
- 23 (2) require that employees who are responsible for assisting participants
24 in the actual performance of a commercial recreational activity have training in basic
25 first aid and cardiopulmonary resuscitation and explain to those employees how to use
26 emergency medical services available in the area;
- 27 (3) maintain recreational equipment and facilities in good repair;
- 28 (4) provide trained and competent personnel; and
- 29 (5) act in a reasonably safe and competent manner.

30 Sec. 05.50.050. INTERACTION WITH OTHER LAWS. This chapter does
31 not affect the immunity of an owner of unimproved land under AS 09.65.200 or of a

1 ski area operator under AS 05.45.

2 Sec. 05.50.100. DEFINITIONS. In this chapter,

3 (1) "children" means persons under 18 years of age;

4 (2) "commercial recreational activity" means a recreational activity for
5 which the participants pay compensation;

6 (3) "recreational activity" means an outdoor activity undertaken for the
7 purpose of exercise, education, relaxation, pleasure, sport, or as a hobby.

8 * Sec. 3. AS 09.10.055 is repealed and reenacted to read:

9 Sec. 09.10.055. STATUTE OF REPOSE OF 10 YEARS. (a) A person may
10 not bring an action for personal injury, death, or property damage unless commenced
11 within 10 years of the earlier of the date of

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

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

18 (b) This section does not apply if

19 (1) the personal injury, death, or property damage resulted from

20 (A) exposure to a hazardous substance; in this subparagraph,
21 "hazardous substance" means an element or compound that, when it enters into
22 the air or on the surface or subsurface land or water of the state, presents an
23 imminent and substantial danger to public or individual health and welfare;

24 (B) an intentional act or gross negligence;

25 (C) fraud or fraudulent misrepresentation;

26 (D) breach of an express warranty or guarantee; or

27 (E) a defective product; in this subparagraph, "product" means
28 an object that has intrinsic value, is capable of delivery as an assembled whole
29 or as a component part, and is introduced into trade or commerce; "product"
30 includes an element or compound that if ingested by humans or if humans are
31 exposed to, or are in contact with the element compound or product, poses a

1 threat to human health;

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

4 (3) a shorter period of time for bringing the action is imposed under
5 another provision of law; or

6 (4) a longer period of time for bringing the action was provided under
7 a contract.

8 (c) The limitation imposed under (a) of this section is tolled

9 (1) as provided under AS 09.10.140(a)(1); and

10 (2) during any period in which there exists the undiscovered presence
11 of a foreign body, that has no therapeutic or diagnostic purpose or effect, in the body
12 of the injured person and the action is based on the presence of the foreign body.

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

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

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

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

28 Sec. 09.10.075. LIMITATION ON ACTIONS INVOLVING INJURY TO
29 PERSON OR PROPERTY. (a) A person may not bring an action for personal injury,
30 death, property damage, or injury to the rights of another not arising on contract,
31 unless the action is brought within two years of the accrual of the action.

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

3 * Sec. 6. AS 09.17.020 is amended to read:

4 Sec. 09.17.020. PUNITIVE DAMAGES. Punitive damages may not be
5 awarded in an action, whether in tort, contract, or otherwise, unless supported by clear
6 and convincing evidence of outrageous conduct, including acts done with malice or
7 bad motives, or reckless indifference to the interest of another person.

8 * Sec. 7. AS 09.17.020 is amended by adding new subsections to read:

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

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

17 (d) If a person receives an award of punitive damages, the court shall require
18 that 75 percent of the award be deposited into the general fund of the state. This
19 subsection does not grant the state the right to file or join a civil action to recover
20 punitive damages.

21 * Sec. 8. AS 09.17.040(e) is amended to read:

22 (e) If a judgment is paid by periodic payments, the [THE] court shall
23 [MAY] require security be posted [,] in order to ensure that funds are available as
24 periodic payments become due. The court may waive this requirement if the person
25 in whose favor judgment is entered agrees to waive the posting of security or the
26 court determines that waiver is prudent in the action [NOT REQUIRE SECURITY
27 TO BE POSTED IF AN AUTHORIZED INSURER, AS DEFINED IN AS 21.90.900,
28 ACKNOWLEDGES TO THE COURT ITS OBLIGATION TO DISCHARGE THE
29 JUDGMENT].

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

31 (f) A judgment ordering payment of future damages for personal injury or

1 death by periodic payment shall specify the recipient, the dollar amount of the
2 payments, including any increases in future payments for anticipated inflation or
3 the formula for the increases, the interval between payments, and the number of
4 payments or the period of time over which payments shall be made. Payments may
5 be modified only in the event of the death of the judgment creditor, in which case
6 payments may not be reduced or terminated, but shall be paid to persons to whom the
7 judgment creditor owed a duty of support, as provided by law, immediately before
8 death. In the event the judgment creditor owed no duty of support to dependents at
9 the time of the judgment creditor's death, the money remaining shall be distributed in
10 accordance with a will of the deceased judgment creditor accepted into probate or
11 under the intestate laws of the state if the deceased had no will.

12 * Sec. 10. AS 09.17.080(a) is amended to read:

13 (a) In all actions involving fault of more than one person [PARTY TO THE
14 ACTION], including third-party defendants and persons who have been released under
15 AS 09.17.091 [AS 09.16.040], the court, unless otherwise agreed by all parties, shall
16 instruct the jury to answer special interrogatories or, if there is no jury, shall make
17 findings, indicating

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

20 (2) the percentage of the total fault [OF ALL OF THE PARTIES TO
21 EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant,
22 [AND] person who has been released from liability under AS 09.17.091, or other
23 person responsible for the damages to each claimant regardless of whether the
24 other person, including an employer, is or could have been named as a party to
25 the action [AS 09.16.040].

26 * Sec. 11. AS 09.17.080(c) is amended to read:

27 (c) The court shall determine the award of damages to each claimant in
28 accordance with the findings [, SUBJECT TO A REDUCTION UNDER
29 AS 09.16.040], and enter judgment against each party liable. The court also shall
30 determine and state in the judgment each party's equitable share of the obligation to
31 each claimant in accordance with the respective percentages of fault as determined

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

6 * Sec. 12. AS 09.17 is amended by adding a new section to read:

7 Sec. 09.17.091. EFFECT OF RELEASE. When a release or covenant not to
8 sue or not to enforce judgment is given in good faith to one of two or more persons
9 civilly liable for the same injury or the same wrongful death it does not discharge any
10 of the other persons from liability for the injury or wrongful death unless its terms so
11 provide.

12 * Sec. 13. AS 09.30.065 is repealed and reenacted to read:

13 Sec. 09.30.065. OFFERS OF JUDGMENT. (a) At any time more than 10
14 days before the trial begins either the party making a claim or the party defending
15 against a claim may serve upon the adverse party an offer to allow judgment to be
16 entered in complete satisfaction of the claim for the money or property or to the effect
17 specified in the offer, with costs then accrued. If within 10 days after the service of
18 the offer the adverse party serves written notice that the offer is accepted, either party
19 may then file the offer and notice of acceptance together with proof of service, and the
20 clerk shall enter judgment. An offer not accepted within 10 days is considered
21 withdrawn and evidence of that offer is not admissible except in a proceeding to
22 determine the form of judgment after verdict.

23 (b) If the judgment finally entered on the claim as to which an offer has been
24 made under this section is at least five percent less favorable to the offeree than the
25 offer, the offeree shall pay costs as allowed under the Alaska Rules of Civil Procedure
26 and all reasonable attorney fees incurred by the offeror from the date the offer was
27 made. In comparing the offer to judgment finally entered, the court may not consider
28 prejudgment interest payable under the judgment during the period between when
29 payment would have been made under the offer and the date of entry of judgment.

30 * Sec. 14. AS 09.30.070(a) is amended to read:

31 (a) Notwithstanding AS 45.45.010, the [THE] rate of interest on judgments

1 and decrees for the payment of money, including prejudgment interest, is three
2 percent above the interest rate set by the United States Bureau of the Public Debt
3 for five-year treasury notes in effect on the day on which the judgment or decree
4 is entered [10.5 PERCENT A YEAR], except that a judgment or decree founded on
5 a contract in writing, providing for the payment of interest until paid at a specified rate
6 not exceeding the legal rate of interest for that type of contract, bears interest at the
7 rate specified in the contract if the interest rate is set out in the judgment or decree.

8 * Sec. 15. AS 09.55 is amended by adding a new section to read:

9 Sec. 09.55.551. EXPERT WITNESS QUALIFICATION. (a) Except as
10 provided under (b) of this section, in an action based upon professional negligence, a
11 person may not testify as an expert witness on the issue of the appropriate standard of
12 care unless the witness is a professional who is licensed in this state or is licensed in
13 another state or country and

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

16 (2) is certified by a board recognized by the state as having
17 acknowledged expertise and training directly related to the particular field or matter
18 at issue.

19 (b) The provisions of (a) of this section do not apply to a person who is
20 testifying on the appropriate standard of care in a profession that is not licensed in this
21 state, or another state or country, and who the court determines is qualified as an
22 expert witness.

23 * Sec. 16. AS 09.55.560 is amended by adding a new paragraph to read:

24 (4) "professional negligence" means a negligent act or omission in
25 rendering professional services.

26 * Sec. 17. AS 09.55 is amended by adding a new section to read:

27 ARTICLE 8. MANDATORY ARBITRATION.

28 Sec. 09.55.700. MANDATORY ARBITRATION. (a) A person who files a
29 civil action for personal injury, death, or property damage shall also submit the claim
30 to the court for arbitration unless the action is excluded under (b) of this section. The
31 costs of arbitration shall be paid in equal shares by the parties.

- 1 (b) A civil action is not required to be arbitrated as provided under (a) of this
2 section if the
- 3 (1) amount claimed by a party, excluding interest, costs, and attorney
4 fees, exceeds \$50,000;
- 5 (2) parties have, under a written agreement made before or after the
6 accrual of the action, agreed to submit the claim to arbitration; or
- 7 (3) action
- 8 (A) is a class action;
- 9 (B) seeks equitable or declaratory relief;
- 10 (C) concerns the title to real property;
- 11 (D) is a probate action;
- 12 (E) is an appeal from a court of limited jurisdiction;
- 13 (F) involves divorce or domestic relations;
- 14 (G) is an appeal from action by an administrative agency;
- 15 (H) is a small claims action.
- 16 (c) When a claim is submitted as required by (a) of this section, the court shall
17 appoint an arbitrator to review the claim. An arbitrator appointed under this section
18 must be a member of the state bar association who has been admitted to the bar for
19 a minimum of five years or a member of the state bar association who is a retired
20 judge. The arbitrator appointed to review the claim shall interview the parties and
21 examine all records or materials relating to the claim and may compel the attendance
22 of witnesses, interview the parties, or consult with medical specialists.
- 23 (d) An arbitrator appointed under this section shall conduct a prehearing
24 settlement conference within 30 days after the appointment. The arbitrator shall
25 establish a period for discovery and a date for a hearing. The hearing date may not
26 be more than 120 days after the settlement conference.
- 27 (e) An arbitrator shall render a decision within 30 days after hearing a claim
28 under (d) of this section. The decision must contain findings of fact and conclusions
29 of law. The decision of the arbitrator may be rejected by a party.
- 30 (f) If the decision of the arbitrator is rejected by a party, the action may
31 proceed in the appropriate court. If an offer of judgment has not been entered by a

1 party, costs or actual reasonable attorney fees shall be assessed against a party who
2 requests a trial after arbitration, and who fails to improve that party's position in the
3 trial de novo.

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

7 (h) Attorney fees and costs shall be included in the arbitrator's award only if
8 a party is found not liable or is awarded more than the party would have been awarded
9 under an offer of judgment entered under AS 09.30.065. If attorney fees and costs are
10 awarded, attorney fees and costs shall be calculated under the Alaska Rules of Civil
11 Procedure or AS 09.30.065, whichever applies.

12 * Sec. 18. AS 09.65 is amended by adding a new section to read:

13 Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR CERTAIN
14 NONEMPLOYEES. (a) A hospital is not liable for civil damages as a result of an
15 act or omission by an emergency room physician who is not an employee or actual
16 agent of the hospital if the hospital provides notice that the emergency room physician
17 is an independent contractor and the emergency room physician is insured as described
18 under (c) of this section. The notice required by this subsection must be posted
19 conspicuously in all admitting areas of the hospital, published at least annually in a
20 newspaper of general circulation in the area, and must be in substantially the following
21 form:

22 Notice of Limited Liability

23 The following emergency room physicians are independent
24 contractors and are not employees of the hospital:

25 (List specific emergency room physicians)

26 The hospital is responsible for exercising reasonable care in granting privileges to
27 practice in the hospital, for reviewing those privileges on a regular basis, and for
28 taking appropriate steps to revoke or restrict privileges in appropriate circumstances.
29 The hospital is not otherwise liable for the acts or omissions of an emergency room
30 physician who is an independent contractor.

31 (b) This section does not preclude liability for civil damages that are the

1 proximate result of the hospital's own negligence or intentional misconduct.

2 (c) A hospital is not immune from liability under (a) of this section for an act
3 or omission of an emergency room physician who is an independent contractor unless
4 the emergency room physician has liability insurance coverage in the amount of at
5 least \$500,000 per incident and the coverage is in effect and applicable to those health
6 care services offered by the emergency room physician that the hospital is required to
7 provide by law or by accreditation requirements.

8 (d) In this section,

9 (1) "emergency room physician" means a physician who provides health
10 care services in a hospital emergency room;

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

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

17 * Sec. 19. AS 09.65 is amended by adding a new section to read:

18 Sec. 09.65.190. CIVIL LIABILITY FOR FALSE CLAIMS AND IMPROPER
19 PRACTICE. (a) A person may not

20 (1) knowingly or recklessly file, or cause to be filed, a civil complaint,
21 answer, or other civil pleading that contains false allegations or material misstatements
22 of fact;

23 (2) sign a civil pleading before making reasonable inquiry and
24 determining that, to the best of the signer's knowledge, information, and belief, each
25 claim, defense, and allegation contained in the pleading is well grounded in fact and
26 is warranted by existing law or a good faith argument for the extension, modification,
27 or reversal of existing law; or

28 (3) interpose, in a civil action, a claim, defense, or allegation for an
29 improper purpose, including to harass or to cause unnecessary delay or needless
30 increase in the cost of litigation.

31 (b) If the trier of fact determines that a party to a civil action has intentionally

1 made a false statement of a material fact in connection with the prosecution or defense
2 of a civil action, the court shall enter judgment against the party making the false
3 statement on the issue to which the false statement relates. If the civil action involves
4 multiple claims and the false statement does not apply to all claims, the judgment
5 required under this section shall apply only to those claims to which the false
6 statement relates.

7 (c) A person who is injured by a violation of (a) of this section may bring an
8 action for compensatory and punitive damages. However, if the injury is the result of
9 an act or omission of a

10 (1) party, then the action shall be asserted in the same action in which
11 the injury arose; and

12 (2) party attorney, then the action shall be asserted in a separate action
13 commenced after entry of final judgment in the action in which the injury arose.

14 (d) A person who, on the person's own behalf or as a party's attorney, takes
15 part in the initiation, defense, continuation, or procurement of a civil action against
16 another is subject to civil liability for compensatory and punitive damages if the person
17 acts

18 (1) without probable cause on a claim or defense; or

19 (2) primarily for a purpose other than that of securing the proper
20 adjudication of a claim or defense involved in the civil action.

21 (e) In an action to recover damages under (c) of this section, a person is not
22 required to be the prevailing party in the civil action in which the violation of (a) of
23 this section occurred.

24 (f) A person may not bring a civil action to recover damages under (d) of this
25 section unless final judgment has been entered in the civil action described in (d) of
26 this section. For purposes of this subsection, a person is not required to be the
27 prevailing party in the civil action in which the violation of (d) of this section
28 occurred.

29 (g) If a person brings an action under (c) or (d) of this section, the court shall
30 award actual reasonable attorney fees to the prevailing party, regardless of whether the
31 prevailing party is the plaintiff or defendant.

1 (h) Neither the state, nor an agent or employee of the state acting within the
2 scope of that agency or employment, is subject to liability under this section.

3 * Sec. 20. AS 09.65.210 is repealed and reenacted to read:

4 Sec. 09.65.210. DAMAGES RESULTING FROM COMMISSION OF A
5 FELONY. (a) A person who suffers personal injury or property damage may not
6 recover damages for the personal injury or property damage if the injury occurred
7 while the person was committing or attempting to commit a felony, or fleeing from the
8 commission of a felony, and the felony substantially contributed to the injury or
9 property damage.

10 (b) The personal representative of a deceased person may not recover damages
11 for the person's death if the court determines by clear and convincing evidence that
12 the death occurred while the person was committing or attempting to commit a felony,
13 or fleeing from the commission of a felony, and that the felony substantially
14 contributed to the death.

15 * Sec. 21. AS 09.68 is amended by adding a new section to read:

16 Sec. 09.68.125. SIGNING OF PLEADINGS, MOTIONS, AND OTHER
17 PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party
18 represented by an attorney shall be signed by at least one attorney of record in the
19 attorney's individual name, whose address shall be stated. A party who is not
20 represented by an attorney shall sign the party's pleading, motion, or other paper and
21 state the party's address. Except when otherwise specifically provided by the Alaska
22 Rules of Civil Procedure or statute, pleadings need not be verified or accompanied by
23 affidavit. The signature of an attorney or party constitutes a certificate by the signer
24 that the signer has read the pleading, motion, or other paper; that to the best of the
25 signer's knowledge, information, and belief formed after reasonable inquiry it is well
26 grounded in fact and is warranted by existing law or a good faith argument of the
27 extension, modification, or reversal of existing law; and that it is not interposed for any
28 improper purpose, including to harass or to cause unnecessary delay or needless
29 increase in the cost of litigation. If a pleading, motion, or other paper is not signed,
30 it shall be stricken unless it is signed promptly after the omission is called to the
31 attention of the pleader or movant. If it is alleged or appears that a pleading, motion,

1 or other paper is signed in violation of this section, the court, upon motion or upon its
2 own initiative, may set the matter for hearing. If the court determines that a pleading,
3 motion, or other paper is signed in violation of this section, the court shall impose
4 upon the person who signed it, a represented party, or both, an appropriate sanction
5 that may include an order to pay to the other party the amount of the reasonable
6 expenses incurred because of the filing of the pleading, motion, or other paper,
7 including costs and attorney fees, and monetary sanctions not to exceed \$10,000.

8 * **Sec. 22. REPORT.** The director of the division of insurance shall determine the effects
9 of this Act on the liability insurance rates in this state and shall present a report of the
10 director's findings to the legislature by January 1, 1998. In this section, "liability insurance"
11 has the meaning given in AS 21.12.070(a)(2).

12 * **Sec. 23. SEVERABILITY.** Under AS 01.10.030, if any provision of this Act, or the
13 application of a provision of this Act to any person or circumstance is held invalid, the
14 remainder of this Act and the application to other persons shall not be affected.

15 * **Sec. 24. APPLICABILITY.** Sections 6 and 7 of this Act apply to a civil action that has
16 accrued on, after, or before the effective date of this Act, if judgment has not been entered in
17 the civil action before the effective date of this Act. Except for secs. 6 and 7 of this Act, this
18 Act applies to all causes of action accruing on or after the effective date of this Act.

AUTHENTICATION

The following officers of the Legislature certify that the attached enrolled bill, SCS CSHB 158(RLS) am S(ct rls fld S), consisting of 15 pages, was passed in conformity with the requirements of the constitution and laws of the State of Alaska and the Uniform Rules of the Legislature.

Passed by the House May 4, 1996


Gail Phillips, Speaker of the House

ATTEST:


Suzi Lowell, Chief Clerk of the House

Passed by the Senate May 2, 1996

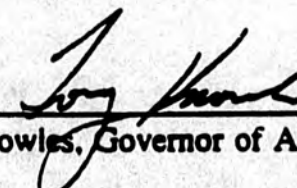

Drue Pearce, President of the Senate

ATTEST:


Nancy Quinto, Secretary of the Senate

ACTION BY GOVERNOR


Approved by the Governor June 14 19 96


Tony Knowles, Governor of Alaska

DEPT. OF COMMERCE

ANALYSIS OF SCS CSHB 158 (RIs) am S (ct rls fld s) - TORT REFORM

Throughout the Legislative process, the consistent Administration position has been that tort reform legislation should do three things: 1) make the civil justice system more efficient and reduce frivolous litigation; 2) still allow for fair and just compensation for injured parties, and not create major constitutional problems through unfair treatment of those who have been injured; and 3) lower liability insurance rates. The corollary to these precepts is that tort reform legislation should *not* 1) increase the cost, complexity, and amount of litigation; or 2) cut off the rights of injured Alaskans to recover reasonable compensation for injuries sustained by another party's negligent acts. Although some of the provisions included in this bill arguably comply with these basic tenets, when viewed as a whole this bill fails to meet most, if not all, of these tests.

The bill will increase the amount, cost, and complexity of litigation.

The Department of Law has prepared a detailed analysis outlining the numerous legal issues raised by this bill. It is worthwhile to briefly list the principal issues identified by Law, since each would likely lead to additional litigation.

1. *Commercial Recreational Activities (sec. 2).* This section of the bill was added very late in the legislative process, without adequate time for public comment or legal review. No other state has similar statutes. Law has now identified several ambiguities in the section, which will likely lead to extensive clarifying litigation. Also, the section probably violates constitutional equal protection guarantees.
2. *Statute of Repose (sec. 3).* This provision would prevent a suit from being filed against a wrongdoer after 10 years, even if the injury did not occur until after this period of time.¹ The Alaska Supreme Court has already indicated that such a statute may be unconstitutional.
3. *Retroactivity of Punitive Damages Limitations (sec. 24).* By far the most disturbing section of the bill is the clause providing a retroactive effective date for the bill's punitive damages limits. This provision is probably unconstitutional as a violation of due process, and might also constitute an unlawful taking, especially because the section appears to be designed to benefit specific private parties to existing lawsuits. Furthermore, an argument can, and most certainly would, be made that the section applies to the punitive damages award in the *Exxon Valdez* litigation.
4. *Allocation of Fault (secs. 10-11).* The proposed changes would allow the fact finder in a trial (the jury, or the judge in a case tried without a jury) to apportion responsibility for the accident not only among the parties in court, but to any parties responsible for the injuries, even if one or more of those responsible are immune from liability. It creates the classic "empty chair" situation, where all those potentially liable to plaintiff argue that the majority of fault lies with those not in court.² Also, because the bill section was not coordinated with worker's compensation statutes, the injured

person could be required to give back some of his recovery to his employer, even though he could not receive compensation for the employer's fault in causing the accident.

5. *Offers of Judgment (sec. 13).* Without getting into the complexities of the legal analysis, the practical effect of the changes proposed could be to *reduce*, rather than increase, the incentives for early settlement of cases.

6. *Admissibility of Expert Testimony (sec. 15).* The restrictions on expert witnesses are at best confusing, and if interpreted by a court expressly as written, would likely be unconstitutional.

7. *New Civil Causes of Action for Frivolous Practice (sec. 19).* This section would create extensive additional litigation, providing an avenue for litigious litigants to bring many new claims and new lawsuits, adding to the cost and complexity of litigation.³

The bill will cut off the rights of injured Alaskans to reasonable and just compensation for injuries.

1. *Statute of Repose (sec. 3).* As noted above, operation of the statute of repose would cut off a person's right to recover, even if the accident had not yet occurred.⁴

2. *Hospital Non-Liability (sec. 18).* The bill would allow a hospital to exempt itself from liability for damages caused by the negligence of its emergency room doctors, if those doctors carry at least \$500,000 in insurance. That amount of insurance is probably inadequate to compensate for most serious emergency room injuries.

3. *Commercial Recreational Activities (sec. 2).* Although the tort reform advocates claim that this section merely codifies current law, the extensive lobbying efforts of the visitor industry clearly demonstrate that industry believes this section will reduce their liability to injured customers.

4. *Mandatory Arbitration (sec. 17).* In general the concept of alternative dispute resolution procedures such as arbitration and mediation can, in some cases, reduce the overall costs of litigation. However, the provisions in this bill could have the additional effect of foreclosing legitimate damage claims. The arbitration procedures set out in the bill have been made applicable only to relatively small cases where the amount claimed is less than \$50,000; by requiring the parties to pay all costs associated with the arbitration, the bill might effectively cut off a smaller claimant's ability to bring suit in the first place.

5. *Offers of Judgment (sec. 13).* The provisions relating to offers of judgment place an almost impossible burden on a plaintiff in a case involving multiple defendants, because the plaintiff will be required not only to reasonably predict how much he or she will recover in the case, but also the relative percentage of responsibility for each defendant; if the predictions for any single defendant are wrong, the plaintiff risks being held liable for all costs and attorney fees of the defendant who made the offer. Many injured plaintiffs cannot afford to take such risks and will be forced to accept unreasonably low settlement offers.

The Legislature totally failed to utilize a public, consensual process in crafting this bill.

Although this legislation went through several committees and had numerous hearings, the Legislature chose to ignore the results of that process and instead adopt a new version of the bill in the final hours without any public process. This session, several hearings were held on HB 158 in the Senate Judiciary and Finance Committees, in which many of the suggestions raised by the Administration and others were incorporated into the bill.

However, the Finance Committee version of the bill was essentially and a totally new version adopted by the Senate Rules Committee, apparently with the assistance and input of the strongest tort reform advocates. Included in this final version for the first time were the provisions relating to commercial recreational activities, a new arbitration procedure, and the retroactive limitations on punitive damages. The only public hearing on the final bill was a 15 minute Rules Committee hearing, held minutes after the bill was made available to the public for the first time.

The Legislature was unwilling to work to adopt acceptable, reasonable tort reform. For example, the tort reform advocates argued that tort reform would help reduce liability insurance rates. However, the Legislature refused to require a 10 percent reduction in rates as a precondition for the bill's taking effect, because the advocates argued that it would take a few years of the bill being in place before any results would be realized.

In response to this argument, Senator Phillips offered an amendment on the Senate floor to sunset the bill in five years if rates did not come down, thereby giving the bill's provisions a chance to have an impact before the rate reduction would be required; this amendment was also rejected.

Conclusion

Last year, Alaskans were charged with 28,370 misdemeanors, 2,778 felonies, came to court 68,761 times for traffic offenses, filed 8,692 domestic relations cases (including 3,984 for divorce or dissolution), and filed 9,717 small claims cases. There were 21,378 cases filed in Superior Court. However, there were only 993 personal injury cases filed —4.6 percent of the total. Only 43 civil jury trials were held last year in the state, and these included not only tort claims, but debt collection, review of administrative orders, and contract disputes. Thus, contrary to the claims of tort reform advocates, there is no explosion of tort litigation in Alaska.

Nonetheless, there are several features of this bill that could improve our civil justice system and form the basis for effective, responsible tort reform. Placing a reasonable limit on the amount of punitive damages that may be awarded in future cases (sec. 7) may be worthy of consideration, and a requirement that some percentage of such awards be turned over to the state (sec. 7) can maintain the benefits of the punitive damage process without giving plaintiffs an unreasonable windfall recovery. Tying interest rates on judgments to a variable market rate makes sense (sec. 14). Allowing hospitals to avoid liability for negligence of their emergency room doctors (sec. 18) may be a laudable goal, provided the doctors are required to carry sufficient insurance to protect patients. Prohibiting a person who is injured while committing a felony from recovering for such injuries

(sec. 20) does not offend most people's sense of justice. And enhancing the penalties under Civil Rule 11 against attorneys who file frivolous pleadings (sec. 21) could help reduce litigation and ensure better judicial practice. Other related concepts that warrant consideration, discussed at various times during the hearing process on this bill, include some method to ensure insurance rate reductions, and mandatory mediation similar to that proposed in CSHB 414 (Jud).

In short, there are many aspects of tort reform that could help reduce the costs and complexity of litigation, and presumably the cost of liability insurance in Alaska, without at the same time cutting off our citizens' right to recover reasonable compensation for injuries caused by the fault of others. Unfortunately, in passing HB 158, the Legislature chose a less humanistic approach: it elected to simply grant unwarranted benefits to insurance companies by cutting off injured parties' rights.

Alaska Department of Commerce and Economic Development, 6/13/96

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
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June 10, 1996

Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811

Re: SCS CSHB 158(RLS) am S(ct rls
fld S) -- (Tort Reform)
Our file: 883-96-0096

Dear Governor Knowles:

At the request of legislative director, Pat Pourchot, the Department of Law has reviewed SCS CSHB 158(RLS) am S(ct rls fld S) (hereafter "HB 158"), commonly known as the "tort reform" bill. If enacted, this bill would materially change substantive and procedural law governing tort actions, and would peripherally affect other types of actions. This review discusses some of the significant legal problems the bill would create.

HB 158 would primarily impact civil actions for personal injury, death, or damage to property.¹ The bill would have much less impact on economic torts such as interference with contract. See Fairbanks North Star Borough v. Roen Design Associates, Inc., 727 P.2d 758, 760 (Alaska 1986) (similar language did not cover damages to intangible property). Accordingly, use of the term "tort" in this review includes only actions for personal injury, death, or property damage, unless otherwise indicated.

CIVIL LIABILITY FOR COMMERCIAL RECREATIONAL ACTIVITIES

Section 2 of the bill limits the liability of those who operate outdoor recreational activities for paying participants. Participants would be deemed comparatively negligent to the extent

¹ Several sections of the bill would impact a broader category of actions. These are secs. 8, 9, 13, 14, 19, and 21 of the bill, which address interest, periodic payment, offers of judgment, and frivolous or improper action.

that an "inherent risk" of the activity contributed to an injury, and any award would be correspondingly reduced.

Current Law

Standard common law currently governs the liability of operators of commercial recreational activities, except for ski areas. The conduct of both the operator and the participant is compared with the conduct of a hypothetical ordinary person in the same circumstances who has similar training and skills and is reasonably prudent. Alaska Pattern Civil Jury Instruction 3.03A; W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32 at 185 (5th ed. 1984). Those circumstances include the risks of injury inherent in a given activity. Fickes v. Petrolane-Alaska Gas Service, Inc., 628 P.2d 908, 912-13 (Alaska 1981). If an operator or participant violates a duty created by statute, that person may be presumed negligent under the doctrine of negligence per se. Alaska Pattern Civil Jury Instruction at 3.04A.

Ski area liability is governed by the Alaska Ski Safety Act of 1994, AS 05.45.010 - 05.45.210. The fourteen sections of the Alaska Ski Safety Act of 1994 precisely define the duties and responsibilities of skiers and operators. If a ski area fulfills all its responsibilities, it is immune from liability for any accident in which a contributing factor was an inherent risk of skiing or the skier's failure to follow the enumerated skier duties.

HB 158

Section 2 of the bill would change the manner of allocating comparative fault in personal injury or property damage lawsuits arising from "commercial recreational activities" other than ski areas. An "inherent risk" of the activity that partly causes an injury would be deemed negligence by the injured person and become part of that person's percentage of fault for calculating damages under AS 09.17.060. The section also would assign certain responsibilities to clients and operators. For example, the participant would be responsible for maintaining control of any equipment or animals the participant used, and all operators would be required to train employees in basic first aid and cardiopulmonary resuscitation (CPR).

Section 2 of the bill would apply to a broad range of activities inside and outside the commercial tourist industry, including outdoor sports leagues that charge a fee, summer camps for children, outdoor educational and sport activities conducted by private schools, and guided tourism, fishing, and hunting.

This section was added to the bill late in the session, in the Senate Rules Committee.² It would present interpretation problems and a constitutional issue.

Analysis

The concept of sec. 2 of the bill is similar to the Alaska Ski Safety Act of 1994, but in contrast to that Act's carefully-crafted, detailed provisions, sec. 2 of the bill covers a far broader range of activities with vague, ambiguous language. Added to the bill when public comment was no longer feasible, the section lacks the precision that results from open discussion and thorough analysis. Foreseeable problems with sec. 2 of the bill include ambiguity about the types of activities to which it applies, the unreasonable nature of the duties it imposes upon participants, a higher imposition of liability on volunteer operators than on paid operators, and elevated rights for nonpaying participants.

A. AMBIGUITY OF "OUTDOOR" RECREATIONAL ACTIVITY

Section 2 of the bill would apply to any "recreational activity" for which the participants pay compensation. "Recreational activity" means an "outdoor activity undertaken for the purpose of exercise, education, relaxation, pleasure, sport, or hobby." Because "outdoor" is not defined, the coverage of sec. 2 of the bill would be uncertain and would not become clear until a selection of claims are litigated over a period of years. For example, the bill is ambiguous as to whether air travel is "outdoor" recreation. Whether sec. 2 of the bill applies when the

² The section has some similarity to HB 300, which the House passed in 1994. Wisconsin's "Participation in Recreational Activities" statute, Wis. Stat. § 895.525 (1995) appears to be the source of some of the language used in sec. 2 of the bill and HB 300 (1994). The Wisconsin statute has a different effect, however. It addresses only the premises liability of landowners and lessees, and by express statement of the legislature is intended to impose no greater duties on recreational participants than they have under common law. Rockweit v. Senecal, 522 N.W.2d 742, 746 (Wis. 1995). Moreover, the Wisconsin law does not distinguish between "outdoor" and other recreational activities, or between activities conducted for compensation and those offered free of charge. No other state has a statute similar to sec. 2 of the bill.

operator of a guided hunting, fishing, climbing, or other outdoor service flies clients to activity locations is unclear.¹

Similarly, while sec. 2 of the bill presumably would cover guided tourism or fishing from the deck of a boat, its application is uncertain if the client spends part or all of the trip in the boat's cabin. Similar activities might be treated differently depending upon whether the boat used was a zodiac, cabin cruiser, coastal tour boat, cruise ship, or ferry.

Further, the coverage of "outdoor activity" may or may not apply when a client is injured in a camp tent, in a rustic cabin provided by the operator, or in a lodge.

The ambiguity extends to traditional sports activities as well. Although sec. 2 of the bill seems to cover a fee-based outdoor hockey or basketball program while exempting the same programs using indoor rinks or courts, it may or may not cover outdoor programs for injuries in the locker room or injuries caused by accidents while transporting participants to games.

B. RESPONSIBILITY FOR CONTROLLING EQUIPMENT AND ANIMALS

Section 2 of the bill unequivocally gives the paying participant responsibility to maintain control of any equipment the participant is using. The broad language covers all types of equipment and all ages of participants. Existing laws, industry standards, and custom often assign control responsibility to someone other than the participant. A skipper is commonly thought to be responsible for maintaining control of a sport fishing boat; a pilot is thought to be responsible for maintaining control of a flightseeing aircraft; and an amusement ride operator is thought to be responsible for maintaining control of a ferris wheel ride. If interpreted as written, sec. 2 of the bill would transfer these responsibilities to the party paying for the service. While a court interpreting the provision would seek to avoid an absurd result, the overbroad language leaves the provision's ultimate effect to the chance of litigation.

Section 2 of the bill also would transfer to the paying participant responsibility for controlling animals the participant

¹ Limited legislative history on the bill suggests that some legislators considered air travel to be an outdoor activity. Legislators apparently did not discuss travel on commercial airliners for recreational or educational purposes in conjunction with HB 158.

is using, such as the dogs provided by a commercial mushing operation or the ponies that children ride on a pony wheel at a fair. Thus, if a child attending summer camp is seriously injured when the camp counselor turns on loud music and causes the horse to shy and throw the child, the child's statutory responsibility for maintaining control of the horse would reduce the camp's liability. Section 2 of the bill would further reduce the camp's liability to the extent that the inherent risks of riding a horse (e.g., the risks associated with sitting high above the ground on an animal capable of being startled unexpectedly) were a contributing factor to the injury. Section 2 of the bill would alter current law so that the injured person would be deemed comparatively negligent and would recover less than full damages.

D. CREATION OF NEW DUTIES

Section 2 of the bill would impose new duties on a participant in a commercial recreational activity, including the obligations to learn about the risks of the activity and act within the limits of the person's ability. The operator also would have new duties, such as to "explain to a participant the fundamental inherent risks" of the activity. This new statutory duty might expand liability under a negligence per se theory if an operator failed to disclose an inherent risk that seemed too obvious for explanation.

E. LACK OF PHASE-IN PERIOD

Section 2 of the bill would take effect in 90 days, during the current outdoor recreation season. Operators of sports and outdoor education programs and recreational businesses in remote areas would have difficulty complying with the new first aid and CPR training requirements prior to the effective date. This would increase their exposure to liability, as failure to comply would constitute negligence per se in the event of an injury.

F. EQUAL PROTECTION

Section 2 of the bill would draw a distinction between compensated and uncompensated outdoor activities. People who operate outdoor activities without compensation would have substantially greater liability than those who are paid. Thus, a person could not raise the defenses under the section if the person voluntarily ran a neighborhood soccer league, but the defenses would be available to a person operating a league for paying participants. Likewise, if a child sustained an injury on

a school playground⁴ and the school were found negligent, the amount of liability would depend on whether the school is public or private; public schools would have greater exposure. The Alaska Supreme Court has struck down a statute discriminating among defendants "based on their occupation or the nature of the work they perform," rather than on distinction in conduct. Turner Construction Co. v. Scales, 752 P.2d 467, 470-71 (Alaska 1988). The distinction that sec. 2 of the bill makes is similar and may be unconstitutional as well.

Section 2 of the bill also would discriminate among plaintiffs in ways that a reviewing court might find capricious. For example, paying attendees at a summer camp apparently would be treated less favorably than campers on full scholarship. Because scholarship campers do not "pay compensation," they are probably outside the scope of sec. 2 of the bill. A scholarship and a paying camper could be injured in the same canoeing accident and the paying camper would have substantially fewer legal rights than would the paying camper's canoe mate.

TIME LIMITATIONS ON ACTIONS

The bill would affect the time period in which a plaintiff can file suit in three ways. Section 3 of the bill broadens the existing statute of repose, which limits a plaintiff's right of action for delayed injuries, to encompass torts outside the construction context, and shortens the time limit from 15 to 10 years. Section 4 of the bill reduces the statute of limitations for damage to tangible property.

A. STATUTE OF REPOSE

A statute of repose prevents a plaintiff from filing suit after a set period of time, even though the statute of limitations has not expired. While the period during which suit may be brought under a statute of limitations ordinarily begins on the date of injury, a statute of repose runs from the date of the defendant's act. This distinction is important when the injury occurs much later than the negligent act -- such as the collapse of a school or warehouse after a heavy snowfall due to defective design or construction years after the defective work was performed. The statute of limitations would not bar an action until two years

⁴ Under sec. 2 of the bill, activities on a playground at school for the purpose of "exercise," "education," or "pleasure" would be "recreational activities." They are within the scope of sec. 2 of the bill if "participants pay compensation."

after the collapse, but a statute of repose could bar a cause of action after the set number of years from the construction even if that period expired before the collapse.

Current Law

Since 1967, Alaska has had a statute of repose aimed at defects in design and construction of real property improvements. In 1988, the Alaska Supreme Court invalidated the 1967 law on equal protection grounds because the statute discriminated between different kinds of defendants "based on their occupation or the nature of the work they perform." Turner Construction, 752 P.2d at 470.

In 1994, the legislature passed a substitute statute of repose, the presently effective AS 09.10.055, which eliminated some of the distinctions among classes of defendants that the Alaska Supreme Court had criticized. The current statute of repose establishes a limit of 15 years for tort actions based on a design or construction defect in real estate improvements.

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The purpose of sec. 3 of the bill is to enact a statute of repose that meets the standards of Turner Construction. Section 3 of the bill would broaden the statute of repose to encompass torts outside the construction context, to all "last acts" by a defendant, and would shorten the bar on action from 15 to 10 years. Exceptions would be granted for damages caused by intentional acts or gross negligence and exposure to a hazardous substance, a defective product, or an undiscovered foreign object in a person's body. The statute of repose would not apply if the facts that would give notice of a potential cause of action were intentionally concealed.

Analysis

Section 3 of the bill may be unconstitutional under the Alaska Constitution's equal protection and due process clauses. In Turner Construction, the Alaska Supreme Court found the statute of repose's discrimination among defendants unconstitutional as an equal protection violation. The court mentioned but did not reach two additional issues: discrimination among classes of plaintiffs and due process issues under the Alaska Constitution. Section 3 of the bill would be vulnerable to challenge on these grounds. State courts have split on the question of whether statutes of repose are constitutional. See Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 827-28 and n.12 (describing split and listing cases finding

such laws unconstitutional) (Mo. 1991). The Alaska Supreme Court has commented that "[i]t is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has had a reasonable opportunity to do so." Hanebuth v. Bell Helicopter Int'l, 694 P.2d 143, 147 (Alaska 1984). This observation suggests that the court would find discrimination among classes of plaintiffs to violate the state constitution.

The state, as the owner of facilities, would be impacted by the broadened statute of repose. In particular, where the state had assumed ownership of facilities constructed by the Bureau of Indian Affairs (BIA) or other federal agencies, the state would lose its potential recourse against the United States for shoddy construction. Under the Federal Tort Claims Act, the federal government is liable only to the same extent as a private individual in like circumstances. 28 U.S.C. 2674 (1994).

The bill's changes to the statute of repose would cause an additional problem. Under sec. 24, the bill would apply retroactively if the defendant's "last act" occurred before the bill's effective date and more than ten years before the accrual date (generally the date of injury). Prospectively, parties could contractually protect themselves from the broadened statute of repose, but they would not have foreseen the retroactive application of a change when preparing earlier contracts. When the legislature amended the current statute of repose in 1994, it addressed this problem by making the bill effective only as to prospective defects in construction. Section 4, ch. 28 SLA 1994. For the reasons discussed below under part (2) of "Punitive Damages," this retroactive application creates additional constitutional concerns.

B. STATUTE OF LIMITATIONS

Current Law

Current law provides that a person has two years from the date a cause of action accrues to file suit for personal injury or other personal torts. AS 09.10.070. A cause of action accrues when a person discovers, or reasonably should have discovered, the existence of all of the elements of a cause of action. Cameron v. State, 822 P.2d 1362, 1366 (Alaska 1991). This doctrine is known as the "discovery rule."

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Section 4 of the bill would reduce the statute of limitations for a claim for damages to tangible property from six years, under AS 09.10.050, to two years. Section 5 of the bill would create a separate statute of limitations addressing only a certain category of torts, and would accommodate the shorter limits established by the statute of repose. Both secs. 4 and 5 of the bill refer to the statute of limitations running "from the accrual of the action."

Analysis

The addition of the language in secs. 4 and 5 of the bill referring to the "accrual of the action" would not be a substantive change. This language incorporates the discovery rule under Cameron. The sponsor's sectional summary demonstrates that these provisions were not intended to change the discovery rule.

LIMITS ON DAMAGES

A. PUNITIVE DAMAGES

Current Law

The purpose of punitive damages is to punish the wrongdoer and deter the wrongdoer and others from repeating the wrong. Providence Washington Ins. v. Valdez, 684 P.2d 861 (Alaska 1984). Punitive damages are not easily obtained; a plaintiff must prove by clear and convincing evidence that the wrongdoer's act was outrageous, such as an act done with malice, bad motive, or a reckless indifference to the interests of another. Bridges v. Alaska Housing Auth., 375 P.2d 696, 702 (Alaska 1962) (citing Restatement of Torts § 908 (1939) and W. Prosser, Handbook on the Law of Torts, § 2 (2d ed. 1955)).

Federal courts look to state law on punitive damages in certain federal cases. Generally, state law governs to the extent that there is a state law basis for the punitive damage award:

In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278, 109 S.Ct. 2909, 2921-22 (1989). Federal courts also look to state law to fill gaps in federal law. Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 366 (9th Cir. 1992); U. S. for Use of Bldg. Rentals Corp. v. Western Cas. & Sur. Co., 498 F.2d 335 (9th Cir. 1974).

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Section 6 of the bill would codify the existing Alaska standard of proof to obtain an award of punitive damages. Section 7 would place a limit on punitive damages in all civil actions. An award could not exceed the greater of three times the compensatory damages or \$300,000. The cap would not apply if the wrongdoer caused the harm in the course of committing a felony. Seventy-five percent of the award, if collected, would be deposited into the state's general fund.

Analysis

A mathematical cap on punitive damages does not appear to pose either state or federal constitutional problems. See, e.g., Wackenhut Applied Technologies Ctr., Inc. v. Symetron Protection Sys., Inc., 979 F.2d 980 (4th Cir. 1992); Bagley v. Shortt, 410 S.E.2d 738 (Ga. 1991); contra, Henderson v. Alabama Power Co., 627 So.2d 878 (Ala. 1993). However, both the United States Supreme Court and the Alaska Supreme Court have noted practical problems with arbitrary mathematical formulas. The United States Supreme Court stated recently:

[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every

case. We can say, however, that [a] general concern of reasonableness . . . properly enter[s] into the constitutional calculus."

BMW of North America v. Gore, 640 U.S.L.W. 4335, 4342 (U.S. May 20, 1996) (citations and footnote omitted). The Alaska Supreme Court has declined on several occasions to judicially adopt a fixed ratio between punitive and compensatory damages:

This court has refused to prescribe a definite ratio between compensatory and punitive damages. . . . 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.

Cameron v. Beard, 864 P.2d 538, 551 (Alaska 1993) (citations omitted).

An allocation to the state of 75 percent of the punitive damage award also does not appear to violate state or federal constitutional provisions. See Gordon v. State, 585 So.2d 1033, 1035-1038 (Fla. App.1991), aff'd, 608 So.2d 800 (Fla.1992); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 637-639 (Ga.1993); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc., 473 N.W.2d 612, 619 (Iowa 1991). The allocation causes practical problems, however, that could in turn raise constitutionality questions.

1. Attorney Fee Liability: Punitive Damage Share.

Section 7(d) of the bill provides that "if a person receives an award of punitive damages, the court shall require that 75 percent of the award be deposited into the general fund of the state." The original bill contained a provision specifying that contingent attorney fees must be calculated after the state's percentage of the punitive damage award was deducted (see section 20, CSHB 158(Fin)), which was dropped from the final bill, leaving the issue unaddressed in HB 158. This oversight creates significant risk that a plaintiff would recover less from an award including punitive damages for outrageous wrongdoing than from an award with no punitive damages.

The following example demonstrates how HB 158 could operate to financially penalize plaintiffs who are awarded punitive damages. If a plaintiff agrees to pay an attorney a 40 percent

contingent fee, which is not uncommon, and the contingent fees were calculated before deduction of the state's 75 percent portion of a punitive damage award, the plaintiff would recover no portion of the punitive award, and would actually be penalized 9 percent on each dollar of punitive damages awarded:

Comp. Damages	\$100,000	\$100,000	\$100,000
Prejudgment Int. ⁵	20,000	20,000	20,000
Punitive Damages	0	10,000	100,000
Civil Rule 82	<u>14,500</u>	<u>15,500</u>	<u>24,500</u>
Gross Award	134,500	145,500	244,500
40% Cont. Fees	<53,800>	< 58,200>	< 97,800>
State's Share of Punitive Damages	< <u>0</u> >	< <u>7,500</u> >	< <u>75,000</u> >
NET RECOVERY ⁶	\$80,700	\$79,800	\$71,700

Substantive due process requires that any bill granting the state a share of punitive damages contain language to protect plaintiffs from liability for contingent attorney fees calculated from the state's share of the recovery.

2. General Retroactivity of Punitive Damages Limitation

Section 24 of the bill would apply the punitive damages limits in sec. 7 of the bill to civil actions that accrued before the effective date of the bill if the court had not yet entered judgment in the civil action. This provision probably would constitute a taking without compensation and a violation of due process.⁷

⁵ The \$20,000 interest figure in this example represents approximately two years of interest on the compensatory award under the current rate of 10.5 percent per year. Prejudgment interest is not awarded on punitive damages. See Matanuska Electric Association, Inc. v. Weissler, 723 P.2d 600 (Alaska 1986).

⁶ This illustration does not take into consideration litigation costs, which would vary from case to case, but which in every case would reduce the plaintiff's net recovery further.

⁷ The retroactivity language was added in the Senate Rules Committee and was never subjected to routine public hearings.

A newly imposed limitation on the remedy in an existing cause of action may constitute a taking of vested property rights or a violation of due process. An unlitigated claim is considered a property interest. Patrick v. Lynden Transp., Inc., 765 P.2d 1375, 1378 (Alaska 1988). State Superior Court Judge Larry Weeks has held that "once a lawsuit is filed by an individual to enforce a then existing legal right, that right cannot be extinguished by later legislative action directed at that individual's claim." Edwards v. Alaska Pulp Corp., 1JU94-1825 CI (September 22, 1994). Judge Weeks extended this principle to any statutory change that "reduces the value of Plaintiff's property." Id. This rationale would be even more compelling if the plaintiff had expended significant litigation costs in reliance on the existing law of punitive damages.

The Legislative Affairs Agency similarly has concluded that "[a]n actionable right that is canceled . . . would be considered a property right that is protected by the due process clause." Memo from Legislative Counsel Theresa Bannister to Rep. Navarre, March 7, 1994. In that matter, the legislative counsel considered a draft bill that would cancel certain private nuisance actionable rights even if the right had already accrued and was being litigated short of final judgment. The memo notes that even when the legislature eliminates a remedy, the action is unconstitutional if the change is so abrupt as to leave no reasonable time to exercise the remedy. The memo also concludes that retroactivity may constitute an inverse condemnation taking under art. I, sec. 18 of the Alaska Constitution. Both the due process and inverse condemnation aspects of the legislative counsel's analysis are applicable to HB 158.

The inverse condemnation concern is particularly applicable because the state would take 75 percent of a remedy that the plaintiff had spent money to obtain. Prospectively, a plaintiff would consider that outcome in determining what resources to devote to a punitive damages claim.

On the other hand, the Alaska Supreme Court could find that a claim for punitive damages does not constitute a property interest. Punitive damages are a creature of statute and do not exist independently of statutory authorization. Hazen v. Anchorage, 718 P.2d 456, 465 (Alaska 1986). Further, punitive damages can be viewed as a windfall to the plaintiff rather than as a right, because the payment does not compensate the plaintiff for actual damages. Some states' courts have held that the legislature may retroactively modify punitive damage provisions. See Shepherd Components, 473 N.W.2d at 619; Vaughan v. Taft

Broadcasting Co., 708 S.W.2d 656, 660 (Mo. 1986); but see Reeves v. Ille Elec. Co., 551 P.2d 647, 652 (Mont. 1976).

This section would raise an additional constitutional problem if it were established, as was suggested in House floor debate, that the legislative purpose of retroactivity was to affect the legal rights of individuals in specific litigation, rather than to promote a broad public purpose. See Yukon-Kuskokwim Health Corp. v. Trust Ins. Plan for S.W. Alaska, 884 F.Supp. 1360, 1366-67 (D. Alaska 1994). Judge Weeks also identified this deficiency in the statute he addressed in his Alaska Pulp Corp. decision. Because he found the legislation to be intended to extinguish rights in particular litigation, Judge Weeks held that it had a private purpose and therefore had insufficient public purpose to withstand due process scrutiny. A private purpose would not meet the constitutional test of bearing a reasonable relation to a legitimate public purpose. See Pan-Alaska Const. v. Dep't of Admin., 892 P.2d 159, 162 (Alaska 1995); Gates v. Tenakee Springs, 822 P.2d 455, 462 (Alaska 1991); Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 351 (Alaska 1988).

Retroactive application of the allocation provision also would cause practical problems. The retroactivity provision would affect cases in which the jury had returned a verdict, but in which post-trial motions were pending. A final judgment "represents the completion of all steps in the adjudication of [a] claim by the court, short of any steps by way of execution or enforcement." Restatement (Second) Judgments § 13 comment b (1982); Catlin v. United States, 324 U.S. 229, 233 (1945). Even cases remanded on appeal may no longer have "final" judgments. Retroactive application would subject litigants in many pending cases to an additional stage of turmoil and unpredictability.

3. Impact on Exxon Valdez Litigation

You have asked about the impact of sec. 24 of the bill on the Exxon Valdez oil spill punitive damages award. The risk that sec. 24 of the bill would impact the \$5 billion punitive damage award in In re the Exxon Valdez, A89-095-CV (HRH) is significant. The court will not issue a final judgment in this case until the final phase of the litigation is completed. Whether sec. 24 of the bill impacts the verdict depends on how the federal appellate courts evaluate several hotly contested issues the trial court decided in the Exxon Valdez case. The federal appellate courts that will decide these issues are entirely outside the control of the state's executive, legislative, and judicial branches of government.

Counsel for the Exxon Valdez plaintiffs have indicated that the punitive damage award applies to the claims of approximately 30,000 victims of the oil spill, mostly Alaskan residents. The amount of the punitive damages award and the number of claimants affected render the award the most significant ever made in this state, and one of the most significant ever made in the United States. The plaintiffs' case took five years to proceed to trial. The federal trial court considered and decided scores of legal issues in motions filed before, during, and after the trial. Given the magnitude of the case, the enactment of sec. 24 of the bill almost certainly would provide an basis for additional post-trial motions, which would further delay final resolution and entry of judgment. Section 24 of the bill also would create substantial uncertainty about the appellate consideration of the punitive damages verdict.

Although the punitive damage award was made in federal court, state law governs if the punitive damage award is based on a state law claim. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. at 278. The plaintiffs in the Exxon Valdez case made claims under state statutes and state common law and sought punitive damages under those state law claims. The State joined the private plaintiffs in arguing that federal maritime law did not preempt applicable state law. The federal district court decided that federal maritime law applied and preempted all of the plaintiffs' state law claims. In re Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991).

Exxon then argued to the federal district court that the state "clear and convincing evidence" legal standard for punitive damages should apply in the Exxon Valdez trial. In its brief to the court on that issue, Exxon stated:

There is no question that a federal court can and should look to prevailing principles of land-based law, to the extent consistent with the policies and purposes of admiralty, when fashioning federal maritime common law rules.

Consistent with the ruling that federal maritime law preempted all state law causes of action, Judge Holland ruled that federal law governs the issue of punitive damages. (Order No. 171). Exxon unsuccessfully repeated its argument in its subsequent motion for a new trial on the plaintiff's punitive damages claims, and likely will continue to argue on appeal that applicable state law should limit punitive damages.

The court's decision that federal maritime law preempts state law is subject to challenge both on motion for reconsideration and on appeal, and may not survive. Another preliminary decision of the federal trial court on a different issue was appealed to and reversed by the Ninth Circuit prior to trial. Evak Native Village v. Exxon Corp., 25 F.3d 773 (9th Cir.), cert. denied, 115 S. Ct. 351 (1994) (reversing in part denial of motions to remand). In addition to the considerable authority the state cited in its briefs supporting the application of state law, several subsequently reported decisions by other federal courts hold that the plaintiffs' state law claims are not preempted by federal maritime law in similar circumstances. See Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994) (holding that federal maritime law does not preempt oil spill-related claims under Rhode Island's Environmental Injury Compensation Act); In re Nautilus Motor Tanker Co., 900 F. Supp. 697 (D.N.J. 1995) (federal maritime law did not preempt oil spill-related claims under N.J. common law); Slaven v. BP America, Inc., 786 F. Supp. 853 (C.D.Cal. 1992) (holding California statutory and common law claims for damages arising from oil spill not preempted). Judge Shortell, who presided over the state court Exxon Valdez litigation, also reached a result contrary to that of the federal trial court, in pretrial orders 15 and 16, September 26, 1990. Whether the Ninth Circuit and the United States Supreme Court would agree with the trial court's decision on the preemption question in the Exxon Valdez case is an open question.

Even if the punitive damages cap and allocation provision do not apply directly to the Exxon Valdez award, HB 158 could have a more subtle effect. In its recent decision in BMW, the United States Supreme Court considered the limitations that state punitive damages laws impose in determining whether the Alabama award violated the due process clause. This type of reasoning would create a further basis for Exxon to argue that the jury's verdict is excessive. Exxon would present the bill's limitations on punitive damages as a standard by which to gauge reasonableness, and argue that the punitive damages awarded are grossly excessive compared to the caps the legislature has deemed appropriate.

Given the federal trial court's prior rulings on punitive damages issues, it is unlikely to determine that sec. 24 of the bill affects the punitive damages verdict in the Exxon Valdez case. The question is unsettled, however; Exxon is likely to argue the issue in a post-trial motion and more significantly, on appeal. Thus, sec. 24 of the bill injects considerable uncertainty and potential delay into the status of the punitive damages verdict.

B. PERIODIC PAYMENT

Current Law

Currently, a plaintiff may request that an award for future damages be paid by periodic payments rather than in a lump sum under Civil Rule 58(d). Periodic payments for future economic damages are permitted for all kinds of tort actions and contract cases. The court also has discretion to require that a defendant post security to ensure that funds are available as periodic payments become due. Civil Rule 58(e).

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Section 8 of the bill would provide the courts further guidance in deciding whether to require security for periodic payments. Section 9 of the bill would amend the provision providing the mechanism for payment of periodic damages, and would require a judgment for periodic damages to specify any future increases for inflation. Section 9 of the bill also limits the periodic payment mechanism to damages arising from personal injury or death.

Analysis

Because these provisions change matters of court procedure, but did not pass the legislature by a two-thirds margin, they probably are invalid as violative of the Alaska Constitution. The Alaska Supreme Court has power to make and promulgate rules governing the practice and procedure in civil and criminal cases in all courts. Alaska Constitution, art. VI, sec. 15. The legislature has no authority to make procedural rules, and can change existing rules only by a two-thirds majority of the members of each house. *Id.*; Linstad v. Sitka School District, 863 P.2d 838, 843 (Alaska 1993); Channel Flying, Inc. v. Bernhardt, 451 P.2d 570, 575, 576 (Alaska 1969).

To determine where the court's power ends and the legislature's begins, the court distinguishes between substantive and procedural law. Substantive law creates, defines, and regulates a right, while procedural law prescribes the method of enforcing the right. Ware v. City of Anchorage, 439 P.2d 793, 794 (Alaska 1968). In order for a statute to be invalidated as infringing on the court's authority to govern court procedure, it must be found that the statute conflicts with a rule promulgated by the court, Matanuska Maid, Inc. v. State, 620 P.2d 182, 188 (Alaska 1980), that the main subject of the statute is not substantive with only an incidental effect on procedure, Winegardner v. Greater

ALLOCATION OF FAULT

Current Law

The current law governing the allocation of fault in a tort action derives from the "Tort Reform Ballot Initiative" approved by Alaskan voters on November 8, 1988. The express purpose of the initiative was to eliminate "joint and several" liability -- the common law doctrine by which multiple defendants are held both jointly and individually liable for the entire amount of damages awarded to a plaintiff irrespective of each defendant's percentage of fault. In pertinent part, the initiative repealed AS 09.16.010, which provided for a right to contribution among co-tortfeasors, and amended AS 09.17.080(d) to read, "[T]he court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault."

In Benner v. Wichman, 874 P.2d 949 (Alaska 1994), the Alaska Supreme Court analyzed the changes in AS 09.17.080 and held that fault could only be allocated among parties who had been joined to the action. Thus, under current law defendants may still be held liable for the fault of any tortfeasors who have not been joined in an action.

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Sections 10 and 11 of the bill would change current law by amending AS 09.17.080 to allow fault to be allocated to all persons responsible for a claimant's damages "regardless of whether the other person, including an employer, is or could have been named as a party to the action." The proposed changes would eliminate the need for a defendant to file a third-party complaint against a negligent but judgment-proof person (whom the plaintiff had elected not to sue) in order to have fault allocated to that person. Moreover, fault could be allocated to persons who are immune from tort liability in a particular case, for example, employers, who are immune from tort liability to injured employees, and the state, which is immune from tort liability for discretionary acts.

In addition, sec. 11 of the bill provides that the assessment of fault against a non-party does not subject the person to liability and may not be used as evidence of liability in another action.

Section 12 of the bill contains new language, added in the Senate Rules Committee, codifying existing Alaska law providing that an agreement not to sue or enforce judgment given to one

Anchorage Area Borough, 534 P.2d 541, 547 (Alaska 1975); Channel Flying, Inc., 451 P.2d at 576, and that legislature has not changed the rule with the stated intention of doing so, Leege v. Martin, 379 P.2d 447, 451 (Alaska 1963); Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1040 (Alaska 1981).

Applying this standard, the changes in mechanism for payment of periodic damages may violate the Alaska Constitution. The mechanism by which periodic damage payments are provided is inherently procedural. Further, the provision in HB 158 changes an existing rule without any statement that the legislature had this intent. In contrast, the legislature passed the original provision in 1986 by amending Alaska Civil Rule 58 by a two-thirds majority to contain periodic payment provisions.

C. INTEREST

Current Law

Under AS 09.30.070(a), the interest rates on judgments, both pre- and post-judgment, is 10.5 percent. The state pays interest on judgments against it under AS 09.50.280, which provides that judgments against the state will draw "legal interest." The Alaska Supreme Court has interpreted this phrase to mean that the state pays the rate set in AS 45.45.010, which sets the legal rate of interest in Alaska generally, rather than the rate set in AS 09.30.070. State v. Phillips, 470 P.2d 266, 272 (Alaska 1970)

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Except when a judgment involves a contract specifying the interest rate, sec. 14 of the bill would change both postjudgment and prejudgment interest to a variable rate, three percent above the rate for five-year treasury notes in effect on the date of judgment. This method of calculating an interest rate would be similar to the practice in federal courts, although the rates applicable to state judgments would be different.

Analysis

A variable interest rate provides more appropriate compensation to a plaintiff for the loss of the use of the money before payment is made. The new interest rate might not apply to judgments against the state, however, absent an amendment to AS 09.50.280 to cross-reference the new rate in proposed AS 09.30.070(a), rather than the rate specified in AS 45.45.010. This would subject the state to a different, presently higher, interest rate on judgments than private parties would pay. The legislative history does not indicate that this result was intended.

person does not discharge another person also civilly liable for the same injury or death. Young v. State, 455 P.2d 889, 893 (Alaska 1969).

Analysis

Sections 10 and 11 of the bill would implement pure "several liability," so that named parties are held accountable only for their own percentage of fault. The plaintiff could not collect damages from nonparties merely because fault is allocated to those persons, however. If the plaintiff chooses to sue unnamed persons in a separate action, the court or jury's allocation of fault in the first action would not be binding or permitted as evidence in the separate action. The bill would allow the court or jury to allocate fault to entities that the plaintiff cannot sue, such as an employer for a work-related injury, or those immune from liability, such as persons protected by the statute of repose or good Samaritan law. The plaintiff would remain uncompensated for that proportion of fault.

This provision creates a problem that HB 158 does not resolve. The bill does not amend workers' compensation law to account for the impact that sec. 10 of the bill would have on a worker injured due to the combined negligence of the employer and a third party. Under current law, a worker injured due to fault on the part of both the employer and a third party is entitled to workers' compensation from the employer and 100 percent tort damages from the third party. Lake v. Construction Machinery, Inc. 787 P.2d 1027 (Alaska 1990). The employee then must reimburse the employer for the workers' compensation benefits (less the employer's proportionate share of litigation costs and attorney fees) from the tort damages recovery. AS 23.30.015. Because HB 158 allows fault to be allocated to non-party employers in a suit against the negligent third party, the employee's tort recovery would be reduced by the employer's percentage of fault.⁸ HB 158 does not amend AS 23.30.015, however, so the employee still would have to reimburse the employer for the full workers' compensation benefits from the partial award from the third party.

⁸ AS 23.30.055 provides that workers' compensation is the exclusive remedy against an employer .

OFFERS OF JUDGMENT

Current Law

Several offer of judgment provisions currently exist to encourage settlement. These provisions generally reward parties who make reasonable offers before trial and penalize parties who reject them. A plaintiff or defendant can make an offer of judgment to the adverse party in a civil case. If the other party rejects the offer and then obtains a judgment more favorable than the offer, the offer will have no effect. If the other party rejects the offer and the ultimate judgment is equal to or less favorable than the offer, however, the prejudgment interest rate is adjusted. It is reduced from 10.5 percent to 5.5 percent simple interest if the offeree with a less favorable judgment than the offer is a plaintiff, and is increased from 10.5 percent to 15.5 percent if the offeree with a less favorable judgment than the offer is a defendant. This mechanism is set forth in AS 09.30.065 and Civil Rule 68.

In addition, Civil Rule 68 provides a further penalty against a plaintiff who obtains a less favorable judgment than the rejected offer. The plaintiff must pay the defendant's costs and attorney fees under Civil Rule 79 or 82 for the period after the date of the offer, as if the defendant had been the prevailing party. Such costs and fees awards are typically 30 percent of a party's actual expenses.

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Section 13 of the bill would change existing offer of judgment law in four ways. First, it would eliminate all adjustment of prejudgment interest rates. Offers of judgment would no longer be connected to the rate of interest assessed on judgments. Second, it would override the Civil Rule 68 provision regarding attorney fees so that the offeror would get full reasonable fees from the date of the offer, not just a percentage of fees. Third, the right to full reasonable fees would apply equally to plaintiffs and defendants, in contrast to current Civil Rule 68's provision for cost and fee awards only against plaintiffs. Fourth, the proposed provision introduces a five percent margin of error to the offer of judgment mechanism; costs and fees would be shifted only if the offeree obtains a judgment at least five percent less favorable than the one offered.

Analysis

As stated, the changes would not pose legal problems. However, some of the changes may be invalid because they amend court rules without the mandatory two-thirds majority vote, and the remaining provisions then would have an effect directly contrary to their intended impact.

Civil Rule 68 provides that the interest rate shall be adjusted "by the amount specified in AS 09.30.065," and sec. 13 of the bill would eliminate that statute's adjustments of prejudgment interest rates. Section 13's award of full reasonable attorney fees, intended to override Civil rule 68, may be invalid as an amendment of court rules in violation of art. IV, sec. 15 of the Alaska Constitution. Thus, the primary financial penalty for failing to accept a reasonable offer would disappear, but the replacement for that penalty would be ineffective and sec. 13 of the bill would have a net impact of reducing rather than increasing the incentives for early settlement of cases.

Finally, the interrelationship between Civil Rules 68 and 82 would cause a result presumably unintended by the legislature. Under Civil Rule 82, the plaintiff is entitled to recover 10 percent of the recovery as attorney fees, while under the proposed amendment to Civil Rule 68(b), the plaintiff also would be entitled to receive full attorney fees incurred from the date of the offer of judgment. Section 13 of the bill provides no mechanism for balancing these overlapping fee provisions.

MALPRACTICE

A. ADMISSIBILITY OF EXPERT TESTIMONY

Current Law

Current law generally restricts a jury from considering any evidence other than testimony of expert witnesses in determining whether a professional breached the standard of care in a malpractice case. Kendall v. State, Div. of Corrections, 692 P.2d 953, 955 (Alaska 1984). The court determines under Evidence Rule 702(a) whether a witness has sufficient expertise to testify as an expert. The witness must qualify by "knowledge, skill, experience, training, or education" to assist the jury "to understand the evidence or to determine a fact in issue." A witness need not possess a particular license or academic degree in order to qualify as an expert. Handley v. State, 615 P.2d 627, 630 (Alaska 1980).

HB 158

Under secs. 15 and 16 of the bill, neither the plaintiff nor the defendant in a professional malpractice action could present an expert to testify at trial who was not both licensed by a state or country and certified by a state-recognized board as having expertise directly related to the particular field or matter at issue. The only exception would be for professions not licensed in any state or country.

Analysis

If a profession is not licensed in Alaska, but is licensed in any other state or country, then no Alaskan professional could testify as an expert. The licensed professional also would have to be board-certified to be qualified to testify, even though most professions (including general practice physicians) do not have boards that certify expertise. For example, if the plumbing profession were licensed only in New Jersey, only a New Jersey plumber could testify in Alaska about the standard of care that Alaskan plumbers should use in Alaska plumbing construction. If the plumber were not board-certified because a board to certify plumbers did not exist, even a New Jersey plumber could not testify. To the extent that these limitations are impossible to meet or unduly limit a party's ability to present evidence at a civil trial, they probably violate due process. Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14, (1950). The federal district court and the Tennessee Supreme Court upheld the constitutionality of a Tennessee statute that limited expert testimony in a medical malpractice case to physicians licensed in the state or contiguous states, because the statute included a waiver provision if appropriate witnesses were unavailable. Ralph v. Nagy, 749 F. Supp. 169, 175 (M.D. Tenn. 1990) quoting Stulphin v. Platt, 720 S.W.2d 455, 458 (Tenn. 1986). Absent such a waiver provision, the Alaska Supreme Court probably would find this provision unconstitutional because it lacks a reasonable relation to a legitimate public purpose. See Pan-Alaska Const., 892 P.2d at 162; Gates, 822 P.2d at 462; Keves, 750 P.2d at 351.

No other state has adopted similar restrictions on the admissibility of expert testimony. Some states require a medical malpractice expert to have knowledge related to the particular medical field. See, e.g., Colo. Rev. Stat. Ann. §13-64-401 (West 1989); Kan. Stat. Ann. § (1995); R.I. Gen. Laws § 9-19-41 (1995). Michigan law requires that if a health professional subject to the malpractice action is a specialist, the expert also must have that specialty, and if the health professional is a board-certified

specialist, then the expert also must be board-certified. Mich. Comp. Laws § 600.2169 (1) (1995). North Carolina has an evidence rule requiring an expert to have the same or a similar specialty as the health care provider subject to the malpractice claims. Evidence Rule 702(b), N.C. Gen. Stat. § 8C-1 (1996). The court can waive this requirement if it finds extraordinary circumstances that warrant permitting the witness to testify to serve the ends of justice. Id. at 702 (e).

Further, HB 158 may be ineffective to change the rules for admission of expert testimony because the bill did not expressly provide for an amendment to court rules and the bill did not pass by the required two-thirds majority. See Alaska Constitution, art. IV, sec. 15. The version of the bill presented on the House floor contained a section expressly amending Evidence Rule 701, but the section failed to pass by the required two-thirds majority. The Senate did not replace the section and therefore did not vote on it.

B. NON-LIABILITY OF HOSPITALS

Current Law

Generally, a hospital is not liable for the act of a physician or other health care provider who is an independent contractor, unless the hospital itself is negligent. The hospital has an independent duty to use reasonable care in granting staff privileges to practice in the hospital and to supervise the medical treatment provided. Jackson v. Power, 743 P.2d 1376, 1378 n.2 (Alaska 1987). This general liability exemption does not apply when the hospital contracts a service that it is required by law to provide, for example, emergency services, and the contractor is negligent. 743 P.2d at 1382-85 (Alaska 1987). This doctrine of "nondelegable duties" applies also in other areas of endeavor based on "the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." 743 P.2d at 1384 (quoting Prosser and Keeton on the Law of Torts § 71 at 511-12). Currently, hospitals may guard against vicarious liability for an emergency room physician by joining the negligent physician as a co-defendant to any suit and by requiring its emergency room physicians to carry adequate malpractice insurance.

HB 158

Section 18 of the bill limits liability of hospitals for civil damages caused by an emergency room physician if the hospital posts and publishes notice that the physician is an independent

contractor and if the physician holds liability insurance coverage for at least \$500,000 per incident. The bill codifies the hospital's independent duty to exercise reasonable care in granting and reviewing staff privileges. Whether the bill is intended to supersede a hospital's existing duty to supervise the medical treatment provided by an emergency room physician is unclear.

Analysis

This section does not appear to have any legal or constitutional problems.

ARBITRATION

HB 158

Section 17 of the bill would establish a requirement for nonbinding arbitration in tort cases with damage claims of less than \$50,000 that are not in small claims court. In such cases, the court would appoint an attorney arbitrator, whom the parties must pay "in equal shares." After an expedited period of discovery and a hearing, the arbitrator would render a decision. A party could reject the decision and receive a court trial, but attorney fees would be awarded against a party who chose this route but failed to improve on the arbitrator's decision. Section 17 of the bill does not state the manner of collecting arbitrators' fees and the appropriate division of arbitration costs in cases with multiple plaintiffs or defendants.

Analysis

Section 17 of the bill would provide for the first mandatory alternative dispute resolution in Alaska beyond the mediation that the court may order under Civil Rule 100. It would have narrow applicability, generally to property damage tort cases in district court. Because the parties with smaller claims would bear arbitration costs that parties in larger actions would avoid, the section may raise equal protection problems.

Further, sec. 17 of the bill may be invalid under art. IV, sec. 15, of the Alaska Constitution because it creates a court procedure without changing substantive rights, as discussed above.

FRIVOLOUS OR IMPROPER PRACTICE

A. NEW CIVIL CAUSES OF ACTION

Section 19 of the bill would allow parties to litigation to file new claims or spinoff lawsuits against other parties and their attorneys for "improper practice," and to seek punitive damages.

Current Law

At present, a person may bring a cause of action, under the common law action for abuse of process, against an opposing party for conduct during other litigation. Prosser and Keeton on the Law of Torts §§ 120-21 cited with approval in J & L Diversified Enter., Inc. v. Anchorage, 736 P.2d 349, 351 n. 3 (Alaska 1987). These causes of action ordinarily must be brought after prevailing in the underlying litigation. Id. at 892. The Alaska Supreme Court has set out the elements of the cause of action:

[A]buse of process consists of two essential elements, "first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." . . . The second element "contemplates some overt act done in addition to the initiating of the suit. . . . '[T]he mere filing or maintenance of a lawsuit -- even for an improper purpose -- is not a proper basis for an abuse of process action.'"

DeNardo v. Michalski, 811 P.2d 315, 317 (Alaska 1991) (citations omitted).

Parties, counsel, witnesses, judges, and juries have absolute immunity against a defamation action for statements made in litigation and pertinent to some issue in the litigation. Prosser and Keeton on the Law of Torts § 114 at 816-17; cf. Nizinski v. Currington, 517 P.2d 754, 756 (Alaska 1974). Of course, perjury would be subject to criminal liability under AS 11.56.200 or 11.56.230.

HB 158

Section 19 of the bill contains language added in the Senate Rules Committee and taken from HB 316. It would create a new cause of action under subsection (d) which is similar to the common law action for abuse of process, except that the new cause of action requires only a showing of either lack of probable cause

or ulterior motive, rather than both. Prosser and Keeton on the Law of Torts at 893-95. Section 19 of the bill also creates a new cause of action under subsec. (a) for various conduct including conduct that violates Civil Rule 11 (see discussion below), or conduct similar to abuse of process. The section creates liability for "reckless" false allegations or material misstatements of fact in the complaint or answer. The causes of action created under both subsections (a) and (d) may be asserted against the party or the party's attorney regardless of the outcome of the underlying litigation that gave rise to the claim. Under both provisions, the prevailing party may seek punitive damages and is entitled to an award of actual reasonable attorney fees.

Section 19 of the bill would dictate two methods for bringing the causes of action. For violations of subsec. (a) allegedly committed by the opposing party, the action would have to be maintained as a compulsory claim or counterclaim in the underlying lawsuit. For the violations of subsec. (a) allegedly committed by the opposing party's attorney, and for violations of (d) allegedly committed by either an opposing party or the party's attorney, the action would have to be brought after the conclusion of the underlying action.⁹

Additionally, subsec. (b) would require a court to enter judgment against a party on the party's claim or defense if the party intentionally made a material false statement in connection with the claim or defense.

Under sec. 19(h) of the bill, "[n]either the state, nor an agent or employee of the state acting within the scope of that agency or employment, is subject to liability under this section." This immunity parallels existing state immunity against claims for abuse of process set out in AS 09.50.250(3).

⁹ The precise demarcation between the causes of action under subsecs. (a) and (d) is unclear. Under (a)(2) and (c)(1), a party may have a compulsory counterclaim against the opposing party for failing to determine that each allegation in a pleading the opposing party signed was well grounded in fact. The same conduct may require that the action be brought after final judgment in the underlying action under (d)(1) and (f) because it could also be characterized as initiating an action without probable cause. Similarly, both (a)(3) and (d)(2) create liability for an ulterior motive.

Analysis

The creation of new causes of action for alleged false claims and improper conduct in litigation would increase the cost and complexity of litigation, particularly litigation against a judgment-proof opponent who could use the new causes of action to disrupt the adversary's case without fear of effective retaliation. The new causes of action could be characterized as more of a "sword" than a "shield."

To the extent that sec. 19 of the bill seeks to create a new category of compulsory counterclaim, based on conduct separate from that giving rise to the original lawsuit, it conflicts with Alaska Civil Rule 13. This aspect of sec. 19 of the bill would probably be invalid under art. IV, sec. 15, of the Alaska Constitution. If it were valid, this section could lead to a cycle of claims and counterclaims, as one party counterclaims that a claim was reckless or contained misstatements, the other party asserts that counterclaim was similarly deficient, and so on. The compulsory counterclaim provisions would create complexities in litigating the underlying case. For example, if a party made a misrepresentation that is corrected during the trial, a portion of the trial might be devoted to the question of whether the initial misrepresentation was reckless.

Additionally, a compulsory counterclaim requirement would often lead to a conflict between the client and attorney that would require the client to obtain new counsel. For example, if a client asserted reliance on the attorney for advice about the legal merits of an action, the original attorney would become a witness as to attorney-client communications and legal theory and might be precluded from continuing as the client's advocate in the underlying action. In some cases, the client may be forced to reveal attorney-client communications that otherwise would be privileged. Tactical use of such counterclaims could adversely impact both plaintiffs and defendants.

The requirement that all defenses be asserted based on "probable cause" may be difficult for defendants to meet. "Probable cause" means "having more evidence for than against." Black's Law Dictionary (5th Ed.). Typically, defense counsel must prepare the answer with very incomplete information and little or no evidence about the case. Current practice is to assert all defenses that conceivably might apply, in order to avoid waiving those defenses. Defenses that prove unfounded can later be dropped. Section 19 of the bill could make an attorney liable to the plaintiff for asserting such defenses in an answer, with the

alternative of being liable to the client for failing to timely assert a defense.

In some cases, a business's current liability insurance may not cover the derivative litigation arising from an underlying suit that otherwise would be covered by the insurance. While comprehensive general liability insurance policies appear to cover much of the litigation that could be generated by this section, some businesses carry more limited coverage that may not encompass the libel and slander claims authorized by sec. 19 of the bill. In such cases, insurance companies would be expected to decline to provide a defense to the spinoff claims, or to indemnify any adverse judgments.

B. SANCTIONS FOR PLEADINGS

Current Law

Under Civil Rule 11, attorneys or parties must sign their pleadings, and their signatures certify that the pleadings are well grounded in fact and law to the extent of their knowledge and belief after reasonable inquiry, and that the pleadings have not been filed for harassment or other improper purposes. Violations of this rule and any other civil rule may be sanctioned under Civil Rule 95. The court may require the offending party or attorney to pay the opposing party "costs or attorney fees as the circumstances of the case and discouragement of like conduct in the future may require." The court may impose an additional fine on an attorney of up to \$1000.

HB 158

Section 21 of the bill amend Civil Rule 95 for violations of Civil Rule 11 only. The bill would mandate sanctions for violations of Civil Rule 11 in an amount left to the court's discretion. An award to the opposing party is limited to those costs or fees "incurred because of" the violation. The bill increases the possible fine payable to the court to \$10,000 and applies the fine to parties as well as attorneys.

Analysis

The first five sentences of sec. 21 of the bill are substantively identical to existing Alaska Civil Rule 11. The remainder of sec. 21 of the bill is intended to amend Alaska Civil Rule 95. This rule change failed to receive the two-thirds majority vote necessary to be effective under article IV, section 15 of the Alaska Constitution.

FELON PLAINTIFFS

Current Law

AS 09.65.210 was enacted in 1986 to preclude 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 (including a plea of nolo contendere), and (3) the felony substantially contributed to the injury or death. The current law maintains the felon's right of action under 42 U.S.C. 1983, the federal Civil Rights Act.

HB 158

Section 20 of the bill expands the liability limitation under AS 09.65.210 to apply when the claimant was attempting to commit a felony or fleeing from the commission of a felony, not merely "engaged in the commission of a felony." It also removes the requirement that the person be convicted. A felon's right of action under 42 U.S.C. 1983, the federal Civil Rights Act, would be no longer exempted from the prohibition on claims.

Analysis

Subsection (a) of sec. 20 of the bill does not state the standard of proof for proving the plaintiff was committing or attempting to commit a felony. In sec. 7 of the bill, the legislature specified the "preponderance of evidence" standard for establishing that the person was committing or attempting to commit a felony. The lack of a standard of proof is troublesome in light of the "clear and convincing evidence" standard set in subsec. (b) of sec. 20 of the bill for a wrongful death action. This section does not appear to have any other legal problems. A prisoner would be prohibited under this section only from maintaining a federal civil rights action in state court, not in federal court, so that all such claims against state officials would be decided by federal courts.

REPORT

Under sec. 22 of the bill, the director of the division of insurance would be directed to report to the legislature by January 1, 1998 on any impact the bill may have had on liability insurance rates.

Hon. Tony Knowles, Governor
Our file: 883-96-0096

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SEVERABILITY

Section 23 of the bill repeats AS 01.10.030 and does not vary the general rules on severability noted in State v. Kenaitze Indian Tribe, 894 P.2d 632, 639 (Alaska 1995).

APPLICABILITY

If enacted, the bill would be applicable to all civil actions accruing on or after the effective date, except the punitive damages provisions would apply retroactively to a cause of action if judgment had not yet been entered. Additionally, as discussed above under Statute of Repose, sec. 3 of the bill would have a retroactive effect to bar actions if the "final act" took place more than ten years before the injury occurring after the effective date.

CONCLUSION

The bill raises substantial constitutional and other legal concerns that warrant your serious consideration.

Sincerely,



Bruce M. Botelho
Attorney General

BMB:TEW:CMK:jem

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May 16, 1996

VIA FAX (907) 465-3532

Governor Tony Knowles
P.O. Box 110001
Juneau, Alaska 99811

Dear Governor Knowles:

We write to you as former Attorneys General for the State of Alaska who care deeply about our state and its justice system. Since statehood, we have served both Democratic and Republican administrations. As lawyers and policymakers, we have differed on many issues over the years. Now, however, we agree on one point: we all are firmly convinced that the civil liability reform measure recently passed by the Alaska legislature is bad for the people of Alaska, and we strongly urge that you exercise your constitutional authority and veto HB 158.

We do not oppose HB 158 because we specialize or have a vested interest in litigating personal injury cases. We oppose HB 158 because it is fundamentally unfair and bad legislation. The bill effectively locks the court house doors to many innocent victims. The bill makes it difficult and in some instances impossible for victims to recover fair compensation for their injuries. It also creates immunity for many wrongdoers, thereby reducing accountability and jeopardizing the safety of all Alaskans, and it gives special and unfair protection to some negligent professionals. Stated simply, HB 158 is primarily special interest legislation that serves to insure that many Alaskans will be denied justice. Among those that will be hurt by the bill is the State of Alaska, itself, which is the largest purchaser of goods and services and which, like other Alaskans, will be unable to seek relief in court for the damages it sustains as a result of another's negligence or misconduct. Moreover, the State will be liable for providing care and support of Alaskans who are foreclosed under the bill from obtaining relief from the person or company responsible for their injuries or losses.

The bill offers nothing for Alaskan consumers. The stated purpose of HB 158 is to reduce the cost of insurance, yet as passed it contains no provision requiring insurance companies to reduce their rates. Such a provision was included in an earlier version of the bill, but, inexplicably, it was deleted at the end of the legislative session. As a result, the bill unfairly inflicts a cruel hoax on Alaskans by taking away their rights to civil justice and giving them nothing in return. The arbitration provision in the bill is ineffective and needlessly

Governor Tony Knowles
May 16, 1996
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burdensome in that it only applies to small cases and imposes an additional layer of costs and delay on the parties. It makes an already onerous legal process nearly intolerable for the Alaskan with a modest-sized, but meritorious legal claim.

The bill is further troubling in that it strips Alaskan juries of their constitutional right to decide cases. During our many years of service as Attorneys General for Alaska, and as lawyers representing a both plaintiffs and defendants, we litigated or supervised more jury trials than anyone. As a result of that experience, we have the greatest respect and confidence in Alaska juries. Contrary to arguments frequently advanced by the proponents of HB 158, there is no history of excessive compensatory or punitive damages verdicts in this state. When challenged to identify such a pattern, the bill's supporters have stood oddly silent. The Alaska courts have carefully and conservatively supervised the awarding of damages in civil actions. In all the years since Statehood, the Alaska Supreme Court has never approved a punitive damages award in excess of \$700,000, and the average approved punitive damages award is under \$200,000. HB 158 artificially caps punitive damages at a level too low to serve in many cases as any meaningful deterrent to wilful misconduct..

Finally, many portions of the bill are unconstitutional, a fact that proponents of the bill were advised of in 1994 by the Hickel administration. For reasons unknown to us, the legislature ignored the serious constitutional problems with the bill. As a result, HB 158 invites avoidable and wasteful litigation of these constitutional issues, needlessly burdening litigants and the courts for years to come.

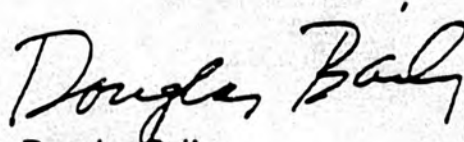
This is not a Republican or Democratic issue. All Alaskans have an interest in preserving an effective system of justice. It is undeniable that there are many areas in which our system of civil justice can be strengthened and improved. Access to justice should be easier. Costs should be reduced. The time needed to obtain a resolution should be shortened. Nothing in HB 158 will accomplish any of these laudable goals, however. Instead, the bill confers unwarranted special privileges, immunities, and benefits on negligent manufacturers, professionals, and insurers, and severely erodes the rights of innocently and seriously injured Alaskans.

On behalf of the people of Alaska, we strongly urge you to veto HB 158.

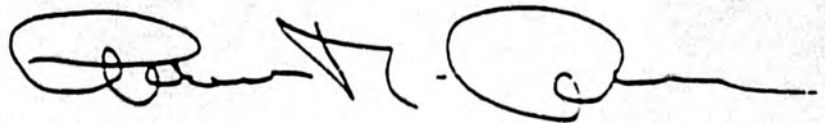
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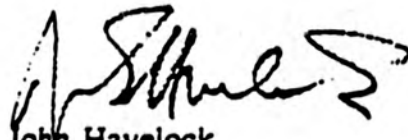
Charles E. Cole
(Attorney General of Alaska 1990-1993)



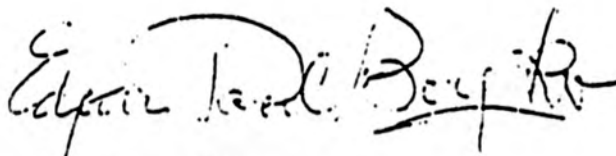
Douglas Baily
(Attorney General of Alaska 1988-1990)



Avrum Gross
(Attorney General of Alaska 1974-1980)



John Havelock
(Attorney General of Alaska 1970-1973)



Edgar Paul Boyko
(Attorney General of Alaska 1967-1968)

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State of Alaska
Office of the Governor

TONY KNOWLES
Governor
P.O. Box 110001
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NEWS RELEASE



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FOR IMMEDIATE RELEASE: June 14, 1996

96-154

KNOWLES VETOES FLAWED "TORT REFORM" MEASURE AS POOR POLICY
Creates Task Force to Develop Responsible Reform Bill

Gov. Tony Knowles today vetoed a so-called "tort reform" bill (HB 158) passed this year by the Legislature, saying it was the product of a flawed public process, it dictates poor public policy and it contains serious legal defects and constitutional problems.

To produce meaningful tort reform, the governor said he will appoint a task force of affected Alaskans to develop a new bill through an open public process that meets the goals of fairness, efficiency and reduction of insurance rates. Knowles has successfully adopted a similar approach of bringing affected Alaskans together on issues such as teacher tenure and welfare reform after the Legislature failed to pass reasonable bills.

"I agree with many Alaskans that meaningful reform of Alaska's civil justice system is necessary," the governor said in a veto message to legislative leaders. "The system should be more efficient yet just, and we should reduce frivolous litigation while preserving the ability of innocent victims to be compensated for injuries caused by others. Alaska businesses are faced with the risk of excessive lawsuit awards, high liability insurance rates and the threat of settlement or costly litigation."

"Few of those ideas survived in this bill. Instead, the current version was hastily rewritten in the dead of night and subject to little public review," Knowles said. "As a result, this bill fails far short of the mark of meaningful and responsible tort reform. It is extreme, seriously flawed and fails to implement these positive aspects of tort reform in a reasonable way. In fact, in some cases, this bill makes problems worse by increasing litigation expenses, lengthening the litigation process and clouding the rights of thousands of Alaskan families."

HB158 was passed by narrow margins in the final days of the session. The governor noted this year's legislative debate included some good concepts for reforming Alaska's civil justice system, such as reasonable limits on punitive damages, cutting back on frivolous lawsuits, insurance rate reductions and mediation to encourage early settlements.

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Tort Reform Veto

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June 14, 1996

But few of those ideas survived in this bill. Instead, the current version was hastily rewritten by the Senate Rules Committee with virtually no public review and lawmakers had little time to even read the bill. The governor said he vetoed it for three primary reasons:

- **Flawed public process** - One result of that process, which supporters of the bill claim is unintentional, is a dangerous and likely unconstitutional approach to limiting punitive damages. This bill would retroactively preclude certain punitive damage awards even after a jury has issued a verdict.

"In a case familiar to all Alaskans, I am advised this provision could jeopardize the rights of 30,000 Alaskans affected by the Exxon Valdez oil spill," Knowles said. "No responsible public official can or should take that risk."

- **Poor public policy** - The bill is littered with poor public policy provisions which complicate instead of streamline the civil justice system, which increase the amount, cost and complexity of litigation and which limit the rights of innocent Alaskans to reasonable and just compensation for injuries caused by others. There also is no guarantee of reduced insurance rates resulting from this bill.
- **Legal defects and constitutional problems** - The bill contains contradictions, legal defects and provisions which are likely unconstitutional. For example, the "statute of repose" provision would prevent a suit being filed against a wrongdoer after 10 years, even if the injury did not occur until after this period of time. The Alaska Supreme Court has already indicated this provision may be unconstitutional.

To develop a meaningful and reasonable tort reform bill, the governor said he will appoint an advisory task force charged with developing recommendations for accomplishing the following goals before the next legislative session:

- Make the civil justice system more efficient and reduce frivolous litigation;
- Provide for fair and just but not excessive compensation for those injured by wrongdoing;
- Lower liability insurance rates; and,
- Provide for reasonable punitive damage awards sufficient to deter conduct and practices that harm innocent Alaskans, without hampering a positive business environment or allowing excessive windfall recoveries.

Thousands of Alaskans urged the governor to veto the bill, including the Kenai and Kodiak boroughs, the city of Cordova and Fairbanks Mayor Jim Hayes; a dozen fishing groups ranging from the Alaska Sportfishing Association to United Fishermen of Alaska; Native corporations and non-profits including the Association of Village Council Presidents, which represents 60 western Alaska villages, Bristol Bay Native Corp. and Chenega Corp.; women's health groups; labor organizations including the Anchorage Police Department Employees Assn.; and many others.

Of more than 21,000 cases filed last year in Alaska Superior Courts, only 4.6 percent were personal injury cases. Tort reform advocates claim there is an explosion of tort litigation in Alaska, but the evidence proves otherwise.

*A Report
on the Impact of House Bill 158
on Injured Alaskans*

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INTRODUCTION

In Alaska, certain groups recognize that they would profit if our jury system of damages for civil wrongs (torts) were significantly limited. Their solution is two pronged. Keep victims out of court, by locking the courtroom doors or by making claims too risky. Handcuff the jury so that it cannot award full compensation. Naturally, it is necessary to justify this solution in noble sounding policy goals.

House Bill 158 begins with a statement of high sounding goals, and then slashes away at the jury system. Every section takes from the victim, and gives to the wrongdoer. In this sense, House Bill 158 could be termed the "Wrongdoer's Relief Act of 1995".

This report will briefly examine the erroneous premises behind the legislative findings and goals in Section One of the bill. Then, each infringement on our jury system will be analyzed in plain English, so that the proposed transfer of rights, power, and money from the victims to the wrongdoers can be more clearly seen for what it is.

SECTION 1 LEGISLATIVE FINDINGS

A. THE JURY SYSTEM AND VICTIMS NEED STILL MORE OF THE LEGISLATIVE LASH, FOR THE GOOD OF SOCIETY.

Implicit throughout this "findings and purposes section" is the premise that the transfer of power from victims to those accused of wrongdoing which has occurred in Alaska over the past twenty five years does not go far enough. What follows is a synopsis of tort reform already on the books.

1. Doctors accused of medical malpractice are entitled to an immediate stay of discovery against them. They proceed to a hearing before their professional colleagues. The opinion of these colleagues is admissible in evidence at trial. A.S. 09.55.536. There is no requirement of impartiality; members of the panel may be rabidly opposed to injury claims. Indeed, one panel recently refused to find an orthopedic surgeon guilty of medical malpractice for performing a surgery on his patient's wrong knee.

2. In medical malpractice litigation, the court may order periodic payment of the judgment. A.S. 09.55.548.

3. Lawsuits may not be brought for injury, death, or property damage caused by construction defects more than fifteen years old. A.S. 09.10.055.

4. Punitive damages may only be awarded upon proof by clear and convincing evidence, a higher than normal standard. 09.17.020.

5. Wrongdoers in Alaska are not jointly liable. A.S. 09.17.080. This is a very significant change in the law which puts Alaska in a distinct minority of American jurisdictions. This law ended what is popularly known as "deep pocket" liability, and puts the risk of insolvency by one of several wrongdoers on the victim alone.

6. Non-economic damages are limited to \$500,000, except in cases of disfigurement or severe physical impairment. A.S. 09.17.010.

7. Damage awards are reduced by collateral benefits not subject to subrogation (payback to the victim's insurer). A.S. 09.17.010.

8. Municipalities are not liable for negligent failure in conducting safety inspections. A.S. 09.65.070.
9. Social hosts are never liable for furnishing liquor to other adults. A.S. 04.21.020.
10. Bar and liquor store owners are not liable for sales to minors made in good faith reliance on identification; criminal negligence must be shown. A.S. 04.21.020, 052.
11. Bars and liquor stores are not liable for selling to drunks or allowing them to remain on premises, unless criminal negligence is proven. A.S. 04.16.030.
12. Ski operators are not liable for ski accidents caused by the inherent risks of skiing. A.S. 05.45.010.
13. The State is not liable for its oil spill response absent gross negligence. A.S. 46.08.160.
14. Oil spill contractors are not liable for property damage absent gross negligence. A.S. 46.03.825.
15. No damages can be awarded to a person injured while in the commission of a felony. A.S. 09.65.210.
16. An owner is not liable for death or injury occurring on unimproved land. 09.65.200.
17. Real estate agents are not liable for mistaken information they innocently pass on to buyers. A.S. 09.65.230.
18. Members of non-profit boards are immune for their torts. A.S. 09.65.170.
19. A person rendering emergency aid cannot be sued. A.S. 09.65.90.

Unsatisfied with these special protections for negligent actors, the drafters of House Bill 158 seek further erosion of our jury system.

B. THE SKY IS FALLING: INSURANCE.

Also implicit in the legislative findings is the notion that society faces an intolerable insurance crisis. Insurance is now generally available and well priced. (Deborah Ballen, Vice President, American Insurance Association, testimony before U.S. Senate Subcommittee, April 5, 1990.) The real cause of the "insurance crisis" of the 1980's was the insurance industry's reliance on flawed investment strategies based on the high interest rates of the late 1970's.

See "The Manufactured Crisis: Liability Insurance Companies Have Created a Crisis and Dumped It On You", Consumer Reports (August 1986). Notably, the State of Alaska joined nineteen other states in an antitrust case against various insurance companies for manipulating the market to artificially restrict coverage in select areas.

The major insurance problem facing Alaskans is the high price of insurance coverage for obstetrical practitioners in rural communities. This problem can only be solved by addressing it head on. It cannot be solved by tinkering with the tort system in general, and hoping that the effects will eventually trickle down to bush doctors who deliver babies. To date, the medical community and the legislature have shown no interest in specific solutions proposed by either consumer groups or trial lawyers.

C. THE SKY IS FALLING: MEDICAL MALPRACTICE

Also implicit in the legislative findings is the belief that society's health care concerns can be resolved by restricting medical malpractice lawsuits. Patients have rights that politicians should not restrict. If the legislature truly had the interests of patients and doctors at heart, it would work to reduce medical injuries through well proven risk management principles, rather than reducing compensation.

Every year, medical negligence injures hundreds of thousands of Americans. A recent Harvard University study found that in New York alone, medical negligence causes from seven thousand to twenty nine thousand deaths annually. New England Journal of Medicine, Vol. 325, No. 4, July 25, 1991. A Rand Corporation study found that between twelve to twenty seven per cent of patient deaths could have been prevented absent sub-standard medical care. Annals of Internal Medicine, Vol. 109, No. 7, October 1, 1988.

Notwithstanding this public health epidemic, few malpractice victims sue, and fewer still recover. The Harvard study concluded that fewer than two per cent of medical malpractice victims file suit. Most of those claimants do not succeed. A comprehensive 1994 study of medical malpractice jury verdicts reveals that patients win fewer than one third of the cases which go to trial. USA Today, citing Jury Verdict Research Study, 4/4/94. The rate of medical

malpractice claims has "steadily declined" since 1985. Consumer Reports, July 1992. "The price of medical malpractice and professional liability [insurance] coverage for health care organizations remains stable and capacity is plentiful". Business Insurance, 3/28/94.

Incredibly, Alaska does not require that doctors be insured. Providence Hospital in Anchorage is one of the few major hospitals in the United States which permit physicians to practice without insurance.

In Alaska, juries are extraordinarily solicitous of physicians. If the case is not so overpowering that it settles out of court, it will almost certainly be lost before the jury. Alaskan juries have found for the claimant and against a doctor fewer than a dozen times in the thirty five years since statehood.

A recent Duke University study of 2,000 medical malpractice cases in North Carolina reveals a median award of only \$36,500. The Atlanta Constitution, 2/1/93. A study by the American College of Physicians found that unjustified malpractice awards are "uncommon". Annals of Internal Medicine, Vol. 117, No. 9, 1992.

The total elimination of all medical malpractice claims would save Americans less than one per cent of health care costs. Department of Health and Human Services, Office of the Actuary. On average, per-physician premiums are less than four per cent of practice receipts. Median Economics, November 4, 1991. The average cost per malpractice claim "for most health care organizations" has decreased in recent years. Business Insurance, 3/28/94. When Alaskan physicians sold MICA, their own insurance company, several years ago, each member received a substantial payment based on MICA's surplus.

In 1994 the Congressional Office of Technology Assessment released a study of "defensive medicine". It revealed that a small percentage of procedures are ordered solely due to physician concern for malpractice exposure. The study concluded that "most malpractice reforms are unlikely to have much effect on defensive medicine". OTA Study, 7/21/94.

Caps on damage awards have no discernible effect on health care costs or doctor's

insurance premiums. Indiana's \$750,000 cap on damages, or California's \$250,000 cap on non-economic damages, have not reduced health care costs in those states. Indiana's health care cost ranking has remained identical before and after the cap; California's has gotten worse. Families USA Foundation, 1990. In twelve years following California's enactment of the cap, medical malpractice premiums in that state rose 191%.

State medical associations are notoriously lax in policing their own profession to sanction or remove repetitively negligent physicians. Because of the tort system, Alaskans receive better medical care. "It is sad but true that many physicians practice more carefully than they did in the past because they have an eye on the potential litigant...If the courts and insurance companies and the fear of malpractice become the most important disciplinary weapon in medicine—distasteful as the idea may be to physicians—so be it". Derbyshire, "Malpractice, Medical Discipline and the Public", 19 Hospital Practice 109, 116 (1984). See also Schwartz and Komesar, "Doctors, Damages and Deterrence: An Economic View of Medical Malpractice", 298 New England Journal of Medicine 1282 (1978).

LOCKING THE COURTHOUSE DOORS

SECTIONS 2-5

HOUSE BILL 158

House Bill 158 locks the courthouse door to many innocent victims of wrongful conduct, before they ever have a chance to file a claim. For example, if a homeowner builds a deck without a railing, and a child falls off more than eight years later, the child cannot sue. If the roof of Anchorage's Performing Arts Center collapsed during a performance, the age of that building would immunize all architects and contractors. A high voltage line installed contrary to standards; abandoned blasting caps or dynamite at a mine; a will negligently drafted by a lawyer; such negligence will go unpunished if it escapes discovery or does not cause harm within eight years. A lottery would control the rights of Alaskans; the losers would be locked out of the courtroom. The Alaska Supreme Court says, "It is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has any reasonable opportunity to do so". Hanebuth v. Bell Helicopter International, 694 P.2d 143, 147 (Ak. 1984). During the Hickel

administration, the Office of the Attorney General studied the predecessor to House Bill 158, and concluded, "The Alaska Supreme Court would probably find the proposed statute of repose invalid under several alternative provisions of the Alaska Constitution...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."

Section 5 of the bill locks children out of the courthouse. Now, the statute of limitations does not commence until children turn eighteen. House Bill 158 eliminates that protection. Section 3 provides special discriminatory treatment of babies and toddlers, if a doctor is at fault.

HANDCUFFING THE JURY: DAMAGE CAPS

SECTION 6

Juries are the conscience of our community. The typical jury includes engineers, accountants, teachers, business people, housewives, government employees, and workers. Juries tend to be quite conservative, and to hold victims to a high standard of proof. A prominent defense lawyer who advises the "tort reform" group privately says that the defense lawyer who waives jury trial is a fool. Insurance defense lawyers always insist on a jury trial. The notion that Alaskan juries are incompetent and unreliable is nonsense.

Large verdicts are not routine. A Rand Corporation study proves that in the past quarter century, jury verdicts have only kept pace with inflation. The U.S. General Accounting Office has determined that large verdicts are not arbitrarily awarded, but rather reflect the severity of injury and the high cost of medical care.

Ignoring all this, the bill slaps Alaskan juries in the face, decreeing they can't be trusted to render fair verdicts. It does this by arbitrarily "capping" the amounts juries can award. With few exceptions, verdicts for pain, suffering, and lost enjoyment of life are limited to \$300,000. Paralyzed and severely brain injured victims are limited to \$500,000.

A quadriplegic can't move his body below his neck, has lost all bowel and bladder control, all sexual response, and requires round the clock attendant care. If his nose itches, he can't scratch. He can't parent his kids, work, travel, play sports, turn a page, or hunt. Suicidal

thoughts are common. Damages for these "non-economic" injuries to him and his family are limited to \$500,000.

Note that the victim only gets a portion of this money, perhaps half, because it must be shared with others in the family who have claims for loss of consortium. The actual quadriplegic's award for pain and suffering, spread out over his lifetime, could easily amount to only \$5,000 for each year spent in a wretched condition.

This cap only targets those who are so seriously injured they have pain and suffering claims beyond \$300,000. Persons suffering mild to moderate injuries are allowed full compensation. It is Alaskans with amputated limbs, gruesome burns, blindness, paralysis, and debilitating brain damage who will be affected by this harsh rule.

The cap will not lower insurance rates. Caps affect a tiny percentage of total insurance payout. Most cases settle for less than \$25,000. Cases with pain and suffering damages exceeding \$300,000 are extremely rare. Legislation which affects only a few innocent, catastrophically injured Alaskans per year will bring down the rates of most people a few pennies a year, at most. What's happening here is truly shameful; the neediest victims are sacrificed, without any corresponding benefit to Alaskans as a whole.

HANDCUFFING THE JURY: PUNITIVE DAMAGES **SECTIONS 7-8, 23**

Occasionally the conduct of a defendant is so repugnant that a jury assesses punitive damages. Under existing law, the conduct must be outrageous, and it must be proven by clear and convincing evidence. Punitive damages are rarely awarded.

When juries speak, corporate America listens. That's why defectively designed cribs no longer strangle infants. Trucks have back-up alarms. Once harmful medical devices have been redesigned. Auto fuel systems have been strengthened. Cancer causing asbestos no longer poisons homes, schools and workplaces. Farm machinery has safety guards.

Punitive damage cases are very uncommon. A comprehensive study of punitive damages in products liability cases found only 355 punitive awards between 1965 and 1990. One

quarter were asbestos cases. Eighty per cent of the time, the manufacturer enacted a safety measure after the verdict. In the much maligned MacDonald's coffee spill case, two things happened. The judge lowered the punitive damage award to \$450,000; and MacDonald's finally turned down the temperature of its coffee, something that 750 prior accidents and complaints had not been able to accomplish. The bill lets criminals off the hook. Now, a driver who is high on drugs and kills meets the "outrageous" test, due to his reckless indifference to safety. The bill would require proof of "conscious acts" by a drunk driver, who will claim he did not know what he was doing.

The bill insults jury intelligence by capping the punitive award at the greater of \$300,000 or three times compensatory damages. Some corporations profit from systematic small thefts over many thousands of transactions. Limiting punitive damages to an arbitrary level undercuts their deterrent value, since reckless or malicious defendants might find it more cost effective to continue their bad behavior. This is precisely the decision making employed by the Ford Motor Company regarding its Pinto automobile. The company determined that it would be cheaper to sell the defectively designed car, and risk paying damage awards to injured consumers, than it would be to make the car significantly safer at a cost of \$11 per car.

The conservative United States Supreme Court recently upheld a substantial punitive award, in the millions, where the compensatory damages were \$19,000 but heavy deterrence was needed. Few other states limit punitive damages. Why should Alaskan juries faced with overwhelming evidence of outrageous conduct be handcuffed?

The bill allocates one half of the punitive damage award to the state, with no fee thereon to the lawyer. This creates a disincentive to the plaintiff and the lawyer to pursue such a case, particularly when the compensatory damages are modest. If an insurance company swindles its insured out of \$20,000, the most the client could recover in punitive damages would be \$150,000. That is simply not enough to justify the risk and expense the lawyer and client must bear to pursue such a case over the course of several years.

Why would the legislature want to limit the power of the jury to correct the conduct of corporations which are proven guilty by clear and convincing evidence of intentionally malicious behavior? At a time when the legislature is raising criminal penalties to hold individuals accountable for their behavior, why is reducing penalties for the malicious conduct of foreign corporations a high priority?

INCOME TAXES SECTION 9

This section commands that we take the income taxes which a victim would have paid in the future if uninjured, and credit them to the wrongdoer. Congress gives injury victims a break by not taxing their recoveries. The bill strips victims of this tax break, and hands it over to wrongdoers.

Most states do not deduct taxes from future lost income awarded by a jury. Figuring out future taxes is highly speculative. The tax code changes, as does the victim's tax status. Will he or she marry? When? How many children? Own a home? Have an IRA? All these unknowns affect tax liability. The jury is in effect asked to fill out twenty or thirty future tax returns by gazing in a crystal ball.

At a time when everyone is concerned with the expense and delay of lawsuits, does it make sense to add more complexity, court time, and jury aggravation?

AN ADMINISTRATIVE NIGHTMARE: PERIODIC PAYMENTS SECTIONS 10-12

Once a lawsuit is over, it's over. The judgment is paid in a lump sum. Future lost wages have been adjusted downward to reflect their early payment. In order to preserve the value of his lost income award, the victim must immediately invest this money, so interest will augment it and permit regular withdrawal to match what his salary would have been. Similarly, the jury has decided on the correct amount to pay the victim for future pain and suffering. The case is closed.

Rather than this straightforward system, House Bill 158 would allow the wrongdoer to pay the victim's future losses on the installment plan. Victim and wrongdoer would be joined for life by ongoing payment obligations. Such payments will be expensive to administer, and they won't accomplish anything beyond enriching outside insurance companies.

To set the payment level, the judge will guess the average inflation over the remaining life of the victim. If the judge guesses low, the victim will lose, because the wrongdoer will eventually be able to pay the victim in cheap dollars. A wrong guess could never be fixed, and could wipe a victim out.

The flexibility and discretion a victim currently possesses is eliminated. If the victim has an expensive medical crisis, the timing and amount of payments can't be adjusted. The bill mechanistically assumes the victim's needs are the same at age twelve and age seventy.

Insurance companies are not required to post security for their future payments. Insurance companies become insolvent each year. As of 1987, Executive Life had assets in the billions and the highest possible rating. Now it's bankrupt, with a trail of broken dreams behind it. One hurricane through New Orleans, one California earthquake, could devastate an insurance company. Why leave an Alaskan accident victim dependent for life on the solvency of one company?

Who is the big winner here? Out of state insurance companies get to control the victim's money. They get to invest it any way they want. It's like an interest free loan.

COLLATERAL BENEFITS SECTION 14

Collateral benefits are automatic payments to an injured person from sources such as medical insurance, state medicaid, or workers' compensation benefits. When an injured person sues, he or she makes claim for medical bills or lost wages which might have already been partially paid by insurers. If the jury awards these damages, the insurers or the state of Alaska get paid back, so there is no double recovery by the victim. This is called subrogation. Subrogation rights are included in virtually all health insurance policies. Reimbursements of

workers' compensation and medicaid payments are required by Alaska statutes. The state hires an accounting firm to monitor its medicaid liens.

The bill would cancel these repayments to insurers and the state, and instead reduce the damages payable by wrongdoers. To provide a benefit to proven wrongdoers, the bill penalizes every health and workers' compensation insurance carrier doing business in Alaska, plus raids the state treasury.

This section tells the jury about the victim's insurance, but not the wrongdoer's. It will increase the cost of health and worker's compensation insurance. It is a misguided, flagrantly unfair imposition on the innocent in favor of the guilty.

TURNING A TRIAL INTO A CIRCUS **SECTIONS 14-15**

The boring, technical language of these sections conceals a revolution in how jury trials will work. Under current rules, the parties to a lawsuit each have a lawyer. The jury listens to everyone, and assigns percentages of fault to the plaintiffs and the defendants. This legislation totally changes that, by permitting the jury to assign fault to "empty chairs", persons who have not been sued, have not defended, and are not present in the courtroom. The empty chairs pay nothing, but their fault decreases the award to the victim.

This rule change degrades the fairness of our jury trials. For example:

Victim is heavily burned in a LP-gas explosion caused by Defendant. She would have survived, except she is a drinker and a smoker. With weakened liver, heart and lungs, she doesn't have a chance. Victim's husband and kids sue Defendant. Defendant has a smart lawyer, who consumes two months of court time presenting evidence against the tobacco and liquor industries for failure to warn victim of health hazards. Those empty chairs of course do not fight back. Although such cases have never prevailed in the United States when defended, the jury buys the argument. End result: Defendant 40%; Marlboro 30%; Johnnie Walker 30%. Only Defendant pays; scotch and cigarette don't, because they were never sued. Victim loses 60% of her damages.

The bill gives defendants every incentive to accuse peripherally involved people. Reputations will be smeared in court by defendants, with no chance for the person behind the empty chair to respond. The average duration of jury trials will increase, as the truth finding quality of those trials degrades.

Alaskan workers will be especially disadvantaged by this change. Now, the workers' compensation law gives employers immunity from civil suit, and no fault can be allocated to them. The bill maintains employer immunity, but burdens the worker with the employer's fault. In every case where a worker is hurt, the defense will criticize the employer in absentia, alleging inadequate safety rules, insufficient procedural manuals, lack of inspection and supervision, failure to buy modern equipment, to train employees, and the like. The employer will have no reason to defend its conduct since the employer is immune and is not obligated to pay its share of the fault. Yet, every bit of fault the jury ascribes to the absent and unrepresented employer will directly diminish the injured worker's verdict.

These provisions are the real sleepers of the bill. Wrapped in dry, technical prose is a radical transformation of jury trials, so that much of the trial is about people and companies who are not present in the courtroom. Not only victims will be hurt; taxpayers will pay for longer trials. Individuals and companies will be publicly pilloried and defamed without a chance to respond. Much of the fairness built into our system as we have known it since statehood will be abandoned.

A REWARD FOR STALLING SECTION 16

Section 16 deals with a partial settlement of a case between a victim and one of several wrongdoers. It is poorly drafted. If it is interpreted to mean that a partial settlement is deducted from the jury award, and that the remaining defendant's percentage of fault is then applied to that reduced number, it becomes mathematically impossible for the plaintiff to fully recover, unless the jury finds the remaining defendant 100% at fault.

Under current law, a defendant who goes to trial pays his percentage of the fault as

found by the jury. It may be that the muddled drafting of this section seeks to change that by crediting to such a defendant any overpayment by a settling defendant. Such a provision allocates to victims all of the risks, and none of the benefits, of pretrial settlements. A victim can only break even or lose by a partial pretrial settlement. A defendant can only break even or win by failing to settle. Settlement is discouraged, and stalling is encouraged. This proposal will increase the cost of litigation by discouraging pretrial settlement.

CONFISCATION OF THE HOMES AND SAVINGS OF VICTIMS SECTION 17

The current "Offer of Judgment" rule is a procedural device to encourage pretrial settlement by giving a moderate reward to one who makes an offer, and after rejection does better at trial. House Bill 158 raises the stakes exponentially, by increasing the price of misjudgment to an intolerable level: full costs and attorney fees to the person making the offer.

This provision is breathtaking in its scope and ferocity. Not only will the victim who loses at trial pay the defendant's entire attorney fee and all costs. Also, the victim who wins at trial, but guesses wrong about the size of the verdict, will pay just as if he had lost. The victim pays if he loses; the victim pays if he wins.

Suppose an accident victim suffers a broken back, is in the hospital a long time, and has one hundred thousand dollars in medical bills. His lawyer researches other jury verdicts, and concludes the case is worth two hundred fifty thousand dollars. The defendant made an early offer of judgment of \$125,000, only twenty five thousand above the medical bills. The jury awards \$120,000. Now the victim must pay attorney fees and costs, which could easily wipe out the entire judgment. The defendant, proven guilty before a jury, goes scott free. The accident victim is stuck with \$100,000 in medical bills he can't pay. Doctors, hospitals and the State of Alaska will therefore have to subsidize this benefit to the wrongdoer.

This example is a simple one. A case may have multiple defendants, each making an offer of judgment. If the plaintiff guesses wrong on any of the offers, he can be wiped out, even if he wins the case. Or the defendants may suddenly accuse a non-party of fault, and

invalidate the assumptions on which a plaintiff earlier rejected an offer of judgment.

Such a system would further erode personal responsibility in Alaska, because it would force injured citizens to back down from holding wrongdoers fully accountable. Victims would choose between accepting a low offer and the risk of financial ruin. Winning a trial is never guaranteed, much less recovering a particular sum from a particular defendant out of many defendants and non-party players. This section gives excessive leverage to insurance companies to undercompensate injured Alaskans. The result: middle class plaintiffs will be forced to accept an insurance company's lowball offer. Who among us would risk his home and life savings betting on a lawyer's prescience regarding the exact size of a jury award from each defendant and each empty chair? This is one of the most anti-victim sections of House Bill 158.

MORE REWARD FOR STALLING SECTIONS 18-19

Currently a wrongdoer pays 10.5% annual interest from the time he receives notice of suit, until the jury decides the case. This is fair, because the wrongdoer has held money due the victim for several years, and has been able to invest it.

The bill would eliminate most of this duty to pay interest. First, it would exempt most of the judgment, the future part, from any interest at all. Secondly, it would cut the remaining interest to the federal discount rate plus 3%. Insurance companies are businesses who play hardball. If they can make money by delaying settlement, they will do so. This section gives them every incentive to delay.

The State of Alaska charges tax deadbeats a minimum of 11%. When the prejudgment interest rate is eliminated for some damages and lowered for other damages, insurance companies are in effect given a low interest loan for as long as they can stall the proceedings. It shouldn't be allowed.

MORE SPECIAL RULES FOR DOCTORS

SECTION 21

The Rules of Evidence adopted by the Alaska Supreme Court govern the qualifications of experts testifying before juries in Alaska. Once again, the medical profession is seeking special rules to make medical malpractice actions more difficult for the plaintiff.

First, this section complicates the victim's life by requiring an exact match; it takes an orthopedist to testify against an orthopedist. Why shouldn't an experienced family practitioner who is qualified to do so, be permitted to testify?

Secondly, the section can be read to require board certification. In medicine, this is akin to an advanced degree. Orthopedic surgeons practicing in Anchorage are not necessarily board certified. Why should an interest group like the State Medical Board be given the power to control who testifies as an expert, rather than our courts? No other profession has this privilege.

Thirdly, the section eliminates all retired physicians as expert witness by establishing an irrebuttable presumption of incompetence one year post retirement. Alaskan victims already struggle with a conspiracy of silence under which Alaskan doctors will not testify against their colleagues. Victims must undergo the added expense of locating expert witnesses out of state. This section would further reduce the expert witness pool by eliminating retired doctors, who are less subject to peer pressure. C. Everett Koop, the retired Surgeon General of the United States, could not testify in Alaska. These special interest rules for doctors are transparently unfair.

WHAT IS A HOSPITAL?

SECTION 24

Should hospitals be allowed to contract out vital patient services they are required by law to provide, to uninsured medical corporations, and wash their hands of the consequences?

For example:

An infant loses both kidneys because of incompetent nursing care in a hospital. He will require weekly blood cleansing (dialysis) for the rest of his life. The hospital denies any responsibility for the substandard care, because it hired Rent-A-Nurse to supply contract nursing services. Rent-A-Nurse was low bidder for the contract because it doesn't bother with insurance. Infant loses, and state medicaid gets stuck for millions.

People go to a hospital because it is an organized, coherent institution, rather than a boarding house for private care providers. If the hospital is immunized for the negligence of routine services contractors, it has no incentive to supervise its emergency room, its radiologists, its anesthesiologists, or its lab. This is poor public policy. The Alaska Supreme Court has ruled that hospitals should be hospitals, and should stand behind the medical care they provide the public, without resort to legal gimmickry. This sensible decision should not be overturned.

AFTERWORD

The drafters of House Bill 158 are nothing if not relentless. Time after time, they seek to disadvantage the innocent victim in favor of the proven wrongdoer. They want to handcuff our discretion when we sit on juries. They want to lock the courthouse doors to victims, based on random occurrences beyond anyone's control. They want to break the backs of middle class victims who have the courage to seek full compensation, but who guess wrong about the amount of the verdict or the complicated fault allocation. They want to coddle corporations proven by clear evidence to have acted maliciously. They want more special treatment for the medical profession. They want tax breaks, interest free loans, installment plans, insurance benefits, fortuitous immunities—all for the bad actor, the certified wrongdoer. They want every injured worker to be punished for his or her employer's negligence.

Who are these victims, and why are they deserving of harsh treatment? They are you and I, and our children, and our children's children. They are those among us who will one day suffer tragedy. They are tomorrow's Ted Stevens or Arliss Sturgulewski, politicians who lost spouses because of negligence and became claimants. They are rich and poor, young and old. They are our most productive workers in our most hazardous jobs. They are the roustabouts and the roughnecks. They are us. The rights we treat cavalierly are our rights.

Alaskan legislators have already implemented drastic changes in favor of defendants. Alaskan cities breathe easier, because "deep pocket" liability is no more. The insurance industry is not in crisis. We now know from experience that measures limiting victims' rights do not reduce premiums.

What we are left with in Alaska is a small group of extremist "tort reformers" who advocate this legislation based on their deep animosity to lawyers and lawsuits, period. These special interests have no fidelity to our constitutional jury system, but would destroy it with the death of a thousand cuts.

Since their bill is technical and complex, legislators may not grasp how drastically it

affects the families in their districts.

If this happens, Alaska will have passed the most radical anti-victim legislation in the United States. Alaskans will have fewer and lower quality civil rights than other Americans. And we will have done it to ourselves; not for any good reason, but merely to make Alaska a more profitable if minuscule niche in the national insurance market. What a shame.

House Bill 158 is harsh legislation which kicks innocent Alaskans when they are down and out. It grants Alaskans no commensurate benefit, such as a mandatory 20% reduction in auto and liability insurance premiums. Let us hope that our legislators find the courage to stand up for individual Alaskans against those who would rob us of our rights.

**THE FOLLOWING HAVE SPOKEN IN OPPOSITION TO
THIS ANTI-VICTIM LEGISLATION OR ITS
PREDECESSOR LAST SESSION**

**ALASKA NETWORK ON DOMESTIC VIOLENCE
AND SEXUAL ASSAULT**

ALASKA POLICE DEPARTMENT EMPLOYEES ASSOCIATION

TRUSTEES FOR ALASKA

AMERICAN ASSOCIATION OF RETIRED PERSONS, ALASKA

ALASKA STATE AFL-CIO

ALASKA ENVIRONMENTAL LOBBY

ALASKA WOMEN'S LOBBY

NEA-ALASKA

ALASKA HEALTH PROJECT

DES ACTION

ALASKA PUBLIC INTEREST RESEARCH GROUP

April 4, 1995

Governor Tony Knowles and Members of the Legislature
State Capitol
Juneau, Alaska 99801

Re: HB 158 - The So-Called "Tort Reform" Bill.

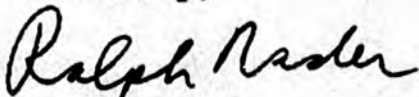
Dear Governor Knowles, and Members of the Legislature:

I have reviewed House Bill 158 at the request of the Alaska Public Interest Research Group. The provisions of this bill are nothing short of radical. Their effect will be to unjustifiably punish ordinary citizens. The bill's provisions, whatever their intentions, in fact are harmful to citizens who have been victims of injustice. That is, the bill punishes people who file just and valid lawsuits; it punishes people who have played by the rules, and who have pursued only legitimate grievances. At the same time, it benefits wrongdoers, insurance companies who do not wish to pay valid claims, and the attorneys who represent these special and usually wealthy interests. For example, the punitive damages provision subsidizes and protects wrongdoers who not only cause injury, but who do so "maliciously". This bill is ill-advised. By subsidizing wrongdoers at the expense of the innocent public, HB 158 will ensure that citizens live in a less just, less safe, and less desirable society.

The playing field in this nation's state and federal courts is already tilted in favor of wealthy defendants. HB 158, if enacted, will only make the process for those who seek justice, but are of average and low incomes, more hazardous and difficult than it already is. Alaska has a proud tradition of protecting its citizens. It has passed comprehensive hazardous substance laws, and has enacted laudable civil rights laws. HB 158 departs from this tradition. I have reviewed this bill in detail, and summarize some, but not all, of my concerns in the attached memorandum.

I urge that you oppose passage of this bill. I would ask that you work instead on measures that: 1) provide for equal access to the courts for Alaskans of average and low incomes, and, 2) protect the public's health and safety. HB 158 undermines both of those goals.

Sincerely,



Ralph Nader
P.O. Box 19312
Washington, DC 20036
202-387-8034

MEMORANDUM

To: Governor Knowles and Members of the Alaska State Senate and House of Representatives.

From: Ralph Nader

Re: Summary of Concerns About HB 158.

Date: April 4, 1995.

I have reviewed HB 158, and highlighted some of my concerns about this bill below.

1. **IMMUNITY FROM SUIT AFTER EIGHT YEARS:** Section 2 of HB 158 would lock the courthouse doors to innocent citizens who have been hurt by the carelessness of others. It does so by preventing them from seeking justice by a date in advance of the time they suffer injury, or should have learned that they have suffered injury. Section 2 proposes an eight-year "statute of repose." The statute would allow some wrongdoers full immunity from suit provided that their misconduct and errors do not cause discoverable injuries within the first eight years of their conduct. Thus, children rendered sterile by a physician's malpractice; movie-goers injured by a negligently-designed roof that collapses eight years and one month after the theater was constructed; and families forced to litigate against aggressive outsiders because a lawyer negligently drafted a will ten years previously would have absolutely no recourse against the people that were paid good money for their bad work in prior years. Examples of injuries that are not discovered, or which do not develop within eight years of a defendant's misconduct include cancers, birth defects, and other serious maladies.

HB 158's radical eight-year cutoff puts all Alaskans at risk that they will be seriously injured and have no rights to seek compensation from those whose misconduct caused their plight by letting wrongdoers off the hook after eight years. The law currently provides a deterrent effect that causes people to act responsibly, and with the interest of public safety in mind. Section 2 will encourage wrongdoers, by immunizing them for their misconduct, to increasingly act without regard to the public interest, and the public's health and safety.

2. **RENDERING THOSE WITH THE MOST POWER IMMUNE FROM PUNISHMENT:** Sections 6 and 7 would limit punitive damages to \$300,000 or three times compensatory damages. Currently punitive damages are allowed only to punish people found, by "clear and convincing" evidence, to have engaged in outrageous or malicious conduct, either intentionally or recklessly. Such people and businesses are not deserving of a state subsidy. It is outrageous that the Legislature would pass a law to protect these people.

The arbitrary cap on punitive damages effectively renders the wealthiest individual and corporate actors immune from meaningful punishment. Under the proposed law, any entity that

can afford to occasionally pay (when and if it gets caught) \$300,000 or three times compensatory damages, can afford to behave recklessly toward or to intentionally hurt Alaskans. This section, like others, immunizes those least deserving of protection for their gross misconduct, and invites them to increasingly act without regard to the public interest, and the public's health and safety.

3. SHUTTING THE COURTHOUSE DOORS TO ALL BUT THE WEALTHIEST ALASKANS: Section 14 of HB 158 makes a small, but significant change to an existing rule that would make filing suit too financially risky for any but the most affluent Alaskans. The current "Offer of Judgment" rule allows a person who makes a reasonable settlement offer a moderate award if he or she does better at trial than the amount of his or her offer. Section 14 would allow the person offering settlement their **full costs and attorney fees** if they managed at trial to beat, even by one dollar, their offer. Given that corporate attorneys charge in the range of \$160 - \$225 per hour for their work, this provision will result in attorney fee awards of hundreds of thousands of dollars to wrongdoers.

The proposed change would turn litigation, already expensive and risky, into a game of "Russian Roulette." Most litigation lasts well over one year; often two or three years elapse between the filing of the complaint and trial. An Alaskan of moderate income cannot afford to pay an insurance company's lawyer or lawyers for three years of litigation bills if his or her lawyer guesses wrong about what the jury will do with the damages portion of the case.

For example, consider a person whose back is badly injured by a toxic and defective product, or in a car wreck that was not his fault. Prior to the injury, the person had started a new job as a maintenance mechanic and had worked there for two weeks. He has three children and equity in a home. He files suit against the person who caused his injury. The ~~same~~ insurance company makes an offer of judgment of \$30,000, which, by rule, is open for 10 days. The injured worker does not yet know how long he will be off work or if his new job will be waiting for him when the doctor releases him to work. He does not know what his medical bills will be or what his long-term prognosis will be. He is afraid that \$30,000 will not cover his damages. However, his lawyer tells him that if he goes to trial and gets one penny less than \$30,000, he will now be liable to pay an attorney's fee that could well exceed \$100,000. If he is of ordinary means, he cannot afford to expose his family to the risk of that kind of liability. He is forced to accept the insurance company's offer.

It is the rule rather than the exception that damages cannot be fixed with certainty. Given this, Section 14 will in the broad run of cases force people to settle for pennies on the dollar for their injuries. This will in almost all cases ensure that citizens recover much less than full compensation for their injuries. It will, again, eradicate the current deterrent effect of the law such that wrongdoers will see it in their financial interest to cut corners, and act irresponsibly.

4. NO GRACE PERIOD FOR CHILDREN: Currently, Alaska law protects children from having to file a lawsuit until after they reach the age of 18. Section 4 of HB 158 would require children to become litigants within two years of suffering an injury, or be forever barred

from bringing suit. Section 4 would expose already injured children to the rigors of cross-examination and trial. It would put the parents or guardians of these children under enormous pressure to avoid asserting their child's rights to avoid further traumatizing their child.

5. ARBITRARY LIMITS FOR THE MOST SERIOUSLY INJURED: Section 5 of HB 158 would cap damages for pain, suffering, inconvenience, physical impairment, loss of enjoyment of life and loss of consortium to \$300,000. The cap would be raised to \$500,000 for quadriplegics, or those suffering permanent loss of a limb or permanent loss of cognitive ability.

This bill hurts the most gravely injured Alaskans. It hits hard at those who need the right to seek justice the most. This section damages only the most seriously injured - and only the people who have suffered the most injustice. Again, it acts as a subsidy to wrongdoers, and encourages conduct that places the public's health and safety at risk. An example illustrates the inequities of this section. Consider a teenage girl who suffers a broken leg in a bad car accident. She will likely receive full and fair compensation for her minor pain and suffering, loss of time from sports and school, etc. However, her friend and fellow passenger suffers a mutilated face, a crushed pelvis (rendering her an unlikely candidate for childbirth), and severely impaired and lacerated hands in the same accident. This friend, whose entire life has been horribly altered, is arbitrarily limited to \$300,000 in damages (minus court deposition costs, witness costs, exhibit costs, and attorney's fees) for pain and suffering, physical impairment and loss of enjoyment of life that will last throughout her lifetime.

Limiting loss of consortium to \$300,000 is grossly unfair to the survivors of deceased family members who worked inside the home or who lived a rural subsistence lifestyle. The two children of a doctor who is killed in an accident will be handsomely compensated for a large lost stream of income. The six children of a stay-at-home mom or a subsistence provider will be limited by an arbitrary, and often inadequate cap on damages, as these deceased parents, under HB 158, were producing no "traditional" monetary income.

CONCLUSION: The changes proposed by HB 158 arbitrarily benefit the wealthiest entities at the expense of smaller Alaskan businesses and hard-working citizens. This memorandum highlights some of the more drastic of these proposals: the one that protects those who maliciously, intentionally or recklessly hurt Alaskans; the one that caps recovery for the most severely injured Alaskans; the one that offers immunity to those wrongdoers lucky enough to have their errors go undetected for eight years; the one that requires Alaskan children to become litigants; and the one that would force any Alaskan of average or above-average means to accept early low-ball settlement offers from insurance companies to avoid the risk of bankruptcy.

HB 158 cloaks dangerous, harmful policies with misleading rhetoric. The real goals of tort reform, are not fairness, predictability, and equal access to the court system. Instead the civil justice system in Alaska could be seriously damaged by the cruel measures proposed in HB 158 by the defendants' lobby. I urge you to help expose these dangers in HB 158 and to work to defeat it.

FILE COPY

**FINAL REPORT OF THE
HOUSE LIABILITY TASK FORCE
(First Revised)**

**JUNEAU
MARCH 1990**

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Juneau, Alaska 99801

"OUR TASK IS NOT TO FIX THE BLAME FOR THE PAST,
BUT TO FIX THE COURSE FOR THE FUTURE."

John F. Kennedy

HOUSE LIABILITY TASK FORCE

Legislative Members:

Representative Sam Cotten, Chair
Representative Red Boucher
Representative Virginia Collins
Representative Dave Donley
Representative Johnny Ellis
Representative Peter Goll
Representative Max Gruenberg
Representative Ron Larson
Representative Loren Leman
Representative Mike Navarre

Public Members:

Gary Fye
Vincent Haneman
Russ Huffman, M.D.
Jeffrey Jefferson, Esquire
Nancy Lord
Ames Luce, Esquire
David McGuire, M.D.
Al Parrish
Mary Pierce
Jim Witt

Alternates for Public Members:

William Brock for Mary Pierce
Dan Hensely for Ames Luce
Richard Ritter for Vincent Haneman

Special Counsel to Task Force:

David E. Rogers, Esquire

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FINAL REPORT OF THE HOUSE LIABILITY TASK FORCE

SUMMARY AND CONCLUSIONS

The Liability Insurance Task Force was established by the Alaska House of Representatives during the first session of the Sixteenth Alaska Legislature through House Resolution 10 (HR 10) in an effort to sort out the many controversies concerning "Tort Reform" and to "determine how the State may more effectively regulate insurance and provide civil justice"(see attached copy of HR 10). The task force consisted of the chairs of the House Judiciary, Labor and Commerce and Health, Education and Social Services Committees and other members appointed by the Speaker of the House including public members "who are involved in tort reform issues or who are involved in insurance or civil justice". A complete list of the Task Force membership is attached.

The resolution noted in particular the problems faced in the public and private sectors as a result of rising insurance costs. It concluded that a comprehensive review of "statutes, case law, practices of the insurance and legal fields and the relationship between insurance costs and civil justice" is warranted under the circumstances and instructed the task force to "recommend to the legislature any changes to the statutes appropriate and necessary for reducing insurance costs and improving civil justice".

PRIOR LEGISLATIVE EFFORTS

The issue of liability insurance availability first surfaced in Alaska in the early 1970's. By 1975, the medical community concluded that legislative relief was required. A bill creating a Joint Underwriting Association passed the legislature during the 1975 session, but was vetoed by Governor Hammond who instead created the Governor's Medical Malpractice Commission to study the problem and make recommendations to the Legislature. On the basis of this report and following extensive hearings on the matter, the Legislature enacted a comprehensive program which set up the basic medical malpractice claims system in operation today and which created the Medical Indemnity Corporation of Alaska as the primary medical malpractice insurer and required all Alaska doctors to participate as a condition of licensure. This latter provision was subsequently repealed and participation was made voluntary.

There were no significant additional developments until 1986 when the Legislature passed "Tort Reform" legislation largely in response to doctors and others who were concerned

about insurance availability and affordability (rates had climbed to record highs). Conference CS for Senate Bill 377 made a series of changes to our civil justice system including: Modified joint and several liability; Caps on non-economic damages (\$500,000 except damages relating to disfigurement or severe physical impairment); increased burden of proof for establishing punitive damages; limits on a person's ability to recover damages for personal injury incurred while that person was committing a felony; detailed provisions on requirements for damage awards; limited liability for certain directors and officers of non-profit corporations, non-profit hospitals (including hospital citizen advisory boards) and members of school boards and school districts and members of governing bodies, commissions and citizen's advisory committees of a municipality; and provisions on contributory fault, collateral benefits, apportionment of damages, offers of judgment, costs and attorney's fees, including pre-judgment interest, and the effects of a release. This legislation has been characterized as a "patch-work quilt" of necessary compromises, and, in the view of many tort reform advocates, did not go far enough toward making Alaska's civil justice system fair and predictable.

During the 1988 session, tort reform legislation intended to complete the 1986 effort was considered by the Legislature but significant differences between the House and Senate could not be resolved. However, the voters approved in November 1988 an initiative which eliminated joint liability for tort and other actions involving fault. A related provision limiting attorney contingency fees was disallowed by the Lieutenant Governor and is now the subject of litigation.

In 1989, another unsuccessful attempt to pass additional tort reform laws led to HR 10 and this Task Force. Most of the controversial issues remain unresolved following the final session of the Sixteenth Alaska Legislature. However, the Legislature did make several important changes to laws governing the regulation of professional conduct, particularly the medical profession (See the final version of HB 146).

SUMMARY AND RESULTS OF TASK FORCE EFFORTS

At its first meeting Task Force members, tired of relying on "anecdotal evidence", concluded there was a need to establish a common factual basis for their consideration of the issues. Accordingly, a list of threshold factual questions was prepared collectively by the Task Force with instructions to Task Force Special Counsel, David Rogers, to develop the appropriate information in response to those questions and report back to the Task Force as soon as

possible for further discussion. The result of this fact gathering effort is contained in a seventeen volume submittal incorporated herein by reference. These attachments contain the best information available at the time primarily from "non-partisan" sources. For a detailed discussion of how the information was developed and what each packet contains see attachment # 1. A "Highlight Summary" is included as Attachment #2. A detailed summary of the information is contained in Attachment #3.

At its second meeting this information was summarized and presented to the Task Force by David Rogers with participation by representatives of state agencies and others and considerable discussion by Task Force members. At its final meeting a problem/solution format suggested by Rep. Fran Ulmer was reviewed but no final action was taken due to an inability to obtain consensus on most of the issues.

Nevertheless, at the request of Chairman Cotten, several Task Force members did offer their written conclusions and observations which are included as Attachment #4. While attitudes about what the problem is and what you can do about it are divergent, it is important to note that based on these written comments and comments made during Task Force deliberations, there appears to be agreement on two critical points:

- 1) THERE IS A NEED TO FURTHER CONSIDER ALTERNATIVE DISPUTE RESOLUTION MECHANISMS WHICH MAY REPRESENT AT LEAST A PARTIAL SOLUTION TO MANY OF THE PROBLEMS IDENTIFIED BY CRITICS OF THE PRESENT SYSTEM INCLUDING: UNREASONABLE DELAY, EXCESSIVE COSTS OF LITIGATION, UNPREDICTABILITY AND FAIRNESS OF COMPENSATION AND LACK OF ACCESS TO THE COURTS; and
- 2) THERE IS A NEED FOR FURTHER INFORMATION AND ANALYSIS OF ISSUES CONCERNING THE INSURANCE INDUSTRY AND REGULATION OF PROFESSIONAL CONDUCT.

CONCLUSION

Despite the frustration expressed by several members of the Task Force about our inability to draw final conclusions, there is general agreement that the materials gathered and reviewed over the past year have brought us one important step closer to a collective understanding of the problems faced by and potential solutions available to policymakers and the public in the civil justice arena. And by establishing a common factual basis that frees us from the never ending battle of anecdotal claims, the work of the Task Force should help decisionmakers narrow the focus of future discussions.

1 IN THE HOUSE

BY ULMER AND NAVARRE

2

HOUSE RESOLUTION NO. 10

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - FIRST SESSION

5

Relating to a Liability Insurance Task

6

Force.

7

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:

8

WHEREAS the state and its political subdivisions, as well as many
9 individuals in the private sector are faced with increasing insurance
10 costs; and

11

WHEREAS tort reform involves civil procedure statutes, insurance
12 statutes, case law developed by the courts over several centuries, many
13 common-law doctrines, and practices of both the insurance industry and
14 attorneys in the state; and

15

WHEREAS a comprehensive review of existing statutes, case law, insur-
16 ance and legal practices, and the relationship between the cost of insur-
17 ance and the civil justice system is needed in order to determine how the
18 state may more effectively regulate insurance and provide civil justice;

19

BE IT RESOLVED by the House of Representatives that a Liability Insur-
20 ance Task Force is established to study state statutes, case law, practices
21 of the insurance and legal fields, and the relationship between insurance
22 costs and civil justice; and be it

23

FURTHER RESOLVED that the task force shall recommend to the legisla-
24 ture any changes to the statutes appropriate and necessary for reducing
25 insurance costs and improving civil justice; and be it

26

FURTHER RESOLVED that the chairs of the House Judiciary Committee,
27 Labor and Commerce Committee; and Health, Education and Social Services
28 Committee shall be members of the task force, and that the speaker of the
29 house shall appoint as members of the task force an appropriate number of

1 members of the House majority and minority, and an appropriate number of
2 persons who are involved in tort reform issues, or who are involved in
3 insurance or civil justice; and be it

4 FURTHER RESOLVED that the terms of the task force members shall begin
5 July 1, 1989, and that the task force shall terminate January 31, 1990; and
6 be it

7 FURTHER RESOLVED that the task force shall submit a report of its
8 findings and proposed legislation to the legislature by January 31, 1990;
9 and be it

10 FURTHER RESOLVED that the administrative and legal services of the
11 Legislative Affairs Agency shall be made available to the task force.

LIABILITY INSURANCE TASK FORCE MEMBERS

Legislative Members:

Representative Sam Cotten, Chair
Representative Red Boucher
Representative Virginia Collins
Representative Dave Donley
Representative Johnny Ellis
Representative Peter Goll
Representative Max Gruenberg
Representative Ron Larson
Representative Loren Leman
Representative Mike Navarre

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Insurance Investigator

Vince Haneman, University of Alaska, Dean of Engineer, 539 Duckering,
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Jeff Jefferson, Esq., 215 Fidalgo Street, Kenai 99611, 283-9187,
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David McGuire, M.D., 4040 Laurel, Anchorage 99508, 562-4142, Physician

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563-3414, MICA

Jim Witt, Teamsters, 4300 Boniface #449, Anchorage 99510, 269-4258,
Attorney

Alternates at March 2-3, 1990 Meeting

**Bill Brock for Mary Pierce, PO Box 20709, Juneau 99802, 586-3656,
Financial Management Consultant and Chair of MICA**

**Dan Hensley for Ames Luce, Luce & Hensley, 1015 West Seventh Avenue,
Anchorage 99501, 272-9430, Attorney**

**Richard Ritter for Vince Haneman, Minch Ritter Voelckers Architects, 800
Glacier Avenue, Juneau 99801, 586-1371, architect**

Special Counsel to Task Force

David Rogers, PO Box 33932, Juneau 99803, 586-2366, Lawyer

ATTACHMENT NUMBER ONE

Memorandum from David E. Rogers
describing fact finding process
and contents of multi-volume fact
submittal

DAVID E. ROGERS

LAWYER

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JUNEAU, AK 99803

907-586-2366
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ATTACHMENT #1

MEMORANDUM

TO: Liability Task Force

FROM: David Rogers *DR*

RE: Fact finding efforts

DATE: January 19, 1990

Our next meeting is set for March 2 (starting at 1:30 p.m.) and March 3 (if necessary; starting at 9:00 a.m.) in Juneau. Attached are materials compiled by my office to date which deal with the various factual matters identified by the Task Force at its first meeting in September. They provide a fairly comprehensive overview of the subjects under discussion although some materials may be dated and/or incomplete. I did not attempt to cover every conceivable angle given limits of time and space, although I did arbitrarily expand the scope of our inquiry into professional liability issues to include Nurses and Dentists.

Additional information will be forwarded upon receipt.

If I have missed an issue that you are concerned about or failed to address a question raised at the last meeting please let me know as soon as possible and I will try to respond before our next show. Please note there are some overlaps since several folks responded to my questions in one letter/submittal which cannot be easily divided (note, for example, information regarding dentists and nurses in "Availability/Affordability; Insured Percentage"); certain reports and studies fall into more than one category. There may also be missing or out of order pages, etc. although I have gone through everything pretty carefully to avoid this problem. Each section was stapled if it could be stapled, bound if not, or "rubberbanded" if it couldn't be stapled or bound. All sections have holes for a three ring notebook if you prefer that method of keeping things organized.

I have not attempted to "stack the deck" one way or the other. Generally, I have tried to give you the best available information from "non-partisan" sources

OFFICES LOCATED IN THE COURT PLAZA BUILDING
240 MAIN ST., SUITE 602, JUNEAU, ALASKA

(particularly those identified in the Group #1 and #2 game plans). However, I have also taken the liberty of including what some may consider "partisan" materials (from both sides of the fence) where I felt the information was relevant or helpful in defining a point of view on the many interrelated issues before us. I anticipate that some of the materials contained in this second packet will be rejected by the Task Force for one reason or another when it draws its final conclusions.

You may also want to take a second look at your first packet for other views on the issues.

Additional suggestions are encouraged. If I have left something out which has been recommended by one party or another I am happy to reconsider. It is also quite possible that constructive information in my possession has been lost in the shuffle.

This should not be considered a final product as there are gaps and other problems (some yet to be discovered) which will hopefully be resolved as the process continues. I apologize for the long delay between meetings, but I had to start from scratch and things have arrived in bits and pieces often requiring additional analysis and follow-up; further complicated by last minute realizations that I had missed a piece of the puzzle, endless problems with scheduling our second meeting (Christmas, Session, and busy Task Force members) and other logistical difficulties. After you (and I) have had a chance to start digesting all this and prior to our next meeting, I'll send out a memorandum with my thoughts and observations along with additional materials.

I know there is a lot to review in a fairly short period of time but the subjects addressed are complex and I thought it best to give you as much original data as possible for starters rather than to simply offer a summary of my impressions and conclusions. Fortunately, some of these materials can be skimmed easily.

Just pretend you are a student studying for a mid-term exam.

My thanks and compliments to the many people and organizations who bent over backwards to assist me in this effort without complaint; and a special thanks to Julie Kraft who was always there when I needed her advice and assistance.

Here is a brief discussion of major attachments by topic as set out in the Task Force Group 1 and Group 2 "to do" lists:

1. **INSURANCE RATES:** You will find attached rate information (current to this date), including "tail" coverage quotes,

received from the major admitted carriers who have responded to informational requests similar to that contained in the "Claims Survey" section. These surveys were sent to as many admitted carriers as we could identify at the time for each of the target professional groups (Lawyers, Physicians, Hospitals, Architects, Engineers and Land Surveyors). In an effort to broaden the scope of our inquiries, I am also including current rate filings provided by the Division of Insurance for Nurses, Nurse mid-wives, Dentists, and Accountants. No other rates have been included but I am told that the Division of Insurance is developing a comparative analysis of auto and home owner's rates which I will pass along.

Finally, I've attached the MIEC rate filing documents provided by the Division of Insurance for your information. Rates filings for other liability policies of admitted carriers (including MICA, which was too thick to include) are available in my office for anyone who is interested. Please let me know. I am also attempting to nail down rates for those non-professional categories listed as problem areas by the Division of Insurance and/or the Alaska Independent Insurance Agents and Brokers Association; and determine general rate trends for the major professional categories over the last several years. I have not focused on "surplus lines", "purchasing groups" and similar issues because you have to draw a line somewhere but we may want to take a closer look in the future. More on this topic in the analysis memorandum. Stay tuned.

2. AVAILABILITY OF INSURANCE: Information developed by the Division of Insurance, the Alaska Independent Insurance Agents and Brokers Association, various professional organizations and the Division of Occupational Licensing, along with responses from several of the major admitted carriers (included in the claims survey section) are attached. This is pretty good stuff. Please read these materials carefully. I am told that relevant additional data developed by the Division of Insurance in December concerning surplus lines (which apparently can only be used when there is an admitted carrier availability problem) will be provided in the near future. Information regarding CPA's (and hopefully Day Care facilities) will follow.

3. PERCENTAGE OF UNINSURED: All available information is included for Doctors, Lawyers, Engineers, Architects, Land Surveyors, Dentists and Nurses. Information regarding CPA's and Day Care Facilities will be forwarded as soon as possible. You will note that with the exception of Doctors, most of the data on this topic is dated, speculative or non-existent. A current survey would be necessary to adequately answer this inquiry. I suspect that most, if not all, of the professional organizations would be willing to conduct such a survey if necessary; but given the effort

required I have not asked them to pending Task Force discussion. However, I have prepared a draft questionnaire which I can share with you upon request. A survey conducted by the Alaska State Medical Association which apparently addresses this issue and perhaps related questions is currently underway with results available by mid-February if all goes according to plan.

4. AVAILABILITY OF SERVICES: This has been hard to pin down since the Task Force provided little guidance on the "other services" category. I have surveyed with a broad brush state and federal agencies, professional and other organizations and individuals who might have something to add to the discussion. All available information received to date is included for target professionals (expanded list). Additional information regarding CPA's is in progress. I'm still working on the "other services" category and waiting for a response from the Department of Health and Social Services; information compiled to date is attached. In addition, I just received word from the Alaska State Medical Association that there are doctor availability problems in the following communities: Haines, Tok, Ketchikan and Dillingham as well as a variety of specialized service gaps (eg. no Ob/Gyn) in other communities. I've also heard that Craig currently has no doctors but this hasn't been confirmed.

Finally and for your information, I am told that it is very difficult for people to find lawyers to represent them in Worker's compensation and certain medical malpractice cases.

5. WHO RECEIVES WHAT FROM SETTLEMENT: See attached "pie chart" from the Rand Corporation contained in the so-called "three-level" study discussed below. Similar information is contained in "Costs and Compensation Paid in Tort Litigation" by Kakalik and Pace also included in that section. Based on my discussions with various interested parties, it appears that no such breakdown has been developed for Alaska, but I suspect that the results would be comparable.

6. CLAIMS EXPERIENCE OF SELF-INSURED ENTITIES: I also sent a claims survey to target self-insurers in Alaska (all major public entities that we could identify at the time and a couple of private entities); results received to date are included (State of Alaska, Municipality of Anchorage, Anchorage School District and the University of Alaska) along with a couple of letters from hospitals in Cordova and Petersburg. A second, less complicated request went out recently to a wider cross section of self-insured's in an effort to pick up more information since several entities were either unable or unwilling to respond to my naively comprehensive original request. In addition, as I mentioned

above, most of the major players in the Alaska admitted professional liability market have responded as best they could with the exception of National Union (lawyers liability) which has apparently declined to respond.

Please note that this section begins with the heading "Claims Information-Professionals".

7. ROLES AND MECHANISMS OF STATE AGENCIES: The attached materials summarize the duties of three state agencies which have primary roles in this arena - The Division of Insurance in the Department of Commerce and Economic Development, which regulates insurance activities in the state; the Division of Risk Management in the Department of Administration which is responsible for handling claims against the State of Alaska, a "self-insured" public entity; and the Division of Occupational Licensing within the Department of Commerce and Economic Development which regulates several of the professional groups discussed in the attachments including Doctors, Dentists, Nurses, Architects, Engineers, Land Surveyors, and Certified Public Accountants. I am still waiting for information on State agencies involved in licensing/certification of hospitals, day care facilities, etc. but I should have more on this soon.

8. STATUS OF STATE SUIT AGAINST INSURANCE COMPANIES: See attached memo from Attorney General's office which tells us what has happened to date along with comments from industry representative Tom Slagle.

9. PEER REVIEW PANEL RESULTS; TOTAL NUMBER OF MEDICAL MALPRACTICE CASES: As you will see from reading the attached letter from the Alaska Court System much of this information is not readily available. The last document in this section does contain potentially useful information but, ironically, I've lost track of the source. Hopefully, someone out there can help me fill in the blanks. I'm also trying to determine annual costs to the State Court system relating to tort litigation and how long it takes to resolve a typical negligence case from the filing of a complaint to final disposition.

10. OTHER SOLUTIONS TRIED ELSEWHERE; MATRIX OF STATE SYSTEMS; FEDERAL ACTIONS: I have included information developed by the National Conference of State Legislatures, a New York law firm which tracks these issues and miscellaneous other sources including the Rand Corporation. There is also a separate attachment on "pre-judgement interest" in response to a specific Task Force inquiry. The James Ludlam article ("Battle for Medical Malpractice Reform") while partisan was included because it contains useful information on legislative strategy issues and "tort reform" pros and cons among other things. I've also attached

an NCSL summary of pending 1989 legislation around the country to give you a sense of current thinking on the subject and a copy of an Alaska Attorney General's opinion on the constitutionality of several proposals contained in HB 166; but please note my unsolicited opinion that the conclusions contained in this memorandum are speculative and debatable.

There is duplication in this section but I wanted to give you a choice of formats. Some information may be dated (e.g. Statute of Repose/Limitations) due primarily to the ever present possibility of judicial decisions overturning these laws on constitutional grounds.

At a minimum, I recommend that you read the NCSL narrative and the Wilson, Elser report and take a quick look at what was going on around the country in 1989. An interesting overall view of Federal and State activities is also contained in Chapter 8 of the Winston/Litan book discussed below.

11. ALTERNATIVE CLAIMS RESOLUTION MECHANISMS: I've included a sampling of information on this topic which should give you a pretty good sense of some of the more significant alternatives which are in operation or under consideration. This section includes a 1984 Rand study on state court arbitration, a comparison of three medical liability reform proposals, and discussions of the Hawaii arbitration system and the Virginia Birth Related Neurological Injury Compensation Act. I also direct your attention to Huber who argues direct "first party" insurance (apparently similar to the policies some people purchase before they get on airplanes) and comments contained in the Litan et. al. piece discussed below. Finally, you may want to refer to my original information package for a review of Governor Cowper's "No Fault" medical malpractice proposal.

12. IMPACTS OF U.S. TORT SYSTEM CHANGES: This information is hard to come by. I have tried to provide several reasonably credible perspectives on the question, although at first glance the evidence appears to be somewhat contradictory. This section includes information from Rand ("Assessing the Effects of Tort Reform"; "Frequency and Severity of Malpractice Claims"), and actuaries Milliman and Robertson along with several other articles on the subject. Please note that the Danzon report on Frequency and Severity of Claims is often referred to by other civil justice commentators. The Maine report discussed below also addresses these issues.

13. LEGISLATIVE RESEARCH REPORTS. All reports prepared to date on liability issues are attached.

14. RAND STUDY-THREE LEVELS: It took awhile to find this study but I am pleased to introduce "Trends in Tort Litigation, The Story Behind the Statistics" by Hensler et. al. I have also included a recent Maine medical malpractice study which you may find interesting along with several other reports (mostly from Rand) which address a number of questions raised by the Task Force; and will be happy to order additional materials in your discretion (see attached Rand Bibliography).

15. RESULTS AND AMOUNT OF SELF-REGULATION: Attached are applicable statutes, regulations, current annual reports, national standards, disciplinary statistics, state by state comparisons and observations supplied by various professional organizations and regulators, along with information regarding educational programs and requirements. More will follow as soon as it arrives in my office including the Alaska Bar Association's latest annual report and a general discussion of trends over the last few years.

16. CHANGES IN TIME IN LAW OF LIABILITY AND DAMAGES: The Huber and Brodeur books (five copies each) just arrived and are available upon request. Call if you want one. I have also included an excellent overall discussion of the issues (including a summary of the kinds of changes which have occurred over the last 30 years) edited by Stephan Litan and Clifford Winston of the Brookings Institution which I urge you to review, particularly the Forward and Chapters 1 and 8. I have talked to Mr. Litan and concluded that he does not appear to have any axes to grind.

17. CHANGES IN INSURANCE SERVICES; HOW THE PUBLIC IS TREATED: While it is not exactly responsive to this specific question, I have included a report prepared by well known consumer advocate Robert Hunter which hits on a number of topics before us. This also can be considered a partisan effort (which may require a rebuttal from the insurance industry and others), but I feel we have an obligation under the terms of our mandate to review Mr. Hunter's many findings and conclusions since he is considered by many to have a steady and enlightened handle on the issues before us. As I mentioned before, Gary Fye is also willing to discuss the service issue at our next meeting if there is no objection from the group. Otherwise, I am open to additional suggestions on how to further explore this topic and related questions.

18. INSURANCE DEPARTMENT REPORT: Jim Jordan, formerly of the Division of Insurance, says there is no such report.

19. MISCELLANEOUS: I have also included several additional attachments which may fall into the "bias" category but are still worth reviewing in my opinion. These include excerpts

from a Tillinghast study on U.S. and World trends, a claim data overview by ISO, Inc., information prepared by Al Tamagni, Senior regarding Alaska Court Rules and related matters, a 1986 report prepared by several state Attorney's General on the causes of the liability insurance situation, A Louis Harris study and others.

Have fun and feel free to call with questions, etc.

Remember, "no pain, no gain".

ATTACHMENT NUMBER TWO

Highlight Summary (as of March 1990)

ATTACHMENT # 2

SUMMARY OF DATA HIGHLIGHTS
(as of March, 1990)

I. AVAILABILITY AND AFFORDABILITY OF INSURANCE.

A. Availability has improved. Based on information received by the Task Force to date from the Division of Insurance and various professional liability carriers, there appear to be no significant availability problems for most professionals with certain limited exceptions. According to the Alaska Independent Insurance Agents and Broker's Association, Inc. there are some availability problems for non-professional categories like day care centers, liquor liability, small specialty and general contractors, pollution and any small business that requires liability coverage only.

B. Generally, rates appear to have stabilized within the last year or so although costs are still perceived as prohibitive and/or unreasonable for some categories, most notably testing labs, structural engineers, attorneys doing SEC work, pollution and asbestos work, real estate developer combinations, computer programmers and certain physician categories including but not limited to OB/GYN. Many experts tell us that this is a cyclical business and anticipate another round of availability/affordability problems in the future.

C. Affordability is relative; the greater percentage of income represented by insurance premiums, the greater the concern. It is interesting to note that nationwide medical malpractice premiums were 6.2% of physician's gross income in 1986; the national average for Architects and Engineers is 4.2% - it is estimated that in Alaska the average is 7%. We have no comparable information for lawyers.

II. PERCENTAGE OF UNINSURED.

A. Based on information provided by the Alaska State Medical Association the total percentage of uninsured physicians in Alaska is 24% in cities, 12% in towns and 56% in the Bush. The study further indicates that OB/GYN (44.7%), Family Practice (34%) and Orthopedics (23%) have the largest block of uninsured. A more recent survey by the Medical Association of Family Practice and OB/GYN practitioners indicates that 15% are uninsured (based on a response rate of over 50%); a majority of these in urban areas. The differences between these numbers possibly are explained by the fact that the latter survey takes into account doctors who are insured by group programs although additional information and analysis is required.

B. Only four out of 23 hospitals surveyed by MICA are uninsured/self-insured.

C. Only 2% of Dentists are uninsured.

D. There are no current and reliable Alaska statistics for lawyers, nurses, architects and engineers; although nationally it is estimated that 49% of Architectural firms do not carry liability insurance; for engineers, 42% of 1-5 person firms, 17% of 6-10 person firms and 15% of 11-25 person firms are "bare".

E. We simply do not know enough to comfortably answer the question of how many professionals are uninsured (or limiting their practices, getting out of the business altogether or significantly limiting coverage) because of the cost of insurance; or for strategic and/or philosophical reasons which have nothing to do with premium expenses. A survey conducted by the various professional organizations is the best way to clarify this issue along with the related question of how many other professionals are uninsured.

III. AVAILABILITY OF SERVICES.

A. There are a variety of service gaps that we have been able to identify including: significant doctor availability problems in several communities particularly relating to obstetrical and pre-natal care, day care service needs, certain legal services gaps (worker's compensation cases, medical malpractice, low and middle income legal services), nursing shortages, and the need for travel funds to transport rural residents to urban areas for diagnosis and treatment. It is interesting to note that according to the most recent Alaska State Medical Association survey, 32% of doctors who used to practice obstetrics don't anymore, primarily due to the cost of insurance; although there is some dispute over this question. Also note that many feel there is a crying need for a comprehensive medical insurance program which covers those many unfortunate folks who "slip through the cracks" for a variety of reasons including lack of health insurance and inability to obtain relief through the civil justice system.

B. With the exception of physicians (and possibly Day Care providers), the cost or availability of liability insurance does not appear to be a major contributing factor to these service gaps.

IV. PEER REVIEW PANEL RESULTS AND RELATED STATISTICS.

A. There is little useful information readily available from the Court System regarding peer review panel results, the frequency and severity of liability actions, the length of time it takes to process an average case and/or the costs of

litigation to the court system or the parties. However, we do know that between January 1, 1987 and July 1, 1989, 177 malpractice cases have been filed in Alaska State Courts: 90 Medical Mal.; 56 Legal Mal.; and 31 "Other". Information provided by the Alaska State Medical Association suggests that as of December 22, 1989 there have been 338 medical malpractice claims processed through the peer review panel program since the current system was established in the 1970's, an average of 26 claims per year with no particular upward trends indicated. Of approximately 178 claims reviewed, the expert advisory panel sided with the defendant 138 times and with the plaintiff 40 times. Finally, MICA has carefully reviewed 90 cases (out of a total of 244 cases since inception) which contain sufficient information for meaningful evaluation and has found that there were fifteen reports adverse to Health care providers, eleven reports that were mixed or equivocal as to the health care provided and Sixty Five reports that were favorable to the health care providers.

B. This information gap appears to be common throughout the United States and consistently has been identified as a problem in attempting to understand and resolve issues relating to reform of the civil justice system.

V. RESULTS AND AMOUNT OF SELF-REGULATION.

A. Based on information provided to date, it is difficult to tell if a relatively small number of professionals (repeat offenders) cause a relatively large percentage of complaints and/or disciplinary actions. Certainly, the number of disciplinary actions taken annually appear to represent a relatively small percentage of the total number of professionals. Please note that only Physicians, Nurses and Dentists have mandatory continuing education requirements. Lawyers have an extensive optional program.

B. Comprehensive risk management programs (including peer review, quality assurance and education) by regulators, professional associations and insurance carriers appear to be the modern trend.

C. In response to a specific Task Force question, Alaska was ranked #2 per capita in the nation in Doctor Discipline for 1987 by the Public Citizen Health Research Group (a Ralph Nader organization); up from 19 in 1986.

VI. STATE AND FEDERAL LEGISLATIVE ACTIVITY.

A. Most states have adopted "tort reform" legislation in one form or another over the years including, for example, measures relating to limits on recovery (e.g. caps), statutes of limitation and repose, modification of joint and several liability, periodic payments of awards, reduction of

compensation by collateral sources and limits on attorney contingency fees. The constitutionality of many of these measures has been challenged in state and federal courts; some upheld, some not, for a variety of reasons. The most comprehensive reforms have been enacted in Alaska, Washington, Hawaii, Colorado, New Hampshire, New York, Florida, Illinois and California.

B. During the 1980's, legislative activity on these issues peaked in 1986 when 36 state legislatures passed tort reform laws. In 1989, only seven legislatures enacted such laws, although many measures were pending. The focus of state activity appears to have shifted to regulation of the insurance industry and auto insurance matters, including "Proposition 103" and "no fault" proposals.

C. At the Federal level, Congress is most concerned with products liability issues and changes to the McCarran-Ferguson Act which, among other things, provides limited anti-trust immunity to insurers.

VII. ALTERNATIVE PROPOSALS.

A. There are a variety of alternative systems in place or under consideration which may provide some relief; although most commentators agree that more analysis is required. These include: 1) court annexed mandatory arbitration programs (with "de novo" appeal rights) for cases which fall within certain limits and other administrative arbitration and/or adjudication proposals including pre-trial peer review screening panels and voluntary, binding arbitration mechanisms; 2) "No-fault" alternatives like the Virginia Birth-Related Neurological Injury Compensation Act which establishes a fund financed by voluntary payments from physicians and hospitals to cover actual and necessary medical and related expenses, loss of earnings from age 18-65 based on a discounted formula and reasonable expenses incurred in connection with filing the claim including attorney's fees. A similar program is operated in Florida which also allows recovery of up to \$100,000 in non-economic damages. Also note that Governor Cowper has proposed a general medical malpractice "no-fault" system and Alaska currently has arbitration and peer review systems applicable to medical malpractice, court ordered arbitration procedures for small claims and recognizes certain contractual arbitration agreements; and 3) a variety of other proposals including use of direct "first party" insurance and state subsidization of certain insurance premiums for qualified applicants (see, for example, HB 449 and 450 by Donley and Gruenberg).

B. Reviewers of the Hawaii and other court annexed arbitration programs have found that they seem to achieve their goals of reducing litigation costs, increasing pace

and maintaining the satisfaction of participants. A Rand Study ("Reforming the Civil Justice System, How Court Arbitration May Help" by Deborah Hensler) indicates similar attitudes about the California and Pennsylvania programs.

VIII. THE RAND THREE-LEVEL STUDY.

A. This study, "Trends in Tort Litigation - The Story Behind the Statistics" by Deborah R. Hensler, Mary E. Viana, James Kakalik and Mark A. Peterson, attempts to settle three highly controversial issues which dominate discussions about the need to reform our civil justice system: How much litigation is there? Are jury awards stable? How much does litigation cost and who gets the money?

B. The authors tell us that one of the reasons for confusion is that there is not a single tort system. Instead, there are at least three types of tort litigation, each with its own distinct class of litigants, attorneys and legal dynamics - 1) the world of routine personal injury torts, exemplified by auto suits. These occur frequently and usually involve modest injuries and relatively low financial stakes. Settled law and routine procedures lend an air of stability to this world; 2) the world of high stakes personal injury suits such as products liability, malpractice and business torts. Here the litigation is newer, the law increasingly uncertain; and 3) the world of mass latent injury cases, such as asbestos litigation, Dalkon Shield cases and other suits arising from mass exposure to drugs, chemicals or toxic substances. The lack of "fit" between traditional tort law and the facts of these cases lead many to view them as problematic.

C. What is the story behind the statistics? The author's found that: Routine personal injury torts such as auto cases are growing slowly in frequency and costs, and their outcomes - inflation adjusted - have not changed much over the last 25 years; Higher stakes torts such as malpractice and product liability are growing faster in frequency and costs, and their outcomes have increased dramatically over the past 25 years in the jurisdictions observed intensively, and substantially in the shorter five year period for which they had national data; Mass latent injury torts, once identified, tend to explode in number, carry high transaction costs and have highly uncertain outcomes.

Please note that a recent article in the New York Times suggests that these trends may be altering based on a recent study by two Cornell Law School professors which concludes that published opinions since the mid-1980's "have moved toward benefiting defendants over plaintiffs".

D. In response to a specific Task Force question about "who gets what" the authors tell us that: for auto cases 19% of

total litigation dollars go to the defendant's lawyers for legal fees and expenses, 26% are for plaintiffs legal fees and expenses, with 52% left for the plaintiff; Non-Auto-30%, 24% and 43% respectively; Asbestos, etc.- 37%, 26% and 37%. We have a few Alaska specific numbers on this question. For example, MICA tells us that on the average they spend approximately 18 cents on the dollar in defending claims; although this number varies depending on whether there is formal legal action, whether there is a plaintiff recovery and other factors.

IX. IMPACTS OF U.S TORT SYSTEM CHANGES- FREQUENCY, SEVERITY AND RATES.

A. While malpractice claim severity has risen roughly twice as fast as the Consumer Price Index, Patricia Danzon in a study prepared for the Rand Corporation ("Frequency and Severity of Malpractice Claims-New Evidence") tells us that certain tort reforms - particularly caps on awards, periodic payment of future damage provisions and shorter statutes of limitation/repose - appear to reduce the frequency and severity of medical malpractice claims as compared to what would have happened if the law had not been enacted. This conclusion is more or less confirmed in other studies contained in our information packet including the recent National Academy of Sciences Study (which acknowledges a "modest" reduction in medical malpractice claim frequency and severity), the 1988 Winston/Litan anthology by the Brookings Institution and the 1989 study done for the Maine Legislature by the Public Health Resource Group, Inc. (but there is disagreement over the significance of this impact).

B. However, there appears to be no definitive evidence that any reduction in claim frequency and severity effects the cost or availability of insurance; although the experience in California suggests that certain tort reform measures may at least contribute to stability (in the context of doctor owned insurance companies at any rate); and Danzon argues that certain reforms that reduce the uncertainty in estimating malpractice claim costs "may be expected to reduce premiums by a modest amount over and above the reduction in mean expected losses" (although she also mentions other factors such as litigation expenses and "changes in the timing of disbursement of loss reserves, and hence investment income").

C. The jury is still out on this one. More time may tell.

X. ALASKA CLAIMS EXPERIENCE- PRELIMINARY FINDINGS.

A) Professionals: Based on information obtained to date it appears that: 1) most medical malpractice claims/recoveries are under \$150,000; 2) there are few "jumbo" recoveries (over \$1 million), and none reported over \$3 million

(through 1988) but payments on these claims typically represent a large percentage of total losses for a given year; 3) punitive damages are rarely, if ever, awarded; 4) most claims are settled before trial, many settled without formal legal action; 5) less than half of MICA claims resulted in a payment to the claimant; and 6) MICA's defense costs, on average, are about 18 cents for every dollar, but this number varies depending on a number of factors.

B) Self-Insured/Uninsured Entities: Based on the results of a survey of several major public and private entities obtained to date, it appears that: 1) the majority of claims/recoveries are between 0 and \$50,000, claims against public entities tend to be larger; 2) most are settled prior to formal legal action; 3) there are occasional large payouts (mostly State claims) which typically represent a large percentage of total losses for a given year; and 4) defense costs do not appear to be significant but this observation requires additional information and analysis.

XI. WHAT SHOULD THE LEGISLATURE DO?

A. The four primary commentators relied on (Rand, Brookings, National Academy of Sciences and the Maine Legislative Study by the Public Health Resource Group, Inc.) agree that sweeping alternatives to the existing system are intriguing but require more study. It is less clear how they feel about partial alternatives like the Hawaii arbitration program.

B. In the meantime, Winston/Litan et al. support "fault based" rules of liability and argue that in terms of reducing uncertainty and eliminating inappropriate levels of compensation under a "fault based" system there is a strong case for limiting non-economic damages in tort cases but only in a way that takes into account the age of the injured party and the severity of the injury. In the same report, Patricia Danzon also argues for more restrictive statutes of limitation, provisions requiring periodic payment of future damages and modification to collateral source rules which will give public and private insurers rights of subrogation against the tort reward. The authors oppose stiffer regulation of insurance rates and support greater solvency regulation by state regulators.

C. On the other hand, the Maine group concludes that new tort reforms at this time are questionable policy options to reduce insurance premiums and to insure medical care availability pending more information that should be available within the next two years. If reforms are pursued they further suggest they be designed to expire after a period of time if the price of insurance and availability of essential medical services do not improve by some measure satisfactory to the legislature. In any event, the report cautions that you cannot just target one set of issues.

Instead, Legislatures should develop a carefully balanced mix of changes to the tort, regulatory (for example, they suggest requiring rate changes to be spread over time and requiring insurer's to demonstrate effective cost control programs) and medical care delivery systems (they suggest investigations of multi-claim physicians, greater efforts to diffuse potential complaints, information collection requirements and, possibly, adoption of "care standards") based on a considered understanding of what will be gained and what will be lost.

D. The National Academy of Sciences, which focuses on the issue of medical liability and obstetrical care, takes a different tack. On the basis of its findings - that the costs of the current system in terms of impaired obstetrical care are great, that tort reforms are so far largely ineffective, and that data evaluating the merits of proposed alternatives to the tort system are lacking - the report concludes that state legislatures should not focus on further reform efforts within the existing tort system but should instead redirect their energies toward developing alternatives to the traditional tort system for resolving medical malpractice claims and towards implementing these alternatives in certain circumstances.

E. Other commentators on the issues before us, like Robert Hunter, advocate various forms of insurance regulatory reform; risk management and disclosure requirements; certain tort reforms like limiting attorney's fees for both sides (although he focuses on defense fees), penalties for frivolous actions and settlement incentives; and increased use of alternative systems except in defective products and similar cases which Hunter feels should be subject to common law principles without damage limits as a necessary deterrence measure.

F. A very recent study completed by Harvard University was available to late in the process to be included in this report but should be carefully reviewed before any final conclusions are drawn.

Finally, it may be helpful to keep in mind the words of Gustave H. Shubert, Director of the Institute for Civil Justice of the Rand Corporation, who observed in 1986: "I think underlying all our problems with the civil justice system is the inability of this country to decide whether it wants to have a pure compensatory system or whether it wants to have a fault based liability system. We can't decide whether everybody should be compensated for every injury no matter what its cause, or whether we want compensation to be limited in a strict way, in a comparative way, or in a contributory way to those who have caused the injury. My personal assessment is that we are experiencing the disadvantages of trying to operate both systems in tandem,

the worst of both worlds. We are attempting to compensate everyone with a fault-based system and we are incurring huge social overhead costs by attempting to do so. I believe it is time to focus on that overall choice and to be rational in doing so".

ATTACHMENT NUMBER THREE

**Information Summary and Index - "Almost
Everything You Ever Wanted to Know About Liability
Issues (and were afraid to ask???)**

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ATTACHMENT #3

ALMOST EVERYTHING YOU EVER WANTED TO KNOW ABOUT LIABILITY
ISSUES (and were afraid to ask???)

Here is a general summary by category of the information contained in the multi-volume factual submittals along with occasional editorial commentary as appropriate:

1. RATES: See Attached rate information including rate filings for selected entities.

2. AVAILABILITY/AFFORDABILITY OF INSURANCE: According to the information compiled by the Division of Insurance the market for professional liability insurance is "soft". Their specific findings based on a survey of major brokers placing professional liability are:

- * The situation is improving which is to be expected in a soft market;

- * Prices are coming down;

- * Coverage is generally available but sometimes at high premium or with restrictive conditions. Non-availability appears to occur with home inspection services and any small unseasoned professional;

- * Some insurers are now writing as part of a package policy;

- * Policies are usually "claims made" with defense within limits and adjustment cost included in any applicable deductible;

- * Pollution usually has a \$25,000 deductible;

- * Costs are perceived to be prohibitive for testing labs, structural engineers, attorneys doing SEC work, pollution and asbestos work, real estate/developer combinations and computer programmers. They cited the following examples:

Lloyds- testing lab-\$1/2 million coverage
\$50,000 premium last year; \$1 million coverage
\$25,000 this year.

CNA- mechanical engineer doing some electrical
and survey-\$3 million in billings-\$1 million
coverage, \$25,000 deductible, \$129,000 premium.

- * Only Allstate was identified during their survey as providing unlimited Civil Rule 82 coverage on its personal

lines coverage. Demand is not there although markets could be found.

The Alaska Independent Insurance Agents and Brokers, Inc. also looked at availability/affordability of other lines of liability insurance based on a survey of members from all areas of the state. They concluded that only the following categories have both availability and affordability problems: Day Care Centers, Liquor Liability, Small Specialty and General Contractors, Pollution, and any small business that requires liability coverage only (no supporting property or auto).

These findings are more or less confirmed by responses to our professional liability claims survey discussed below, informal conversations with representatives of insurance companies and in letters contained in this section from representatives of various professional organizations and regulators. Generally, there does not appear to be an availability problem for most professionals at this time. Affordability, as Keith Brown points out, is relative. Note that Dan Rowley estimates that insurance premiums for Alaska Architectural and Engineering firms are approximately 7% of annual gross billings, as compared to the national average of 4.2%; according to the Medical Malpractice Liability Study prepared for the Maine Legislature (see discussion below) nationwide medical malpractice premiums were 6.2% of physicians gross practice income in 1986. I have no comparable statistics for Alaska. Also note that according to Mr. Rowley seven out of eleven carriers nationally have a maximum limit of \$1 million; six of those carriers don't do business in Alaska. Finally, note that in addition to the groups identified by the Division of Insurance rates for certain physicians are very high as we will see in more detail below.

3. PERCENTAGE OF UNINSURED: a) Physicians: Based on information provided by the Alaska State Medical Association the total percentage of uninsured is 24% in cities, 12% in towns and 56% in the bush. According to my notes, the study further indicates that OB (44.7%), Family Practice (34%) and Orthopedics (23%) have the largest block of uninsured. The results of a recent detailed questionnaire sent out to over 600 doctors gives us a different picture. Based on responses from over 50% of those surveyed, 15% of the Family Practice and OB/GYN physicians are uninsured in Alaska. Apparently, this figure takes into account a variety of group insurance programs not reflected in the other information provided by the State Medical Association. The results also suggest that a majority of uninsured Family Practice and OB/GYN's are located in Anchorage and other urban areas. Please note that MICA insures approximately 50% of Alaska insured physicians, MIEC approximately 30% and CNA approximately 10% through

group practices that meet CNA criteria; b) Hospitals: Based on a recent survey of 23 hospitals by MICA four (Kodiak Island, Central Peninsula Hospital, Cordova Community and Petersburg General) are uninsured/self-insured. The others are either insured through MICA (most), affiliations with a national chain or the Federal government. MICA also insures twelve health related health care facilities, many of which are "rural" including a skilled nursing facility, clinics, intermediate care facilities and home health services; c) Lawyers: Information on lawyers is based on a survey conducted several years ago when availability was limited and prices had skyrocketed; although market circumstances have changed for the better since then according to Keith Brown, former Chairman of the Alaska Bar Association's Professional Liability Insurance Committee. If I am reading the results correctly, at that time, 275 firms were covered by liability insurance, 120 were not; d) Architects, Engineers, Land Surveyors: There is no statistical information available for Alaska, although nationally 49% of architectural firms do not carry professional liability insurance - 42% of 1-5 person, 17% of 6-10 person and 15 percent of 11-25 person engineering firms are "bare". Rich Ritter of the Alaska Chapter of the American Institute of Architects estimates that 70% of the architect and engineering firms he does business with in Alaska carry professional liability insurance; although he is aware of one major Anchorage firm recently going bare apparently due to the high cost of insurance. Nurses: No numbers are available. Note that Gail McGuill of Occupational Licensing tells us that while nurses typically are covered by their employers' policy increasing numbers are purchasing their own policies to protect themselves further; Dentists: According to Frank Thomas-Mears, writing on behalf of the Alaska Dental Society, approximately 2% of Alaska dentists are uninsured. We have no information for CPA's or other professionals at this time.

We don't have a solid answer to the question of how many professionals are going bare (or limiting their practices, reducing coverage or getting out of the business altogether) because they can't afford the premiums; or who do not carry insurance for philosophical or logistical reasons. A survey conducted by each professional organization is the best way to clarify this issue along with the related question of how many professionals are in fact uninsured.

4. AVAILABILITY OF SERVICES: The information contained in this section is limited. What follows is a discussion of some of the service gaps in Alaska that I have been able to identify and comments on whether these gaps are attributable to the affordability or availability of liability insurance: a) Health Care: There are a number of communities in the state (mostly rural) that are having difficulties recruiting and retaining physicians. According to the Health

Association of Alaska and the Alaska State Medical Association Haines, Tok, Ketchikan, Dillingham, Wrangell and Petersburg (and possibly Craig) are having doctor availability problems along with other communities with specialized care gaps. In addition, according to a 1988 survey of availability of obstetric care for low income women, fewer than half of the physicians surveyed (93% of the 196 family practice and OB/GYN physicians surveyed responded) are now providing obstetric care; "within two years only slightly more than a third of the surveyed physicians may be offering obstetric services in Alaska." However, recent uncorroborated information suggests that this trend not be true for Anchorage and perhaps other larger urban communities. This source contends that six new obstetricians have begun practicing in Anchorage in the last two or three years and two additional obstetricians will begin practicing there in the near future.

In the more recent survey of Family Practice and OB/GYN physicians discussed above, 32% of doctors formerly providing obstetrical services have stopped performing this service primarily due to the cost of liability insurance.

Many others also attribute this situation to the cost of liability insurance and other health care cost factors. For example, the Report of the Governor's Interim Commission on Health Care (September 1988) states that rural providers, especially those providing obstetrical care, have been particularly hard hit by the increase in medical liability insurance: "The cost of medical liability insurance has created a particularly severe problem for pregnant women in rural areas. Non-Native residents of Glenallen, Dillingham, Bethel, and some other communities have lost access to local obstetrical and prenatal care because local providers are either unable or unwilling to pay for the expensive premiums" (at page 57). The report contends that medical liability insurance premiums had more than doubled between 1985 and 1988. See also the comments of Harlan Knudson of the Health Association of Alaska.

For native rural residents the problem, according to Dr. Ward Hurlburt of the Public Health Service, is particularly one of finding money to fund travel costs for diagnostic and treatment services in the larger cities: "As we discussed, as health professionals, we could point to many places in our program where, with added funding, we could do a better job. If I were to select one area, however, to point to where I could see a need related to medical services for rural Alaskans, I would identify the lack of funding for travel...At this time...we are basically paying only for emergency travel. If the State were wanting to identify an area for potential positive impact on the provision of Native services for rural Alaskans, I would suggest consideration of the development of a mechanism for

supporting travel costs." The Department of Community and Regional Affairs tells us that this position was echoed in a Resolution passed in November by the North and Northwest Alaska Mayors Conference which proposed an insurance program which will cover both transportation to Anchorage or Fairbanks and services provided by non-Indian Health service facilities in these towns.

There also appears to be a nursing shortage in Alaska. According to Gail McGuill of the state Division of Occupational Licensing : "It has recently been more severe than the cyclical shortage in rural communities and in certain specialty areas of practice. Almost all acute care and long term care facilities in the state have had to utilize "traveling nurses", nurses retained through agencies for short term periods of employment...Of the four main issues discussed in this letter, I view the nursing shortage and the problems it has caused for the health care industry in our state to be the most crucial one. Although, a concentrated effort of agencies in Alaska working together to remedy the shortage has not occurred, individual agencies and organizations have been attempting to alleviate the problem with the resources available to them." There are many cited reasons for this situation including poor pay and benefits, lack of hospital administration support, limited opportunities to further professional education, inadequate staffing, state laws that limit nursing practice, lack of access to child care facilities, insufficient in-service education and lack of competent support personnel. The cost (or availability) of liability insurance does not appear to be a significant contributing factor.

b) Legal Services: We have no Alaska specific information. However, informal discussions with attorneys have identified several service gaps worth noting - representation of claimants in state and federal workmen's compensation matters; certain medical malpractice claims; low income legal services that cannot be provided by Alaska Legal Services and/or the Alaska Pro Bono program; and general legal services for middle income people who don't qualify for assistance but can't afford standard legal rates for a variety of basic legal services involving personal and family matters; a problem which may be growing due to the increasing need for some legal services in our society. These gaps do not appear to be due to high liability insurance premiums.

c) Engineering/Architectural/etc Services: We have no Alaska specific information on this but according to Rich Ritter of the Alaska Chapter of the American Institute of Architects there is no apparent availability problem despite the fact that over 50% of Alaska Architects, Engineers and Land Surveyors have left the state in recent years. He feels that "there is still a core group of experienced

professionals remaining in Alaska available to provide professional services". It is not clear how much of the attrition is due to the cost of liability insurance versus the dramatic recent economic slump.

d) Dentists: Frank Thomas-Mears tells us that Dental services in rural areas are not impacted by affordability and availability of insurance since a majority of dental practitioners are employed by the Public Health Service and protected under the Federal Tort Claims Act. Of those private practice dentists which either contract with the PHS or native corporations most are insured.

d) Day Care: The only other significant service gap that I have been able to identify to date (other than the need for a comprehensive health insurance program to take care of people who "slip through the cracks" under our current system, a subject which is being addressed elsewhere; and sewer and water system and similar service needs which are well beyond the scope of our duties) concerns Day Care Facilities. According to the report of the Governor's Interim Commission on Children and Youth parents "often have difficulty finding child care that meets their needs and matches their resources." This is particularly a problem for parents who work rotating shifts, nights or weekends; parents with infants and parents with school age kids who need before and after school supervision: "Too few programs offer flexible hours, overnight care and flexible staffing to ensure safe care for children. Not enough family child care homes exist to accommodate the needs of parents who work a non-traditional or normal schedule. The result is a near crisis in urban and rural Alaska." Recent changes to Federal welfare laws (the Federal Family Support Act of 1988) will exacerbate this problem. It is estimated that the welfare reform work and training requirements will result in the need for day care space for an additional 2400 children statewide.

And child care is expensive. Again according to the Governor's Interim Commission, a recent survey of 600 American families indicates that 40% of their respondents feel they cannot afford their current child care arrangement or the arrangement they would prefer. The authors of the study add that evidence indicates Alaskans would agree. In March 1987 infant care ranged from \$321 to \$521 per month, pre-school care from \$301 to \$450 per month, school age child care from \$132 to \$215 per month and care for children with special needs from \$600 to \$1,200 per month. High quality care may be even more expensive.

A variety of solutions are under discussion including a plan proposed by Virginia Johnson, Dean of the School of Education at the University of Alaska Anchorage, called the Middle School Day Care Center, which would locate day care

centers at the six middle schools in the Anchorage area with the curriculum being developed by the Director of the Day Care Centers.

It is difficult to determine if the cost of liability insurance contributes to the day care service gap. It is my understanding based on several informal conversations with people familiar with these issues that affordability and availability is less of an issue at the present time, even for new facilities. It is interesting to note that current policies exclude liability for molestation/abuse related circumstances and, in some cases, require adult/child ratios that exceed state standards.

5. CLAIMS EXPERIENCE - Preliminary Findings:

a. Professionals: We requested claims experience data from all of the major admitted professional carriers. However, only information received from MICA and MIEC, the major medical liability carriers is useful. Generally, the information provided indicates that: 1) most medical malpractice claims/recoveries in Alaska fall within the 0-\$150,000 category (MICA tells us that the average claim is \$48,731; average claim where indemnity is paid is \$124,353; 2) there are few "jumbo" recoveries (over \$1 million), and none reported over \$3 million (through 1988), but payments on these claims typically represent a large percentage of total payouts for a given year (MIEC tells us that nationally about 3% of claims account for over 70% of loss costs; these numbers appear to be consistent with their Alaska experience); 3) Punitive damages are rarely, if ever, awarded; 4) most claims are settled prior to trial; many are settled without legal action; 5) for MICA at least, less than one-half of claims filed result in a payment to the claimant; 6) on the average, MICA defense costs are approximately 18 cents per dollar; this number varies depending whether the claim was settled without litigation, whether there was a payment to the claimant and other factors; and 5) it is hard to predict which doctor will cause the big claims, although MIEC tells us that the highly, trained well regarded physicians often get the "jumbo" cases.

b. Self-insured/Uninsured entities: We have surveyed a wide variety of public and private "self-insured" entities. Results received from the State of Alaska, the University of Alaska, the Municipality of Anchorage, the Anchorage School District, the City of Fairbanks, the North Star Borough, the North Star Borough School District, the City and Borough of Juneau, NANA Regional Corporation, Inc., Nabors Alaska Petroleum Services, Phillips Petroleum Company, the Carr-Gottsten Corporation, Petersburg General Hospital and Cordova Community Hospital indicates that: 1) the majority of claims are between 0 and \$50,000, public entities report

more claim activity than private entities; 2) most are settled, often prior to formal legal action; 3) there are occasional large claim payouts (mostly the State of Alaska;) which typically represent a large percentage of total losses in a given year; 4) defense costs do not appear to be significant but this information requires further analysis. Please note that NANA has made two specific suggestions of issues that should be looked at by the Task Force which are contained in their letter to David Rogers dated January 31, 1990 attached.

6. ROLES AND MECHANISMS OF STATE AGENCIES: The information provided is self-explanatory. However, please note that the Division of Insurance has four primary functions: a) Market Conduct Surveillance (review and approve as appropriate all rate and form filings and perform market conduct examinations on insurance companies or producer licensees to ensure that the consumer is treated fairly in the marketplace); b) Licensing (to license qualified individuals and insurance companies to market insurance in Alaska); c) Financial Surveillance (primarily to ensure solvency - i.e. that the company has sufficient reserves to protect policy holders and pay their claims - and to determine if investments meet statutory requirements and if reinsurance agreements comply with Alaska law); and d) Consumer Complaint and Investigation (to investigate and resolve individual consumer complaints that are filed with the Division. Statistical data that is collected by this section is utilized by the market section as a means to identify licensees or trade practices that warrant further examination.

7. STATUS OF STATE SUIT AGAINST INSURANCE COMPANIES: This lawsuit was filed by 19 states against four major American primary insurance companies and a variety of reinsurance companies alleging anti-trust violations in the form of a pattern of collusion. According to the Attorney General's Office, the allegations are that leading primary insurance companies and reinsurers conspired to withdraw casualty and pollution coverage from the United States market; and that defendants coerced others to take actions which prevented other potential competitors from offering these types of coverage resulting in consumers paying more premium for less coverage than ever before. Tom Slagle of the American Insurance Organization adds that the primary thrust of the lawsuit was that various entities conspired to eliminate the occurrence policy for a claims made policy. In October of 1989, Federal District Court Judge Schwarzer granted defendants' motions to dismiss and entered final judgment against the states. The states have appealed this decision to the Ninth Circuit Court of Appeals; a decision is expected next fall. According to the Attorney General's Office, Alaska has actively participated in this case

(against the advice of advice of industry representatives according to Slagle) and intends to continue.

8. PEER REVIEW PANEL RESULTS: With the exception of information concerning the number of professional malpractice cases filed in Alaska state courts between January 1, 1987 and July 1, 1989 (177: 90 medical mal.; 56 legal mal.; 31 other), there is no official information available from the court system on peer review panel matters or other issues relating to frequency and severity of claims/judgments; although within the last year or so the court system has started to keep track of how long a case takes from start to finish. The data contained on the last page of this section regarding peer review panel results since 1977 was developed by the Alaska State Medical Association. While incomplete, it suggests that there is no apparent upward trend in cases processed through expert advisory panels (an average of 26 per year; although this does not appear to be consistent with the Court System statistics discussed above) and defendants are not always vindicated. Of 178 cases evaluated, the panels sided with the defendant 138 times and with the plaintiff 40 times. You may also want to refer to information prepared by Al Tamagni Sr. of Pension Services Ltd. regarding pending civil cases in Anchorage Superior Court.

Information provided by MICA during Task Force deliberations involving 90 cases where panels had been appointed (only definitive information available; MICA has dealt with a total of 244 lawsuits from its inception to March 1990) tells us that: 1) There were 15 reports adverse to health care providers with payment resulting in all instances by MICA and/or co-defendants; 2) Eleven reports were either mixed or equivocal as to the health care provided. In one instance, that case is still pending (as of March 5, 1990) with no resolution. Five cases resulted in settlement by MICA. Two cases were dismissed by the plaintiff. Another case was dismissed by the plaintiff but it was unclear whether the basis for the dismissal was voluntary or successful defense motion for summary judgement. Two of the cases resulted in payment by other co-defendants but no contribution from MICA; 3) Sixty-five reports were favorable to the health care providers. Five are still pending without resolution. One was tried to a plaintiff verdict with a substantial recovery. Three were tried to a defense verdict with no recovery of costs and fees by MICA. Twenty-eight cases were dismissed by one mechanism or another. Twelve were dismissed by plaintiff in return for a waiver of costs and fees. Seven were dismissed on successful motions for summary judgement with virtually no recovery of costs and fees by defense. Nine were dismissed but the basis for dismissal was unclear. Finally, in one case, the MICA defendant was dismissed by the plaintiff who proceeded to try the case against a co-defendant and recover a

substantial sum through a plaintiff verdict and large judgement.

9. RESULTS AND AMOUNT OF SELF-REGULATION: Given the large amount of information contained in this section, I will only attempt to set out several general observations about the subject:

a) With the exception of lawyers, all target professionals (doctors, architects, engineers, land surveyors, dentists and nurses) are regulated by the Division of Occupational Licensing within the Department of Commerce and Economic Development through various regulatory Boards. Lawyers are governed by the Alaska Bar Association (and its Board of Governors) created by statute as an "instrumentality of the State". All groups also have independent professional organizations (e.g. The Alaska Dental Society, the Alaska State Medical Association, The Alaska State Nurses Association, The Alaska Chapter of the American Institute of Architects, the Juneau Bar Association, etc.)

b) All target groups are subject to a variety of admission and licensing requirements, grievance procedures, and disciplinary sanctions for improper conduct; along with certain peer review procedures, sometimes required as a condition of membership in their respective professional associations. Note that lawyers are subject to rules promulgated by the Alaska Supreme Court.

c) Only Physicians, Nurses and Dentists have mandatory continuing education requirements. For example, physicians are required to complete at least 17 continuing medical education hours per year to retain a medical license provided through hospitals, the Alaska State Medical Association, local medical societies and physician specialty associations. Lawyers have an extensive optional continuing legal education program. Architects, Engineers and Land Surveyors apparently have no continuing legal education requirements or voluntary programs.

d) Based on information gathered to date, it is difficult to determine if, in fact, a relatively small number of professionals cause a relatively large percentage of complaints/disciplinary actions but some statistics included in this section suggest that is the case. The Alaska Bar Association tells us that since 1982 there were 1505 complaints against 710 attorneys. 57% of the attorneys had only one complaint against them which accounted for 27% of the complaint volume. 18% of the attorneys had two complaints against them which accounted for 17% of the complaint volume. The remaining 25% of the attorneys had three or more complaints against them and were responsible for 56% of the complaint volume. However, additional information provided on disciplinary actions taken against

lawyers suggests that there are repeat offenders but they do not dominate the statistics except in the disbarment and probation categories.

Certainly, the number of disciplinary actions taken annually appear to represent a relatively small percentage of total professionals in several of the target groups. Please note that according to the Alaska Bar Association, there has been a marked increase in informal requests for ethics opinions from Bar Counsel which suggests that lawyers are attempting to practice preventative medicine, so to speak.

e) All target groups are subject to specific statutory or regulatory provisions regarding unprofessional conduct. In addition, Physicians apparently follow the American Medical Association "Principles of Medical Ethics", as a condition of membership in the Alaska State Medical Association; Nurses apparently follow the Code of Ethics of the American Nurses Association; Lawyers are subject to a Code of Professional Responsibility promulgated by the Alaska Supreme Court; Dentists who belong to the Alaska Dental Society (2/3 of all Alaska dentists) agree to adhere to a Dental Code of Ethics (along with agreeing to be subject to peer review and mediation procedures); same with Architects, Engineers and Land Surveyors who each have separate codes adherence to which is a condition of membership to their respective professional organizations.

f) As to a specific task force question concerning Alaska physician disciplinary actions compared to other states, the information provided by the Public Citizen Health Research Group ranks Alaska #2 (per capita) in Doctor discipline for 1987; up from 19 in 1986 (Pam Ventgen tells us that in 1981 there was 1 disciplinary action; 0 in 1982; 4 in 1983; 2 in 1984; 1 in 1985; 2 in 1986; 5 in 1987; 5 in 1988 and 7 in 1989. She also points out that HB 70, passed in 1987 provided for a full time investigator and an executive secretary for the medical board which may help explain these numbers) The recommendations contained in this report are also worth noting: Increase license fees to \$500 per year and use all money to finance doctor disciplinary actions; Require periodic re-certification of doctors based on written exams and audits of doctor performance such as medical record review; Grant subpoena power to state licensing boards to go after evidence necessary to evaluate doctors; Grant state boards emergency powers to suspend a doctor's license to practice, pending investigation, when continued practice is considered to constitute a hazard to public safety; Require all hospitals to have a risk management program designed to prevent injury to patients (according to the American Hospital Association only 60 percent of hospitals have such programs and only half of these are excellent programs); Require all insurance companies to experience-rate doctors with sub-specialities,

whereby doctors with the best records pay the lowest premiums, and multiple malpractice "loser" doctors pay the most; Require insurance companies to immediately disclose and forward to the state licensing board the filing of malpractice claims, as well as the results of all malpractice settlements and adjudications (see HB 146 now in House HESS); Require hospitals or other institutions taking disciplinary actions against doctors to publicly disclose and forward to the state licensing board the details of such actions; Provide immunity and confidentiality to all those reporting doctor malpractice, incompetence, substance abuse or fraud to state medical boards (see HB 146); Provide strong consumer representation on state medical boards; Do not allow the state medical society to control membership on the boards; Officials should make strong, public statements indicating a commitment to strong doctor discipline and protection of patient's safety. It is my understanding that several of these suggestions have already been adopted in Alaska.

10. MATRIX OF STATE SYSTEMS; FEDERAL ACTIVITY: It is difficult to briefly summarize this material but several general observations can be made:

a) Legislative responses to the increasing cost and availability of insurance and apparent claim trends can be broadly categorized into civil justice- or tort reform - measures, insurance regulatory reform measures and risk management measures. According to Patricia Young formerly of the Legislative Research Agency from information provided by the National Conference of State Legislatures (NCSL), in 1986 the emphasis was on civil justice reform. The legislative focus in 1987 turned to immunities- from sovereign immunity extended to counties, cities and towns, to immunity from personal liability extended to groups of public employees and volunteers. However, more recently legislative activity in civil justice reform has declined and the focus has shifted to regulation of the insurance industry, including the anti-trust suit discussed above. In 1989, the majority of legislative activity regarding liability dealt with regulation of the automobile insurance industry, including California's proposition 103 and similar measures introduced in other states.

b) The significant "tort reform" measures enacted over the years include laws relating to limits on recovery (caps) of damages; abolition or modification of Joint and Several Liability; reduction of compensatory awards by collateral sources, or at least notification to the jury of such sources; limits on attorney's contingency fees; limits on punitive damages; periodic payment of awards; penalties for frivolous suits; settlement incentives; limits on prejudgment interest; and establishment of statutes of limitation and repose. Proposals concerning alternative

systems and similar issues will be discussed below. I have little "easy to read" summary information on the status of proposals regarding regulation of the insurance industry, professional competency laws and similar approaches to the problem.

c) According to the recent report by the New York law firm of Wilson, Elser, Moskowitz, Edelman and Dicker (Wilson) contained in this section, a majority of the states have considered or enacted "tort reform" laws as described above in various forms. The constitutionality of many of these measures has been challenged in state and federal courts with mixed results; some upheld, some not for a variety of reasons. See also the Alaska Attorney General's opinion for a discussion of some of these cases including the recent decision by the Washington Supreme Court on their cap mentioned below.

d) According to the Wilson Report, in 1989, the most significant activity concerning Civil Justice reform occurred in the courts rather than the Legislatures. In 1986 thirty-six state (36) legislatures passed tort reform laws (varying in degree and significance). In 1989 only seven (7) states enacted reforms; although many measures were pending (see NCSL 1989 pending legislation summary). NCSL tells us that four state courts rendered decisions in litigation questioning the constitutionality of damages caps. In Maryland, the cap on non-economic damages in all civil suits was upheld; in Kansas, a \$100,000 cap on such damages in wrongful death actions was upheld; the Virginia Court upheld a cap on total damages in medical malpractice cases; but in Washington, the cap on all non-economic damages was ruled unconstitutional (letter from Brenda Trolin dated December 23, 1989).

e) According to the Wilson Report, states which enacted the most extensive reforms in 1986 include Alaska, Washington, Hawaii, Colorado, New Hampshire, New York, California, Florida and Illinois (See Wilson starting on page 1 of the Introduction for a detailed breakdown of how many states enacted various reform measures in 1986 and 1987; and for a discussion of 1989 tort reform enactments).

f) Alaska, in 1986, enacted a series of civil justice changes including: Modified joint and several liability; caps on non-economic damages (\$500,000 except damages relating to disfigurement or severe physical impairment); increased burden of proof for establishing punitive damages; limits on a person's ability to recover damages sustained while that person was committing a felony; detailed provisions on damage award requirements; limited liability for certain directors and officers of non-profit corporations, non-profit hospitals (including hospital citizen advisory boards) and members of school boards and

school districts and members of governing bodies, commissions and citizen's advisory committees of a municipality; and provisions on contributory fault, collateral benefits, apportionment of damages, offers of judgement, costs and attorney's fees (including pre-judgment interest), and the effects of a release. This legislation has been characterized by tort reform advocates as a "patch work quilt" of necessary compromises, and, in their view, did not go far enough toward making Alaska's civil justice system fair and predictable. As you know, Alaska also has a medical malpractice claims system created during the 1970's.

g) On the automobile insurance front, California's Proposition 103 is the biggest news. This reform measure narrowly adopted by California voters in November 1988 included a one year 20% roll back in most property/casualty "insurance charges" from November 1987 levels; a 20% automobile insurance discount for "good drivers", as defined as those with no more than one moving violation in three years; a requirement of advance state approval for insurance rate increases after November 1989; and election, instead of appointment, of the State Insurance Commissioner starting in 1990. Prop 103 also requires the Insurance Commissioner publish for consumers a list of rate comparisons, and compels insurance companies to notify their customers of the right to join an "independent, non-profit corporation which shall advocate the interests of insurance consumers in any forum." The California Supreme Court upheld all of 103's long term restrictions on insurance rates and practices, but struck down the provision that would require insurers to be "substantially threatened with insolvency" before they could receive relief from rollback. The Court held that insurers may charge rates above the rollback level whenever insurers can justify them as not being excessive.

Many states are also considering "No-fault" automobile insurance proposals in response to escalating auto insurance costs. Note that according to NCSL at least 20 states already have no-fault legislation in many different forms particularly on issues relating to restrictions on the right to sue, conditions necessary to sue for pain and suffering and first party coverage.

h) The Wilson Report concludes as to state activity: "In general, although state legislatures have reviewed thousands of bills addressing the Civil Justice System and insurance regulation, disputes persist as to what precisely are the problem areas, and solutions to the perceived problem areas remain elusive. It is likely that state legislative activity will continue in the area of civil justice reform and the courts will be entertaining arguments relative to the interpretation and validity of these reforms for some time." See Wilson at page 7.

i) Federal activity in this area has confined itself primarily to products liability. For the past several years Congress has seriously considered proposals to federalize products liability law. Detailed discussions of current proposals are contained in the Wilson materials at pps. 77 and 93. In addition, Congress is considering a variety of proposals to modify the McCarren-Ferguson Act, a 1945 law that provides limited anti-trust immunity to insurers and continues the authority of the state to serve as the primary regulators of the insurance industry. A proposal to modify the doctrine of Joint and Several liability also is pending in the Senate according to my sources.

j) Two final notes. On the question of "pre-judgement interest", according to a 1983 Rand Note prepared by Stephan Carrol (which hasn't been updated according to Carrol) at least 26 states had pre-judgement interest laws on the books. The Note also suggests that juries implicitly provide pre-judgement interest at a rate equal to the underlying inflation rate plus 3.7 per cent per year in addition to any applicable statutory pre-judgement interest rate.

As to contingency fees, commentators argue that limiting those fees will potentially increase the amount of compensation paid to claimants, increase the likelihood that a case is dropped, decrease the likelihood of litigation to verdict and deter frivolous suits by placing the plaintiff's lawyer at financial risk; but will also preclude some victims with legitimate claims from obtaining representation. It is not clear whether the presence of contingency fee arrangements increases the total number of claims (See Frank Sloan "State Responses to the Malpractice Insurance "Crisis" of the 1970's: An Empirical Assessment"-Vanderbilt University, 1985). One study also concludes that in modest cases contingent fee lawyers spend less time on a case than hourly fee lawyers; but there is no statistically significant evidence of a differential in effort for larger cases, although there is an indication that if there is an effect it is in the opposite direction (see Rand, "The Impact of Fee Arrangement on Lawyer Effort" by Kritznier et. al.) For detailed discussions of these issues see "Rand Three Level Study and Other Reports" and various references to the subject contained in "Impact of U.S. Tort System Changes". Note that Danzon suggests that contingency fee limits reduced the amount of settlements by 9%, reduced the number of cases litigated to verdict by 1.5%, and reduced the number of cases dropped by 5% (See Maine Malpractice Study at page 36).

11. ALTERNATIVE PROPOSALS: Here is a summary of some of the more significant alternatives I have been able to identify that are either in effect or under consideration today:

a) Arbitration and Screening Panels: According to the Rand article by Deborah Hensler entitled "Reforming the Civil Justice Process, How Court Arbitration May Help" arbitration programs may be established by state statute or by rule of a state supreme court or a local court. Typically, under these programs the Court is authorized to compel arbitration for cases that fall within certain limits (Rand says \$25,000 is the typical cutoff); with certain exceptions. However, any of the parties to a suit may reject an arbitration award and request that the case be calendered "de novo" (without regard to the arbitration verdict). This appeal option is generally considered necessary to ensure that the litigants right to a trial is not abrogated. In 1984, Rand's Institute for Civil Justice estimated that arbitration programs are operating in more than 100 trial courts around the country and estimated that over 100,000 cases are arbitrated annually through this process. Apparently, there also are voluntary, binding program options.

Typically in court annexed arbitration programs cases are heard by private attorneys or retired judges who volunteer to serve as arbitrators and, according to Rand, receive only a small honorarium for their efforts. Arbitration hearings usually are private, informal and often brief. After giving the parties an opportunity to settle, the facts of the case are heard with the litigants often appearing as witnesses. If accepted, an arbitrator's award is entered as a judgement and is enforceable. As a disincentive for frivolous appeals, some programs require applicants who request a trial de novo to reimburse the court for arbitrator's fees; in some programs court costs and attorneys fees may be levied on unsuccessful appellants, or applicants who do not improve their position (e.g. Hawaii-if the court does not alter the award by at least 15% in favor of the appealing party; see Patricia Young memo in this section). Note that such programs also are required by some carriers.

Does it work? The reason for these programs is to reduce congestion, costs and delay. According to Rand preliminary information derived from two studies of a new program in California and an older program in Pennsylvania arbitration can and does contribute significantly to reducing congestion, costs and delay. These findings are confirmed by the Hawaii and North Carolina experiences discussed in this attachment. For example, reviewers from the University of Hawaii of the Hawaii program which covers all tort cases with a probable jury award of \$150,000 or less concluded in January of 1989 that: "Hawaii's Court Annexed Arbitration Program appears to be meeting its goals of reducing litigant costs, increasing pace, and maintaining the satisfaction of participants....To our knowledge no other arbitration program in the country claims to be reducing litigation costs; Hawaii leads the nation in this area." Similarly, a 1989 evaluation of the North Carolina program by the

University of North Carolina concludes that the program: disposed of cases faster than standard procedures; reduced trials and out of court settlements replacing them with "promptly scheduled adversarial hearings in a courtroom before specially trained arbitrators"; and improved litigants satisfaction with the outcome and procedure used in their cases. The study also notes that attorneys were satisfied with the program and, in a survey, voted strongly in favor of continuing it.

However, the Rand study cautions that program design and implementation are critical factors in determining success. Some of the design issues that must be considered include: setting jurisdictional limits of the program, establishing procedures for determining case eligibility, adopting guidelines and procedures for selecting arbitrators and deciding how many arbitrators will hear each case, where the hearings will take place and whether there will be financial disincentives for appealing.

Please be advised that the American Medical Association, The American Hospital Association and the Physician Insurers Association of America each have proposed versions of alternative systems apparently involving arbitration or a form of administrative adjudication with various limitations on recovery. I do not have sufficient first hand information on these proposals at this time to go into specific differences but you may want to refer to the analysis prepared for MICA by Jerry Cogan. The State Alternative version of the PIAA proposal is also included for your information. Also note that the AHA calls for a study of a Medical Indemnity Fund as a supplemental method for compensating medical malpractice victims financed by assessments or surcharges levied on medical malpractice insurers and the self-insured.

In Alaska, arbitration and peer review systems applicable to medical malpractice (AS 9.55.535 and 536) and court ordered small claims arbitration procedures (AS 9.43.190-220) are available. In addition, state law recognizes certain contractual arbitration agreements (AS 43.010-180; Uniform Arbitration Act). I have no other information on the latter two options.

b) The No-Fault Alternative to Tort Recovery: James Ludlam ("The Battle for Medical Malpractice Tort Reform: A Report From the Front Lines" prepared for the Annual Meeting of the American Academy of Hospital Attorney's, June 1989) tells us that in the 1970's and 1980's there was much discussion of possible no-fault alternatives to compensating plaintiffs for catastrophic injuries including "trip insurance" under which a patient bought his own coverage, or a system for which there would be payment without fault on the basis of a worker's compensation type schedule (similar to that

proposed by Governor discussed in my introductory memo to the Task Force dated September 15, 1989). There was little or no action on these proposals. In fact, the California Medical Association and the California Hospital Association concluded that these systems would be more expensive than the existing tort system based on a study of over 25,000 charts and dropped the whole idea.

Then, in 1987 North Carolina and Virginia adopted no fault programs followed by Florida in 1988. The North Carolina program was restricted to vaccine related injuries which were compensated for out of a fund consisting of state appropriations with a limit of \$300,000. Damages only can be awarded under this system to the person receiving the vaccine.

The Virginia Birth-Related Neurological Injury Compensation Act, mentioned at our first Task Force meeting, apparently was adopted to meet a crisis in the availability of insurance for physicians practicing obstetrics (according to Ludlam, it was expected that 25% of the OB/GYN's were going to lose coverage by the end of 1987). The Act applies only to patients of physicians and hospitals that have voluntarily participated in the program by payment of \$50 per delivery with a \$150,000 maximum by a hospital and a \$5,000 fee for a physician doing obstetrics. These payments are voluntary. In addition, all other physicians are assessed a fee of \$250 as a condition of licensing. If the fund falls short there is an annual premium tax on all liability carriers in the state. The purpose of the fund is to assure lifetime care of infants with severe neurological injuries sustained during labor, delivery and resuscitation, and to be the sole and exclusive remedy for those who participate. The fund is administered by the Industrial Commission of Virginia with the assistance of an expert panel of three physicians. Compensation is limited to actual and necessary medical and related expenses, loss of earnings from age 18-65 based on a discounted formula and reasonable expenses incurred in connection with filing the claim including attorney's fees.

Following in the footsteps of Virginia, the Florida legislature passed a comprehensive malpractice reform package in 1988. Part of the package was a no-fault state run fund to provide for the care and treatment of babies born with permanent, severe disabilities due to mechanical failure or malpractice. The Fund, administered by the State Worker's Compensation Division, is to be financed by an annual payment of \$5,000 per year by each participating physician. The parents may recover the cost of care and rehabilitation and up to \$100,000 for non-economic damages. As an aside, the total Florida legislation (114 pages) also included caps for other cases, arbitration options, a new watchdog unit called the Medical Quality Assurance Division,

hospital reporting requirements of malpractice cases involving doctors and other provisions designed to provide notice of certain events. It is interesting to note that there are no caps if both parties refuse arbitration.

One final note on alternative systems. Peter Huber ("Liability-The Legal Revolution and its Consequences") calls for a return to contract principles in the form of direct first party insurance.

Other miscellaneous procedures to provide faster and less expensive ways to resolve disputes include: "fast tracks" for certain types of cases; dismissal of inactive cases; penalties for last minute settlements made after the trial is underway; procedures designed to limit filing of motions and pleadings; procedures limiting discovery; and procedures which set firm trial dates.

12. THE RAND THREE LEVEL STUDY AND OTHER REPORTS: "Trends in Tort Litigation- The Story behind the Statistics" by Deborah R. Hensler, Mary E. Vaiana, James S. Kakalik, and Mark A. Peterson attempts to set the record straight on many of the underlying issues that we too are attempting to sort out. They start by reminding of us of how all this began:

"Over the past two years, manufacturers, physicians, consumer advocates and trial attorneys have vigorously debated the costs and benefits of the tort system as a mechanism for compensating and deterring injuries. The debate began with a perceived "insurance crisis". Liability insurance premiums, particularly for medical malpractice and commercial lines, increased sharply and insurance for some kinds of activities became unavailable at any price. While there is broad consensus that obtaining and paying for insurance was a pressing problem, there was little agreement about the cause or its solution. On the one hand, insurers linked rising rates and unavailability to trends in tort litigation, thus focusing attention on the legal system. In many states and at the federal level, insurers, manufacturers, health care professionals and local government officials formed coalitions to support substantive changes in tort law. On the other hand, trial attorneys and consumer groups generally opposed these changes arguing that what needed reform was not the tort law but poor management practices in the insurance industry."

The authors go on to say that not only did these groups hold different positions on these issues they also held sharply different views of reality (and presented contradictory statistical data to support their claims):

"Proponents of change argued that there has been an explosion of liability lawsuits in the past five years, that recent verdicts demonstrate that civil juries are "out of

control" and that the monetary benefits delivered by the tort system to injured parties are overshadowed by the enormous costs of administering the system. Tort reform was needed to counteract these trends. Opponents of tort reform argued that the litigation explosion is a myth, that jury awards have been basically stable for 25 years, and that the transactions costs of the system are acceptable, given the systems twin objectives of compensation and deterrence. Tort reform was not only unnecessary - it might be harmful to those whom the system is intended to serve."

In the author's words, "Where does the truth lie?" In an effort to resolve these apparent contradictions and put the issues in perspective for policy makers this report attempts to answer three questions - How much litigation is there? Are jury awards stable? How much does litigation cost, and who gets the money? A summary of their basic conclusions follows:

a) One of the reasons for confusion is that there is not a single tort system. Instead, there are at least three types of tort litigation, each with its own distinct class of litigants, attorneys and legal dynamics. The FIRST is the world of routine personal injury torts, exemplified by auto suits. They occur frequently and usually involve modest injuries and relatively low financial stakes. Settled law and routine procedures lend an air of stability to this world. The SECOND is the world of high-stakes personal injury suits such as product liability, malpractice and business torts. Here the litigation itself is newer, the law is still evolving, and the stakes per case are larger and increasingly uncertain. The THIRD is the world of mass latent injury cases, such as asbestos litigation, Dalkon Shield cases and other suits arising from mass exposure to drugs, chemicals or toxic substances. The lack of "fit" between traditional tort law and the facts of these cases leads many to view them as problematic.

b) How much tort litigation is there? Based on data compiled from the Administrative Office of the U.S. Courts, the National Center for State Courts and the Rand Institute for Civil Justice they have concluded that: accident cases are a steady or declining percentage of court action; non-auto personal injury cases such as malpractice and product liability are growing moderately in state courts and more dramatically in federal courts; and mass latent injury cases have the potential for explosive growth as new evidence of harms is developed.

c) Are jury awards stable or out of control? Based primarily on data compiled by Rand from Cook County, Illinois and San Francisco, California between 1960 and 1984, (only data available in the U.S. that can be used to discuss long term trends) they have concluded that: Plaintiffs in auto cases

involving modest injuries and expense continue to obtain modest awards and, at least in recent years, these awards generally hold after trial; Plaintiffs in product liability and malpractice cases are winning more frequently and obtaining higher awards; Deep pocket defendants in product liability cases ultimately pay much, if not all the awards against them, even after post-trial adjustments; Jury behavior seems more unpredictable, but this may simply be because we do not have a very good sense of why juries make the decisions they do. The authors suggest that these trends may hold nationwide because of the similarities between the jurisdictions studied.

d) Litigation costs - How much, to whom? Based on Rand studies of litigation costs the authors state: "Our snapshot of litigation shows that the costs of litigation consumed about half of the \$29 to \$36 billion dollars that were spent on litigation. When we disaggregate these costs, we see that in more complex cases (non-auto torts) the costs of litigation were higher. In the case of asbestos claims, the only mass latent injury cases for which these data have been assembled, litigation costs constituted almost two-thirds of the total per-claim expenditure." Their specific breakdown in percentage of totals: Auto - 19% in Defendant legal fees and expenses, 26% in Plaintiff legal fees and expenses and 52% to Plaintiff; Non-auto- 30%, 24% and 43% respectively; Asbestos- 37%, 26% and 37%. See also pie charts contained on pages 27 and 28 of the report and the Tillinghast cost breakdown contained in Miscellaneous on page 15.

e) What is the story behind the statistics? Here is the authors' summary of their findings: Routine personal injury torts such as auto cases are growing slowly in frequency and costs, and their outcomes-inflation adjusted- have not changed much over the last 25 years; Higher stakes torts such as malpractice and product liability are growing faster in frequency and costs, and their outcomes have increased dramatically over the past 25 years in the jurisdictions observed intensively, and substantially in the shorter five year period for which they had national data; Mass latent injury torts, once identified, tend to explode in number, carry high transaction costs and have highly uncertain outcomes.

Unfortunately, this report does not resolve the nagging underlying question of why have we had significant affordability and availability problems that have lead to considerable debate of these issues. Is it industry practice, increased claims loss experiences, or both? I have found no study or analysis which settles this question in my mind.

Please note that a recent study by two Cornell Law School professors recently reported in the New York Times indicates

that since the mid-1980's published opinions have moved toward benefitting defendants over plaintiffs suggesting a possible shift in overall trends.

The Medical Malpractice Liability Study by the Public Health Resource Group, Inc. for the Maine Legislature submitted in June 1989 is also worth noting in some detail. Here are their general findings:

a) Premium rates for Maine Physicians have been rising to "record proportions" over the last ten years.

b) Frequency, severity and losses as a percentage of income do not indicate that the liability insurance problem in Maine is out of control. It does suggest that more efficient methods of estimating reserves, reinsuring and obtaining legal services could reduce the price of premiums for policy holders while continuing to provide high quality coverage. These are areas where policy changes could achieve savings to the insurance industry and ultimately the rate payers.

c) Maine is experiencing a steady decline in physicians who provide obstetrical services; although the decline appears limited primarily to urban areas. The principal reasons reported by physicians for this decline are the price of medical malpractice insurance and fear of a malpractice suit.

d) It is not clear whether tort reforms actually have succeeded in reducing the price of insurance or the frequency or severity of claims, or whether they will succeed in reducing or stabilizing premiums or claims in the future; although it is far easier to estimate the effect of certain reforms on the frequency and severity of claims than on the price of insurance or the willingness of physicians to practice high risk specialties. For example, caps on awards have potential to reduce the dollar amount of high stakes claims and limits on attorneys fees may increase compensation to plaintiffs (while also leaving some victims with smaller claims without representation, they add). Nor is it known if these parameters would have increased more than they have in the absence of reforms. Moreover, many state reform statutes have not been in operation long enough to have a clearly measurable effect. For these and other reasons, new tort reforms at this time are questionable policy options to reduce insurance premiums and to insure medical care availability. Ongoing studies to be completed within the next two years may provide a clearer picture. If reforms are contemplated, the legislature might consider designing them to expire after a certain period of time if availability and affordability of insurance and medical services does not improve by some measure acceptable to policymakers.

e) Alternative systems are appealing because they may help reduce inefficiencies and costs of the current tort system. Unfortunately, no state has implemented an exclusive alternative and it will be years before any evidence is available on the impact of such approaches. Please note the report indicates that the Vermont Legislature is considering the AMA fault based administrative system discussed briefly above.

f) A principal goal of the government in a regulated industry like insurance is to get insurers to manage their business as efficiently as possible and provide a quality product to consumers at a reasonable price and at a fair return on investment. Accordingly, the Insurance Regulator should be directed to promulgate an investment income model and require insurers to demonstrate an effective cost control program. The report also suggests that the State could authorize insurance regulators to spread rate changes over three years and implement a merit rate system and/or system of deductibles which would have the effect of spreading the risk of claims payments and resulting rate increases to those policy holders responsible.

g) To keep professionals on their toes, the state could require investigations by the medical board of physicians who have three or more claims over a ten-year period which resulted in a payment; create an ombudsman within the board to defuse potential complaints before they are elevated to a claim; and require the board to collect additional information on the voluntary or involuntary loss of hospital privileges in or outside the state. They also suggest that the Legislature take a look at "care standards" that have been proposed by a variety of entities.

h) They conclude: "There are many approaches to controlling the rising and unstable malpractice liability premiums in Maine and their effect on access to care. These include changes in the tort system, the insurance regulatory system and the medical care delivery system. To target one while ignoring the other will create disequilibrium and lead to policies likely to fall far short of the mark. Each has some merit and some drawbacks. Each needs to be addressed with a realistic understanding of what will be gained and what will be lost. It was no surprise to many experts that the St. Paul Companies decided to lower their premiums due in part to a reduction in expected reserve demand for outstanding claims. Considering past history, however, the medical malpractice issue is likely to revisit Maine in a very few years. The severity of the problem will depend on how comprehensive an approach the Legislature takes now."

13. IMPACTS OF U.S TORT SYSTEM CHANGES: (Frequency, Severity and Rates - this section does not attempt to discuss impacts of tort reform on victim rights and related issues, but see

pros and cons discussions contained in your first information packet along with the James Ludlam article discussed above): While tort reform measures do appear to affect the frequency and severity of claims there is no solid proof to date that they also have a direct effect on the cost or availability of insurance.

Patricia Danzon of the University of Pennsylvania in a series of Rand articles (including in particular "Frequency and Severity of Malpractice Claims-New Evidence"- 1986) appears to have produced the most credible contemporary analysis of the relationship between certain tort reform provisions and the frequency and severity of medical malpractice claims. Although her study is restricted to medical malpractice claims her conclusions are worth examining in some detail:

a) Malpractice claim severity has risen roughly twice as fast as the Consumer Price Index. Nevertheless, the tort reforms enacted since the mid-1970's malpractice "crisis" affected the frequency and severity of malpractice claims over the decade from 1975-1984 in a manner broadly consistent with economic theory and previous evidence. Although claim frequency and severity have continued to rise despite reforms this trend does not indicate that the tort changes have had no effect.

b) For example, states that enacted shorter statutes of limitations and set outer limits on discovery rules have had less growth in claim frequency than states with statutes more lenient to plaintiffs. On the average, cutting one year off the statute of limitations for adults reduces claim frequency by eight percent. The effect would presumably be greater for a reduction from, say, four to three years than from ten to nine years.

c) Statutes permitting or mandating the offset of collateral benefits have apparently reduced malpractice claim severity by eleven to eighteen percent and claim frequency by fourteen percent relative to comparable states without collateral source offset. One of the reasons for this is that collateral source offsets often reduce the potential for recovery for a large number of claims, thereby reducing incentives to file.

d) Caps on awards have reduced severity by twenty-three percent. This percentage represents the average impact of the various forms of cap, over the period of 1975 and 1984, during which time some statutes were still under challenge. If the dollar thresholds are not revised periodically to keep pace with inflation, the future effect will presumably be greater, unless juries find ways of implicitly circumventing the limits by increasing allowances for uncapped components of the award.

e) Arbitration statutes apparently increased claim frequency, but reduced overall average severity. Disaggregated data would be necessary to determine whether the reduction in observed average severity results from a reduction in awards per case or simply reflects the filing of more small claims. The net effect appears to be an increase in total claim costs, but compensation of more claimants.

f) None of the other reforms analyzed, including screening panels and limits on contingency fees, appears to have had any systematic impact on claim frequency or severity.

g) Urban areas have a particularly high frequency of non-meritorious claims (those closed without payment) and claims filed more than two years after the alleged injury. Per capita income, the unemployment rate, and the number of attorneys per capita have no statistically significant effects. The surgery rate in a state increases claim frequency, and the ratio of surgeons to medical specialists increases claims severity.

h) On average, severity of malpractice claims has increased at almost twice the rate of inflation of consumer prices over the last decade.

i) The above analysis on claim frequency and severity should not automatically be translated into an effect on premiums (a subject beyond the scope of this paper) for several reasons: First, the net potential impact on premiums also depends on litigation expenses and changes in the timing of disbursement of loss reserves, and hence investment income. Second, reforms that reduce the uncertainty in estimating malpractice claims costs- namely caps on awards, periodic payment of amounts for future damages and shorter statutes of limitation/repose- may be expected to reduce premiums by a modest amount over and above the reduction in mean expected losses. This result can be expected because of the reduction in the insurer's risk. Perhaps more importantly, she adds, by reducing uncertainty, such reforms should reduce the volatility in price and availability of malpractice insurance, which is a major inefficiency of the present malpractice system.

Please note that Danzon's claim severity conclusions are more or less confirmed by actuaries Milliman and Roberston, Inc. in their August 5, 1988 letter to MICA.

While this potential positive impact on insurance costs is theoretically possible and there is evidence that the experience in California (which has had time to test the theory) and perhaps other states bears this out (the informal opinion of Ray Bacon of the California Department

of Insurance and Ron Neupauer of MIEC who feels strongly that California tort reform measures have had a significant impact on rates which currently are increasing less than inflation; although he agrees that other factors also come into play), as well as evidence to the contrary, I have found no study that definitively concludes this has been the case. And I suspect no such study exists. See "Insuring Our Future: Report of the Governor's Advisory Commission on Liability Insurance," New York, 1986- "no research currently available quantifies the linkage or even irrefutably establishes that such a linkage exists." In fact, according to Franklin Nutter, president of the Alliance of American Insurers (quoted in the attached article from Public Citizen, "The Impact of Tort Changes on Insurance Rates"), "It is clearly impossible to say that if you adopt a certain tort reform, you will get 'X' reductions in premiums." Similarly, the Frank Sloan article entitled "State Responses to the Malpractice Insurance 'Crisis' of the 1970's: an Empirical Assessment" states: "The empirical results of the study presented here give no indication that individual state legislative actions, or actions taken collectively, had their intended effects on premiums." One last comment. When evaluating the significance of the California experience, it is useful to keep in mind that 90% of the insurance is provided by doctor owned companies which have a significant incentive to keep rates down.

Perhaps the most recent and detailed analysis of this issue in the context of medical liability and obstetrical care is contained in the 1989 report of the National Academy of Science Institute of Medicine's Committee to Study Medical Professional Liability and the Delivery of Obstetrical Care which has just been brought to my attention by a Task Force Member. While I have not had time to review this report in any detail, I have summarized their conclusions on the question of "tort reform". According to the study's Preface, the Institute of Medicine appointed a "distinguished interdisciplinary committee" (see attached list of participants) to evaluate the data relating to the effects of medical professional liability issues on access and delivery of obstetrical care. The preface continues that this study was a response to an inquiry of the American Academy of Pediatrics along with several other groups who believed that more attention to professional liability issues was "urgently" required. Here are there general findings on the basic question of legislative solutions to the problem:

a) Every state but West Virginia has enacted legislation modifying common-law tort doctrine that is intended to relieve the medical liability crisis; many are discussing additional reforms.

b) After evaluating these reforms (and reviewing the Danzon analyses, a 1987 Report of the General Accounting Office and others) the committee concluded that only a modest reduction in medical malpractice claim frequency and size of awards has been achieved. The committee also concluded that "the many deleterious side effects of the tort system for resolving obstetrical claims - resulting in distortions of health care delivery patterns - have not been reduced by those tort reforms." (See Attachment to follow, Volume I page 127).

c) The committee believes that the problems created by the medical professional liability issues in obstetrics represent a serious threat to the delivery of obstetrical care in this nation. However, although some of the tort reforms already in place have merit, they do not appear sufficient to stem the exodus of obstetrical providers from the profession or to solve the attendant problems caused by the current professional liability climate in obstetrics.

d) On the basis of its findings - that the costs of the current system in terms of impaired obstetrical care are great, that tort reforms are so far largely ineffective, and that data evaluating the merits of proposed alternatives to the tort system are lacking- the committee concludes that state legislatures should not focus on further reform efforts within the existing tort system but should instead redirect their energies toward developing alternatives to the traditional tort system for resolving medical malpractice claims and toward implementing these alternatives in certain circumstances.

e) The committee recommends that states consider three proposals for additional research and implementation on a limited basis: the no-fault designated compensable events scheme (including those variants enacted in Virginia and Florida discussed above), the AMA-Specialty Society's fault based administrative system, and legislation authorizing the use of contractually determined legal relationships governing medical professional liability between providers and patients. The committee also recommends that the Federal Government provide grant funds to finance studies of proposed legislation and to begin pilot projects for limited implementation of various solutions.

Despite these findings, keep in mind that some commentators still feel that it may be too soon to draw any definite conclusions about the impacts of tort reform measures. According to Brenda Trolin of the NCSL a minimum of five years is needed before cases processed under previous systems clear the courts. Several additional years must pass before a sufficient number of cases have been processed through systems to determine whether changes have had the desired consequences.

And Patricia Young formerly of the Legislative Research Agency reminds us : "Because of the variations in state constitutions and laws regarding tort reform, identical reform measures may have dissimilar impacts in each state. Thus, even those reform measures which appear promising require careful consideration in the context of an individual states circumstances to determine potential ramifications. Opponents frequently argue that constitutional rights-including equal protection, access to courts, and trial by jury- are violated by certain reform measures. Also, reform measures can encourage or discourage lawsuits. Although some measures may facilitate and expedite resolution, they may also encourage claims which would not otherwise be made."

One of the keys to better understanding of this issue is more and better information. Most agree that this general lack of statistical data is a problem. According to Stephan Carroll ("Assessing the Effects of Tort Reforms, 1987 at viii): "The kinds of data needed to assess the effects of reform are generally not now available... Three types of new data collection systems need to be considered: 1) systematic efforts to obtain data from insurers and self-insured defendants on the aggregate outcomes of liability claims; 2) special surveys of claimants, the bar, and insurers to obtain the detailed individual claim information needed to identify reform's winners and losers; and 3) systems for collecting information both on the other factors that impinge on the behavior of participants in the tort system, and therefore have to be controlled for, and on economic outcomes and injuries".

14. ROBERT HUNTER ("CHANGES IN INSURANCE SERVICES; HOW THE PUBLIC IS TREATED"): Given limits of time and space I will only summarize in "bullet" form Hunter's many recommendations contained in the publication called "How to Tame the Insurance Industry Cycle and Make the Legal System More Efficient- A Suggested Legislative Agenda for 1987" by Robert Hunter and Jay Angoff. Hunter's central premise is that limiting the ability of severely injured people to sue and be compensated for their injuries does not bring down insurance rates (see above for additional discussion of this issue). He proposes many reforms including: Requiring disclosure by insurance companies of data on actual income and payouts on different types of insurance; permit group insurance/risk-retention group programs; allow banks to write liability insurance; establish joint underwriting associations which provide insurance to those who can't get insurance in the voluntary market; establish state reinsurance programs which would authorize self-insureds to pay the state a premium in return for which the state would agree to pay all claims above a certain specified amount; establish state run insurance companies; establish

interstate compacts for interstate reinsurance programs; prohibit arbitrary cancellations of policies; require experience rating where good risks pay less than those who are bad risks; to allow the market to work competitively despite the McCarren-Ferguson Act, establish flex-rating which would allow insurance companies to raise or reduce rates without insurance commissioner approval within a "zone of reasonableness"; beef up enforcement by properly funding and staffing state insurance agencies; close the "revolving door" by discouraging or limiting the practice of hiring industry people to regulate the industry; establish an office of Insurance Consumer Advocate which would represent the consumer point of view at rate hearings and ensure that the insurance regulators do not rubber stamp insurance company rate requests; prohibit the pass through of lobbying expenses; require risk management by insurance purchasers and self-insureds which should reduce the frequency and severity of claims; allocate medical malpractice insurance costs more equitably. For example, doctors in high risk specialties pay for the risks that should be shared by others, doctors are broken down by insurance companies into too many categories with too few doctors in some categories, doctors pay for malpractice that could be more easily borne by hospitals, and doctors are not experienced rated; insurance companies should disclose names of doctors involved in claims and the amount of those claims. This information should be made available to various organizations and the public in general; limit lawyers fees on both sides. Hunter focuses on defense costs and contends that defense legal fees have doubled in ten years. States could limit defense fees by disapproving any rate that included within it more than a certain percentage (he suggests 25%) for defense costs which would force the insurer to keep an eye on fees insuring that a greater percentage of the money flowing through the system would end up in the hands of the injured person; penalize frivolous actions on both sides including frivolous motions and objections by defendants lawyers who charge by the hour; to encourage accountability to the public, prohibit secrecy agreements which prevent disclosure of the details of a settlement and other information about the case; encourage offensive collateral estoppel which prevents re-litigation of certain facts (i.e. once a fact is established it can be used in future cases); pass back collateral source benefits by requiring the defendant to pay the full amount of a verdict but excuse the source of collateral benefits from paying such benefits to the extent they are already included in the jury verdict and then require the source of the collateral benefits to reduce the cost of those benefits across the board based on these savings; create incentives to settle including penalizing defendants for refusing to make reasonable offers to settle, and penalizing plaintiffs for making unreasonable demands; and last but not least, establish alternatives to the tort system including no-fault

systems (particularly for relatively minor injuries), arbitration, mediation, mini-trials, and other dispute resolutions systems. However, Hunter is careful to point out that cases involving defective products should be subject to common law principles without any limits on either compensatory or punitive damages: "The stories of A.H. Robins and the Dalkon Shield, Ford and the Pinto gas tank, Richardson-Merrell and MER-29, and Johns-Manville and asbestos are just a few of the scandals unearthed as a result of tort litigation. And it was only the fear of more litigation, and of large awards for both compensatory and punitive damages, which finally forces these and other dangerous products off the market and encourages the development of less dangerous substitutes."

15. CHANGES IN TIME IN THE LAW OF LIABILITY AND DAMAGES: "Liability, Perspectives and Policy" edited by Robert E. Litan and Clifford Winston of the Brookings Institution in Washington, D.C. (1988) provides insight not only into the question of how tort law has evolved over the last thirty years but also presents an excellent overview and summary of the many issues we have attempted to review in this memorandum and related attachments. Here are the key findings:

a) Tort law is largely based not on statutes but on common law, a body of legal principles developed case by case by judges, primarily those in state courts. It is difficult to generalize about the status of tort law in all jurisdictions but certain important changes in doctrines have occurred in the past several decades, all of which have expanded the system's function in spreading losses:

* Whether by applying the negligence test in a flexible fashion or by imposing liability on parties whose behavior is causally related to accidents but who are not necessarily negligent (so-called strict liability) the courts have increased manufacturer's liability for defective products. Certain courts have held that a product can be defective even if it conforms to prevailing regulatory standards and if the manufacturer had no knowledge at the time of design or production that it would entail the risks later attributed to it in litigation.

* The negligence standard itself has been extended through litigation to impose liability on a wide class of service providers not previously accustomed to being sued. Day care centers, ski lift, ice rink, and amusement park operators, taverns and restaurants, and not-for-profit organizations have all been taken to court for failures to warn of certain dangers and for the careless conduct of their employees. The exposure of these defendants to liability claims has been widened by the doctrine of joint and several liability, which allows prevailing plaintiffs to recover up to the full

amount of a total damage award from any single defendant if the other defendants are unable to pay, and by the collateral source rule, which prohibited juries from reducing damages by subtracting insurance monies or other compensation plaintiffs receive from other sources.

* The concept of contributory negligence has been relaxed in many states so that negligent plaintiffs are no longer totally barred from recovery. Instead, they find their damages reduced by the proportion by which their negligence contributed to their injury. In addition, beginning with the Federal Tort Claims Act of 1946, which waived the federal government's sovereign immunity, courts have made state and local governments liable for tort suits.

* Courts have relaxed the standards the plaintiffs must satisfy in proving, under either the negligence or strict liability doctrine, that defendants have caused their injuries. This trend has been manifested primarily in product liability and so-called toxic tort cases, which have frequently required courts to decide whether plaintiffs' injuries have been caused by their exposure, often over long periods of their lives, to substances recently discovered to be associated with the development of cancer or other serious diseases. Courts have adopted a long range of rules to determine causation in such cases. Some have placed liability on the first or last source to which plaintiffs can establish they were exposed; others have made all manufacturers of the substance jointly and severally liable. In one noted case involving the exposure of Vietnam veterans to the chemical Agent Orange, a federal court actively encouraged a \$180 million settlement even though no hard scientific evidence had been uncovered that linked the chemical to the medical infirmities claimed by the plaintiffs.

* Finally, courts in certain jurisdictions have liberally interpreted statutes of limitation, which bar plaintiffs from recovering if they wait too long after suffering injury to file suit. In many toxic tort, product liability and medical malpractice cases it is difficult to determine when injury actually occurs. It could develop decades later when the symptoms of disease become observable. Although jurisdictions differ widely on this issue, the trend has been for courts not to invoke the statute of limitations to bar suits involving long-latent injuries.

These observations appear to be more or less consistent with the more detailed and critical analysis of these trends contained in Peter Huber's book "Liability, the Legal Revolution and Its Consequences" (1988).

b) The calls for reforming the civil justice system are less urgent now (1988) than they were in "recent months". As in

previous insurance cycles, increases in premiums have moderated. In some instances, coverage that was withdrawn has reappeared. In 1986 the property and casualty industry earned 11.6 percent on its equity, a return lower than the manufacturing sector average of 13 percent during the past decade but still considerably better than the disappointing performance of the previous two years.

c) The issues raised by the most recent crisis will not disappear. If nothing else, the dramatic increases in premiums and curtailments of coverage have called greater attention to the nation's civil justice system - whether it is working satisfactorily, and if not why - then at any point in recent memory. Moreover, interest in these issues will intensify if and when the underwriting cycle reverses course and turns against the industry once again. Chances are that it will in five to ten years.

d) Injuries pose three different and potentially conflicting challenges for all societies. One is to efficiently deter behavior that cause injuries. A second and related objective is to exact retribution against those responsible (the criminal law is a key component of this function). The third challenge is to compensate victims for their injuries. Compensation may be supplied by the government or the private sector (through insurance), and may or may not be linked to specific injuries or types of accidents. Tort law-rules allowing accident victims to seek compensation through the judicial system from the parties responsible - can be considered a mechanism for meeting all three of these challenges.

e) Of the millions of insurance claims filed each year, typically only 2% are resolved through litigation. Of cases brought to court, less than 5% are tried to verdict; the rest are settled.

f) The amounts actually received by successful plaintiffs are often much smaller than those originally awarded by juries due to trial judge and appellate overrides and/or the inability of some defendants to satisfy the judgement. In one study of 198 tort verdicts between 1984 and 1985 that resulted in awards of 1 million or more the final distributions to plaintiffs were on average 30% less than the original award. Successful plaintiffs received the jury award in only 51 cases.

g) As Rand noted, average awards in tort cases in San Francisco and Cook County increased sharply, considerably faster than growth in real GNP and real prices of medical services.

h) Awards in medical malpractice cases and products liability cases were significantly higher and increased at a faster pace than those for personal injury cases generally.

i) Much of the Cook County and San Francisco increases are due to "explosive growth" in jury awards of \$1 million or more (Cook County-Two verdicts between 1960 to 1964 accounting for 4% of all personal injury awards; 67 verdicts between 1980 to 1984 accounting for 85% of awards; San Francisco- only 3.8 % of all personal injury case produced \$1 million plus awards which accounted for half of the total amounts awarded).

j) From the liability insurers point of view these statistics cause problems - Insurers can only remain profitable if they set their premiums to cover total expected claim costs, and large dollar claims increase uncertainty about the range of possible losses.

k) The greater frequency of large dollar awards can be partly explained by increases in non-economic damages - pain and suffering - as well as increases in punitive awards in certain cases. One commentator (George Priest, see page 10) finds that non-economic damages generally account for 30% to 40% of all tort damage awards and for even higher proportions of very large awards. Patricia Danzon draws similar conclusions according to Litan/Winston.

l) There are gaps in existing compensation programs and devices. For example, more than 30 million people in this country remain uninsured for medical purposes at any given time, and perhaps more than 20 million are uninsured throughout a given calendar year. In addition, many of those with insurance have limited coverage, especially for the catastrophic medical expenses often associated with major tort litigation. Gaps also exist in programs designed to compensate for income losses, although such coverage (provided through public and private disability programs) probably has increased over time. There is little evidence that expanded tort liability has efficiently filled in the gaps left by the public and private network of compensation plans. In fact, it may be undermining the compensation objective by inducing private insurers to withdraw coverage and raise premiums at the expense of low income consumers.

m) While they have broadened the availability of compensation, more liberal liability doctrines and larger damage awards and settlements may have overdeterred, forcing socially worthwhile products, services and activities to be curtailed, withdrawn from the market or eliminated. (A classic example of this phenomenon is the loss of physicians willing to perform obstetrics, as discussed in this memorandum under "Availability of Services" above and in the Danzon article contained in chapter 4 of this book. Similar

effects are observed by Peter Huber in chapter 5 regarding hazardous waste facilities.)

n) Delivering compensation through the tort system is very expensive. According to Rand, the United States spent between \$29 million and \$36 million in 1985. Of that amount less than half the total (\$14 billion to \$16 billion) was paid to plaintiffs as damage awards; the rest went to lawyers and court administrators. Researchers at New York University, using a variety of methodologies, have arrived at similar estimates for administrative costs.

o) Because these costs are so high, interest has grown in supplementing or replacing the tort system with alternative means of compensation similar to the worker's compensation system. Most suggestions would place some sort of cap on total compensation - especially for pain and suffering - in return for automatic eligibility. More ambitious proposals envision separate funds, financed by taxes on employees or employers or both, to pay compensation awarded to victims of medical malpractice or exposure to toxic substances. But the limited experience with alternative compensation programs in the United States has not been encouraging. The federal black lung program, was established in 1969 to provide temporary compensation for an estimated 100,000 miners with pneumoconiosis. But due to broadened eligibility provisions by Congress, 542,000 miners, spouses and dependents have received benefits under the program by the end of 1981. Because of this experience, future proposals to establish compensation programs are unlikely to be given serious consideration by Congress or state legislatures unless they are accompanied by convincing demonstrations that their costs can be contained. The New Zealand experience, which does not cover disease or sickness, has not been evaluated comprehensively; and is of probable limited value in the United States which is larger and has a more heterogeneous population. In short, we simply do not know whether society would be better off if the process of identifying risks and hazards were further centralized by replacing the tort system with more intensive regulation.

p) Nevertheless, the most effective way of avoiding much of the transaction cost would be to provide ways of compensating injured parties that do not require the high fact-finding expenses characteristic of tort litigation. This suggests a tradeoff: relaxed standards for eligibility but limits on compensation, especially for non-economic damages. The Product Liability Reform Act of 1986 (S. 2760) offers the tradeoff within the tort system itself by giving plaintiffs incentives to accept manufacturers settlement offers that limited non-economic damages components. This approach could be generalized to all types of tort cases; although it is not clear whether an expedited settlement process would result in net savings.

q) Stiffer regulation of liability insurance rates or policies will not solve the liability crisis and conceivably could be counterproductive. Tighter regulations by some states will only induce some carriers in those states to reduce coverage they offer or even withdraw entirely. The only way in which regulation of the property-casualty industry might be significantly improved is to strengthen solvency regulation by state insurance agencies. At the Federal level, it is unclear whether repeal of the McCarran-Ferguson Act would have a significant impact on insurers.

r) Virtually all tort reform measures would reduce compensation available through the system. In fact, there is evidence, at least for medical malpractice cases, that tort reforms have already reduced the frequency of claims and the growth rate of insurance premiums (he cites the 1987 update of the Tort Policy Working Group under the Reagan Administration contained in your first packet). But deterring injury is also an objective of tort law, and reducing compensation could weaken deterrence. The problem facing policymakers is that relatively little empirical information is available to indicate how tort compensation could be modified without compromising deterrence.

s) Judges should encourage juries to evaluate the costs and benefits of the behavior of both plaintiffs and defendants in tort cases in deciding which parties should bear the loss from the accident at issue.

t) The search for cost effective reforms should focus on modifications of the tort system to reduce uncertainty and eliminate inappropriate levels of compensation while retaining a fault-based rule of liability (which while costly and inefficient is probably less expensive than no-fault systems). Accordingly, there is a strong case for limiting non-economic damages in tort cases (as well as for more restrictive statutes of limitation, periodic payment of future damages and revised collateral source mechanisms that give private and public insurers rights of subrogation against the tort award, according to Danzon) but only in a way that takes into account the age of the injured party and the severity of the injury. By reducing non-diversifiable risk, such changes would also reduce the volatility of insurance premiums.

u) Finally, while some may be disappointed by the failure of Congress to enact comprehensive tort reform legislation, the experiments now being conducted by the states may prove more useful in the long run. Given the uncertainties about economic effects of different legal rules, we may one day be grateful that reform proceeded in the relatively uncoordinated fashion that it has in recent years. Today we simply know too little to be confident that any major

overhaul of the U.S. tort system would produce more benefit than harm.

ATTACHMENT NUMBER FOUR

Comments From Task Force Members

ALASKA STATE LEGISLATURE

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Representative Virginia Collins

MEMORANDUM

To: Representative Sam Cotten, Chairman
Liability Task Force

From: Representative Virginia Collins 

Date: March 23, 1990

Subject: Statement-Liability Task Force

Several members of the task force expressed their concerns that the task force had been a failure. Given the time frames and the climate, I think that the task force really did the best it could.

The real failure, as I see it, is everybody's inability or refusal to address the real problem and that, I believe, is that the original purpose of the civil justice system, i.e., compensating innocent victims who have been injured or suffered a loss by another through no fault of their own, has been lost.

It seems that the civil justice system has become a means to redistribute the wealth. The only people who have to worry about being sued are those who have assets. The only victims who are compensated are those whose injury occurred at the hands of a wealthy individual or entity. This leaves us with an expensive, unworkable and unbalanced system, that in the end hurts us all.

Until we focus our efforts on returning the civil justice system to the purpose for which it was originally intended, we will continue to fail in our efforts to appropriately address these issues.

.. AMES LUCE
DAN A. HENSLEY

LAW OFFICES
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ANCHORAGE, ALASKA 99501

TELEPHONE (907) 276-1181
FAX: (907) 277-4864

March 27, 1989

Via Fax

David E. Rogers, Esq.
Box 33932
Juneau, Alaska 99803

Re: Liability Task Force Report

Dear David:

I have very serious objections to the Task Force issuing a report in the problem/solution form you have suggested. The reasons for my objections are:

- (1) The "problem" portion of the report suggests a widespread insurance problem when, in fact, the data gathered by the Task Force indicates that insurance problems only affect a limited segment of Alaska's businesses;
- (2) The "solution" portion of the report suggests that there are a number of viable solutions to insurance problems when, in fact, the data gathered by the Task Force indicates just the opposite; and
- (3) The report fails to mention that the Task Force has investigated only the tip of the iceberg of the insurance issue and that a substantial number of the Task Force members recommended that the investigation continue before the Task Force issues any reports or makes any recommendations.

Now let me move to the most important issue. The issue isn't what kind of report we do, but what kind of accountability we have to the legislature and to the public.

We were charged with investigating issues relating to insurance problems. We looked at issues of interest to some members of the committee -- legislative restrictions on victims' rights. We completely failed to consider issues such as insurance regulation, reinsurance, and similar questions. We haven't completed our job but we have been disbanded.

David E. Rogers, Esq.
March 27, 1990
Page TWO

Some persons, more cynical than I, might suggest that the reason we were disbanded is that the information we gathered concerning the impact of restrictions of victims' rights on insurance rates did not support further legislative activity in that area. Regardless of the reason for discontinuation of the Task Force, the fact remains that there is much work to be done before we can even begin to understand how best to reduce insurance rates (assuming reduction of rates is necessary). We will have wasted the public's money if we don't complete that work.

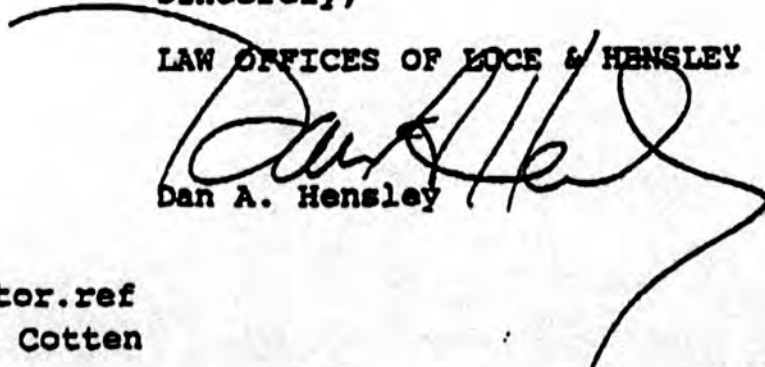
I realize that issuing any report from the Task Force may be problematic because there exist disagreements among the members as to the impact of the data gathered. As you know, I believe that the data gathered by the Task Force strongly supports the view that further legislative restrictions on victims' rights won't have any appreciable impact on insurance rates and certainly won't solve those insurance problems that presently exist in this state. However, I am sure that there will be no Task Force consensus on that view. Therefore, I don't expect you to issue a report taking that position.

I don't have any objection to a report which attempts to summarize the data gathered by the Task Force in an objective manner. You did just that in your February 22, 1990, draft. I would have no objection to the Task Force issuing a report in this form (as opposed to the March 2 edited form) if the report is prefaced with appropriate disclaimers, and if the report makes clear that there still is much work to be done to understand how insurance rates are made and how those rates can be impacted by legislation.

Thanks for the opportunity to participate and make these comments.

Sincerely,

LAW OFFICES OF LOCE & HENSLEY


Dan A. Hensley

DAH:fs
:udd:case:off.let.rog.tor.ref
cc: Representative Sam Cotten

March 21, 1990

TO: Speaker Sam Cotten
Chair, Liability Insurance Task Force

FROM: Nancy Lord *NL*

RE: Liability Insurance -- Conclusions and Recommendations

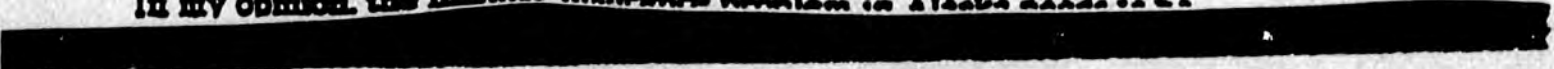
At the end of the task force's final, teleconferenced meeting last week, task force members agreed to submit their thoughts on the subject, to be compiled into a report. It is understood that the task force did not fulfill its charge to complete a comprehensive review of the issue and make recommendations to the legislature. The primary reason for this, in my opinion, was that the task force did not meet enough times to reach a common basis of fact and consider with any seriousness any of the options identified.

CONCLUSIONS

After participating in the two task force meetings and reading the enormous amount of material that was gathered, my personal conclusions are these:

The problem in Alaska concerning the availability and affordability of professional liability insurance is a complex one with no easy solutions. Following national trends, Alaska addressed the problem in 1986 by passing a "tort reform" package that was, among the states, one of the most substantial; this was followed in 1988 by passage of a ballot measure that eliminated joint liability for tort actions involving fault. There is no data suggesting that these changes in tort law, which restricted the rights of victims, have had any effect on making liability insurance more available or less costly. Nationally, the focus has now moved on to court challenges of "tort reform" and to efforts to reform the insurance industry, ensure better self-regulation by the professions, and provide alternative dispute resolution mechanisms.

In my opinion, the liability insurance problem in Alaska needs to be



further defined and addressed, not through more changes to our civil justice system but through Alaska-specific investigations into the insurance industry, the regulation of professionals, and alternative dispute resolution systems. An understanding of each of these subjects--how they operate and what possibilities they offer for reducing insurance costs while maintaining services--may provide the basis for recommending statutory changes.

RECOMMENDATIONS

1. If the legislature is interested in continuing a fact-finding effort, establish a continuing or new task force. To be more workable, such a task force might be either smaller or divided into committees; it might also be given a more narrow focus, such as to address specifically the medical malpractice issue. It might also be given the resources to contract for specific research. (Of all the reports we reviewed, the one I believe serves as the best model for an Alaskan effort is Maine's 1989 "Medical Malpractice Liability Study," which was prepared by a study team of public health experts, under the oversight of a special legislative committee.)
2. Review "tort reform" changes of 1986 and 1988 and determine what impact they have had on the rights of victims, insurance rates, insurance availability, etc.
3. Provide the Division of Insurance with a budget adequate to regulate the insurance industry, including having on-staff actuaries. Request or require (with sufficient funds) the division to do its own review of insurance regulation and identify areas it believes need attention or hold promise for meaningful reform.
4. A data-base is absolutely necessary to understand what is happening with insurance claims and profits. Require all insurance companies doing business in Alaska to report to the Division of Insurance such information as claims, settlements, premiums, investment income, reserves, and estimates of incurred claims. (Washington law may provide a good example.) Once this data is available, it should be possible to see if, among other things, the insurance companies are operating efficiently. (Generally, they do not, since they can pass along expenses to policy holders). Alaska could mandate that all insurers that do business in the state demonstrate

Liability Insurance Task Force**N. Lord****Page 3**

an effective cost control program.

5. Investigate further the issue of reinsurance. From what I know about this, there's a definite potential of holding down premiums by having the State of Alaska, by itself or in a compact with other states, offer reinsurance as an alternative to the main reinsurers, particularly Lloyd's of London. Reinsurers are currently beyond the regulatory control of states, yet a large portion of premium costs (40% of medical malpractice premiums in Maine) go to cover reinsurance costs. Reinsurers hold major economic power over primary insurers, including in many cases dictating their terms and coverages. Alaska as reinsurer could assert its own influence on rates and coverage and, importantly, the efficiencies of primary insurers; it could also offer reinsurance to groups that self-insure; properly run, it could expect to make a profit.

6. Continue to investigate alternative dispute resolution mechanisms. While none of the systems we looked at were clearly working so well that we would want to adopt them, the general concept certainly holds much promise for providing more complete and timely compensation to victims while keeping costs down.

7. Encourage the adoption of risk management programs. Consider mandating that health care facilities develop and implement risk management programs.

8. Review the panel system currently used for peer review in the medical profession. There seemed to be consensus that this was not working well and could be improved. (HB 336, which changes the panel system, does not seem to be responsive to the problems we heard about.)

I appreciated being able to serve on the task force and hope that our efforts have helped advance the legislative discussion. Thank you for the opportunity to participate.

MICA Medical Indemnity
Corporation of Alaska

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ANCHORAGE, ALASKA 99503
(907) 563-3414

March 29, 1990

Representative Sam Cotten, Speaker
House of Representatives
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Speaker Cotten:

You offered members of the Legislative Liability Task Force the opportunity to review and draw some individual conclusions. This was an opportunity I did not want to miss. Although the Legislative Liability Task Force only had the opportunity to meet twice, I was impressed by the membership's ability to communicate and forward their own thoughts on some very complicated issues. At the final meeting on Friday, March 16, 1990, we still had not been able to reach conclusions as a group. I, however, would like to draw my own and am forwarding those to you in this letter.

Let me start by saying that the time spent, both interfacing with other members, and reading the data gathered by David Rogers from various sources, convinced me that this task was extremely complex. Experience has taught me that nothing this complex has a single, simple, easy solution. Although I do admit to that fact that the group didn't seem to agree upon exactly what the problems were, the fact that there were problems didn't allude anyone. In other words, I believe that everyone was convinced that the system was "broken". To what extent there was damage to the system, and what kinds of repairs needed to be made, seemed to be the questions that the group needed to tackle.

It seems to me that a three-pronged approach is necessary in solving the complex liability issue placed before us. These three remedies are as interwoven and complex as the problems they are attempting to solve. I have come to believe that, singly, they will not fix any of the problems but, taken in concert, will work towards attacking the issue from several fronts. I believe that these three remedies are: a thoughtful reform to the tort system, an organized approach to civil justice reform and, finally, increased regulation both of the insurance industry and of professional organizations.

Investigation of our own claims experience and discussions with our actuary have led us to conclude that there are some specific changes to the tort system which would, in the long run, reduce premiums. Certainly, limiting prejudgement interest, establishing a statute of repose, clarifying the statute of limitations, reducing contingencies fees to present value, and reducing the prejudgement interest rate are known changes that would reduce the cost to

Medical Indemnity Corporation of Alaska

the system. Information and testimony given to the Legislative Liability Task Force seems to point to the fact that no one can exactly quantify what the reduction would be. However, the fact that there would be a reduction seems to be, in my mind, a meaningful reason to make these changes.

I'm a firm believer and supporter of our current civil justice system. My question about the current system revolves around the word "justice": Is, in fact, justice being done under the current system? I feel that the task force was presented with evidence to the contrary. First of all, plaintiff attorney members of the task force testified that they would not pursue medical malpractice cases against a health care provider who was uninsured. They also said that they turned away all but the most compelling cases. This leads me to believe that there are citizens of the state of Alaska who have been legitimately injured and who have no recourse for recovery under the current system. We also had information presented to us that clearly proved the opposite exists: some victims are overcompensated. My feeling is that this is not the American concept of true justice. We were also presented with evidence that the court system is overburdened. Court cases are calendared by judges without any internal control over deadlines. Also, the judge is in charge of giving the jury instructions regarding what they can consider in a court case. The jury does not seem to be allowed the privilege of hearing all information and making their own decisions. That leads me to conclude that the current civil justice system has a variety of flaws. We, at MICA, at least, are interested in looking at an alternative to the current adjudication system.

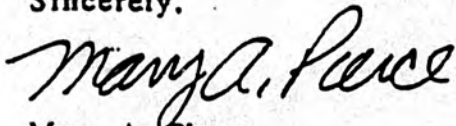
Gathering information for the task force proved difficult in some respects. Insufficient information regarding data from insurance companies on claims losses and risk management was certainly a problem. We also had difficulty in gathering data about the current court system. It is certainly difficult to draw conclusions when you have insufficient information. I believe that we need to take a good look at the requirements for both the insurance industry and the court system, then allow funding to give state government the mechanisms through the Division of Insurance, etc., to do their regulatory job. There also seems to be a variety of certification, licensing, and sanctions on the various professions. My feeling is that there should be some uniformity among the various professions as to sanctions for misconduct, disclosure requirements, education, recertification requirements, peer review and immunity for those peer reviewers.

These three approaches that I have presented here may, on review, seem complicated and overwhelming, but the problem is complicated and overwhelming. It seems when we were discussing these issues, I was reminded of a push button radio in a car where, when you push the button in to fix one problem, the remaining buttons all pop out. I'm afraid that if we don't look at all the issues, much like the buttons on the radio, and attempt to attack them comprehensively, we will end up with a partial fix that soon topples over without the support of other important component parts.

Medical Indemnity Corporation of Alaska

Let me conclude with saying that I do believe the task force performed a great service in providing a common data bank of information that the legislature can use in making further decisions about the problems. I would like to again thank the other members for the time that I know they committed to this effort. I'd also like to thank David Rogers for the wonderful job that he did, and you, Representative Cotten, for putting such a well balanced group together and allowing us the opportunity to share information and experiences.

Sincerely,



Mary A. Pierce
Executive Director

MAP/blb

cc William Brock
David Rogers

CS FOR HOUSE BILL NO. 158(FIN) am(ct rls pld)(efd fld)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Amended: 4/27/95

Offered: 3/22/95

Sponsor(s): REPRESENTATIVES PORTER, Toohey, Mulder, Ogan

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil actions; amending Alaska Rule of Civil Procedure 95."

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

3 * Section 1. PURPOSE. It is the purpose of this Act to

4 (1) enact further reforms that create a more equitable distribution of the cost
5 and risk of injury;6 (2) reduce cost associated with the civil justice system, while ensuring that
7 adequate and appropriate compensation for persons injured through the fault of others is
8 available;

9 (3) help match losses with compensation by helping to

10 (A) ensure that money paid to an injured person is available when
11 anticipated expenses or losses occur;12 (B) ensure that a claimant with substantial injury requiring long-term
13 treatment will have money available for future medical care;14 (C) reduce reparation system costs by eliminating those portions of
15 awards that are not needed to compensate the claimant;

- 1 (D) eliminate duplicate recoveries;
2 (E) reduce the costs of litigation;
3 (F) establish appropriate thresholds for a damage award in order to
4 allow predictability of liability exposure; and
5 (G) reduce the ultimate costs to the state and to local governments of
6 providing medical services to those who cannot otherwise afford those services;
7 (4) ensure that in actions involving the fault of more than one person, the fault
8 of each claimant, defendant, third-party defendant, person who has been released from
9 liability, or other person responsible for the damages be determined and awards be allocated
10 in accordance with their fault;
11 (5) reduce the amount of litigation proceeding to trial by modifying the
12 allocation of attorney fees and court costs based on the offer of judgment and the final court
13 award thereby providing a financial incentive to both parties to settle the dispute;
14 (6) enact a statute of repose that meets the tests set out in Turner Construction
15 Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988);
16 (7) clarify the circumstances in which hospitals are held directly liable for the
17 actions of health care providers not employed by the hospital;
18 (8) encourage health care providers to provide quality medical care in all areas
19 of this state at a cost that is affordable;
20 (9) stabilize the rapidly escalating costs of health care by curtailing the rapid
21 escalation in malpractice premiums and thereby make broader based health care available to
22 more residents of the state;
23 (10) require that one-half of punitive damages awarded by a court be deposited
24 into the general fund for the benefit of the public welfare and to deter future harm to the
25 public.
26 * Sec. 2. AS 09.10.055 is repealed and reenacted to read:
27 Sec. 09.10.055. STATUTE OF REPOSE OF EIGHT YEARS. (a)
28 Notwithstanding the disability of minority described under AS 09.10.140(a), a person
29 may not bring an action for personal injury, death, or property damage unless
30 commenced within eight years of the earlier of the date of
31 (1) substantial completion of the construction alleged to have caused

1 the personal injury, death, or property damage; however, the limitation of this
2 paragraph does not apply to a claim resulting from an intentional or reckless disregard
3 of specific project design plans and specifications or building codes; or

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

6 (b) This section does not apply if

7 (1) the personal injury, death, or property damage resulted from

8 (A) exposure to a hazardous substance; in this subparagraph,
9 "hazardous substance" means an element or compound that, when it enters into
10 the air or on the surface or subsurface land or water of the state, presents an
11 imminent and substantial danger to public or individual health and welfare;

12 (B) an intentional act or gross negligence;

13 (C) fraud or fraudulent misrepresentation;

14 (D) breach of an express warranty or guarantee; or

15 (E) a defective product; in this subparagraph, "product" means
16 an object that has intrinsic value, is capable of delivery as an assembled whole
17 or as a component part, and is introduced into trade or commerce; "product"
18 includes an element or compound that if ingested by humans or if humans are
19 exposed to, or are in contact with the element compound or product, poses a
20 threat to human health;

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

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

25 (4) a longer period of time for bringing the action was provided under
26 a contract.

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

31 (d) In this section, "substantial completion" means the date when construction

1 is sufficiently completed to allow the owner or a person authorized by the owner to
2 occupy the improvement or to use the improvement in the manner for which it was
3 intended.

4 * Sec. 3. AS 09.10.070 is amended to read:

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

13 * Sec. 4. AS 09.10 is amended by adding a new section to read:

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

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

21 * Sec. 5. AS 09.17.010 is repealed and reenacted to read:

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

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

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

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

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

6 (B) has lost both arms or both legs or an arm and a leg;

7 (C) has permanently impaired cognitive capacity, is incapable
8 of making independent, responsible decisions, and is permanently incapable of
9 independently performing the activities of normal, daily living;

10 (D) is both deaf and blind; or

11 (E) has third degree burns over one half or more of the
12 claimant's body.

13 (d) The limit under (b) or (c) of this section shall adjust annually to reflect the
14 difference in the Consumer Price Index for all urban consumers for all items for the
15 Anchorage metropolitan area compiled by the Bureau of Labor Statistics, United States
16 Department of Labor, for the preceding calendar year. The index for the first half of
17 1995 is the reference base index.

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

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

26 * Sec. 6. AS 09.17.020 is amended to read:

27 Sec. 09.17.020. PUNITIVE DAMAGES. Punitive damages may not be
28 awarded in an action, whether in tort, contract, or otherwise, unless supported by clear
29 and convincing evidence of outrageous conduct, including acts done with malice or
30 bad motives, or reckless indifference to the interest of another person.

31 * Sec. 7. AS 09.17.020 is amended by adding new subsections to read:

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

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

9 (d) If a person receives an award of punitive damages, the court shall require
10 that one-half of the award be deposited into the general fund of the state. This
11 subsection does not grant the state the right to file or join a civil action to recover
12 punitive damages.

13 * Sec. 8. AS 09.17.040(e) is amended to read:

14 (e) Except as provided in this subsection, if a judgment is paid by periodic
15 payments, the [THE] court shall [MAY] require security be posted [,] in order to
16 ensure that funds are available [AS PERIODIC PAYMENTS BECOME DUE]. The
17 court may not require security to be posted if the state, a self-insured municipality,
18 or an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its
19 obligation to discharge the judgment.

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

21 (f) A judgment ordering payment of future damages for personal injury or
22 death by periodic payment shall specify the recipient, the dollar amount of the
23 payments, including any increases in future payments for anticipated inflation, the
24 interval between payments, and the number of payments or the period of time over
25 which payments shall be made. Payments may be modified only in the event of the
26 death of the judgment creditor, in which case payments may not be reduced or
27 terminated, but shall be paid to persons to whom the judgment creditor owed a duty
28 of support, as provided by law, immediately before death. In the event the judgment
29 creditor owed no duty of support to dependents at the time of the judgment creditor's
30 death, the money remaining shall be distributed in accordance with a will of the
31 deceased judgment creditor accepted into probate or under the intestate laws of the

1 state if the deceased had no will. In this subsection, "inflation" means the change
2 in the Consumer Price Index for Anchorage, all items index, compiled by the
3 Bureau of Labor Statistics, United States Department of Labor.

4 * Sec. 10. AS 09.17.070 is repealed and reenacted to read:

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

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

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

13 (3) the collateral source is the payment of a dependent child's medical
14 bills by the injured child's parent which does not result from insurance coverage; or

15 (4) the benefit consists of death benefits paid under life insurance; or

16 (5) the benefit consists of workers' compensation benefits received
17 under AS 23.30.

18 (b) A person defending a claim may introduce into evidence an amount paid
19 or payable as a benefit to the claimant as a result of the personal injury or death under
20 42 U.S.C. 301 - 1397 (Social Security Act); a state or federal disability act; health,
21 sickness, disability, accident, or income-disability insurance; insurance that provides
22 health benefits or income-disability coverage; and a contract or agreement of a group,
23 organization, partnership, or corporation, or other collateral source, to provide, pay for,
24 or reimburse the cost of medical, hospital, dental, or other health care services,
25 disability, or lost wages. However, evidence of a collateral source that is a federally
26 funded program that by law must seek subrogation or that has a right of subrogation
27 under federal law, evidence of death benefits paid under life insurance, or evidence of
28 workers' compensation benefits received under AS 23.30, may not be introduced under
29 this subsection. If a person defending a claim elects to introduce evidence described
30 in this subsection, the claimant may introduce evidence of the amount that the claimant
31 has paid or contributed to secure the claimant's right to the collateral benefit, including

1 the cost to the claimant resulting from depleted or exhausted coverage.

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

6 * Sec. 11. AS 09.17.080(a) is amended to read:

7 (a) In all actions involving fault of more than one person [PARTY TO THE
8 ACTION], including third-party defendants and persons who have been released under
9 AS 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury
10 to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

13 (2) the percentage of the total fault [OF ALL OF THE PARTIES TO
14 EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant,
15 [AND] person who has been released from liability under AS 09.16.040, or other
16 person responsible for the damages to each claimant regardless of whether the
17 other person, including an employer, is or could have been named as a party to
18 the action.

19 * Sec. 12. AS 09.17.080(c) is amended to read:

20 (c) The court shall determine the award of damages to each claimant in
21 accordance with the findings, subject to a reduction under AS 09.16.040, and enter
22 judgment against each party liable. The court also shall determine and state in the
23 judgment each party's equitable share of the obligation to each claimant in accordance
24 with the respective percentages of fault as determined under (a) of this section. An
25 assessment of a percentage of fault against a person who is not a party may only
26 be used as a measure for accurately determining the percentages of fault of a
27 named party. Assessment of a percentage of fault against a person who is not a
28 party does not subject that person to civil liability in that action and may not be
29 used as evidence of civil liability in another action.

30 * Sec. 13. AS 09.30.065 is amended to read:

31 Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days

1 before the trial begins either the party making a claim or the party defending against
2 a claim may serve upon the adverse party an offer to allow judgment to be entered in
3 complete satisfaction of the claim for the money or property or to the effect specified
4 in the offer, with costs then accrued. If within 10 days after the service of the offer
5 the adverse party serves written notice that the offer is accepted, either party may then
6 file the offer and notice of acceptance together with proof of service, and the clerk
7 shall enter judgment. An offer not accepted within 10 days is considered withdrawn
8 and evidence of that offer is not admissible except in a proceeding to determine the
9 form of judgment after verdict. If the judgment finally entered on the claim as to
10 which an offer has been made under this section is at least five percent less [NOT
11 MORE] favorable to the offeree than the offer, the offeree shall pay costs as allowed
12 under the Alaska Rules of Civil Procedure and all reasonable attorney fees
13 incurred by the offeror from the date the offer was made [THE INTEREST
14 AWARDED UNDER AS 09.30.070 AND ACCRUED UP TO THE DATE
15 JUDGMENT IS ENTERED SHALL BE ADJUSTED AS FOLLOWS:

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

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

21 * Sec. 14. AS 09.30.070(a) is amended to read:

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

30 * Sec. 15. AS 09.30.070 is amended by adding a new subsection to read:

31 (c) Prejudgment interest may not be awarded for future economic damages,

1 future noneconomic damages, or for punitive damages.

2 * Sec. 16. AS 09.55.535(k) is amended to read:

3 (k) The provisions of the Uniform Arbitration Act, AS 09.43.010 - 09.43.180,
4 apply to arbitrations under this section if they do not conflict with the provisions of
5 this section; arbitrations under this section shall be conducted in accordance with
6 procedures established by any rules of court which may be adopted and according to
7 provisions of AS 09.55.540 - 09.55.547 [AS 09.55.540 - 09.55.548] and AS 09.55.554
8 - 09.55.560, and AS 09.65.090.

9 * Sec. 17. AS 09.55 is amended by adding a new section to read:

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

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

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

20 * Sec. 18. AS 09.55.560 is amended by adding new paragraphs to read:

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

23 (5) "professional services" means services provided by a health care
24 provider.

25 * Sec. 19. AS 09.65 is amended by adding a new section to read:

26 Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES.

27 (a) A hospital is not liable for civil damages as a result of an act or omission by a
28 health care provider who is not an employee or actual agent of the hospital if the
29 hospital provides notice that the health care provider is an independent contractor. The
30 notice required by this subsection must be posted conspicuously in all admitting areas
31 of the hospital, published at least annually in a newspaper of general circulation in the

1 area, and must be in substantially the following form:

2 **No ice of Limited Liability**

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

5 **(List specific health care providers)**

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

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

13 **(c) In this section,**

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

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

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

24 *** Sec. 20. AS 09.65.210 is repealed and reenacted to read:**

25 **Sec. 09.65.210. DAMAGES RESULTING FROM COMMISSION OF A**
26 **FELONY. (a) A person who suffers personal injury or property damage may not**
27 **recover damages for the personal injury or property damage if the injury occurred**
28 **while the person was committing or attempting to commit a felony, or fleeing from the**
29 **commission of a felony and the person has been convicted of the felony, including**
30 **conviction based on a guilty plea or plea of nolo contendere, and the felony**
31 **substantially contributed to the injury or property damage.**

1 (b) The personal representative of a deceased person may not recover damages
2 for the person's death if the court determines by clear and convincing evidence that the
3 death occurred while the person was committing or attempting to commit a felony, or
4 fleeing from the commission of a felony, and that the felony substantially contributed
5 to the death.

6 * Sec. 21. AS 09.68 is amended by adding a new section to read:

7 Sec. 09.68.125. SIGNING OF PLEADINGS, MOTIONS, AND OTHER
8 PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party
9 represented by an attorney shall be signed by at least one attorney of record in the
10 attorney's individual name, whose address shall be stated. A party who is not
11 represented by an attorney shall sign the party's pleading, motion, or other paper and
12 state the party's address. Except when otherwise specifically provided by the Alaska
13 Rules of Civil Procedure or statute, pleadings need not be verified or accompanied by
14 affidavit. The signature of an attorney or party constitutes a certificate by the signer
15 that the signer has read the pleading, motion, or other paper; that to the best of the
16 signer's knowledge, information, and belief formed after reasonable inquiry it is well
17 grounded in fact and is warranted by existing law or a good faith argument of the
18 extension, modification, or reversal of existing law; and that it is not interposed for any
19 improper purpose, including to harass or to cause unnecessary delay or needless
20 increase in the cost of litigation. If a pleading, motion, or other paper is not signed,
21 it shall be stricken unless it is signed promptly after the omission is called to the
22 attention of the pleader or movant. If it is alleged or appears that a pleading, motion,
23 or other paper is signed in violation of this section, the court, upon motion or upon its
24 own initiative, may set the matter for hearing. If the court determines that a pleading,
25 motion, or other paper is signed in violation of this section, the court shall impose
26 upon the person who signed it, a represented party, or both, an appropriate sanction
27 that may include an order to pay to the other party the amount of the reasonable
28 expenses incurred because of the filing of the pleading, motion, or other paper,
29 including costs and attorney fees, and monetary sanctions not to exceed \$10,000.

30 * Sec. 22. AS09.55.548 is repealed.

31 * Sec. 23. AS 09.68.125, as enacted in sec. 21 of this Act, has the effect of amending

1 Alaska Rule of Civil Procedure 95, by requiring imposition of sanctions for certain failures
2 to sign pleadings, motions, or other papers.

3 * Sec. 24. SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the
4 application of a provision of this Act to any person or circumstance is held invalid, the
5 remainder of this Act and the application to other persons shall not be affected.

6 * Sec. 25. APPLICABILITY. This Act applies to all causes of action accruing on or after
7 the effective date of this Act.

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November 19, 1996

Governor's Committee on Tort Reform

Re: Comments on Draft Proposals

To the honorable committee:

We briefly reviewed draft materials sent out on November 6 concerning the work of the governor's tort-reform committee. Having apparently conceded that there is no liability crisis in Alaska the committees nonetheless continue to urge the increasing restrictions on injured individuals rights to recover damages from wrongdoers. One can only conclude that the business representatives know something that the public at large does not, that it makes more economic sense to maim and kill then operate safely if you can keep people from suing you, or, if you can shift the blame for your misconduct to the other guy. Frankly speaking to the extent a certain member of this committee recently political ran ads as a victim's rights advocate, the recommendations of the liability subcommittee on which he sat are remarkably inconsistent with that position.

Turning to the work of the subcommittees as contained in the packet we received, we offer the following comments:

1. Allocation of fault: The committee apparently fundamentally misunderstands the role of courts in America and in the State of Alaska. Courts adjudicate disputes between parties. They are supremely incapable of resolving disputes or claims involving persons not parties. This is because our courts are based on an adversary model. That model anticipates that the parties will be before the court, that they will have a stake in the litigation, and will have the opportunity to vigorously pursue and defend claims against themselves.

The committee's recommendation that fault be able to be allocated to non-parties violates these most basic tenets of common law jurisprudence and judicial decision making, the court is adjudicating the responsibility on an individual not before it, that individual has no stake in the outcome of the litigation, and has neither the opportunity or reason

to pursue claims or defend themselves. The Alaska Supreme Court has expressed concerns when nominal parties are permitted to remain in a lawsuit. Breitkreutz v. Baker, 514 P.2d 17, 29 n.29 (Alaska 1973). The sub-committee's recommendation for fault allocation to non-parties significantly increases the hazards of an unjust result presented when litigation includes those who have no stake in the outcome.

If a defendant truly believes that some other individual is at fault in whole or in part for a plaintiff's injuries they should be required to sue that third-party. It is far too easy to name a non-party as the cause of an injury when you know they won't be in court defending themselves and proving the error of the assertion. Moreover, the ability to name non-parties for fault allocation purposes unfairly places the burden on the plaintiff to not only prove their own claim but then to disprove a negative, prove that the non-party tortfeasor was not at fault. This is fundamentally unfair and raises grave due process concerns.

There is another significant hazard, the allocation of fault to non-parties would have the effect of overruling the Alaska Supreme Court's decision in Lake v. Construction Machinery, Inc., 787 P.2d 1027 (Alaska 1990).

In Lake, the court recognized based on the immunity provisions of the worker's compensation act that it would be fundamentally unfair to permit a defendant in a third party suit to allocate a portion of fault to the employer. The subcommittee's recommendation would overrule Lake. The effect would be that a defendant without naming the employer as a party could place a portion of the blame on the the employer. To the extent any judgment was awarded against the defendant, the employer under the worker's compensation laws has a lien. The worker's recovery is then reduced by that lien. The effect of this is to encourage collusion between employer's and defendants so that the employer who cannot be sued and who is not under an obligation to fully compensate the injured worker, accepts responsibility, reducing the defendant's liability and turns around and takes money through the lien from the injured worker. If your going to recommend that a defendant be permitted to shift blame to an employer, I would submit at the same time you need to deal with the worker's compensation issues including 1) eliminating employer immunity and 2) providing for elimination or reduction of any lien asserted by an employer when it is found to be at fault. To do anything else is fundamentally unfair to injured workers and will

result in them being undercompensated rather than properly compensated.

The sub-committee's failure to address the issues of later use of findings and statute of limitations emphasizes the lack of serious thought which has gone into this proposal. Given the nature of the legal system it is clear that a jury's determination of fault of a non-party could not later be used against that party. There is not a court in America that would bind a non-related non-party to the results of litigation. Statute of limitations defenses in the equitable apportionment area are already resulting in plaintiff's being forced to eat the liability of third party defendants who were brought in after the statute of limitations has run. If the committee wanted to do something useful in the allocation area it would simply make the following recommendation:

The filing of a third party complaint for equitable apportionment tolls the statute of limitations for the commencement of an action or pursuit of a claim under ARCP 14(c) against all parties who may be assessed any percentage of fault.

See Iowa Code § 668.8.

The effect of this provision would be to ensure that plaintiff's claim under 14(c) are not considered time barred if the the third-party complaint is timely filed. Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985). No evidence suggests that in changing from joint and several liability to several liability the legislature or voters of Alaska intended a plaintiff to be under compensated. The change was simply to ensure that no defendant paid more than their fair share. One benefit of this proposal would be to end the temptation to name third-party defendants who have no incentive to defend because of statutes of limitation restrictions on plaintiff which do not exist as to defendants. Thus, any party timely named in a timely filed third-party complaint which sought to apportion fault would be held liable, assuring plaintiffs full recovery and that no defendant pays more, or less, than their allocated amount.

2. Felons as plaintiffs: We are unaware of any evidence that the courts are being overrun by felons filing civil damages lawsuits. The proposed defense would immunize tortfeasors from claims by those who have been found legally

not guilty of any crime or whose criminality was never adjudicated. On what constitutional basis do we impose the burden of conviction on those who are legally innocent? The recommendation is both unnecessary and constitutionally suspect. As to the response to the issue of immunizing police officers from excessive force claims, the history of criminal prosecutions of police officers in this state does not suggest that either prosecutors or licensing authorities would vigorously pursue an officer for excessive force. I know of only one case where the state charged an officer with excessive force. At trial he was acquitted. Given the agenda of cutting government espoused by the legislative majority, it is ludicrous to suppose that understaffed and overworked prosecutors will actively and aggressively prosecute excessive force claims. Moreover, the only liability from suit conferred would be for state law damage claims, federal claim under 42 U.S.C. § 1983 could still be pursued. These claims may be pursued in state courts.

3. Hospital liability: Has the committee been presented evidence that lawsuits against emergency room physicians has a substantial effect on hospital costs? I doubt it. Repeated studies have shown that medical malpractice claims are an almost insignificant part of the cost of health care.

4. Sovereign immunity: It is always refreshing to see the government so strongly endorse basic incidents of democracy such as the right to jury trial. Perhaps we should reinstitute the monarchical regime of the king can do no wrong. As to immunity for social workers, probation and parole officers, what the state should be urging is fuller funding for the programs these individuals work under so that they can do their jobs properly. If the legislative decision is to underfund programs so that they are negligently performed, no reason exists that the innocents who are injured should be left to bear the cost alone. When state probation and parole officers put an unsupervised and known violent felon into an unprotected community, the state should bear the financial risk. When the probation officers negligently place a repeat drunk driver with repeated problems with non-compliance with court orders and escapes into a half-way house which he walks away from, drinks, drives, and kills an innocent woman and child, the state should bear financial responsibility. It is the state's conduct at issue. If the state does not want Neakok liability, it should do its job right.

5. Insurance rates:- What the committee should be recommending is strengthening the regulatory environment so

that there is more enforcement, and more severe penalties for insurers who violate the law. Evidence in bad faith cases repeatedly reveal patterns and practice of insurer misconduct ranging from deliberate decisions to misrepresent policy benefits and terms to corporate decisions to cheat insureds out of the true value of their claim by taking a "get tough" policy.

The committee's comments that Alaska presents too small a market to make a rate roll back effective is further evidence that nothing the Alaska legislature does will effect insurance rates in the state in favor of either consumers or small business. This further militates against further restrictions of plaintiffs ability to recover full compensation for injuries.

6. Statutes of limitation: Our recommendation is to leave all current statutes of limitation alone. No evidence suggests that plaintiffs are unduly sitting on claims until the last possible minute. Indeed under several trial court's views with respect to equitable apportionment, it would be hazardous to do so since if the third party/14(c) claim is not brought within the statute of limitations the plaintiff may be barred from recovering. Accordingly, to the extent any change in statutes of limitation are recommended the recommendation stated in § 1 supra should be implemented.

7. Statute of repose: No comment.

8. Wrongful discharge: No evidence suggests that juries are giving windfalls to terminated employees. The existence of a written contract is certainly one fact that a jury can consider. Making this fact determinative fails to recognize the diverse and shifting relationships in employment which occur. The likely outcome of this kind of limitation will be to force wrongful discharge claimants into extra-contractual remedies such as for fraud.

In addition, since few Alaskan's have written employment contracts, this provision creates a license for employers to treat employees unfairly despite the employees objectively reasonable expectations. In sum, such a provision would eliminate the covenant of good faith and fair dealing inherent in all contracts, including especially employment contracts.

9. Alcohol impaired plaintiffs: Alaska adopted comparative negligence principles many years ago now. Alaska has also long followed the substantial factor test

for liability. Nothing in the judicial experience since that time as reported in the case law suggests that juries are incapable of evaluating the role of intoxication in assessing fault. Under the proposal a slight difference in fault would make a dramatic difference in recovery. For example if someone's intoxication were 50% of the cause they would collect half the damage award, but if the intoxication were 51% of the fault they would get nothing. The proposal would also reintroduce the discredited doctrine of contributory negligence and would eliminate the substantial factor test for determining liability. Given the hazard that intoxication presents, a far more sensible proposal would be to bar intoxicated defendants and those unlawfully contributing to the intoxication of another defendant from apportioning fault to other parties.

10. Cap on wrongful termination damages: No evidence suggests that wrongful damage claims should be treated from other claims. Juries are not incapable of evaluating the evidence in these cases and determining what damages should be assessed.

11. Cap on non-economic damages: There was never evidence supporting capping non-economic damages in the first place. There is no evidence that a cap on non-economic damages resulted in holding down insurance premiums. The committee should recommend that the damage cap simply be eliminated. Moreover, the committee should recognize that death is severe physical impairment so as to eliminate the argument that the cap applies in wrongful death cases.

12. Punitive damages: Subsection (d) of the proposal bifurcates both trial and discovery of financial information related to punitive damages. Bifurcated discovery will often result in substantial delays between the first jury verdict and the second. In many situations, an economist will be used to explain the average net income or the profit derived from the wrongful conduct. It may take a few days to analyze the materials, and more time for the opposing party to depose the expert. While bifurcation of trial may be appropriate, and is and has been within the court's discretion, bifurcation of discovery will lead to delays which are counter-productive to the stated goals of tort-reformers.

Subsection (f) of the proposal says the section does not apply to claims against the state. How will punitive damages be calculated against the state in situations where

it has waived its immunity to these types of damages? See the Whistleblower Act. This section could simply read:

In no case shall punitive damages be assessed against any party or entity that is immune from awards of punitive damages by law.

13. Mandatory alternative dispute resolution: The experience with mediation suggests it only works when the parties want it to work. Requiring plaintiffs who are proceeding on a contingent fee basis to take part in a proceeding in which they may not have an interest, and requiring them to pay for it, only increases the cost of litigation without significant benefit. If parties currently want mediation it can be ordered pursuant to Civil Rule 100. Before implementing a five year program forcing unwilling parties to pay for mediators they do not want to use, a study of cases in which Civil Rule 100 mediation was invoked should be conducted to determine if mandatory mediation is effective. I should note that we are of mixed views with respect to this provision. We recognize that there are many cases in which mediation can be very useful. Perhaps what is needed is an opt out provision.

In conclusion, our view of the proposals is that they are remarkably unbalanced and short-sighted. The evidence does not establish a liability or damages crisis.

The various provisions of the tort reform package, to the extent they limit the ability to seek compensation from those who are actually at fault will likely result in a large "fiscal note." If you deny people the right to recover compensation for their injuries from the party that caused the damage, they will look elsewhere for the money they need to survive. The most likely source of that money will be the welfare rolls.

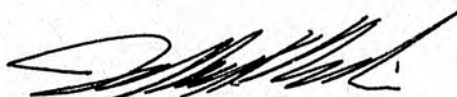
Effective liability reform would seek to strengthen individual safety and consumer protection through vigorous enforcement of regulatory schemes with penalty provisions increased. Through effective safety enforcement and consumer protection, individual lawsuits that supposedly "plague" business would be decreased. The fact is, though, that by underfunding enforcement and limiting liability, the legislative tort reform proponents and their constituency seek to escape their own responsibility and enhance their bottom lines at a cost incalculable in human misery. To the extent the committee adopts recommendations which further

Governor's Committee on Tort Reform
Re: Draft Proposals
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limit liability of tortfeasors in this state, it contributes to the parade of victims for whom there is no recourse or incomplete recourse.

The state legislature is largely considered the most irresponsible branch of government and held in the greatest disrepute. The proposals of the committee, particularly with respect to fault allocation to non-parties, will help ensure that the public comes to regard the courts in as low a fashion.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Jeffrey K. Rubin', with a stylized, flowing script.

Jeffrey K. Rubin

1

(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. 2. AS 09.10.070 is repealed and reenacted 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 person may not bring an action (1) for libel, slander, assault, battery, seduction, or false imprisonment; (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. 3. 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. 4. 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 of a party to the action, 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 (a) 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;

(B) has lost both arms or both legs or an arm and a leg;

(C) 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) is both deaf and blind; or

(E) has third degree burns over one half or more of the claimant's body.

(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. 17

Sec. 5. AS 09.17.020 is repealed and reenacted to read:

Sec. 09.17.020. **PUNITIVE DAMAGES.** (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence of outrageous conduct, including acts done with malice or bad motives, or reckless indifference to the interest of another person.

(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 seventy five percent 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. 6. 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;

Present Value?

- (2) the collateral source has a right of subrogation under federal law;
- (3) the collateral source is the payment of a dependent child's medical bills by the injured child's parent which does not result from insurance coverage;
- (4) the benefit consists of death benefits paid under life insurance; or
- (5) the benefit consists of workers' compensation benefits received under AS 23.30.

(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 Title 42 Chapter 7 of the United States Code (Social Security Act); a state or federal disability 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, or evidence of workers' compensation benefits received under AS 23.30, 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. 7

(c) 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. 7. AS 09.17.080 is repealed and reenacted to read:

Sec. 09.17.080. ALLOCATION OF DAMAGES. (a) In all actions involving the fault of more than one person, including third-party defendants and persons who have been released, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is not jury, shall make findings, indicating 7

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

(2) the percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, 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. 7

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

be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings 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.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault.

Sec. 8. AS 09.30.070 is amended by adding a new subsection to read:

Sec. 09.30.070(c) **PREJUDGMENT INTEREST.** Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or for punitive damages.

Sec. 9. 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

INITIATIVE

September 30, 1996

is licensed in this state:

(2) "hospital" has the meaning given in AS 18.20.130 and includes a governmental 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. 10. AS 09.65.210 is repealed and reenacted to read:

Sec. 09.65.210 DAMAGES RESULTING FROM COMMISSION OF A FELONY. (a) A person who suffers personal injury or property damage may not recover damages for the personal injury or property damage if the injury occurred while the person was committing or attempting to commit a felony, or fleeing from the commission or attempted commission of a felony and the commission or attempted commission of the felony substantially contributed to the injury or property damage.

(b) The personal representative of a deceased person may not recover damages for the person's death if the court determines by clear and convincing evidence that the death occurred while the person was committing or attempting to commit a felony, or fleeing from the commission or attempted commission of a felony, and that the felony or attempted felony substantially contributed to the death.

Sec. 11. AS 09.17 is amended to add a new section to read

Sec. 09.17.090 EXPERT WITNESS QUALIFICATION. (a) Except as provided under (b) of this section, in an action based upon professional negligence, a person may not testify as an expert witness on the issue of the appropriate standard of care unless the witness is a professional who is licensed in this state, or is licensed 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; and

(2) is certified by a board recognized by the state as having acknowledged expertise and training directly related to the particular field or matter at issue.

(b) The provisions of (a) of this section do not apply to a person who is testifying on the appropriate standard of care in a profession that is not licensed in this state, or another state or country, and who the court determines is qualified as an expert witness.

(c) "Professional negligence" means a negligent act or omission in rendering professional services.

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Sec. 12. AS 09.55.548 is repealed.

Sec. 13. SEVERABILITY. If any provision of this Initiative, or the application of a provision of this Initiative to any person or circumstance is held invalid, the remainder of this Initiative and the application to other persons or circumstances shall not be affected.

Sec. 14. APPLICABILITY. This Initiative applies to all causes of action accruing on or after the effective date of this Act. This Initiative does not apply to any action or recovery arising out of the "Exxon Valdez" oil spill of March 1989.

Sec. 15. EFFECTIVE DATE OF THIS INITIATIVE. This Initiative takes effect ninety days after its certification by the lieutenant governor.

① Award Actual Atty Fees ?

A BRIEF HISTORY OF TORT REFORM EFFORTS IN ALASKA

Most of the current tort statutes were enacted in 1962. They operate in conjunction with principles of common law. The reforms commenced in 1967.

For injuries related to the design, planning, or construction of improvements to real estate, a statute of repose was enacted in 1967 as an exception to the general two-year statute of limitations. Under the 1967 statute of repose, a claim was barred unless brought within six years of the date of substantial completion of construction. An exception was made if the injury occurred in the sixth year -- the claimant would have two years to file for that injury.¹

In 1967, provisions specific to medical malpractice were added as Article 6 of AS 09.55. The new provisions listed the elements that needed to be proved to establish malpractice. A physician's standard of care was established as that of physicians with that expertise practicing in that or a similar locality.

In 1970, the legislature passed the Uniform Contribution Among Joint Tortfeasors Act, AS 09.16.010 - 09.16.060, that provided for contribution so that each joint tortfeasor was liable for an equal share of the damages despite the percentage of fault.² Previously, each joint tortfeasor could be liable for all of a claimant's damages, without a right of contribution. In 1975, the supreme court also changed the existing rule that a claimant could not recover any damages if the claimant was contributorily negligent. Under the new rule, the claimant's damages were reduced proportionally by the amount of the claimant's negligence (termed "comparative negligence.") Kaatz v. State, 540 P.2d 1037 (Alaska 1975) *appeal after remand* 572 P.2d 775 (1977)

The next flurry of activity took place during the 1975-76 legislative session. In 1975, after Governor Hammond vetoed a medical insurance bill, he created the Governor's Medical

¹ In 1988, the Alaska Supreme Court invalidated the 1967 law on equal protection grounds because the statute discriminated between different kinds of defendants "based on their occupation or the nature of the work they perform." Turner Construction Co. v. Scales, 752 P.2d 467, 470 (Alaska 1988). The court mentioned but did not reach two additional issues: discrimination among classes of plaintiffs and due process issues under the Alaska Constitution.

In 1994, the legislature passed a bill amending the statute of repose, AS 09.10.055. The bill contained findings of legislative purpose to justify the distinctions that the Alaska Supreme Court had criticized among classes of defendants. The bill extended the statute of repose to fifteen years. The current AS 09.10.055 has not been evaluated by the state supreme court.

² In 1979, the supreme court invited the legislature to amend the law to provide for proportionate liability. Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979).

Malpractice Commission. The following year, a comprehensive bill was enacted. The Medical Indemnity Corporation of Alaska (MICA) was established as a public corporation. As a condition of licensure, physicians were required to obtain insurance from MICA; various other medical professions were also required to obtain insurance, but only from MICA if other insurance was found to be unavailable.³ The burden of proof for malpractice was amended to remove the "locality" restriction on standard of care; AS 09.55.535 provided for voluntary arbitration; and AS 09.55.556 required informed consent. Expert advisory panels were established with subpoena powers. A panel reports to the superior court its findings on medical malpractice cases, that the report is admissible as evidence, and the panel maintains a record of its proceedings. The bill required hospital peer review systems with attendant confidentiality and immunity for reviewers. Additionally, the new law provided for payment of future damages by periodic payment and allowed evidence of compensation from collateral sources to be considered by the court after the jury reached a verdict.

During the 1979-80 legislative session, the three tort-related bills that were filed all passed. AS 09.65.200 provides that a landowner of unimproved land is not responsible for injuries to a person who is not compensating the owner for use of the land and who is injured as a result of the natural condition of the land.⁴ Under another bill, skiers were assumed to assume the inherent risks of skiing if the ski resort posted prominent signs warning of the inherent risks that are enumerated in the statute.⁵ Additionally, a bill was passed that tolled the running of the statute of limitations for persons who were incompetent as a result of mental illness.

Major tort reform occurred during 1986. The bill that passed was one of five "omnibus" bills filed that session. The most significant change was a cap on noneconomic damages of \$500,000, except damages related to disfigurement or severe physical impairment. The bill provided for jury itemization of damages between past and present, and among economic, noneconomic, and punitive; modified joint and several liability; precluded damages for injuries during a claimant's commission of a felony; limited liability of nonprofit directors and officers; allowed reduction of a verdict by collateral source payments; limited awards of attorney fees to prevailing parties in certain contested cases, and provided for periodic payments of damage awards. The bill also amended provisions on offers of judgment; costs and attorney fees; and interest on

³ Under ch. 177, SLA 1978, the mandatory insurance provisions were later made voluntary. MICA was abolished in 1991. Ch. 14, SLA 1991.

⁴ The statute was amended by ch. 168, SLA 1988 to expand the definition of unimproved land to allow certain improvements, to preclude liability to a person who uses the land for free recreational use, and to exclude from immunity gross negligence or intentional conduct.

⁵ Ski area liability is now governed by the Alaska Ski Safety Act of 1994, AS 05.45.010 - 05.45.210. (Ch. 63, SLA 1994) The fourteen sections of the act precisely define the duties and responsibilities of skiers and operators. If a ski area fulfills all its responsibilities, it is immune from liability for any accident in which a contributing factor was an inherent risk of skiing or the skier's failure to follow the enumerated skier duties.

judgments, including a new section on prejudgment interest. The bill codified the standard of proof for punitive damage awards of "clear and convincing evidence" set by the state supreme court in 1962 and the court's ruling on contributory fault set in 1975.

During the 1987-88 session, Governor Cowper introduced a bill to make further tort reform. The significant differences between the House and Senate version could not be resolved. Two other "omnibus" bills died in committee.

In November, 1988, the voters approved an initiative to eliminate "joint and several" liability -- the common law doctrine by which multiple defendants are held both jointly and individually liable for the entire amount of damages awarded to a plaintiff irrespective of each defendant's percentage of fault. The initiative repealed AS 09.16.010, which provided for a right to contribution among co-tortfeasors, and amended AS 09.17.080(d) to read, "[T]he court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault."⁶ A provision in the initiative limiting attorney contingency fees was not placed on the ballot after it was disallowed by the Lieutenant Governor. (See Citizens Coalition for Tort Reform v. McAlpine, 810 P.2d 162 (Alaska 1991).

In 1989, the House of Representatives created the "Liability Insurance Task Force" for the purpose of reviewing controversies concerning tort reform and to "determine how the state may more effectively regulate insurance and provide civil justice." The task force's final report was made in March, 1990, containing findings but no recommendations. That report is provided is the last document under tab 6, "Alaska Tort Reforms," in volume I of your packet for this meeting. An "omnibus" bill filed in both the house and senate died in committee that year.

In 1993, the state supreme court adopted a civil rule allowing the court to order mediation at the request of a party or on its own motion. Alaska R. Civ. P. 100. Mediation is not available in certain matters involving domestic abuse.

Another "omnibus" tort bill - HB292 - was filed in 1993. After extensive hearings by the House Labor and Commerce committee, it was not reported out of the House Finance committee. The most recent "omnibus" tort bill - HB158 - was filed in 1995. Extensive materials on that bill are located under tab 6, "Alaska Tort Reforms," in volume I of the packet for this meeting.

⁶ In Benner v. Wichman, 874 P.2d 949 (Alaska 1994), the Alaska Supreme Court analyzed the changes to AS 09.17.080 and held that fault could only be allocated among parties who had been joined to the action. (See tab 13, volume II in the packet for this meeting.) Thus, defendants may still be held liable for the fault of any tortfeasors who have not been joined in an action.

CHRONOLOGY - BY LEGISLATIVE SESSION¹

5TH LEGISLATIVE SESSION - 1967-68

ENACTED

Ch. 61, SLA 1967 - Statute of repose for construction- AS 09.10.055

Ch. 49, SLA 1967 - Medical malpractice burden of proof-- AS 09.55.530 - 09.55.550

6TH LEGISLATIVE SESSION - 1969-70

ENACTED

Ch. 80, SLA 1979 - Uniform Contribution Among Joint Tortfeasors Act - AS 09.16.010 - 09.16.060²

9TH LEGISLATIVE SESSION - 1975-76

ENACTED

Ch. 102, SLA 1976 - Medical malpractice - amendments to Title 8, additions to AS 09.55.530 - 09.55.560, new AS 13.23 and AS 21.88

OTHER BILLS FILED:

BILL	SPONSOR	BRIEF DESCRIPTION	FINAL STATUS
HB98	Smith	Medical malpractice - limit on damages	(H) Jud
HB176	Cowper	Comparative negligence	(S) Jud
HB476 SB549	Beirne	Med malpractice - limit on contingency fees	(H) Jud (S) Jud
HB575 SB523	Gov	Med Malpractice adjudication board / appeals	(H) Jud (S) Comm
HB636 SB566	Bierne	Med malpractice: admin adjudication; clear and convincing evidence; limits on damages; limit on informed consent liability; required insurance	(H) Jud (S) Comm
SB550	Kerttula	Limit on awards against physician or dentist	(S) Jud

¹ Bills filed and not enacted before the 9th Legislative Session are not shown. No search mechanism exists for those bills.

² Repealed by 1988 Initiative.

10TH LEGISLATIVE SESSION - 1977-78

ENACTED

Ch. 177, SLA 1978 - mandatory medical malpractice insurance made voluntary - Title 8

OTHER BILLS FILED:

HB124 SB308	Cowper Rodey	Comparative fault	(H) Jud (S) Jud
HB292 SB170	Beirne	Med malpractice - atty fees	(H) Comm (S) Jud
HB280 SB171	Bierne	Med malpractice - limit on awards	(H) Comm (S) Hess
HB309	Beirne	Med malpractice - requirement of notice of claim	(H) Comm
HB310	Beirne	Med malpractice - statute of limitations	(H) Comm
HB311	Beirne	Med malpractice - limit on pain and suffering damages	(H) Comm

11TH LEGISLATIVE SESSION 1979-80

ENACTED

Ch. 46, SLA 1979 - limitations of actions / exemption for mentally ill - AS 09.10.140

Ch. 80, SLA 1980 - inherent risks of skiing - AS 09.10.300 (replaced by AS 05.45.010 - 05.45.210)

Ch. 138, SLA 1980 - injuries on unimproved land - AS 09.65.200

12TH LEGISLATIVE SESSION - 1981-82

BILLS FILED:

HB562 SB537	Clocksini (S) Judiciary	Repeal statute of repose on construction	(H) Jud (S) Jud
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13TH LEGISLATIVE SESSION - 1983-84

BILLS FILED:

HB126	Hurlbert	Liability for aircraft guest	exp. 1st sess.
HB407	Bettisworth	State reimbursement - expenses	(H) Jud

14TH LEGISLATIVE SESSION - 1985-86

ENACTED

Ch. 139, SLA 1986 - "Omnibus" bill - added AS 09.17 and 09.65.120, amended AS 09.30.065, 09.30.070, and AS 09.60.010

OTHER BILLS FILED:

HB97	Duncan	State liability for hazardous recreation	(H) Jud
HB368	Gruenberg	Uniform Comparative Fault Act	(H) Jud
HB481	Reiger	"Omnibus" bill: punitive damages to state; itemized verdicts; periodic payments; frivolous litigation; contributory fault; apportionment of damages; effect of release	(H) Jud
HB490	Szmanski	Periodic payment by state / munis	(H) L&C
HB532	Cotten	"Omnibus" bill: cap on noneconomic damages (\$250,000); punitive damages to state; itemized verdicts; periodic payments; frivolous litigation; collateral benefits; contributory fault; apportionment of damages; effect of release; limits on contingent fees; mandatory arbitration; offers of judgment; wrongful death; attorney fees	(H) Jud
HB660	Binkley	Recreational use of land	(H) Res
SB382	Kerttula	"Omnibus" bill: cap on noneconomic damages (\$750,000); periodic payments; apportionment of damages; limits on contingent fees	(S) L&C
SB392	Josephson	Periodic payment	(S) L&C
SB444	V. Fischer	"Omnibus" bill: cap on noneconomic damages (\$500,000); periodic payments; itemized verdict; limits on contingent fees	(S) L&C
SB451	Halford	Apportionment of damages	(S) L&C

15TH LEGISLATIVE SESSION - 1987-88

ENACTED

Ch. 168, SLA 1988 - injuries on unimproved land - amendments to AS 09.65.200

Initiative Proposal No. 2 - abolished joint and several liability - repealed AS 09.16 and replaced with AS 09.17.080(d)

BILLS FILED:

HB85	Gov	"Omnibus" bill: cap on noneconomic damages (\$250,000); periodic payment; collateral benefits, costs; commission of crime; liability of zoos, liability of hospitals for contractors, liability for hazardous substances, reports on insurance rates and litigation	await conc/reced
HB198	Hoffman	Recreational use of land	(S) Rules
HB250	Larson	"Omnibus" bill: cap on noneconomic damages (\$100,000); periodic payment; collateral benefits, commission of crime; costs	(H) L&C
HB515	Zawaki	Changes to statute of limitations; statute of repose for manufacturing equipment	(H) L&C
HB517	Ulmer	Liability of certain volunteers	(H) Jud
SB211	Faiks	"Omnibus" bill: commission of crime; partial immunity for nonprofit / gov't; joint and several liability; report on insurance rates	(H) Jud
SB447	Duncan	State liability for hazardous recreation	(S) Jud
SB461	Jones	Liability of hospitals for contractors	(H) L&C

16TH LEGISLATIVE SESSION - 1989-90

BILLS FILED:

HB115 SB228	Ulmer	Liability of certain volunteers	(H) L&C (S) Jud
HB166	Cotten, et al	"Omnibus" bill: statute of repose for product liability, construction, and physicians; commission of crime, periodic payments, partial immunity for nonprofit / gov't / peace officers; collateral benefits; interest; limit on nonpecuniary damages; costs; liability of hospitals for contractors; report on insurance rates	w/drawn
HB334	L&C	Require insurance after judgment entered against licensed health professional	(H) Jud
HB345 SB323	Gov	Creation of Health Claims Board; no fault claims for set amounts as exclusive remedy	(H) L&C (S) Jud
HB494	Menard	Recreational land use	(H) Jud
HB597 SB451	L&C Jud	"Omnibus" bill: statute of repose for product liability and construction (6 year); commission of crime, periodic payments, partial immunity for nonprofit / gov't; collateral benefits; interest; limit on nonpecuniary damages; costs; liability of hospitals for contractors; report on insurance rates	(H) Jud (S) Jud
SB229	Duncan	State liability for hazardous recreation	(S) Jud
SB495	Rodey	Statute of repose for product liability and construction (5 year)	(S) Jud

17TH LEGISLATIVE SESSION - 1991-92

BILLS FILED:

HB178	Jud	Offers of judgment / costs and fees	(H) Jud
HB302	Jud	Require insurance after judgment entered against licensed health professional	(H) Fin
SB109	Halford	Statute of repose for construction (7 years)	(H) L&C
SB285	Halford	Liability of hospitals for contractors	(H) L&C
SB462	HES	Statute of repose for physicians	(S) Jud

18TH LEGISLATIVE SESSION - 1993-94

ENACTED

Ch. 12, SLA 1993 - good faith disclosure of job performance information - AS 09.65.160
 Ch. 17, SLA 1994 - limitation on private nuisance action for pollution - AS 09.45.230
 Ch. 28, SLA 1994 - statute of repose for construction - amendments to AS 09.10.055
 Ch. 63, SLA 1994 - Alaska Ski Safety Act of 1994 - AS 05.45

OTHER BILLS FILED:

HB274 SB204	HES HES	"Omnibus" bill: limits on statute of limitations for health care; mandatory arbitration for health care; collateral source for health care; cap on noneconomic damages (\$250,000); contributory fault; allocation of damages; effect of release; interest; liability of hospitals for contractors	(H) HES (S) HES
HB292 SB254	L&C Pearce	"Omnibus" bill: general statute of repose (6 years); limits on statute of limitations for health care; expansion of cap on noneconomic damages cap on punitive damages; commission of crime; reduction by equivalent of taxes; wrongful death; collateral benefits; contributory fault; allocation of damages; effect of release; offers of judgment; liability of hospitals for contractors	(H) Fin (S) Jud
HB300	L&C	Liability for comm'l rec activities	(S) Jud
HB360	Bunde	Liability for air / watercraft guest passenger	(S) Comm
HB414 SB270	Gov Gov	Mandatory arbitration for health care claims	(H) Comm (S) HES
HB492	HES	Limits on liability to insurance coverage and mandatory arbitration for health care claims	(H) HES
HB493	HES	Required insurance for health care providers	(H) HES
SB123	HES	Medical malpractice: limits on statute of limitations; judgment interest rates; mandatory arbitration	(S) HES
SB184	Frank	Imm: nonprofit corp volunteers and employees	(S) Jud
SB367	HES	Mandatory arbitration for health care claims	(S) Rules

19TH LEGISLATIVE SESSION - 1995-96

ENACTED

Ch. 79, SLA 1995 - Prisoner litigation against state - AS 09.19, etc.

OTHER BILLS FILED:

HB19	Therriault	Def of "fault" to include intentional misconduct	(S) Jud
HB145	Ogan	Proof beyond reasonable doubt: punitive damages	(H) Jud
HB158	Porter	"Omnibus" bill: statute of repose; cap on punitive damages; 75% of punitive damages to state; allocation of fault; comm'l recreation activities; hospital liability for contractors; liability for frivolous or improper practice; offers of judgment; expert witnesses in malpractice; mandatory arbitration; periodic payment; effects of release; interest; commission of felony; sanctions; reports on insurance rates	Vetoed
HB161	Bunde	Liability for aircraft/ watercraft guest passenger	(H) Jud
HB252	Sanders	Cap on punitive damages	(H) Sta
HB316	Mulder	Liability for frivolous lawsuits	(S) Jud
HB414	Green	Mandatory conciliation panels for design professionals	(S) Jud
SB72	Frank	imm: nonprofit corp volunteers and employees	(S) Sta
SB324	Jud	mandatory arbitration; caps on punitive damages for unlawful employment practices	(H) Sta

TORT REFORM PROPOSALS BY TOPIC

CONSTRUCTION

1967-68

Ch. 61, SLA 1967 - Statute of repose

1981-82

HB562 / SB537 - Repeal statute of repose

1991-92

SB109 - Amend statute of repose

1993-94

Ch. 28, SLA 1994 - Amend statute of repose

1995-96

HB414 - Mandatory conciliation panels for design professionals

DAMAGES

1969-70

Ch. 80, SLA 1970 Uniform Contribution Among Tortfeasors Act

1975-76

HB 176 - Comparative negligence

1977-78

HB124 / SB308 - Comparative fault

1985-86

HB368 - Uniform Comparative Fault Act

SB392 - Periodic payment

SB451 - Apportionment of damages

1987-88

Initiative - abolished joint and several liability

1995-96

HB145 - Proof beyond reasonable doubt:
punitive damages

HB252 - Cap on punitive damages

LAND / RECREATION

1979-80

Ch. 80, SLA 1980 - inherent risks of skiing

Ch. 168, SLA 1980 - Non compensated use of unimproved land

1983-84

HB126 - Aircraft guest

1985-86

HB97 - State liability - hazardous recreation

HB660 - Non-compensated recreational use of land

1987-88

Ch. 168, SLA 1988 - Injuries on unimproved land

HB198 - Recreational use of land

SB477 - State liability for hazardous recreation

1989-90

HB494 - Recreational use of land

SB229 - State liability for hazardous recreation

1993-94

Ch. 63, SLA 1994 - Alaska Ski Safety Act

HB300 - Liability for comm'l recreation activities

HB360 - Liability for air / watercraft guest passengers

1995-96

HB161 - Liability for air / watercraft guest passengers

MEDICAL MALPRACTICE

1967-68

Ch. 49, SLA 1967 Burden of proof

1975-76

Ch. 102, SLA 1976 - Omnibus bill

HB 98 - Limits on damages

HB 476 / SB549 - Limit on contingency fees

HB575 / SB 523 - Admin adjudication /
appeals

HB636 - Administrative adjudication; clear and
convincing evidence; limits on damages;
limit on informed consent; required
insurance

SB550 - Limit on awards against physicians
and dentists

1977-78

Ch. 177 SLA 1978

HB252 / SB 170 - Attorney fees

HB280 / SB171 - Limit on awards

HB309 - Required notice of med mal claim

HB310 - Statute of limitations

HB311 - Limit on pain and suffering damages

HB 485 / SB325 - Revolving loan fund

1987-88

HB85 / SB461 - Hospitals for contractors

MISCELLANEOUS OTHER

1979-80

Ch. 46 SLA 1979 - Statute of limitations /
mentally ill

1987-88

HB515 - Manufacturing equipment

HB517 - Liability of certain volunteers

1989-90

HB115 / SB228 Liability of certain volunteers

1989-90

HB166 - Statute of repose for physicians; limit of
hospital liability for contractors

HB334 - Required insurance

HB345 / SB323 - No fault claims exclusive
remedy

HB597 - limit of hospital liability for contractors

1991-92

HB302 - Required insurance

SB285 - Hospitals for contractors

SB462 - Statute of repose for physicians

1993-94

HB274 / SB204 - Statute of limitations /
mandatory arbitration / collateral source

HB292 - statute of limitations / limit of hospital
liability for contractors

HB414 / SB270 - Mandatory arbitration

HB492 - Limits on liability to insurance coverage
/ mandatory arbitration

HB493 - Required insurance

SB123 - Statute of limitations / prejudgment
interest / mandatory arbitration

SB367 - Mandatory arbitration

1993-94

Ch. 12, SLA 1993 - good faith disclosure of
job performance information

Ch. 17, SLA 1994 - limitation on private
nuisance action for pollution

SB184 - Imm: nonprofit corp volunteers and
employees

1995-96

HB19 - Definition of "fault" to include
intentional conduct

SB72 - Imm: nonprofit corp volunteers and
employees

HB316 - Liability for frivolous lawsuits

"OMNIBUS" BILLS

1985-86

Ch. 139, SLA 1986 - Cap on noneconomic damages (\$500,000); itemized verdicts; modified joint and several liability; allocation for contributory fault; commission of a felony; limited liability of nonprofit directors and officers; collateral source evidence; periodic payments; offers of judgment; costs and attorney fees; interest

HB481 - Punitive damages to state; itemized verdicts; periodic payments; frivolous litigation; contributory fault; apportionment of damages; effect of release

HB532 - "Omnibus" bill: cap on noneconomic damages (\$250,000); punitive damages to state; itemized verdicts; periodic payments; frivolous litigation; collateral benefits; contributory fault; apportionment of damages; effect of release; limits on contingent fees; mandatory arbitration; offers of judgment; wrongful death; attorney fees

SB382 - cap on noneconomic damages (\$750,000); periodic payments; apportionment of damages; limits on contingent fees

SB444 - cap on noneconomic damages (\$500,000); periodic payments; itemized verdict; limits on contingent fees

1987-88

HB85 - cap on noneconomic damages (\$250,000); periodic payment; collateral benefits, costs; commission of crime; liability of zoos, liability of hospitals for contractors, liability for hazardous substances, reports on insurance rates and litigation

HB250 - cap on noneconomic damages (\$100,000); periodic payment; collateral benefits, commission of crime; costs

SB211 - commission of crime; partial immunity for nonprofit / gov't; joint and several liability; report on insurance rates

1989-90

HB166 - statute of repose for product liability, construction, and physicians; commission of crime, periodic payments, partial immunity for nonprofit / gov't / peace officers; collateral benefits; interest; limit on nonpecuniary damages; costs; liability of hospitals for contractors; report on insurance rates

HB597 / SB451 - statute of repose for product liability and construction (6 year); commission of crime, periodic payments, partial immunity for nonprofit / gov't; collateral benefits; interest; limit on nonpecuniary damages; costs; liability of hospitals for contractors; report on insurance rates

1993-94

HB274 / SB204 - cap on noneconomic damages (\$250,000); contributory fault; allocation of damages; effect of release; interest; liability of hospitals for contractors

HB292 / SB254 - general statute of repose (6 years); limits on statute of limitations for health care; expansion of cap on noneconomic damages cap on punitive damages; commission of crime; reduction by equivalent of taxes; wrongful death; collateral benefits; contributory fault; allocation of damages; effect of release; offers of judgment; liability of hospitals for contractors

1995-96

HB 158 - statute of repose; cap on punitive damages; 75% of punitive damages to state; allocation of fault; comm'l recreation activities; hospital liability for contractors; liability for frivolous or improper practice; offers of judgment; expert witnesses in malpractice; mandatory arbitration; periodic payment; effects of release; interest; commission of felony; sanctions; reports on insurance rates

SB324 - mandatory arbitration; caps on punitive damages for unlawful employment practices

PROCEDURE**1991-92**

HB178 - Offers of judgment / costs and fees

SB495 - Statute of repose for product liability and construction (5 year)

STATE AS PARTY**1983-84**

HB407 - State pays all fees and costs

1985-86

HB490 - Periodic payment of judgments against state or political subdivisions

1995-96

Ch. 79, SLA 1995 - Prisoner litigation against state

**LEGISLATOR E-Z CHECK-OFF FOR TORT REFORM BILL
(USING HISTORIC EXAMPLES)**

✓	Admin. adjudication	✓	Medical
	Allocation of fault / apportionment of damages		Definition of "fault" Include unnamed as well as named parties State effects of release
	Arbitration		Mandatory - medical - general
	Attorney fees and costs		Contingency fees - cap of _____ - prohibit in _____ types of cases Prevailing party - increase payments - eliminate payments
	Cap on noneconomic damages (e.g. physical impairment, pain and suffering, disfigurement, loss of enjoyment of life)		\$ _____ (10,000 - 750,000) Expand applicability
	Collateral benefits (e.g. claimant's insurance)		Evidence to jury Increase reduction of award Prohibit subrogation rights
	Conciliation panel		Mandatory non-binding determination of design professional negligence, but not damages, by panel; not admissible in court
	Crime - no damages to perpetrator		Include attempts and fleeing from commission of felony Expand to include misdemeanors as well as felonies Remove conviction requirement
	Damages		Limits on awards against certain professions: ____ physicians ____ limit to insurance coverage ____ dentists ____ health care
	Frivolous lawsuits		Increases sanctions New cause of action
	Immunity		Nonprofit employees and volunteers Volunteers State employees within scope of employment
	Informed consent		Reduce requirement for medical malpractice Create requirement for hazardous recreation activities

✓	Insurance rates	✓	Reduce by ____ % Report on changes
	Interest		Change rate / floating rate of ____ Preclude prejudgment interest on future damages
	Malpractice		Limits on expert witnesses: licensed and board-certified
	Medical		Any other reform, for medical only: ____ Hospitals -- nonliability for contractors
	No-fault / exclusive remedy		Workers' comp - type remedy for medical claims
	Offers of judgment		Increase incentives Reduce incentives
	Periodic payment of damage awards		Apply only to personal injury Allow for inflation
	Punitive damages		Cap of ____ Cap on certain types of action, e.g. unlawful employment practices ____% to state Increase burden of proof
	Recreation		Compensated Non-compensated Parameters of state liability
	Required insurance		For ____ health profession(s) For health professional who has malpractice judgment
	Sanctions		Increase Allow fines against parties as well as attorneys
	Standard of proof		Increase for medical malpractice claims
	Statute of limitations		Modify tolling for minors in medical malpractice cases
	Statute of repose		Reduce # of years to ____ Expand to: product liability, manufacturing equip., physicians, all Repeal
	Taxes		Reduce judgment by estimated taxes
	Wrongful death		Apply (specified) personal injury reforms: ____

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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June 10, 1996

Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811

Re: SCS CSHB 158(RLS) am S(ct rls
fld S) -- (Tort Reform)
Our file: 883-96-0096

Dear Governor Knowles:

At the request of legislative director, Pat Pourchot, the Department of Law has reviewed SCS CSHB 158(RLS) am S(ct rls fld S) (hereafter "HB 158"), commonly known as the "tort reform" bill. If enacted, this bill would materially change substantive and procedural law governing tort actions, and would peripherally affect other types of actions. This review discusses some of the significant legal problems the bill would create.

HB 158 would primarily impact civil actions for personal injury, death, or damage to property.¹ The bill would have much less impact on economic torts such as interference with contract. See Fairbanks North Star Borough v. Roen Design Associates, Inc., 727 P.2d 758, 760 (Alaska 1986) (similar language did not cover damages to intangible property). Accordingly, use of the term "tort" in this review includes only actions for personal injury, death, or property damage, unless otherwise indicated.

CIVIL LIABILITY FOR COMMERCIAL RECREATIONAL ACTIVITIES

Section 2 of the bill limits the liability of those who operate outdoor recreational activities for paying participants. Participants would be deemed comparatively negligent to the extent

¹ Several sections of the bill would impact a broader category of actions. These are secs. 8, 9, 13, 14, 19, and 21 of the bill, which address interest, periodic payment, offers of judgment, and frivolous or improper action.

that an "inherent risk" of the activity contributed to an injury, and any award would be correspondingly reduced.

Current Law

Standard common law currently governs the liability of operators of commercial recreational activities, except for ski areas. The conduct of both the operator and the participant is compared with the conduct of a hypothetical ordinary person in the same circumstances who has similar training and skills and is reasonably prudent. Alaska Pattern Civil Jury Instruction 3.03A; W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32 at 185 (5th ed. 1984). Those circumstances include the risks of injury inherent in a given activity. Fickes v. Petrolane-Alaska Gas Service, Inc., 628 P.2d 908, 912-13 (Alaska 1981). If an operator or participant violates a duty created by statute, that person may be presumed negligent under the doctrine of negligence per se. Alaska Pattern Civil Jury Instruction at 3.04A.

Ski area liability is governed by the Alaska Ski Safety Act of 1994, AS 05.45.010 - 05.45.210. The fourteen sections of the Alaska Ski Safety Act of 1994 precisely define the duties and responsibilities of skiers and operators. If a ski area fulfills all its responsibilities, it is immune from liability for any accident in which a contributing factor was an inherent risk of skiing or the skier's failure to follow the enumerated skier duties.

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Section 2 of the bill would change the manner of allocating comparative fault in personal injury or property damage lawsuits arising from "commercial recreational activities" other than ski areas. An "inherent risk" of the activity that partly causes an injury would be deemed negligence by the injured person and become part of that person's percentage of fault for calculating damages under AS 09.17.060. The section also would assign certain responsibilities to clients and operators. For example, the participant would be responsible for maintaining control of any equipment or animals the participant used, and all operators would be required to train employees in basic first aid and cardiopulmonary resuscitation (CPR).

Section 2 of the bill would apply to a broad range of activities inside and outside the commercial tourist industry, including outdoor sports leagues that charge a fee, summer camps for children, outdoor educational and sport activities conducted by private schools, and guided tourism, fishing, and hunting.

This section was added to the bill late in the session, in the Senate Rules Committee.² It would present interpretation problems and a constitutional issue.

Analysis

The concept of sec. 2 of the bill is similar to the Alaska Ski Safety Act of 1994, but in contrast to that Act's carefully-crafted, detailed provisions, sec. 2 of the bill covers a far broader range of activities with vague, ambiguous language. Added to the bill when public comment was no longer feasible, the section lacks the precision that results from open discussion and thorough analysis. Foreseeable problems with sec. 2 of the bill include ambiguity about the types of activities to which it applies, the unreasonable nature of the duties it imposes upon participants, a higher imposition of liability on volunteer operators than on paid operators, and elevated rights for nonpaying participants.

A. AMBIGUITY OF "OUTDOOR" RECREATIONAL ACTIVITY

Section 2 of the bill would apply to any "recreational activity" for which the participants pay compensation. "Recreational activity" means an "outdoor activity undertaken for the purpose of exercise, education, relaxation, pleasure, sport, or hobby." Because "outdoor" is not defined, the coverage of sec. 2 of the bill would be uncertain and would not become clear until a selection of claims are litigated over a period of years. For example, the bill is ambiguous as to whether air travel is "outdoor" recreation. Whether sec. 2 of the bill applies when the

² The section has some similarity to HB 300, which the House passed in 1994. Wisconsin's "Participation in Recreational Activities" statute, Wis. Stat. § 895.525 (1995) appears to be the source of some of the language used in sec. 2 of the bill and HB 300 (1994). The Wisconsin statute has a different effect, however. It addresses only the premises liability of landowners and lessees, and by express statement of the legislature is intended to impose no greater duties on recreational participants than they have under common law. Rockweit v. Senecal, 522 N.W.2d 742, 746 (Wis. 1995). Moreover, the Wisconsin law does not distinguish between "outdoor" and other recreational activities, or between activities conducted for compensation and those offered free of charge. No other state has a statute similar to sec. 2 of the bill.

operator of a guided hunting, fishing, climbing, or other outdoor service flies clients to activity locations is unclear.³

Similarly, while sec. 2 of the bill presumably would cover guided tourism or fishing from the deck of a boat, its application is uncertain if the client spends part or all of the trip in the boat's cabin. Similar activities might be treated differently depending upon whether the boat used was a zodiac, cabin cruiser, coastal tour boat, cruise ship, or ferry.

Further, the coverage of "outdoor activity" may or may not apply when a client is injured in a camp tent, in a rustic cabin provided by the operator, or in a lodge.

The ambiguity extends to traditional sports activities as well. Although sec. 2 of the bill seems to cover a fee-based outdoor hockey or basketball program while exempting the same programs using indoor rinks or courts, it may or may not cover outdoor programs for injuries in the locker room or injuries caused by accidents while transporting participants to games.

B. RESPONSIBILITY FOR CONTROLLING EQUIPMENT AND ANIMALS

Section 2 of the bill unequivocally gives the paying participant responsibility to maintain control of any equipment the participant is using. The broad language covers all types of equipment and all ages of participants. Existing laws, industry standards, and custom often assign control responsibility to someone other than the participant. A skipper is commonly thought to be responsible for maintaining control of a sport fishing boat; a pilot is thought to be responsible for maintaining control of a flightseeing aircraft; and an amusement ride operator is thought to be responsible for maintaining control of a ferris wheel ride. If interpreted as written, sec. 2 of the bill would transfer these responsibilities to the party paying for the service. While a court interpreting the provision would seek to avoid an absurd result, the overbroad language leaves the provision's ultimate effect to the chance of litigation.

Section 2 of the bill also would transfer to the paying participant responsibility for controlling animals the participant

³ Limited legislative history on the bill suggests that some legislators considered air travel to be an outdoor activity. Legislators apparently did not discuss travel on commercial airliners for recreational or educational purposes in conjunction with HB 158.

is using, such as the dogs provided by a commercial mushing operation or the ponies that children ride on a pony wheel at a fair. Thus, if a child attending summer camp is seriously injured when the camp counselor turns on loud music and causes the horse to shy and throw the child, the child's statutory responsibility for maintaining control of the horse would reduce the camp's liability. Section 2 of the bill would further reduce the camp's liability to the extent that the inherent risks of riding a horse (e.g., the risks associated with sitting high above the ground on an animal capable of being startled unexpectedly) were a contributing factor to the injury. Section 2 of the bill would alter current law so that the injured person would be deemed comparatively negligent and would recover less than full damages.

D. CREATION OF NEW DUTIES

Section 2 of the bill would impose new duties on a participant in a commercial recreational activity, including the obligations to learn about the risks of the activity and act within the limits of the person's ability. The operator also would have new duties, such as to "explain to a participant the fundamental inherent risks" of the activity. This new statutory duty might expand liability under a negligence per se theory if an operator failed to disclose an inherent risk that seemed too obvious for explanation.

E. LACK OF PHASE-IN PERIOD

Section 2 of the bill would take effect in 90 days, during the current outdoor recreation season. Operators of sports and outdoor education programs and recreational businesses in remote areas would have difficulty complying with the new first aid and CPR training requirements prior to the effective date. This would increase their exposure to liability, as failure to comply would constitute negligence per se in the event of an injury.

F. EQUAL PROTECTION

Section 2 of the bill would draw a distinction between compensated and uncompensated outdoor activities. People who operate outdoor activities without compensation would have substantially greater liability than those who are paid. Thus, a person could not raise the defenses under the section if the person voluntarily ran a neighborhood soccer league, but the defenses would be available to a person operating a league for paying participants. Likewise, if a child sustained an injury on

a school playground⁴ and the school were found negligent, the amount of liability would depend on whether the school is public or private; public schools would have greater exposure. The Alaska Supreme Court has struck down a statute discriminating among defendants "based on their occupation or the nature of the work they perform," rather than on distinction in conduct. Turner Construction Co. v. Scales, 752 P.2d 467, 470-71 (Alaska 1988). The distinction that sec. 2 of the bill makes is similar and may be unconstitutional as well.

Section 2 of the bill also would discriminate among plaintiffs in ways that a reviewing court might find capricious. For example, paying attendees at a summer camp apparently would be treated less favorably than campers on full scholarship. Because scholarship campers do not "pay compensation," they are probably outside the scope of sec. 2 of the bill. A scholarship and a paying camper could be injured in the same canoeing accident and the paying camper would have substantially fewer legal rights than would the paying camper's canoe mate.

TIME LIMITATIONS ON ACTIONS

The bill would affect the time period in which a plaintiff can file suit in three ways. Section 3 of the bill broadens the existing statute of repose, which limits a plaintiff's right of action for delayed injuries, to encompass torts outside the construction context, and shortens the time limit from 15 to 10 years. Section 4 of the bill reduces the statute of limitations for damage to tangible property.

A. STATUTE OF REPOSE

A statute of repose prevents a plaintiff from filing suit after a set period of time, even though the statute of limitations has not expired. While the period during which suit may be brought under a statute of limitations ordinarily begins on the date of injury, a statute of repose runs from the date of the defendant's act. This distinction is important when the injury occurs much later than the negligent act -- such as the collapse of a school or warehouse after a heavy snowfall due to defective design or construction years after the defective work was performed. The statute of limitations would not bar an action until two years

⁴ Under sec. 2 of the bill, activities on a playground at school for the purpose of "exercise," "education," or "pleasure" would be "recreational activities." They are within the scope of sec. 2 of the bill if "participants pay compensation."

after the collapse, but a statute of repose could bar a cause of action after the set number of years from the construction even if that period expired before the collapse.

Current Law

Since 1967, Alaska has had a statute of repose aimed at defects in design and construction of real property improvements. In 1988, the Alaska Supreme Court invalidated the 1967 law on equal protection grounds because the statute discriminated between different kinds of defendants "based on their occupation or the nature of the work they perform." Turner Construction, 752 P.2d at 470.

In 1994, the legislature passed a substitute statute of repose, the presently effective AS 09.10.055, which eliminated some of the distinctions among classes of defendants that the Alaska Supreme Court had criticized. The current statute of repose establishes a limit of 15 years for tort actions based on a design or construction defect in real estate improvements.

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The purpose of sec. 3 of the bill is to enact a statute of repose that meets the standards of Turner Construction. Section 3 of the bill would broaden the statute of repose to encompass torts outside the construction context, to all "last acts" by a defendant, and would shorten the bar on action from 15 to 10 years. Exceptions would be granted for damages caused by intentional acts or gross negligence and exposure to a hazardous substance, a defective product, or an undiscovered foreign object in a person's body. The statute of repose would not apply if the facts that would give notice of a potential cause of action were intentionally concealed.

Analysis

Section 3 of the bill may be unconstitutional under the Alaska Constitution's equal protection and due process clauses. In Turner Construction, the Alaska Supreme Court found the statute of repose's discrimination among defendants unconstitutional as an equal protection violation. The court mentioned but did not reach two additional issues: discrimination among classes of plaintiffs and due process issues under the Alaska Constitution. Section 3 of the bill would be vulnerable to challenge on these grounds. State courts have split on the question of whether statutes of repose are constitutional. See Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 827-28 and n.12 (describing split and listing cases finding

such laws unconstitutional) (Mo. 1991). The Alaska Supreme Court has commented that "[i]t is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has had a reasonable opportunity to do so." Hanebuth v. Bell Helicopter Int'l, 694 P.2d 143, 147 (Alaska 1984). This observation suggests that the court would find discrimination among classes of plaintiffs to violate the state constitution.

The state, as the owner of facilities, would be impacted by the broadened statute of repose. In particular, where the state had assumed ownership of facilities constructed by the Bureau of Indian Affairs (BIA) or other federal agencies, the state would lose its potential recourse against the United States for shoddy construction. Under the Federal Tort Claims Act, the federal government is liable only to the same extent as a private individual in like circumstances. 28 U.S.C. 2674 (1994).

The bill's changes to the statute of repose would cause an additional problem. Under sec. 24, the bill would apply retroactively if the defendant's "last act" occurred before the bill's effective date and more than ten years before the accrual date (generally the date of injury). Prospectively, parties could contractually protect themselves from the broadened statute of repose, but they would not have foreseen the retroactive application of a change when preparing earlier contracts. When the legislature amended the current statute of repose in 1994, it addressed this problem by making the bill effective only as to prospective defects in construction. Section 4, ch. 28 SLA 1994. For the reasons discussed below under part (2) of "Punitive Damages," this retroactive application creates additional constitutional concerns.

B. STATUTE OF LIMITATIONS

Current Law

Current law provides that a person has two years from the date a cause of action accrues to file suit for personal injury or other personal torts. AS 09.10.070. A cause of action accrues when a person discovers, or reasonably should have discovered, the existence of all of the elements of a cause of action. Cameron v. State, 822 P.2d 1362, 1366 (Alaska 1991). This doctrine is known as the "discovery rule."

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Section 4 of the bill would reduce the statute of limitations for a claim for damages to tangible property from six years, under AS 09.10.050, to two years. Section 5 of the bill would create a separate statute of limitations addressing only a certain category of torts, and would accommodate the shorter limits established by the statute of repose. Both secs. 4 and 5 of the bill refer to the statute of limitations running "from the accrual of the action."

Analysis

The addition of the language in secs. 4 and 5 of the bill referring to the "accrual of the action" would not be a substantive change. This language incorporates the discovery rule under Cameron. The sponsor's sectional summary demonstrates that these provisions were not intended to change the discovery rule.

LIMITS ON DAMAGES

A. PUNITIVE DAMAGES

Current Law

The purpose of punitive damages is to punish the wrongdoer and deter the wrongdoer and others from repeating the wrong. Providence Washington Ins. v. Valdez, 684 P.2d 861 (Alaska 1984). Punitive damages are not easily obtained; a plaintiff must prove by clear and convincing evidence that the wrongdoer's act was outrageous, such as an act done with malice, bad motive, or a reckless indifference to the interests of another. Bridges v. Alaska Housing Auth., 375 P.2d 696, 702 (Alaska 1962) (citing Restatement of Torts § 908 (1939) and W. Prosser, Handbook on the Law of Torts, § 2 (2d ed. 1955)).

Federal courts look to state law on punitive damages in certain federal cases. Generally, state law governs to the extent that there is a state law basis for the punitive damage award:

In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278, 109 S.Ct. 2909, 2921-22 (1989). Federal courts also look to state law to fill gaps in federal law. Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 366 (9th Cir. 1992); U. S. for Use of Bldg. Rentals Corp. v. Western Cas. & Sur. Co., 498 F.2d 335 (9th Cir. 1974).

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Section 6 of the bill would codify the existing Alaska standard of proof to obtain an award of punitive damages. Section 7 would place a limit on punitive damages in all civil actions. An award could not exceed the greater of three times the compensatory damages or \$300,000. The cap would not apply if the wrongdoer caused the harm in the course of committing a felony. Seventy-five percent of the award, if collected, would be deposited into the state's general fund.

Analysis

A mathematical cap on punitive damages does not appear to pose either state or federal constitutional problems. See, e.g., Wackenhut Applied Technologies Ctr., Inc. v. Symetron Protection Sys., Inc., 979 F.2d 980 (4th Cir. 1992); Bagley v. Shortt, 410 S.E.2d 738 (Ga. 1991); contra, Henderson v. Alabama Power Co., 627 So.2d 878 (Ala. 1993). However, both the United States Supreme Court and the Alaska Supreme Court have noted practical problems with arbitrary mathematical formulas. The United States Supreme Court stated recently:

[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in Haslip: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every

case. We can say, however, that [a] general concern of reasonableness . . . properly enter[s] into the constitutional calculus."

BMW of North America v. Gore, 640 U.S.L.W. 4335, 4342 (U.S. May 20, 1996) (citations and footnote omitted). The Alaska Supreme Court has declined on several occasions to judicially adopt a fixed ratio between punitive and compensatory damages:

This court has refused to prescribe a definite ratio between compensatory and punitive damages. . . . 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.

Cameron v. Beard, 864 P.2d 538, 551 (Alaska 1993) (citations omitted).

An allocation to the state of 75 percent of the punitive damage award also does not appear to violate state or federal constitutional provisions. See Gordon v. State, 585 So.2d 1033, 1035-1038 (Fla. App.1991), aff'd, 608 So.2d 800 (Fla.1992); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 637-639 (Ga.1993); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc., 473 N.W.2d 612, 619 (Iowa 1991). The allocation causes practical problems, however, that could in turn raise constitutionality questions.

1. Attorney Fee Liability: Punitive Damage Share.

Section 7(d) of the bill provides that "if a person receives an award of punitive damages, the court shall require that 75 percent of the award be deposited into the general fund of the state." The original bill contained a provision specifying that contingent attorney fees must be calculated after the state's percentage of the punitive damage award was deducted (see section 20, CSHB 158(Fin)), which was dropped from the final bill, leaving the issue unaddressed in HB 158. This oversight creates significant risk that a plaintiff would recover less from an award including punitive damages for outrageous wrongdoing than from an award with no punitive damages.

The following example demonstrates how HB 158 could operate to financially penalize plaintiffs who are awarded punitive damages. If a plaintiff agrees to pay an attorney a 40 percent

contingent fee, which is not uncommon, and the contingent fees were calculated before deduction of the state's 75 percent portion of a punitive damage award, the plaintiff would recover no portion of the punitive award, and would actually be penalized 9 percent on each dollar of punitive damages awarded:

Comp. Damages	\$100,000	\$100,000	\$100,000
Prejudgment Int. ⁵	20,000	20,000	20,000
Punitive Damages	0	10,000	100,000
Civil Rule 82	14,500	15,500	24,500
Gross Award	134,500	145,500	244,500
40% Cont. Fees	<53,800>	< 58,200>	< 97,800>
State's Share of Punitive Damages	< 0>	< 7,500>	<75,000>
NET RECOVERY ⁶	\$80,700	\$79,800	\$71,700

* Substantive due process requires that any bill granting the state a share of punitive damages contain language to protect plaintiffs from liability for contingent attorney fees calculated from the state's share of the recovery.

2. General Retroactivity of Punitive Damages Limitation

Section 24 of the bill would apply the punitive damages limits in sec. 7 of the bill to civil actions that accrued before the effective date of the bill if the court had not yet entered judgment in the civil action. This provision probably would constitute a taking without compensation and a violation of due process.⁷

⁵ The \$20,000 interest figure in this example represents approximately two years of interest on the compensatory award under the current rate of 10.5 percent per year. Prejudgment interest is not awarded on punitive damages. See Matanuska Electric Association, Inc. v. Weissler, 723 P.2d 600 (Alaska 1986).

⁶ This illustration does not take into consideration litigation costs, which would vary from case to case, but which in every case would reduce the plaintiff's net recovery further.

⁷ The retroactivity language was added in the Senate Rules Committee and was never subjected to routine public hearings.

A newly imposed limitation on the remedy in an existing cause of action may constitute a taking of vested property rights or a violation of due process. An unlitigated claim is considered a property interest. Patrick v. Lynden Transp., Inc., 765 P.2d 1375, 1378 (Alaska 1988). State Superior Court Judge Larry Weeks has held that "once a lawsuit is filed by an individual to enforce a then existing legal right, that right cannot be extinguished by later legislative action directed at that individual's claim." Edwards v. Alaska Pulp Corp., 1JU94-1825 CI (September 22, 1994). Judge Weeks extended this principle to any statutory change that "reduces the value of Plaintiff's property." Id. This rationale would be even more compelling if the plaintiff had expended significant litigation costs in reliance on the existing law of punitive damages.

The Legislative Affairs Agency similarly has concluded that "[a]n actionable right that is canceled . . . would be considered a property right that is protected by the due process clause." Memo from Legislative Counsel Theresa Barnister to Rep. Navarre, March 7, 1994. In that matter, the legislative counsel considered a draft bill that would cancel certain private nuisance actionable rights even if the right had already accrued and was being litigated short of final judgment. The memo notes that even when the legislature eliminates a remedy, the action is unconstitutional if the change is so abrupt as to leave no reasonable time to exercise the remedy. The memo also concludes that retroactivity may constitute an inverse condemnation taking under art. I, sec. 18 of the Alaska Constitution. Both the due process and inverse condemnation aspects of the legislative counsel's analysis are applicable to HB 158.

The inverse condemnation concern is particularly applicable because the state would take 75 percent of a remedy that the plaintiff had spent money to obtain. Prospectively, a plaintiff would consider that outcome in determining what resources to devote to a punitive damages claim.

On the other hand, the Alaska Supreme Court could find that a claim for punitive damages does not constitute a property interest. Punitive damages are a creature of statute and do not exist independently of statutory authorization. Hazen v. Anchorage, 718 P.2d 456, 465 (Alaska 1986). Further, punitive damages can be viewed as a windfall to the plaintiff rather than as a right, because the payment does not compensate the plaintiff for actual damages. Some states' courts have held that the legislature may retroactively modify punitive damage provisions. See Shepherd Components, 473 N.W.2d at 619; Vaughan v. Taft

Broadcasting Co., 708 S.W.2d 656, 660 (Mo. 1986); but see Reeves v. Ille Elec. Co., 551 P.2d 647, 652 (Mont. 1976).

This section would raise an additional constitutional problem if it were established, as was suggested in House floor debate, that the legislative purpose of retroactivity was to affect the legal rights of individuals in specific litigation, rather than to promote a broad public purpose. See Yukon-Kuskokwim Health Corp. v. Trust Ins. Plan for S.W. Alaska, 884 F.Supp. 1360, 1366-67 (D. Alaska 1994). Judge Weeks also identified this deficiency in the statute he addressed in his Alaska Pulp Corp. decision. Because he found the legislation to be intended to extinguish rights in particular litigation, Judge Weeks held that it had a private purpose and therefore had insufficient public purpose to withstand due process scrutiny. A private purpose would not meet the constitutional test of bearing a reasonable relation to a legitimate public purpose. See Pan-Alaska Const. v. Dep't of Admin., 892 P.2d 159, 162 (Alaska 1995); Gates v. Tenakee Springs, 822 P.2d 455, 462 (Alaska 1991); Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 351 (Alaska 1988).

Retroactive application of the allocation provision also would cause practical problems. The retroactivity provision would affect cases in which the jury had returned a verdict, but in which post-trial motions were pending. A final judgment "represents the completion of all steps in the adjudication of [a] claim by the court, short of any steps by way of execution or enforcement." Restatement (Second) Judgments § 13 comment b (1982); Catlin v. United States, 324 U.S. 229, 233 (1945). Even cases remanded on appeal may no longer have "final" judgments. Retroactive application would subject litigants in many pending cases to an additional stage of turmoil and unpredictability.

3. Impact on Exxon Valdez Litigation

You have asked about the impact of sec. 24 of the bill on the Exxon Valdez oil spill punitive damages award. The risk that sec. 24 of the bill would impact the \$5 billion punitive damage award in In re the Exxon Valdez, A89-095-CV (HRH) is significant. The court will not issue a final judgment in this case until the final phase of the litigation is completed. Whether sec. 24 of the bill impacts the verdict depends on how the federal appellate courts evaluate several hotly contested issues the trial court decided in the Exxon Valdez case. The federal appellate courts that will decide these issues are entirely outside the control of the state's executive, legislative, and judicial branches of government.

Counsel for the Exxon Valdez plaintiffs have indicated that the punitive damage award applies to the claims of approximately 30,000 victims of the oil spill, mostly Alaskan residents. The amount of the punitive damages award and the number of claimants affected render the award the most significant ever made in this state, and one of the most significant ever made in the United States. The plaintiffs' case took five years to proceed to trial. The federal trial court considered and decided scores of legal issues in motions filed before, during, and after the trial. Given the magnitude of the case, the enactment of sec. 24 of the bill almost certainly would provide an basis for additional post-trial motions, which would further delay final resolution and entry of judgment. Section 24 of the bill also would create substantial uncertainty about the appellate consideration of the punitive damages verdict.

Although the punitive damage award was made in federal court, state law governs if the punitive damage award is based on a state law claim. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. at 278. The plaintiffs in the Exxon Valdez case made claims under state statutes and state common law and sought punitive damages under those state law claims. The State joined the private plaintiffs in arguing that federal maritime law did not preempt applicable state law. The federal district court decided that federal maritime law applied and preempted all of the plaintiffs' state law claims. In re Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991).

Exxon then argued to the federal district court that the state "clear and convincing evidence" legal standard for punitive damages should apply in the Exxon Valdez trial. In its brief to the court on that issue, Exxon stated:

There is no question that a federal court can and should look to prevailing principles of land-based law, to the extent consistent with the policies and purposes of admiralty, when fashioning federal maritime common law rules.

Consistent with the ruling that federal maritime law preempted all state law causes of action, Judge Holland ruled that federal law governs the issue of punitive damages. (Order No. 171). Exxon unsuccessfully repeated its argument in its subsequent motion for a new trial on the plaintiff's punitive damages claims, and likely will continue to argue on appeal that applicable state law should limit punitive damages.

The court's decision that federal maritime law preempts state law is subject to challenge both on motion for reconsideration and on appeal, and may not survive. Another preliminary decision of the federal trial court on a different issue was appealed to and reversed by the Ninth Circuit prior to trial. Evak Native Village v. Exxon Corp., 25 F.3d 773 (9th Cir.), cert. denied, 115 S. Ct. 351 (1994) (reversing in part denial of motions to remand). In addition to the considerable authority the state cited in its briefs supporting the application of state law, several subsequently reported decisions by other federal courts hold that the plaintiffs' state law claims are not preempted by federal maritime law in similar circumstances. See Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994) (holding that federal maritime law does not preempt oil spill-related claims under Rhode Island's Environmental Injury Compensation Act); In re Nautilus Motor Tanker Co., 900 F. Supp. 697 (D.N.J. 1995) (federal maritime law did not preempt oil spill-related claims under N.J. common law); Slaven v. BP America, Inc., 786 F. Supp. 853 (C.D.Cal. 1992) (holding California statutory and common law claims for damages arising from oil spill not preempted). Judge Shortell, who presided over the state court Exxon Valdez litigation, also reached a result contrary to that of the federal trial court, in pretrial orders 15 and 16, September 26, 1990. Whether the Ninth Circuit and the United States Supreme Court would agree with the trial court's decision on the preemption question in the Exxon Valdez case is an open question.

Even if the punitive damages cap and allocation provision do not apply directly to the Exxon Valdez award, HB 158 could have a more subtle effect. In its recent decision in BMW, the United States Supreme Court considered the limitations that state punitive damages laws impose in determining whether the Alabama award violated the due process clause. This type of reasoning would create a further basis for Exxon to argue that the jury's verdict is excessive. Exxon would present the bill's limitations on punitive damages as a standard by which to gauge reasonableness, and argue that the punitive damages awarded are grossly excessive compared to the caps the legislature has deemed appropriate.

Given the federal trial court's prior rulings on punitive damages issues, it is unlikely to determine that sec. 24 of the bill affects the punitive damages verdict in the Exxon Valdez case. The question is unsettled, however; Exxon is likely to argue the issue in a post-trial motion and more significantly, on appeal. Thus, sec. 24 of the bill injects considerable uncertainty and potential delay into the status of the punitive damages verdict.

B. PERIODIC PAYMENT

Current Law

Currently, a plaintiff may request that an award for future damages be paid by periodic payments rather than in a lump sum under Civil Rule 58(d). Periodic payments for future economic damages are permitted for all kinds of tort actions and contract cases. The court also has discretion to require that a defendant post security to ensure that funds are available as periodic payments become due. Civil Rule 58(e).

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Section 8 of the bill would provide the courts further guidance in deciding whether to require security for periodic payments. Section 9 of the bill would amend the provision providing the mechanism for payment of periodic damages, and would require a judgment for periodic damages to specify any future increases for inflation. Section 9 of the bill also limits the periodic payment mechanism to damages arising from personal injury or death.

Analysis

Because these provisions change matters of court procedure, but did not pass the legislature by a two-thirds margin, they probably are invalid as violative of the Alaska Constitution. The Alaska Supreme Court has power to make and promulgate rules governing the practice and procedure in civil and criminal cases in all courts. Alaska Constitution, art. VI, sec. 15. The legislature has no authority to make procedural rules, and can change existing rules only by a two-thirds majority of the members of each house. *Id.*; Linstad v. Sitka School District, 863 P.2d 838, 843 (Alaska 1993); Channel Flying, Inc. v. Bernhardt, 451 P.2d 570, 575, 576 (Alaska 1969).

To determine where the court's power ends and the legislature's begins, the court distinguishes between substantive and procedural law. Substantive law creates, defines, and regulates a right, while procedural law prescribes the method of enforcing the right. Ware v. City of Anchorage, 439 P.2d 793, 794 (Alaska 1968). In order for a statute to be invalidated as infringing on the court's authority to govern court procedure, it must be found that the statute conflicts with a rule promulgated by the court, Matanuska Maid, Inc. v. State, 620 P.2d 182, 188 (Alaska 1980), that the main subject of the statute is not substantive with only an incidental effect on procedure, Winegardner v. Greater

Anchorage Area Borough, 534 P.2d 541, 547 (Alaska 1975); Channel Flying, Inc., 451 P.2d at 576, and that legislature has not changed the rule with the stated intention of doing so, Leege v. Martin, 379 P.2d 447, 451 (Alaska 1963); Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1040 (Alaska 1981).

Applying this standard, the changes in mechanism for payment of periodic damages may violate the Alaska Constitution. The mechanism by which periodic damage payments are provided is inherently procedural. Further, the provision in HB 158 changes an existing rule without any statement that the legislature had this intent. In contrast, the legislature passed the original provision in 1986 by amending Alaska Civil Rule 58 by a two-thirds majority to contain periodic payment provisions.

C. INTEREST

Current Law

Under AS 09.30.070(a), the interest rates on judgments, both pre- and post-judgment, is 10.5 percent. The state pays interest on judgments against it under AS 09.50.280, which provides that judgments against the state will draw "legal interest." The Alaska Supreme Court has interpreted this phrase to mean that the state pays the rate set in AS 45.45.010, which sets the legal rate of interest in Alaska generally, rather than the rate set in AS 09.30.070. State v. Phillips, 470 P.2d 266, 272 (Alaska 1970)

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Except when a judgment involves a contract specifying the interest rate, sec. 14 of the bill would change both postjudgment and prejudgment interest to a variable rate, three percent above the rate for five-year treasury notes in effect on the date of judgment. This method of calculating an interest rate would be similar to the practice in federal courts, although the rates applicable to state judgments would be different.

Analysis

A variable interest rate provides more appropriate compensation to a plaintiff for the loss of the use of the money before payment is made. The new interest rate might not apply to judgments against the state, however, absent an amendment to AS 09.50.280 to cross-reference the new rate in proposed AS 09.30.070(a), rather than the rate specified in AS 45.45.010. This would subject the state to a different, presently higher, interest rate on judgments than private parties would pay. The legislative history does not indicate that this result was intended.

ALLOCATION OF FAULT

Current Law

The current law governing the allocation of fault in a tort action derives from the "Tort Reform Ballot Initiative" approved by Alaskan voters on November 8, 1988. The express purpose of the initiative was to eliminate "joint and several" liability -- the common law doctrine by which multiple defendants are held both jointly and individually liable for the entire amount of damages awarded to a plaintiff irrespective of each defendant's percentage of fault. In pertinent part, the initiative repealed AS 09.16.010, which provided for a right to contribution among co-tortfeasors, and amended AS 09.17.080(d) to read, "[T]he court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault."

In Benner v. Wichman, 874 P.2d 949 (Alaska 1994), the Alaska Supreme Court analyzed the changes in AS 09.17.080 and held that fault could only be allocated among parties who had been joined to the action. Thus, under current law defendants may still be held liable for the fault of any tortfeasors who have not been joined in an action.

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Sections 10 and 11 of the bill would change current law by amending AS 09.17.080 to allow fault to be allocated to all persons responsible for a claimant's damages "regardless of whether the other person, including an employer, is or could have been named as a party to the action." The proposed changes would eliminate the need for a defendant to file a third-party complaint against a negligent but judgment-proof person (whom the plaintiff had elected not to sue) in order to have fault allocated to that person. Moreover, fault could be allocated to persons who are immune from tort liability in a particular case, for example, employers, who are immune from tort liability to injured employees, and the state, which is immune from tort liability for discretionary acts.

In addition, sec. 11 of the bill provides that the assessment of fault against a non-party does not subject the person to liability and may not be used as evidence of liability in another action.

Section 12 of the bill contains new language, added in the Senate Rules Committee, codifying existing Alaska law providing that an agreement not to sue or enforce judgment given to one

person does not discharge another person also civilly liable for the same injury or death. Young v. State, 455 P.2d 889, 893 (Alaska 1969).

Analysis

Sections 10 and 11 of the bill would implement pure "several liability," so that named parties are held accountable only for their own percentage of fault. The plaintiff could not collect damages from nonparties merely because fault is allocated to those persons, however. If the plaintiff chooses to sue unnamed persons in a separate action, the court or jury's allocation of fault in the first action would not be binding or permitted as evidence in the separate action. The bill would allow the court or jury to allocate fault to entities that the plaintiff cannot sue, such as an employer for a work-related injury, or those immune from liability, such as persons protected by the statute of repose or good Samaritan law. The plaintiff would remain uncompensated for that proportion of fault.

This provision creates a problem that HB 158 does not resolve. The bill does not amend workers' compensation law to account for the impact that sec. 10 of the bill would have on a worker injured due to the combined negligence of the employer and a third party. Under current law, a worker injured due to fault on the part of both the employer and a third party is entitled to workers' compensation from the employer and 100 percent tort damages from the third party. Lake v. Construction Machinery, Inc. 787 P.2d 1027 (Alaska 1990). The employee then must reimburse the employer for the workers' compensation benefits (less the employer's proportionate share of litigation costs and attorney fees) from the tort damages recovery. AS 23.30.015. Because HB 158 allows fault to be allocated to non-party employers in a suit against the negligent third party, the employee's tort recovery would be reduced by the employer's percentage of fault.* HB 158 does not amend AS 23.30.015, however, so the employee still would have to reimburse the employer for the full workers' compensation benefits from the partial award from the third party.

* AS 23.30.055 provides that workers' compensation is the exclusive remedy against an employer .

OFFERS OF JUDGMENT

Current Law

Several offer of judgment provisions currently exist to encourage settlement. These provisions generally reward parties who make reasonable offers before trial and penalize parties who reject them. A plaintiff or defendant can make an offer of judgment to the adverse party in a civil case. If the other party rejects the offer and then obtains a judgment more favorable than the offer, the offer will have no effect. If the other party rejects the offer and the ultimate judgment is equal to or less favorable than the offer, however, the prejudgment interest rate is adjusted. It is reduced from 10.5 percent to 5.5 percent simple interest if the offeree with a less favorable judgment than the offer is a plaintiff, and is increased from 10.5 percent to 15.5 percent if the offeree with a less favorable judgment than the offer is a defendant. This mechanism is set forth in AS 09.30.065 and Civil Rule 68.

In addition, Civil Rule 68 provides a further penalty against a plaintiff who obtains a less favorable judgment than the rejected offer. The plaintiff must pay the defendant's costs and attorney fees under Civil Rule 79 or 82 for the period after the date of the offer, as if the defendant had been the prevailing party. Such costs and fees awards are typically 30 percent of a party's actual expenses.

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Section 13 of the bill would change existing offer of judgment law in four ways. First, it would eliminate all adjustment of prejudgment interest rates. Offers of judgment would no longer be connected to the rate of interest assessed on judgments. Second, it would override the Civil Rule 68 provision regarding attorney fees so that the offeror would get full reasonable fees from the date of the offer, not just a percentage of fees. Third, the right to full reasonable fees would apply equally to plaintiffs and defendants, in contrast to current Civil Rule 68's provision for cost and fee awards only against plaintiffs. Fourth, the proposed provision introduces a five percent margin of error to the offer of judgment mechanism; costs and fees would be shifted only if the offeree obtains a judgment at least five percent less favorable than the one offered.

Analysis

As stated, the changes would not pose legal problems. However, some of the changes may be invalid because they amend court rules without the mandatory two-thirds majority vote, and the remaining provisions then would have an effect directly contrary to their intended impact.

Civil Rule 68 provides that the interest rate shall be adjusted "by the amount specified in AS 09.30.065," and sec. 13 of the bill would eliminate that statute's adjustments of prejudgment interest rates. Section 13's award of full reasonable attorney fees, intended to override Civil rule 68, may be invalid as an amendment of court rules in violation of art. IV, sec. 15 of the Alaska Constitution. Thus, the primary financial penalty for failing to accept a reasonable offer would disappear, but the replacement for that penalty would be ineffective and sec. 13 of the bill would have a net impact of reducing rather than increasing the incentives for early settlement of cases.

Finally, the interrelationship between Civil Rules 68 and 82 would cause a result presumably unintended by the legislature. Under Civil Rule 82, the plaintiff is entitled to recover 10 percent of the recovery as attorney fees, while under the proposed amendment to Civil Rule 68(b), the plaintiff also would be entitled to receive full attorney fees incurred from the date of the offer of judgment. Section 13 of the bill provides no mechanism for balancing these overlapping fee provisions.

MALPRACTICE

A. ADMISSIBILITY OF EXPERT TESTIMONY

Current Law

Current law generally restricts a jury from considering any evidence other than testimony of expert witnesses in determining whether a professional breached the standard of care in a malpractice case. Kendall v. State, Div. of Corrections, 692 P.2d 953, 955 (Alaska 1984). The court determines under Evidence Rule 702(a) whether a witness has sufficient expertise to testify as an expert. The witness must qualify by "knowledge, skill, experience, training, or education" to assist the jury "to understand the evidence or to determine a fact in issue." A witness need not possess a particular license or academic degree in order to qualify as an expert. Handley v. State, 615 P.2d 627, 630 (Alaska 1980).

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Under secs. 15 and 16 of the bill, neither the plaintiff nor the defendant in a professional malpractice action could present an expert to testify at trial who was not both licensed by a state or country and certified by a state-recognized board as having expertise directly related to the particular field or matter at issue. The only exception would be for professions not licensed in any state or country.

Analysis

If a profession is not licensed in Alaska, but is licensed in any other state or country, then no Alaskan professional could testify as an expert. The licensed professional also would have to be board-certified to be qualified to testify, even though most professions (including general practice physicians) do not have boards that certify expertise. For example, if the plumbing profession were licensed only in New Jersey, only a New Jersey plumber could testify in Alaska about the standard of care that Alaskan plumbers should use in Alaska plumbing construction. If the plumber were not board-certified because a board to certify plumbers did not exist, even a New Jersey plumber could not testify. To the extent that these limitations are impossible to meet or unduly limit a party's ability to present evidence at a civil trial, they probably violate due process. Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14, (1950). The federal district court and the Tennessee Supreme Court upheld the constitutionality of a Tennessee statute that limited expert testimony in a medical malpractice case to physicians licensed in the state or contiguous states, because the statute included a waiver provision if appropriate witnesses were unavailable. Ralph v. Nagy, 749 F. Supp. 169, 175 (M.D. Tenn. 1990) quoting Stulphin v. Platt, 720 S.W.2d 455, 458 (Tenn. 1986). Absent such a waiver provision, the Alaska Supreme Court probably would find this provision unconstitutional because it lacks a reasonable relation to a legitimate public purpose. See Pan-Alaska Const., 892 P.2d at 162; Gates, 822 P.2d at 462; Keyes, 750 P.2d at 351.

No other state has adopted similar restrictions on the admissibility of expert testimony. Some states require a medical malpractice expert to have knowledge related to the particular medical field. See, e.g., Colo. Rev. Stat. Ann. §13-64-401 (West 1989); Kan. Stat. Ann. § (1995); R.I. Gen. Laws § 9-19-41 (1995). Michigan law requires that if a health professional subject to the malpractice action is a specialist, the expert also must have that specialty, and if the health professional is a board-certified

specialist, then the expert also must be board-certified. Mich. Comp. Laws § 600.2169 (1) (1995). North Carolina has an evidence rule requiring an expert to have the same or a similar specialty as the health care provider subject to the malpractice claims. Evidence Rule 702(b), N.C. Gen. Stat. § 8C-1 (1996). The court can waive this requirement if it finds extraordinary circumstances that warrant permitting the witness to testify to serve the ends of justice. Id. at 702 (e).

Further, HB 158 may be ineffective to change the rules for admission of expert testimony because the bill did not expressly provide for an amendment to court rules and the bill did not pass by the required two-thirds majority. See Alaska Constitution, art. IV, sec. 15. The version of the bill presented on the House floor contained a section expressly amending Evidence Rule 701, but the section failed to pass by the required two-thirds majority. The Senate did not replace the section and therefore did not vote on it.

B. NON-LIABILITY OF HOSPITALS

Current Law

Generally, a hospital is not liable for the act of a physician or other health care provider who is an independent contractor, unless the hospital itself is negligent. The hospital has an independent duty to use reasonable care in granting staff privileges to practice in the hospital and to supervise the medical treatment provided. Jackson v. Power, 743 P.2d 1376, 1378 n.2 (Alaska 1987). This general liability exemption does not apply when the hospital contracts a service that it is required by law to provide, for example, emergency services, and the contractor is negligent. 743 P.2d at 1382-85 (Alaska 1987). This doctrine of "nondelegable duties" applies also in other areas of endeavor based on "the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." 743 P.2d at 1384 (quoting Prosser and Keeton on the Law of Torts § 71 at 511-12). Currently, hospitals may guard against vicarious liability for an emergency room physician by joining the negligent physician as a co-defendant to any suit and by requiring its emergency room physicians to carry adequate malpractice insurance.

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Section 18 of the bill limits liability of hospitals for civil damages caused by an emergency room physician if the hospital posts and publishes notice that the physician is an independent

contractor and if the physician holds liability insurance coverage for at least \$500,000 per incident. The bill codifies the hospital's independent duty to exercise reasonable care in granting and reviewing staff privileges. Whether the bill is intended to supersede a hospital's existing duty to supervise the medical treatment provided by an emergency room physician is unclear.

Analysis

8 This section does not appear to have any legal or constitutional problems.

ARBITRATION

HB 158

Section 17 of the bill would establish a requirement for nonbinding arbitration in tort cases with damage claims of less than \$50,000 that are not in small claims court. In such cases, the court would appoint an attorney arbitrator, whom the parties must pay "in equal shares." After an expedited period of discovery and a hearing, the arbitrator would render a decision. A party could reject the decision and receive a court trial, but attorney fees would be awarded against a party who chose this route but failed to improve on the arbitrator's decision. Section 17 of the bill does not state the manner of collecting arbitrators' fees and the appropriate division of arbitration costs in cases with multiple plaintiffs or defendants.

Analysis

Section 17 of the bill would provide for the first mandatory alternative dispute resolution in Alaska beyond the mediation that the court may order under Civil Rule 100. It would have narrow applicability, generally to property damage tort cases in district court. Because the parties with smaller claims would bear arbitration costs that parties in larger actions would avoid, the section may raise equal protection problems.

Further, sec. 17 of the bill may be invalid under art. IV, sec. 15, of the Alaska Constitution because it creates a court procedure without changing substantive rights, as discussed above.

FRIVOLOUS OR IMPROPER PRACTICE

A. NEW CIVIL CAUSES OF ACTION

Section 19 of the bill would allow parties to litigation to file new claims or spinoff lawsuits against other parties and their attorneys for "improper practice," and to seek punitive damages.

Current Law

At present, a person may bring a cause of action, under the common law action for abuse of process, against an opposing party for conduct during other litigation. Prosser and Keeton on the Law of Torts §§ 120-21 cited with approval in J & L Diversified Enter., Inc. v. Anchorage, 736 P.2d 349, 351 n. 3 (Alaska 1987). These causes of action ordinarily must be brought after prevailing in the underlying litigation. Id. at 892. The Alaska Supreme Court has set out the elements of the cause of action:

[A]buse of process consists of two essential elements, "first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." . . . The second element "contemplates some overt act done in addition to the initiating of the suit. . . . '[T]he mere filing or maintenance of a lawsuit -- even for an improper purpose -- is not a proper basis for an abuse of process action.'"

DeNardo v. Michalski, 811 P.2d 315, 317 (Alaska 1991) (citations omitted).

Parties, counsel, witnesses, judges, and juries have absolute immunity against a defamation action for statements made in litigation and pertinent to some issue in the litigation. Prosser and Keeton on the Law of Torts § 114 at 816-17; cf. Nizinski v. Currington, 517 P.2d 754, 756 (Alaska 1974). Of course, perjury would be subject to criminal liability under AS 11.56.200 or 11.56.230.

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Section 19 of the bill contains language added in the Senate Rules Committee and taken from HB 316. It would create a new cause of action under subsection (d) which is similar to the common law action for abuse of process, except that the new cause of action requires only a showing of either lack of probable cause

or ulterior motive, rather than both. Prosser and Keeton on the Law of Torts at 893-95. Section 19 of the bill also creates a new cause of action under subsec. (a) for various conduct including conduct that violates Civil Rule 11 (see discussion below), or conduct similar to abuse of process. The section creates liability for "reckless" false allegations or material misstatements of fact in the complaint or answer. The causes of action created under both subsections (a) and (d) may be asserted against the party or the party's attorney regardless of the outcome of the underlying litigation that gave rise to the claim. Under both provisions, the prevailing party may seek punitive damages and is entitled to an award of actual reasonable attorney fees.

Section 19 of the bill would dictate two methods for bringing the causes of action. For violations of subsec. (a) allegedly committed by the opposing party, the action would have to be maintained as a compulsory claim or counterclaim in the underlying lawsuit. For the violations of subsec. (a) allegedly committed by the opposing party's attorney, and for violations of (d) allegedly committed by either an opposing party or the party's attorney, the action would have to be brought after the conclusion of the underlying action.⁹

Additionally, subsec. (b) would require a court to enter judgment against a party on the party's claim or defense if the party intentionally made a material false statement in connection with the claim or defense.

Under sec. 19(h) of the bill, "[n]either the state, nor an agent or employee of the state acting within the scope of that agency or employment, is subject to liability under this section." This immunity parallels existing state immunity against claims for abuse of process set out in AS 09.50.250(3).

⁹ The precise demarcation between the causes of action under subsecs. (a) and (d) is unclear. Under (a)(2) and (c)(1), a party may have a compulsory counterclaim against the opposing party for failing to determine that each allegation in a pleading the opposing party signed was well grounded in fact. The same conduct may require that the action be brought after final judgment in the underlying action under (d)(1) and (f) because it could also be characterized as initiating an action without probable cause. Similarly, both (a)(3) and (d)(2) create liability for an ulterior motive.

Analysis

The creation of new causes of action for alleged false claims and improper conduct in litigation would increase the cost and complexity of litigation, particularly litigation against a judgment-proof opponent who could use the new causes of action to disrupt the adversary's case without fear of effective retaliation. The new causes of action could be characterized as more of a "sword" than a "shield."

To the extent that sec. 19 of the bill seeks to create a new category of compulsory counterclaim, based on conduct separate from that giving rise to the original lawsuit, it conflicts with Alaska Civil Rule 13. This aspect of sec. 19 of the bill would probably be invalid under art. IV, sec. 15, of the Alaska Constitution. If it were valid, this section could lead to a cycle of claims and counterclaims, as one party counterclaims that a claim was reckless or contained misstatements, the other party asserts that counterclaim was similarly deficient, and so on. The compulsory counterclaim provisions would create complexities in litigating the underlying case. For example, if a party made a misrepresentation that is corrected during the trial, a portion of the trial might be devoted to the question of whether the initial misrepresentation was reckless.

Additionally, a compulsory counterclaim requirement would often lead to a conflict between the client and attorney that would require the client to obtain new counsel. For example, if a client asserted reliance on the attorney for advice about the legal merits of an action, the original attorney would become a witness as to attorney-client communications and legal theory and might be precluded from continuing as the client's advocate in the underlying action. In some cases, the client may be forced to reveal attorney-client communications that otherwise would be privileged. Tactical use of such counterclaims could adversely impact both plaintiffs and defendants.

The requirement that all defenses be asserted based on "probable cause" may be difficult for defendants to meet. "Probable cause" means "having more evidence for than against." Black's Law Dictionary (5th Ed.). Typically, defense counsel must prepare the answer with very incomplete information and little or no evidence about the case. Current practice is to assert all defenses that conceivably might apply, in order to avoid waiving those defenses. Defenses that prove unfounded can later be dropped. Section 19 of the bill could make an attorney liable to the plaintiff for asserting such defenses in an answer, with the

alternative of being liable to the client for failing to timely assert a defense.

In some cases, a business's current liability insurance may not cover the derivative litigation arising from an underlying suit that otherwise would be covered by the insurance. While comprehensive general liability insurance policies appear to cover much of the litigation that could be generated by this section, some businesses carry more limited coverage that may not encompass the libel and slander claims authorized by sec. 19 of the bill. In such cases, insurance companies would be expected to decline to provide a defense to the spinoff claims, or to indemnify any adverse judgments.

B. SANCTIONS FOR PLEADINGS

Current Law

Under Civil Rule 11, attorneys or parties must sign their pleadings, and their signatures certify that the pleadings are well grounded in fact and law to the extent of their knowledge and belief after reasonable inquiry, and that the pleadings have not been filed for harassment or other improper purposes. Violations of this rule and any other civil rule may be sanctioned under Civil Rule 95. The court may require the offending party or attorney to pay the opposing party "costs or attorney fees as the circumstances of the case and discouragement of like conduct in the future may require." The court may impose an additional fine on an attorney of up to \$1000.

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Section 21 of the bill amend Civil Rule 95 for violations of Civil Rule 11 only. The bill would mandate sanctions for violations of Civil Rule 11 in an amount left to the court's discretion. An award to the opposing party is limited to those costs or fees "incurred because of" the violation. The bill increases the possible fine payable to the court to \$10,000 and applies the fine to parties as well as attorneys.

Analysis

The first five sentences of sec. 21 of the bill are substantively identical to existing Alaska Civil Rule 11. The remainder of sec. 21 of the bill is intended to amend Alaska Civil Rule 95. This rule change failed to receive the two-thirds majority vote necessary to be effective under article IV, section 15 of the Alaska Constitution.

FELON PLAINTIFFS

Current Law

AS 09.65.210 was enacted in 1986 to preclude 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 (including a plea of nolo contendere), and (3) the felony substantially contributed to the injury or death. The current law maintains the felon's right of action under 42 U.S.C. 1983, the federal Civil Rights Act.

HB 158

Section 20 of the bill expands the liability limitation under AS 09.65.210 to apply when the claimant was attempting to commit a felony or fleeing from the commission of a felony, not merely "engaged in the commission of a felony." It also removes the requirement that the person be convicted. A felon's right of action under 42 U.S.C. 1983, the federal Civil Rights Act, would be no longer exempted from the prohibition on claims.

Analysis

Subsection (a) of sec. 20 of the bill does not state the standard of proof for proving the plaintiff was committing or attempting to commit a felony. In sec. 7 of the bill, the legislature specified the "preponderance of evidence" standard for establishing that the person was committing or attempting to commit a felony. The lack of a standard of proof is troublesome in light of the "clear and convincing evidence" standard set in subsec. (b) of sec. 20 of the bill for a wrongful death action. This section does not appear to have any other legal problems. A prisoner would be prohibited under this section only from maintaining a federal civil rights action in state court, not in federal court, so that all such claims against state officials would be decided by federal courts.

REPORT

Under sec. 22 of the bill, the director of the division of insurance would be directed to report to the legislature by January 1, 1998 on any impact the bill may have had on liability insurance rates.

Hon. Tony Knowles, Governor
Our file: 883-96-0096

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SEVERABILITY

Section 23 of the bill repeats AS 01.10.030 and does not vary the general rules on severability noted in State v. Kenaitze Indian Tribe, 894 P.2d 632, 639 (Alaska 1995).

APPLICABILITY

If enacted, the bill would be applicable to all civil actions accruing on or after the effective date, except the punitive damages provisions would apply retroactively to a cause of action if judgment had not yet been entered. Additionally, as discussed above under Statute of Repose, sec. 3 of the bill would have a retroactive effect to bar actions if the "final act" took place more than ten years before the injury occurring after the effective date.

CONCLUSION

The bill raises substantial constitutional and other legal concerns that warrant your serious consideration.

Sincerely,



Bruce M. Botelho
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JOHN C. HUGHES
RICHARD S. GARY

Reply to: JUNEAU

March 11, 1994

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

Re: House Bill 292

Dear Representative Porter:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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HUGHES THORSNESS GANTZ POWELL & BRUNDIN
ATTORNEYS AT LAW

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

Thank you again for opportunity to comment on this legislation.

Sincerely,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN

By: Michael L. Lessmeier
Michael L. Lessmeier

3673 xml/ns

Anchorage newspaper
editorial on
Brian's TORT Bill

Publisher: BILL J. ALLEN

"Believing in Alaskans, putting Alaska first"

Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM J. TOBIN

The Anchorage Times Commentary in this segment of the Anchorage Daily News does not represent the views of the Daily News. It is written and published under an agreement with former owners of The Times, in the interests of preserving a diversity of viewpoints in the community.

Porter's progress

A JOURNEY of a thousand miles, according to Lao-tzu, must begin with a single step. The ancient Chinese philosopher neglected to mention, though, the length of time that might be involved.

For Rep. Brian Porter, his journey of a thousand miles has taken four years — so far, at any rate. He won't know for a few more days or weeks whether he's reached his destination — it all depends on Gov. Tony Knowles.

Porter's long-sought objective is to revise Alaska's liability laws to place reasonable limits on the size of damage awards handed out by judges and juries, and to discourage frivolous lawsuits that tie up the state court system and waste a lot of time and money.

Legislation sponsored by the Anchorage Republican to accomplish this is headed to the governor's desk. If the governor approves, Porter will have achieved what some have called a mission impossible. Over the years, others have tried and failed to get tort reform through the Legislature.

The GOP lawmaker from House District 20 picked up the tort reform torch as soon as he arrived in Juneau four years ago. It was an issue, he said, in which he believed strongly. Many small businesses and individual Alaskans were being hurt by excessive legal costs resulting from existing state liability laws. Porter intended to change that.

He began with the support of a long list of individuals, businesses, associations and civic organizations. Statewide opinion surveys showed four out five Alaskans endorsed the concept. Still, all that support was no match for the well organized opponents — trial lawyers who pack a lot of clout in Juneau.

The first year, Porter's tort reform bill got no further than a House committee. The second year, it made it to the Senate — only to die there. The third year, the first session of the 19th Legislature, his bill again cleared the House — but once again bogged down in a Senate committee. With help from Senate President Drue Pearce and the Republican majority, Porter's bill eventually moved through the Senate committee process, cleared the Senate floor and returned to the House for one final vote of approval.

If it's signed into law, the bill will make a number of significant changes to Alaska law — all geared toward creating a more equitable distribution of the cost and risk of injury, and reducing the costs associated with the liability system. At the same time, it will ensure that people injured through the fault of others receive adequate and appropriate compensation.

On the day his bill cleared its final legislative hurdle, Porter sounded as euphoric and relieved as someone who just completed a walk of a thousand miles.

We trust the governor will allow him the final step.

The Anchorage Times

Publisher: BILL J. ALLEN

"Believing in Alaskans, putting Alaska first"

Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM J. TOBIN

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The big lie

THE TRIAL LAWYERS are in a panic. After years of being able to dip into the cookie jar and extract goodies worth millions of dollars, they tremble at the prospect of losing bonanza payoffs from outrageous punitive damage suits.

Their ride on the gravy train will end if Gov. Tony Knowles displays the courage to face them down in what is becoming a major shootout over House Bill 158. That measure, passed by the 1996 Legislature during the course of its regular session, is known as the tort reform bill.

The reform that it promises, if Gov. Knowles does not veto the bill, will hit the pocketbooks of trial lawyers — the attorneys who have raised to a fine art the practice of suing anybody and everybody, claiming that individuals and businesses, large and small, need to suffer stupendous punishment in liability suits, over and beyond any actual damages that may have occurred.

The fishermen awaiting huge damage awards from the Exxon Valdez oil spill have become the latest tools in the trial lawyers' bag of tricks. But they need not worry. This measure will not affect the Exxon Valdez case, which is in federal — not state — court.

In an advertisement in the newspaper yesterday, an "open letter" to the governor made the outrageous claim on behalf of fishermen that the tort reform bill "increases the chances of future oil spills (the emphasis is in the wordage of the ad) by radically reducing the deterrent effect of Alaska's tort laws."

The ad tells the governor: "If you sign it, this legislation will send a clear message to polluters that Alaska is a safe place for them to operate and that reckless or malicious conduct will go unpunished."

Hogwash.

The implication is that the oil industry — relieved of excessive punitive damages — will see approval of this bill as an open invitation to run rampant over Alaska's environmental laws.

It's the big lie technique at work. The claim is absurd. Enactment of this bill in *no way* (the emphasis is ours) will send any kind of a message that Alaska is a safe place for polluters. To suggest that reckless and malicious conduct will go unpunished is ridiculous to the extreme.

But emotions are the goal here — an attempt to frighten good people and stampede them into telling the governor he should not take action that will shut down the punitive damage claim mill that has made a relative small number of lawyers very, very rich.

This "open letter" ad was signed by organizations representing commercial fishermen operating in Cordova, Bristol Bay, Kodiak, Cook Inlet, Kenai, Prince William Sound and other coastal regions of Alaska. But did these fishermen really write this so-called letter?

Yeah, sure. How about a trial lawyer, instead?

ice of The Times



Urge Gov. Knowles to sign tort reform legislation

THE ALASKA Legislature has passed a measure, House Bill 158, that takes a giant step toward making our civil court system more fair.

This important legislation, now awaiting Gov. Tony Knowles' signature, puts a cap on what have become increasingly outrageous punitive damage awards handed out in lawsuits — awards that can destroy companies large or small. The threat of seeking such awards is used as a threat to force unfair, undeserved settlements.

The bill also aims to put an end to the frivolous lawsuits that choke our courts and drive up costs for everyone who pays for health, auto or other insurance.

Trial lawyers, the very people who have turned our civil legal system into a giant slot machine, are trying their best to persuade Gov. Knowles not to sign the legislation. They want things to stay the way they are now. And you cannot blame them. The system is a gold mine for lawyers.

But for the rest of us ordinary people, it's something else. It's evolving into something that daily threatens companies, jobs and our pocketbooks. A single outrageous award can put people out of work and at the same time increase what the rest of us pay for products and insurance. For us, the current system is not a good deal.

We urge that you let Gov. Knowles know that ordinary people want the system reformed; that while it now is

good for lawyers, it's lousy for the rest of us. We don't want any more outrageous jury awards for hot coffee or bad paint jobs.

Tell him that we believe in fairness; that a person should be compensated for a loss, but not be given the keys to the store on a jury's whim.

Gov. Knowles needs to hear from you as quickly as possible on this important issue. He needs to know that ordinary people who depend on companies small and large for jobs want the law changed.

You can telephone his office in Juneau at (907) 465-3500.

You can send him a fax at (907) 465-3532.

Or you can send a letter to P.O. Box 110001, Juneau AK 99811-0001.