HB

58

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT OF SFC: APR 11 1997

DATE: 3/19/97

FURTHER:

DATE TURNED IN TO OFFICE: 4-14-97

Finance Committee considered CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL 58(FIN) am

CIVIL ACTIONS & ATTY PROVIDED BY INS CO.

and recommends:

[✓] be **replaced** with SCS CS SSHB 58 (FIN)

[ ] adopt **previous** ____ CS _____ (____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical change
[ ] new: SCR#____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
	✓		✓		
			✓		
				X NOT NECESSARY	
					✓
Co-Chair:	✓	Co-Chair:			
Co-Chair:	✓	Co-Chair:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
DOA	4/4	✓	

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
2 Law	2/20	✓	
3 DCED	2/20	✓	
4 Judicial Council	2/19		26.5
5 Courts	3/11		19.4

[ ] **APPROPRIATION -- no fiscal note**

***include fiscal notes accompanying Governor's bill**

REPORTED OUT OF SFC APR 11 1997

FISCAL NOTE

STATE OF ALASKA

1997 LEGISLATIVE SESSION

BILL NO. CS SSHB 58 (FIN) am

Revision Date: _____

Department Affected: Administration

Title: "An Act relating to civil actions; independent counsel provided under an insurance policy;amending Rules 16.1, 41, 49, 58, 68, and ....."

BRU: Risk Management

Component: Risk Management

Sponsor: Representatives Porter, Cowdery, Bunde

Requestor: Senate Finance

COMPONENT SERIAL NO. 0071

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 97) cost: $ -0-

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

State agency civil liability exposure and the amount Risk Management will ultimately pay in future liability loss settlements and allocated loss adjustment expense (defense costs) will be reduced by this legislation.

The extent of such savings is difficult to forecast, due to the uncertainty that the limitations in the type of claims that may be filed or the amounts of damages that can be awarded will be realized in future liability claims filed against State agencies.

The state funds the liability coverage provided through Risk Management on a "cash flow" basis, appropriating only the amounts expected to be paid the next fiscal year—collected solely through interagency receipts assessed each agency.

In future years, Risk Management's liability premium assessments will reflect the reductions actually realized by this legislation as premiums are developed from actual claims expenses incurred.

No immediate negative fiscal impact can be shown due to outstanding unfunded liabilities.

Prepared by: J. Brad Thompson, Director

Phone: 465-5723

Division: Risk Management

Date: _____

Approved by Commissioner: Mark Boyer

Agency: Department of Administration

Date: 4/4/97

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FISCAL NOTE

Bill Version: CSSSHB 58(FIN)
(H) Publish Date: 3/17/97

STATE OF ALASKA
1997 LEGISLATIVE SESSION

REPORTED OUT OF COMMITTEE APR 11 1997

Revision Date: 03/11/97
Title: Tort Reform
Sponsor: Rep. Porter
Requestor: House Judiciary

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

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	5.7	5.7	5.7	5.7	5.7	5.7
TRAVEL						
CONTRACTUAL	13.7	13.7	13.7	13.7	13.7	13.7
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	19.4	19.4	19.4	19.4	19.4	19.4
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

Fund Source (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	19.4	19.4	19.4	19.4	19.4	19.4
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	19.4	19.4	19.4	19.4	19.4	19.4

Estimate of any current year (FY 97) cost: None

Positions

Full-Time						
Part-Time	1.0	1.0	1.0	1.0	1.0	1.0
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Agency: Alaska Court System
Phone: 264-8228
Date: 03/11/97

Approved by: Stephanie J. Cole, Acting Administrative Director
Agency: Alaska Court System
Date: 03/11/97

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10:54 AM
Rev 1/97

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Alaska Court System
Fiscal Analysis
CSSSHB 58 (JUD)

CSSSHB 58 (JUD) proposes numerous changes to that portion of the civil justice system which deals with personal injury and property damage. These changes are primarily intended to redistribute costs and risks associated with personal injury and property damage.

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

At the present time, a defendant has no right to pay a civil judgment for future damages periodically; such damages must be paid as a lump sum unless the plaintiff requests periodic payments. Plaintiffs rarely exercise this option because they generally do not perceive periodic payments as being in their economic best interest. Thus, as a practical matter, the court system does not now hold hearings on this issue. Sections 11, 12, 13, and 14 of CSSSHB 58 (JUD) give a defendant the option of making periodic payments to a successful plaintiff for judgments in excess of $100,000. The judgment must set the amounts of the payments, including any increases for anticipated inflation, the interval between payments, and the number of payments or the period of time over which payments will be made. Setting the appropriate amount, number, and inflation factor of these payments will require taking and evaluating conflicting testimony from experts and others representing each party, if the parties disagree. Such disagreements are inevitable. The payment hearing will be held before a judge and will not require the expenditure of jury costs. However, additional costs will inevitably arise when a percentage of plaintiffs return to court in later years because the defendant has stopped making periodic payments for some reason. This fiscal note estimates that approximately ten percent of superior court tort judgments are for future damages in an amount in excess of $100,000.

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

Section 15 of CSSSHB 58 (JUD) repeals and reenacts AS 09.17.070, relating to collateral benefits. This amendment essentially provides that the amount which a defendant owes to a plaintiff will be reduced by whatever insurance benefits or other benefits the plaintiff has already received as compensation. Implementation will require extra trial time, in order for the jury to hear testimony regarding the types of coverage which might be involved, the amounts paid, and determining which payments may be offset. The current statute relating to collateral benefits is substantially less complex. Moreover, at the present time only the judge hears the testimony, and then only if the jury has returned a verdict for the plaintiff. The proposed system is thus less efficient and results in longer trials and more jury costs.

Section 23 of CSSSHB 58 (JUD) modifies the amount at which prejudgment interest is accrued by changing it from a fixed rate to a floating rate. This complicates the process of calculating interest owed, something which is done by the court system. Such calculations are performed thousands of times per year, so even small increases in time spent per case can have a major impact on clerical staff.

This fiscal note reflects costs to automate this process and thus keep clerical time increases to a minimum.

Section 28 of CSSSHB 58 (JUD) increases the number of medical malpractice three-person expert advisory panels which will be paid for each year by the court system, by requiring the appointment of such panels in cases involving claims against government doctors. The number of additional panels appointed each year should be relatively low, and this note does not include costs for payments to the panel members.

CSSSHB 58 (JUD) can be expected to save some judicial costs by reducing the motion practice currently engaged in on issues which were not clearly resolved the last time tort laws were amended. The amount of savings is speculative, and this note assumes that it is offset by the longer trials and increased appeals that will result until the supreme court resolves issues created by the procedural and substantive changes made by CSSSHB 58 (JUD). In this regard, note that several of the pro-tort reform attorneys who testified in favor of HB 292 during the 18th Legislature conceded that that bill would result in increased litigation for a period of years, until all the legal issues were resolved by appeals to the supreme court. One of these attorneys estimated the period of increased litigation at five to seven years.

This fiscal note makes the following assumptions:

In superior court in FY 96, there were 1005 tort cases filed. Approximately 42 tort trials were held, with approximately 50 percent returning a verdict for plaintiff; there were approximately 53 tort cases decided by summary judgment, with all returning a verdict for the defendant; and there were approximately 42 default judgments entered, with all entered for the plaintiff. Determining periodic payments will average one day of court time without a jury. Determining collateral benefits will average one-half day of court time, including jury time. Time spent is discounted by two-thirds in default cases.

In district court in FY 96, there were 515 tort cases filed (other than small claims). Approximately 21 tort trials were held; approximately 26 tort cases were decided by summary judgment; and approximately 21 default judgments were entered. Because of the lower dollar value of cases, not as much time will be invested by litigants in determining collateral benefits; it is assumed that one-half as much court time will be used. District court jury costs are also less, because half as many jurors are used.

Alaska Court System
Fiscal Analysis
CSSSHB 58 (JUD)

Personal Services Position	Salary	Benefits	Total
Pro Tem Judge, fully vested, Anchorage, PPT, 1 3/4 months	$3,706	$2,025	$5,731

Contractual Services		
Jury Fees		8,663
Superior Court-		
42 – 1/2 day length collateral benefit hearings with 13 jurors at $12.50 a half day (from trials)	6,825	
District Court-		
21 – 1/2 day length collateral benefit hearings with 7 jurors at $12.50 a half day (from trials)	1,838	
Programming *(one-time cost)*		
Modification of Statewide Court Information Processing System to provide automatic updating of prejudgment interest rates. This expenditure will reduce personnel costs for entering interest rate information.		5,000
Total Contractual Services		13,663

Estimated Total Cost	$19,394

FISCAL NOTE

(F) Version: 4 CSSSHB 58(FIN)
(H) Publish Date: 3/17/97

REPORTED OUT OF APR 11 1997

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Revision Date: 02/18/97
Dept. Affected: Alaska Judicial Council
Title: Civil Actions & Attorneys Provided by Insurance Company
BRU:
Components:
Sponsor: Reps. Brian Porter and John Cowdery
Requestor:
COMPONENT SERIAL NO. 0771

EXPENDITURES/REVENUES (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	17.5	16.7	16.7	16.7	16.7	16.7
TRAVEL		1.3	1.3	1.3	1.3	1.3
CONTRACTUAL	9.0	1.2	1.2	1.2	1.2	1.2
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	26.5	19.2	19.2	19.2	19.2	19.2
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	26.5	19.2	19.2	19.2	19.2	19.2
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	26.5	19.2	19.2	19.2	19.2	19.2

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	1	1	1	1	1	1
TEMPORARY	1	1	1	1	1	1

Estimate of current year (FY 97) cost: $ None

ANALYSIS: (See attached pages)

Prepared by: William T. Cotton, Executive Director
Phone: 279-2526
Agency: Alaska Judicial Council
Date: 2/19/97

Approved by: William T. Cotton, Executive Director
Agency: Alaska Judicial Council
Date: 2/19/97

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Analysis for Alaska Judicial Council
Fiscal Note on HB 58:
Civil Actions and Attorneys Provided by Insurance Company

The bill assigns two tasks to the Alaska Judicial Council: (1) review and report on alternative dispute resolution (ADR) programs in other states; and (2) collect, analyze and report on Alaska civil cases which are settled. The costs of the two functions are discussed separately.

1. Review of ADR Programs

The bill provides:

> **Section 09.42.010. Legislative Intent.** It is the intent of this legislation to create a pilot alternative dispute resolution procedure within the existing civil litigation system in order to promote the timely, inexpensive and efficient resolution of civil disputes.
>
> **Sec. 09.42.020. Pilot program for alternative dispute resolution.** The Alaska Judicial Council shall consult with the Alaska Dispute Settlement Association, review court sanctioned alternative dispute resolution programs in other states and in the federal court system, and make recommendations to assist the legislature and the Alaska Court System in the establishment of a pilot program for alternative dispute resolution within the Alaska Court System. The Alaska Judicial Council shall submit a written report to the legislature and to the Alaska Supreme Court within six months after the effective date of this legislation. The report shall include specific types of programs; specific types of cases within each program which are amenable to alternative dispute resolution; the cost to the parties and to the Alaska Court System under these programs; and the qualifications of the neutrals who will provide dispute resolution services under the programs, including nonlawyers.
>
> **Sec. 09.42.030. Definitions.** In this chapter,
> (a) "alternative dispute resolution" is limited to arbitration, mediation and early neutral evaluation.

The Council would hire a contract attorney to complete much of the review of ADR programs. The attorney would be paid $35 per hour for 200 hours for a total of $7,000. The contract attorney would work with Council staff to complete the project. Other costs would include a temporary secretary, long distance telephone, and costs for various books and other literature.

ADR Costs Summarized

Personnel

Temporary Secretary 50 hours @ $16.38/ hour	$ 841

Contractual

Contract Attorney (200 hours @$35/hour)	$7,000
Telephone	$ 500
Books	$ 300
TOTAL	**$8,641**

2. Review of Settlement Data

The bill provides in relevant part:

> Sec. 42. AS 09.68 is amended by adding a new section to read:
>
> Sec. 09.68.130. **Collection of settlement information.** (a) Except as provided in (c) of this section, the Alaska Judicial Council shall collect and evaluate information relating to the compromise or other settlement of all civil litigation. The information, including the case name and file number, a general description of the claims being settled, the dollar amount of the settlement to whom it was paid, and any nonmonetary terms, shall be collected on a form developed by the council for that purpose.
>
> (b) The information received by the council under (a) of this section is confidential. This restriction does not prevent the disclosure of summaries and statistics in a manner that does not allow the identification of particular cases or parties.
>
> (c) The requirements of (a) of this section do not apply to the following types of cases:
>
> (1) divorce and dissolution;
>
> (2) adoption, custody, support, visitation, and emancipation of children;
>
> (3) children in need of aid cases under AS 47.10 or delinquent minors cases under 47.12;
>
> (4) domestic violence protective orders under AS 18.66.100- 18.66.180;
>
> (5) estate, guardianship, and trust cases filed under AS 13;
>
> (6) small claims under AS 22.15.040.

The Council estimates that 8,000 settlement forms would be filed per year. The data would be entered into a Microsoft Access database (estimating four minutes per form). A data entry employee also would review approximately 500 case files per year to check the accuracy of the settlement data and put the settlements in context (estimated 20 minutes per case). Finally, the data employee would spend about 300 hours cleaning the data and working with Judicial Council staff to conduct the preliminary analysis.

Council staff would complete the analysis and issue a fairly brief annual report based on the settlement forms. A more extensive report would be prepared in the third year based on data both from the settlement forms and the case data. The time of existing Council staff is not included in the fiscal note.

Other costs include short trips to Fairbanks and Juneau to collect case data, a temporary secretary for forty hours, and a small amount for printing and postage.

Settlement Data Review Annual Costs Summarized

Personnel	
One Part-time Data Entry/Analysis Employee	
8,000 forms @ 4 minutes each =533 hours	
5,000 case files @ 20 minutes each =167 hours	
Data cleaning and Prelim Analysis =300 hours	
Total Hours: 1,000 @ $16.00 per hour =	$16,000.00
Temporary Secretary	
40 hours @ $16.83 per hour =	$ 673.20
Travel	
One 5 day trip to Fairbanks	$ 700.00
One 3 day trip to Juneau	$ 600.00
Contractual	
Postage and Printing	$ 1,200.00
TOTAL	**$19,173.20**

FISCAL NOTE

No. 3

Bill Version: CSSSHB 58(JUD)

(H) Publish Date: 2/27/97

STATE OF ALASKA

1997 LEGISLATIVE SESSION

REPORTED OUT OF SFC APR 11 1997

Revision Date:

Department: Commerce and Economic Development

Title: An Act relating to civil actions: relating to independent counsel provided under an insurance policy.

BRU: Insurance

Component: Insurance

Sponsor: Porter

Requestor:

COMPONENT SERIAL NO. 324

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 97) cost: $ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This legislation will have a slight fiscal impact which can be managed by the division. The division currently requires the information requested in Section 38 of the legislation but will have to implement regulations for new compilation and reporting requirements.

Prepared by: Marianne K. Burke, Director

Phone: 465-2515

Division: Insurance

Date: 2-20-97

Approved by Commissioner: William L. Hensley

Date: 2-20-97

Agency: Commerce and Economic Development

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FISCAL NOTE

No. 2
Bill Version: CSSSHB 58(JUD)
(H) Publish Date: 2/27/97

STATE OF ALASKA
1997 LEGISLATIVE SESSION

APR 11 1997

Revision Date:
Title: "An Act relating to civil actions; . . . amending . . . AK Rules of Civil Procedure, . . . AK Rules of Evidence . . .
Sponsor: Representative Porter
Requester: House Judiciary Committee

Dept. Affected: Department of Law
BRU: Civil Division
Component: General Legal Services
COMPONENT SERIAL NO. 2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Sponsor Substitute for HB 58 is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Division: Administrative Services Division
Phone: 465-5370
Date: 2/20/97

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 2/20/97

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FISCAL NOTE

Moved by Torgerson
ADOPTED W/O

SENATE FINANCE COMMITTEE
Amendment Number: 1
Bill Number: CSSSHB 58(FIN)am
Sponsor: Torgerson Date: 4-3-97
Logged In By:

0-LS0056\LA.12
Ford
4/2/97

AMENDMENT

OFFERED IN THE SENATE BY SENATOR TORGERSON

TO: CSSSHB 58(FIN) am

Page 1, following line 7:

Insert a new paragraph to read:

"(1) ensure that this Act does not apply to or in any way have an effect on existing litigation or a civil cause of action that accrues before the effective date of this Act; it is the specific intent of the legislature that this Act not apply to or in any way have an effect on In Re Exxon Valdez, A89-0095 Civ. (D.Alaska);"

Renumber the following paragraphs accordingly.

Moved by Tor
Adopted w/o

OFFERED IN SENATE FINANCE

BY SENATOR TORGERSON

TO: CSSSHB 58 (FIN) am

Amendment to Amendment #1:

following line 6, insert new language at end of sentence to read:

"or any other federal admiralty action now or in the future."

Am to Am #6 - Moved by Donley Torgerson obj./ w/d Adopted / w/o

Donley Moved Adopted w/o

SENATE FINANCE COMMITTEE 0-LS0036\LA.44
Amendment Number: 6 Ford
Bill Number: HB 58 4/7/97
Sponsor: Donley Date: 4/8/97
Logged In By: Bolton

AMENDMENT

OFFERED IN THE SENATE BY SENATOR DONLEY

TO: CSSSHB 58(FIN) am

Page 16, line 24:

Following "must":

Insert "(1)"

Delete ","

Insert "; (2) consist of a sign at least four ~~inches~~ feet high and two ~~inches~~ feet wide, with print at least two inches high; (3) ~~appear in all printed documents relating to emergency room services provided by the hospital~~; (4) be"

Am to Am

Page 16, line 25:

Delete ", and must"

Insert "; and (5)"

Page 16, line 27, before "Notice":

Insert "~~Warning~~ Notice to Hospital Users and"

Am Am

Page 16, line 28, before "The":

Insert "(Name of Hospital) may not be responsible for the actions of emergency room physicians in (Name of Hospital's) emergency room."

~~Page 17, line 5:~~

~~Delete "$500,000"~~

~~Insert "$5,000,000"~~

Parnell Motion
Ferguson Object
6/1 Adopted

SENATE FINANCE COMMITTEE
Amendment Number: 19
Bill Number:
Sponsor: Date: 4-11-97
Legislative By:

0-LS0056\LA.3
Ford
3/21/97

AMENDMENT

OFFERED IN THE SENATE BY SENATOR PARNELL

TO: CSSSHB 58(FIN) am

Page 7, lines 1 - 2:

Delete "a [AN INJURED]"

Insert "an injured"

Page 24, line 13:

Delete "a"

Insert "an injured"

Moved by Parnell
Sharp object / WO
ADOPTED W/O

SENATE FINANCE
COMMITTEE
Amendment Number: 20
Bill Number: _____
Sponsor: _____ Date: 4-11-97
Logged In By: _____

AMENDMENT

BY ~~SENATOR~~ PARNELL

OFFERED IN THE SENATE
TO: CSSSHB 58(FIN) am

p. 5, lns. 25-27 Delete all material

p.5, lns. 25-27 Insert "convincing evidence of outrageous conduct, including acts done with malice or bad motives, or reckless indifference to the interest of another person."

Moved by Torgerson w/ indirec
Adams obj.
MOTION CARRIED 6/1
0-LS0056\L.a

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 58(FIN) am

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Amended: 3/18/97
Offered: 3/17/97

Sponsor(s): REPRESENTATIVES PORTER, Cowdery, Bunde

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil actions; relating to independent counsel provided under an insurance policy; relating to attorney fees; amending Rules 16.1, 41, 49, 58, 68, 72.1, 82, and 95, Alaska Rules of Civil Procedure; amending Rule 702, Alaska Rules of Evidence; and amending Rule 511, Alaska Rules of Appellate Procedure."

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

*** Section 1.** LEGISLATIVE INTENT. In enacting this bill, it is the intent of this legislature as a matter of public policy to

(1) encourage the efficiency of the civil justice system by discouraging frivolous litigation and by decreasing the amount, cost, and complexity of litigation without diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries caused by others;

(2) provide for reasonable, but not excessive, punitive damage awards against tortfeasors sufficient to deter conduct and practices that harm innocent Alaskans while not hampering a positive business environment by allowing excessive penalties;

(3) encourage individual savings and economic growth by fostering an environment likely to control the increase of liability insurance rates to individuals and businesses resulting in a savings to the state, municipalities, and private businesses that are self-insured;

(4) encourage the traditionally recognized Alaska values of self-reliance and independence by underscoring the need for personal responsibility in making choices and personal accountability for the consequences of those choices;

(5) alleviate the high cost of malpractice insurance premiums that discourage physicians, architects, engineers, attorneys, and other professionals from rendering needed services to the public;

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

(7) ensure that one of several tortfeasors is not held responsible for the negligence of an employer; to this extent, this Act is intended to overrule Lake v. Construction Machinery, Inc., 787 P.2d 1027 (Alaska 1990);

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

(9) ensure that in actions involving the fault of more than one person, the fault of each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages be determined and awards be allocated in accordance with the fault of each, thereby overruling Benner v. Wichman, 874 P.2d 949 (Alaska 1994); and

(10) reduce the amount of litigation proceeding to trial by modifying the allocation of attorney fees and court costs based on the offer of judgment and the final court award, thereby providing a financial incentive to both parties to settle the dispute.

*** Sec. 2.** AS 06.05.473(h) is amended to read:

(h) After the payment of all other claims, including interest at the rate **of 10.5 percent a year** [ESTABLISHED UNDER AS 09.30.070], the department shall pay claims that are otherwise valid but that were not filed within the time prescribed.

*** Sec. 3.** AS 09.10.050 is repealed and reenacted to read:

TORGERSON MOVED
PEARCE OBJ.
3/4 (in favor)

SENATE FINANCE
COMMITTEE
Amendment Number: 2
Bill Number: CSSSHB 58(FIN)am
Sponsor: Torgerson Date: 4-3-97
Logged In By: PJ

0-LS0056\LA.13
Ford
4/2/97

AMENDMENT

OFFERED IN THE SENATE BY SENATOR TORGERSON

TO: CSSSHB 58(FIN) am

Page 6, line 13:

Following "award":

Insert "or the amount of the award that is equivalent to 100 percent of the costs incurred by the state to adjudicate and litigate the action, whichever is lesser,"

Following "state.":

Insert "For purposes of determining the costs incurred by the state to adjudicate and litigate the action, the administrative director of the court system shall prepare a fiscal note for each action in which punitive damage is awarded."

Page 6, line 15, following "damages.":

Insert "In this subsection, "costs incurred by the state to adjudicate and litigate" includes the cost of providing a judge, jury, clerk, or any other administrative support required to litigate the civil action and, if applicable, reasonable litigation costs and the reasonable cost of attorneys paid by the state."

not offered

SENATE FINANCE
COMMITTEE

Amendment Number: 3 0-LS0056\LA.5
Bill Number: CSSSHB 58(FIN)am Ford
Sponsor: Adams Date: 4-3-97 3/24/97
Logged In By: PJ Adams

AMENDMENT

OFFERED IN THE SENATE

TO: CSSSHB 58(FIN) am

Page 17, line 5:

Delete "$500,000"

Insert "$5,000,000"

not offered

SENATE FINANCE COMMITTEE
Amendment Number: 4
Bill Number: CSSSHB 58 (FIN) am
Sponsor: _____ Date: 4-7-97
Logged In By: _____

0-LS0056\LA.11
Ford
3/31/97

A M E N D M E N T

OFFERED IN THE SENATE BY SENATOR MACKIE

TO: CSSSHB 58(FIN) am

Page 1, following line 7:

Insert a new paragraph to read:

"(1) ensure that this Act does not apply to or in any way have an effect on existing litigation or a civil cause of action that accrues before the effective date of this Act; it is the specific intent of the legislature that this Act not apply to or in any way have an effect on In Re Exxon Valdez, A89-0095 Civ. (D.Alaska);"

Renumber the following paragraphs accordingly.

DONLEY MOVED OBJECTIONS HEARD FAILED 2/5

SENATE FINANCE COMMITTEE

0-LS0056\LA.41
Ford
4/7/97

Amendment Number: 5
Bill Number: HB 58
Sponsor: Donley Date: 4/8/97
Logged In By: NJSottara

AMENDMENT

OFFERED IN THE SENATE BY SENATOR DONLEY

TO: CSSSHB 58(FIN) am

Page 16, line 13, through page 17, line 15:

Delete all material.

Renumber the following bill sections accordingly.

Not offered

SENATE FINANCE
COMMITTEE 0-LS0056\LA.43
Amendment Number: 7 Ford
Bill Number: HB 58 4/8/97
Sponsor: Donley Date: 4/8/97
Logged In By: Holtan

AMENDMENT

OFFERED IN THE SENATE BY SENATOR DONLEY

TO: CSSSHB 58(FIN) am

Page 19, following line 26:

Insert a new bill section to read:

"* **Sec. 41.** AS 21.36 is amended by adding a new section to read:

Sec. 21.36.128. Civil action for claim settlement practices. (a) A person who alleges a violation of AS 21.36.125 or a violation of a trade practice or claim settlement regulation adopted by the director may bring a civil action for damages. Notwithstanding any other provision of law, a person bringing an action under this section may not be required to prove that the violation occurred with a frequency that indicates a general business practice.

(b) Before filing a civil action under (a) of this section, the person filing the action shall give at least 60 days written notice to the person who committed the violation. Notice required under this subsection must include

(1) a copy of the statute or regulation that the person is claimed to have violated;

(2) the facts and circumstances giving rise to the violation;

(3) the name of any individual involved in the violation;

(4) reference to any policy that is relevant to the violation; this paragraph does not apply if the person bringing the civil action is a third party claimant unless the insurer has provided the person bringing the civil action with a copy of the policy; and

(5) a statement that the notice is given in compliance with this subsection.

(c) If, within 60 days after notice required under (b) of this section is received by the insurer, the insurer pays the damages claimed by the person bringing the action or corrects the settlement practice giving rise to the action, a person may not bring

an action under (a) of this section.

(d) If an insurer receives a notice described under (b) of this section or settles an alleged violation as provided under (c) of this section, the insurer shall provide a copy of the notice to the director or notify the director of the settlement within 30 days after receiving the notice or settling the matter.

(e) Upon mailing or delivering the notice required under (b) of this section, the applicable time limit for commencing an action under (a) of this section shall be tolled for 65 days.

(f) If the person filing an action under (a) of this section is a prevailing party, the person may recover

(1) costs and attorney fees as allowed under the Alaska Rules of Civil Procedure; and

(2) damages that are foreseeable as a result of the violation, including damages in excess of applicable insurance policy limits.

(g) Notwithstanding any other provision of law, a person filing an action under (a) of this section may recover punitive damages if the act or omission giving rise to the violation is

(1) wilful, wanton, or malicious; or

(2) in reckless disregard of the rights of the person filing the civil action.

(h) The rights provided under this section are in addition to other rights provided by law."

Renumber the following bill sections accordingly.

Moved by Donley
Peace Obj.

SENATE FINANCE
COMMITTEE
Amendment Number: 8
Bill Number: CSSSHB 58 (Fin) am
Sponsor: Donley Date: 4-11-97
AMENDED BY: PJ

0-LS0056\LA.46 W/D by Donley
Ford/Chenoweth
4/11/97

OFFERED IN THE SENATE

TO: CSSSHB 58(FIN) am

Page 5, line 31:

Following "awarded":

Insert ","

Following "$300,000":

Insert ", or 25 percent of the defendant's net worth"

Page 6, line 1:

Delete "greater"

Insert "greatest"

Page 6, line 3, following "awarded":

Insert ","

Page 6, line 4:

Following "$600,000":

Insert ", or 35 percent of the defendant's net worth"

Delete "greater"

Insert "greatest"

Page 6, following line 15:

Insert a new subsection to read:

"(e) In (b) and (c) of this section, "net worth" is the average net worth of the defendant for the three calendar years immediately preceding the defendant's conduct on which the action to recover damages and the punitive damage award is made except that, if the defendant is an entity that was not in existence for at least three

years preceding the defendant's conduct giving rise to the damage action, "net worth" shall be calculated using the calendar year in which the defendant was in existence during which the defendant's net worth was greatest."

Moved by Adams
Peirce object
LA-1
FAILED 2/5

SENATE FINANCE
COMMITTEE
Amendment Number: 9
Bill Number: 11358
Sponsor: _____ Date: _____
Logged In By: By Adams BJ

Amendment

CS for SS HB 58(FIN) am

On page 3, line 9 through page 4 line 9:

Delete all material.

Renumber accordingly.

Adams moved
Peace object
LA-2

SENATE FINANCE
COMMITTEE
Amendment Number: 10
Amendment Number: 11
Sponsor: _____ Date: ____
Logged In By: By Adams

CS for SS HB 58(FIN) am

On page 3, line 25:
following "(A)" delete "prolonged" ~ ?
following the word "to", insert "a"

following the word "hazardous" insert the word "substance" and delete the word "waste"

Adams moved Torgerson object 2/5 FAILED (A-3)

SENATE FINANCE COMMITTEE
Amendment Number: 11
Bill Number: _____
Sponsor: _____ Date: ____
Logged In By: _____

Amendment

CS for SS HB 58(FIN) am By Adams

On page 5, lines 1-21:

delete all material

renumber the following sections accordingly

Moved by Adams
Objections heard
FAILED 1/6 LA-4

SENATE FINANCE
COMMITTEE
Amendment Number: 12
Bill Number:
Amendment Sponsor: Date:
Logged In By:

CS for SS HB 58(FIN) am By Adams

On page 6, line 6, following the word "gain":

Delete "and"
Insert "or"

Moved by Adams
Please object
FAILED 2/5
LA-5

SENATE FINANCE
COMMITTEE
Amendment Number: 13
Bill Number:
Sponsor: Date:
Logged In By:

Amendment

CS for SS HB 58(FIN) am By Adams

Page 8, Line 11, through page 9, line 10:
Delete entire section.

Renumber following sections accordingly.

Adams moved Point Obj. FAILED 1/6 LA-6

SENATE FINANCE COMMITTEE
Amendment Number: 14
Bill Number:
Sponsor: Date:
Logged In By:

Amendment

CS for SS HB 58(FIN) am By Adams

On page 10, delete lines 28 and 29.

On page 10, line 30 delete (2).

On page 10, line 31, following the word "issue" delete "; and" insert "."

On page 11, delete lines 1-4.

Adams moved Torgerson obj. FAILED 2/5 LA-1

SENATE FINANCE COMMITTEE
Amendment Number: 15
Bill Number: _____
Sponsor: _____ Date: 4-11-97
Logged In By: _____

Amendment

CS for SS HB 58(FIN) am By Adams

On page 9, line 11 through page 10, line 14:
Delete all material.

Renumber sections accordingly.

On page 20, lines 18-27:
Delete all material.

Renumber sections accordingly.

On page 24, lines 20-24:
Delete all material.

Renumber sections accordingly.

Moved by Adams objections Pannell

By: Adams

SENATE FINANCE COMMITTEE

Amendment Number: 16

Bill Number: CSSSHB 38(FIN)am

Sponsor: _____ Date: 4-11-97

Logged In By: DY

AMENDMENT 16

On page 11, line 6

AS. 09.30.065 is amended to read:

After " **Section .09.30.065.** Offers of Judgment " Insert:

a. Prior to Commencement of an Action: Upon receipt of a written offer of final settlement, prior to filing a complaint, in the form of an Offer of Judgment, pursuant to Alaska Civil Rule 68, an insurance company shall make payment of all monetary amounts, if any, due the offeror within 90 days of receipt of the written offer. If the judgment entered on the claim to which the payment was made under this section is at least 10% greater than the insurance company payment, the insurance company shall pay all actual costs and the reasonable actual attorneys incurred by the offeror from the date the offer was made through judgment or the termination of the action. This section in addition to any other remedy held by an insured or offeror specified in statue or common law.

b. After Commencement of an Action:

Not offered

SENATE FINANCE
COMMITTEE
Amendment Number: 17
Bill Number:
Sponsor: Date: 4-11-97
Logged In By:

Amendment

CS for SS HB 58(FIN) am By Adams

On page 11, line 16:

following "is" delete "at least five, less", insert "not more"

On page 11, line 17: following the word "offer":
delete "the offeree, whether the party making the claim or defending against the claim, shall pay all costs as allowed under the Alaska Rules of Civil Procedure and shall pay reasonable actual attorney fees incurred by the offeror from the date the offer was made,"

Insert: "the interest awarded under AS 09.30.070 and accrued up to the date judgment is entered shall be adjusted"

Delete all material contained on page 11, lines 23 through page 12 line 18.

And insert on page 11, line 23:
" (1) if the offeree is the party making the claim, the interest rate shall be adjusted as follows:

A) if the offer was served no later than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), the interest rate shall be reduced by five percent;

B) if the offer was served more than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), but more than 90 days before the trial began, the interest rate shall be reduced by three percent;

C) if the offer was served 90 days or less but more than 10 days before the trial began, the interest rate shall be reduced by two percent [REDUCED BY FIVE PERCENT A YEAR]

(2) if the offeree is the party defending against the claim, the interest rate shall be adjusted as follows:
A) if the offer was served no later than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), the interest rate shall be increased by five percent;

B) if the offer was served more than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure

26(a)(1), but more than 90 days before the trial began, the interest rate shall be increased by three percent;

C) if the offer was served 90 days or less but more than 10 days before the trial began, the interest rate shall be increased by two percent [REDUCED BY FIVE PERCENT A YEAR]

Renumber sections accordingly.

Adams moved Pearce obj. FAILED 1/6

SENATE FINANCE COMMITTEE
Amendment Number: 18
Bill Number: CSSS HB 38 (FIN)am
Sponsor: _____ Date: 4-11-97
Logged In By: _____

AMENDMENT # _____

OFFERED BY SENATOR ADAMS

Page 25, delete lines 5 thru 20, replace with the following & renumber accordingly

A.S. 09 is amended to add a new chapter to read:
CHAPTER 42. ALTERNATIVE DISPUTE RESOLUTION.

Sec. 09.42.010. PURPOSE. The legislature finds that providing a formalized program of alternative dispute resolution procedures within the existing civil litigation system can promote the timely and efficient resolution of many civil disputes. To that end, the legislature enacts AS 09.42.010 - 09.42.050 to provide for an initial pilot program of alternative dispute resolution of certain civil cases.

Sec. 09.42.020. PILOT PROGRAM FOR ALTERNATIVE DISPUTE RESOLUTION. (a) The supreme court shall provide for a pilot program of no less than five years' duration for the submission of civil cases filed in the superior court, third judicial district, to alternative dispute resolution procedures. The program shall operate in accordance with the provisions of AS 09.42.010 - 09.42.050.

(b) The following types of cases shall not be included in the pilot program:

(1) divorce and dissolution;
(2) child custody and visitation;
(3) other children's matters;
(4) probate;
(5) cases where no answer is filed.

Sec. 09.42.030. STRUCTURE OF PILOT PROGRAM. (a) The program established under AS 09.42.020 shall provide criteria for the screening of covered cases to determine if they are appropriate for referral to alternative dispute resolution. The criteria shall be constructed so that at least 50 percent of the covered cases filed in a calendar year are referred.

(b) The program shall provide for a list of qualified persons to whom cases may be referred and a schedule of the fees charged by these individuals. The court shall establish minimum qualifications for those persons. Under the program, parties shall be permitted by mutual agreement to choose a person from the panel or to choose a person not on the panel to conduct the alternative dispute resolution procedure. In the event that the parties cannot agree, the person to conduct the procedure shall be appointed from the panel by the trial court.

(c) The program shall provide that the parties to an alternative dispute resolution procedure shall share the costs of the procedure equally. A party found indigent under guidelines established by the supreme court shall be eligible to have that

party's share of the costs borne at public expense. The costs borne at public expense on behalf of an indigent party shall constitute a lien on any recovery by that party to be paid first out of the recovery.

(d) The program shall provide procedures and rules promoting the timely referral to and conclusion of the alternative dispute resolution procedure. The time from the filing of defendant's answer to the conclusion of the alternative dispute resolution procedure shall not exceed 100 days unless permitted by the trial court in exceptional cases and for good cause shown. Unless a longer period is agreed to by mutual consent of the parties, the alternative dispute resolution session shall be limited to no more than 12 hours.

(e) A person appointed to conduct an alternative dispute resolution procedure under the program established pursuant to AS 09.42.010 - 09.42.050 shall have judicial immunity to the same extent as a judge and shall abide by applicable rules of confidentiality established by the supreme court.

Sec. 09.42.040. EVALUATION OF PILOT PROGRAM. (a) The Alaska Judicial Council shall evaluate the efficacy of the program established pursuant to AS 09.42.010 - 09.42.050 annually. The evaluation shall address factors such as the speed with which cases are resolved, the satisfaction of the litigants, the expenditure of court resources, and the expenditure of litigant resources.

(b) The council shall work with the court system to create a system for efficient collection of information needed to evaluate the program. The council shall report the results of its evaluation to the legislature each year by March 31.

Sec. 09.42.050. DEFINITION. As used in AS 09.42.010 - 09.42.050, "alternative dispute resolution procedure" includes mediation and early neutral evaluation.

* Sec. 33. AS 09.42, as enacted by sec. 11 of this Act, has the effect of amending Alaska Rule of Civil Procedure 100 by making the mediation process mandatory for certain civil cases in the superior court, third judicial district, and by expanding the scope of the rule to include other forms of alternative dispute resolution in addition to mediation.

FISCAL NOTE

No: 1
Bill Version: CSSSHB 58(JUD)
(H) Publish Date: 2/27/97

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Revision Date: _____
Department Affected: Administration
Title: "An Act relating to civil actions: amending Rules 49 and 68. ....."
BRU: Risk Management
Component: Risk Management
Sponsor: Representatives Porter, Cowdery
Requestor: House Judiciary
COMPONENT SERIAL NO. 0071

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 97) cost: $ -0-

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

State agency civil liability exposure and the amount Risk Management will ultimately pay in future liability loss settlements will be reduced by this legislation.

The extent of such savings is difficult to forecast, due to the uncertainty that the limitations in the type of claims that may be filed or the amounts of damages that can be awarded will be realized in future liability claims — that might be filed against State agencies — arising from events that have not yet occurred.

The state funds the liability coverage provided through Risk Management on a "cash flow" basis, appropriating only the amounts expected to be paid the next fiscal year—collected solely through interagency receipts assessed each agency.

In future years, Risk Management's liability premium assessments will reflect the reductions actually realized by this legislation as premiums are developed from actual claims expenses incurred.

No immediate negative fiscal impact can be shown due to outstanding unfunded liabilities.

Prepared by: J. Brad Thompson, Director
Phone: 465-5723
Division: Risk Management
Date: _____

Approved by Commissioner: Mark Boyer
Agency: Department of Administration
Date: 2/20/97

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LEG97\FNSSHB. 581

Not adopted

Alaska State Legislature

RECEIVED
APR 17 1997

Please enter into the record my testimony to the Tort Reform Committee
committee name

committee on HB 58 , dated 4/11/97 .
bill/subject

I feel that taking away my rights to be compensated for injury, either physical or financially, is an infringement on my constitutional rights. However in this case I would support HB 58 if it included all amendments submitted by U.F.A. (united Fishermen of Alaska) and those submitted by Cordova District Fishermen united (C.D.F.U.) [redacted] Juries should decide amounts, and there should be no caps. Thank you

Signed: Robert A. Martinson
Testifier

CDFU Gillnet division
Representing (Optional)

900 IROQUIS DRIVE Wasilla, AK 99654
Address

907 - 373-2627
Phone No.

Robert Martinson

9/116 Legislative Information Office

Alaska State Legislature

Please enter into the record my testimony to the TORT COMMITTEE
committee name

committee on HB 58 , dated 4/11/97 .
bill/subject

I would be in support of HB 57 only if the following changes be made:

1) Amend Section 10 to include as exceptions to the punitive damages cap to include: RECKLESS INDIFFERENCE TO THE RIGHTS or SAFETY OF OTHERS AS WELL AS THE EXISTING "EVIDENCE of MALICE".

2) Punitive damage cap is acceptable only if there is an exception of torts relating to natural resource damages and ecosystem disruptions.

3) Section 11 (50% being given to state) should be eliminated in its entirety.

Thank you for considering my testimony.

Signed: James Tuttle
Testifier

Representing (Optional)

P.O. Box 878810 Wasilla, Ak. 99687
Address

(907) 892-8187
Phone No.

9/116 Legislative Information Office

Alaska State Legislature

Please enter into the record my testimony to the Senate Finance committee name

committee on HR58 bill/subject, dated 4/11/97.

I am opposed to tort reform unless the amendments as proposed by CDFU + UFA ~~and~~ are adopted.

Signed: Tom Namtvedt
Testifier

Representing (Optional)

540 Portage Dr Wasilla 99654
Address

376 7060
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the SENATE FINANCE committee name

committee on HB 58 TORT REFORM, dated 4-11-97. bill/subject

I SUPPORT TORT REFORM AS AMENDED PROPOSED BY CDFU and UFA. I AM OPPOSED TO 2 PARTS AS FOLLOWS:

1) PUNITIVE DAMAGES SHOULD NOT BE LIMITED. EACH CASE NEEDS TO BE DECIDED ON A CASE BY CASE BASIS. THERE IS A LIMITING FACTOR BUILT IN. THE JURY IS THE DECIDER OF THE DEFENDANT'S CONDUCT & THE DAMAGES TO BE AWARDED; ALSO WHETHER PUNITIVE DAMAGES SHOULD BE AWARDED. THERE ARE FURTHER SAFEGUARDS. THE APPEAL PROCESS WHICH REVIEWS THE JURY'S VERDICT & DETERMINES IF PUNITIVES ARE REASONABLE.

2) THE STATE SHOULD NOT SHARE IN ANY PUNITIVE DAMAGE AWARD. IF THE STATE WAS NOT HARMED, IT HAS NO STANDING TO JOIN THE LAWSUIT OR SHARE IN THE PUNITIVE DAMAGE AWARD. IF THE STATE WAS HARMED, THEN IT HAS THE RIGHT TO SUE. QUESTION: IF THE STATE IS COMPENSATED FOR HARM TO THE STATE, IS IT ENTITLED TO RECEIVE MORE THAN IT SUED FOR? THAT IS WHAT COULD HAPPEN IN THE INSTANCE OF THE EXXON SETTLEMENT(S) IF THIS BILL PASSES.

Signed: Bill Pace
Testifier

Self
Representing (Optional)

Hc 31, Box 5079P, Wasilla, AK 99654
Address

1 (907) 376-2286
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the S Finance
committee name

committee on HB 58 , dated 4/11/97 .
bill/subject

see attached 4 pages

Signed: _____
Testifier

Paul Sweet
Representing (Optional)

P O Box 1562 Palmer 99645
Address

745-2242
Phone No.

9/16 Legislative Information Office

(1)

Tort Reform

With the proposed Tort Reform the State of Alaska will be in the business of waiting for one of its residents to be killed, maimed or injured in order to collect a portion of the victim's insurance.

The Governor's Tort Reform Task Force had 28 people testify. 18 were violently opposed, of the 10 remaining 7 represented insurance companies and 3 represented small businesses. Small business is under the assumption that once tort reform is passed their premiums will automatically go down. According to the insurance company's own testimony at committee meetings it was stated that there will be no reduction in premiums for 5-7 years.

Punitive damages seem to be the State's main contention for tort reform. If that is the case, get rid of punitive damages. The State of Washington does not allow punitive damages by order of the Washington Supreme Court. They do not have any caps, and seem to be functioning just fine. If the State of Alaska thinks that punitive damages are necessary, they can take the insurance company to court and whatever is received pass on to the victim. Therefore you have accomplished your purpose to penalize the company for unsafe products.

The new Tort Reform bill has $300,000 caps on personal loss, I don't think its the state's job to determine the value of one person's life to their loved ones. Do not place caps on anything.

Since the early 80's 3500 cases have been filed. 958 of these were settled out of court for under $100,000. You can bet they were on the low end of $100,000. There are no statistics allowed listing what each victim received, there is no way to tell exactly what was paid because the courts are prevented from revealing the out of court settlements. The remaining 58 go to court, in other words 150 out of 3500. 1 in 20 of those court cases result in punitive damages. So only approximately 7 cases received punitive awards. It hardly seems worth the state's time to pursue punitive damages. All of the committee meetings and task force expenses probably cost more than the state could ever anticipate collect-

Paul Sweet

ing in punitive damages.

There were a few outlandish cases through the years which awarded astronomical punitive damages. For example, a bad paint job on a Mercedes Benz, the victim was awarded $10,000,000, an amount significantly reduced by the judge.

The new Tort Reform contains incentives for quick settlements, under 30, 60, 90 day time limits. The incentives are directed to force lawyers to settle early, sometimes at the expense of their clients. If a victim wanted to continue on with the case and was counseled for early settlement, the victim would generally follow the advice of their lawyer. There seem to be too many variables for this portion of the bill to work properly. These incentives will also restrict lawyers from accepting cases on a contingency basis, which leaves victims without representation.

The new bill contains language of eliminating "deep pockets". I think that it is a shame to pick on the medical profession, especially those who work in emergency rooms. Only a specialized group of people can work in this field requiring quick decisions. I noticed that part of the requirements now is the posting of which doctors are working under contract and which are working for the hospital.

1. Most people who are admitted into emergency rooms are in no shape to look for bulletin boards.
2. If someone refuses a contract doctor's services is there always trauma hospital staff available to handle that emergency?
3. If not, why post the names on a bulletin board?
4. If trauma doctors are required to have $500,000+ insurance policies the patient gets it in the neck again because this expense is reflected in their bill.

If this tort reform bill passes as indicated with contract doctors treated differently than in-house personnel, this type of institutional avoidance of responsibility will become widespread. For example, construction companies who now hire contractors will be able to hire contract workers and relieve the prime contractor of all responsibility. If we are going to eliminate "deep pockets" and "double-dipping" then maybe we ought to start with the legislature. I do not personally mind "double-dipping". If you've worked hard for a

Paul Sweet

retirement you should be able to collect it while working a new job. The Valdez oil spill trial was trying to relieve the responsibility of the ship from Hazelwood because he happened to in his cabin and not on deck. Since the beginning of time the ship's captain has always been responsible for the actions of his crew. This has always applied to prime contractors whether they are running a hospital or building a house. With the new legislation you cannot sue your personal insurance company if you have sued the doctor. Where does the state get the right to tell me how to deal with an insurance company that I pay premiums to for coverage?

Most of the Governor's Tort Reform Task Force recommendations were not accepted by the Tort Reform Committee. This brings me back to the question "Why do we have task forces of this nature?" This always results in a multiplication of expenses. The committee already in place is under no obligation to accept recommendations from the task force. Typically they don't. A more appropriate type of task force would be one dealing with building roads, schools, etc. where everyone is going in the same direction.

Mr. Tardiff, attorney for the State of Washington, works all tort cases. His telephone #1-360-753-6200, if you have questions, he would be a good source of information.

After checking with the election commission on campaign contributions I received numerous files and I noticed that some legislators could not afford to run their campaigns without corporate or insurance contributions. With the small percentage of donations received from the public some could not afford a cab ride across town. It makes one wonder where the loyalty lies, with corporate America or with their constituents.

I would like to publicly thank Senator Rick Halford for the help he gave me to produce the Sex-Offender Registration document. Without his help I would still be scratching my ____ nose. I would also like to thank Litta Evans who set up the Sex-Offender Registration list by city, which makes it easier for the public to digest the information. It also allows for the addition of the names of those yet to comply with the statute. I found 35 names on the list of people who are now working for the state in a variety of positions, some

Paul Sweet

(4)

in positions that might compromise an uninformed public. I would like to see an improvement in enforcement so that the statute must be complied with. I recommend an easy way to accomplish this: instead of over-burdening our State Troopers with warrants, judge's signatures and the disbursement of information we should solicit public service announcements for two weeks. Day and night, informing those people who have not complied with the statute that on the third Sunday they can look for their names in the Sunday paper listing names, addresses and offenses of those who have yet to comply. (A fine of $100 on each person filing late would cover publication expenses-that would involve 1000+ filers or $100,000+).

Paul J. Sweet
P.O. Box 1562
Palmer, AK 99645
745-2242

DATE: 4/14/97

Please accept the enclosed original(s) of written testimony for the Dan Fraser

for the HB58 teleconference hearing that was scheduled on 4/11/97.

A copy of this testimony was transmitted to your committee via fax on 4/14/97

Thank you,

Mat-Su Legislative Information Office

Alaska State Legislature

Please enter into the record my testimony to the SENATE.
committee name

committee on H B - 58, dated 4/15/97.
bill/subject

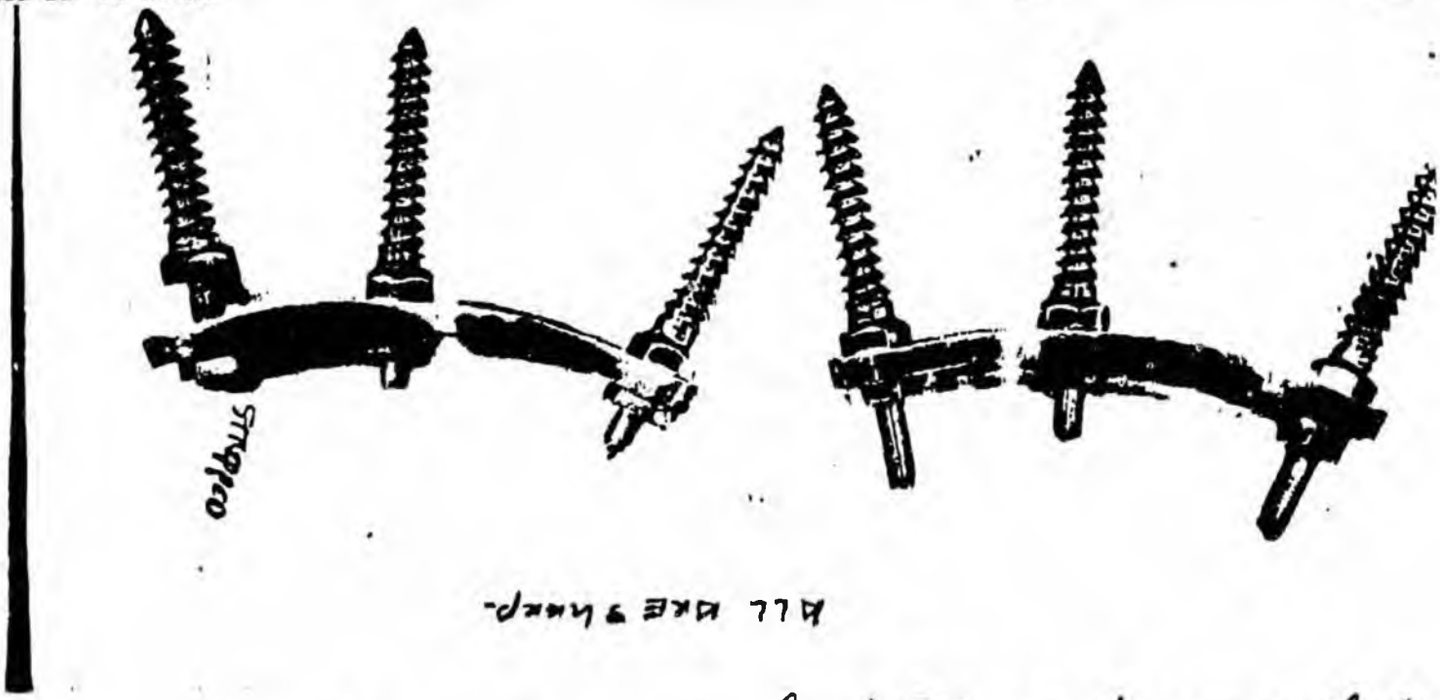
I Vote no on H/B 58 - I have been injured on the job for the State of Alaska. I have a Documented 1.6 - Million Dollar Loss - + I am 100% disabled from it. Will H/B 58 give me back my losses?

Signed: Don Patterson
Testifier

Representing (Optional)

P.O. Box 873483 Wasilla, Ak. 99687
Address

907-373-6754
Phone No.



Here is a copy of the plates & screws that were installed in me, (unknown to me). There is approx 300,000 ea persons across the U.S. who were used as guinea pigs and were not told - Alaska has a high percentage Rate of persons per Population Rates.

I have much documentation and a movie from F.D.A. Commissioner David Kessler.

I have a list of appx 50 persons in anchorage area near who are 100% disabled like myself. I have 1.6 mil documented loss.

No on house Bill #58

Don Patterson
Bx 873183
WASILLA AK.
99687

ph. 907-373-6754
FAX 907-373-6759

Alaska State Legislature

Please enter into the record my testimony to the Senate
committee name

committee on Bill # 58 , dated 4/14-97.
bill/subject

I'm Totaly Against Tort Reform as I am Disabled, From Experimental Back Surjary. Also I understand That The State Medical Board Has No Regulation on Pedalo Senate's Safe Garding Alaska Citizens.

Signed: Floyd Cornelius
Testifier

Representing (Optional)

3501 Tamarack Wasilla AK
Address

907-376-7338
Phone No.

Public's rising voice: Physician, reveal thyself

THE ECONOMIST

The reports do not include the number of people who have died under a given doctor's care.

BOSTON — Not so long ago, finding a new doctor meant asking the old one for a referral. But fewer Americans now have a family doctor to turn to. What should they do?

Massachusetts has the answer. Since November, the state's medical licensing board has been giving the public much-improved access to information about the 27,000 licensed physicians in the state, including their disciplinary records and (more vaguely) their malpractice histories.

It is a huge success. In just a few days, the board had to more than double the office staff and add extra telephone lines to handle the load.

"People want this information. They're getting tired of subscribing to Consumer Reports and finding way more about the safety of their cars than their doctors," says Sidney Wolfe, director of the health-research arm of Public Citizen, a lobbying group in Washington.

"Doctors kill way more people than automobiles (do)."

Since people still have trouble getting through the clogged switchboard, copies of the records may well be placed in public libraries or posted on the Internet.

Doctors themselves are much less keen. The Massachusetts Medical Society originally opposed the idea of opening doctors' records to public scrutiny.

But when it became clear that a bill of this kind was bound to pass the Legislature, the society wrote a bill that it could live with, and this became the basis of the law that was passed last summer.

The reports do not include the number of people who have died under a given doctor's care. "It's hard to collect and it's hard to verify," says Alexander Fleming, the board's executive director.

Nor are they explicit about malpractice cases. Instead of revealing the dollar amounts claimed or paid, the reports merely say that Doctor A, a neurosurgeon, had claims made against him that amounted to 40 percent of the average malpractice claim for neurosurgeons nationally. Would-be patients in search of plain figures will have to go on digging.

Thomas Reardon, the vice-chairman of the American Medical Association, says the AMA opposes the inclusion of malpractice data in any form, fearing that patients would not really understand the information.

Doctors are sometimes slapped with malpractice suits that are baseless, but which would cost so much to fight that they settle anyway. And doctors in high-risk practices, such as brain and heart surgeons, stand a much greater chance of being sued through no fault of their own.

Besides, adds Dr. Reardon, "We don't think the malpractice information is relevant."

California, Florida, Texas and other big states are looking closely at the Massachusetts system. But since doctors are as mobile as any other Americans, consumer advocates say the disclosure should be on a nationwide basis.

A national database of such information already exists, but the law that created it also sharply restricts access. Only licensing authorities and peer-review organizations, such as hospitals and some managed-care operations, can get information from it.

Dr. Wolfe of Public Citizen would like to see it opened to the public. The AMA would rather see it destroyed.

Even Dr. Reardon admits that opening the files nationwide on doctors is probably inevitable.

Meanwhile, the same sort of disclosure system has already been proposed for lawyers. And yes, the American Bar Association also maintains a national databank of disciplinary actions against members of the bar. But guess what: it is open only to other lawyers.

❑ The Economist, of London, is an international magazine of business, politics and cultural affairs.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

FEB 13 1997

Dear Consumer:

This is in response to your inquiry to the Food and Drug Administration (FDA), regarding pedicle screws. Your inquiry has been forwarded to FDA's Communication Section in the Center for Devices and Radiological Health for reply. The following paragraphs describe the regulatory issues surrounding pedicle screws. Also included is a list of contacts for back support groups.

Regulatory status of pedicle screw devices varies based upon the indication, FDA's Center for Devices and Radiological Health acknowledges, in January of 1995, that a device manufacturer provided adequate documentation to demonstrate the preamendments, commercial distribution of a pedicle screw fixation system when used for the indication of severe spondylolisthesis (grades 3 and 4) at the fifth lumbar - first sacral vertebral (L5-S1) joint.

In accordance with this determination, premarket notifications (510(k)s) have been accepted for pedicle screw spinal fixation device systems for the same intended use. These submissions have been reviewed under 510(k) regulations as a premamendments, device system. Warning labels limited the intended use of these device systems are required and must be presented as follows:

Warnings:

- When used as a pedicle screw system, this device system is intended only for grade 3 or 4 spondylolisthesis at the fifth lumbar - first sacral vertebral (L5-S1) joint.

- The screws of this device system are not intended for the insertion onto the pedicles to facilitate spinal fusions above the L5-S1 joint.

- Benefit of spinal fusions utilizing any pedicle screw fixation system has not been adequately established in patients with stable spines.

- Potential risks identified with the use of this device system, which may require additional surgery include, device component fracture, loss of fixation, non-union, fracture of the vertebra, neurological injury, and vascular or visceral injury.

Although future submission for pedicle screw spinal fixation systems for severe spondylolisthesis are subject to 510(k) regulations, other indications and/or intended uses of pedicle screws are still considered post-enactment and, therefore, class III requiring premarket approval. Investigational studies should

continue for this and any other intended uses under FDA approved Investigational Device Exemption (IDEs) while the agency determines the appropriate classification for these systems.

In docket number 95N-0176 of the Federal Register published October 4, 1995, FDA has proposed a classification for pedicle screw spinal systems for severe spondylolisthesis and proposed reclassification of some other indications. The comment period for this proposed rule closed March 4, 1996. FDA has received over 1,900 comments and is currently reviewing those comments. After reviewing these comments, FDA will have to decide whether to finalize the proposal, modify the proposal, or possibly reject the initial proposal. If the proposal is finalized or modified, then FDA must also determine whether studies will be required under discretionary post-market surveillance requirements, section 5622(a)(2) of the Safe Medical Devices Act of 1990 for these devices.

Although the Food and Drug Administration does not endorse groups, there are patient support groups that you might be interested in contacting. The contact person and their phone number are listed as follows:

- Carol Fielder - Virginia (540)890-3248
- Marty Ward - New Mexico (505)327-0603
- Steve Balderzach - New York (716)372-0098

If you wish to report any problems you have experienced, please call FDA's Medwatch Problem Reporting line at 1-800-FDA-1088. For additional information or questions regarding pedicle screw fixation system, please call the FDA's Consumer Inquiry Line at (301)443-3170.

I am enclosing our most recent information on pedicle screws which will answer some of your questions.

Sincerely yours,

Nancy M. Leonard

Nancy M. Leonard
Editor
Communications Section, HFZ-210
Office of Health and Industry Programs
Center for Devices and
Radiological Health

Enclosure

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
1390 Piccard Drive
Rockville MD 20850

February 17, 1994

UPDATE ON THE REGULATORY STATUS OF PEDICLE SCREWS

Although a variety of bone screws have been approved by FDA for posterior fixation of the sacral spine and for anterior fixation of the cervical, thoracic and lumbar spine, no screws have been approved for placement in the vertebral pedicles as part of a spinal fixation system. Thus the law forbids manufacturers or others from labeling or promoting orthopedic screws approved for other uses as "pedicle screws."

The use of orthopedic screws approved for other purposes as "pedicle screws" by physicians is considered by FDA to be an "off-label" use -- that is, using an approved device for an unapproved indication. In general, a physician who engages in off-label uses has the responsibility to be well informed about the device, and to base the decision to use it on sound medical evidence and a firm, scientific rationale. The physician should undertake a full and frank discussion of such off-label use with the patient, explaining the benefits, drawbacks and limitations of knowledge about the procedure, and making it clear that the use in question has not been approved by FDA.

FDA is particularly concerned about the widespread use of pedicle screws without approval and without sufficient data to fully advise practitioners and patients about expected outcomes for various indications. To assess the situation, FDA sponsored a Scientific Symposium on Pedicle Screw Devices on August 20, 1993, under the auspices of the agency's Orthopedic Devices Advisory Panel. This symposium, along with scientific information in the medical literature and presentations at professional meetings and at FDA's Advisory Committee meetings, have provided the Agency and the panel with valuable preliminary information regarding the safety and effectiveness of pedicle screws in certain specific applications such as spinal fractures, degenerative spondylolisthesis, tumors and scoliosis. However, FDA has little evidence to date on which to evaluate these devices (or spine surgery in general) as part of the treatment of low back pain.

FDA is seeking to collect safety and effectiveness information on pedicle screws. The agency is working actively with a consortium of spine surgery societies to collect data on the use of these products as part of fixation surgery in unstable and degenerative

conditions of the spine. In addition, there are now 13 ongoing FDA-approved clinical trials to gather safety and effectiveness data for a number of clinical indications. FDA encourages surgeons using pedicle screw devices to enroll their patients in such approved clinical investigations.

The available safety and effectiveness data on pedicle screws will be re-evaluated during a public meeting of FDA's Orthopedic Devices Advisory Panel this summer.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

December 20, 1994

UPDATE ON PEDICLE SCREWS

FDA has recently received a number of inquiries about certain screws used in surgery to stabilize the spine. We hope the following information helps to answer these questions.

How are the screws used?

Screws are used to stabilize the spine after spinal injury, or to correct severe spinal curvatures and other abnormalities. A pair of the screws is placed horizontally into the rear of the bony bridges, called pedicles, that are connected to each vertebra, one on each side. (Thus they are called "pedicle screws" when used for this purpose.) Vertical rods (or plates) are attached to the screws. The rods are connected to the pedicles of a second vertebra by means of another set of pedicle screws, straightening or strengthening the spine.

How widespread is this use?

Pedicle screws have largely replaced other methods of spine stabilization such as wires, rods and hooks in the 30-70,000 spine stabilization procedures performed annually in the U.S. About 300,000 people have been implanted with the screws.

Why is FDA concerned about the screws?

Because, despite their widespread use, not enough is known about the possible short-term adverse effects of the screws when they are used in the pedicles of the spine, nor about their long-term effectiveness. Under the law, before orthopedic screws can be marketed as pedicle screws, their manufacturers must submit scientific data to FDA establishing that these devices are safe and effective for this purpose. Limited studies of pedicle screws have been ongoing for a number of years, and FDA has approved using the screws in these studies. But the studies are still not complete, and the manufacturers have not yet accumulated enough data to show, one way or the other, whether the screws are safe and effective.

Are there any spinal screws approved by FDA?

Yes. Those that are inserted into the front of the spine rather than the rear have been approved. Screws used in certain portions of the lower spine (the sacrum) are also approved. But no screws have been approved for use in the pedicles of the spine.

If pedicle screws aren't approved, how can they be used so widely?

In practice, surgeons often use orthopedic screws that FDA has cleared for other purposes, such as repairing long bones in the arms and legs, as pedicle screws. Such use of approved medical devices for non-approved purposes is called "off-label use," and has traditionally been regulated by the hospitals in which physicians practice and by their state medical boards, not by FDA.

However, FDA has taken two actions to be sure that all parties are adequately informed that using screws in the pedicles of the spine is considered an "off-label" use. First, to be sure physicians understand the regulatory status of the screws, FDA requires that manufacturers include in the labeling for the screws a statement that they are not approved for use in the spine. And second, FDA has advised physicians that they have an obligation to discuss any "off-label" use of these screws with the patient, explaining the benefits, drawbacks and limitations of knowledge about the procedure, and making it clear to the patient that this particular use of the screws has not been approved by FDA.

Widespread use of screws in the pedicles of the spine was encouraged in the past by some of the screw manufacturers, who promoted this practice to surgeons through training courses given during professional meetings. As a result of FDA warnings, this type of illegal promotion has largely ceased.

Does the lack of FDA approval mean the screws are unsafe?

Not necessarily. There simply isn't enough scientific information at this point to say for sure whether the screws are safe for use in the pedicles of the spine or not. There is some evidence that the screws might be beneficial in treating certain specific conditions, such as spinal fractures, degenerative spondylolisthesis (slippage of the spine), tumors and scoliosis (spinal curvature). In light of this evidence, an FDA advisory panel of outside experts recommended in July 1994 that FDA re-classify those pedicle

screw device systems intended for two specific uses -- treating spinal fractures and spinal slippage -- into a less stringent regulatory category. FDA is now considering whether to take this action.

But the effectiveness of the screws -- or any other surgical procedure -- in treating low back pain or simple disc problems is far more uncertain. Despite this, many of the 30-70,000 spine stabilization procedures performed annually in the U.S. are to treat these conditions.

What about the problem of screws breaking inside the body?

Although some news stories have implied that the screws break very commonly, the actual breakage rate is not known. Limited information suggests that the screws now being used break less frequently than those used in the mid-1980s, because of improvements in product design and testing. More information is needed about breakage rates before FDA can decide whether the screws are safe and effective for use in the spine.

Is progress being made in getting scientific information on the effectiveness of the screws?

Yes. FDA is working with surgeons and manufacturers to design sound clinical studies and get them underway. These studies will provide the needed information about which spinal conditions, if any, can be successfully treated with the screws, the kinds of adverse effects that can be expected, and how often they occur.

In the meantime, what about people contemplating back surgery?

Patients considering back surgery in which pedicle screws might be used to stabilize the spine should keep in mind that these devices have not been approved for this purpose, and that FDA cannot assure that they are safe and effective. They should also remember that there is little evidence that the screws are effective in treating low back pain or simple disc problems. Patients should ask their doctors to explain beforehand both the potential benefits and risks of the screws, as well as alternative treatments, including non-surgical ones. Patients should also keep in mind that, as with any surgery, it is important to choose a surgeon who is skilled and experienced in performing the procedure.

What are the surgical alternatives to the screws?

The goal in these procedures is to stabilize the spine temporarily until two or more adjacent vertebrae permanently fuse together. This can be done with the use of hooks or wires, which are approved by FDA, rather than the screws. Surgery can also be done using implants attached from the front of the spine rather than the rear. And fusion can be accomplished surgically without the use of implants by inserting bone grafts between the vertebrae, followed by the prolonged use of braces or casts.

How about people who already have the screws?

Some news stories have implied that a large proportion of pedicle screws fail in use. Although the actual failure rate is still unknown, the medical literature indicates that the screws probably fail only a small percentage of the time. This means that most patients with the screws are not likely to have serious problems with them. However, patients who are experiencing problems or concerns that relate to their surgery should consult with their doctors.

MEDWATCH

THE FDA MEDICAL PRODUCTS REPORTING PROGRAM

INSTRUCTIONS FOR COMPLETING FDA FORM 3500A

For use by user facilities, distributors, and manufacturers
for MANDATORY reporting of adverse events and product problems
as designated in the applicable statutes and FDA regulations.

- All entries should be typed.
- Complete all sections that apply.
- To complete an item when information is not available, use:
  - NA for not applicable
  - NI for no information at this time (but may be available at a later date)
  - UNK for unknown
- Dates should be entered as month/day/year (e.g. June 3, 1993 = 06/03/93). If exact dates are unknown, provide the best estimate.
- For narrative entries, if the fields do not provide adequate space, attach an additional page(s), and indicate the appropriate section and block number next to the narrative continuation.
- All attached pages should be identified as page __ of __ and should display the user facility, distributor, or manufacturer report number in the upper right corner as applicable. Reports from user facilities, device distributors, and device manufacturers should include the firm's or facility's name in the upper right corner as well.
- If reporting more than two (2) suspect medications or one (1) suspect medical device per adverse event, use another copy of the form with only section C or section D filled in as appropriate.
- A computer-generated facsimile of the form may be submitted in lieu of the preprinted form if the submitter has received written preapproval from the appropriate FDA program office. It is not necessary for this form to be generated in the same two-sided format as the preprinted form. A two page front-only form is acceptable.
- If no suspect medical device is involved in a reported adverse event, section G "all manufacturers" may be substituted for section D "suspect medical device" on the front of the form to enable the submission of a one page form.
- Adverse events with vaccines should not be reported on this form. Call 1-800-822-7967 for a copy of the VAERS form to report an adverse event associated with a vaccine.

SECTION A: PATIFNT INFORMATION

Complete a separate form for each patient unless the report is on a medical device in which multiple patients were adversely affected through the use of the same device. In that case, indicate the number of patients in block B5 (event description) and complete blocks A1 - A3 for any one patient of the submitter's choice.

A1: **Patient Identifier** - Provide the patient's initials or some other type of identifier that will allow both the submitter and the initial reporter (if different), to identify the report if contacted for follow-up. Do NOT use the patient's name or social security number.

The patient's identity is held in strict confidence by FDA and protected to the fullest extent of the law.

A2: Age - Enter the patient's birthdate, if known, or the patient's age at the time of event onset.

- o if the patient is **3 years or older**, use **years** (e.g., 4 years).
- o if the patient is **less than 3 years old**, use **months** (e.g., 24 months).
- o if the patient is **less than 1 month old**, use **days** (e.g., 5 days).

Provide the best estimate if exact age is unknown.

If the adverse event is a congenital anomaly, use the age or birthdate of the child or the date pregnancy is terminated. If information is available as to the time during pregnancy when exposure occurred, provide that information in narrative block B5.

A3: Sex - Enter the patient's gender. If the adverse event is a congenital anomaly, report the sex of the child.

A4: Weight - Indicate whether the weight is in pounds (lbs) or kilograms (kgs). Make a best estimate if exact weight is unknown. If the adverse event is a congenital anomaly, use the weight of the child.

Other - Check only if the other categories are not applicable to the report. Briefly describe the patient outcome in the space provided. The actual narrative of the event will be entered in block B5.

B3: **Date of the event** - Provide the best estimate of the date of first onset of the adverse event. For congenital anomalies, the date of birth or the date pregnancy is terminated should be used. If day is unknown, month and year are acceptable. If day and month are unknown, year is acceptable.

B4: **Date of this report** - The date the report is filled out.

B5: **Describe event or problem** -

For an **adverse event**: Describe the event in detail using the reporter's own words including a description of what happened and a summary of all relevant clinical information (medical status prior to the event, signs, symptoms, diagnoses, clinical course, treatment, outcome, etc.) If available and if relevant, include synopses of any office visit notes or the hospital discharge summary. To save time and space (and if permitted by the institution) attach copies of these records with any confidential information deleted. **Do not identify any patient, physician or institution by name. The initial reporter's identity should be provided in full in section E.**

Results of relevant tests and laboratory data should be entered in block B6. Preexisting medical conditions and other relevant history belong in block B7.

For a **product problem**: Describe the problem in sufficient detail so that the circumstances surrounding the defect or malfunction of the medical product can be understood. If available, the results of any evaluation of a malfunctioning device and, if known, any relevant maintenance/service information should be included in this section.

B6: **Relevant tests/laboratory data, including dates** - Include any relevant baseline laboratory data prior to the administration or use of the medical product, all laboratory data used in diagnosing the event and any available laboratory data/engineering analyses (for devices) that provide further information on the course of the event. Include any available pre- and post-event medication levels and dates if applicable). Include a synopsis of any relevant autopsy, pathology, engineering or lab reports, if available. If preferred, copies of any reports may be submitted as attachments with all confidential information deleted. **Do not identify any patient, physician or institution by name. The initial's reporter's identity should be provided in full in section E.**

B7: **Other relevant history, including preexisting medical conditions** - If available, provide information on other known conditions in the patient (e.g., hypertension, diabetes, renal/hepatic dysfunction, etc.) and significant history (allergies, race or ethnic origin, pregnancy, smoking and alcohol use, drug abuse, etc.)

SECTION D: SUSPECT MEDICAL DEVICE

For adverse event reporting - a suspect medical device is one that the initial reporter suspected was associated with the adverse event. In block D10, report other concomitant medical products (drugs, biologics, medical devices, etc.) that the patient was using at the time of the event that are not the suspect product(s). Attach an additional form if there was more than one suspect medical device for the reported adverse event.

D1: **Brand name** - The trade or proprietary name of the suspect medical device as used in product labeling or in the catalog. (e.g., Easyflo Catheter, Reliable Heart Pacemaker, etc.) This information may be on a label attached to a durable device, may be on a package of a disposable device, or may appear in labeling materials of an implantable device.

D2: **Type of device** - The generic or common name of the suspect medical device or a generally descriptive name (e.g., Foley catheter, heart pacemaker, patient restraint, etc.)

D3: **Manufacturer name & address** - If available, list the full name and mailing address of the manufacturer of the product.

D4: **Operator of device** - Indicate the type (not the name) of person operating or using the device on the patient at the time of the event.

Health professional =	physician, nurse, respiratory therapist, etc.
Lay user/patient =	person being treated, parent/spouse/friend of the patient
Other =	nurses aide, orderly, etc.

D5: **Expiration date** - If available. This date can often be found on the device itself or printed on the accompanying packaging.

D6: **Product identification numbers** - If available. Provide any or all identification numbers associated with the suspect device exactly as they appear on the device or labels. These numbers can be found on the device itself and/or in the accompanying literature and packaging. If the type of number is unknown, record the number on the line marked "other #".

Model # - the exact model number found on the device label or accompanying packaging, including any revision level information.

Catalog # - the exact number as it appears in the manufacturer's catalog or labeling.

Serial # - can be found on the device label. This number, assigned by the manufacturer should be specific to each device.

BACK PAGE

At the top of the back page, enter the page number and the total number of pages submitted (include attachments in the total) where the words "page __ of __" are indicated.

SECTION F: FOR USE BY USER FACILITY/DISTRIBUTOR - DEVICES ONLY

This section is to be used by user facilities or distributors for the mandatory reporting of device adverse events and/or malfunctions to the FDA and/or the manufacturer. The use of form 3500A for reporting by user facilities and distributors is voluntary until the publication of the final regulation at which time the use of the form will be required.

A device user facility is defined by Section 519(b)(5)(A) of the Food, Drug, and Cosmetic Act as a "hospital, ambulatory surgical facility, nursing home, or outpatient treatment facility which is not a physician's office." FDA has proposed in a tentative final regulations, under Section 519(e)(5) of the act, to include, outpatient diagnostic facilities within the definition of user facility as well. Reporting by outpatient diagnostic facilities will be voluntary until FDA issues the final regulation implementing such requirement.

F1: **Check one** - Indicate whether the report is from a user facility or a device distributor.

F2: **UF/Dist report number** - Enter the complete number of the report exactly as entered in the upper right corner of the front page. For a follow-up report, the UF/Dist report number must be identical to the number assigned to the initial report. See instructions on page 2 for further explanation of UF/Dist report number.

F3: **User facility or distributor name/address** - Enter the full name and address of the user facility or distributor where report originated.

F4: **Contact person** - Enter the full name of the medical device reporting (MDR) contact person. This is the person designated by the facility's most responsible person as the device user facility/distributor contact for this requirement. FDA will conduct its MDR correspondence with this individual. The contact person may or may not be an employee of the facility. However, the facility and its responsible officials will remain the parties ultimately responsible for compliance with the requirement.

F5: **Phone number** - Enter the phone number of the medical device reporting (MDR) contact person.

F6: **Date user facility or distributor became aware of event** - Enter the date that the user facility's medical personnel or the distributor became aware that the device may have caused or contributed to the reported event.

F13: **Report sent to manufacturer?** - By statute or regulation, user facilities and distributors must submit reports of certain device-associated adverse events to the manufacturer of the device.

A user facility must submit to the manufacturer, if known, reports of

1. deaths suspected of being device related
2. serious injuries suspected of being device related

a distributor must submit to the manufacturer reports of

1. deaths suspected of being device related
2. serious injuries suspected of being device related
3. certain malfunctions

See applicable statute, regulations, or guidelines for further explanation of reportable events.

F14: **Manufacturer name/address** - Enter full name and address of the device manufacturer to which the report was sent.

SECTION G: ALL MANUFACTURERS

This section is to be filled out by all manufacturers.

NOTE: If a drug or biologic manufacturer is reporting an adverse event in which no suspect medical device is involved, section G may be identically reproduced in place of Section D on the front of the form so that a one page form may be submitted.

G1: **Contact office - name/address (& mfring site for device)** - Enter the full name and address of the manufacturer. The name of the contact person may also be included. The name and address of the manufacturing site of the device should be included if different from the contact office. Device manufacturers should include the name of the medical device reporting (MDR) contact person.

G2: **Phone number** - Enter the phone number of the contact office.

G3: **Report source** - Check the box(s) that most accurately describes how the manufacturer contact office found out about the reported adverse event. Current regulations require the submission of reports from any source, including the literature.

Foreign - Foreign sources include foreign governments, foreign affiliates of the application holder, foreign licensors and licensees, etc. The country of origin should be included.

Study - Postmarketing, clinical trial, or surveillance study.

If the report lists two products by the same applicant as suspect, the report should be submitted to the application file of the product thought by the initial reporter most likely to be the cause of the adverse event. If they are equally suspect, the report should be submitted to the application file of the product that is first alphabetically.

(A)NDA # - the abbreviated new drug application or the new drug application number. The report should be filed to the first approved NDA if a product has several NDA's and the specific one cannot be determined.

IND # - the investigational new drug application number.

PLA # - the product license application number.

Pre-1938 - check the box if the suspect medication was approved prior to 1938 and does not have an NDA#.

OTC - product check the box if the suspect medication can be purchased over-the-counter.

G6: **If IND, protocol # -** This block is for use by drug and biologic manufacturers only. If the form is being used as a 10-day IND safety report, enter the protocol number.

G7: **Type of report -** Check all that apply to reported event.

5-day - Devices: See applicable statute, regulations, and guidelines.

10-day - Drugs and Biologics: For reports of serious adverse events derived from a study conducted under an investigational new drug application (IND), as specified in the applicable regulations and guidelines.

15-day - Devices: See applicable statute, regulations, and guidelines.

Drugs and Biologics: For reports of serious and unexpected adverse events, as specified in the applicable regulations and guidelines.

Periodic - Drugs and Biologics: For reports of serious labeled and non-serious (labeled and unlabeled) adverse events as specified in the applicable regulations and guidelines.

Initial - Check if the report is the first submission of a report.

Follow-up - Check if the report is a follow-up to an previously submitted

Malfunction - see the guidelines.

Other - specify the type of report in the space provided. This option is intended to capture reports that a manufacturer believes the agency should be aware of that are not covered by death, serious injury, or malfunction as these terms are defined by statute, regulation or guidelines.

This "other" category can be used to notify FDA of a MDR reportable event for which a corrective action or removal was taken. Section 519(f)(1) of the act states that no report of corrective action or removal is required if it has been reported per section 519(a) of the act. Do not use this form to report a corrective action or removal if no MDR report is required.

This "other" category can also be used to report "other significant adverse device experience as determined by the Secretary to be necessary to be reported" as specified under the Medical Device Amendments of 1992.

H2: **If follow-up, what type?** - Check the box(s) that most accurately describe the nature of the follow-up report.

Correction - changes to previously submitted information.

Additional information - information concerning the event that was not provided in the initial report because it was not known/available when the report was originally submitted.

Response to FDA request - additional information requested by FDA concerning the device/event.

Device evaluation - evaluation/analysis of device.

H3: **Device evaluated by mfr?** - Indicate if an evaluation was made of the suspect device. If an evaluation was conducted attach a summary of the evaluation and check the box. If an evaluation was not conducted, explain why not on an attached page or in block H10 or provide the appropriate code in the space provided. (See coding manual for appropriate codes.)

H4: **Device manufacture date** - Enter the month and year of manufacture of the suspect medical device.

H5: **Labeled for single use?** - Indicate whether the device was labeled for single use or not. If the question is not relevant to the device being reported, such as capital equipment, the "no" box is the appropriate selection.

How to obtain copies of the form, instructions and coding manual

Ten copies or less of FDA Form 3500A and a copy of the instruction may be obtained from:

Division of Epidemiology and Surveillance (HFD-730)
Center for Drug Evaluation and Research
Food and Drug Administration
5600 Fishers Lane
Rockville, MD 20857 301-443-4580

Adverse Experience Branch (HFM-220)
Center for Biologic Evaluation and Research
Food and Drug Administration
1401 Rockville Pike
Rockville, MD 20852-1448 301-295-9004

Division of Small Manufacturers Assistance (HFZ-220)
Center for Devices and Radiological Health
Food and Drug Administration
5600 Fishers Lane
Rockville, MD 20857 1-800-638-2041

Bulk copies of FDA Form 3500A can be obtained from:

Consolidated Forms and Publications Distribution Center
Washington Commerce Center
3222 Hubbard Road
Landover, Maryland 20785

Copies of blank FDA Form 3500A may also be duplicated by the applicant.

A copy of the coding manual for use by user facilities, device distributors and device manufacturers can be obtained from:

Division of Small Manufacturers Assistance (HFZ-220)
Center for Devices and Radiological Health
Food and Drug Administration
5600 Fishers Lane
Rockville, MD 20857 1-800-638-2041

The instructions and coding manual are also available through the FDA electronic bulletin board system at: 1-800-222-0185

INFORMATION RELATED TO: SB 15 & HB 58

Distributed by Senate Judiciary

Section 9. Establishes a formula for increasing or reducing the rate of interest applicable to a judgment by either two, three, or five percent, depending on whether an offer of judgment is accepted or rejected.

Section 10. Changes the rate of interest applicable to a judgment from a fixed rate of 10.5 percent to a floating rate determined under subsection (c) enacted in sec. 11.

Section 11. Establishes a method for determining the rate of interest to be paid on a judgment.

Section 12. Establishes a alternative dispute resolution pilot program for certain civil cases. Only certain cases filed in Anchorage are required to be mediated. Requires that the program operate for at least five years, under a structure set by the supreme court. Requires fees and costs be shared equally by the parties to the case. Requires the Alaska Judicial Council to annually evaluate the program.

Section 13. Provides that in a judgment entered against the state, the rate of interest is the floating rate established under AS 09.30.070.

Section 14. Provides that in eminent domain actions, the compensation awarded must include interest at a rate of 10.5 percent.

Section 15. Requires that certain civil actions must be arbitrated. Requires the court to appoint an arbitrator and establishes time lines for reaching a decision. Provides that the decision is admissible in the civil action and that a party that rejects the decision and loses in later civil litigation is liable for actual costs and attorney fees.

Section 16. Provides that a person who is injured or killed cannot recover civil damages, if the person was committing a felony, or was engaged in conduct that constitutes the commission of a felony and the conduct substantially contributed to the injury or death and is proved by clear and convincing evidence. Provides that the section does not apply if the person is acquitted.

Section 17. Requires that the Alaska Judicial Council collect and evaluate certain information regarding civil litigation.

Section 18. Limits the amount of punitive damages that can be recovered in an unlawful employment action.

Section 19. Requires the director of the division of insurance to evaluate the effect of the provisions of this Act and the financial health and profitability of insurers doing business in the state. Requires insurers to provide information to the state and provides for an annual report to the legislature and the governor.

Section 20. Establishes a private cause of action for a violation of the unfair trade practice provisions of AS 21.36.125, or of a trade practice or claim regulation adopted by the director. Requires notice be given to the insurer and to the director. Allows for the recovery of foreseeable damages, costs, attorney fees, and punitive damages.

Section 21. Limits the authority of the court to award punitive damages in employment cases.

Section 22. Increases the jurisdiction of the district court to claims that do not exceed $100,000.

Section 23. Imposes a penalty on insurers who deny medical coverage under a motor vehicle insurance policy and later are determined to have wrongfully denied coverage.

Section 24. Requires that uninsured and underinsured motor vehicle insurance be excess coverage, payable even when other policy coverage is not exhausted.

Section 25. Amends civil rule 16.1(c) to prohibit filing of a motion to set trial until after the parties meet to discuss settlement required under sec. 26.

Section 26. Amends civil rule 16.1 to require a meeting of the parties to discuss settlement and to establish discovery guidelines.

Section 27. Amends civil rule 41(a) to require parties to a civil action to submit certain information required under AS 09.68.130.

Section 28. Repeals and reenacts civil rule 68, to provide a formula for increasing or decreasing the interest rate applicable to a judgment depending on an offer of judgment made in the case. The rule is changed to be consistent with sec. 9.

Section 29. Changes the limit the use of discovery in a medical malpractice action from 80 to 60 days.

Section 30. Increases the fine that can be imposed by a court against an attorney to $10,000.

Section 31. Amends district court civil rule 1(a)(1) to limit the use of discovery.

Section 32. Amends district court civil rule 4 to require a maximum of 270 days before a case goes to trial.

Section 33. Amends appellate rule 511 to require parties to a civil action to submit certain information required under AS 09.68.130.

Section 34. Repealers.

Section 35. Repealers.

Section 36. Repealers.

Section 37. This section sets out the intent of the legislature to amend civil rules 49 and 26(b) and (d).

Section 38. This section sets out the intent of the legislature to amend civil rule 68.

Section 39. This section sets out the intent of the legislature to amend civil rule 100.

Section 40. This section sets out the intent of the legislature to amend civil rule 79(b).

Section 41. This section sets out the intent of the legislature to amend civil rule 82(b).

Section 42. This section sets out the intent of the legislature to amend civil rule 82(b).

Section 43. Applicability section.

Section 44. Severability clause.

Section 45. Instruction to the revisor of statutes regarding technical amendment.

Section 46. Effective date for court rule change sections.

Section 47. Effective date.

MFF:pl
97-069.plm

ADN 3/24/97

THERE IS GOOD TORT REFORM, AND BAD; KNOW THE DIFFERENCE

By JEFF BUSH

JUNEAU -- Remember when everyone, except maybe ice cream salesmen, thought all cholesterol was bad? And everyone, except a few trial lawyers, thought any tort reform was good?Well, we now know that some cholesterol is actually good for you. And while almost everyone, myself included, supports reform of our civil justice laws, some tort reform actually is bad for you.

Tort reform comes in many shapes and sizes. Let's look at a typical lawsuit. Say Vic is walking across the street when he's hit by a car driven by Sue. His legs are crushed in the accident. Fortunately, Vic has health insurance to pay the $200,000 hospital bill, but he can no longer work as a home builder and will have to get a lower-paying job as a clerk for an insurance agency. He'll also have to learn to live in pain the rest of his life.

Vic hires one of those trial lawyers he sees on TV and agrees to pay the guy a third of any settlement. The lawyer files suit and the case winds its way through the endless process of depositions, motions and medical examinations. Five years later, the case goes to trial and the jury awards Vic $750,000 -- $200,000 for his medical expenses; $150,000 for lost wages, since he now works for less, and $400,000 to him and his family for pain and suffering. Meanwhile, Sue's insurance company has shelled out another $250,000 to its $200-an-hour attorney to defend the case.

Before Vic gets a penny, the trial lawyer deducts his third and all his expenses, such as thousands of pages of depositions at $10 per page and medical experts at $350 per hour. The money awarded for medical expenses is used to reimburse Vic's insurance carrier. Vic has been crippled for life, and if he's lucky, he and his family will get about $200,000 in compensation. Almost 60 percent of the money paid by the insurance company has been eaten up by the "system."

The problem seems obvious; the solutions, however, are not.

Good Tort Reform tries to reduce that 60 percent figure. That was the approach taken by Gov. Tony Knowles' Task Force on Civil Justice Reform and included in the governor's tort reform bill. The bill includes a pilot project to require most cases to go to mediation or other alternative dispute resolution, rather than fester for years in the courts. Another proposal would require cases filed in District Court to go to trial within a year and reduce the amount of money spent on depositions and other legal mumbo-jumbo. A third proposal would encourage parties to settle cases early.

Bad Tort Reform doesn't reduce the 60 percent figure but instead puts limits on compensation. For instance, Rep. Brian Porter's tort reform bill, HB 58, places a "cap" on non-economic damages, which in this case would have reduced the jury's award by $100,000. Guess whose share that comes out of? (Hint: Neither the lawyers nor the insurance company gives up much.)

Bad Tort Reform also lets a defendant point the finger at anyone. Sue could blame the state for failing to properly maintain the road, or her doctor for giving her medication that made her drowsy, or the Japanese maker of her car because something was wrong with the steering, or even the used car salesman she bought it from.

The courts currently deal with these kinds of claims by requiring the plaintiff to bring that carmaker or salesman into court so the judge and jury can weigh the evidence and decide the appropriate level of responsibility. But under Bad Tort Reform, the more people whom Sue and her lawyer can point a finger at, even if they are not around to defend themselves, the more money

Sue's insurance company gets to keep. And, of course, the less Vic gets.

Bad Tort Reform even allows some people who hurt others to walk away scot-free.Say Vic is parking his snowblower and his garage roof collapses on top of him. Whether Vic could recover anything from the builder would depend, under Porter's bill, on how old the garage was. It if was 7 years old, no problem; 8 years, tough luck, Vic.

So when someone tries to tell you that you should support some bill just because it's tort reform, ask if it's good tort reform or bad tort reform. You already do the same with cholesterol -- why else would anyone eat frozen yogurt instead of Ben and Jerry's?

Jeff Bush is Deputy Commissioner of Commerce & Economic Development. He was a member of Gov. Tony Knowles' Civil Justice Reform Task Force.

LAW OFFICES OF
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Richard H. Friedman
Jeffrey K. Rubin
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To: Robin Taylor

From: Rick Friedman

Robin,

Thanks for introducing the "Task Force" bill. Needless to say, everyone up here is very grateful and willing to do anything to help you along.

I am enclosing a "closing argument" for punitive damages which has some concepts you may want to use if you end up debating this issue.

As always, let me (us) know what we can do.

RHF

From: John C. McCarthy
Especially for: The Western Trial Lawyers Association
Sun Valley, Idaho,
Saturday, March 1, 1997
8:50 to 9:30 AM

A CLOSING ARGUMENT FOR PUNITIVE DAMAGES

Planning your closing argument in a punitive damage case starts with jury selection, if not with motions in limine.

I feel it is essential in voir dire to prepare the jury for its role in deciding whether or not to assess punitive damages and, if so, how much will be appropriate to do the job the law asks them to do - - punish the defendant. You may even have to duke it out with the trial judge before starting jury selection to make certain the deck is clear for you to question prospective jurors about their attitudes concerning punitives and their possible role in fixing them.

But in order for the plaintiff's attorney to do that he or she must understand what his or her role is and then get that message across in voir dire as part of the screening of jurors. Obiously, you want to try to select only those who are eager to play the right role, enthusiastically, fully and effectively.

So, here is the approach I use: THE COP ON THE BEAT. This is the message I try to convey to the judge and to the jurors. You have to use your own words that work for you and for the situation that you face. Each case is different.

Surprisingly, despite a national mood for tougher anti-crime legislation and tougher sentences for criminals, when it comes to corporate crime, we have little help from lawmakers, prosecutors or the courts. They leave it almost entirely up to jurors like those called to duty in this case and private attorneys like us.

For over 40 years as a private attorney I have been a cop on the beat trying to protect consumers, employees, insureds and other victims of corporate fraud and deceit. I am a private cop because there are no police to protect my neighbors. There never have been.

I am also their private prosecutor because there are no laws that any public attorney, district attorney or attorney general can enforce that will restore to my neighbors what has been taken from them as a result of corporate fraud or deceit in the (manufacture and marketing of defective and dangerous products) (bad faith denial of insurance benefits due a policyholder) (firing of good employees because they are too old, the wrong sex or race) etc. Adapt to your case.

My beat is the courtroom and my only weapon has been the law of punitive damages. And I am permitted to use it only when I can prove that the corporate defendant acted with full knowledge and malice and succeeded in unlawfully injuring my innocent neighbor. If I cannot prove my charge with clear and convincing evidence, I not only lose, I do not get paid.

The lawful purpose of punitive damages is to punish the guilty corporation, to discourage it from continuing to profit from cheating and injuring the public, and to send a public message to other like-minded corporations. Jail sentences serve the same purpose for individuals who commit the same acts. But a corporation cannot be sentenced to jail. It cannot be executed no matter how many lives, careers or fortunes it has unlawfully destroyed.

It is out of an historical sense of fairness that Americans are careful to fit the punishment to the crime. Eighty percent support the death penalty because they feel it is necessary to punish severely individuals who maliciously commit deadly crimes. Americans also feel strongly that the death penalty saves lives because it is a deterrent to such criminal conduct.

Therefore, when jurors find a corporation guilty of deliberately, unlawfully and maliciously causing death or injury or property loss to their consumer victims, they must be ready, willing, and able to impose appropriate punishment. And the only way the law provides for that is through fines fixed by jurors in the form of punitive damages.

If jurors refuse to do so, are not permitted to do so or are limited in the fines they can assess, doesn't that put an easily affordable price on corporate crime? Why should the wealthiest and most powerful corporations who commit the most reprehensible fraud be given the green light for open season on our fellow Americans?

The cop on the beat can do only so much. The prosecutor in the courtroom can do only so much. The judge can do only so much. If corporate crime is to be brought under control in America, it is up to ordinary Americans, sitting as jurors, to do it. And I will prove this is such a case.

One well-publicized report of a carefully considered jury's verdict assessing punitive damages does more to deter growing corporate crime against Americans than any politician's campaign promise ever could do.

KENNETH O. JARVI

101 East 9th Avenue, Suite 9B
Anchorage, Alaska 99501-3677
(907) 276-4271

March 20, 1997

Senator Robin Taylor
Chair, Senate Judiciary Committee
Alaska State Legislature
State Senate
State Capitol
Juneau, Alaska 99801

Dear Senator Taylor:

I know you are aware that current Alaska Statute §09.17.010 puts a cap on non-economic damages for victims of personnel injury, but fairly recognizes that it does not apply to that small percentage of cases which involve severe physical impairment or disfigurement. By contrast, the current legislation being propounded by Representative Porter from Anchorage effectively obliterates the rights of severely injured persons for fair compensation. SS HB 58 creates a $500,000 cap on non-economic damages and does not create a exception for severely injured persons. Simply stated, if a person's life is trashed because of someone's tort liability, $500,000 for non-economic damages is inadequate.

The question with regard to this proposed legislation is really one of fairness. These catastrophic injury cases represent very few of all cases in the judicial system. These victims have had the quality of their lives changed in a significant way, and in a way which no one would willingly exchange places with them for any amount of money. Why should they be picked on? There is nothing unfair about having a paraplegic, hemiplegic, quadriplegic, or brain injured person fully compensated for their losses. With their life dramatically changed and frequently effectively destroyed, this compensation in these small minority of cases is really all the "system" has to offer.

I am a registered Independent and have been for my 30-plus years in Alaska, but I have closely followed Republican philosophy. I thought Republican philosophy meant less government interference with citizens exercise of their rights, not more. Why pick on these trauma induced crippled people by stripping them of the only justice that the system can offer?

My experience in dealing with insurance companies is the less they have at risk, the more difficult they are to deal with and the more unreasonable they become. I would suggest that establishing caps that relate to catastrophic injuries will be a greater incentive for the insurance companies to contest cases of merit. When they have less at risk, they can afford to be contentious. Reduce the risk of exposure of these insurance companies and you will see more, not less, of these cases in court.

I note that the sponsor statement relating to SS HB 58 states that liability insurance is unavailable. This has to be a misstatement, whether unwittingly or intentional I don't know. But, clearly, the sponsor of SS HB 58 was a member of the Governor's Task Force and the Governor's Task Force concluded that no insurance crisis exists in Alaska at this time in terms of cost or availability (See Task Force Report at page 55).

Perhaps in the present context, it is too easy for truth to be a victim. It appears that severely injured trauma victims are easy prey. They have none of the powerful, well paid lobbyists that the insurance industry or the big business interests have. If the proponents of SS HB 58 are successful in their effort to effectively eliminate severely injured trauma victim's rights, then my question is what is the quid pro quo? I have heard or seen nothing from the insurance industry that it has committed itself to a reduction in rates. There is a good reason for this. It won't do so. Further, we all know why. When the trauma victim's rights are savagely stripped, this will simply create a windfall for the insurance companies. They will not change their premiums one wit. As a consequence, the insurance consumer will continue to pay as they have. The victims, those who became severely crippled, will give up substantial rights in exchange for nothing. The insurance consumer gets nothing more, but our friendly insurers sure do: substantially limited exposure for the same premium dollar. Since there is no insurance crisis in terms of availability or affordability, who benefits? Not the consumer, and certainly not the severely injured trauma victim.

What happened to the Republication philosophy of no new taxes? The treatment in the tort reform bill regarding punitive damages is to give 50% of any hard won recovery to the State. This is simply a tax on plaintiffs who have suffered substantial damages caused by outrageous conduct of a defendant, but who have had the guts and stamina to pursue a case against defendants who deserve what they get.

I know as a lawyer, you have a comprehension of how difficult it is to successfully pursue a punitive damage case. Punitive damages are so infrequently awarded that instead of putting a 50% tax on a plaintiff who has the guts and stamina to pursue such a case, the Legislature should do the opposite: create a incentive for the prosecution of such cases because it does

effectively root out some genuinely bad actors who deserve what they get. At the very least, the Legislature should not create a disincentive to pursue these difficult cases. Under current law, the conduct of the defendant has to be outrageous and intentional or be outrageous and evidence a reckless disregard for the safety of other people. With this stiff criteria, juries almost never award punitive damages. When they do, the verdicts are reviewed by courts and then are frequently reduced.

If there was some benefit to be gained, maybe these draconian in-roads on the rights of severely injured people would make sense. If there is a quid pro quo, it is not obvious. All I would ask is that in the consideration of the proposed bill coming from the House that the Senate consider the unfairness of obliterating the severely injured victim's rights, that is what SS HB 58 proposes to do.

Sincerely yours,

Kenneth O. Jarvi

KOJ/sel/5119

AFFIDAVIT OF ROBERT BELLOTT

Robert Bellott, being first duly sworn, deposes and states his belief is as follows:

1. I live in Anchorage, Alaska, and worked in Alaska as an insurance agent for State Farm for over 20 years. I worked in this capacity through August, 1996.

2. As an agent, I sold various forms of liability insurance for businesses and other insureds. The types of liability insurance I sold included personal and commercial liability umbrella policies; automobile liability coverage; general liability coverage; and package insurance policies that included liability insurance components.

3. Liability insurance has become more costly since 1985, and its cost has steadily risen. All forms of liability insurance of which I am aware have risen almost every year, if not every year, since 1985.

4. I have been informed that the Alaska legislature enacted a tort reform measure in 1986. I am aware of no reduction in the cost of liability insurance associated with this measure.

Law Offices of
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1227 West 9th Avenue, Second Floor
Anchorage, Alaska 99501
(907) 258-0704

Dated this 16th day of October, 1996.

FURTHER YOUR AFFIANT SAITH NAUGHT.

Robert J. Bellott
Robert Bellott

SUBSCRIBED AND SWORN to before me this 16th day of October, 1996, at Anchorage, Alaska.

Cynthia A. Bellott
Notary Public in and for Alaska
My commission expires: 6/2/00

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Jeffrey Friedman
P.O. Box 111841
Anchorage, AK 99511-1841

jeffjan@alaska.net

January 25, 1997

Senator Sean Parnell
State Capitol
Juneau, AK 99801-1182

Sent by Fax to 465-2278

Dear Senator Parnell:

I am writing to you about the various tort reform bills before the Legislature this year. Since I am a lawyer, many people will say I am biased, and my opinion should be discounted. But I am also an owner of an office building in Anchorage, a small business owner, a husband, and a father. To say that lawyers can not be trusted to provide reasonable opinions on tort reform is no different than suggesting that each Legislator's vote is determined solely by what will garner the most campaign contributions. While that may occasionally be true, I'd like to think that most people, including Legislators and lawyers, are capable of putting the public interest ahead of any personal interests.

I know what it means to have to make a payroll each month, and I know how important it is to have affordable commercial and consumer insurance. None of the tort bills will have a major effect on my law practice's income. Similarly, none of these bills will lower my insurance premiums by more than a couple of dollars. What they will do, however, is make life much more difficult for victims harmed by the wrongful conduct of others.

For example, under the proposed Statute of Repose in HB 58, if my son's school roof should happen to collapse on his head because of a negligent design calculation, I won't be able to recover a dime for his medical expenses because the building is more than 8 years old. On top of that, the school district won't be able to recover any money to rebuild the school. Instead, the district will have to raise taxes to cover that cost.

Unfortunately, people make mistakes. Sometimes, those mistakes cause injury and property damage which someone has to pay for. Proponents of tort reform seem to think the victims should be required to pay this cost rather than the negligent tortfeasor. I believe the person causing the harm should pay this cost. That is the person in the best position to be careful to avoid the harm, is the person in the best position to include the cost of potential harm in the cost of his or her product, and is the person in the best position to purchase insurance to protect against this risk.

People talk about outrageous jury verdicts, and frivolous lawsuits. Despite this talk, they can point to very few examples here in Alaska. **Legislation ought to be based on facts, not rumor.** When you examine actual cases, you find that the claims and defenses raised are valid, and the jury's verdict is reasonable. In the very rare case when the verdict is excessive, the trial judge or appellate court is quick to reverse the result. No system of resolving disputes is perfect, but the current system works very well. Several of the proposed changes will make the system more expensive. Overall, the proposed changes will make the system less efficient, and shift the cost of injury away from the wrongdoer and on to the victim.

Of course, politics requires compromise. I have looked at the various bills being proposed. If some tort reform must pass, I urge you to do what you can to ensure it is SB 15. SB 15 in its present form is not perfect, but it is a reasonable compromise.

Sincerely,

Jeff Friedman

cc: Sen. Robin Taylor (by fax)

Edmond W. Burke
4003 Heritage Way
Missoula, Montana 59802
Tel. (406) 542-2720
Fax (406) 543-6996

VIA FAX & FIRST CLASS MAIL

March 23, 1997

Sen. Robin Taylor
Alaska Senate
State Capitol, Room 30
Juneau, Alaska 99801-1182

Re: Exemplary Damage Awards, Proposed Legislation.

Dear Robin:

Although I now make my home in Montana, my interest in Alaska remains strong: I still have a daughter living there and, since moving here, I have become part of a small Anchorage law firm, Burke, Bauermeister and Brelsford.

I have been interested in the debate in Alaska concerning "tort reform," and my colleagues tell me that you are a leader in the fight against artificial caps on non-economic losses and punitive or exemplary damage awards. With this in mind, I am sending you suggested language for a bill intended to create a stir with regard to at least one of these issues: exemplary damages. (Needless to say, my suggested language would have to be put in proper legislative form, before it would be ready for submission as an actual bill; for the most part, however, I think the language could -- and probably should -- remain unchanged.)

Despite the shrill cry of those seeking to avoid exposure to the threat of exemplary damage, it is entirely clear that such damages serve a very useful purpose. Moreover, I see absolutely no reason for the Alaska Legislature to limit anyone's liability for the sort of wanton and malicious conduct required, under existing law, as the prerequisite for an award of exemplary damages. As former Justice Morrison of Montana once warned, in Owens v. Parker Drilling, Co., 676 P.2d 162, 166 (Mont. 1984):

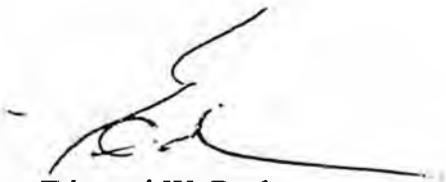
> There are those who distrust the lay person's capacity for reasoned and dispassionate judgment. There are those who tolerate the juries but feel compelled to hold tight rein lest the wretched twelve break the bank. This judicial chauvinism will, if not checked, inevitably erode the jury process.

The bill which I am proposing may help preserve the right of an Alaska jury to award exemplary damages which are meaningful, by accomplishing two things: First, such a bill should clarify the main purpose in awarding exemplary damages -- protection of the public; such damages are wrongly, but all too often, seen only as an opportunity for greedy plaintiffs' lawyers and a financial "windfall" to the successful plaintiff. Second, such legislation will provide a direct benefit the people of Alaska, by requiring a share of any punitive damage award to be placed in the Permanent Fund Earnings Reserve Account, at no cost to the State and without destroying the only incentive there is for an individual plaintiff to undertake the added difficulty and personal financial risk necessary to obtain an award of exemplary damages.

If nothing else, the introduction of such a proposal in the present session might at least improve the quality of the debate concerning "tort reform." It would be quite interesting, for example, to hear some of your fellow-legislators' answers, when asked whether they oppose all or any part of the proposed bill and, if so, why.

I plan to call you later this week for an update on where things are headed in Juneau. Perhaps we can kick this and some of the other aspect of "tort reform" around then. Meanwhile, keep up the good fight; there's no doubt, you're on the side of the angels on this one.

Sincerely yours,



Edmond W. Burke

PROPOSED LEGISLATION

WHEREAS, it is in the best interest of the people of Alaska to hold accountable those guilty of malicious or wanton conduct, including acts intended to harm the person or interests of another, without lawful justification or excuse, and any act or omission involving gross negligence or reckless disregard for the safety or interests of another; and

WHEREAS, the compensatory damages which may be awarded to the plaintiff in a civil action may not exceed in amount that which is necessary to provide reasonable compensation for the plaintiff's injuries; and

WHEREAS, the defendant's conduct, in some cases, is sufficiently egregious to call for the award of exemplary damages as well, in order to punish the defendant and protect the public from similarly egregious conduct in the future; and

WHEREAS, in order to achieve these important public goals, every award of exemplary damages must be great enough to inflict upon the defendant just punishment for the particular act or omission supporting the award, and sufficient in amount to be likely to deter the defendant and others from engaging in similar conduct in the future; and

WHEREAS, the full and consistent realization of these important and necessary public goals is often hindered by the reluctance of some jurors and judges to award an individual plaintiff the amount necessary for their accomplishment;

NOW, THEREFORE, BE IT ENACTED:

A. **Exemplary Damages.** When appropriate, exemplary damages may be awarded against the defendant in a civil action.

1. Exemplary damages are appropriate when it is shown by clear and convincing evidence that a defendant is guilty of malicious or wanton conduct causing harm to the person or interests of another. Such conduct includes, but is not limited to, the following:

(a) Any act intended by the defendant to cause harm to the person or interests of another, provided such act is not one which has been declared justified or excused by the applicable law;

(b) Any act or omission on the part of the defendant amounting to gross negligence under the particular circumstances; and

(c) Any act or omission on the part of the defendant demonstrating reckless disregard for the personal safety and interests of another.

2. Awards of exemplary damages shall be based upon the egregiousness of the defendant's conduct, the importance of discouraging like conduct in the future and the defendant's wealth, and every such award shall great enough to accomplish the following goals:

(a) The award must inflict just punishment upon the defendant, for the particular act or omission supporting the award, and

(b) The award must be great enough to be likely to deter the defendant and others from engaging in like conduct in the future.

B. **Public Share of Exemplary DamageAwards; Deposit in the Alaska Permanent Fund Earnings Reserve.** Exemplary damages awarded in a civil action belong, in part, to the principal intended beneficiary of every such award, the people of the State of Alaska. Such damages shall be divided and the State's share thereof administered as follows:

1. When exemplary damages are awarded in a civil action, the State and the party obtaining the award shall each be entitled to one-half (50%) the amount of the award remaining after deducting such person's full litigation costs and attorneys' fees;

2. The State's one-half (50%) share of the net proceeds of the exemplary damage award will be deposited, upon receipt, in the Alaska Permanent Fund Earnings Reserve Account, and administered according to the provisions of AS 37.13.145.

When Courts Become Political Battlegrounds

Alabama politics has been overwhelmed by an all-consuming fight over tort reform

By Dale Russakoff
Washington Post Staff Writer

BIRMINGHAM

The sacred Southern rituals of Saturday afternoon football and Sunday morning prayer are safe, for now, from the unholy wars of Alabama politics. The "skunk ad" is off the air, no longer incessantly interrupting touchdown drives with word that a candidate for Supreme Court justice "stinks." The letters full of tawdry details from his 20-year-old divorce have stopped circulating in fundamentalist Christian churches across Alabama.

STATES

But this high-financed nastiness was no passing symptom of Campaign '96. Alabama politics has fallen into the grip of a national showdown between two of the country's most powerful interest groups, trial lawyers and business groups, whose money now overwhelms elections for once-obscure offices in this small state. The recent judicial campaign reached senatorial heights of more than $5 million. Legislative races have approached $500,000.

In Alabama, dubbed "Tort Hell" by Forbes magazine, both sides are struggling to control a court system in which populist-style plaintiffs' lawyers regularly win eye-popping civil damage awards by whipping up juries to "send a message" to Big Business. Among the more spectacular verdicts was $130 million against General Motors Corp., won by a rural factory worker paralyzed in a car wreck. (It recently was settled in a postverdict conference for an undisclosed amount.)

According to consultants for both major parties, this struggle has come to dominate all politics in Alabama. They say this year's Supreme Court race, in which a Republican backed by the state Business Council unseated a Democrat backed by the state trial lawyers' group, marked the height, but by no means the limit, of the trend. Already, both sides are gearing up for 1998, when the terms of three justices, the governor and the lieutenant governor will expire.

"This is literally killing politics in Alabama," says political scientist Natalie Davis, who ran unsuccessfully for the U.S. Senate in the Democratic primary this year. "The trial lawyers and the Business Council control most of the money in politics. The trial lawyers pick the Democrat and the Business Council picks the Republican and it's all about your stand on tort reform.

"If you poll voters to see what they're concerned about," Davis says, "they'll say education, health care, jobs, seniors and crime. They never say tort reform. But the big money cares only about tort reform. Then the candidates go to the airwaves with all the garbage and money they can dig up, and voters are turned off and they say: Government doesn't work for me."

Although Alabama is commonly viewed as behind the times, it may be the leading edge in this front. As Washington gives more power to states to regulate issues from the environment to banking to welfare, well-financed groups are pouring resources into political races in capitals from Albany, N.Y., to Sacramento, Calif., political analysts say.

In this year's Supreme Court contest, the Republican, Harold See, is estimated to have raised more than $3 million. He retained Virginia consultant John Deardourff, who says he was surprised to find that a state judicial race could command national strategists. The Democratic incumbent, Associate Justice Kenneth Ingram, with an estimated $2 million—much of it from the Democratic Party—hired Hank Sheinkopf, a member of President Clinton's media team.

FROM A TELEVISED POLITICAL AD

This attack ad was paid for by forces behind Alabama Supreme Court Justice Kenneth Ingram.

Exact fund-raising totals are unavailable because Alabama does not require final campaign finance reports until January, obscuring the vast sums that typically pour in during the final days, often from out of state. Moreover, there are no limits on individual or political action committee donations, resulting in huge contributions from wealthy trial lawyers as well as big companies.

THE STORY OF HOW TORT REFORM came to overwhelm Alabama politics dates to the early 1980s, when plaintiffs' lawyers began winning huge punitive damage verdicts, mostly against insurance firms for fraudulent practices by agents.

The plaintiffs' attorneys had a strong moral argument on their side. "Alabama has very weak regulatory bodies and so lawsuits are very important in setting standards for corporate conduct," Birmingham lawyer Sam Heldman says.

They also had political history on their side. Just as former governor George C. Wallace incited populist anger at big business through the 1970s, some of the most successful plaintiffs' lawyers came to specialize in stem-winding summations urging juries in low-income counties to punish greedy, out-of-state corporations by assessing huge punitive damages against them.

The state's premier trial lawyer is Jere Beasley, Wallace's former lieutenant governor, who has won his largest victories in desperately poor rural counties. Beasley, who represented the paraplegic plaintiff in the General Motors case, was listed in Forbes among the top 20 highest-earning trial lawyers in the country, taking in $6 million in 1994. He has tried many of his cases in his native Barbour County, before a judge who is his former law partner.

"They draw on the same school of thought the George Wallaces and the Huey Longs tapped into," says Gere White, a Birmingham lawyer who represents business. "It's us against them. It's the idea that the reason you're downtrodden is these big Northern corporations are taking advantage of you. It's the civil equivalent of the O.J. Simpson verdict: payback time."

The issue quickly became political as increasingly wealthy trial lawyers raised large sums to help elect pro-plaintiff judicial candidates. Business PACs responded by raising even larger sums for legislative candidates committed to curbing punitive damage awards. Says one business lawyer: "You can't buy legislators here, but you can rent them. In 1986, business rented a lot of them."

The next year, the legislature passed a broad tort-reform package, including a $250,000 ceiling on punitive damages. But the year after that, the trial lawyers roared back when the head of their state association, Ernest "Sonny" Hornsby, who had won a series of big-ticket fraud verdicts, was elected chief justice over a business-backed candidate. In the first full-dress battle between the interest groups, the two campaigns spent a then-record $800,000.

THE HIGH COURT PROCEEDED TO strike down most of the major 1987 tort-reform provisions as unconstitutional, unleashing another round of punitive damage verdicts, including a now-notorious $4 million judgment against BMW of North America for touching up a damaged car and selling it as new to an Alabama physician. The state Supreme Court cut the damages to $2 million, which the U.S. Supreme Court then struck down as "grossly excessive," since the actual damages were $4,000. (The U.S. Supreme Court has since taken the extraordinary step of overturning other damage awards in Alabama.)

Two years ago, business forces picked Hornsby in an election so close it had to be decided by a federal court, which invalidated 2,000 absentee ballots that were not properly notarized or witnessed. The state high court, including justices who contributed to Hornsby's campaign, earlier had voted to count the ballots, which would have given Hornsby his victory margin.

The battle took an even nastier turn this year with Ingram, a Hornsby ally up for reelection, and See, a Chicago-trained law professor at the University of Alabama, as his business-backed challenger.

At one point, a "Committee for Family Values," which turned out to be financed by a number of trial lawyers, ran an ad saying See had a "secret" past, and had "abandoned his wife and two children, had a love affair . . . and fled Illinois for Alabama" 20 years earlier. See responded with an ad featuring his daughter from that marriage declaring that the attack had not "a shred of truth." His ex-wife also issued a statement denouncing the ad.

Another ad featured footage of a skunk crawling into a picture of See, and the message: "Some things you can smell a mile away. Harold See doesn't think average Alabamians are smart enough to serve on juries." The words, "Slick Chicago Lawyer," were plastered over See's face.

Each side called the other a puppet: Ingram of "rich, personal injury lawyers . . . trying to buy the Alabama Supreme Court," and See of "giant insurance companies and big business" who want to deny Alabamians their "right to a trial by jury."

Beasley, whose firm raised $37,500 for a pro-Ingram PAC in a single day, says he believes the final finance reports will show that tobacco and insurance giants bankrolled See. Indeed, an ad attacking the high court, sponsored by a group called Alabama Voters Against Lawsuit Abuse, featured a telephone number that ran to a national business-backed coalition based in California.

See's victory, with 53 percent of the vote, leaves the plaintiff-backed forces on the high court with a one-vote margin.

With three of the nine justices' terms up in 1998, along with those of the governor and lieutenant governor, civic leaders shudder to think how much mud and money will converge here in two years.

As a remedy, Alabama Bar Association President Warren Lightfoot is calling for an end to the election of judges—a practice in 20 states—in favor of merit appointments, with periodic votes to retain or dismiss them.

"Our courts will not be able to function if justices have to engage in this kind of campaigning," Lightfoot says.

But others say that both plaintiff and business forces oppose the effort, in part because the current system enriches them all.

Says one attorney in a corporate practice: "I've had people in my firm say, 'Sure this is terrible, but look at all this business they create.'" ■

The New York Times

Prosecutors and Deputies in Death Row Case Are Charged With Framing Defendant

By DON TERRY

TON, Ill., Dec. 12 — In a and rare indictment, three DuPage County assistant rs and four sheriff's depu- charged here today with y and obstruction of justice rongful murder convictions oung Hispanic men, who rs on death row before be- sed from prison last year. o men were released after igator admitted he had lied testimony about important in the case. Today's indict- rges that that evidence was d.

n were convicted in 1985 in ction, rape and murder of a d girl.

g prosecutors for their during criminal investiga- prosecutions is almost un- No one interviewed, from

e case of law- cement officials charged with cating evidence.

lars to former and current rs, could recall a similar where in the country. ens very, very infrequent- Samuel R. Gross, a profes- e University of Michigan ol. "Three former prosecu- . This is extraordinary."

the former prosecutors day in the 42-count indict- ert K. Kilander, is now a ounty judge.

d murder of the girl his affluent county west of Today's indictment is the al twist in the case, which nnocent men sent to death ly because sheriff's depu- ied that one of the men, ruz, had told them about a had about the killing, in- tails only the killer could n. That testimony was the e of the prosecution's case . Cruz and the other man, Alexandro Hernandez.

Defense lawyers had long contended that investigators fabricated the dream. Last year, during the third trial for Mr. Cruz, held after two previous convictions were overturned on appeal, a DuPage County judge ordered him acquitted after another sheriff's deputy said he had earlier testified falsely that other investigators had said Mr. Cruz had told them about the dream.

That officer, DuPage County Sheriff's Lieut. James T. Montesano, was one of those indicted today.

After Mr. Cruz's acquittal, a grand jury was convened to review the investigation and prosecution. A special prosecutor, William J. Kunkle Jr., was put in charge.

"In a free society there must always be a line between vigorous prosecution and official misconduct, between advocacy and unfairness, and between justice and injustice," Mr. Kunkle said in announcing the indictment late this afternoon. "This indictment charges that line was crossed by seven people."

In addition to Judge Kilander and Lieut. Montesano, the others indicted are , sheriff's deputies Thomas E. Vosburgh, Dennis Kurzawa and Robert L. Winkler and former prosecutors Thomas L. Knight and Patrick J. King Jr. Mr. King is now an assistant United States Attorney in Chicago, and Mr. Knight is in private practice.

Even before today's announcement, word of the indictment had sparked a heated debate on what impact the charges will have. Joseph E. Birkett, the DuPage County States Attorney, the local prosecutor, said the indictments will have a chilling effect on prosecutors everywhere.

"Charging prosecutors for conduct in the performance of their duties is unheard of," Mr. Birkett said. "If this type of allegation can be made, prosecutors will have to second guess everything they do. This is devastating to law enforcement."

Prosecuting prosecutors for official misconduct is difficult because there has to be almost overwhelming evidence that the prosecutors knowingly used false evidence or testimony, a violation of law and ethics that Professor Gross said was exceedingly rare. When it happens, he said, it is usually in high-profile cases like this, where there was enormous pressure to solve the case, and political futures were on the line.

Three of those indicted yesterday in Illinois in the wrongful murder convictions of two men are, from left, Thomas L. Knight and Robert K. Kilander, former prosecutors, and Sheriff's Lieut. James T. Montesano.

Thomas Breen, a defense lawyer, who was a prosecutor for 10 years in neighboring Cook County, which includes Chicago, represents Mr. Cruz. Mr. Breen said the indictments should have no impact on the vast majority of honest prosecutors.

"But it should certainly chill the kind of conduct alleged in the indictment, which is perjury and obstruction of justice," he said. "I hope it freezes it solid. We're beginning to lose track of due process and the pursuit of truth in many cases. The Cruz case is absolutely one of them."

Mr. Breen insisted, as did the other defense lawyers who worked long to free Mr. Cruz, that because someone is indicted does not mean someone is guilty and cautioned against a rush to judgment. "Just ask Rolando about that," he said.

Terry Ekl, another former Cook County prosecutor, is representing Mr. Knight, who prosecuted the men at their first trial in 1985.

Mr. Ekl said that there was no basis to indict his client, and that Mr. Knight had testified twice before the grand jury in the case "because he has nothing to hide."

Mr. Ekl said Mr. Knight believed the police had been telling the truth about the dream, and still believed them. "Now, we're making martyrs out of murderers and indicting prosecutors who were trying to protect the public," Mr. Ekl said. "If Tom Knight is prosecuted in this case, there probably isn't a prosecutor in the country who is safe."

"These guys did not do anything wrong," said Brian Telander, a lawyer for Mr. Vosburgh. "They have good hearts. They are good people, with families. All they wanted to do is the right thing. They didn't make up statements."

Mr. Cruz, who is 33, was 19 when he was convicted. He was sentenced to die after both of his first two trials. In setting Mr. Cruz free, the judge, Ronald Mehling, said the state's case against him was built on lies, mistakes and sloppy police work.

Lawrence Marshall, a law professor at Northwestern University and one of Mr. Cruz's lawyers, said he hoped the trials of the prosecutors and deputies will open "the public's eyes to the fact that the system is way far from perfect and that there is a grave risk of executing innocent people even when a police officer stands up and says 'I heard a confession.'"

Since 1994, five men, including Mr. Cruz, have been released from death row in Illinois because of lack of evidence or because of evidence of innocence. Since the mid-1970's, nearly 70 people have been released from death row nationwide.

"It is quite certain that some innocent people have been executed in the past," Professor Gross said. "It will happen again. We can't keep lucking out forever as we did with Rolando Cruz."

Mr. Hernandez spent more than three years on death row before his conviction was overturned. He was convicted during a second trial and was sentenced to 80 years in prison. Last year, he, too, was freed.

The murder of the girl, Jeanine Nicarico horrified DuPage County, home to a string of well-off Chicago suburbs where the people vote Republican and play polo. She was home alone from school with the flu when someone kicked in the front door of her family's home in Naperville, Ill., and took her away. Her body was found two days later in a field.

"To this day," Mr. Birkett said, "it is probably one of the most shocking murders that has occurred here, and that will never change."

The trial of a third defendant, a 21-year-old white man, Stephen Buckley, ended in a hung jury. He was released in 1987, when the authorities decided not to pursue the case against him.

Another man, Brian Dugan, who has never been charged in the case, admitted in 1985, according to his lawyer, to being the girl's lone killer. DNA tests, which excluded Mr. Cruz and Mr. Hernandez as the source of semen found in the child, have implicated Mr. Dugan, who is serving a life sentence for the rapes and murders of a 7-year-old girl and a 27-year-old woman.

Mr. Dugan has refused to tell the authorities his story unless they promise not to seek his execution.

For years, several law-enforcement officials said Mr. Cruz and Mr. Hernandez were innocent. Mary Brigid Kenney, a lawyer in the Illinois Attorney General's office, who was in charge of fighting Mr. Cruz's appeals to save his life, resigned in 1992 in protest, saying the state was trying to kill an innocent man.

Menorahs Bloom From Act of Vandalism

By JENNIFER PRESTON

NEWTOWN TOWNSHIP, Pa., Dec. 12 — At 5 A.M. Sunday, Judith and Martin Markovitz were awakened by the sound of breaking glass. Vandals had walked across their front lawn and smashed in their living room window to destroy an electric menu-

Tort-reform battle heats up in Juneau

Both sides on the issue appeal to human element

By NATALIE PHILLIPS
Daily News reporter

Christy Tengs Fowler is selling the family liquor store after 44 years of business. She said a frivolous lawsuit drove her to it.

Seven years ago, a 20 year-old used fake identification to buy wine coolers at the family's store in Haines. A couple of hours later, he crashed his pickup truck and died. His parents sued for more than $100,000, but eventually settled out of court for $37,500. Two years later, a passenger in the vehicle also sued, but his claim was dismissed.

"It was like blackmail," Fowler said. "It made me lose faith in the inherent goodness of mankind. It's still upsetting. Something has got to be done to stop these frivolous lawsuits. We need some protection."

Fowler is a poster child for the forces gathered in Juneau to push for changes to state laws that dictate who can sue whom, when they can sue and for how much.

Business owners, medical professionals and insurance industry leaders insist that

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TOM MORPHET Special to the Daily News

Christy Tengs Fowler, owner of The Alaska Liquor Store in Haines, stands in front of her store, which closed after she was sued twice.

Senate leader is confident Legislature will pass a bill

By RALPH THOMAS
Daily News Juneau Bureau

JUNEAU — During a recent speech to state business leaders, Senate President Mike Miller made a promise: the Legislature will put another tort reform bill on Gov. Tony Knowles' desk this year.

But what Miller, R-North Pole, didn't say is what that bill will look like by the time it reaches the governor.

Much of its identity will be hammered out in the coming weeks in the Senate during a sort of tort reform summit meeting between all of the main players.

Lawmakers recently waded back into the high stakes issue when the House went to work on a massive new bill aimed at limiting the number and size of civil damage claims and putting an end to so-called frivolous lawsuits.

The 25 page, 65 section measure, which was approved by the House last week, was put together by Republican Rep. Brian Porter of Anchorage, who has been leading the tort reform

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Anchorage Daily News

LEGISLATURE: Senator expects bill

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charge for the past four years.

Porter's bill includes many of the provisions suggested last fall by a governor's task force. But it also still includes some of the controversial sections that prompted Knowles to kill last year's legislation.

The battle now moves to the Senate, where, as in the House, a larger and stronger Republican-led majority clearly has the votes to quickly pass the bill. But what is not clear is whether the House and Senate will have the two-thirds vote needed to override another Knowles veto.

Senate Majority Leader Robin Taylor, a lawyer himself and longtime critic of tort reform, said Friday he hopes it doesn't come to that.

Taylor, R-Wrangell, who has a bill in the Senate that mirrors the governor's task force recommendations, is trying to work out a compromise between all sides.

The goal in the end, Taylor said, is to come up with a bill everyone can live with.

TORT REFORM: Both sides of issue argue the human element

Continued from Page B-1

untold numbers of business owners like Fowler settle lawsuits out of court rather than risk what they call "runaway jury verdicts" like the much-publicized $2.9 million awarded a New Mexico woman burned by McDonald's coffee.

Simply put, reformers want to reduce the number and size of lawsuits and cut the amount defendants have to pay if they lose. They say the cost of defending frivolous lawsuits and rising insurance premiums stifle business. A more friendly, predictable justice system would encourage existing businesses to stay and help lure new ones to the state, they contend.

Fighting the tort reformers with equal fury are the Alaska Trial Lawyers Association and a nonprofit, consumer advocacy group called the Alaska Public Interest Research Group. They point to people like Donald Murray as a reason why lawmakers should move with caution.

A former Alaskan who now lives in Oklahoma, Murray is paralyzed from the waist down. He was working on a Cook Inlet oil platform in 1989 when he fell about 15 feet, crushing his lower back.

A $50 fix at the work site probably would have prevented the accident, his attorney said.

After six years of litigation, the 55-year-old man who once loved to fish and hunt settled his lawsuit against the oil company and a contractor for $5.7 million. The money didn't make the pain in his lower body go away. But it did allow Murray and his wife, Pat, to move to a warmer climate, build a wheelchair-accessible house and pay back the initial workers' compensation benefits he received. And it will cover what he expects to be $3 million in future medical expenses because he can no longer get medical insurance.

The civil-law changes looming in Juneau would hurt injured people like Murray, tort-reform opponents charge. Capping damage awards will take away one of the checks that keep big businesses in balance, they say. And if businesses don't pay for damage they have caused, the burden will shift to taxpayers.

The attorneys, who keep as much as 30 percent of their client's awards, say there is no guarantee that the proposed changes would lower insurance rates. Besides, they point out, statistics show that large jury verdicts are rare in Alaska.

The two sides have been at it for years, both in Alaska and nearly every other state in the country. And the arguments on both sides haven't changed much. But this year, Alaska civil-law reformers have more political bases covered than ever before, making it likely at least some of their changes will become law.

The groundwork was laid last year when the Legislature passed a stringent tort reform bill. Gov. Tony Knowles vetoed it, but

Photo courtesy of the Fredericksen

Donald Murray is shown with his wife, Pat. Murray was paralyzed from the waist down when he fell 15 feet while working on an oil platform in Cook Inlet. Six years after the accident Murray settled his lawsuit against the oil company and contractor for $5.7 million.

Republican-lead reformers didn't have the votes to override the veto. Knowles then asked business leaders and attorneys to study the issue. Some of their recommendations appear in three bills introduced this year.

And if all three measures fail, the Alaska State Chamber of Commerce has a tort reform initiative in the works that might appear on the 1998 ballot along with Gov. Knowles, should he decide to run for re-election.

DEJA VU ALL OVER AGAIN

The struggle to balance the state's tort system isn't a new one.

Alaska was one of the pioneers of a national tort-reform movement that began in the mid-1980s, said Rose Marshall of the Tort Reform Association in New York City.

In 1986, the state decided juries couldn't award more than $500,000 for pain and suffering unless someone was disfigured or severely impaired. Nine states quickly followed with similar restrictions. Now, all but five states have placed some sort of restrictions on civil injury lawsuits.

Since then, the Alaska Legislature continued to make stabs at tightening civil injury lawsuits, but little has changed.

Like courts around the country, tort cases are not what's clogging Alaska's court system.

Every year, about 1,000 medical malpractice, wrongful death and other tort cases are filed in Alaska Superior Court, according to a study by the Alaska Judicial Council, a state agency that researches the justice system. That compares with 21,000 criminal cases and other lawsuits.

The number of injury lawsuits filed in Alaska is about half the average rate of most other states. It is well below states like New York, New Jersey and California, but about par for sparsely populated states like Idaho, Maine and Utah. About 4 percent of Alaska's cases end up in trial.

In analyzing 233 Alaska jury verdicts rendered between 1985 and 1995, the council found:

- Plaintiffs won in about half of the cases;
- In medical malpractice suits, defendants won 80 percent of the time;
- Alaska juries awarded punitive damages in only 6 percent of the cases;
- More than half of the jury awards were less than $50,000; and
- Most of the cases took two years or more to resolve.

Despite the small percentage of cases with punitive damages and that a majority of jury awards are under $50,000, reformers are targeting the amount juries can award. Proposals include lowering the cap for pain and suffering to $300,000 and restricting punitive damage awards, which are designed to punish and deter a defendant.

The Alaska reformers aren't alone. Thirty states have written laws to restrict punitive damages. They range from the New Hampshire law, which banned them completely, to the Kansas law, which links its punitive damage cap to a business's average net earnings. Both Knowles and Sen. Robin Taylor, R-Wrangell, have modeled their proposals after the Kansas law. The Porter bill and the Chamber of Commerce proposal simply would set caps on punitive damages and turn a portion of all such awards over to the state.

Still, most tort cases in Alaska are settled out of court. But for how much is a mystery. There is no reporting requirement and most settlements include a confidentiality agreement, so there is no public record of the outcome.

That lack of information prompted language in a couple of the 1997 bills that would require lawyers to report out-of-court settlements. The specific information would be kept confidential, but the trends would be made public in a statistical report compiled by state officials.

Two of the bills also would require insurance companies to report their rates, premiums and expenses so that state officials could analyze whether the tort reform measures actually lower insurance rates.

'SOMETHING HAS GOT TO CHANGE'

Tort reform proponents, including House Speaker Gail Phillips, R-Homer, and the Alaska State Chamber of Commerce, have argued repeatedly that a number of small businesses have gone under because of skyrocketing insurance rates and frivolous lawsuits.

But when asked for a list of those businesses, the Anchorage Daily News was directed to Fowler, the Haines liquor store owner.

Fowler says that she is not sure if the bills under consideration by Juneau lawmakers would have curtailed the lawsuit brought against her family's liquor store, but "something has got to change," she said.

PenAir president Orin Seybert is also a passionate tort reformer. He has had to cut back on service because of escalating insurance rates.

Last year, a boat captain chartered one of Seybert's airplanes to fly him from Dutch Harbor to an offshore freighter. The plane crashed, killing the company pilot and the captain. The family of the passenger has a multimillion-dollar lawsuit pending against Seybert.

Seybert had insurance, but he could only get $1 million worth of coverage per charter passenger — less than the well-paid boat captain was worth.

Seybert has stopped offering boat captains the service.

Seybert said his insurance costs have jumped from 4.5 percent of his sales in 1991 to 12 percent of sales this year.

"The real problem is our limits have been cut," he added. "Five years ago, we carried $20 million. That is not available now."

Seybert said if tort reform is adopted, the consumer wins because the insurance writers will offer higher limits at a lower cost.

Insurance rates are also a concern among doctors pushing for tort reform, not because they're losing cases but because they say the time, energy and money they spend defending themselves is out of control.

Please see Page B-4, TORT REFORM

TORT REF(

Continued from Page B-3

Doctors and medical professional are winning four out of five cases brought against them, according Dr. Rodman Wilson, who served on the governor's commission and who has long been an advocate of tort reform.

"There is no question that people are injured from medical care from time to time," he said. What needs fixing is the system. It's cumbersome, it costs both sides a great deal of money and it's a distraction, he said.

Limits on damages might streamline the system.

"It would serve the public well to get on with life, and that is what the tort reform efforts are generally about," Wilson said.

A MATTER OF FAIR COMPENSATION

Don Murray won't talk about that moment he took his life-changing fall: "I can't get keyed up about it, I'm prone to seizures."

But he will talk about Alaska's tort reform effort.

"If they are going to set a cap at $500,000, they (should) just as well put it at zero," Murray said. "The case would never go to court and you could never get an attorney to take it."

That's not to say he couldn't still receive millions of dollars to cover his actual medical costs and loss of income. But it would mean his wife, who had to quit her job to care for him, would be limited in how much money she could collect for giving up her job and the dramatic change in her life.

"A $500,000 total cap for him and his wife for noneconomic damages? Is that really fair compensation?" asks Murray's attorney, Christine Schleuss.

And if the reforms were in place at the time of Murray's case, he would have had less leverage to use during settlement negotiations.

Murray will never walk

)RM: Old adversaries stick with old arguments as issue heats up

again. He has no control over his bodily functions. And he is constant pain, Schleuss said.

"And you are saying to a company that is huge and absolutely had the control to provide him with a safe work site that they owe him only $500,000 for pain and suffering?" she asked.

What a lot of people don't realize is that capping liability amounts means the financial burden of long-term care will shift from businesses to taxpayers, Schleuss said.

Amid the debate are concerns among lawyers and fishermen that tort reform will upend the the $5 billion record verdict against Exxon three years ago.

It would, said Lloyd Miller, one of the attorneys who represented the fishermen and others in their lawsuit against the oil giant. Maritime cases often take into account the law of the state where the event occurs, he said.

Fishermen and other plaintiffs are "gravely concerned" that the latest wave of tort reform will gut the settlement, Miller said. If the state does set caps, Exxon might cite the legal change to the U.S. 9th Circuit Court of Appeals and argue that the people of Alaska object to large punitive damage verdicts.

Under two of the proposals coming out of Juneau, the verdict would have been far less. The proposed caps aren't "even a blip on (Exxon's) radar," he said.

In most cases, large punitive damage awards are overturned or settled out of court for lesser amounts, anyway, according to several national studies and a state study.

The $2.9 million verdict against McDonald's for serving scalding hot coffee is a case in point.

The jury returned the verdict after learning that the company had received at least 700 reports of coffee burns and had settled claims arising from some of those injuries for more than $500,000.

The company offered to pay the 81-year-old woman $800 for her burns. A mediator suggested McDonald's settle for $225,000. But McDonald's fought it.

The jurors decided the woman was partially to blame for the injury but came back with the large punitive damage award because they thought McDonald's had been reckless and malicious.

A judge later reduced the award to $640,000. And rather than appeal, McDonald's and the woman settled out of court for an undisclosed sum.

Tort reform at a glance

	Current law	Porter's HB 58	Taylor's SB 15	Governor's SB 43	Alaska Chamber of Commerce ballot initiative
Punitive Damages	No monetary cap	State gets 50 percent of all awards. Awards are limited to three times actual damages or $300,000, whichever is greater. If the act was motivated by financial gain, the cap is four times damages or $600,000.	Three times actual damages or $500,000, whichever is greater. If the act was motivated by financial gain, cap is average net income over five years or twice the amount of financial gain resulting from the incident	Three times actual damages or $500,000, whichever is greater. If the act was motivated by financial gain, cap is average net income over five years or twice the amount of financial gain.	State gets 75 percent of all awards. Awards are limited to three times actual damages or $300,000, whichever is greater
Statute of repose	Allows 15 years to file a lawsuit	Eight years, unless the injury was caused by a hazardous waste, gross negligence, a defective product, or intentional act			Eight years, unless injury was caused by hazardous substance, gross negligence or defective product
Health-care provider protections	A medical advisory panel reviews malpractice lawsuits and advises if the claims are legitimate.	Lawsuits over birth injuries must be filed before child is 8. Hospitals not liable for emergency room physicians on contract, as long as the physician carries $500,000 in insurance and a notice is posted in the admitting area and published annually in the local newspaper.	Eliminates the medical advisory panel.		Lawsuits over birth injuries must be filed before child is 8. Hospitals not liable for contract employees, such as emergency room physicians, as long as they post a notice in the admitting area and publish it annually in the local newspaper
Damages for pain and suffering	Cap of $500,000 but no limit if someone is disfigured or severely impaired physically.	Capped at $300,000 unless the victim is a paraplegic, quadriplegic, lost a limb, suffers permanent brain damage or severe third-degree burns. Then the cap is $500,000	Would add word "severe" to definition of disfigurement.	Would add word "severe" to definition of disfigurement	Capped at $300,000 unless the victim is a paraplegic, quadriplegic, lost a limb, has severe third-degree burns or suffers permanent brain damage. Then the cap is $500,000
Trial alternatives	Parties can go to an arbitrator, but the decision is nonbinding	Creates a pilot alternative dispute-resolution program.	Creates alternative dispute-resolution program. Cases under $100,000 must undergo non-binding arbitration.	Creates pilot alternative dispute-resolution program	
Allocation of fault	Jury can assign fault only to parties named in the lawsuit	Jury can assign a percentage of fault to a person or company not named in the lawsuit			Jury can assign a percentage of fault to a person or company not named in the lawsuit
Reports & studies		State evaluates the effects of tort reform by collecting out-of-court settlement information, which will remain confidential, as well as information from insurance companies	State evaluates the effects of tort reform by collecting out-of-court settlement information, which will remain confidential, as well as information from insurance companies	State evaluates the effects of tort reform by collecting out-of-court settlement information, which will remain confidential, as well as information from [illegible] companies	

The language

Making sense of legal lingo

Tort - A wrongful act, in which one party hurts another. Tort laws allow the injured party to sue and collect money. It does not include criminal actions or breach of contract.

Tort reform - A nationwide movement driven by business owners, medical professionals and insurance companies to rewrite the civil laws governing who can sue, when they can sue and how much they can sue for after an injury.

Damages - Refers to the amount of money a person is claiming they lost or should be awarded as a result of another person injuring them.

Compensatory damages - The amount of money required to pay for the actual monetary losses that result from an injury, for example, lost earnings and medical bills.

Punitive damages - The amount of money a court or a jury decides a defendant should pay as a penalty for outrageous or reckless conduct. The punitive damage award is designed to punish and deter others.

Economic damages - The amount of money a person seeks for compensation to cover their actual losses, such as wages and future lost wages and medical bills.

Noneconomic damages - The amount of money a person seeks in compensation for changes in their life, for instance pain and suffering and loss of companionship.

Statute of limitations - A law that requires lawsuits to be filed within a specific period of time after a person has been injured. Once the statute of limitations has expired, a lawsuit cannot be filed.

Statute of repose - Cuts off the right of an injured person to file a lawsuit after a specified period of time, which is set by law. It is measured from the delivery of a product or completion of work. For example, the current statute of repose is 15 years. If a 10 year old building collapsed under current law, a claim against the architect and construction company could be filed. If the building was 16 years old, under existing law, it

Bruce Cain, CPA

P.O. Box 303
Glennallen, AK 99588
907-822-3342, Fax 907-822-3073 email bcain@tribalnet.org

Senator Drue Pearce
Senator Bert Sharp
Co Chairs, Senate Finance Committee

VIA Fax

April 2, 1997

I am requesting that the committee hearing on house bill 58, tort reform be given teleconference coverage. This bill has far reaching affects for the future of our state and the businesses that operate within our state.

We the people deserve the opportunity to participate in the process of this bill's development as much as possible. We live with the pipeline running for several hundred miles in our back yard. It crosses major salmon streams. We are concerned about the affects this bill will have on the operations and safety measures taken by operations within our area.

We are remote and find it difficult to travel to Juneau to participate. I called Gene Kubina's office this morning and the committee meeting is not even on the printed committee schedule. Kubina's aide had to search on the computer to find that the committee was even meeting tomorrow morning at 9:00 AM. You are elected to represent the public. You owe it to the public to be open in your hearings and committees. It would be graciously appreciated if you would give us the opportunity to participate in this hearing putting it on the legislative teleconference system.

If you have any questions, please give me a call.

Sincerely:

Bruce Cain

cc: Governor Tony Knowles
Senator Georgiana Lincoln
Representative Gene Kubina
Representative Irene Nicolai
Senator Adams
Senator Donley
Senator Parnell
Senator Phillips
Senator Torgerson

Alaska State Legislature

Please enter into the record my testimony to the SENATE FINANCE committee name

committee on HB 58 TORT REFORM, dated 4-11-97.
bill/subject

I SUPPORT TORT REFORM AS AMENDED PROPOSED BY CDFU and UFA. I AM OPPOSED TO 2 PARTS AS FOLLOWS:

1) PUNITIVE DAMAGES SHOULD NOT BE LIMITED. EACH CASE NEEDS TO BE DECIDED ON A CASE BY CASE BASIS. THERE IS A LIMITING FACTOR BUILT IN. THE JURY IS THE DECIDER OF THE DEFENDANT'S CONDUCT & THE DAMAGES TO BE AWARDED; ALSO WHETHER PUNITIVE DAMAGES SHOULD BE AWARDED. THERE ARE FURTHER SAFEGUARDS. THE APPEAL PROCESS WHICH REVIEWS THE JURY'S VERDICT & DETERMINES IF PUNITIVES ARE REASONABLE

2) THE STATE SHOULD NOT SHARE IN ANY PUNITIVE DAMAGE AWARD. IF THE STATE WAS NOT HARMED, IT HAS NO STANDING TO JOIN THE LAWSUIT OR SHARE IN THE PUNITIVE DAMAGE AWARD. IF THE STATE WAS HARMED, THEN IT HAS THE RIGHT TO SUE. QUESTION: IF THE STATE IS COMPENSATED FOR HARM TO THE STATE, IS IT ENTITLED TO RECEIVE MORE THAN IT SUED FOR? THAT IS WHAT COULD HAPPEN IN THE INSTANCE OF THE EXXON SETTLEMENT(S) IF THIS BILL PASSES.

Signed: Bill Pace
Testifier

Self
Representing (Optional)

HC 31, Box 5029P, Wasilla, AK 99654
Address

1 (907) 376-2284
Phone No.

9/96 Legislative Information Office

Alaska State Legislature

Please enter into the record my testimony to the Senate Finance committee name

committee on HR58 bill/subject, dated 4/11/97.

I am opposed to tort reform unless the amendments as proposed by CDFU + UFA ~~and~~ are adopted.

Signed: Tom Namtvedt
Testifier

Representing (Optional)

5640 Portage Dr Wasilla 99654
Address

376 7060
Phone No.

9/16 Legislative Information Office

Alaska State Legislature

Please enter into the record my testimony to the TORT COMMITTEE
committee name

committee on HB 58 , dated 4/11/97 .
bill/subject

I would be in support of HB 57 only if the following changes be made:

1) Amend Section 10 to include as exceptions to the punitive damages cap to include: RECKLESS INDIFFERENCE TO THE RIGHTS or SAFETY OF OTHERS AS WELL AS THE EXISTING "EVIDENCE of MALICE".
2) Punitive damage cap is acceptable only if there is an exception of torts relating to natural resource damages and ecosystem disruptions.
3) Section 11 (50% being given to state) should be eliminated in its entirety.

Thank you for considering my testimony.

Signed: James Tuttle
Testifier

Representing (Optional)

P.O. Box 878810 Wasilla, Ak. 99687
Address

(907) 892-8187
Phone No.

9/116 Legislative Information Office

Alaska State Legislature

Please enter into the record my testimony to the Tort Reform Committee
committee name

committee on HB 58 , dated 4/11/97 .
bill/subject

I feel that taking away my rights to be compensated for injury, either physical or financially, is an infringement on my constitutional rights. However in this case I would support HB58 if it included all amendments submitted by U.F.A. (united Fishermen of Alaska) and those submitted by Cordova District Fishermen united (C.D.F.U.) [redacted]. Juries should decide amounts, and there should be no caps. Thank you

Signed: Robert A. Martinson
Testifier

CDFU Gillnet division
Representing (Optional)

900 IROQUOIS DRIVE Wasilla, AK 99654
Address

907-373-2627
Phone No.

Robert Martinson

9/16 Legislative Information Office

P.02

APR-12-97 SAT 10:51

Alaska State Legislature

Please enter into the record my testimony to the Senate Finance committee name

committee on SB 60 bill/subject, dated 4/9/97.

- I oppose SB 60.
- I do not want the Lt. Governor to put this question on the next election ballots because I deeply believe the Death Penalty is wrong. I definitely urge you to stay away from any further action dealing with Capital Punishment and I do not want to see any money spent to write the question and then print it on the ballots.

- When we see other countries torturing and executing people we cry "How Barbaric!" "How Uncivilized!" What gives us the right to judge or criticize these other countries or cultures when we remain so very barbaric ourselves in supporting capital punishment. The Death Penalty is wrong - it is killing - it does not deter violence. And my question for you is why do we kill people who kill people to show people that killing people is wrong? my plea for you is to not pass this bill.

Thank you.

Signed: Nancy Michaelson
Testifier

Representing (Optional)

HC5 Box 6916F Palmer, AK 99645
Address

745-6673
Phone No.

9/116 Legislative Information Office

Alaska State Legislature

Please enter into the record my testimony to the S Finance
committee name

committee on HB 58 , dated 4/11/97.
bill/subject

see attached 4 pages

Signed: _____
Testifier

Paul Sweet
Representing (Optional)

P O Box 1562 Palmer 99645
Address

745-2242
Phone No.

9/96 Legislative Information Office

Tort Reform

With the proposed Tort Reform the State of Alaska will be in the business of waiting for one of its residents to be killed, maimed or injured in order to collect a portion of the victim's insurance.

The Governor's Tort Reform Task Force had 28 people testify. 18 were violently opposed, of the 10 remaining 7 represented insurance companies and 3 represented small businesses. Small business is under the assumption that once tort reform is passed their premiums will automatically go down. According to the insurance company's own testimony at committee meetings it was stated that there will be no reduction in premiums for 5-7 years.

Punitive damages seem to be the State's main contention for tort reform. If that is the case, get rid of punitive damages. The State of Washington does not allow punitive damages by order of the Washington Supreme Court. They do not have any caps, and seem to be functioning just fine. If the State of Alaska thinks that punitive damages are necessary, they can take the insurance company to court and whatever is received pass on to the victim. Therefore you have accomplished your purpose to penalize the company for unsafe products.

The new Tort Reform bill has $300,000 caps on personal loss, I don't think its the state's job to determine the value of one person's life to their loved ones. Do not place caps on anything.

Since the early 80's 3500 cases have been filed. 95% of these were settled out of court for under $100,000. You can bet they were on the low end of $100,000. There are no statistics allowed listing what each victim received, there is no way to tell exactly what was paid because the courts are prevented from revealing the out of court settlements. The remaining 5% go to court, in other words 150 out of 3500. 1 in 20 of those court cases result in punitive damages. So only approximately 7 cases received punitive awards. It hardly seems worth the state's time to pursue punitive damages. All of the committee meetings and task force expenses probably cost more than the state could ever anticipate collect-

Paul Sweet

(2)

ing in punitive damages.

There were a few outlandish cases through the years which awarded astronomical punitive damages. For example, a bad paint job on a Mercedes Benz, the victim was awarded $10,000,000, an amount significantly reduced by the judge.

The new Tort Reform contains incentives for quick settlements, under 30, 60, 90 day time limits. The incentives are directed to force lawyers to settle early, sometimes at the expense of their clients. If a victim wanted to continue on with the case and was counseled for early settlement, the victim would generally follow the advice of their lawyer. There seem to be too many variables for this portion of the bill to work properly. These incentives will also restrict lawyers from accepting cases on a contingency basis, which leaves victims without representation.

The new bill contains language of eliminating "deep pockets". I think that it is a shame to pick on the medical profession, especially those who work in emergency rooms. Only a specialized group of people can work in this field requiring quick decisions. I noticed that part of the requirements now is the posting of which doctors are working under contract and which are working for the hospital.

1. Most people who are admitted into emergency rooms are in no shape to look for bulletin boards.
2. If someone refuses a contract doctor's services is there always trauma hospital staff available to handle that emergency?
3. If not, why post the names on a bulletin board?
4. If trauma doctors are required to have $500,000+ insurance policies the patient gets it in the neck again because this expense is reflected in their bill.

If this tort reform bill passes as indicated with contract doctors treated differently than in-house personnel, this type of institutional avoidance of responsibility will become widespread. For example, construction companies who now hire contractors will be able to hire contract workers and relieve the prime contractor of all responsibility. If we are going to eliminate "deep pockets" and "double-dipping" then maybe we ought to start with the legislature. I do not personally mind "double-dipping". If you've worked hard for a

P. 1 of 2

retirement you should be able to collect it while working a new job. The Valdez oil spill trial was trying to relieve the responsibility of the ship from Hazelwood because he happened to in his cabin and not on deck. Since the beginning of time the ship's captain has always been responsible for the actions of his crew. This has always applied to prime contractors whether they are running a hospital or building a house. With the new legislation you cannot sue your personal insurance company if you have sued the doctor. Where does the state get the right to tell me how to deal with an insurance company that I pay premiums to for coverage?

Most of the Governor's Tort Reform Task Force recommendations were not accepted by the Tort Reform Committee. This brings me back to the question "Why do we have task forces of this nature?" This always results in a multiplication of expenses. The committee already in place is under no obligation to accept recommendations from the task force. Typically they don't. A more appropriate type of task force would be one dealing with building roads, schools, etc. where everyone is going in the same direction.

Mr. Tardiff, attorney for the State of Washington, works all tort cases. His telephone #1-360-753-6200, if you have questions, he would be a good source of information.

After checking with the election commission on campaign contributions I received numerous files and I noticed that some legislators could not afford to run their campaigns without corporate or insurance contributions. With the small percentage of donations received from the public some could not afford a cab ride across town. It makes one wonder where the loyalty lies, with corporate America or with their constituents.

I would like to publicly thank Senator Rick Halford for the help he gave me to produce the Sex-Offender Registration document. Without his help I would still be scratching my ____ nose. I would also like to thank Litta Evans who set up the Sex-Offender Registration list by city, which makes it easier for the public to digest the information. It also allows for the addition of the names of those yet to comply with the statute. I found 35 names on the list of people who are now working for the state in a variety of positions, some

Paul Arnett

(4)

in positions that might compromise an uninformed public. I would like to see an improvement in enforcement so that the statute must be complied with. I recommend an easy way to accomplish this: instead of over-burdening our State Troopers with warrants, judge's signatures and the disbursement of information we should solicit public service announcements for two weeks. Day and night, informing those people who have not complied with the statute that on the third Sunday they can look for their names in the Sunday paper listing names, addresses and offenses of those who have yet to comply. (A fine of $100 on each person filing late would cover publication expenses-that would involve 1000+ filers or $100,000+).

Paul J. Sweet
P.O. Box 1562
Palmer, AK 99645
745-2242

Cynthia Brooke, M.D., F
Diplomate of the American Board of Obstetrics

Sound Women's Health Care

Cynthia Brooke, MD
A balance of treatment and prevention.

March 24, 1997

Senator Drue Pearce, Co-Chair of Senate Finance
716 West Fourth Avenue
Anchorage, Alaska 99501

Dear Senator Pearce,

I am an OB-GYN in Anchorage, Alaska, and would like you to know of a grave situation which exists regarding medical research and our country's current legal system.

As an obstetrician and gynecologist, I have had occasion to interact with the court system, both as an observer and as a participant. Over the years, I think I have developed some insight into the interaction between medicine and the legal system. A great deal of problems seem to arise, and I think many of these problems result from the difference between science, medicine and the law. I think there is a definite problem in trying to solve scientific issues in the courtroom. To illustrate this point, I have a story to tell. I think this exemplifies what is wrong with our legal system today.

The story centers around a physician and scientific researcher named Dr. Marcia Angell. Dr. Angell is trained in internal medicine and is also the editor of *The New England Journal of Medicine.* Her job with *The New England Journal* is to evaluate the quality of studies and research submitted to the journal for publication. In this capacity, she had occasion to write an editorial in response to an article by Dr. David Kessler of the FDA who was considering declaring a ban on silicone breast implants. This ban was not going to be imposed, Dr. Kessler was careful to say, because he thought they were unsafe, but only because he felt the company had an obligation to do more studies to prove they were safe. There have been rare cases of fatigue and other symptoms in women with these implants, but nothing significant had ever been reported in thirty years of use. Because of this, Dr. Angell told Dr. Kessler she did not think that the ban was a good idea. One million women at that time had breast implants, and she felt they would be unnecessarily alarmed. Again, these implants had been used for thirty years without any significant problems. Apparently Dr. Kessler wavered, but then he decided to go ahead and implement the ban on the implants. Unfortunately, the fact that Dr. Kessler said the implants were not unsafe did not make it through to the media or public at large. Women panicked. Lawsuits against Merrell-Dow burgeoned into the thousands. One jury verdict alone, in Houston, was for $25 million. The average out-of-court settlement was $1 million. Eventually Merrell-Dow, in desperation, settled the largest class action lawsuit in the history of the world at $4.25 billion.

Two months after the settlement, the Mayo Clinic published the first rigorous study regarding breast implants and disease. This study found absolutely no association between disease and breast implants. This study was submitted to *The New England Journal of Medicine* for publication and was published on June 16, 1994. In that same publication, Dr. Angell wrote her second editorial on the subject. Like a good scientist, she pointed out the backwards sequence of events, in that first there was public opinion and then a ban and then lawsuits and then a huge class action settlement. Only after all this, was any evidence presented. This peculiar chain of

events, Dr. Angell dared to say, was due to some peculiar characteristics of the tort system in the United States of America which differs from any other tort system in the civilized world.

These differences include contingency fees of lawyers, which encourage a sort of lottery system where lawyers can build a case, then find clients to suit their case. For example, there are currently cases being built against Norplant which has a silicone base and penile implants. This is in spite of the Mayo Clinic study.

The second difference in the United States tort system is that the defendant pays no matter who wins. In Britain, Australia, Sweden, Canada, and the rest of the civilized world, loser pays. In the United States, Merrell-Dow was faced with a situation where even if they won every case, they would still have to pay out about $200 million. This system encourages out-of-court settlements which are not justified by the facts or the evidence.

Also unique to our tort system in this country is the lack of scientific evidence presented to the jury. Expert witnesses are called to give biased testimony - in fact, that is their job! Judges often do not utilize the option to call neutral scientific witnesses to help them decide the issues based on the evidence, although this option is available to them. (In Alaska we have an expert advisory panel system which is sometimes utilized and sometimes not.) In many cases, investigations by medical societies and other organizations have found some expert witnesses to be total charlatans. They may not even have a medical degree (that they do not buy out of the catalog). As a consequence, many of the scientific research experts at the top of their fields will not participate in court proceedings because they are not convinced it is about trying to find the truth. To them, it is a total circus atmosphere, a kind of dramatic passion play which has nothing to do with scientific evidence.

Legal experts who have interviewed juries coming out of trials note that juries do not think that cases involving medical science are about weighing the scientific evidence. It is about which lawyer they like the most, it is about which lawyer is the most dramatic, it is about which lawyer is the most convincing. It is a moral question between the poor victim and the big corporation. It is not about what the scientifically correct findings should be.

Needless to say, after Dr. Angell's editorial and when all of this was published, she received a significant response from the plaintiffs' attorneys involved in the implants class action case. She was served by two subpoenas within a year. The attorneys accused her of being paid by the implant manufacturers. They requested any records of communication between her and the manufacturers. Of course, none of these records existed because there had been no communication between Dr. Angell and any of the implant manufacturers. However, the harassment did not stop there. Dr. Angell was also asked to release confidential records which were used in the peer review process at *The New England Journal of Medicine*. She was taken to court twice, and both times the subpoenas were denied. Later she found that the Mayo Clinic, who had conducted the implant study published in *The New England Journal of Medicine* was also being harassed by subpoenas. Not only did the attorneys ask for records regarding the data published in the breast implant study, but they subpoenaed the entire data base at the Mayo Clinic which includes confidential names of patients and doctors, medical data which has been collected by the Mayo Clinic for 150 years in Olmstead County, Minnesota. Because this data base is invaluable, not only to the Mayo Clinic but to the world at large, the Mayo Clinic understandably was reluctant to relinquish the data base to the attorneys. Also, as confidentiality of their research was threatened and doctors and patients pulled out of research

studies, research, in general, was basically shut down at the Mayo Clinic. So the plaintiffs' attorneys got basically what they wanted: a moratorium on breast implant research. It was not worth it to the Mayo Clinic to risk all research. It was easier to give up doing breast implant research. Since the Mayo Clinic study was published in 1994, ten other peer-reviewed studies on breast implants have been conducted. None of these studies have found any link between breast implants and disease.

Now, what has happened in the aftermath of all this and what have we learned? Obviously, this has sent quite a strong message to the medical device industry and will, no doubt, have an incredible impact on anything which is silicone based including dialysis tubing, hydrocephalus shunts, Norplant, heart valves, artificial joints, not to mention the other supplies and devices which have been affected by the fallout of this huge class action suit. Dupont has already pulled out of the medical device industry and says it will no longer supply Dacron graft materials for vascular grafts (used in heart surgery). The class action settlement against Dow collapsed, and Dow has now filed bankruptcy. The economic impact on this country as a result, one can only guess. The economic impact on plaintiffs' attorneys involved in the case is that they cleared $1 billion in attorney fees. This has even caused ripples in some parts of the legal community, specifically the Yale School of Law, reportedly the #1 law school in the United States. There, an assistant professor, E. Donald Elliot, said that "the tort lawyers perpetuated a fraud" (earning them a billion dollars), and called the class action tort system "a public health issue."

Fewer and fewer pharmaceutical companies are willing to do research on contraception due to liability issues - contraception like birth control pills which saves the United States billions of health care dollars every year, not to mention thousand of lives. Fewer and fewer pharmaceutical companies are willing to make vaccines. There used to be twenty pharmaceutical companies who made vaccines, and now there are only four. Medical research in other medical arenas is practically strangulated. As law professor Elliott states, "Economics drives the system, and until we address this, there will be no change in the tort system."

These same issues prompted Yale law professor John Langbein to state: "The American legal system is the laughing stock in the civilized world. We have a legal system that encourages people not to do business in this country. We have a legal system that gets ever more expensive and that causes us to pay monumental insurance premiums compared to the rest of the civilized world. We have a legal system that is a flop." He goes on to say: "We have lawyers running the system, and that is the problem. Lawyers do not have an obligation and a commitment to the truth. Lawyers have an obligation to win, so we have a combat system rather than a truth system." Professor Elliott echoes this by stating in his law review article of 1989 that "one of the problems with the present legal system is that it extends equal dignity to charlatans and Nobel Prize winners with only a lay jury to distinguish between the two." Dr. Angell's rather harrowing experience with the legal system has prompted her to write a book called *Science on Trial*, illustrating the danger to us as a public when we try to answer scientific questions in the absence of evidence.

This problem is not just a problem in the medical community alone; it is a problem cited among scientists at large. You need only to walk into Borders Books or Barnes & Nobles to see the shelves burgeoning with frustrated scientists and researchers who are dealing with a world and a society that turns to pseudo-science and superstition to answer important questions which may affect our lives, our children's lives, and our planet as a whole.

In Carl Sagan's recent book, which was a New York Times best seller for many weeks, called *The Demon-Haunted World: Science as a Candle in the Darkness*, he states how necessary

science is in a healthy democracy. "The values of science and the values of democracy are concordant, in many cases indistinguishable. Science and democracy began in their civilized incarnations in the same time and place, Greece in the seventh and sixth centuries B.C. Science confers power on anyone who takes the trouble to learn it... Science thrives on, and indeed, requires the free exchange of ideas; its values are antithetical to secrecy. Science holds to no special vantage points or privileged positions. Both science and democracy encourage unconventional opinions and vigorous debate. Both demand adequate reason, coherent argument, rigorous standards of evidence and honesty. Science is a way to call the bluff of those who only pretend to knowledge."

As a legislator, I ask that you make a vote for sanity and reason. Anyone, at this point, who argues that the current tort system is in the best interest of the community or the public at large has not looked at the facts. "What is wrong with this system?" they ask. "Merrell-Dow is a big company - they can afford it, they can afford that kind of money. So what if there is no scientific evidence to back it up? Where is the harm?"

The harm is women who were so frightened by the claims that they tried to cut out their own implants with razor blades. The harm is $4.25 billion which could have been spent on something else besides lining the pockets of lawyers. What could we do with $4.25 billion if that was pumped back into the public health system? Oh, let my imagination wander! But most of all, the harm is in the lie, the lie that has been perpetuated by fear; fear that is unsubstantiated by fact. The lie that might deprive you of a heart valve or your child of a shunt that might save his or her life, or untold fantastic treatments, devices and cures that might lie on the horizon.
I cannot support a system that intimidates and harasses our brightest minds in medicine or that dictates what research will or will not be done based on whether or not they agree with the results. That is very dangerous. That is behavior that should not be tolerated by any legislature. Only if we attack this problem, state by state, will it ever be solved on a national.

So, I ask for your vote: I ask for your vote for reform. I ask for your vote for sanity. I ask for your vote for reason. I ask you to support science, the candle in the darkness that is flickering before you. Please, please do not let it go out! Support House Bill 581!!

Thank you very much for your consideration.

Sincerely,

Cynthia L. Brooke, MD

/plc

Mr. Chair.

I oppose HB 58 as it makes the State of Alaska Judge, Jury and beneficiary.

Under the Alaska Constitution Article 1, section 7. We the people are guaranteed Due Process of law to determine fair and just treatment.

Article 1, section 16 we are guaranteed the right by jury trial based on common law.

Blacks Law Dictionary 6th Ed. TORT: "A private or civil wrong or injury, including action for bad faith breach of contract, for which the court will provide a remedy in the form of an action for damages. The Courts are to decide not the LEGISLATORS.

Torts are based on common law as they existed in 1607, when the first English colonists settled here. They are principles and rules based on man's sense of justice to govern themselves in social relations.

HB 58 goes against all that our forefathers fought for. The King picked the judges, juries and the amounts to be decided on as well as keeping a portion of the proceeds for himself so the People chose to break away from Great Britain and the Declaration of Independence was written.

People need to review JURY RIGHTS. It is the juries that must decide the cases based on the facts and information presented not the government.

The only power the judge has over the jury is their ignorance.

Consider the following:

"The jury has a right to judge both the law as well as the fact in controversy." John Jay, 1rst Chief Justice 1789

"The law itself is on trial quite as much as the cause which is to be decided." Oliver Wendell Holmes, 12th Chief Justice 1902

HB 58 is nothing but Jury Tamping, the legislature is dictating to the jury how much can be awarded and then taking a cut of what is not rightfully theirs. Kind of like the Mafia.

America has begun to function like a democracy instead of a Republic. A democracy is dangerous because it is a one vote system as opposed to a republic, which is a three vote system. We need to uphold The United States Constitution of America, especially Article 4, section 4. That third vote is the most powerful vote, the vote of a jury and a informed jury knows the laws of right and wrong, therefore HB 58 is unnecessary and unconstitutional.

Douglas E Wood

Sovereign citizen of the Republic of Alaska.

4-11-97

My feelings on HB58 are very strong! - to say the least!

It is a slap in the face to all Alaskans - the only beneficiaries are big business; the oil companies, and the ~~corporate~~ corporations that control our economies.

It gut our legal system of any ability to give any recourse to anyone; the vast majority of us cannot afford to fight these huge corporations - and this bill effectively removes any incentive for any lawyer in their right mind to take on such cases. They'd never recover a dime.

~~The~~ The Exxon Valdez Case will blow up; make no mistake. It is fact

from one, and this horrendous step by our legislature would give them tremendous leverage in the court system to overturn our current damages -

Since the spill, PWS is been on sick mess; no fish, sick fish - no seasons - for the last five years.

This horrible bill would remove any possibility of any financial compensation for these 35,000 fishermen, and their families. No one in the legislature would consider cutting their income to less than 25% of their current income, with all their expenses remaining at current levels - considering the sizable raise they just gave themselves.

That's what happened to the Cordova fleet; thru no fatal fault of their own, our whole future, our lives, blew up. The compensation, if it is ever received, would not 'quite' make up for this loss - it would help pay the last 5 yrs worth of bills, ~~but~~ giving us some hope of putting our lives back on an even keel.

Tort reform should be done in a sensible fashion; not so ~~dated~~ dastardly biased, putting us on a level playing field, with everyone treated in an equal fashion; not with the dice loaded before the process even begins.

Thank you,

Roy Estes
711 Lady Samantha

Eyak corporation's

WSCA

My name is Amy Brockert. I am the ^Administrative Assistant. ~~of The Eyak Corporation.~~ The Eyak Corporation is Cordova's ~~Alaska Native Claims Settlement Act~~ Village Corporation. I am testifying today to express Eyak's opposition to HB 58 as written, and support CDFU's proposal to include an amendment which exempts natural resource torts, from the constraints found within HB 58. We are concerned that HB 58 as written will jeopardize punitive damage awards our shareholders may receive as a result of the Exxon Valdez litigation. Our shareholders as a group are already economically disadvantaged and would be hurt by HB 58 if their Exxon settlement's are further offset by the state in any way.

Thank you for this time to express our concerns.

"LETS GET IT STRAIGHT"

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I would like to briefly address the many false assertions that stand out in Rep. Porter's letter to all majority Representatives and Senators, dated 4 April and entitled appropriately "**DON'T BE FOOLED AND DON'T BE MANIPULATED**".

1. Porter states: **HB58 "does not deprive Alaskans of their right to a jury trial".** I contend that sec. 22 Offers of Judgement effectively does exactly that. The opportunity to

manipulate the outcome of whether a case will go trial, given by sec. 22 to the party making the offer amounts to the power of economic blackmail being given to insurance companies and large corporate interests with their batteries of lawyers and virtually unlimited resources. The draconian consequences imposed on a fearful victim can only serve to chill the the injured parties ability to determine the ramifications of a decision and thereby reduces his opportunity for due process that is so highly valued as a means of achieving equity in our society.

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4. Porter states: "The assertion that HB58 will not permit punitive damages where reckless conduct causes and environmental disaster is an outright inflammatory lie, the egregiousness of which undermines everything the opponents are contending. HB58 requires a showing of 'malice' for punitive damages." "The Alaska Supreme Court interprets 'malice' to include "reckless indifference to the rights of others". "If that is not reckless conduct, what is" / "*Cummings v. Sealion Corporation, 924 P. 2d 1011.* **WRONG! – WRONG! –WRONG!** Does Rep. Porter really assume the people are so stupid that they will not look up the actual case language? I quote the Cummings v. Sealion case cited above. In the case the Alaska Supreme Court is discussing the standards for punitive damages under existing Alaska law:

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5. Finally Rep. Porter asserts that HB58, if passed, would not apply in any way to the Exxon Valdez ongoing litigation Porter states: "which it would not, since federal

maritime law preempts Alaska Law. WRONG! To be charitable one could assume that again Porter is receiving bad legal advice–or worse. A look at a recent Alaska Supreme Court decision, **Hughes v. Foster Wheeler Company**, Supreme Court No. S-6928 , No. 4790, 3/7/97/ which states clearly that Alaska State Law would be applied in a Federal Maritime law context, such as the Exxon Valdez, so long as there was no direct federal maritime or admiralty law with which it conflicted. In the current Exxon Valdez case there is not any that HB58 is directly in conflict with. Thus the passage of HB58 would most certainly have a negative impact upon the 40 thousand Exxon plaintiffs. I will make this my personal crusade to ensure that all that are impacted by HB58 have very long memories.

AMENDMENT I urge the the thoughtful members of the Senate majority and any in the minority that support this current extreme tort reform measure make a clear exception for torts relating to natural resource disasters and ecosystem disruptions. This would be easily achieved by adding at the end of the bill with appropriate number the following language:
xxx. sub section:
(a). In cases of Torts relating to natural resource damages including disasters and ecosystem disruptions, the following sections of this bill do not apply: 5, 10, 11-15, 17-20, 22-23, and 35.
(b). It is intended that the passage of this legislation, HB58, (as amended,) shall in no way be applied or applicable to the litigation, now ongoing, between certain Alaska citizens and Exxon Corporation ensuing from North Americas largest oil spill, occurring on March 24, 1989. It is the intent of the Alaska State Legislature that HB58 shall not be construed by any one or by any legal body, to apply in any manner whatsoever to the continuing Exxon Valdez litigation. This shall include all appeals and any remanded or ordered retrials to a lower court that may occur after the passage of this legislation known by all as HB 58.

Accommodating the above request would certainly prove that the majority member of the 20th Alaska legislature are truly prepared to support the assertions made by the sponsors of HB58. Assertions that at present are entirely without merit. Your good faith in incorporating the above request would certainly be a major step in restoring in you constituents a sense that you are all honorably motivated and provide with sense that the amended legislation is fair, balanced and just.

Thank you for your valuable time.

Signed: Ross Mullins

Ross Mullins. Chairman, Prince William Sound
Fishermen Plaintiffs' Committee;
Board of Directors, CDFU;
BOD & Exec. Cmty, PWSAC;
Board of Directors, CFAB.

RECEIVED
APR 11 1997

ALASKA MINERS ASSOCIATION, INC.
501 W. Northern Lights Blvd., Suite 203, Anchorage, Alaska 99503 FAX: (907) 278-7997 Telephone (907) 278-7947

April 11, 1997

Honorable Druc Pearce
Honorable Bert Sharp
Co-Chairman, Senate Finance
Capitol Building
Juneau, AK 99801

RE: Tort Reform

Dear Senators Pearce and Sharp,

The Alaska Miners Association wishes to go on record in support of House Bill 58, regarding tort reform. The time has come for meaningful and comprehensive reform of Alaska's tort law. This bill will accomplish what is needed. We support fair compensation for injured persons but we do not support the current system which encourages abuse of the law. Many, and possibly most, tort cases are now settled out of court because that is less costly for the company. When this happens to our vendors, they have to increase the cost of goods and services to the miner to cover the settlement as well as the cost of insurance to cover the uncertainty of other tort issues.

Other tort reform needs include a change to insure that each party is liable only to the extent that each is responsible. Another needed change is to ensure that a person cannot receive an award for an injury that occurs while committing a criminal act.

This area of law is a major factor in the general and wide-spread distrust and contempt in this country for the legal system, the courts, and attorneys in this country. The changes and reasonable limits in this bill will help restore the public faith in our legal system.

We have been told that an amendment may be offered that would tie the level of punitive damages to the size, net profits, or net worth of the company being sued. This would be a very adverse change to the bill and would be seen as a slap in the face by the major mining companies now beginning to explore in Alaska. We would oppose any such a provision.

Thank you for the opportunity to comment on this important bill. We urge its passage as now written

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Representative Brian Porter

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Alaska State Legislature

Written Testimony Form

Please enter into the record my testimony to the _____ (committee name)

committee on HB 58 (bill/subject), dated 11 April 97.

I strongly oppose HB 58

Signed: Douglas L Petta
Testifier Name

Copper Hwy Heating
Representing (Optional)

P.O. Box 745 Cordova Alaska
Address

907 424-3107
Phone Number

Alaska State Legislature

Written Testimony Form

Please enter into the record my testimony to the _____ (committee name)

committee on HB 58 (bill/subject), dated April 11, 1997.

I oppose HB 58 !!

Signed: Carmelita "Collette" Pettit
Testifier Name

_____
Representing (Optional)

P.O. Box 745 Cordova, Alaska
Address

(907) 424-3107
Phone Number

Mr. Chair,

I oppose HB 58 as it makes the State of Alaska Judge, Jury and beneficiary.

Under the Alaska Constitution Article 1, section 7. We the people are guaranteed Due Process of law to determine fair and just treatment.

Article 1, section 16 we are guaranteed the right by jury trial based on common law.

Blacks Law Dictionary 6th Ed. TORT: "A private or civil wrong or injury, including action for bad faith breach of contract, for which the court will provide a remedy in the form of an action for damages. The Courts are to decide not the LEGISLATORS.

Torts are based on common law as they existed in 1607, when the first English colonists settled here. They are principles and rules based on man's sense of justice to govern themselves in social relations.

HB 58 goes against all that our forefathers fought for. The King picked the judges, juries and the amounts to be decided on as well as keeping a portion of the proceeds for himself so the People chose to break away from Great Britain and the Declaration of Independence was written.

People need to review JURY RIGHTS. It is the juries that must decide the cases based on the facts and information presented not the government.

The only power the judge has over the jury is their ignorance.

Consider the following:

"The jury has a right to judge both the law as well as the fact in controversy." John Jay, 1rst Chief Justice 1789

"The law itself is on trial quite as much as the cause which is to be decided." Oliver Wendell Holmes, 12th Chief Justice 1902

HB 58 is nothing but Jury Tamping, the legislature is dictating to the jury how much can be received and then taking a cut of what is not rightfully theirs. Kind of like the Mafia.

America has begun to function like a democracy instead of a Republic. A democracy is dangerous because it is a one vote system as opposed to a republic, which is a three vote system. We need to uphold The United States Constitution of America, especially Article 4, section 4. That third vote is the most powerful vote, the vote of a jury and a informed jury knows the laws of right and wrong, therefore HB 58 is unnecessary and unconstitutional.

Sovereign citizen of the Republic of Alaska.

4-11-97

Alaska State Legislature

Written Testimony Form

Please enter into the record my testimony to the Senate Finance Committee
(committee name)

committee on HB 58, dated 4-11-97.
(bill/subject)

Signed: Dewey Earl Weaver
Testifier Name

Representing (Optional)

Box 1791 Deep Bay Hawkins Island
Address Via Cordova, Alaska 99574

1-907-424-3745
Phone Number

WSCA

My name is Amy Brockert. I am the Eyak corporation's Administrative Assistant. ~~of The Eyak Corporation.~~ The Eyak Corporation is Cordova's ~~Alaska Native Claims Settlement Act~~ Village Corporation. I am testifying today to express Eyak's opposition to HB 58 as written, and support CDFU's proposal to include an amendment which exempts natural resource torts, from the constraints found within HB 58. We are concerned that HB 58 as written will jeopardize punitive damage awards our shareholders may receive as a result of the Exxon Valdez litigation. Our shareholders as a group are already economically disadvantaged and would be hurt by HB 58 if their Exxon settlement's are further offset by the state in any way.

Thank you for this time to express our concerns.

Alaska State Legislature

Written Testimony Form

Please enter into the record my testimony to the SENATE FINANCE COMMITTEE (committee name)

committee on HB 58 (bill/subject), dated APRIL 11, 97.

Signed: AMY BROCKERT
Testifier Name

THE EYAK CORPORATION
Representing (Optional)

BX 340 CORDOVA, AK 99574
Address

907-424-7161
Phone Number

My feelings on HB 58 are very strong - to say the least!

It is a slap in the face to all Alaskans - the only beneficiaries are big business; the oil companies, and the ~~company~~ corporations that control our canneries.

It guts our legal system of any ability to give any real recourse to anyone; the vast majority of us cannot afford to fight these huge corporations - and this bill effectively removes any incentive for any lawyer in their right mind to take on such cases. They'd never receive a dime.

~~[illegible]~~ The Exxon Valdez Case will blow up; make no mistake. It is a farce.

70! Lady Somethin

Alaska State Legislature

Written Testimony Form

Please enter into the record my testimony to the SEN. FINANCE
(committee name)

committee on HB58, dated 4/11/97.
(bill/subject)

Signed: Ruth J Esta
Testifier Name

Esta' Family - F.V. Lady Samantha
Representing (Optional)

Box 1709 - Cordova, Alaska
Address

907-424-7228
Phone Number

Box 2574
Cordova, Alaska 99574
11 April 1997

Honorable Governor Knowles
Alaska State Senate Members
Alaska State House of Representatives Members

I am not surprised that some measures of legal limitations on actual damages and punitive damages are needed to prevent outrageous awards. But, in Alaska we have not had outrageous awards. We have not had a court docket that is loaded with frivolous cases.

When a jury of one's peers determines that actual damages are warranted, they have seen the evidence that supports that award. When the jury has seen the profit a corporation or company has made because of their poor judgment or ignored the injured party's life or impact on their life, a punitive damages award is reasonable based on what it will take to get the corporation's attention to be more careful. The jury has not frivolously determined the amount of the punitive damages; they have used solid evidence.

To hamstring a jury of Alaska citizens by limiting what they believe will bring the lawsuit to a moral and legal conclusion by enacting a tort reform law as is now proposed is an insult to the legal process as well as to the ability of Alaska citizens to protect the public.

To include that the State of Alaska would share in the damages award is insane. The State has a responsibility to protect its citizens from irresponsible business actions. It has the oversight of enforcing pollution laws -- laws that keep our land pristine and beautiful. For the State to profit from an individual's trauma of is likened to a vulture circling a dying animal - just waiting for it to die and finishing it off!

Please do not enact this Tort Reform bill. It is not healthy for the citizens of Alaska; it does nothing to promote the spirit of the Last Frontier; it does not protect the citizens; it does not demonstrate that we have responsible leaders in our government. It only benefits those who wish to exploit our great State.

Sincerely,

Patience Andersen Faulkner

Alaska State Legislature

Written Testimony Form

Please enter into the record my testimony to the _____ (committee name) committee on _____ (bill/subject), dated 4-11-97.

Signed: Patience Andersen Faulkner
Testifier Name

Alaska Native
Representing (Optional)

Box 2574 Cordova
Address

(907) 424-7585
Phone Number

Alaska State Legislature

Written Testimony Form

Please enter into the record my testimony to the _____ (committee name)

committee on HB 58 (bill/subject), dated 4/11/97.

I OPPOSE HB 58

WRONG DOERS MUST BE SUFFICIENTLY FINANCIALLY DETERRED FROM RUINING OUR ENVIRONMENT AND OUR LIVES.

WE CANNOT BELIEVE WHAT WE ARE BEING TOLD BY THE WRITERS OF HB 58. WE HAVE CONSISTENTLY BEEN LIED TO IN THE PAST — FIRST BY SEN. STEVENS WHO PROMISED "NOT ONE DROP OF OIL WILL BE SPILLED IN PWS". THEN AFTER THE SPILL BY EXXON WHO PROMISED "TO MAKE US WHOLE". WE, THE PEOPLE, MUST HAVE THE LEGAL RIGHT TO BE PROTECTED FROM RECKLESS ACTIONS OF OTHERS.

Signed: SHEELAGH MULLINS
Testifier Name

SELF (FISHERWOMAN)
Representing (Optional)

BOX 436, CORDOVA 99574
Address

(907) 424-3664
Phone Number

Testimony in Support of House Bill 58
April 11, 1997

Mr. Chairman and Members of the Committee:

My name is Christy Tengs Fowler. I have a bar and restaurant and liquor store in Haines. I feel so strongly about this issue tnat I flew in from Haines specifically to testify at this hearing.

I n July of 1990, a young man (6 months short of 21) used a fake I.D. to purchase at our liquor store. A few hours later he totalled his Toyota pick-up and died in the crash. It didn't matter to his parents that he broke the law 9 times that night. It also didn't matter that he had shown 8 of our employees I.D. that met Alaska's requirements for proof of age. Nor did it matter that he had purchased and consumed alcohol in the presence of his parents. They filed a civil suit against us claiming we were entirely responsible for their son's death.

A year and a half later, we settled the suit for $37,500. Although we felt we could win the case, it would have cost twice that to get to trial. Financially it was disastrous for our small business which has been in my family for 44 years. Just this year we closed our liquor store for good. The financial cost pales, however, next to the emotional toll it took on not just my family, but on the whole town.

From this experience I lost my faith in the inherent goodness of mankind. I know there are people deserving of compensation for their injuries, but there are many more who take advantage of the legal system and try to find someone or something else to blame for whatever is wrong or unsatisfactory or just plain unpleasant in their lives. People know they can do stupid and dangerous things then blame someone else for it.

I am not free to do business as usual. I am paranoid. I know that even if I do everything right, if someone chooses to sue me, I can lose everything without even seeing a courtroom.

When you vote on House Bill 58, please think of those of us in business, especially in Southeast, who have lost our year-round economy, who are brutalized by taxes, beseiged by government regulations, who can't afford insurance, and whose production costs have increased because of liability costs passed on to us.

Please vote for House Bill 58 and give us some incentive for staying in business.

Alaska State Legislature

Written Testimony Form

Please enter into the record my testimony to the SEN FIN
(committee name)

committee on HB 58, dated 4/11/97.
(bill/subject)

HB 58
2187

Corrected Version

Signed: Ross Mullins
Testifier Name

See Testimony
Representing (Optional)

Address

Phone Number

"LETS GET IT STRAIGHT"

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This makes it crystal clear that under current Alaska law, malice is different from reckless indifference, and either one will support an award of punitive damages. **This would all be changed if HB58 became law.** Reckless indifference would no longer be sufficient to award punitive damages. Instead, actual malice would have to be proved. Why? are sponsors of HB58 unwilling to maintain the existing language of proof required by current state law? I would really like a truthful answer to that puzzle.

5. Finally Rep. Porter asserts that HB58, if passed, would not apply in any way to the Exxon Valdez ongoing litigation Porter states: "which it would not, since federal

maritime law preempts Alaska Law. **WRONG!** To be charitable one could assume that again Porter is receiving bad legal advice–or worse. A look at a recent Alaska Supreme Court decision, **Hughes v. Foster Wheeler Company**, Supreme Court No. S-6928, No. 4790, 3/7/97/ which states clearly that Alaska State Law would be applied in a Federal Maritime law context, such as the Exxon Valdez, so long as there was no direct federal maritime or admiralty law with which it conflicted. In the current Exxon Valdez case there is not any that HB58 is directly in conflict with. Thus the passage of HB58 would most certainly have a negative impact upon the 40 thousand Exxon plaintiffs. I will make this my personal crusade to ensure that all the citizens who were impacted have very long memories.

I urge the the thoughtful members of the Senate majority and any in the minority that support this current extreme tort reform measure make a clear exception for torts relating to natural resource disasters and ecosystem disruptions. This would be easily achieved by adding at the end of the bill with appropriate number the following language:

xxx. sub section:

PROPOSED AMENDMENTS

(a). In cases of Torts relating to natural resource damages including disasters and ecosystem disruptions, the following sections of this bill do not apply: 5, 10, 11-15, 17-20, 22-23, and 35.

(b). It is intended that the passage of this legislation, HB58, (as amended,) shall in no way be applied or applicable to the litigation, now ongoing, between certain Alaska citizens and Exxon Corporation ensuing from North Americas largest oil spill, occurring on March 24, 1989. It is the intent of the Alaska State Legislature that HB58 shall not be construed by any one or by any legal body, to apply in any manner whatsoever to the continuing Exxon Valdez litigation. This shall include all appeals and any remanded or ordered retrials to a lower court that may occur after the passage of this legislation known by all as HB 58.

Accommodating the above request would certainly prove that the majority member of the 20th Alaska legislature are truly prepared to support the assertions made by the sponsors of HB58. Assertions that at present are entirely without merit. Your good faith in incorporating the above request would certainly be a major step in restoring in you constituents a sense that you are all honorably motivated and provide with sense that the amended legislation is fair, balanced and just.

Thank you for your valuable time.

Signed; Ross Mullins

Ross Mullins. Chairman, Prince William Sound
Fishermen Plaintiffs' Committee;
Board of Directors, CDFU;
BOD & Exec. Cmty, PWSAC;
Board of Directors, CFAB.

ALASKA STATE EMPLOYEES ASSOCIATION
AFSCME Local 52, AFL-CIO

HEADQUARTERS, 3510 Spenard Road, Ste. 201, Anchorage AK 99503
(907) 277-5200 * Toll Free 800-478-ASEA * Fax (907) 277-5206

April 10, 1997

Senator Bert Sharp, Co-Chair
Senate Finance Committee
State Capitol Mail Stop 3101
Juneau, Alaska 99801-1182

Dear Senator Sharp:

The Public Employment Relations Act (PERA) was passed in 1972, and in the past twenty-five (25)) years this act has resulted in a labor relations environment that has produced approximately one hundred (100) collective bargaining agreements. During this quarter of a century collective bargaining has worked well and the states workers feel that they have a meaningful voice in determining their terms and conditions of employment.

There have only been three instances where collective bargaining has resulted in a strike by state workers, these were in 1974, 1975, and 1977. In the first two instances the strikes lasted only a day or two, and in 1977 it lasted approximately three (3) weeks. That's it, in a quarter of a century there has been labor peace 99.008% of the time. (I also feel it is important to note that the General Government Bargaining Unit (GGU) has never been on strike.) PERA has been beneficial for the State of Alaska and the workers that it has employed.

The public policy purpose of PERA is stated very clearly:

> **23.40.070. Declaration of Policy.** The legislature finds that joint decision-making is the modern way of administering government. If public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, to strengthen the merit principle where civil service is in effect, and to maintain a favorable political and social environment. The legislature declares that it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government.

And, in my view, this public policy purpose has been fulfilled over the past quarter century and will continue to be satisfied well into the next century with the existing PERA statute.

Unions engage in free speech, and we engage in the political process. Our right to do so is no different than the rights of women's groups, religious groups, the chamber's of commerce, retired persons, minority groups, political subdivisions, and/or any other group interested in public policy.

I have been asked many times, "What is the purpose of your Union?" And, my consistent response has been that our purpose is to secure the best possible terms and conditions of employment and the fair and just treatment of all individuals in our bargaining unit. As of this point in time we have achieved only a moderate amount of success, and in my view the balance of power between public employee unions and management is balanced. It was the intent of PERA to create a level playing field between labor and management and its purpose has been fulfilled. The work done by our members is honorable work and to give it some definition I am going to list the kind of work done by the members of ASEA/AFSCME Local 52.

We:

1. Implement fair and honest elections;
2. Enforce fair treatment of Alaskan workers;
3. Carry out retirement programs;
4. Invest and audit Alaska's income and investments;
5. Provide care and custody for Alaska's needy seniors;
6. Provide for citizen legal services;
7. Monitor Alaska's financial institutions;
8. Encourage domestic and foreign commerce;
9. Monitor Alaska's insurance companies;
10. Require that measurement standards be fair;
11. Insure that professionals are properly licensed;
12. Promote and encourage tourism to our state;
13. Require accountability of public utilities;
14. Train, help finance, and assist Alaskan local governments;
15. Monitor and provide for educational funding and opportunities;
16. Train the unemployed, people with disabilities, displaced, and convicted;
17. Provide financial assistance, training, and employment opportunities for the unemployed;
18. Contain the criminals---be they adult or juveniles;
19. Monitor convicted criminals on probation and/or parole;
20. Fund and teach the children and adults;
21. Maintain history and plan for the future;
22. Insure the safety of the air, water, and the land;
23. Guarantee the continued abundance of the fish and wildlife for all;
24. Redirect the chemically dependent;
25. Assist families in domestic, financial, and medical jeopardy;
26. Care for the mentally and physically disadvantaged;
27. Require safety in the workplace and places of public accommodation;
28. Prosecute the indicted;
29. Guarantee all citizens due process;
30. Assist and help in times of natural disaster;
31. Respond to commercial and private airline tragedies;
32. Insure the sustainable yield of renewable resources;
33. Because of us "Alaskan Grown" happens;

34. We survey, monitor, and assign fair value to the land;
35. Guarantee that workers are fairly paid;
36. Public safety is our responsibility;
37. Monitor and see to it that all revenues due the state are paid;
38. Require and enforce the payment of child support;
39. Provide resources that enable the ownership of homes and businesses;
40. Protect, defend, and invest the permanent fund---and we distribute the dividend; and
41. We guarantee the design, construction, maintenance, and future security of the infrastructure of our state.

Senate Bill 151 would result in a labor relations environment that would be oppressive to the worker.

All of this work is important to the people of Alaska, we do it proudly and believe it deserves respect. Your committee has proposed Senate Bill 151, which is a complete rewrite of the existing collective bargaining statute. This bill proposes to amend, add to, and repeal sections of PERA in at least seventy-seven (77) ways, and there is no justification or reason for most of these amendments.

The Unions in this state, both public and private sector, have met to discuss this, and other anti-labor bills, and we have all agreed to share the cost of a comprehensive analysis of the public policy impacts of Senate Bill 151. We intend to select a neutral master who understands both labor and management issues. We will share the outcome of this analysis with you at the earliest possible time.

While it is no surprise to you that I, as the Business Manager of the largest Union in the AFL-CIO oppose this bill, I would respectfully request that as a matter of good public policy you delay passing SB 151 out of the Senate Finance Committee until such time as an objective dialogue can take place concerning the proposed seventy-seven (77) amendments to PERA which are contained in Senate Bill 151.

Thank you in advance for your attention and consideration.

Sincerely,

Charles L. O'Connell
Business Manager
ASEA/AFSCME Local 52

ALASKA AIR CARRIERS ASSOCIATION
[illegible] E. 36th Avenue, Suite 102
Anchorage, Alaska 99508
(907) 277-0071 Fax (907) 277-0072

AACA

RESOLUTION 97-1

TORT REFORM

RESOLUTION supporting sponsor substitute for HB58.

WHEREAS, the purpose for State involvement in aviation is to promote, encourage and develop aviation, (AS 02.15.010); and

WHEREAS, Alaskans rely on the aviation industry as their primary transportation source for persons, mail, food, shelter, health care and goods and services in general; and

WHEREAS, in the past decade the Alaska aviation industry has made significant progress and investment in developing a system which better meets the transportation needs of our vast state; and

WHEREAS, the commercial air carrier industry in Alaska is suffering from a lack of insurance underwriting capacity with insufficient limits of liability to compensate injured parties,

WHEREAS, passage of this bill will benefit the traveling public by allowing more funds to be available to properly compensate injured parties for economic and non-economic damages,

THEREFORE BE IT RESOLVED, the Alaska Air Carriers Association supports passage of sponsor substitute HB58.

PENAIR
The Spirit of Alaska

March 10, 1996

Representative Gene Therriault
State Capitol
Juneau, Ak 99801-1182

Dear Rep Therriault:

This letter is to support HB 58. I am writing you because I understand your committee is soon to have a hearing on it.

Besides Penair, I have been delegated by the Alaska Air Carriers Association to work towards the approval of HB 58.

The Alaska Air Carriers membership is well over one hundred air carriers throughout the State, all the way from Alaska Airlines to the smallest one aircraft operator. I can not think of any significant airline that does not belong.

There are over 200 communities throughout the State that are not on any road system, thus are totally dependent on our collective services for all their transportation needs.

We are being greatly impaired by a lack of insurance underwriting capacity. The problem dramatically escalated a little over two years ago when the BAIG (British Aviation Insurance Group) made a corporate decision to cease writing commuter airline insurance in Alaska. There is now no underwriter in Europe, including Lloyd's, that will touch us.

This is a direct result of the knowledge that Alaska has a potential for the highest punitive damage awards in the nation, second only to Alabama.

The plaintiffs attorneys will tell you that relatively few cases go to jury trial, and when they do the amounts awarded have not been excessive. There are answers for both statements.

Most cases are settled out of court because, for example, a death loss with an economic value of two million dollars will be settled for four million because the defendants are well aware they risk a much higher award, maybe eight million, if it gets to a jury in Alaska. This is possible even without any finding of gross negligence or willful misconduct! So the result was it still cost the defendant (underwriter) twice as much as it should have.

Penair is in the middle of just such a scenario. The initial letter from the plaintiff attorney estimated economic damage of 2.8 million, then brags that he should be able to get 12 to 16 million in punitives, if it gets to a jury!

As to the past awards, I suspect the only cases that do get to the trial stage are the ones where the defendant has a strong case.

Most of us mid-sized carriers traditionally carried twenty million dollar CSL (combined single limit) passenger liability coverage. But since the BAIG pulled out CSL is not available at any cost. Penair has been limited to one million per seat for the last two years, and our cost for the last renewal was over three million dollars annually, or ten percent of our gross revenue! Many of the smaller carriers have only five hundred thousand per seat, and some only one hundred fifty thousand.

If HB 58 is passed, it will actually make more money available to compensate a citizen hurt or killed in an aircraft accident. That is because underwriters will make higher limits easier and cheaper to obtain. Consider a one-plane operator with one hundred fifty thousand per seat, when he crashes and kills someone there are no other assets, so no matter what the economic value is there is no other money available.

In the Penair case, the economic value alone is higher than our insurance available, (and there is no evidence of gross negligence on our part). A direct result of that is we have examined our customer base to see where we may be exposed, in other words looking for high value people, if you will. We have actually refused service to some such customers, so some companies ability to do business in Alaska is being restricted by this insurance problem.

Enclosed are copies of my correspondence regarding this situation, as well as a resolution passed by the AACA general membership at our recent convention.

We will certainly appreciate any assistance you can give, believe me HB 58 will go a long way towards benefiting anyone in the State who has to use aircraft services.

Very truly yours

Orin D Seybert
President

Enclosures (4)

CC: Rep Porter

PENAIR
The Spirit of Alaska

November 21, 1996

Rep Brian Porter
State Capitol
Juneau, AK 99801-1182

Dear Brian:

Penair is involved right now in a scenario that clearly highlights the need for tort reform.

We lost a [redacted] The one passenger was a highly compensated, [redacted]. He was relatively young, and left a wife and two daughters.

Enclosed is copy of the letter from her attorney, estimating purely economic value of $2.7 million. (by the way, there will be no finding of any negligence on our part whatsoever).

In past years, we normally carried a $20 million Combined Single Limit (CSL) for any accident. As you know, that sum is available for all the passengers collectively. If there were nine passengers, each estate would be entitled to over two million, or varying amounts as the case proved. In this case the entire twenty million would have been available.

Two years ago the London underwriters, primarily the BAIG, (British Aviation Insurance Group) simply refused to write any more Alaskan commuters, period. That leaves us with only two underwriters in the world, AIG (Aviation Insurance Group in Atlanta) and USAIG (US Aviation Insurance Group in New York, different company).

They absolutely refuse to write the CSL any more, so we are now limited to one million dollars per seat. Most of the other operators only have $500,000 per seat, and some of the real small operators are at $150,000.

The reason given is not particularly related to the perceived accident rate or difficult operating conditions in Alaska. Rather the overwhelming problem is the fact, or at least perception, that Alaska has a history of the highest punitive damage jury awards in the nation.

PAGE TWO

So back to the letter from [redacted] you see him bragging about the punitive damages being 12 to 16 million. And this apparently is possible without any negligence by the defendant!

My first reaction was to realize that Penair is exposed, so I examined our customer base to see where potential problems lay. That resulted in the enclosed letter to the Alaska Marine Pilot group. So a direct result of the insurance problem is impacting the ability of some companies to do business. I am preparing similar letters to other customers.

I have thought of another argument for reform. Since the limits are so low, there is actually less money available for the average Alaskan claimant. If we could just cap the punitive damages there would be more insurance coverage available.

For instance the Jimair crash at Lake Hood in September killed three tourists, but they only had $150,000 per seat insurance. Since there were no other assets, it doesn't make any difference what the judgement is, but if it were easier for underwriters to write higher limits, there would then be more money available in cases such as that.

Anyway, as I told you I am now highly motivated to help write the bill this session, and I intend to be there.

I would like to ask for your help in letting me know when things are happening during the session, and who the key players are that I need to work on.

Very truly yours

Orin D Seybert
President

CC: Gail Phillips
Rick Halford

PENAIR
The Spirit of Alaska

November 8, 1966

Capt. Stephan Moreno
Alaska Marine Pilots
2622 38th Ave S. W.
Seatle, Wa 98126

Dear Steve:

We recently concluded a very, very difficult insurance renewal. Not only did the price increase drastically, we were not able to get any increase in limits. We still have only one million dollars for passenger liability.

In view of our tragedy it has made me realize that Penair cannot afford to be put in such a position again.

So I am in the process of identifying charter groups and individuals where the resource generated does not justify the risk associated with the contract. Certainly the Alaska Marine Pilots (and any marine pilot) is a perfect example.

Therefore, I am sorry to say that effective immediatedly we will no longer be able to provide transportation to your group.

This limitation applies only to charter or contract operations involving the nine or less passenger planes. We were able to get proper limits on the larger aircraft operating the schedules out of Anchorage.

I am having our attorney look into the possibility of having a limitation of liability agreement the customer could execute which would limit the exposure in the event of an accident. If such becomes available we will contact your groups at that time for the purpose of discussing the resumption of service.

Very truly yours

Orin D Scybert
President

CC: Hal Snow

PENAIR
The Spirit of Alaska

November 26, 1996

Magone Marine
P. O. Box 442
Dutch Harbor, Ak 99692

Dear Dan:

On September 30 we concluded a very, very difficult liability insurance renewal. Not only did the price increase drastically, but for the second year in a row we were unable to get passenger liability limits over one million dollars per passenger seat.

After our accident of August 11, it has become apparent that under present Alaska law judgements in wrongful death claims can be many millions of dollars, even without any negligence.

So I have been looking at each charter customer, trying to analyze the possible exposure of Penair. It occurs to me that your divers are probably young and highly compensated, which would lead to such an excessive award.

Therefore, I must decline to provide you with such charter services, we simply cannot accept the risk.

My attorney is working on some sort of "hold harmless" or limitation of liability that the passenger could execute, we hope to have that available in the next few weeks.

Meanwhile, the real problem is the present Alaska laws, this situation clearly illustrates the need for Tort reform. I intend to be working on this issue during the upcoming legislative session, and would appreciate any help you might be able to give.

Very truly yours,

Orin D Seybert
President

PENAIR • 4851 Aircraft Drive • Anchorage • Alaska • 99502 • (907) 243-2485 • Fax 243-6848
Peninsula Airways, Inc. D/B/A PenAir

Cordova District Fishermen United

Celebrating 62 Years of Service to Commercial Fishermen in Cordova, Alaska
P.O. Box 939 Cordova, Alaska 99574 / Telephone (907) 424-3447 / Fax (907) 424-3430

April 10, 1997

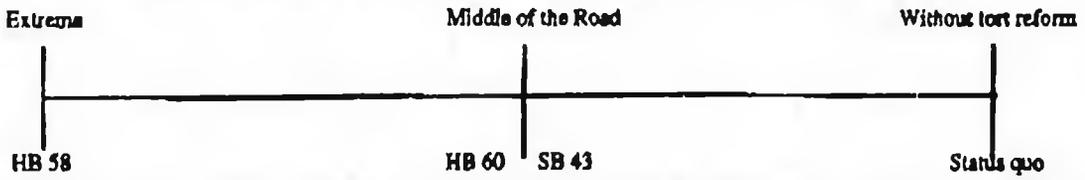
TO: All Alaska Representatives and Senators **RE:** HB 58 Tort Reform
FROM: Cordova District Fishermen United **SENT:** Via Facsimile

Dear Alaska Legislator:

In response to the April 4 memo distributed to majority representatives and senators by Representative Porter regarding House Bill 58 (Tort Reform), I would like to clear up some misunderstandings. First let me begin by saying that the commercial fishing industry *does* support responsible tort reform. In a letter to Representative Porter dated February 27, I made this statement abundantly clear while submitting amendments the commercial fishing industry thought were reasonable and responsible.

Representative Porter writes, "the trial lawyers are manipulating the fishermen....into acting as their tool." Please be advised that Cordova District Fishermen United began their campaign against HB 58 immediately after it was introduced on January 13. I personally met with both of my legislators while in Juneau in early February and discussed the problems with HB 58. The recent outcry by Cordova residents is the result of a grassroots movement by citizens who are afraid their concerns are not being addressed and it is not a "well-orchestrated" last ditch hope by trial attorneys in Alaska.

HB 58 *is* radical legislation! The following graph depicts our concept of tort reform to the extreme:



In Representative Porter's memo he states that the Governor's Advisory Task Force was dominated by trial lawyers. Please refer to the list of participants and see for yourself that this statement is completely untrue. You will also find that not one Exxon plaintiff attorney was seated on this task force.

I checked two of the legal interpretations made by Representative Porter and was surprised to find inaccuracies. 1) In a recent Alaska Supreme Court decision, Alaska state law can be applied in Federal Maritime context if there is no direct conflict and 2), requiring malice or conscious acts showing deliberate disregard of another person would be needed for punitive damages to be awarded under HB 58. Porter says that "malice" and "reckless indifference to the rights of others" are interpreted the same by the Alaska Supreme Court in awarding punitive damages. However, the case cited by Representative Porter holds the opposite, In fact, you would have to prove malice or show deliberate disregard of another person under the constraints of HB 58. With these conditions, punitive damages would not have been awarded in the Exxon Valdez case. Proving malice in litigation involving a grounded supertanker would be an impossible task in future cases. Further, HB 58 might jeopardize the judgment against Exxon now on appeal, see the enclosed memo from Matt Jamin, one of the attorneys in that case.

Another misrepresentation I found was the calculation of the possible Exxon Valdez punitive award under HB 58. Representative Porter states that the award could be as high as $4.8 billion. My calculations show that under HB 58, the punitive award paid to the plaintiffs would be vastly reduced from the original award. Is this equitable for the indigenous people and fishermen who have suffered greatly in the wake of this horrendous disaster?

A final point of contention is Representative Porter's claim that 60 attorneys would be splitting the $1 billion in attorney fees... try 400 attorneys! Furthermore, the attorneys' fees award is subject to federal court approval.

Please consider the inaccuracies of Representative Porter's memo before deciding the fate of the people of Alaska. Talk with Senate Finance committee members if you have reservations regarding HB 58. Look at the real facts and as Representative Porter so eloquently states, "Don't be fooled and don't be manipulated!" Thank you for your time and consideration.

Sincerely,
CORDOVA DISTRICT FISHERMEN UNITED

Cheri Shaw

Cheri Shaw, Executive Director

/enclosure

cc Governor Tony Knowles
Lt. Governor Fran Ulmer
United Fishermen of Alaska

Memorandum

To: Lacey Benn

From: Matthew D. Jamin

Date: April 9, 1997

Subject: Exxon Valdez and Tort Reform

I appreciate your request that I comment on behalf of the class of punitive damage claimants for whom I serve (with several other attorneys) as class counsel.

1. Who recovers if the Exxon verdict is sustained, or, stated differently, which legislators' constituents are affected? Though any recovery goes primarily to fishermen in the oiled areas (PWS, Cook Inlet, Chignik and Kodiak), a significant portion goes to the "unoiled" fisheries, a fact perhaps not generally well known, but of importance to legislators whose constituencies include commercial fishers. Average recoveries are expected as follows for the following fisheries. Note that these are just some of the fisheries affected. All salmon and herring fisheries statewide (e.g., Norton Sound and Yukon) will receive payments as well.

Fishery	permit holders	average recovery
Southeast Salmon Seine	375	$50,000
Southeast Salmon Drift	475	$10,000
Southeast Herring Seine	50	$10,000
Peninsula Aleutians Salmon Seine	125	$70,000
Peninsula Aleutians Salmon Drift	165	$50,000
Peninsula Aleutians Salmon Set	115	$25,000
Bristol Bay Salmon Drift	1900	$30,000
Bristol Bay Salmon Set	1000	$10,000

Note that unoiled permit holder recoveries get shared with crew as well, so in each of the unoiled fisheries, a very significant portion of each applicable legislator's constituents will be affected by how the Exxon Valdez oil spill litigation fares on appeal.

As to the affect in Kodiak, Senator Mackie's region, well in excess of $1 billion dollars is slated to come to the community if the verdict is sustained. Obviously, any affect that tort reform might have statewide pales by comparison to the direct effects on Jerry's constituents. Among those who will recover are commercial fishers, their crew, municipalities (the City of Kodiak, Kodiak Island Borough, Old Harbor, Port Lions, Larsen Bay and Ouzinkie), all Alaska Natives in the area, all property owners with beachfront including all Native Corporations, the Kodiak Regional Aquaculture Association, several of the area processors, and other businesses and fish tenderers. Exactly the same situation obtains for representatives whose regions cover the Kenai Peninsula, Prince William Sound and Chignik areas, and, to a lesser extent, as explained above, wherever there are commercial salmon or herring fishers in the state.

2. What's the real affect of the proposed legislation on the case as it stands right now?

As one of the people working on the appeals, I believe most of the discussion about how what the Alaska legislature does may affect Exxon Valdez now misses the point, and is hyper technical. Though concerns about how tort reform legislation passed this year might affect a future spill are important, or how this legislation might affect the case now on appeal if the court of appeals required a new trial, the most important issue right now for Jerry's constituents is how what the legislature does may be used by Exxon in the Court of Appeals as Exxon argues that standards should be changed in the federal courts, and, as a result of those changes, the verdict should be lowered or wiped out.

Exxon has previously argued that the federal court should look to (not be bound by) what the states have done -- especially Alaska -- in deciding how it should deal with this case. Thus Exxon argued to the District Court that because Alaska has a "clear and convincing" burden of proof for punitive damages, the federal court should use the same standard. Judge Holland said no, but Exxon will make that argument again in the Court of Appeals. If Alaska passes a cap on punitives at 3 X or 4X compensatory damages, and that cap applies to natural resources and environmental cases, Exxon will argue that the same standard should be adopted by the federal court as evidence of what the people of Alaska want. And if Alaska passes a law which says that there must be actual "malice or conscious acts showing deliberate disregard of another person's

rights," Exxon will argue that such a standard, and not "recklessness" should be adopted by the federal court as evidence of what the people of Alaska want. I cannot overemphasize the importance of such arguments, and how legislation passed this year could significantly affect our chances on appeal.

As such, it is my recommendation, because any effect that tort reform legislation would have is minimal in affected communities in comparison to the downside of a reduction or loss of the Exxon Valdez verdict, that Jerry not support tort reform measures this year which adopt a cap on punitive damages or require that a portion of any punitive award should go to the state or attempt to change the mental standard for punitive damages to "conscious disregard" rather than "recklessness," as is now the rule. Alternatively, language that any modifications made this year would have no affect on prior or future oil spills, or, more generally, cases which involve damage to the environment or natural resources, would go a long way towards countering what we expect to be the arguments Exxon is now preparing to file with the Court of Appeals. This is very real right now. Exxon's brief is expected to be due in June with the Court of Appeals, and it will make use of every possible argument to argue that the verdict is too high and/or that a new trial should be ordered.

3. Is this just "for the lawyers!" Apparently some are saying that the only persons who will benefit from a substantial verdict in Exxon are attorneys. While the lawyers have sought a portion of any recovery on a contingency basis, even if their request is granted, well over 75% of any recovery would go to claimants if the request is approved. Payments will still be on the order of $20,000,000 to Kodiak Island Borough, and several hundred thousand dollars to over a million dollars to permit holding fishers in oiled communities after fires. I would be pleased to provide more detail if requested. As chairman of the fee committee for the Exxon Valdez plaintiffs, I can assure you that the request we have made is completely consistent with standards adopted in federal courts for fees in such cases, and that Judge Holland is well aware of what applicable rules are for fairness in deciding how to compensate the attorneys.

Thank you for this opportunity to comment on behalf of the approximately 40,000 Exxon Valdez plaintiffs statewide who are my clients.

mackie mcm

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

MEMBER
HOUSE JUDICIARY COMMITTEE
HOUSE RULES COMMITTEE
HEALTH, EDUC. & SOCIAL SERVICES COMMITTEE
LEGISLATIVE COUNCIL JOINT COMMITTEE

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DISTRICT 20

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PENAIR
The Spirit of Alaska

March 10, 1996

Representative Gene Therriault
State Capitol
Juneau, Ak 99801-1182

Dear Rep Therriault:

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The Alaska Air Carriers membership is well over one hundred air carriers throughout the State, all the way from Alaska Airlines to the smallest one aircraft operator. I can not think of any significant airline that does not belong.

There are over 200 communities throughout the State that are not on any road system, thus are totally dependent on our collective services for all their transportation needs.

We are being greatly impaired by a lack of insurance underwriting capacity. The problem dramatically escalated a little over two years ago when the BAIG (British Aviation Insurance Group) made a corporate decision to cease writing commuter airline insurance in Alaska. There is now no underwriter in Europe, including Lloyd's, that will touch us.

This is a direct result of the knowledge that Alaska has a potential for the highest punitive damage awards in the nation, second only to Alabama.

The plaintiffs attorneys will tell you that relatively few cases go to jury trial, and when they do the amounts awarded have not been excessive. There are answers for both statements.

Most cases are settled out of court because, for example, a death loss with an economic value of two million dollars will be settled for four million because the defendants are well aware they risk a much higher award, maybe eight million, if it gets to a jury in Alaska. This is possible even without any finding of gross negligence or willful misconduct! So the result was it still cost the defendant (underwriter) twice as much as it should have.

Penair is in the middle of just such a scenario. The initial letter from the plaintiff attorney estimated economic damage of 2.8 million, then brags that he should be able to get 12 to 16 million in punitives, if it gets to a jury!

PENAIR • 4451 Aircraft Drive • Anchorage • Alaska • 99502 • (907) 243-2485 • Fax 243-6848
Peninsula Airways, Inc. D/B/A PenAir

As to the past awards, I suspect the only cases that do get to the trial stage are the ones where the defendant has a strong case.

Most of us mid-sized carriers traditionally carried twenty million dollar CSL (combined single limit) passenger liability coverage. But since the BAIG pulled out CSL is not available at any cost. Penair has been limited to one million per seat for the last two years, and our cost for the last renewal was over three million dollars annually, or ten percent of our gross revenue! Many of the smaller carriers have only five hundred thousand per seat, and some only one hundred fifty thousand.

If HB 58 is passed, it will actually make more money available to compensate a citizen hurt or killed in an aircraft accident. That is because underwriters will make higher limits easier and cheaper to obtain. Consider a one-plane operator with one hundred fifty thousand per seat, when he crashes and kills someone there are no other assets, so no matter what the economic value is there is no other money available.

In the Penair case, the economic value alone is higher than our insurance available, (and there is no evidence of gross negligence on our part). A direct result of that is we have examined our customer base to see where we may be exposed, in other words looking for high value people, if you will. We have actually refused service to some such customers, so some companies ability to do business in Alaska is being restricted by this insurance problem.

Enclosed are copies of my correspondence regarding this situation, as well as a resolution passed by the AACA general membership at our recent convention.

We will certainly appreciate any assistance you can give, believe me HB 58 will go a long way towards benefiting anyone in the State who has to use aircraft services.

Very truly yours

Orin D Seybert
President

Enclosures (4)

CC: Rep Porter

DRAFT

ALASKA AIR CARRIERS ASSOCIATION

RESOLUTION 97-1

RESOLUTION supporting sponsor substitute for HB58.

WHEREAS, the purpose for State involvement in aviation is to promote, encourage and develop aviation, (AS 02.15.010); and

WHEREAS, Alaskans rely on the aviation industry as their primary transportation source for persons, mail, food, shelter, health care and goods and services in general; and

WHEREAS, in the past decade the Alaska aviation industry has made significant progress and investment in developing a system which better meets the transportation needs of our vast state; and

WHEREAS, the commercial air carrier industry in Alaska is suffering from a lack of insurance underwriting capacity with insufficient limits of liability to compensate injured parties.

WHEREAS, passage of this bill will benefit the traveling public by allowing more funds to be available to properly compensate injured parties for economic and non-economic damages,

THEREFORE BE IT RESOLVED, the Alaska Air Carriers Association supports passage of sponsor substitute HB58.

PENAIR
The Spirit of Alaska

November 8, 1966

Capt. Stephan Moreno
Alaska Marine Pilots
2622 38th Ave S. W.
Seatle, Wa 98126

Dear Steve:

We recently concluded a very, very difficult insurance renewal. Not only did the price increase drastically, we were not able to get any increase in limits. We still have only one million dollars for passenger liability.

In view of our recent tragedy it has made me realize that Penair cannot afford to be put in such a position again.

So I am in the process of identifying charter groups and individuals where the resource generated does not justify the risk associated with the contract. Certainly the Alaska Marine Pilots (and any marine pilot) is a perfect example.

Therefore, I am sorry to say that effective immediatedly we will no longer be able to provide transportation to your group.

This limitation applies only to charter or contract operations involving the nine or less passenger planes. We were able to get proper limits on the larger aircraft operating the schedules out of Anchorage.

I am having our attorney look into the possibility of having a limitation of liability agreement the customer could execute which would limit the exposure in the event of an accident. If such becomes available we will contact your groups at that time for the purpose of discussing the resumption of service.

Very truly yours

Orin D Seybert
President

CC: Hal Snow

PENAIR
The Spirit of Alaska

November 26, 1996

Magone Marine
P. O. Box 442
Dutch Harbor, Ak 99692

Dear Dan:

On September 30 we concluded a very, very difficult liability insurance renewal. Not only did the price increase drastically, but for the second year in a row we were unable to get passenger liability limits over one million dollars per passenger seat.

After our accident of August 11, it has become apparent that under present Alaska law judgements in wrongful death claims can be many millions of dollars, even without any negligence.

So I have been looking at each charter customer, trying to analyze the possible exposure of Penair. It occurs to me that your divers are probably young and highly compensated, which would lead to such an excessive award.

Therefore, I must decline to provide you with such charter services, we simply cannot accept the risk.

My attorney is working on some sort of "hold harmless" or limitation of liability that the passenger could execute, we hope to have that available in the next few weeks.

Meanwhile, the real problem is the present Alaska laws, this situation clearly illustrates the need for Tort reform. I intend to be working on this issue during the upcoming legislative session, and would appreciate any help you might be able to give.

Very truly yours,

Orin D Seybert
President

3/11/97
ANCHORAGE Daily NEWS

JURY WEIGHS MAN'S CLAIM OF EAR DAMAGE

By LIZ RUSKIN
Daily News reporter

A man who was a passenger on a 1990 flight to Prudhoe Bay is asking an Anchorage jury for more than $13 million in damages for injury to his ears he says he suffered because the plane's cabin was not properly pressurized.

Mickey Barrett, now 50, was a welder but says he can't work because of a ringing in his ears, dizziness and balance problems. He claims the injuries resulted from a descent into Deadhorse on Christmas Day aboard a Convair 580. He is suing Era Aviation, the operator of the charter flight.

His lawyer, Andrew Kurzmann, told a Superior Court jury during closing arguments Monday that the injuries cost Barrett his job, his family, and his ability to relate to his young son. Era Aviation has stripped Barrett of his dignity and self-respect, condemning him to a sad, lonely life for his remaining years, Kurzmann said.

But Era's lawyer said Barrett's problems aren't related to the flight. The crew, attorney Robert Richmond said, noted nothing unusual in the cabin pressure, and there's no reliable evidence of problems aboard the flight.

"At no point during the flight ... was there ever any complaint made," Richmond told the jury.

Barrett's trouble began before he got on the plane, Richmond said. He had already separated from his wife, and he'd received a job evaluation that said he had difficulty concentrating on his work, Richmond said. Barrett also had a cold and an ear infection when he got on the plane, the lawyer said. When you have a cold, it's hard for your ears to handle flying under normal pressure conditions, and they will hurt, Richmond said.

Several of Barrett's co-workers were among the 40 passengers on the plane. A couple of them corroborated his claim in court. One woman who was on the flight testified that the pressure felt as if someone had put a hose in her mouth and turned it on.

Kurzmann said Barrett bears the hallmarks of an injury to the vestibule of the inner ear: vertigo, hearing loss, pressure, ringing.

"He plays the radio 24 hours a day just to (mask the noise,)" Kurzmann said.

Richmond pointed out that Barrett continued working for the two weeks following the Dec. 25 flight, then took two weeks off in Oklahoma. When he returned to the North Slope, he was fired from his job with Atlas Wireline for smoking a cigarette in a room

where explosives are stored, Richmond said. Then he returned to Oklahoma and applied for unemployment compensation, claiming he was fit and ready to return to work, Richmond said.

Kurzmann asked for punitive damages equal to one year of Era's profits. As for assigning a value to Barrett's pain and suffering, Kurzmann said he once heard a seasick angler offer a skipper $200 to turn the boat around and return to the Homer harbor. Using that analagy, Kurzmann argued the jury should make Era pay $200 a day for the 25 years of Barrett's remaining life expectancy.

The jury began its deliberations Monday afternoon.

Headquarters:
217 2nd Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323 FAX 463-5515

STATE
CHAMBER
OF COMMERCE

March 10, 1997

Honorable Gene Therriault, Co-chairman
House Finance Committee
State Capitol
Juneau, Alaska 99801

Subject: Support for HB 58 - Tort Reform

Dear Representative Therriault:

The Alaska State Chamber of Commerce represents approximately seven hundred member businesses statewide which provide jobs to nearly 70,000 employees. Indirectly, through our network of the 35 local Chambers of Commerce throughout Alaska, we represent an additional 6000 businesses. Eighty-five percent of our membership consists of small businesses. As the Voice of Business, the State Chamber's mission is to create a climate in Alaska that is conducive to a strong private sector economy.

Reform of Alaska's civil justice system is one of the highest priorities for this organization. It is also of significant importance to the voters of Alaska. In a statewide survey of registered voters conducted by ASCC in January, 1996, four out of five Alaskan voters favored changing Alaska's tort system. Three out of four believed that those who would be most helped by the proposed changes to the system would be small businesses, doctors, taxpayers, and people with legitimate lawsuits. By a ratio of eight to one, those surveyed believed that those who would find the changes disadvantageous would be people with frivolous lawsuits and personal injury lawyers.

The issue of greatest concern to the State Chamber is that of punitive damages, because they can be assessed on a business or individual even without intentional wrongdoing or willful neglect, and the sky is the limit. ASCC believes there should be parameters, or established criteria for assessment of punitive damages. ASCC also believe the penalty should be pre-established as a multiple of the compensatory damage caused. We support the formula established in SSHB 58.

We strongly urge the support of the House Finance Committee and all members of the State Legislature of SSHB 58.

Sincerely,

Pamela LaBolle

Pamela La Bolle
President

ALASKA TRUCKING ASSOCIATION, INC.

3443 Minnesota Drive • Anchorage, Alaska 99503 • PHONE (907) 276-1149 • FAX (907) 274-1946

March 12, 1997

Representative Gene Therriault
Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

Dear Representative Therriault:

Members of Alaska Trucking Association strongly urge you to support H.B. 58. We believe that America is drowning in a sea of judicial abuse. It seems apparent to anyone outside of the legal system that " legal thinking" and "common sense" have parted company. H.B. 58 is a small, but much needed step towards a complete reconstruction of our legal system. Don't succumb to the arguments that will surely attempt to kill the bill or at least amend it into ineffectiveness.

Also attached, for your information, is one of the more egregious trucking cases. Unfortunately, this is not an extremely unusual case. ATA's members hope that one day they may run their businesses, for at least one day, without thinking of lawyers. Thank you for your time and attention on this very important issue.

Sincerely,

Frank J. Dillon
Executive Director

ALASKA TRUCKING ASSOCIATION, INC.

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ATA Officers and Board of Directors 1996-1997

Representative	*Company*	*Phone / Fax.*
President Jimmy Doyle	Weaver Bros., Inc	278-4526/276-431[redacted]
1st V-President Bill Deaver	Sea-Land Sevice, Inc	263-5600/[redacted]
2nd V-President Jeff Gregory	Sourdough Express, Inc	800-478-3976/[redacted]
Sec/Treas Ted DeBoer	Totem Ocean Trailer Exp, Inc	276-5868/278-0461/[redacted]
Ron Locke	Wilder Construction Co.	344-2593/522-8645/[redacted]
Gordon Harang	Arrowhead Transfer, Inc	747-8647/747-6433/
Bob Hopf	Kenworth Alaska, Inc	279-0602/258-6639/[redacted]
Edith Montpetit	Sig Wold Storage & Tran	274-7535/272-1296/[redacted]
Billy Read	Reed Trucking Co	344-9093/ nope /
Lefty Prickett	Lefty's Trucking Co	745-3328/745-7374/[redacted]
Dale Morman	Anchorage Sand & Gravel	349-3333/344-2844/[redacted]
Peter Blanas	Muleskinners, Ltd	344-7887/522-3389/[redacted]
Steve Saunders	Inlet Petroleum Co	274-3835/272-8151/[redacted]
Thomas Culhane	Anchorage Refuse, Inc	563-3717/563-3932/
Albert Snelling	Samson Tug & Barge Co, Inc	747-8559/747-5370/
Fred Stauber	Fred's Towing & Recovery	243-4037/ nope [redacted]
Duane Congdon	Valley Transport & Storage	745-7733/745-7734/
Richard Asay	Asay Trucking, Inc	349-4774/349-6047/[redacted]
M. Kathyrn Thomas	ArcTech Services, Inc	776-5480/776-5132/[redacted]
Charlotte Emerson	World Equipment, Inc	563-3557/563-3558/
Jasper Hall	Service Oil & Gas	822-3375/822-3511/
Harry McDonald	Carlile Ent/K&W Trucking	276-7797/278-7301/[redacted]
Dean McKenzie	Alaska West/Frontier Trans	279-9515/272-8152/[redacted]
Greg Wakefield	Alaska Mover's Assoc, Inc	276-3506/258-3986/[redacted]
Blaine Ghan	Lynden Transport, Inc	276-4800/257-5155/[redacted]

Fax 263-56[illegible]

Award in ADA Case Sets Record

EEOC Filed Lawsuit for Former Ryder Driver

By Daniel P. Bearth
Staff Writer

A jury verdict in Detroit is send- g shivers down the spines of ecking industry lawyers.

A former truck driver who lost his b after suffering an epileptic izure in 1989 was awarded $5.5 illion because his employer — der System — refused to offer n comparable work.

Thomas Lewis, 45, an employee Ryder's Complete Auto Transit bsidiary in Flint, Mich., was arded $192,000 in back pay, 60,000 in compensatory dam- es and about $4.4 million in punitive damages.

Although a $300,000 federal cap on damages in employment claims reduced the judgment to $492,000, the jury award ranks as the largest amount ever won on behalf of a single plaintiff in a disability case, according to the U.S. Equal Employment Opportunity Commission, which filed the lawsuit on behalf of Mr. Lewis.

Fred Batten, an attorney for Ryder, said he will ask for a new trial.

He said Mr. Lewis has been on medical leave since the first seizure and, in fact, suffered a second seizure in April 1996 while working as a truck driver for another company.

According to Mr. Batten, Mr. Lewis lost his federal certification to drive after the first seizure and then falsified his medical card to get a ther driving job.

Ry r made a good faith effort to accommodate Mr. Lewis, but could not find a suitable job, Mr. Batten said.

Mr. Lewis had asked to be transferred from his previous job of hauling cars over-the-road to dealerships to a job loading cars from the auto assembly plant onto rail cars.

That job would have required him to drive and to work at heights up to 18 feet. The company maintained that was an unreasonable risk.

"An employer should have the right to make that decision," Mr. Batten said. "The judge in this case told the jury, 'You decide.'"

Mr. Lewis took his case to the EEOC in 1993 and filed a claim under the 1992 Americans With Disabilities Act, which requires employers to attempt to accommodate disabled workers.

William H. Herrmann, American Trucking Associations' labor counsel, said he found the facts in the Lewis case to be "disturbing."

"If a company puts this guy to work driving and he has an episode and hurts someone, Ryder is liable."

The courts generally have held that if a driver is medically disqualified, there is no requirement to offer another driving job, Mr. Herrmann said.

Employers may be forced to offer such people nondriving positions, however.

Even so, Mr. Herrmann said, management should retain some prerogatives in hiring. "Just because you are disabled doesn't mean you jump to the top of the list. ADA is not affirmative action."

Another question for companies that operate nationwide is whether injured workers must be offered jobs in other cities.

Mark A. Spognardi, a Chicago-based labor attorney, said the Lewis case is no fluke. He expects to see more like it because the ADA has set a very high burden of proof for employers to meet in determining the potential harm to individuals due to physical handicaps.

In the case of a person with epilepsy, it may not be enough to argue that seizures are likely to happen again, he said. The company must prove the individual poses a "significant" risk of "substantial" harm

Alaska Forest Association, Inc.

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KETCHIKAN, ALASKA 99901-6599
Phone 907-225-6114
FAX 907-225-5920

March 12, 1997

Honorable Mark Hanley, Co-chairman
Honorable Gene Therriault, Co-chairman
House Finance Committee
State Capitol
Juneau, Alaska 99801

Subject: Support for HB 58 - Tort Reform

Dear Gentlemen,

The Alaska Forest Association (AFA) is a private, non-profit corporation comprised of member companies engaged in activities related to the forest industry. We currently have over 250 member companies representing all aspects of the industry. Our membership includes logging companies, road building companies, towing companies, wood processing facilities, and a wide variety of firms that deliver goods and services in support of the timber industry.

The time is long overdue for meaningful changes in Alaska's tort laws. There have been many individuals over the last 15 years working hard for legal liability reform. It is a complex system that has been abused too often. The Alaska Forest Association supports House Bill 58 sponsored by Representative Brian Porter because it is a step in the right direction to make the civil justice system more fair and less costly.

AFA supports reasonable compensation for valid personal injury cases. This bill allows a person to be "made whole" with no limits on medical costs and lost wages. One of the problems with the current system is that there are no real limits on "non-compensatory" damages such as pain and suffering and punitive damages. It is this "sky is the limit" system that is rife for abuse. Representative Porter's legislation includes reasonable limits on these damage awards as well as other provisions that make the system more fair.

Please move this bill expeditiously through the process for passage this year.

Sincerely,

Jack Phelps, Executive Director

ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, Alaska 99503 FAX: (907) 279-7967 Telephone: (907) 276-0347

March 10, 1997

Honorable Gene Therriault
Co-Chairman, House Finance
Capitol Building
Juneau, AK 99801

RE: Tort Reform

Dear Representative Therriault,

The Alaska Miners Association wishes to go on record in support of House Bill 58, regarding tort reform. The Alaska Miners Association has over 1000 members from all parts of the mining industry. Our membership includes suction dredgers, small mom & pop miners, independent prospectors, suppliers, and major international mining companies.

The time has come for meaningful and comprehensive reform of Alaska's tort law. This bill will accomplish what is needed. We support fair compensation for injured persons but we do not support the current system that encourages abuse of the law. Many, and possibly most, tort cases are now settled out of court because that is less costly for the company. When this happens to our vendors, they have to increase the cost of goods and services to the miner to cover the settlement as well as the cost of insurance to cover the uncertainty of other tort issues.

Other tort reform needs include a change to insure that each party is liable only to the extent that each is responsible. Another needed change is to ensure that a person cannot receive an award for an injury that occurs while committing a criminal act.

Lastly, this area of law is a major factor in the general and wide-spread distrust and contempt in this country for the legal system, the courts, and attorneys in this country. The changes and reasonable limits in this bill will help restore the public faith in our legal system.

Thank you for the opportunity to comment on this important bill. We urge its passage.

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Representative Brian Porter

ALASKA MUNICIPAL LEAGUE

217 Second Street, Suite 200 • Juneau, Alaska 99801 • Tel (907) 586-1325, Fax (907) 463-5480

March 10, 1997

Representative Brian Porter
Alaska State Capitol
Juneau, AK 99801-1182

Dear Representative Porter,

Thank you for your continued hard work on tort reform. Last year the AML urged the implementation of the Tort Reform bill. **The AML continues its support of the adoption of a meaningful tort reform bill.** The provisions of CS of SSHB 58 (JUD) appear to fulfill this goal.

Municipalities have considerably broader liability exposures than almost any private business because of the extremely broad nature of municipal services and public safety responsibilities. Also, municipalities are seen as "deep pockets", however, a municipality must pass costs on to residents directly through taxes. It is clearly in the interest of residents of municipalities to reasonably limit their municipality's liability exposures.

In CS for SSHB 58 (JUD), a good example of a direct benefit for municipalities is the liability reduction for non-negligent actions of an electric utility. As a broader example, the provisions that limit liability to more reasonable sums, encourage early settlements, and discourage the proliferation of "nuisance" suits, will benefit taxpayers by reducing the legal and other costs of claims. These same provisions will require that municipalities become more efficient in submitting their own claims, especially in cases such as the discovery of latent defects in construction work. On balance, **a more defined legal system, as proposed by this bill, will have benefits for municipal taxpayers.**

While the AML endorsed last year's tort reform bill, the AML Legislative Committee has not yet formally approved the provisions of this bill and may comment on specific provisions after the AML/Alaska Conference of Mayors Legislative Conference on April 1 and 2 in Juneau. You are invited to present the bill to municipal officials on Tuesday April 1. Please keep the AML informed of any issues specifically relevant to municipalities and the AML will be pleased to continue to participate in the process.

Sincerely,

Kevin Ritchie
Executive Director

CC: AML Board of Directors
AML Legislative Committee
C:Legcomm:297tortreformhb58

Alaska Oil and Gas Association

121 West Fireweed Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907) 272-1481 Fax: (907) 279-8114

March 10, 1997

The Honorable Gene Therriault, Co-Chairman
Finance Committee
Alaska State House of Representatives
State Capitol
Juneau, Alaska 99801

AOGA Position on Tort Reform Legislation

Dear Representative Therriault:

The Alaska Oil and Gas Association (AOGA) is a trade association whose 19 member companies account for the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska.

On February 10, 1997, the AOGA Board of Directors adopted the following position on tort reform legislation. AOGA is aware of your interest in tort reform legislation and wanted to forward our position to you for your reference.

The Alaska Oil and Gas Association believes Alaska should adopt reforms to its civil justice system:

- The Alaska civil justice system gives juries and judges discretion to impose unlimited punitive damages awards, without adequate guidelines or criteria necessary to insure the constitutional protection of due process.

- Alaska's civil justice system discourages investment in the state. Firms assessing whether to invest or to conduct business in Alaska rather than in another state or country must take into account the legal risks that Alaskan law allows, and the substantial legal risks that can be incurred even in defending against frivolous civil actions.

A variety of reforms have been suggested to address these problems. The Alaska Oil and Gas Association believes the most important are:

- Limitations on punitive damages. This reform would make it clear that awards beyond those necessary to compensate plaintiffs for real damages would need to be justified by clear and convincing evidence of outrageous conduct, and would be capped - as are sentences in criminal law - so that juries and judges could not impose financially ruinous or unlimited awards.

- Judgments should be proportionate to fault. It is fundamentally unfair to require a defendant to pay a much larger share of damages than the defendant's share of fault.

Other legitimate and important reforms are appropriate. However, the two reform areas above are particularly significant to companies who are sensitive to the large risks they face from disproportionate awards and unlimited punitive judgements. Reform of these two areas would reduce business risks, establish a greater degree of fairness, and bring Alaskan law into line with that found in progressive states interested in fairness and a competitive business climate.

Sincerely,

JUDITH M. BRADY
Executive Director

cc: Rep. Brian Porter

BBFM Engineers Inc.

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Anchorage, AK 99509-1139
(907) 274-2239
(907) 274-2520 Fax

March 10, 1997

apodicium397

Representative Gene Therriault
Co-chair, House Finance Committee
Room 511, State Capitol
Juneau, AK 99801-1182

Re: HB58

Dear Representative Therriault:

I am writing to you and your committee as a professional engineer and as a representative of the Alaska Professional Design Council, commonly known as APDC. APDC is a consortium of professional societies representing architects, engineers, land surveyors, building code officials, and landscape architects. The ten member-organizations have a combined membership of over 1400 and represent approximately 5000 licensed professionals. APDC is very supportive of tort reform in general and HB58 in particular.

Our legal system needs modification! Over 90% of civil suits never go to trial. Most cases are settled, with little to no consideration to actual fault, to avoid the expenses of discovery, trials, the threat of punitive damages (which aren't covered by insurance) and the seemingly capricious decisions of juries. When suits are filed against all possible defendants, regardless of fault, to ensure there are plenty of pockets to chip into the settlement, some defendants end up spending a considerable amount of time and money to extricate themselves from cases in which they shouldn't be involved. In most cases, they get to contribute to the settlement, even though they have no fault, due to pressure from the other parties to the suit. Knowing this, some people use the court system as a means of legal extortion by filing frivolous suits with the hope of a settlement. Millions of dollars are spent in the so called "discovery process" which almost always results in the defendants throwing in their insurance to stop the bleeding and make the case go away. Existing sanctions against frivolous suits are rarely used because they require that the plaintiff first lose at trial, a trial that rarely happens. Summary judgment is also very rare because appellate courts have almost always overturned such decisions, making trial judges wary of issuing such orders. Many settlements are due to fear of the perceived large down side of going to trial, including the expense involved and the tendency of some juries to ignore common sense and aid the "little guy" plaintiff by dipping into the so-called "deep pocket". All too often we read about large awards being reduced by the trial judge or on appeal or on the second appeal, all of which takes time and money. Some argue that these are rare, but they are not rare enough to take the gamble of a trial.

HB58 includes two sections which will help the situation for design professionals:

The first reduces the statute of repose for construction related suits from fifteen years to eight years and expands it to cover all suits. According to a study by Victor O. Schinnerer, over 83% of cases associated with construction are brought within 4 years after substantial completion, almost 90% percent of the cases are brought within eight years and 100% of claims which resulted in an indemnity payment were brought within nine years. We believe that an eight year statute is more reasonable than the current fifteen years for four main reasons:

1) Almost all of the cases brought after eight years are related to maintenance problems, rather than design or construction problems. The owner of the building would still be available for suit if his lack of maintenance is the cause of the damage, because that would be an on-going problem. Cases brought this late do not result in an indemnity payment on the behalf of the design professional. However, it does require expenditure of time and money which is rarely recovered by the designer.

2) It is impossible to defend, or prosecute, a case fifteen years after substantial completion due to the lack of witnesses, fading memories, and lack of documentation. Most of us would have a hard time remembering what we did fifteen days or months ago, never mind fifteen years.

3) Designers will not have to store fifteen years of files and can reduce the size, and rent, for our archive storage, and pass the savings on to our clients.

4) It is unreasonable to expect an engineer or architect to pay tens of thousands of dollars a year in insurance premiums for fifteen years after they retire. Errors & Omissions insurance for design professionals is on a claims-made basis: that is, it covers you for claims made during that year. Therefore, the longer a period you have to cover, the higher the premium. The firm in which I am a principal had a premium of nearly twenty thousand dollars in our first year, with no "tail" to cover. It was our third highest expense, after payroll and rent. Adding a fifteen year tail results in a considerably higher premium. It is not unheard of to have a premium of over a hundred thousand dollars with a deductible of a hundred thousand dollars for the million dollar policy required by the State of Alaska. If we can limit the "tail" for which we have to insure to eight years, we expect to see a reduction in our insurance bills.

Many of the arguments for a statute of repose for construction related cases also apply to other cases and its application to those cases makes sense.

The second section in which we have an interest is the section regarding alternative dispute resolution. **It is time to develop a system which identifies patently frivolous and meritorious suits early, so we can to get them out of the system.** With this in mind, APDC is urging that alternative dispute resolution be included in any tort reform action by the legislature. A mandatory mediation or independent early evaluation system would reduce the number and costs of frivolous suits by letting the plaintiff and their attorney know early on if a case has no merit. They will be less willing to press the case as the likelihood of recovery will be decreased and the likelihood of court sanction for bringing a frivolous suit will be increased. On the other hand, it will encourage defendants to settle valid claims early by giving them an independent opinion of the validity of the claim against them. It will reduce the costs of litigation by resolving cases before the lengthy, expensive, discovery process which may result in more money going to the injured, rather than lawyers and expert witnesses. It should slow down the shotgun approach to suits by removing defendants who are obviously not liable. It is our understanding that approximately 80% of cases sent to mediation in Washington are resolved during or soon after the mediation process. Fewer, smaller, and shorter cases should provide relief to an overtaxed court system. A bill which would have established mandatory mediation in suits against design professionals passed the House last year, 37-3. The trial attorneys, who have generally not been proponents of tort reform, testified on that bill that they would support mandatory mediation, if it was mandatory for all suits. We would have no objection to this approach.

In closing, it is our belief that Representative Porter has worked hard with all of the parties interested in this action and has crafted a bill which resolves many of the concerns with the legal system without infringing on anybody's ability to have their wrongs redressed. We urge that your committee move HB58 with a recommendation of "do pass".

If you have any questions, I can be reached by phone at (907) 274-2236, by fax at (907) 274-2520, or by e-mail at bbfm@alaska.net.

Respectfully yours,

Colin Maynard, PE.

cc: Rep. Brian Porter

Alaska
Rural
Electric
Cooperative
Association, Inc.

703 W. Tudor Rd., #200
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FAX (907) 561-3547

ARECA
Electric Service for 300,000 Alaskans

March 11, 1997

Representative Gene Therriault
Co-Chairman
House Finance Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Subject: House Bill 58—Tort Reform Legislation

Dear Representative Therriault:

I am writing this letter to express support for the tort reform legislation that is currently moving through the House of Representatives. House Bill 58, introduced by Representative Brian Porter, is a piece of legislation that deserves the Senate's consideration and support.

This letter is being written on behalf of the members of the Alaska Rural Electric Cooperative Association, Inc. ("ARECA"). The active members of ARECA comprise 18 electric cooperatives situated throughout the state of Alaska. These electric cooperatives serve a large percentage of the state's population. The cooperatives represent an effort by citizens of the state to provide the best possible electric service to their communities at the lowest possible cost. The members of ARECA are in support of tort reform legislation and believe it would be beneficial if tort reform were accomplished during this legislative session.

One section of the legislation is of particular importance to the members of ARECA. Over the years, the electric cooperatives have been subject to many claims by plaintiffs' attorneys attempting to impose strict liability on an electric utility for any and all electric service. The argument is made that the electric utility should be responsible for any injuries or damages arising from electricity even if the utility was not negligent in any way. For example, in one situation a claim has been made that an electric utility should be strictly liable for the quality of electric service even though the injured individual had obtained electricity only by running his own wiring from a neighboring house. The provision of the tort reform legislation desired by the electric cooperatives would ensure that utilities are held accountable only in situations in which an injured party can establish how the utility may have been at fault.

f:\ARECA\Legis\3-11-97W

Thank you for your time and attention. I will of course be available to provide testimony to the appropriate committee or committees which consider this important piece of legislation.

Sincerely yours,

ALASKA RURAL ELECTRIC
COOPERATIVE ASSOCIATION, INC.

Eric P. Yould

:lka

cc: ARECA Active Members
Larry Markley
Roger R. Kemppel, Esq.

Resolution 97-3-2

A Resolution Supporting Tort Reform

ARECA supports tort reform and especially passage of section 35 of CSSSHB 58 as currently written; the section clarifies the liability of utilities for providing electric service.

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

March 11, 1997

The Honorable Gene Therriault
Co-Chair Finance Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Dear Representative Therriault:

I am writing this letter on behalf of the Alaska Hospital and Nursing Home Association in support of CS for Sponsor Substitute for House Bill 58 (Jud).

Our 33 member community hospitals and nursing homes from across the state join with other health care organizations, architects, engineers and the business community in asking the Legislature to pass and the Governor to sign CSSSHB58(Jud), the 1997 Comprehensive Liability Reform Bill.

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

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

Between 1982 and 1992 medical malpractice insurance premiums in Alaska increased from 2,276,000 to 13,371,000. The following comparison between rates for the same level of liability insurance in Alaska and those in California, where components of CSSSHB58(Jud) are the law, demonstrates the savings that can be realized when tort reform legislation is enacted:

SPECIALITY	CALIFORNIA	ALASKA
Anesthesia	$10,000	$26,500
Family Practice	$ 7,000	$19,000
OB/GYN	$31,500	$64,500

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The cost associated with the practice of defensive medicine creates another unnecessary financial burden shifted to the patient. Defensive medicine can be defined as those procedures and tests ordered because of a perceived malpractice risk and those services not provided to patients because of the perceived liability risk to the provider. An example of the latter is the OB/GYN who provides gynecology services but not obstetrics.

Alaska's small rural communities continue to face the challenge of recruiting and retaining physicians particularly family physicians wishing to provide obstetrical care. The cost of liability insurance is a barrier to that recruitment process.

Section 36, on page 16, of CSSSHB58(Jud) is very important to Alaskan hospitals. Hospitals have become the deep pocket when uninsured or under-insured physicians are sued. An Alaska Supreme Court decision (Jackson vs Power) holds hospitals liable for emergency room physician actions, even though the hospital or its personnel did nothing wrong. Mandated minimum liability coverage for practitioners as a pre-requisite to immunity for Jackson vs Power for hospitals makes sense to us.

In conclusion, the Alaska Hospital and Nursing Home Association supports CSSSHB58(Jud) in its entirety with particular interest in the provisions outlined in Section 36.

Sincerely,

Robert F. Valliant
Hospital Administrator

Alaska State Medical Association

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

March 13, 1997

The Honorable Mark Hanley, Co-Chairman
The Honorable Gene Therriault, Co-Chairman
Finance Committee
Alaska House of Representative
State Capitol (MS3100)
Juneau, AK 99801

Post-it® Fax Note 7671	Date 3.11.97	# of pages ▶
To Brian Porter	From Jim Jordan	
Co./Dept.	Co. ASMA	
Phone #	Phone # 562-2662	
Fax #	Fax #	

Subject: SSHB58

Dear Representatives Hanley and Therriault:

The Alaska State Medical Association (ASMA) is comprised of nearly 500 physicians located throughout Alaska. The ASMA House of Delegates and Board of Trustees would like to thank you for providing the opportunity for ASMA to testify on its recommendations for modifications to the civil justice system.

Physicians in Alaska practice in unique and challenging circumstances. Our goal is to provide the most appropriate and best medical care possible to our patients. Our profession is facing increasingly complex issues involving new technology, moral and ethical situations, and fiscal pressures from all fronts.

The practice of medicine in Alaska is typified by the sole practitioner or small clinic practices which are essentially small businesses. But this too is changing with managed care appearing throughout Alaska which brings its own special considerations. Questions arise as to quality of care in a managed care setting that is driven perhaps more by fiscal considerations than by the medical condition of the patient. These fiscal considerations are being driven by others than the treating physicians. Such circumstances provide for further complications and uncertainties in the applications of the civil justice system to the practice of medicine.

ASMA has been on record for many years supporting changes in the civil justice system that provide for less uncertainties in the system while not keeping any person from the courthouse. Those changes are as follows:

1. Ceiling on Non- economic Damages
   No limit is suggested on proven economic damages such as loss of earnings and medical expenses. ASMA recommends a ceiling of $250,000 on recovery from non-economic damages which are those intangibles such as pain and suffering.

No caps or extremely high ceilings for non-economic damages provides for a system along the lines of a lottery. Uncertain, extremely high potential awards lead to high professional liability insurance rates which in turn leads to more physicians going without such coverage. An uninsured doctor may not have the assets to satisfy a judgment for loss of earnings and future medical expenses let alone an award for non-economic damages.

2. Limits on Attorney Fees
   A sliding attorney's contingency fee schedule is recommended as follows:
   40% of the first $50,000
   33 1/3% of the next $50,000
   25% of the next $500,000
   15% of any amounts in excess of $600,000

   Sufficient, appropriate net compensation to the injured party is the goal of the recommendation while providing for just compensation to the injured party's attorney. More compensation to the patient is the result.

3. Collateral Source Evidence
   Allow a defendant (e.g., physician) to introduce evidence pertaining to amounts of other proceeds received by a plaintiff due to the situation that resulted in the lawsuit. Examples of those proceeds are insurance proceeds and workers compensation payments. This prevents duplicate payments for the same loss.

4. Periodic Payment of Future Damages
   When an award for future damages exceeds $50,000, allow either party to require the court to provide that the judgment be paid in installments over the term of the plaintiff's disability.

   This allows for the purchase of an annuity to make future payments as and when they arise - a significant savings over an immediate lump-sum payment of an entire award.

5. Arbitration
   Allow physicians to contract with patients for mandatory arbitration of malpractice claims.

6. Statute of Limitation
   Maintain a statute of limitation that requires an action for injury or death against a physician to be filed within 2 years of when the person knows or should have known of the injury. However, for children under age six, require that action be brought before age eight or within two years, whichever is longer. But, the clock stops if there is fraud, intentional concealment of facts, or if there exists an undiscovered foreign body (of no therapeutic or diagnostic purpose) in the body of the injured child and the action is based on the presence of the foreign body.

7. Statute of Repose

   Incorporate a general statute of repose that prevents suits from being brought after eight years measured from the date of the act that caused the injury or death. The statute of repose applies without regard to the statute of limitation. However, any statute of repose should not apply in cases involving intentional acts or if intentional concealment of facts occurred that resulted in a delay of more than eight years before the basis for the legal action was known.

8. Panel System

   ASMA recommends the continuation of the panel system. Although, complete and credible empirical data which would indicate the impact of the panel system is impossible to develop, anecdotally many ASMA member physicians feel it is important and worthwhile for the panel system to remain in place. ASMA would consider a change in the method of selection of the panel to allow each side to choose a physician member with then those two members selecting a third physician. However, the physicians chosen should be physicians both licensed and actively practicing medicine in Alaska.

   ASMA would also recommend that the "bias" questionnaire be changed so as to ferret out only real conflicts of interests as opposed to perceived conflicts. It would also appear that the existing questionnaire may be easily "gamed" by physicians not wanting to serve.

   ASMA's experience is that it is not unusual for 40 suits involving medical malpractice to be filed each year which tend to take approximately two years to be adjudicated. Therefore, at any given point in time approximately 240 Alaska physicians are impaneled. This is over 20% of all physicians in Alaska, a significant contribution to the system for which, in most cases, the service is done pro bono.

The above are outlines of the features of civil justice reform that ASMA member physicians feel should be adopted. Many of the above are incorporated in SSHB58. For those that aren't, ASMA recommends amending SSHB58 to include them. Specifically, the absolute cap of $250,000 on non-economic damages is recommended to be incorporated. The general concepts underlying SSHB58 are supported by ASMA.

The underlying purpose in the above is to provide some certainty where little certainty currently exists. Imposition of certainty provides for greater predictability and should result in reduced premium rates for professional liability coverage. Similar measures were adopted in California over 20 years ago with one result being that overall medical malpractice insurance premiums in California are half of what they are here in Alaska. Attached is a copy of an article that appeared in January/February 1997 issue of Contingencies the bi-monthly journal of the American Academy of Actuaries. Also, included is the "Issue Brief" cited in the article. As you can see, the impact of the MICRA has been significant in California; The Academy work group concludes that a

package of reforms is more effective than individual reforms, and key among the reforms are a cap on non-economic damages and a mandatory collateral-source offset rule.

Lower rates should result in more physicians having professional liability insurance coverage with sufficiently high limits. This result should provide for added peace of mind to patients. We believe it can be expected that lower costs for professional liability will have a marginally greater impact on the likelihood of private practice physicians practicing in rural communities having coverage with sufficient limits than those physicians practicing in urban areas.

Should you have any questions or comments you may direct them to any of the following people:

ASMA Board of Trustees

Paul Raymond MD, President,
235-7000, fax 235-4050
John J. Smith MD,
276-5222, fax 278-9044
Kevin M. Tomera MD,
276-2903, fax 278-8052
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563-3929, fax 562-2848
James J. Jordan, Executive Director, ASMA,
562-2662, fax 561-2063

Cynthia Brooke MD,
563-8588, fax 563-6903
Patrick Brady MD,
261-3102, fax 261-4882
Douglas G. Smith MD,
272-2571, fax 272-6751
David E. Johnson MD,
225-5144, fax 247-0920

Thank you again for opportunity to provide testimony.

Sincerely,

James J. Jordan
Executive Director

cc: Representative Brian Porter
Alaska House of Representatives
State Capitol, Mail Stop 3100
Room 216
Juneau, AK 99801-1182

A Surgical Fix for Medical Malpractice

Reforms Work Best as a Package, Study Shows

By Jeffrey Speicher

Almost everyone agrees: The medical malpractice system in the United States serves no one well. Although a few multimillion dollar settlements draw public attention, most individuals who suffer real injury at the hands of their physician or hospital accept less than the full value of their claim—and endure long delays before receiving compensation. Those most harmed—people left with lifelong medical needs or permanent loss of income—are most likely to be underpaid.

Physicians, who in the 1950s faced a 1-in-7 chance of being sued over the course of a career, now see the odds reduced to 1-in-7 *per year*. As a result malpractice insurance premiums have skyrocketed, causing many practitioners to abandon their specialties or adopt costly defensive-medicine procedures. Many insurers, buffeted since the early '70s by recurrent cycles of higher claims frequency and larger jury awards, have withdrawn from the market, which has reduced availability of coverage and further driven up costs. And as for attorneys . . . . well, even some thoughtful legal scholars believe the system is out of whack.

According to Randall Bovbjerg of Washington's Urban Institute, author of numerous studies on medical malpractice, many of the system's problems arise from a basic difference between doctors and lawyers: Physicians think about healing injuries, attorneys about resolving disputes. Says Bovbjerg, "Doctors see medical malpractice as a way to make injured patients whole—financially as well as physically. Lawyers come into the process after a conflict arises, and their focus is on justice for their client."

Jeffrey Speicher is manager of member communications for the Academy and an editor for Contingencies.

This difference in worldview intertwines medical malpractice with the legal system. Malpractice must balance the need to compensate deserving claimants, deter future violations by making doctors more careful, and obtain justice for both patients and medical providers. All this from what Bovbjerg defines as "mainly an insurance system run by experts."

A group of those insurance experts, members of the American Academy of Actuaries, recently suggested an approach to make the system less costly. According to the Academy report, "Medical Malpractice Tort Reform: Lessons from the States," the mixed results of reform attempts by the states point the way to effective federal action.

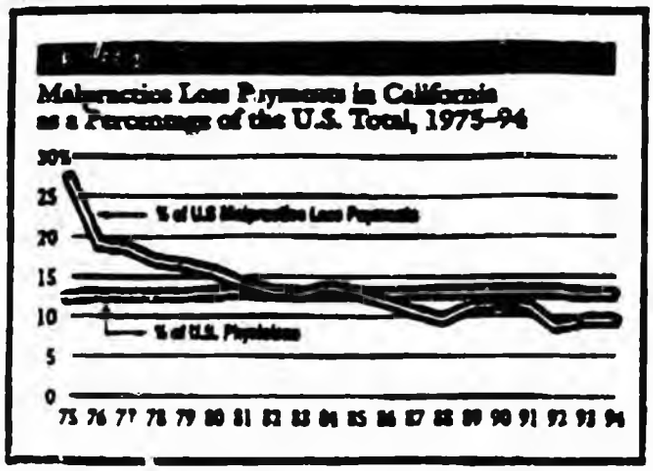
"Congress should adopt a comprehensive approach to tort reform by adopting a package of measures," says Jim Hurley, an actuary with Tillinghast/Towers Perrin and leader of the Academy group. "Our report provides a synthesis of measures that have been effective at the state level."

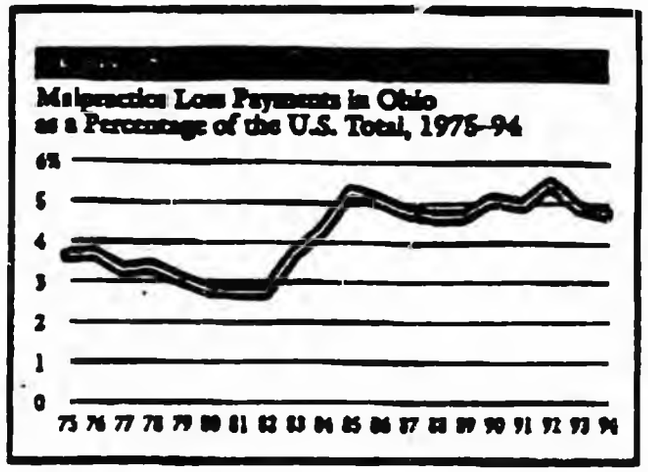
A Package Deal

The California Medical Injury Compensation Reform Act (MICRA) of 1975 shows the success of the package approach. Before MICRA's adoption, the state's percentage of total U.S. loss payments was significantly higher that its proportion of the nation's physicians. By 1981, California's loss payments had dropped and were about even with its percentage of physicians. Costs continue to fall, even as California's share of physicians remains stable. Writes the Academy group: "The relationship of decreased relative costs to the timing of reform provides strong evidence for the effectiveness of the MICRA package." [See Figure 1.]

At the head of the Academy's list for lawmakers is a nationwide cap on jury awards for noneconomic damages such as pain and suffering. As evidence, Hurley points to Ohio where malpractice costs fell after a 1975 cap on damages, only to rise dramatically after court challenges led to a 1985

American Academy of Actuaries Bi-Monthly





ruling that overturned the cap. [See Figure 2.]

Such a cap should be established on a per-medical-injury basis at a level low enough to have an impact—at $250,000, for example. In addition, a mandatory collateral-source offset rule is needed to ensure that double and triple indemnification cannot be collected through multiple suits. Under this rule, a jury or judge would have to consider compensation paid from other sources.

Above all, the Academy report warns against piecemeal or faulty changes. Loss experience in New York shows that the individual tort reform measures adopted in that state over the past two decades did not improve costs relative to the U.S. total. "Poorly crafted malpractice reform—either individual measures that are too limited or broad transformations that are too far-reaching—can have unintended consequences that drive up costs," says Hurley.

Above all, the Academy report warns against piecemeal or faulty changes. "Poorly crafted malpractice reform—either individual measures that are too limited or broad transformations that are too far-reaching—can have unintended consequences that drive up costs."

The Academy's suggested approach involves what medical malpractice experts call "takeaway" reforms—preserving the current reliance on the tort system, but eliminating some of the costliest and most abused features.

Other voices in the debate, including representatives of the medical community, call for a back-to-the-drawing-board approach. Unfortunately, the design that comes back often relies on a no-fault model. While no-fault medical malpractice insurance would largely untangle the process from the legal system, no-fault often rewards individuals whose claims would otherwise be denied. Says Hurley, "No-fault would drive frequency of claims through the roof—some argue by a factor of at least two and perhaps by a factor of eight or more. It's scary how many things can be compensated under the typical no-fault system."

Frequency of claims, according to Hurley, is the key driver of costs. "Over the past two decades, the plateaus and surges of claims frequency have been difficult to anticipate and measure, but the long-term trend has been up," says Hurley. Size of claims also is an important cost factor, but dollar amounts in settlements have been increasing in a more predictable fashion over time.

No-fault also would take most cases out of court and make malpractice a transaction between insurer and claimant. Advocates claim that this would cut legal costs—which are enormous. For example, according to the Insurance Services Office, legal defense costs for insurers alone accounted for 14 percent of total tort costs in 1992.

However, experience in Florida and Virginia, where no-fault for obstetric cases is already in place, does not show substantially reduced costs or less need for legal counsel. Says Bovberg, "*Everyone* who uses the no-fault system in Florida and Virginia consults a lawyer."

Other options exist. A proposal by Jeffrey O'Connell, professor at the University of Virginia School of Law, seeks a middle way between no-fault and status quo. He would shorten the process and lower costs through an early offer of payment of noneconomic damages.

O'Connell is blunt about his disgust with the current state of affairs. "Medical malpractice is a nightmare of useless circularity," he says. However, according to O'Connell, the system is not consistently biased against defendants. Most proposed changes, on the other hand, invariably favor the defendant. Justice—as well as political reality—requires benefits for the plaintiff as well.

"Reform requires a quid pro quo," says O'Connell. "While the Academy has described quite lucidly the options for takeaway reform, such measures could not get through Congress without being so watered down as to be meaningless," says O'Connell. "True reform should involve a fair trade: making it easier for claimants to be paid, but paying them less, as under workers compensation laws."

An Offer You Can't Refuse

O'Connell's ideas have found sponsorship on Capitol Hill. A bill introduced in the 104th Congress by Sen. Mitch Mc-

Connell (R-Ky.) would create an early-offer plan for all tort claims, including medical malpractice. Under the proposal, a defendant in a personal injury claim is given the option of offering payment to the injured party within 180 days of the claim. The defendant purchases for the claimant a comprehensive major medical insurance policy that covers medical expenses, rehabilitation, and lost wages beyond monies received from collateral sources. In addition, reasonable hourly fees for the claimant's attorney would be paid.

Claimants who are offered such a settlement within 180 days of the claim would be obliged to accept. This won't get egregious medical offenders off the hook, however. A normal tort claim could be pursued for noneconomic damages, but with a higher-than-current standard of evidence.

> Medical malpractice is a nightmare of useless circularity.

The plaintiff must prove that the medical provider's misconduct was wanton or intentional.

Because the defendant would not be forced to offer a settlement, physicians and their insurers could take their chances in court in the case of bogus claims. However, the risk might be too great. O'Connell cites a prominent medical malpractice defense lawyer who estimates that he'd make an early offer in 200 of the his firm's 250 current cases. So the balance is tipped toward the defendant, but not without providing a substantial benefit to the plaintiff: Timely resolution and quick settlement.

The limit on legal fees would discourage what O'Connell calls "the unconscionable abuse of the system by some members of my profession." Among other criticisms, the Virginia professor points out that contingent fees are often not truly contingent on risk. Attorneys take the same settlement percentage from open-and-shut cases as from complex cases, a practice that subsidizes work on failed litigation and which O'Connell denounces as an illegal tax on deserving claimants.

Hurley gives O'Connell's proposal a mixed review. "To its credit, the early-offer plan is not mandatory for defendants, which leaves the tort system in place to challenge claims perceived as nonmeritorious," says Hurley. He also notes that periodic insurance payment to claimants allows compensation to be made as costs are incurred, eliminating the burden of large lump-sum payouts. Also, O'Connell's plan emphasizes two fundamentals that the Academy report identified: mandatory recognition of collateral benefits and controlling noneconomic damage costs. In fact, the O'Connell plan eliminates consideration of noneconomic damages altogether unless the case goes to court.

However, Hurley notes, the periodic payment plan theoretically would have to remain in force for decades. Will claimants be out in the cold after the disability policy limits are reached, or will the insurer face unlimited exposure? Another concern: Like no-fault, the early-offer plan could give incentives for unmerited claims. Insurers may pay a doubtful claim rather than incur expensive litigation costs and risk a large judgment award. In addition to increased costs, Hurley worries about a basic question: "Is it the right message to send to individuals who think doctors and insurers have deep pockets? The system may have practical advantages, but in terms of equity, it is hardly fair."

No matter which remedy is tried, no action will slash premium costs immediately, Hurley cautions. "Tying tort reform to premium reductions, as has been done in some states, is unrealistic," he says. "There is little evidence that the cost savings can be translated directly into lower costs for health care providers. More likely, reform will slow the rate of premium cost increases."

The course of reform will be determined by elected officials at the state and federal levels. The debate will be long, no matter which option—if any—is approved. In the meantime, the cost of inaction continues to be passed on to the public in the form of increased medical fees and reduced services.

By working together in recent years, insurers and healthcare providers have begun to bring medical spending under control. Effective medical malpractice reform is one way to keep the momentum going. □

Answer to Brain Drain, page 13: The house number is 78.

Fall 1996

ISSUE BRIEF

Medical Malpractice Tort Reform: Lessons from the States

The cost of insuring physicians against medical malpractice claims has increased dramatically in recent years. Skyrocketing premium costs and a string of highly publicized lawsuits have led many physicians to curtail certain high-risk procedures. By reducing the availability of important medical services, this practice of defensive medicine could have serious public-health consequences. In addition, increased malpractice insurance expenses are passed on to patients and health plans, thus fueling medical inflation.

To combat these ill effects, several states have adopted reforms designed to reduce the cost of medical malpractice insurance. More recently, Congress has attempted to follow the initiative of the states but has been unable to enact comprehensive medical malpractice tort reforms into law.

To date, state efforts have enjoyed varying degrees of success in reducing medical malpractice insurance rates. What can be learned from the experience of the states? How can these conclusions be applied at the federal level? The American Academy of Actuaries Work Group on Medical Malpractice Reform has studied the impact of state reforms and offers its conclusions to state and federal officials who are considering national tort reform.

Findings

Any federal medical malpractice tort reform effort should be based on a *package* of measures that have exhibited some success in stabilizing medical malpractice costs. The most effective elements of such a package are a cap on noneconomic damages and an offset for collateral payments from other sources. These reforms would limit the financial exposure of health-care providers to lawsuits and would ensure that damages could not be collected through multiple suits. While there are significant limitations on data used to study specific tort reforms, persuasive results can be observed by looking at medical malpractice costs in certain states over time and relating that experience to the timing of particular tort reform measures.

In the following comparison of cost levels in three states that have enacted tort reform measures, paid losses of the individual states as a percentage of the U.S. total are used as the measure of costs. The percentage of physicians in each state as a total of U.S. physicians is used as a reasonable benchmark. The degree to which the percentage of paid losses differs from the percentage of physicians measures the effectiveness of the reforms. All else being equal, the relative cost percentages of paid medical malpractice claims should remain constant over time. Any observed changes in a state's relative cost levels provide an indication of the effectiveness of tort reform. The three states studied are California, New York, and Ohio.

The American Academy of Actuaries is the public policy organization for the actuarial profession, providing actuarial information, advice to elected officials and regulators.

Members of the Work Group on Medical Malpractice Reform: James D. Hurley, ACAS, MAAA; William E. Burns, ACAS, MAAA; Linda A. Demkovic, FCAS, MAAA; Allen C. Lyle, FCAS, MAAA; and Edward M. Weebel Jr., FCAS, MAAA.

AMERICAN ACADEMY of ACTUARIES

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William W. Wyatt, Jr., Executive Director

Christine M. Cassidy, Director of Public Policy

Ken Kosiba, Director of Communications

David F. Hoom, Legislative and Regulatory Specialist

Jeffrey Spaldon, Manager of Member Communications

• [illegible]. Since the Medical Injury Compensation Reform Act (MICRA) package of reforms was enacted in 1975, medical malpractice costs have fallen substantially as a percentage of the U.S. total.

• New York. Individual reform measures were adopted in 1975, 1981, 1985, and 1986. No observable improvement in the state's relative costs has resulted. The New York reforms did not include a cap on damages.

• Ohio. Reforms enacted in 1975 included a cap on damages. The cap was overturned in 1985, after which costs rose dramatically and have remained high.

California

The California loss data (Exhibit 1) illustrate that while the state's proportion of the U.S. physician population has remained relatively stable, its per-

Exhibit 1
Malpractice Loss Payments in California as a Percentage of the U.S. Total, 1975–94

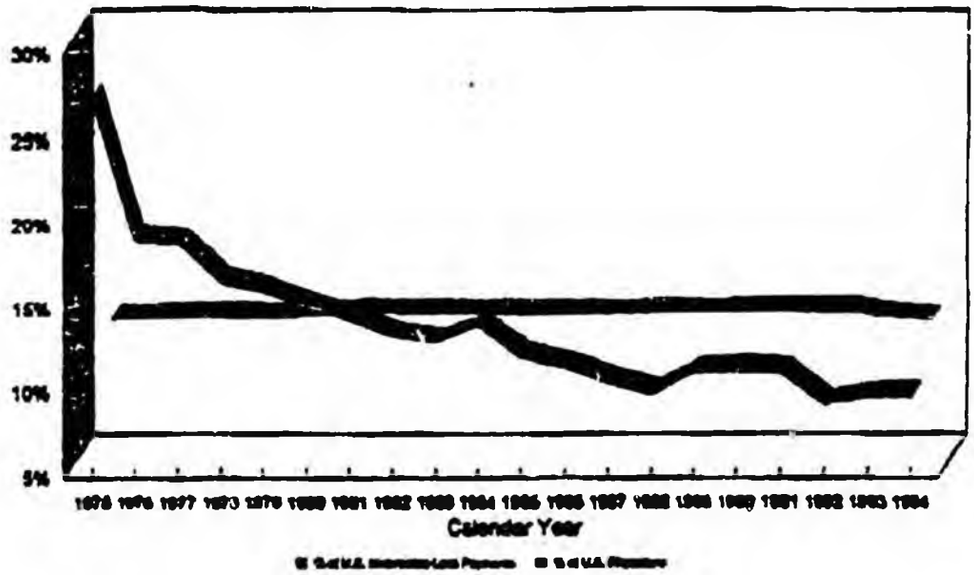
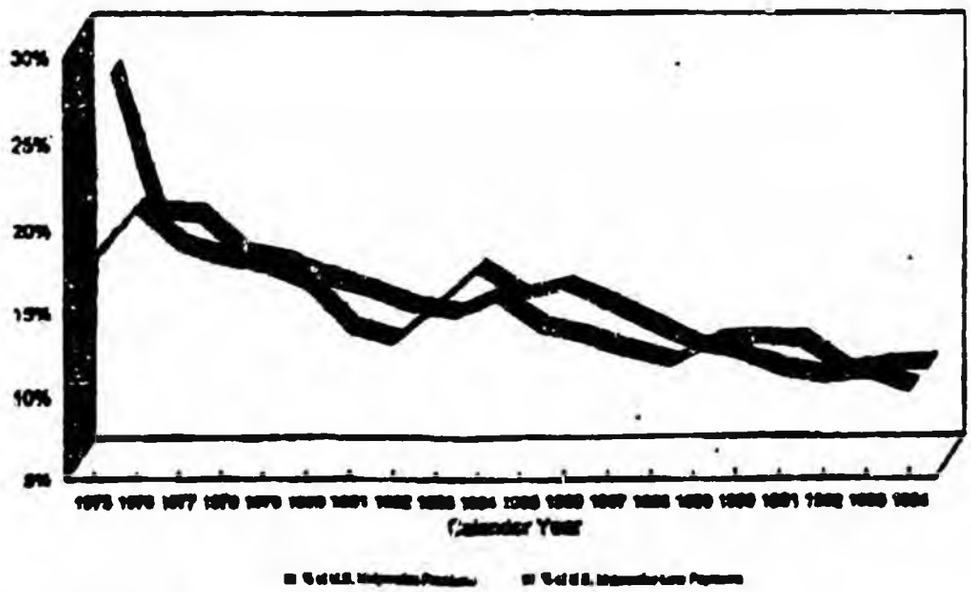


Exhibit 2
Malpractice Premiums and Malpractice Loss Payments in California as a Percentage of the U.S. Total,



[illegible] since enactment of the MICRA package of tort reforms. Before MICRA's adoption in 1975, California's percentage of loss payments was significantly higher than its proportion of physicians. By 1981, California's loss payments had dropped and were about even with its percentage of physicians. Since that date, California has continued to benefit from MICRA: Costs continue to drop as a percentage of the U.S. total, even as the percentage of physicians remains stable. Although other factors affect these data, the relationship of decreased relative costs to the timing of reform provides strong evidence for the effectiveness of the MICRA package.

Many opponents of tort reform argue that insurance premiums do not drop after medical malpractice reform. Indeed, costs and premiums normally rise with inflation, and tort reform may only slow the increases. However, the California data show that premiums declined as losses declined. Exhibit 2 compares the paid loss data from Exhibit 1 with California premiums as a percentage of the total U.S. medical malpractice premiums. Although year-to-year fluctuations do occur, premiums have fallen in proportion to the decline in losses. Competition tends to keep companies at an appropriate profit margin, and any extra profits are normally short-lived.

New York

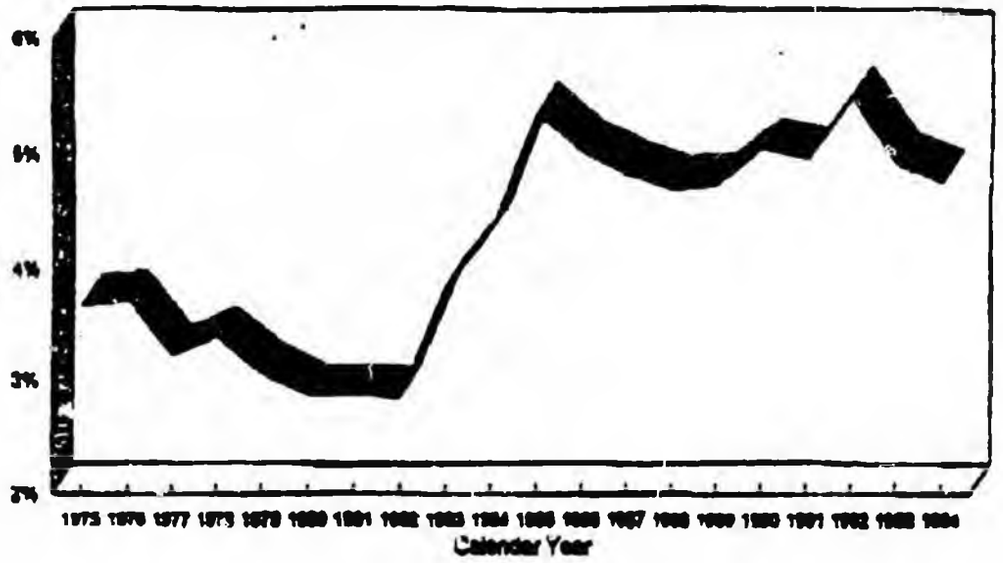
The New York loss experience is shown in Exhibit 3. It shows that the individual tort reform measures implemented in New York did not improve New York's experience relative to that of other states. New York's loss payment percentage does not show any observable pattern of decline or improvement over the 19-year period, despite the various tort reform measures adopted. The New York reforms did not include a cap on damages and were enacted in piecemeal fashion. Therefore, this result supports the merits of a cap on damages and the concept of a package of reforms.

Exhibit 3
Malpractice Loss Payments in New York as a Percentage of the U.S. Total, 1975–94

Ohio

The final example is Ohio, with data presented in Exhibit 4. The data show a gradual decline in costs following tort reform in 1975. The Ohio cap on damages came under court challenge in 1982, resulting in sharp increases that reached a peak in 1985 when the cap was finally overturned. Since 1985, costs in Ohio have remained high, with no signs of decreasing. Again, the data appear to support a tort reform package and the specific benefit of a cap on noneconomic damages.

Exhibit 4
Malpractice Loss Payments in Ohio as a Percentage of the U.S. Total, 1975–94



Conclusions

California's experience indicates that properly implemented medical malpractice tort reform can reduce the cost of medical malpractice insurance. After reviewing several states' experience with medical malpractice tort reform and examining studies on the issue, the Academy work group has concluded the following:

- a package of reforms is more likely than individual reforms to achieve savings in malpractice losses and insurance premiums, and
- key among the reforms in the package are a cap on noneconomic awards and a mandatory collateral-source offset rule.

For reform to be effective in reducing costs, the cap on noneconomic awards should be established on a per-medical-injury basis at a level low enough to have an impact (e.g., $250,000). In addition, a mandatory collateral-source offset rule is needed to ensure that double and triple damages cannot be collected through multiple suits. Under this rule, each suit would have to consider damages already paid from other sources.

Although these reforms have been successful in reducing the cost of medical malpractice insurance, elected officials and regulators must still consider the effects of medical malpractice reform on physicians, consumers, health plans, and other interested parties. When considering medical malpractice reform, state and federal officials should weigh the impact on society as a whole and strive for a balanced, comprehensive solution.

March 10, 1997

Representative Mark Hanley, Co-Chairman
Representative Gene Therriault, Co-Chairman
Alaska State Legislature
Juneau, Alaska 99801-1182

Re: SSHB 58

Dear Representatives Hanley & Therriault:

As Chairman of the Legislative Committee of the Associated General Contractors. I appreciate the opportunity to present our views on this very important piece of legislation. I realize that this is a complex bill and therefore I would like to address two issues that are of paramount importance to the construction industry.

Before addressing these issues, I would like to present an overall observation as to the problems with the Civil Justice System in the State. First of all, the Civil Justice System is a very inefficient system for dealing with important legal issues. As an illustration of the inefficiency of the system, Towers Perrin Company analyzed the distribution of funds to the ultimate recipient Their study found that Social Security returned 99% of the funds received to the beneficiaries, health insurance returned 85%, workers compensation returned 70%, but the Civil Justice system returned only 50%. A copy of this summary is attached to this letter. In addition, the findings of the Governor's Task Force needs to be examined. The structure of the committee was weighed heavily in favor of the legal profession and contained no members of the State Chamber of Commerce, the NFIB, the construction industry, the travel industry, the trucking industry, the mining industry, the liquor and food industry, the hospital association, the insurance industry and the many other organizations that have been fighting for reform for many years. The results of the Task Force were easily predicable and did not deal with the many concerns of the various organizations. The findings were at best incomplete and at worst a sham perpetrated against the many organizations that have worked so hard to deal with the inadequacies of the current system. While it may be inappropriate to presume that the Task Force members that were attorneys are biased against significant tort reform, I have included a copy of a recent Wall Street Journal editorial that dealt with the anti-business attitude

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bias of the American Bar Association. It is impossible to determine the degree to which the attitude of the ABA reflects the opinions of the members of the Task Force, but the potential issue of vested, self-serving interest should not be ignored.

In terms of the concerns of AGC, the first deals with Section 8, the Statue of Repose. In 1992, Schinnerer Management Services Inc. reviewed four studies which measured when claims were brought on construction projects. The studies indicated that a vast majority of claims are filed within six years of substantial completion of a construction project. (Copies attached) Claims filed more than six years after substantial completion almost always involve users of the project. In view of the complexity of the construction process, it is unrealistic to expect parties involved in the design and construction of any project to defend stale claims brought many years after their involvement with the project has ended. This section of the bill does not impose an unfair burden to an injured party because it allows them to seek redress from the owner or occupier of the project, the party most likely to be responsible for the injury and the one in the best position to have prevented it. The proposed Section provides protection to some injured parties by tolling the time period if the cause of action was the result of an intentional or fraudulent action which contributed to the cause of action.

In the Matter of Frederick W. Triem, the Alaska Supreme Court held that

> "A five-year statute of limitations governs the filing of attorney grievances. This reflects a judgment that five years is the outer limit of time in which responding attorneys are able to fairly defend themselves against charges, given the loss of memory, evidence, and witnesses that occurs over time."

I believe that the construction industry faces the same problems as the legal profession in defending itself from suits. Why then should the construction period have a longer period of time before they are free from litigation.

According to a report of Legislative Research, the 8 year period would be exceed by only 4 states. In fact, Statutes of Repose of 3, 4 or 5 years are fairly common in other states and the proposed time frame of 8 years would seem to be more than adequate to provide the detection of any construction and design defects and allow the property owner to take action to remedy them.

The second area of concern is Section 10, Punitive Damages. In Alaska, more than 95% of the businesses are classified as small, "mom and pop" firms or companies that employ fewer

than 20 employees. To them the issue of punitive damages is very serious because punitive damages are not covered by insurance. The Court System has issued statistics that indicate that the award of punitive damages is rare in Alaska and therefore not really a serious problem. What is overlooked is the fact that these statistics do not report on the suits that are settled prior to going to Court. Punitive damages are requested in almost 30 percent of the civil cases and seem to be used as a means of "extortion" to drive the defendant to settle prior to trial. Defendants realize that their insurance company will defend their acts for the original claim but exclude the defense or payment of any punitive damage awards. Companies are therefore forced to choose between the belief of their innocence or settling to avoid the crippling costs of defending the punitive damages suit should the case get that far. For the small business this is a Hobson's choice. Do you instruct your insurance company to settle even though you believe that you are innocent or do you risk your business and savings defending yourself should a trial for punitive damages be necessary. Many cannot afford the luxury of the gamble and avoid the risk of losing everything they worked for their entire life. Such a system is unfair and we should not tolerate a system that rewards the unscrupulous behavior of such plaintiffs attorneys'.

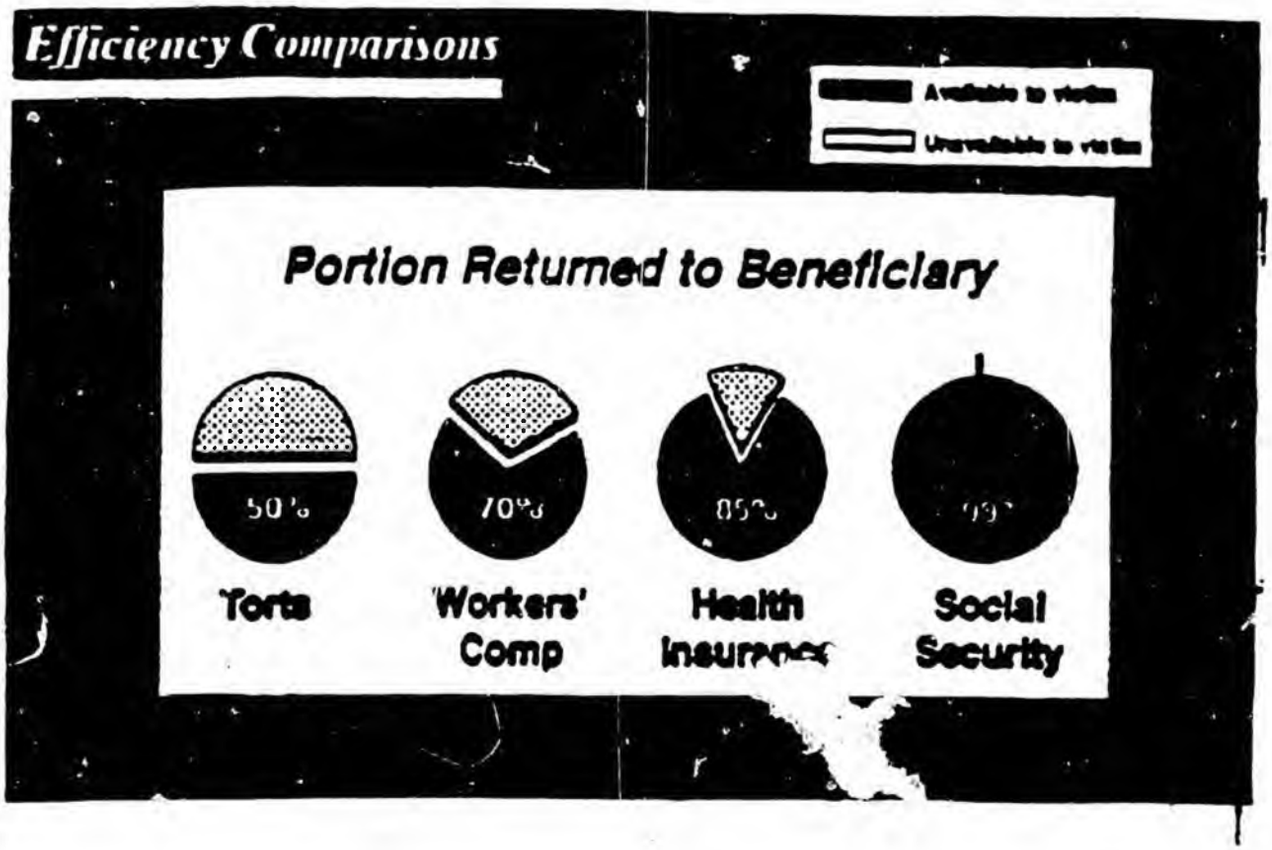
While the bill is complex, it deals with many issues that are of important to many sectors of Alaska's economy. The recommendations of the Governor's task force were also considered and many were included since they dealt with many issues that had not been addressed previously. I encourage your support of this bill and hope that you can move the bill rapidly through your committee so that we can get it out of the House and over to the Senate.

If I can provide any additional insight into this bill please do not hesitate contacting me.

Sincerely,

Richard Cattanach

Does Not Effectively Serve Victims' Needs



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

Source: The Tillinghast Report, Towers Perrin Company

2.27.97

THE WALL STREET JOURNAL

REVIEW & OUTLOOK

ABA v. Business

The American Bar Association has gotten a lot of heat, and deservedly so, for its loony forays into non-legal matters. What's the ABA doing supporting abortion rights, endorsing affirmative action and now calling for a death penalty moratorium? Congressman Chris Cox wrote a trenchant article for the Weekly Standard recently exposing in detail how the ABA's liberal agenda skews its evaluations of judicial nominees. But another area where the nation's largest organization of lawyers has gone off the tracks hasn't gotten nearly enough attention—the ABA is actively promoting an anti-business agenda.

At the same meeting earlier this month where the ABA adopted the anti-death penalty plank, its House of Delegates also endorsed a resolution on class actions. The resolution favors making it easier to certify class actions for settlement purposes, and opposes a proposal to rein in "coupon" settlements unless the "litigation's probable deterrence value" is taken into account. In other words the ABA thinks the public is being well-served by settlements—such as those in the notorious Ford Bronco II and airline price-fixing cases—where the plaintiffs' lawyers reap millions while their ostensible clients collect coupons worth almost nothing.

Nobody should be surprised, since the ABA has a long record of opposing any effort to improve the tort system. According to a summary compiled by the Federalist Society, the ABA opposes a loser pays rule; opposes any limits on pain and suffering awards; opposes a "ceiling" on medical malpractice damages; and opposes product liability reform. In effect, then, the ABA wants to let plaintiffs' lawyers continue extorting billions from American companies.

As if to add insult to (personal) injury, the ABA has also gone on record favoring a long list of government mandates on business: universal health care, protection from discrimination for HIV patients, the Family and Medical Leave Act and the like. The group has even called for the creation of "a federal agency to advocate the views of consumers," a long-standing Naderite pipe dream. Is there any *pro*-business idea that finds favor with the poon-bahs of the ABA? Oh yes, there is one: The ABA supported Nafta.

The ABA resolutions aren't just empty words. The ABA has a corps of paid lobbyists who are authorized to support the stances taken by its House of Delegates. And these lobbyists were active in opposing Republican efforts to pass civil justice reform as part of the "Contract with America." Who can forget the ABA president describing the new GOP Congressional majority in 1995 as "reptilian bastards."

Some will no doubt say: Well what do you expect from a bunch of lawyers? They want to preserve their honey pot, so they don't want to change the tort system. A realistic, if cynical, assessment. But the ABA itself claims that it's not merely a special pleader for lawyers; after all, it somehow finds the moral authority to instruct the rest of America on how to run foreign and social policy. The group even has a quasi-governmental function: It certifies lawyers and law schools, and regulates their conduct. The ABA also formally advises the President and Senate on judicial nominations. By backing the plaintiffs' bar, the ABA is not only casting doubt on its ability to carry out these functions fairly and impartially, but it's also sticking it to a large portion of its membership: lawyers who work for businesses.

A bunch of Fortune 500 general counsels were sufficiently alarmed about the ABA's drift that they convened a summit meeting last year with the organization's leaders. The powwow didn't accomplish much. The ABA, for instance, still refuses to adopt a proposal limiting contingency fees endorsed by heavyweights ranging from Robert Bork to Robert Pitofsky. This group wants the ABA, which already bars "unreasonable" fees, to stipulate that it's unethical for a lawyer to take one-third of a plaintiff's award if the case was so simple that he didn't have to do much work or take much risk. No dice. Apparently the ABA is more interested in opposing nuclear weapons than contingency fees, which happen to be the engine driving much of the liability explosion of recent decades.

But then the ABA doesn't believe there *is* a liability explosion. Not long ago, the group put out a lengthy pamphlet of "Facts About the Civil Justice System," which claims there hasn't been an increase in personal injury suits. As evidence, the pamphlet points out that tort litigation has slightly decreased since 1990. The brochure doesn't bother to mention another fact: tort filings have increased dramatically since 1954.

Such selective use of evidence reveals the ABA's deep and abiding bias in favor of runaway litigation. Given that slant, it's hard for us to see why anybody should take seriously the ABA's opinions on judges or any other subject.

Statute of Repose/Limitations by State, 1993

State	Years Within Date of Discovery (Statute of Limitations)	Maximum # Years (Statute of Repose)
Alabama	6 months	4 years
Alaska	2 years	-
Arkansas	-	-
Arizona	2 years	-
California	1 year	3 years
Colorado	2 years	3 years
Connecticut	2 years	3 years
Delaware	3 years	-
Florida	2 years	4 years
Georgia	-	5 years
Hawaii	2 years	6 years
Idaho	-	-
Indiana	2 years	6 years
Kansas	2 years	4 years
Kentucky	1 year	5 years
Louisiana	1 year	3 years
Massachusetts	-	7 years
Maine	-	3 years
Maryland	3 years	-
Michigan	6 months	6 years
Minnesota	-	-
Mississippi	2 years	-
Missouri	2 years	10 years
Montana	3 years	5 years
Nebraska	1 year	10 years
Nevada	2 years	-
New Hampshire	3 years	-
New Jersey	2 years	-
New Mexico	-	-
New York	-	-
North Carolina	-	4 years
North Dakota	2 years	6 years
Ohio	1 year	-
Oklahoma	2 years	3 years
Oregon	2 years	5 years

Pennsylvania	2 years	-
Rhode Island	3 years	-
South Carolina	3 years	6 years
South Dakota	-	-
Tennessee	1 year	3 years
Texas	-	-
Utah	2 years	4 years
Vermont	2 years	7 years
Virginia	-	10 years
Washington	1 year	8 years
West Virginia	2 years	10 years
Wisconsin	1 year	5 years
Wyoming	2 years	-

The statutory time limit for bringing suit is measured from the time at which the plaintiff could have reasonably discovered the injury. Often States allow the time limit to run from either the time of injury or the time of discovery, depending on the nature of the injury.

The maximum period in which a claim can be brought, regardless of whether the limit is measured from the date of injury or act or the date of discovery.

Document produced by Peters office; info from Leg. Research

Schinnerer & Company Inc.

March 16, 1983

VICTOR O. SCHINNERER & COMPANY INC.
SPECIAL CLAIM STUDY
DISTRIBUTION OF CLAIMS IN RELATIONSHIP TO SUBSTANTIAL COMPLETION

Years Brought Within	# of Claims	% of Claims	Cumulative Percentage
One	73*	45.9	45.9
Two	22	13.8	59.7
Three	13	8.2	67.9
Four	13	8.2	76.1
Five	12	7.5	83.6
Six	9	5.7	89.3
Seven	5	3.1	92.4
Eight	5	3.1	95.5
Nine	0	0	95.5
Ten	2	1.3	96.8
More Than Ten	5	3.1	99.9
	159	99.9	99.9

*Based on CNA's records, roughly 32.5% of these claims were brought prior to the date of substantial completion.

Study is based upon a review of 250 CNA files set up between December 1979 and October 1980.

The Date of Substantial Completion was established from information secured from CNA claim records.

159 files contained sufficient documentation which could be used for the purpose of this study.

Distribution Of Claims By Year As Compared To Project Substantial Completion

Year Claim Made v. Substantial Completion	Number of Claims Each Year	Percentage of Claims Made Each Year	Cumulative Percentage of Claims
Prior	6	25%	25%
One	5	21%	46%
Two	4	17%	63%
Three	4	17%	80%
Four	0	0	80%
Five	0	0	80%
Six	1	4%	84%
Seven	3	12%	96%
Eight	0	0	96%
Nine	0	0	96%
Ten	0	0	96%
Eleven	0	0	96%
Twelve	0	0	96%
Thirteen	0	0	96%
Fourteen	1	4%	100%
Total	24	100%	

DISTRIBUTION OF CLAIMS BY YEAR WITHIN WHICH RECEIVED AFTER SUBSTANTIAL COMPLETION

YEAR WITHIN WHICH CLAIM MADE AFTER COMPLETION	NUMBER OF CLAIMS MADE WITHIN EACH YEAR	PERCENTAGE OF CLAIMS MADE WITHIN EACH YEAR	CUMULATIVE PERCENTAGE OF CLAIMS BY YEAR
1	106	33.13%	33.13%
2	45	14.06%	47.19%
3	41	12.81%	60.00%
4	30	9.38%	69.38%
5	23	7.19%	76.56%
6	20	6.25%	82.81%
7	9	2.81%	85.63%
8	7	2.19%	87.81%
9	12	3.75%	91.56%
10	4	1.25%	92.81%
11	8	2.50%	95.31%
12	2	0.63%	95.94%
13	7	2.19%	98.13%
14	1	0.31%	98.44%
15	0	0.00%	98.44%
16	0	0.00%	98.44%
17	2	0.63%	99.06%
18	2	0.63%	99.69%
19	0	0.00%	99.69%
20	0	0.00%	99.69%
21 +	1	0.31%	100.00%
TOTAL	320	100.00%	

This chart gives the number and percentage of claims by year within which claims are made after substantial completion. For example, the row of date with the first column entry of 10 represents all claims received at least 9 years after substantial completion but less than 10 years. Thus, if a 10 year statute of limitations had been in place, 92.81% of the claims would have been allowed and 7.19% would have been outside the time period.

YEAR WITHIN WHICH CLAIM MADE AFTER COMPLETION	NUMBER OF CLAIMS RESULTING IN AN INDEMNITY PAYMENT	PERECENT WITHIN GIVEN YEAR OF TOTAL OF SUCH CLAIMS	CUMULATIVE PERCENTAGE OF CLAIMS
1	12	30.77%	30.77%
2	5	12.82%	43.59%
3	9	23.08%	66.67%
4	1	2.56%	69.23%
5	1	2.56%	71.79%
6	3	7.69%	79.49%
7	1	2.56%	82.05%
8	4	10.26%	92.31%
9	1	2.56%	94.87%
10	0	0.00%	94.87%
11	2	5.13%	100.00%
12	0	0.00%	100.00%
13	0	0.00%	100.00%
14	0	0.00%	100.00%
15	0	0.00%	100.00%
16	0	0.00%	100.00%
17	0	0.00%	100.00%
18	0	0.00%	100.00%
19	0	0.00%	100.00%
20	0	0.00%	100.00%
21 +	0	0.00%	100.00%
TOTAL	39	100.00%	

This chart gives the number and percentage of claims resulting in an indemnity payment by the insurer for the year within which the claim is made after substantial completion. All examined claims resulting in indemnity payment, except for 2, were received within 10 years of substantial completion. For example, the row in which the left column has an entry of 10 provides the number and percentage of claims having an indemnity payment that were received at least 9 years after substantial completion, but less than 10 years. For year 10, there were 0 claims received that resulted in an indemnity payment. For claims received within year 11, 2 resulted in an indemnity payment; 2 equals 5.13 percent of the total number (39) of claims examined that resulted in an indemnity payment. Since no claims received after 11 years of substantial completion resulted in an indemnity payment, the cumulative percentage at year 11 is 100%; all claims resulting in an indemnity were filed by the end of the 11th year of substantial completion.

DISTRIBUTION OF CLAIMS BY TYPE OF CLAIMANT

YEAR WITHIN WHICH CLAIM MADE AFTER COMPLETION	PERCENT OF CLAIMS FROM PARTIES INVOLVED IN DESIGN, CONSTRUCTION, ETC.	NUMBER FROM PARTIES NOT SO INVOLVED
1	65.71%	34.29%
2	60.00%	40.00%
3	75.61%	24.39%
4	73.33%	26.67%
5	65.22%	34.78%
6	70.00%	30.00%
7	55.56%	44.44%
8	42.86%	57.14%
9	41.67%	58.33%
10	50.00%	50.00%
11	12.50%	87.50%
12	0.00%	100.00%
13	42.86%	57.14%
14	0.00%	100.00%
15	0.00%	0.00%
16	0.00%	0.00%
17	0.00%	0.00%
18	0.00%	100.00%
19	0.00%	100.00%
20	0.00%	0.00%
21 +	0.00%	100.00%
TOTAL	61.76%	38.24%

This chart gives the percentage of claims by parties involved in design and construction of a project and the percentages of parties not involved, by year within which the claims were made after substantial completion. For example, the row with the first column entry of 10 gives the percentage of claims received at least 9 years after substantial completion but less than 10 years for each type of claimant. For year 10, fifty percent were from claimants involved in the design and construction of the project and fifty percent were not so involved.

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March 11, 1997

The Honorable Gene Therriault
Co-Chair of the House Finance Committee
House of Representatives
State Capitol, MS 3100
Juneau, AK 99801-1182

Re: CS for Sponsor Substitute for House Bill No. 58(JUD)
File No. 1795.6377

Dear Representative Therriault:

I am writing to provide my support for CS for Sponsor Substitute for House Bill No. 58(JUD). The specific provisions which I am addressing are Sections 40 and 41 relating to independent counsel. A significant portion of my practice entails providing legal advice to insurers doing business in the State of Alaska. We are very pleased with the Bill offered by the Committee and appreciate Representative Porter's efforts in this regard.

Sections 40 and 41 of this Bill address significant problems which remain in the wake of the Supreme Court's decision in CHI of Alaska, Inc. v. Employers Reinsurance Corporation, the decision which gave a defendant the right to select its own independent counsel when an insurance company had issued a reservation of rights on coverage.

The situation addressed by these sections arises when a claim for which there may be insurance coverage is joined with several for which there clearly is not insurance coverage. The example I will utilize is a lawsuit in which a plaintiff has sued a defendant in five separate counts. The First is for injury, which is alleged to be negligent. The Second is for injury alleged to be either negligent or intentional. The Third is for unpaid wages. The Fourth is for breach of contract. The Fifth is for discrimination. If the defendant is a typical business it has insurance for the injury claim, but that insurance will not cover the injury claim if it was intentionally caused. The first count - injury negligently caused - is clearly covered. However, an insurer would typically issue a "reservation of rights" letter on the Second count advising the defendant that it would be

responsible for defending a negligently-caused bodily injury but would reserve its rights not to pay for a judgment on this Count if the jury found it was intentionally caused. The claims for unpaid wages, breach of contract, and discrimination have no insurance coverage. I have attached a chart demonstrating this scenario.

Because the insurer has issued a reservation of rights letter on the Second Count, the defendant is entitled to select its own counsel and, under current practice in Alaska, that lawyer would defend Counts 1-5 and submit his/her entire bill for that defense to the insurance company. Because the insurance company has no control over the independent counsel it has been the experience of many of my clients that these bills are extraordinarily high. In one case with which I am personally familiar the bills were $80,000 per month and totaled $800,000 with most of that time devoted to the non-covered claims. Counsel for other insurers have advised me that this experience is not unique. I have knowledge of a second case which is almost identical to the example I am using in which the fees totalled in excess of $1,000,000. "Independent counsel" use the checkbook of the insurance carrier to provide a gold plated defense to claims for which there has never been insurance coverage.

Section 40 of this Bill provides that the insurance carrier in this situation need only pay for the costs of defending the First and Second Counts. Because these are the only counts for which insurance coverage was ever purchased, the defendant is getting precisely what it bargained for when it bought insurance. This is a resolution which has been brought about judicially in California, in Horace Mann Insurance Co. v. Barbara B, 846 P.2d 792 (1993). Alaska has modeled much of its judicial and statutory law in this area upon California precedent.

I have had conversations with Marianne Burke, the Director of the Division of Insurance, and she has advised that it is the Division's understanding that insurance carriers did not pay for the defense of uncovered claims in this situation. While we appreciate the position of the Division, threats of bad faith litigation against the insurers make the practice in Alaska different than that understood by the Division. Ms. Burke was aghast when I conveyed to her the magnitude of the attorneys fees which had been incurred in these cases. Because it is Ms. Burke's belief that insurers do not at present pay for the costs of defense for the uncovered claims, we anticipate no objection from the Division to these provisions.

I would not expect the plaintiff's bar to have difficulty with this proposal. When a defendant is represented by independent counsel, that independent counsel frequently takes a "scorched-earth" approach to litigation because of the lack of real financial constraints on the defense activity. In the case I have utilized here, one would expect the independent counsel to defend Counts 3-5 with extensive discovery and motion tactics that run up the costs of litigation for the plaintiff who must respond to these tactics. By requiring the defendant individually to shoulder the burden of expense for defending Counts 3-5, there is a realistic fiscal check on the activities of independent counsel.

Section 41 of this Bill provides a mechanism by which the insurance carrier can deal directly with the plaintiff in settling these types of cases. In the example we have utilized the only claims giving rise to the obligation for defense are Counts 1 and 2. Section 41 makes it clear that the insurer can deal directly with the plaintiff to settle the injury claims. Once those claims are settled, all that remain are claims for which there is no coverage and the obligation to provide independent counsel is eliminated. At present, there is a fear among insurance carriers that if they deal directly with the plaintiff, that they run the risk of a bad faith lawsuit by their insured. Once again the insurance carrier is providing all that it contracted to provide as it is settling the claims for which there is potentially coverage and eliminating a risk to the defendant. The plaintiff's bar should have no opposition to this as it allows plaintiffs to settle cases but obviously does not require them to do so. This is a section which is only implicated where both the plaintiff's counsel and the insurance carrier are in agreement on the settlement.

Thank you very much for considering these matters.

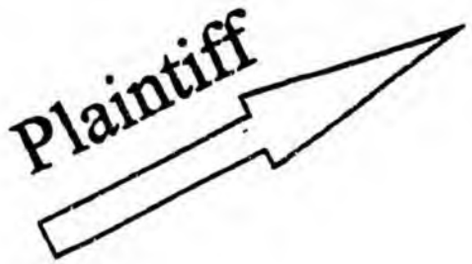
Very truly yours,

Michael K. Barcott

MAB:mb

Enclosure

cc: Representative Brian Porter



Defendant

I.
Injury
Negligent

Covered

II.
Injury
Negligent/Intentional

Reservation of Rights

III.
Unpaid Wages

IV.
Breach of Contract

V.
Discrimination

Denial of Coverage

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February 21, 1997

VIA FACSIMILE - (907) 465-3422

Marianne Burke
Commissioner of Insurance
State of Alaska
333 Willoughby Ave.
Juneau, AK 99811-1720

Dear Ms. Burke:

Thank you very much for talking with me yesterday about the proposed Sections 39 and 40 of SSHB58. I have attempted to find some published decision or article which discuss the abuses that these sections are intended to counter. Unfortunately, I have been unable to locate any such publication. I do, however, have very real firsthand knowledge of these abuses by independent counsel in specific cases. I have spoken with the clients that I have represented in those cases and while they are very comfortable with me providing the details, they are concerned about providing client names or case names.

I do harken back to our conversation, however, and your apparent opinion that independent counsel's bill for uncovered claims should not be the responsibility of the carrier. If that is the case, we presume that the Division would not object to codifying that concept rather than leaving it to the vagaries of the litigation process.

I would be most happy to provide whatever additional information I can. I will be in my office for the rest of this day and in our Juneau office Monday morning.

Very truly yours,

Michael A. Barcott

MAB/amf

AMF\C:\WP51\WRITER\BURKE.LTR

CITY OF SEWARD

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February 18, 1997

Representative Brian Porter
Alaska State Legislature
State Capitol
M/S 3100
Juneau, Alaska 99801-1182

FAXED & MAILED

Dear Representative Porter:

The City of Seward continues to support your tort reform legislation, including the revisions to-date. Municipalities and taxpayers are deeply impacted by rising costs associated with claims. Since 1986, insurance and claim costs have been a major factor in municipal tax increases and have, in some cases, influenced communities to limit or eliminate recreation and other public services.

We are concerned for our youth, yet due to the increase in public liability, municipalities are reducing and/or eliminating recreational facilities and activities, such as skateboard parks, that would provide our youth with constructive activities instead of idle time which causes many of our youth to get in trouble in their communities.

The City supports tort reform legislation that will:

- Relieve hospitals of liability for negligent acts of an emergency room contract physician if the doctor carries malpractice insurance.
- Decrease the statute of limitations from 6 to 3 years for contract disputes, attorney malpractice and damages to personal property.
- Set a "statute of repose" which is like a statute of limitations, at 8 years for damages caused by exposure to hazardous substances, defective products or fraud. The limit is currently 15 years.
- Establish a pilot program for alternative dispute resolution.
- Cap a punitive damage award by tying it to the compensatory award in the case, with limits.

We should work together to provide services the public wants in the safest, most cost-efficient manner. High insurance premiums and claims interfere with local government's ability to do our part of the job. We all want to do more for our citizens, but must not be afraid to provide needed services like skate parks because of punitive legal actions.

Thanks for your help!

Sincerely,

City of Seward

for

Ronald A. Garzini,
City Manager

RAG:rg

cc: Governor Tony Knowles
Senator John Torgerson
Representative Gary Davis
Seward Mayor and Council Members
Alaska Municipal League
Alaska Municipal League Joint Insurance Association

NORCAL
Mutual Insurance Company

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March 11, 1997

Gene Therriault, Co-Chair
House Finance Committee
House of Representatives
State Capitol
Juneau, AK 99811

RE: SSHB 58 (JUD) Tort Reform Bill

Dear Representative Therriault:

NORCAL Mutual Insurance Company is a physician and health care provider-owned professional liability insurer with over 13,000 policyholders located in Alaska and the lower 48. In 1991, we assumed the medical malpractice business formerly written by Medical Insurance Company of Alaska (MICA). We are the only professional liability insurer with a full service office located in Alaska. Our nine person professional staff has served physicians and hospitals located throughout Alaska since 1975. Based on our extensive experience in Alaska and the lower 48, we support those portions of SSHB 58 in order to provide modest relief for physicians and hospitals from the worst abuses of the tort system. This bill will help move Alaska more in line with most other states that have adopted medical tort reform.

A number of studies have been done regarding the relative cost of medical malpractice insurance and the impact of tort reform on health care costs. Although we have been advised by actuaries that it is impossible to quantify precisely the impact of any particular tort reform, it is widely acknowledged that the package of reforms known as the Medical Injury Compensation Reform Act ("MICRA") has made medical malpractice insurance widely available and affordable in California as compared to Alaska. These savings arising from medical tort reform have been passed on to consumers in the form of lower medical costs (Exhibit 1).

Prior to the enactment of MICRA, California medical malpractice costs were out of control. During the period 1970 - 1975, medical malpractice costs increased over 400% in response to the dramatic increase in the number of lawsuits brought against doctors and hospitals. Since 1976 when MICRA was enacted, medical malpractice costs have only increased about 100% in California while nationwide costs excluding California have increased by over 563% (Exhibit 2). Had California medical malpractice premiums increased at the same rate as the rest of the United States, California physicians and hospitals would have paid an additional $663 million during calendar year 1992 alone. Total savings to date exceed several billion dollars.

Comparing experience in California to other states graphically demonstrates that tort reform helps control medical malpractice insurance costs. Several states including Ohio enacted medical malpractice tort reforms similar to California and also saw a gradual reduction in malpractice costs compared to the rest of the United States. However, in 1982, Ohio's medical malpractice tort reforms were substantially weakened and its costs have risen dramatically (Exhibit 3).

Some states such as Alaska have not enacted medical tort reforms and their physicians and hospitals have over the years suffered severe increases in the cost of medical malpractice insurance resulting from swings in the severity and frequency of losses. Alaska has experienced the largest percentage increase in medical malpractice premiums in the nation with malpractice premiums skyrocketing from $781,000 in 1976 to $13,940,000 in 1994. This is a 1,684% increase in the cost of Alaska medical malpractice over 18 years for an average of 22% per year, which is almost three times the national average of 7.8% and more than eight times the average annual increase in California of 2.7% for the same period.

In 1975, California physicians' malpractice costs were the highest in the nation. To date, a comparison of premium costs for six medical specialties in California and Alaska clearly demonstrates that MICRA has kept California premiums significantly lower than in other states (Exhibit 4). California physicians not only pay less than their colleagues in other states, but they have seen a drop in their premiums when adjusted for the cost of living. The average California physician pays 60% less today than before MICRA (Exhibit 5).

Over the long term, Alaska physicians and hospitals should see similar reductions in the cost of malpractice insurance if SSHB 58 is enacted and upheld by the courts. California's medical tort reforms have worked in spite of strong pressure from the trial bar to overturn them in the courts. Real savings did not occur for many years until the California Supreme Court upheld MICRA in 1985. Because trial courts were reluctant to apply MICRA before the Supreme Court ruled on the constitutionality of MICRA, insurers were unable to report savings from tort reform and malpractice insurance costs actually increased during the early 1980s. The MICRA debate was finally put to rest in 1987 when the California Legislature refused to repeal or weaken MICRA. Since that time, California trial courts have recognized MICRA and policyholders have received substantial "MICRA" dividends amounting to several hundred million dollars. These MICRA dividends were paid by California's physician-owned insurers from loss reserve savings in the late 1980s. During the 1990s, California policyholders have had almost no rate increases and continue to receive substantial MICRA dividends.

The impact of legal reforms on health care costs has been the subject of several recent studies. The U.S. Congress, Office of Technology Assessment reported in 1993 that states which place reasonable limits on non-economic damages, require periodic payments and permit juries to hear evidence of collateral sources have seen a reduction in costs. Twenty-nine states place limits on non-economic damages, 30 states authorize periodic payments of large verdicts, 40 states have abolished the collateral

source rule, 50 states have statute of limits and 22 states control the amount of attorney contingency fees (Exhibit 6).

SSHB 58 offers a fair and balanced approach to reforming the civil justice system. SSHB 58 allows all Alaskans whether rich or poor to access the civil justice system and receive full compensation for their economic losses. SSHB 58 will eliminate the worst abuses by those who treat the civil justice system as a lawsuit lottery.

If the Alaska Legislature enacts SSHB 58, the rate of increase in the cost of medical malpractice insurance should, over time, be brought in line with other states that have enacted similar tort reform. SSHB 58 should also help eliminate the wild swings in the severity and frequency of losses which will foster a stable marketplace for medical malpractice insurance in Alaska and, ultimately, help control health care costs.

We urge your support of SSHB 58.

Very truly yours,

Philip R. Hinderberger

PHILIP R. HINDERBERGER

PRH/rl

Enclosures

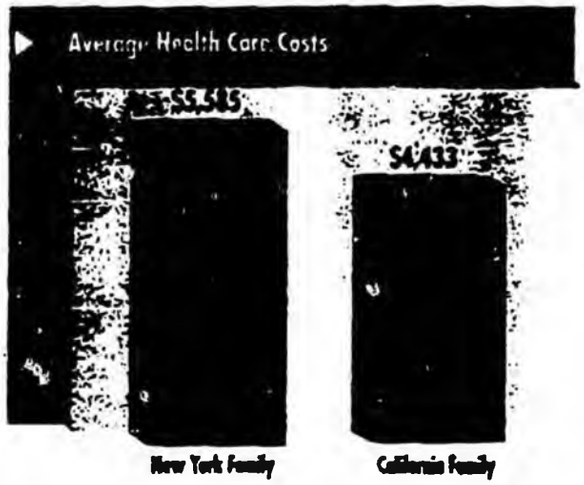
cc: Representative Brian Porter

bc: Richard Cattanach, Alaskans for Liability Reform
Steven S. Fountain, M.D., NORCAL Mutual Insurance Company
Roger Holmes, Biss & Holmes
Janet Johnston, NORCAL Mutual Insurance Company - Alaska
Jim Jordan, Alaska State Medical Association
Harlan Knudson, Alaska State Hospital and Nursing Association
Jay Michael, Californians Allied for Patient Protection
Ron Neupauer, Medical Insurance Exchange of California, San Francisco, CA
J. William Newton, NORCAL Mutual Insurance Company
Tim Shannon, California Association of Professional Liability Insurers
Larry Smarr, Physician Insurers Association of America

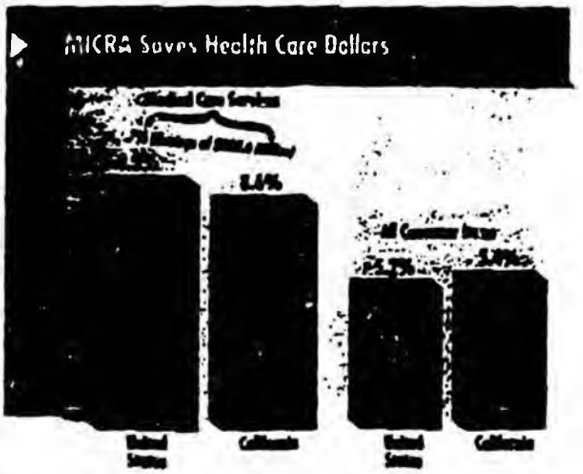
After MICRA: Real Results

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

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



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



SOURCE: 1. Families USA
2. Source: Consumer Price Index for All Urban Consumers (CPI-U), U.S. City Average, the Los Angeles and San Francisco Bay area indexes

EXHIBIT 1

Charts

Alaska Medical Malpractice Insurance Costs Compared to U.S. and California 1976 - 1994

Year	AK Premium Earned (Thous.)	% Change	U.S. Premium Earned (Millions)	% Change	CA Premium Earned (Millions)	% Change
1976	$781		$1,187		$288	
1977	655	-16	1,266	+6.7	227	-21.2
1978	Not available		1,382	+9.2	249	+9.7
1979	2,233	+240.9	1,235	-10.6	239	-4.0
1980	1,798	-19.5	1,333	+7.9	230	-3.8
1981	2,125	+18.2	1,232	-7.6	204	-11.3
1982	2,276	+7.1	1,361	+10.5	211	+3.4
1983	2,609	+14.6	1,844	+35.5	287	+36.0
1984	3,483	+33.5	1,835	-.50	375	+30.7
1985	4,403	+26.4	2,261	+23.2	450	+20.0
1986	8,480	+92.6	3,435	+51.9	629	+39.8
1986	13,639	+60.8	4,450	+29.5	633	+0.6
1988	15,109	+10.8	5,080	+14.2	663	+4.7
1989	16,341	+8.2	5,120	+.80	633	-4.5
1990	14,983	-8.3	4,931	-3.7	605	-4.4
1991	13,371	-10.8	4,862	-1.4	529	-12.6
1992	13,439	+0.5	5,138	+5.7	526	-0.6
1993	14,723	+9.0	5,174	+1.0	563	+6.0
1994	13,940	-5.0	5,932	+15.0	577	+2.0

National Association of Insurance Commissioners' Report on Profitability by Line and by State 1976-1994.
This report is based on information obtained from insurance company Annual Statements.

Conclusions:

·Alaska medical malpractice premiums have increased from $781,000 to $13,940,000 for a total increase of $13,159,000 or 1,684% overall at an average annual rate of 22%.

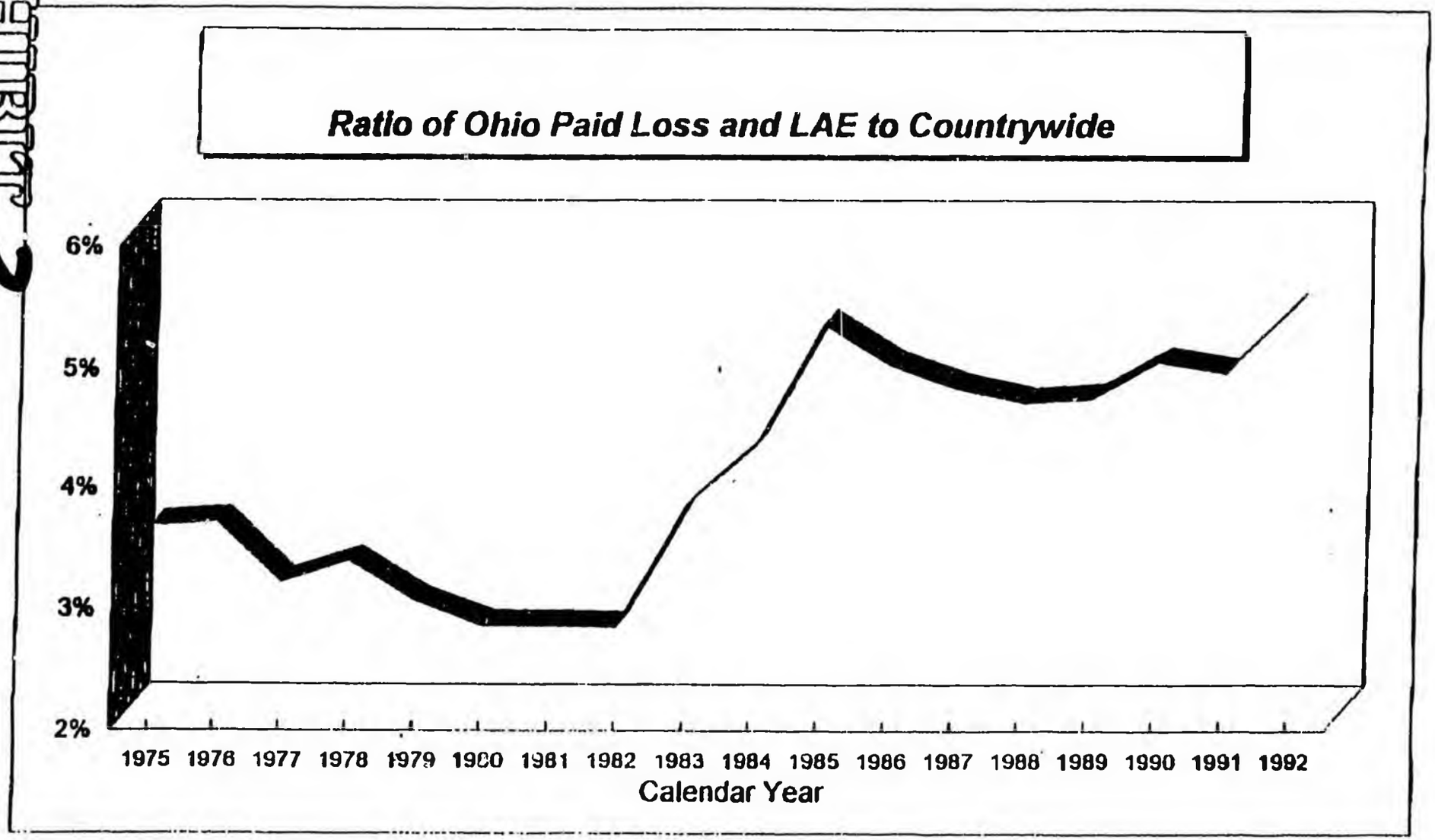
·U.S. medical malpractice premiums including Alaska have increased from $1,187 billion to $5,932 billion for a total increase of $4,745 billion or 400% overall at an average annual increase of 7.8%.

·California medical malpractice premiums have increased from $288 million to $577 million for a total increase of $289 million or 100% overall at an annual average increase of 2.7%.

AMMIC-3/11/97

EXHIBIT 2

EXHIBIT 3


Ratio of Ohio Paid Loss and LAE to Countrywide
6%
5%
4%
3%
2%
1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992
Calendar Year

Medical Liability Insurance Costs

California v. Alaska

	California	Alaska	Difference
Anesthesia	10,000	26,500	2 1/2x
Family Practice/ Minor Surgery	7,000	16,000	2x
Family Practice/ Major Surgery	19,000	26,500	1 1/2x
Neurosurgery	43,000	80,000	2x
Obstetrics/ Gynecology	31,500	64,500	2x
Orthopedic Surgery	26,000	80,000	3x

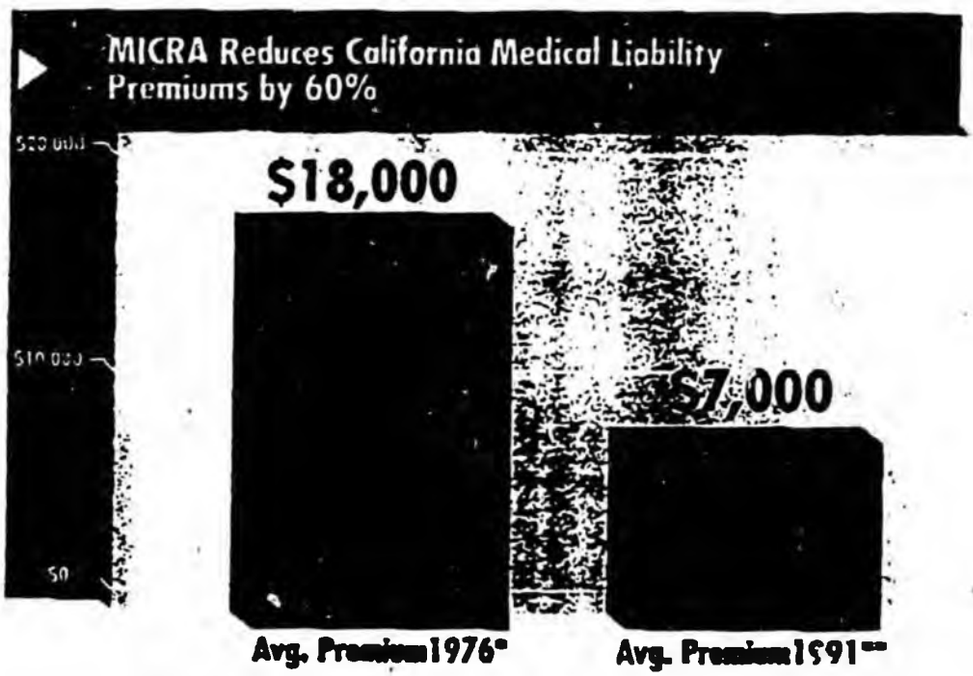
NOTE: NORCAL, Northern California and Alaska published premiums 1995.

EXHIBIT 4

Insurance Premiums Cut

MICRA Has Cut Medical Liability Insurance Premiums by 60%

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



— Shown in 1991 dollars

* $7,261 average premium adjusted to 1991 dollars on the December Urban CPI Index

** Dividends from 1990 deducted from 1991 average premium

EXHIBIT 5

SOURCE: Physicians Insurance Association of America

IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS

Background Paper
prepared by the

Health Program
Office of Technology Assessment

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September 1993

This paper was prepared for desk-top publishing by Carolyn Martin and Daniel B. Carson.

EXHIBIT 6

EXPLANATION OF METHODS USED BY OTA TO COMPILE DATA

The tables, figures, and accompanying notes in appendix A were derived from a variety of sources and synthesized by OTA to reflect the most recent information available on selected State medical malpractice reforms.

The primary published sources were 1991 and 1993 editions of a compendium developed for the Federal Agency for Health Care Policy and Research (AHCPR),[1] selected State statutes, and judicial cases. Two additional sources were used to update, cross-check, and supplement the AHCPR compendia.[2]

After compiling information from these sources into summary tables, OTA sent draft copies of the information to the attorneys general in all 50 States on March 24, 1993, for confirmation or amendment. Information was changed to reflect respondents' comments. Where conflicts arose between the attorney general response and information found elsewhere, the attorneys general's responses were favored. Unresolved questions were addressed through follow-up phone conversations with attorney general respondents and statutory research. The revised drafts were sent again to all 50 State attorneys general on June 25, 1993, for a final review and any corrections were incorporated.

For States that responded to the first survey only, information is current to March 1993. For States that responded to the second survey, information is current to June 1993. For the 10 States[3] that did not respond to either review and the District of Columbia, information was cross-checked and supplemented through followup telephone calls and/or review of the relevant State codes where possible. Where confirmation was not possible, information in this appendix reflects that presented in the 1993 edition of the AHCPR compendium.

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[1]U.S. Department of Health and Human Services, Agency for Health Care Policy and Research, "Compendium of State Systems for Resolution of Medical Injury Claims," prepared by S.M. Spernak, Center for Health Policy Research, The George Washington University (Rockville, MD: AHCPR, April 1993), AHCPR Pub. No. 93-0053; U.S. Department of Health and Human Services, Agency for Health Care Policy and Research, "Compendium of State Systems for Resolution of Medical Injury Claims," prepared by S.M. Spernak and P.P. Budetti, Center for Health Policy Research, The George Washington University (Rockville, MD: DHHS, February 1991), DHHS Pub. No. (PHS)91-3474.

[2]These sources were: Fisk, M.C., "The Reform Juggernaut Slows Down," The National Law Journal 15(10):1,34-37, Nov. 9, 1992; American Nurses Association, "Report to ANA Board of Directors on Tort Reform, Part 3: Presentation of Selected Summary of State and Local Legislation Related to Tort Reform and Review of Insurance Company Practices and Policies Related to Nursing Negligence with Recom-mendations," December 1991.

[3]DE,FL,HI,KS,KY,MS,NJ,NM,TX,WV.

Table A-1—Collateral Source Offset Provisions,[a] by State, 1993

Mandatory	Discretionary	No provision
CO*	AK*	AR
CT	AL	DC
FL	AZ	GA[O]
IA	CA	HI
IL*	DE	LA
ID	IN	MO*
KS[O]*	KY	MS
MA*	MD*	NC
ME	ND[O]*	NE
MI	OR	NH[O]
MN*	SD	NV*
MT*		OK
NJ		PA[O]
NM		SC
NY		TX
OH*		VA
RI*		VT
TN		WA*
UT		WI
		WV
		WY

[a]The traditional collateral source rule forbade evidence of the plaintiff's collateral sources of income and reimbursement (e.g., medical insurance, disability payments) from being entered into evidence. States classified as "mandatory" or "discretionary" in this table have modified the traditional evidence rule to allow certain types of collateral sources to be admitted as evidence. Statutes which require that the plaintiff's award be offset by certain collateral sources are classified as mandatory. Statutes that leave the decision of whether to offset to the jury or judge are classified as discretionary. States with no provision have not modified their traditional collateral source rules. It is of note that a number of States reduce the malpractice award by the collateral source payments, but credit the plaintiff with any premiums he or she has paid or will pay to obtain the insurance (e.g., MN, MI, CT, IA, IL and NY).

O = Provision overturned.

* See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

Table A-2—Caps on Damages[a] and State Patient Compensation Funds, by State, 1993

Noneconomic cap

AK: $500,000*

CA: $250,000

FL:[O] $350/250,000

HI: $375,000

ID:[O] $400,000*

KS:[O] $250,000*

MD: $350,000

MA: $500,000

MO: $465,000*

OR: $500,000

UT: $250,000

WV: $1,000,000

WI: $1,000,000

Economic and noneconomic

AL:[O] Total recovery capped at $1 million.*

CO: Total recovery capped at $1 million. $250,000 cap on noneconomic.*

IN: $750,000

LA: $500,000*

NE: $1,250,000

NM: $500,000*

SD: $1,000,000*

VA: $1,000,000

No statutory limits

AR
AZ
CT
DC
DE
GA
IA
IL[O]
KY
ME
MN[R]
MS
MT
NC
*ND[O]
NH[O]
NJ
NV
NY
OH[O]
OK[R]
PA
RI
SC
TN
*TX[O]
VT
WA[O]
WY

PCF (Patient Compensation Fund)

FL: Physicians may participate in fund by obtaining liability coverage of $250,000 per claim and $500,000 per occurrence. Fund will pay malpractice awards exceeding maximum physician liability of $250,000 per claim, up to $1 million per claim and $3 million aggregate per policy.

IN: Provider not liable for that portion of any malpractice award which exceeds $100,000. Any amount due the plaintiff which is in excess of the total liability of all health care providers, shall be paid from the PCF, with total payments from the PCF not to exceed $750,000.

KS: Physicians must carry $200,000 in malpractice insurance per claim ($600,000 per annum) then can choose one of three options for excess coverage from PCF. For each option, the physician pays the initial $200,000 in damages and then the fund will pay some portion of the remainder depending on how the physician chooses to distribute fund liability across potential claims: 1) fund liable for next $100,000 per claim ($300,000 aggregate per provider); 2) fund liable for next $300,000 ($900,000 aggregate per provider); and 3) fund liable for up to $800,000 per claim.

Table A-2—Caps on Damages[a] and State Patient Compensation Funds, by State, 1993 (Continued)

Noneconomic cap	Economic and noneconomic	No statutory limits	PCF (Patient Compensation Fund)
			LA: Provider liability limited to $100,000 for injuries or death to plaintiff. Fund will pay total amount recoverable for all injuries or death of a plaintiff exclusive of future medical care and related benefits, up to $400,000 for private providers. The State pays all damages up to $500,000 for State health care providers.
			NE: The PCF shall cover liability exceeding $200,000 up to $1.25 million.
			NM: Health care provider liability is capped at $100,000, with the remainder to be paid by the PCF. Total payment from PCF not to exceed $500,000 per occurrence per year.
			PA: The fund shall pay any amount exceeding $100,000 per occurrence, up to $1 million per claim.
			SC: The fund will pay awards in excess of $100,000 per claim (no upper limit).
			WI: Physicians must have $400,000 of malpractice coverage per incident and $1,000,000 in coverage per annum. The fund will pay for damages exceeding the physician's coverage. Each health care provider is also assessed an annual fee to help finance the fund.

[a]NOTE: OTA's review did not include caps that apply only, or separately, to claims against State-employed or State-owned health care providers.

O = Provision overturned.
R = Provision repealed.

*See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

Table A-3—Periodic Payment of Awards,[a] by State, 1993

Mandatory	Discretionary	No provision
AL > $150,000*	AK*	DC
AZ	AR > $100,000	GA
CA > $50,000	CT > $200,000*	HI
CO > $150,000	DE	KS[O]
IL > $250,000*	FL > $250,000	KY
LA ≥ $500,000*	IA	MA
ME ≥ $250,000	ID > $100,000	MS
MI	IN	NC
MO > $100,000*	MD	NE
NM	MN > $100,000	NH[O]
OH > $200,000	MT > $100,000	NJ
SD > $200,000	ND*	NV
UT > $100,000	NY > $250,000*	OK
WA > $100,000*	OR	PA
	RI > $150,000*	TN
	SC > $100,000	TX
		VA
		VT
		WI
		WV
		WY

[a]Periodic payment provisions are often not triggered unless the award reaches a threshold amount. The specific thresholds are noted parenthetically in the table. Periodic payment provisions apply only to future damages. The schedule of payments is either negotiated by the parties or determined by the court. Some statutes offer guidelines for determining the schedule. The mandatory category includes statutes in which periodic payment is mandatory upon reaching the threshold or upon unilateral request by defendant or plaintiff.

O = Provision overturned.

* See additional notes on following page.

SOURCE: Office of Technology Assessment, 1993.

Table A-4—Statutes of Limitations,[a] by State, 1993

	Years within date of injury	Years within date of discovery	Maximum number of years	Foreign object exception[b]
AL:	2 years	6 months	4 years	-
AK:	-	*2 years	-	-
AR:	2 years	-	-	1 year
AZ:	-	2 years	-	-
CA:	3 years	1 year	3 years	1 year
CO:	-	2 years	3 years	2 years
CT:	-	2 years	3 years	-
DC:	3 years	-	-	-
DE:	2 years	3 years	-	-
FL:	2 years	2 years	4 years	-
GA:	2 years*	-	5 years	1 year
HI:	-	2 years	6 years	-
ID:	2 years	-	-	1 year*
IN:	-	2 years	-	-
IL:	-	2 years	4 years	-
IA:	-	2 years	6 years	2 years
KS:	-	2 years	4 years	-
KY:	-	1 year	5 years	-
LA:	1 year*	1 year	3 years	-
MA:	3 years	-	7 years	General Exception
ME:	3 years	-	3 years	Upon "reasonable discovery"
MD:	5 years	3 years	-	Exception for minors only
MI:	2 years*	6 months	6 years	6 months
MN:	2 years*	-	-	-
MS:	-	2 years	-	-
MO:	-	2 years	10 years	2 years after discovery 10 years max.
MT:	3 years	3 years	5 years	-
NE:	2 years	1 year	10 years	-
NV:	4 years	2 years	-	-
NH:	3 years	3 years	-	-
NJ:	-	2 years*	-	-
NM:	3 years*	-	-	-
NY:	2 years, 6 months	-	-	1 year
NC:	3 years	-	4 years	1 year after discovery, 10 year max
ND:	-	2 years	6 years	-
OH:	-	1 year	-	-
OK:	-	2 years	3 years O*	-
OR:	-	2 years	5 years	-
PA:	2 years	2 years	-	-
RI:	3 years	3 years	-	-
SC:	3 years	3 years	6 years	2 years
SD:	2 years	-	-	-
TN:	-	1 year	3 years	1 year
TX:	2 years*	-	-	-
UT:	-	2 years	4 years	1 year

Table A-4—Statutes of Limitations,[a] by State, 1993 (Continued)

Years within date of injury	Years within date of discovery	Maximum number of years	Foreign object exception"*
VT: 3 years	2 years	7 years	2 years
VA: 2 years	-	10 years	1 year
WA: 3 years	1 year	8 years	1 year
WV: 2 years	2 years	10 years	-
WI: 3 years	1 year	5 years	1 year
WY: 2-2.5 years	2 years	-	-

Explanatory Notes for Table A-4

Column 1: Statutory time limit for bringing a suit is measured from the time the injury occurs or from the date of termination of the medical treatment that led to the claim.

Column 2: The statutory time limit for bringing suit is measured from the time at which the plaintiff could have reasonably discovered the injury. Often States allow the time limit to run from either the time of injury or the time of discovery, depending on the nature of the injury.

Column 3: The maximum period in which a claim can be brought, regardless of whether the limit is measured from the date of injury or act or the date of discovery. In most States, this maximum does not apply to the foreign body exception (see column 4).

Column 4: Because of the difficulty of discovering a foreign body (e.g., a surgical sponge) left inside a patient during invasive procedures, a number of States make special exceptions to the statute of limitations for these cases.

[a]This table does not cover special provisions for minors, disabled plaintiffs or cases involving fraud or concealment on the part of the healthcare provider.

O = Provision overturned.

* See additional notes on following page.

** Within year of discovery, maximum number of years do not apply unless stated.

SOURCE: Office of Technology Assessment, 1993.

Table A-5—Pretrial Screening Panels, by State, 1993

Pretrial screening panels[a]			
Mandatory	Voluntary	No provision	
AK*	AR	AL	ND[R]
HI*	CT	AZ[R]	NJ[R]
ID*	DE*	CA	NY[R,*]
IN	KS*	CO*	OH
LA*	NH*	DC	OK
MA*	VA	FL[O]	OR
MD*		GA	PA[O,*]
ME		IA	RI[O]
MI		IL[O,*]	SC
MT		KY	SD
NE*		MN	TX
NM*		MO[O]	WA
NV		MS	WI[R,*]
TN		NC*	WV
UT			WY[O]
VT*			

[a] "Mandatory" includes provisions that allow a waiver of the pretrial screening process upon the request of one or both parties. "Voluntary" refers to provisions that allow but do not require parties to submit their claim to pretrial screening panels.

R = Provision repealed
O = Provision overturned

* See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

Table A-6—Attorney Fee Limits,[a] by State, 1993

Sliding scale	Maximum %	Court-determined/ court approved	No statutory limits
CA: 40% of first $50,000	IN-15%[c]	AZ	AK
33.33% of next $50,000	MI-33.33%	HI	AL
25% of next $50,000	OK-50%	IA	AR
15% damages that exceed $600,000	TN-33.33%	KS	CO
	UT-33.33%	MD[c]	DC
CT: 33.33% of first $300,000		NE	FL[R]
25% of next $300,000		NH[O,c]	GA
20% of next $300,000		WA	ID
15% of next $300,000			KY
10% damages that exceed $1.2 million			LA
			MN
DE: 35% of first $100,000			MO
25% of next $100,000			MS
10% of damages that exceed $200,000			MT
			NC
IL: 33.33% of first $150,000			ND
25% of next $850,000			NM
20% of damages exceeding $1 million			NV
			OH
MA: 40% of first $150,000			OR[R]
33.33% of next $150,000			PA[O]
30% of next $200,000			RI
25% of damages that exceed $500,000[c]			SC
			SD
ME: 33.33% of first $100,000			TX
25% of next $100,000			VA
20% of damages that exceed $200,000			VT
			WV
NJ: 33.33% of first $250,000			WY
25% of next $250,000			
20% of next $500,000			
Amount shall not exceed 25% for a minor or an incompetent plaintiff			
NY: 30% of first $250,000			
25% of next $250,000			
20% of next $500,000			
15% of next $250,000			
10% of damages exceeding $1.25 million			

Table A-6--Attorney Fee Limits,[a] by State, 1993 (Continued)

Sliding scale	Maximum %	Court-determined/ court approved	No statutory limits
WI: 33.33% of first $1 million OR 25% of first $1 million recovered if liability is stipulated within 180 days, and not later than 60 days before the first day of trial and 20% of any amount exceeding $1 million			

[a]NOTE: Most attorney fee limits are not direct limits on the amount attorneys can charge their clients. Rather, they are limits on the portion of the damage award that may go toward attorney fees.

O = Provision overturned.
R = Provision repealed.

* See additional notes on following page.

SOURCE: Office of Technology Assessment, 1993.

Table A-7—Arbitration Provisions[a] by State, 1993

Specific provision for medical malpractice claims	General arbitration provision[b]	
AK	AL	NC
CA	AR	ND[R]
CO*	AZ	NE*
FL*	CT	NH
GA	DC	NM
HI*	DE	NV
IL	IA	OK
LA*	ID	OR
MI	IN	PA
NJ*	KS	RI
NY*	KY	SC*
OH*	MA	TN
SD	MD	TX*
UT*	ME	VT
VA	MN	WA
	MO	WI*
	MS	WV
	MT	WY

*NOTE: Voluntary, binding arbitration provisions only, unless otherwise noted. This table does not indicate statutory provisions for court-annexed, nonbinding arbitration. Several States have provisions authorizing mandatory, nonbinding arbitration for civil suits where expected damages are below a certain threshold (most thresholds range from $10,000 to $50,000). However, because the vast majority of medical malpractice cases involve expected awards in excess of these thresholds, the provisions are rarely relevant to medical malpractice. One exception is the State of Hawaii, which requires court-ordered nonbinding arbitration for all civil tort actions having a probably jury award (exclusive of costs and interest) of $150,000 or less (Hawaii Rev. Stats. Sec. 601-20 (Lexis 1992)). However, medical malpractice claimants may elect to bypass court-ordered arbitration if a decision has been rendered under the State's mandatory medical malpractice pretrial screening provision (Hawaii Rev. Stats. Sec. 671-16.5 (Lexis 1992)).

[b]Many States have adopted the Uniform Arbitration Act (UAA) (Uniform Arbitration Act, Uniform Laws Annotated (Vol. 7) (St. Paul, MN: West Publishing Company, 1992)).

R = Provision repealed
O = Provision overturned

* See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

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February 23, 1997

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

Re: House Bill 58 (Sponsor substitute)

Dear Representative Porter:

This will confirm my conversation with Jim Sourant of your office concerning the Statute of Repose. I mentioned to Jim that all professionals in the State of Alaska are now covered by "claims made" professional liability insurance. This means that the claim must arise and be made during the policy period. When a professional retires the custom is to buy "tail insurance." This insurance covers the professional for claims made during the policy period but which do not arise until after the professional has retired and no longer carries insurance.

At the present time, most professional "tail" endorsements only cover three years into the future. In certain limited situations a five year "tail" endorsement is possible. You do not need much insurance savvy to figure out that without a statute of repose, all professionals who spend their lives practicing in Alaska have a substantial uninsurable risk in their retirement years.[1]

Most professionals carry insurance to protect their clients (patients) as well as to protect themselves and their families. An uninsured loss over five years after retirement without adequate resources to combat the suit or income potential to recoup the loss is a devastating situation for the retired professional. Such a claim could result in the professional and his/her family requiring substantial state aid in their declining years.

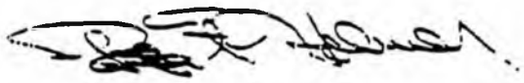
---

[1]The alternative if for the retired professional to continue to purchase "claims made" insurance for the remainder of his/her retirement years. For most professionals this is prohibitively expensive without income from the practice of their profession. For instance, some many physicians pay in excess of $50,000 a year for "claims made" insurance.

Representative Brian S. Porter
February 23, 1997

Very truly yours,

BISS & HOLMES



Roger F. Holmes
\RFH

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11 March 1997

Honorable Gene Therriault
Finance Committee
Alaska House of Representatives
Juneau, Alaska

Dear Representative Therriault:

I am writing on behalf of the Alaska State Medical Association Board of Trustees in support of House Bill 58. I would particularly like to address Section 6 regarding the statute of limitations, Section 8 regarding noneconomic damages, and Sections 29 and 30 regarding the expert advisory panels.

We support a statute of limitations of two years, except for infants. Waiting until two years after the incident or age eight, whichever is later, provides time for parents to watch their children through most of their developmental milestones. Contact with the school system comes within a few weeks of the child's sixth birthday at the latest, and that provides a societal back-up to the parents' observations. Early injuries do not have quiet interludes before expression: brain injury is not a discontinuous event.

Unpredictability of noneconomic damages is the single most expensive aspect of insuring against liability, and the unpredictability in unlimited damages makes it possible to justify almost any insurance premium a company might want. With medical expenses and lost economic value paid, a limitation on the lottery aspect of noneconomic damages makes the system more predictable and thus less expensive for everyone.

Steps to more sharply focus and to define timelines more clearly will strengthen the expert advisory panel system. As currently constituted the panel system is being distorted by preemptory challenges by counsel from its intended role as advisory to the court. We believe that the expert advisory panel system has been a useful tool for sorting through the complexities of medical liability cases, and that the system should be preserved.

Thank you for the opportunity to present our ideas on House Bill 58. I would be happy to address both any aspect of what I have presented here and any other questions regarding this important piece of legislation.

The Alaska State Medical Association supports House Bill 58.

Yours truly,

David E. Johnson, MD, FAAP

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March 11, 1997

Representative Gene Therriault
Co-Chair, House Finance Committee
Alaska House of Representatives
State Capital
Juneau, Alaska 99801

Re: HB 58

Dear Representative :

I am writing to you on behalf of State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company. State Farm Mutual presently has approximately 32 percent of the automobile insurance market in the state of Alaska. State Farm Fire & Casualty has approximately 43 percent of the homeowners' market. Collectively State Farm has had significant experience with Alaska's civil justice system which goes back for at least 25 years. It is from this perspective that we offer our comments regarding the bill presently before you.

State Farm Mutual is a mutual company, which means it is owned by its policy holders. The premiums it charges its Alaska policy holders are determined primarily by its loss experience in Alaska. When State Farm's loss experience in Alaska has been better than expected, State Farm has returned premiums to its policy holders. In November of 1987 State Farm Mutual returned 3.3 million dollars to its Alaska policy holders. In November of 1988, State Farm Mutual returned 3.1 million dollars to its Alaska policy holders. Since then, State Farm's loss experience in Alaska has worsened. Over the years 1992-96 State Farm Mutual experienced a pure underwriting loss of approximately 1.8 million dollars. Over the same years, State Farm Fire and Casualty experienced a pure underwriting loss of approximately 23 million dollars. Although there are signs that this trend is changing, these losses have been disturbing.

We offer this information because there has been testimony that insurance rates in Alaska are set on a national level and that nothing done in Alaska will affect the price of insurance in Alaska. We strongly disagree with this proposition. As set forth above, our rates in Alaska are determined primarily by our loss experience in Alaska. The fact that we have returned significant amounts of money to our Alaska policy holders is irrefutable evidence of this. Other mutual companies have also returned money to their Alaska policy holders.

LESSMEIER & WINTERS
ATTORNEYS AT LAW

We believe this legislation will improve our loss experience in Alaska. Improvement in our loss experience will be reflected in the premiums we must charge for our products. We believe this to be true for many other companies as well.

There are several provisions of this legislation we wish to comment specifically on. One of the sections we feel strongly about is Section 10, which is the limit on punitive damages. We see punitive damage claims frequently. Without exception these claims are time consuming and expensive to defend. Although these cases are most often successfully defended, they nonetheless impose a tremendous burden. The limitation contained in this bill, which we fully support, would lessen this burden.

In prior hearings there has been much argument to the effect there are not documented instances of adverse jury verdicts indicating there is a problem with punitive damages. We have enclosed a copy of a study by Steven Hayward, The Role of Punitive Damages in Civil Litigation: New Evidence From Lawsuit Filings. This paper provides empirical support for what we have been saying all along: the issue is not necessarily the number of adverse verdicts, but the number of claims which are made. Each such claim has to be defended. Each has the potential of effecting the value of the underlying claim for compensatory damages. Each imposes a cost. It is no surprise to us that this study found that punitive damages claims on average take one-third longer to resolve and play a significant role in the settlement process. This reality is ignored by those who choose to focus only on actual verdicts.

The second issue we feel strongly about is the several liability provision contained in Sections 16-18. In 1988, the voters in Alaska adopted pure several liability through the initiative process. The ballot told the voters that the "initiative would make each party liable only for damages equal to his or her share of fault". This initiative was approved by approximately 75% of the voters. Five years later the Supreme Court ruled that fault could be apportioned only to those who were formally named as parties to the action. Thus instead of a party being liable only for damages he or she caused, a party can now be held liable for damages caused by the fault of another. We believe this to be contrary what the voters were told in 1988.

We have heard the argument that if these changes are adopted, a defendant may try to blame a non-party for a loss and that a plaintiff will be forced to defend an "empty chair" from claims that are for the first time made at trial. We believe this is a specious argument. The basis for any such claim would have to be disclosed at the very outset by Rule 26 of the Rules of Civil Procedure. The usual discovery would also require disclosure of such a claim. There is simply no basis for the argument that such claims could be raised for the first time at trial.

The essence of several liability is that each party should be held liable only for his or her share of fault and no more. Although it is difficult to argue with the fairness of such a fundamental proposition, the overwhelming approval the voters gave to the 1988 initiative shows the public's agreement with this proposition. Any mechanism which serves to reallocate fault so that one party ends up bearing the consequences of someone else's conduct is unfair and contrary to the expressed intent of the voters. Sections 16 and 17 will simply insure that the intent of the voters is implemented and accordingly is a provision we fully support.

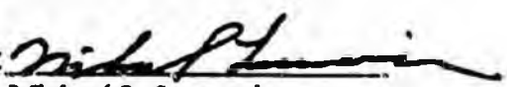
Section 21 of this bill will dramatically change the law on offers of judgment so there is a significant incentive to evaluate one's position early and in a responsible way. This section simply provides that if a party betters by more than 5% an offer of judgement entered within 60 days of initial disclosures, that party may recover reasonable actual attorney fees. There is no such present incentive in the law.

The final section we wish to comment on is Section 48, which provides a certain deterrent for those that come to court and intentionally make false statements of material fact. We do not believe this provision to be controversial and again believe it is hard to argue with the logic of such a concept.

There are other portions of this legislation that are important in that they remove windfalls which are currently in the system. Examples of this include Section 23, which provides for a floating rate of prejudgment interest, Section 24, which provides that prejudgment interest may not be awarded on future damages and Section 11, which reduces future wage loss claims by the amount one would have to pay for income taxes. Each of these provisions is fair. Each will reduce a windfall currently present in the system. Each will help to further the goals this legislation seeks to accomplish.

We thank you for the opportunity to comment on this legislation. If you have questions, please let us know as we will be happy to respond.

Sincerely,
LESSMEIER & WINTERS

By: 
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cc: Rep. Brian Porter

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The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings

By Steven Hayward†

HIGHLIGHTS:

- **This study offers new data on the frequency and the effects of punitive damages, based on a detailed review of more than 1000 lawsuits filed and concluded in San Francisco County Superior Court.**

- **Punitive damages are demanded in 27 percent of all cases where they are conceivably recoverable.**

- **Lawsuit filing data show that business and government defendants are four times as likely as an individual defendant to face a lawsuit that demands punitive damages.**

- **Lawsuits that include punitive damage demands take one-third longer to resolve than suits without these demands. The average lawsuit in our 1000 case sample took 15 months to resolve; cases with punitive damage demands took an average of 21 months to resolve.**

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† Steven Hayward is vice president, research for the Pacific Research Institute. William S. Loughman, an attorney and senior fellow in legal studies for the Pacific Research Institute, conducted the research into lawsuit filings.

• Punitive damage demands play a significant role in the out-of-court settlement process, where the vast majority of lawsuits are settled. Punitive damage demands tilt the playing field in favor of demanding parties, and increase out-of-court settlement amounts.

• Studies of punitive damage jury verdicts have been interpreted to suggest that the risk of receiving an adverse punitive damage judgment is remote. Closer scrutiny of the data, we argue, will show that the probability of punitive damage awards is vastly understated by these studies, in part because the data have been improperly qualified.

Introduction

The controversy over punitive damages in civil litigation has centered around the number of punitive damage awards, and the dollar amounts of such awards. Comprehensive data on this issue are scarce because there is no complete statistical database of trial verdicts. However, we believe that the focus of research on the number of punitive damage verdicts is misplaced to some extent. Focusing only on trial verdicts understates the scope and nature of the problem because the overwhelming majority of all lawsuits are resolved out of court. According to surveys of lawsuits, less than 2 percent of all cases go to trial. Looking only at the 2 percent of cases that reach a jury is like looking only at the visible tip of a large iceberg: it ignores the larger unseen part below the water line that may do more harm. Thus, to argue that punitive damage awards are rare is to miss an obvious point: *jury verdicts of any kind are rare*. No one would say, however, that because jury verdicts are rare, lawsuits themselves are insignificant or costless. Yet this is the inference that has been drawn from various punitive damage studies that focus only on trial verdicts.[1]

The right question to ask about the civil litigation process is: *what is occurring in the other 98 percent of cases that are resolved out-of-court?* Because 98 percent of cases are resolved out of court, it is important for researchers and for public policy makers to understand what is going on in these cases, and how the legal rules, including the relative probability of punitive damages, affect the outcomes of the negotiation process for out-of-court settlements.

A large proportion of lawsuits today include punitive damage demands. Because 98 percent of lawsuits are resolved out-of-court, an important threshold question to answer is: *Do punitive damage demands in lawsuit filings have a significant effect on the out-of-court settlement process?*

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[1] For example, the recent federal Department of Justice estimates of civil suit verdicts in state courts, discussed below, generated numerous newspaper headlines to the effect that "punitive damages are rarely awarded."

In an attempt to shed light on this question, the Pacific Research Institute conducted a detailed examination of more than 1000 lawsuit filings in San Francisco County Superior Court. We conclude that punitive damages are used as a weapon to generate more favorable out-of-court settlements, especially against business and government defendants.

What Lawsuit Filings Data Tell Us

Most punitive damage studies focus on verdicts in the handful of cases that proceed to trial. There are no empirical studies that examine how often and against whom, punitive damage demands are employed.

In an attempt to shed light on these issues, we have scrutinized a month's worth of lawsuits filed between January 2, 1991 and February 1, 1991 in the Civil Division of the California Superior Court for the County of San Francisco. There were 1,024 lawsuits filed in this venue during this time period. Our analysis seeks to determine what patterns exist with respect to the distribution of claims for punitive damages and statutorily mandated multiple damages. We reviewed each case to determine the type of case, the principal cause of action claimed, whether punitive damages were demanded, how the case was resolved, and how long it took to resolve. We picked cases from 1991 because over 98 percent of cases from this time period had been resolved, either by trial, settlement, or dismissal, so most could be traced out to their conclusion. (A complete description of the methodology used in surveying and classifying these cases is available upon request.)

The highlights of the analysis of these cases include:

- **78 percent of all punitive damage demands were filed against a business defendant. (See Figure 1 below.)**

- **Government defendants face punitive demands in more than one-third of lawsuits filed against government agencies. (See Table 1 below.)**

- **Lawsuits that include punitive damage demands take about six months longer to resolve than lawsuits that do not include punitive damage demands.**

- **The probability of a punitive damage award if a case proceeds to trial is 14 percent or higher. For business defendants, the probability is more than 20 percent.**

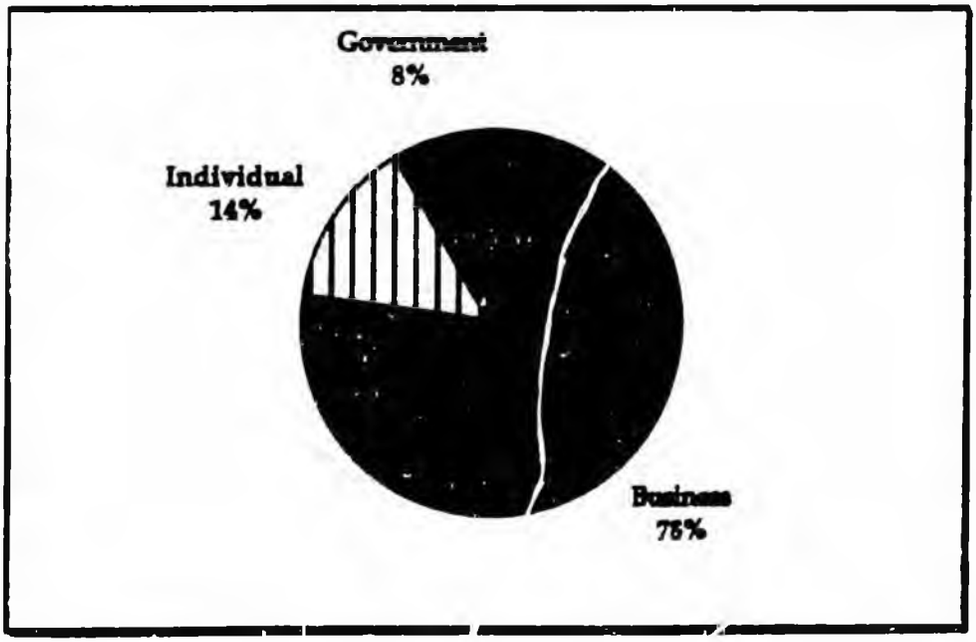
Of the 1,024 cases we examined, nine (9) cases were designated by the court as "sealed" and were unavailable for study. This left a pool of 1,015 lawsuits for study. 537 of these 1,015 cases, or 52.9 percent, were based on one of three principal causes of action where punitive damages are recoverable:

1) common law tort;
2) statutory tort or other statutory civil action; or
3) contract.*

The remaining civil filings within this pool—478 cases—consisted of civil law categories where punitive damages are not available or only very rarely available. These categories include equity causes of action (such as requests for a temporary restraining order); family law matters (chiefly dissolution of marriage proceedings); and civil petitions (such as a name change, to confirm an arbitration award, or to compel an audit entry).

Punitive damage demands were included in 145 of the lawsuits. This represents only 14 percent of the total pool of lawsuits, but 27 percent of the suits in areas where punitive damages are generally available (145 out of 537). Of these 145 filings, 112 or 78 percent were filed against a business defendant. This breakdown is displayed in Figure 1 below.

Figure 1: Distribution of Punitive Damage Demands by Type of Defendant



* Although punitive damages are not normally recoverable in contract lawsuits, many contract suits nowadays include secondary causes of action, such as fraud or "bad faith," which can suffice as a basis for punitive damages. For this reason, contract cases have been included in the pool of cases which can potentially involve a viable claim for punitive or statutory damages.

Of the 1,015 cases reviewed, only 22 went to trial, or 2.1 percent. This is comparable to the trial rate estimated in the Department of Justice study, and is consistent with most studies of lawsuits. Seventeen of these 22 cases were tort, statutory, or contract cases (in which punitive damages may be alleged). Of these 17 cases, seven were court trials (heard by a judge instead of a jury) and 10 were jury trials. Business entities were the primary defendant in 11 of the 17 trials; government entities and individuals were named as the primary defendants in three trials. Six of the 17 cases (two court trials, and four jury trials) included punitive damage demands. Two of the 17 cases settled during trial. Of the remaining 15 cases, plaintiffs won in seven of the trials, while defendants won eight. No punitive damages were awarded in these verdicts.

Table 1 categorizes cases according to the type of primary designated defendant (individual, business entity, government entity, and non-profit organization). Table 2 displays the same data according to type of case instead of type of defendant. The data in these tables demonstrate that punitive damages are overwhelmingly alleged against business entities. Businesses face punitive damage demands roughly four times as often as individuals.

Government Agencies Frequently Targeted

Another remarkable feature is apparent in Table 1: Government entities face punitive damage demands more than one-third of the time (35 percent). While defenders of punitive damages argue that punitive awards are necessary to prevent allegedly gross negligence, malice, or willful harm by businesses, such malicious behavior can hardly be just as frequently alleged in government. But government entities, like businesses, are perceived to have "deep pockets" and make attractive targets for punitive damage demands. Thus, taxpayers, and not just business interests, bear the direct cost of punitive damages. Many of the lawsuits brought against government, and defended at taxpayers' expense, are patently frivolous. For example, in one case from our research, *Buford v. California Department of Real Estate*, the plaintiff demanded $3 million in punitive damages because the agency had refused to grant him a real estate license. The Department of Real Estate had to answer the suit in court, pointing out that the plaintiff was a convicted felon.

Another notable suit was *Shervin v. California State Police*. Alleging that five state police officers had burst into his home without a warrant but on the direct orders of Governor Deukmejian, Shervin demanded punitive damages based on seven different allegations, including "organized conspiracy, racketeering and/or extortion, to subvert the court and to obstruct justice."

Additional allegations included "torture," and the accusation that the California State Police were engaged in "an extensive, continued and perpetual gigantic organized conspiracy" of an unspecified nature. This was the *fourth* such lawsuit Shervin had brought against various government agencies in recent years, all defended at taxpayer expense.

Table 1: Civil Litigation Filings in Common Law Tort, Statutory Tort, and Contract Cases, and Punitive or Statutory Damage Claims Frequency by Category of Primary-Designated Defendant, 1991

INDIVIDUALS (as primary-designated defendant)		
Category of case:	Total # of cases:	Punitive damages demand included:
Common law tort:	169	16
Statutory tort/actions:	1	0
Contract:	34	5
Totals:	204	21
Frequency of punitive damage claims:		10.29%

BUSINESSES (as primary-designated defendant)		
Category of case:	Total # of cases:	Punitive damages demand included:
Common law tort:	184	74
Statutory tort/actions:	26	19
Contract:	80	20
Totals:	290	113
Frequency of punitive damage claims:		38.97%

GOVERNMENT ENTITIES (as primary-designated defendant)		
Category of case:	Total # of cases:	Punitive damages demand included:
Common law tort:	25	6
Statutory tort/actions:	6	4
Contract:	6	3
Totals:	37	13
Frequency of punitive damage claims:		35.14%

NON-PROFIT ENTITIES (as primary-designated defendant)		
Category of case:	Total # of cases:	Punitive damages demand included:
Common law tort:	5	0
Statutory tort/actions:	0	0
Contract:	1	0
Totals:	6	0
Frequency of punitive damage claims:		0%

Table 2: Distribution of Punitive and Statutory Damages Claims Among Civil Filings by Category of Lawsuit, 1991

Common Law Tort Cases				
	Primary Designated Defendant (Punitive Damage Claims in Parenthesis)			
	Individual	Business	Gov't Entity	Non-Profit
Totals	169 (16)	184 (74)	25 (6)	4 (0)
P.D.s as %	9.47%	40.22%	24.0%	0%
PDs for all common law tort cases:		24.87%	(96/382)	

Statutory Tort Cases				
	Primary Designated Defendant (Punitive Damage Claims in Parenthesis)			
	Individual	Business	Gov't Entity	Non-Profit
Totals	1 (0)	26 (19)	6 (4)	0 (0)
P.D.s as %	0%	73%	66%	0%
PDs for all statutory tort cases:		66%	(23/33)	

Contract Cases				
	Primary Designated Defendant (Punitive Damage Claims in Parenthesis)			
	Individual	Business	Gov't Entity	Non-Profit
Totals	34 (5)	80 (20)	6 (3)	1 (0)
P.D.s as %	14.71%	25%	50%	0%
PDs for all contract cases:		23.14%	(28/121)	

Duration: Punitive Cases Take Longer to Resolve

Another significant finding of this sample of lawsuit filings concerns the average duration of the cases. We assigned a duration value to each case in the sample. The purpose of this analysis was to gauge the length of time until each case was resolved, and to see whether lawsuits that included punitive damage demands were concluded more quickly or less quickly than lawsuits that did not demand punitive damages. Our analysis of the duration of cases showed that lawsuits that did not include a punitive damage demand were concluded in an average of 15 months, while punitive damage lawsuits required an average of 21 months to conclude—a six month difference.

It is difficult to know whether this distribution of case filings, punitive damage demands, and average duration to resolution holds constant in the

case filings in other jurisdictions. But for *purposes of illustration* only, *if* this distribution were roughly similar in all the jurisdictions covered in the Department of Justice estimates, it would suggest that a business defendant facing a punitive damage demand would have about a 14 percent probability of receiving an adverse punitive damage judgment at trial—substantially higher than the 5.9 percent of trials that resulted in punitive damages in all of the trial verdicts considered as a whole in the DoJ study.[2] It should be emphasized here that many of the 75 counties included in the DoJ study, such as Washington state counties, do not allow or severely restrict punitive damages, so the overall probability in areas allowing punitive damages is certainly much higher than 14 percent.

Asking the Right Questions: The Dynamics of Lawsuit Settlement

To appreciate fully the significance of the findings of our analysis of lawsuit filings, it is necessary to understand how punitive damage demands may affect the calculus of out-of-court settlement demands. A review of the scholarship about this subject will establish the following conclusions:

> **1. The *unpredictability* of a prospective punitive damage award contributes significantly to the *uncertainty* (and therefore the *risk*) of a court trial outcome.**
>
> **2. Both the uncertainty posed by the prospect of unlimited punitive damages, combined with the relative probability of a punitive damage award if a case goes to jury trial, provide litigants who demand punitive damages with potent leverage against risk-averse defendants, and tip the balance in settlement bargains in favor of litigants with weak or even frivolous cases.**

As mentioned previously, concentrating on trial verdicts overlooks "where the action is" in civil litigation: out-of-court settlements. We are not suggesting that verdicts are unimportant. To the contrary, punitive damage verdicts are like the tip of the proverbial iceberg. The small number of trials affect decisions in the vast majority of lawsuits that do not proceed to trial. Verdicts are "information signals" for litigants. Even Stephen Daniels and

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[2] The calculation for this figure is as follows: In our case sample, 38.5 percent of business cases include a punitive damage demand. The Department of Justice report estimated that there were 5,240 tort cases against a business defendant in its sample of cases from 75 counties. Holding constant from our sample, this would suggest that 2,017 of these cases included punitive damage demands (38.5% of 5,240 cases). If we assume that the proportion of punitive verdicts is in parity with the distribution of punitive demands (i.e., 78 percent against business), then 284 of the 364 punitive verdicts in the DoJ study were against business defendants. These 284 verdicts represent 14 percent of the 2,107 cases.

Joanne Martin, who are strong proponents of punitive damage awards, note that "jury verdicts in the minority of matters actually adjudicated play an important role in determining the worth, or settlement value, of civil matters filed but not tried."[3]

To get a proper perspective on how this process works requires a consideration of the basic dynamics of a lawsuit. There is growing scholarly literature that offers several models of decision-making in the litigation process, especially in cases involving doubtful or even frivolous legal claims. "Situations involving litigation are a paradigmatic case of bargaining conflict," Kip Viscusi has written, and hence susceptible to illumination through game-theory and decision-tree models.[4] As professors Robert Cooter and Daniel Rubinfeld of U.C. Berkeley have noted, "The attributes of litigation bargaining—rivalry, communication, side payments, interdependency, and uncertainty—characterize bargaining games as analyzed in microeconomics."[5] This approach can help clarify the role of punitive damages in changing the calculus of settlement between litigating parties.

The first thing to understand about lawsuits under American law is that the plaintiff has the opening strategic advantage: even a plaintiff with a weak case places the defendant in the position of having to defend himself (and therefore incurring legal costs), or else the defendant will be liable for the full claim on a default judgment. Hence, even a defendant facing a suit without merit is often willing to pay an amount that is less than his prospective defense costs to settle the case and "make it go away." According to various studies, the cost of defense in an *average* tort lawsuit ranges from $6000 to $10,000, depending on the kind of suit.[6] A litigant with even a mildly plausible basis for an average suit can often expect a nuisance settlement value within this range. Professors David Rosenberg and Stephen Shavell of Harvard Law School comment: "By filing a claim, any plaintiff, and thus the plaintiff with a weak case, places the defendant in a position where he will be held liable for the full judgment demanded unless he defends himself. Hence, the defendant should be willing to pay a positive amount in settlement to the plaintiff with the weak case—despite the defendant's knowledge that were he to defend himself, such a plaintiff would withdraw."[7] University of Michigan economist Avery Katz adds that in

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[3] Stephen Daniels and Joanne Martin, "Myth and Reality in Punitive Damages," 75 *Minnesota Law Review* 1-64 (October 1990), p. 28.

[4] W. Kip Viscusi, "Product Liability Litigation with Risk Aversion," *Journal of Legal Studies*, Vol. XVII (January 1988) p. 120.

[5] Robert D. Cooter and Daniel L. Rubinfeld, "Economic Analysis of Legal Disputes and Their Resolution," *Journal of Economic Literature*, Vol. XXVII (September 1989), p. 1069.

[6] J. Kakalik and N. Pace, *Costs and Compensation Paid in Tort Litigation* (Santa Monica: RAND Corporation Institute for Civil Justice, 1986).

[7] D. Rosenberg & S. Shavell, "A Model in Which Suits Are Brought for Their Nuisance Value," 5 *International Review of Law and Economics* (1983), p. 3.

many cases "the defendant is willing to pay a settlement up to the amount of his defense costs in order to avoid having to respond to the plaintiff's complaint."[8]

The main determining factor of whether a filed lawsuit will yield a settlement to the plaintiff is the "threat credibility" of the suit, i.e., what is the probability of a verdict favorable to the plaintiff if the case goes to trial, and what is the likely amount of damages that the plaintiff could win? The scholarly models of the out-of-court negotiation process suggest that an increase in the prospective amount of a jury verdict increases the likelihood of a settlement offer by the defendant, and tends to increase the amount of such settlements. Professors Kathleen Engelmann and Bradford Cornell argue that "it is almost invariably the case that increasing the cost of litigation increases the probability of settlement."[9] Professor Barry Nalebuff of Princeton University concurs, noting that "an increase in the court award . . . raises the probability of settlement." [10]

This can be true even in frivolous or marginal lawsuits, or lawsuits with a doubtful chance of success at a trial. Professor Katz comments: "The main reason that frivolous suits are not always met with a blanket denial and refusal to negotiate, of course, is that the defendant rarely knows the merits of the claim with certainty. Since refusing to take a valid claim seriously can be quite costly, a frivolous plaintiff may be able to take advantage of the defendant's uncertainty regarding the claim's validity to extract a substantial settlement." Moreover, Katz adds, "higher trial costs raise the defendant's benefit from settling with valid claimants and makes him more willing to tolerate the cost of settling with strike suitors."[11]

The point is: punitive damage demands will often tip the balance of power in bargaining to the plaintiff, even one with a weak or frivolous case. It does so in two ways: by increasing the size of a prospective jury award (by an unpredictable and potentially enormous amount) if the case is taken to trial, and by increasing the legal costs that a defendant will have to incur to fight the suit at trial. First, to use a hypothetical example: while a $50,000 lawsuit with arguable merit might have a settlement value of $20,000 or $30,000, a $50,000 lawsuit that also demands $200,000 in punitive damages is no longer a

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[8] Avery Katz, "The Effect of Frivolous Lawsuits on the Settlement of Litigation," *International Review of Law and Economics*, Vol 10 (1990), p. 4.

[9] Kathleen Engelmann and Bradford Cornell, "Measuring the Cost of Corporate Litigation: Five Case Studies," *Journal of Legal Studies*, Vol. XVII (June 1988), p. 397. For a general discussion of this point, see John P. Gould, "The Economics of Legal Conflicts," *Journal of Legal Studies*, Vol. 2, No. 2 (June 1973), pp. 279-300; Lucian Arye Bebchuk, "Suing Solely to Extract a Settlement Offer," *Journal of Legal Studies*, Vol. XVII (June 1988), pp. 437-450; Cooter and Rubinfeld, *op cit.*

[10] Barry Nalebuff, "Credible Pretrial Negotiation," *RAND Journal of Economics*, Vol. 18, No. 2 (Summer 1987), p. 208.

[11] Katz, *op cit.*, p. 4, 5.

$50,000 lawsuit for purposes of settlement. The presence of a punitive damage demand provides leverage for the plaintiff to force a higher settlement value from the suit. Second, the presence of a punitive damage demand often requires a more extensive, more costly, and more time-consuming defense by the defendants. Most punitive damage demands are based on claims of intentional wrongdoing or "conscious disregard" of the rights of the litigant. Defending against such extraordinary claims usually requires a more expensive discovery process than ordinary damage claims. In addition to a discovery process about the basic facts of the injury or fraud involved in the tort allegation, determining the malicious intent of the defendant will involve more extensive, and therefore more expensive, document searches and depositions.

The key dynamic of the out-of-court settlement process is *uncertainty*. Obviously if the outcome of jury trials were highly predictable, few if any cases would ever go to trial. The parties would always settle. It is the uncertainty of trial outcomes that has led to a thriving market for jury verdict data services, which are intended to provide at least some guidance to litigating parties to help estimate the risks of trial and the parameters of a reasonable settlement. Punitive damage demands add dramatically to the uncertainty of out-of-court settlement deliberations. The inclusion of a punitive damage demand increases the potential amount of an adverse jury award by an unpredictable degree, since punitive damages are unlimited.

To judge how serious a factor this is, it is necessary to consider the probability of receiving a punitive damage verdict if a case is taken to trial. The plaintiff's leverage is only effective if the threat of extracting punitive damages from a trial is credible. What makes a punitive damage demand credible in the eyes of a defendant? The studies that minimize the number of punitive damage awards are highly misleading on this point.

For example, the recent Department of Justice study's estimates on civil lawsuits seems to suggest that because so few cases result in punitive damages (364 out of 762,000 cases filed, or .0004 percent), the threat of a punitive damage demand in a lawsuit pleading is not very credible.[12] But this is to miss something rather obvious in the DoJ statistics: because only 1.5 percent of the lawsuits actually went to trial, the relevant question to ask is: *what is*

---

[12] "Civil Jury Cases and Verdicts in Large Counties," U.S. Department of Justice, Bureau of Justice Statistics, Special Report NCJ-154346, July 1995. It is important to take note of the methodological difficulties with this study. While the study purports to represent a review of 762,000 case filings and 12,000 jury verdicts, in fact the Department of Justice only scrutinized a sample of these cases. It is from these samples that extrapolations are made in the various tables in the study. The sample size is not divulged. This is why we have consistently referred to the DoJ's figures as "estimates." Finally, the Department of Justice study does not provide a state-by-state breakdown, so it is impossible to offer observations specific to California based on their estimates.

the risk of receiving a punitive damage judgment if a case is brought to trial? The 364 punitive damage verdicts in the DoJ estimates take on a new significance if pondered in this fashion: they amount to 3 percent of the 12,000 cases tried, or 5.9 percent of verdicts in which the plaintiff was the winner. Three percent, or even 5.9 percent, still may not seem very substantial to outside observers who do not bear the risk themselves, but it is crucial to remember, however, that many if not a majority of these cases that went to trial *did not include a punitive damage demand as a part of their pleading.* Secondly, the DoJ statistics do not tell how many of the suits that included punitive damage demands, or how many of the verdicts that included punitive damages, were suits brought against *businesses* as opposed to *individuals.* (The Department of Justice has the data to make this breakdown, but chose not to report it in its study.)

The disaggregated figures in Table 3 below, taken from the Department of Justice estimates, tell the story more clearly.[13] Although the DoJ estimates are severely limited because they do not tell us whether the defendant in these verdicts is an individual or a business, and does not tell us what proportion of the cases that went to trial sought punitive damages, they do confirm that the probability of receiving a punitive damage award is significant.[14] For example, in employment law cases (nearly all of which were brought against business defendants), we see that 26.8 percent of all verdicts included punitive damages, with a hefty median punitive award of $179,000.

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[13] These data appear as Table 8 on page 8 in the Department of Justice study.

[14] As pointed out above, the DoJ did not actually analyze 762,000 cases on a case-by-case basis. It would take years to conduct such an analysis. But unless a substantial sample of cases is analyzed closely, it is impossible to answer some key questions about what is happening. The DoJ does not estimate how many of the 762,000 suits requested punitive damages as a part of their filing, or how many of the 12,000 that went to trial included punitive damage demands. But without knowing this, it is difficult to judge the significance of some of the DoJ findings. For example, while the DoJ study notes that only 13 out of 403 medical malpractice verdicts included punitive damages, the study does not say—because the DoJ does not know—how many of those 403 cases demanded punitive damages as a part of their case filing. Although the DoJ estimates do break down suits filed against individuals and filed against business, it does not reveal how many of the suits against business that went to trial included punitive damage demands. Again, the DoJ cannot know this without actually examining each and every case filing. Because the DoJ study is based on estimates instead of a hard count of actual cases, it cannot tell us much that is meaningful about the relative risk posed to defendants who face punitive damage demands.

Table 3: Punitive Damage Awards for Plaintiff Winners in Civil Jury Cases in State Courts in the Nation's 75 Largest Counties, 1992

	Plaintiff winner cases		Amount of punitive damages awarded to plaintiff winners			% of plaintiff winner cases with punitive damages	
	No. awarded punitive damages	% of cases receiving punitive damages	Total	Median	Mean	Over $250K	Over $1 mill.
Case type:							
All jury cases	364	5.9	$267,879,000	$50,000	$735,000	23.7	11.6
Tort cases	190	4.0	91,477,000	36,000	481,000	22.7	10.1
Automobile	55	2.4	35,535,000	25,000	641,000	19.9	7.5
Premises liability	15	1.7	1,272,000	40,000	87,000	0	0
Product liability	3	2.2	40,000	9,000	12,000	0	0
Intentional tort	38	18.5	10,926,000	25,000	286,000	13.8	8.5
Medical malpractice	13	3.1	3,120,000	199,000	245,000	31.8	0
Profsnl malpractice	15	15.7	6,077,000	250,000	412,000	44.0	8.5
Slander/libel	8	29.8	1,341,000	47,000	164,000	34.2	0
Toxic substance	13	6.2	26,420,000	1,692,000	1,994,000	54.7	54.7
Other tort	30	7.2	6,746,000	100,000	226,000	20.9	10.9
Contract cases	169	12.2	169,528,000	52,000	1,003,000	24.4	12.6
Fraud	38	21.2	7,339,000	45,000	191,000	18.9	10.4
Seller plaintiff	24	5.6	1,221,000	22,000	51,000	0	0
Buyer plaintiff	47	12.4	27,446,000	27,000	581,000	3.6	11.1
Employment	46	26.8	132,759,000	179,000	2,875,000	42.1	26.1
Rental/lease	11	11.3	399,000	50,000	37,000	0	0
Other contract	2	1.8	365,000	145,000	162,000	44.4	0
Real property cases	5	11.7	6,873,000	85,000	1,375,000	40.0	40.0

Another point should be made from the DoJ estimates. While defenders of unlimited punitive damages prefer to use *median* punitive award figures because a few large awards can skew *average* award figures, this point can be turned on its head. The large disparity between median punitive award amounts and average award amounts ($50,000 and $735,000 respectively in the DoJ estimates) highlights the unpredictability of punitive awards. As our previous report on punitive damages in California showed, there was a huge range in punitive damages awarded between 1990 and 1994, demonstrating that punitive damages are unpredictable and arbitrary.[15] In California cases during this period, the range of punitive awards runs from 710 times compensatory damages to .0001 times compensatory damages. (In one case, a defendant who was not assessed any compensatory damages was nevertheless

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[15] *Punitive Damages in California: A Preliminary Report* (San Francisco: Pacific Research Institute, 1995).

hit with $62,000 in punitive damages.) It is precisely this uncertainty that provides the plaintiff with additional leverage in the settlement process.

Conclusions

The California statutes governing punitive damages use exceptionally strong language to prescribe when punitive damages are appropriate. Punitive damages should be awarded where there is "clear and convincing evidence" that a defendant has behaved with "malice," or has engaged in "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." Other descriptions include "oppression, intentional misrepresentation, deceit, or concealment of a material fact. . ." Unless it is implausibly assumed that such extraordinary behavior is rampant and pervasive in California, the frequent appearance of punitive damage demands in lawsuit filings is evidence that they have become simply a regular litigation tactic.

It is not persuasive to say that the frequency of punitive damage demands have little or no effect on the cost and outcomes of litigation. The uncertainty and risk posed by potential punitive damage awards magnifies the leverage of such demands in out-of-court settlements. The prospect of "runaway juries" is far from fanciful. Even judges have felt compelled to speak out about this phenomena. In a recent California trial involving an employment dispute that resulted in an $80 million punitive damage award, the trial judge set aside the verdict, noting:

> "This award is so disproportionate to the injuries, damages and conduct, and so unsupported by the evidence it shocks the conscience of this court to the point that the court cannot countenance such a result and feels compelled, despite its respect for the jury process, to grant a new trial . . . Punitive damages award is excessive and clearly motivated by passion and prejudice [of the jury]. The award does not bear a reasonable relationship to the nature of defendant's action and the extent of plaintiffs' injuries."[16]

Despite the admonitions of California statutes that there be "clear and convincing evidence" of extraordinarily deliberate malicious behavior, it is clear that new guidelines and limitations on punitive damages are needed.

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[16] *Lane v. Hughes Aircraft Company*, Los Angeles County Superior Court Case No. BC 075 519 (December 15, 1994).

THE ROLE OF PUNITIVE DAMAGES IN CIVIL LITIGATION: NEW EVIDENCE FROM LAWSUIT FILINGS

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2/96

A L A S K A

March 11, 1997

Representative Mark Hanley, Co-chairman
Representative Gene Therriault, Co-chairman
House Finance Committee
State Capitol
Juneau, AK 99801-1182

Dear Representative Hanley and Representative Therriault,

HB 58, making important changes in Alaska's tort law, will be before the Finance Committee this week. This is a priority issue for the National Federation of Independent Business. With 4,400 Alaska members, NFIB/Alaska is the states largest small-business advocacy organization. NFIB represents the entire spectrum of independent businesses, from one person "cottage" operations to quite substantial enterprises.

NFIB is interested in changing Alaska's tort laws to make the civil justice system more fair, more efficient and less costly. That is the purpose of HB 58. This bill allows for appropriate compensation for persons injured through the fault of others. There is no limit on economic damages such as medical costs and lost wages. It does put a reasonable cap on additional awards for damages such as pain and suffering. It prohibits punitive damages unless deliberate disregard for another person is shown. It also puts sensible limits on punitive damage awards.

NFIB/Alaska strongly supports putting reasonable limits on non-economic and punitive damages. When there are no limits on damages, any business may be just one lawsuit away from being put out of business. The unpredictability of what a jury may award often forces insurance companies to settle out of court too soon for too much money. This drives up the cost of liability insurance.

NFIB/Alaska believes HB 58 will help control the costs of personal injury cases while assuring appropriate compensation for persons injured through no fault of their own. NFIB/Alaska urges support for HB 58.

Sincerely,

Thyes J. Shaub
on behalf of NFIB/Alaska

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

The Guardian of Small Business for Fifty Years

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March 10, 1997

Mr. Gene Therriault
Co-Chairman, House Finances
State Capitol, Room 517/15
Juneau, AK 99801-1182

Dear Representative Therriault:

I'm writing this letter to encourage your support of tort reform. I appreciate the efforts that you expend on our behalf. As you may know, I was instrumental in founding the original tort reform effort in Alaska, called the Citizens' Coalition for Tort Reform. We got some tort reform established in 1986, and were successful in getting the initiative on the ballot in 1988. Clearly not enough was done. The bill introduced by Senator Miller, and its running mate, Representative Porter's SSHB58, will certainly go a long way towards solving the problems that present us.

While it may be true that in 1976 only doctors and other small groups were affected, it is now the case that absolutely everyone in Society is affected. I most recently had a conversation with Oren Seybert of Penninsula Air. They had the unfortunate occurrence of an airplane disappearing with its passenger on board. The passenger's economic value is computed to be more than one million dollars. Unfortunately, Oren is in the unenviable position of being completely unable to obtain more than one million dollars in insurance. It is not only the cost interests of insurance, but the availability, that often affects decisions of businesses and professions in the State of Alaska.

Mr. Jim Jordon, of the Alaska State Medical Association, has been kind enough to forward two articles which I would like to bring to your attention. They are written by the American Academy of Actuaries. Once in my life I wanted to be an actuary, until I found out how little contact actuaries have with their fellow human beings. Having said that, they are very excellent at analyzing numbers in a dispassionate way. This analysis would appear to confirm what many of us have been thinking and saying for a long time. MICRA Reform in California has been demonstrably effective. California doctors now pay less for the same level of malpractice insurance than Alaska Doctors pay. No one, I think, would believe that Californians are less litigious than Alaskans. It simply shows the effectiveness of the Tort Reform legislation passed in 1975. The article also points out that tort reforms are ineffective when passed piece-meal. We have heard numerous arguments over the years that tort reform should be incremental, that we should do a little bit at a time. I for one have resisted those arguments because every time a small piece of

legislation has passed, everyone says tort reform is done, and since it's a controversial subject, they don't want to touch it again for the next four, five, or ten years. Meanwhile it's like having a bucket with ten holes in it, and one hole is plugged; the bucket still leaks at a very rapid rate.

A cap on non-economic damages, the prohibition of recovering from collateral sources and mandated structured periodic payments, are key elements to this tort reform. The MICRA Legislation included limitations on contingent fees. The pro-active way of making that statement is that in effect, more money is left for the truly injured client. The point is made in these articles, however, that that contingent fee is usually a fixed sum of money, regardless of risk involved in the case. A truly contingent fee would take less money from a case that was an open and shut case, as opposed to those in which there was considerable doubt. I can assure you that the standard practice in the Alaskan Legal Community is to take a fixed percentage of the case, regardless of risk. Those trial attorneys who are fortunate enough to be in the position of having the "Oh my God" case come through the door, are virtually assured of being millionaires as the result of the outcome of a single case. That seems a little unbalanced.

I'm enclosing, for your perusal, an analysis of a case that occurred in Alaska in 1987. Essentially Mr. Justice was involved in a bar fight, presented himself to the Emergency Room at Alaska Regional Hospital, which subsequently has become Columbia Hospital. He was thoroughly examined and sent home. He returned almost exactly 24 hours later, in the early morning hours, and was again examined and no material findings were produced. He then left to go to California. He was extensively evaluated in California, including CAT-scans and MRI's, for persistent headaches, and was admitted twice in California with no findings noted. On the third admission, he presented with symptoms of a cerebral hemorrhage, and was subsequently discovered to have a Berry aneurysm, which is a congenital malformation that he had prior to his altercation in the bar. It is noteworthy that he left Alaska neurologically intact, with the appropriate measures having been taken.

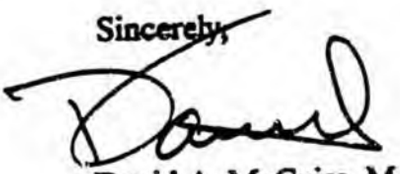
He elected to sue in California, which by then had enacted the MICRA Reform mentioned in the previous part of this letter. As a result of that, there was a cap on non-economic damages. He had mandated periodic payments for his economic damages. There were limitation on the amount of money that the attorney could recover, and he had no collateral source at that time from which to recover.

After having received the benefit of this life-time benefit in California, he returned to the State of Alaska. He sued the doctors and Alaska Regional Hospital, and shortly before trial, dropped the doctors. The jury was never permitted to know that he had received full compensation under the California Micra Act. The jury returned a verdict of "guilty", and assessed damages. We have enclosed an analysis of these damages, with those paid by California on the left, and those paid by Alaska on the right. You can see clearly that the

cost to settle the same case in California was one-third of that in Alaska. Another way of stating it is, that Alaska health care consumers pay three times as much to injured victims as California health care consumers do. In the end, all the money comes from the patients or their payors. This is a clear and egregious example of why collateral sources need to be limited. You will hear time and time again that "Tort Reformers" are trying to rig the Jury system. Nothing could be further from the truth. We'd simply like the Jury to know the whole truth and nothing but the truth, and if that were the case, we believe that they would come to a sensible verdict.

I appreciate the opportunity to present you with this information, and I would be most happy to discuss any part of it. (I have read the Justice file, including the examinations in the E.R. myself, and therefore I can promise you that it did happen as indicated.)

Sincerely,



David A. McGuire, M.D.

DAM:li

cc: Brian Porter

In November of 1987, MICA went to trial on the Justice v. Humana Hospital Case. MICA insured each of the three defendants including the hospital on a "tail" policy purchased when Humana brought Community Hospital. The two physician defendants were dropped the day before trial by the plaintiff's attorneys and the hospital became a single defendant.

CASE FACTS:

Justice was seen in the emergency room on two occasions in May of 1982 for injuries received from a fall in an Anchorage bar. The visits were both in the middle of the night and 25 hours apart. 48 hours later the patient presented himself to Los Angeles County Hospital where he was admitted and discharged the next day. He was admitted yet again five days later, discharged and finally readmitted twelve days later comatose with a right sided hemiplegia.

LEGAL ACTION:

Separate suits were filed in California and later in Alaska. L.A. County made a settlement with an agreement that if the plaintiff was successful in Alaska, L.A. County could recover 1/3 of the Alaska award to a maximum of $300,000.

TRIAL RESULTS:

MICA tried to join L.A. County Hospital in a joint defense. Certainly they were responsible for the last and longest treatment. Our court would not allow this and further would not allow any negligence by L.A. County to be a defense. The outcome was a verdict with the plaintiff 10% negligent and Humana 90% negligent. The verdict was an award totaling $1,304,244 with add-ons for prejudgement interest and Rule 82 increasing the award to in excess of $2,000,000.

TORT REFORM EFFECTS:

The cost to Alaska to pay for the plaintiff who had already received retribution in California is substantial. Tort Reform legislation would have had an absolute impact on the results of this case. Under Tort Reform legislation-

- the extent of L.A. County's negligence would have to be considered;
- the percentage of fault for Humana would be affected under joint and several liability;
- collateral source from the L.A. settlement would have to be offset and;
- a cap on non-economic losses would have impacted the judgement.

MICA feels this is an excellent representation of the positive effects of California tort reform. Because of the positive effects of California tort reform. Because of our own laws, Alaskans paid in the extreme for a plaintiff that had been compensated elsewhere. Our analysis of the Justice case leads us to the irrevocable conclusion that tort reform legislation will decrease costs to Alaska and its citizens.

COMPARISON OF RESULTS IN JUSTICE
With Mandated Structured Settlements

California (WITH Tort Reform)		Alaska (WITHOUT Tort Reform)	
($1,344,000) $32,000 paid per year for life expectancy of 42 years	$ 305,619	Total jury verdict	$ 1,449,160
		Less plaintiffs 10% comparative negligence	(144,916)
			$ 1,304,244
$75,000 payment on July 1, 1995.	28,113		
		Present value of L. A. Hospital settlement as of July 1, 1985.	(210,201)
			$ 1,094,043
$200,000 payment on July 1, 2005.	28,101		
$400,000 payment on July 1, 2015.	22,125	Collateral benefits pursuant to AS 09.55.548(b)	(89,378)
Present value of future payment of total jury verdict of $2,019,000 as of July 1, 1985.	$ 383,958	Subtotal	$ 1,004,665
		Prejudement interest @ 10.5% per annum from May 30, 1982 (date of injury) through March 16, 1988.	683,534
Plus cash payment on July 1, 1985.	50,000		
		Rule 82(a) attorney fees	171,319
Plus attorney fees present values as of July 1, 1985.	130,000		
Plus costs	15,000		
Subtotal	$ 578,958	Subtotal	$ 1,859,518
Defense cost	unk	Insurance, Defense fees	501,605
Total	$ 578,958	Total	$ 2,361,123

DOES TORT REFORM WORK?

The effect of mandated structured settlements:

In California, the plaintiff received $2,214,000 from a structured settlement for a present cost of $578,958.

In Alaska, the plainteff received $1,859,518 with a present cost of $1,859,518.

The present cost to health care consumers in Alaska in 3.2 times the amount in California.

DAVID A. McGUIRE, M.D.
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March 10, 1997

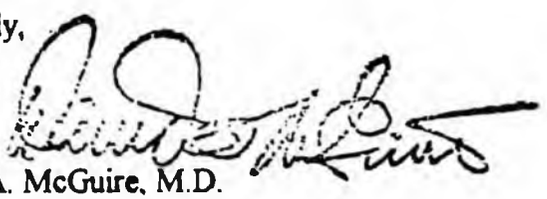
Brian Porter, Majority Leader
State Capitol, Room 216
Juneau, AK 99801-1182

Dear Brian:

Thanks again for your efforts in Tort Reform. I'm enclosing two articles that Jim Jordon of ASMA sent over to me. They are produced by the Acturarial Society. They leave very little doubt that tort reform is effective. They show clear evidence that a package of tort reform is what's required, and not individual piece-meal segments. The experience in Ohio shows that when enacted, they were effective, and when repealed, the costs rose. These State examples, I would think, would be abundant information for someone who truly wanted to understand the system.

Once again, I appreciate your help, and let me know if there is anything that I can do to help.

Sincerely,



David A. McGuire, M.D.

DAM:li

A Surgical Fix for Medical Malpractice

Reforms Work Best as a Package, Study Shows

By Jeffrey Speicher

Almost everyone agrees: The medical malpractice system in the United States serves no one well. Although a few multimillion dollar settlements draw public attention, most individuals who suffer real injury at the hands of their physician or hospital accept less than the full value of their claim—and endure long delays before receiving compensation. Those most harmed—people left with lifelong medical needs or permanent loss of income—are most likely to be underpaid.

Physicians, who in the 1950s faced a 1-in-7 chance of being sued over the course of a career, now see the odds reduced to 1-in-7 *per year*. As a result malpractice insurance premiums have skyrocketed, causing many practitioners to abandon their specialties or adopt costly defensive-medicine procedures. Many insurers, buffeted since the early '70s by recurrent cycles of higher claims frequency and larger jury awards, have withdrawn from the market, which has reduced availability of coverage and further driven up costs. And as for attorneys . . . . well, even some thoughtful legal scholars believe the system is out of whack.

According to Randall Bovbjerg of Washington's Urban Institute, author of numerous studies on medical malpractice, many of the system's problems arise from a basic difference between doctors and lawyers: Physicians think about healing injuries, attorneys about resolving disputes. Says Bovbjerg, "Doctors see medical malpractice as a way to make injured patients whole—financially as well as physically. Lawyers come into the process after a conflict arises, and their focus is on justice for their client."

Jeffrey Speicher is manager of member communications for the Academy and an editor for Contingencies.

This difference in worldview intertwines medical malpractice with the legal system. Malpractice must balance the need to compensate deserving claimants, deter future violations by making doctors more careful, and obtain justice for both patients and medical providers. All this from what Bovbjerg defines as "mainly an insurance system run by experts."

A group of those insurance experts, members of the American Academy of Actuaries, recently suggested an approach to make the system less costly. According to the Academy report, "Medical Malpractice Tort Reform: Lessons from the States," the mixed results of reform attempts by the states point the way to effective federal action.

"Congress should adopt a comprehensive approach to tort reform by adopting a package of measures," says Jim Hurley, an actuary with Tillinghast/Towers Perrin and leader of the Academy group. "Our report provides a synthesis of measures that have been effective at the state level."

A Package Deal

The California Medical Injury Compensation Reform Act (MICRA) of 1975 shows the success of the package approach. Before MICRA's adoption, the state's percentage of total U.S. loss payments was significantly higher that its proportion of the nation's physicians. By 1981, California's loss payments had dropped and were about even with its percentage of physicians. Costs continue to fall, even as California's share of physicians remains stable. Writes the Academy group: "The relationship of decreased relative costs to the timing of reform provides strong evidence for the effectiveness of the MICRA package." [See Figure 1.]

At the head of the Academy's list for lawmakers is a nationwide cap on jury awards for noneconomic damages such as pain and suffering. As evidence, Hurley points to Ohio where malpractice costs fell after a 1975 cap on damages, only to rise dramatically after court challenges led to a 1985

FIGURE 1

Malpractice Loss Payments in California as a Percentage of the U.S. Total, 1975–94

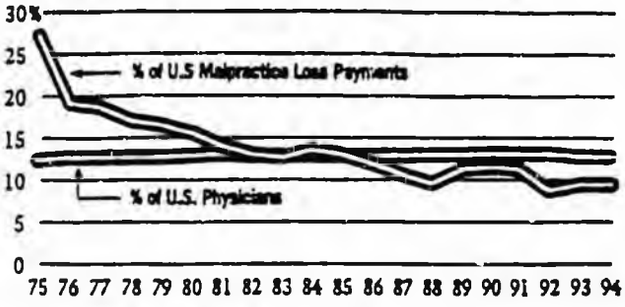
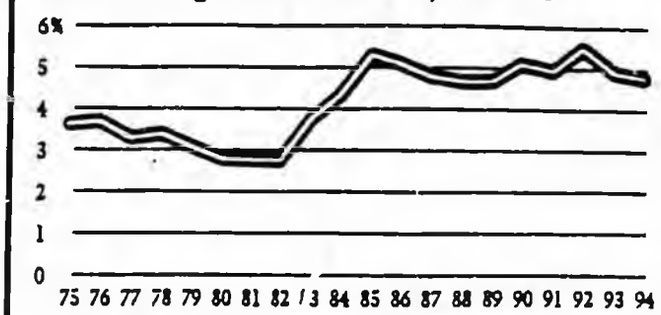


FIGURE 2

Malpractice Loss Payments in Ohio as a Percentage of the U.S. Total, 1975–94



ruling that overturned the cap. [See Figure 2.]

Such a cap should be established on a per-medical-injury basis at a level low enough to have an impact—at $250,000, for example. In addition, a mandatory collateral-source offset rule is needed to ensure that double and triple indemnification cannot be collected through multiple suits. Under this rule, a jury or judge would have to consider compensation paid from other sources.

Above all, the Academy report warns against piecemeal or faulty changes. Loss experience in New York shows that the individual tort reform measures adopted in that state over the past two decades did not improve costs relative to the U.S. total. "Poorly crafted malpractice reform—either individual measures that are too limited or broad transformations that are too far-reaching—can have unintended consequences that drive up costs," says Hurley.

Above all, the Academy report warns against piecemeal or faulty changes. "Poorly crafted malpractice reform—either individual measures that are too limited or broad transformations that are too far-reaching—can have unintended consequences that drive up costs."

The Academy's suggested approach involves what medical malpractice experts call "takeaway" reforms—preserving the current reliance on the tort system, but eliminating some of the costliest and most abused features.

Other voices in the debate, including representatives of the medical community, call for a back-to-the-drawing-board approach. Unfortunately, the design that comes back often relies on a no-fault model. While no-fault medical malpractice insurance would largely untangle the process from the legal system, no-fault often rewards individuals whose claims would otherwise be denied. Says Hurley, "No-fault would drive frequency of claims through the roof—some argue by a factor of at least two and perhaps by a factor of eight or more. It's scary how many things can be compensated under the typical no-fault system."

Frequency of claims, according to Hurley, is the key driver of costs. "Over the past two decades, the plateaus and surges of claims frequency have been difficult to anticipate and measure, but the long-term trend has been up," says Hurley. Size of claims also is an important cost factor, but dollar amounts in settlements have been increasing in a more predictable fashion over time.

No-fault also would take most cases out of court and make malpractice a transaction between insurer and claimant. Advocates claim that this would cut legal costs—which are enormous. For example, according to the Insurance Services Office, legal defense costs for insurers alone accounted for 14 percent of total tort costs in 1992.

However, experience in Florida and Virginia, where no-fault for obstetric cases is already in place, does not show substantially reduced costs or less need for legal counsel. Says Bovberg, "*Everyone* who uses the no-fault system in Florida and Virginia consults a lawyer."

Other options exist. A proposal by Jeffrey O'Connell, professor at the University of Virginia School of Law, seeks a middle way between no-fault and status quo. He would shorten the process and lower costs through an early offer of payment of noneconomic damages.

O'Connell is blunt about his disgust with the current state of affairs. "Medical malpractice is a nightmare of useless circularity," he says. However, according to O'Connell, the system is not consistently biased against defendants. Most proposed changes, on the other hand, invariably favor the defendant. Justice—as well as political reality—requires benefits for the plaintiff as well.

"Reform requires a quid pro quo," says O'Connell. "While the Academy has described quite lucidly the options for takeaway reform, such measures could not get through Congress without being so watered down as to be meaningless," says O'Connell. "True reform should involve a fair trade: making it easier for claimants to be paid, but paying them less, as under workers compensation laws."

An Offer You Can't Refuse

O'Connell's ideas have found sponsorship on Capitol Hill. A bill introduced in the 104th Congress by Sen. Mitch Mc-

Connell (R-Ky.) would create an early-offer plan for all tort claims, including medical malpractice. Under the proposal, a defendant in a personal injury claim is given the option of offering payment to the injured party within 180 days of the claim. The defendant purchases for the claimant a comprehensive major medical insurance policy that covers medical expenses, rehabilitation, and lost wages beyond monies received from collateral sources. In addition, reasonable hourly fees for the claimant's attorney would be paid.

Claimants who are offered such a settlement within 180 days of the claim would be obliged to accept. This won't get egregious medical offenders off the hook, however. A normal tort claim could be pursued for noneconomic damages, but with a higher-than-current standard of evidence.

Medical malpractice is a nightmare of useless circularity.

The plaintiff must prove that the medical provider's misconduct was wanton or intentional.

Because the defendant would not be forced to offer a settlement, physicians and their insurers could take their chances in court in the case of bogus claims. However, the risk might be too great. O'Connell cites a prominent medical malpractice defense lawyer who estimates that he'd make an early offer in 200 of the his firm's 250 current cases. So the balance is tipped toward the defendant, but not without providing a substantial benefit to the plaintiff: Timely resolution and quick settlement.

The limit on legal fees would discourage what O'Connell calls "the unconscionable abuse of the system by some members of my profession." Among other criticisms, the Virginia professor points out that contingent fees are often not truly contingent on risk. Attorneys take the same settlement percentage from open-and-shut cases as from complex cases, a practice that subsidizes work on failed litigation and which O'Connell denounces as an illegal tax on deserving claimants.

Hurley gives O'Connell's proposal a mixed review. "To its credit, the early-offer plan is not mandatory for defendants, which leaves the tort system in place to challenge claims perceived as nonmeritorious," says Hurley. He also notes that periodic insurance payment to claimants allows compensation to be made as costs are incurred, eliminating the burden of large lump-sum payouts. Also, O'Connell's plan emphasizes two fundamentals that the Academy report identified: mandatory recognition of collateral benefits and controlling noneconomic damage costs. In fact, the O'Connell plan eliminates consideration of noneconomic damages altogether unless the case goes to court.

However, Hurley notes, the periodic payment plan theoretically would have to remain in force for decades. Will claimants be out in the cold after the disability policy limits are reached, or will the insurer face unlimited exposure? Another concern: Like no-fault, the early-offer plan could give incentives for unmerited claims. Insurers may pay a doubtful claim rather than incur expensive litigation costs and risk a large judgment award. In addition to increased costs, Hurley worries about a basic question: "Is it the right message to send to individuals who think doctors and insurers have deep pockets? The system may have practical advantages, but in terms of equity, it is hardly fair."

No matter which remedy is tried, no action will slash premium costs immediately, Hurley cautions. "Tying tort reform to premium reductions, as has been done in some states, is unrealistic," he says. "There is little evidence that the cost savings can be translated directly into lower costs for health care providers. More likely, reform will slow the rate of premium cost increases."

The course of reform will be determined by elected officials at the state and federal levels. The debate will be long, no matter which option—if any—is approved. In the meantime, the cost of inaction continues to be passed on to the public in the form of increased medical fees and reduced services.

By working together in recent years, insurers and healthcare providers have begun to bring medical spending under control. Effective medical malpractice reform is one way to keep the momentum going. □

Answer to Brain Drain, page 13: The house number is 76.

Rx: radical lawyerectomy

BY PETER HUBER

Peter Huber, a senior fellow of the Manhattan Institute, is the author of *Orwell's Revenge*. E-mail address is 7264322110 @ CompuServe.com His home page is http://www.phuber.com/huber/home.html

How do you trim $20 billion a year from Medicare? That's about what it will take to stave off bankruptcy. The easiest way: amputate lawyers.

It can be done. In 1995 Congress immunized community health care centers from malpractice suits. The federal government now covers the claims incurred by these federally subsidized clinics—claims are heard by a judge, not a jury, and there are no punitive awards. The clinics save an estimated $40 million in malpractice insurance. That funds treatment for an additional half-million indigent patients.

Why stop there? The country spends about $8 billion a year treating elderly heart-disease patients. Cap awards, abolish punitive damages, implement a few other financial limits on medical malpractice suits, and you reduce hospital expenditures on cardiac patients by 5% to 9%.

If limits like these had been written into federal law, nationwide spending on cardiac disease in the late 1980s would have been $600 million a year lower. Extrapolate these results to medical spending generally—a debatable but reasonable enough basis for estimation—and you find that tort reform would save the country as a whole well over $50 billion a year.

But how much more negligent medicine would that encourage? How many more cardiac patients would die? How many more would get inferior treatment and suffer a second heart attack as a result? The best estimate: None at all. Nor would any true victims of negligence go uncompensated. The reforms we're talking about here don't eliminate liability, they just place sensible limits on windfalls and double-dipping. They are in fact already part of the law in many states.

The numbers I cite come from a very important paper, "Do Doctors Practice Defensive Medicine?" written by Daniel Kessler and Mark McClellan, both of Stanford University. The paper appeared in the May 1996 *Quarterly Journal of Economics*.

The authors analyze data on all elderly Medicare beneficiaries hospitalized for serious heart disease in 1984, 1987 and 1990. The study correlates spending for medical care with state tort laws. About three patients in five were treated in states that placed no direct limits on rights to sue. But two in five were hospitalized in states that did. Direct liability limits have clear, strong effects on medical spending, the study concludes.

But that's just the first half of the story. Previous studies—most notably one conducted by Harvard Medical School in 1990—asked panels of doctors to review patient files and attach subjective judgments about adverse outcomes and deficient treatment. Much of the "negligence" identified in this way had no significant impact on the ostensible victim. Studies like this didn't reveal much about the consequences of malpractice litigation because they didn't pin down the consequences of malpractice itself.

With elderly cardiac patients there are objective standards for assessing ineffective care: Patients die, or they end up back in a cardiac ward not long after discharge.

Medical tort reform would save the country $50 billion a year.

Analyzing the record on these solid criteria, Kessler and McClellan reach a second, clear conclusion: None of the liability reforms studied "led to any consequential differences in mortality or the occurrence of serious complications."

If liability doesn't force doctors to provide better treatment, why does it boost the cost of medicine so sharply? Unlimited liability gets you more medicine, not better. Lawyer-shy doctors administer tests willy-nilly, and hand off patients to specialists with great alacrity. They know that the surest way to avoid liability is to dispatch your problem patient to someone else—a lab technician or another doctor. This can go on indefinitely. It's very expensive. And medically useless.

Congress has generally left medical malpractice reform to the states. But when Medicare and Medicaid patients sneeze, it's the federal Treasury that catches cold. No principle of federalism requires federal taxpayers in Montana to pay for Mississippi medicine ordered up by the lawyers there, not the doctors or patients.

The best place for Congress to balance the Medicare budget is on the backs of trial lawyers. These lawyers are not old, not poor and not needed.

Fall
1996

ISSUE BRIEF

Medical Malpractice Tort Reform: Lessons from the States

The cost of insuring physicians against medical malpractice claims has increased dramatically in recent years. Skyrocketing premium costs and a string of highly publicized lawsuits have led many physicians to curtail certain high-risk procedures. By reducing the availability of important medical services, this practice of defensive medicine could have serious public-health consequences. In addition, increased malpractice insurance expenses are passed on to patients and health plans, thus fueling medical inflation.

To combat these ill effects, several states have adopted reforms designed to reduce the cost of medical malpractice insurance. More recently, Congress has attempted to follow the initiative of the states but has been unable to enact comprehensive medical malpractice tort reforms into law.

To date, state efforts have enjoyed varying degrees of success in reducing medical malpractice insurance rates. What can be learned from the experience of the states? How can these conclusions be applied at the federal level? The American Academy of Actuaries Work Group on Medical Malpractice Reform has studied the impact of state reforms and offers its comments to state and federal officials who are considering national tort reform.

Findings

Any federal medical malpractice tort reform effort should be based on a *package* of measures that have exhibited some success in stabilizing medical malpractice costs. The most effective elements of such a package are a cap on noneconomic damages and an offset for collateral payments from other sources. These reforms would limit the financial exposure of health-care providers to lawsuits and would ensure that damages could not be collected through multiple suits. While there are significant limitations on data used to study specific tort reforms, persuasive results can be observed by looking at medical malpractice costs in certain states over time and relating that experience to the timing of particular tort reform measures.

In the following comparison of cost levels in three states that have enacted tort reform measures, paid losses of the individual states as a percentage of the U.S. total are used as the measure of costs. The percentage of physicians in each state as a total of U.S. physicians is used as a reasonable benchmark. The degree to which the percentage of paid losses differs from the percentage of physicians measures the effectiveness of the reforms. All else being equal, the relative cost percentages of paid medical malpractice claims should remain constant over time. Any observed changes in a state's relative cost levels provide an indication of the effectiveness of tort reform. The three states studied are California, New York, and Ohio.

The American Academy of Actuaries is the public policy organization for the actuarial profession, providing unbiased actuarial information to elected officials and regulators.

Members of the Work Group on Medical Malpractice Reform: James D. Hurley, ACAS, MAAA; William E. Burns, ACAS, MAAA; Linda A. Dambacher, FCAS, MAAA; Allan C. Lyle, FCAS, MAAA; and Edward M. Wrobel Jr., FCAS, MAAA.

AMERICAN ACADEMY of ACTUARIES

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Ken Krehbiel, Director of Communications
David F. Rivera, Legislative and Regulatory Specialist
Jeffrey Speicher, Manager of Member Communications

• California. Since the Medical Injury Compensation Reform Act (MICRA) package of reforms was enacted in 1975, medical malpractice costs have fallen substantially as a percentage of the U.S. total.

• New York. Individual reform measures were adopted in 1975, 1981, 1985, and 1986. No observable improvement in the state's relative costs has resulted. The New York reforms did not include a cap on damages.

• Ohio. Reforms enacted in 1975 included a cap on damages. The cap was overturned in 1985, after which costs rose dramatically and have remained high.

California

The California loss data (Exhibit 1) illustrate that while the state's proportion of the U.S. physician population has remained relatively stable, its per-

Exhibit 1
Malpractice Loss Payments in California as a Percentage of the U.S. Total, 1975–94

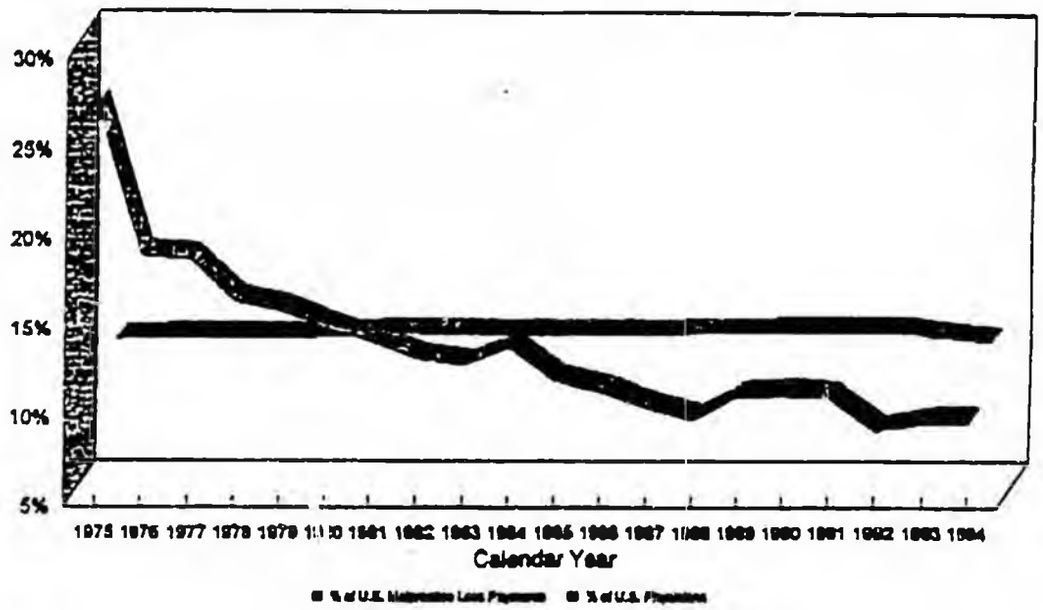
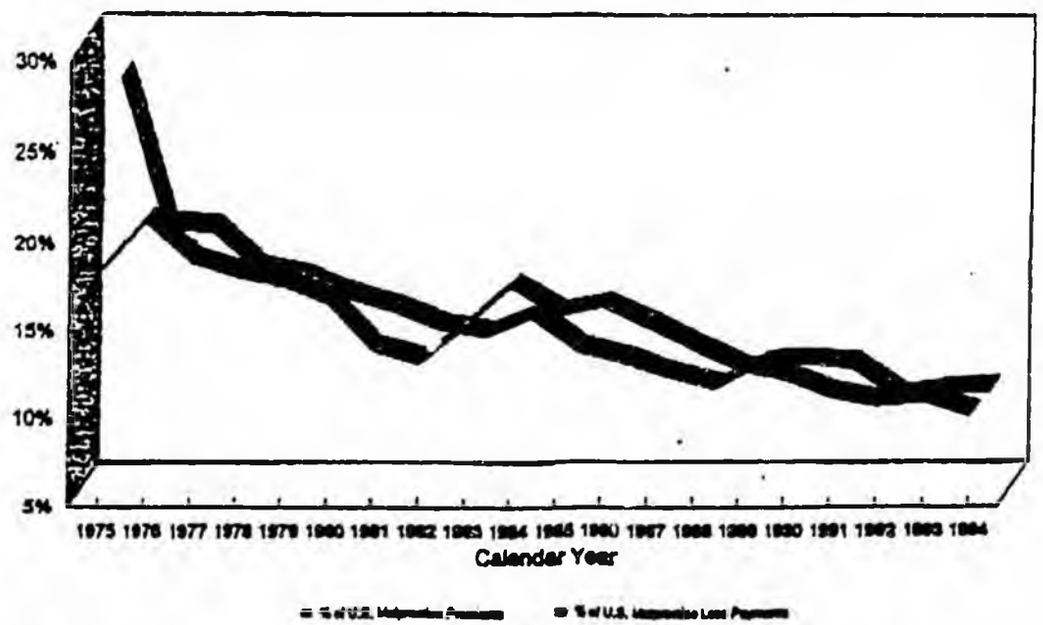


Exhibit 2
Malpractice Premiums and Malpractice Loss Payments in California as a Percentage of the U.S. Total,



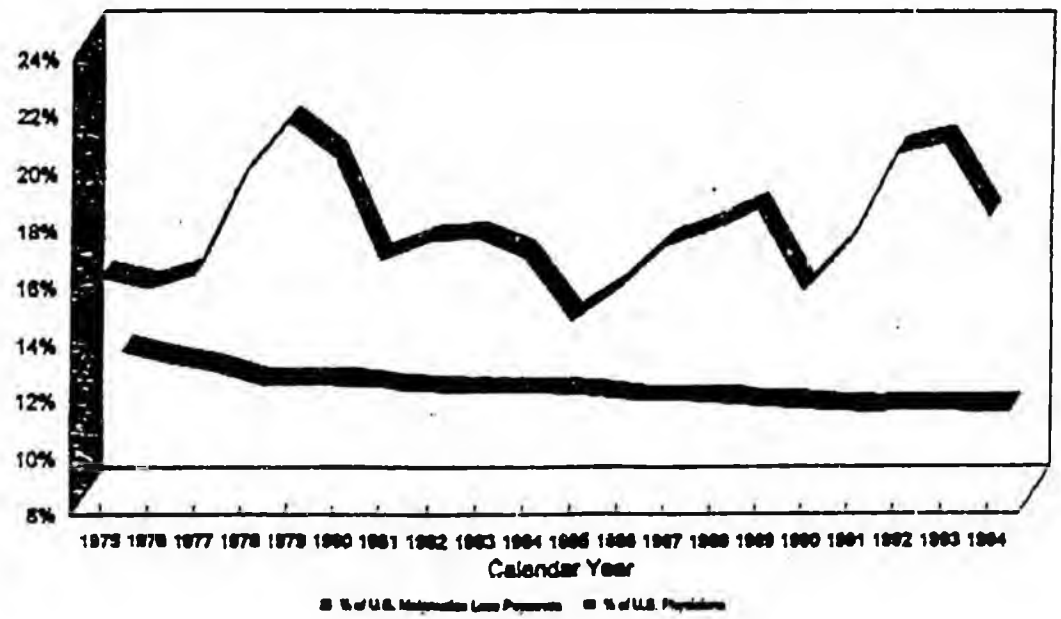
centage of loss payments has dropped dramatically since enactment of the MICRA package of tort reforms. Before MICRA's adoption in 1975, California's percentage of loss payments was significantly higher than its proportion of physicians. By 1981, California's loss payments had dropped and were about even with its percentage of physicians. Since that date, California has continued to benefit from MICRA: Costs continue to drop as a percentage of the U.S. total, even as the percentage of physicians remains stable. Although other factors affect these data, the relationship of decreased relative costs to the timing of reform provides strong evidence for the effectiveness of the MICRA package.

Many opponents of tort reform argue that insurance premiums do not drop after medical malpractice reform. Indeed, costs and premiums normally rise with inflation, and tort reform may only slow the increases. However, the California data show that premiums declined as losses declined. Exhibit 2 compares the paid loss data from Exhibit 1 with California premiums as a percentage of the total U.S. medical malpractice premiums. Although year-to-year fluctuations do occur, premiums have fallen in proportion to the decline in losses. Competition tends to keep companies at an appropriate profit margin, and any extra profits are normally short-lived.

New York

The New York loss experience is shown in Exhibit 3. It shows that the individual tort reform measures implemented in New York did not improve New York's experience relative to that of other states. New York's loss payment percentage does not show any observable pattern of decline or improvement over the 19-year period, despite the various tort reform measures adopted. The New York reforms did not include a cap on damages and were enacted in piecemeal fashion. Therefore, this result supports the merits of a cap on damages and the concept of a package of reforms.

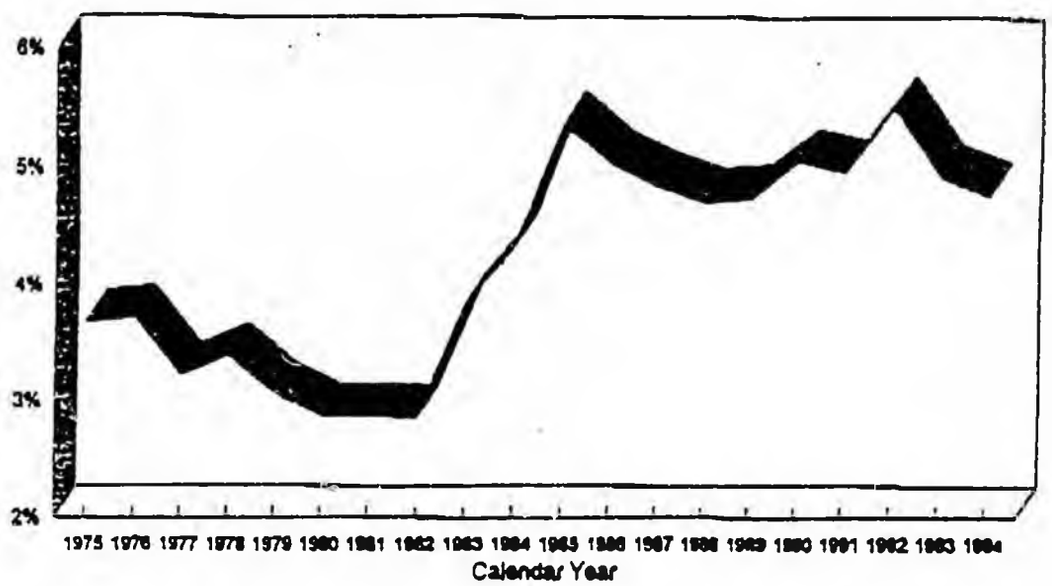
Exhibit 3
Malpractice Loss Payments in New York as a Percentage of the U.S. Total, 1975–94



Ohio

The final example is Ohio, with data presented in Exhibit 4. The data show a gradual decline in costs following tort reform in 1975. The Ohio cap on damages came under court challenge in 1982, resulting in sharp increases that reached a peak in 1985 when the cap was finally overturned. Since 1985, costs in Ohio have remained high, with no signs of decreasing. Again, the data appear to support a tort reform package and the specific benefit of a cap on noneconomic damages.

Exhibit 4
Malpractice Loss Payments in Ohio as a Percentage of the U.S. Total, 1975–94



Conclusions

California's experience indicates that properly implemented medical malpractice tort reform can reduce the cost of medical malpractice insurance. After reviewing several states' experience with medical malpractice tort reform and examining studies on the issue, the Academy work group has concluded the following:

- a package of reforms is more likely than individual reforms to achieve savings in malpractice losses and insurance premiums, and
- key among the reforms in the package are a cap on noneconomic awards and a mandatory collateral-source offset rule.

For reform to be effective in reducing costs, the cap on noneconomic awards should be established on a per-medical-injury basis at a level low enough to have an impact (e.g., $250,000). In addition, a mandatory collateral-source offset rule is needed to ensure that double and triple damages cannot be collected through multiple suits. Under this rule, each suit would have to consider damages already paid from other sources.

Although these reforms have been successful in reducing the cost of medical malpractice insurance, elected officials and regulators must still consider the effects of medical malpractice reform on physicians, consumers, health plans, and other interested parties. When considering medical malpractice reform, state and federal officials should weigh the impact on society as a whole and strive for a balanced, comprehensive solution.

Municipality of Anchorage

P.O. Box 196650
Anchorage, Alaska 99519-6650
Telephone: (907) 343-4545

Rick Mystrom, Mayor

OFFICE OF THE MUNICIPAL ATTORNEY

March 12, 1997

The Honorable Gene Therrault
STATE CAPITAL, Room 511
Juneau, Alaska 99801-1182

Re: SSHB58 - Tort Reform Legislation

Dear Representative Therrault:

The Municipality of Anchorage is self insured for tort claims. As such, every dollar spent on the defense and resolution of tort claims is paid directly by the taxpayers. Despite earlier tort reform, the Municipality of Anchorage continues to be faced with frivolous lawsuits and in a climate of a back logged court system and increasing defense costs. In particular, there has been a significant increase in frivolous lawsuits against the Anchorage Police Department and individual officers. When the officers are pulled away from their important duties of investigating, fighting, and prosecuting crime to defend against these lawsuits, the safety of the people of this city and state is jeopardized.

For these reasons, the Municipality of Anchorage supports SSHB58, tort reform legislation, which would encourage the efficiency of the Alaska civil justice system by discouraging frivolous litigation while at the same time protecting injured Alaskans' rights to just compensation for injuries and damages caused by the negligent acts of others.

Anchorage supports the comprehensive changes set forth in SSHB58. In particular, those portions of the legislation that the Municipality would like to see implemented are as follows:

1. Section 7. AS 09.10.070(a) which would amend the statute of limitations for lawsuits arising out of damage to personal property to two years instead of the current six years. It is difficult if not impossible to defend against stale claims when memories have faded, personnel have changed, witnesses are gone, and evidence is lost. The Anchorage Police Department, in particular, has been faced with having to defend such claims due to the large amount of property handled by it in the course of a criminal investigation. The current six year statute actually encourages a delay in the bringing of such an action since the current prejudgment interest at 10.5% could potentially result in a windfall to the claimant.

2. Section 8. AS 09.10.070 Non-economic damages. The changes proposed to this section are fair and would result in reasonable compensation to Alaskans who are injured by the negligent acts of others. The current law results in excessive damage claims that are typically unsupported by facts.

3. Section 9. AS 09.17020 Punitive damages. The Alaska Supreme Court has ruled that municipalities are exempt from liability for punitive damages. In an effort to circumvent this law, plaintiffs' attorneys attempt to avoid Anchorage's immunity for punitive damages by suing employees individually and alleging punitive damages against them. There has been a significant increase in such claims in recent years. A legislative change which would streamline litigation by preventing meritless punitive damage claims is strongly supported by Anchorage.

4. Section 18. AS 09.17.080(c) Anchorage supports changes to the current law that would allow any person responsible for damages to be assessed a percentage of fault regardless of whether the person is named in a lawsuit. Anchorage has often found itself in a position of acting as a third-party plaintiff to bring the appropriate parties into a lawsuit for a fair determination of fault. This is expensive and time consuming and the proposed legislation would obviate this need and would reduce the costs of defending litigation while at the same time ensuring a just result.

5. Section 36. AS 09.65.210 Anchorage strongly supports repeal and reenactment of AS 09.65.210 to eliminate potential recovery of damages for personal injury or death if the injury or death occurred while the person was engaged in the commission of a felony. Further, since alcohol and other controlled substances have become an increasing problem in Alaska and across the country, Anchorage encourages the passage of both sections AS 09.65.210(4) and (5) which would reduce or eliminate the need to defend against claims brought by impaired persons who have substantially contributed or caused their own injuries.

Finally, Anchorage supports changes to the law that it would allow an offset for collateral benefits received by a party to avoid a double recovery, the proposed changes to prejudgment interest to avoid the windfall that currently exists regarding prejudgment interest, and more "teeth" in the present offer of judgment law to encourage early and prompt resolution of claims.

On behalf of the Municipality of Anchorage, the Law Department and the Risk Management Department encourage the passage of SSHB58. I would happy to discuss with you more detail how the proposed changes would impact litigation in this State, and in particular, would impact litigation faced by Anchorage on a day to day basis. Thank you for your attention to these matters.

Very truly yours,

Stephanie Galbraith Moore
Assistant Municipal Attorney

cc: Mary K. Hughes, Municipal Attorney
Harry Sjoberg, Risk Manager

Resource Development Council for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
(907) 276-0700 Fax: (907) 276-3887 e-mail: rdc@acsalaska.com

March 10, 1997

Representative Gene Therriault, co-Chair
Representative Mark Hanley, co-Chair
House Finance Committee
State Capitol
Juneau, AK 99801

Dear Representatives Therriault and Hanley:

RE: Support for CSHB 58, Tort Reform legislation.

The Resource Development Council supports CSHB 58 and urges its passage. RDC has long supported liability reform efforts which will improve Alaska's business climate for natural resource development.

RDC is a statewide, membership-funded, non-profit, pro-development organization working on behalf of Alaska's basic industries, including oil and gas, mining, timber, fishing and tourism. RDC's membership, numbering in the thousands, includes the aforementioned industries, as well as the sectors which support those industries, such as construction, labor and other technical service providers, individuals, Native corporations, and a wide variety of Alaska communities.

Sincerely,

RESOURCE DEVELOPMENT COUNCIL
for Alaska, Inc.

Becky L. Gay
Executive Director

STRUCTURED FINANCIAL ASSOCIATES, INC.®

NSSTA National Structured Settlements Trade Association Member

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March 10, 1997

Representative Gene Therriault
Co-Chairman
House Finance Committee
Room 511
State Capitol
Juneau, AK 99801-1182

Re: HB58

Via Fax: 1-907-465-3884

Dear Representative Therriault:

I wish to comment on the proposed legislation (HB58) that is very much needed in this State for reducing the cost and time of litigation. I fully support the bill in general, and the following section in particular.

1. SECTION 12: 09.17.404(d) This language is extremely important as proposed . The reasons are as follows:

a. A defendant **can now make an offer** of periodic payments to replace the future damages as they would have occurred with cost of living adjustments. Section 104(a)(2) of the Internal Revenue Code allows those payments **to flow exempt from Gross income**.

b. A plaintiff should be **demonstratively advised by counsel** of his or her options to either receive a partial lump sum, future lump sums and future periodic payments on a tax exempt basis under Section 104(a)(2).

c. This eliminates the potential dissipation of the award and avoids the "Risks of Mismanagement". Industry statistics show that about 25-30% of all accident victims completely dissipate their judgments or settlement within two months of recovery, and 90% if them spend it all within five years. (The Rutter Group, Ltd. from Flahavan, Rea, Kelly & Tener, "California Practice Guide: Personal Injury" TRG 1992 Ch.4)

d. More importantly it allows a person to retain pride and dignity in his or her life, and it eliminates dependence on public assistance programs, as the funds cannot be dissipated through imprudent investments and or spending sprees..

e. Most importantly it makes it highly likely that the injured party is made aware of his or her choices. Currently it is estimated that about 95% of injured parties are not advised or properly advised on this issue. I most cases it could amount from thousands to millions of dollars in increased tax benefits. It also would deter potential plaintiff legal malpractice cases in which the injured party was not demonstratively advised of this choice.

2. SECTION 13: 09.17.404(e) This section is excellent as it allows claimants to choose between a "Structured Settlement" funded by United States government obligations or an "Annuity" from a financially sound life insurance company or combination of both. (See Attached Rating Agency Reviews)

Additionally it mandates diversification from affiliated companies, allows potential for independent payment choice, prohibits insurance companies from placing these in house with their own Life Company, and allows placement with an independent carrier in addition to guarantees by a second non affiliated company.

I applaud the action on this bill to make changes in our laws and our courts which we own to facilitate a better system that currently is dysfunctional.

In the event you may have any questions please call at any time.

Very Truly

Al Tamagni Sr.
Settlement Consultant

encl/ratings

ANCHORAGE, ALASKA OFFICE: 1205 EAST INTERNATIONAL AIRPORT ROAD • SUITE 205 • ANCHORAGE, ALASKA 99518
PHONE: 907-562-7421 • FAX 907-562-1348 • (WITHIN ALASKA: 800-478-1973)

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ADVANTAGES TO THE CLAIMANT/PLAINTIFF:

1. Income — tax-free guaranteed payments;*
2. Avoids risk of mismanagement — insurance industry statistics show that about 25 to 30% of all accident victims completely dissipate their judgments or settlements within two months of recovery, and 90% of them spend it all within five years;**
3. Avoids expense and worry with regard to financial loss — provides a secure, low-risk source of money;
4. Convenience of regular payments designed to meet the individual plaintiff's needs;
5. Claimant can receive more money over time than a lump sum settlement;
6. Competitive with other rates of return — see Internal Rate of Return illustration which shows before tax rate-of-return required to match the benefits offered by a structure;
7. Helps avert risk, expense and delay of going to trial;
8. Transfers the risk of outliving one's income to a life insurance company;
9. Benefits may be made higher if injury decreased life expectancy.

ADVANTAGES TO THE DEFENDANT/INSURER:

1. Earlier settlements — including assistance by structured settlement brokers with negotiations and settlement documents;
2. Reduced litigation costs;
3. May assign future liability;
4. Avoids risk and expense of a jury trial;
5. Can make low policy limits more attractive by making payments over time.

* Check with your own tax advisor for confirmation

** The Rutter Group, Ltd. from Fleisman, Rea, Kelly & Tener, "California Practice Guide: Personal Injury" (TRG 1992) Ch. 4

COMP-PARE

1995 Life Insurance Company Rating Definitions

A. M. BEST RATINGS EXPLANATIONS

A++ and A+ (Superior)
Assigned to companies which, in our opinion, have demonstrated superior overall performance when compared to the standards established by the A. M. Best Company. A++ and A+ companies have a very strong ability to meet their obligations to policyholders over a long period of time.

A and A- (Excellent)
Assigned to companies which, in our opinion, have demonstrated excellent overall performance when compared to the standards established by the A. M. Best Company. A and A- companies have a strong ability to meet their obligations to policyholders over a long period of time.

B++ and B+ (Very Good)
Assigned to companies which, in our opinion, have demonstrated very good overall performance when compared to the standards established by the A. M. Best Company. B++ and B+ companies have a good ability to meet their obligations to policyholders over a long period of time.

B and B- (Adequate)
Assigned to companies which, in our opinion, have demonstrated adequate overall performance when compared to the standards established by the A. M. Best Company. B and B- companies generally have an adequate ability to meet their obligations to policyholders, but their financial strength may be vulnerable to unfavorable changes in underwriting or economic conditions.

C++ and C+ (Fair)
Assigned to companies which, in our opinion, have demonstrated fair overall performance when compared to the standards established by the A. M. Best Company. C++ and C+ companies generally have a current ability to meet their obligations to policyholders, but their financial strength is vulnerable to unfavorable changes in underwriting or economic conditions.

C and C- (Marginal)
Assigned to companies which, in our opinion, have demonstrated marginal overall performance when compared to the standards established by the A. M. Best Company. C and C- companies have a current ability to meet their obligations to policyholders, but their financial strength is very vulnerable to unfavorable changes in underwriting or economic conditions.

D (Very Vulnerable)
Assigned to companies which, in our opinion, have demonstrated poor overall performance when compared to the standards established by the A. M. Best Company. D companies have a current ability to meet their obligations to policyholders, but their financial strength is extremely vulnerable to unfavorable changes in underwriting or economic conditions.

E (Under State Supervision)
Assigned to companies which are placed by a state insurance regulatory authority under any form of supervision, control or restraint, such as a conservatorship or rehabilitation, but does not include liquidation. May be assigned to a company under a cease and desist order issued by a regulator from a state other than its state of domicile.

F (In Liquidation)
Assigned to companies which have been placed under an order of liquidation by a court of law or whose owners have voluntarily agreed to liquidate. Note: Companies that voluntarily liquidate or dissolve their charters are generally not insolvent.

NA-1 (Limited Data Filing)
Assigned primarily to small companies exempt from filing the standard NAIC annual statement. These company reports are based on selected financial data obtained by the A. M. Best Company.

NA-2 (Less than Minimum Size)
Assigned to companies that file the standard NAIC annual statement but do not meet our minimum size requirement. To assure reasonable financial stability, we require a company to have a minimum policyholders' surplus of $2.0 million for assignment of an initial letter rating. Exceptions include: a company that is virtually reinsured by a Best's rated affiliated company; is a member of a group participating in a business pooling arrangement; or is a company writing stable lines of business and has demonstrated a long history of above average performance when compared to Best's Rating standards. Companies assigned to the NA-2 rating category are eligible for assignment of Best's Financial Performance Rating (FPR).

NA-3 (Insufficient Operating Experience)
Assigned to companies which meet, or are anticipated will shortly meet, our minimum size requirement, but have not accumulated five consecutive years of representative operating experience. This requirement pertains to the age of the company's financial performance and not the actual experience of its management and includes consistency in both the types of coverages written and the relative volume of premium writings. Additional years of operating experience may be required if a company exhibits substantial premium growth or changes in product mix. NA-3 rated companies are eligible for assignment of Best's Financial Performance Rating (FPR).

NA-4 (Rating Procedure Inapplicable)
Assigned to companies whose business and/or operations are such that our normal rating procedure does not properly

apply. Examples are as follows: companies writing lines of business not common to the property/casualty or life/health fields; companies writing financial guaranty insurance; companies retaining only a small portion of their gross premiums written; companies which have discontinued writing new and renewal business and have a defined plan to run-off existing contractual obligations; companies that are effectively dormant or have no significant premium volume or in-force business; companies that are true captives; companies discounting loss reserves to the extent that the anticipated future investment income represents a significant part of their policyholders' surplus; and companies not soliciting business in the United States. This rating is also assigned to the life/health companies whose sole operation is the acceptance of business written directly by a parent, subsidiary or affiliated insurance company, or those writing predominantly property/casualty insurance under a dual charter.

NA-5 (Significant Change)
Assigned to previously letter-rated companies which experience a significant change in ownership, management or book of business, or other event which affects the nature of their operations and makes it impossible to render a rating opinion. Depending on the change, our rating procedure may require one to five years before the company is eligible for a rating.

NA-6 (Reinsured by Unrated Reinsurer)
Assigned to companies which have a substantial portion of their book of business reinsured by, or have reinsurance recoverables from, non-Best's rated reinsurers which represent a substantial portion of their policyholders' surplus. Exceptions are non-Best's rated foreign reinsurers that comply with our reporting requirements and satisfy our financial performance standards.

NA-7 (Below Minimum Standards)
Replaced by the Best's Rating of D.

NA-8 (Incomplete Financial Information)
Assigned to companies eligible for a ratings but which failed to submit complete financial information for the five-year period under review, including all domestic insurance subsidiaries in which the company's ownership exceeds 50%.

NA-9 (Company Request)
Assigned to companies eligible for ratings, but which request that the rating not be published because they disagree with our rating.

NA-10 (Under State Supervision)
Replaced by the Best's Rating of either E or F

NA-11 (Rating Suspended)
Assigned to previously rated companies which have experienced sudden and significant events affecting their financial position and/or operating performance whose impact cannot be evaluated due to a lack of timely or adequate information.

STANDARD & POOR'S CLAIMS-PAYING ABILITY RATING DEFINITIONS

AAA
Insurers rates "AAA" offer superior financial security on both an absolute and relative basis. They possess the highest degree of safety and have an overwhelming capacity to meet policyholders obligations.

AA
Insurers rates "AA" offer excellent financial security, and their capacity to meet policyholder obligations differ only on a small degree from the insurers rates "AAA".

A
Insurers rates "A" offer a strong financial security, but their capacity to meet policyholder obligations is somewhat more susceptible to adverse changes in economic or underwriting conditions than more highly rated insurers.

BBB
Insurers rated "BBB" offer good financial security, but their capacity to meet policyholder obligations is considered more vulnerable to adverse economic or underwriting conditions than that of more highly rated insurers.

BB
Insurers rated "BB" offer adequate financial security for the "short-tail" or short-term policies, but their capacity to meet policyholder obligations is considered vulnerable to adverse economic conditions or underwriting conditions and may not be adequate for "long-tail" or long-term policies.

B
Insurers rated "B" are currently able to meet policyholder obligations, but their vulnerability to adverse economic or underwriting conditions is considered high.

CCC
Insurers rated "CCC" are vulnerable to adverse economic or underwriting conditions to the extent that their continued capacity to meet policyholder obligations is highly questionable unless a favorable environment prevails.

R (Regulatory Action)
As of the date indicated, the insurer is under supervision of insurance regulators following rehabilitation, receivership, liquidation, or any other action that reflects regulatory concern about the insurer's financial condition. Information on this status is provided by the National Association of Insurance Commissioners and other regulatory bodies. Although believed to be accurate, this information is not guaranteed. The R rating does not apply to insurers subject only to non-financial actions, such as market conduct violations.

"Quantitative" Ratings
A 'q' subscript indicates that the rating is based solely on quantitative analysis of publicly available data. In the case of claims-paying ability ratings, this is the statutory financial data filed with the National Association of Insurance Commissioners. These ratings are issued for each insurer on a standalone basis without consideration for strength or weakness that might be added by a parent or affiliated companies. These new ratings which were effective July 31, 1995 replace Qualified Solvency Ratings, which are being discontinued.

MOODY'S CLAIMS-PAYING RATINGS DEFINITIONS

Numeric modifiers are used to refer to the ranking within the groups below - one being the highest and three being the lowest. However, the financial strength of companies within a generic rating symbol is broadly the same.

Aaa
Highest quality.

Aa
High quality by all standards; long-term risks somewhat larger.

A
Upper medium grade; adequate security.

Baa
Medium grade; neither highly protected nor poorly secured.

Ba
Judged to have speculative elements.

B
Lack characteristics of the desirable investment.

Caa
May be in default or there may be present elements of danger with respect to principal or interest.

Ca
Speculative in a high degree; often in default.

C
Lowest rated class.

DUFF & PHELPS CLAIMS-PAYING ABILITY RATINGS DEFINITIONS

AAA
Highest claims paying ability. Risk factors are negligible.

AA+, AA, AA-
Very high claims paying ability. Protection factors are strong. Risk is modest, but may vary slightly over time due to economic and/or underwriting conditions.

A+, A, A-
High claims paying ability. Protection factors are average and there is an expectation of variability in risk over time due to economic and/or underwriting conditions.

BBB+, BBB, BBB-
Below average claims paying ability. Protection factors are average. However, there is considerable variability in risk over time due to economic and/or underwriting conditions.

BB+, BB, BB-
Uncertain claims paying ability and less than investment grade quality. However, the company is deemed likely to meet these obligations when due. Protection factors will vary widely with changes in economic and/or underwriting conditions.

B+, B, B-
Possessing risk that policyholder and contractholder obligations will not be paid when due. Protection factors will vary widely with changes in economic and/or underwriting conditions, or company fortunes.

CCC
There is a substantial risk that policyholder and contractholder obligations will not be paid when due. Company has been or is likely to be placed in state insurance department supervision.

THE ALLIANCE
4220 'B' Street, Suite 200 • Anchorage, Alaska 99503-5911
Phone (907) 563-2226 • Fax (907) 561-8870

Transmittal by Fax

March 12, 1997

Representative Gene Therriault
Finance Co-Chairman
Alaska State Legislature
Room 511
Juneau, AK 99801

Dear Representative Therriault:

The Alaska Support Industry Alliance is a non-profit trade association representing a broad-based membership doing business within the oil, gas and mining industries. Our mission is to foster and promote the safe and environmentally sound development of natural resources, and to enhance and stimulate the business climate for our 300+ members. Comprised of oilfield service companies, transportation, wholesale and retail sales, professional services, and private citizens, The Alliance is one of the most effective and dominant voices for business in Alaska.

As a state, we are competing for investment dollars on a global basis. We must continue to send the message to potential investors that Alaska is "Open for Business". We can do this by stabilizing the economic climate through fiscal restraint and by stabilizing the legal climate through comprehensive tort reform.

The cost of litigation and liability insurance has a dramatic impact on businesses -- both small and large. The ever-increasing product liability, personal injury suits, and unpredictability of damage awards have caused costs to soar. Tort reform legislation will help control these expenditures while assuring appropriate compensation for persons injured through the fault of others.

Government officials must continue to search for ways to reduce the cost of doing business in Alaska, including a comprehensive review of liability laws affecting the economics of business. We believe House Bill #58, sponsored by Representative Brian Porter, addresses this critical problem with a fair and equitable solution. The Alliance strongly supports HB #58, and ask the House Finance Committee to pass this legislation out of committee, and on to the House floor.

Sincerely,

Karen Cowart

Karen Cowart
General Manager

cc: Representative Brian Porter

THE ALLIANCE
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TESTIMONY IN SUPPORT OF HOUSE BILL 58
PRESENTED BY KAREN COWART, GENERAL MANAGER
MARCH 13, 1997

THANK YOU MR. CHAIRMAN AND COMMITTEE MEMBERS FOR PROVIDING THIS OPPORTUNITY TO SPEAK IN SUPPORT OF HOUSE BILL # 58. MY NAME IS KAREN COWART. I AM THE GENERAL MANAGER OF THE ALASKA SUPPORT INDUSTRY ALLIANCE. THE ALLIANCE IS A NON-PROFIT TRADE ASSOCIATION REPRESENTING A BROAD-BASED MEMBERSHIP ENGAGED IN BUSINESS WITHIN THE OIL, GAS AND MINING INDUSTRIES. OUR MISSION IS TO FOSTER AND PROMOTE THE SAFE AND ENVIRONMENTALLY SOUND DEVELOPMENT OF NATURAL RESOURCES, AND TO ENHANCE AND STIMULATE THE BUSINESS CLIMATE FOR OUR 300+ MEMBERS. WE ARE COMPRISED OF OILFIELD SERVICE COMPANIES, TRANSPORTATION, WHOLESALE AND RETAIL SALES, PROFESSIONAL SERVICES, AND PRIVATE CITIZENS.

OUR 1997 LEGISLATIVE PRIORITIES CONTAIN ONLY THREE ISSUES:

- CONTINUE TO CLOSE ALASKA'S FISCAL GAP;
- SUPPORT LEGISLATION THAT PROMOTES SOUND DEVELOPMENT OF OIL AND GAS; AND
- SUPPORT THE PASSAGE OF COMPREHENSIVE TORT REFORM

FOR REVIEW, I HAVE ATTACHED A COPY OF OUR LEGISLATIVE PRIORITIES PAMPHLET.

WE ARE COMPETING IN TODAY'S MARKET ON A GLOBAL BASIS. IF ALASKA AND OUR INDEPENDENT BUSINESSES ARE TO MEET THE DEMANDS OF THIS GLOBAL ECONOMY, WE BELIEVE WE MUST STABILIZE OUR ECONOMY THROUGH FISCAL RESTRAINT, A BALANCED BUDGET AND A HEALTHY ENVIRONMENT FOR BUSINESS. COMPREHENSIVE TORT REFORM LEGISLATION IS A CRITICAL COMPONENT NECESSARY FOR OUR FUTURE.

THE COST OF LITIGATION AND LIABILITY INSURANCE HAS A DRAMATIC IMPACT ON BUSINESS- BOTH LARGE AND SMALL. THE EVER-INCREASING PRODUCT LIABILITY, PERSONAL INJURY SUITS , AND UNPREDICTABILITY OF DAMAGE AWARDS HAS CAUSED COSTS TO SOAR.

OVER THE YEARS THE TORT LITIGATION SYSTEM HAS BEEN INCREASINGLY CRITICIZED BY MANY PUBLIC AND PRIVATE SECTORS. EFFORTS TO INSTITUTE CHANGE TO REDUCE OPPORTUNITIES FOR ABUSE, HOWEVER, HAVE
BEEN HINDERED FEARING A CHANGE IN THE SYSTEM WOULD NOT ALLOW JUST COMPENSATION FOR INJURY.

THE ALLIANCE BELIEVES TORT REFORM SHOULD:

- LIMIT NON ECONOMIC DAMAGES.
- PROHIBIT PUNITIVE DAMAGES UNLESS MALICE OR CONSCIOUS ACTS SHOWING DELIBERATE DISREGARD FOR ANOTHER PERSON CAN BE SHOWN.
- LIMIT PUNITIVE DAMAGES.
- ALLOW JURIES TO BE INFORMED ABOUT AWARDS ALREADY COLLECTED BY CLAIMANTS FOR THE SAME INJURIES.
- ALLOW COURTS TO DECIDE EACH PARTY'S SHARE OF DAMAGES.
- PROVIDE MONETARY SANCTIONS AGAINST ANY ATTORNEY IN CIVIL CASES FOR FILING FRIVOLOUS, UNNECESSARY, AND/OR LEGALLY DEFICIENT PLEADINGS.
- BAR DAMAGE SUITS IF INJURIES WERE RECEIVED WHILE COMMITTING A FELONY.

- ESTABLISH GUIDELINES FOR THE QUALIFICATION OF EXPERT WITNESSES.

WE BELIEVE THE ABILITY TO RECOVER COSTS AND DAMAGES, TO BE MADE WHOLE, SHOULD BE PROTECTED. PUNITIVE DAMAGES SHOULD BE CAPPED BY A MULTIPLE OF ACTUAL DAMAGES, AND ASSESSED WHEN WILLFUL NEGLECT OR MALICIOUS INTENT IS PROVEN. IF THE INTENT OF PUNITIVE DAMAGES IS TO PUNISH RATHER THAN REWARD, IT WOULD FOLLOW THAT A PORTION OF THE PUNITIVE DAMAGES COULD BE ALLOCATED TO THE STATE.

WE AGREE WITH THE GOVERNOR THAT ALASKA NEEDS TO SEND THE GLOBAL MESSAGE THAT WE'RE "OPEN FOR BUSINESS". THE ALLIANCE BELIEVES COMPREHENSIVE TORT REFORM IS A POSITIVE STEP TOWARD IMPROVING OUR BUSINESS ENVIRONMENT IN ALASKA.

THE ALASKA SUPPORT INDUSTRY ALLIANCE STRONGLY SUPPORTS HOUSE BILL #58.

Continue to Close Alaska's Fiscal Gap

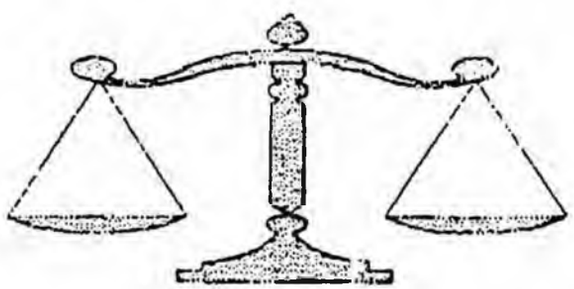
Alliance members believe the health of Alaska's economy will be better served by closing the state's fiscal gap and balancing the budget. Well defined fiscal restraint will provide a stable environment that allows businesses to plan for the future with confidence. It will encourage and promote business development and economic investment.

Our Legislature and Administration have made solving the state budget gap a priority. They have rallied to the concerns of the people of Alaska. Fiscal responsibility is a priority! They realize their obligation to provide a stable economy in Alaska. State revenues depend on substantial private investments that will aid in closing our fiscal gap without the threat of imposing new taxes or fees. Such investments in our natural resources will fuel the economy and provide Alaskans with jobs

The Alliance supports this commitment to close the fiscal gap and balance the budget. We believe this action is necessary to insure continued growth in the days of declining oil revenues.

A successful fiscal plan will require the state to develop and execute its budget without depleting its cash reserves. The Alliance will oppose any efforts to fill the fiscal gap by imposing new taxes or fees without the prior implementation of substantial spending reductions.

The Alliance supports the aggressive implementation of a balanced budget. We believe that this issue should be the first order of business and the highest legislative priority for Alaska!



Levelop Legislation to Encourage Oil and Gas Exploration, Development, and Production

Since Alaska must compete for petroleum and mineral investment dollars with other states and nations, our leaders must continue to devise attractive and innovative programs that will encourage environmentally safe exploration, development, production, and sales of Alaska's oil, gas, and mineral resources.

The state must realize that oil and gas development presents unique economic opportunities that can continue to be a viable source of revenue to the state. Continuing to explore incentive programs, regulatory review, and the permitting process are integral to the encouragement of investment in Alaska.

The Alliance believes new innovative oil and gas exploration development programs will benefit Alaska and industry by increasing state revenues and creating jobs for Alaskans.

Develop Comprehensive Tort Reform Legislation

Government officials must continue to search for ways to reduce the cost of doing business in Alaska, including a comprehensive review of liability laws affecting the economics of business.

The cost of litigation and liability insurance has a dramatic impact on businesses-large and small. The ever-increasing product liability, personal injury suits, and unpredictability of damage awards has caused costs to soar. Tort reform legislation will help control these expenditures while assuring appropriate compensation for persons injured through the fault of others.

The Alliance believes tort reform should:

- Limit noneconomic damages.
- Prohibit punitive damages unless malice or conscious acts showing deliberate disregard for another person can be shown.
- Limit punitive damages.
- Allow juries to be informed about awards already collected by claimants for same injuries.
- Allow courts to decide each party's share of obligation.
- Provide monetary sanctions against any attorney in civil cases for filing frivolous, unnecessary, and/or legally deficient pleadings.
- Bar damage suits if injuries were received while committing a felony.
- Establish guidelines for the use of expert witnesses.

The Alliance believes comprehensive tort reform is a positive step toward improving the business environment in Alaska.

USAA

March 11, 1997

The Honorable Gene Therriault
Co-Chairman, House Finance Committee
Alaska House of Representatives
State Capitol
Juneau AK

Subject: House Bill 58 / USAA Policyholders

Dear Chairman Therriault:

As you may know, USAA is a worldwide insurance and diversified services company meeting the needs of members of the armed forces and their families. USAA members insure one another and our membership consists primarily of present and former military officers and their families. In the state of Alaska, USAA has approximately 12,000 automobile insurance policyholders (insureds) and, in addition, has nearly 5,000 homeowner insureds there. Most of the homeowner insureds will also be automobile insureds. The information I am providing is merely designed to inform you of USAA's method of serving its insureds and to show how those insureds can be better served by the adoption of House Bill 58. Additionally, I would recommend you seek similar input from other insurers.

As a reciprocal insurer, USAA pays dividends to its members which are based, in part, on the loss experience in their state for the previous year. Since 1980, with the exception of 1992, when no dividends were paid because of losses due to natural catastrophes, USAA's Alaska safe driver insureds have received a 10% dividend each year in recognition of their safe driving. In addition to the safe driver dividend, a special dividend has been paid to USAA insureds. In 1995 the dividend was 15% and in 1996 it was 8%. In 1996, our Alaska insureds received a 6% payout from their individual Subscriber Savings Account (SSA). It should be noted that only members of the United Services Automobile Association are holders of SSA's. Persons, such as former dependents and spouses, insured by the subsidiary USAA Casualty and Indemnity (CIC) did not receive the SSA distribution.

As a true reciprocal, USAA members insure each other and they are the owners of the Association. Since 1969, USAA has employed the SSA to represent a measure of a members ownership in the Association. A member's SSA balance grows based on both the members participation (number of policies and premiums in effect) and the Association's performance. The SSA serves an important role in the Association's financial structure by providing the flexibility to retain sufficient funds to cover large, unexpected losses and the

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financial resources necessary to grow. The SSA is one of the unique aspects of USAA as a reciprocal inter-insurance exchange. The amount in each member's SSA is returned to the member upon leaving the association.

SSA funds are held on account by the Association on behalf of the members. The funds comprise a portion of USAA's surplus and are available for use by the Association should the need arise. The amount of retained surplus is important to insurance regulators and rating agencies. Each year, the Board of Directors determines the appropriate level of surplus needed to provide adequate assurance that all financial obligations can be met. SSA funds not needed by the Association are paid to the members. SSA payments are the combination of a percentage of the members SSA balance from previous years and a percentage of the premium paid in the previous year. Worldwide, SSA payments since 1969 have varied from an annual average of 34.67% (high) to none. In 1996, the average was nearly 11%.

Obviously, insurance companies will vary widely in their business practices and products. For example, stock insurance companies will disburse any profits to the shareholders. Reciprocal and mutual insurers such as USAA and State Farm will share their profits in the form of policyholder dividends. No matter what type of ownership an insurer may have, however, there are a number of statutory and regulatory changes which can affect insurance premiums. Among the proposed statutory changes in House Bill 58 that will have a significant impact on USAA's loss experience in Alaska and, in turn, a substantial effect on insurance premiums, are those which impose reasonable limits on punitive and non-economic damages, and those which reform the collateral benefits rules in order to prevent double recovery.

Tort reform can have a major effect on insurance premiums, both directly and in the form of increased dividends and higher SSA distributions. In Alaska, USAA policy holders will be directly benefited by adoption of House Bill 58. As this bill moves forward, I would be pleased to assist you in any way possible.

Sincerely

James R. Jinks

James R. Jinks, AVP
Senior Legislative Counsel

JRJ:djn

cc: Representative Brian Porter

USAA RETURNING $290 MILLION DIVIDENDS ON AUTO POLICIES

USAA, the nation's fifth-largest auto insurer, has mailed dividend checks worth $290 million to more than 2.6 million policyholders.

"USAA is able to declare this policyholder dividend because of very good financial results over this past year," said Robert Herres, USAA's chairman and CEO. "Those results were driven by lower-than-predicted auto claims expenses and reduced growth in medical costs, combined with continued internal cost-savings during the past year."

The dividend was based on auto insurance premiums for a one-year period from May 1, 1995 to April 30, 1996.

"These dividends represent management's commitment to return any premiums that exceed what is necessary for the operating needs of the association," Herres said.

He said the dividend was in addition to the regular 10 percent dividend USAA pays to accident-free drivers in most states.