

ALASKA LEGISLATURE

1630

HOUSE and SENATE FINANCE COMMITTEE FILES, 1997-1998

Richard Cattanach



March 10, 1997

Representative Mark Hanley, Co-Chairman
Representative Gene Therriault, Co-Chairman ✓
Alaska State Legislature
Juneau, Alaska 99801-1182

Re: SSHB 58

Dear Representatives Hanley & Therriault:

As Chairman of the Legislative Committee of the Associated General Contractors. I appreciate the opportunity to present our views on this very important piece of legislation. I realize that this is a complex bill and therefore I would like to address two issues that are of paramount importance to the construction industry.

Before addressing these issues, I would like to present an overall observation as to the problems with the Civil Justice System in the State. First of all, the Civil Justice System is a very inefficient system for dealing with important legal issues. As an illustration of the inefficiency of the system, Towers Perrin Company analyzed the distribution of funds to the ultimate recipient. Their study found that Social Security returned 99% of the funds received to the beneficiaries, health insurance returned 85%, workers compensation returned 70%, but the Civil Justice system returned only 50%. A copy of this summary is attached to this letter. In addition, the findings of the Governor's Task Force needs to be examined. The structure of the committee was weighed heavily in favor of the legal profession and contained no members of the State Chamber of Commerce, the NFIB, the construction industry, the travel industry, the trucking industry, the mining industry, the liquor and food industry, the hospital association, the insurance industry and the many other organizations that have been fighting for reform for many years. The results of the Task Force were easily predicable and did not deal with the many concerns of the various organizations. The findings were at best incomplete and at worst a sham perpetrated against the many organizations that have worked so hard to deal with the inadequacies of the current system. While it may be inappropriate to presume that the Task Force members that were attorneys are biased against significant tort reform, I have included a copy of a recent Wall Street Journal editorial that dealt with the anti-business attitude

bias of the American Bar Association. It is impossible to determine the degree to which the attitude of the ABA reflects the opinions of the members of the Task Force, but the potential issue of vested, self-serving interest should not be ignored.

In terms of the concerns of AGC, the first deals with Section 8, the Statue of Repose. In 1992, Schinnerer Management Services Inc. reviewed four studies which measured when claims were brought on construction projects. The studies indicated that a vast majority of claims are filed within six years of substantial completion of a construction project. (Copies attached) Claims filed more than six years after substantial completion almost always involve users of the project. In view of the complexity of the construction process, it is unrealistic to expect parties involved in the design and construction of any project to defend stale claims brought many years after their involvement with the project has ended. This section of the bill does not impose an unfair burden to an injured party because it allows them to seek redress from the owner or occupier of the project, the party most likely to be responsible for the injury and the one in the best position to have prevented it. The proposed Section provides protection to some injured parties by tolling the time period if the cause of action was the result of an intentional or fraudulent action which contributed to the cause of action.

In the Matter of Frederick W. Triem, the Alaska Supreme Court held that

"A five-year statute of limitations governs the filing of attorney grievances. This reflects a judgment that five years is the outer limit of time in which responding attorneys are able to fairly defend themselves against charges, given the loss of memory, evidence, and witnesses that occurs over time."

I believe that the construction industry faces the same problems as the legal profession in defending itself from suits. Why then should the construction period have a longer period of time before they are free from litigation.

According to a report of Legislative Research, the 8 year period would be exceed by only 4 states. In fact, Statutes of Repose of 3, 4 or 5 years are fairly common in other states and the proposed time frame of 8 years would seem to be more than adequate to provide the detection of any construction and design defects and allow the property owner to take action to remedy them.

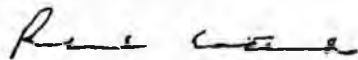
The second area of concern is Section 10, Punitive Damages. In Alaska, more than 95% of the businesses are classified as small, "mom and pop" firms or companies that employ fewer

than 20 employees. To them the issue of punitive damages is very serious because punitive damages are not covered by insurance. The Court System has issued statistics that indicate that the award of punitive damages is rare in Alaska and therefore not really a serious problem. What is overlooked is the fact that these statistics do not report on the suits that are settled prior to going to Court. Punitive damages are requested in almost 30 percent of the civil cases and seem to be used as a means of "extortion" to drive the defendant to settle prior to trial. Defendants realize that their insurance company will defend their acts for the original claim but exclude the defense or payment of any punitive damage awards. Companies are therefore forced to choose between the belief of their innocence or settling to avoid the crippling costs of defending the punitive damages suit should the case get that far. For the small business this is a Hobson's choice. Do you instruct your insurance company to settle even though you believe that you are innocent or do you risk your business and savings defending yourself should a trial for punitive damages be necessary. Many cannot afford the luxury of the gamble and avoid the risk of losing everything they worked for their entire life. Such a system is unfair and we should not tolerate a system that rewards the unscrupulous behavior of such plaintiffs attorneys'.

While the bill is complex, it deals with many issues that are of important to many sectors of Alaska's economy. The recommendations of the Governor's task force were also considered and many were included since they dealt with many issues that had not been addressed previously. I encourage your support of this bill and hope that you can move the bill rapidly through your committee so that we can get it out of the House and over to the Senate.

If I can provide any additional insight into this bill please do not hesitate contacting me.

Sincerely,



Richard Cattanach

In the Final Analysis, the Tort System Does Not Effectively Serve Victims' Needs

Efficiency Comparisons

Available to victim
 Unavailable to victim

Portion Returned to Beneficiary



Torts



**Workers'
Comp**



**Health
Insurance**



**Social
Security**

■ If the tort system is judged as a method of compensating accident victims for their losses, it is both inefficient and unfair. Inefficient, because only half - or less - of the cost goes toward any form of compensation for victims. Unfair, because many victims receive no compensation at all.

Source: The Tillinghast Report, Towers Perrin Company

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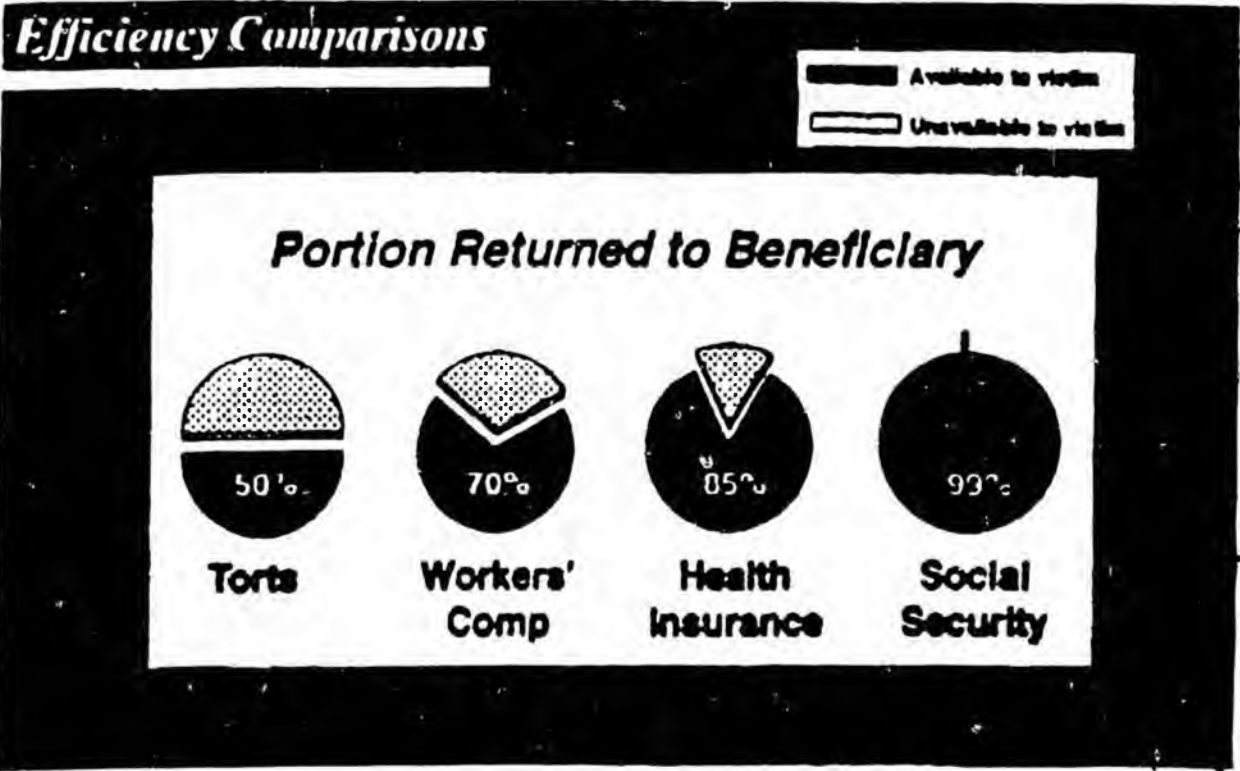
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In the Tillingbast Analysis, the Tort System Does Not Effectively Serve Victims' Needs



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THE WALL STREET JOURNAL

REVIEW & OUTLOOK

ABA v. Business

The American Bar Association has gotten a lot of heat, and deservedly so, for its loony forays into non-legal matters. What's the ABA doing supporting abortion rights, endorsing affirmative action and now calling for a death penalty moratorium? Congressman Chris Cox wrote a trenchant article for the *Weekly Standard* recently exposing in detail how the ABA's liberal agenda skews its evaluations of judicial nominees. But another area where the nation's largest organization of lawyers has gone off the tracks hasn't gotten nearly enough attention—the ABA is actively promoting an anti-business agenda.

At the same meeting earlier this month where the ABA adopted the anti-death penalty plank, its House of Delegates also endorsed a resolution on class actions. The resolution favors making it easier to certify class actions for settlement purposes, and opposes a proposal to rein in "coupon" settlements unless the "litigation's probable deterrence value" is taken into account. In other words the ABA thinks the public is being well-served by settlements—such as those in the notorious Ford Bronco II and airline price-fixing cases—where the plaintiffs' lawyers reap millions while their ostensible clients collect coupons worth almost nothing.

Nobody should be surprised, since the ABA has a long record of opposing any effort to improve the tort system. According to a summary compiled by the Federalist Society, the ABA opposes a loser pays rule; opposes any limits on pain and suffering awards; opposes a "ceiling" on medical malpractice damages; and opposes product liability reform. In effect, then, the ABA wants to let plaintiffs' lawyers continue extorting billions from American companies.

As if to add insult to (personal) injury, the ABA has also gone on record favoring a long list of government mandates on business: universal health care, protection from discrimination for HIV patients, the Family and Medical Leave Act and the like. The group has even called for the creation of "a federal agency to advocate the views of consumers," a long-standing Naderite pipe dream. Is there any *pro-business* idea that finds favor with the pooh-bahs of the ABA? Oh yes, there is one: The ABA supported *Nafta*.

The ABA resolutions aren't just empty words. The ABA has a corps of paid lobbyists who are authorized to support the stances taken by its House of Delegates. And these lobbyists were active in opposing Republican efforts

to pass civil justice reform as part of the "Contract with America." Who can forget the ABA president describing the new GOP Congressional majority in 1995 as "reptilian bastards."

Some will no doubt say: Well what do you expect from a bunch of lawyers? They want to preserve their honey pot, so they don't want to change the tort system. A realistic, if cynical, assessment. But the ABA itself claims that it's not merely a special plender for lawyers; after all, it somehow finds the moral authority to instruct the rest of America on how to run foreign and social policy. The group even has a quasi-governmental function: It certifies lawyers and law schools, and regulates their conduct. The ABA also formally advises the President and Senate on judicial nominations. By backing the plaintiffs' bar, the ABA is not only casting doubt on its ability to carry out these functions fairly and impartially, but it's also sticking it to a large portion of its membership: lawyers who work for businesses.

A bunch of Fortune 500 general counsels were sufficiently alarmed about the ABA's drift that they convened a summit meeting last year with the organization's leaders. The powwow didn't accomplish much. The ABA, for instance, still refuses to adopt a proposal limiting contingency fees endorsed by heavyweights ranging from Robert Bork to Robert Pitofsky. This group wants the ABA, which already bars "unreasonable" fees, to stipulate that it's unethical for a lawyer to take one-third of a plaintiff's award if the case was so simple that he didn't have to do much work or take much risk. No dice. Apparently the ABA is more interested in opposing nuclear weapons than contingency fees, which happen to be the engine driving much of the liability explosion of recent decades.

But then the ABA doesn't believe there is a liability explosion. Not long ago, the group put out a lengthy pamphlet of "Facts About the Civil Justice System," which claims there hasn't been an increase in personal injury suits. As evidence, the pamphlet points out that tort litigation has slightly decreased since 1990. The brochure doesn't bother to mention another fact: tort filings have increased dramatically since 1984.

Such selective use of evidence reveals the ABA's deep and abiding bias in favor of runaway litigation. Given that slant, it's hard for us to see why anybody should take seriously the ABA's opinions on judges or any other subject.



Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

State Capital
Juneau, AK 99801-1182

Statute of Repose/Limitations by State, 1993

<u>State</u>	<u>Years Within Date of Discovery</u> (Statute of Limitations)	<u>Maximum # Years</u> (Statute of Repose)
Alabama	6 months	4 years
Alaska	2 years	-
Arkansas	-	-
Arizona	2 years	-
California	1 year	3 years
Colorado	2 years	3 years
Connecticut	2 years	3 years
Delaware	3 years	-
Florida	2 years	4 years
Georgia	-	5 years
Hawaii	2 years	6 years
Idaho	-	-
Indiana	2 years	6 years
Kansas	2 years	4 years
Kentucky	1 year	5 years
Louisiana	1 year	3 years
Massachusetts	-	7 years
Maine	-	3 years
Maryland	3 years	-
Michigan	6 months	6 years
Minnesota	-	-
Mississippi	2 years	-
Missouri	2 years	10 years
Montana	3 years	5 years
Nebraska	1 year	10 years
Nevada	2 years	-
New Hampshire	3 years	-
New Jersey	2 years	-
New Mexico	-	-
New York	-	-
North Carolina	-	4 years
North Dakota	2 years	6 years
Ohio	1 year	-
Oklahoma	2 years	3 years
Oregon	2 years	5 years

Pennsylvania	2 years	.
Rhode Island	3 years	.
South Carolina	3 years	6 years
South Dakota	-	.
Tennessee	1 year	3 years
Texas	-	.
Utah	2 years	4 years
Vermont	2 years	7 years
Virginia	-	10 years
Washington	1 year	8 years
West Virginia	2 years	10 years
Wisconsin	1 year	5 years
Wyoming	2 years	.

The statutory time limit for bringing suit is measured from the time at which the plaintiff could have reasonably discovered the injury. Often States allow the time limit to run from either the time of injury or the time of discovery, depending on the nature of the injury.

The maximum period in which a claim can be brought, regardless of whether the limit is measured from the date of injury or act or the date of discovery.

document produced by Parkers office; info from Leg. Research

FAX TRANSMITTAL

TO: Representative Therriault, 465-3884

Pages (including cover) 4

SECTIONAL ANALYSIS

OF

HOUSE BILL 58

Prepared by:

Alaska Action Trust
P.O. Box 102323
Anchorage, Alaska 99510
(907) 258-4040

March 13, 1997

SECTIONAL ANALYSIS OF CSSS H.B. 58

Alaska Academy of Trial Lawyers
Alaska Action Trust

The Governor's Advisory Task Force on Civil Justice Reform studied court statistics on cases in Alaska and heard from two nationally recognized experts on civil justice reform. Contrary to the stated need for H.B. 58, the Task Force found that there was no explosion in the number of tort cases filed, no evidence of high jury awards, and no evidence of significant numbers of frivolous lawsuits. The Task Force found no evidence of any crisis in insurance cost or availability, or that tort reform in Alaska would have any effect on insurance rates for Alaskans. The following explains why H.B. 58 neither helps Alaskans nor follows the recommendations of the Governor's Task Force.

Section 5: Reduces the ability of those injured by faulty design or construction to recover for their injury by prohibiting claims after eight years from completion of the construction, even if the negligent work is not discovered until after then. *The Governor's Task Force did not recommend any changes to the statute of repose. This provision will prevent local governments, school districts and homeowners from recovering damages for faulty construction which is typically not discovered until a fire, roof collapse or other event occurs long after completion of the project.*

Section 6: Gives only doctors and other health care professionals special protection when their negligence injures young children. This section requires malpractice actions affecting children under six years of age to be filed by the child's eighth birthday, even if the effect of the doctor's negligence can't be recognized because of the infant's age. No other person or professional is given this special protection. *The Governor's Task Force did not recommend any changes regarding when lawsuits must be filed for injuries to children.*

Section 8: This provision reduces the existing cap on non-economic damages. Section 8 not only limits the non-economic damages which can be recovered for all claims to \$300,000 in most situations, but also does not allow non-economic damages to exceed \$500,000, even when someone is quadriplegic and has suffered permanent brain damage. Current law at least allows the cap to be exceeded when injuries are serious. *The Governor's Task Force did not recommend reductions to the cap on non-economic damages because this only harms those who are most severely injured.*

Section 9: This section changes the current legal definition for punitive damages by eliminating reckless conduct as the basis for an award of punitive damages. This means that punitive damages cannot be assessed against a drunk driver and could not have been assessed against Exxon for the oil spill. *The Governor's Task Force did not recommend any changes in the definition of punitive damages.*

Section 10: Section 10 places an absolute cap on punitive damages regardless of the wealth of the wrongdoer or the nature of the wrongdoer's conduct. This section also requires 50% of punitive damages to be deposited to go to the state. This section only benefits large multi-national corporations, like Exxon, against whom a punitive damage award of \$600,000 would have no effect. *The proposal of the Governor's Task Force on punitive damages allowed for consideration of the financial gain of the defendant and did not recommend that punitive damages go to the state.*

Section 11: This section reduces all damages an injured person might receive by a federal income tax rate, even though these damages are not taxed under state or federal law. This unfair provision means that an injured person's recovery is automatically reduced 20%-30%. *No such proposal was made by the Governor's Task Force.*

Sections 12 - 14: Force an injured person to accept any damages which are awarded for past injury as installment payments to be paid over time in the future. This takes away the choice of injured Alaskans to decide for themselves whether periodic payments are fair, or meet their needs. *This proposal was rejected by the Governor's Task Force.*

Section 15: This section requires a jury to reduce the damages an injured person can receive by the amount of insurance payments the person has received for the injury, or might receive in the future. *The Governor's Task Force concluded that such a proposal would increase the cost of insurance and rejected the idea.* This provision in HB 158 will only make trials more time consuming and complicated.

Sections 16 - 19: These sections allow responsibility for injury to be allocated to a person or corporation which is not even brought into the lawsuit or into the courtroom. This means that someone at fault can shift blame to an "empty chair" without the jury ever hearing evidence to the contrary. *The Governor's Task Force rejected this proposal because innocent victims might be denied full recovery.* Section 19 even allows punitive damages to be allocated to someone who is not in the courtroom.

Section 21: This section forces injured persons to guess about the outcome of their case with near certainty at the risk of having to pay all of the defendants' actual attorney's fees. This section and

Section 16 encourage a negligent defendant to delay disclosing actors who may be at fault. *The changes to Section 21 are far harsher to victims than the recommendations about offers of judgment made by the Governor's Task Force.*

Other Sections make it more difficult for those injured to have experts testify on their behalf (Sec. 20); give special protection to hospitals (Sec. 35); limit attorney fee recoveries in punitive damage cases (Sec. 34); and make trials more complicated (Sec. 49). *None of these changes were recommended by the Governor's Task Force.*

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**TESTIMONY IN SUPPORT OF HOUSE BILL 58
 PRESENTED BY KAREN COWART, GENERAL MANAGER**

MARCH 13, 1997

THANK YOU MR. CHAIRMAN AND COMMITTEE MEMBERS FOR PROVIDING THIS OPPORTUNITY TO SPEAK IN SUPPORT OF HOUSE BILL # 58. MY NAME IS KAREN COWART. I AM THE GENERAL MANAGER OF THE ALASKA SUPPORT INDUSTRY ALLIANCE. THE ALLIANCE IS A NON-PROFIT TRADE ASSOCIATION REPRESENTING A BROAD-BASED MEMBERSHIP ENGAGED IN BUSINESS WITHIN THE OIL, GAS AND MINING INDUSTRIES. OUR MISSION IS TO FOSTER AND PROMOTE THE SAFE AND ENVIRONMENTALLY SOUND DEVELOPMENT OF NATURAL RESOURCES, AND TO ENHANCE AND STIMULATE THE BUSINESS CLIMATE FOR OUR 300+ MEMBERS. WE ARE COMPRISED OF OILFIELD SERVICE COMPANIES, TRANSPORTATION, WHOLESALE AND RETAIL SALES, PROFESSIONAL SERVICES, AND PRIVATE CITIZENS.

OUR 1997 LEGISLATIVE PRIORITIES CONTAIN ONLY THREE ISSUES:

- CONTINUE TO CLOSE ALASKA'S FISCAL GAP;
- SUPPORT LEGISLATION THAT PROMOTES SOUND DEVELOPMENT OF OIL AND GAS; AND
- SUPPORT THE PASSAGE OF COMPREHENSIVE TORT REFORM

FOR REVIEW, I HAVE ATTACHED A COPY OF OUR LEGISLATIVE PRIORITIES PAMPHLET.

STAFF

Karen Cowart
 General Manager

WE ARE COMPETING IN TODAY'S MARKET ON A GLOBAL BASIS. IF ALASKA AND OUR INDEPENDENT BUSINESSES ARE TO MEET THE DEMANDS OF THIS GLOBAL ECONOMY, WE BELIEVE WE MUST STABILIZE OUR ECONOMY THROUGH FISCAL RESTRAINT, A BALANCED BUDGET AND A HEALTHY ENVIRONMENT FOR BUSINESS. COMPREHENSIVE TORT REFORM LEGISLATION IS A CRITICAL COMPONENT NECESSARY FOR OUR FUTURE.

THE COST OF LITIGATION AND LIABILITY INSURANCE HAS A DRAMATIC IMPACT ON BUSINESS- BOTH LARGE AND SMALL. THE EVER-INCREASING PRODUCT LIABILITY, PERSONAL INJURY SUITS , AND UNPREDICTABILITY OF DAMAGE AWARDS HAS CAUSED COSTS TO SOAR.

OVER THE YEARS THE TORT LITIGATION SYSTEM HAS BEEN INCREASINGLY CRITICIZED BY MANY PUBLIC AND PRIVATE SECTORS. EFFORTS TO INSTITUTE CHANGE TO REDUCE OPPORTUNITIES FOR ABUSE, HOWEVER, HAVE BEEN HINDERED FEARING A CHANGE IN THE SYSTEM WOULD NOT ALLOW JUST COMPENSATION FOR INJURY.

THE ALLIANCE BELIEVES TORT REFORM SHOULD:

- LIMIT NON ECONOMIC DAMAGES.
- PROHIBIT PUNITIVE DAMAGES UNLESS MALICE OR CONSCIOUS ACTS SHOWING DELIBERATE DISREGARD FOR ANOTHER PERSON CAN BE SHOWN.
- LIMIT PUNITIVE DAMAGES.
- ALLOW JURIES TO BE INFORMED ABOUT AWARDS ALREADY COLLECTED BY CLAIMANTS FOR THE SAME INJURIES.
- ALLOW COURTS TO DECIDE EACH PARTY'S SHARE OF DAMAGES.
- PROVIDE MONETARY SANCTIONS AGAINST ANY ATTORNEY IN CIVIL CASES FOR FILING FRIVOLOUS, UNNECESSARY, AND/OR LEGALLY DEFICIENT PLEADINGS.
- BAR DAMAGE SUITS IF INJURIES WERE RECEIVED WHILE COMMITTING A FELONY.

- ESTABLISH GUIDELINES FOR THE QUALIFICATION OF EXPERT WITNESSES.

WE BELIEVE THE ABILITY TO RECOVER COSTS AND DAMAGES, TO BE MADE WHOLE, SHOULD BE PROTECTED. PUNITIVE DAMAGES SHOULD BE CAPPED BY A MULTIPLE OF ACTUAL DAMAGES, AND ASSESSED WHEN WILLFUL NEGLIGENCE OR MALICIOUS INTENT IS PROVEN. IF THE INTENT OF PUNITIVE DAMAGES IS TO PUNISH RATHER THAN REWARD, IT WOULD FOLLOW THAT A PORTION OF THE PUNITIVE DAMAGES COULD BE ALLOCATED TO THE STATE.

WE AGREE WITH THE GOVERNOR THAT ALASKA NEEDS TO SEND THE GLOBAL MESSAGE THAT WE'RE "OPEN FOR BUSINESS". THE ALLIANCE BELIEVES COMPREHENSIVE TORT REFORM IS A POSITIVE STEP TOWARD IMPROVING OUR BUSINESS ENVIRONMENT IN ALASKA.

THE ALASKA SUPPORT INDUSTRY ALLIANCE STRONGLY SUPPORTS HOUSE BILL #58.



THE ALLIANCE

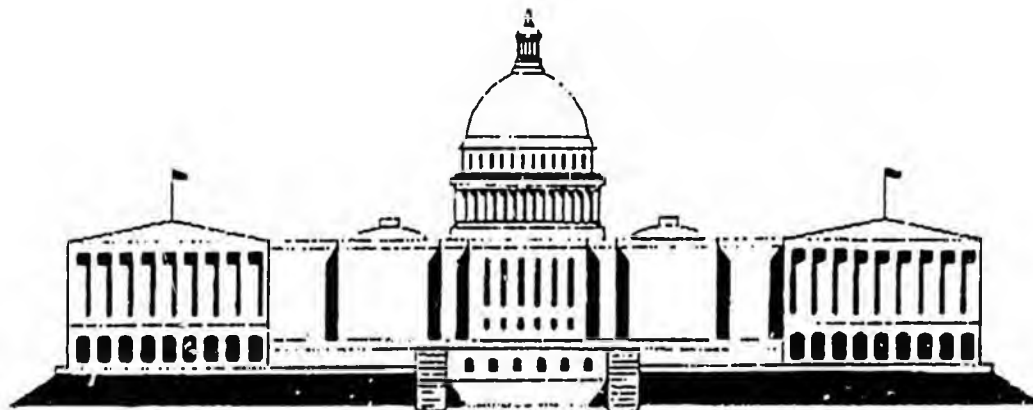
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1997 Public Policy Priorities

Continue to Close Alaska's Fiscal Gap

**Develop Legislation to Encourage
Oil and Gas Exploration,
Development, and Production**

**Develop Comprehensive
Tort Reform Legislation**



Continue to Close Alaska's Fiscal Gap

Alliance members believe the health of Alaska's economy will be better served by closing the state's fiscal gap and balancing the budget. Well defined fiscal restraint will provide a stable environment that allows businesses to plan for the future with confidence. It will encourage and promote business development and economic investment.

Our Legislature and Administration have made solving the state budget gap a priority. They have rallied to the concerns of the people of Alaska. Fiscal responsibility is a priority! They realize their obligation to provide a stable economy in Alaska. State revenues depend on substantial private investments that will aid in closing our fiscal gap without the threat of imposing new taxes or fees. Such investments in our natural resources will fuel the economy and provide Alaskans with jobs.

The Alliance supports this commitment to close the fiscal gap and balance the budget. We believe this action is necessary to insure continued growth in the days of declining oil revenues

A successful fiscal plan will require the state to develop and execute its budget without depleting its cash reserves. The Alliance will oppose any efforts to fill the fiscal gap by imposing new taxes or fees without the prior implementation of substantial spending reductions.

The Alliance supports the aggressive implementation of a balanced budget. We believe that this issue should be the first order of business and the highest legislative priority for Alaska!



Develop Legislation to Encourage Oil and Gas Exploration, Development, and Production

Since Alaska must compete for petroleum and mineral investment dollars with other states and nations, our leaders must continue to devise attractive and innovative programs that will encourage environmentally safe exploration, development, production, and sales of Alaska's oil, gas, and mineral resources.

The state must realize that oil and gas development presents unique economic opportunities that can continue to be a viable source of revenue to the state. Continuing to explore incentive programs, regulatory review, and the permitting process are integral to the encouragement of investment in Alaska.

The Alliance believes new innovative oil and gas exploration development programs will benefit Alaska and industry by increasing state revenues and creating jobs for Alaskans.

Develop Comprehensive Tort Reform Legislation

Government officials must continue to search for ways to reduce the cost of doing business in Alaska, including a comprehensive review of liability laws affecting the economics of business.

The cost of litigation and liability insurance has a dramatic impact on businesses-large and small. The ever-increasing product liability, personal injury suits, and unpredictability of damage awards has caused costs to soar. Tort reform legislation will help control these expenditures while assuring appropriate compensation for persons injured through the fault of others.

The Alliance believes tort reform should:

- Limit noneconomic damages.
- Prohibit punitive damages unless malice or conscious acts showing deliberate disregard for another person can be shown.
- Limit punitive damages.
- Allow juries to be informed about awards already collected by claimants for same injuries.
- Allow courts to decide each party's share of obligation.
- Provide monetary sanctions against any attorney in civil cases for filing frivolous, unnecessary, and/or legally deficient pleadings.
- Bar damage suits if injuries were received while committing a felony.
- Establish guidelines for the use of expert witnesses.

The Alliance believes comprehensive tort reform is a positive step toward improving the business environment in Alaska.



March 10, 1996

Representative Gene Therriault
 State Capitol
 Juneau, Ak 99801-1182

Dear Rep Therriault:

This letter is to support HB 58. I am writing you because I understand your committee is soon to have a hearing on it.

Besides Penair, I have been delegated by the Alaska Air Carriers Association to work towards the approval of HB 58.

The Alaska Air Carriers membership is well over one hundred air carriers throughout the State, all the way from Alaska Airlines to the smallest one aircraft operator. I can not think of any significant airline that does not belong.

There are over 200 communities throughout the State that are not on any road system, thus are totally dependent on our collective services for all their transportation needs.

We are being greatly impaired by a lack of insurance underwriting capacity. The problem dramatically escalated a little over two years ago when the BAIG (British Aviation Insurance Group) made a corporate decision to cease writing commuter airline insurance in Alaska. There is now no underwriter in Europe, including Lloyd's, that will touch us.

This is a direct result of the knowledge that Alaska has a potential for the highest punitive damage awards in the nation, second only to Alabama.

The plaintiffs attorneys will tell you that relatively few cases go to jury trial, and when they do the amounts awarded have not been excessive. There are answers for both statements.

Most cases are settled out of court because, for example, a death loss with an economic value of two million dollars will be settled for four million because the defendants are well aware they risk a much higher award, maybe eight million, if it gets to a jury in Alaska. This is possible even without any finding of gross negligence or willful misconduct! So the result was it still cost the defendant (underwriter) twice as much as it should have.

Penair is in the middle of just such a scenario. The initial letter from the plaintiff attorney estimated economic damage of 2.8 million, then brags that he should be able to get 12 to 16 million in punitives, if it gets to a jury!

PAGE TWO

As to the past awards, I suspect the only cases that do get to the trial stage are the ones where the defendant has a strong case.

Most of us mid-sized carriers traditionally carried twenty million dollar CSL (combined single limit) passenger liability coverage. But since the BAIG pulled out CSL is not available at any cost. Penair has been limited to one million per seat for the last two years, and our cost for the last renewal was over three million dollars annually, or ten percent of our gross revenue! Many of the smaller carriers have only five hundred thousand per seat, and some only one hundred fifty thousand.

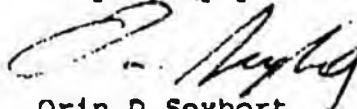
If HB 58 is passed, it will actually make more money available to compensate a citizen hurt or killed in an aircraft accident. That is because underwriters will make higher limits easier and cheaper to obtain. Consider a one-plane operator with one hundred fifty thousand per seat, when he crashes and kills someone there are no other assets, so no matter what the economic value is there is no other money available.

In the Penair case, the economic value alone is higher than our insurance available, (and there is no evidence of gross negligence on our part). A direct result of that is we have examined our customer base to see where we may be exposed, in other words looking for high value people, if you will. We have actually refused service to some such customers, so some companies ability to do business in Alaska is being restricted by this insurance problem.

Enclosed are copies of my correspondence regarding this situation, as well as a resolution passed by the AACCA general membership at our recent convention.

We will certainly appreciate any assistance you can give, believe me HB 58 will go a long way towards benefiting anyone in the State who has to use aircraft services.

Very truly yours



Orin D Seybert
President

Enclosures (4)

CC: Rep Porter

ALASKA AIR CARRIERS ASSOCIATION
RESOLUTION 97-1

DRAFT

RESOLUTION supporting sponsor substitute for HB58.

WHEREAS, the purpose for State involvement in aviation is to promote, encourage and develop aviation, (AS 02.15.010); and

WHEREAS, Alaskans rely on the aviation industry as their primary transportation source for persons, mail, food, shelter, health care and goods and services in general; and

WHEREAS, in the past decade the Alaska aviation industry has made significant progress and investment in developing a system which better meets the transportation needs of our vast state; and

WHEREAS, the commercial air carrier industry in Alaska is suffering from a lack of insurance underwriting capacity with insufficient limits of liability to compensate injured parties.

WHEREAS, passage of this bill will benefit the traveling public by allowing more funds to be available to properly compensate injured parties for economic and non-economic damages,

THEREFORE BE IT RESOLVED, the Alaska Air Carriers Association supports passage of sponsor substitute HB58.

3/11/97
ANCHORAGE Daily NEWS

*
JURY WEIGHS MAN'S CLAIM OF EAR DAMAGE

By LIZ RUSKIN
Daily News reporter

A man who was a passenger on a 1990 flight to Prudhoe Bay is asking an Anchorage jury for more than \$13 million in damages for injury to his ears he says he suffered because the plane's cabin was not properly pressurized.

Mickey Barrett, now 50, was a welder but says he can't work because of a ringing in his ears, dizziness and balance problems. He claims the injuries resulted from a descent into Deadhorse on Christmas Day aboard a Convair 580. He is suing Era Aviation, the operator of the charter flight.

His lawyer, Andrew Kurzmann, told a Superior Court jury during closing arguments Monday that the injuries cost Barrett his job, his family, and his ability to relate to his young son. Era Aviation has stripped Barrett of his dignity and self-respect, condemning him to a sad, lonely life for his remaining years, Kurzmann said.

But Era's lawyer said Barrett's problems aren't related to the flight. The crew, attorney Robert Richmond said, noted nothing unusual in the cabin pressure, and there's no reliable evidence of problems aboard the flight.

"At no point during the flight ... was there ever any complaint made," Richmond told the jury.

Barrett's trouble began before he got on the plane, Richmond said. He had already separated from his wife, and he'd received a job evaluation that said he had difficulty concentrating on his work, Richmond said. Barrett also had a cold and an ear infection when he got on the plane, the lawyer said. When you have a cold, it's hard for your ears to handle flying under normal pressure conditions, and they will hurt, Richmond said.

Several of Barrett's co-workers were among the 40 passengers on the plane. A couple of them corroborated his claim in court. One woman who was on the flight testified that the pressure felt as if someone had put a hose in her mouth and turned it on.

Kurzmann said Barrett bears the hallmarks of an injury to the vestibule of the inner ear: vertigo, hearing loss, pressure, ringing.

"He plays the radio 24 hours a day just to (mask the noise,)" Kurzmann said.

Richmond pointed out that Barrett continued working for the two weeks following the Dec. 25 flight, then took two weeks off in Oklahoma. When he returned to the North Slope, he was fired from his job with Atlas Wireline for smoking a cigarette in a room

where explosives are stored, Richmond said. Then he returned to Oklahoma and applied for unemployment compensation, claiming he was fit and ready to return to work, Richmond said.

Kurzmann asked for punitive damages equal to one year of Era's profits. As for assigning a value to Barrett's pain and suffering, Kurzmann said he once heard a seasick angler offer a skipper \$200 to turn the boat around and return to the Homer harbor. Using that analogy, Kurzmann argued the jury should make Era pay \$200 a day for the 25 years of Barrett's remaining life expectancy.

The jury began its deliberations Monday afternoon.

*

STATE OF ALASKA

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

Jeff Bush
TONY KNOWLES, GOVERNOR

P.O. BOX 110800
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2500
FAX: (907) 465-5442
TDD: (907) 465-5437

March 7, 1997

The Honorable Brian Porter
Alaska State House of Representatives
Capital Room 216
Juneau, Alaska

Re: CS SSHB 58 (Judiciary) (Tort Reform)

Dear Representative Porter:

You requested my comments on various items in the current version of the tort reform bill, CSSSHB 58 (Jud) ("HB 58"), which I believe represent drafting errors and are not necessarily consistent with your intent, as expressed in your testimony and comments in the House Judiciary Committee.

In addition, I would like to take this opportunity to set out several of the significant policy concerns raised by this bill. As I testified before the Judiciary Committee, I firmly believe that the bill developed by the Task Force and introduced by the Governor represents an effective, comprehensive, and meaningful approach to tort reform. That bill was arrived at after several comprehensive meetings, a great deal of debate, and with the input and research of experts in the field. It is the product of significant compromise on the part of representatives of all competing interests in this debate, and it is, quite frankly, disheartening to have this product cast off without appropriate legislative consideration. To the extent HB 58 differs from that approach, these differences generally tend to be poorly conceived and represent extreme views, contrary to public policy and the interests of most Alaskans.

Technical Issues:

Section 5: Statute of Repose. In previous versions of the tort reform legislation, the statute of repose proposal has included a provision permitting a contractual override of the time limit, an exemption that I understand the state and several municipalities routinely rely upon. At the hearing, you indicated that this was intended here. However, it is not included in the language currently in the bill, and there is some concern that without it a contractual override is impermissible.

Section 6: Special Statute of Repose for Minors. You stated that the intention of this change is to impact the statute of limitations for minors, not the statute of repose. But as drafted, it is a limiting statute of repose, more restrictive than the general one for adults contained in section 5. It is, in short, anti-children, and the Department of Law believes that it is very likely unconstitutional on that ground.

I think that this change is unnecessary and that your concerns are already addressed in the bill. The general statute of repose of eight years would be applied to children as well as adults irrespective of the statute of limitations, meaning that a child's cause of action for birth injuries would be extinguished at age eight. To make sure that this would be the court's interpretation, you could even make an amendment to AS 09.10.140 to clarify that the tolling of the statute of limitations for minority does not extend the statute of repose.

Section 9: Standard for Punitive Damages. The phrase being inserted should say "deliberate disregard of another person's rights" instead of "deliberate disregard of another person." This is consistent with the case law, as most recently expressed in the *Chizmar* case.

Section 11: Taxes on Award. I believe this section, allowing a defendant a deduction for taxes that would otherwise be payable were the award taxable, should only apply to damages for traditionally taxable compensatory damages, such as damages for lost wages. It should not apply to compensation for medical costs incurred. As written, a verdict for medical reimbursement only could have a deduction applied, leaving the victim without full compensation for his medical expenses.

Section 15: Collateral Benefits. The last sentence in proposed AS 09.17.070(b), which allows a plaintiff to submit evidence of payments made for the purchase of the collateral source, is apparently meaningless and probably should be removed. Under (a) and the first part of (b), the amount paid by the collateral source is automatically deducted from the judgment, irrespective of the amount paid by the plaintiff for the benefit.

Sections 20: Expert Witness Qualifications. This section is unclear and needs substantial work. Is this section targeting medical malpractice, or all professional malpractice? And who is a "professional"; is the term linked to licensure (e.g., barbers and hairdressers, architects, marine pilots); does it include attorneys? And since Alaska does not have any such thing as "board certification" (in most profession, that is done by private associations), what is meant by "recognized by the state"? If this contemplates that the Division of Occupational Licensing will be required to evaluate and "recognize" various professional associations' certification programs, it will require expertise and analysis far beyond that which the division currently has, and there will be a substantial fiscal note attached to this bill.

This section is also troubling in its application. When the Task Force reviewed these concepts, Dr. Wilson noted the problems associated with its implementation in a state as small as Alaska. For example, he stated that there are only three neurosurgeons in Alaska, and two are partners. Thus, if any one of the three is involved in a lawsuit, the pool of available experts is either one or two, they will certainly have a conflict of interest, and they may be unwilling or unable to testify. Under current law, the other party could hire an internist or other surgeon to testify. But if this provision is adopted, the only option would be to find a "hired gun" from Outside, which even you have admitted is not a desirable situation.

The solution is really quite simple: remove proposed AS 09.20.185(a)(1) and (3), but leave in (2), thereby requiring that the expert be trained and experienced in the relevant discipline, but not necessarily "licensed" or "board certified."

Significant Policy Concerns:

Sections 5 & 6: Statutes of Repose. As you know, Governor Knowles vetoed last year's tort reform legislation, stating that although he supports meaningful tort reform, it must preserve the ability of Alaskan victims to be compensated for injuries caused by others. Nothing flies in the face of this goal more than statutes of repose, which can cut off a person's right to compensation even before they are injured. Such statutes are likely unconstitutional and certainly bad public policy. As discussed above, the special, shorter statute of repose for children is particularly troubling. In addition, the exceptions for "fraud or collusion" of parents or guardians will likely lead to litigation between parents and their children, and against the state in cases where the state has (or had) custody of the injured child.

Section 8: New Cap on Noneconomic Damages. These proposed caps on non-economic damages are irresponsibly low, designed to penalize not the victim of a minor injury (who will be fully compensated in any event), but only those severely injured by another's wrongdoing. Furthermore, the exceptions for spinal injuries are irrational; why should someone have a higher cap if one loses the use of a limb due to a spinal injury, but not if the limb is cut off? Why is the use of one arm deemed more serious than the loss of one's sight? I believe that if the legislature is going to impose a graduated scale of caps, either the application of the scale to individual cases should be left with the jury, as under current law, or the scale has to bear some rational relationship to the severity of the injury, as is done under the workers' compensation system. Finally, it must be noted that empirical studies have demonstrated no connection between the existence of damage caps and the amount paid for liability insurance rates.

Section 10: Punitive Damages. Although much like the proposal put forth by the Task Force, your proposal has a serious flaw that I believe should be reconsidered. As drafted, the higher caps on punitive damages would only apply where prior serious injury had occurred due to similar, profit-motivated, actions. What is the rationale for the repeat offense requirement? If a person consciously, knowingly, and maliciously constructs a bridge or a roof contrary to legitimate requirements, simply to pocket the material or construction savings and in spite of known risks of potential serious injury or death, that person should not be able claim the lower caps.

Also, the provision for the transfer of 50% of any punitive damages to the state treasury, although perhaps reasonable public policy, has a practical problem. Any time a jury awards punitive damages, the state's portion becomes simply a settlement fund to be split between the parties. For instance, if a jury awards \$200,000 in punitive damages, the defendant's attorney will simply call the other party and agree to settle for \$150,000 (splitting the state's share), with an agreement that the entire amount will be considered compensatory damages. I seriously doubt whether the state would ever realize any recoveries under the provision in this bill.

Section 15: Collateral Benefits. What is the problem that this section is trying to fix? The elimination of subrogation rights is merely a tradeoff between various insurance companies. To the extent that there may be savings realized to the property and casualty carriers, they will be at the expense of the health insurers. In fact, because the state is the largest health insurer in the state (and is moving toward self-insurance for health), this section may have a significant unintended consequence of raising health insurance costs and premiums for the state and its employees.

Sections 16-18: Apportionment of Fault. As you know, the Task Force struggled with these issues at length, eventually rejecting them. Of principal concern is the allowance that non-parties *who are not even subject to the court's jurisdiction* can be found partly responsible, thereby reducing the plaintiff's rightful

compensation. As Representative Croft pointed out, this section invites abuse by defense lawyers, making false accusations about any number of non-parties in order to reduce their own client's responsibility.

These provisions are especially onerous in light of the proposed changes to the offers of judgment rules. This best can be demonstrated by example. Assume P sues D for injuries sustained when D struck P with his automobile. D then claims that the state should be liable because the road was not properly maintained, or alternatively that the responsibility lies with the Seattle used car salesman or the Japanese automaker because the steering mechanism was defective (a good defense lawyer could come up with any number of possibilities). To the extent that the people D accuses are beyond the reach of the court, such as the salesman and possibly the automaker, D has a free rein to claim anything. As for the condition of the road, P is left little choice but to sue the state. The state's attorney, however, will then immediately serve an offer of judgment in the amount of \$100. P's dilemma is this: if he accepts the offer and dismisses the state (because he actually agrees that the state is not responsible), D will continue to assert the state's fault, and P will have to try to defend against that position without the state's help. On the other hand, if P rejects the offer in order to keep the state in the case, even though he thinks there is no state responsibility, he risks having to pay the state's full attorney fees and costs. As the Task Force rightly concluded, this is unfair.

Section 21: Offers of Judgment. Although the goal of encouraging early settlements is laudable, this section goes too far. It is not uncommon for defense attorneys to expend far in excess of a case's value, simply to "prove a point" (plaintiffs' attorneys do not have the same incentives, so the same cannot generally be said of them). Our current system, with definite awards under Rule 82 in most cases, acts as a reasonable but not unfair disincentive to so-called "frivolous" lawsuits. To create a situation where a party is at risk for fees far in excess of the potential value of the case makes it virtually impossible for the small guy to bring even valid claims, and grants the large insurance carriers a tool to coerce beneficial but unjustified settlements.

Section 36: ER Doctors. This provision, overruling *Jackson v. Powers*, was also rejected by the Task Force, because when people go to an emergency ward, they expect to receive treatment from the hospital, not a particular doctor. But even more disturbing is the very low insurance requirement contained in the bill. In the emergency room, we are likely dealing with serious injuries, and the medical expenses of an injury incurred there could easily use up \$500,000 before any consideration is made for other compensatory damages. The Task Force, in considering this provision, learned that the hospitals in Anchorage already require their ER doctors to carry \$1 million/\$2 million in E&O coverage, and we were told by the medical community that insurance in those amounts was readily available to any ER doctor in Alaska. Requiring anything less, especially where the hospital will not be able to be held liable, is unconscionable and can only be designed to hurt victims in serious cases.

Section 62: ADR. I must also make a pitch for inclusion of an ADR pilot program in the bill. I understand that the Court System has threatened a significant fiscal note if the provisions contained in the Task Force bill are adopted. Suffice it to say that their threats are unfounded. You have indicated to me that you support ADR; if so, why not include it here, in a bill that has a reasonably good chance of passage? In crafting the proposal for the Task Force, the Procedures Subcommittee was very much aware of the Court System's threats, and we worked very hard to minimize the financial impact of the pilot program. If a pilot program is included in this bill, I would be very happy to work with you in

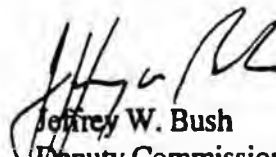
reviewing and analyzing any fiscal notes relating to this section, in order to minimize any impact on the state treasury.

I must also respectfully disagree with some comments you made at the conclusion of the Judiciary hearing (and which I have since heard you repeat on *Gavel-to-Gavel* and before the AARP board), in which you stated that the reason the Task Force did not come up with more recommendations was because of the requirement of approval by a super-majority before a recommendation could go forward. It was unfortunate that you were unable to attend the final Task Force meetings, when the votes on these important issues were taken. I have, in my file, the voting results for each item on the Task Force agenda. Only once was a recommendation rejected where the recommendation received more than half of the votes. That recommendation related to the statute of repose, where the vote was 10-7 in favor; but that was a far less onerous proposal than the one in this bill: it was for a 10-year statute of repose that tolled for minors and incompetents. Provisions relating to allocation of fault were rejected 8-9, and the section to overrule *Jackson v. Powers* was withdrawn by unanimous consent. No other recommendations even made it out of committee, nor were any that were rejected in committee offered to the full Task Force. The proposal relating to expert witness qualifications was rejected *unanimously* by the Procedures Committee, and proposals relating to collateral benefits and periodic payments were rejected *unanimously* by the Damages Committee.

I think we both agree that tort reform is necessary. However, I firmly believe that the general approach adopted by the Task Force -- to reduce the time and expense of litigation for all parties while continuing to protect the rights of all Alaskans -- is superior to the approach taken in HB 58, which appears designed more to protect insurance companies at the expense of innocent Alaska victims. I encourage you to rethink your approach.

Please feel free to contact me at any time to discuss these or related issues.

Sincerely,


Jeffrey W. Bush
Deputy Commissioner

cc: Representative Mark Hanley, Co-Chair, House Finance Committee
Pat Pourchot, Legislative Director, Governor's Office
Attorney General Bruce Botelho

LESSMEIER & WINTERS

LAWYERS - LLC

ONE SEALASKA PLAZA
SUITE 303
JUNEAU, ALASKA 99801-1249

TELEPHONE: (907) 586-5912

FACSIMILE: (907) 463-3020

MICHAEL L. LESSMEIER
GREGORY W. LESSMEIER
SHELDON E. WINTERS
BETH LEIBOWITZ*

*MICHIGAN

March 12, 1997

Representative Gene Therriault
Co-Chair, House Finance Committee
Alaska House of Representatives
State Capital
Juneau, Alaska 99801

COPY

Re: HB 58

Dear Representative Therriault:

I am writing to you on behalf of State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company. State Farm Mutual presently has approximately 32 percent of the automobile insurance market in the state of Alaska. State Farm Fire & Casualty has approximately 43 percent of the homeowners' market. Collectively State Farm has had significant experience with Alaska's civil justice system which goes back for at least 25 years. It is from this perspective that we offer our comments regarding the bill presently before you.

State Farm Mutual is a mutual company, which means it is owned by its policy holders. The premiums it charges its Alaska policy holders are determined primarily by its loss experience in Alaska. When State Farm's loss experience in Alaska has been better than expected, State Farm has returned premiums to its policy holders. In November of 1987 State Farm Mutual returned 3.3 million dollars to its Alaska policy holders. In November of 1988, State Farm Mutual returned 3.1 million dollars to its Alaska policy holders. Since then, State Farm's loss experience in Alaska has worsened. Over the years 1992-96 State Farm Mutual experienced a pure underwriting loss of approximately 1.8 million dollars. Over the same years, State Farm Fire and Casualty experienced a pure underwriting loss of approximately 23 million dollars. Although there are signs that this trend is changing, these losses have been disturbing.

We offer this information because there has been testimony that insurance rates in Alaska are set on a national level and that nothing done in Alaska will affect the price of insurance in Alaska. We strongly disagree with this proposition. As set forth above, our rates in Alaska are determined primarily by our loss experience in Alaska. The fact that we have returned significant amounts of money to our Alaska policy holders is irrefutable evidence of this. Other mutual companies have also returned money to their Alaska policy holders.

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
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Rev. 6/98

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State of Alaska

LESSMEIER & WINTERS

LAWYERS - LLC

MICHAEL L. LESSMEIER
GREGORY W. LESSMEIER
SHELDON E. WINTERS
BETH LEIBOWITZ

*MICHIGAN

ONE SEALASKA PLAZA
SUITE 303
JUNEAU, ALASKA 99801-1249

TELEPHONE: (907) 586-5912
FACSIMILE: (907) 463-3020

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Representative Gene Therriault
Co-Chair, House Finance Committee
Alaska House of Representatives
March 12, 1997
Page 2

We believe this legislation will improve our loss experience in Alaska. Improvement in our loss experience will be reflected in the premiums we must charge for our products. We believe this to be true for many other companies as well.

There are several provisions of this legislation we wish to comment specifically on. One of the sections we feel strongly about is Section 10, which is the limit on punitive damages. We see punitive damage claims frequently. Without exception these claims are time consuming and expensive to defend. Although these cases are most often successfully defended, they nonetheless impose a tremendous burden. The limitation contained in this bill, which we fully support, would lessen this burden.

In prior hearings there has been much argument to the effect there are not documented instances of adverse jury verdicts indicating there is a problem with punitive damages. We have enclosed a copy of a study by Steven Hayward, The Role of Punitive Damages in Civil Litigation: New Evidence From Lawsuit Filings. This paper provides empirical support for what we have been saying all along: the issue is not necessarily the number of adverse verdicts, but the number of claims which are made. Each such claim has to be defended. Each has the potential of effecting the value of the underlying claim for compensatory damages. Each imposes a cost. It is no surprise to us that this study found that punitive damages claims on average take one-third longer to resolve and play a significant role in the settlement process. This reality is ignored by those who choose to focus only on actual verdicts.

The second issue we feel strongly about is the several liability provision contained in Sections 16-18. In 1988, the voters in Alaska adopted pure several liability through the initiative process. The ballot told the voters that the "initiative would make each party liable only for damages equal to his or her share of fault". This initiative was approved by approximately 75% of the voters. Five years later the Supreme Court ruled that fault could be apportioned only to those who were formally named as parties to the action. Thus instead of a party being liable only for damages he or she caused, a party can now be held liable for damages caused by the fault of another. We believe this to be contrary what the voters were told in 1988.

We have heard the argument that if these changes are adopted, a defendant may try to blame a non-party for a loss and that a plaintiff will be forced to defend an "empty chair" from claims that are for the first time made at trial. We believe this is a specious argument. The basis for any such claim would have to be disclosed at the very outset by Rule 26 of the Rules of Civil Procedure. The usual discovery would also require disclosure of such a claim. There is simply no basis for the argument that such claims could be raised for the first time at trial.

Representative Gene Therriault
Co-Chair, House Finance Committee
Alaska House of Representatives
March 12, 1997
Page 3

The essence of several liability is that each party should be held liable only for his or her share of fault and no more. Although it is difficult to argue with the fairness of such a fundamental proposition, the overwhelming approval the voters gave to the 1988 initiative shows the public's agreement with this proposition. Any mechanism which serves to reallocate fault so that one party ends up bearing the consequences of someone else's conduct is unfair and contrary to the expressed intent of the voters. Sections 16 and 17 will simply insure that the intent of the voters is implemented and accordingly is a provision we fully support.

Section 21 of this bill will dramatically change the law on offers of judgment so there is a significant incentive to evaluate one's position early and in a responsible way. This section simply provides that if a party betters by more than 5% an offer of judgment entered within 60 days of initial disclosures, that party may recover reasonable actual attorney fees. There is no such present incentive in the law.

The final section we wish to comment on is Section 48, which provides a certain deterrent for those that come to court and intentionally make false statements of material fact. We do not believe this provision to be controversial and again believe it is hard to argue with the logic of such a concept.

There are other portions of this legislation that are important in that they remove windfalls which are currently in the system. Examples of this include Section 23, which provides for a floating rate of prejudgment interest, Section 24, which provides that prejudgment interest may not be awarded on future damages and Section 11, which reduces future wage loss claims by the amount one would have to pay for income taxes. Each of these provisions is fair. Each will reduce a windfall currently present in the system. Each will help to further the goals this legislation seeks to accomplish.

We thank you for the opportunity to comment on this legislation. If you have questions, please let us know as we will be happy to respond.

Sincerely,
LESSMEIER & WINTERS

By: 
Michael L. Lessmeier

cc: Rep. Brian Porter

BRIEFING

755 Sansome Street, #450

San Francisco, CA 94111

Phone: (415) 989-0833

Fax: (415) 989-2411

E-Mail: PRIPP@aol.com

Leismur



The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings

By Steven Hayward†

HIGHLIGHTS:

- This study offers new data on the frequency and the effects of punitive damages, based on a detailed review of more than 1000 lawsuits filed and concluded in San Francisco County Superior Court.
- Punitive damages are demanded in 27 percent of all cases where they are conceivably recoverable.
- Lawsuit filing data show that business and government defendants are four times as likely as an individual defendant to face a lawsuit that demands punitive damages.
- Lawsuits that include punitive damage demands take one-third longer to resolve than suits without these demands. The average lawsuit in our 1000 case sample took 15 months to resolve; cases with punitive damage demands took an average of 21 months to resolve.

† Steven Hayward is vice president, research for the Pacific Research Institute. William S. Loughman, an attorney and senior fellow in legal studies for the Pacific Research Institute, conducted the research into lawsuit filings.

- Punitive damage demands play a significant role in the out-of-court settlement process, where the vast majority of lawsuits are settled. Punitive damage demands tilt the playing field in favor of demanding parties, and increase out-of-court settlement amounts.
- Studies of punitive damage jury verdicts have been interpreted to suggest that the risk of receiving an adverse punitive damage judgment is remote. Closer scrutiny of the data, we argue, will show that the probability of punitive damage awards is vastly understated by these studies, in part because the data have been improperly qualified.

Introduction

The controversy over punitive damages in civil litigation has centered around the number of punitive damage awards, and the dollar amounts of such awards. Comprehensive data on this issue are scarce because there is no complete statistical database of trial verdicts. However, we believe that the focus of research on the number of punitive damage verdicts is misplaced to some extent. Focusing only on trial verdicts understates the scope and nature of the problem because the overwhelming majority of all lawsuits are resolved out of court. According to surveys of lawsuits, less than 2 percent of all cases go to trial. Looking only at the 2 percent of cases that reach a jury is like looking only at the visible tip of a large iceberg: it ignores the larger unseen part below the water line that may do more harm. Thus, to argue that punitive damage awards are rare is to miss an obvious point: *jury verdicts of any kind are rare*. No one would say, however, that because jury verdicts are rare, lawsuits themselves are insignificant or costless. Yet this is the inference that has been drawn from various punitive damage studies that focus only on trial verdicts.¹

The right question to ask about the civil litigation process is: *what is occurring in the other 98 percent of cases that are resolved out-of-court?* Because 98 percent of cases are resolved out of court, it is important for researchers and for public policy makers to understand what is going on in these cases, and how the legal rules, including the relative probability of punitive damages, affect the outcomes of the negotiation process for out-of-court settlements.

A large proportion of lawsuits today include punitive damage demands. Because 98 percent of lawsuits are resolved out-of-court, an important threshold question to answer is: *Do punitive damage demands in lawsuit filings have a significant effect on the out-of-court settlement process?*

¹ For example, the recent federal Department of Justice estimates of civil suit verdicts in state courts, discussed below, generated numerous newspaper headlines to the effect that "punitive damages are rarely awarded."

In an attempt to shed light on this question, the Pacific Research Institute conducted a detailed examination of more than 1000 lawsuit filings in San Francisco County Superior Court. We conclude that punitive damages are used as a weapon to generate more favorable out-of-court settlements, especially against business and government defendants.

What Lawsuit Filings Data Tell Us

Most punitive damage studies focus on verdicts in the handful of cases that proceed to trial. There are no empirical studies that examine how often, and against whom, punitive damage demands are employed.

In an attempt to shed light on these issues, we have scrutinized a month's worth of lawsuits filed between January 2, 1991 and February 1, 1991 in the Civil Division of the California Superior Court for the County of San Francisco. There were 1,024 lawsuits filed in this venue during this time period. Our analysis seeks to determine what patterns exist with respect to the distribution of claims for punitive damages and statutorily mandated multiple damages. We reviewed each case to determine the type of case, the principal cause of action claimed, whether punitive damages were demanded, how the case was resolved, and how long it took to resolve. We picked cases from 1991 because over 98 percent of cases from this time period had been resolved, either by trial, settlement, or dismissal, so most could be traced out to their conclusion. (A complete description of the methodology used in surveying and classifying these cases is available upon request.)

The highlights of the analysis of these cases include:

- 78 percent of all punitive damage demands were filed against a business defendant. (See Figure 1 below.)
- Government defendants face punitive demands in more than one-third of lawsuits filed against government agencies. (See Table 1 below.)
- Lawsuits that include punitive damage demands take about six months longer to resolve than lawsuits that do not include punitive damage demands.
- The probability of a punitive damage award if a case proceeds to trial is 14 percent or higher. For business defendants, the probability is more than 20 percent.

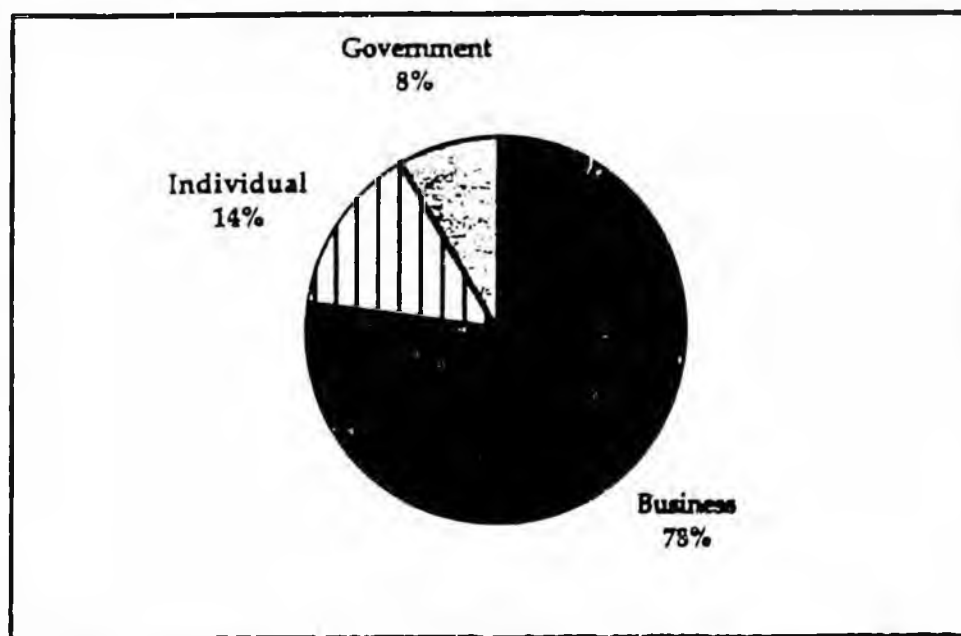
Of the 1,024 cases we examined, nine (9) cases were designated by the court as "sealed" and were unavailable for study. This left a pool of 1,015 lawsuits for study. 537 of these 1,015 cases, or 52.9 percent, were based on one of three principal causes of action where punitive damages are recoverable:

- 1) common law tort;
- 2) statutory tort or other statutory civil action; or
- 3) contract.*

The remaining civil filings within this pool—478 cases—consisted of civil law categories where punitive damages are not available or only very rarely available. These categories include equity causes of action (such as requests for a temporary restraining order); family law matters (chiefly dissolution of marriage proceedings); and civil petitions (such as a name change, to confirm an arbitration award, or to compel an audit entry).

Punitive damage demands were included in 145 of the lawsuits. This represents only 14 percent of the total pool of lawsuits, but 27 percent of the suits in areas where punitive damages are generally available (145 out of 537). Of these 145 filings, 112 or 78 percent were filed against a business defendant. This breakdown is displayed in Figure 1 below.

Figure 1: Distribution of Punitive Damage Demands by Type of Defendant



* Although punitive damages are not normally recoverable in contract lawsuits, many contract suits nowadays include secondary causes of action, such as fraud or "bad faith," which can suffice as a basis for punitive damages. For this reason, contract cases have been included in the pool of cases which can potentially involve a viable claim for punitive or statutory damages.

Of the 1,015 cases reviewed, only 22 went to trial, or 2.1 percent. This is comparable to the trial rate estimated in the Department of Justice study, and is consistent with most studies of lawsuits. Seventeen of these 22 cases were tort, statutory, or contract cases (in which punitive damages may be alleged). Of these 17 cases, seven were court trials (heard by a judge instead of a jury) and 10 were jury trials. Business entities were the primary defendant in 11 of the 17 trials; government entities and individuals were named as the primary defendants in three trials. Six of the 17 cases (two court trials, and four jury trials) included punitive damage demands. Two of the 17 cases settled during trial. Of the remaining 15 cases, plaintiffs won in seven of the trials, while defendants won eight. No punitive damages were awarded in these verdicts.

Table 1 categorizes cases according to the type of primary designated defendant (individual, business entity, government entity, and non-profit organization). Table 2 displays the same data according to type of case instead of type of defendant. The data in these tables demonstrate that punitive damages are overwhelmingly alleged against business entities. Businesses face punitive damage demands roughly four times as often as individuals.

Government Agencies Frequently Targeted

Another remarkable feature is apparent in Table 1: Government entities face punitive damage demands more than one-third of the time (35 percent). While defenders of punitive damages argue that punitive awards are necessary to prevent allegedly gross negligence, malice, or willful harm by businesses, such malicious behavior can hardly be just as frequently alleged in government. But government entities, like businesses, are perceived to have "deep pockets" and make attractive targets for punitive damage demands. Thus, taxpayers, and not just business interests, bear the direct cost of punitive damages. Many of the lawsuits brought against government, and defended at taxpayers' expense, are patently frivolous. For example, in one case from our research, *Buford v. California Department of Real Estate*, the plaintiff demanded \$3 million in punitive damages because the agency had refused to grant him a real estate license. The Department of Real Estate had to answer the suit in court, pointing out that the plaintiff was a convicted felon.

Another notable suit was *Shervin v. California State Police*. Alleging that five state police officers had burst into his home without a warrant but on the direct orders of Governor Deukmejian, Shervin demanded punitive damages based on seven different allegations, including "organized conspiracy, racketeering and/or extortion, to subvert the court and to obstruct justice."

Additional allegations included "torture," and the accusation that the California State Police were engaged in "an extensive, continued and perpetual gigantic organized conspiracy" of an unspecified nature. This was the *fourth* such lawsuit Shervin had brought against various government agencies in recent years, all defended at taxpayer expense.

Table 1: Civil Litigation Filings in Common Law Tort, Statutory Tort, and Contract Cases, and Punitive or Statutory Damage Claims Frequency by Category of Primary-Designated Defendant, 1991

INDIVIDUALS (as primary-designated defendant)		
Category of case:	Total # of cases:	Punitive damages demand included:
Common law tort:	169	16
Statutory tort/actions:	1	0
Contract:	34	5
Totals:	204	21
Frequency of punitive damage claims:		10.29%

BUSINESSES (as primary-designated defendant)		
Category of case:	Total # of cases:	Punitive damages demand included:
Common law tort:	184	74
Statutory tort/actions:	26	19
Contract:	80	20
Totals:	290	113
Frequency of punitive damage claims:		38.97%

GOVERNMENT ENTITIES (as primary-designated defendant)		
Category of case:	Total # of cases:	Punitive damages demand included:
Common law tort:	25	6
Statutory tort/actions:	6	4
Contract:	6	3
Totals:	37	13
Frequency of punitive damage claims:		35.14%

NON-PROFIT ENTITIES (as primary-designated defendant)		
Category of case:	Total # of cases:	Punitive damages demand included:
Common law tort:	5	0
Statutory tort/actions:	0	0
Contract:	1	0
Totals:	6	0
Frequency of punitive damage claims:		0%

Table 2: Distribution of Punitive and Statutory Damages Claims Among Civil Filings by Category of Lawsuit, 1991

Common Law Tort Cases				
	Primary Designated Defendant (Punitive Damage Claims in Parenthesis)			
	Individual	Business	Gov't Entity	Non-Profit
Totals	169 (16)	184 (74)	25 (6)	4 (0)
P.D.s as %	9.47%	40.22%	24.0%	0%
PDs for all common law tort cases:		24.87%	(96/382)	

Statutory Tort Cases				
	Primary Designated Defendant (Punitive Damage Claims in Parenthesis)			
	Individual	Business	Gov't Entity	Non-Profit
Totals	1 (0)	26 (19)	6 (4)	0 (0)
P.D.s as %	0%	73%	66%	0%
PDs for all statutory tort cases:		66%	(13/33)	

Contract Cases				
	Primary Designated Defendant (Punitive Damage Claims in Parenthesis)			
	Individual	Business	Gov't Entity	Non-Profit
Totals	34 (5)	80 (20)	6 (3)	1 (0)
P.D.s as %	14.71%	25%	50%	0%
PDs for all contract cases:		23.14%	(28/121)	

Duration: Punitive Cases Take Longer to Resolve

Another significant finding of this sample of lawsuit filings concerns the average duration of the cases. We assigned a duration value to each case in the sample. The purpose of this analysis was to gauge the length of time until each case was resolved, and to see whether lawsuits that included punitive damage demands were concluded more quickly or less quickly than lawsuits that did not demand punitive damages. Our analysis of the duration of cases showed that lawsuits that did not include a punitive damage demand were concluded in an average of 15 months, while punitive damage lawsuits required an average of 21 months to conclude—a six month difference.

It is difficult to know whether this distribution of case filings, punitive damage demands, and average duration to resolution holds constant in the

case filings in other jurisdictions. But for *purposes of illustration* only, if this distribution were roughly similar in all the jurisdictions covered in the Department of Justice estimates, it would suggest that a business defendant facing a punitive damage demand would have about a 14 percent probability of receiving an adverse punitive damage judgment at trial—substantially higher than the 5.9 percent of trials that resulted in punitive damages in all of the trial verdicts considered as a whole in the DoJ study.² It should be emphasized here that many of the 75 counties included in the DoJ study, such as Washington state counties, do not allow or severely restrict punitive damages, so the overall probability in areas allowing punitive damages is certainly much higher than 14 percent.

Asking the Right Questions: The Dynamics of Lawsuit Settlement

To appreciate fully the significance of the findings of our analysis of lawsuit filings, it is necessary to understand how punitive damage demands may affect the calculus of out-of-court settlement demands. A review of the scholarship about this subject will establish the following conclusions:

1. The *unpredictability* of a prospective punitive damage award contributes significantly to the *uncertainty* (and therefore the *risk*) of a court trial outcome.
2. Both the uncertainty posed by the prospect of unlimited punitive damages, combined with the relative probability of a punitive damage award if a case goes to jury trial, provide litigants who demand punitive damages with potent leverage against risk-averse defendants, and tip the balance in settlement bargains in favor of litigants with weak or even frivolous cases.

As mentioned previously, concentrating on trial verdicts overlooks “where the action is” in civil litigation: out-of-court settlements. We are not suggesting that verdicts are unimportant. To the contrary, punitive damage verdicts are like the tip of the proverbial iceberg. The small number of trials affect decisions in the vast majority of lawsuits that do not proceed to trial. Verdicts are “information signals” for litigants. Even Stephen Daniels and

² The calculation for this figure is as follows: In our case sample, 38.5 percent of business cases include a punitive damage demand. The Department of Justice report estimated that there were 5,240 tort cases against a business defendant in its sample of cases from 75 counties. Holding constant from our sample, this would suggest that 2,017 of these cases included punitive damage demands (38.5% of 5,240 cases). If we assume that the proportion of punitive verdicts is in parity with the distribution of punitive demands (i.e., 78 percent against business), then 284 of the 364 punitive verdicts in the DoJ study were against business defendants. These 284 verdicts represent 14 percent of the 2,107 cases.

Joanne Martin, who are strong proponents of punitive damage awards, note that "jury verdicts in the minority of matters actually adjudicated play an important role in determining the worth, or settlement value, of civil matters filed but not tried."³

To get a proper perspective on how this process works requires a consideration of the basic dynamics of a lawsuit. There is growing scholarly literature that offers several models of decision-making in the litigation process, especially in cases involving doubtful or even frivolous legal claims. "Situations involving litigation are a paradigmatic case of bargaining conflict," Kip Viscusi has written, and hence susceptible to illumination through game-theory and decision-tree models.⁴ As professors Robert Cooter and Daniel Rubinfeld of U.C. Berkeley have noted, "The attributes of litigation bargaining—rivalry, communication, side payments, interdependency, and uncertainty—characterize bargaining games as analyzed in microeconomics."⁵ This approach can help clarify the role of punitive damages in changing the calculus of settlement between litigating parties.

The first thing to understand about lawsuits under American law is that the plaintiff has the opening strategic advantage: even a plaintiff with a weak case places the defendant in the position of having to defend himself (and therefore incurring legal costs), or else the defendant will be liable for the full claim on a default judgment. Hence, even a defendant facing a suit without merit is often willing to pay an amount that is less than his prospective defense costs to settle the case and "make it go away." According to various studies, the cost of defense in an *average* tort lawsuit ranges from \$6000 to \$10,000, depending on the kind of suit.⁶ A litigant with even a mildly plausible basis for an average suit can often expect a nuisance settlement value within this range. Professors David Rosenberg and Stephen Shavell of Harvard Law School comment: "By filing a claim, any plaintiff, and thus the plaintiff with a weak case, places the defendant in a position where he will be held liable for the full judgment demanded unless he defends himself. Hence, the defendant should be willing to pay a positive amount in settlement to the plaintiff with the weak case—despite the defendant's knowledge that were he to defend himself, such a plaintiff would withdraw."⁷ University of Michigan economist Avery Katz adds that in

³ Stephen Daniels and Joanne Martin, "Myth and Reality in Punitive Damages," 75 *Minnesota Law Review* 1-64 (October 1990), p. 28.

⁴ W. Kip Viscusi, "Product Liability Litigation with Risk Aversion," *Journal of Legal Studies*, Vol. XVII (January 1988) p. 120.

⁵ Robert D. Cooter and Daniel L. Rubinfeld, "Economic Analysis of Legal Disputes and Their Resolution," *Journal of Economic Literature*, Vol. XXVII (September 1989), p. 1069.

⁶ J. Kakalik and N. Pace, *Costs and Compensation Paid in Tort Litigation* (Santa Monica: RAND Corporation Institute for Civil Justice, 1986).

⁷ D. Rosenberg & S. Shavell, "A Model in Which Suits Are Brought for Their Nuisance Value," 5 *International Review of Law and Economics* (1983), p. 3.

many cases "the defendant is willing to pay a settlement up to the amount of his defense costs in order to avoid having to respond to the plaintiff's complaint."⁸

The main determining factor of whether a filed lawsuit will yield a settlement to the plaintiff is the "threat credibility" of the suit, i.e., what is the probability of a verdict favorable to the plaintiff if the case goes to trial, and what is the likely amount of damages that the plaintiff could win? The scholarly models of the out-of-court negotiation process suggest that an increase in the prospective amount of a jury verdict increases the likelihood of a settlement offer by the defendant, and tends to increase the amount of such settlements. Professors Kathleen Engelmann and Bradford Cornell argue that "it is almost invariably the case that increasing the cost of litigation increases the probability of settlement."⁹ Professor Barry Nalebuff of Princeton University concurs, noting that "an increase in the court award . . . raises the probability of settlement."¹⁰

This can be true even in frivolous or marginal lawsuits, or lawsuits with a doubtful chance of success at a trial. Professor Katz comments: "The main reason that frivolous suits are not always met with a blanket denial and refusal to negotiate, of course, is that the defendant rarely knows the merits of the claim with certainty. Since refusing to take a valid claim seriously can be quite costly, a frivolous plaintiff may be able to take advantage of the defendant's uncertainty regarding the claim's validity to extract a substantial settlement." Moreover, Katz adds, "higher trial costs raise the defendant's benefit from settling with valid claimants and makes him more willing to tolerate the cost of settling with strike suitors."¹¹

The point is: punitive damage demands will often tip the balance of power in bargaining to the plaintiff, even one with a weak or frivolous case. It does so in two ways: by increasing the size of a prospective jury award (by an unpredictable and potentially enormous amount) if the case is taken to trial, and by increasing the legal costs that a defendant will have to incur to fight the suit at trial. First, to use a hypothetical example: while a \$50,000 lawsuit with arguable merit might have a settlement value of \$20,000 or \$30,000, a \$50,000 lawsuit that also demands \$200,000 in punitive damages is no longer a

⁸ Avery Katz, "The Effect of Frivolous Lawsuits on the Settlement of Litigation," *International Review of Law and Economics*, Vol 10 (1990), p. 4.

⁹ Kathleen Engelmann and Bradford Cornell, "Measuring the Cost of Corporate Litigation: Five Case Studies," *Journal of Legal Studies*, Vol. XVII (June 1988), p. 397. For a general discussion of this point, see John P. Gould, "The Economics of Legal Conflicts," *Journal of Legal Studies*, Vol. 2, No. 2 (June 1973), pp. 279-300; Lucian Arye Bebchuk, "Suing Solely to Extract a Settlement Offer," *Journal of Legal Studies*, Vol. XVII (June 1988), pp. 437-450; Cooter and Rubinfeld, *op cit.*

¹⁰ Barry Nalebuff, "Credible Pretrial Negotiation," *RAND Journal of Economics*, Vol. 18, No. 2 (Summer 1987), p. 208.

¹¹ Katz, *op cit.*, p. 4, 5.

\$50,000 lawsuit for purposes of settlement. The presence of a punitive damage demand provides leverage for the plaintiff to force a higher settlement value from the suit. Second, the presence of a punitive damage demand often requires a more extensive, more costly, and more time-consuming defense by the defendants. Most punitive damage demands are based on claims of intentional wrongdoing or "conscious disregard" of the rights of the litigant. Defending against such extraordinary claims usually requires a more expensive discovery process than ordinary damage claims. In addition to a discovery process about the basic facts of the injury or fraud involved in the tort allegation, determining the malicious intent of the defendant will involve more extensive, and therefore more expensive, document searches and depositions.

The key dynamic of the out-of-court settlement process is *uncertainty*. Obviously if the outcome of jury trials were highly predictable, few if any cases would ever go to trial. The parties would always settle. It is the uncertainty of trial outcomes that has led to a thriving market for jury verdict data services, which are intended to provide at least some guidance to litigating parties to help estimate the risks of trial and the parameters of a reasonable settlement. Punitive damage demands add dramatically to the uncertainty of out-of-court settlement deliberations. The inclusion of a punitive damage demand increases the potential amount of an adverse jury award by an unpredictable degree, since punitive damages are unlimited.

To judge how serious a factor this is, it is necessary to consider the probability of receiving a punitive damage verdict if a case is taken to trial. The plaintiff's leverage is only effective if the threat of extracting punitive damages from a trial is credible. What makes a punitive damage demand credible in the eyes of a defendant? The studies that minimize the number of punitive damage awards are highly misleading on this point.

For example, the recent Department of Justice study's estimates on civil lawsuits seems to suggest that because so few cases result in punitive damages (364 out of 762,000 cases filed, or .0004 percent), the threat of a punitive damage demand in a lawsuit pleading is not very credible.¹² But this is to miss something rather obvious in the DoJ statistics: because only 1.5 percent of the lawsuits actually went to trial, the relevant question to ask is: *what is*

¹² "Civil Jury Cases and Verdicts in Large Counties," U.S. Department of Justice, Bureau of Justice Statistics, Special Report NCJ-154346, July 1995. It is important to take note of the methodological difficulties with this study. While the study purports to represent a review of 762,000 case filings and 12,000 jury verdicts, in fact the Department of Justice only scrutinized a sample of these cases. It is from these samples that extrapolations are made in the various tables in the study. The sample size is not divulged. This is why we have consistently referred to the DoJ's figures as "estimates." Finally, the Department of Justice study does not provide a state-by-state breakdown, so it is impossible to offer observations specific to California based on their estimates.

the risk of receiving a punitive damage judgment if a case is brought to trial? The 364 punitive damage verdicts in the DoJ estimates take on a new significance if pondered in this fashion: they amount to 3 percent of the 12,000 cases tried, or 5.9 percent of verdicts in which the plaintiff was the winner. Three percent, or even 5.9 percent, still may not seem very substantial to outside observers who do not bear the risk themselves, but it is crucial to remember, however, that many if not a majority of these cases that went to trial *did not include a punitive damage demand as a part of their pleading.* Secondly, the DoJ statistics do not tell how many of the suits that included punitive damage demands, or how many of the verdicts that included punitive damages, were suits brought against *businesses* as opposed to *individuals.* (The Department of Justice has the data to make this breakdown, but chose not to report it in its study.)

The disaggregated figures in Table 3 below, taken from the Department of Justice estimates, tell the story more clearly.¹³ Although the DoJ estimates are severely limited because they do not tell us whether the defendant in these verdicts is an individual or a business, and does not tell us what proportion of the cases that went to trial sought punitive damages, they do confirm that the probability of receiving a punitive damage award is significant.¹⁴ For example, in employment law cases (nearly all of which were brought against business defendants), we see that 26.8 percent of all verdicts included punitive damages, with a hefty median punitive award of \$179,000.

¹³ These data appear as Table 8 on page 8 in the Department of Justice study.

¹⁴ As pointed out above, the DoJ did not actually analyze 762,000 cases on a case-by-case basis. It would take years to conduct such an analysis. But unless a substantial sample of cases is analyzed closely, it is impossible to answer some key questions about what is happening. The DoJ does not estimate how many of the 762,000 suits requested punitive damages as a part of their filing, or how many of the 12,000 that went to trial included punitive damage demands. But without knowing this, it is difficult to judge the significance of some of the DoJ findings. For example, while the DoJ study notes that only 13 out of 403 medical malpractice verdicts included punitive damages, the study does not say—because the DoJ does not know—how many of those 403 cases demanded punitive damages as a part of their case filing. Although the DoJ estimates do break down suits filed against individuals and filed against business, it does not reveal how many of the suits against business that went to trial included punitive damage demands. Again, the DoJ cannot know this without actually examining each and every case filing. Because the DoJ study is based on estimates instead of a hard count of actual cases, it cannot tell us much that is meaningful about the relative risk posed to defendants who face punitive damage demands.

Table 3: Punitive Damage Awards for Plaintiff Winners in Civil Jury Cases in State Courts in the Nation's 75 Largest Counties, 1992

	Plaintiff winner cases		Amount of punitive damages awarded to plaintiff winners			% of plaintiff winner cases with punitive damages	
	No. awarded punitive damages	% of cases receiving punitive damages	Total	Median	Mean	Over \$250K	Over \$1 mill.
Case type:							
All jury cases	364	5.9	\$267,879,000	\$50,000	\$735,000	23.7	11.6
Tort cases	190	4.0	91,477,000	36,000	481,000	22.7	10.1
Automobile	55	2.4	35,535,000	25,000	641,000	19.9	7.5
Premises liability	15	1.7	1,272,000	40,000	87,000	0	0
Product liability	3	2.2	40,000	9,000	12,000	0	0
Intentional tort	38	18.5	10,926,000	25,000	286,000	13.8	8.5
Medical malpractice	13	3.1	3,120,000	199,000	245,000	31.8	0
Profsnl malpractice	15	15.7	6,077,000	250,000	412,000	44.0	8.5
Slander/libel	8	29.8	1,341,000	47,000	164,000	34.2	0
Toxic substance	13	6.2	26,420,000	1,692,000	1,994,000	54.7	54.7
Other tort	30	7.2	6,746,000	100,000	226,000	20.9	10.9
Contract cases	169	12.2	169,528,000	52,000	1,003,000	24.4	12.6
Fraud	38	21.2	7,339,000	45,000	191,000	18.9	10.4
Seller plaintiff	24	5.6	1,221,000	22,000	51,000	0	0
Buyer plaintiff	47	12.4	27,446,000	27,000	581,000	28.6	11.1
Employment	46	26.8	132,759,000	179,000	2,875,000	42.1	26.1
Rental/lease	11	11.3	399,000	50,000	37,000	0	0
Other contract	2	1.8	365,000	145,000	162,000	44.4	0
Real property cases	5	11.7	6,873,000	85,000	1,375,000	40.0	40.0

Another point should be made from the DoJ estimates. While defenders of unlimited punitive damages prefer to use *median* punitive award figures because a few large awards can skew *average* award figures, this point can be turned on its head. The large disparity between median punitive award amounts and average award amounts (\$50,000 and \$735,000 respectively in the DoJ estimates) highlights the unpredictability of punitive awards. As our previous report on punitive damages in California showed, there was a huge range in punitive damages awarded between 1990 and 1994, demonstrating that punitive damages are unpredictable and arbitrary.¹⁵ In California cases during this period, the range of punitive awards runs from 710 times compensatory damages to .0001 times compensatory damages. (In one case, a defendant who was not assessed any compensatory damages was nevertheless

¹⁵ *Punitive Damages in California: A Preliminary Report* (San Francisco: Pacific Research Institute, 1995).

hit with \$62,000 in punitive damages.) It is precisely this uncertainty that provides the plaintiff with additional leverage in the settlement process.

Conclusions

The California statutes governing punitive damages use exceptionally strong language to prescribe when punitive damages are appropriate. Punitive damages should be awarded where there is "clear and convincing evidence" that a defendant has behaved with "malice," or has engaged in "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." Other descriptions include "oppression, intentional misrepresentation, deceit, or concealment of a material fact. . ." Unless it is implausibly assumed that such extraordinary behavior is rampant and pervasive in California, the frequent appearance of punitive damage demands in lawsuit filings is evidence that they have become simply a regular litigation tactic.

It is not persuasive to say that the frequency of punitive damage demands have little or no effect on the cost and outcomes of litigation. The uncertainty and risk posed by potential punitive damage awards magnifies the leverage of such demands in out-of-court settlements. The prospect of "runaway juries" is far from fanciful. Even judges have felt compelled to speak out about this phenomena. In a recent California trial involving an employment dispute that resulted in an \$80 million punitive damage award, the trial judge set aside the verdict, noting:

"This award is so disproportionate to the injuries, damages and conduct, and so unsupported by the evidence it shocks the conscience of this court to the point that the court cannot countenance such a result and feels compelled, despite its respect for the jury process, to grant a new trial . . . Punitive damages award is excessive and clearly motivated by passion and prejudice [of the jury]. The award does not bear a reasonable relationship to the nature of defendant's action and the extent of plaintiffs' injuries."¹⁶

Despite the admonitions of California statutes that there be "clear and convincing evidence" of extraordinarily deliberate malicious behavior, it is clear that new guidelines and limitations on punitive damages are needed.

¹⁶ *Lane v. Hughes Aircraft Company*, Los Angeles County Superior Court Case No. BC 075 519 (December 15, 1994).

THE ROLE OF PUNITIVE DAMAGES IN CIVIL LITIGATION: NEW EVIDENCE FROM LAWSUIT FILINGS



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PACIFIC RESEARCH INSTITUTE
755 Sansome Street, #450
San Francisco, CA 94111
Phone: (415) 989-0833
Fax: (415) 989-2411
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Looking Out For Business...

Second in a series of articles by the Alaska State Chamber addressing issues of major importance to Alaska's business community.



Could this be the year when meaningful reform of Alaska's civil justice system is finally realized?

For the first time in more than a decade of effort, both the legislature and the governor have introduced legislation in support of tort reform. The Governor's goals for tort reform are precisely those of the Alaska State Chamber and others who have led the fight for reform:

- To decrease the costs of resolving cases
- To discourage frivolous litigation
- To promote fair compensation for injured parties
- To promote the predictability of outcomes

With this being the case, it would seem to be only a matter of sorting out some definitions and a few differences in approach before achieving the desired results. But as it is often said, the devil is in the details.

Although there are numerous issues within tort law that will be addressed in the tort reform effort, the issue of punitive damages has been one of primary concern to Alaska's businesses, both large and small. Under the present tort system there are no guidelines or parameters for establishing punitive damages. Although the term "punitive" means "concerned with, or to inflict punishment," under today's tort system punitive damages can be assessed even when there has been no willful act or intentional wrongdoing on anyone's part. In addition, although in criminal or administrative law the level of punishment is pre-established, under tort law there are no established limits on the level of punishment.

This is why punitive damages are known as "litigation lottery", and also as a tool for blackmail. An example of this was provided to us recently by one of our members, a small airline that was being sued as a result of a plane crash in which there was a fatality. Although it had been determined that the airline was not at fault in the acci-

dent, the law firm representing the estate of the deceased bragged and threatened in a letter to the company that their firm had been "extremely successful" in obtaining punitive damages from Alaskan juries, named the amounts of those victories in the multi-millions of dollars, and went on to say that they had settled several cases in which the *prospect of punitive damages* led to settlements "vastly exceeding" the economic loss. They were suggesting that a high out-of-court settlement would be to the benefit of this airline.

These "pay up or take the chance of losing everything you ever owned or ever hoped to own" cases usually are settled out of court. Therefore, the number of lawsuits of this nature are not accurately reflected in the statistics.

Punitive damages are known as "litigation lottery", because they can be assessed without intentional wrongdoing on anyone's part...and the sky is the limit.

This is one of the most flagrant abuses of justice existing in Alaska's tort law system today, and also one of the most expensive. If this airline ends up meeting the exorbitant demands in the case just cited, rather than bet against the odds, the costs will have to be passed on to their customers in order for them to stay in business. Can we even begin to assess the liability costs we pay everyday as consumers? And is this how we think the justice system should work?

The Alaska State Chamber wants to see parameters put in place. We believe punitive damages should only be assessed when there is clear and convincing evidence of malicious intent, outrageous conduct, or reckless indifference. The penalty for such actions should be pre-established and not exceed three times the amount of compensatory damages awarded, or \$300,000, whichever is greater. We also believe that 75% of the penalty should go to the state, thereby helping to support the cost of justice rather than serving as a windfall for those who would use the system to their own ends.

Looking Out For Business...

One in a series of articles by the Alaska State Chamber addressing issues of major importance to Alaska's business community



Alaskans Support Tort Reform. A new statewide survey of Alaskan voters shows that 83% favor changing Alaska's liability laws. In the January poll commissioned by the Alaska State Chamber of Commerce, a random sample of 500 Alaskans taken from state voting lists were interviewed by a national polling firm out of San Francisco regarding the civil legal system.

The three top concerns expressed were that too much money is being awarded in civil lawsuits, limits or established guidelines are needed, and it is too easy to file lawsuits. Sixty-seven percent of those surveyed believe there are too many lawsuits being filed these days, while only 15 percent feel not enough people exercise their right to sue. Sixty-two percent think people

are taking unfair advantage of the system in order to receive large awards they don't deserve.

The majority of those surveyed believe frivolous lawsuits, those that are unnecessary in many people's views, are thought to cause higher insurance premiums for everyone (87%), have raised health care costs (80%), and delay compensation to legitimate victims (73%) by clogging the courts.

The State Chamber commissioned the survey to show legislators and the Governor the degree of public support for the present legislative efforts to reform the tort legal system. House Bill 158, Civil Liability, sponsored by Representative Brian Porter of Anchorage, includes those changes to the system most supported by the public, but the bill is vehemently opposed by the powerful Alaska Trial Lawyers Association. After narrowly passing the House last session, the bill is now in the Senate Judiciary Committee, chaired by Senator Robin Taylor, a former judge and an attorney who has not looked with favor upon the bill.

According to the survey, three out of four believe small businesses, doctors, taxpayers, and people with legitimate lawsuits would be most helped by the proposed changes to the system. The survey participants believe, by a ratio of eight to one, that those who would be most hurt by the new law are people with frivolous lawsuits and personal injury lawyers.

A statewide survey of Alaskan voters shows that 83% favor changing Alaska's liability laws.


The State Chamber believes unjustifiable litigation disrupts commerce at every level, and legal expenses constitute a large and growing cost of doing business in Alaska. Threatened or actual litigation and the associated defense costs jeopardize the existence of small and medium sized businesses.

The poll also revealed that political candidates accepting financial support from personal injury lawyers could experience a backlash if that support becomes known. In fact, 69 percent of those surveyed said they would likely vote against candidates who receive support from personal injury lawyers.

Upon clearing the Senate Judiciary committee, House Bill 158 will be heard in the Senate Labor & Commerce and Finance committees before being voted on by the whole Senate. Any changes the Senate makes to the bill will have to be approved by the House. It is not known if the Governor would approve the bill, but the survey showed there is broad consensus--83 percent agreement--that if the Legislature passes a liability reform bill aimed at reducing frivolous lawsuits, the Governor should sign it.

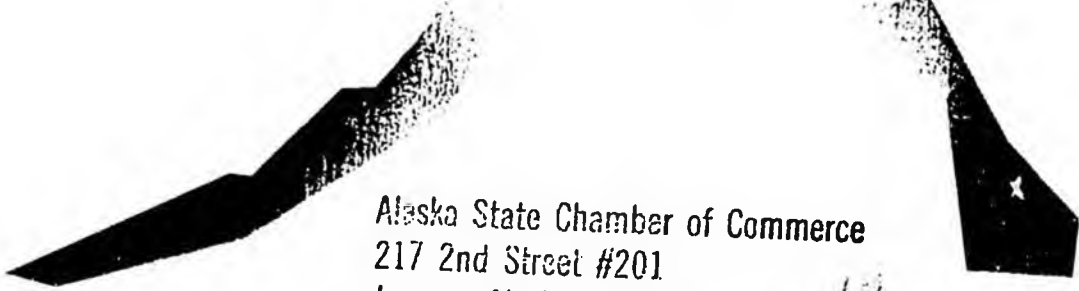
For more information contact the Alaska State Chamber of Commerce at (907)586-2323 or Fax (907)463-5515.

Advertisement



ALASKA VOTERS: LAWSUIT ABUSE SURVEY

JANUARY, 1996



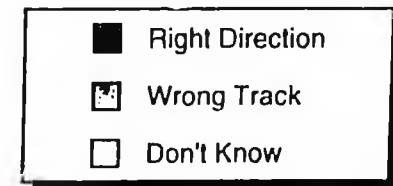
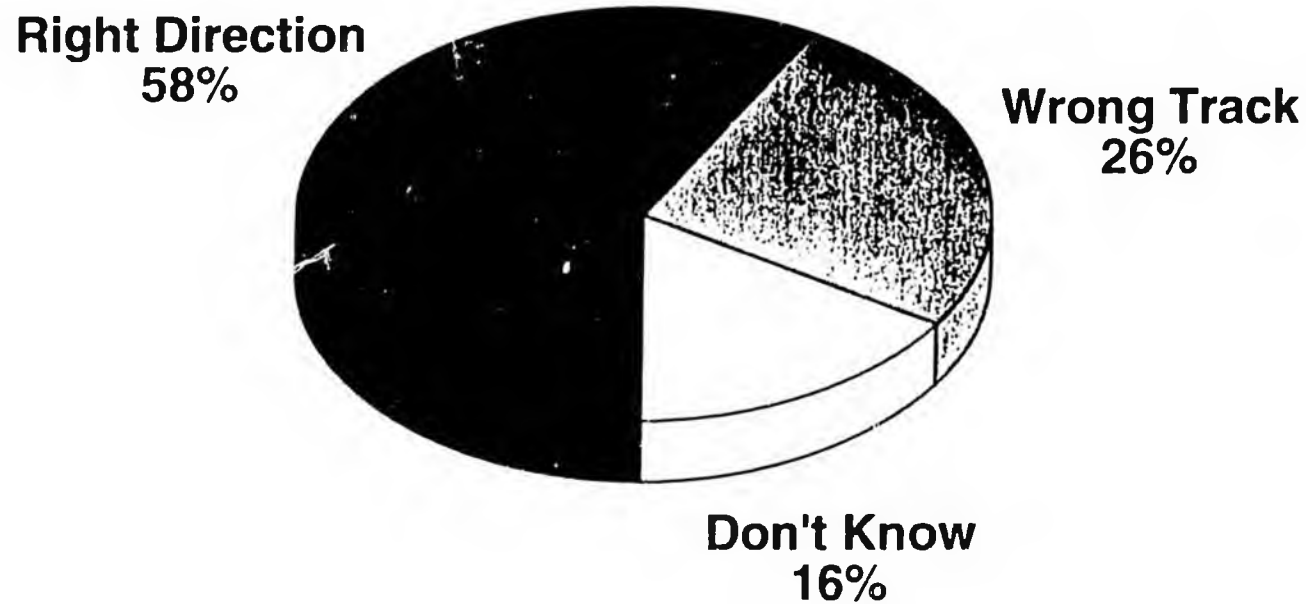
Alaska State Chamber of Commerce
217 2nd Street #201
Juneau, Alaska 99801

Methodology

MODE	Telephone Survey
UNIVERSE	Alaska Registered Voters
SAMPLE SIZE	N=500
MARGIN OF ERROR	+/- 4.4%
FIELD DATES	January 12, 13, 14, 16
LENGTH	56 questions; Approximately 15 minutes

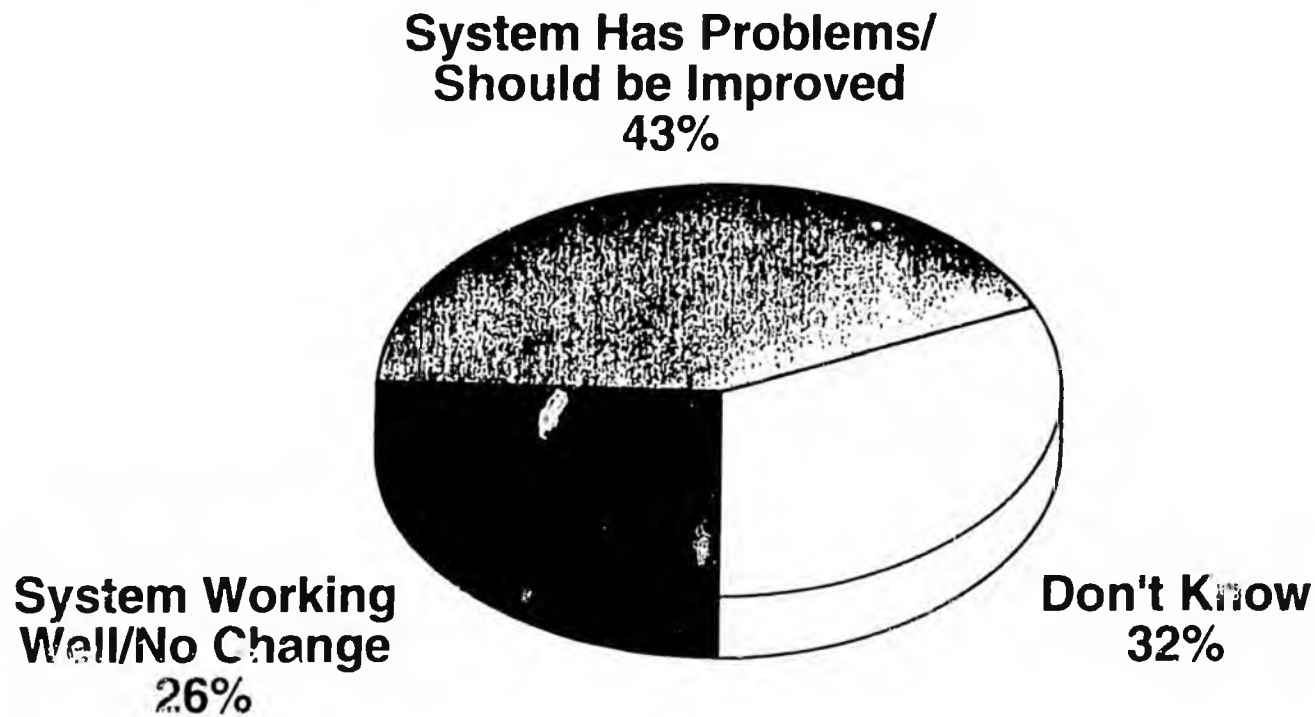
Mood of Alaska

Do you feel things in Alaska are generally going in the right direction or do you feel things have pretty seriously gotten off on the wrong track? (Q1)



Liability System Status

Thinking about the legal system here in Alaska, do you feel the present liability system is working well and should not be changed, or do you feel the present liability system has problems and should be improved? (Q2)



- System working well/no change
- ▨ System has problems/ should be improved
- Don't Know

Problems with Liability Court System

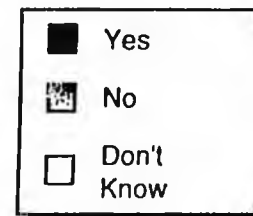
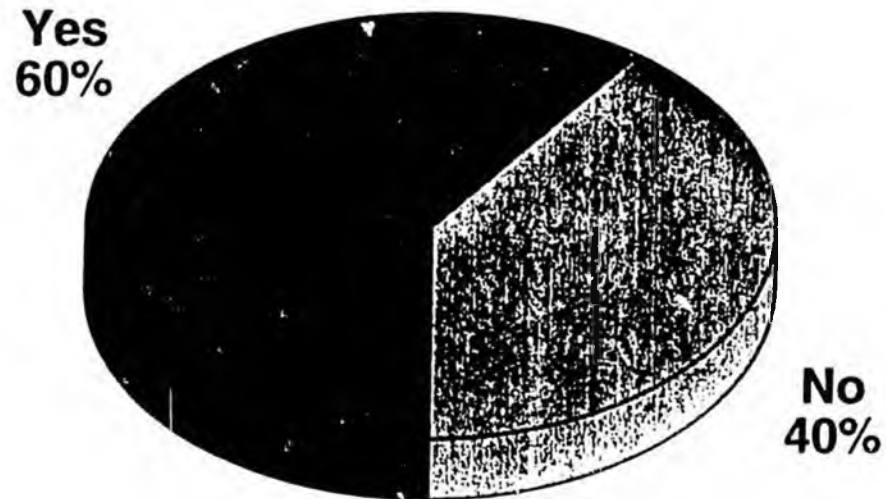
What are some of the problems with Alaska's liability court system that should be changed or improved? (Q3)

n=214

	<u>First</u> <u>Mentions</u> %	<u>Second</u> <u>Mentions</u> %
Too much money rewarded	17	17
Need new laws	14	27
Too easy to file lawsuits	14	22
Too many lawsuits	9	11
Fraud/Personal greed	9	9
Greedy//Unethical lawyers	7	10
Ties up the courts	7	8
Take resources away from real problems	3	4
Hurts innocent people	2	4
Everything	*	*
Other mentions	4	4
Don't know/refused	14	14

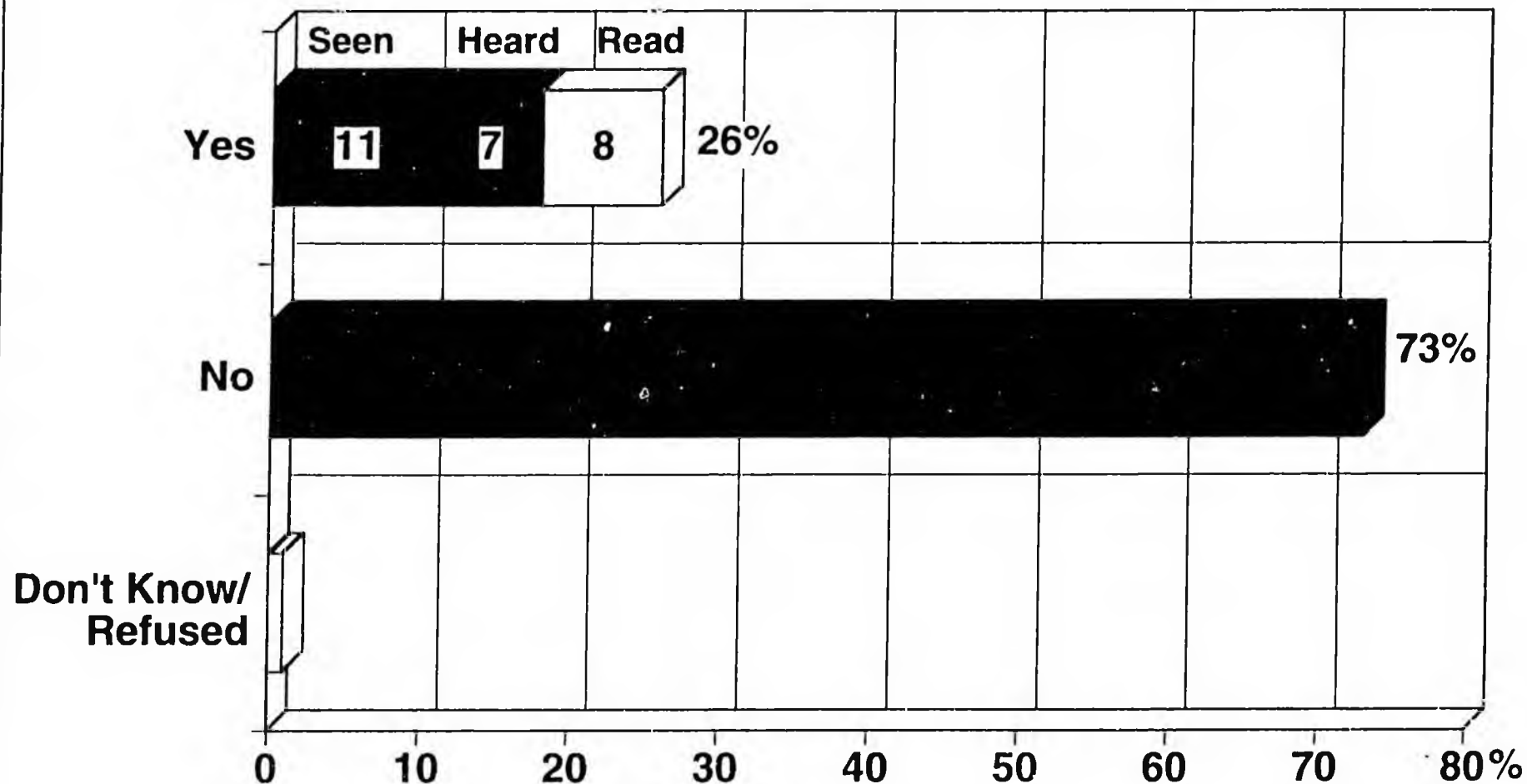
Recall: Lawyer Advertisements

On a related subject, lawyers, like businesses, sometimes try to reach customers through advertising. Have you seen or heard any advertisements for lawyers recently? (Q4)



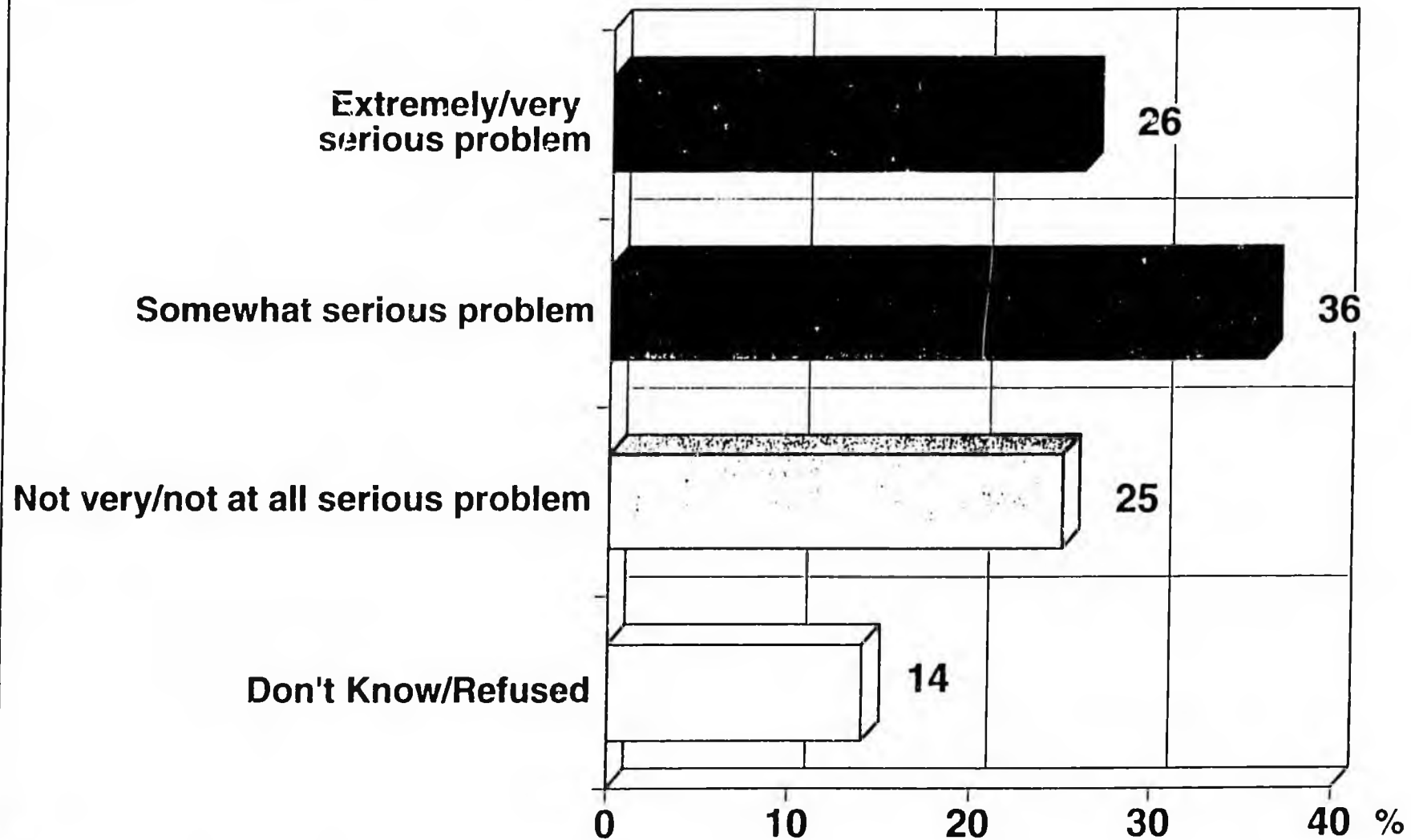
Recall: Legal System Reform

One issue that has come up is reforming the state's legal system to reduce the number of frivolous lawsuits being filed. On this issue, have you seen, heard or read anything in the news lately? (Q5)



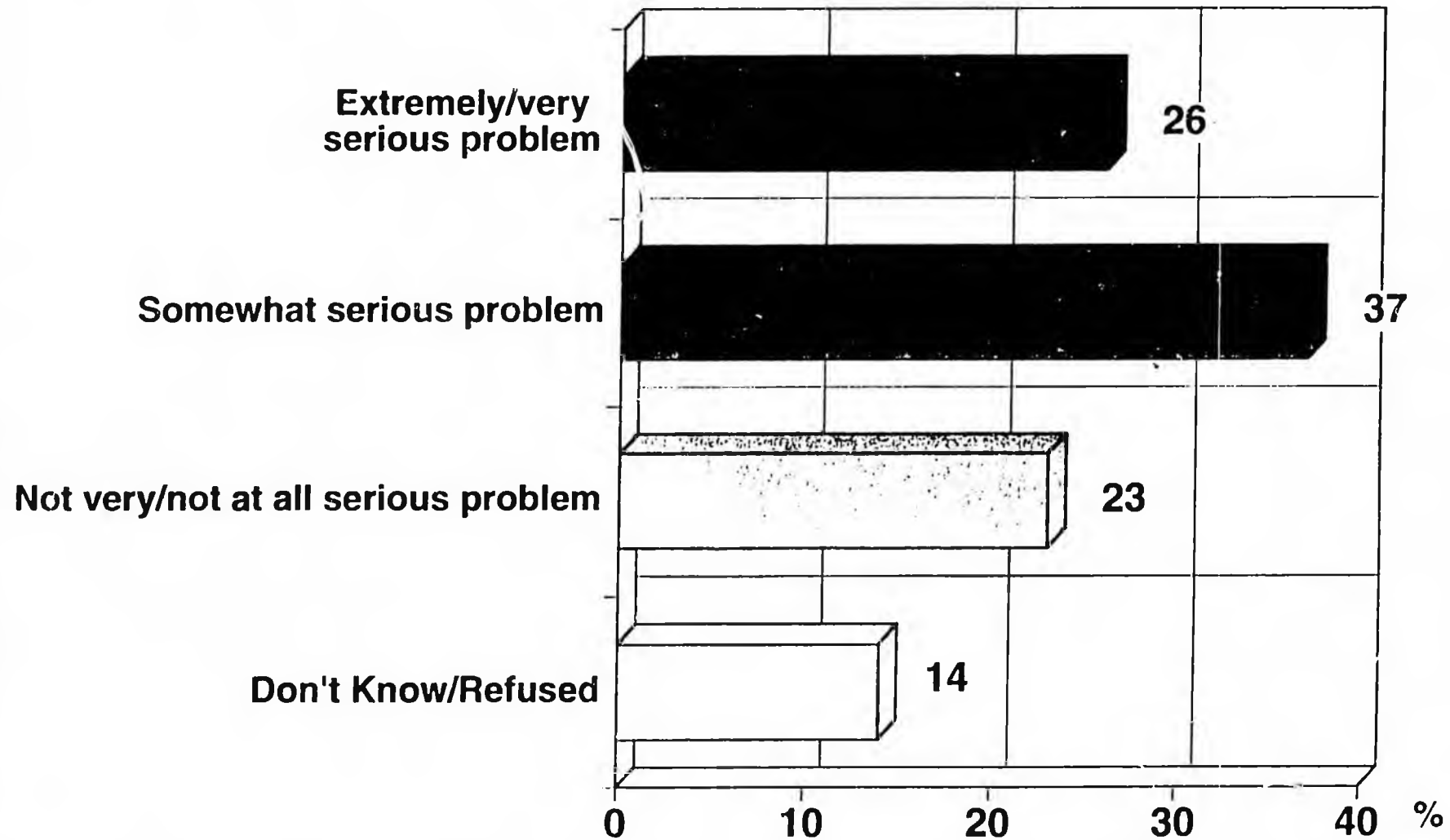
Frivolous Lawsuits Problem in Alaska

From what you have heard about the issue of frivolous lawsuits, how serious a problem would you say they are in Alaska? Are frivolous lawsuits... (Q6)



Negative Impact of Frivolous Lawsuits on Alaska Economy

Some people say there are too many frivolous lawsuits being filed in Alaska and that they are having a negative impact on our economy; others disagree. How much negative impact do you think frivolous lawsuits are having on the Alaska economy? Would you say they are having... (Q7)



Too Many Lawsuits vs. Not Enough People Exercising Right

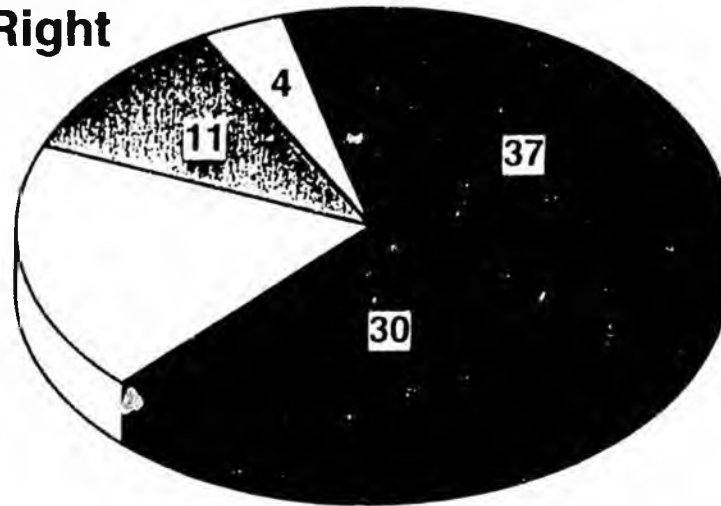
Which of the following statements comes closer to your opinion regarding the liability law system? And would that be strongly or somewhat more like your opinion? (Q8)

Some people say: There are too many lawsuits being filed in Alaska these days.

Other people say: Not enough people in Alaska are exercising their right to sue.

**Not Enough
Exercising Their Right**
15%

**Don't
Know**
19%



**Too Many
Lawsuits**
67%

- Too many lawsuits/strongly
- Too many lawsuits/somewhat
- Don't Know
- ▨ Not enough exercising their right/somewhat
- Not enough exercising their right/strongly

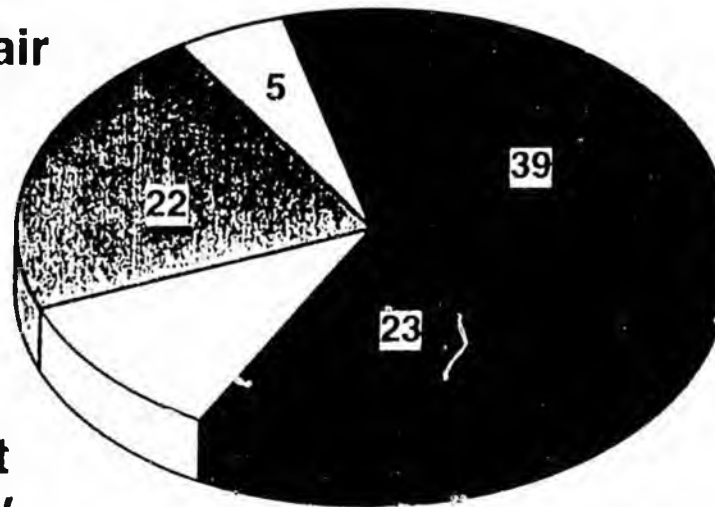
People Taking Advantage vs. System is Fair

Which of the following statements comes closer to your opinion? And would that be strongly or somewhat more like your opinion? (Q9)

Some people say: Too many people are taking unfair advantage of the system in order to get their hands on large damage awards.

Other people say: Although it may have some loopholes, the system is fair in nearly all cases.

System is Fair
27%



Too Many People Taking Advantage
62%

Don't Know
11%

- Too many people taking advantage/strongly
- Too many people taking advantage/somewhat
- Don't Know
- System is fair/somewhat
- System is fair/strongly

Agree/Disagree Statements *Ranked by Agree*

Please tell me whether you agree or disagree with the following statements about frivolous lawsuits in the liability law system. Frivolous lawsuits are lawsuits that are unnecessary in many people's views. And would that be a somewhat or strongly (agree/disagree)? (Q10-16)

	Agree %	Disagree %	Don't Know %
Frivolous lawsuits have caused higher insurance premiums for everyone. (Q15)	87 (64)*	8	5
Fear of frivolous malpractice suits causes doctors to practice defensive medicine which has raised health care costs. (Q14)	80 (55)	13	7
The number of frivolous lawsuits delays compensation to legitimate victims. (Q16)	73 (44)	15	12
Frivolous civil lawsuits are the main reason the civil courts are so clogged and cases are delayed. (Q10)	68 (37)	19	13

* **Strongly Agree**

Agree/Disagree Statements (p. 2) Ranked by Agree

Please tell me whether you agree or disagree with the following statements about frivolous lawsuits in the liability law system. Frivolous lawsuits are lawsuits that are unnecessary in many people's views. And would that be a somewhat or strongly (agree/disagree)? (Q10-16)

	Agree %	Disagree %	Don't Know %
Frivolous lawsuits have increased the cost of medical care in Alaska. (Q11)	66 (40) *	18	16
I am afraid that one day I, or someone in my family or my business, will be the victim of a frivolous lawsuit. (Q12)	61 (28)	31	9
Frivolous lawsuits have increased the cost of consumer products in Alaska. (Q13)	55 (27)	27	18

* Strongly Agree

Proposals to Address Frivolous Lawsuits

Ranked by Favor

People have mentioned a number of different proposals to address the issue of frivolous lawsuits. Please tell me whether you would favor or oppose each of the following proposals. And would that be somewhat or strongly (favor/oppose)? (Q17-29)

	Favor %	Oppose %	Don't Know %
A proposal that would make jurors aware of all the different sources of compensation an injured party has already received before trial, and stop injured parties from secretly collecting twice for the same injury without the jury's knowledge. (Q24)	86 (68) *	10	5
A proposal that will stop forcing someone who is found only 10% responsible to pay 100% of a damage award, and instead require them only to pay their percentage of fault and no more. (Q27)	84 (59)	9	7
A proposal to strengthen the penalties and fines against attorneys who are guilty of improper client solicitation. (Q21)	83 (58)	9	8

* Favor Strongly

Proposals to Address Frivolous Lawsuits

Ranked by Favor (p.2)

People have mentioned a number of different proposals to address the issue of frivolous lawsuits. Please tell me whether you would favor or oppose each of the following proposals. And would that be somewhat or strongly (favor/oppose)? (Q17-29)

	Favor %	Oppose %	Don't Know %
A proposal to prohibit lawsuits by individuals for injuries sustained in the commission of a felony. (Q28)	80 (61)*	12	8
A proposal to limit medical expert witnesses who can testify in trials to currently licensed doctors who have practiced the medical specialty being questioned sometime within the last ten years. (Q26)	80 (56)	12	8
A proposal requiring harsher penalties for people who bring or aid in bringing a frivolous lawsuit. (Q22)	80 (53)	14	6
A proposal to limit the percentage a personal injury trial lawyer can receive as a fee from any settlement or award from the client. (Q17)	78 (53)	15	6

* Favor Strongly

Proposals to Address Frivolous Lawsuits

Ranked by Favor (p.3)

People have mentioned a number of different proposals to address the issue of frivolous lawsuits. Please tell me whether you would favor or oppose each of the following proposals. And would that be somewhat or strongly (favor/oppose)? (Q17-29)

	Favor %	Oppose %	Don't Know %
A proposal to limit the ability of convicted felons in prison to bring liability lawsuits. (Q23)	76 (58)*	18	5
A proposal that would reduce to TEN years the time limit allowed to file a lawsuit for an injury someone is claiming happened years ago in the past. (Q29B)**	75 (53)	17	8
A proposal that would reduce to SIX years the time limit allowed to file a lawsuit for an injury someone is claiming happened years ago in the past. (Q29A)**	73 (49)	20	8

* *Favor Strongly*

** *Split Sample*

Proposals to Address Frivolous Lawsuits

Ranked by Favor (p.4)

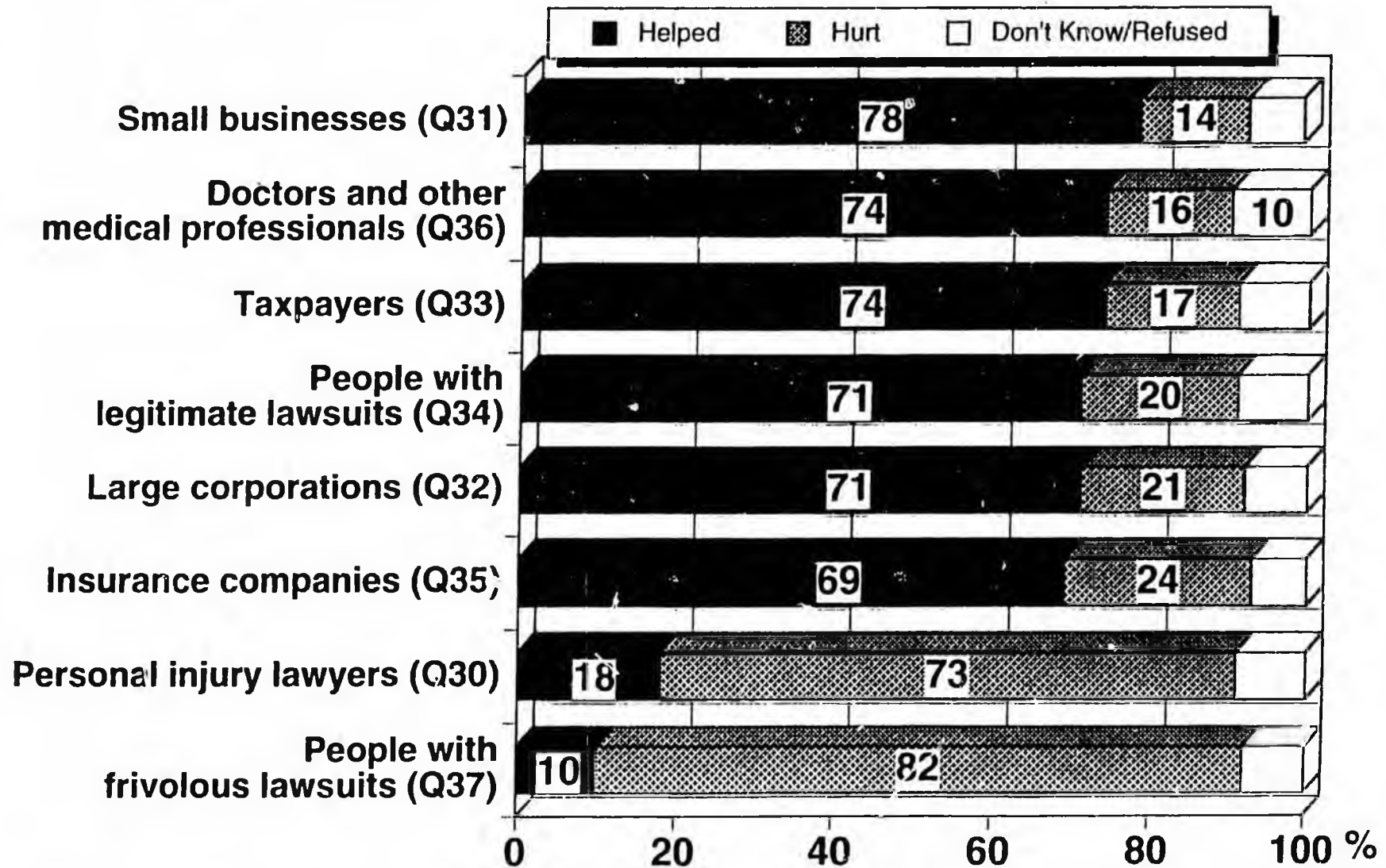
People have mentioned a number of different proposals to address the issue of frivolous lawsuits. Please tell me whether you would favor or oppose each of the following proposals. And would that be somewhat or strongly (favor/oppose)? (Q17-29)

	Favor %	Oppose %	Don't Know %
A proposal requiring that disputes of less than \$100,000 automatically go to arbitration or mediation before going to a jury trial. (Q20)	73 (44)*	17	10
A proposal that puts a limit on punitive damage awards by juries to three times economic and pain and suffering damages. (Q25)	66 (38)	19	15
A proposal requiring the loser of a lawsuit to pay legal fees for both sides. (Q19)	63 (35)	28	9
Having a no-fault insurance system where people involved in accidents receive insurance payments from their own insurance company regardless of who is at fault. (Q18)	49 (24)	39	13

* *Favor Strongly*

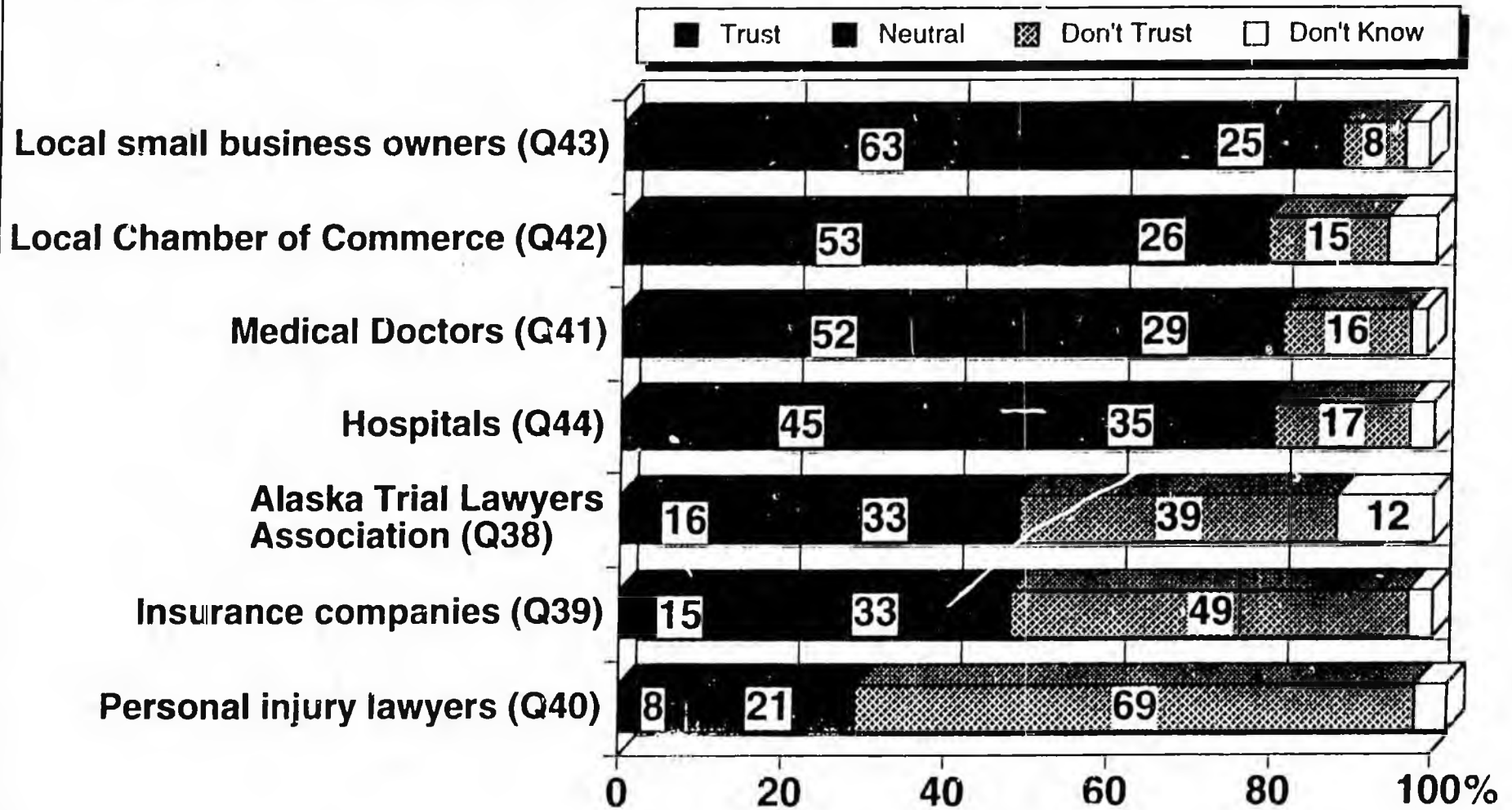
Impact of Lawsuit Reforms

Now, I am going to read you a list of groups, and I would like you to tell me if you think these groups would be helped or hurt by all these lawsuit liability reform proposals I just read you. (Q30-37)



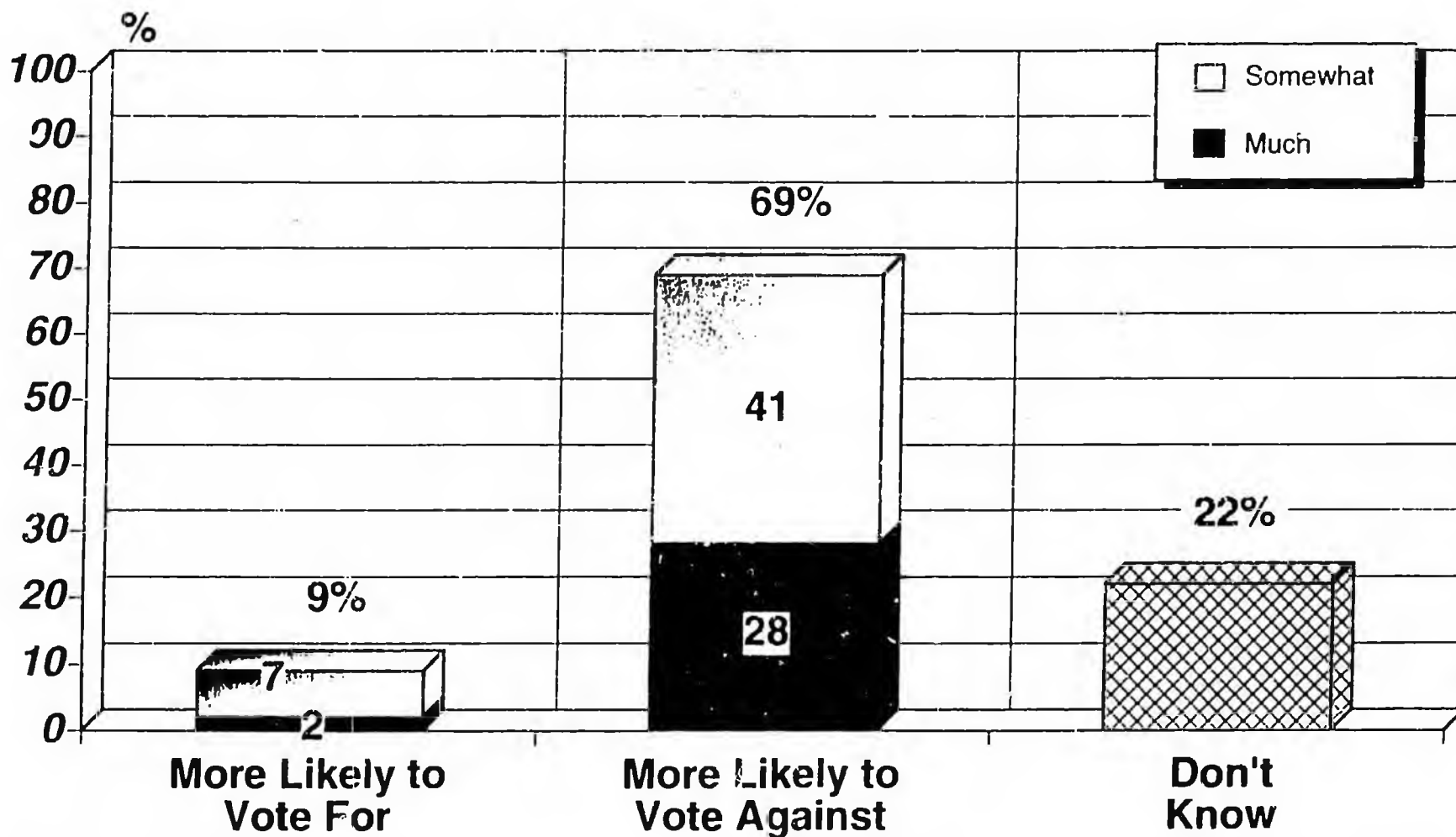
Name I.D. / Favorability

There has been some talk about reforming the liability law system. I'd like to read you a brief list of groups and individuals who might speak out on this topic. For each one, on a scale of one to five where one means you don't trust that group or individual at all, and five means you trust that group or individual completely, please tell me how much you trust each on this topic. (Q38-44)



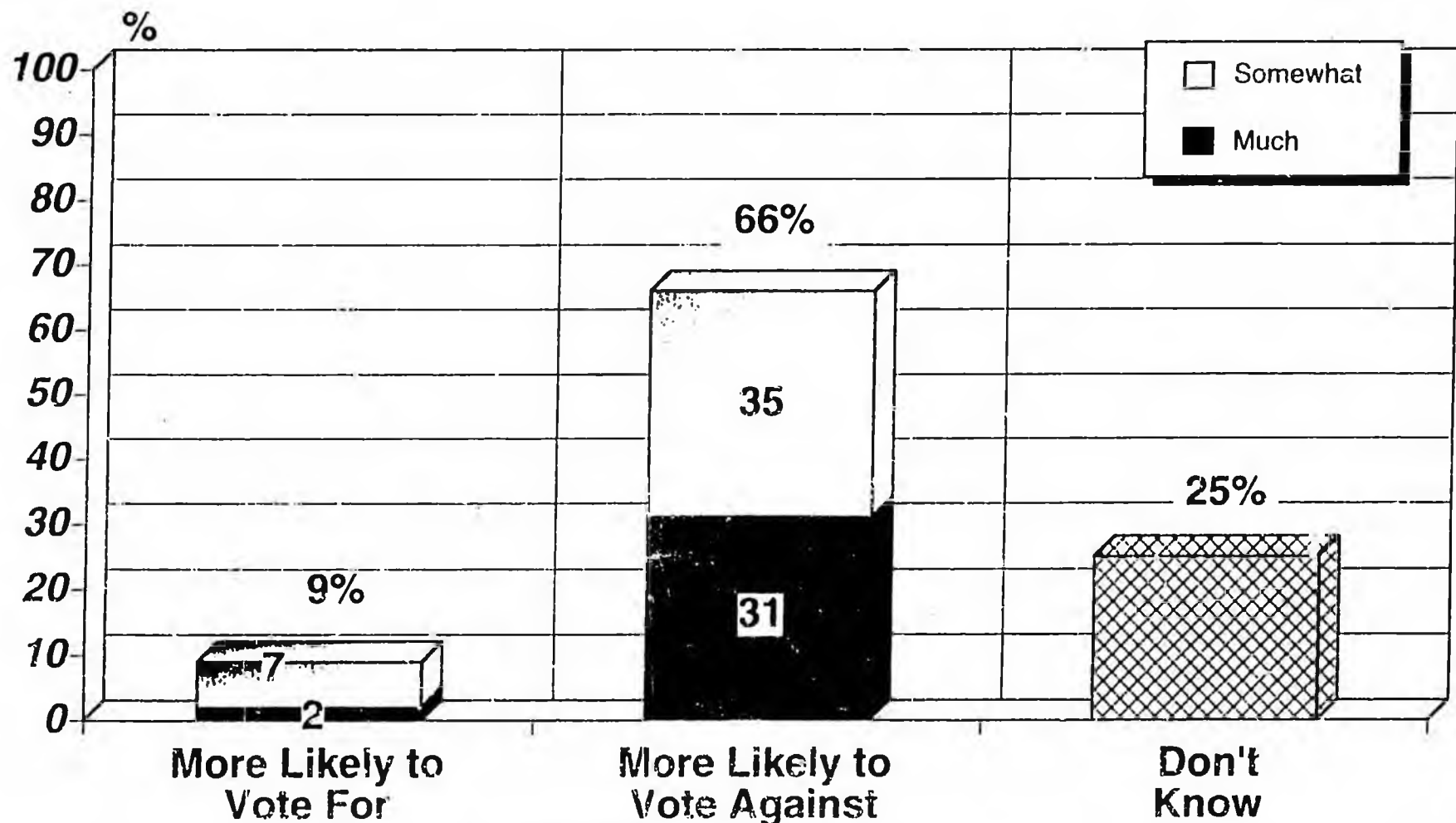
Candidate Endorsed by Personal Injury Trial Lawyers

Would you be more likely to vote FOR or more likely to vote AGAINST a candidate for state office who was endorsed by personal injury trial lawyers? And would that be somewhat or much more likely to vote (for/against)? (Q45A)



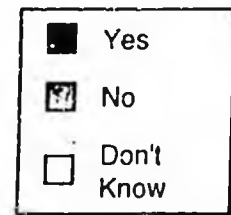
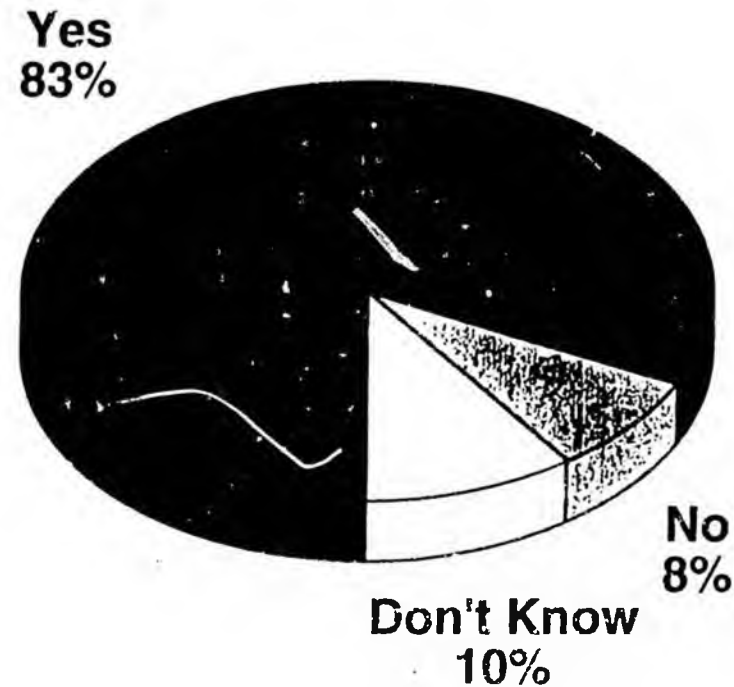
Candidate Accepting Campaign Contributions from Personal Injury Trial Lawyers

Would you be more likely to vote FOR or more likely to vote AGAINST a candidate for state office who accepts campaign contributions from personal injury trial lawyers? And would that be somewhat or much more likely to vote (for/against)? (Q45B)



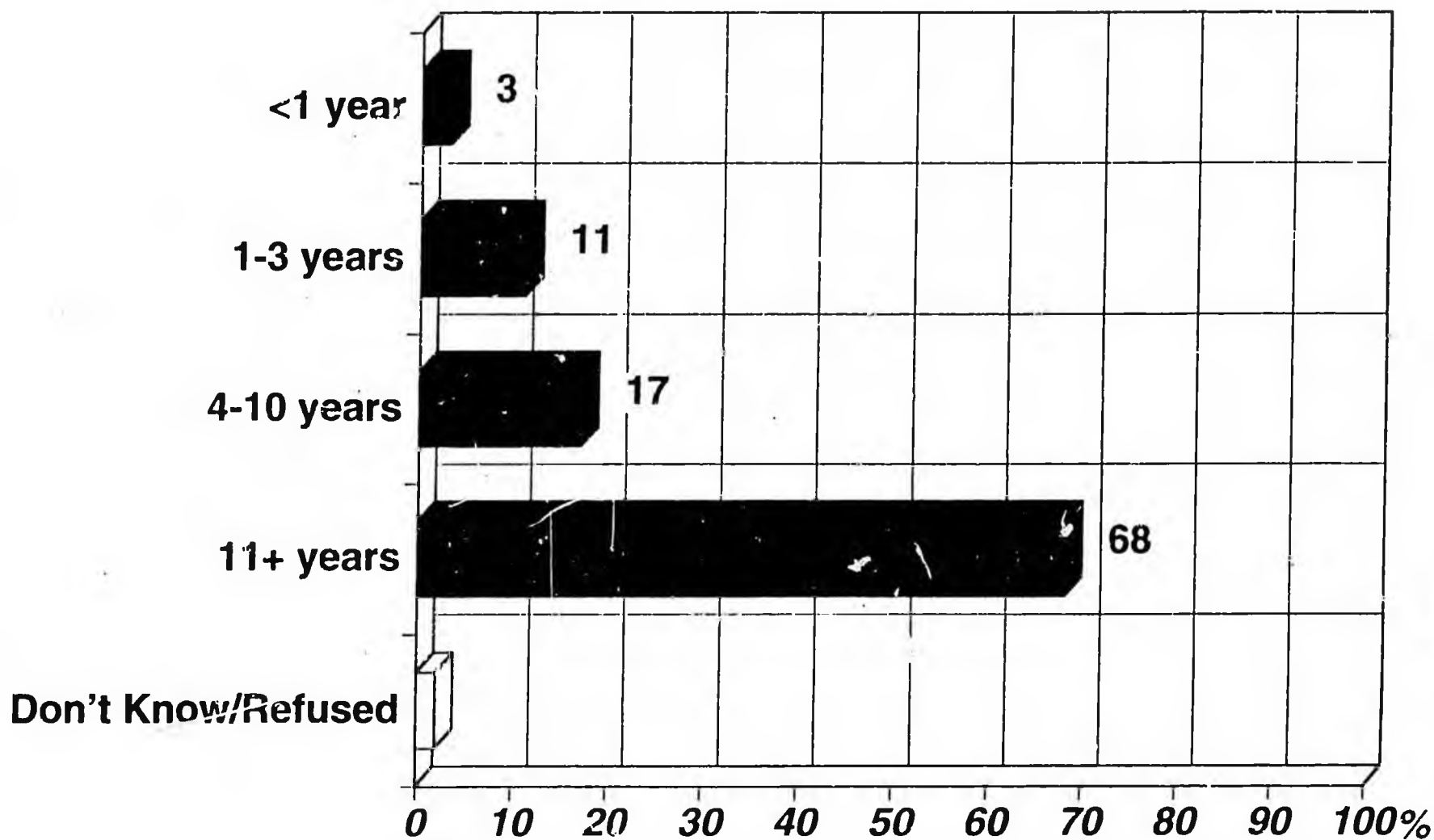
Should Governor Sign Frivolous Lawsuit Reform?

If the State Legislature passes a liability reform measure aimed at reducing frivolous lawsuits, do you think the governor should sign it? (Q46)



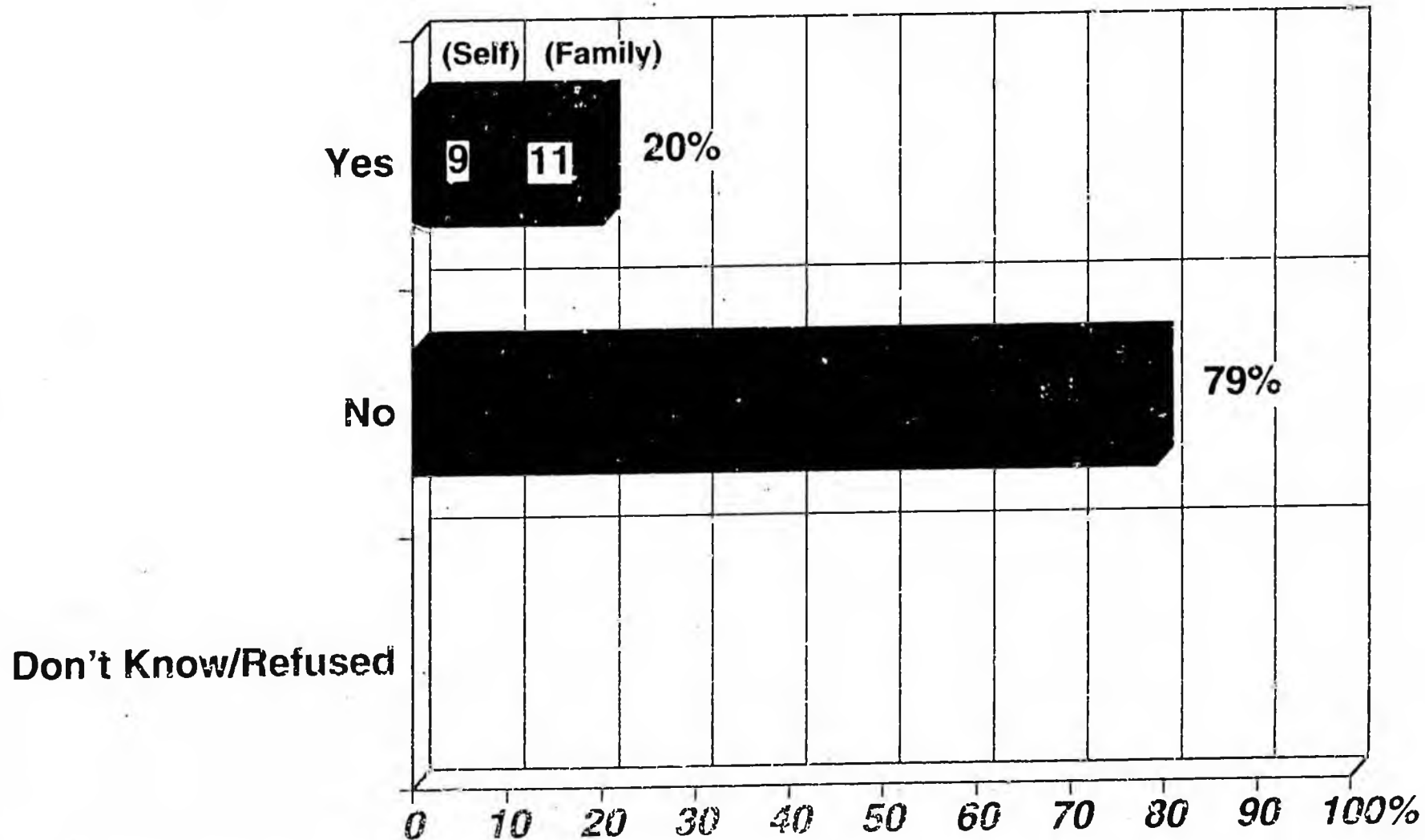
Time Lived in Alaska

How long have you lived in Alaska? (Q47)



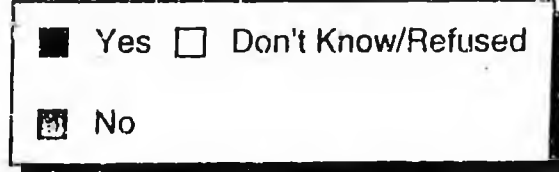
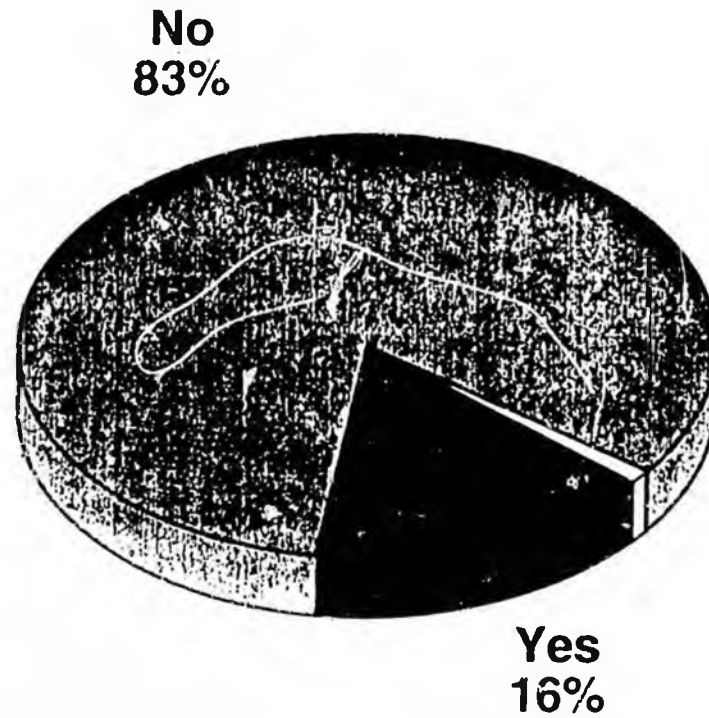
Ever Involved in Personal Injury Lawsuit

Have you or anyone in your household ever been involved in a personal injury lawsuit? (Q48)



Ever Served on a Jury

Have you ever served on a jury in a civil — that is, a non-criminal — court case? (Q49)



Favorite Radio Station

What type of radio station do you listen to most? (Q50)

Country & western music	26%
Classic rock and roll	21
News talk/sports talk	17
Oldies/easy listening	16
Public radio/NPR	15
Contemporary pop music	9
Classical music	7
Christian radio	7
Modern/new wave/alternative rock	7
Jazz	5
Soul/Rap	4
Other	3
Don't Know/Refused	6

CHARLTON RESEARCH COMPANY

44 Montgomery Street, Suite 1710
San Francisco, California 94104
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PERSONAL AND CONFIDENTIAL

#624
ALASKA: LAWSUIT ABUSE
AGGREGATE
November 1995
(n=500)

Interviewer: _____

Date: _____

Time Start: _____

Time End: _____

Record:

Male - 48%
Female - 52

=====

A. Is [ASK FOR NAME ON LIST] available?

Yes ----- 1 [CONTINUE]
No ----- 2

[ASK WHEN WOULD BE A GOOD TIME TO REACH
HIM/HER]

Hi, I'm _____ from the Charlton Research Company, a national research firm.
We're talking with people in your area today and would like to ask you a few questions.

1. Do you feel things in Alaska are generally going in the right direction or do you feel things
have pretty seriously gotten off on the wrong track?

Right Direction----- 58%
Wrong Track----- 26
Don't Know [DO NOT READ] ----- 16

Now I'd like you to think about the issue of liability lawsuits -- the lawsuits where a person claims
to be injured and sues for money to pay for damages.

2. Thinking about the legal system here in Alaska, do you feel the present liability system is
working well and should not be changed, or do you feel the present liability system has
problems and should be improved?

System working well/no change----- 26% [SKIP TO Q4]
System has problems/should be improved ----- 43
Don't Know [DO NOT READ] ----- 32 [SKIP TO Q4]

[IF HAS PROBLEMS IN Q2, ASK:]

3. What are some of the problems with Alaska's liability court system that should be changed or improved? **[PROBE:]** Is there anything else? **[n=214]**

	<u>First Mentions</u>	<u>Total Mentions</u>
Too much money rewarded -----	17%	17%
Need new laws -----	14	27
Too easy to file lawsuits-----	14	22
Too many lawsuits -----	9	11
Fraud/Personal greed -----	9	9
Greedy//Unethical lawyers -----	7	10
Ties up the courts-----	7	8
Take resources away from real problems-----	3	4
Hurts innocent people-----	2	4
Everything-----	*	*
Other mentions-----	4	4
Don't know/refused-----	14	14

4. On a related subject, lawyers, like businesses, sometimes try to reach customers through advertising. Have you seen or heard any advertisements for lawyers recently?

Yes -----	60%
No-----	40
Don't Know [DO NOT READ] -----	*

5. One issue that has come up is reforming the state's legal system to reduce the number of frivolous lawsuits being filed. On this issue, have you seen, heard or read anything in the news lately?

Yes/seen -----	11%
Yes/heard -----	7
Yes/read -----	8
No-----	73
Don't Know/Refused [DO NOT READ] -----	1

6. From what you have heard about the issue of frivolous lawsuits, how serious a problem would you say they are in Alaska? Are frivolous lawsuits...**[READ LIST:]**

An extremely serious problem -----	8%
A very serious problem-----	18
A somewhat serious problem -----	36
Not a very serious problem -----	19
Not at all a serious problem -----	6
Don't Know/Refused [DO NOT READ] -----	14