Alaska State Legislature

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

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

see attached 4 pages

Signed: _____
Testifier

Paul Sweet
Representing (Optional)

P O Box 1562 Palmer 99645
Address

745-2242
Phone No.

9/16 Legislative Information Office

(1)

Tort Reform

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

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

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

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

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

Paul Sweet

ing in punitive damages.

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

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

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

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

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

Paul Sweet

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

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

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

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

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

Paul Sweet

(4)

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

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

DATE: 4/14/97

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

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

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

Thank you,

Mat-Su Legislative Information Office

Alaska State Legislature

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

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

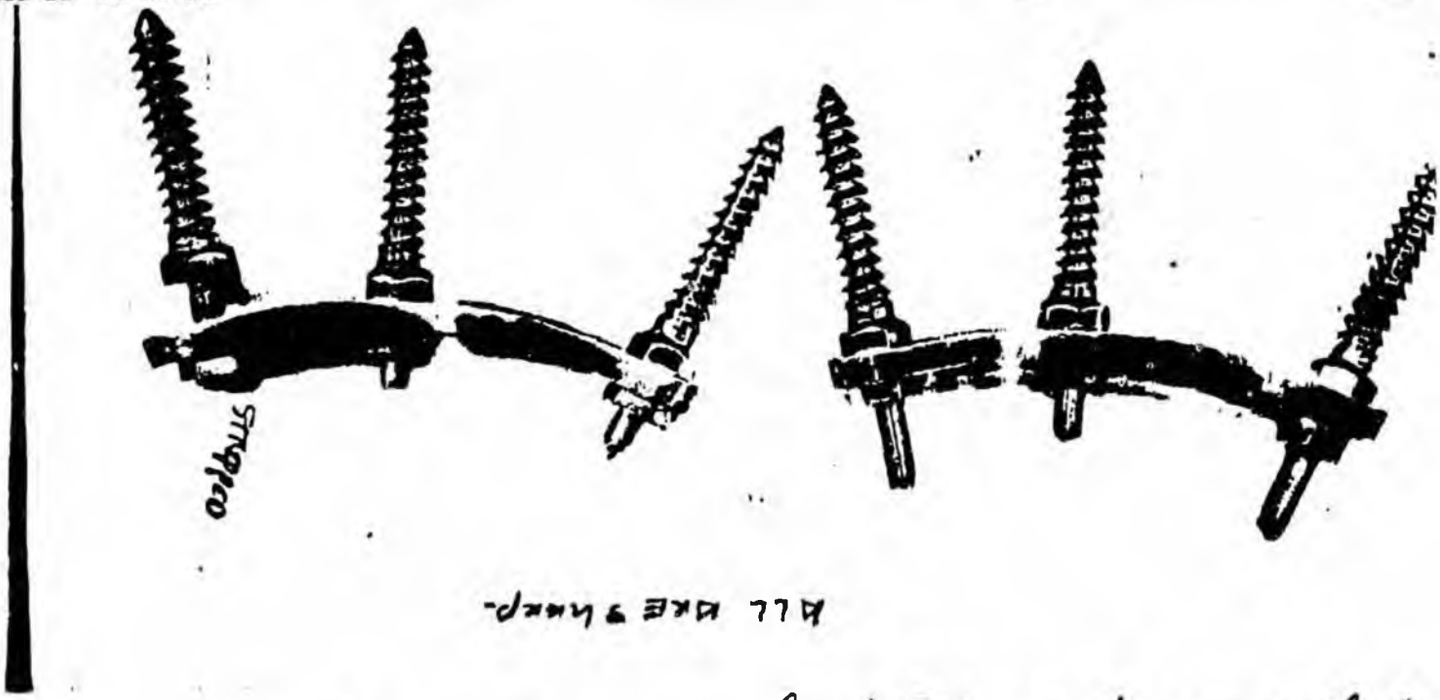
I Vote no on H/B 58 - I have been injured on the job for the State of Alaska. I have a Documented 1.6 - Million Dollar Loss - + I am 100% disabled from it. Will H/B 58 give me back my losses?

Signed: Don Patterson
Testifier

Representing (Optional)

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

907-373-6754
Phone No.



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

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

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

No on house Bill #58

Ph. 907-373-6754
FAX 907-373-6759

Don Patterson
Bx 873183
WASILLA AK.
99687

Alaska State Legislature

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

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

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

Signed: Floyd Cornelius
Testifier

Representing (Optional)

3501 Tamarack Wasilla AK
Address

907-376-7338
Phone No.

Public's rising voice: Physician, reveal thyself

THE ECONOMIST

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

FEB 13 1997

Dear Consumer:

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

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

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

Warnings:

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

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

Nancy M. Leonard

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

Enclosure

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
1390 Piccard Drive
Rockville MD 20850

February 17, 1994

UPDATE ON THE REGULATORY STATUS OF PEDICLE SCREWS

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

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

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

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

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

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

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

December 20, 1994

UPDATE ON PEDICLE SCREWS

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

How are the screws used?

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

How widespread is this use?

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

Why is FDA concerned about the screws?

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

Are there any spinal screws approved by FDA?

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

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

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

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

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

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

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

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

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

What about the problem of screws breaking inside the body?

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

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

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

In the meantime, what about people contemplating back surgery?

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

What are the surgical alternatives to the screws?

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

How about people who already have the screws?

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

MEDWATCH

THE FDA MEDICAL PRODUCTS REPORTING PROGRAM

INSTRUCTIONS FOR COMPLETING FDA FORM 3500A

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

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

SECTION A: PATIFNT INFORMATION

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

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

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

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

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

Provide the best estimate if exact age is unknown.

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

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

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

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

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

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

B5: **Describe event or problem** -

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

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

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

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

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

SECTION D: SUSPECT MEDICAL DEVICE

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

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

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

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

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

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

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

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

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

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

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

BACK PAGE

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

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

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

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

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

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

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

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

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

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

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

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

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

a distributor must submit to the manufacturer reports of

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

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

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

SECTION G: ALL MANUFACTURERS

This section is to be filled out by all manufacturers.

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

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

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

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

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

Study - Postmarketing, clinical trial, or surveillance study.

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

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

IND # - the investigational new drug application number.

PLA # - the product license application number.

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

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

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

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

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

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

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

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

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

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

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

Malfunction - see the guidelines.

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

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

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

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

Correction - changes to previously submitted information.

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

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

Device evaluation - evaluation/analysis of device.

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

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

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

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

Malfunction - see the guidelines.

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

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

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

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

Correction - changes to previously submitted information.

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

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

Device evaluation - evaluation/analysis of device.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INFORMATION RELATED TO: SB 15 & HB 58

Distributed by Senate Judiciary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 34. Repealers.

Section 35. Repealers.

Section 36. Repealers.

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

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

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

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

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

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

Section 43. Applicability section.

Section 44. Severability clause.

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

Section 46. Effective date for court rule change sections.

Section 47. Effective date.

MFF:pl
97-069.plm

ADN 3/24/97

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

By JEFF BUSH

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

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

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

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

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

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

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

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

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

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

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

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

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

LAW OFFICES OF
FRIEDMAN, RUBIN & WHITE

Richard H. Friedman
Jeffrey K. Rubin
Jeffrey A. Friedman
Michael N. White
Les Gara
James H. McComas, Of Counsel
H. Dee Taylor, Investigator

1227 West 9th Avenue, Second Floor
Anchorage, Alaska 99501
(907) 258-0704
Telefax: (907) 278-6449

To: Robin Taylor

From: Rick Friedman

Robin,

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

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

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

RHF

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

A CLOSING ARGUMENT FOR PUNITIVE DAMAGES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

KENNETH O. JARVI

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

March 20, 1997

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

Dear Senator Taylor:

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

Kenneth O. Jarvi

KOJ/sel/5119

AFFIDAVIT OF ROBERT BELLOTT

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

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

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

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

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

Law Offices of
FRIEDMAN, [illegible]IN & WHITE
1227 West 9th Avenue, Second Floor
Anchorage, Alaska 99501
(907) 258-0704

Dated this 16th day of October, 1996.

FURTHER YOUR AFFIANT SAITH NAUGHT.

Robert J. Bellott
Robert Bellott

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

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

Law Offices of
FRIEDMAN, [illegible]IN & WHITE
1227 West 9th Avenue, Second Floor
Anchorage, Alaska 99501
(907) 258-0704

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

jeffjan@alaska.net

January 25, 1997

Senator Sean Parnell
State Capitol
Juneau, AK 99801-1182

Sent by Fax to 465-2278

Dear Senator Parnell:

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

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

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

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

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

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

Sincerely,

Jeff Friedman

cc: Sen. Robin Taylor (by fax)

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

VIA FAX & FIRST CLASS MAIL

March 23, 1997

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

Re: Exemplary Damage Awards, Proposed Legislation.

Dear Robin:

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

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

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

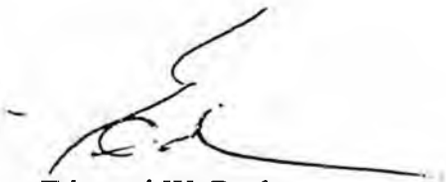
> There are those who distrust the lay person's capacity for reasoned and dispassionate judgment. There are those who tolerate the juries but feel compelled to hold tight rein lest the wretched twelve break the bank. This judicial chauvinism will, if not checked, inevitably erode the jury process.

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

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

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

Sincerely yours,



Edmond W. Burke

PROPOSED LEGISLATION

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

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

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

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

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

NOW, THEREFORE, BE IT ENACTED:

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

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

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

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

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

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

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

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

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

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

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

When Courts Become Political Battlegrounds

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

By Dale Russakoff
Washington Post Staff Writer

BIRMINGHAM

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

STATES

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

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

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

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

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

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

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

FROM A TELEVISED POLITICAL AD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The New York Times

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

By DON TERRY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Menorahs Bloom From Act of Vandalism

By JENNIFER PRESTON

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

Tort-reform battle heats up in Juneau

Both sides on the issue appeal to human element

By NATALIE PHILLIPS
Daily News reporter

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

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

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

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

Business owners, medical professionals and insurance industry leaders insist that

Please see Page B-3, TORT REFORM

TOM MORPHET Special to the Daily News

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

Senate leader is confident Legislature will pass a bill

By RALPH THOMAS
Daily News Juneau Bureau

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

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

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

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

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

Please see Page B-5, LEGISLATURE

Anchorage Daily News

LEGISLATURE: Senator expects bill

PAGE 5

Continued from Page B-1

charge for the past four years.

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

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

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

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

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

TORT REFORM: Both sides of issue argue the human element

Continued from Page B-1

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

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

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

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

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

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

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

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

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

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

Photo courtesy of the Fredericksen

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

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

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

DEJA VU ALL OVER AGAIN

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

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

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

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

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

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

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

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

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

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

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

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

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

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

'SOMETHING HAS GOT TO CHANGE'

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

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

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

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

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

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

Seybert has stopped offering boat captains the service.

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

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

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

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

Please see Page B-4, TORT REFORM

TORT REF(

Continued from Page B-3

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

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

Limits on damages might streamline the system.

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

A MATTER OF FAIR COMPENSATION

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

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

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

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

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

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

Murray will never walk

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tort reform at a glance

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

The language

Making sense of legal lingo

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

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

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

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

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

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

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

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

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

Bruce Cain, CPA

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

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

VIA Fax

April 2, 1997

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

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

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

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

Sincerely:

Bruce Cain

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

Alaska State Legislature

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

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

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

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

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

Signed: Bill Pace
Testifier

Self
Representing (Optional)

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

1 (907) 376-2284
Phone No.

9/96 Legislative Information Office

Alaska State Legislature

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

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

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

Signed: Tom Namtvedt
Testifier

Representing (Optional)

5640 Portage Dr Wasilla 99654
Address

376 7060
Phone No.

9/16 Legislative Information Office

Alaska State Legislature

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

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

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

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

Thank you for considering my testimony.

Signed: James Tuttle
Testifier

Representing (Optional)

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

(907) 892-8187
Phone No.

9/116 Legislative Information Office

Alaska State Legislature

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

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

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

Signed: Robert A. Martinson
Testifier

CDFU Gillnet division
Representing (Optional)

900 IROQUOIS DRIVE Wasilla, AK 99654
Address

907-373-2627
Phone No.

Robert Martinson

9/16 Legislative Information Office

P.02

APR-12-97 SAT 10:51

Alaska State Legislature

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

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

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

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

Thank you.

Signed: Nancy Michaelson
Testifier

Representing (Optional)

HC5 Box 6916F Palmer, AK 99645
Address

745-6673
Phone No.

9/116 Legislative Information Office

Alaska State Legislature

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

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

see attached 4 pages

Signed: _____
Testifier

Paul Sweet
Representing (Optional)

P O Box 1562 Palmer 99645
Address

745-2242
Phone No.

9/96 Legislative Information Office

Tort Reform

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

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

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

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

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

Paul Sweet

(2)

ing in punitive damages.

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

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

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

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

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

P. 1 of 2

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

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

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

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

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

Paul Arnett

(4)

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

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

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

Sound Women's Health Care

Cynthia Brooke, MD
A balance of treatment and prevention.

March 24, 1997

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

Dear Senator Pearce,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you very much for your consideration.

Sincerely,

Cynthia L. Brooke, MD

/plc

Mr. Chair.

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

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

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

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

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

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

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

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

Consider the following:

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

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

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

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

Douglas E Wood

Sovereign citizen of the Republic of Alaska.

4-11-97

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

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

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

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

from Ours, and this insurdous step by our legislature would give them tremendous leverage in the Court System to overturn our current damages.

Since the option; P(W)S is there (No risk means, no fault, risk fault - no damages - for the last five years. This feasible bill would remove any possibility of any financial compensation for these 35,000 fatalities, and their families. No one in the legislature would consider cutting their income to less than 75% of their current income, with all their expenses remaining at current levels - Considering the negligible raise they just gave themselves.

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

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

Thank you,

Roy Estes
711 Lady Samantha

Eyak corporation's

WSCA

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

Thank you for this time to express our concerns.

"LETS GET IT STRAIGHT"

A blitz of media and other sources of misinformation and disinformation is now being mounted to obscure the real impact that provisions of HB 58 are likely to have on many Alaskans' lives. One particularly objectionable and aggressive organization is the State Chamber of Commerce acting in part as a spokesman of Bill Allen and Veco Co., with material provided by David Bundy esq, one of Veco's attorneys. There is a lot more underlying this than meet the casual observers eye.

Additionally, the sponsor of "**true tort reform,**" Representative Brian Porter is also observed to be most adept at use of misinformation and disinformation (which most of us refer to as lying). For example, in 1996 Porter chose to rely upon a letter he received from Juneau attorney Michael Lessmeier stating that the impact of Porters "true tort reform measure" HB158 and the onerous "11th hour" language inserted (we hear at the urging of Bill Allen) would have no impact on the Exxon Valdez plaintiffs because that case had reached final judgement. Lessmeier stated, "There is a clear answer to question of whether this legislation (ie. HB158) has any effect on the Exxon Valdez punitive damage award. <u>That answer is none whatsoever</u>. (emphasis added). Rep. Porter used this totally false and bogus information in his attempts to discredit the opposition to his bill by contending that the opponents of his "true tort reform" bill were actually being manipulated by the "Trial Lawyers Assn". That my friends is total BS!

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

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

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

2. Porter states: HB58 "creates a big incentive for businesses of any size to prevent future environmental disasters." because "of the huge clean up price tag". Apparently that point was overlooked by Exxon in 1989 when they knowingly let an alcoholic to command a vessel.

3. Porter states: "If the Exxon Valdez situation were governed by HB58, the amount of punitive damages could have been as high as 4.8 billion, not far from the 5 billion actually awarded". **WRONG!** Porter includes the 900 million awarded to the State of Alaska in a separate action. It is extremely unlikely that this would be construed to be part of the plaintiffs compensatory damage.

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

> To recover punitive damages, the plaintiff must prove that the wrongdoer's conduct was outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another. Actual malice need not be proved. Rather, reckless indifference to the rights of others, and conscious action in deliberate disregard of them...may provide the necessary sate of mind to justify punitive damages.(my emphasis added.)

This makes it crystal clear that under current Alaska law, malice is different from reckless indifference, and either one will support an award of punitive damages. **This would all be changed if HB58 became law.** Reckless indifference would no longer be sufficient to award punitive damages. Instead, actual malice would have to be proved. Why? are sponsors of HB58 unwilling to maintain the existing language of proof required by current state law? I would really like a truthful answer to that puzzle.

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

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

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

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

Thank you for your valuable time.

Signed: Ross Mullins

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

RECEIVED
APR 11 1997

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

April 11, 1997

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

RE: Tort Reform

Dear Senators Pearce and Sharp,

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

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

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

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

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

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Representative Brian Porter

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

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

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

Thank you for your valuable time.

Signed; Ross Mullins

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

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

2. Porter states: HB58 "creates a big incentive for businesses of **any size** to prevent future environmental disasters." because "of the huge cleanup price tag". Apparently that point was overlooked by Exxon in 1989 when they knowingly let an alcoholic to command a vessel.

3. Porter states: 'If the Exxon Valdez situation were governed by HB58, the amount of punitive damages could have been as high as 4.8 billion, not far from the 5 billion actually awarded". **WRONG!** Porter includes the 900 million awarded to the State of Alaska in a separate action. It is extremely unlikely that this would be construed to be part of the plaintiffs compensatory damage.

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

> To recover punitive damages, the plaintiff must prove that the wrongdoer's conduct was outrageous, such as acts done with malice or bad motives **or** a reckless indifference to the interests of another. Actual malice need not be proved. Rather, reckless indifference to the rights of others, and conscious action in deliberate disregard of them...may provide the necessary sate of mind to justify punitive damages.(my emphasis added.)

This makes it crystal clear that under current Alaska law, malice is different from reckless indifference, and either one will support an award of punitive damages. **This would all be changed if HB58 became law.** Reckless indifference would no longer be sufficient to award punitive damages. Instead, actual malice would have to be proved. Why? are sponsors of HB58 unwilling to maintain the existing language of proof required by current state law? I would really like a truthful answer to that puzzle.

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

"LETS GET IT STRAIGHT"

A blitz of media and other sources of misinformation and disinformation is now being mounted to obscure the real impact that provisions of HB 58 are likely to have on many Alaskans' lives. One particularly objectionable and aggressive organization is the State Chamber of Commerce acting in part as a spokesman of Bill Allen and Veco Co., with material provided by David Bundy esq, one of Veco's attorneys. There is a lot more underlying this than meet the casual observers eye.

Additionally, the sponsor of "**true tort reform,**" Representative Brian Porter is also observed to be most adept at use of misinformation and disinformation (which most of us refer to as lying). For example, in 1996 Porter chose to rely upon a letter he received from Juneau attorney Michael Lessmeier stating that the impact of Porters "true tort reform measure" HB158 and the onerous "11th hour" language inserted (we hear at the urging of Bill Allen) would have no impact on the Exxon Valdez plaintiffs because that case had reached final judgement. Lessmeier stated, "There is a clear answer to question of whether this legislation (ie. HB158) has any effect on the Exxon Valdez punitive damage award. That answer is none whatsoever. (emphasis added). Rep. Porter used this totally false and bogus information in his attempts to discredit the opposition to his bill by contending that the opponents of his "true tort reform" bill were actually being manipulated by the "Trial Lawyers Assn". That my friends is total PS!

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

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

Alaska State Legislature

Written Testimony Form

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

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

I strongly oppose HB 58

Signed: Douglas L Petta
Testifier Name

Copper Hwy Heating
Representing (Optional)

P.O. Box 745 Cordova Alaska
Address

907 424-3107
Phone Number

Alaska State Legislature

Written Testimony Form

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

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

I oppose HB 58 !!

Signed: Carmelita "Collette" Pettit
Testifier Name

_____
Representing (Optional)

P.O. Box 745 Cordova, Alaska
Address

(907) 424-3107
Phone Number