

LEG. FINANCE - BILLS 1985 - 1986 2252

SB 377 cont. 2252

1 satisfaction of the claim for the money or property or to the effect
2 specified in the offer, with cost then accrued. If within 10 days
3 after the service of the offer the adverse party serves written notice
4 that the offer is accepted, either party may then file the offer and
5 notice of acceptance together with proof of service, and the clerk
6 shall enter judgment. An offer not accepted within 10 days is con-
7 sidered withdrawn and evidence of that offer is not admissible except
8 in a proceeding to determine the form of judgment after verdict. If
9 the judgment finally entered on the claim as to which an offer has
10 been made under this section is not more favorable to the offeree than
11 the offer, the interest awarded under AS 45.45.010(a) and accrued up
12 to the date judgment is entered shall be adjusted as follows:

13 (1) if the offeree is the party making the claim, the
14 interest rate shall be reduced by two percent a year;

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

17 * Sec. 5. AS 09.30.070 is amended to read:

18 Sec. 09.30.070. INTEREST ON JUDGMENTS. The rate of interest on
19 judgments and decrees for the payment of money is equal to the 12th
20 Federal Reserve district discount rate as determined under AS 45.45.-
21 010(b) [10.5 PERCENT A YEAR], except that a judgment or decree founded
22 on a contract in writing, providing for the payment of interest until
23 paid at a specified rate not exceeding the legal rate of interest for
24 that type of contract, bears interest at the rate specified in the
25 contract if the interest rate is set out in the judgment or decree.

26 * Sec. 6. AS 09.30.070 is amended by adding a new subsection to read:

27 (b) Except when the court finds that the parties have agreed
28 otherwise, prejudgment interest accrues from the day process is served
29 on the defendant.

1 * Sec. 7. AS 09.43.110 is amended to read:

2 Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of
3 a party, the court shall confirm an award unless

4 (1) within the time limits imposed by AS 09.43.120 and
5 09.43.130 grounds are urged for vacating or modifying or correcting
6 the award, in which case the court shall proceed as provided in
7 AS 09.43.120 and 09.43.130; or

8 (2) an appeal is taken under AS 09.43.160(c).

9 * Sec. 8. AS 09.43.160 is amended by adding a new subsection to read:

10 (c) An award made as a result of arbitration required by AS 09.-
11 10.075 may be appealed to the district court. The appeal shall be
12 filed within 60 days after notice of an award is made under
13 AS 09.43.080. The court shall grant a trial de novo if an appeal is
14 filed under this subsection.

15 * Sec. 9. AS 09.55.548 is repealed and reenacted to read:

16 Sec. 09.55.548. AWARDS. Except as provided in AS 09.17, damages
17 in a malpractice action shall be awarded in accordance with principles
18 of the common law.

19 * Sec. 10. AS 09.60.010 is repealed and reenacted to read:

20 Sec. 09.60.010. COSTS AND ATTORNEY FEES ALLOWED PREVAILING
21 PARTY. The supreme court shall determine by rule or order the costs,
22 if any, that may be allowed a prevailing party in a civil action.
23 Unless specifically authorized by statute or by agreement between the
24 parties, attorney fees may not be awarded to a party in a civil
25 action.

26 * Sec. 11. AS 09.60 is amended by adding a new section to read:

27 Sec. 09.60.035. COSTS AND ATTORNEY FEES ALLOWED FOR ARBITRATION
28 APPEAL. If a party appeals an award made as a result of arbitration
29 required by AS 09.10.075, and the appellate court increases or

1 decreases the award by more than 10 percent, the prevailing party on
2 appeal shall also be awarded actual costs and attorney fees incurred
3 as a result of the appeal.

4 * Sec. 12. AS 22.15.030(a) is amended to read:

5 (a) The district court has jurisdiction of civil cases and
6 proceedings as follows:

7 (1) for the recovery of money or damages when the amount
8 claimed exclusive of costs, interest and attorney fees does not exceed
9 \$25,000;

10 (2) for the recovery of specific personal property, when
11 the value of the property claimed and the damages for the detention do
12 not exceed \$25,000;

13 (3) for the recovery of a penalty or forfeiture, whether
14 given by statute or arising out of contract, not exceeding \$25,000;

15 (4) to give judgment without action upon the confession of
16 the defendant for any of the cases specified in this section, except
17 for a penalty or forfeiture imposed by statute;

18 (5) for establishing the fact of death of any person in the
19 manner prescribed in AS 09.55.020 - 09.55.060;

20 (6) for the recovery of the possession of premises in the
21 manner provided under AS 09.45.070 - 09.45.160 when the value of the
22 property or of the arrears and damage to the property does not exceed
23 \$25,000;

24 (7) for the foreclosure of a lien when the amount in con-
25 troversy does not exceed \$25,000;

26 (8) for the recovery of money or damages in motor vehicle
27 tort cases when the amount claimed exclusive of costs, interest and
28 attorney fees does not exceed \$25,000;

29 (9) over civil actions for taking utility service and for

1 damages to or interference with a utility line filed under AS 42.20.-
2 030;

3 (10) over cases involving injunctive relief for domestic
4 violence under AS 25.35.010 and 25.35.020;

5 (11) over an appeal by a party to an arbitration award under
6 AS 09.43.160(c).

7 * Sec. 13. AS 09.16.010, 09.16.020, 09.16.030, 09.16.040, 09.16.050,
8 and 09.16.060 are repealed.

9 * Sec. 14. AS 09.17.030 and 09.17.060 enacted in sec. 3 of this Act
10 have the effect of amending Alaska Rule of Civil Procedure 49 by requiring
11 the jury to answer the special interrogatories listed in AS 09.17.060
12 regarding the amount of damages and the percentages of fault to be allo-
13 cated among the parties and to itemize the verdict regarding economic and
14 noneconomic loss as specified in AS 09.17.030.

15 * Sec. 15. AS 09.17.060 enacted in sec. 3 of this Act has the effect of
16 amending Alaska Rule of Civil Procedure 52 by requiring the court to make
17 specific findings regarding the amount of damages and the percentages of
18 fault to be allocated among the parties.

19 * Sec. 16. AS 09.17.030 and 09.17.060 enacted in sec. 3 of this Act
20 have the effect of amending Alaska Rule of Civil Procedure 58 by requiring
21 the court to include a specific item in its judgment.

22 * Sec. 17. AS 09.17.040 enacted in sec. 3 of this Act has the effect of
23 amending Alaska Rule of Civil Procedure 11 by requiring verification of
24 certain pleadings.

25 * Sec. 18. AS 09.17.080 enacted in sec. 3 of this Act has the effect of
26 amending Alaska Rule of Civil Procedure 82 by limiting the amount that
27 could be awarded as attorney fees in an action for personal injury or
28 property damage.

29 * Sec. 19. AS 09.30.070(b) as added by sec. 6 of this Act has the

1 effect of amending Alaska Rule of Civil Procedure 68 by providing that
2 prejudgment interest accrues from the day process is served on the defen-
3 dant.

4 * Sec. 20. AS 09.60.010 as amended by sec. 10 of this Act has the
5 effect of amending Alaska Rule of Civil Procedure 82 by prohibiting the
6 award of attorney fees, unless allowed by statute or by agreement of the
7 parties.

8 * Sec. 21. APPLICABILITY. Sections 1 - 13 of this Act apply to all
9 causes of action accruing after the effective date of this Act, except that
10 AS 09.17.055(b) enacted in sec. 3 of this Act applies to all contracts for
11 the provision of collateral benefits that are formed or renewed after the
12 effective date of this Act.

13 * Sec. 22. SEVERABILITY. If any provision of this Act, or the applica-
14 tion thereof to any person or circumstance is held invalid, the remainder
15 of this Act and the application to other persons or circumstances shall not
16 be affected thereby.

17 * Sec. 23. LEGISLATIVE INTENT. The legislature intends that the
18 changes made in this Act to the code of civil procedure should be reviewed
19 three years after the effective date of the Act, to determine if additional
20 modifications or changes are necessary. To achieve effective review, the
21 legislature requests that the governor direct the division of insurance to
22 monitor the effect of this Act on premiums being charged for liability
23 insurance and to report the effect to the legislature no later than
24 March 1, in 1987, 1988, and 1989.

25 * Sec. 24. Except for AS 09.17.080, added by sec. 3 of this Act, this
26 Act takes effect immediately in accordance with AS 01.10.070(c).

27 * Sec. 25. AS 09.17.080, added by sec. 3 of this Act, only takes effect
28 if sec. 10 of this Act does not pass each house of the legislature by at
29 least a two-thirds majority vote. If AS 09.17.080 takes effect, it takes

1 effect immediately under AS 01.10.070(c).

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Sackett - by request

4/30/86

Failed,
withdrawn, or
incorporated in
other amendments

AMENDMENT 1

es 20-27 and insert the following:
ONECONOMIC DAMAGES. In an action to
sonal injury based on negligence,
losses shall be limited to
uffering, inconvenience, physical
t, loss of enjoyment of life and

..... damage.

Failed 5-1

4/29/86. ypm

Amendment 1. Limits on Noneconomic Damage. Damages in tort actions are of two types: (1) economic damages which consist of medical expenses and wage loss; and (2) noneconomic damages which consist of pain and suffering, disfigurement, loss of enjoyment of life and the like. Under present law, juries lump both of these categories in one total award, with the result that no one in Alaska has any idea how much money juries have awarded in the past for pain and suffering. The only thing we do know is that the vast majority of negligence cases are for small amounts, so that the number of cases that will be affected by a limit of \$500,000 on noneconomic damages will be minimal. Imposing a limit then will seriously impact a very few people with catastrophic injuries with no known corresponding public benefit. Until the legislature has some knowledge of who will be affected and how much they will be affected; it should adopt no limits but leave it to juries to decide what is fair in particular cases. If the legislature does adopt a limit, it will be substituting its judgment, having heard no evidence in any case, for that of juries which have heard all of the evidence.

The proposed amendment describes what types of damages may be awarded by a jury but removes the limit on noneconomic damages. Another section of the bill, Sec. 09.17.030, would require juries to specify in their verdicts

how much money is being awarded for noneconomic damages.
This provision will at least provide the kind of information
necessary for the legislature to make a reasoned judgment at
some future time as to the need for and impact of a
statutorily mandated limit on noneconomic damages.

Sackett - by request

Failed

AMENDMENT 2

Delete material from page 2 lines 28 through page 3, line 4, and insert the following:

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Fifty percent of any punitive or exemplary damages that may be adjudged against the party defending the claim shall be awarded to the benefit of the state and when paid deposited in the general fund.

(b) The amount of punitive damages awarded to the state shall be considered a part of the amount recovered by the claiming party for purposes of calculating an award of attorney fees.

(c) Except for purposes of seeking execution on a judgment, the state may not bring or be joined in an action based on punitive damages that may be awarded under this section.

4/29/86 jpm

Amendment 2. Punitive Damages. Punitive damages under present law can only be awarded when a parties conduct is in "reckless disregard" of the rights of others, or done with malice toward another. The leading case in Alaska involved a gun manufacturer who knew a gun was defective and likely to cause serious injury to a person using the gun. The manufacturer knew the defect could be remedied for less than \$1.75/gun but still decided to sell it to the public without modification. Since the manufacturer had no malice toward any particular individual and the conduct was not a crime, it would not be subject to punitive damages under this bill. It was, however, conduct which recklessly disregarded the safety of persons using the product.

The amendment returns to the Senate Judiciary version. It does not effect the standards under which punitive damages may be awarded but does effect who gets them. Since they are in the nature of a civil fine, 50 percent of them will go to the public; to provide an incentive for a plaintiff to seek them, the remaining 50 percent will go to the plaintiff. Under present law all punitive damages go to the plaintiff.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 377

The committee substitute for this bill calls for a study of the current insurance crisis.

First, a detailed and thorough examination will be undertaken of closed claims by line in Alaska for insurance companies doing business in Alaska. Second, a thorough examination will be made of insurance company financial operations, expenditures, and profitability.

From the closed claims study we will be able to identify:

- (a) the extent to which the legal system has or has not been the cause of dramatic liability insurance premium increases and coverage reduction in crisis lines in Alaska;
- (b) how victims are faring under the present system; and
- (c) what the various specific tort reform proposals will actually accomplish.

The analysis of insurance company finances will enable us to determine:

- (a) the extent to which dramatic liability insurance rate increases and coverage limitations in Alaska are -- or are not -- cost-justified,
- (b) what alternatives exist to limiting coverage and raising rates; and
- (c) the legislative and/or regulatory actions which may be necessary to resolve the State's liability insurance crisis.

In order to undertake the study the Department of Law will hire outside financial management experts to determine the causes of the existing insurance situation, and to advise of possible corrective actions.

AMENDMENT NO. 7

Sackett
- by request
Withdrawn
(to be rewritten)

Page 5, line 28, delete "for appointed official"

Frank: Suggested deleting

Purpose -- including all appointed municipal officials in a section granting blanket immunity is overly broad.

AMENDMENT NO. 8

Withdrawn

Page 8, delete lines 3-13.

Purpose -- Returns to existing system of allowing persons to make their own contractual arrangements with their own attorneys.

AMENDMENT NO. 9

*Withdrawn in favor of
Halford Am #8*

Page 9, lines 28-29, delete, "process is served on the defendant" and insert, "the cause of action accrues."

Purpose -- to preserve existing law relating to prejudgment interest by stating that such interest accrues from the date of injury.

AMENDMENT NO. 10

*Failed
5-1*

Page 10, lines 19-25, delete all material and renumber remaining sections accordingly.

Purpose -- to retain Rule 82 providing for partial compensation of attorney fees for all prevailing parties in civil actions.

RH: Moved DAMAGE - No. 06

(Suggested by Snowden)

Amendment #5

by request
Failed
0-2-4

Delete all material on page 7, lines 2 - 25, and insert the following:

Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.17.070, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.070.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.070, and enter judgment against each party liable. The court shall also determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

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

Hal-Ford suggested DELETE

Amendment 5. Apportionment of Damages -- Joint and Several Liability. Under present law, if three defendants are held liable for an injury to a plaintiff, they each bear full responsibility for the total amount of the damage. This is "joint and severally" liability. If one of the defendants pays the full amount of the judgment he has rights under law to contribution from the other defendants. If one of those defendants has no money, the courts long ago uniformly concluded that the problem of insolvency is one that the remaining defendants who contributed to the accident will have to bear, rather than reducing the award of an injured plaintiff who is not at fault.

Some persons are concerned that juries are holding some defendants, like states and cities with "deep pockets," only minimally liable, but the result under joint and several liability is that they end up getting stuck for the whole judgment. Accordingly, both the Senate Judiciary Committee and the House Labor and Commerce Committee sought a compromise which would insure that defendants only minimally liable would not be held responsible for all the damage, while still providing a cushion for innocent parties who were seriously injured by multiple defendants, some of whom might be insolvent. Senate Judiciary and House Labor and Commerce produced what we have included as Amendment 5, which in subsection (d) continues the rule of joint and

several liability but changes it to provide that a defendant is never more responsible in damages than for twice his percentage of fault for the injury. If in fact then a defendant is only liable for five percent of an injury, he cannot be held responsible for more than ten percent of the total damages. Only if a defendant is responsible for at least 50 percent of the injury can he be held liable for the entire amount of the damages. Even then, he would still have the right to seek contribution from the other defendants who were also liable for the injury.

The proposed Senate Finance version would limit responsibility on the basis of "several" liability by saying that you are responsible in damages only for your percentage of fault as decreed by a jury. Even if the allocation of fault were an exact science, which it is not, this proposal would entirely shift the risk of insolvent defendants from the remaining defendants who are at fault to a plaintiff who is blameless and injured. Remember the issue here is not whether a party should be responsible in damages for more than their percent of fault; the issue is when a party who is at fault has no money, who should bear the risk -- the plaintiff or other parties at fault. This amendment attempts to compromise that issue.

Withdrawn

FURTHER AMENDMENT RE APPLICATION OF RULE 82

Page 10, lines 25-25, delete "a civil damages action" and insert, "an action for damages for personal injury based on negligence."

-- this language tracks similar language as to applicability throughout the new chapter 17 enacted in section 3 of the bill.

TO: CSSB 377 (Finance)

By: Faiks

Amendment #1

Page 13, line 16 insert new section:

* Section 22. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.137. CIVIL LIABILITIES OF ZOOS. (a) A person may not recover damages for injury to person or property from a zoo or a zoo operator, if the damages occurred as a result of an inherent risk of attendance at a zoo, notice of the inherent risk was posted as required under (b) of this section, and the zoo operator exercised reasonable care to prevent the injury.

(b) A zoo operator shall post signs at prominent places within a zoo and at each entrance. Each sign shall include a statement warning that the zoo is not liable for injuries to person or property occurring as a result of dangers or conditions inherent in attending the zoo.

(c) For purposes of this section

(1) "inherent risk of attendance" means the dangers or conditions that are an integral part of the physical layout of a zoo and the physical proximity of wild animals;

(2) "zoo" means a place where wild animals are kept for exhibition to the public.

Re-number remaining sections accordingly

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(1) "inherent risk of attendance" means the dangers or conditions that are an integral part of the physical layout of a zoo and the physical proximity of wild animals;

(2) "zoo" means a place where wild animals are kept for exhibition to the public.

Renumber remaining sections accordingly



Senate Finance Committee

Senator Jan Falks, Co-Chairman Senator John Sackett, Co-Chairman

4/29/86

*Incorporated in
4/29/86 amendment packet.*

A M E N D M E N T

By Eliason

Offered in the SENATE

TO: CSSB 377 (Finance) Version #2

Page 10, line 15 Delete Sec. 9 and renumber the following
sections accordingly.

4/29/86

A M E N D M E N T

By Eliason

Offered in the SENATE

TO: CSSB 377 (Finance) Version #2

Page 8, line 2 After the word "discharge." add the following language.

"However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of AS 09.17.060."

Seckett - by request

AMENDMENT 2

Delete material from page 2 lines 28 through page 3, line 4, and insert the following:

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Fifty percent of any punitive or exemplary damages that may be adjudged against the party defending the claim shall be awarded to the benefit of the state and when paid deposited in the general fund.

(b) The amount of punitive damages awarded to the state shall be considered a part of the amount recovered by the claiming party for purposes of calculating an award of attorney fees.

(c) Except for purposes of seeking execution on a judgment, the state may not bring or be joined in an action based on punitive damages that may be awarded under this section.

Amendment 2. Punitive Damages. Punitive damages under present law can only be awarded when a parties conduct is in "reckless disregard" of the rights of others, or done with malice toward another. The leading case in Alaska involved a gun manufacturer who knew a gun was defective and likely to cause serious injury to a person using the gun. The manufacturer knew the defect could be remedied for less than \$1.75/gun but still decided to sell it to the public without modification. Since the manufacturer had no malice toward any particular individual and the conduct was not a crime, it would not be subject to punitive damages under this bill. It was, however, conduct which recklessly disregarded the safety of persons using the product.

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The analysis of insurance company finances will enable us to determine:

- (a) the extent to which dramatic liability insurance rate increases and coverage limitations in Alaska are -- or are not -- cost-justified,
- (b) what alternatives exist to limiting coverage and raising rates; and
- (c) the legislative and/or regulatory actions which may be necessary to resolve the State's liability insurance crisis.

In order to undertake the study the Department of Law will hire outside financial management experts to determine the causes of the existing insurance situation, and to advise of possible corrective actions.

Seckett - by request

AMENDMENT 6

Delete material beginning at page 8, line 24 through page 9, line 16, and insert the following:

Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 30 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 [AS 45.45.010(a)] and accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be reduced by five [TWO] percent a year;

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

Sackett
- by request

AMENDMENT NO. 7

Page 5, line 28, delete "or appointed official"

Purpose -- including all appointed municipal officials in a section granting blanket immunity is overly broad.

AMENDMENT NO. 8

Page 8, delete lines 3-13.

Purpose -- Returns to existing system of allowing persons to make their own contractual arrangements with their own attorneys.

AMENDMENT NO. 9

Page 9, lines 28-29, delete, "process is served on the defendant" and insert, "the cause of action accrues."

Purpose -- to preserve existing law relating to prejudgment interest by stating that such interest accrues from the date of injury.

AMENDMENT NO. 10

Page 10, lines 19-25, delete all material and renumber remaining sections accordingly.

Purpose -- to retain Rule 82 providing for partial compensation of attorney fees for all prevailing parties in civil actions.

by FEROUSON

AMENDMENT TO CSSB 377(Fin):

Page 8, lines 3-13, delete all material and insert a new section to read:

"Sec. 09.17.080. ATTORNEY FEE AGREEMENTS. (a) An attorney may not contract for or collect a contingency fee for representing a person seeking damages in connection with an action for personal injury based on negligence in excess of 25 percent of the amount recovered.

(b) If periodic payments for future damages are awarded, the present value of the periodic payments must be included in computing the total award from which attorney fees are calculated under (a) of this section.

(c) An attorney may not contract for or receive a fee for defending a person against a claim for damages in connection with an action for personal injury based on negligence in excess of 25 percent of the amount in controversy or the amount recovered by the plaintiff.

(d) The limitations of (a) and (b) of this section apply whether the recovery is by settlement, arbitration, or judgment."

Offered: 3/20/86
Referred: Judiciary

Original sponsors: Kelly, Abood,
Bennett, et al

BY THE LABOR AND
COMMERCE COMMITTEE

1 IN THE SENATE

2

CS FOR SENATE BILL NO. 377 (L&C)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act relating to civil actions; amending Alaska
7 Rules of Civil Procedure 49, 52, 58, 68, and 82; and
8 providing for an effective date."

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

10 * Section 1. AS 09 is amended by adding a new chapter to read:

11

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

12

Sec. 09.17.010. NONECONOMIC DAMAGES. (a) In an action to

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recover damages for personal injury based on negligence, damages for
14 noneconomic losses shall be limited to compensation for pain, suffer-
15 ing, inconvenience, physical impairment, disfigurement, loss of enjoy-
16 ment of life and other nonpecuniary damage.

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(b) The amount of damages awarded by a court or jury under (a)

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of this section may not exceed \$250,000 for each claim based on a
19 separate incident or injury.

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Sec. 09.17.020. ITEMIZED VERDICTS. In every case where damages

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for personal injury are awarded by the court or jury, the verdict

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shall be itemized between economic loss and noneconomic loss, if any,

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and economic loss shall be further itemized by category. Itemization

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of economic loss by category includes: (1) amounts intended to com-

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pensate for reasonable expenses that have been incurred, or which will

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be incurred, for necessary medical, surgical, x-ray, dental, or other

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health or rehabilitative services, drugs, and therapy; (2) amounts

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intended to compensate for lost wages or loss of earning capacity; and

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(3) all other economic losses claimed by the plaintiff or granted by

1 the jury. A verdict shall further determine the amounts intended to
2 compensate for injury or losses incurred before the verdict and
3 amounts intended to compensate for losses that will be incurred in the
4 future.

5 Sec. 09.17.030. PERIODIC PAYMENTS. (a) In an action to recover
6 damages for personal injury, the court shall, at the request of a
7 judgment creditor, enter judgment ordering that amounts awarded for
8 future damages be paid to the maximum extent feasible by periodic
9 payments rather than by a lump-sum payment if the award equals or
10 exceeds \$50,000 in future damages. The court may require a judgment
11 debtor to post security adequate to assure full payment of future
12 damages awarded by judgment.

13 (b) A judgment ordering payment of future damages by periodic
14 payments shall specify the recipient, the dollar amount of the pay-
15 ments, the interval between payments, and the number of payments or
16 the period of time over which payments shall be made. Payments may be
17 modified only in the event of the death of the judgment creditor, in
18 which case payments may not be reduced or terminated, but shall be
19 paid to persons to whom the judgment creditor owed a duty of support,
20 as provided by law, immediately before death. The court that rendered
21 the original judgment, may, upon petition of a party in interest,
22 modify the judgment to award and apportion the unpaid future damages
23 in accordance with this section.

24 (c) If the court finds that the judgment debtor has exhibited a
25 continuing pattern of failing to make payments under (b) of this
26 section, the court shall find the judgment debtor in contempt of court
27 and, in addition to the required periodic payments, shall order the
28 judgment debtor to pay the judgment creditor any damages caused by the
29 failure to make periodic payments, including costs and attorney fees.

1 (d) Following expiration of all obligations specified in the
2 periodic payment judgment, the obligation of the judgment debtor to
3 make further payments shall cease and security given under (a) of this
4 section shall revert to the judgment debtor.

5 (e) A certified copy of a judgment or order of the court issued
6 under this section may be recorded under AS 09.30.010, but may not
7 become a lien upon real property before the date that payment becomes
8 due.

9 Sec. 09.17.040. EFFECT OF CONTRIBUTORY FAULT. In an action
10 based on fault seeking to recover damages for injury or death to
11 person or harm to property, contributory fault chargeable to the
12 claimant diminishes proportionately the amount awarded as compensatory
13 damages for an injury attributable to the claimant's contributory
14 fault, but does not bar recovery.

15 Sec. 09.17.050. APPORTIONMENT OF DAMAGES. (a) In all actions
16 involving fault of more than one party to the action, including third-
17 party defendants and persons who have been released under AS 09.17.-
18 060, the court, unless otherwise agreed by all parties, shall instruct
19 the jury to answer special interrogatories or, if there is no jury,
20 shall make findings, indicating

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

23 (2) the percentage of the total fault of all of the parties
24 to each claim that is allocated to each claimant, defendant, third-
25 party defendant, and person who has been released from liability under
26 AS 09.17.060; for this purpose the court may determine that two or
27 more persons are to be treated as a single party.

28 (b) In determining the percentages of fault, the trier of fact
29 shall consider both the nature of the conduct of each party at fault

*L&C refers
to obligation*

Effect of Release

*Jtd refers
to amt*

Effect of Release

1 and the extent of the causal relation between the conduct and the
2 damages claimed.

3 (c) The court shall determine the award of damages to each
4 claimant in accordance with the findings, subject to a reduction under
5 AS 09.17.060, and enter judgment against each party liable on the
6 basis of rule of several liability. The court also shall determine
7 and state in the judgment each party's equitable share of the obliga-
8 tion to each claimant in accordance with the respective percentages of
9 fault.

10 Sec. 09.17.060. EFFECT OF RELEASE. A release, covenant not to
11 sue, or similar agreement entered into by a claimant and a person
12 liable discharges that person from liability to the claimant, but it
13 does not discharge another person liable upon the same claim unless
14 the release, covenant not to sue, or similar agreement provides for
15 discharge. [However, the claim of the releasing person against other
16 persons is reduced by the amount of the released person's equitable
17 share of the obligation, determined in accordance with the provisions
18 of AS 09.17.050.]

*McGuire
7/15/08*

19 Sec. 09.17.900. DEFINITIONS. In this chapter

20 (1) "fault" includes acts or omissions that are in any
21 measure negligent or reckless toward the person or property of the
22 actor or others, or that subject a person to strict tort liability;
23 the term also includes breach of warranty, unreasonable assumption of
24 risk not constituting an enforceable express consent, misuse of a
25 product for which the defendant otherwise would be liable, and unrea-
26 sonable failure to avoid an injury or to mitigate damages; legal
27 requirements of causal relation apply both to fault as the basis for
28 liability and to contributory fault;

29 (2) "future damages" includes damages for future medical

1 treatment, care or custody; loss of future earning capacity; or any
2 future noneconomic loss.

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

4 Sec. 09.10.075. PERSONAL INJURY ACTIONS THAT MUST BE ARBITRATED.
5 A person may not bring an action for damages based on personal injury
6 when the amount in controversy is less than \$100,000, exclusive of
7 costs, interest and attorney fees, unless the controversy is first
8 arbitrated under AS 09.43.

9 * Sec. 3. AS 09.30.065 is amended to read:

10 Sec. 09.30.065. OFFERS OF JUDGMENT. On or before the 60th day
11 following the filing of an answer in a civil action, and on the fifth
12 day following the day discovery closes as ordered by the court, [EI-
13 THER THE PARTY MAKING A CLAIM OR] the party defending against a claim
14 may serve upon the party making the claim [ADVERSE PARTY] an offer to
15 allow judgment to be entered in complete satisfaction of the claim
16 against that defending party for the money or property or to the
17 effect specified in the offer, with cost then accrued. If within 10
18 days after the service of the offer the claiming [ADVERSE] party
19 serves written notice that the offer is accepted, either party may
20 then file the offer and notice of acceptance together with proof of
21 service, and the clerk shall enter judgment. An offer not accepted
22 within 10 days is considered withdrawn and evidence of that offer is
23 not admissible except in a proceeding to determine the form of judg-
24 ment after verdict. If the judgment finally entered on the claim as
25 to which an offer has been made under this section is not more favor-
26 able to the claiming party [OFFEREE] than the offer, the claim may not
27 bear interest from the date of the offer to the date of judgment [THE
28 INTEREST AWARDED UNDER AS 45.45.010(a) AND ACCRUED UP TO THE DATE
29 JUDGMENT IS ENTERED SHALL BE ADJUSTED AS FOLLOWS:

1 (1) IF THE OFFEREE IS THE PARTY MAKING THE CLAIM, THE
2 INTEREST RATE SHALL BE REDUCED BY TWO PERCENT A YEAR;

3 (2) IF THE OFFEREE IS THE PARTY DEFENDING AGAINST THE
4 CLAIM, THE INTEREST RATE SHALL BE INCREASED BY TWO PERCENT A YEAR].

5 * Sec. 4. AS 09.43.110 is amended to read:

6 Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of
7 a party, the court shall confirm an award unless

8 (1) within the time limits imposed by AS 09.43.120 and
9 09.43.130 grounds are urged for vacating or modifying or correcting
10 the award, in which case the court shall proceed as provided in
11 AS 09.43.120 and 09.43.130; or

12 (2) an appeal is taken under AS 09.43.160(c).

13 * Sec. 5. AS 09.43.160 is amended by adding a new subsection to read:

14 (c) An award made as a result of arbitration required by AS 09.-
15 10.075 may be appealed to the proper court. The appeal shall be filed
16 within 60 days after notice of an award is made under AS 09.43.080.
17 The court shall grant a trial de novo if an appeal is filed under this
18 subsection.

19 * Sec. 6. AS 09.60.010 is amended by adding a new subsection to read:

20 (b) Notwithstanding (a) of this section, the court may not award
21 attorney fees to a prevailing party in an action for damages to the
22 person or to property in the absence of a specific finding that the
23 party at fault acted with malice, in bad faith, or with reckless
24 disregard of the rights of another in causing the injury. In this
25 subsection, "reckless disregard of the rights of another" means a lack
26 of consideration of the rights of another in a manner that is reason-
27 ably likely to cause damage to the person or property of another.

28 * Sec. 7. AS 22.10.020(d) is amended to read:

29 (d) The superior court has jurisdiction in all matters appealed

1 to it (1) from a subordinate court; (2) by a party to an arbitration
2 award under AS 09.43.160(c); [,] or (3) an administrative agency when
3 appeal is provided by law. The hearings on appeal from a final order
4 or judgment of a subordinate court or administrative agency shall be
5 on the record unless the superior court, in its discretion, grants a
6 trial de novo, in whole or in part.

7 * Sec. 8. AS 09.16.010, 09.16.020, 09.16.030, 09.16.040, 09.16.050, and
8 09.16.060 are repealed.

9 * Sec. 9. AS 09.17.020 and 09.17.050 enacted in sec. 1 of this Act have
10 the effect of amending Alaska Rule of Civil Procedure 49 by requiring the
11 jury to answer the special interrogatories listed in AS 09.17.050 regarding
12 the amount of damages and the percentages of fault to be allocated among
13 the parties and to itemize the verdict regarding economic and noneconomic
14 loss as specified in AS 09.17.020.

15 * Sec. 10. AS 09.17.050 enacted in sec. 1 of this Act has the effect of
16 amending Alaska Rule of Civil Procedure 52 by requiring the court to make
17 specific findings regarding the amount of damages and the percentages of
18 fault to be allocated among the parties.

19 * Sec. 11. AS 09.17.020, 09.17.030 and 09.17.050 enacted in sec. 1 of
20 this Act have the effect of amending Alaska Rule of Civil Procedure 58 by
21 requiring the court to include a specific item in its judgment.

22 * Sec. 12. AS 09.30.065 as amended by sec. 3 of this Act has the effect
23 of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment
24 interest stops accruing from the date of an offer by a defending party that
25 a claiming party fails to increase at judgment.

26 * Sec. 13. AS 09.60.010 as amended by sec. 6 of this Act has the effect
27 of amending Alaska Rule of Civil Procedure 82 by allowing costs and attor-
28 ney fees in an action for personal injury or property damage only after a
29 specific finding of malice, bad faith, or reckless disregard of the rights

1 of another in causing the injury.

2 * Sec. 14. APPLICABILITY. Sections 1 - 7 of this Act apply to all
3 causes of action accruing after the effective date of this Act.

4 * Sec. 15. LEGISLATIVE INTENT. The legislature intends that the
5 changes made in this Act to the code of civil procedure should be reviewed
6 three years after the effective date of the Act, to determine if additional
7 modifications or changes are necessary. To achieve effective review, the
8 legislature requests that the governor direct the division of insurance to
9 monitor the effect of this Act on premiums being charged for liability
10 insurance and to report the effect to the legislature no later than
11 March 1, in 1987, 1988, and 1989.

12 * Sec. 16. This Act takes effect immediately in accordance with AS 01.-
13 10.070(c).

AMENDMENT

CSSB-377 (Fin) version 2

DELETE: Sec. 2, page 2, lines 12 - 17

Sec. 8, page 10, lines 9 - 14

AND IF THE ABOVE DELETIONS ARE DELETED, THEN:

DELETE: Sec. 11, page 10, lines 27 - line 3 (page 11)

*Jackell moved this am - Discussion
Snowden*

*Ferguson
4/28/86*

Senator Joe Josephson
April 28, 1986

Senate Finance Committee Meeting
RE: Senate Bill 377

I have reviewed the 4/23/86 work draft of CSSB 377 (Finance) and want to share some concerns. The problems I cite are generally unrelated to the philosophy, but involve questions of meaning and intent.

1. Section 2. What is the intent with respect to the costs of arbitration? There will be indigent plaintiffs who will not be able to pay the costs of arbitration; is it the intent that the State assume the costs in such a case, just as court costs are borne by the taxpayer? If not, how is the matter to be dealt with?

2. Section 2. "The amount in controversy" is usually considered to be the amount pleaded by the plaintiff's attorney. Has the Committee considered whether Section 2 will tend to raise the demands in smaller cases, instead of to lower the demands, and if so, what effect that will have on the costs to insurers?

3. Section 3, page 3, lines 5-7. Does the Committee intend that before a punitive damages issue can go to the jury or judge, there will be a bifurcated proceeding to establish the "prima facie claim"? If so, is the Committee contemplating two proceedings? Before the same judge and jury? Or before a different judge and/or jury? How else will the claimant "first establish" a prima facie claim?

4. Page 4, lines 13-17. Assuming that there is a bona fide problem of stability in the insurance industry, somebody should be sure that the insurer making periodic payments will be able to perform years into the future. Please see the language in my bill, SB 392, which called for periodic payments but with protections for the victims.

5. Does the periodic payment language provide for post-judgment interest on the amount deferred? If you reduce the award to present value, but have no inflation factor or interest requirement on the amount deferred, then the victim gets devalued dollars later on instead of the real and genuine value of what the jury or judge intended to award as compensation.

6. Page 5. What is a "continuing pattern of failing" to make payments? If payments are made on an annual basis,

4/28/86

Senator Josephson
April 28, 1986
SB 377

would this require the unpaid victim to wait two or three years before asking the court to order relief? Why is not one default sufficient to trigger a court order?

7. Page 5. Limited liability. Does this section purport to exclude the liability of certain corporate directors or officers, etc., for such torts as defamation (libel or slander), fraud, etc.? If not, the language should be changed.

These are a few issues that spring up from the page. I hope this memorandum will be helpful.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

Tull file

April 28, 1986

The Honorable Jan Faiks
The Honorable John Sackett
Co-Chairs, Senate Finance Committee
AND
The Honorable M. Mike Miller
Chairman, House Judiciary Committee
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Re: Tort Reform

Dear Senators Faiks and Sackett, Representative Miller:

Today, I am recommending that we take clear and measured steps toward tort reform through a number of moderate changes to our current civil justice system. The first steps I propose include 1) revision of the common law concerning joint and several liability, 2) statutory changes to allow courts to award and monitor periodic payments of future economic damages in appropriate cases, and 3) a requirement that a percentage of all punitive damage awards be turned over to the state, to be used to promote legal services for the poor and disadvantaged of Alaska.

The real goal of tort reform is affordable insurance that will allow small businesses, non-profit groups, and individual Alaskans to operate, secure in the knowledge that they have the coverage they need at rates they can afford. It is to that end that I am recommending these changes.

In addition, and equally important, I am asking the Legislature to authorize and fund a thorough study of both the claims experience and the true financial condition of the insurance industry in Alaska. We need to uncover the real facts behind the present insurance crisis, to determine whether additional modifications to the judicial system are warranted, and to consider whether additional legislative actions might ease the present insurance crisis.

I am not, however, convinced that our civil justice system can be held solely responsible for the current insurance crisis. Nor am I convinced that tort reform will result in

Senator Jan Faiks
Senator John Sackett
Representative M. Mike Miller

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lower insurance premiums or more availability of insurance at any price. Many experts believe the current crisis is simply the result of a downturn in the economic cycle of the insurance industry, and that changes in the cost and availability of insurance may come about in the near future as a consequence of normal market forces.

Both this Administration and the Legislature have been the subject of tremendous lobbying efforts by a variety of interest groups who want to bring about significant changes in our civil justice system. The rationale behind many of the arguments advanced is sometimes confusing and occasionally misleading. I have received hundreds of communications from small businessmen, day-care operators, fishermen, professionals, and people from all walks of life, including those who represent the insurance industry, suggesting that significant tort reform will lead to lower insurance premiums and more availability of insurance coverage.

I have carefully considered the arguments and various proposals concerning tort reform. Generally, before I support any legislation, I must first be assured that the legislation is fair, equitable, and just for all Alaskans, not just certain special interest groups. I also must be assured that the rights of Alaskans who are the unfortunate victims of accidents in this state are fully protected. A balance needs to be struck between the rights of victims to compensation for their injuries and legitimate concerns for a more equitable distribution of the cost and risk of injury. The end result of any modification to our civil justice system must be fairness to all Alaskans, including the small businessman, the professional, the urban resident, the villager, the poor, and the disadvantaged.

Probably the most significant tort reform measure currently under consideration by the Legislature is an amendment to the legal doctrine of joint and several liability. This is an area of law which society has developed over the course of many years. Under this doctrine, when a fact finder determines that two or more defendants are each at fault in causing an injury to a plaintiff, that plaintiff may recover all of his damages against any one defendant and it is the defendants' responsibility to collect among themselves.

Senator Jan Faiks
Senator John Sackett
Representative M. Mike Miller

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April 28, 1986

Problems arise where one or more of the defendants is insolvent or otherwise judgment proof. In such a case, another defendant may have to pay all of the injured person's damages and the paying defendant may have no recourse to recover the amount he paid in excess of his "fair" share. The doctrine of joint and several liability developed because society, recognizing that some inequities will result in any case where one of the parties responsible for the injury cannot pay his or her share, decided that it would be more equitable for a guilty defendant to bear the added burden, rather than the injured victim.

This doctrine, however, often results in inequities of another form. Where only one of the defendants has the financial ability to pay, that defendant may end up paying 100 percent of the plaintiff's damages, even though that defendant is only 5 or 10 percent negligent in the particular case. This is the so-called "deep-pocket" problem. Municipalities, the State, and persons responsible enough to maintain insurance are often required to pay large sums of money when their actual contribution arguably should be much less.

Given these competing considerations, there is currently under consideration one proposal modifying joint and several liability which attempts to strike a fair balance between the rights of the victim, which must be protected, and the rights of the financially responsible defendant. This version provides that a party may be held liable for up to -- but not more than -- twice the party's percentage of fault in the accident. It recognizes that pure several liability, which is supported by some advocates of tort reform, may result in victims not being adequately compensated for their injuries, while pure joint and several liability, as it is currently applied, may unjustly burden those who are financially responsible.

A second concept drawing much attention is a proposal to put a cap on non-economic damages, which are generally referred to as pain and suffering. One version of a tort reform bill which I have seen purports to limit any award for non-economic damages to 25 percent of the present value of the economic damages awarded, or \$500,000.00, whichever is less. Since a significant portion of economic damages frequently involves lost wages, under this provision a successful businessman or a brain surgeon would have a right to more non-economic damages than an Alaskan who lives by a subsistence way of life, a housewife who does not work

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outside the home, a teenager who has not yet had the opportunity to demonstrate his or her income earning capabilities, or an older retired Alaskan -- even where the amount of pain and suffering sustained by each was equal. This is unacceptable: it discriminates among Alaskans on the basis of wealth, is constitutionally questionable, and fails to consider the rights of accident victims. As I stated earlier, I cannot support legislation that is not fair and equitable for all Alaskans.

Another tort reform measure currently under consideration is whether society should require parties to arbitrate cases where the amount claimed by the plaintiff is relatively small. Although I agree that there are undoubtedly better ways to resolve disputes than taking all matters to court, I believe this proposal has some serious problems, because it would infringe upon the right of people to be compensated in small cases. Under the proposed legislation, the cost of an arbitration must be borne by the parties. This is in contrast to our traditional system of justice in which the courts are funded by the State and everyone has a right of access to the courts to redress grievances. By requiring the cost of an arbitrator to be borne by the parties -- a cost which could be very significant in any given case -- persons with relatively small but nonetheless legitimate claims will be effectively prevented from recovering for their injuries. In addition, there appears to be little consideration of the difficulties and costs inherent in holding arbitration hearings in the small, more remote villages of Alaska, where the court system already exists but an arbitration mechanism does not. In my opinion, further study of alternative dispute resolution mechanisms is necessary before we enact legislation to require arbitration, and I recommend this idea be considered in the interim by the Legislature.

With respect to the idea of periodic -- rather than lump sum -- payments of awards for future economic loss (such as future wages), I would recommend that the courts be given the discretion to require that the portion of a judgment representing future economic loss be paid into a trust account or used to purchase an annuity and thereafter paid in periodic installments to the victim. The Legislature should indicate that payments for future economic losses should, in the appropriate case, be made on a periodic basis. I would not propose that periodic payments of future economic loss be required in every case, nor should periodic

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payments ever be used to reduce the liability or obligations of the defendant.

Finally, with respect to proposals dealing with the award of punitive damages (which frequently result in an undeserved windfall to the plaintiffs), I believe we should provide that 50 percent of all punitive damages awarded in any case be turned over to the State. This money should be placed in a special fund, which we could call the Legal Justice Fund, created for the purpose of providing legal services for the poor. I have asked the Department of Law to advise the Legislature on how this might be accomplished and proposed legislation is attached.

There are several other tort reform proposals presently before the Legislature, but at this time I think that we should proceed with caution. I have suggested a couple of things that can be done at this time. However before we do more, we need to develop the specific information necessary to tailor future modifications to accomplish the desired result.

There are two sides to the tort reform issue. In order to accomplish something meaningful in the years to come, I suggest that any modification to our civil justice system should be coupled with a complete study, financed by the Legislature and performed during the interim, which focuses on two major areas concerning the insurance crisis. First, a detailed and thorough examination should be undertaken of closed claims by line in Alaska for insurance companies doing business in Alaska. Second, a thorough examination should be made of insurance company financial operations, expenditures, and profitability.

From the closed claims study we would be able to identify:

- (a) the extent to which the legal system has or has not been the cause of dramatic liability insurance premium increases and coverage reduction in crisis lines in Alaska;
- (b) how victims are faring under the present system; and
- (c) what the various specific tort reform proposals will actually accomplish.

Senator Jan Faiks
Senator John Sackett
Representative M. Mike Miller

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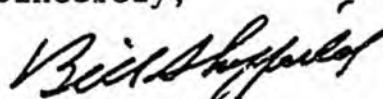
April 28, 1986

The analysis of insurance company finances will enable us to determine:

- (a) the extent to which dramatic liability insurance rate increases and coverage limitations in Alaska are -- or are not -- cost-justified,
- (b) what alternatives exist to limiting coverage and raising rates; and
- (c) the legislative and/or regulatory actions which may be necessary to resolve the State's liability insurance crisis.

I believe these proposals represent a genuine first step towards tort reform by successfully balancing the competing interests involved in this issue while guaranteeing that the rights of all Alaskans are protected. In addition, the proposed interim study would greatly assist not only the Legislature -- but Alaskans generally -- to see precisely what has caused our current insurance crisis and what can be done to correct it.

Sincerely,



Bill Sheffield
Governor

Attachments

* Sec. _____ AS 37.05 is amended by adding a new section to read:

Sec. 37.05.153. LEGAL JUSTICE FUND. There is established as a separate trust fund in the state treasury the Legal Justice Fund. The fund consists of amounts contributed by persons who are awarded punitive or exemplary damages in a civil action under AS 09.17.020. Money in the fund may not be diverted for a purpose other than for providing legal services for the poor in civil or criminal matters.

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence. Each claiming party must agree that 50 percent of any punitive or exemplary damages that may be adjudged against the party defending the claim will be contributed to the legal justice fund established in AS 37.05.-153. Money in the fund shall be held in trust to finance legal services for the poor.

(b) The amount of punitive damages awarded to the state shall be considered a part of the amount recovered by the claiming party for purposes of calculating an award of attorney fees.

(c) Except for purposes of seeking execution on a judgment, the state may not bring or be joined in an action based on punitive damages that may be awarded under this section.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 23, 1986

SUBJECT: Limitation of Civil Actions
 CSSB 377 (Finance) Version #2

TO: Senator Dick Eliason
 Finance Committee

FROM: Terri Lauterbach *TL*
 Assistant Revisor of Statutes

The following is a sectional analysis of the above referenced Senate bill:

Section 1 - Legislative Findings

Section 2 - Requires that personal injury and property damage actions seeking damages of less than \$25,000, exclusive of costs, interest, and attorney fees, must be arbitrated under AS 09.43 before a lawsuit can be commenced.

Section 3 - This section creates a new chapter that generally provides for limits on amount and type of recovery in a civil action. The analysis will discuss each section of this chapter in turn.

Sec. 09.17.010 - Limits the amount that could be recovered for noneconomic damages to \$250,000.

Sec. 09.17.020 - Raises the standard of proof for the award of punitive damages by requiring clear and convincing evidence of an act that is felonious, deliberate, or malicious.

Sec. 09.17.025 - Prohibits a personal injury action by a victim who was intoxicated, under the influence of a controlled substance, or committing a felony at the time of injury unless the act causing the victim's injury was intentional.

Sec. 09.17.030 - Requires that verdicts be itemized between punitive damages, economic loss, and noneconomic loss,

and that a verdict must categorize compensation for existing and future losses.

Sec. 09.17.035 - Requires that an award of future damages in excess of \$100,000 must be paid to the maximum extent feasible by periodic payments, rather than in a lump sum, if requested by a party. Requires the court to make specific findings regarding periodic payment, and provides the court may require the judgment debtor to post security. A judgment requiring periodic payment must specify the recipient, amount, interval between payments, and number of payments to be made. Judgment may be modified only if the judgment creditor dies, in which case the payments go to persons the judgment creditor owed a duty of support prior to death. Allows the court to penalize a judgment debtor who fails to make required payments.

Sec. 09.17.040 - Requires a person who submits certain pleadings to a court to verify that the person believes that statements in the pleadings are true.

Sec. 09.17.045 - Limits liability of school superintendents, elected or appointed officials of a political subdivision, and certain board members.

Sec. 09.17.050 - Establishes by statute the rule already established by case law, that contributory fault diminishes recovery, but does not bar a plaintiff from seeking compensation.

Sec. 09.17.055 - Provides that a civil award for personal injury or death must be reduced by the amount received by the claimant from other sources for the injury or death. Does not apply to life insurance death benefits or some kinds of recoveries under federal programs.

Sec. 09.17.060 - Requires the jury or court to apportion damages between each party to the lawsuit, if there is more than one party to the action. Each party is assigned a percentage of the fault, and damages are awarded based on the applicable percentage. Changes the existing rule of joint and several liability to one of several liability only. For example, if A sues B and C, and A is not at fault, and B and C are each 50% at fault, assuming damages are \$100,000, B and C would each be liable for \$50,000 in damages. Under rules of joint and several liability, Party A could collect

the entire judgment of \$100,000 from either B or C, in which case B or C would seek contribution if either paid more than their share. Under a rule of several liability, A cannot collect from B or C more than their respective shares of the liability, so if B is insolvent, A is without recourse for that \$50,000.

Sec. 09.10.070 - Provides that if a person settles a claim, the settlement does not release anyone else unless the agreement so provides. However, the sum of the total claim is reduced by the amount of the released persons share of the damages, determined under AS 09.17.060.

Sec. 09.17.080 - Limits contingency fees for attorneys who represent plaintiffs in personal injury actions based on negligence.

Sec. 09.17.900 - Definition of "fault."

Section 4 - Changes the time period for when an offer of judgment must be served on a party in order for that offer to be considered a reason for reducing interest on any award made later to the other party.

Section 5 - Changes the interest rate on judgments so that it will float according to the Federal Reserve discount rate.

Section 6 - Provides that prejudgment interest accrues from the day process is served on the defendant unless the parties have agreed otherwise.

Section 7 - Technical change related to section 8.

Section 8 - Provides that appeal of an arbitration award must be filed within 60 days of an award. Also, requires a new trial of the issues, if an appeal is filed.

Section 9 - Technical amendment required so that malpractice actions governed by sections in AS 09.55 are also governed by the limitations of AS 09.17, enacted in this draft.

Section 10 - Provides that attorney fees cannot be awarded unless authorized by statute or an agreement between the parties.

Vet sued for not killing pet dog

CANTON, Ohio (AP) — A veterinarian is being sued by a couple who claim he diagnosed a painful back condition in Barney, their 4-year-old dachshund, but then kept the dog he "didn't have the heart" to destroy.

"I know I probably should have done it, but how do you kill a dog who's wagging his tail and licking your face?" said Dr. Daniel Evans. "I just couldn't do it."

The lawsuit, filed Thursday by Linda G. and Dennis W. Gregory of Perry Township, contends they suffered "severe emotional trauma" from the doctor's treatment of their dog.

The Stark County Common Pleas Court lawsuit, which seeks \$100,000 damages from Evans and Massillon Animal Hospital, contends Mrs. Gregory asked Evans to destroy Barney last October, based on his diagnosis of possible continued pain and eventual paralysis.

They learned Barney was alive when they took another animal to Evans' office earlier this month. Barney was returned to them March 5, causing them "another emotional trauma, although admittedly a happy one," the lawsuit said.

Evans said he agreed to destroy the dog after Mrs. Gregory told him she didn't want to spend any money on the dog for treatment of what she said was a painful back condition.

"When I went in to put him to sleep, he jumped all over me and licked my face and wagged his tail," said Evans. "I didn't have the heart to put him to sleep. She said he was in pain and yet there he was jumping around."

Evans said he cared for Barney for the next five months, intending eventually to destroy the dog.

"He became a part of the family. We just loved him and fed him and gave him a good home."

Psychic awarded \$1 million

By MICHELE DIGIROLAMO
United Press International

PHILADELPHIA — A woman who blamed a CAT scan for loss of her psychic powers has been awarded more than \$1 million by a jury but a "shocked" hospital attorney said Friday the verdict would be appealed.

"If the verdict is allowed to stand, it's an outrage and an example of why the American tort system has to be changed," said Richard Galli, an attorney for Temple University Hospital, where the CAT scan was performed.

A jury deliberated about 45 minutes Thursday before awarding Judith Richardson Haimes, 42, \$600,000, plus \$418,000 in delay damages. Haimes, of Clearwater, Fla., lived in New Castle, Del., at the time of the test.

Haimes had contended that as a result of the CAT scan she suffered severe headaches when she tried to concentrate to use her psychic powers. Her attorney, Joel Lieberman, said Haimes had previously earned her living as a psychic and was able to read people's auras and help police solve crimes.

After the jury heard Haimes' case, Court of Common Pleas Judge Leon Katz ruled Haimes had failed to prove her claim that the CAT scan left her with headaches that made it impossible for her to use her psychic powers.

Katz ordered the jury to disregard Haimes' allegations about her lost psychic



The Associated Press

Judith Richardson Haimes

powers and consider only her testimony about the negative allergic reaction she suffered from a dye injected during the CAT scan.

"There is no way in the world a person who walked out of the hospital, did not pass out, did not lose consciousness, whose heart did not stop beating, who did not stop breathing, is entitled to pain and suffering in that amount of money," Galli said.

"I was shocked," Galli said. "There's no basis for it."

But Lieberman disagreed and maintained the award would have been much higher if the jury had been allowed to consider Haimes' loss of psychic powers and loss of business earnings.

Senator Dick Eliason

Page 4

April 23, 1986

Section 11 - Allows costs and attorneys fees to be awarded to prevailing party in connection with appeal of an arbitration award if the award is increased or decreased ten percent by the appellate court.

Section 12 - Gives the district court jurisdiction over appeals of arbitration awards related to section 8.

Section 13 - Repeals AS 09.16, the existing chapter concerning contribution among joint tortfeasors.

Section 14 - Provides for the amendment of Civil Rule 49.

Section 15 - Provides for the amendment of Civil Rule 52.

Section 16 - Provides for the amendment of Civil Rule 58.

Section 17 - Provides for the amendment of Civil Rule 11.

Section 18 - Provides for the amendment of Civil Rule 82.

Section 19 - Provides for the amendment of Civil Rule 68.

Section 20 - Provides for the amendment of Civil Rule 82.

Section 21 - Provides that the Act will apply to actions accruing after the effective date of the Act.

Section 22 - Severability clause.

Section 23 - States legislative intent that the changes made by this Act be reviewed in three years. Also requests three annual reports from the division of insurance premiums charged for liability insurance.

Section 24 - Effective date for most of the bill.

Section 25 - Provides that AS 09.17.080, added by sec. 3 of the bill, only takes effect if Sec. 10 of the bill does not pass by a two-thirds majority in each house. If sec. 10 passes by a two-thirds majority in each house, then AS 09.17.080 will not take effect.

TL:csh
c6/081

Plaintiff's view:

In his article, Mr. Kleinfeld concludes that Rule 82, under which the prevailing party is compensated partially for attorneys' fees, should be abolished. I presume this expresses disagreement with Chief Justice Burger's proposal to expand the approach to the federal courts. I respectfully, but sincerely, disagree with Mr. Kleinfeld's conclusion. In my view, Rule 82 does encourage settlement, in a fair and meaningful manner, and would be especially appropriate in the federal system.

Contrary to Mr. Kleinfeld's opinion, plaintiffs do consider the impact of an adverse Rule 82 award upon them. The Rule 82 award directly applies to the determination of liability and to the amount of the judgment through Rule 68. In my experience, Rule 68 offers of judgment less often control. In cases where damages are the primary issue, parties are usually able to settle, with some help from Rules 82 and 68.

Mr. Kleinfeld also concludes that Rule 82 is ineffective in discouraging nuisance cases. He does so on the basis that "if the case is litigated through trial, the defendant will probably win an award of \$5,000 to \$10,000 against the plaintiff. But because the cost to the defendant will exceed the award, and because the award will probably be uncollectible, most defendants will pay up to \$5,000 or so even on frivolous claims."

My experience has been that defen-
(Please turn to page 11)

By James A. Parrish

The Alaska Rules Are a Success

Defense view:

Civil Rule 68, which has been in operation in Alaska for many years, permits only the defendant to make an offer of judgment. However, with the passage of Alaska Statute § 09.30.055 in 1980, either party may make an offer of judgment. The difference is that Rule 68 provides for awards of costs and attorneys' fees, while the statute increases or decreases the prejudgment interest by 2 percent, making a 4 percent difference when applied to both sides' costs. That could be substantial if the case were large and several years old at the time of judgment.

I strongly support both the rule and the statute. The benefit of Rule 68 is to the defendant. Even Mr. Kleinfeld does not suggest abolishing Rule 68. The purpose of Rule 68 is to provide protection to the defendant against Alaska Rules 82 and 79, which allow for awards of costs and attorneys' fees to the prevailing party. If Rule 68 did not exist, a plaintiff might claim \$1 million and demand in settlement \$100,000, but only recover \$10,000 and still be the prevailing party. If, under those circumstances the defendant recognizes the claim as a \$10,000 claim and makes an offer of judgment for \$10,000, he can protect himself against a subsequent award of costs and attorneys' fees; thus, in effect, making himself the prevailing party. Without Rule 68 he would be helpless to protect himself against costs and attorneys' fees short of paying an unreasonable demand.

(Please turn to page 10)

By H. Bixler Whiting

(Continued from page 9)

The benefit to the court system is that offers of judgment create some stark realities to clients. I have not found anything more difficult to explain to a client, or more helpful in making an otherwise unreasonable client recognize the true value of his case, than having to explain the effect of a Rule 68 offer of judgment. When such an offer is made, one must have a very serious conversation with his client along the lines described in Mr. Kleinfeld's article. The client needs to have the effect of Rule 68 explained to him and some appraisal of costs and attorneys' fees which might be assessed against him if he does not prevail. Of course, it also makes the plaintiff's lawyer very realistic, requiring him to examine the merits of his case prior to going forward.

I do not think defense attorneys in general use Rule 68 effectively, although there are some who are adept at using it. Those generally tend to be the defense attorneys who are professionally interested in protecting their clients as opposed to some defense attorneys who put their personal financial gain ahead.

As far as the plaintiff is concerned, Rule 68 is useless. Under the statute, a plaintiff could make an offer to settle a case at the high end of the settlement range and hope to beat it before the jury, but the risk is a 4 percent difference on the interest if he does not beat the offer. A plaintiff cannot very well make an offer at the low end of his settlement range because of the impact that might have on future settlement negotiations. We all know that it is very difficult to negotiate a settlement if the plaintiff begins demanding more money.

In conclusion, I think Rule 68 is extremely effective if used properly. I know for a fact that it deters litigation. I have used it myself to do so, as have many other lawyers.

Rule 68 clearly provides incentives to settle, even improving on prejudgment interest provisions, which do not come into effect until the eve of trial. Rule 68, however, is not a substitute for prejudgment interest, because at the eve of trial, the defendant is facing the prospect of an adverse judgment plus prejudgment interest, which might have accumulated over a 3-to-5 year period. The two elements can work together to enhance settlements with prejudgment interest providing a return on investment if the case is not settled.

CIVIL RULE 82

Civil Rule 82 has the same effect as the laws providing for prejudgment interest, except that Rule 82 can work to the benefit of either party and the prejudgment interest provision really only benefits the plaintiff. Rule 82 is the biggest factor which comes into play when one has to consider a Rule 68 offer of judgment, as Mr. Kleinfeld has pointed out.

Rule 82 is a rule which recognizes the reality of attorneys' fees. I do not think there is any provision in Alaska law regarding civil litigation that has been clarified so

The late H. Bixler Whiting was an attorney in Fairbanks, Alaska. James A. Parrish is a partner in the Parrish Law Office, Fairbanks, Alaska.

extensively by the Alaska Supreme Court. In my opinion, the rule is well-balanced. It certainly does not fully compensate a party for attorneys' fees. If it did, I fear that it would have a chilling effect upon potential litigation, including meritorious litigation. It, thus, offers a proper balance between creating a chilling effect and providing some compensation to the prevailing party in litigation in which he was wrongfully involved.

Rule 82 compensates the prevailing party with an additional 10 percent of the judgment for attorneys' fees. The normal attorney's fee in a contingent fee case is one-third of the recovery. In most plaintiffs' recoveries, Rule 82 compensates the plaintiff for approximately one-third of the attorneys' fees he has paid. For defendants who prevail, the court is required to make an equitable award based on the work done.

Like Rule 68, Rule 82 definitely forces sobering reality on both parties when evaluating settlement. The plaintiff must explain to his client the prospect of the defendant recovering attorneys' fees if the case is lost. Rule 82 discourages people from filing and prosecuting lawsuits that they know they are likely to lose but are willing to try as long as they stand to lose nothing.

Another beneficial effect of Rule 82 is to give a sued party some incentive to defend against meritless claims. If it were not for Rule 82, insurance companies—as well as other defendants—would be more prone to pay a nuisance value on a meritless claim rather than spend the money to defend. Rules 68 and 82 give those unjustly sued defendants some substantial protection by allowing the wrongfully sued person to recover costs and fees.

I do believe that Rule 82 does have an effect on settlements by increasing the amount, but I do not think that

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is unjust considering the fact that the recipient has been obligated to incur attorneys' fees to recover the money to which he is entitled.

Attorneys spend very little time preparing a cost bill and motion regarding same. The cost bill is decided by the clerk, not the court. A party may ask the court to review the clerk's rulings, but that does not even require a hearing in most cases, and the costs to the awarded are pretty well-established. Attorneys' fees can be awarded without any hearing at all by the trial judge, although sometimes hearings are held. The time spent on this

aspect of the case is normally very small and should probably not have any effect on considering the merits of Rule 82.

I strongly support the provisions for prejudgment interest and Rule 82 attorneys' fees, primarily because they recognize economic and legal reality and are equitable. I support them secondarily because they tend to promote settlement of cases.

Ultimately, the bench and bar are responsible for resolving disputes, whether by settlement or litigation, and I believe these provisions advance that. tt

Parrish

(Continued from page 8)

dants, especially insurers, do not pay unfounded nuisance claims. Any win is a win for the company involved. The less merit there is to a case, the less likely it is to settle.

Whether an average award of \$5,000 to \$10,000 upon a successful defense is full compensation says nothing about the impact upon prospective plaintiffs considering such suits. Even impecunious plaintiffs are usually morally responsible and are especially sensitive about incurring attorneys' fees against them. It is the rare plaintiff, well-heeled or not, who is willing to press an obviously unfounded claim at the risk of incurring \$5,000 to \$10,000 liability. The mere filing of such a judgment creates a lien on any real property he might acquire.

To the extent there are those plaintiffs or attorneys who would file nuisance cases at the risk of a substantial attorney fee award, abolishing Rule 82 would not help. Those claimants base their claim on what they think the defendant will pay to avoid defending a lawsuit. There is no prospect of obtaining an affirmative attorney fee award in such cases. As to this class of litigant, imposing Rule 82 is, at worst, neutral. At best, it discourages the filing of some of what would otherwise be nuisance cases.

The other side of the problem is the nuisance defense. Rule 82 is flexible enough to allow full or nearly full attorneys' fees to a plaintiff who has been forced to try a case over a nuisance defense. Absent such a rule, institutional or well-heeled private defendants can literally drive plaintiffs' attorneys out of the market in small-to medium-size cases. It is simply impossible, even with a clear liability and clear damage case, in the \$10,000 to \$20,000 range, to make a profit against an obstructive defense in the absence of an attorneys' fees rule. Even simple contract cases can be forced to take 10 days actual trial time without regard to the amount at issue. If the claim is in the \$20,000 range, counsel must charge by the hour. Without an award of attorneys' fees, the justly deserving claimant can actually lose money.

Although such cases can happen, even with attorneys' fee awards, they are much more likely to happen without them. When they do occur, it is mandatory that the plaintiff receive an award for attorneys' fees, hopefully near actual expenses.

On a practicing level, a plaintiff's attorney faced with Rule 82 is required to advise his client, up front, of the possibility of an adverse Rule 82 award. This advice usually prompts the client to more completely disclose the weak points of his case to the attorney and to express a more realistic attitude toward evaluating it.

In other words, once the client has a *personal* stake in a lawsuit—over and above the mere possibility of recovering money in his favor—he takes much more interest in it. This enables the attorney, early on, to evaluate the case more fairly by shifting the emphasis away from sympathy, revenge, or so-called "principle." Cases, which are evaluated fairly and early, tend to settle early. Where this does not happen, interim resources are wasted, making settlement difficult to achieve, if at all. Thus, when the plaintiff is financially realistic, Rule 82 serves a very beneficial purpose to all.

ECONOMIC DURESS ON PLAINTIFFS

I think Mr. Kleinfeld protests too much concerning the economic duress on plaintiffs. He fails to consider several factors:

- (1) the impact of Rule 82 on settlement before the hiring of counsel or filing of litigation;
- (2) the real need to at least partially compensate plaintiffs with bona fide claims for the attorneys' fees they incur;
- (3) the resolve of average plaintiffs to pursue a bona fide claim even at some risk of paying attorneys' fees; and
- (4) the very real economic impact which Rule 82 has upon defendants.

Rule 82 applies in uncontested as well as contested litigation. It applies to nearly all civil claims, contractual or tort in nature. In the presence of Rule 82, a potential defendant cannot, without incurring expenses to himself, force the plaintiff to hire an attorney and file a lawsuit just to see if he is serious.

In undisputable claims, which would not be contested in court, the mere filing of a complaint provides for an award of attorneys' fees based upon the uncontested schedule. Thus, in contract and debt cases, there is considerable incentive to avoid delaying payment to creditors to the point of forcing litigation.

In tort cases, Rule 82 provides an added incentive for insurance companies to affirmatively seek settlement prior to selection of legal counsel. Aside from the obvi-

(Please turn to page 53)

donment of his appeal. This promotes settlements, but not necessarily in a just manner.

SUPREME COURT INCONSISTENCY

An oddity of Alaska Supreme Court practice suggests an inference that the court does not really believe in the justice of the doctrines it has imposed.

Although the supreme court awards attorneys' fees to prevailing parties, it does not follow anything like Rule 82. Instead, it routinely awards \$250 to \$750. The prevailing party is ordinarily not allowed to submit evidence of his actual fees, and the court does not consider them. Actual attorney's fees on appeals in substantial civil cases are typically in the \$5,000 to \$15,000 range. If a trial court followed this practice, it would be reversed.

The Alaska Supreme Court has never explained its anomalous practice on attorney's fees awards to prevailing parties. Does the court wish to avoid discouraging appeals? Then why not similarly avoid discouraging trials? Delay is a more serious problem in Alaska at the appellate than at the trial level, so administrative considerations do not favor keeping the door open wider at the appellate level.

Supreme court results are unpredictable, but so are trial results. Trial results in similar cases may approximate a bell shaped curve, with most in a predictable range, but substantial tails on the low and high ends. In certain kinds of cases, such as the weak liability, high damages personal injury case, the results may be

an even more unpredictable dumbbell curve, with clusters around zero, and at very high levels, and few in between. In some cases, a plaintiff or his lawyer may be unreasonable in going to trial, but in many, trial is as good a means as settlement to decide how much money, if any, ought to be taken from one party and given to the other.

ABOLISH RULE 82

I suppose the above criticism implies that the rules are too effective, rather than not effective enough, in promoting settlement. The plaintiff is forced to settle his case for less than it is worth because of his lesser ability than the defendant to try the case on a double or nothing basis.

Some may feel that encouraging settlement is of such great value as to justify this result. Where the stakes are so high, my own values place a greater weight on justice than administrative convenience, so I cannot accept this outcome as desirable.

The Alaska Bar Association passed a resolution more than a decade ago calling upon the supreme court to repeal Rule 82. The court has never acted, nor explained its inaction, regarding this resolution. I think the bar was correct. We have gone too far in the direction of threatening litigants with catastrophe to compel them to settle. We ought to use our luxuriously expensive system of courts to try cases, not frighten people of moderate means out of trying them.

Parrish

(Continued from page 11)

ous fairness of forcing an insurance company to share plaintiff's costs of counsel in bona fide litigated cases, Rule 82 provides an economic incentive to insurers to avoid involving counsel altogether. The rule promotes settlement of litigation before it starts, as much as after. Wise insurers should, and I believe do, take this cost into account in deciding upon prelitigation settlement policies.

RULE 82 PROVIDES PARTIAL COMPENSATION

Although the prospect of an adverse award does promote a more meaningful evaluation, I doubt that it discourages the filing of many bona fide claims. Clients as a class are self-righteous, especially when they have a good case.

I also question whether the system suffers that much when a plaintiff who lacks confidence in his position, even though it may be well-founded, elects not to pursue his claim. At least his decision is predominantly free, coerced only by fair risks which are beneficial to the integrity of the system. What detriment there is in this situation is small in comparison to the alternative. The greater injustice by far is the bona fide case which cannot, as a matter of economics, be brought at all. Without fee

awards, the freedom to bring bona fide claims in the \$20,000 range can be lost altogether. We should not attempt to avoid one injustice by imposing a larger one.

Of course, there is the occasional case where a plaintiff without a serious injury and a reasonably good liability position loses to a jury and suffers a fee award. This can be harsh, but the trial courts have sufficient discretion to temper the awards in light of the plaintiff's circumstances and the quality of the case.

Also, as Mr. Kleinfeld noted, marginal appellate grounds can be bargained against the fee award in most instances. But, by this mechanism, the rule again prompts realistic consideration of the merits of the case before proceeding into the appellate court. The plaintiff, who could otherwise not have anything to lose on appeal, suddenly does.

Average contingent fees in contested cases are one-third. As a result, plaintiffs, even with clearly bona fide claims, are rarely fairly compensated for their losses. Aside from the occasional run-away verdict, which is so often publicized, plaintiffs rarely come out ahead. To the extent Rule 82 covers approximately one-third (10 percent divided by 33 1/3 percent) of fees actually paid, it reduces the under-compensation.

The successful defendant also is partially compensated. Thus, Rule 82 effects a redistribution of resources. Because both sides usually come out behind, it is better that the prevailing party suffers less.

Whether a rule providing for full attorney fees in normal cases should be adopted is an interesting question. Theoretically, it would benefit plaintiffs overall. From a practical standpoint, I doubt that it would work or be beneficial.

Without a personal stake in the amount of attorneys' fees charged to a successful plaintiff, there would be no market force to sustain competition as to the contingent fee contract percentage. A plaintiff under a contingent fee pays only if he wins. If a plaintiff will be repaid full attorneys fees, he could care less what percentage the attorney charges. With unlimited attorneys fees, contingent fee contracts would edge, if not leap, upward.

On the defense side, it would be impossible to police hours and rates charged by counsel for a successful defendant. When a successful defendant must still pay a large proportion, usually about two-thirds, of his attorney's billings, those billings are adequately policed. But where a successful defendant might pay nothing, he could encourage the largest billing from his attorney so as to punish his adversary.

In my view, full fee awards as a matter of course would be difficult to enforce fairly. The primary goals can be achieved without them. The loss of market control would cause more unfairness than it would resolve.

NO INTERFERENCE WITH THE FEE AGREEMENT

Mr. Kleinfeld's reference to "tinkering" with the fee agreement between the attorney and client does not in my opinion merit serious consideration. Rule 82 does not and should not govern the private fee agreement.

The right to counsel is fundamental. To protect this right, clients must be free to negotiate fees in the manner they wish. Otherwise, clients with money will always be able to afford attorneys. A limitation on contingency fees would mean that some people without money will be denied attorneys that they might otherwise have retained.

I believe any system that would limit contractual attorneys fees to given scheduled amounts or that would require court-awarded attorneys' fees to be paid exclusively to the attorney would be abhorrent. These are matters between attorney and client which must be left to the competitive forces of the market.

Although interference with attorneys' fee agreements in workmen's compensation cases and federal tort claims has successfully limited attorneys' fees, it has done so at the expense of access. My own office turns away many cases that should otherwise be brought because fair compensation to the attorney for prosecuting those cases is not possible. Countless people, especially those without funds, have been denied representation, and therefore relief, which they could have received but for such "tinkering."

SUPREME COURT INCONSISTENCY

In Alaska, Rule 82 applies at the trial level but not at the appellate level. I do not believe this is an inconsistency, much less one that merits discarding the rule altogether.

Rule 82 applies after trial but is not effective unless the case is affirmed. If the case is reversed, a new award, under the same rule, would eventually be required.

Applying Rule 82 at the appellate level would be difficult. When an appellant wins a retrial, the ultimate outcome of the litigation is rarely known. It also would not be beneficial to compensate for purely technical victories, because an appellate court with a limited record before it would have difficulty assessing who the prevailing party is, and, especially, whether the prevailing party's action has actually advanced the litigation. The Alaska Supreme Court, more so than trial courts, has better things to do than evaluate attorneys' fee claims.

More importantly, the Alaska Supreme Court does not wish to discourage the raising of bona fide legal claims on appeal. Likewise, it does not wish to encourage attorneys to bring appeals unless the clients are serious enough about the issue to bear the cost. This allows free access to the court and maintains strict adversity. Also, the absence of significant fee awards tends to keep the court's focus on legal issues, thereby maintaining a "detached" image and attitude essential to an appellate body.

As a practicing plaintiff's lawyer, with extensive appellate experience in the Alaska Supreme Court, I would like to see larger attorneys' fee awards to the successful party on appeal. Fees usually run \$250 to \$750 even for three weeks' work on an appellate brief. I have found no consistency in the fees awarded in my cases and, by the nature of the system, have not had the opportunity to set fee awards in others. I assume with clearly frivolous appeals that fee awards are more substantial, but I do not know. I accept our court's trivial and unexplained awards knowing they have not diverted the court from important matters.

Finally, whether there is any merit to the Alaska Supreme Court's method of awarding fees on appeal seems entirely beside the point. The issue is whether Rule 82 should be enforced in trial courts. To the extent Rule 82 is beneficial there, it should be used.

The Alaska Supreme Court's appellate fee practice may be "an oddity," but I do not believe that it "suggests an inference that the court does not really believe in the justice of the doctrines it has imposed." The supreme court has been firm, consistent, and predictable regarding awards of attorneys' fees pursuant to Rule 82. There is nothing in its cases applying Rule 82 that suggests that it does not believe in the justice of the rule.

ADOPT RULE 82 IN THE FEDERAL SYSTEM

Rule 82 is effective. From one who represents plaintiffs, let it be said they are better off with it. Fewer cases would have to go to lawyers or to trial if Rule 82 were adopted in the federal system. (The rule is followed by the U.S. District Court of Alaska, where civil trials are rare. [Local Rule 21.1.]) If the rule were followed by other federal courts, plaintiffs with bona fide claims would receive a greater proportion of their fair recovery, and many nuisance claims would be discouraged.

Although the Alaska Bar Association passed a resolution more than a decade ago calling upon the Alaska Supreme Court to appeal Rule 82, my office was not aware of it. I am not aware that it is a current issue today. To the extent it is, I doubt that those who represent individuals, and not large companies, would support abolishing Rule 82.

In my view, Rule 82 does not compel litigants to settle by threatening them with catastrophe. On the contrary, it should be strengthened some to further settlement. Every potential litigant, whether plaintiff or defendant, ought to consider the extreme cost of entering the courts and trying cases. Except in unusual circumstances, each

litigant should be faced with the prospect of bearing part of his opponent's costs if he loses. We all tend to be considerably more introspective, less arrogant, and more willing to hear our opponent's view of the case when we must stand ready to pay a reasonable part of his costs.

Overall, the rule enhances the image and effectiveness of the judiciary. No institution that regularly allows its costs to devour its benefits can merit respect. Provision for partial fees in most cases, and full fees in appropriate ones, goes a long way to advance the primary goal of the judicial system: the fair and efficient resolution of private disputes. H-

Taylor/Buchanan

(Continued from page 35)

*K. Phillip Taylor and Raymond W. Buchanan are authors, with David U. Strawn of the book, *Communication Strategies for Trial Lawyers*, published by Scott, Foresman and Co., and priced at \$7.95 for the paperback edition.

1. M. Ludden, *In death penalty was, a short letup*, SENTINEL STAR, December 8, 1981, pp. 1, 6A.

2. See D. Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, AMERICAN JOURNAL OF SOCIOLOGY (July 1980) 139-148; G. Kleck, *Capital Punishment, Gun Ownership and Homicide*, AMERICAN JOURNAL OF SOCIOLOGY (January, 1979), 882-910; D. Lester, *Effect of Gary Gillmore's execution on homicide behavior*, PSYCHOLOGICAL REPORTS (December, 1980), 1262.

3. M. McLaughlin, T. Cheatham, K. Erickson, and B. Waggenpack, *Juror Perceptions of Participants in Criminal Proceedings*, J. OF APPLIED COMMUNICATIONS RESEARCH 2 (November, 1979), 91-102.

4. See C. KIESLER, *THE PSYCHOLOGY OF COMMITMENT*,

Academic Press, New York, New York 1971; B. Pryor, K.P. Taylor, R.W. Buchanan, D.U. Strawn, *An Affective-Cognitive Consistency Explanation of Comprehension of Standard Jury Instructions*, COMMUNICATION MONOGRAPHS (March, 1980), 68-76.

5. J. Cooper and S. Worchel, *Role of Undesired Consequences in Arousing Cognitive Dissonance*, 16 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 2 (1970), 199-206; J. Cooper, *Personal Responsibility and Dissonance: The Role of Foreseen Consequences*, J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 3 (1971), 354-363.

6. V. BUOLIOSI and K. KURWITZ, *TILL DEATH US DO PART*, W.W. Norton & Co., New York, New York, 1978, pp. 364-365.

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8. See D. Myers and H. Lamm, *The Polarizing Effect of Group Discussion* PSYCHOLOGICAL BULLETIN, (1976), 602-627; K. P. Taylor, R.W. Buchanan, B. Pryor, D.U. Strawn, *How Do Jurors Reach a Verdict?* J. OF COMMUNICATION, (1981), 37-42; K. P. TAYLOR, R.W. BUCHANAN, D.U. STRAWN, *COMMUNICATION STRATEGIES FOR TRIAL ATTORNEYS*, Scott Foresman & Co., Glenview, Illinois 1984.

Special

(Continued from page 28)

statistics concerning volume," jurors, witnesses in law suits and, finally, other judges.¹⁸

A major concern of the Report is "confidentiality"¹⁹ as to the source of information, in order to protect the "informant" from "reprisal,"²⁰ presumably from the judge! The Report expressly rejects any concern that such a shield will be misused, encouraging vindictiveness or other meanly-based motives for attack upon the judge.

No corresponding concern appears for the reputation of a judge wrongly accused. The Report would keep the evaluations confidential "except to the extent required by the particular program."²¹

ANALYSIS AND RECOMMENDATIONS

In the judgment of this committee, this Report proposes a dangerous intrusion upon judicial independence for reasons hereafter stated. The individual criticisms are such as to lead us to believe that our concerns for judicial independence cannot be overcome by mere modifications of the proposal.

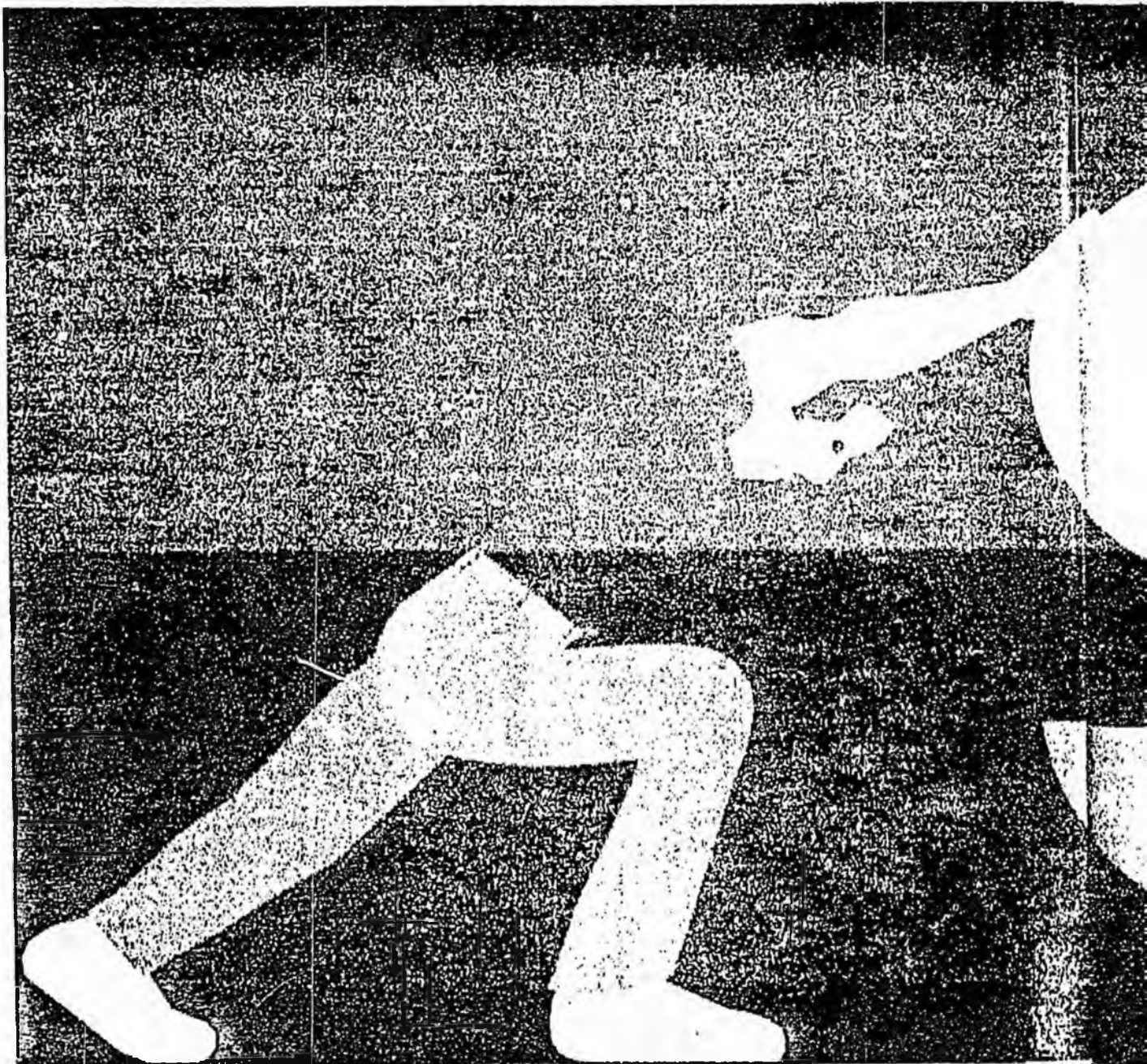
(1) Judicial evaluation committees are superfluous.

Judges are continually undergoing "judicial performance evaluations." The appellate process is precisely such an evaluation, on a case-by-case basis, of judicial performance. As a judge continues in the judicial system, the accumulation of appellate reviews constitutes a far more knowing description of judicial performance than any which could be provided by the proposed evaluation committees.

True, the appellate process does not deal with judicial temperament, mannerisms, punctuality, and matters of that sort except in the most egregious cases meriting comment or even reversal. On the other hand, such conduct is the very reason for the existence of our judicial discipline commissions.

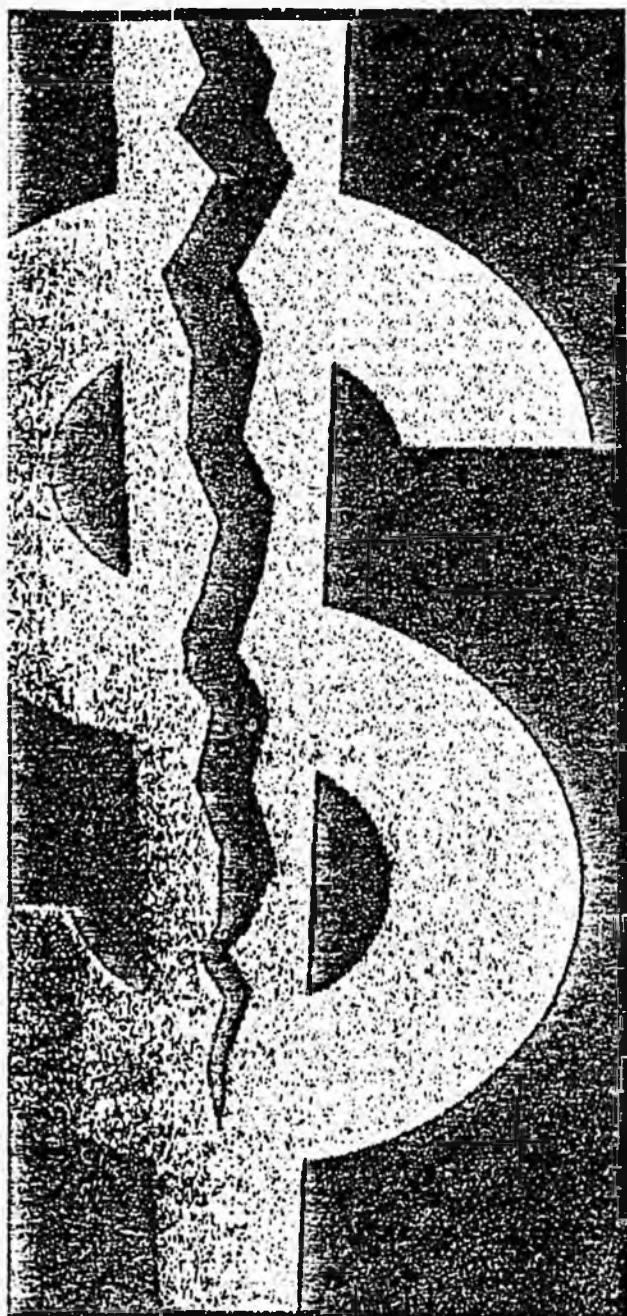
(2) *Reliability*. The information to be collected by the proposed judicial evaluation committee is almost guaranteed to be unreliable. The sources are most likely to be losers, the uninformed, and the merely venal. The design of record collecting and protection is such as to invite the comment of such people without any means whatever for evaluating its accuracy. Thus, the disgruntled clerk who is not permitted to catch a four o'clock train to his out-of-county home becomes a source of information; the lawyer, unfamiliar with the rules of evidence whose objection or tender of evi-

Alaska: Where the Loser Pays the Winner's Fees



Only one state has this provision (with an offer of judgment rule).
How is it working?

By Andrew J. Kleinfeld



Alaska combines a federal-style Rule 68 offer of judgment rule with the English rule awarding attorneys' fees to the prevailing party in civil litigation. This article summarizes the Alaska system and discusses its effect on litigation and settlement.

Under Alaska Civil Rule 68, as under the federal rule, a party, ordinarily the defendant, may at any time prior to judgment make a formal offer to allow judgment to be taken against himself for a specified amount plus costs. If the plaintiff rejects the offer and subsequently wins a verdict lower than the amount of the offer plus interest, the defendant is deemed the prevailing party from the time of the offer and is entitled to costs from the time of the offer.

Costs (other than attorneys' fees) allowed under the rule are much less than actual out-of-pocket costs. For example, a party is likely to have to pay a physician who testifies in court \$500 to \$1,500 for routine, brief testimony, but will usually receive only the subpoena rate for expert witnesses—less than \$50 in most cases—under Rule 68.

The Rule 68 offer would have little force were it not for Alaska's use of the English rule on attorneys' fees. The risk that a few hundred, or at most, a few thousand dollars in a costs award may be shifted will ordinarily not affect the settlement evaluation of a plaintiff anticipating an award ten or a thousand times as large.

The power of Rule 68 offers of judgment in Alaska derives from Civil Rule 82, requiring that the prevailing party should ordinarily recover partial com-



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compensation for attorneys' fees. The rule works slightly differently for plaintiffs and defendants. Rule 68 offers of judgment work mainly with defense awards, but both sides of the rule should be understood.

For successful plaintiffs, the courts ordinarily follow a schedule provided in the text of the rule. Cases are broken down into three categories: noncontested (defaulted); contested without trial (resolved after an answer or motion by defense but before trial); and contested through trial.

Awards on contested without trial cases are 20 percent of the first \$2,000, 15 percent of the next \$3,000, 12.5 percent of the next \$5,000, and 7.5 percent of everything over \$10,000. Thus, the substantial case entails an award of \$1,475 plus 7.5 percent of everything over \$10,000, if resolved before trial, as by acceptance of a Rule 68 offer of judgment—attorneys' fee awards being in addition to offer of judgment. If a case is tried, the Rule 82 award to a prevailing plaintiff is \$1,850 plus 10 percent of the excess over \$10,000.

Rule 82 computations are performed on the sum of the verdict and prejudgment interest. For example, a verdict of \$100,000 three years after the accident yields a judgment of \$131,500 with prejudgment interest at 10.5 percent and \$145,500, including Rule 82 attorneys' fees at the contested rate of \$1,850 plus 10 percent of the excess over \$10,000. Thus, with costs, a \$100,000 jury verdict yields about a \$150,000 judgment after a typical lag.

On the defense side, the operative language of the rule is that the award should be "in a reasonable amount" which is "commensurate with the amount and value of legal services rendered." The Alaska Supreme Court has provided little guidance for trial judges on what this language means.

The Alaska Supreme Court has made it reversible error to award full or substantially full compensation for his attorney's fees to the prevailing party, if the unsuccessful party litigated in good faith. Awards are to "partially" compensate the prevailing party, not fully compensate him. *Malvo v. J.C. Penney Co., Inc.*, 512 P.2d 575 (Alaska 1973).

The Supreme Court will also reverse denial of attorneys' fees to the prevailing party without some good reason articulated by the trial judge. *Stordahl v. Government Employees Insurance Co.*, 564 P.2d 63 (Alaska 1977). The trial judge has broad discretion, but must award some partially compensatory amount based upon the actual work done and fees charged by the prevailing party's attorney.

Awards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not re-

versible. These awards can amount to substantial four- or even five-figure judgments against unsuccessful plaintiffs.

Here is how Rule 68 and Rule 82 fit together.

The defendant offers to allow the plaintiff to take judgment against him for x dollars plus costs and attorney's fees.

If the plaintiff accepts the offer, he may file a Rule 79 costs bill and move for a Rule 82 attorney's fee award, which will ordinarily be the scheduled "contested without trial" amount. For example, a \$45,000 Rule 68 offer is worth \$49,100 plus allowable Rule 79 costs, for a total in the neighborhood of \$50,000. Prejudgment interest is already accounted for in the amount of the offer. Usually plaintiff's and defendant's attorneys agree on these amounts over the telephone and avoid the extra filings.

If the plaintiff rejects the Rule 68 offer and the case is tried to a verdict, a little arithmetic must be performed to determine which party obtains a Rule 82 attorney's fees award. The court must compute prejudgment interest to the date of the offer of judgment, using the amount of the verdict as the principal amount.

If the sum of the verdict plus interest is less than the offer of judgment, then the defendant is entitled to a Rule 82 award from the date of the offer to the date of judgment. This may be a great deal of money, since trial of a substantial case is likely to entail defense attorneys' fees of \$10,000 to \$50,000, or more, for protracted and complex litigation. The wise defendant will have made an offer of judgment early in the discovery process, so that most of the attorneys' fees will have been incurred after the Rule 68 offer and will be subject to Rule 82.

Thus, the plaintiff who wins an award lower than the Rule 68 offer plus interest faces an often catastrophic result. For example, in a personal injury case with a projected value in the \$10,000 to \$30,000 range, if the defendant makes a Rule 68 offer of \$10,000, and the jury award with interest is less, the plaintiff will lose money on the litigation. The plaintiff will have to pay the defendant's attorney fees award—probably in the \$5,000 to \$10,000 range—and the plaintiff's own nonreimbursable costs for medical experts and so forth in the \$1,000 to \$5,000 range.

The knife also gets a little twist from a new Alaska statute on prejudgment interest. Under the statute, either side may make an offer of judgment within the first 60 days of the litigation, or five days after discovery ends. If the party does better than its offer

The rules do not substantially reduce the burden of attorneys' fees for successful plaintiffs

(lower for a defendant's offer, higher for a plaintiff's), then the prejudgment interest rate will be raised or lowered 2 percent for its benefit. Thus a plaintiff who wins a verdict higher than its offer is entitled to 12.5 percent prejudgment interest, and a successful defendant lowers the interest rate to 8.5 percent.

DO THESE RULES SERVE THEIR INTENDED PURPOSES?

This combination of rules is intended to serve two purposes—achieving more perfect justice between the litigants and encouraging settlement. They serve the latter objective better than the former.

The model villain, against whom the entire complex of rules is aimed, is the "bad man" who acknowledges the justice of the plaintiff's demand, but refuses to pay the obligation in order to profit from delay or use the plaintiff's anticipated litigation expenses as leverage to obtain an unjustly low settlement. The honest claimant, whom the rules are intended to benefit, is the person who demands what he is entitled to—and prevails. He is supposed to obtain sufficient interest and compensation for his attorneys' fees so that his victory is not Pyrrhic.

First, the rules do not substantially reduce the burden of attorneys' fees for successful plaintiffs. Here are the mechanics for typical contingent fee arrangements.

The scheduled percentages are much less than the percentages conventionally charged by plaintiffs' attorneys. Contingent fees in Alaska, as elsewhere, range from 25 percent to 50 percent. Most Alaska plaintiff attorneys' fee contracts, in my experience, provide that the Rule 82 award is rolled into the total recovery against which the contractual percentage is applied. Thus, if a case is settled, without trial, for the defendant's \$100,000 liability insurance policy limit and Rule 82 attorneys' fees of \$8,225, the usual one-third contingent fee will be applied to \$108,225, yielding an actual fee of \$36,075, and compensation to the plaintiff of only \$72,150, a far cry from the \$100,000 he should supposedly receive.

The obvious tinkering would be to limit attorneys' fees actually charged to the amount awarded, as in workers' compensation. But unless the scheduled percentages were raised to market levels, this might dry up the supply of attorneys willing to handle plaintiffs' personal injury claims, particularly the smaller ones.

Analogously, it has become extremely difficult during the last year or so for injured workers to hire attorneys in Alaska to prosecute moderately sized

workers' compensation claims, because fees awarded by the workers' compensation board are below the amounts needed to make handling of the claims as profitable as alternative work.

If the Rule 82 schedule were raised to market rates, liability insurance premiums would have to be increased substantially in order to spread the much higher cost. This might well increase the amount of evasion of Alaska's very loose new mandatory insurance law.

If the rules designated the Rule 82 award as the amount actually to be paid to the plaintiff's attorney, an additional problem would develop around personal injury cases, resulting in judgments higher than the defendant's liability insurance policy limits. A line of Alaska cases holds that the Rule 82 award should be calculated on the total verdict plus interest, not merely the policy limit. And unless the insurance policy clearly provides otherwise, the total verdict plus interest must be paid by the insurer as costs on top of its policy limit. If a defendant has a \$100,000 policy limit, and the verdict plus prejudgment interest is \$2 million, then the Rule 82 award is \$200,850 (again, \$1,850 + 10 percent of the excess over \$10,000). Under current practice, the attorney would get his contingent fee percentage computed on the amount actually recovered from the insurance company—the \$100,000 policy limit plus the \$200,850 Rule 82 award and the Rule 79 costs would be rolled together, and the client would receive the rest. If the rules were changed so that the attorney received the Rule 82 award and nothing else, he would wind up with about twice as much as his client in this not extraordinary situation.

Second, the rules do not effectively discourage nuisance claims. These are claims for which the plaintiff knows that in all likelihood, a jury will find no liability or no damages, but suit is filed in hope of a settlement. If the case is litigated through trial, the defendant will probably win an award of \$5,000 to \$10,000 against the plaintiff, but the cost to the defendant will exceed the award, and the award will probably be uncollectible, so most defendants will pay up to \$5,000 or so, even on frivolous claims.

Third, the rules do not really promote settlement in the manner contemplated. Alaska Supreme Court opinions have suggested that defendants would be more eager to settle because the stakes at trial are raised to include prejudgment interest and attorneys' fees. But the plaintiffs' attorneys are equally aware of the "add-ons" and factor them into their settle-

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matters to the disciplinary counsel, is that the ABA Standing Committee on Professional Discipline is advocating referring every minor infringement of the ethical rules.

Obviously, that is not the case; nor is it the problem. If I have overemphasized the need to refer misconduct in this article, it is because judges as a group are not referring the misconduct they observe or become aware of. I have attempted to show why referral is appropriate and also ethically mandated by Canon 3B(3). I

believe that for the judge referral is usually the most advantageous response to lawyer misconduct. **W**

Judges and judicial organizations interested in further information on disciplinary agencies or other information in this article may contact the author, Timothy McPike, ABA Center for Professional Responsibility, 11th Floor, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

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(Continued from page 7)

ment demands. The arithmetic consequence is that if the plaintiff's and defendant's attorneys evaluate the case differently, the difference is magnified, not shrunk, by the "add-ons." Interest and attorney's fees are proportional, so if the parties are far apart, their mutual awareness of the rules pushes them further apart.

ECONOMIC DURESS ON PLAINTIFFS

A positive feature of the rules is that by making a small case larger, they make it easier for plaintiffs with small cases to induce attorneys to accept them. But this increasing of the stakes works both ways—and has a serious negative side effect.

The combination of Rule 68 offers, statutory adjustment of prejudgment interest rates, Rule 79 costs, and Rule 82 attorney's fees, greatly raises the stakes in litigation. As was shown above, if the defendant loses a \$100,000 case, he pays about \$150,000. If the plaintiff wins a \$10,000 verdict after rejecting a higher offer of judgment, he winds up owing money to the defendant as well as to his own lawyer.

The economic effect is like doubling the stakes in a poker game. It drives out the players whose resources do not allow them to stay at the table for a long enough time for the probabilities to work themselves out beyond a few bad hands.

Plaintiffs suffer more from the increased stakes than defendants. To understand why, one must consider the varying abilities of persons and institutions to bear risk. An institutional defendant, such as a large business or an insurance company, can afford the risk of a single adverse judgment much more easily than the person or firm of moderate resources who rarely litigates.

Consider the plaintiffs in a clear liability but unpredictable damages case. Most typical are the preexisting condition plaintiffs. These individuals present themselves to the jury with substantial disabilities, but the defendant has a good opportunity to show that their disabilities should be attributed to conditions which preexisted the accident. It is not at all unusual in these cases to have an offer of judgment around \$50,000, a demand around \$100,000, and jury verdict substantially lower than the offer or higher than the demand.

Now consider the risks to each side. In order to try the case, the defendant must risk a judgment which, with interest and attorneys' fees, may be twice the demand. But a professional litigant, such as a liability insurer, would be wise to take this risk rather than pay the demanded amount, because the occasional high verdict will be more than offset by the general run of moderate verdicts and the occasional low one.

The real pressure on insurers to settle these cases arises not from the interest and attorneys' fees rules, but instead from the risk of a judgment in excess of insurance policy limits, leading to a bad faith claim. Many cases worth \$40,000 have settled for \$50,000 policy limits plus Rule 82 attorneys' fees because of the bad faith risk. But sophisticated insurers are now learning to take the cap off their policy limit rather than be forced by the risk of a bad faith claim to pay more than a claim is worth.

The plaintiff faces a much more brutal choice. This is probably the only lawsuit he will ever have, so he cannot balance the occasional low verdict against the occasional high one. His resources are probably limited, so the difference between collecting the offered settlement and perhaps collecting nothing—because of a verdict lower than the offer of judgment—matters more to him than the same dollar difference matters to the institutional defendant. A four- or five-figure judgment against him for attorneys' fees and costs, because he did not beat the defendant's offer of judgment or lost on liability, may be catastrophic.

As a practical matter, if the defendant makes an offer of judgment early in the litigation at the low end of the likely value of the case, or even 10 percent to 20 percent less, the plaintiff takes an imprudent and unaffordable risk if he rejects it. The risk is made unaffordable by the impact of Rule 68, Rule 82, Rule 79 costs, and the new interest statute. In effect, the defendant is empowered to turn the plaintiff's reasonable bet on the outcome into a double or nothing bet which the plaintiff cannot prudently risk. The chance of recovering his loss plus all the add-ons is not worth the risk of having defendant's add-ons set off against his recovery.

When a plaintiff runs the risk of trial against a moderate offer of judgment and loses, the defendant often has enough leverage to prevent appeal. Typically the defendant offers to drop his costs and attorneys' fee awards in exchange for the plaintiff's aban-

Introduced: 1/31/86
Referred: Labor and Commerce, Judiciary
and Finance

BY KELLY, ABOOD, BENNETT, COGHILL,
DEVRIES, FAIKS, P. FISCHER, KERTTULA,
STURGULEWSKI AND ZHAROFF

1 IN THE SENATE

2 SENATE BILL NO. 377

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to civil actions; amending Alaska
7 Rules of Civil Procedure 11, 49, 52, 58, 68, and 82;
8 and providing for an effective date."

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

10 * Section 1. AS 09 is amended by adding a new chapter to read:

11 CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

12 Sec. 09.17.010. NONECONOMIC DAMAGES. (a) In an action to
13 recover damages for personal injury based on negligence, damages for
14 noneconomic losses shall be limited to compensation for pain, suffer-
15 ing, inconvenience, physical impairment, disfigurement, loss of enjoy-
16 ment of life and other nonpecuniary damage.

17 (b) The amount of damages awarded by a court or jury under (a)
18 of this section may not exceed \$250,000.

19 Sec. 09.17.020. PUNITIVE DAMAGES. In an action, whether in
20 tort, contract, or otherwise, in which a party seeks to recover dam-
21 ages, any punitive or exemplary damages that may be adjudged against
22 the party defending the claim shall be awarded to the benefit of the
23 state and when paid deposited in the general fund.

24 Sec. 09.17.030. ITEMIZED VERDICTS. In every case where damages
25 for personal injury are awarded by the court or jury, the verdict
26 shall be itemized between economic loss and noneconomic loss, if any,
27 and economic loss shall be further itemized by category. Itemization
28 of economic loss by category includes: (1) amounts intended to com-
29 pensate for reasonable expenses that have been incurred, or which will

1 be incurred, for necessary medical, surgical, x-ray, dental, or other
2 health or rehabilitative services, drugs, and therapy; (2) amounts
3 intended to compensate for lost wages or loss of earning capacity; and
4 (3) all other economic losses claimed by the plaintiff or granted by
5 the jury. A verdict shall further determine the amounts intended to
6 compensate for injury or losses incurred before the verdict and
7 amounts intended to compensate for losses that will be incurred in the
8 future.

9 Sec. 09.17.040. PERIODIC PAYMENTS. (a) In an action to recover
10 damages for personal injury, the court shall, at the request of a
11 party, enter judgment ordering that amounts awarded a judgment credi-
12 tor for future damages be paid to the maximum extent feasible by
13 periodic payments rather than by a lump-sum payment if the award
14 equals or exceeds \$50,000 in future damages. In entering judgment
15 ordering the payment of future damages by periodic payments, the court
16 shall make a specific finding as to the dollar amount of periodic
17 payments that will compensate the judgment creditor for future dam-
18 ages. The court may require a judgment debtor to post security ade-
19 quate to assure full payment of future damages awarded by judgment.

20 (b) A judgment ordering payment of future damages by periodic
21 payments shall specify the recipient, the dollar amount of the pay-
22 ments, the interval between payments, and the number of payments or
23 the period of time over which payments shall be made. Payments shall
24 be modified only in the event of the death of the judgment creditor,
25 in which case payments may not be reduced or terminated, but shall be
26 paid to persons to whom the judgment creditor owed a duty of support,
27 as provided by law, immediately before death. The court that rendered
28 the original judgment, may, upon petition of a party in interest,
29 modify the judgment to award and apportion the unpaid future damages

1 in accordance with this section.

2 (c) If the court finds that the judgment debtor has exhibited a
3 continuing pattern of failing to make payments, under (b) of this
4 section, the court shall find the judgment debtor in contempt of court
5 and, in addition to the required periodic payments, shall order the
6 judgment debtor to pay the judgment creditor any damages caused by the
7 failure to make periodic payments, including costs and attorney fees.

8 (d) Following expiration of all obligations specified in the
9 periodic payment judgment, the obligation of the judgment debtor to
10 make further payments shall cease and security given under (a) of this
11 section shall revert to the judgment debtor.

12 (e) A certified copy of a judgment or order of the court issued
13 under this section may be recorded under AS 09.30.010, but may not
14 become a lien upon real property before the date that payment becomes
15 due.

16 Sec. 09.17.050. VERIFICATION OF CLAIMS. Every complaint, cross-
17 claim, and counterclaim shall be signed and verified by the claiming
18 party or the attorney of the claiming party and shall bear a statement
19 that the person signing the claim believes the statements made in the
20 claim are true. If the court finds that a statement made in the
21 complaint, cross-claim, or counterclaim is untrue, and upon motion of
22 a party defending against the claim, the person signing the claim
23 shall be compelled to show cause why the person signing the claim
24 should not be held in contempt of court.

25 Sec. 09.17.060. COLLATERAL BENEFITS. (a) The defendant, in an
26 action for personal injury, may introduce evidence of an amount paid
27 or payable as a benefit to the plaintiff as a result of the personal
28 injury under the United States Social Security Act, a state or federal
29 income disability or workers' compensation act, a health, sickness, or

1 income-disability insurance, accident insurance that provides health
2 benefits or income-disability coverage, and a contract or agreement of
3 a group, organization, partnership, or corporation to provide, pay for
4 or reimburse the cost of medical, hospital, dental, or other health
5 care services. If the defendant elects to introduce evidence under
6 this section, the plaintiff may introduce evidence of an amount that
7 the plaintiff has paid or contributed to secure the right to an insur-
8 ance benefit concerning which the defendant has introduced evidence.

9 (b) Collateral benefits introduced under (a) of this section may
10 not be used to recover an amount against the plaintiff nor may the
11 source of the benefits be subrogated to the rights of the plaintiff
12 against a defendant.

13 Sec. 09.17.070. EFFECT OF CONTRIBUTORY FAULT. In an action
14 based on fault seeking to recover damages for injury or death to
15 person or harm to property, contributory fault chargeable to the
16 claimant diminishes proportionately the amount awarded as compensatory
17 damages for an injury attributable to the claimant's contributory
18 fault, but does not bar recovery.

19 Sec. 09.17.080. APPORTIONMENT OF DAMAGES. (a) In all actions
20 involving fault of more than one party to the action, including
21 third-party defendants and persons who have been released under
22 AS 09.17.090, the court, unless otherwise agreed by all parties, shall
23 instruct the jury to answer special interrogatories or, if there is no
24 jury, shall make findings, indicating

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

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

1 AS 09.17.090; for this purpose the court may determine that two or
2 more persons are to be treated as a single party.

3 (b) In determining the percentages of fault, the trier of fact
4 shall consider both the nature of the conduct of each party at fault
5 and the extent of the causal relation between the conduct and the
6 damages claimed.

7 (c) The court shall determine the award of damages to each
8 claimant in accordance with the findings, subject to a reduction under
9 AS 09.17.090, and enter judgment against each party liable on the
10 basis of rules of several liability. The court also shall determine
11 and state in the judgment each party's equitable share of the obliga-
12 tion to each claimant in accordance with the respective percentages of
13 fault.

14 Sec. 09.17.090. EFFECT OF RELEASE. A release, covenant not to
15 sue, or similar agreement entered into by a claimant and a person
16 liable discharges that person from liability to the claimant, but it
17 does not discharge another person liable upon the same claim unless
18 the release, covenant not to sue, or similar agreement provides for
19 discharge. However, the claim of the releasing person against other
20 persons is reduced by the amount of the released person's equitable
21 share of the obligation, determined in accordance with the provisions
22 of AS 09.17.080.

23 Sec. 09.17.900. DEFINITIONS. In this chapter

24 (1) "fault" includes acts or omissions that are in any
25 measure negligent or reckless toward the person or property of the
26 actor or others, or that subject a person to strict tort liability;
27 the term also includes breach of warranty, unreasonable assumption of
28 risk not constituting an enforceable express consent, misuse of a
29 product for which the defendant otherwise would be liable, and

1 unreasonable failure to avoid an injury or to mitigate damages; legal
2 requirements of causal relation apply both to fault as the basis for
3 liability and to contributory fault;

4 (2) "future damages" includes damages for future medical
5 treatment, care or custody; loss of future earning capacity; or any
6 future noneconomic loss.

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

8 Sec. 09.10.075. PERSONAL INJURY ACTIONS THAT MUST BE ARBITRATED.
9 A person may not bring an action for damages based on personal injury
10 when the amount in controversy is less than \$50,000, exclusive of
11 costs, interest and attorney fees, unless the controversy is first
12 arbitrated under AS 09.43.

13 * Sec. 3. AS 09.30.065 is amended to read:

14 Sec. 09.30.065. OFFERS OF JUDGMENT. On or before the 60th day
15 following the filing of an answer in a civil action, and on the fifth
16 day following the day discovery closes as ordered by the court,
17 [EITHER THE PARTY MAKING A CLAIM OR] the party defending against a
18 claim may serve upon the party making the claim [ADVERSE PARTY] an
19 offer to allow judgment to be entered in complete satisfaction of the
20 claim against that defending party for the money or property or to the
21 effect specified in the offer, with cost then accrued. If within 10
22 days after the service of the offer the claiming [ADVERSE] party
23 serves written notice that the offer is accepted, either party may
24 then file the offer and notice of acceptance together with proof of
25 service, and the clerk shall enter judgment. An offer not accepted
26 within 10 days is considered withdrawn and evidence of that offer is
27 not admissible except in a proceeding to determine the form of judg-
28 ment after verdict. If the judgment finally entered on the claim as
29 to which an offer has been made under this section is not more

1 favorable to the claiming party [OFFEREE] than the offer, the claim
2 shall bear no interest from the date of the offer to the date of
3 judgment [THE INTEREST AWARDED UNDER AS 45.45.010(a) AND ACCRUED UP TO
4 THE DATE JUDGMENT IS ENTERED SHALL BE ADJUSTED AS FOLLOWS:

5 (1) IF THE OFFEREE IS THE PARTY MAKING THE CLAIM, THE
6 INTEREST RATE SHALL BE REDUCED BY TWO PERCENT A YEAR;

7 (2) IF THE OFFEREE IS THE PARTY DEFENDING AGAINST THE
8 CLAIM, THE INTEREST RATE SHALL BE INCREASED BY TWO PERCENT A YEAR].

9 * Sec. 4. AS 09.43.110 is amended to read:

10 Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of
11 a party, the court shall confirm an award unless

12 (1) within the time limits imposed by AS 09.43.120 and
13 09.43.130 grounds are urged for vacating or modifying or correcting
14 the award, in which case the court shall proceed as provided in
15 AS 09.43.120 and 09.43.130; or

16 (2) an appeal is taken under AS 09.43.160(c).

17 * Sec. 5. AS 09.43.160 is amended by adding a new subsection to read:

18 (c) An award made as a result of arbitration required by
19 AS 09.10.075 may be appealed to the superior court. The appeal shall
20 be filed within 60 days after notice of an award is made under
21 AS 09.43.080. The court shall grant a trial de novo if an appeal is
22 filed under this subsection.

23 * Sec. 6. AS 09.55.580(a) is amended to read:

24 (a) When the death of a person is caused by the wrongful act or
25 omission of another, the personal representatives of the former may
26 maintain an action therefor against the latter, if the former might
27 have maintained an action, had the person lived, against the latter
28 for an injury done by the same act or omission and if the decedent is
29 survived by a spouse, children or other dependents. The action shall

1 be commenced within two years after the death, and the damages therein
2 shall be the damages the court or jury may consider fair and just.
3 The amount recovered, if any, shall be exclusively for the benefit of
4 the decedent's spouse and children when the decedent is survived by a
5 spouse or children, or other dependents. When the decedent is sur-
6 vived by no spouse or children or other dependents, the action shall
7 be dismissed [THE AMOUNT RECOVERED SHALL BE ADMINISTERED AS OTHER
8 PERSONAL PROPERTY OF THE DECEDENT BUT SHALL BE LIMITED TO PECUNIARY
9 LOSS]. When the plaintiff prevails, the trial court shall determine
10 the allowable costs and expenses of the action and may, in its dis-
11 cretion, require notice and hearing thereon. The amount recovered
12 shall be distributed only after payment of all costs and expenses of
13 suit and debts and expenses of administration.

14 * Sec. 7. AS 09.60.010 is amended by adding a new subsection to read:

15 (b) Notwithstanding (a) of this section, the court may not award
16 attorney fees to a prevailing party in an action for damages to the
17 person or to property in the absence of a specific finding that the
18 party at fault acted with malice, in bad faith, or with reckless
19 disregard of the rights of another in causing the injury.

20 * Sec. 8. AS 22.10.020(d) is amended to read:

21 (d) The superior court has jurisdiction in all matters appealed
22 to it (1) from a subordinate court; (2) by a party to an arbitration
23 award under AS 09.43.160(c); [,] or (3) an administrative agency when
24 appeal is provided by law. The hearings on appeal from a final order
25 or judgment of a subordinate court or administrative agency shall be
26 on the record unless the superior court, in its discretion, grants a
27 trial de novo, in whole or in part.

28 * Sec. 9. AS 09.16 is repealed.

29 * Sec. 10. AS 09.17.030 and 09.17.080 enacted in sec. 1 of this Act

1 have the effect of amending Alaska Rule of Civil Procedure 49 by requiring
2 the jury to answer the special interrogatories listed in AS 09.17.080
3 regarding the amount of damages and the percentages of fault to be
4 allocated among the parties and to itemize the verdict regarding economic
5 and noneconomic loss as specified in AS 09.17.030.

6 * Sec. 11. AS 09.17.080 enacted in sec. 1 of this Act has the effect of
7 amending Alaska Rule of Civil Procedure 52 by requiring the court to make
8 specific findings regarding the amount of damages and the percentages of
9 fault to be allocated among the parties.

10 * Sec. 12. AS 09.17.030, 09.17.040 and 09.17.080 enacted in sec. 1 of
11 this Act have the effect of amending Alaska Rule of Civil Procedure 58 by
12 requiring the court to include a specific item in its judgment.

13 * Sec. 13. AS 09.17.050 enacted in sec. 1 of this Act has the effect of
14 amending Alaska Rule of Civil Procedure 11 by requiring verification of
15 claims, counterclaims, and cross-claims.

16 * Sec. 14. AS 09.30.065 as amended by sec. 3 of this Act has the effect
17 of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment
18 interest stops accruing from the date of an offer by a defending party
19 which a claiming party fails to increase at judgment.

20 * Sec. 15. AS 09.60.010 as amended by sec. 7 of this Act has the effect
21 of amending Alaska Rule of Civil Procedure 82 by allowing costs and attor-
22 ney fees only after a specific finding of malice, bad faith, or reckless
23 disregard of the rights of another in causing the injury.

24 * Sec. 16. APPLICABILITY. Sections 1 - 8 of this Act apply to all
25 causes of action accruing after the effective date of this Act.

26 * Sec. 17. This Act takes effect immediately in accordance with AS 01.-
27 10.070(c).

Offered: 4/18/86
Referred: Finance

Original sponsors: Kelly, Abood,
Bennett, et al

1 IN THE SENATE BY THE JUDICIARY COMMITTEE
2 CS FOR SENATE BILL NO. 377 (Judiciary)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FOURTEENTH LEGISLATURE - SECOND SESSION
5 A BILL

6 For an Act entitled: "An Act relating to civil actions; amending Alaska
7 Rules of Civil Procedure 49, 52, 58, and 68; and
8 providing for an effective date."

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

10 * Section 1. FINDINGS AND PURPOSE. (a) Tort law in this state has
11 generally been developed by the courts on a case-by-case basis. While this
12 process has resulted in some significant changes in the law, including
13 amelioration of the harshness of many common law doctrines, the legislature
14 has periodically intervened in order to bring about needed reforms. The
15 purpose of this Act is to enact further reforms in order to create a more
16 equitable distribution of the cost and risk of injury and increase the
17 availability and affordability of insurance.

18 (b) The legislature finds that boroughs, cities, and other
19 governmental entities are faced with increased exposure to lawsuits and
20 awards and dramatic increases in the cost of insurance coverage. These
21 escalating costs ultimately affect the public through higher taxes, loss of
22 essential services, and loss of the protection provided by adequate
23 insurance. In order to improve the availability and affordability of
24 quality governmental services, comprehensive reform is necessary.

25 (c) The legislature also finds comparable cost increases in
26 professional liability insurance. Escalating malpractice insurance
27 premiums discourage physicians and other health care providers from
28 initiating or continuing their practice or offering needed services to the
29 public and contribute to the rising costs of consumer health care. Other

1 professionals, such as architects and engineers, face similar difficult
2 choices, financial instability, and unlimited risk in providing services to
3 the public.

4 (d) The legislature also finds that general liability insurance is
5 becoming unavailable or unaffordable to many businesses, individuals, and
6 nonprofit organizations in amounts sufficient to cover potential losses.
7 High premiums have discouraged socially and economically desirable
8 activities and encourage many to go without adequate insurance coverage.

9 (e) It is the intent of the legislature to reduce costs associated
10 with the tort system, while ensuring that adequate and appropriate
11 compensation for persons injured through the fault of others is available.

12 * Sec. 2. AS 09 is amended by adding a new chapter to read:

13 CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

14 Sec. 09.17.010. NONECONOMIC DAMAGES. In an action to recover
15 damages for personal injury based on negligence, damages for
16 noneconomic losses shall be limited to compensation for pain, suffer-
17 ing, inconvenience, physical impairment, disfigurement, loss of enjoy-
18 ment of life and other nonpecuniary damage.

19 Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not
20 be awarded in an action, whether in tort, contract, or otherwise,
21 unless supported by clear and convincing evidence. Fifty percent of
22 any punitive or exemplary damages that may be adjudged against the
23 party defending the claim shall be awarded to the benefit of the state
24 and when paid deposited in the general fund.

25 (b) The amount of punitive damages awarded to the state shall be
26 considered a part of the amount recovered by the claiming party for
27 purposes of calculating an award of attorney fees.

28 (c) Except for purposes of seeking execution on a judgment, the
29 state may not bring or be joined in an action based on punitive

1 damages that may be awarded under this section.

2 Sec. 09.17.025. DAMAGES RESULTING FROM INTOXICATION OR COMMIS-
3 SION OF A CRIME. A person who suffers personal injury or death may
4 not recover damages for the personal injury or death if the person is
5 determined by the fact finder to be more than 50 percent responsible
6 for the injuries or death and the person was

7 (1) intoxicated or under the influence of a controlled
8 substance listed in AS 11.71.140 - 11.71.190; or

9 (2) engaged in the commission of a felony, if the felony
10 was causally related to the injury or death in time, place, or activi-
11 ty; however, nothing in this paragraph shall affect a right of action
12 under 42 U.S.C. 1983.

13 Sec. 09.17.030. ITEMIZED VERDICTS. In every case where damages
14 for personal injury are awarded by the court or jury, the verdict
15 shall be itemized between economic loss and noneconomic loss, if any,
16 and economic loss shall be further itemized by category. Itemization
17 of economic loss by category includes: (1) amounts intended to com-
18 pensate for reasonable expenses that have been incurred, or which will
19 be incurred, for necessary medical, surgical, x-ray, dental, or other
20 health or rehabilitative services, drugs, and therapy; (2) amounts
21 intended to compensate for lost wages or loss of earning capacity; and
22 (3) all other economic losses claimed by the plaintiff or granted by
23 the jury. A verdict shall further determine the amounts intended to
24 compensate for injury or losses incurred before the verdict and
25 amounts intended to compensate for losses that will be incurred in the
26 future.

27 Sec. 09.17.040. VERIFICATION OF CIVIL CLAIMS. The party or the
28 attorney of the party filing a complaint, answer, cross-claim, or
29 counterclaim shall sign and verify the pleading and shall state in

1 the verification that the signatory believes the statements made in
2 the pleading are true. If the court finds that the signatory knowing-
3 ly made a false statement in the pleading, upon motion of a party, the
4 court shall order the signatory to show cause why the signatory should
5 not be held in contempt of court.

6 Sec. 09.17.050. EFFECT OF CONTRIBUTORY FAULT. In an action
7 based on fault seeking to recover damages for injury or death to a
8 person or harm to property, contributory fault chargeable to the
9 claimant diminishes proportionately the amount awarded as compensatory
10 damages for the injury attributable to the claimant's contributory
11 fault, but does not bar recovery.

12 Sec. 09.17.055. COLLATERAL BENEFITS. (a) After the fact finder
13 has rendered an award to a claimant, and after the court has awarded
14 costs and attorney fees, a defendant may introduce evidence of amounts
15 received or to be received by the claimant as compensation for the
16 same injury from collateral sources that do not have a right of subro-
17 gation against the claimant by law or contract.

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

20 (1) the amount that the actual attorney fees incurred by
21 the claimant exceed the amount of attorney fees awarded to the claim-
22 ant; and

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

26 (c) If the total amount of collateral benefits introduced as
27 evidence under (a) of this section exceeds the total amount that the
28 claimant introduced as evidence under (b) of this section, the court
29 shall deduct from the amount awarded the claimant, the amount by which

1 the value of the benefits under (a) of this section exceeds the amount
2 of payments under (b) of this section.

3 (d) Notwithstanding (a) of this section, the defendant may not
4 introduce evidence of

5 (1) benefits that cannot be reduced or offset by federal
6 law;

7 (2) a deceased's life insurance policy; or

8 (3) gratuitous benefits provided to the claimant.

9 Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions
10 involving fault of more than one party to the action, including third-
11 party defendants and persons who have been released under AS 09.17.-
12 070, the court, unless otherwise agreed by all parties, shall instruct
13 the jury to answer special interrogatories or, if there is no jury,
14 shall make findings, indicating

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

17 (2) the percentage of the total fault of all of the parties
18 to each claim that is allocated to each claimant, defendant, third-
19 party defendant, and person who has been released from liability under
20 AS 09.17.070.

21 (b) In determining the percentages of fault, the trier of fact
22 shall consider both the nature of the conduct of each party at fault
23 and the extent of the causal relation between the conduct and the
24 damages claimed. The trier of fact may determine that two or more
25 persons are to be treated as a single party if their conduct was a
26 cause of the damages claimed and the separate act or omission of each
27 person cannot be distinguished.

28 (c) The court shall determine the award of damages to each
29 claimant in accordance with the findings, subject to a reduction under

1 AS 09.17.070, and enter judgment against each party liable. The court
2 shall also determine and state in the judgment each party's equitable
3 share of the obligation to each claimant in accordance with the
4 respective percentages of fault.

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

10 Sec. 09.17.070. EFFECT OF RELEASE. A release, covenant not to
11 sue, or similar agreement entered into by a claimant and a person
12 liable discharges that person from liability to the claimant, but it
13 does not discharge another person liable upon the same claim unless
14 the release, covenant not to sue, or similar agreement provides for
15 discharge. However, the claim of the releasing person against other
16 persons is reduced by the dollar amount of the release, covenant not
17 to sue, or similar agreement.

18 Sec. 09.17.900. DEFINITION. In this chapter "fault" includes
19 acts or omissions that are in any measure negligent or reckless toward
20 the person or property of the actor or others, or that subject a
21 person to strict tort liability; the term also includes breach of
22 warranty, unreasonable assumption of risk not constituting an
23 enforceable express consent, misuse of a product for which the
24 defendant otherwise would be liable, and unreasonable failure to avoid
25 an injury or to mitigate damages; legal requirements of causal
26 relation apply both to fault as the basis for liability and to
27 contributory fault.

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

29 Sec. 09.10.075. ACTIONS THAT MUST BE ARBITRATED. A person may

1 not bring an action for damages based on injury to person or property
2 when the amount in controversy is less than \$75,000, exclusive of
3 costs, interest and attorney fees, unless the controversy is first
4 arbitrated under AS 09.43.

5 * Sec. 4. AS 09.30.065 is amended to read:

6 Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 30
7 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE
8 FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING
9 THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party
10 making a claim or the party defending against a claim may serve upon
11 the adverse party an offer to allow judgment to be entered in complete
12 satisfaction of the claim for the money or property or to the effect
13 specified in the offer, with cost then accrued. If within 10 days
14 after the service of the offer the adverse party serves written notice
15 that the offer is accepted, either party may then file the offer and
16 notice of acceptance together with proof of service, and the clerk
17 shall enter judgment. An offer not accepted within 10 days is con-
18 sidered withdrawn and evidence of that offer is not admissible except
19 in a proceeding to determine the form of judgment after verdict. If
20 the judgment finally entered on the claim as to which an offer has
21 been made under this section is not more favorable to the offeree than
22 the offer, the interest awarded under AS 45.45.010(a) and accrued up
23 to the date judgment is entered shall be adjusted as follows:

24 (1) if the offeree is the party making the claim, the
25 interest rate shall be reduced by five [TWO] percent a year;

26 (2) if the offeree is the party defending against the
27 claim, the interest rate shall be increased by five [TWO] percent a
28 year.

29 * Sec. 5. AS 09.30.070 is amended by adding a new subsection to read:

1 (b) Except when the court finds that the parties have agreed
2 otherwise, prejudgment interest accrues from the day the cause of
3 action accrues.

4 * Sec. 6. AS 09.43.110 is amended to read:

5 Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of
6 a party, the court shall confirm an award unless

7 (1) within the time limits imposed by AS 09.43.120 and
8 09.43.130 grounds are urged for vacating or modifying or correcting
9 the award, in which case the court shall proceed as provided in
10 AS 09.43.120 and 09.43.130; or

11 (2) an appeal is taken under AS 09.43.160(c).

12 * Sec. 7. AS 09.43.160 is amended by adding a new subsection to read:

13 (c) An award made as a result of arbitration required by AS 09.-
14 10.075 may be appealed to the proper court. The appeal shall be filed
15 within 60 days after notice of an award is made under AS 09.43.080.
16 The court shall grant a trial de novo if an appeal is filed under this
17 subsection.

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

19 Sec. 09.55.548. AWARDS. Except as provided in AS 09.17, damages
20 in a malpractice action shall be awarded in accordance with principles
21 of the common law.

22 * Sec. 9. AS 09.60.010 is amended by adding a new subsection to read:

23 (b) The court may, upon petition by a party to a civil action,
24 determine the reasonableness of that party's attorney fee agreement.
25 The court shall take into consideration

26 (1) the time and labor required, the novelty and difficulty
27 of the questions involved, and the skill requisite to perform the
28 legal service properly;

29 (2) the likelihood, if apparent to the client, that the