

ALASKA LEGISLATURE

HOUSE and SENATE FINANCE COMMITTEE FILES, 1993-1994

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

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

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

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

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

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

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

Constitutional Problems.

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

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

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

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

Equal Protection.

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

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

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

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

² (...continued)

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

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

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

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

In State v. Erickson, the court said:

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

Id. at 5.

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

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

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

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

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

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

The Goal of Reducing Insurance Premiums.

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

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

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

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

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

Societal Considerations.

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

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

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

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

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

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

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

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

Furthermore, it is unclear whether this proposed statute of repose is intended to apply to statutorily created causes of action³; if so, it would have detrimental effects. Specifically, application of proposed AS 09.10.052 to hazardous waste cases would be particularly devastating since the results of such environmental pollution are often not known or felt until decades after the disposal of the waste. For example, in the famous Love Canal case, waste disposed up until the 1930s percolated out of its burial site in the 1970s, resulting in contamination of drinking water and residential homes. In Alaska, abandoned wastes from oil field operations in the Kenai Peninsula during the 1960s have caused contamination of private residences and drinking water wells that was not discovered until the 1980s. Under such a statute of repose, injured property owners would be unable to recover for decreased property values or cleanup costs if the initial disposal of the waste occurred more than six years before the discovery of the waste.

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

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

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Public Policy.

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

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

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

Availability of Insurance.

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

Fairness of Defending Older Claims.

Section 1(a)(3) asserts that it is difficult to defend against a claim that has become stale after information and witnesses have disappeared. Several commentators have noted that this is really not the case. Manufacturers and designers document their work. Practice shows that they retain those documents. There is no evidence that products liability cases based on older products have a higher rate of favorable verdicts for plaintiffs or unfavorable verdicts for defendants. *See VanKirk, The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, Duke L.J. '689, 1712 - 13 (1989).

The Remaining Findings and Purposes.

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

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

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

The Nature of the Rights Abridged and Discriminatory Effects.

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

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

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

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

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

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

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Arbitrariness.

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

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

Rationality.

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

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

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

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

Fiscal Note.

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

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

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

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

Consumer Protection and Warranties.

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

Conclusion.

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

SECTION 4: LIMITATION ON ACTIONS AGAINST HEALTH CARE PROVIDERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 7: NONECONOMIC DAMAGES CAP

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

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

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

¹¹ We note that the House Labor & Commerce Committee wrote a letter of intent, indicating its desire that the House Judiciary
(continued...)

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

SECTION 8: PUNITIVE DAMAGES STANDARD

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

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

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

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

¹¹ (...continued)

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

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

SECTION 9: PUNITIVE DAMAGES CAP

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

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

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

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

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

SECTION 10: CRIMINAL CONDUCT BARS RECOVERY OF DAMAGES

AS 09.17.030 was enacted in 1986 in response to public outcry. Individuals engaged in felonious¹³ conduct could file lawsuits and seek monetary awards as a result of situations that resulted in personal injury or death brought about or affected by their own criminal wrongdoing. The present statute precludes recovery by a person who suffers personal injury or death if three elements are present: (1) the injury or death occurred while the person was engaged in the commission of a felony, (2) the person has been convicted of the felony (either through a guilty plea or a plea of nolo contendere), and (3) the felony substantially contributed to the injury or death. The current law specifically states that this section does not affect a right of action under 42 U.S.C. § 1983.¹⁴

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

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

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

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

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

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

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

Damages may be awarded to a plaintiff for past and future economic¹⁵ loss as well as for past and future noneconomic¹⁶ loss. AS 09.17.040(a). Punitive damages may also be awarded if the court or jury finds that the conduct that caused the plaintiff's injury was malicious and outrageous. Id. See Section 8 discussion, supra.

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

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

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

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

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

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

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

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

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

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

SECTION 12: FUTURE DAMAGES PAID THROUGH PERIODIC PAYMENTS

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

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

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

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

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

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

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

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

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

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

SECTION 13: SECURITY FOR PERIODIC PAYMENTS

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

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

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

SECTION 14: INFLATION ON PERIODIC PAYMENTS

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

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

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

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

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

SECTION 15: COLLATERAL BENEFITS

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

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

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

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

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

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

SECTIONS 16 and 17: APPORTIONMENT OF FAULT

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

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

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

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

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

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

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

SECTION 18: EFFECT OF RELEASE

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

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

SECTION 21: LIMITATION ON AWARDS OF PREJUDGMENT INTEREST

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

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

SECTION 25: CAP ON WRONGFUL DEATH AWARDS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Honorable Brian Porter
Alaska House of Representatives
Re: HB 292, tort reform

March 8, 1994
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its evaluation by a committee of practitioners from around the state.²⁷


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

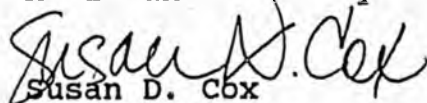
CONCLUSION

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

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: 
Jim Forbes
Assistant Attorney General

By: 
Susan D. Cox
Assistant Attorney General

BMB:SDC:JF:pch

cc: Raga Elim, Legislative Liaison
Deborah Behr, AAG

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

Guess & Rudd

March 11, 1994

VIA FACSIMILE TO 907-465-3834

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

Re: HB 292, Tort Reform

Dear Representative Porter:

Alaskans for Liability Reform asked me to make a quick review (because that is all the time apparently available) and offer you my thoughts with respect to the Attorney General's letter as it relates to the statute of repose proposed in the new Tort Reform Bill, HB 292.

First, I believe the Attorney General's office accurately sets forth the standard of review by which the Alaska Supreme Court will judge this legislation, and particularly the statute of repose. Because the Court addressed a statute of repose before, in Turner Construction, the applicable law is fairly predictable. Our Supreme Court will find that while a classification of individuals is involved, there is no suspect class involved. Thus, the statute of repose would be evaluated under a "fair and substantial relationship" test. The Court will find that the State has a legitimate governmental purpose enacting this legislation and it then will engage in a balancing test as it did in Turner. The question is: Does this statute of repose differ sufficiently from the statute rejected in the Turner case, and has the insurance, economic and political climate changed sufficiently to convince the Court to approve this statute of repose? With a few modifications to alleviate some unfair results, I think our Court would find the proposed statute of repose constitutional.

The Attorney General's office suggests what is obviously true with respect to a showing of hard facts to justify the purpose and objective of the statute -- facts will have to be mustered to demonstrate that there is a real problem that will really be solved, at least in part, by this legislation. However, contrary to the position set forth in the Attorney

The Honorable Brian Porter
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Page 2

General's letter, I believe hard facts justify this legislation. The Alaskans for Liability Reform can muster specific facts and examples to demonstrate, even more clearly today than could be done in 1988, that there is a relationship between insurance premiums and tort reform. More importantly, there is a direct relationship between tort reform getting insurers to write business in Alaska, thereby creating premium competition which of course is essential to keeping rates down and affording the citizens of Alaska fair rates for insurance.

On page 7 of the Attorney General's opinion letter, the argument is made that there would be little effect on insurance rates because Alaska has so few residents compared to the rest of the United States. This analysis is misguided. The question is not how much impact we would have on the national market, but rather whether we can convince an already very reluctant insurance industry to bring insurance to this small population located in a remote area. We can only achieve fair insurance rates for our residents if we can get insurance companies to do business here. From my experience as an insurance defense lawyer, I can tell you that insurers, especially after they have seen a few verdicts in the \$60 million range (thankfully it was reversed), flat refuse to do business in Alaska. The State needs to do everything it can to convince a reluctant national and international insurance industry that Alaska is legislatively and judicially stable enough to warrant bringing their business here. Without that business, we will never achieve fair insurance rates for anyone.

One personal example is my own firm's malpractice insurance. About three or four years ago (the last time I was involved in the actual procurement of insurance for the firm), we had no choice about which insurer to go with. There was only one writing business in the State of Alaska at that time.

There are examples of unfairness for any statute of limitations. One individual can recover because he was injured one day after someone else. That seems unfair, but the benefits of finality and predictability outweigh that unfairness. The real difference between existing statutes of limitation and the proposed statute of repose is there is only a limited (foreign bodies left in patients) "discovery rule" for the proposed statute of repose. I believe much of the risk of unconstitutionality could be alleviated by expanding this limited discovery rule to include toxic tort cases, including asbestosis cases, such as was done by the Kansas Legislature.

The Honorable Brian Porter
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I do not think the examples about saddlebag gas tanks are a problem. On evaluation, it is clear that the already existing exceptions in this proposed legislation would allow individuals who are injured even after a six-year period of repose because of defects in "the saddlebag gas tanks" would be allowed to recover. The very nature of the tort revealed in the old Pinto cases was misrepresentation and intentional concealment. The fact is, if a manufacturer of automobiles puts dangerous gas tanks on its cars, one can reasonably expect them to go boom during a six-year period of use. If other cars go boom after six years pass, and a cover up is revealed, those individuals would be allowed to recover.

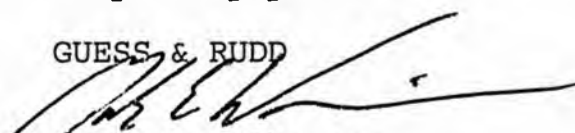
At page 9 of the Attorney General's opinion letter, AS 09.10.120 is referenced as setting forth a special six-year statute of limitations applicable where the State is the plaintiff. Frankly, all of the Attorney General's arguments of potential unfairness can be applied to argue that the State's special six-year statute of limitations would be unconstitutional. Clearly, a special class was created and equal protection arguments could be raised. For example, a little old lady walks by a building which collapses and crushes her legs. She files a claim two years and one day later. It is barred by the existing two-year statute of limitations. However, the State has another four years in which to bring a claim for damages the falling building caused to the State's snowplowing equipment upon which part of the collapsed building fell. The point here is not to be critical of the existing statute, but rather to point out that examples can be created making any limitations statute seem unfair.

With minor modifications to accommodate toxic tort claims, I think the Alaska Supreme Court would find the proposed statute of repose constitutional.

I hope this memo is of assistance.

Very truly yours,

GUESS & RUDD



Mark E. Wilkerson

MEW:cte

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March 11, 1994

The Honorable Brian Porter
House Judiciary Committee
3111 C Street
Anchorage, AK 99503

VIA FACSIMILE
465-3834

Re: HB 292

Dear Representative Porter:

I have had a very brief opportunity to review the Department of Law's lengthy letter dated March 8, 1994, which considers various portions of HB 292.

Because I have very little time, my comments are necessarily brief.

It appears that the only section posing serious concern to the Department of Law is the statute of repose. Essentially, the Department of Law takes issue with the statute of repose, and further concludes that our Supreme Court would hold that provision unconstitutional. I will leave the constitutional law arguments to others, as I understand you are receiving additional comments.

Concerning the general idea of a statute of repose, it is my opinion that a statute of repose, per se, would not be unconstitutional. The idea behind the statute of repose is to provide certainty and finality, and to

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To Danielle Lopez	From D.L.
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The Honorable Brian Porter
March 11, 1994
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avoid the multiple problems associated with litigating a claim with stale evidence. I myself have defended numerous claims involving evidence upwards of 30 years old. As a practical matter, a full and fair trial on such stale evidence is impossible. Specifically, I would refer to DES litigation, which the Department of Law refers to in its analysis. Having defended a major drug manufacturer sued in numerous such actions, I can state unequivocally my experience that that litigation did not result in any measurable recovery for any of the claimants. Rather, the true winners in that litigation appeared to me to be the lawyers.

In addition to DES litigation (which was largely concluded four to five years ago), a substantial portion of my practice is product liability defense. In particular, I have defended cases involving products manufactured over 30 years ago, and designed well before then. By the time such claims are brought, the designers are usually deceased, and the corporate records are sketchy at best. It is my opinion that missing evidence makes it impossible to have a fair trial. Moreover, in product liability cases, Alaska law effectively places the burden on the manufacturer to prove a negative -- that is, that the product is not defective. Without evidence available to it, a manufacturer simply cannot meet that burden of proof.

While arguments may be made that a statute of repose of six years is too short, it is my opinion that some statute of repose is an essential element of our

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March 11, 1994
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tort law. Statutes of repose have been around for many years and in many jurisdictions. They serve a useful and important function.

With respect to the remaining items of HB 292, it does not appear that the Department of Law believes them to be insurmountably problematic. I would note that the analysis at page 35 concerning abolition of Rule 82 seems incomplete. In particular, this discussion ignores that fact that HB 292 contains a provision for an offer of judgment. Replacement of Rule 82 with the effective offer of judgment means that a party who is reasonable in his or her settlement position will be compensated for actual attorneys' fees and costs at the expense of an unreasonable party. This is much more effective than the current Rule 82 scheme, and is more akin to attorneys' fees provisions proposed by other states in their tort reform efforts. It also is specifically designed to force parties and their attorneys to realistically evaluate their cases, or bear stiff consequences. I cannot imagine anyone would believe that to be an undesirable goal.

Finally, there appears to be some confusion concerning the limitation on pecuniary loss in wrongful death cases. That limitation applies only to situations where the decedent leaves no dependents, spouse or children. The limitation applies only to pecuniary loss. There is no limitation on non-pecuniary loss. Thus, even where a decedent leaves no dependents, spouse or children, a claim could be brought on behalf of

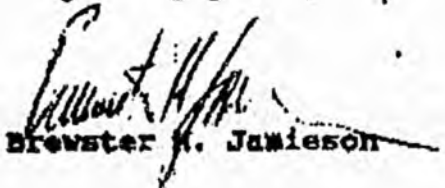
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The Honorable Brian Porter
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certain survivors for non-economic damages, which would then be capped at \$500,000.

I must stress that the above was hurriedly dictated. I would be happy to discuss any of the above, or any other aspect of the Department of Law's letter in greater detail. Please feel free to contact me any time should you wish to do so.

Very truly yours,


Brewster N. Jamieson

BHJ/sjw
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March 11, 1994

VIA FACSIMILE

The Honorable Brian Porter
House of Representatives
State Capitol, Room 118
Juneau, Alaska 99801-1182

Re: House Bill 292

Dear Mr. Porter:

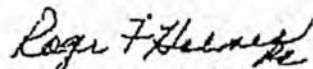
I have reviewed House Bill 292 as originally proposed, the Attorney General's March 8, 1994, opinion referencing House Bill 292 and the case of Turner Construction, Inc. v. Scales, 752 P.2d 467 (Alaska 1968).

I am, therefore, of the opinion that all sections of House Bill 292 will be held constitutional. Specifically, the statute of repose complies with all requirements set forth in Turner v. Scales.

In Turner v. Scales the Alaska Supreme Court struck the six-year statute of repose because of the restrictive nature of the statute. I believe House Bill 292 remedies the justices' concerns by broadening the statute of repose.

Very truly yours,

BISS & HOLMES


Roger F. Holmes

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Reply to: JUNEAU

March 11, 1994

Representative Brian Porter
Alaska State Legislature
State Capital
Juneau, Alaska 99801-1182

Re: House Bill 292

Dear Representative Porter:

On behalf of State Farm, I have previously written to the House Labor and Commerce Committee regarding HB 292, and I have also testified before your committee. I have just seen a copy of the March 8, 1994 letter from the attorney general and I felt compelled to comment.

Section 3: Statute of Repose. You will recall from our previous correspondence that we took no position on the statute of repose other than to say that reasonable limitations obviously would have a positive impact on the goals this legislation seeks to further. In that light, we would simply make the following observations about the attorney general's letter of March 8, 1994.

The letter seems to be saying that regardless of what kind of statute of repose the legislature seeks to adopt, it will be held on unconstitutional by the Alaska Supreme Court. With this we disagree. We believe the legislature clearly has the power to enact a statute of repose. It has enacted numerous limitations on civil claims, such as statute of limitations, changes in the law relating to the medical malpractice area, and the tort reform of 1986. To our knowledge, the court has never indicated it would strike down all statutes of repose, and indeed, it would

Representative Brian Porter
March 11, 1994
Page 2

not have gone through the analysis it went through in Turner Construction Company, Inc. v. Scales, 752 P.2d, 467 (Alaska 1988) if that were its position. Contrary to what the attorney general apparently believes, we believe it is clearly within the legislature's power and authority to enact a statute of repose.

We also feel that it is very difficult to predict the action of the Alaska Supreme Court on any particular piece of legislation. The court has historically reversed approximately half of the rulings that are appealed to it. The possibility that it might find this statute unconstitutional in our view is not something that should deter the legislature from acting in this area if it feels that a statute of repose as a matter of policy is a positive thing for the people in Alaska.

There are several other comments we have regarding the analysis of the attorney general regarding the statute of repose. First, the attorney general indicates that insurance premiums tend to be governed by factors such as the insurance companies' return on their investments and other money management practices. I suspect the Division of Insurance would take great issue with this statement, as it is not an approved underwriting practice to set rates based on investment return, rather rates are set by loss experience. For State Farm, our rates in Alaska are determined by our loss experience in Alaska. I suspect this is true also of the medical malpractice carriers who do business in this state.

The second statement we take issue with is the statement that states that have adopted statutes of repose or other tort reform measures have not seen corresponding drops in malpractice insurance rates. This ignores the testimony that was presented by the general counsel of Norcal. As I recall that testimony, their general counsel said that since the enactment of tort reform in the medical malpractice area in 1975, medical malpractice premiums in the state of California have increased by 85 percent, whereas nationwide they have increased by 400 percent and in the state of Alaska by 1,600 percent. This also ignores testimony presented by the director of Risk Management, who testified he thought this legislation would have a positive impact.

The third concern we have about the attorney general's March 8, 1994 letter, is the statement that "automobile insurance rates have increased at approximately the same rate as malpractice insurance rates during the last 15 or 20 years." I can tell you that automobile insurance premiums in Alaska have not increased by 1600 percent since 1975, as have medical malpractice premiums. I have been following the cost of automobile insurance

Representative Brian Porter
March 11, 1994
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closely in Alaska since 1983 and rates have been remarkably stable. Those increases which have occurred have been primarily linked to increases in medical costs and the increased cost of buying and repairing automobiles, which have led to increases in claims severity, coupled with an increase in the frequency of claims. Even so, these increases are far less than the 1,600 percent increase in medical malpractice premiums.

The fourth concern we have about the attorney general's letter is that it implies that Alaska insurance premiums are set on a national basis. Again, as set forth above, this is not so, certainly for homeowner's insurance and automobile insurance. We also suspect it is not so for malpractice insurance.

In considering the constitutionality arguments raised by the attorney general in his letter of March 8, 1994, you should also consider that this provision, as well as the statute of limitations provisions, are but one part of a comprehensive bill, the overall purposes of which are clearly defined in the bill. These purposes have been recognized as being legitimate in Beck v. Department of Transportation and Public Facilities, 837 P.2d, 105, 117 (Alaska 1992). It is very difficult to separate one part of this legislation and focus on the role that part alone will play in accomplishing the goals which the legislation seeks to further.

The final concern we have is that the attorney general has ignored the measures this bill contains to study the effectiveness of the legislation and thus, if the legislation does not have its intended effect, appropriate changes can be made. This would in effect provide the overall documentation to support the changes it proposes, the lack of which is the primary basis for the criticisms of the attorney general.

Sections 7, 8, and 9. It does not appear the attorney general sees legal difficulties with section 7, 8, 9 or 10 although the attorney general notes the Alaska Supreme Court's refusal to apply a ratio test in reviewing punitive damage award raises some doubts as to how this cap would fair in a court challenge. Again, we believe this is an area where the legislature clearly has the authority to act. To our knowledge, a punitive damage cap does not pose any kind of constitutional challenge, and we know of no other basis for the court to overturn it.

Section 11: Damage Awards for Loss Earnings to be Reduce for Taxes. This section of the proposed legislation is one we are strongly in favor of. Certainly the attorney general is correct that the Alaska Supreme Court has refused to reduce awards for damages for impairment of future wage earning capacity

Representative Brian Porter
March 11, 1994
Page 4

by the amount that would have been paid for income taxes on the basis that a court cannot predict with sufficient certainty what amounts a plaintiff would be obliged to pay. Frankly, there are many areas that are much more difficult to predict than issues of future income tax consequences, such as future impairment, future pain and suffering, future wage loss itself, and future medical expenses. Indeed, the federal courts, including the United States Supreme Court, have long ruled that future damage awards must be reduced by the amount one would pay for income taxes Norfolk and Western Railroad Company v. Liepelt, 44 U.S. 490 rehearing denied 445 U.S. 972 (1980). Federal income taxes have been with us for many many years, and we have seen no predictions from anyone that federal income taxes will cease. Unless there is some evidence that federal income taxes will cease, there is simply no good, sound logical reason not to remove this windfall from our current system.

Sections 12, 13 and 14. There does not appear to be significant debate about the logic of periodic payments, rather the debate seems to center around the mechanism for implementing a periodic payment provision. We do not believe this will be as difficult or time consuming as the attorney general seems to feel it is. As practical matter, this issue will be decided by agreement of the parties or expert testimony and presents issues no more difficult or time consuming than courts deal with every day.

Section 15: Collateral Benefits. We believe a better collateral benefits provision is that reflected in the present law regarding medical malpractice claims as contained in AS 9.55.548. We suspect that if the only time this section will be applicable is when there is by contract no right of subrogation, it will seldom, if ever be applicable. AS 9.55.548 (or a predecessor version) has been in effect for a number of years and we think it is a very effective provision.

Sections 16, 17 and 18: Apportionment of Fault. These provisions simply implement the intent of the voters with respect to the several liability initiative and the attorney general evidently has no problem with these provisions, except for Section 18 regarding the effect of a release. To respond to the concerns raised by the attorney general, we would suggest you substitute the words "amount of the jury's verdict" for the words "claim against the others" in subsection 1.

Section 26: Rule 82 Fee Awards. We continue to support the abolition of Rule 82, as prevailing party attorney fees are paid as a matter course in virtually every claim now. Under the concept envisioned by section 19 and section 26, this would no longer be the case, but rather attorney fees would be awarded

Representative Brian Porter
March 11, 1994
Page 5

only when one party or the other beats their own offer of judgment. We frankly feel this is a much more equitable way of awarding attorney fees, and we also feel it creates far greater incentive for parties to voluntarily come to the bargaining table.

Thank you again for opportunity to comment on this legislation.

Sincerely,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN

By: Michael L. Lessmeier
Michael L. Lessmeier

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 23, 1994

P.O. BOX 110300 - DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

RECEIVED

MAR 23 1994

The Honorable Brian H. Porter
Alaska House of Representatives
State Capitol, Room 118
Juneau, AK 99801

Rep. Brian Porter

Re: HB 292

Dear Representative Porter:

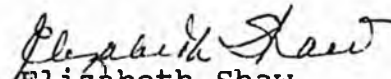
Thank you for the opportunity to review correspondence the House Judiciary Committee received following our March 8, 1994, letter on CSHB 292 (L&C). We appreciate the effort that so many people have devoted to this subject.

We recognize that reasonable minds can differ, and that is most certainly true of lawyers. Those attorneys who wrote to you following our March 8 letter disagree with relatively few of the opinions expressed therein; some expressly concur in legal points we made. To the extent there is disagreement, much of it is based on factual arguments on which we express no view. We believe there is consensus that, if this bill is enacted into law, the courts will be the final arbiter of those factual issues and the constitutional questions identified in our opinion.

We have reviewed the materials provided to us by your staff¹, and decline to change the legal opinions we have given. Please feel free to contact us with legal questions about the bill as it moves through the legislature.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL


Elizabeth Shaw
Deputy Attorney General

cc: Raga Elim
Deborah Behr

¹ Those materials consist of letters from the Anchorage Municipal Attorney Richard L. McVeigh, Michael Lessmeier on behalf of State Farm Insurance, Mark Wilkerson for Alaskans for Liability Reform, Roger Holmes, and part of a letter that appears to be from Lane Powell Spears & Lubersky, and attachments.

**Municipality
of
Anchorage**



P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4545

*TOM FINK,
MAYOR*

OFFICE OF THE MUNICIPAL ATTORNEY

March 4, 1994

Via Fax No.: (907) 465-3834

Representative Brian Porter
State Capital
Juneau, Alaska 99508


Re: Tort Reform Legislation

Dear Representative Porter:

Please be advised that the Municipality of Anchorage supports House Bill 292 and Senate Bill 254, commonly known as Tort Reform. Although the Tort Reform legislation originally passed in 1986 accomplished many the goals intended by the Legislature, and reduced spurious litigation against the Municipality of Anchorage, problems remain and should be addressed. After comprehensive review of pending House Bill 292, we believe it addresses many of the problems remaining and accomplishes the goal of creating a more equitable distribution of the costs and risks of injury while at the same time reducing costs associated with the civil justice system. At the same time the legislation ensures that adequate and appropriate compensation for persons injured by tort feasons remains available. The Municipality supports the original bill in its entirety.

If you have any questions or would like to further discuss the Municipality's position in this regard, please feel free to call Assistant Municipal Attorney, Stephanie Galbraith Moore (907) 343-4545 or Harry Sjoberg, the Municipal Risk Manager (907) 343-4201. Thank you for your attention.

Sincerely,


Richard L. McVeigh
Municipal Attorney

misc\sdg\lrm\porter.rlm



February 21, 1994

Representative Pete Kott
House Judiciary Committee
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

Dear Representative Kott:

I am writing to inform you that the Klukwan, Inc. Board of Directors has voted unanimously to support H.B. 292, also known as the Alaska Civil Liability Act of 1993-1994.

Tort reform is an important issue to our corporation. We pay over \$1 million in premiums for all types of insurance each year and premiums keep rising.

We believe in fair and adequate compensation for victims. We also believe that the situation has gotten out of hand in recent years, driven by aggressive and sometimes greedy lawyers. Corporations are particularly at risk, since they are often viewed as being able to "afford" large settlements. I can assure you that our shareholders do not agree with this.

The current situation also encourages litigation where other methods of dispute resolution would be quicker and less costly. Our society wastes a tremendous amount of resources on needless litigation each year. Anything we can do to curb this trend will have real benefits for society.

Again, we urge your support of H.B. 292 as a positive step towards reform of our legal system and we sincerely appreciate your consideration of our comments.

Sincerely,

Robert G. Loiselle
President

KLUKWAN, INC.

P.O. BOX 32077 • JUNEAU, ALASKA 99803-2077 • (907) 789-7361



March 12, 1994

Rep. Brian Porter, Chair
House Judiciary Committee
Juneau, Alaska 99801

Dear Rep. Porter:

We strongly urge the passage of HB 292.

Sincerely,

A handwritten signature in cursive script that reads "H. Vance Taylor, Jr.".

H. Vance Taylor, Jr.,
President

A handwritten signature in cursive script that reads "Alfred R. Lupton, Jr.".

Alfred R. Lupton, Jr.,
Sec/Treasurer

RECEIVED

MAR 22 1994

Rep. Brian Porter



ALASKA STATE MEDICAL ASSOCIATION

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

January 21, 1994

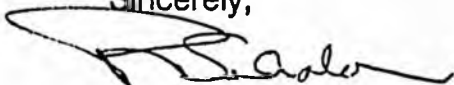
Representative Brian Porter
Alaska State Legislature
Room 122, State Capitol
Juneau, Alaska 99801

Dear Representative Porter:

On behalf of the Alaska State Medical Association, I urge you to support H.B. 292, Liability Reform. We believe strongly that any health system reform must include comprehensive liability reform. Our association was involved in the drafting of H.B. 292 and support all reform in the bill. Therefore, we ask you to move H.B. 292 from Labor & Commerce to House Judiciary.

Your support and sponsorship is sincerely appreciated.

Sincerely,



Ray Schalow
Executive Director

Received
JAN 24 1994
REP B

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

January 17, 1994

Representative Brian Porter, Member
Labor & Commerce Committee
House of Representatives
Capitol Building
Juneau, Alaska

Re: Support HB 292
Liability Reform

Dear Representative Porter:

On behalf of community hospitals and nursing homes across the state, we ask:

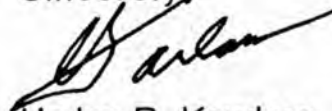
1. Your support of HB 292, the Comprehensive Liability Reform bill currently pending before the Labor & Commerce Committee.
2. Your support for bringing HB 292 to a vote before the Labor and Commerce Committee as early in the 1994 session as possible.

Attached is our position paper on the need for HB 292. We have, and continue to study other solutions to the problem of the cost surrounding liability and the need for the business and health care community to have access to reasonably priced insurance. We continue to believe the best solutions to resolving high liability costs are contained in HB 292.

I will be calling and getting on your appointment calendar to discuss this and any other health issues. Welcome back to Juneau.

*Thank you
for support*

Sincerely,



Harlan R. Knudson
President/CEO

Encl: (1)

cc: Gary Brewer, Alaska Regional Hospital; Sister Suzanne Brennan, Providence Hospital; Kathleen Cronen, Charter North Hospital, Jim Walsh, Valley Hospital; Tom Boling, Our Lady of Compassion Care Center and Joan Fisher, The Mary Conrad Center.

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

January 17, 1994

Representative Bill Hudson, Chair
House Labor & Commerce Committee
Capitol Building
Juneau, Alaska 99801-1182

Re: Support HB 292,
Liability Reform

Dear Bill:

We want to thank you and members of the House Labor & Commerce Committee for having HB 292, the comprehensive liability reform bill introduced and for the two excellent hearings you and your committee have held on that bill.

We have reworked our position paper to reflect the information received at the above meetings, and at the meeting with you and the Medical Association on January 5. As mentioned, we congratulate the Trial Bar for finally recognizing there is a very serious liability problem in this state, and for offering solutions to that problem.

Our request to you is to let the House of Representatives vote on liability reform at this 1994 session. From 1988 through the 1992 session, the Labor and Commerce, and Judiciary Committee Chair took it upon themselves to deny the House a vote on this issue. We believe the members of the House, like the public will support the measures contained in HB 292.

You have heard the arguments on all sides, now we ask that you and your committee make a decision on what you feel should be in, added or deleted from HB 292, and move it on to Judiciary.

Sincerely

Encl: (1)

Harlan R. Knudson, President/CEO

cc: Members, House Labor & Commerce Committee; Robert Valliant,
Bartlett Memorial Hospital & Grant Asay, St. Ann's Care Center.

Alaska State Hospital & Nursing Home Association

POSITION PAPER - SUPPORT HB 292. LIABILITY REFORM

January, 1994

Contact: Harlan Knudson, 586-1790

Liability Problem - Health Providers

1. Cost of the Legal System
2. Slowness of Legal System
3. Cost of Defensive Medicine
4. Injured Party Receives Less than 50% of Award
5. Needed Care Denied Rural Areas
6. No Access or Recourse for Claims under \$100,000
7. Health Providers Cannot Afford/Do Not Have Liability Insurance

HB 292. Comprehensive Liability Reform - SB 254 Companion Bill (Note: SB 204/HB 274 contain medical liability reform provisions included in HB 292) Purpose:

1. Reduce cost (health care, business, professional) associated with civil justice system.
2. Assure adequate and appropriate compensation for persons injured through the fault of others.
3. Increase availability and reduce cost liability insurance.
4. Establish fair and equitable timelines for resolving disputes.
5. Accumulate additional information concerning the cost of the civil justice system.

(More)

SECTIONS HB 292 IMPORTANT FOR REDUCING HEALTH COSTS:

Statute of Limitations - Current statutes must be clarified to make sure lawsuits are brought with a reasonable time. Six years is recommended, and for medical liability 2 years from the time of the incident and/or for minors two years from the time of the incident or before the 8th birthday, whichever time period is longer.

Cap on Non-economic Damages - ASHNHA supports caps on non-economic damages to limit the dollar amount of damages which a jury or judge can award a plaintiff. The recommended cap amount is \$250,000.00 indexed to the Consumer Price Index.

Limit on Punitive Damages - Provides definition of punitive damages to be "as actions of malice and conscious disregard of another person and establishes punitive damages as \$200,000 or up to three times the amount of compensatory damages awarded.

Periodic Payments - Provides for reducing the cost of compensating plaintiffs for future losses; preventing premature dissipation of damages and preventing windfall recoveries if a plaintiff should die.

Collateral Sources - Prevents double compensation for an injury. Current rules prohibits the defendant from introducing evidence that damages suffered by a plaintiff have been paid by a source other than the defendant. The court and a jury should be able to take into account the fact that part of the plaintiff's damages are already covered by other sources.

Liability Hospitals Acts/Omissions Non-Employed Personnel - Community hospitals should not be "automatic" deep pockets when a lawsuit is filed against a physician. This overturns an Alaska Supreme Court decision (Jackson v Power) holding a hospital liability for the action of an emergency room physician, even though the hospital was not negligent and did not violate any legal or regulatory requirements.

ASHNHA has under review the Trial Bar proposal requiring all health professionals to have \$5 million in liability insurance; implementing enterprise liability where a state authority, not the provider is sued; mandatory arbitration for all lawsuits under \$200,000 with a certificate of merit required before filing a medical liability lawsuit. ##end##

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

February 17, 1994

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

Re: Support HB 292

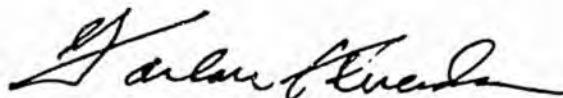
Dear Representative Porter:

Community hospitals and nursing homes from across the state join with other health care professional organizations, architects, engineers and the business community in asking the Senate Judiciary Committee to approve HB 292, the 1994 Comprehensive Liability Reform Bill.

Attached is a "position paper" from the Association outlining reasons why Alaska health facilities feel HB 292 is one of the most important issues confronting the Legislature this session.

It will not be possible to reform our health care system, ensuring access to all citizens while controlling health care costs, if we do not control the cost of medical liability.

Sincerely,



Harlan R. Knudson
President/CEO

cc: Members House Judiciary Committee
Encl: (1)

ALASKA STATE HOSPITAL & NURSING HOME ASSOCIATION

SUPPORT- SB HB 292 - COMPREHENSIVE LIABILITY REFORM

(February, 1994)

THE LIABILITY PROBLEM - Alaska's community hospitals and nursing homes support HB 292 because:

1) The current legal system costs too much and works too slowly. The cost of claims handling, and litigation (including both plaintiff and defense attorney costs) consume over half of the professional liability dollars, with less than half of those dollars going to the injured patient.

2) The current legal system fails to provide access to the legal system for many, particularly individuals with small claims, less than \$100,000.00. The current system awards nothing to some with meritorious claims while lavishing exorbitant amounts on others.

3) The current legal system adds billions of dollars to the nation health care bill by inducing physicians and other health professionals to order more examinations, tests and procedures as a hedge against accusations of neglect or negligence.

4) The current legal system diminishes access to health care, particularly to high risk services such as obstetrical care.

HB 292. COMPREHENSIVE LIABILITY REFORM BILL WILL:

1) Control the liability costs for health professionals, health facilities, other professionals and the business community.

2) Ensure adequate and appropriate compensation for individuals injured through the fault of others.

3) Increase the availability and reduce the cost of liability insurance.

4) Establish fair and equitable timelines for resolving disputes.

5) Collects data on the cost of the civil justice system.

SECTIONS HB 292 IMPORTANT TO HEALTH CARE:
CS HB 292 (L&C) 2/7/94

Sections 1. Findings and Purpose. Support.

Section 2. Practice Parameters. ASHNHA supports the establishment of practice parameters established by the Alaska State Medical Association.

Section 3. Statute of Limitations 6 years. ASHNHA supports a six year statute of limitations. Current statutes need to be clarified to make sure that lawsuits are brought within a reasonable time. Recent court decisions make it possible to file suits in the distant future, making risks totally unpredictable for insurance purposes.

Section 4 and 5. Statute of Limitation for Health Providers. ASHNHA supports a statute for medical liability at two years from the time of the incident. For minors that statute would be two years from the time of the incident or before the 8th birthday, whichever time period is longer.

Section 7. Non-Economic Damages. ASHNHA supports a cap on the non-economic awards for intangible losses such as pain and suffering, for which there is no established economic values. There must be a limit if there is to be predictability for insurance purposes. \$250,000 is the recommended cap for these damages.

Section 8 and 9. Punitive Damages. ASHNHA supports a clarification of punitive damages and the limit of such damages to \$200,000.00.

Section 12, 13, 14. Periodic Payments. ASHNHA supports that either party may request that a judgement be paid in periodic payments and that in such cases, the attorney's contingent fee be reduced to present value and paid in a lump sum.

Section 15, 16, 17. Collateral Benefits and Determination of Fault. Insurance payments which have been made to an injured party should be disclosed to the jury and should be protected from recover in the event the injured person receives an award. Individuals not at fault should not be liable for damages.

Section 27. Civil Liability of Hospitals. This section does not prevent a hospital from being sued, but it reverses the Supreme Court Decision holding the hospital liable damages when the hospital has not done anything wrong and is not guilty of negligence. It prevents community hospitals from being the automatic deep pocket in all lawsuits against physicians.

On October 16, 1987, the Alaska Supreme Court ruled in Jackson v Power (no. 3237) that a hospital has a nondelegable duty to provide emergency room services, and therefore the hospital is vicariously liable for the negligence of an emergency room physician, regardless of fault. Hospitals will continue to be liable for permitting an incompetent physician to practice and it does not relieve the hospital of liability for failing to fulfill its responsibilities.

###

John L. George & Associates
9515 Moraine Way
Juneau, Alaska 99801
Tel. 907-789-0172 Fax 907-789-6964

February 7, 1994

The Honorable Brian Porter
Chairman, House Judiciary Committee
State Capitol
Juneau, Alaska 99801-1182

Reference: House Bill 292

Dear Representative Porter,

During the last hearing on HB 292 in the House Labor and Commerce Committee, comments were made relative to my prior testimony on the bill. I had stated that problem causing the need for tort reform was not so much the million dollar awards as it was related to the volume of smaller claims that settle for greater amounts than they would normally justify due to the threat and potential for extremely high awards in court. To clarify and expand on those remarks I offer the following comment.

The threat of unlimited awards for subjective and unquantifiable damages drives the settlements for many claims higher than normal. The threat of court awards that deviate from the predictable norm for similar claims leaves out of court settlements up to emotional arguments and speculation. A similar situation in criminal law happens when an innocent party is charged with a murder he did not commit. Does he risk life in prison or plea bargain to a lesser charge for the certain five year sentence for the crime he did not commit. Principle would dictate a court fight but practicality might dictate the absolute avoidance of a life sentence by taking a known lesser sentence. This would be further exacerbated if the death penalty were a possibility. The higher the stakes the greater the incentive to offer higher than justified settlements. Would you opt for a chance at the gas chamber or the certainty of five years in prison for a crime you did not commit?

Caps on non economic damages are a recognition that significant but not unlimited compensation is proper for pain and suffering. Caps on non economic damages add predictability and upper quantifiable limits to an otherwise completely subjective loss. While a relatively small percentage of awards for non economic damages exceed the proposed caps, they non the less, have the effect of adding great unpredictability to claims settlements and are a meaningful and integral part of the tort reform package.

Sincerely,


John L. George

KODIAK OIL SALES IC
BOX 1487
KODIAK ALASKA 99615
486-3245
486-3205 FAX

Received

JAN 31 1993

B.P. PORTER

JAN. 31, 1993

HOUSE LABOR AND COMMERCE COMMITTEE
ATTN.:

BILL HUDSON
ELDON MILLER
BILL WILLIAMS

JERRY MACKIE
JOE GREEN
BRIAN PORTER

JOE SITTON

HB 292

DEAR SIRs:

KODIAK OIL SALES IS A FAMILY OWNED BUSINESS WHICH HAS OPERATED IN ALASKA SINCE 1950. WE LIKE MOST ALASKAN BUSINESS ARE FACED WITH RISING INSURANCE PREMIUMS AND IF WE BECOME INVOLVED IN A LAWSUIT THE POSSIBILITY OF AN OUTRAGEOUSLY HIGH SETTLEMENT THAT MAY THREATEN OUR CONTINUED OPERATION.

ALASKA NEEDS TORT REFORM VERY BADLY, WE NEED TO STOP THE INSANITY IN OUR LEGAL INDUSTRY IN ALASKA. I SAY INDUSTRY INSTEAD OF LEGAL PROFESSION OR LEGAL SYSTEM SINCE THAT WHAT IT IS A MULTI MILLION DOLLAR INDUSTRY THAT PREYS ON THE PEOPLE OF THIS STATE.

HB 292 WILL BEGIN TO BRING SOME SANITY TO THIS OUT OF CONTROL SITUATION. I URGE YOU MOVE THIS BILL INTO THE HOUSE.

YOURS TRULY
JIM RAMAGLIA
VICE PRESIDENT

FAX TRANSMITTAL

FROM DAVID FRAZIER & ASSOCA. INC.

PHONE 907-258-1169, FAX 907-258-3638,
ACCOUNTING PHONE & FAX 907-274-2889

Number of Pages 1

Date 2-3-94

To Assoc. Labor & Comm. Attention Brian Parker

I'm in support of HR 292 except
that the non-economic damage cap is
too high. It should be reduced from
\$500,000 to \$250,000. I urge you to move
to suit of committee. Thank you

David Frazier
Josh Shepherd Jr.
Anchoridge 7950P

** a speaker - Mike Lessmeier*



**HUGHES THORSNESS
GANTZ POWELL & BRUNDIN**

Est. 1939

ATTORNEYS AT LAW

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JAMES M POWELL
BRIAN J BRUNDIN
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JOE M HOOLESTON
CARL J O BAUMAN
DENNIS M RUMP
MARY A HUGHES
FRANK A PIFFNER
R CRAIG HESSER
ROBERT L MANLEY
JAMES M GORSKI
TIMOTHY R BYRNES
JAMES M SEEDORF
RONALD E NOEL
EDWARD J JUDEN
MICHAEL L LESSMEIER**
SILVER S TAYLOR
MATHEW A PETERSON
JOSEPH R O LOESCHER
KENNETH D LOUDGE
EARL M SUTHERLAND
JOHN R THORSNESS

GREGORY W LESSMEIER**
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KENNETH M GUTCH
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VICKI L RUSSELL
SHELDON E WINTERS**
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LINDA J JOHNSON
JOHN C WHARTON
PAUL K WENDLANDT
CYNTHIA M KLEPASKI
GREGORY S FISHER
RON L SAYER
JOHN J TIEMESSEN
KIMMERLEE A COLBO
SHANE J DEOWSKI
JAMES E CUP*AIN**

OF COUNSEL:
JOHN C. HUGHES
RICHARD O GANTZ

509 WEST THIRD AVENUE
ANCHORAGE, ALASKA 99501-2273
TELEPHONE (907) 274-7522
TELECOPIER: (907) 263-8320

590 UNIVERSITY AVENUE
SUITE 200
FAIRBANKS, ALASKA 99709-3652
TELEPHONE (907) 479-3181
TELECOPIER: (907) 474-2620

**ONE SEALASKA PLAZA
SUITE 303
JUNEAU, ALASKA 99801-1249
TELEPHONE (907) 586-5912
TELECOPIER: (907) 463-3020

Reply to: JUNEAU

February 3, 1994

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

Re: CSHB 292

Dear Representative Hudson:

I am writing to you on behalf of State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company. State Farm presently has approximately 32 percent of the automobile insurance market in the state of Alaska. State Farm Fire & Casualty has 43 percent of the homeowners' insurance market. Collectively State Farm has had significant experience with Alaska's civil justice system which goes back for at least 20 years. It is from this perspective that we offer our comments regarding the CS for HB292, which is presently before you.

You probably already know that we had n. involvement in the introduction or drafting of this legislation. Since our day-to-day activities will be affected significantly by this legislation, we feel compelled to comment on it. We feel compelled to comment for another reason, for regardless of whether we wish to be a part of this debate, we nonetheless are brought into it by those who believe the only reason for tort reform is insurance reform.

At the outset we wish to commend your committee for the efforts it has and is making toward finding balance in an area where there are strong feelings on all sides. Many people have

Received
FEB 03 1994
EMPORIER

vastly different opinions about where as a matter of fairness to draw the line on issues such as statutes of repose and caps for non-economic damages. While we have no opinion on those particular issues, it is easy to make the observation that efforts to impose reasonable limitations will have a positive effect on the goals your committee seeks to further through the introduction of this legislation. There are other areas addressed by this legislation which we feel strongly about and the following will set forth those areas.

1. Section 11 (Reduction of future wage loss awards by income taxes). We have always questioned the logic behind not reducing awards for future earnings by the amount of federal and/or state income tax. Section 11 would alleviate what is currently a windfall and we are very much supportive of this change.

2. Sections 16 and 17 (several liability). These sections alleviate an obvious problem in the interpretation of the 1988 several liability initiative. We found it incredible that one of the opponents to this legislation has argued the changes proposed by Sections 16 and 17 to be significant when compared to the way things are currently done. Frankly the rulings we have received on this issue have been different in almost every case. We doubt if anyone else's experience has been different.

What we also find to be incredible is how the clear intent of the 1988 initiative has been so frustrated by those who are unwilling to enforce the intent of the voters. As you will recall the voters in 1988 were told that "the initiative would make each party liable for damages only equal to his or her share of fault and repeal the law concerning reimbursement from other parties." Unfortunately this has not proven to be the case. The changes that you propose in Sections 16 and 17 would simply ensure that indeed a party would be held responsible only for his or her percentage of fault, regardless of who the plaintiff chose to sue. We very much support this change as it will simply give effect to what the voters decided in 1988.

3. Section 14 (offers of judgment) is a change we also support. This provision represents an attempt to encourage parties to reasonably and fairly evaluate their cases. We think the effect of a provision such as this will indeed be significant.

4. Section 20 (pre-judgment interest) is a change which is long overdue. The proposal would key pre-judgment interest to what a party could realistically hope to earn on their money, which of course is the intent of pre-judgment interest. No longer would there be the risk that pre-judgment interest is arbitrarily either too high or too low.

5. Section 21 (pre-judgment interest on future damages) is

Representative Bill Hudson
February 3, 1994
Page 3

HUGHES THORSNESS GANTZ POWELL & BRUNDIN
ATTORNEYS AT LAW

also a provision we are very much in support of. This again operates to remove the windfall of awarding pre-judgment interest on future damages or punitive damages, which again as a matter of logic and fairness seems most appropriate.

6. Finally, we are supportive of Section 26, which eliminates costs and attorney's fees that are presently awarded as a matter of course in almost every case. The current issue of who is the "prevailing party" in civil litigation is one that is litigated probably more frequently than any other issue. Indeed, every consumer who purchases an insurance policy from us in Alaska pays for Rule 82 coverage. Eliminating this would not only reduce litigation on this issue, but would remove an element of cost that is present in the current system.

Aside from the above comments which relate to specific sections of the proposed legislation before you, we have a general comment we would like to make. We are, of course, aware that any time legislation such as this is proposed, the opponents will respond by arguing it should not be passed unless there are guarantees the passage will reduce insurance rates by a specific percentage. We wish the issues were so simple. To see they are not, we need only look back at the 1988 initiative. Although we thought then and even now the issue of several liability to be a simple one, there has been a great deal of litigation about the issue of whether fault is to be allocated only amongst those parties the plaintiff has chosen to sue, or amongst all. We are now rapidly approaching the five-year anniversary of the effective date of this initiative and this seemingly simple issue has still not been answered.

We suspect that even if the legislation before you is passed, the meaning of many of these provisions will be disputed for years to come. The opponents of this legislation are talented and at least in some cases well-financed groups who have a great deal of personal stake in the enforcement of the provisions before you. It may be years before the true benefit of this legislation will be felt.

There is a second reason the benefit we fully expect to result from this legislation is not easily quantifiable. Many aspects of civil litigation remain subjective and not quantifiable, especially over the short term. One need only look at the natural disasters which have befallen literally every region of our country in the past five years to see that.

Although we fully expect this legislation to have a positive effect on insurance premiums, those that oppose legislation of this nature for the purported reason that there is no guarantee insurance rates will be affected need only to understand that there are a number of controls in the system that prevent an insurer from having an excessive level of profit. The first is

Representative Bill Hudson
February 3, 1994
Page 4

HUGHES THORSNESS GANTZ POWELL & BRUNDIN
ATTORNEYS AT LAW

that the insurance industry is highly regulated and indeed, the state of Alaska employs a Director of Insurance and staff for the very purpose of protecting Alaska consumers.

Second, the insurance industry, even though highly regulated, is also highly competitive. The effect of competition is to also provide for a level of control on the cost of insurance products.

Third, this legislation does provide for a study of the costs to society of the civil justice system. If the goals this legislation seeks to accomplish are not furthered, additional changes can be made. This legislation certainly seems to be a significant step in the right direction.

Finally, we believe you should keep the concept of fairness in mind as you examine each of the proposals before you, aside from their effect on insurance rates, as ultimately, the cost of insurance is borne by each one of us. Is it really fair to have pre-judgment interest at an unrealistically high or for that matter low level? Does it really make sense to assume there would be no income taxes paid on a future lost wage award? Is it fair to pay pre-judgment interest on future damages? Do we, as a matter of course, wish to pay for attorney's fees in every single case? Even if you ignore the benefit we believe this legislation will ultimately have on insurance rates, the answer to these questions seems clear. We would urge each one of you to support this legislation.

If we can be of any assistance to you in evaluating any of these provisions or trying to assess the possible effect of these provisions, please let us know and we will be happy to help.

Sincerely,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN

By: 

Michael L. Lessmeier

xm113600/lp

cc: Members, House Labor
& Commerce Committee



JACKSON CONSTRUCTION

241 ASPEN STREET
SOLDOTNA, AK 99669
907-262-4485

Dear Committee Member !

As a concerned business man and citizen I respectfully urge you to move house Bill 292 into the House for immediate action

Insurance reform is long overdue and even tho I believe this bill does not Go far enough it is a step in the right direction.

I will do all I can to assure its passage once it reaches the House.

Respectfully I am


Harold A Jackson

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

file

PRACTICE LIMITED TO GENERAL SURGERY

BY APPOINTMENT ONLY

February 1, 1994

Resolved

...ER

Representative Brian Porter
House of Representatives
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Brian:

A note (from the home front) to encourage you to continue to support tort reform. House Bill 292 looks pretty good to me as it does to others in the medical field. If I can be of any help to you from this end with testimonies, information, etc., please do not hesitate to contact me.

Wishing you a successful year in Juneau.

Sincerely,



Roland E. Gower. M.D.

REG:bar

NFIB Alaska

National Federation of
Independent Business

FOR IMMEDIATE RELEASE
January 10, 1993

FFI, CONTACT: Resa Jerrel
(907) 789-4278

TORT REFORM TOP ISSUE FOR NFIB/ALASKA

JUNEAU--Despite civil justice reforms enacted in 1986, Alaska's small business owners still suffer from sky-high liability insurance rates. "Many members tell me their premiums have continued to soar, even though there have been no claims, or only a very minor claim, against their policies," says Resa Jerrel, Director of the 4,400-member Alaska chapter of the National Federation of Independent Business. "I know of several who have been forced to drop their coverage due to premium hikes, leaving them and their customers without meaningful protection."

The failure of the '86 reforms has led NFIB/Alaska, the state's largest small-business advocacy group, to place passage of HB 292, a comprehensive tort reform bill, at the top of its legislative agenda.

A recent survey of NFIB/Alaska members found overwhelming support for all six of the bill's key reforms among the small business community:

- * 96 percent approved barring damage suits by people who received their injuries in the course of committing a crime;
- * 89 percent approved limiting the filing deadline for lawsuits arising from construction accidents or product liability claims to six years from the time of injury;
- * 84 percent approved telling juries of awards already collected by a claimant for the same incident and deducting that amount from any subsequent judgement;
- * 83 percent approved capping punitive damage awards at \$200,000 or three times the amount of actual loss, whichever is greater;

9159 Skywood Lane
Juneau, AK 99801



The Guardian of
Small Business

-more-

* 79 percent approved barring injury claimants from naming only "deep pocket" defendants;

* 78 percent approved limiting the economic loss awards in fatal accidents to \$50,000 if the deceased has no dependents.

"The survey results clearly show small-business owners feel the current civil justice system is neither civil nor just," Jerrel said. "It encourages people to file million-dollar lawsuits on the flimsiest of pretexts, often in the hope of being offered a settlement just to stop being a nuisance. This kind of 'civil extortion' frustrates fairness and clogs the courts, slowing the delivery of justice for all. And, it imposes tremendous costs on society, fueling insurance rate inflation and raising cost of goods and services for all Alaskan consumers."

Jerrel says pre-session conferences have left her feeling upbeat about the prospect of getting meaningful reforms enacted this year. "You get the sense from all parties involved, including the trial lawyers, that progress must be made this year," Jerrel said. "For the first time in all my years of dealing with this issue, there seems to be a determination among all the players to work together, to seek conciliation rather than confrontation."

#####

NFIB Alaska

National Federation of
Independent Business

January 10, 1994

The Honorable Brian Porter
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Porter:

The NFIB/Alaska - National Federation of Independent Business of Alaska - membership is comprised of 4300 small and independent business owners. The typical NFIB/Alaska member employs four workers and rings up gross sales of about \$190,000 per year. In aggregate, the organization's members employ nearly 50,000 workers.

The legislative agenda of NFIB/Alaska is determined by our ballot. The ballot is our annual poll of our membership on a series of issues deemed critical to small business. A majority vote, of the members in response to the poll, sets our policy and position on legislative issues. The objective of this letter is to share with you the enclosed results of the 1994 poll.

I hope this information regarding the views of small business owners on these issues will be useful to you. At your convenience, I would be happy to meet with you to discuss this years results or previous years poll results.

I look forward to working with you on these and other issues of importance to small business owners.

Sincerely,

9159 Skywood Lane
Juneau, AK 99801



Resa Jerrel
State Director



Enclosure

The Guardian of
Small Business

Received

JAN 11 1994

... BRIAN PORTER

NFIB/ALASKA BALLOT RESULTS
1994

1. Should legislation be passed requiring voter approval of any new state tax or tax increase?

Yes 81% No 14% Undecided 5%

2. Should the legislature reform the Alaska tort law system by making the following changes:

a. Require construction and product liability actions involving personal injury, death, or property damage to be filed within six years of the accident?

Yes 89% No 4% Undecided 7%

b. Prevent injury claimants from naming only those businesses and individuals who have the deepest pockets?

Yes 79% No 9% Undecided 12%

c. Limit punitive damages to not more than three times that awarded for actual loss, or \$200,000, whichever is greater?

Yes 83% No 8% Undecided 9%

d. Limit award for economic loss to \$50,000 when the deceased is not survived by children, spouse or other dependent?

Yes 78% No 14% Undecided 8%

e. Make the courts and juries aware of any other awards the claimant may have received and deduct that amount from judgements?

Yes 84% No 10% Undecided 6%

f. Prohibit suits for damages if the injury or death occurred while the plaintiff was committing a crime?

Yes 96% No 3% Undecided 1%

3. Should a small-business economic impact statement be attached to all bills considered during session?

Yes 62% No 25% Undecided 13%

4. Should a Small business Advisory Committee in the legislature be established to review proposed legislation and recommend legislation beneficial to small business?

Yes 73% No 18% Undecided 9%

5. Should legislation be enacted permitting a small business to replace workers' compensation insurance with a combination of health and wage replacement insurance (known as 24-hour coverage)?

Yes 51% No 16% Undecided 33%

1994 Ballot Results

Page: 2

6. Should there be a limit on the number of bills legislators can introduce?

Yes 60% No 28% Undecided 12%

7. Do you currently provide health insurance to your full-time employees?

Yes 47% No 53% Undecided 0%

7a. If you answered yes to question 7, approximately how much do you currently pay for health insurance for each full-time employee each month?

Up to \$75	3%
\$76 to \$125	13%
\$126 to \$200	33%
More than \$200	51%

7b. If you provide health insurance, who pays for it?

Employer pays 100 percent	66%
Employee pays 100 percent	3%
Employer and employee share the cost.	31%

8. If your firm does not provide health insurance to employees, why not? (Check only one):

43% Premiums are too high or the firm cannot afford to pay for benefits.

17% Employees are generally covered under policy of spouse or parent.

14% The firm does not qualify for a group policy.

7% Employees prefer additional compensation in place of health insurance benefits.

3% Lack of employee interest.

16% Other. (Please detail in the Comment section.)

8a. If you do not provide health insurance, which of the following measures would you likely take to recover costs if you were required to buy health insurance for all your full-time employees? (select those that apply.)

42% Raise prices for my product or service.

22% Eliminate part-time jobs.

35% Eliminate full-time jobs.

23% Reduce hours worked for some employees.

26% Cut or hold down other employee benefits.

51% Cut or hold down employee wage increases.

- 18% Postpone or cut expenditures for plant and/or equipment.
- 24% I would be forced out of business.
- 6% Other. (Please explain in the Comment section.)

9. Who should have the responsibility for making health insurance purchasing decisions?

Employer 45% Individual 42% Undecided 13%

10. Should doctors and hospitals be required to post their fees for the services and procedure they provide?

Yes 76% No 14% Undecided 10%



Weona Corporation

We the following strongly support the passage of H.B. 292.

Please move this bill into the House as soon as possible.

Edward Andrew Sr STR #2 Box 9319 Eagle River, AK 344-1921

JH B. [unclear] 2910 West 33rd Anch, AK 99517 344-1921

Arvidson O Pererosa 5901 E 6th Ave SP 191 Anch AK 99504 337-4235

Brian J. Huntman 500 Fischer #B Anchorage AK 99518 562-1682

James H. [unclear] 3750 Pererosa Cir Anch AK 99515 - 344-7475

[unclear] 11700-B Nix Ct Anch, AK 99515 - 344-7826

PA. [unclear] [unclear] [unclear] 344-1921

ST RT Box 9319 Eagle River AK - 654-5170

501 Nathan Drive #3 Anchorage, AK 99518 344-1921

Debra Robertson 4021 Rabbit Creek Rd. Anch. AK 344-1921

John P. [unclear] 501 [unclear] Anch. AK 99518 561-1579

FAX TRANSMITTAL

FROM DAVID FRAZIER & ASSOC. INC.

PHONE 907-258-1169, FAX 907-258-3698,
ACCOUNTING PHONE & FAX 907-274-2869

Number of Pages 1

Date 3-15-94

To Brian Porter Attention House Judiciary Committee

I think HB292 (Tort Reform) makes
a lot of economic sense for both
the plaintiff and defendant. What
I like most is the quick resolution
of economic issues. What would
come with mandatory arbitration.

David Frazier
2636 Shepherdia Dr.
Ruchrose Ok 99508
(District 20)

RECEIVED

MAR 15 1994

Rep. Brian Porter



UNITED BROTHERHOOD OF
Carpenters and Joiners of America

LOCAL UNION NO. 1281

407 DENALI , #100

PHONE 276-3533

ANCHORAGE, ALASKA 99501
FAX : 276-7962



February 28, 1994

Representative Brian Porter FAXED AND MAILED 2/28/94
State Capitol, Room 118
Juneau, AK 99801-1182
FAX : 465-3834

RE : House Bill 292

Dear Representative Porter,

Many of us, myself included, within the construction industry favor a great deal of that which is contained in HB292. We can agree that tort reform is needed. However, there needs to be an avenue to make sure the savings are realized by those from whom it has been extracted in the first place.

That means that the insurance companies must also step to the plate along with the medical community and others.

Senator Duncan has a good idea in his health care bill. Give the insurance companies so long, in this case 1 year, to drop rates or it will be mandatory. Right on down the line until it gets to the average citizen, the consumer.

That would be ideal, but you must start somewhere, so "YES" to HB292.

Sincerely,

Phil Thingstad
Business Manager
Carpenters Local 1281

PT/wh

Received

3 1994

...ANPORTLA



March 2, 1994

Representative Brian Porter, Chair
House Judiciary Committee

Dear Representative Porter:

I want to add my voice to those urging your passage of HB 292.

I have been an advocate of Tort reform for many years. The provisions of HB 292 are well thought through, and reasonable. They level the field on which we play in an already too litigious world. They provide adequate protection for successful plaintiffs without ruining any prospect that the losing party will be able to stay in business.

Our insurance costs are high, and the complexity of our potential liability requires expensive professional attention. We are a small company that have never experienced an insurance loss, and still we have to struggle to assure that we have all the coverage we need.

"I'll sue you" is becoming as common a daily greeting in business as "have a nice day". HB 292 is good for Alaska. It is moderate, and fair. I urge you to pass it.

Sincerely,

Ernesta Ballard
Chief Executive Officer

Received

MAR 6 1994

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

Received
22
REP BRIAN PORTER

February 22, 1994

Representative Brian Porter
State Capitol, Rm. 122
Juneau, AK 99801-1182

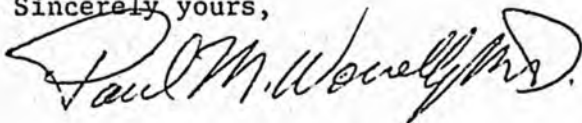
Dear Representative Porter:

I appreciate your work in the Legislature in moving the Tort Reform bill forward. I hope that we have a chance to say hello when I am in Juneau the 27th and 28th of February or March 1.

The lack of Tort Reform changes has certainly discouraged the medical community far more than is realized. I think Tort costs have also driven up the cost of medical care far greater than people realize.

I certainly appreciate your work this past few months.

Sincerely yours,



Paul M. Worrell, M.D.

President, Anchorage Medical Society
pmw:pk

February 22, 1994

Rep. Brian Porter, Chair

When I moved to Alaska in 1955, attorneys headed my list of most admired professions. Lawyers have done a lot for Alaska and America. However, times have changed.

The legal system has changed to be one of the worst of the profession. Not lawyers, per se, but the system.

I recently was involved in a silly lawsuit that racked up way over \$100,000 in legal fees. The suit was eventually suspended with no settlement money. Only the lawyers won.

Please pass any law that will clamp down on liability reform and stop silly lawsuits. Why does Alaska need 10 times more per capita the number of attorneys that practise in growing Japan?

Thank you,

Keep us fighting!
Sewell

Sewell F. Faulkner

P.S. This complaint is about the legal system, not lawyers. There's lots of fine attorneys that must play by the rules of this terrible system.

Received

FEB 23 1994
REP BRIAN PORTER

ARCTIC WELDING SUPPLY INC.

DATE 2/23/94 TIME _____ A.M. _____ P.M. _____ PAGES _____

NOTE: If you did not receive all of the pages of if you have a question, please call the verifying number 907 562 2638.



FROM:	
Name	Name
Address	Subject
Attention	Fax. # <u>FAX # (907) 562-2638</u>
Box No.	Verifying No.

Re: B. Porter

I have been actively pushing for some form of Tort Reform for several years.

I believe we need a cap on awards + a cap on attorney fees allowed.

If H.B. - 292 speaks to those issues then I hope you will help insure its passage.

Owen J. Sauger

PH 279-2846

wk ph. 562-2681

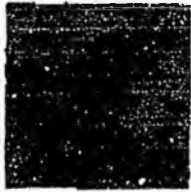
2.23.94

To: Rep Brian Porter & Committee Members

From: R.W. Garner, M.D.

Get MB 292 out of
committee & onto the floor.
I strongly support it.

RWG




ALASKA STATE MEDICAL ASSOCIATION

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

March 11, 1994

TO: Representative Brian Porter
Alaska State Legislature
P. O. Box V (MS 3100)
Juneau, AK 99811

FROM: Dr. Donald Lehmann, President
Alaska State Medical Association 

RE: House Bill 292

Dear Representative Porter:

On behalf of the Alaska State Medical Association I would strongly encourage you to support House Bill 292 and pass this bill through your committee. The Alaska Bar Association is currently attempting to smear this bill by passing out a significant amount of misinformation. The current Tort system that we have in this state is unfair, inequitable, and irrational. It is making it increasingly difficult for hospitals to stay open and the physicians to practice, especially in rural parts of the state. Tort Reform does work. Experience has shown that fair and comprehensive reform has lowered malpractice costs significantly in California and Indiana, the two states where it has been enacted. Alaska will benefit with the passage of House Bill 292.

If you have any questions that I can answer, do not hesitate to contact me.

JOHN M. SNYDER, M.D.

General Surgery

2841 DEBARR ROAD, SUITE 44

ANCHORAGE, ALASKA 99508

(907) 277-1375

(907) 277-1376 FAX

RECEIVED

MAR 22 1994

Rep. Brian Porter

Dear Representative:

I am writing to voice my objection to the Duncan bill specifically, and in general to any premature attempts by the state legislature to radically change the health care system of Alaska.

As a prelude to my comments I would also like to inform you that the recent sanction of the Duncan bill by the Anchorage Medical Society and by Dr. Korshin is not reflective of the general opinion of the majority of private physicians in Anchorage. The meeting, at which it was voted to support the bill, was attended by less than 50 physicians, several of whom are not members of that body. The vote was 22 for, 10 against, which indicates the attendance. I believe that the Medical Society no longer reflects the desires or opinions of the average physician in practice, but rather the voices of a vocal minority, who by default, secondary to unimaginative and ineffective policies, have assumed leadership roles in the organization. I personally discontinued membership in the Society 15 or so years ago for these reasons.

I acknowledge that problems exist within our current health care system. If you will bear with me for a few moments, I would like to share some of my thoughts with you.

There is only one universal agreement concerning the current system; it costs too much. All other objections are either subjugated to this fact, a result of this fact, or emotional cries of crisis to magnify some of the manifestations of this fact.

The appropriate question is, why does it cost too much?

The answer is not a defective capitalistic system, nor is it economic greed, excess demands or any other obvious practical causality. Medicine in the United States today costs too much because of the underlying philosophical principles under which it is practiced. The basic flaw is that our populace demands, and we physicians, without restriction, offer, health care on the basis of "the least potential good", as distinct from "the most probable good." By least potential good, I mean that we will use any technology, therapy, test, or treatment if the slightest possibility exists that it may be of help. To elucidate why this philosophical error currently is accepted by our society