ALASKA LEGISLATURE 1633

HOUSE and SENATE FINANCE COMMITTEE FILES, 1997-1998

Mr. Chair,

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

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

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

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

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

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

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

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

Consider the following:

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

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

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

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

Sovereign citizen of the Republic of Alaska.

4-11-97

Alaska State Legislature

Written Testimony Form

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

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

Signed: Dennis Earl Weathers
Testifier Name

Representing (Optional)

Box 1791, Deep Bay Hawkins Island
Address Via Cordova, Alaska 99574

1-907-424-3745
Phone Number

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

Thank you for this time to express our concerns.

Alaska State Legislature

Written Testimony Form

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

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

Signed: AMY BROCKERT
Testifier Name

THE EYAK CORPORATION
Representing (Optional)

BX 340 CORDOVA, AK 99574
Address

907-424-7161
Phone Number

My feelings on HB 58 are very strong! - to say the least!

It is a slap in the face to all Alaskans - the only benificiaries are big bucks; the oil companies, and the ~~company~~ corporations that control our canneries.

It gut our legal system of any ability to give any sort 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.

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

Alaska State Legislature

Written Testimony Form

Please enter into the record my testimony to the SEN. FINANCE (committee name)

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

Signed: Roy L Estes
Testifier Name

Estes' Family - F.V. Lady Samantha
Representing (Optional)

Box 1709 - Cordova, Alaska
Address

907-424-7228
Phone Number

Box 2574
Cordova, Alaska 99574
11 April 1997

Honorable Governor Knowles
Alaska State Senate Members
Alaska State House of Representatives Members

I am not surprised that some measures of legal limitations on actual damages and punitive damages are needed to prevent outrageous awards. But, in Alaska we have not had outrageous awards. We have not had a court docket that is loaded with frivolous cases.

When a jury of one's peers determines that actual damages are warranted, they have seen the evidence that supports that award. When the jury has seen the profit a corporation or company has made because of their poor judgment or ignored the injured party's life or impact on their life, a punitive damages award is reasonable based on what it will take to get the corporation's attention to be more careful. The jury has not frivolously determined the amount of the punitive damages; they have used solid evidence.

To hamstring a jury of Alaska citizens by limiting what they believe will bring the lawsuit to a moral and legal conclusion by enacting a tort reform law as is now proposed is an insult to the legal process as well as to the ability of Alaska citizens to protect the public.

To include that the State of Alaska would share in the damages award is insane. The State has a responsibility to protect its citizens from irresponsible business actions. It has the oversight of enforcing pollution laws -- laws that keep our land pristine and beautiful. For the State to profit from an individual's trauma of is likened to a vulture circling a dying animal - just waiting for it to die and finishing it off!

Please do not enact this Tort Reform bill. It is not healthy for the citizens of Alaska; it does nothing to promote the spirit of the Last Frontier; it does not protect the citizens; it does not demonstrate that we have responsible leaders in our government. It only benefits those who wish to exploit our great State.

Sincerely,

Patience

Patience Andersen Faulkner

Alaska State Legislature

Written Testimony Form

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

committee on _____, dated 4-11-97.
(bill/subject)

Signed: Patrenee Andersen Faulkner
Testifier Name

Alaska Native
Representing (Optional)

Box 2574 Cordova
Address

(907) 424-7585
Phone Number

Alaska State Legislature

Written Testimony Form

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

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

I OPPOSE HB 58

WRONG DOERS MUST BE SUFFICIENTLY FINANCIALLY DETERRED FROM RUINING OUR ENVIRONMENT AND OUR LIVES.

WE CANNOT BELIEVE WHAT WE ARE BEING TOLD BY THE WRITERS OF HB 58. WE HAVE CONSISTENTLY BEEN LIED TO IN THE PAST — FIRST BY SEN. STEVENS WHO PROMISED "NOT ONE DROP OF OIL WILL BE SPILLED IN PWS". THEN AFTER THE SPILL BY EXXON WHO PROMISED "TO MAKE US WHOLE". WE, THE PEOPLE, MUST HAVE THE LEGAL RIGHT TO BE PROTECTED FROM RECKLESS ACTIONS OF OTHERS.

Signed: SHEELAGH MULLINS
Testifier Name

SELF (FISHERWOMAN)
Representing (Optional)

BOX 436, CORDOVA 99574
Address

(907) 424 - 3664
Phone Number

Testimony in Support of House Bill 58
April 11, 1997

Mr. Chairman and Members of the Committee:

My name is Christy Tengs Fowler. I have a bar and restaurant and liquor store in Haines. I feel so strongly about this issue tnat I flew in from Haines specifically to testify at this hearing.

I n July of 1990, a young man (6 months short of 21) used a fake I.D. to purchase at our liquor store. A few hours later he totalled his Toyota pick-up and died in the crash. It didn't matter to his parents that he broke the law 9 times that night. It also didn't matter that he had shown 8 of our employees I.D. that met Alaska's requirements for proof of age. Nor did it matter that he had purchased and consumed alcohol in the presence of his parents. They filed a civil suit against us claiming we were entirely responsible for their son's death.

A year and a half later, we settled the suit for $37,500. Although we felt we could win the case, it would have cost twice that to get to trial. Financially it was disastrous for our small business which has been in my family for 44 years. Just this year we closed our liquor store for good. The financial cost pales, however, next to the emotional toll it took on not just my family, but on the whole town.

From this experience I lost my faith in the inherent goodness of mankind. I know there are people deserving of compensation for their injuries, but there are many more who take advantage of the legal system and try to find someone or something else to blame for whatever is wrong or unsatisfactory or just plain unpleasant in their lives. People know they can do stupid and dangerous things then blame someone else for it.

I am not free to do business as usual. I am paranoid. I know that even if I do everything right, if someone chooses to sue me, I can lose everything without even seeing a courtroom.

When you vote on House Bill 58, please think of those of us in business, especially in Southeast, who have lost our year-round economy, who are brutalized by taxes, beseiged by government regulations, who can't afford insurance, and whose production costs have increased because of liability costs passed on to us.

Please vote for House Bill 58 and give us some incentive for staying in business.

Alaska State Legislature

Written Testimony Form

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

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

HB 58
2187

Corrected version

Signed: Ross Mullins
Testifier Name

See Testimony
Representing (Optional)

Address

Phone Number

"LETS GET IT STRAIGHT"

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 totally FALSE.

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 to 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 <u>or</u> a reckless indifference to the interests of another. <u>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 state of mind to justify punitive damages</u>.(my emphasis added.)

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

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

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

I urge the the thoughtful members of the Senate majority and any in the minority that support this current extreme tort reform measure make a clear exception for torts relating to natural resource disasters and ecosystem disruptions. This would be easily achieved by adding at the end of the bill with appropriate number the following language:

xxx. sub section:

PROPOSED AMENDMENTS

(a). In cases of Torts relating to natural resource damages including disasters and ecosystem disruptions, the following sections of this bill do not apply: 5, 10, 11-15, 17-20, 22-23, and 35.

(b). It is intended that the passage of this legislation, HB58, (as amended,) shall in no way be applied or applicable to the litigation, now ongoing, between certain Alaska citizens and Exxon Corporation ensuing from North Americas largest oil spill, occurring on March 24, 1989. It is the intent of the Alaska State Legislature that HB58 shall not be construed by any one or by any legal body, to apply in any manner whatsoever to the continuing Exxon Valdez litigation. This shall include all appeals and any remanded or ordered retrials to a lower court that may occur after the passage of this legislation known by all as HB 58.

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

Thank you for your valuable time.

Signed; Ross Mullins

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

ALASKA STATE EMPLOYEES ASSOCIATION
AFSCME Local 52, AFL-CIO

HEADQUARTERS, 3510 Spenard Road, Ste. 201, Anchorage AK 99503
(907) 277-5200 * Toll Free 800-478-ASEA * Fax (907) 277-5206

April 10, 1997

Senator Bert Sharp, Co-Chair
Senate Finance Committee
State Capitol Mail Stop 3101
Juneau, Alaska 99801-1182

Dear Senator Sharp:

The Public Employment Relations Act (PERA) was passed in 1972, and in the past twenty-five (25)) years this act has resulted in a labor relations environment that has produced approximately one hundred (100) collective bargaining agreements. During this quarter of a century collective bargaining has worked well and the states workers feel that they have a meaningful voice in determining their terms and conditions of employment.

There have only been three instances where collective bargaining has resulted in a strike by state workers, these were in 1974, 1975, and 1977. In the first two instances the strikes lasted only a day or two, and in 1977 it lasted approximately three (3) weeks. That's it, in a quarter of a century there has been labor peace 99.008% of the time. (I also feel it is important to note that the General Government Bargaining Unit (GGU) has never been on strike.) PERA has been beneficial for the State of Alaska and the workers that it has employed.

The public policy purpose of PERA is stated very clearly:

> **23.40.070. Declaration of Policy.** The legislature finds that joint decision-making is the modern way of administering government. If public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, to strengthen the merit principle where civil service is in effect, and to maintain a favorable political and social environment. The legislature declares that it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government.

And, in my view, this public policy purpose has been fulfilled over the past quarter century and will continue to be satisfied well into the next century with the existing PERA statute.

Unions engage in free speech, and we engage in the political process. Our right to do so is no different than the rights of women's groups, religious groups, the chamber's of commerce, retired persons, minority groups, political subdivisions, and/or any other group interested in public policy.

I have been asked many times, "What is the purpose of your Union?" And, my consistent response has been that our purpose is to secure the best possible terms and conditions of employment and the fair and just treatment of all individuals in our bargaining unit. As of this point in time we have achieved only a moderate amount of success, and in my view the balance of power between public employee unions and management is balanced. It was the intent of PERA to create a level playing field between labor and management and its purpose has been fulfilled. The work done by our members is honorable work and to give it some definition I am going to list the kind of work done by the members of ASEA/AFSCME Local 52.

We:

1. Implement fair and honest elections;
2. Enforce fair treatment of Alaskan workers;
3. Carry out retirement programs;
4. Invest and audit Alaska's income and investments;
5. Provide care and custody for Alaska's needy seniors;
6. Provide for citizen legal services;
7. Monitor Alaska's financial institutions;
8. Encourage domestic and foreign commerce;
9. Monitor Alaska's insurance companies;
10. Require that measurement standards be fair;
11. Insure that professionals are properly licensed;
12. Promote and encourage tourism to our state;
13. Require accountability of public utilities;
14. Train, help finance, and assist Alaskan local governments;
15. Monitor and provide for educational funding and opportunities;
16. Train the unemployed, people with disabilities, displaced, and convicted;
17. Provide financial assistance, training, and employment opportunities for the unemployed;
18. Contain the criminals---be they adult or juveniles;
19. Monitor convicted criminals on probation and/or parole;
20. Fund and teach the children and adults;
21. Maintain history and plan for the future;
22. Insure the safety of the air, water, and the land;
23. Guarantee the continued abundance of the fish and wildlife for all;
24. Redirect the chemically dependent;
25. Assist families in domestic, financial, and medical jeopardy;
26. Care for the mentally and physically disadvantaged;
27. Require safety in the workplace and places of public accommodation;
28. Prosecute the indicted;
29. Guarantee all citizens due process;
30. Assist and help in times of natural disaster;
31. Respond to commercial and private airline tragedies;
32. Insure the sustainable yield of renewable resources;
33. Because of us "Alaskan Grown" happens;

34. We survey, monitor, and assign fair value to the land;
35. Guarantee that workers are fairly paid;
36. Public safety is our responsibility;
37. Monitor and see to it that all revenues due the state are paid;
38. Require and enforce the payment of child support;
39. Provide resources that enable the ownership of homes and businesses;
40. Protect, defend, and invest the permanent fund---and we distribute the dividend; and
41. We guarantee the design, construction, maintenance, and future security of the infrastructure of our state.

Senate Bill 151 would result in a labor relations environment that would be oppressive to the worker.

All of this work is important to the people of Alaska, we do it proudly and believe it deserves respect. Your committee has proposed Senate Bill 151, which is a complete rewrite of the existing collective bargaining statute. This bill proposes to amend, add to, and repeal sections of PERA in at least seventy-seven (77) ways, and there is no justification or reason for most of these amendments.

The Unions in this state, both public and private sector, have met to discuss this, and other anti-labor bills, and we have all agreed to share the cost of a comprehensive analysis of the public policy impacts of Senate Bill 151. We intend to select a neutral master who understands both labor and management issues. We will share the outcome of this analysis with you at the earliest possible time.

While it is no surprise to you that I, as the Business Manager of the largest Union in the AFL-CIO oppose this bill, I would respectfully request that as a matter of good public policy you delay passing SB 151 out of the Senate Finance Committee until such time as an objective dialogue can take place concerning the proposed seventy-seven (77) amendments to PERA which are contained in Senate Bill 151.

Thank you in advance for your attention and consideration.

Sincerely,

Charles L. O'Connell

Charles L. O'Connell
Business Manager
ASEA/AFSCME Local 52

AACA

ALASKA AIR CARRIERS ASSOCIATION
1117 E. 35th Avenue, Suite 102
Anchorage, Alaska 99508
(907) 277-0071 Fax (907) 277-0072

AACA

RESOLUTION 97-1

TORT REFORM

RESOLUTION supporting sponsor substitute for HB58.

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

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

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

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

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

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

March 10, 1996

Representative Gene Therriault
State Capitol
Juneau, Ak 99801-1182

Dear Rep Therriault:

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

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

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

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

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

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

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

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

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

PENAIR • 4451 Aircraft Drive • Anchorage • Alaska • 99502 • (907) 243-2485 • Fax 243-6848
Peninsula Airways, Inc. D/B/A PENAIR

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

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

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

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

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

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

Very truly yours

Orin D Seybert
President

Enclosures (4)

CC: Rep Porter

November 21, 1996

Rep Brian Porter
State Capitol
Juneau, AK 99801-1182

Dear Brian:

Penair is involved right now in a scenario that clearly highlights the need for tort reform.

We lost a [redacted] The one passenger was a highly compensated, [redacted]. He was relatively young, and left a wife and two daughters.

Enclosed is copy of the letter from her attorney, estimating purely economic value of $2.7 million. (by the way, there will be no finding of any negligence on our part whatsoever).

In past years, we normally carried a $20 million Combined Single Limit (CSL) for any accident. As you know, that sum is available for all the passengers collectively. If there were nine passengers, each estate would be entitled to over two million, or varying amounts as the case proved. In this case the entire twenty million would have been available.

Two years ago the London underwriters, primarily the BAIG, (British Aviation Insurance Group) simply refused to write any more Alaskan commuters, period. That leaves us with only two underwriters in the world, AIG (Aviation Insurance Group in Atlanta) and USAIG (US Aviation Insurance Group in New York, different company).

They absolutely refuse to write the CSL any more, so we are now limited to one million dollars per seat. Most of the other operators only have $500,000 per seat, and some of the real small operators are at $150,000.

The reason given is not particularly related to the perceived accident rate or difficult operating conditions in Alaska. Rather the overwhelming problem is the fact, or at least perception, that Alaska has a history of the highest punitive damage jury awards in the nation.

PENAIR • 4451 Aircraft Drive • Anchorage • Alaska • 99502 • (907) 243-2485 • Fax 243-6348
Peninsula Airways, Inc. D/B/A PENAIR

PAGE TWO

So back to the letter from [redacted] you see him bragging about the punitive damages being 12 to 16 million. And this apparently is possible without any negligence by the defendant!

My first reaction was to realize that Penair is exposed, so I examined our customer base to see where potential problems lay. That resulted in the enclosed letter to the Alaska Marine Pilot group. So a direct result of the insurance problem is impacting the ability of some companies to do business. I am preparing similar letters to other customers.

I have thought of another argument for reform. Since the limits are so low, there is actually less money available for the average Alaskan claimant. If we could just cap the punitive damages there would be more insurance coverage available.

For instance the Jimair crash at Lake Hood in September killed three tourists, but they only had $150,000 per seat insurance. Since there were no other assets, it doesn't make any difference what the judgement is, but if it were easier for underwriters to write higher limits, there would then be more money available in cases such as that.

Anyway, as I told you I am now highly motivated to help write the bill this session, and I intend to be there.

I would like to ask for your help in letting me know when things are happening during the session, and who the key players are that I need to work on.

Very truly yours

Orin D Seybert
President

CC: Gail Phillips
Rick Halford

PENAIR
The Spirit of Alaska

November 8, 1966

Capt. Stephan Moreno
Alaska Marine Pilots
2622 38th Ave S. W.
Seatle, Wa 98126

Dear Steve:

We recently concluded a very, very difficult insurance renewal. Not only did the price increase drastically, we were not able to get any increase in limits. We still have only one million dollars for passenger liability.

In view of our tragedy it has made me realize that Penair cannot afford to be put in such a position again.

So I am in the process of identifying charter groups and individuals where the resource generated does not justify the risk associated with the contract. Certainly the Alaska Marine Pilots (and any marine pilot) is a perfect example.

Therefore, I am sorry to say that effective immediatedly we will no longer be able to provide transportation to your group.

This limitation applies only to charter or contract operations involving the nine or less passenger planes. We were able to get proper limits on the larger aircraft operating the schedules out of Anchorage.

I am having our attorney look into the possibility of having a limitation of liability agreement the customer could execute which would limit the exposure in the event of an accident. If such becomes available we will contact your groups at that time for the purpose of discussing the resumption of service.

Very truly yours

Orin D Seybert
President

CC: Hal Snow

PENAIR • 4851 Aircraft Drive • Anchorage • Alaska • 99502 • (907) 243-2485 • Fax 243-6848
Peninsula Airways, Inc. D/B/A PenAir

PENAIR
The Spirit of Alaska

November 26, 1996

Magone Marine
P. O. Box 442
Dutch Harbor, Ak 99692

Dear Dan:

On September 30 we concluded a very, very difficult liability insurance renewal. Not only did the price increase drastically, but for the second year in a row we were unable to get passenger liability limits over one million dollars per passenger seat.

After our accident of August 11, it has become apparent that under present Alaska law judgements in wrongful death claims can be many millions of dollars, even without any negligence.

So I have been looking at each charter customer, trying to analyze the possible exposure of Penair. It occurs to me that your divers are probably young and highly compensated, which would lead to such an excessive award.

Therefore, I must decline to provide you with such charter services, we simply cannot accept the risk.

My attorney is working on some sort of "hold harmless" or limitation of liability that the passenger could execute, we hope to have that available in the next few weeks.

Meanwhile, the real problem is the present Alaska laws, this situation clearly illustrates the need for Tort reform. I intend to be working on this issue during the upcoming legislative session, and would appreciate any help you might be able to give.

Very truly yours,

Orin D Seybert
President

PENAIR • 4851 Aircraft Drive • Anchorage • Alaska • 99502 • (907) 243-2485 • Fax 243-6848
Peninsula Airways, Inc. D/B/A PenAir

Cordova District Fishermen United

Celebrating 62 Years of Service to Commercial Fishermen in Cordova, Alaska
P.O. Box 939 Cordova, Alaska 99574 / Telephone (907) 424-3447 / Fax (907) 424-3430

April 10, 1997

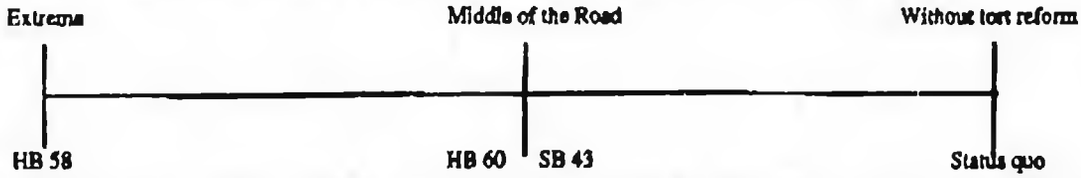
TO: All Alaska Representatives and Senators
FROM: Cordova District Fishermen United
RE: HB 58 Tort Reform
SENT: Via Facsimile

Dear Alaska Legislator:

In response to the April 4 memo distributed to majority representatives and senators by Representative Porter regarding House Bill 58 (Tort Reform), I would like to clear up some misunderstandings. First let me begin by saying that the commercial fishing industry *does* support responsible tort reform. In a letter to Representative Porter dated February 27, I made this statement abundantly clear while submitting amendments the commercial fishing industry thought were reasonable and responsible.

Representative Porter writes, "the trial lawyers are manipulating the fishermen....into acting as their tool." Please be advised that Cordova District Fishermen United began their campaign against HB 58 immediately after it was introduced on January 13. I personally met with both of my legislators while in Juneau in early February and discussed the problems with HB 58. The recent outcry by Cordova residents is the result of a grassroots movement by citizens who are afraid their concerns are not being addressed and it is not a "well-orchestrated" last ditch hope by trial attorneys in Alaska.

HB 58 *is* radical legislation! The following graph depicts our concept of tort reform to the extreme:



In Representative Porter's memo he states that the Governor's Advisory Task Force was dominated by trial lawyers. Please refer to the list of participants and see for yourself that this statement is completely untrue. You will also find that not one Exxon plaintiff attorney was seated on this task force.

I checked two of the legal interpretations made by Representative Porter and was surprised to find inaccuracies. 1) In a recent Alaska Supreme Court decision, Alaska state law can be applied in Federal Maritime context if there is no direct conflict and 2), requiring malice or conscious acts showing deliberate disregard of another person would be needed for punitive damages to be awarded under HB 58. Porter says that "malice" and "reckless indifference to the rights of others" are interpreted the same by the Alaska Supreme Court in awarding punitive damages. However, the case cited by Representative Porter holds the opposite, In fact, you would have to prove malice or show deliberate disregard of another person under the constraints of HB 58. With these conditions, punitive damages would not have been awarded in the Exxon Valdez case. Proving malice in litigation involving a grounded supertanker would be an impossible task in future cases. Further, HB 58 might jeopardize the judgment against Exxon now on appeal, see the enclosed memo from Matt Jamin, one of the attorneys in that case.

Another misrepresentation I found was the calculation of the possible Exxon Valdez punitive award under HB 58. Representative Porter states that the award could be as high as $4.8 billion. My calculations show that under HB 58, the punitive award paid to the plaintiffs would be vastly reduced from the original award. Is this equitable for the indigenous people and fishermen who have suffered greatly in the wake of this horrendous disaster?

A final point of contention is Representative Porter's claim that 60 attorneys would be splitting the $1 billion in attorney fees... try 400 attorneys! Furthermore, the attorneys' fees award is subject to federal court approval.

Please consider the inaccuracies of Representative Porter's memo before deciding the fate of the people of Alaska. Talk with Senate Finance committee members if you have reservations regarding HB 58. Look at the real facts and as Representative Porter so eloquently states, "Don't be fooled and don't be manipulated!" Thank you for your time and consideration.

Sincerely,
CORDOVA DISTRICT FISHERMEN UNITED

Cheri Shaw

Cheri Shaw, Executive Director

/enclosure

cc Governor Tony Knowles
Lt. Governor Fran Ulmer
United Fishermen of Alaska

Memorandum

To: Lacey Benu

From: Matthew D. Jamin

Date: April 9, 1997

Subject: Exxon Valdez and Tort Reform

I appreciate your request that I comment on behalf of the class of punitive damage claimants for whom I serve (with several other attorneys) as class counsel.

1. Who recovers if the Exxon verdict is sustained, or, stated differently, which legislators' constituents are affected? Though any recovery goes primarily to fishermen in the oiled areas (PWS, Cook Inlet, Chignik and Kodiak), a significant portion goes to the "unoiled" fisheries, a fact perhaps not generally well known, but of importance to legislators whose constituencies include commercial fishers. Average recoveries are expected as follows for the following fisheries. Note that these are just some of the fisheries affected. All salmon and herring fisheries statewide (e.g., Norton Sound and Yukon) will receive payments as well.

Fishery	permit holders	average recovery
Southeast Salmon Seine	375	$50,000
Southeast Salmon Drift	475	$10,000
Southeast Herring Seine	50	$10,000
Peninsula Aleutians Salmon Seine	125	$70,000
Peninsula Aleutians Salmon Drift	165	$50,000
Peninsula Aleutians Salmon Set	115	$25,000
Bristol Bay Salmon Drift	1900	$30,000
Bristol Bay Salmon Set	1000	$10,000

Note that unoiled permit holder recoveries get shared with crew as well, so in each of the unoiled fisheries, a very significant portion of each applicable legislator's constituents will be affected by how the Exxon Valdez oil spill litigation fares on appeal.

As to the affect in Kodiak, Senator Mackie's region, well in excess of $1 billion dollars is slated to come to the community if the verdict is sustained. Obviously, any affect that tort reform might have statewide pales by comparison to the direct effects on Jerry's constituents. Among those who will recover are commercial fishers, their crew, municipalities (the City of Kodiak, Kodiak Island Borough, Old Harbor, Port Lions, Larsen Bay and Ouzinkie), all Alaska Natives in the area, all property owners with beachfront including all Native Corporations, the Kodiak Regional Aquaculture Association, several of the area processors, and other businesses and fish tenderers. Exactly the same situation obtains for representatives whose regions cover the Kenai Peninsula, Prince William Sound and Chignik areas, and, to a lesser extent, as explained above, wherever there are commercial salmon or herring fishers in the state.

2. What's the real affect of the proposed legislation on the case as it stands right now?

As one of the people working on the appeals, I believe most of the discussion about how what the Alaska legislature does may affect Exxon Valdez now misses the point, and is hyper technical. Though concerns about how tort reform legislation passed this year might affect a future spill are important, or how this legislation might affect the case now on appeal if the court of appeals required a new trial, the most important issue right now for Jerry's constituents is how what the legislature does may be used by Exxon in the Court of Appeals as Exxon argues that standards should be changed in the federal courts, and, as a result of those changes, the verdict should be lowered or wiped out.

Exxon has previously argued that the federal court should look to (not be bound by) what the states have done -- especially Alaska -- in deciding how it should deal with this case. Thus Exxon argued to the District Court that because Alaska has a "clear and convincing" burden of proof for punitive damages, the federal court should use the same standard. Judge Holland said no, but Exxon will make that argument again in the Court of Appeals. If Alaska passes a cap on punitives at 3 X or 4X compensatory damages, and that cap applies to natural resources and environmental cases, Exxon will argue that the same standard should be adopted by the federal court as evidence of what the people of Alaska want. And if Alaska passes a law which says that there must be actual "malice or corrocious acts showing deliberate disregard of another person's

rights," Exxon will argue that such a standard, and not "recklessness" should be adopted by the federal court as evidence of what the people of Alaska want. I cannot overemphasize the importance of such arguments, and how legislation passed this year could significantly affect our chances on appeal.

As such, it is my recommendation, because any effect that tort reform legislation would have is minimal in affected communities in comparison to the downside of a reduction or loss of the Exxon Valdez verdict, that Jerry not support tort reform measures this year which adopt a cap on punitive damages or require that a portion of any punitive award should go to the state or attempt to change the mental standard for punitive damages to "conscious disregard" rather than "recklessness," as is now the rule. Alternatively, language that any modifications made this year would have no affect on prior or future oil spills, or, more generally, cases which involve damage to the environment or natural resources, would go a long way towards countering what we expect to be the arguments Exxon is now preparing to file with the Court of Appeals. This is very real right now: Exxon's brief is expected to be due in June with the Court of Appeals, and it will make use of every possible argument to argue that the verdict is too high and/or that a new trial should be ordered.

3. Is this just "for the lawyers?" Apparently some are saying that the only persons who will benefit from a substantial verdict in Exxon are attorneys. While the lawyers have sought a portion of any recovery on a contingency basis, even if their request is granted, well over 75% of any recovery would go to claimants if the request is approved. Payments will still be on the order of $20,000,000 to Kodiak Island Borough, and several hundred thousand dollars to over a million dollars to permit holding fishers in oiled communities after loss. I would be pleased to provide more detail if requested. As chairman of the fee committee for the Exxon Valdez plaintiffs, I can assure you that the request we have made is completely consistent with standards adopted in federal courts for fees in such cases, and that Judge Holland is well aware of what applicable rules are for fairness in deciding how to compensate the attorneys.

Thank you for this opportunity to comment on behalf of the approximately 40,000 Exxon Valdez plaintiffs statewide who are my clients.

mackie mcm

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

MEMBER
HOUSE JUDICIARY COMMITTEE
HOUSE RULES COMMITTEE
HEALTH, EDUC. & SOCIAL SERVICES COMMITTEE
LEGISLATIVE COUNCIL JOINT COMMITTEE

SESSION
STATE CAPITOL, ROOM [illegible]
JUNEAU, ALASKA [illegible]
PHONE [illegible]
FAX [illegible]

INTERIM:
716 W. 4TH AVE., SUITE [illegible]
ANCHORAGE, AK [illegible]
PHONE [illegible]
FAX (907) 258-5510

DISTRICT 20

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HB 58

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PENAIR
The Spirit of Alaska

March 10, 1996

Representative Gene Therriault
State Capitol
Juneau, Ak 99801-1182

Dear Rep Therriault:

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

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

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

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

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

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

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

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

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

PENAIR • 4451 Aircraft Drive • Anchorage • Alaska • 99502 • (907) 243-2485 • Fax 243-6848
Peninsula Airways, Inc. D/B/A PenAir

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

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

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

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

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

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

Very truly yours

Orin D Seybert
President

Enclosures (4)

CC: Rep Porter

DRAFT

ALASKA AIR CARRIERS ASSOCIATION

RESOLUTION 97-1

RESOLUTION supporting sponsor substitute for HB58.

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

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

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

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

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

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

PENAIR
The Spirit of Alaska

November 8, 1966

Capt. Stephan Moreno
Alaska Marine Pilots
2622 38th Ave S. W.
Seatle, Wa 98126

Dear Steve:

We recently concluded a very, very difficult insurance renewal. Not only did the price increase drastically, we were not able to get any increase in limits. We still have only one million dollars for passenger liability.

In view of our recent tragedy it has made me realize that Penair cannot afford to be put in such a position again.

So I am in the process of identifying charter groups and individuals where the resource generated does not justify the risk associated with the contract. Certainly the Alaska Marine Pilots (and any marine pilot) is a perfect example.

Therefore, I am sorry to say that effective immediatedly we will no longer be able to provide transportation to your group.

This limitation applies only to charter or contract operations involving the nine or less passenger planes. We were able to get proper limits on the larger aircraft operating the schedules out of Anchorage.

I am having our attorney look into the possibility of having a limitation of liability agreement the customer could execute which would limit the exposure in the event of an accident. If such becomes available we will contact your groups at that time for the purpose of discussing the resumption of service.

Very truly yours

Orin D Seybert
President

CC: Hal Snow

PENAIR
The Spirit of Alaska

November 26, 1996

Magone Marine
P. O. Box 442
Dutch Harbor, Ak 99692

Dear Dan:

On September 30 we concluded a very, very difficult liability insurance renewal. Not only did the price increase drastically, but for the second year in a row we were unable to get passenger liability limits over one million dollars per passenger seat.

After our accident of August 11, it has become apparent that under present Alaska law judgements in wrongful death claims can be many millions of dollars, even without any negligence.

So I have been looking at each charter customer, trying to analyze the possible exposure of Penair. It occurs to me that your divers are probably young and highly compensated, which would lead to such an excessive award.

Therefore, I must decline to provide you with such charter services, we simply cannot accept the risk.

My attorney is working on some sort of "hold harmless" or limitation of liability that the passanger could execute, we hope to have that available in the next few weeks.

Meanwhile, the real problem is the present Alaska laws, this situation clearly illustrates the need for Tort reform. I intend to be working on this issue during the upcoming legislative session, and would appreciate any help you might be able to give.

Very truly yours,

Orin D Seybert
President

3/11/97
ANCHORAGE Daily NEWS

JURY WEIGHS MAN'S CLAIM OF EAR DAMAGE

By LIZ RUSKIN
Daily News reporter

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

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

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

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

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

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

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

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

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

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

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

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

The jury began its deliberations Monday afternoon.

Headquarters:
217 2nd Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323 FAX 463-5515

★STATE★
CHAMBER
OF COMMERCE

March 10, 1997

Honorable Gene Therriault, Co-chairman
House Finance Committee
State Capitol
Juneau, Alaska 99801

Subject: Support for HB 58 - Tort Reform

Dear Representative Therriault:

The Alaska State Chamber of Commerce represents approximately seven hundred member businesses statewide which provide jobs to nearly 70,000 employees. Indirectly, through our network of the 35 local Chambers of Commerce throughout Alaska, we represent an additional 6000 businesses. Eighty-five percent of our membership consists of small businesses. As the Voice of Business, the State Chamber's mission is to create a climate in Alaska that is conducive to a strong private sector economy.

Reform of Alaska's civil justice system is one of the highest priorities for this organization. It is also of significant importance to the voters of Alaska. In a statewide survey of registered voters conducted by ASCC in January, 1996, four out of five Alaskan voters favored changing Alaska's tort system. Three out of four believed that those who would be most helped by the proposed changes to the system would be small businesses, doctors, taxpayers, and people with legitimate lawsuits. By a ratio of eight to one, those surveyed believed that those who would find the changes disadvantageous would be people with frivolous lawsuits and personal injury lawyers.

The issue of greatest concern to the State Chamber is that of punitive damages, because they can be assessed on a business or individual even without intentional wrongdoing or willful neglect, and the sky is the limit. ASCC believes there should be parameters, or established criteria for assessment of punitive damages. ASCC also believe the penalty should be pre-established as a multiple of the compensatory damage caused. We support the formula established in SSHB 58.

We strongly urge the support of the House Finance Committee and all members of the State Legislature of SSHB 58.

Sincerely,

Pamela LaBolle

Pamela La Bolle
President

ALASKA TRUCKING ASSOCIATION, INC.

3443 Minnesota Drive • Anchorage, Alaska 99503 • PHONE (907) 276-1149 • FAX (907) 274-1946

March 12, 1997

Representative Gene Therriault
Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

Dear Representative Therriault:

Members of Alaska Trucking Association strongly urge you to support H.B. 58. We believe that America is drowning in a sea of judicial abuse. It seems apparent to anyone outside of the legal system that " legal thinking" and "common sense" have parted company. H.B. 58 is a small, but much needed step towards a complete reconstruction of our legal system. Don't succumb to the arguments that will surely attempt to kill the bill or at least amend it into ineffectiveness.

Also attached, for your information, is one of the more egregious trucking cases. Unfortunately, this is not an extremely unusual case. ATA's members hope that one day they may run their businesses, for at least one day, without thinking of lawyers. Thank you for your time and attention on this very important issue.

Sincerely,

Frank J. Dillon
Executive Director

ALASKA TRUCKING ASSOCIATION, INC.

3443 Minnesota Drive • Anchorage, Alaska 99503 • PHONE (907) 276-1149 • FAX (907) 274-1946

ATA Officers and Board of Directors 1996-1997

Representative	*Company*	*Phone / Fax.*
President Jimmy Doyle	Weaver Bros., Inc	278-4526/276-4316
1st V-President Bill Deaver	Sea-Land Sevice, Inc	263-5600/
2nd V-President Jeff Gregory	Sourdough Express, Inc	800-478-3976/
Sec/Treas Ted DeBoer	Totem Ocean Trailer Exp, Inc	276-5868/278-0461
Ron Locke	Wilder Construction Co.	344-2593/522-8645/
Gordon Harang	Arrowhead Transfer, Inc	747-8647/747-6433/
Bob Hopf	Kenworth Alaska, Inc	279-0602/258-6639/
Edith Montpetit	Sig Wold Storage & Tran	274-7535/272-1296/
Billy Raxl	Reed Trucking Co	344-9093/ nope /
Lefty Prickett	Lefty's Trucking Co	745-3328/745-7374
Dale Morman	Anchorage Sand & Gravel	349-3333/344-2844/
Peter Blanas	Muleskinners, Ltd	344-7887/522-3389
Steve Saunders	Inlet Petroleum Co	274-3835/272-8151
Thomas Culhane	Anchorage Refuse, Inc	563-3717/563-3932/
Albert Snelling	Samson Tug & Barge Co, Inc	747-8559/747-5370/
Fred Stauber	Fred's Towing & Recovery	243-4037/ nope
Duane Congdon	Valley Transport & Storage	745-7733/745-7734/
Richard Asay	Asay Trucking, Inc	349-4774/349-6047
M. Kathyrn Thomas	ArcTech Services, Inc	776-5480/776-5132
Charlotte Emerson	World Equipment, Inc	563-3557/563-3558/
Jasper Hall	Service Oil & Gas	822-3375/822-3511/
Harry McDonald	Carlile Ent/K&W Trucking	276-7797/278-7301
Dean McKenzie	Alaska West/Frontier Trans	279-9515/272-8152
Greg Wakefield	Alaska Mover's Assoc, Inc	276-3506/258-3986
Blaine Ghan	Lynden Transport, Inc	276-4800/257-5155

Fax 263-56

Award in ADA Case Sets Record

EEOC Filed Lawsuit for Former Ryder Driver

By Daniel P. Bearth
Staff Writer

A jury verdict in Detroit is sending shivers down the spines of trucking industry lawyers.

A former truck driver who lost his job after suffering an epileptic seizure in 1989 was awarded $5.5 million because his employer — Ryder System — refused to offer him comparable work.

Thomas Lewis, 45, an employee of Ryder's Complete Auto Transit subsidiary in Flint, Mich., was awarded $192,000 in back pay, $60,000 in compensatory damages and about $4.4 million in punitive damages.

Although a $300,000 federal cap on damages in employment claims reduced the judgment to $492,000, the jury award ranks as the largest amount ever won on behalf of a single plaintiff in a disability case, according to the U.S. Equal Employment Opportunity Commission, which filed the lawsuit on behalf of Mr. Lewis.

Fred Batten, an attorney for Ryder, said he will ask for a new trial.

He said Mr. Lewis has been on medical leave since the first seizure and, in fact, suffered a second seizure in April 1996 while working as a truck driver for another company.

According to Mr. Batten, Mr. Lewis lost his federal certification to drive after the first seizure and then falsified his medical card to get another driving job.

Ryder made a good faith effort to accommodate Mr. Lewis, but could not find a suitable job, Mr. Batten said.

Mr. Lewis had asked to be transferred from his previous job of hauling cars over-the-road to dealerships to a job loading cars from the auto assembly plant onto rail cars.

That job would have required him to drive and to work at heights up to 18 feet. The company maintained that was an unreasonable risk.

"An employer should have the right to make that decision," Mr. Batten said. "The judge in this case told the jury, 'You decide.'"

Mr. Lewis took his case to the EEOC in 1993 and filed a claim under the 1992 Americans With Disabilities Act, which requires employers to attempt to accommodate disabled workers.

William H. Herrmann, American Trucking Associations' labor counsel, said he found the facts in the Lewis case to be "disturbing."

"If a company puts this guy to work driving and he has an episode and hurts someone, Ryder is liable."

The courts generally have held that if a driver is medically disqualified, there is no requirement to offer another driving job, Mr. Herrmann said.

Employers may be forced to offer such people nondriving positions, however.

Even so, Mr. Herrmann said, management should retain some prerogatives in hiring. "Just because you are disabled doesn't mean you jump to the top of the list. ADA is not affirmative action."

Another question for companies that operate nationwide is whether injured workers must be offered jobs in other cities.

Mark A. Spognardi, a Chicago-based labor attorney, said the Lewis case is no fluke. He expects to see more like it because the ADA has set a very high burden of proof for employers to meet in determining the potential harm to individuals due to physical handicaps.

In the case of a person with epilepsy, it may not be enough to argue that seizures are likely to happen again, he said. The company must prove the individual poses a "significant" risk of "substantial" harm

Alaska Forest Association, Inc.

111 STEDMAN SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-6114
FAX 907-225-5920

March 12, 1997

Honorable Mark Hanley, Co-chairman
Honorable Gene Therriault, Co-chairman
House Finance Committee
State Capitol
Juneau, Alaska 99801

Subject: Support for HB 58 - Tort Reform

Dear Gentlemen,

The Alaska Forest Association (AFA) is a private, non-profit corporation comprised of member companies engaged in activities related to the forest industry. We currently have over 250 member companies representing all aspects of the industry. Our membership includes logging companies, road building companies, towing companies, wood processing facilities, and a wide variety of firms that deliver goods and services in support of the timber industry.

The time is long overdue for meaningful changes in Alaska's tort laws. There have been many individuals over the last 15 years working hard for legal liability reform. It is a complex system that has been abused too often. The Alaska Forest Association supports House Bill 58 sponsored by Representative Brian Porter because it is a step in the right direction to make the civil justice system more fair and less costly.

AFA supports reasonable compensation for valid personal injury cases. This bill allows a person to be "made whole" with no limits on medical costs and lost wages. One of the problems with the current system is that there are no real limits on "non-compensatory" damages such as pain and suffering and punitive damages. It is this "sky is the limit" system that is rife for abuse. Representative Porter's legislation includes reasonable limits on these damage awards as well as other provisions that make the system more fair.

Please move this bill expeditiously through the process for passage this year.

Sincerely,

Jack Phelps, Executive Director

ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, Alaska 99503 FAX: (907) 279-7987 Telephone: (907) 276-0347

March 10, 1997

Honorable Gene Therriault
Co-Chairman, House Finance
Capitol Building
Juneau, AK 99801

RE: Tort Reform

Dear Representative Therriault,

The Alaska Miners Association wishes to go on record in support of House Bill 58, regarding tort reform. The Alaska Miners Association has over 1000 members from all parts of the mining industry. Our membership includes suction dredgers, small mom & pop miners, independent prospectors, suppliers, and major international mining companies.

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

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

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

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

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Representative Brian Porter

ALASKA MUNICIPAL LEAGUE
217 Second Street, Suite 200 • Juneau, Alaska 99801 • Tel (907) 586-1325, Fax (907) 463-5480

March 10, 1997

Representative Brian Porter
Alaska State Capitol
Juneau, AK 99801-1182

Dear Representative Porter,

Thank you for your continued hard work on tort reform. Last year the AML urged the implementation of the Tort Reform bill. **The AML continues its support of the adoption of a meaningful tort reform bill.** The provisions of CS of SSHB 58 (JUD) appear to fulfill this goal.

Municipalities have considerably broader liability exposures than almost any private business because of the extremely broad nature of municipal services and public safety responsibilities. Also, municipalities are seen as "deep pockets", however, a municipality must pass costs on to residents directly through taxes. It is clearly in the interest of residents of municipalities to reasonably limit their municipality's liability exposures.

In CS for SSHB 58 (JUD), a good example of a direct benefit for municipalities is the liability reduction for non-negligent actions of an electric utility. As a broader example, the provisions that limit liability to more reasonable sums, encourage early settlements, and discourage the proliferation of "nuisance" suits, will benefit taxpayers by reducing the legal and other costs of claims. These same provisions will require that municipalities become more efficient in submitting their own claims, especially in cases such as the discovery of latent defects in construction work. On balance, **a more defined legal system, as proposed by this bill, will have benefits for municipal taxpayers.**

While the AML endorsed last year's tort reform bill, the AML Legislative Committee has not yet formally approved the provisions of this bill and may comment on specific provisions after the AML/Alaska Conference of Mayors Legislative Conference on April 1 and 2 in Juneau. You are invited to present the bill to municipal officials on Tuesday April 1. Please keep the AML informed of any issues specifically relevant to municipalities and the AML will be pleased to continue to participate in the process.

Sincerely,

Kevin Ritchie
Executive Director

CC: AML Board of Directors
AML Legislative Committee
C:Legcomm:297tortreformhb58

Alaska Oil and Gas Association

121 West Fireweed Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907) 272-1481 Fax: (907) 279-8114

March 10, 1997

The Honorable Gene Therriault, Co-Chairman
Finance Committee
Alaska State House of Representatives
State Capitol
Juneau, Alaska 99801

AOGA Position on Tort Reform Legislation

Dear Representative Therriault:

The Alaska Oil and Gas Association (AOGA) is a trade association whose 19 member companies account for the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska.

On February 10, 1997, the AOGA Board of Directors adopted the following position on tort reform legislation. AOGA is aware of your interest in tort reform legislation and wanted to forward our position to you for your reference.

The Alaska Oil and Gas Association believes Alaska should adopt reforms to its civil justice system:

- The Alaska civil justice system gives juries and judges discretion to impose unlimited punitive damages awards, without adequate guidelines or criteria necessary to insure the constitutional protection of due process.

- Alaska's civil justice system discourages investment in the state. Firms assessing whether to invest or to conduct business in Alaska rather than in another state or country must take into account the legal risks that Alaskan law allows, and the substantial legal risks that can be incurred even in defending against frivolous civil actions.

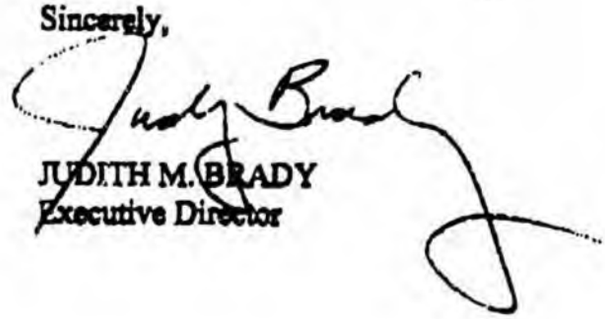
A variety of reforms have been suggested to address these problems. The Alaska Oil and Gas Association believes the most important are:

- Limitations on punitive damages. This reform would make it clear that awards beyond those necessary to compensate plaintiffs for real damages would need to be justified by clear and convincing evidence of outrageous conduct, and would be capped - as are sentences in criminal law - so that juries and judges could not impose financially ruinous or unlimited awards.

• Judgments should be proportionate to fault. It is fundamentally unfair to require a defendant to pay a much larger share of damages than the defendant's share of fault.

Other legitimate and important reforms are appropriate. However, the two reform areas above are particularly significant to companies who are sensitive to the large risks they face from disproportionate awards and unlimited punitive judgements. Reform of these two areas would reduce business risks, establish a greater degree of fairness, and bring Alaskan law into line with that found in progressive states interested in fairness and a competitive business climate.

Sincerely,



JUDITH M. BRADY
Executive Director

cc: Rep. Brian Porter

BBFM Engineers Inc.

510 L Street, Suite 200
P.O. Box 91139
Anchorage, AK 99509-1139
(907) 274-2238
(907) 274-2520 Fax

March 10, 1997

apdclaim397

Representative Gene Therriault
Co-chair, House Finance Committee
Room 511, State Capitol
Juneau, AK 99801-1182

Re: HB58

Dear Representative Therriault:

I am writing to you and your committee as a professional engineer and as a representative of the Alaska Professional Design Council, commonly known as APDC. APDC is a consortium of professional societies representing architects, engineers, land surveyors, building code officials, and landscape architects. The ten member-organizations have a combined membership of over 1400 and represent approximately 5000 licensed professionals. APDC is very supportive of tort reform in general and HB58 in particular.

Our legal system needs modification! Over 90% of civil suits never go to trial. Most cases are settled, with little to no consideration to actual fault, to avoid the expenses of discovery, trials, the threat of punitive damages (which aren't covered by insurance) and the seemingly capricious decisions of juries. When suits are filed against all possible defendants, regardless of fault, to ensure there are plenty of pockets to chip into the settlement, some defendants end up spending a considerable amount of time and money to extricate themselves from cases in which they shouldn't be involved. In most cases, they get to contribute to the settlement, even though they have no fault, due to pressure from the other parties to the suit. Knowing this, some people use the court system as a means of legal extortion by filing frivolous suits with the hope of a settlement. Millions of dollars are spent in the so called "discovery process" which almost always results in the defendants throwing in their insurance to stop the bleeding and make the case go away. Existing sanctions against frivolous suits are rarely used because they require that the plaintiff first lose at trial, a trial that rarely happens. Summary judgment is also very rare because appellate courts have almost always overturned such decisions, making trial judges wary of issuing such orders. Many settlements are due to fear of the perceived large down side of going to trial, including the expense involved and the tendency of some juries to ignore common sense and aid the "little guy" plaintiff by dipping into the so-called "deep pocket". All too often we read about large awards being reduced by the trial judge or on appeal or on the second appeal, all of which takes time and money. Some argue that these are rare, but they are not rare enough to take the gamble of a trial.

HB58 includes two sections which will help the situation for design professionals:

The first reduces the statute of repose for construction related suits from fifteen years to eight years and expands it to cover all suits. According to a study by Victor O. Schinnerer, over 83% of cases associated with construction are brought within 4 years after substantial completion, almost 90% percent of the cases are brought within eight years and 100% of claims which resulted in an indemnity payment were brought within nine years. We believe that an eight year statute is more reasonable than the current fifteen years for four main reasons:

1) Almost all of the cases brought after eight years are related to maintenance problems, rather than design or construction problems. The owner of the building would still be available for suit if his lack of maintenance is the cause of the damage, because that would be an on-going problem. Cases brought this late do not result in an indemnity payment on the behalf of the design professional. However, it does require expenditure of time and money which is rarely recovered by the designer.

2) It is impossible to defend, or prosecute, a case fifteen years after substantial completion due to the lack of witnesses, fading memories, and lack of documentation. Most of us would have a hard time remembering what we did fifteen days or months ago, never mind fifteen years.

3) Designers will not have to store fifteen years of files and can reduce the size, and rent, for our archive storage, and pass the savings on to our clients.

4) It is unreasonable to expect an engineer or architect to pay tens of thousands of dollars a year in insurance premiums for fifteen years after they retire. Errors & omissions insurance for design professionals is on a claims-made basis: that is, it covers you for claims made during that year. Therefore, the longer a period you have to cover, the higher the premium. The firm in which I am a principal had a premium of nearly twenty thousand dollars in our first year, with no "tail" to cover. It was our third highest expense, after payroll and rent. Adding a fifteen year tail results in a considerably higher premium. It is not unheard of to have a premium of over a hundred thousand dollars with a deductible of a hundred thousand dollars for the million dollar policy required by the State of Alaska. If we can limit the "tail" for which we have to insure to eight years, we expect to see a reduction in our insurance bills.

Many of the arguments for a statute of repose for construction related cases also apply to other cases and its application to those cases makes sense.

The second section in which we have an interest is the section regarding alternative dispute resolution. **It is time to develop a system which identifies patently frivolous and meritorious suits early, so we can to get them out of the system.** With this in mind, APDC is urging that alternative dispute resolution be included in any tort reform action by the legislature. A mandatory mediation or independent early evaluation system would reduce the number and costs of frivolous suits by letting the plaintiff and their attorney know early on if a case has no merit. They will be less willing to press the case as the likelihood of recovery will be decreased and the likelihood of court sanction for bringing a frivolous suit will be increased. On the other hand, it will encourage defendants to settle valid claims early by giving them an independent opinion of the validity of the claim against them. It will reduce the costs of litigation by resolving cases before the lengthy, expensive, discovery process which may result in more money going to the injured, rather than lawyers and expert witnesses. It should slow down the shotgun approach to suits by removing defendants who are obviously not liable. It is our understanding that approximately 80% of cases sent to mediation in Washington are resolved during or soon after the mediation process. Fewer, smaller, and shorter cases should provide relief to an overtaxed court system. A bill which would have established mandatory mediation in suits against design professionals passed the House last year, 37-3. The trial attorneys, who have generally not been proponents of tort reform, testified on that bill that they would support mandatory mediation, if it was mandatory for all suits. We would have no objection to this approach.

In closing, it is our belief that Representative Porter has worked hard with all of the parties interested in this action and has crafted a bill which resolves many of the concerns with the legal system without infringing on anybody's ability to have their wrongs redressed. We urge that your committee move HB58 with a recommendation of "do pass".

If you have any questions, I can be reached by phone at (907) 274-2236, by fax at (907) 274-2520, or by e-mail at bbfm@alaska.net.

Respectfully yours,

Colin Maynard, PE.

cc: Rep. Brian Porter

Alaska
Rural
Electric
Cooperative
Association, Inc.

ARECA

703 W. Tudor Rd., #200
Anchorage, AK 99503
(907) 561-6103
FAX (907) 561-3547

Electric Service for 300,000 Alaskans

March 11, 1997

Representative Gene Therriault
Co-Chairman
House Finance Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Subject: House Bill 58—Tort Reform Legislation

Dear Representative Therriault:

I am writing this letter to express support for the tort reform legislation that is currently moving through the House of Representatives. House Bill 58, introduced by Representative Brian Porter, is a piece of legislation that deserves the Senate's consideration and support.

This letter is being written on behalf of the members of the Alaska Rural Electric Cooperative Association, Inc. ("ARECA"). The active members of ARECA comprise 18 electric cooperatives situated throughout the state of Alaska. These electric cooperatives serve a large percentage of the state's population. The cooperatives represent an effort by citizens of the state to provide the best possible electric service to their communities at the lowest possible cost. The members of ARECA are in support of tort reform legislation and believe it would be beneficial if tort reform were accomplished during this legislative session.

One section of the legislation is of particular importance to the members of ARECA. Over the years, the electric cooperatives have been subject to many claims by plaintiffs' attorneys attempting to impose strict liability on an electric utility for any and all electric service. The argument is made that the electric utility should be responsible for any injuries or damages arising from electricity even if the utility was not negligent in any way. For example, in one situation a claim has been made that an electric utility should be strictly liable for the quality of electric service even though the injured individual had obtained electricity only by running his own wiring from a neighboring house. The provision of the tort reform legislation desired by the electric cooperatives would ensure that utilities are held accountable only in situations in which an injured party can establish how the utility may have been at fault.

f:\ARECA\Legis\3-11-97V

Thank you for your time and attention. I will of course be available to provide testimony to the appropriate committee or committees which consider this important piece of legislation.

Sincerely yours,

ALASKA RURAL ELECTRIC
COOPERATIVE ASSOCIATION, INC.

Eric P. Yould

Eric P. Yould

:lka

cc: ARECA Active Members
Larry Markley
Roger R. Kemppel, Esq.

Resolution 97-3-2

A Resolution Supporting Tort Reform

ARECA supports tort reform and especially passage of section 35 of CSSSHB 58 as currently written; the section clarifies the liability of utilities for providing electric service.

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

March 11, 1997

The Honorable Gene Therriault
Co-Chair Finance Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Dear Representative Therriault:

I am writing this letter on behalf of the Alaska Hospital and Nursing Home Association in support of CS for Sponsor Substitute for House Bill 58 (Jud).

Our 33 member community hospitals and nursing homes from across the state join with other health care organizations, architects, engineers and the business community in asking the Legislature to pass and the Governor to sign CSSSHB58(Jud), the 1997 Comprehensive Liability Reform Bill.

It will not be possible to control costs within our health care system if we do not control the costs related to the inefficiency of the liability system. Tillinghast, a consulting actuarial firm, reported in 1992 that only 43% of tort costs of some $132 billion nationwide went to the injured party. The remaining 57% went to the cost of litigation (administrative costs, 24%; defense costs, 18%; and plaintiff costs, 15%).

Medical liability costs include the cost of insurance, defensive medicine and the costs borne by the manufacturers of medicines and medical supplies.

Between 1982 and 1992 medical malpractice insurance premiums in Alaska increased from 2,276,000 to 13,371,000. The following comparison between rates for the same level of liability insurance in Alaska and those in California, where components of CSSSHB58(Jud) are the law, demonstrates the savings that can be realized when tort reform legislation is enacted:

SPECIALITY	CALIFORNIA	ALASKA
Anesthesia	$10,000	$26,500
Family Practice	$ 7,000	$15,000
OB/GYN	$31,500	$64,500

319 SEWARD STREET #11 • JUNEAU, AK 99801 • (907) 586-1790 • FAX (907) 463-3573

The cost associated with the practice of defensive medicine creates another unnecessary financial burden shifted to the patient. Defensive medicine can be defined as those procedures and tests ordered because of a perceived malpractice risk and those services not provided to patients because of the perceived liability risk to the provider. An example of the latter is the OB/GYN who provides gynecology services but not obstetrics.

Alaska's small rural communities continue to face the challenge of recruiting and retaining physicians particularly family physicians wishing to provide obstetrical care. The cost of liability insurance is a barrier to that recruitment process.

Section 36, on page 16, of CSSSHB58(Jud) is very important to Alaskan hospitals. Hospitals have become the deep pocket when uninsured or under-insured physicians are sued. An Alaska Supreme Court decision (Jackson vs Power) holds hospitals liable for emergency room physician actions, even though the hospital or its personnel did nothing wrong. Mandated minimum liability coverage for practitioners as a pre-requisite to immunity for Jackson vs Power for hospitals makes sense to us.

In conclusion, the Alaska Hospital and Nursing Home Association supports CSSSHB58(Jud) in its entirety with particular interest in the provisions outlined in Section 36.

Sincerely,

Robert F. Valliant
Hospital Administrator

CORRECTION

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

The cost associated with the practice of defensive medicine creates another unnecessary financial burden shifted to the patient. Defensive medicine can be defined as those procedures and tests ordered because of a perceived malpractice risk and those services not provided to patients because of the perceived liability risk to the provider. An example of the latter is the OB/GYN who provides gynecology services but not obstetrics.

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In conclusion, the Alaska Hospital and Nursing Home Association supports CSSSHB58(Jud) in its entirety with particular interest in the provisions outlined in Section 36.

Sincerely,

Robert F. Valliant
Hospital Administrator

Alaska State Medical Association

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

March 13, 1997

The Honorable Mark Hanley, Co-Chairman
The Honorable Gene Therriault, Co-Chairman
Finance Committee
Alaska House of Representative
State Capitol (MS3100)
Juneau, AK 99801

Post-it® Fax Note 7671	Date 3.11.97	# of pages ▶
To Brian Porter	From Jim Jordan	
Co./Dept.	Co. ASMA	
Phone #	Phone # 562-2662	
Fax #	Fax #	

Subject: SSHB58

Dear Representatives Hanley and Therriault:

The Alaska State Medical Association (ASMA) is comprised of nearly 500 physicians located throughout Alaska. The ASMA House of Delegates and Board of Trustees would like to thank you for providing the opportunity for ASMA to testify on its recommendations for modifications to the civil justice system.

Physicians in Alaska practice in unique and challenging circumstances. Our goal is to provide the most appropriate and best medical care possible to our patients. Our profession is facing increasingly complex issues involving new technology, moral and ethical situations, and fiscal pressures from all fronts.

The practice of medicine in Alaska is typified by the sole practitioner or small clinic practices which are essentially small businesses. But this too is changing with managed care appearing throughout Alaska which brings its own special considerations. Questions arise as to quality of care in a managed care setting that is driven perhaps more by fiscal considerations than by the medical condition of the patient. These fiscal considerations are being driven by others than the treating physicians. Such circumstances provide for further complications and uncertainties in the applications of the civil justice system to the practice of medicine.

ASMA has been on record for many years supporting changes in the civil justice system that provide for less uncertainties in the system while not keeping any person from the courthouse. Those changes are as follows:

1. Ceiling on Non- economic Damages
   No limit is suggested on proven economic damages such as loss of earnings and medical expenses. ASMA recommends a ceiling of $250,000 on recovery from non-economic damages which are those intangibles such as pain and suffering.

No caps or extremely high ceilings for non-economic damages provides for a system along the lines of a lottery. Uncertain, extremely high potential awards lead to high professional liability insurance rates which in turn leads to more physicians going without such coverage. An uninsured doctor may not have the assets to satisfy a judgment for loss of earnings and future medical expenses let alone an award for non-economic damages.

2. Limits on Attorney Fees
   A sliding attorney's contingency fee schedule is recommended as follows:
   40% of the first $50,000
   33 1/3% of the next $50,000
   25% of the next $500,000
   15% of any amounts in excess of $600,000

   Sufficient, appropriate net compensation to the injured party is the goal of the recommendation while providing for just compensation to the injured party's attorney. More compensation to the patient is the result.

3. Collateral Source Evidence
   Allow a defendant (e.g., physician) to introduce evidence pertaining to amounts of other proceeds received by a plaintiff due to the situation that resulted in the lawsuit. Examples of those proceeds are insurance proceeds and workers compensation payments. This prevents duplicate payments for the same loss.

4. Periodic Payment of Future Damages
   When an award for future damages exceeds $50,000, allow either party to require the court to provide that the judgment be paid in installments over the term of the plaintiff's disability.

   This allows for the purchase of an annuity to make future payments as and when they arise - a significant savings over an immediate lump-sum payment of an entire award.

5. Arbitration
   Allow physicians to contract with patients for mandatory arbitration of malpractice claims.

6. Statute of Limitation
   Maintain a statute of limitation that requires an action for injury or death against a physician to be filed within 2 years of when the person knows or should have known of the injury. However, for children under age six, require that action be brought before age eight or within two years, whichever is longer. But, the clock stops if there is fraud, intentional concealment of facts, or if there exists an undiscovered foreign body (of no therapeutic or diagnostic purpose) in the body of the injured child and the action is based on the presence of the foreign body.

7. Statute of Repose
   Incorporate a general statute of repose that prevents suits from being brought after eight years measured from the date of the act that caused the injury or death. The statute of repose applies without regard to the statute of limitation. However, any statute of repose should not apply in cases involving intentional acts or if intentional concealment of facts occurred that resulted in a delay of more than eight years before the basis for the legal action was known.

8. Panel System
   ASMA recommends the continuation of the panel system. Although, complete and credible empirical data which would indicate the impact of the panel system is impossible to develop, anecdotally many ASMA member physicians feel it is important and worthwhile for the panel system to remain in place. ASMA would consider a change in the method of selection of the panel to allow each side to choose a physician member with then those two members selecting a third physician. However, the physicians chosen should be physicians both licensed and actively practicing medicine in Alaska.

   ASMA would also recommend that the "bias" questionnaire be changed so as to ferret out only real conflicts of interests as opposed to perceived conflicts. It would also appear that the existing questionnaire may be easily "gamed" by physicians not wanting to serve.

   ASMA's experience is that it is not unusual for 40 suits involving medical malpractice to be filed each year which tend to take approximately two years to be adjudicated. Therefore, at any given point in time approximately 240 Alaska physicians are impaneled. This is over 20% of all physicians in Alaska, a significant contribution to the system for which, in most cases, the service is done pro bono.

The above are outlines of the features of civil justice reform that ASMA member physicians feel should be adopted. Many of the above are incorporated in SSHB58. For those that aren't, ASMA recommends amending SSHB58 to include them. Specifically, the absolute cap of $250,000 on non-economic damages is recommended to be incorporated. The general concepts underlying SSHB58 are supported by ASMA.

The underlying purpose in the above is to provide some certainty where little certainty currently exists. Imposition of certainty provides for greater predictability and should result in reduced premium rates for professional liability coverage. Similar measures were adopted in California over 20 years ago with one result being that overall medical malpractice insurance premiums in California are half of what they are here in Alaska. Attached is a copy of an article that appeared in January/February 1997 issue of Contingencies the bi-monthly journal of the American Academy of Actuaries. Also, included is the "Issue Brief" cited in the article. As you can see, the impact of the MICRA has been significant in California; The Academy work group concludes that a

package of reforms is more effective than individual reforms, and key among the reforms are a cap on non-economic damages and a mandatory collateral-source offset rule.

Lower rates should result in more physicians having professional liability insurance coverage with sufficiently high limits. This result should provide for added peace of mind to patients. We believe it can be expected that lower costs for professional liability will have a marginally greater impact on the likelihood of private practice physicians practicing in rural communities having coverage with sufficient limits than those physicians practicing in urban areas.

Should you have any questions or comments you may direct them to any of the following people:

ASMA Board of Trustees

Paul Raymond MD, President,
235-7000, fax 235-4050
John J. Smith MD,
276-5222, fax 278-9044
Kevin M. Tomera MD,
276-2903, fax 278-8052
Lee Schloastein MD,
563-3929, fax 562-2848
James J. Jordan, Executive Director, ASMA,
562-2662, fax 561-2063

Cynthia Brooke MD,
563-8588, fax 563-6903
Patrick Brady MD,
261-3102, fax 261-4882
Douglas G. Smith MD,
272-2571, fax 272-6751
David E. Johnson MD,
225-5144, fax 247-0920

Thank you again for opportunity to provide testimony.

Sincerely,

James J. Jordan
Executive Director

cc: Representative Brian Porter
Alaska House of Representatives
State Capitol, Mail Stop 3100
Room 216
Juneau, AK 99801-1182

A Surgical Fix for Medical Malpractice

Reforms Work Best as a Package, Study Shows

By Jeffrey Speicher

Almost everyone agrees: The medical malpractice system in the United States serves no one well. Although a few multimillion dollar settlements draw public attention, most individuals who suffer real injury at the hands of their physician or hospital accept less than the full value of their claim—and endure long delays before receiving compensation. Those most harmed—people left with lifelong medical needs or permanent loss of income—are most likely to be underpaid.

Physicians, who in the 1950s faced a 1-in-7 chance of being sued over the course of a career, now see the odds reduced to 1-in-7 *per year*. As a result malpractice insurance premiums have skyrocketed, causing many practitioners to abandon their specialties or adopt costly defensive-medicine procedures. Many insurers, buffeted since the early '70s by recurrent cycles of higher claims frequency and larger jury awards, have withdrawn from the market, which has reduced availability of coverage and further driven up costs. And as for attorneys . . . . well, even some thoughtful legal scholars believe the system is out of whack.

According to Randall Bovbjerg of Washington's Urban Institute, author of numerous studies on medical malpractice, many of the system's problems arise from a basic difference between doctors and lawyers: Physicians think about healing injuries, attorneys about resolving disputes. Says Bovbjerg, "Doctors see medical malpractice as a way to make injured patients whole—financially as well as physically. Lawyers come into the process after a conflict arises, and their focus is on justice for their client."

Jeffrey Speicher is manager of member communications for the Academy and an editor for Contingencies.

This difference in worldview intertwines medical malpractice with the legal system. Malpractice must balance the need to compensate deserving claimants, deter future violations by making doctors more careful, and obtain justice for both patients and medical providers. All this from what Bovbjerg defines as "mainly an insurance system run by experts."

A group of those insurance experts, members of the American Academy of Actuaries, recently suggested an approach to make the system less costly. According to the Academy report, "Medical Malpractice Tort Reform: Lessons from the States," the mixed results of reform attempts by the states point the way to effective federal action.

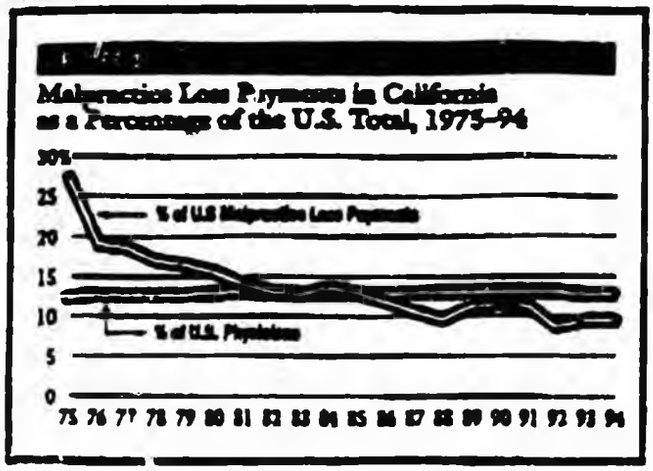
"Congress should adopt a comprehensive approach to tort reform by adopting a package of measures," says Jim Hurley, an actuary with Tillinghast/Towers Perrin and leader of the Academy group. "Our report provides a synthesis of measures that have been effective at the state level."

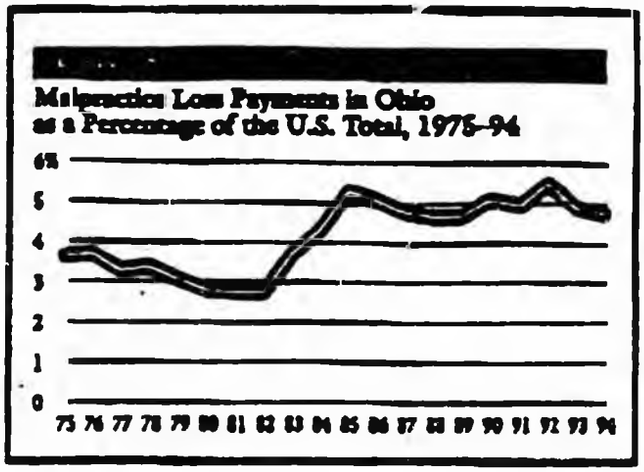
A Package Deal

The California Medical Injury Compensation Reform Act (MICRA) of 1975 shows the success of the package approach. Before MICRA's adoption, the state's percentage of total U.S. loss payments was significantly higher that its proportion of the nation's physicians. By 1981, California's loss payments had dropped and were about even with its percentage of physicians. Costs continue to fall, even as California's share of physicians remains stable. Writes the Academy group: "The relationship of decreased relative costs to the timing of reform provides strong evidence for the effectiveness of the MICRA package." [See Figure 1.]

At the head of the Academy's list for lawmakers is a nationwide cap on jury awards for noneconomic damages such as pain and suffering. As evidence, Hurley points to Ohio where malpractice costs fell after a 1975 cap on damages, only to rise dramatically after court challenges led to a 1985

American Academy of Actuaries Bi-Monthly





ruling that overturned the cap. [See Figure 2.]

Such a cap should be established on a per-medical-injury basis at a level low enough to have an impact—at $250,000, for example. In addition, a mandatory collateral-source offset rule is needed to ensure that double and triple indemnification cannot be collected through multiple suits. Under this rule, a jury or judge would have to consider compensation paid from other sources.

Above all, the Academy report warns against piecemeal or faulty changes. Loss experience in New York shows that the individual tort reform measures adopted in that state over the past two decades did not improve costs relative to the U.S. total. "Poorly crafted malpractice reform—either individual measures that are too limited or broad transformations that are too far-reaching—can have unintended consequences that drive up costs," says Hurley.

> Above all, the Academy report warns against piecemeal or faulty changes. "Poorly crafted malpractice reform—either individual measures that are too limited or broad transformations that are too far-reaching—can have unintended consequences that drive up costs."

The Academy's suggested approach involves what medical malpractice experts call "takeaway" reforms—preserving the current reliance on the tort system, but eliminating some of the costliest and most abused features.

Other voices in the debate, including representatives of the medical community, call for a back-to-the-drawing-board approach. Unfortunately, the design that comes back often relies on a no-fault model. While no-fault medical malpractice insurance would largely untangle the process from the legal system, no-fault often rewards individuals whose claims would otherwise be denied. Says Hurley, "No-fault would drive frequency of claims through the roof—some argue by a factor of at least two and perhaps by a factor of eight or more. It's scary how many things can be compensated under the typical no-fault system."

Frequency of claims, according to Hurley, is the key driver of costs. "Over the past two decades, the plateaus and surges of claims frequency have been difficult to anticipate and measure, but the long-term trend has been up," says Hurley. Size of claims also is an important cost factor, but dollar amounts in settlements have been increasing in a more predictable fashion over time.

No-fault also would take most cases out of court and make malpractice a transaction between insurer and claimant. Advocates claim that this would cut legal costs—which are enormous. For example, according to the Insurance Services Office, legal defense costs for insurers alone accounted for 14 percent of total tort costs in 1992.

However, experience in Florida and Virginia, where no-fault for obstetric cases is already in place, does not show substantially reduced costs or less need for legal counsel. Says Bovberg, "*Everyone* who uses the no-fault system in Florida and Virginia consults a lawyer."

Other options exist. A proposal by Jeffrey O'Connell, professor at the University of Virginia School of Law, seeks a middle way between no-fault and status quo. He would shorten the process and lower costs through an early offer of payment of noneconomic damages.

O'Connell is blunt about his disgust with the current state of affairs. "Medical malpractice is a nightmare of useless circularity," he says. However, according to O'Connell, the system is not consistently biased against defendants. Most proposed changes, on the other hand, invariably favor the defendant. Justice—as well as political reality—requires benefits for the plaintiff as well.

"Reform requires a quid pro quo," says O'Connell. "While the Academy has described quite lucidly the options for takeaway reform, such measures could not get through Congress without being so watered down as to be meaningless," says O'Connell. "True reform should involve a fair trade: making it easier for claimants to be paid, but paying them less, as under workers compensation laws."

An Offer You Can't Refuse

O'Connell's ideas have found sponsorship on Capitol Hill. A bill introduced in the 104th Congress by Sen. Mitch Mc-

Connell (R-Ky.) would create an early-offer plan for all tort claims, including medical malpractice. Under the proposal, a defendant in a personal injury claim is given the option of offering payment to the injured party within 180 days of the claim. The defendant purchases for the claimant a comprehensive major medical insurance policy that covers medical expenses, rehabilitation, and lost wages beyond monies received from collateral sources. In addition, reasonable hourly fees for the claimant's attorney would be paid.

Claimants who are offered such a settlement within 180 days of the claim would be obliged to accept. This won't get egregious medical offenders off the hook, however. A normal tort claim could be pursued for noneconomic damages, but with a higher-than-current standard of evidence.

Medical malpractice is a nightmare of useless circularity.

The plaintiff must prove that the medical provider's misconduct was wanton or intentional.

Because the defendant would not be forced to offer a settlement, physicians and their insurers could take their chances in court in the case of bogus claims. However, the risk might be too great. O'Connell cites a prominent medical malpractice defense lawyer who estimates that he'd make an early offer in 200 of the his firm's 250 current cases. So the balance is tipped toward the defendant, but not without providing a substantial benefit to the plaintiff: Timely resolution and quick settlement.

The limit on legal fees would discourage what O'Connell calls "the unconscionable abuse of the system by some members of my profession." Among other criticisms, the Virginia professor points out that contingent fees are often not truly contingent on risk. Attorneys take the same settlement percentage from open-and-shut cases as from complex cases, a practice that subsidizes work on failed litigation and which O'Connell denounces as an illegal tax on deserving claimants.

Hurley gives O'Connell's proposal a mixed review. "To its credit, the early-offer plan is not mandatory for defendants, which leaves the tort system in place to challenge claims perceived as nonmeritorious," says Hurley. He also notes that periodic insurance payment to claimants allows compensation to be made as costs are incurred, eliminating the burden of large lump-sum payouts. Also, O'Connell's plan emphasizes two fundamentals that the Academy report identified: mandatory recognition of collateral benefits and controlling noneconomic damage costs. In fact, the O'Connell plan eliminates consideration of noneconomic damages altogether unless the case goes to court.

However, Hurley notes, the periodic payment plan theoretically would have to remain in force for decades. Will claimants be out in the cold after the disability policy limits are reached, or will the insurer face unlimited exposure? Another concern: Like no-fault, the early-offer plan could give incentives for unmerited claims. Insurers may pay a doubtful claim rather than incur expensive litigation costs and risk a large judgment award. In addition to increased costs, Hurley worries about a basic question: "Is it the right message to send to individuals who think doctors and insurers have deep pockets? The system may have practical advantages, but in terms of equity, it is hardly fair."

No matter which remedy is tried, no action will slash premium costs immediately, Hurley cautions. "Tying tort reform to premium reductions, as has been done in some states, is unrealistic," he says. "There is little evidence that the cost savings can be translated directly into lower costs for health care providers. More likely, reform will slow the rate of premium cost increases."

The course of reform will be determined by elected officials at the state and federal levels. The debate will be long, no matter which option—if any—is approved. In the meantime, the cost of inaction continues to be passed on to the public in the form of increased medical fees and reduced services.

By working together in recent years, insurers and healthcare providers have begun to bring medical spending under control. Effective medical malpractice reform is one way to keep the momentum going. □

Answer to Brain Drain, page 23:
The house number is 78.

Fall 1996

ISSUE BRIEF

Medical Malpractice Tort Reform: Lessons from the States

The cost of insuring physicians against medical malpractice claims has increased dramatically in recent years. Skyrocketing premium costs and a string of highly publicized lawsuits have led many physicians to curtail certain high-risk procedures. By reducing the availability of important medical services, this practice of defensive medicine could have serious public-health consequences. In addition, increased malpractice insurance expenses are passed on to patients and health plans, thus fueling medical inflation.

To combat these ill effects, several states have adopted reforms designed to reduce the cost of medical malpractice insurance. More recently, Congress has attempted to follow the initiative of the states but has been unable to enact comprehensive medical malpractice tort reforms into law.

To date, state efforts have enjoyed varying degrees of success in reducing medical malpractice insurance rates. What can be learned from the experience of the states? How can these conclusions be applied at the federal level? The American Academy of Actuaries Work Group on Medical Malpractice Reform has studied the impact of state reforms and offers its conclusions to state and federal officials who are considering national tort reform.

Findings

Any federal medical malpractice tort reform effort should be based on a *package* of measures that have exhibited some success in stabilizing medical malpractice costs. The most effective elements of such a package are a cap on noneconomic damages and an offset for collateral payments from other sources. These reforms would limit the financial exposure of health-care providers to lawsuits and would ensure that damages could not be collected through multiple suits. While there are significant limitations on data used to study specific tort reforms, persuasive results can be observed by looking at medical malpractice costs in certain states over time and relating that experience to the timing of particular tort reform measures.

In the following comparison of cost levels in three states that have enacted tort reform measures, paid losses of the individual states as a percentage of the U.S. total are used as the measure of costs. The percentage of physicians in each state as a total of U.S. physicians is used as a reasonable benchmark. The degree to which the percentage of paid losses differs from the percentage of physicians measures the effectiveness of the reforms. All else being equal, the relative cost percentages of paid medical malpractice claims should remain constant over time. Any observed changes in a state's relative cost levels provide an indication of the effectiveness of tort reform. The three states studied are California, New York, and Ohio.

The American Academy of Actuaries is the public policy organization for the actuarial profession, providing objective actuarial information, analysis, and expertise to elected officials and regulators.

Members of the Work Group on Medical Malpractice Reform: James D. Hurley, ACAS, MAAA; William E. Burns, ACAS, MAAA; Linda A. Demkovich, FCAS, MAAA; Allen C. Lyle, FCAS, MAAA; and Edward M. Wenkel Jr., FCAS, MAAA.

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• California. Since the Medical Injury Compensation Reform Act (MICRA) package of reforms was enacted in 1975, medical malpractice costs have fallen substantially as a percentage of the U.S. total.

• New York. Individual reform measures were adopted in 1975, 1981, 1985, and 1986. No observable improvement in the state's relative costs has resulted. The New York reforms did not include a cap on damages.

• Ohio. Reforms enacted in 1975 included a cap on damages. The cap was overturned in 1985, after which costs rose dramatically and have remained high.

California

The California loss data (Exhibit 1) illustrate that while the state's proportion of the U.S. physician population has remained relatively stable, its per-

Exhibit 1
Malpractice Loss Payments in California as a Percentage of the U.S. Total, 1975–94

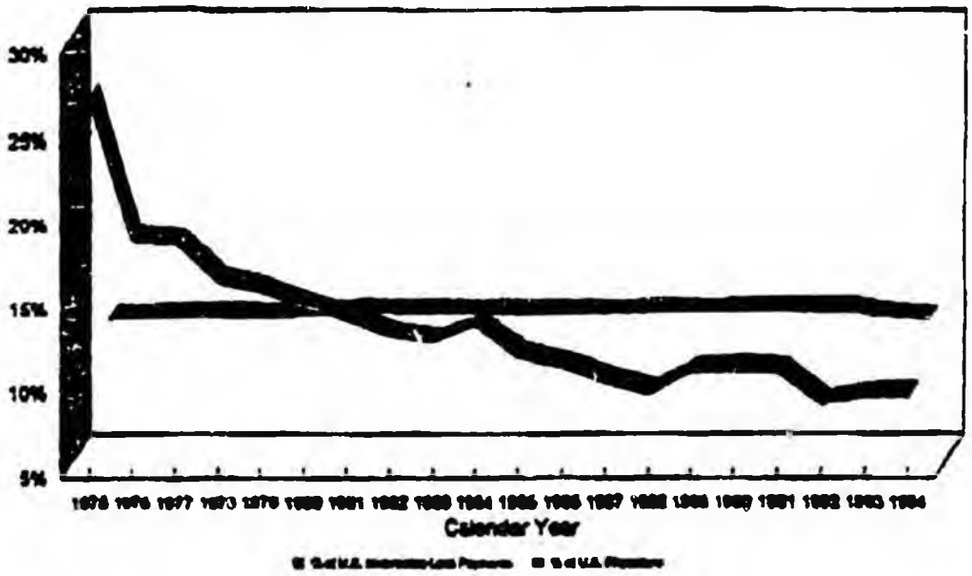
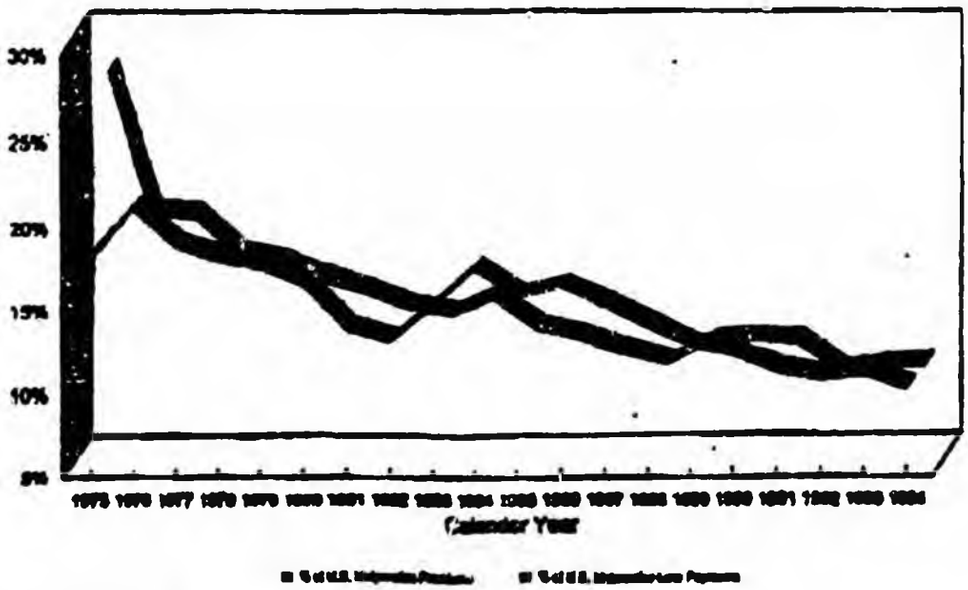


Exhibit 2
Malpractice Premiums and Malpractice Loss Payments in California as a Percentage of the U.S. Total,



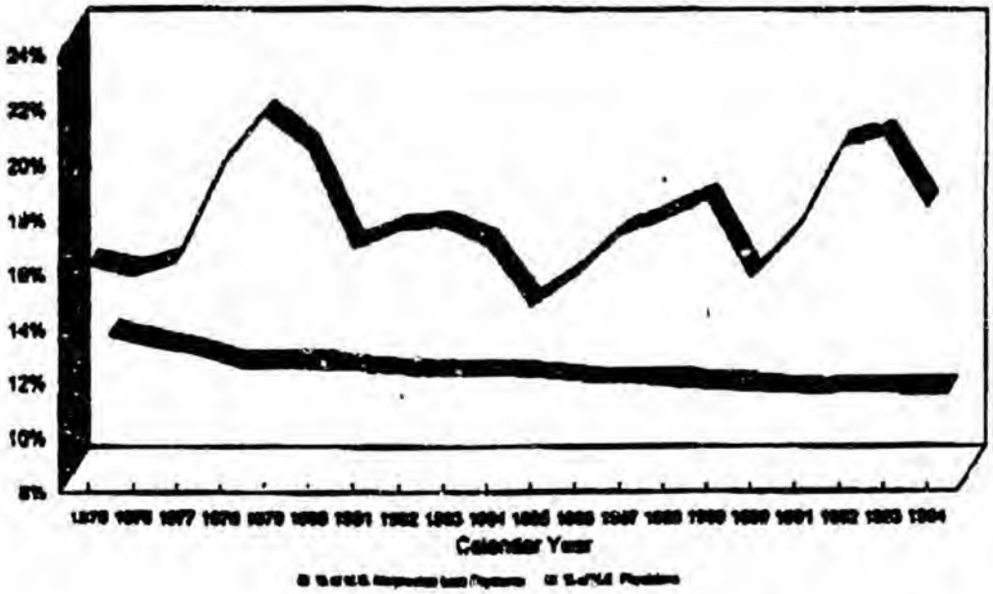
[illegible] payments has dropped dramatically since enactment of the MICRA package of tort reforms. Before MICRA's adoption in 1975, California's percentage of loss payments was significantly higher than its proportion of physicians. By 1981, California's loss payments had dropped and were about even with its percentage of physicians. Since that date, California has continued to benefit from MICRA: Costs continue to drop as a percentage of the U.S. total, even as the percentage of physicians remains stable. Although other factors affect these data, the relationship of decreased relative costs to the timing of reform provides strong evidence for the effectiveness of the MICRA package.

Many opponents of tort reform argue that insurance premiums do not drop after medical malpractice reform. Indeed, costs and premiums normally rise with inflation, and tort reform may only slow the increases. However, the California data show that premiums declined as losses declined. Exhibit 2 compares the paid loss data from Exhibit 1 with California premiums as a percentage of the total U.S. medical malpractice premiums. Although year-to-year fluctuations do occur, premiums have fallen in proportion to the decline in losses. Competition tends to keep companies at an appropriate profit margin, and any extra profits are normally short-lived.

New York

The New York loss experience is shown in Exhibit 3. It shows that the individual tort reform measures implemented in New York did not improve New York's experience relative to that of other states. New York's loss payment percentage does not show any observable pattern of decline or improvement over the 19-year period, despite the various tort reform measures adopted. The New York reforms did not include a cap on damages and were enacted in piecemeal fashion. Therefore, this result supports the merits of a cap on damages and the concept of a package of reforms.

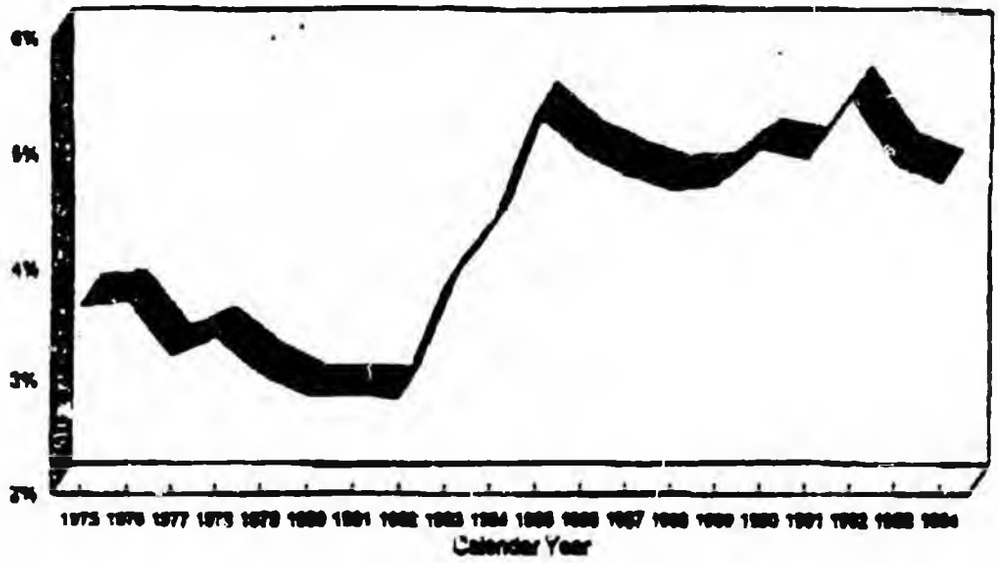
Exhibit 3
Malpractice Loss Payments in New York as a Percentage of the U.S. Total, 1975–94



Ohio

The final example is Ohio, with data presented in Exhibit 4. The data show a gradual decline in costs following tort reform in 1975. The Ohio cap on damages came under court challenge in 1982, resulting in sharp increases that reached a peak in 1985 when the cap was finally overturned. Since 1985, costs in Ohio have remained high, with no signs of decreasing. Again, the data appear to support a tort reform package and the specific benefit of a cap on noneconomic damages.

Exhibit 4
Malpractice Loss Payments in Ohio as a Percentage of the U.S. Total, 1975–94



Conclusions

California's experience indicates that properly implemented medical malpractice tort reform can reduce the cost of medical malpractice insurance. After reviewing several states' experience with medical malpractice tort reform and examining studies on the issue, the Academy work group has concluded the following:

- a package of reforms is more likely than individual reforms to achieve savings in malpractice losses and insurance premiums, and
- key among the reforms in the package are a cap on noneconomic awards and a mandatory collateral-source offset rule.

For reform to be effective in reducing costs, the cap on noneconomic awards should be established on a per-medical-injury basis at a level low enough to have an impact (e.g., $250,000). In addition, a mandatory collateral-source offset rule is needed to ensure that double and triple damages cannot be collected through multiple suits. Under this rule, each suit would have to consider damages already paid from other sources.

Although these reforms have been successful in reducing the cost of medical malpractice insurance, elected officials and regulators must still consider the effects of medical malpractice reform on physicians, consumers, health plans, and other interested parties. When considering medical malpractice reform, state and federal officials should weigh the impact on society as a whole and strive for a balanced, comprehensive solution.

March 10, 1997

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

Re: SSHB 58

Dear Representatives Hanley & Therriault:

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

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

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

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

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

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

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

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

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

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

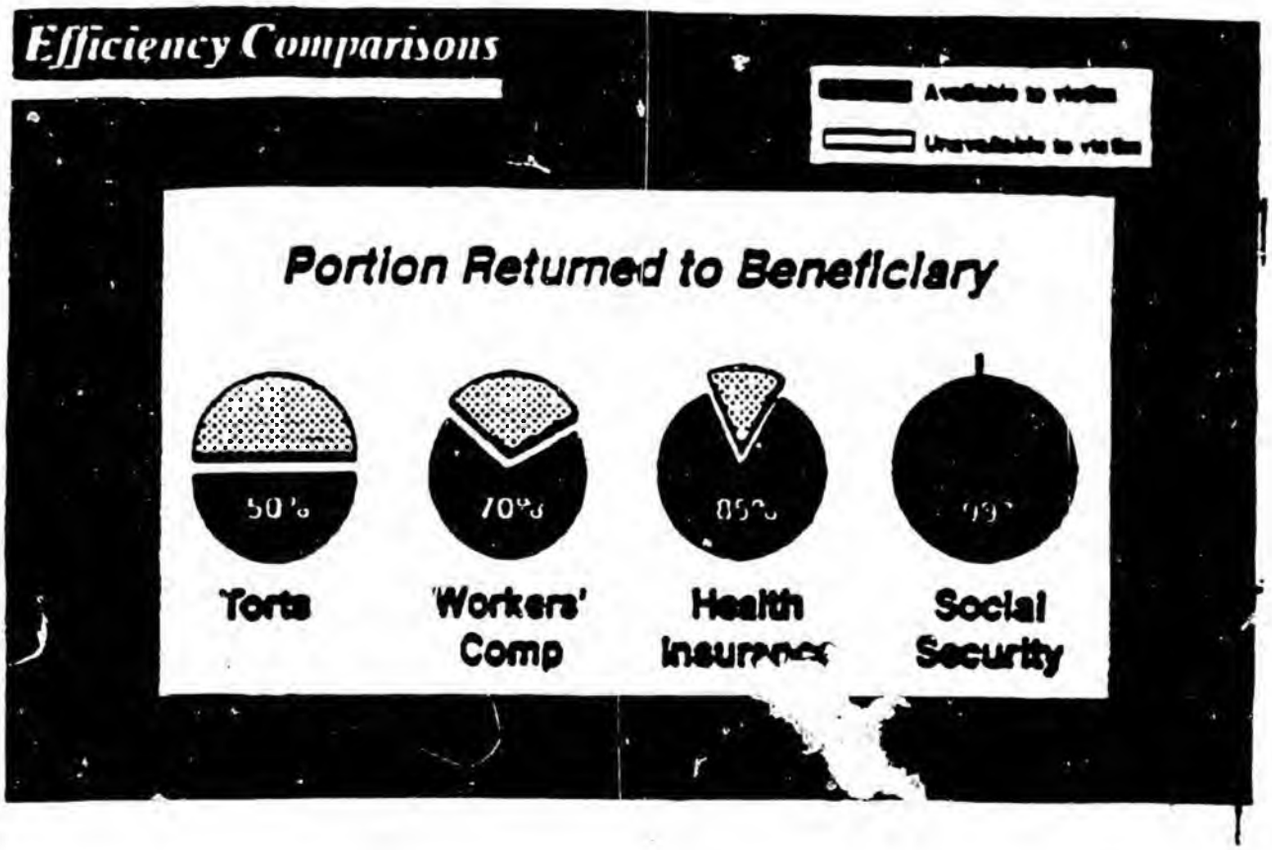
While the bill is complex, it deals with many issues that are of important to many sectors of Alaska's economy. The recommendations of the Governor's task force were also considered and many were included since they dealt with many issues that had not been addressed previously. I encourage your support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

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

Sincerely,

Richard Cattanach

Does Not Effectively Serve Victims' Needs



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

Source: The Tillinghast Report, Towers Perrin Company

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To Danielle Lopez	From Al Tamargo
Co.	Co.
Dept.	Phone #
Fax # 907-465-3854	Fax # 907-562-1240

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THE WALL STREET JOURNAL

REVIEW & OUTLOOK

ABA v. Business

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

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

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

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

The ABA resolutions aren't just empty words. The ABA has a corps of paid lobbyists who are authorized to support the stances taken by its House of Delegates. And these lobbyists were active in opposing Republican efforts to pass civil justice reform as part of the "Contract with America." Who can forget the ABA president describing the new GOP Congressional majority in 1995 as "reptilian bastards."

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

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

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

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

HOUSE OF REPRESENTATIVES

Official Business

State Capitol
Juneau, AK 99811-1[illegible]

Statute of Repose/Limitations by State, 1993

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

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

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

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

Document produced by Perkins office; info from Leg. Research

Schinnerer & Company Inc.

March 16, 1983

VICTOR O. SCHINNERER & COMPANY INC.
SPECIAL CLAIM STUDY
DISTRIBUTION OF CLAIMS IN RELATIONSHIP TO SUBSTANTIAL COMPLETION

Years Brought Within	# of Claims	% of Claims	Cumulative Percentage
One	73*	45.9	45.9
Two	22	13.8	59.7
Three	13	8.2	67.9
Four	13	8.2	76.1
Five	12	7.5	83.6
Six	9	5.7	89.3
Seven	5	3.1	92.4
Eight	5	3.1	95.5
Nine	0	0	95.5
Ten	2	1.3	96.8
More Than Ten	5	3.1	99.9
	159	99.9	99.9

*Based on CNA's records, roughly 32.5% of these claims were brought prior to the date of substantial completion.

Study is based upon a review of 250 CNA files set up between December 1979 and October 1980.

The Date of Substantial Completion was established from information secured from CNA claim records.

159 files contained sufficient documentation which could be used for the purpose of this study.

Distribution Of Claims By Year As Compared To Project Substantial Completion

Year Claim Made v. Substantial Completion	Number of Claims Each Year	Percentage of Claims Made Each Year	Cumulative Percentage of Claims
Prior	6	25%	25%
One	5	21%	46%
Two	4	17%	63%
Three	4	17%	80%
Four	0	0	80%
Five	0	0	80%
Six	1	4%	84%
Seven	3	12%	96%
Eight	0	0	96%
Nine	0	0	96%
Ten	0	0	96%
Eleven	0	0	96%
Twelve	0	0	96%
Thirteen	0	0	96%
Fourteen	1	4%	100%
Total	24	100%	

DISTRIBUTION OF CLAIMS BY YEAR WITHIN WHICH RECEIVED AFTER SUBSTANTIAL COMPLETION

YEAR WITHIN WHICH CLAIM MADE AFTER COMPLETION	NUMBER OF CLAIMS MADE WITHIN EACH YEAR	PERCENTAGE OF CLAIMS MADE WITHIN EACH YEAR	CUMULATIVE PERCENTAGE OF CLAIMS BY YEAR
1	106	33.13%	33.13%
2	45	14.06%	47.19%
3	41	12.81%	60.00%
4	30	9.38%	69.38%
5	23	7.19%	76.56%
6	20	6.25%	82.81%
7	9	2.81%	85.63%
8	7	2.19%	87.81%
9	12	3.75%	91.56%
10	4	1.25%	92.81%
11	8	2.50%	95.31%
12	2	0.63%	95.94%
13	7	2.19%	98.13%
14	1	0.31%	98.44%
15	0	0.00%	98.44%
16	0	0.00%	98.44%
17	2	0.63%	99.06%
18	2	0.63%	99.69%
19	0	0.00%	99.69%
20	0	0.00%	99.69%
21 +	1	0.31%	100.00%
TOTAL	320	100.00%	

This chart gives the number and percentage of claims by year within which claims are made after substantial completion. For example, the row of data with the first column entry of 10 represents all claims received at least 9 years after substantial completion but <u>less</u> than 10 years. Thus, if a 10 year statute of limitations had been in place, 92.81% of the claims would have been allowed and 7.19% would have been outside the time period.

YEAR WITHIN WHICH CLAIM MADE AFTER COMPLETION	NUMBER OF CLAIMS RESULTING IN AN INDEMNITY PAYMENT	PERECENT WITHIN GIVEN YEAR OF TOTAL OF SUCH CLAIMS	CUMULATIVE PERCENTAGE OF CLAIMS
1	12	30.77%	30.77%
2	5	12.82%	43.59%
3	9	23.08%	66.67%
4	1	2.56%	69.23%
5	1	2.56%	71.79%
6	3	7.69%	79.49%
7	1	2.56%	82.05%
8	4	10.26%	92.31%
9	1	2.56%	94.87%
10	0	0.00%	94.87%
11	2	5.13%	100.00%
12	0	0.00%	100.00%
13	0	0.00%	100.00%
14	0	0.00%	100.00%
15	0	0.00%	100.00%
16	0	0.00%	100.00%
17	0	0.00%	100.00%
18	0	0.00%	100.00%
19	0	0.00%	100.00%
20	0	0.00%	100.00%
21 +	0	0.00%	100.00%
TOTAL	39	100.00%	

This chart gives the number and percentage of claims resulting in an indemnity payment by the insurer for the year within which the claim is made after substantial completion. All examined claims resulting in indemnity payment, except for 2, were received within 10 years of substantial completion. For example, the row in which the left column has an entry of 10 provides the number and percentage of claims having an indemnity payment that were received at least 9 years after substantial completion, but less than 10 years. For year 10, there were 0 claims received that resulted in an indemnity payment. For claims received within year 11, 2 resulted in an indemnity payment; 2 equals 5.13 percent of the total number (39) of claims examined that resulted in an indemnity payment. Since no claims received after 11 years of substantial completion resulted in an indemnity payment, the cumulative percentage at year 11 is 100%; all claims resulting in an indemnity were filed by the end of the 11th year of substantial completion.

DISTRIBUTION OF CLAIMS BY TYPE OF CLAIMANT

YEAR WITHIN WHICH CLAIM MADE AFTER COMPLETION	PERCENT OF CLAIMS FROM PARTIES INVOLVED IN DESIGN, CONSTRUCTION, ETC.	NUMBER FROM PARTIES NOT SO INVOLVED
1	65.71%	34.29%
2	60.00%	40.00%
3	75.61%	24.39%
4	73.33%	26.67%
5	65.22%	34.78%
6	70.00%	30.00%
7	55.56%	44.44%
8	42.86%	57.14%
9	41.67%	58.33%
10	50.00%	50.00%
11	12.50%	87.50%
12	0.00%	100.00%
13	42.86%	57.14%
14	0.00%	100.00%
15	0.00%	0.00%
16	0.00%	0.00%
17	0.00%	0.00%
18	0.00%	100.00%
19	0.00%	100.00%
20	0.00%	0.00%
21 +	0.00%	100.00%
TOTAL	61.76%	38.24%

This chart gives the percentage of claims by parties involved in design and construction of a project and the percentages of parties not involved, by year within which the claims were made after substantial completion. For example, the row with the first column entry of 10 gives the percentage of claims received at least 9 years after substantial completion but less than 10 years for each type of claimant. For year 10, fifty percent were from claimants involved in the design and construction of the project and fifty percent were not so involved.

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March 11, 1997

The Honorable Gene Therriault
Co-Chair of the House Finance Committee
House of Representatives
State Capitol, MS 3100
Juneau, AK 99801-1182

Re: CS for Sponsor Substitute for House Bill No. 58(JUD)
File No. 1795.6377

Dear Representative Therriault:

I am writing to provide my support for CS for Sponsor Substitute for House Bill No. 58(JUD). The specific provisions which I am addressing are Sections 40 and 41 relating to independent counsel. A significant portion of my practice entails providing legal advice to insurers doing business in the State of Alaska. We are very pleased with the Bill offered by the Committee and appreciate Representative Porter's efforts in this regard.

Sections 40 and 41 of this Bill address significant problems which remain in the wake of the Supreme Court's decision in CHI of Alaska, Inc. v. Employers Reinsurance Corporation, the decision which gave a defendant the right to select its own independent counsel when an insurance company had issued a reservation of rights on coverage.

The situation addressed by these sections arises when a claim for which there may be insurance coverage is joined with several for which there clearly is not insurance coverage. The example I will utilize is a lawsuit in which a plaintiff has sued a defendant in five separate counts. The First is for injury, which is alleged to be negligent. The Second is for injury alleged to be either negligent or intentional. The Third is for unpaid wages. The Fourth is for breach of contract. The Fifth is for discrimination. If the defendant is a typical business it has insurance for the injury claim, but that insurance will not cover the injury claim if it was intentionally caused. The first count - injury negligently caused - is clearly covered. However, an insurer would typically issue a "reservation of rights" letter on the Second count advising the defendant that it would be

responsible for defending a negligently-caused bodily injury but would reserve its rights not to pay for a judgment on this Count if the jury found it was intentionally caused. The claims for unpaid wages, breach of contract, and discrimination have no insurance coverage. I have attached a chart demonstrating this scenario.

Because the insurer has issued a reservation of rights letter on the Second Count, the defendant is entitled to select its own counsel and, under current practice in Alaska, that lawyer would defend Counts 1-5 and submit his/her entire bill for that defense to the insurance company. Because the insurance company has no control over the independent counsel it has been the experience of many of my clients that these bills are extraordinarily high. In one case with which I am personally familiar the bills were $80,000 per month and totaled $800,000 with most of that time devoted to the non-covered claims. Counsel for other insurers have advised me that this experience is not unique. I have knowledge of a second case which is almost identical to the example I am using in which the fees totalled in excess of $1,000,000. "Independent counsel" use the checkbook of the insurance carrier to provide a gold plated defense to claims for which there has never been insurance coverage.

Section 40 of this Bill provides that the insurance carrier in this situation need only pay for the costs of defending the First and Second Counts. Because these are the only counts for which insurance coverage was ever purchased, the defendant is getting precisely what it bargained for when it bought insurance. This is a resolution which has been brought about judicially in California, in Horace Mann Insurance Co. v. Barbara B, 846 P.2d 792 (1993). Alaska has modeled much of its judicial and statutory law in this area upon California precedent.

I have had conversations with Marianne Burke, the Director of the Division of Insurance, and she has advised that it is the Division's understanding that insurance carriers did not pay for the defense of uncovered claims in this situation. While we appreciate the position of the Division, threats of bad faith litigation against the insurers make the practice in Alaska different than that understood by the Division. Ms. Burke was aghast when I conveyed to her the magnitude of the attorneys fees which had been incurred in these cases. Because it is Ms. Burke's belief that insurers do not at present pay for the costs of defense for the uncovered claims, we anticipate no objection from the Division to these provisions.

I would not expect the plaintiff's bar to have difficulty with this proposal. When a defendant is represented by independent counsel, that independent counsel frequently takes a "scorched-earth" approach to litigation because of the lack of real financial constraints on the defense activity. In the case I have utilized here, one would expect the independent counsel to defend Counts 3-5 with extensive discovery and motion tactics that run up the costs of litigation for the plaintiff who must respond to these tactics. By requiring the defendant individually to shoulder the burden of expense for defending Counts 3-5, there is a realistic fiscal check on the activities of independent counsel.

Section 41 of this Bill provides a mechanism by which the insurance carrier can deal directly with the plaintiff in settling these types of cases. In the example we have utilized the only claims giving rise to the obligation for defense are Counts 1 and 2. Section 41 makes it clear that the insurer can deal directly with the plaintiff to settle the injury claims. Once those claims are settled, all that remain are claims for which there is no coverage and the obligation to provide independent counsel is eliminated. At present, there is a fear among insurance carriers that if they deal directly with the plaintiff, that they run the risk of a bad faith lawsuit by their insured. Once again the insurance carrier is providing all that it contracted to provide as it is settling the claims for which there is potentially coverage and eliminating a risk to the defendant. The plaintiff's bar should have no opposition to this as it allows plaintiffs to settle cases but obviously does not require them to do so. This is a section which is only implicated where both the plaintiff's counsel and the insurance carrier are in agreement on the settlement.

Thank you very much for considering these matters.

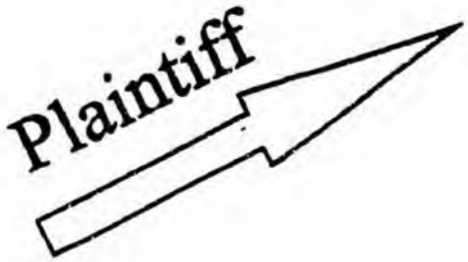
Very truly yours,

Michael K. Barcott

MAB:mb

Enclosure

cc: Representative Brian Porter



Defendant

I.
Injury
Negligent

Covered

II.
Injury
Negligent/Intentional

Reservation of Rights

III.
Unpaid Wages

IV.
Breach of Contract

V.
Discrimination

Denial of Coverage

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February 21, 1997

VIA FACSIMILE - (907) 465-3422

Marianne Burke
Commissioner of Insurance
State of Alaska
333 Willoughby Ave.
Juneau, AK 99811-1720

Dear Ms. Burke:

Thank you very much for talking with me yesterday about the proposed Sections 39 and 40 of SSHB58. I have attempted to find some published decision or article which discuss the abuses that these sections are intended to counter. Unfortunately, I have been unable to locate any such publication. I do, however, have very real firsthand knowledge of these abuses by independent counsel in specific cases. I have spoken with the clients that I have represented in those cases and while they are very comfortable with me providing the details, they are concerned about providing client names or case names.

I do harken back to our conversation, however, and your apparent opinion that independent counsel's bill for uncovered claims should not be the responsibility of the carrier. If that is the case, we presume that the Division would not object to codifying that concept rather than leaving it to the vagaries of the litigation process.

I would be most happy to provide whatever additional information I can. I will be in my office for the rest of this day and in our Juneau office Monday morning.

Very truly yours,

Michael A. Barcott

MAB/amf

AMF\C:\WP51\WRITER\BURKE.LTR

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February 18, 1997

Representative Brian Porter
Alaska State Legislature
State Capitol
M/S 3100
Juneau, Alaska 99801-1182

FAXED & MAILED

Dear Representative Porter:

The City of Seward continues to support your tort reform legislation, including the revisions to-date. Municipalities and taxpayers are deeply impacted by rising costs associated with claims. Since 1986, insurance and claim costs have been a major factor in municipal tax increases and have, in some cases, influenced communities to limit or eliminate recreation and other public services.

We are concerned for our youth, yet due to the increase in public liability, municipalities are reducing and/or eliminating recreational facilities and activities, such as skateboard parks, that would provide our youth with constructive activities instead of idle time which causes many of our youth to get in trouble in their communities.

The City supports tort reform legislation that will:

- Relieve hospitals of liability for negligent acts of an emergency room contract physician if the doctor carries malpractice insurance.

- Decrease the statute of limitations from 6 to 3 years for contract disputes, attorney malpractice and damages to personal property.

- Set a "statute of repose" which is like a statute of limitations, at 8 years for damages caused by exposure to hazardous substances, defective products or fraud. The limit is currently 15 years.

- Establish a pilot program for alternative dispute resolution.

- Cap a punitive damage award by tying it to the compensatory award in the case, with limits.